

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-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S MOTION IN LIMINE
TO EXCLUDE PORTIONS OF THE STATE OF UTAH'S
PREFILED TESTIMONY AND EXHIBITS CONCERNING
CONTENTION UTAH K/ CONFEDERATED TRIBES B

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743(c), and the Atomic Safety and Licensing Board's "Memorandum and Order (Revised General Schedule)," Attachment A, dated September 17, 2001, the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Licensing Board issue an Order, *in limine*, excluding portions of the State of Utah's (State) prefiled testimony of Dr. Marvin Resnikoff and Lt. Col. Hugh Horstman and related exhibits from the record of this proceeding. For the reasons set forth below, the Staff respectfully submits that these materials do not constitute reliable, admissible evidence, and properly should be excluded from the record of this proceeding.

DISCUSSION

The rules governing the admissibility of evidence in an NRC adjudicatory proceeding are set forth in 10 C.F.R. § 2.743(c), which specifies that "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted." Further, information appearing in prefiled testimony that is outside the scope of an admitted contention is not material and relevant to any issue in the proceeding, and is, therefore, inadmissible. In drafting contentions, intervenors are

required pursuant to the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2) to alert the parties to the proceeding of the issues that will be litigated. If during the course of the hearing, an intervenor were permitted to create additional contested issues or enlarge the scope of the admitted issues, this goal of the intervention specificity and basis requirements would be frustrated. *See Northern States Power Co. (Prairie Island Nuclear Generating Plan, Units 1 and 2), ALAB-244, 8 AEC 857, 867 (1974).* If an intervenor wishes to have testimony on a late-filed contention or basis admitted for litigation, the intervenor must satisfy the balancing test for late-filed contentions. *See 10 C.F.R. § 2.714(a)(1).* Therefore, testimony concerning issues that are not within the admitted contention and admitted bases is irrelevant and immaterial and should be stricken.

1. Value of the UTTR

In the pre-filed testimony of Lt. Col. Horstman, the State seeks to raise an issue with respect to the military value of the Utah Test and Training Range (UTTR). Specifically, Lt. Col. Horstman's (Horstman) Answer 10 asserts, in part, "[t]he UTTR 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 national security of the United States." The military value of the UTTR is outside of the scope of Utah Contention K, which is limited to the hazards posed to the facility due to aircraft crashes, and should be stricken. Further, this statement appears to relate to proposed Contention Utah KK ("Military Training Impacts"), which the Licensing Board excluded in LBP-00-27 (October 30, 2000). Accordingly, there is no reason why the State should be permitted to proffer evidence concerning the value of the UTTR in this testimony.

2. Forty-Year Life

In the pre-filed testimony of both Lt. Col. Horstman and Dr. Marvin Resnikoff, the State appears to argue that the aircraft crash predictions must account for activities beyond the 20-year term of the facility requested in the Application. For example, Lt. Col. Horstman refers to activities

“during the 40 year operation of the proposed facility” and predictions based on “the next 40 plus years.” See Horstman Answer 33. See also, Horstman Answers 36, 37, and 77. Likewise, Dr. Resnikoff refers to the planned life of the facility as being 40 years. See Resnikoff Answers 13 and 44. The Application, however, is for a term of 20 year term. See, e.g., “Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing,” 62 Fed. Reg. 41,099 (1997). If, in the future, the Applicant seeks to renew or extend the license term of the facility, it would be required to submit an application to amend or renew its license. See 10 C.F.R. § 72.56. In determining whether an amendment to the license would then be issued, the Commission will be guided by the considerations that govern the issuance of initial licenses. See 10 C.F.R. § 72.58. Therefore, the references to a 40-year term or operating life should be stricken. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-35, 50 NRC 180, 189 n.3 (1999) (finding that the relevant issue with respect to Dr. Resnikoff’s concern regarding additional future Salt Lake City Airport traffic is whether a material increase in traffic would have “some reasonable likelihood of occurring during the 20-year term of the PFS facility Part 72 license.”)¹

3. Conversations with Other Pilots

In the pre-filed testimony of Lt. Col. Horstman, the State asserts that the pilot of a crashing aircraft will be too distracted to steer the aircraft away from a ground site. See Horstman Question and Answer 46 & n.2; Horstman Question and Answer 47. In so doing, Lt. Col. Horstman relates the conversations he had with four named active duty F-16 pilots. These questions and answers should be excluded, on the basis that the State did not offer the pilots as witnesses for cross-

¹ The Staff notes that the Applicant also makes certain statements concerning a 40-year planned facility life. See Applicant’s Testimony of Cole/Jefferson/Fly at Answer 49. The Staff believes that this reference to a 40-year facility life should also be stricken, for the reasons stated in the text above.

examination, and their purported statements concerning their personal experiences can not be tested for reliability.

