RAS 4287

April 1, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S REPLY TO STATE OF UTAH'S MOTION IN LIMINE TO EXCLUDE APPLICANT'S PREFILED TESTIMONY OF JAMES L. COLE, JR., WAYNE O. JEFFERSON, JR., AND RONALD E. FLY

Pursuant to 10 C.F.R. § 2.730(c), Private Fuel Storage, L.L.C. ("PFS" or "Applicant") files this response to State of Utah's Motion In Limine to Exclude Applicant's Prefiled Testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly, dated March 25, 2002 ("State Mot."). The State of Utah ("State") asks the Atomic Safety and Licensing Board ("Licensing Board" or "Board") to strike the Applicant's prefiled direct testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly on Utah Contention K/Confederated Tribes Contention B ("Utah K") filed on February 19, 2002 ("Applicant's Testimony") or to enter an order requiring the Applicant to amend the Applicant's Testimony by identifying the answer or portions thereof sponsored or claimed by specific witness. In addition, the State requests the Board to strike information from the Applicant's Testimony on the use of the Moser Recovery Route as based on hearsay and the Applicant's calculation of the probability of an aircraft crash impacting the Private Fuel Storage Facility ("PFSF") as unreliable. For the reasons stated below, the Applicant respectfully requests the Board to deny the State's Motion.

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SECY-02

I. DISCUSSION

A. The Use of Panel Testimony Is Consistent with Long-Standing Commission Practice

The State urges that the Applicant's Testimony be struck because PFS did not identify the individual witness(es) sponsoring each paragraph. State Mot. at 4. Otherwise, "the separation of the panel testimony into individual answers will have to be done at the hearing." Id. at 5. Alternately, the State asks that the Board order the Applicant's Testimony be amended to identify the answer or portions thereof personally sponsored or claimed by a specific witness. Id. In contradiction of long-standing Commission practice, the State asserts that panel testimony is not acceptable absent clear and compelling reasons. Id. at 3. This assertion is based on an unpublished ruling in an NRC enforcement proceeding, Safety Light Corp. (Bloomsbury Site Decontamination), 1991 WL 307322 (N.R.C.) (1991), that is not applicable and has no binding effect here. The State also asserts that it is necessary to know the identity of the witness sponsoring specific statements in prefiled testimony based on Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) LBP-79-19, 10 NRC 37, 107 (1979). In Harris, the State is relying on a non-binding memorandum that recommends improvements in the presentation of NRC staff testimony during licensing hearings. Id. at 105-107.

Contrary to the State's claim, the use of witness panels is a long-standing practice in NRC licensing hearings. Commission practice has found it helpful to take expert testimony on a "roundtable basis." 10 C.F.R. Part 2, App. A § V(d)(4). Licensing boards regularly receive evidence on technical or scientific matters of such complexity that no one person possesses the skills and experience to endorse and explain the entire direct testimony. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC

565, 569 (1977);[1] see also, Houston Lighting & Power Co. (South Texas Project Units 1 and 2), ALAB-799, 21 NRC 360, 379 (1985).[2] The State's argument is an attack on this long-standing practice of using panels in NRC licensing hearings, recognizing the frequent need for the collaborative effort of experts with differing expertise to address complex issues.

The Applicant's Testimony demonstrates the need for a collaborative effort to analyze the aircraft crash hazard at the PFSF. The opinions expressed in the testimony are the collective opinions of the witnesses. The State's effort to parse the testimony into clauses drafted or sponsored by an individual witness is unnecessary. "The key factor is not who originated the words that comprise the testimony, but rather whether the witness can truthfully attest that the statement is complete and accurate to the best of his or her knowledge." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 918 (1982).

