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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECURITY,
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of: PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation))))))	Docket No. 72-22-ISFSI ASLBP No. 97-732-02-ISFSI June 7, 2000
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**STATE OF UTAH'S RESPONSE TO NRC STAFF'S MOTION IN LIMINE TO
EXCLUDE PORTIONS OF PREFILED TESTIMONY OF GARY A. WISE
(UTAH CONTENTION R)**

Pursuant to the Board's May 1, 2000, Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters), the State files this Response to the NRC Staff's Motion in Limine to Exclude Portions of Prefiled Testimony of Gary A. Wise ("Staff's Motion"). It should be noted that the Applicant did not file a Motion in Limine with respect to Utah Contention R.

The Staff asserts that issues relating to the Applicant's compliance with Occupational Safety and Health Administration ("OSHA") regulations are outside the scope of Utah Contention R. *Sae* Staff's Motion at 1. Furthermore, the Staff asserts that issues relating to the adequacy or need for an "organizational statement" regarding the fire brigade are outside the scope of Utah Contention R, and the issues relating to the Applicant's compliance with National Fire Protection Association ("NFPA") standard 1500 are irrelevant to Utah Contention R. *Sae id.* at 1-2.

Template = SECY-041

SECY-02

Utah Contention R states as follows:

The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site in that PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

LBP-99-39, App. A. Contrary to the Staff's assertions, the prefiled testimony of Gary A. Wise subject to the Staff's Motion in Limine is neither beyond the scope of nor irrelevant to Utah Contention R. The testimony regarding the Applicant's lack of compliance with OSHA and NFPA standards is submitted as evidence that the Applicant does not have adequate support capability to fight fires onsite – the essence of Utah Contention R.

ARGUMENT

A. Mr. Wise's Testimony Relating to PFS's Failure to Satisfy OSHA Requirements Is Offered as Evidence that PFS Will Not Be Capable of Responding Adequately to On-site Emergencies and Is Therefore Within the Scope of Utah Contention R.

Pursuant to 10 C.F.R. § 72.32(a), PFS must submit an emergency plan for the PFS facility. The Staff must subsequently determine if the emergency plan is adequate. The State asserts, through Utah Contention R, that the Applicant's Emergency Plan is inadequate to protect the public health and safety because PFS does not have adequate support capabilities to fight fires onsite. *See* Utah Contention R, as modified by LBP-99-39, *supra*.

To prove that the Applicant's Emergency Plan is inadequate, the State has submitted evidence that the number of trained firefighters specified in the Emergency Plan will be inadequate to adhere with OSHA regulations. The issue of whether the Emergency Plan satisfies OSHA regulations is offered as evidence of whether the Emergency Plan adequately

protects the public health and safety (including the safety of on-site workers). The State is not asserting that the NRC is responsible for enforcing OSHA regulations directly, as the Staff suggests.¹ See Staff's Motion at 5.

The Emergency Plan must describe the arrangements made for "requesting and effectively using offsite assistance." 10 C.F.R. § 72.32(a)(15) (*emphasis added*). PFS plans to rely on the Tooele County Fire Department for off-site assistance. See EP at 10-1 to 10-2 (Rev. 5). However, given the location of the PFS facility in relation to the Tooele County Fire Department, the effectiveness of Tooele County's assistance is doubtful, at best. As Mr. Wise's testimony makes clear, the response time for the Tooele County Fire Department is such that PFS must be self-reliant in its ability to fight fires on site. See Prefiled Testimony of Mr. Wise at 3 (Question 4). As such, the Emergency Plan must provide for an adequately staffed and trained fire fighting unit without resort to off-site assistance.

Moreover, the Emergency Plan must provide for the protection of onsite workers (see 10 C.F.R. § 72.32(a)(5)), and describe the training the licensee will provide to workers, (see 10 C.F.R. § 72.32(a)(10)). OSHA, a federal agency, has developed safety-based regulations to protect firefighters. See, e.g., 29 C.F.R. § 1910.134. Accordingly, OSHA can be used as a vehicle to evaluate and demonstrate whether PFS's Emergency Plan adequately protects on-site workers and whether the training provided to those workers is adequate.