To be sure, there is generally no bar to the admissibility of hearsay evidence in NRC adjudicatory proceedings. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983). Whether evidence is or is not hearsay is significant only as it pertains to the reliability of the evidence. *Id.* Some hearsay statements may be excluded as unreliable; thus, it has been held that remote hearsay and rumor do not constitute substantial evidence upon which administrative decisions are to be based. See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 229-230 (1938).

The testimony at issue here relates to the four pilot's personal observations and experiences with respect to each pilot's aircraft crash, and is primarily based on their thoughts during the emergency. The parties in the proceeding should be allowed an opportunity to probe into these matters during cross-examination (for example, to determine whether some opportunity may in fact have existed for the pilot to steer the aircraft for a few seconds before he ejected), which opportunity would be denied if the reported conversations are allowed into evidence through the hearsay testimony of Lt. Col. Horstman.² In addition, three of the four pilots were involved in crashes for which no additional information is provided beyond the remarks provided by Lt. Col. Horstman,³ and thus the relevance of those crashes cannot readily be ascertained. Therefore, Lt. Col. Horstman's testimony concerning these matters should be stricken.

² The Staff should be allowed to pose inquiries directly to the pilots regarding the nature of their crashes. For example, one crash is said to have taken place in "Cold Lake, Canada." Horstman Answer 46 at n.2. If the pilot was available for cross-examination, the Staff would ask, *inter alia*, whether the crash took place over water or an uninhabited area, and the effect that this may have had on his frame of mind.

³ The fourth crash was the subject of an accident report that was analyzed by the Applicant's panel.

4. Consequences of Aircraft or Ordnance Impacts

In the pre-filed testimony of Lt. Col. Horstman and Dr. Resnikoff, the State provides opinions pertaining to the consequences of a jettisoned ordnance strike with respect to the penetration of casks and canisters. See Horstman Question and Answer 74; see also Resnikoff Question and Answer 2, 3, and 4. In addition, Dr. Resnikoff provides a consequence analysis in Section 9 of his testimony, "Consequences of an Aircraft Crash or Ordnance Striking the PFS Facility." It has three sub-components: a) "F-16 Engines Would Breach the Cask System"; b) "Jettisoned Ordnance Could Breach the Cask System"; and c) "Consequences of Breached Cask at the PFS Facility." These portions of Dr. Resnikoff's testimony, as well as Utah Exhibits 82-84 should be stricken because they are irrelevant to the probability calculation and are immaterial. The Board has previously stated with respect to the ordnance matter that:

[W]e note that, given the PFS assumption that an aircraft or associated ordnance strike will cause a radioactive release, see PFS Dispositive Motion at 29, as currently presented Dr. Resnikoff's assertions about ordnance penetration, see State Disputed Facts at 7, appear to have little relevance to his particular calculation. Further, given the relatively small probabilities involved with this item, namely 2.43E-10 per year, the materiality of his assertions regarding the significance of the possibility of live ordnance exploding at high temperatures, see State Response at 25, is questionable.

See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 443 n.9 (2001). Therefore, these materials should be stricken.⁴

5. Limited Appearance Statements

Utah Exhibit 46 consists of a transcribed Limited Appearance statement made by an individual (Mr. Kester), purporting to be the statement of Congressman James Hansen in connection with the PFS hearings in 2000, and is offered to demonstrate that the U.S. Air Force

⁴ The Staff notes that a similar discussion is found in the testimony of the Applicant's witness, Jeffrey Johns. See Johns Testimony at Q6-Q7. For the reasons set forth above, this matter should be stricken.

will continue to use the UTTR airspace. See Horstman Question and Answer 14. This Limited Appearance statement, however, should be stricken in that it does not constitute evidence, or even hearsay evidence; rather, it constitutes personal opinion that can not be cross-examined and has no evidentiary weight. Limited appearance statements are, by their nature, unsworn and unverifiable non-expert opinion statements made by non-parties. See 10 C.F.R. § 2.715(a). See *also* Tr. 1388 (Board explains purpose of limited appearance sessions). The limited appearance sessions were not evidentiary sessions, and the parties did not have an opportunity to conduct cross-examination during those sessions, to question the truth of the matter asserted, or to examine the speaker to determine if they had any personal or political motive for making the statement. Therefore, regardless of the identity of the speaker, this limited appearance statement is inherently unreliable and should be excluded.⁵

6. Newspaper Articles

Utah Exhibit 49 allegedly constitutes a “news report.” See Horstman Answer 30. It is offered to show that 12 additional F-16 fighters have been assigned to the 388th Fighter Wing, increasing the total number of F-16s from 54 to 66. *Id.* While the increase of 12 F-16s is not in dispute,⁶ this report goes far beyond this fact, into such matters as personnel assignments and rotations and, as to those matters, is irrelevant. In addition, this report lacks any “earmarks” of reliability, in that its source is unidentified. In this regard, it has been recognized that newspaper articles are hearsay evidence whose value depends on the truth of statements reported in the news. See *Rockwell International Corp.* (Rocketdyne Division), LBP-90-11, 31 NRC 320, 323 (1990). Exhibit 49 lacks the requisite reliability, in that it does not provide any clue as to its

⁵ Further, this statement should be stricken because it goes far beyond the scope of the remaining issues raised in contention Utah K. For example, this statement includes references to military readiness and cruise missile testing.

