

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '01 FEB 27 A11:15

In the Matter of:	)	Docket No. 72-22-ISFSI	OFFICE OF SECRETARY RULEMAKINGS AND ADJUDICATIONS STAFF
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI	
	)	February 20, 2001	

**STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION TO STRIKE  
PORTIONS OF STATE'S RESPONSE TO APPLICANT'S MOTION FOR  
SUMMARY DISPOSITION ON UTAH CONTENTION K/CONFEDERATED  
TRIBES CONTENTION B**

Pursuant to the Board's Order of February 12, 2001, the State of Utah files this Response to PFS's February 9, 2001, Motion to Strike Portions of the State of Utah's Response to Applicant's Motion for Summary Disposition on Utah Contention K and Confederated Tribes Contention B, including all of Lt. Colonel Hortsman's Declaration that relates to categorization and assessment of air craft crash reports and the use of the Utah Test and Training Range, and portions of Dr. Resnikoff's Declaration that relates to risk standards and cruise missile calculations ("Motion to Strike"). PFS's Motion to Strike lacks merit and, thus, the State urges the Board to deny the motion.

**BACKGROUND**

In support for its Summary Disposition Motion, PFS substantially relies on its report, *Aircraft Crash Impact Hazard at the Private Fuel Storage Facility* ("Aircraft Crash"). This report was initially generated on November 24, 1999 and was subsequently revised on February 2, 2000 (Rev. 1), June 6, 2000 (Rev. 2), June 17, 2000 (Rev. 3), August 10, 2000 (Rev. 4), and January 19, 2001 (Rev. 4 addendum). In the Aircraft Crash report, PFS

categorizes Class A accident reports between 1989 and 1998 in which F-16 aircraft were destroyed. See Aircraft Crash, Tab H at 3.

On December 5, 2000, the State filed a supplemental discovery response,<sup>1</sup> in which the State provided additional information that contested PFS aircraft crash report assumptions. On December 11, 2000, PFS deposed State's expert Lt. Colonel Hugh Horstman, U.S. Air Force (retired)<sup>2</sup>. The next day the State deposed PFS's expert Colonel Ronald Fly, U.S. Air Force (retired). On December 30, 2000, PFS filed its Motion for Summary Disposition on Utah Contention K and Confederated Tribes Contention B.

## ARGUMENT

NRC rules do not set a standard for motions to strike; thus, the State's submits that the Board look to the Federal Rules of Civil Procedure to establish a standard of review. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490 (1983).

### **I. PFS's Motion to Strike Is Not Applicable to the State Experts' Declarations.**

The State asserts that motions to strike should apply only to pleadings, not affidavits or declarations. International Longshoremen's Association v. Virginia International

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<sup>1</sup> State of Utah's Supplemental Response to Applicant's First Set of Discovery Requests for Contention Utah K (December 5, 2000) ("State's Supplemental Discovery Response").

<sup>2</sup> Consistent in this case, the State again requested that Colonel Fly's deposition take place prior to Lt. Colonel Horstman's deposition to provide Lt. Colonel Horstman the benefit of any new information provided by PFS's witness and to reduce the potential that Lt. Colonel Horstman may change or modify his opinion based on that new information. Over the objections of the State, PFS, citing potential availability concerns, insisted on scheduling Lt. Colonel Horstman's deposition first.

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.

PFS's moves to strike portions of the declarations of State's experts Lt. Colonel Hugh Horstman and Dr. Marvin Resnikoff. The PFS Motion to Strike should be denied in toto in that it attacks expert witness declarations, not pleadings.

## **II. PFS Inappropriately Uses Its Motion to Strike to Reply to the State's Response to Summary Disposition.**

By filing its motion to Strike, PFS is attempting to imprudently reply to the State's Response to Summary Disposition, including areas that it failed to address in its Summary Disposition Motion. 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>3</sup> Furthermore, if denial of the motion to strike also results in denial of PFS's motion for summary disposition, PFS still has the opportunity to persuade the Board of its case at an evidentiary hearing. Id. at 305.