The Board in the Safety Light proceeding cited by the State specifically departed from the normal practice of accepting panel testimony because a significant focus of the inquiry was the veracity of witnesses regarding "the amount of money that could be made available from the Licensees' insurers or from the Licensees' own resources." Safety Light at *2. Far from standing for the proposition that panel testimony is disfavored in

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[1] For perspective, a search on the Lexis database identified over 100 cases where NRC licensing boards accepted panel testimony. See e.g., Louisiana Energy Services (Claiborne Enrichment Center) LBP-97-8, 45 NRC 367, 378 (1997); Georgia Institute of Technology (Georgia Tech Research Reactor) LBP-96-8, 43 NRC 178, 180 (1996); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-94-35, 40 NRC 180, 195 (1994); Certified Testing Laboratories, Inc LBP-92-2, 35 NRC 20, 25-26 (1992); Tulsa Gamma Ray, Inc. LBP-91-40, 34 NRC 297, 303 (1991).

[2] The South Texas Appeal Board (chaired by J. Farrar), in addressing the reasons why general exclusion of NRC Staff witnesses from licensing proceedings was inappropriate, analogized to the reasons why witness panels are normally used in such proceedings.

NRC proceedings as asserted by the State, the unpublished ruling merely identifies an exception in the unique circumstances of that enforcement proceeding.

Nevertheless, to address the State's concern, PFS attaches hereto a list that identifies a lead witness (or witnesses) for each answer. PFS intends to introduce this list at the hearing to accompany the Applicant's Testimony. Notwithstanding the attached list, the Applicant's Testimony is a collaborative effort of all three witnesses. We submit that each witness is entitled to attest to the answers to the extent of his collaboration.

B. The Applicant's Expert Opinion Testimony That is Based in Part on Hearsay Is Admissible

The State requests that the Applicant's Testimony on the number of aircraft that use the Moser Recovery Route ("MRR") near Skull Valley be stricken as impermissible hearsay. State Mot. at 6. The State asserts that the PFS expert witness's interviews with air traffic controllers as to what fraction of planes returning to Hill Air Force Base ("Hill AFB") use the MRR is "most unreliable" hearsay opinion, as it is "an undisclosed amount, opined by persons unknown." Id. at 7. The State's assertion is wrong for two reasons: (1) the Applicant's Testimony is offering the expert opinion of PFS's expert witnesses, not that of the air traffic controllers, and (2) interviews are among the types of hearsay that experts can rely on for their opinions even under the stricter rules governing federal judicial proceedings.

There is generally no bar to the admissibility of hearsay evidence in NRC adjudicatory hearings. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983). "In administrative proceedings, the presiding officer does have more leeway than a judicial officer in accepting hearsay testimony, if reliable, to shortcut what might otherwise be a laborious procedure in establishing the facts." Commonwealth Edison Co. (Braidwood Station, Unit Nos. 1 and 2) LBP-86-12, 23 NRC 414, 419 (1986). Administrative decisions are

based on substantial evidence "to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-230 (1938). Substantial evidence includes expert reports, even if hearsay in the technical sense because their content is not produced live before the hearsay examiner, provided other indicia of reliability are present. Richardson v. Perales, 402 U.S. 389, 404-408 (1971). For example, the D.C. Circuit accepted a licensing board's admission of an applicant's Final Safety Analysis Report (FSAR) over an intervenor's challenge that the FSAR was unreliable because the professional qualifications of all experts involved in FSAR preparation were not established in the record. Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1094 (D.C. Cir. 1974).

The Applicant's Testimony offers the expert opinion that fewer than 286 flights use the MRR annually. Applicant's Testimony at A132 at 97. This opinion is based not only on interviews with air traffic controllers, but also on other information analyzed through the panel's expertise in this area, including personal experience, the weather conditions and runway use at Hill AFB that favor use of the MRR, air traffic interference constraints, and minutes of a meeting between NRC and Hill AFB staffs. Id. at 97-98.

The State's reliance on Tennessee Valley Authority (Hartsville Nuclear Power Plan Units 1A, 2A, 1B, and 2B) ALAB-367, 5 NRC 92, 121 (1977) is misplaced. In Hartsville, the NRC staff witness had no recorded expertise in swimming and was merely repeating that an anonymous swimming expert had told him that a swimmer had a great chance of being involuntarily entrained in a cooling water intake. Id. Unlike the staff witness in Hartsville who lacked expertise on swimming and relied on no other information but an interview with a swimming expert, the PFS's panel has relevant and

extensive expertise in aircraft operations and knowledge of the MRR and relies on other information in addition to the interviews with air traffic controllers to estimate MRR use. Therefore, Hartsville is clearly distinguishable from this case and provides no support for excluding the Applicant's Testimony on MRR use.

