

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:  PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	) ) ) ) )	Docket No. 72-22-ISFSI  ASLBP No. 97-732-02-ISFSI  February 20, 2001	OFFICE OF SECRETARY RULEMAKINGS AND ADJUDICATIONS STAFF
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**STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION TO STRIKE  
PORTIONS OF STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION  
FOR SUMMARY DISPOSITION OF  
UTAH CONTENTION L**

On February 9, 2001, PFS filed a Motion to Strike portions of the State's January 30, 2001 Response to PFS's Motion for Summary Disposition of Contention Utah L, portions of the State's Disputed and Relevant Material Facts ("Utah Facts"), portions of the Arabasz Declaration, portions of the Bartlett Declaration, and almost all of the Ostadan Declaration. The State files this response to PFS's Motion pursuant to the Licensing Board's Order of February 12, 2001.

**ARGUMENT**

**A. PFS Has Not Justified Its Motion to Strike; Instead PFS Has Filed a Reply to Utah's Response to Summary Disposition.**

There are no NRC regulations directly relating to Motions to Strike; therefore, it is reasonable for the Board to look to Federal Rules of Civil Procedure by analogy. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490 (1983). Federal Rule of Civil Procedure 12(f) addresses motions to strike, and although the rule allows a court to strike allegations which are redundant, immaterial,

impertinent or scandalous, the court will not do so unless the allegations have no possible relation to the controversy and could cause prejudice to one of parties. U.S. v. Sea Winds of Marco, Inc., 893 F.Supp. 1051, 1056 (M.D.Fla.1995); *see also*, Augustus v. Board of Public Instruction, 306 F.2d 862, 868-869 (5th Cir.1962). Many courts have held that the federal rules do not give them authority to strike briefs, memoranda, or affidavits, but only give them authority to strike pleadings. International Longshoremen's Association v. Virginia International Terminals, 904 F.Supp. 500, 504 (E.D. Va. 1995); Wimberly v. Clark Controller Company, 364 F. 2d 225, 227 (6th Cir. 1966); *but see* Rawson v. Sears Roebuck and Co., 585 F. Supp. 1393, 1397 (D. Colo. 1984). Instead, the fact that the material is irrelevant goes to the weight of the argument or evidence, and is not a justification for striking the material. Wimberly, at 227. Should the Board choose to adopt the federal standard by analogy, the Applicant's Motion to Strike should be denied.

Even when motions to strike are allowed, they are not favored, and are frequently denied where no prejudice could result from the challenged allegations. Dipietro v. Jefferson Bank, 1993 WL 101356, 101357 (E.D. Pa. 1993). The movant bears the burden of demonstrating it will be unduly prejudiced. Rawson, 585 F. Supp. at 1397. PFS has failed to demonstrate that it will be unduly prejudiced by the arguments made in the State's Response, the Utah Facts or the supporting declarations.<sup>1</sup>

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<sup>1</sup> PFS relies on Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637 (1981) as endorsing a motion to strike as an appropriate means of striking irrelevant material from a summary disposition response. PFS Motion at 2-3. Allens Creek is a far cry from the response PFS is challenging in Utah L. The Board in Allens Creek struck an intervenor's affidavit that did not respond to the substantive arguments raised by the affiant but contained a "scurrilous personal attack upon

A motion to strike must “not address, as a reply would, the merits of the Intervenor’s arguments against summary disposition ... [but must] confine[ ] itself to the procedural sufficiency of the Intervenor’s response and affidavits.” Florida Power and Light (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 304 (1985).<sup>2</sup> Moreover, if the motion for summary disposition is denied, the proponent of the motion still has the chance at hearing to persuade the panel of its case. Id. at 305.

Here, the disagreement between PFS and the State relates to the scope of Utah L, not to any procedural defects in the State’s summary disposition response. The Applicant is using a motion to strike as a mechanism for arguing to the Board what it perceives to be the scope of Utah L instead of requesting leave of the Board to file a reply to the State’s Response to Summary Disposition. A blatant example of PFS’s “reply” is PFS’s request to strike the State’s legal argument as to why Basis 2 relates to whether or not PFS has conducted an adequate deterministic seismic hazard analysis. PFS Motion at 5-6. The State is confident that the Board has the proficiency and authority to review and analyze this legal argument. Thus, PFS’s attempt to usurp the Board’s role should be soundly rejected.

