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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 RESPONSE TO 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**

Applicant Private Fuel Storage, L.L.C. ("PFS") submits this response to the Nuclear Regulatory Commission ("NRC") Staff's Motion¹ to exclude portions of the State of Utah's ("State") prefiled testimony regarding Contention Utah K/Confederated Tribes B - Credible Accidents. PFS supports, for the most part, striking the testimony identified by the Staff as not relevant to the contention or the proceeding. PFS, however, opposes barring relevant hearsay testimony sponsored by expert witnesses because the reliability of and weight given such evidence is an issue properly determined by the Atomic Safety and Licensing Board ("Board") in resolving the contention.

I. DISCUSSION

On February 19, 2002, the State submitted prefiled testimony by Lt. Col. Hugh L. Horstman and Dr. Marvin Resnikoff regarding contention Utah K/Confederate Tribes B.² The

¹ "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" (Mar. 25, 2002) ("Staff's Motion").

² "State of Utah's Prefiled Testimony of Lieutenant Colonel Hugh Horstman (U.S.A.F. Retired) for Contention Utah K/Confederated Tribes B" (Feb. 19, 2002) ("Horstman Testimony"); "State of Utah's Prefiled Testimony of Dr. Marvin Resnikoff for Contention Utah K/Confederated Tribes B" (Feb. 19, 2002) ("Resnikoff Testimony").

NRC Staff filed its Motion on March 25, 2002, seeking to strike nine identified portions of the State's testimony. The Staff's Motion also sought to strike two small portions of PFS' pre-filed testimony³ that the NRC Staff identified as "similar" to the State's testimony it sought to exclude.⁴ PFS responds to each of the issues in the Staff's Motion below.

1. Value of the UTTR

PFS supports striking the portion of Horstman Testimony Answer 10 that discusses the purported military value of the Utah Test and Training Range ("UTTR"). See Staff's Motion at 2. Testimony on the value of the UTTR is clearly outside the scope of the existing contention, which is limited to consideration of credible accidents. The NRC Staff also properly identified that the Board has already excluded a similar issue from this proceeding. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 220 (2000) (rejecting proposed contention Utah KK that asserted adverse "impacts from loss of military operations area airspace use, including a reduction in military readiness"). Thus, the portions of Horstman Testimony Answer 10 discussing the military value of the UTTR should be stricken as irrelevant.

2. Forty-Year Life

PFS agrees with the NRC Staff that testimony should be limited to issues relevant during the 20-year term of the license. See Staff's Motion at 2-3. In response to the Staff's Motion, PFS will make two changes⁵ to the Cole/Jefferson/Fly Testimony. First, PFS will revise the sec-

³ "Testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr. and Ronald E. Fly on Aircraft Crash Hazards at the PFSF -- Contention Utah K/Confederated Tribes B" (Feb. 19, 2002) ("Cole/Jefferson/Fly Testimony"); "Testimony of Jeffery Johns on Aircraft Crash Hazards at the PFSF -- Contention Utah K/Confederated Tribes B" (Feb. 19, 2002) ("Johns Testimony").

⁴ See, Staff's Motion at 3, n.1 (moving to strike "certain statements concerning a 40-year planned facility life" in Cole/Jefferson/Fly Testimony at A.49.); id. at 5, n.4 (moving to strike Johns Testimony Q6-Q7).

⁵ PFS' third reference to a 40 year facility lifetime is a citation to a statement by Lt. Col. Horstman. See Cole/Jefferson/Fly Testimony at A.58.

ond sentence of the last paragraph of Answer 49 to focus on the initial license term of 20 years. The revised sentence will read, "It is important to keep in mind that the initial license term of the PFSF is 20 years." Second, PFS will delete the term "40-year" from the second sentence of the sixth paragraph of Answer 163. The last phrase of the sentence will read, "the facility would contain 4,000 casks for only one year during its lifetime." These changes will be made on the record upon introducing the Cole/Jefferson/Fly Testimony at the evidentiary hearing.

3. Conversations with Other Pilots

PFS opposes striking the Horstman Testimony regarding conversations with active-duty pilots. See Staff's Motion at 3-4. As the NRC Staff correctly points out, there is generally no bar to the admission of hearsay in NRC adjudicatory hearings -- the hearsay nature goes only to the reliability and weight to be given to the evidence. Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983). The NRC Staff relies on Consolidated Edison v. NLRB, 305 U.S. 197 (1938) as a basis for barring hearsay evidence, but the Supreme Court has explicitly clarified that its Consolidated Edison statement that "mere uncorroborated hearsay or rumor does not constitute substantial evidence" was "not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value." Richardson v. Perales, 402 U.S. 389, 407-08 (1971). Thus, potentially reliable and probative hearsay is admissible although it may not be entitled to great weight if it is not reliable. Further, hearsay defended by a sponsoring expert witness is more "than mere uncorroborated hearsay."⁶ Id. at 407; cf. San Onofre, 17 NRC at 366 (party asserting reliability of documents put into controversy must provide "a competent witness to defend them").

⁶ To be sure, PFS does not concede the relevance or the reliability of the State's testimony (e.g., a crash of a F-111 in the United Kingdom nearly 20 years ago, a crash in Canada), only that the Board should have an opportunity to make a determination as to the weight it should be given.

Moreover, the NRC Staff did not identify any reason that the Board could not assign the proper weight to hearsay testimony in this proceeding based on its reliability. To the contrary, PFS suggests that, in the context of this lengthy and detailed proceeding, after the cross examination of the sponsoring witness and the presentation of rebuttal testimony, the Board will be particularly well situated to determine the reliability of hearsay evidence relevant to potential aircraft crashes at the PFSF. See e.g., Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 419 (1986) (an expert witness is given leeway “to base his testimony on hearsay”). To exclude potentially probative evidence solely because it is hearsay would deprive the Board of an opportunity to properly weigh relevant evidence. The Board, therefore, should not strike testimony solely because it is hearsay.