Furthermore, interviews are included in the types of hearsay information on which experts can base their opinions even under the more strict rules governing hearsay use in federal court. See United States v. Gardener, 211 F.3d 1049, 1054 (7th Cir. 2000) (stating that third-party interviews are included in the types of information that is reasonably relied on by arson investigators and psychiatrists). Interviews with personnel knowledgeable about aviation operations are reasonably relied on by experts in forming opinions about aviation matters. For example, even the State's expert relies on such interviews.[3] Interviews are included in the types of hearsay experts may reasonably rely on to form the bases of opinions admitted as evidence even in criminal trials. Id. Therefore, expert opinions based in part on interviews are certainly acceptable in NRC licensing proceedings. The State's motion to strike the Applicant's Testimony on MRR use should be denied.

C. The Applicant's Testimony On Calculating the Probability of an Aircraft Crash Is Based on a Reliable Methodology

The State requests that the calculation of the probability of an F-16 aircraft crash at the PFSF in the Applicant's Testimony be struck as unreliable to the extent it employs a factor ("R") to account for the reduction in crash hazard resulting from the pilot's ability to guide a crashing aircraft away from the PFSF. Utah Mot. at 7-8. The State

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[3] See Horstman Testimony at A46 and A47 (relying on interviews of F-16 pilots); see also NRC Staff's Motion In Limine to Exclude Portions of the State of Utah's Prefiled Testimony and Exhibits Concerning Contention Utah K/ Confederated Tribes B, at 4 (March 25, 2002).

argues that the methodology is not reliable as it is "new" and not recognized by several references, and that the "value assigned to R is a subjective estimate." Id. at 8-9.

Probative expert testimony is that which is helpful to the fact-finder and reliable. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993). A determination of reliability focuses on the methodology and principles behind the testimony. Id. at 595. Peer review and general acceptance are not necessary preconditions to the admissibility of scientific evidence. Id. at 597. The Applicant's Testimony is the reliable product of a detailed, objective methodology in which expert witnesses applied accepted principles to adapt the methodology of the Standard Review Plan for Nuclear Power Plants, NUREG-0800, to the specific circumstances of an F-16 crash in Skull Valley. Each step in the methodology is described in the PFS report, Aircraft Crash Impact Hazard at the Private Fuel Storage Facility (Rev. 4, August 10, 2000), and the reliability of the experts' testimony can be challenged on cross-examination at the hearing. In addition, the approach has been subject to peer review by the NRC Staff. NRC Staff's Response to Motions in Limine Filed by the Applicant and State Concerning Contention Utah K/ Confederated Tribes B (March 29, 2002), at 4.

The State's Motion should be denied as the Applicant's Testimony is a calculation of the hazard to the PFSF from an F-16 crash based on a methodology and principles sufficiently reliable to at least warrant conditional admission to a proceeding in which its reliability can be ultimately determined. Union of Concerned Scientists, 499 F.2d at 1094.

II. CONCLUSION

For the reasons stated above, the Applicant respectfully requests the Board deny the State's Motion.

Respectfully submitted,

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Dated: April 1, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply to State of Utah's Motion In Limine to Exclude Applicant's Prefiled Testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 1st day of April, 2002.

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D. SEAN BARNETT

Primary Witness Responsibility for Answers to Questions in Testimony of James L. Cole., Jr., Wayne O. Jefferson, Jr. and Ronald E. Fly