⁶ See, e.g., Applicant’s Testimony of Cole/Jefferson/Fly at Questions 56 and 57; Staff’s Testimony at Question 16.

authenticity - - rather, it is just a paragraph of text under the heading, "Capt. S." The failure of the State to identify the publication, date, and, page number precludes an evaluation as to whether the article should be regarded as credible. *See id.* *See also San Onofre, supra*, ALAB-717, 17 NRC at 365 (the requirement of authentication or identification as a condition for evidence to be admissible is satisfied by evidence to support a finding that the matter is what it is purported to be).

Similarly, Utah Exhibit 53 is purported to be a newspaper article. However, it has flaws similar to those of Utah Exhibit 49, and should be stricken. There is no way in which one can determine its authenticity and, therefore, it cannot be considered reliable. For this reason, too, the statement in Answer 34 of Lt. Col. Horstman's testimony regarding when the F-16s will reach the end of their life, which is based upon the news article in Exhibit 53, should be stricken.

7. Deposition Transcript

Utah Exhibit 58 consists of the 182-page transcript of a deposition of PFS witness Col. Ronald E. Fly. The proffer of such a lengthy exhibit is unnecessary, and will confuse and burden the record, without some attempt by the State to specify the particular portions of the transcript which it seeks to rely upon in its evidentiary presentation or subsequent proposed findings of fact. If admitted in its present form, the parties will be obliged to search through the transcript in order to determine which portions they need to defend against or oppose.⁷ Therefore, the State should be required to select and identify those portions of the deposition transcript that it wishes to have admitted as evidence herein. The Board has previously cautioned that witnesses and exhibits should be tied together and that they must have a relationship. *See* Tr. 881 ("A big document dump on the Board will not be acceptable.").

⁷ Further, objections to questions propounded during a deposition are merely noted by the officer before whom the deposition is taken, but questioning is normally permitted to proceed. The officer (*i.e.*, court reporter) does not decide on the competency, materiality, or relevancy of evidence. *See* 10 C.F.R. 2.740a(d). Should Exhibit 58 be admitted without prior rulings by the Licensing Board on the objections made, any objections made therein would be rendered nugatory.

8. Declaration of Lt. Col. Horstman in Response to Summary Disposition

Utah Exhibit 65 consists of the Declaration of Lt. Col. Horstman submitted in support of the State of Utah's response to a summary disposition motion, on January 30, 2001. This Declaration, although "only" 25 pages (single-spaced) in length, in turn cites to and relies upon a myriad of exhibits and statements that are not attached to the Declaration.⁸ Accordingly, this Exhibit should be stricken, and the State should be required to rely upon the (largely duplicative) evidentiary submissions contained in its prefiled testimony and other exhibits thereto.

9. Legal Memorandum

Utah Exhibit 73 is a 1980 legal pleading filed in the Three Mile Island Nuclear Station Unit 2 operating license proceeding. This pleading is offered as support for the State's use of the entire lifetime crash history for the F-16 crash rate. See Resnikoff Question and Answer 14. The State's proffer of a legal pleading filed in another proceeding is wholly improper. First, legal pleadings are, by their nature, argumentative legal briefs and should not be admitted into an adjudicatory proceeding as evidence. See *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1279-80 (N.D. Ohio 1980) (proposed findings of fact and conclusions of law are no more than "informal suggestions for the assistance of the court" and may not be admitted as evidentiary admissions). Second, the TMI-2 proceeding, like all proceedings, had its own unique issues and associated evidentiary presentations, as well as its own unique sets of parties and Counsel, such that the evidence in that proceeding is highly unlikely to be reproduced or identical to the evidence proffered in another proceeding involving different parties, Counsel, and issues. Further, to the extent that the State is trying to demonstrate that the Staff may have followed a different approach to ascertaining air craft crash data in a prior case over twenty years ago -- even if true, which is not

⁸ Moreover, even if those materials were attached to this proposed Exhibit, other parties would have to sort through and prepare cross-examination on all such matters, greatly expanding their litigation tasks with respect to this contention.

conceded here -- that assertion would have only marginal relevance, at best, with respect to the adequacy of the Staff's calculations in the present case. Therefore, this legal pleading and the related discussion in Dr. Resnikoff's testimony at Question and Answer 14 should be stricken.

CONCLUSION

For the reasons set forth above, the referenced portions of the State's testimony and Exhibits should be stricken, as indicated above.

Respectfully submitted,

/RA/
Catherine L. Marco
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of March, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE STATE OF UTAH'S PREFILED TESTIMONY AND EXHIBITS CONCERNING CONTENTION UTAH K/ CONFEDERATED TRIBES B," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 25th day of March, 2002:

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