4. Consequences of Aircraft or Ordnance Impacts

PFS agrees with the NRC Staff that the testimony of Lt. Col. Horstman and Dr. Resnikoff regarding the potential radiation dose consequences of jettisoned military ordnance impacting and penetrating a spent fuel cask and canister should be stricken. See Staff’s Motion at 5. The issue for this hearing is whether the probability of an aircraft crash or jettisoned ordnance is sufficiently low that it need not be considered in the design of the PFSF. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 429-31 and n.4 (2001). As discussed more fully in PFS’ motion to strike,⁷ the State’s testimony in this area addresses the radiological consequences that would allegedly result from a piece of jettisoned ordnance impacting and penetrating a spent fuel storage cask at the PFSF. The dose consequences of a penetrating ordnance impact is wholly unrelated to the probability of such an impact occurring. Thus, Horstman Testimony at Question and Answer 74 and Resnikoff Testimony at Questions and Answers 2, 3, 4 and 47 regarding potential dose consequences of spent fuel cask and

⁷ “Applicant’s Motion to Strike Portions of State of Utah’s Prefiled Testimony of Dr. Marvin Resnikoff Regarding Utah Contention K/Confederated Tribes Contention B” (Mar. 25, 2002) at 2-6.

canister penetration should be stricken.

On the other hand, PFS' (and other parts of the State's) testimony on spent fuel cask impacts is properly limited to the probability of a penetrating impact. The NRC Staff incorrectly concluded that Johns Testimony Questions 6 and 7 (and implicitly, Answers 6 and 7) were "similar" to the State's testimony. Staff's Motion at 5, n.4. To the contrary, a plain reading of the questions and answers shows that the discussion is narrowly focused on whether a crashing F-16 "could penetrate" a cask and related assumptions. Johns Testimony at Q.6. There is no mention of any dose consequences of penetration, should such an event occur. Thus, the Johns Testimony is clearly relevant to the contention and should not be stricken.

5. Limited Appearance Statements

PFS fully supports the NRC Staff position regarding the lack of evidentiary value of Utah Exhibit 46, purportedly the "limited appearance" statement of a Mr. Kester regarding a statement on the continued use of the UTTR attributed to Congressman James Hansen. See Staff's Motion at 5-6. First, a limited appearance statement is exactly that, a statement made by a non-party that is limited to that person's "position on the issues." 10 C.F.R. § 2.715(a). Further, this statement is irrelevant to the issues in this contention, which are credible accidents. Utah Exhibit 46, therefore, should be stricken from the evidentiary record.

6. Newspaper Articles

PFS agrees with the NRC Staff that Utah Exhibit 49 contains information that, even if reliably reported, is irrelevant to this proceeding. See Staff's Motion at 6-7. It is not disputed that the total number of F-16's assigned to the 388th Fighter Wing is increasing from 54 to 66. See, e.g., Cole/Jefferson/Fly Testimony at Q.56, 57. The remainder of Utah Exhibit 49 regarding personnel changes at Hill Air Force Base and Ogden Air Logistics Center is irrelevant and should be stricken.

PFS agrees with the Staff that Utah Exhibit 53 is of questionable reliability because the

source of the article is not identified. PFS believes, however, that its reliability goes to the weight that should be given the evidence, not to its admissibility.

7. Deposition Transcript

PFS supports the NRC Staff's position on striking irrelevant portions of Utah Exhibit 58. See Staff's Motion at 7. As filed, the exhibit contains the entire 182-page transcript of a December 2000 deposition of Col. Ronald E. Fly.⁸ Lt. Col. Horstman's testimony refers to only a single page of Col. Fly's deposition.⁹ Since the State's witnesses do not explicitly identify any other portions of the deposition that they are seeking to sponsor as evidence, the remainder of the deposition should be stricken. Admission of such extraneous information on the record would only increase the possibility for confusion and unnecessarily add to the burden of hearing preparation.

8. Declaration of Lt. Col. Horstman in Response to Summary Disposition

PFS takes no position regarding Utah Exhibit 65, a January 30, 2001, declaration of Lt. Col. Horstman. See Staff's Motion at 8. PFS may seek to use portions of the declaration as an exhibit in cross examination.

9. Legal Memorandum

PFS supports the NRC Staff's Motion regarding striking Utah Exhibit 73, a 1980 NRC Staff pleading in a Three Mile Island Nuclear Station proceeding. See Staff's Motion at 8-9. The document is a legal pleading in a proceeding with no relevance to the PFSF and discusses aircraft types and flight patterns with no relevance to those found in Skull Valley. Moreover, the document contains only legal argument advocating a desired legal outcome, not expert witness testimony. It is, therefore, not factual testimony. For these reasons, Utah Exhibit 73 (and asso-

⁸ Deposition of Ronald E. Fly (Dec. 12, 2000) (Utah Exhibit 85).

⁹ Horstman Testimony at A.56 (citing Utah Exhibit 58 at 85).

ciated Resnikoff Testimony Question and Answer 14) should be stricken.

III. CONCLUSION

For all the reasons discussed above, the Board should strike the indicated portions of the State's testimony and Exhibits regarding Utah K/Confederated Tribes B.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. E. Silberg", written over a horizontal line.

Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037

Dated: April 1, 2002

Counsel for Private Fuel Storage L.L.C.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to NRC Staff's Motion in Limine to Exclude Portions of the State of Utah's Pre-filed Testimony and Exhibits Concerning Contention Utah K/Confederated Tribes B" 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.

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

* By U.S. mail only

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com


D. SEAN BARNETT