

April 12, 2002 (11:54AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

ASLBP No. 97-732-02-ISFSI

April 1, 2002

**STATE OF UTAH'S MEMORANDUM IN OPPOSITION
TO THE NRC STAFF'S MOTION IN LIMINE**

INTRODUCTION

The NRC Staff filed its Motion in Limine to Exclude Certain Portions of the State of Utah's Prefiled Testimony and Exhibits Concerning Contention Utah K/Confederated Tribes B on March 25, 2002. By this action, the Staff is improperly serving as an taxpayer-funded advocate for the Applicant in this matter.

If an application meets the Staff's requirements, the testimony properly should reflect that fact, but the Staff should not 'support' an application. . . . Our concern is that the actual practice may be for the Staff to serve as an advocate for the application.

Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units, 1, 2, 3, and 4), LBP-79-19, 10 N.R.C. 37, 107 (1979).

In filing the instant motion seeking to strike certain parts of the State's evidence (to which the Applicant has not even objected) the Staff has gone far beyond its proper role of indicating whether the application meets the Staff's requirements. The Staff here seeks to strike the testimony of Lt. Col. Horstman (USAF Ret.) who relates the statements of specifically identified pilots with whom he has talked. The Staff claims this evidence is

“remote hearsay.” Significantly, the Staff makes no similar motion as to the Applicant’s prefiled testimony which relates conversations with unidentified persons who purportedly have rendered expert opinions on which the Applicant’s calculations are based.¹ Moreover, the Staff has consistently exceeded its proper role with respect to the evidence in this matter. For example, the Staff has offered the prefiled testimony of not one but two experts answering identical questions in support of the application with respect to Contention Utah K.² The Staff’s motion should be disregarded by the Board and stricken as an improper action by the Staff. Even if the Staff’s motion had been properly made, it is not meritorious on the grounds asserted and the State requests that it be denied as set forth below.

1. Value of the UTTR

The Staff (Motion at 2) claims the following statement³ from Lt. Col. Horstman’s testimony is irrelevant and outside the scope of Contention Utah K:

The UTTR is a unique and valuable asset to the U.S. military, and its continued use as a military training and testing area is vital to military training and the national security of the United States.

The entire analysis of the hazards posed to the proposed PFS facility by aircraft crashes centers on the continued use of the Utah Test and Training Range (“UTTR”) for training military pilots. The proposed PFS facility is placed at risk by its location directly under the UTTR airspace. Calculation of the crash probability requires an estimate of the type and

¹ See, e.g., State’s March 25, 2002 Motion in Limine to Exclude Applicant’s Prefiled Direct Testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly, at 6.

² NRC Staff Testimony of Kazimieras M. Campe and Amitava Ghosh Concerning Contention Utah K/Confederated Tribes B (Inadequate Consideration of Credible Accidents) (February 19, 2002).

³ The entire text of A.10. from which the quoted portion of the answer was taken is attached hereto.

number of military flights expected in the UTTR in the future. Evidence that the continued use of the UTTR is highly likely and the reasons therefore are not only relevant but central to all issues in this matter.

The Applicant has offered evidence on this very issue, claiming that the use of the UTTR will diminish with fewer flights in future years.⁴ The Staff's argument that the foregoing statement of Lt. Col. Horstman is not relevant or is not within the scope of Contention Utah K is without merit.

2. Forty-year life

The fact of the 40 year planned life of the PFS facility has been offered as evidence in this matter by PFS and the Staff. The PFS Crash Report⁵ states that the effective cask storage area for the facility "will increase as spent fuel casks are brought into the facility over the first 20 years of its life and will decrease as the casks are shipped off site during the last 20 years of its life." Crash Report at 25, 26. The panel testimony of PFSs witnesses states: "In fact under the plan for the, [sic] PFSF, the facility would contain 4,000 casks for only one year during its 40- year lifetime."⁶ The Staff's SER sets forth the design life of the facility as 40 years.⁷ The prefilled testimony of PFS' witnesses in fact stress the importance of the 40 year operational life of the PFS facility:

It is important to keep in mind that the planned operational life of the PFSF

⁴Testimony 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 ("PFS panel testimony"), A49-A.53, n. 20.

⁵ *Aircraft Crash Impact Hazard at the Private Fuel Storage Facility*, Rev. 4, August 10, 2000 ("Crash Report"), and Addenda thereto (January 19, 2001 and July 20, 2001).