As recognized in another NRC proceeding, "[a] guideline established by a federal

¹ For example, the OSHA "two-in, two-out" rule is evidence that protection of on-site workers requires properly trained fire-fighters additional to the number listed in the Emergency Plan. The State is not suggesting that the NRC is responsible for enforcing OSHA regulations.

agency . . . is entitled to be accorded substantial evidentiary weight.” Consumers Power Company (Big Rock Point Plant), LBP-84-32, 20 N.R.C. 601, 698 (1984) (referring to EPA guidelines on radioactive dose levels that would prompt early evacuation of pregnant women). The OSHA regulations cited by Mr. Wise in his testimony are, of course, more than mere guidelines – they are enforceable federal regulations. As such, they should be given considerable evidentiary weight on the question of the deficiencies identified by the State's witness in PFS's Emergency Plan.

The Staff appears to be concerned that allowing this evidence into this proceeding would frustrate the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2) because parties to the proceeding would not be alerted to the issues that will be litigated. *See* Staff's Motion at 3. At the contention filing stage, however, intervenors do not have to present their case in full. In the Commission's response to comments received on the proposed amendments to 10 C.F.R. Part 2, the Commission indicated “[10 C.F.R. § 2.714] does not call upon the intervenor to make its case [at the contention filing stage].” 54 Fed. Reg. 33,168, 33,170. Intervenors are only required to “provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing.” *Id.* Moreover, “intervenors will continue to be able to use discovery to develop the facts necessary to support its case.” *Id.* at 33,171.

Failure to mention OSHA regulations at the time of filing Utah Contention R is no reason to exclude it as evidence. The State has used the intervening period from the time it

filed its original Contention R on November 23, 1997² as well as discovery to more completely analyze the issues and develop the facts necessary to present its case at the evidentiary hearing. Therefore, the failure to mention OSHA requirements in Utah Contention R does not provide a basis for striking this evidence. Moreover, the State's evidence is no surprise to the Staff. See State of Utah's Sixth Supplemental Response to Applicant's First Set of Formal Discovery Requests (Utah Contention R) dated May 9, 2000, at 3 ("PFS's fire fighting capability must comport with [NFPA] ... 600 and NFPA 1500 standards, as well as relevant federal [OSHA] ... standards").

In addition to the Staff's substantive arguments, which are addressed above, the State has concerns with the breadth of the Staff's effort to strike the State Fire Marshal's testimony. See Attachment to Staff's Motion. First, the Staff has even re-written the questions asked of the witness. See Attachment at 8, Question 9. Second, in several instances, the Staff has suggested striking testimony that does not even refer to OSHA requirements, but are the expert opinion of Mr. Wise. For example, the Staff suggests that all but the first sentence of the last paragraph of Mr. Wise's response to Question 7 be stricken even though reference to OSHA requirements was only made once in passing. See Attachment to Staff's Motion at 7-8.

The Staff's aggressive assault on Mr. Wise's testimony is such that his testimony no longer has any unity and, taken out of context, may appear to be supportive of the

² See State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, at 116-122.

Applicant. The last paragraph of Mr. Wise's Answer to Question 7 is eviscerated to the point that under the Staff's rendition his testimony would read: "In its EP, PFS appears to rely on the fact that a second fire truck located at the Goshute village is available to bolster the adequacy of its fire protection at the facility." Swept aside by the Staff is the pre-filed testimony in which Mr. Wise, who has hands-on fire-fighting experience and is in fact the Utah State Fire Marshal, uses his experience, training and current duties to inform the Board about the hands-on requirements for fighting fires. The Board should disregard the Staff's Attachment.