In this summary disposition proceeding the burden is on PFS -- the proponent of the motion -- and “the evidence submitted must be construed in favor of the party in

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the Applicants’ affiant.” Allens Creek, 14 NRC at 677. Here, the State makes no such “scurrilous personal attack” on any of the Applicant’s declarants.

<sup>2</sup> In Turkey Point, the Board denied the applicant’s motion to strike because in a proceeding involving safety, the Board reasoned that “a motion to strike a filing and affidavits on summary disposition is most useful when it is directed at the proponent of a motion” who puts forward experts of questionable competence. Id. at 305.

opposition thereto, who receives the benefit of any favorable inferences that can be drawn.”<sup>3</sup>

To uphold these burdens and standards, the Board should consider and weigh the State’s arguments as to the scope of Utah L and dismiss PFS’s attempt to garner support for its Summary Disposition Motion by carving out issues in Utah L that it cannot defend.

In sum, PFS may be inconvenienced by a ruling against it on summary disposition but PFS has not demonstrated in its Motion to Strike that PFS will be prejudiced by the State’s Response.<sup>4</sup>

**B. PFS Has Been Put on Notice by the State of the Scope of Utah L and Has Failed, at Its Peril, to Address those Issues in Its Summary Disposition Motion.**

PFS cannot feign surprise at the scope of the State’s response to PFS’s Motion for Summary Disposition. The State has repeatedly put PFS on notice as to the outstanding issues remaining in Utah L. The State in answering PFS’s discovery elaborated in detail about the issues PFS now wants stricken from the record.<sup>5</sup> In the State’s Response to PFS’s Second Set of Discovery Requests (June 28, 1999), for example, the State provided PFS with a critical, specific and detailed analysis of such issues in Basis 3 as the variability in the shear wave velocity data (p. 42-43); depth to bedrock and to groundwater (pp 43-44); soil structure

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<sup>3</sup> Sequoyah Fuels Corp. and General Atomics Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff’d* CLI-94-11, 40 NRC 55 (1994).

<sup>4</sup> PFS cannot meet its burden because PFS will have the chance at hearing to persuade the Board of its case if the Board denies summary disposition on any of the issues PFS wants stricken. *See Turkey Point*, 33 NRC at 305.

<sup>5</sup> The exception to this statement is PFS’s new seismic investigation which was not planned at the time the State filed its discovery responses or during the depositions of the State’s witnesses.

interaction issues in modeling cask seismic response (pp. 61); pad foundation stability, dynamic loading and soil stability (p. 62); rigidity of the mat for the Canister Transfer Building (“CTB”) (p. 66); design motion control point (p. 67); concrete cracking (p. 68) and many others.

There is no merit to PFS’s assertion that the State is making a belated attempt to broaden the issues under Basis 2 by raising PFS’s inadequate deterministic seismic hazard analysis. PFS Motion at 5. The State described this issue and the basis thereof in a detailed response to a PFS interrogatory in which it requested the State to identify and fully explain each and every respect in which the State claims PFS’s seismic analyses is inadequate. PFS 2nd Set of Discovery at 33.

Moreover at the Bartlett and Ostadan deposition, PFS went over Utah L line by line,<sup>6</sup> as well as the State’s discovery responses<sup>7</sup> to determine the remaining issues in the scope of Utah L. Even though PFS avoided questioning Dr. Ostadan as to where the scope of his issues fitted into Utah L, they were nonetheless brought to PFS’s attention at that time. See Bartlett & Ostadan Tr. at 445-53. Yet in its Summary Disposition Motion, PFS, at its peril, has assiduously avoided any mention of the issues it now wants stricken. PFS should be required to adhere to its litigation strategy and not be permitted, *post hoc*, to change the record to defend against the State’s Response. The Board should, therefore, reject PFS’s motion.

