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April 22, 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 RESPONSE TO STATE OF UTAH'S MOTION IN
LIMINE TO EXCLUDE PORTIONS OF NRC STAFF'S PREFILED
TESTIMONY OF LUK & GUTTMAN; WATERS; AND
STAMATAKOS, McCANN & CHEN (Unified Contention Utah L/QQ)**

Pursuant to 10 C.F.R. § 2.730(c) and the Order (General Schedule Revisions) of the Atomic Safety and Licensing Board ("Licensing Board" or "Board") of September 20, 2001, Private Fuel Storage, L.L.C. ("PFS" or "Applicant") files this response to the "State of Utah's Motion In Limine to Exclude Portions of NRC Staff's Prefiled Testimony of Luk & Guttman; Waters; and Stamatakos, McCann & Chen (Unified Contention Utah L/QQ)" dated April 15, 2002 ("State's Motion"). In its Motion, the State of Utah ("State") seeks to strike all or portions of three sets of NRC Staff's prefiled direct testimony on Unified Contention Utah L/QQ ("Contention Utah L/QQ") on the grounds that portions of the testimony "are unreliable; are not based on sufficient facts or data; have no foundational basis; and contain opinions of unidentified persons." State's Motion at 1. The State's Motion is lacking in merit and should be denied.

I. DISCUSSION**A. Motion to Strike the Luk and Guttman Testimony**

The State seeks to strike the testimony of Dr. Luk and Mr. Guttman in its entirety as being based on undisclosed facts and data, unknown principles and methods, and

unreliable application of principles and methods.¹ The State complains that a report prepared by Dr. Luk² describing certain cask stability analysis conducted by Dr. Luk or under his supervision “is only summary in nature” and leaves unanswered a number of questions that the State would like to explore. State Motion at 3-5. The State further asserts that it has been unable to take Dr. Luk’s deposition to obtain answers to those questions. *Id.* at 5. The State claims that if its motion to strike is denied, the State will essentially have to conduct “a deposition of Dr. Luk during cross-examination.” *Id.* Doing so will delay the hearing and “hamper the State in formulating trial strategy and proffering its best evidence.” *Id.*

The legal principles that control the resolution of this and other aspects of the State’s Motion are set described in the Applicant’s Response, filed simultaneously herewith, to the State’s Motion to strike Applicant’s pre-filed direct testimony.³ Briefly summarized, expert testimony is admissible in an NRC proceeding if it (1) assists the trier of fact and (2) is rendered by a properly qualified witness.⁴ Likewise, opinions of an expert witness based on scientific principles, acquired through training or experience and data derived from analyses or by perception are admissible as evidence.⁵ Moreover, an

¹ NRC Staff Testimony of Vincent K. Luk and Jack Guttman Concerning Unified Contention Utah L/QQ (Geotechnical Issues) dated April 1, 2002 (“Luk/Guttman Testimony”).

² NRC Project on Seismic Behavior of Spent Fuel Storage Casks Systems, Seismic Analysis Report on HI-STORM 100 Casks at Private Fuel Storage Facility, Rev 1, prepared by Vincent K. Luc, Jeffrey A. Smith, David A. Aube (Sandia National Laboratories), Robert A. Dameron (ANATECH Corp.), and Ignatius Po Lam (Earth Mechanics, Inc.), March 31, 2002 (“Luk Report”).

³ Applicant’s Response to State of Utah’s Motion In Limine to Strike Applicant’s Prefiled Direct Testimony (Unified Contention Utah L/QQ), dated April 22, 2002 (“Applicant’s Response to Motion to Strike”).

⁴ Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983); Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985).

⁵ Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 at n.52 (1985).

expert witness may testify about analyses performed by other experts due, *inter alia*, to the impossibility of an expert deriving all background data from experiments that the expert personally conducted.⁶ Further, under Federal Rule of Evidence 703 an expert may express an opinion based on information that has not been admitted at trial, even if the evidence may otherwise be inadmissible, if it is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”⁷

The State does not contest any of these principles or their applicability to the Luk/Guttman Testimony, nor does it allege any other infirmity in the testimony. Indeed, the only bases that the State asserts for seeking to exclude the testimony is that it will have to obtain additional information on the Staff’s analyses through extensive examination of Dr. Luk at the hearing, and that such prospect will somehow hamper the State’s trial preparation. In this regard, based on recent communications between the Staff and the State, we understand that the dispute over the Luk Report is in the process of being addressed at least through the provision of certain documents by the Staff.⁸ In any event, generalized allegations of harm such as this do not rise above unsupported speculation and cannot form the basis for a motion to strike.

⁶ Limerick, 22 NRC at 718 (citing Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972)).

⁷ See, e.g., United States v. Arias, 678 F.2d 1202 (4th Cir. 1982), *cert. denied*, 459 U.S. 910 (1982); see also United States v. Lundy, 809 F.2d 392 (7th Cir. 1987).

⁸ See, e.g., letters from Sherwin E. Turk, Esq. to Denise Chancellor, Esq., dated April 17 and April 22, 2002 and enclosures thereto.