⁶ *Id.* A. 163 at 113.

⁷ NRC Staff's Consolidated Safety Evaluation Report ("SER"), March 2002, table 4-3, at 4-8.

is 40 years. . . . As discussed further below, we believe that this average is a reasonable, conservative approximation of the future traffic density when the PFSF will be operating, particularly 20 or more years in the future when the Facility would be approximately at full capacity.

PFS panel testimony A.49 at 20.

The Staff now moves to strike statements of Lt. Col. Horstman and Dr. Marvin Resnikoff that refer to the “40 year operation of the proposed facility.” Motion at 3. The Staff claims that through such statements the State “appears to argue” that PFS must account for activities beyond the 20-year term requested in the application. Id. at 2. However, the State clearly does not so argue nor does the Staff’s motion go so far as to make that claim.

The State is entitled to make reference to the 40-year lifetime of the facility claimed by the Applicant and set forth in documents filed by both the Applicant and the Staff. The reference by State witnesses to the 40-year life of the facility does not “appear to argue” the relevance of matters beyond the 20-year application term any more than the Applicant’s or the Staff’s references to the 40-year design life.

3. Conversations with other pilots

Lt. Col. Horstman relates conversations with four pilots who have told him that during an in-flight emergency requiring ejection, their thoughts were focused on their survival, not on determining where the aircraft would impact. Horstman Testimony A. 46 and n. 2. The Staff claims this testimony should be stricken “on the basis that the State did not offer the pilots as witnesses for cross-examination.” The Staff makes no similar motion as to the Applicant’s testimony including its Crash Report, both of which continually rely on

hearsay conversations, some without even identifying the declarant.⁸

The Staff cites no authority for the proposition that a party must “offer” the declarant of a hearsay statement for cross-examination before a hearing, and in fact there is none. The very nature of hearsay testimony contemplates the unavailability of the declarant for cross-examination. The pilots referred to by Lt. Col. Horstman are active United States Air Force officers identified by name and rank. One of the pilots was identified by Lt. Col. Horstman in his deposition held July 27, 2001. The fact that the Staff has chosen not to talk with these pilots, as the State’s witness has, is of the Staff’s own choosing.

The Staff cites Consolidated Edison Co. v. N.R.L.B., 305 U.S. 206 (1938), suggesting that the case somehow supports the Staff’s claim. The Consolidated Edison court stated in dicta “The obvious purpose of [not being required to follow the rules of evidence] is 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. . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence.” Consolidated Edison at 229-230. While undoubtedly true, at least in 1938, the court did not undertake an analysis of particular evidence under this standard and in fact found that the Board’s findings were based on sufficient evidence. The Staff has given no reason why the hearsay testimony from Lt.Col. Horstman is not within the long established rule that hearsay testimony is generally acceptable in NRC adjudicatory proceedings. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

⁸ See, e.g., Crash Report notes 3, 4, 5, 7, 10, 11; Revised Addendum to Crash Report, July 20, 2001, at 23; PFS panel testimony, notes 17, 42, 43, 81.

4. Consequences of Aircraft or Ordnance Impacts

The Staff argues that testimony regarding the consequences of aircraft or ordnance impact should be stricken because it is irrelevant to the calculation of the probability of a strike. Motion at 5. As the Board has acknowledged, testimony regarding consequences is relevant because it is necessarily within the scope of Contention Utah K:

In this regard, we do not accept the staff's assertion that the State's argument regarding consequences is outside the scope of this contention. See Staff Motion to Strike Response at 1 n. 1. As the discussion of the applicable benchmark standard in the PFS summary disposition motion suggests, in this context the State's challenge to the adequacy of the PFS discussion of credible accidents necessarily encompasses the bases upon which those accidents are asserted to be credible.

LBP-01-19, 53 NRC 416, n. 5 (2001).

For purposes of its summary disposition, PFS assumed that an aircraft strike would in fact cause a radioactive release. It was due only to this assumption of radiological consequences that the Board noted that Dr. Resnikoff's testimony regarding the consequences of a strike was of little relevance:

we note that, given the PFS assumption that an aircraft or associated ordnance strike will cause a radioactive release . . . Dr. Resnikoff's assertions about ordnance penetration appear to have little relevance . . .