Question	Subject	LEAD
25	Describe issues to which you are testifying	All
26	Where is assessment documented	All
27	What hazard was determined	Jefferson
28	How was it determined	Jefferson
29	What did you do to assess the nature of the accidents	All
30	Summarize Skull Valley F-16 flights and potential hazard to PFSF	All
31	Summarize flight activities in UTTR and their associated hazard	All
32	Summarize Moser Recovery operations and hazard posed	Cole
33	Summarize IR-420 operations and hazard	Cole
34	Summarize jettisoned ordnance hazard	Jefferson
35	Describe airspace where PFSF is located	Fly
36	Describe military air operations near PFSF	Fly
37	Have you assessed hazards by category	All
38	Describe F-16 traffic that transits Skull Valley	Fly
39	What hazards do F-16s pose	Fly
40	How did you calculate probability of F-16 crash	Jefferson
41	How was C, crash rate per mile, calculated	Jefferson
42	How was N, number of flights, calculated	Jefferson
43	How was A, effective area, calculated	Jefferson
44	How was W, width of airway for Skull Valley, calculated	Jefferson
45	How was R, pilot avoidance reduction factor, calculated	Jefferson
46	Crash probability for F-16s transitting Skull Valley	Jefferson
47	Basis for 5,870 flights per year	All
48	Did number of sorties change since FY98	All
49	Why is FY99-FY00 average appropriate	All
50	Did anything else change that affects expected flights through Skull Valley	All
51	Why are Skull Valley sorties proportional to aircraft at Hill AFB	Fly
52	What happens if FY00 used as baseline sortie count	Jefferson
53	Is an increase above FY00 expected for the lifetime of PFSF	Fly
54	How did State challenge your transiting F-16 calculations	All
55	How do you respond	All

56	Elaborate on State's claim concerning additional aircraft at Hill AFB and sorties	Fly
57	Have the effects of additional aircraft been accounted for	All
58	Why does State say FY99-FY00 average inappropriate as sortie baseline	All
59	Should PFS have used the higher FY00 sortie rate	All
60	State claims about bathtub effect	Jefferson
61	Is State correct about FY99 accident rate and bathtub effect	Jefferson
62	Your evaluation of F-16 exhibiting a bathtub effect	Jefferson
63	Does 5 or 10 year rolling average of destroyed aircraft show a bathtub effect	Jefferson
64	What happened with respect to F-16A crash rates	Jefferson
65	Have we reviewed other Air Force fighters being phased out for bathtub effect	Jefferson
66	Have other Air Force aircraft shown a rise in rates due to bathtub effect	Jefferson
67	Do we expect F-16 to display a bathtub effect in the future	Jefferson
68	Which accident rate is most appropriate to use	All
69	Why else does State contend the wrong accident rate was used	All
70	Is State correct regarding potential effect of replacement of F-16	All
71	Will Hill F-16s necessarily be replaced by the first F-22's or JSFs	All
72	State objections to F-16 flight distribution in Skull Valley	All
73	Describe "turning point" and "sensor alignment"	Fly
74	Will PFSF fundamentally change historic flight patterns	Fly
75	Why is your distribution of flights in Skull Valley conservative	Jefferson
76	Why won't PFSF construction make pilots fly over or near it	Fly
77	Why won't pilots use PFSF as navigational turning point as claimed by State	Fly
78	Why won't pilots overfly the PFS site for sensor alignment	Fly
79	If hypothetically pilots used PFSF as nav/sensor point, how does State overstate the risk	Fly
80	State's claim concerning Skull Valley width and F-16 flight distribution	All
81	How did you arrive at 10 mile width and F-16 distribution	Jefferson
82	Other factors making eastern side of Skull Valley favored route	Fly
83	Other info showing F-16s would tend to pass away from the PFSF not close to it	All
84	Conclusion regarding State challenge of 10 mile width	Jefferson
85	Describe State's objections concerning pilot avoidance and pilot experience	Fly
86	Is State correct concerning experience and pilots guiding aircraft away	Fly
87	Did you see anything in accident reports indicating experience impacted pilots actions	All
88	Describe State's objections concerning pilot avoidance and weather	Fly
89	Do you agree	Fly
90	Describe cloud cover datarelied upon by the State	Fly