B. Motion to Strike Portions of the Waters Testimony

The State seeks to strike portions of the testimony of Staff witness Michael D. Waters, related to the potential dose consequences of a hypothetical cask tipover.⁹ The State bases its motion on the alleged failure by the Staff to produce documents to the State that contain “the facts, data, or methodology that Mr. Waters relies upon to base his opinion.” Again, PFS understands that the Staff is making arrangements to provide the information sought by the State about the analyses conducted by Mr. Waters. Assuming, however, that the Staff and the State fail to amicably resolve this matter, PFS believes there are no valid grounds for striking the cited portions of Mr. Waters’ testimony.

First, as noted above and as discussed in the Applicant’s Response to Motion to Strike, an expert may express an opinion based on information that has not been admitted at trial, if it is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”¹⁰ Second, the State itself admits that the lack of the information it seeks would not preclude it from “elicit[ing] sufficient information on cross examination” as to two of the three answers that it seeks to strike.¹¹ Third, the allegedly missing information on the third answer (i.e., the inputs to the computer codes used by Dr. Waters to perform multiple dose calculations) can also be elicited in cross-examination, as is the methodology used by Mr. Waters in his analyses. In the event that such cross-examination fails to elicit the underlying information, the State can seek additional relief from the Board. Striking the testimony is therefore unnecessary.

⁹ Testimony of Michael D. Waters Concerning Radiological Dose Considerations Related to Unified Contention Utah L/QQ, Part E (Seismic Exemption) dated April 1, 2002 (“Waters Testimony”).

¹⁰ See, e.g., United States v. Arias, 678 F.2d 1202, *supra*; see also, United States v. Lundy, 809 F.2d 392, *supra*.

¹¹ See State Motion at 6.

C. The Stamatakos/Chen/McCann Testimony

Finally, the State moves to strike portions of the testimony of John Stamatakos, Rui Chen and Martin McCann.¹² The grounds asserted by the State is that (largely unidentified) portions of the testimony are not sponsored by a witness, lack foundation and are unreliable.

In this portion of its Motion, the State raises a variety of insubstantial complaints which, even if correct, would hardly warrant the drastic remedy that the State seeks. For example, the State complains that the testimony is presented “in panel format” without “attribution to which panel member is answering the question.” State Motion at 7-8. However desirable it may be to have specific panel members answer each question posed in direct testimony, it should be neither difficult nor as time consuming as the State alleges to establish which witness is sponsoring which part of a given answer.¹³

Likewise, other deficiencies alleged by the State to exist in the testimony, such as the lack of “sponsorship” by the witnesses of the Staff positions with respect to the Applicant’s seismic exemption request and the bases of Section E of Contention Utah L/QQ, can be easily probed at the hearing. If any of the witnesses disagrees with the

¹² Testimony of John A. Stamatakos, Rui Chen and Martin W. McCann, Jr., Concerning Unified Contention Utah L/QQ, Part E (Seismic Exemption) (April 1, 2002) (“Stamatakos/Chen/McCann Testimony”).

¹³ What the State interprets as lack of sponsorship may very well be an intention by the Staff that the answers be those of the panel, as opposed to an individual witness, reflecting their collaborative effort. For example, in Answer 8 the witnesses state: “At the Staff’s request, we conducted an evaluation of the Applicant’s seismic exemption request, which is described in Section 2.1.6.2 of the Consolidated SER.” Stamatakos/Chen/McCann Testimony at A8. A fair reading of that sentence is that the panel is testifying that “at the request” of the NRC Staff they (the panel) jointly conducted an evaluation of PFS’s seismic exemption request. If that is the intent of the testimony, there is neither an inconsistency between the panel members and the NRC Staff nor is there any deficiency in not having individual panel members identified as sponsoring the answer.

positions attributed to “the Staff” in their testimony, the State should be able to bring this disagreement out in questioning the panel.¹⁴

In much the same manner, any hearsay problems that might exist in Answer 27 of the Stamatakos/Chen/McCann Testimony relating to a conversation between an NRC Staff member and a Department of Energy official can be explored at the hearing, and remedy (if any is appropriate) sought at that time. Hearsay evidence is admissible in NRC proceedings, provided its reliability can be established. See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983). Therefore, the deficiencies that the State alleges may not exist. Their extent and significance are matters to be determined by examination of the witness at the hearing, not through a motion to strike.¹⁵

In short, the alleged deficiencies raised by the State with respect to the Stamatakos/Chen/McCann Testimony would not be sufficient grounds, even if validated, for striking the testimony at issue. Thus, this part of the State’s Motion is also non-meritorious and should be denied.

¹⁴ Again, it is likely that the panel is testifying as to what it did on behalf of the NRC Staff as a collaborative effort.

¹⁵ The reliability of hearsay testimony by an expert witness can be determined through questioning of the witness. Limerick, ALAB-819, 22 NRC 681 at 718.

II. CONCLUSIONS

For the above stated reasons, Applicants submit that the State's Motion to strike portions of the Staff's pre-filed direct testimony on Contention Utah L/QQ should be denied in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Gaukler", written over a horizontal line.

Jay E. Silberg

Paul A. Gaukler

Matias F. Travieso-Diaz

SHAW PITTMAN, LLP

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage L.L.C

Dated: April 22, 2002

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Motion In Limine to Exclude Portions of NRC Staff's Prefiled Testimony of Luk & Guttman; Waters; and Stamatakos, McCann & Chen (Unified Contention Utah L/QQ)" 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 22nd day of April, 2002, and with hard copies to be provided to the Board and parties at the hearing on April 23, 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)

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

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

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


Paul A. Gaukler