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<sup>6</sup> See Bartlett & Ostadan Tr. at 8, 16-30, 100-02, 132-35, 172-79, 186-96, 197, 205-07, 210-12, 235-40, 445-53.

<sup>7</sup> *Id.* at 264-80; 296-432; 440-44, 569-601.

**C. The Unsupported List of Issues PFS Requests to Be Stricken Fit Within the Scope of Utah L.**

PFS's Motion to Strike is premised on nothing more than its desire to carve out of Utah L certain issues that give PFS considerable discomfort in its effort to attain a favorable ruling on summary disposition. PFS's baseless statement that its new geotechnical information does not relate to Utah L is contradicted by the changes PFS's anticipates making to the SAR. Cf PFS Motion at 3 with Utah Response, Exhibit 9. Moreover, PFS wants stricken from the record the State's analysis of why the new information fits within the scope of Utah L (PFS edited Utah Response at 6-7); the State's criticism of PFS's failure to integrate its seismic investigation across disciplines (*id.* at 7-8, 23, 24-25); the State's dispute of Dr. Young's assertion the new information has no effect on Utah L (*id.* at 16); and the implications that flow from the conflicting and missing data (*id.* at 14-15, 24-25). The State would clearly be negligent if it did not raise these material issues in defending against PFS's motion.<sup>8</sup> Furthermore, PFS has the audacity to attempt to strike the State's legal argument, that the new data and apparent substantive re-evaluation of its geophysical characterization, are well recognized bases for denying PFS's Summary Disposition Motion. *Id.* at 16-18. The State re-iterates that same legal argument here: PFS is not entitled to summary disposition because there is a possibility that a litigable issue of fact exists and there is doubt as to whether the parties should be permitted or required to proceed further. General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15

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<sup>8</sup> Material facts asserted by PFS in its Statement of Material Fact will be deemed admitted unless controverted by opposing party's material facts. 10 CFR § 2.749 (a). PFS wants to deny the State the ability to so controvert PFS's material facts.

NRC 530, 532 (1982).

PFS makes a shameless attempt to strike the State's legal argument as to the scope of Basis 2 and the State's reference to the Staff's admission that PFS does not meet the deterministic seismic hazard regulations. PFS edited Utah Response at 12-13. This is strictly a legal argument, well within the Board's domain, and is antithetical to the requirements for a motion to strike. Furthermore, PFS distorts the State's response by arguing that the State is trying to expand Basis 2 by citing to concerns the State raised under Basis 3. *See* PFS Motion at 4-5 and nn. 18, 19, 21. As described above, the State in the Bartlett and Ostadan depositions and in responses to discovery, all of which relate to Basis 3, has put PFS on notice about the conflicts in the shear wave velocity data and depth to bedrock. Finally, PFS's argument relating to the State's Modification of Basis 2<sup>9</sup> is illogical -- unless PFS is attempting to file a reply -- particularly in light of PFS's reference back to note 10.<sup>10</sup>

PFS challenges the State references to Holtec's calculations (PFS Motion at 7-8) but what PFS fails to realize is that, because Holtec used incorrect and non-conservative assumptions, the seismic loads would be greater than assumed, and it is questionable whether the soils beneath the pads will have the capacity to sustain the additional load. *See* *eg.*, Utah Response at 21-23. This is clearly within the scope of Basis 3, which states in part:

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<sup>9</sup> The State's makes only two references to modification of Basis 2: in the Background section and in a reference to the Board's jurisdiction. State Response at 2-3, 11. PFS has not requested that any of this material be stricken.

<sup>10</sup> Note 10 in PFS's Motion relates to its new seismic investigation. The State's various requests to modify Basis 2 occurred long before PFS announced its intent to conduct a new seismic investigation.

The Applicant must also show that the static and dynamic engineering properties of the soils, such as unconfined compressive strength, shear strength parameters for strength parameters from cyclic triaxial tests, were properly determined and that reasonable and conservative values were used in the design. This demonstration should explain how the developed data were used in design analyses, how the test data were enveloped for design, and why the design envelope is conservative.

Utah L at 89 (*emphasis added*).<sup>11</sup> The Board should deny PFS's request to strike such material.