In sum, PFS and the Staff failed to consider OSHA regulations in determining the number of firefighters necessary to adequately protect the safety of the on-site workers. The State's testimony shows that when OSHA regulations are taken into account, the staffing of the fire brigade in the Emergency Plan is insufficient. However, the NRC should not turn a blind eye to OSHA or another federal agency's regulations or guidance. OSHA's regulations are entitled to substantial evidentiary weight because OSHA has expertise and experience with what precautions are necessary to ensure worker safety. The Staff should have taken notice of that expertise in evaluating the adequacy of PFS's Emergency Plan. Accordingly, the State Fire Marshal's testimony relating to OSHA is relevant and admissible.

B. Mr. Wise's Expert Opinion that PFS Should Meet NFPA Standards Goes Directly to the Issue of Whether PFS Is Capable of Responding Adequately to On-site Fires and Is Therefore Relevant to Utah Contention R.

For reasons similar to those outlined above, Mr. Wise's testimony regarding NFPA standards are admissible as evidence of PFS's firefighting capabilities. The Staff suggests that NFPA standards are irrelevant to whether PFS will be capable of responding adequately

to on-site fires. See Staff Motion at 6. Ironically, both PFS and the Staff have relied on other NFPA standards (NFPA 600) in developing and evaluating the PFS Emergency Plan. See EP at 4-3; NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention R at 8, 10 n. 13-14. The Staff has even re-written Question 9 of the State's pre-filed testimony to read: "Describe [sic] NFPA 600." See Attachment to Staff's Motion at 8. It is obvious that the State and the Staff have a fundamental disagreement on what NFPA standards apply to the PFS facility. Such a disagreement is not grounds for exclusion of testimony but rather should be the subject of cross examination of the witness.

The Staff's next issue, the "organizational statement" required by NFPA 600, is directly related to whether PFS will be capable of responding adequately to fires on site and is therefore within the scope of Utah Contention R. In fact, the Emergency Plan indicates that the "fire brigade will be organized, operated, trained, and equipped in accordance with NFPA 600." EP Rev. 5 at 4-3. Mr. Wise's testimony refers to the organizational statement requirement in pointing out that the Emergency Plan does not supply the information that is required under NFPA 600 §§ 1-4.1 and 2-1.2.1.

Similar to the organizational statement required by NFPA 600, 10 CFR Part 72 requires of an Emergency Plan a "description of the responsibilities of licensee personnel should an accident occur." 10 C.F.R. § 72.32(a)(7). The State asserts that PFS has not adequately described the means and equipment for mitigation of accidents. See Utah Contention R, *supra*. Thus, the references to the adequacy of PFS's organizational statement is within the scope of Utah Contention R and should not be excluded.

C. State Exhibits 7, 9, and 10 Are Submitted as Evidence Supporting Mr. Wise's Testimony and Therefore Should Not Be Stricken.

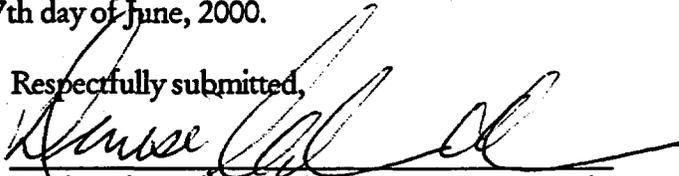
Exhibits 7, 9 and 10 are the subject of another Staff Motion in Limine, to which the State has today filed a separate response. Exhibits 7 (29 C.F.R. § 1910.156), 9 (29 C.F.R. § 1910.134(g)(4), and 10 (NFPA 1500) were submitted as evidence supporting Mr. Wise's testimony. In addition, they were submitted for the convenience of the Board and to preserve a record of the regulations at time of hearing. These exhibits are admissible.

CONCLUSION

For the foregoing reasons, the State requests that the Staff's Motion in Limine be denied.

DATED this 7th day of June, 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC STAFF'S

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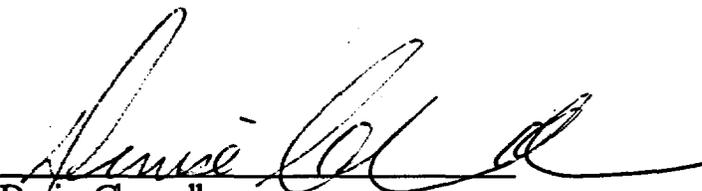
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