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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
PUBLIC RECORDS
ADJUTANT GENERAL STAFF

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
)
(Private Fuel Storage Facility))

Docket No. 72-22-ISFSI

**APPLICANT'S RESPONSE TO NRC STAFF MOTIONS TO EXCLUDE
TESTIMONY AND EXHIBITS OF THE STATE OF UTAH**

Pursuant to the Memorandum and Order of the Atomic Safety and Licensing Board ("Board") of May 1, 2000,¹ Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this response supporting the NRC Staff's ("Staff") motions in limine to exclude portions of the testimony of State of Utah ("State") witness Gary A. Wise on Utah Contention R ("Utah R") and certain State exhibits.² The Staff is correct in its assertions that the portions of the State's testimony to which it objects are irrelevant to Utah R and that the State's exhibits to which it objects are irrelevant, unnecessary, or have been superseded by subsequent revisions of documents.

¹ Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters) (May 1, 2000).

² NRC Staff's Motion in Limine to Exclude Portions of Prefiled Testimony of Gary A. Wise (May 31, 2000) [hereinafter "Staff Utah R"]; NRC Staff's (Corrected) Motion in Limine to Exclude Certain Exhibits Filed by the State of Utah (May 31, 2000) [hereinafter "Staff Utah Exh."]. The Staff and PFS have both filed similar motions to exclude portions of the testimony of State witness Michael Sheehan on Utah Contention S. NRC Staff's Motion in Limine to Exclude Portions of Prefiled Testimony of Michael F. Sheehan, Ph.D. Regarding Utah Contention S (May 31, 2000); Applicant's Motion to Strike Portion of Testimony of Michael Sheehan on Utah Contention S (May 31, 2000).

I. DISCUSSION

A. The State Testimony on Utah R to which the Staff Objects Should Be Excluded as Irrelevant

In NRC hearings, evidence will be excluded if it is irrelevant, immaterial, unreliable, or unduly repetitious. 10 C.F.R. § 2.743(c). Testimony outside the literal scope of a contention and its bases will be excluded as irrelevant. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988). On May 15, 2000, the State filed the testimony of Gary A. Wise regarding Utah R.³ Mr. Wise's testimony challenged the sufficiency of the number of people PFS will have on site to fight fires and the adequacy of the training firefighters will receive. Wise Utah R at 3. The Staff moves to exclude portions of Mr. Wise's testimony as irrelevant to Utah R. Staff Utah R at 1-2. PFS supports the Staff's motion.

1. OSHA Regulations

The Staff's first objection is to Mr. Wise's testimony that PFS's firefighting capability will be inadequate in that PFS allegedly will not be in compliance with Occupational Health and Safety Administration (OSHA) regulations. Staff Utah R at 4 (objecting to portions of Answers 6, 7, and 11). Mr. Wise alleges that PFS has not complied with "all of the requirements for fire brigades as found in OSHA [regulations], 29 CFR § 1910.156." Wise Utah R at 6. Specifically, regarding OSHA regulations Mr. Wise claims that 1) PFS has not provided an adequate organizational statement, id., 2) PFS's "back-up fire brigade" members will not receive training commensurate with their duties, id. at 8, 3) PFS will not comply with the OSHA "two-in two-out" rule, id., and 4) PFS's ability to protect on-site workers is deficient, id. at 11-12.

³ Prefiled Testimony of Gary A. Wise on Behalf of the State of Utah Regarding Contention Utah R (May 15, 2000) [hereinafter "Wise Utah R"].

As the Staff points out, Mr. Wise's testimony on OSHA compliance is irrelevant, in that OSHA compliance is not relevant to NRC emergency planning requirements. The scope of NRC emergency planning regulations, and thus the litigable scope of Utah R, is limited to "the hazards associated with nuclear materials rather than to all questions of fire safety at licensed facilities." The Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 159 (1995); The Curators of the University of Missouri, CLI-95-8, 41 NRC, 386, 393 (1995).⁴ "It is, of course, true that the Commission's radiation-protection mission requires it to consider questions of fire safety, but this does not convert the Commission into the direct enforcer of local codes, OSHA regulations, or national standards on fire safety, occupational safety, and building safety." Id.

Moreover, even if OSHA compliance were within the scope of NRC licensing proceedings, Mr. Wise's testimony is not relevant in that he does not show how PFS's alleged failure to comply with OSHA is relevant to nuclear materials hazards at the Private Fuel Storage Facility ("PFSF"). See Wise Utah R at 11-12. When asked about the consequences of PFS's alleged shortcomings, Mr. Wise's only response is that personnel on site might be endangered by fire. Id. Thus, there is no apparent connection between Mr. Wise's testimony on OSHA requirements and the standard by which the NRC judges facility emergency plans (response to radiological hazards) and hence Mr. Wise's testimony is irrelevant.

In addition, Mr. Wise's testimony should be excluded as outside the scope of Utah R, in that the State did not mention OSHA requirements in any way when it filed its

⁴ See also 10 C.F.R. § 72.32(a)(2) (emergency planning regulations concern "radioactive materials accident[s]"); 51 Fed. Reg. 19,106, 19,109 (1986) (Statement of Considerations for proposed rule that ultimately became sections 72.32(a)(2) and (a)(5)) (emergency plan must protect against "accidental releases of radioactive materials" and "radiation hazards").

contention. See State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Installation (Nov. 23, 1997), at 120-121. Thus, the State should not be allowed to introduce this issue at this late date in the proceeding.

2. Fire Brigade Organizational Statement

The Staff's second objection is to Mr. Wise's testimony that PFS's emergency plan is deficient because it lacks an adequate organizational statement. Staff Utah R at 6. Mr. Wise complains that PFS has not provided an adequate organizational statement for its fire brigade and its "back-up" fire brigade. Wise Utah R at 6-7.