See PFS Motion at 7-9 and items (e) through (k) at 9-10.

PFS also summarily laments that some issues raised by the State relate to how structures at PFS will behave in the presence of earthquake forces.<sup>12</sup> The quoted contention language above is a sufficient basis for challenging PFS's soil structure interaction, foundation loadings, near fault effects and lack of conservatism (*i.e.*, lack of redundancy).

PFS's attempts to constrict Basis 3 to a simple soils analysis should be rejected. Significantly, one quarter of the items listed by PFS related directly to soils, *i.e.* soil Layer 1, the novel and unproven soil-cement mix concept.<sup>13</sup> PFS Motion at 9-10. In its material facts, Basis 2, ¶ 44, PFS cites to the Bartlett Tr. at 522-23 as support for its statement that Layer 2 is the only layer of concern at the PFS site. This citation is misleading. The focus of the issue at the citation listed by PFS was not the soil-cement mat in Layer 1; instead, the focus related to certain listed examples in Utah L (at 86) that Dr. Bartlett testified are no

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<sup>11</sup> One reason the State mentioned Holtec's bold design philosophy is to show that Holtec's assumptions cannot withstand scrutiny and, taken together with PFS's inadequate soil-structure interaction and foundation loading analyses, the PFS design envelope is not conservative. See Ostadan Dec. ¶ 26.

<sup>12</sup> There is no substantive discussion or analysis of the perceived out-of-scope issues, merely a twelve item list of PFS's general complaints. See PFS motion at 9-10.

<sup>13</sup> See Utah Response at 18-19, Utah Facts ¶¶ 58, 62-64; and Bartlett Dec. ¶¶ 22-23.

longer a concern because of borings additional to the initial work that PFS has completed. Consistent testimony by Dr. Bartlett during his deposition shows that PFS has presented insufficient soil test data to support its conceptual soil-cement mix in Layer 1; PFS's presumptions that the soil-cement mat would impart an impermeable barrier are speculative; and tensile strength and other issues relating to seismic loading cannot be resolved until PFS demonstrates the adequacy of its conceptual design through calculations and testing. *See e.g.*, Bartlett & Ostadan Tr. at 103, 216-26, 389-90. The following portion of Utah L clearly has not been satisfied with respect to Layer 1:

There are insufficient soil test data presented in the application to determine that strength tests have been performed on undisturbed samples and that there are sufficient relevant test data to support the selection of design parameters.... There is also insufficient data to conclude whether or not soil and rock characteristics derived from the investigations have been completely and conservatively interpreted to develop design parameters. If site building foundations and soil structures have not been investigated and laboratory tests to measure and quantify the soil performance not documented, a decision regarding suitability or applicability cannot be made.

Utah L at 86. *See also* Bartlett Dec. ¶¶ 18, 19, 23, 24.

During PFS's deposition of Dr. Bartlett and Dr. Ostadan, the witnesses laboriously reviewed Basis 3 in its entirety and testified where in the contention their issues fell. The State in its Response supported its assertions with citations to Utah L. *See* Utah Response at 17-24. The Board should treat PFS's Motion to Strike for what is really is: an unauthorized reply to the State's Response to PFS's Summary Disposition Motion. There is no merit to PFS's Motion; the Board should dismiss it in its entirety.

## CONCLUSION

For the reasons stated above, the State urges the Board to consider the entire summary disposition record before it and to deny PFS's Motion to Strike.

DATED this 20<sup>th</sup> day of February, 2001.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION TO STRIKE PORTIONS OF STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION L was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 20<sup>th</sup> day of February, 2001:

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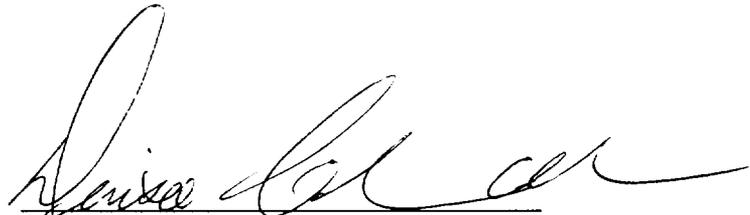
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