

July 30, 1999

**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
)	
(Private Fuel Storage Facility))	

**APPLICANT'S Motion To STRIKE PART OF THE STATE OF UTAH'S
RESPONSE TO THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF
CONTENTION uTAH k**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion to strike part of the State of Utah's ("State" or "Utah") response to PFS's motion for summary disposition of Contention Utah K ("Utah K").¹ Specifically, PFS seeks to strike Section I.D of the State's response which asserts that, during transportation of rocket motors to and from the Tekoi Rocket Engine Test Facility ("Tekoi"), "[t]he Applicant has failed to analyze another source of risk from [an explosion of a rocket motor during transit], the risk caused by objects that would be sent flying by the explosion of the rocket . . ." Utah Resp. at 12. PFS files this motion because this allegation is based on a declaration from Dr. Marvin Resnikoff whom PFS was effectively denied the ability to fully and completely depose because, first, the State identified another individual, William Wallner of the Utah Department of Environmental Quality, as its knowledgeable person

¹ Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B, dated June 7, 1999 [hereinafter PFS Mot.]; State of Utah's Opposition to Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B, dated July 22, 1999 [hereinafter Utah Resp.]; Statement of Material Facts in Dispute Regarding Utah Contention K and Confederated Tribes Contention B [hereinafter St. Mat. Facts].

on the facility²; second, the State did not identify Dr. Resnikoff as either a person knowledgeable of, or as a testifying witness on, the activities at Tekoi,³ and third, Dr. Resnikoff explicitly excluded, upon questioning during his deposition, any involvement concerning Tekoi.

I. Statement of the Issues

On June 7, 1999, the Applicant filed a motion for partial summary disposition of Contention Utah K that sought, among other things, the dismissal of that part of Utah K concerning the alleged hazard to the PFSF from the Tekoi Rocket Engine Test Facility, including the hazard allegedly posed by the transportation of rocket motors to Tekoi via Skull Valley Road. PFS Mot. at 4-7. In its motion, PFS sought to address the issues identified by the State during the discovery process, including those raised by William Wallner in his deposition concerning Tekoi. Mr. Wallner was identified by the State during informal discovery as its knowledgeable person on the operations and activities at Tekoi, and verified the State's formal discovery responses concerning Tekoi.⁴

In its response to PFS's summary disposition motion, the State asserted that PFS had failed to analyze a source of risk from rocket motor transportation and based that assertion on a

² PFS deposed Mr. Wallner on the activities at the Tekoi Rocket Engine Test Facility on May 11, 1999 (excerpts attached as Exhibit 1).

³ The State did identify Dr. Resnikoff as a witness on Utah K (which as the Board knows involves numerous issues) without specifying, as it had done for its other witnesses for Utah K, the specific area of Dr. Resnikoff's testimony. Compare Answer to General Interrogatory No. 5, State of Utah's Amended Response to Applicant's First Set of Formal Discovery Requests, dated April 29, 1999, at 5-6, with State of Utah's Supplemental Response to Applicant's First Set of Formal Discovery Requests, dated May 20, 1999. However, during the questioning at his deposition Dr. Resnikoff specifically and expressly limited his role in Utah K to issues that did not include Tekoi.

⁴ See State of Utah's Amended Response to Applicant's First Set of Formal Discovery Requests, Attachment 1, and State of Utah's Response to Applicant's Second and Third Set of Discovery Requests With Respect To Group I Contentions, Exhibit 1, dated June 4, 1999.

declaration of Dr. Marvin Resnikoff wholly devoid of support, citation or specificity. Utah Resp. at 12; see St. Mat. Facts at ¶¶ 1-2.⁵ Dr. Resnikoff, however, had stated in response to PFS questioning in a deposition on May 19, 1999 that he would be testifying concerning the issues under Utah K only regarding alleged hazards to the Private Fuel Storage Facility ("PSFF") from military and civilian aviation in the region and from asserted radioactive releases from Dugway Proving Ground. Resnikoff Dep. at 110-13, 121, 136.⁶ After questioning on these two issues, Dr. Resnikoff was asked if he intended to assess "any other accident scenarios related to other facilities . . ." to which he answered "No." Id. at 136. Dr. Resnikoff's statements in the deposition effectively denied PFS the opportunity to examine him regarding his knowledge of and potential testimony regarding alleged hazards to the PFSF from Tekoi. Accordingly, PFS files this motion to strike the portion of the State's response concerning Tekoi, which solely relies on Dr. Resnikoff's declaration for support.