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<sup>3</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 the motion" who puts forward experts of questionable competence. Id.

PFS argues that portions of Dr. Resnikoff's declaration, relating to the appropriate risk standard, should be stricken essentially because "PFS has shown [the credible design basis event standard for above ground facilities at nuclear waste repositories] is applicable to ISFSIs as well." Motion to Strike at 7. PFS then, in an attempt to fill in voids in its original Summary Disposition argument, makes new arguments to prop up its original position. Thus, PFS purports to justify striking Dr. Resnikoff's declaration because his description concerning the differences between the proposed PFS facility and Yucca Mountain are irrelevant. *Id.* at 8. Instead, PFS actually attacks the merits of the State's arguments concerning the applicable credible design basis event standard. PFS's futile attempt to mask its reply as a motion to strike should be rejected by the Board.

PFS also moved to strike portions of ¶ 10 of Lt. Colonel Horstman's declaration, which states that "[t]he UTTR [Utah Test and Training Range] 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." Motion to Strike at 9. PFS argues the critical nature of the UTTR to the nation's defense was addressed in Contention Utah KK and, thus, must be struck. *Id.* PFS's position is illogical because the primary debate in Utah K is projecting the actual use and probability of an aircraft, ordnance, or cruise missile striking its proposed facility. Lt. Colonel Horstman's declaration is directly relevant to the military's desire to continue to use the UTTR in the future and the ramifications thereof. Thus, the issue is material and relevant to Contention Utah K.

Additionally, whether material is irrelevant goes to the weight of the argument or evidence, and is not a justification for striking the material. Wimberly, 364 F.2d at 227.

Furthermore, PFS bears the burden of proof in summary disposition as “the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inference that can be drawn.”<sup>4</sup> Moreover, PFS failed to request leave to file a reply to the State’s Response to Summary Disposition. Memorandum and Order at 4 (February 2, 1998), *citing* 10 C.F.R. § 2.730(c). Hence, the State urges the Board to give full consideration to the State’s Response to Summary Disposition and deny PFS’s Motion to Strike.

### III. The State Provided PFS Reasonable Notice of Its Concerns.

Even if a motion to strike affidavits is considered, motions to strike are frequently denied where no prejudice could result from the challenged allegations. Dipietro v. Jefferson Bank, 1993 WL 101356, 101357 (E.D. Pa. 1993). PFS must demonstrate it will be unduly prejudiced if its Motion to Strike is not granted. Rawson v. Sears Roebuck and Co., 585 F. Supp. 1393, 1397 (D. Colo. 1984)).<sup>5</sup>

Lt. Colonel Horstman’s dispute with PFS’s categorization and assessment of the accident reports is primarily based on his overriding concern with PFS’s Aircraft Crash

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<sup>4</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>5</sup> In its motion, the PFS also 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. 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 the Applicants’ affiant.” Allens Creek, 14 NRC at 677. Here, the State makes no such “scurrilous personal attack” on any of PFS’s declarants.

assumptions (e.g, type of flight activities, whether the facility would be visible, type of accidents which could occur in Skull Valley, etc.). Admittedly, PFS did not have an opportunity to depose Lt. Colonel Horstman on his analysis of specific accident reports; however, PFS should have been well aware of his general concerns which were addressed in the State's Supplemental Discovery Response and discussed in detail in his deposition.

In devising its probability that pilots would be capable of avoiding the proposed PFS facility, PFS categorized aircraft accident reports between 1989 and 1998 in which F-16 aircraft were destroyed.<sup>6</sup> PFS only considered those accidents that it subjectively believed could occur in Skull Valley ("Skull Valley Type Events") or under "Sevier B Military Operating Area Conditions." See, e.g, Aircraft Crash, Tab H. Then, PFS speculated whether the pilot in the accident would be capable of avoiding the proposed PFS facility.