Id., at 21, n. 9. Any suggestion that the testimony of Dr. Resnikoff regarding consequences was found to be outside the scope of Contention Utah K is simply false.

The State notes that four PFS witnesses address the subject of consequences in their prefiled testimony, and the 8- page testimony of PFS witness Jeffrey Johns is

devoted entirely to this subject.⁹ Further, the 15-page PFS Exhibit Z is devoted entirely to consequences of a crash impact.

The State further notes that the consequences of impact directly relate to the conservatisms claimed by PFS, as to which the Board has invited further evidence:

For those portions of this contention that remain for litigation, so long as they are relevant to our assessment of whether the PFS has adequately considered the effects upon its proposed facility of credible accidents caused by external events, the impact of such “conservatisms,” or the lack thereof, are items that the parties may continue to pursue.

Id., at 29, n. 14. The testimony of concerning consequences of impact is squarely within the scope of Contention Utah K and therefore relevant.

5. Limited Appearance Statement

The Staff objects to the statement of James Hansen, Representative of the First Congressional District of Utah and senior member of the House Arms Services Committee. The statement appears in Utah Exhibit 46 and concerns the continued use of the UTTR, “a unique national asset . . . critical to Air Force military readiness.” The Staff offers no basis to strike the statement other than the fact that it is embodied in a transcript of the limited appearance of Ms. Kester. To be sure, the statement is an opinion, but an opinion held by the senior member of the House Arms Services Committee. It is not offered here as a limited appearance but for the statement of Congressman Hansen contained therein. The

⁹Testimony 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, p.110, 111; Testimony of Jeffrey Johns on Aircraft Crash Hazards at the PFSF - Contention Utah K/Confederated Tribes B, (Entire testimony limited to this subject).

statement is probative on the issue of the continued use of the UTTR. The declarant is clearly identified and the Staff is able to confirm the text of Representative Hansen's letter if it has any doubt as to its accuracy. The actual letter and full text appear in NRC's Public Document Room under Accession number ML003754466.

6. Newspaper Articles

The Staff complains that the news article shown in Utah Exhibit 49 is not reliable because it does not identify the publication where it appears. The text of Exhibit 49 can be found at two military websites; <http://www2.acc.af.mil/accnews/mar00/000082.html> and at <http://www.hilltoptimes.com/archive/20000316/Mainstory.html>, the same website cited by Applicant for its news articles. See e.g. PFS panel testimony n.14.

The staff claims there are "similar flaws," although none are specified, as to Utah Exhibit 53, even though web site information appears on its face. The web site information reveals that Exhibit 53 is an article from the *Stars and Stripes*, a newspaper published by the Department of Defense.

7. Deposition Transcript

The Staff argues that the State should be required to identify relevant portions of the transcript of Col. Ronald Fly submitted as Utah Exhibit 58. The State voluntarily withdraws Exhibit 58, subject to use of deposition transcripts at trial as provided by law.

8. Declaration of Lt. Col. Horstman

The Staff argues that the Declaration of Lt. Col. Horstman submitted as Utah Exhibit 65 should be stricken. The State voluntarily withdraws Exhibit 65.

9. Legal Memorandum

Utah Exhibit 73 is a Memorandum filed by the Staff in a proceeding before the NRC

Appeal Board involving the calculation of aircraft crash probability. In that Memorandum, the Staff argues that it is unreasonable to base accident rates on claimed safety improvements and that all years of accident data should be used to set future rates:

it is not reasonable to quantify such improvements in safety for purposes of either limiting the data base to establish the current accident rate or to develop a rate for future projections. Thus, it is reasonable to use data for the entire 22-year period in computing an accident rate.

State's Exhibit 73, *NRC Staff Posthearing Memorandum Regarding Aircraft Crash Probability Issue*, Docket No. 50-320 (dated April 30, 1980) at 10.

In the instant proceeding, the Staff argues to the contrary:

Hence, PFS used the crash rate based on the last 10 years data (i.e., from FY 1989 to FY 1998). This is acceptable because, given the trend toward lower crash rate [sic], use of the lifetime (1975 through 1998) average crash rate would be overly conservative.

PFS SER Supplement No. 1, November 13, 2001, at 11.

The Staff argues that it should not be confronted with this inconsistency because it is contained in a legal memorandum. To the contrary, the position of the staff of the NRC on aircraft crash methodology, urged in a public proceeding, is presumed to be founded on reliable methodology, made in good faith, and should be guidance for others. The State makes reference only to the methodology employed by the Staff, not to any legal issue.