As the Staff indicates, Mr. Wise's testimony on organizational statements is outside the scope of Utah R. Longstanding NRC case law holds that emergency plan implementing procedures are not required in a license application and hence are not litigable in NRC licensing proceedings. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); see Curators of the University of Missouri, CLI-95-1, 41 NRC at 130-131, 137, 140-143. The development of an organizational statement to satisfy NFPA 600 would be part of the implementation of PFS's commitment to establish, train and equip its fire brigade pursuant to NFPA 600. See PFSF Emergency Plan at 4-3. Therefore, Mr. Wise's testimony regarding the organizational statement for the PFS fire brigade is irrelevant to NRC licensing requirements and should be excluded.

3. Compliance with NFPA 1500

The Staff's third objection is to Mr. Wise's testimony that fire protection at the PFSF will be inadequate because PFS does not comply with NFPA 1500, Standard on Fire Department Occupational Safety and Health Program. Staff Utah R at 6. Mr. Wise

testifies that PFS's fire brigade should comply with NFPA 1500, rather than NFPA 600, in that the PFSF is located far from a municipality with an organized fire department. Wise Utah R at 10.

At the outset, Mr. Wise's testimony is irrelevant in that NFPA 1500, by its own words, simply does not apply to the PFSF. NFPA 1500 § 1-1.3 states: "This standard does not apply to industrial fire brigades or industrial fire departments meeting the requirements of NFPA 600, *Standard on Industrial Fire Brigades*." (emphasis added) NFPA 600, in turn, states:

This standard shall apply to any organized private, industrial group of employees having fire fighting duties, such as emergency brigades, emergency response teams, fire teams, and plant emergency organizations.

This standard shall not apply to industrial fire brigades that respond to fire emergencies outside the boundaries of the industrial facility when the off-site fire involves unfamiliar hazards or enclosed structures with layout and contents that are unknown to the fire brigade.

NFPA 600 §§ 1-1.2 and 1-1.3. The PFS fire brigade is clearly "[an] organized private, industrial group of employees having fire fighting duties," that will not "respond to fire emergencies outside the boundaries of the industrial facility" and therefore, PFS has appropriately committed to equipping and training its fire brigade in accordance with NFPA 600. PFSF Emergency Plan at 4-3. Thus, NFPA 1500 simply does not apply to the PFSF and Mr. Wise's testimony regarding the requirements of NFPA 1500 is irrelevant.

In addition, Mr. Wise's testimony is irrelevant in that he does not show in any way how a PFS fire brigade in compliance with NFPA 600, as opposed to NFPA 1500, would be inadequate to deal with the fire hazards associated with nuclear materials. Mr. Wise asserts, hypothetically, that "if adequate back-up is needed, the lengthy response time could put the facility and the safety of those working there at risk." Wise Utah R at 10. But Mr. Wise does not discuss the specific fire hazards at the PFSF at all and does

not show either 1) that back-up would be needed in the event of a fire or 2) that radio-logical harm would somehow result if such back-up did not arrive as quickly as Mr. Wise believes it should.

Mr. Wise also claims that NFPA 1500 should apply to PFS because, similar to “Industrial Fire Departments” to which NFPA 1500 assertedly applies, the PFS brigade will be trained and equipped for interior structural firefighting and will be trained in rescue services. Id. at 10-11. This testimony is irrelevant, in that it does not show in any way that a PFS fire brigade trained and equipped in accordance with NFPA 600 would be inadequate to handle fire hazards at the PFSF associated with nuclear materials. Furthermore, the testimony is irrelevant in that fire brigades to which NFPA 600 applies, like the PFS fire brigade, can also be trained and equipped for interior structural firefighting and trained to provide rescue services for the on-site facilities on which they are trained. See NFPA 600 Chapters 5 and 6 (interior structural fire fighting); id. § 1-5 (Interior Structural Fire Fighting includes “rescue . . . inside of buildings or enclosed structures”). Thus, the testimony does not show that the a PFS fire brigade trained and equipped under NFPA 600 would be inadequate in any way to perform any of the functions PFS has stated that it will perform (independent of whether such functions are necessary to handle fire hazards at the PFSF associated with nuclear materials).

B. The State Exhibits to which the Staff Objects Should Be Excluded as Irrelevant, Unnecessary, or Superseded by Later Documents.

The Staff objects to certain State exhibits on the grounds that they are irrelevant, unduly repetitious, or have been superseded by later revisions of documents. PFS supports the Staff’s motion. Exhibits the State seeks to introduce to support the testimony of its witness that is irrelevant are in turn irrelevant and should be excluded. See 10 C.F.R.

§ 2.743(c). Thus, Utah Exhibits 7, 9, and 10, see Staff Utah Exh. at 1-2, should be excluded because the State seeks to introduce them to support the testimony of its witness, Gary A. Wise, on Utah R that, as indicated above, is irrelevant.⁵

II. CONCLUSION

For the foregoing reasons, Applicant requests that the Board grant the NRC Staff's motion to exclude portions of the testimony of State witness Gary A. Wise and certain State exhibits.

Respectfully submitted,



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⁵ PFS also supports the Staff's argument that State exhibits of which the Board could take judicial notice are simply unnecessary and thus should be excluded, that certain exhibits, such as the letter from the NRC attorney concerning the applicability of the Price-Anderson Act to spent fuel shipments, are inappropriate and should be excluded, and that the State should provide up-to-date versions of the licensing documents it seeks to introduce.

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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to NRC Staff Motions to Exclude Testimony and Exhibits of the State of Utah" was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 7th day of June 2000.

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