PFS was fully aware that Lt. Colonel Horstman disagreed with a number of PFS's assumptions. PFS relied upon those assumptions in categorizing the accident reports. For example, PFS completely disregarded accidents which occurred more than 5,000 feet above ground level, or claimed it was unrealistic that a similar accident could occur in Skull Valley. Aircraft Crash, Tab H at 12. However, in his deposition, Lt. Colonel Horstman discussed the fact that F-16s frequently fly above the Sevier B MOA (above 5,000 feet). Horstman Tr. at 48-49, 59-60. Although cloud conditions posed questionable visibility in some accidents,

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<sup>6</sup> PFS reviewed only 126 out of 142 accident reports in which F-16 aircraft were destroyed for the ten year period. Aircraft Crash, Tab H at 3.

PFS asserted that pilots would still be able to avoid the proposed PFS facility.<sup>7</sup> Again in his deposition, Lt. Colonel Horstman clearly expressed and testified that in his expert opinion a pilot could only avoid the proposed facility if the facility was visible and not obstructed by clouds. Horstman Tr. at 127-130, 141-44, 163-71, 178-80; *see also* State's Supplemental Discovery Response at 4. PFS did not include in its analysis any accidents that occurred under instrument flight rules ("IFR"). Aircraft Crash, Tab H at 9. Once again in his deposition, Lt. Colonel Horstman attested that flights through Skull Valley occur under IFR. Horstman Tr. at 57, 60.

Likewise, PFS excludes from its analysis various accidents based on the type of flight activity. Aircraft Crash, Tab H at 8-9. Nevertheless, in his deposition, Lt. Colonel Horstman discussed such types of flight activities as G awareness warmups, night vision goggle training, etc. *See e.g.*, Horstman Tr. at 53-59, 105-127, 215. PFS also excluded from its analysis accidents concerning bird strikes. However, during his deposition, Lt. Colonel Horstman clearly expressed his disagreement with PFS and stated that an accident as a result of a bird strike was in fact a real possibility while flying through Skull Valley. Horstman Tr. at 204-08.

PFS had ample opportunity to address the general issues raised by Lt. Colonel Horstman's accident analysis in its summary disposition motion. PFS chose not to do so, and now PFS wants to rectify this omission through a motion to strike. As described above, there is no justifiable reason to grant PFS's Motion to Strike.

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<sup>7</sup> *See* Aircraft Crash, Tab H, Table 1 for reports dated March 19, 1991, June 8, 1991, and February 2, 1993.

**IV. The State Has Made Reasonable and Good Faith Efforts to Fulfill Its Discovery Obligations, Notwithstanding that PFS Has Failed to Fulfill Its Obligations.**

To fulfill its discovery obligations relating to Utah K, the State updated its discovery responses on December 5, 2000. *See*, State's Supplemental Discovery Response.

Additionally, State's expert Lt. Colonel Horstman was deposed by PFS on December 11, 2000. Now, PFS complains that it could "not [have] respond[ed] to or anticipate[d] the [accident report assessment] challenges Lt. Col. Horstman raised in his declaration." Motion to Strike at 3. As discussed, the State gave PFS reasonable and adequate notice of the concerns which formed the basis of the State's dispute with PFS's accident report analysis.

While Lt. Colonel Horstman did not review the F-16 accident reports prior to his deposition, he felt a need to do so after he attended Colonel Fly's deposition.<sup>8</sup> Colonel Fly testified about PFS's analysis and categorization of various accident reports. *See* Fly Tr. at 154-79, attached as Exhibit E to State's Response, Horstman Dec. As described in the State's Response, a primary dispute between PFS and the State is the way in which PFS has categorized various accidents. State's Response to Summary Disposition at 16-18. Thus, Lt. Colonel Horstman's critical review of the accident reports was precipitated by Colonel Fly's deposition and further necessitated by PFS's assertions in its Motion for Summary Disposition.