The authority offered by the Staff for striking Exhibit 73, City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F Supp. 1257 (N.D. Ohio 1980) does not in any way address the issue presented here. Cleveland Elec. did not involve an administrative proceeding but a jury trial. The issue presented was whether proposed findings of fact and conclusions of law could be read to the jury based on the basis that they constituted a "pleading." The proposed findings were held not to be a pleading under Rule 7(a),

Fed.R.Civ.P. and therefore not allowed to be read to the jury.

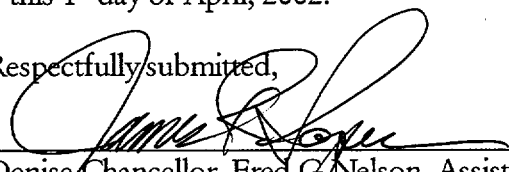
Here, Utah Exhibit 73 is an exhibit to the testimony of Dr. Resnikoff, an expert in the storage of irradiated fuel and other nuclear waste. Dr. Resnikoff has understandably reviewed and relied on this public document which contains the NRC Staff's expert analysis that supports his testimony. The greatest insight on the technical methodology acceptable to the Staff is the methodology advanced by the Staff itself in an actual proceeding. It is well established that an expert witness may testify about analyses performed by other experts. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 718 (1985), review declined, CLI-86-5, 23 NRC 125 (1986).

CONCLUSION

The State voluntarily withdraws Exhibit 58, subject to the customary use of deposition transcripts at trial as provided by law. The State also voluntarily withdraws Exhibit 65. The State respectfully requests that the balance of the Staff's motion in limine be denied in all other respects.

DATED this 1st day of April, 2002.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MEMORANDUM IN
OPPOSITION TO THE NRC STAFF'S MOTION IN LIMINE was served on the
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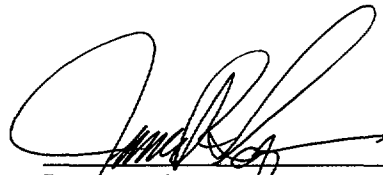
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Attachment to State of Utah's Memorandum in Opposition
to the NRC Staff's Motion in Limine (April 1, 2002)

A. The nature of the airspace and the aircraft flights above Skull Valley.

Q. 10: Please describe the UTTR air space and the military activities that occur within the air space.

A. 10: The UTTR or Utah Test and Training Range, located in Utah's west desert, is comprised of both an on-ground training range and training airspace. See State's Exhibit 40, map showing a portion of the UTTR. The UTTR range and the UTTR airspace are defined by different boundaries. Skull Valley is located below the UTTR airspace while the UTTR South range is defined by on-the-ground boundaries that do not include Skull Valley.

The UTTR airspace is the largest overland special use airspace in the continental United States and the largest overland safety footprint available to the U.S. Department of Defense. See State's Exhibit 41, UTTR Capabilities Guide excerpt at 3. The UTTR is a unique and valuable asset to the U.S. military, and its continued use as a military training and testing area is vital to military training and the national security of the United States.

The Sevier B Military Operating Area is part of the UTTR airspace over Skull Valley. See State's Exhibit 42, Annual Military Operating Area Usage Report for Sevier B MOA. Military low altitude training, air-to-air combat training, major exercises, and cruise missile testing are authorized and conducted in this airspace. See also Exh. 40, and State's Exhibit 43, Map of IFR Enroute Low Altitude - U.S., effective May 20, 1999, showing locations of Sevier B and D MOAs.

Portions of Sevier D MOA are also part of the UTTR airspace over Skull Valley. See State's Exhibit 44, Annual Military Operating Area Usage Report for Sevier D MOA; see also State's Exh. 43. Major exercises and cruise missile testing are authorized in the Sevier D MOA.

Additionally, the portions of the UTTR airspace over the UTTR range are designated "restricted airspace." See Map, State's Exh. 40. Airspaces designated as R-6402 and R-6406, located near the proposed PFS facility, are authorized for air-to-ground bombing, air-to-air training, and major exercise deployment in the restricted UTTR airspace. See State's Exhibit 45, Separate Annual Military Operating Area Usage Reports for R-6402A, R-6402B, and R6406, dated November 30, 1998.