91	Assuming a ceiling in Skull Valley, would that necessarily prevent seeing or avoiding PFSF	Fly
92	Describe assessement of weather impacts on pilot avoidance of PFSF	Fly
93	What did accident reports show regarding effects of weather and being able to avoid	All
94	What conclusions can be drawn from the accident reports concerning weather	Fly
95	What adjustments need to be made to account for weather	All
96	State objections to likelihood of pilots being able to control the aircraft	All
97	How do you respond	All
98	How did you assess probability pilot would be left in control	All
99	How did you define evaluation parameters	Jefferson
100	In what respects did the State challenge your assessment	All
101	How do we respond regarding engine failure frequency	Jefferson
102	State objections to individual accident report assessments	All
103	25 May 90 accident, 300' low level at Moody AFB	Fly
104	19 Sep 90 night, simulated radar delivery	Fly
105	20 Feb 91 engine failure, Diyarbakir, Turkey	Fly
106	19 Mar 91 SMS, electrical failure	Fly
107	4 Apr 91 fighting wing and clouds	Fly
108	8 Jun 91 Tex 22, engine failure at Ellington AFB	Fly
109	31 Jul 92 Retro 34, night radar trail, overseas deployment	Fly
110	16 Sep 97 NJ night vision goggles	Fly
111	19 Feb 93 Rolex 24, range, engine failure, pitch up into clouds	Fly
112	13 Jan 95 low level engine failure, Belgium	Fly
113	29 Jan 97 target egress, engine failure, Gila Bend	Fly
114	13 May 98 white pelicans impact	Fly
115	Have state challenges given you any reason to change assessement	Fly
116	State objections to statistical inferences	Jefferson
117	Is State correct	Jefferson
118	Other State objections concerning F-16 crash statistics	All
119	Is State correct	All
120	Your conclusions about State challenges	All
121	UTTR operations	Fly
122	Hazard posed by air-air training on UTTR	Fly
123	Elaborate on likely locations for crashes on the UTTR	All
124	Elaborate on pilots ability to avoid PFSF	Fly
125	Hazard posed by air-air training on UTTR	Fly

126	Was air-air hazard ever calculated differently	Jefferson
127	Why did you change assessment	Jefferson
128	Did State challenge your UTTR assessment	Jefferson
129	Are State challenges relevant	Jefferson
130	Did State address or consider your new assessment based upon actual reports	All
131	What is the Moser recovery	Fly
132	How many aircraft use the Moser	Cole
133	Hazard posed by Moser	Jefferson
134	Did state challenge your Moser assessment	All
135	Is State correct	All
136	How do aircraft fly to Michael Army Airfield (MAAF) on IR-420	Fly
137	How did PFS calculate hazard posed by flights	Jefferson
138	Has IR-420 traffic changed	Cole
139	MAAF takeoffs & landings	All
140	Did State challenge your IR-420 assessment	Cole
141	Do we account for all MAAF traffic on IR-420	All
142	Potential for inadvertent ordnance release	All
143	Could ordnance carried on F-16 pose a threat	Jefferson
144	What ordnance hazard did you calculate	Jefferson
145	Did ordnance carriage change since FY 98	Jefferson
146	What if you use FY00 sortie counts as baseline instead of FY99-FY00 average	Jefferson
147	Could ordnance carried on F-16 pose a hazard in any other respect	All
148	Did you calculate a hazard based upon a nearby explosion of jettisoned ordnance	Jefferson
149	How did you determine whether a nearby explosion would damage a cask or CTB	Jefferson
150	How did you calculate hazard posed by nearby explosions	Jefferson
151	Have changes in ordnance useage affected your assessment	Jefferson
152	What if plane crashes with two bombs or bombs were jettisoned simultaneously	Jefferson
153	Did State challenge jettisoned ordnance assessment	Jefferson
154	What is the effect of increasing site area as State proposes	Jefferson
155	What other claims did State make concerning jettisoned ordnance	All
156	Is State correct	All
157	Did State make any other claims about jettisoned ordnance	All
158	Is State correct	All
159	Did State challenge calculations of potential hazard posed by nearby explosions	All
160	Does State claim affect your assessment	Jefferson

161	What is cumulative aircraft crash and jettisoned ordnance hazard to PFSF	Jefferson
162	What effect would Skull Valley F-16 sensitivity analysis have on cumulative hazard	Jefferson
163	Does aircraft crash hazard assessment remain conservative	Jefferson
164	What is the cumulative effect of all the conservatism	Jefferson
165	What is the cumulative aircraft crash and jettisoned ordnance hazard	Jefferson
166	How does this compare with NRC limit	All