Due to the holidays and other professional obligations, Lt. Colonel Horstman did

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<sup>8</sup> Colonel Fly's deposition was taken December 12, 2000, the day following the deposition of Lt. Colonel Horstman.

not complete his review of the voluminous accident reports until after January 21, 2001<sup>9</sup>. The State believed that its response to summary disposition would serve equally as well as a supplement to discovery, because PFS would effectively receive the same notice of the State's position after PFS filed its Motion for Summary Disposition. Thus, PFS is not prejudiced by the State's actions, especially in light of PFS's failure to supplement its discovery prior to filing its Motion for Summary Disposition. In fact, the State saw for the first time the *Risk Assessment of Cruise Missile Accidents Impacting Private Fuel Storage, L.L.C.* when it was submitted on December 30, 2000, as Exhibit 3 to the Wagner and Girman Dec., PFS's Motion for Summary Disposition. Likewise in that motion PFS raised many other new issues and evaluations on which the State itself had not had an opportunity for discovery<sup>10,11</sup> or upon which the Staff has not taken a position. See e.g., Cole et al. Dec. ¶¶ 59-117, Exhibits 8, 9, 10, 11, 12, 13; and John's Dec., Exhibit 2.

#### V. Dr. Resnikoff Should Not Be Disqualified.

PFS attacks the qualifications of State expert, Dr. Marvin Resnikoff concerning his calculations of the probability that a cruise missile would hit the proposed PFS facility. Motion to Strike at 5. The Supreme Court has dismissed concerns about the new, more lenient Federal Rule of Evidence 702 resulting in admission of faulty science by noting that

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<sup>9</sup> Lt. Colonel Horstman reviewed a substantial portion of F-16 accident reports but has not review all 2,500 pages of the reports.

<sup>10</sup> In fact, the State had no notice that PFS would rely on its witnesses David Girman and Stephen Vigeant for contention Utah K.

<sup>11</sup> After it filed its Motion for Summary Disposition, on January 19, 2001, PFS amended its Crash Report (Addendum to Rev. 4). Further, on January 25, 2001, PFS submitted its amendment to its Risk Assessment of Cruise Missile Accidents, Rev. 1.

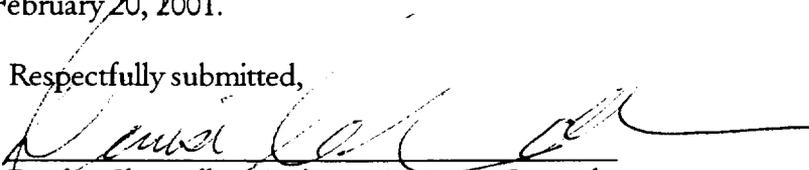
“[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993). As the Fifth Circuit has noted, “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.” U.S. v. 14.38 Acres of Land, More or Less, Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). Thus, Dr. Resnikoff’s qualifications with respect to cruise missiles goes to the weight of the argument and should not be struck. Moreover, the input values for Dr. Resnikoff’s calculations are not highly sophisticated, requiring unique expertise. Given that three cruise missiles recently crashed outside the UTTR land boundaries within a sixteen month period, Dr. Resnikoff reasonably assumed an out of control cruise missile could crash anywhere under the UTTR airspace. Resnikoff Dec. ¶ 54.

## CONCLUSION

For the reasons stated above, PFS’s Motion to Strike should be denied.

DATED this February 20, 2001.

Respectfully submitted,



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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'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION ON UTAH CONTENTION K/CONFEDERATED TRIBES CONTENTION B was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this February 20, 2001:

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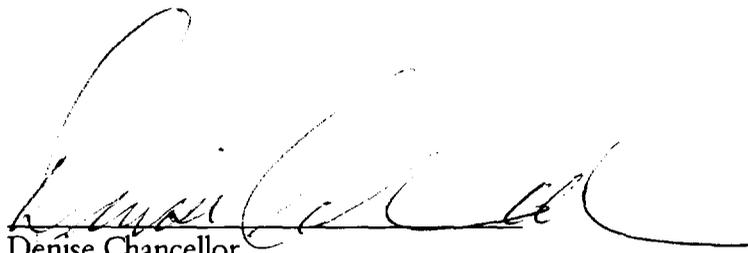
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