II. Argument

In its motion for summary disposition of the part of Utah K concerning alleged hazards from Tekoi, PFS argued and provided evidentiary support that the explosions of rocket motors in transit to Tekoi would pose no significant hazard to the PFSF because such an explosion would not create an overpressure of 1.0 psi at the PFSF. PFS Mot. at 5-6 & n. 11. As PFS stated in its motion, overpressure causes greater damage at comparable distances than heat or blast fragments, and thus controls the safe offset distance. Id. at n. 11 (citing Reg. Guide 1.91 at 1). PFS

⁵ See PFS Mot. at 5-6 & n.11.

⁶ Deposition of Marvin Resnikoff, May 19, 1999 (excerpts attached as Exhibit 2).

determined the safe offset distance using standard industry relationships for determining such distances which Mr. Wallner confirmed was standard industry practice. Wallner Dep. at 37.

In its response, the State asserted that “[t]he Applicant has failed to analyze another source of risk from such an accident, the risk caused by objects that would be sent flying by the explosion of the rocket” Utah Resp. at 12. The sole support cited by the State for this proposition was paragraph 19 of the declaration of Dr. Resnikoff, in which he stated in full:

Regarding the Tekoi rocket facility, the Applicant claims that neither an explosion on the pad, nor an overpressure caused by an explosion along Skull Valley Road could compromise the integrity of a storage cask, which is designed to withstand much greater overpressures. The Applicant has not addressed the issue of flying objects due to an explosion during transport of rocket motors, the Trident rocket engine contains 40,000 lbs. of explosives.⁷

In his deposition on May 19, however, Dr. Resnikoff stated that the only two issues on which he would testify with respect to Utah K were “the accident probability [from aircraft in the region] . . . as it relates to the PFS transfer facility and storage facility” and “radioactive releases from Dugway as to how those releases might confound the radiation monitors at the PFS facility.” Resnikoff Dep. at 110. “Those are my two roles as concerns this contention.” Id. (emphasis added). Later in the deposition, after questioning about the two topics, the following exchange occurred:

Q. Are there any other accident scenarios related to other facilities under [Utah] K for which you intend to do a probability calculation of potential impact on the Private Fuel Storage facility or [intermodal transfer point] ITP?

⁷ Dr. Resnikoff made no citation or reference to any underlying factual basis nor did he acknowledge or address the point made in Applicant’s Motion and the supporting declaration of Bruce Brunson that overpressure, not blast fragments, governs the safe offset distance from explosions. See PFS Mot. at 5, n. 11; Brunson Dec. at ¶ 10.

A. Regarding any of these other facilities located around PFS?

Q. Yes, the facilities [that are the] the subject of K.

A. No.

Id. at 136; see also id. at 111-13. After a few more questions, having explored all the areas on which Dr. Resnikoff stated he would testify, PFS concluded the deposition. Id. at 136-140.

Dr. Resnikoff's statements in the deposition effectively denied PFS the opportunity to depose him regarding his knowledge of and potential testimony regarding alleged hazards to the PFSF from Tekoi, preventing PFS from addressing his concerns in its motion for summary disposition. During its deposition of William Wallner, whom the State identified as its knowledgeable person on Tekoi, PFS extensively questioned Mr. Wallner concerning the hazards and likelihood of an explosion during transportation of rocket motors to and from Tekoi. Wallner Dep. at 30-32. The value of the deposition process was plainly evidenced by PFS's ability to establish that Mr. Wallner did not know the likelihood of an explosion nor of any instance where an explosion during transportation had ever occurred,⁸ as well as his acknowledgement of standard industry calculations for determining safe off-set distances. Id. at 37. Clearly, if Dr. Resnikoff's involvement with Tekoi had been identified by the State or disclosed during his deposition – which took place eight days after Mr. Wallner's deposition –

⁸ The exact exchange was as follows:

Q. Do you have an idea, based on your professional knowledge and experience, of the likelihood that a motor being transported would explode?

A. I don't.

Q. Do you know of any instances where that has happened before?

A. I do not.

Wallner Dep. at 31.

PFS would have had the opportunity to similarly inquire into his knowledge and understanding concerning the Tekoi facility and the use of standard industry calculations for safe offset distances. Because this opportunity was denied, the Board should not allow the State to make an assertion based on an unsupported claim by an individual shielded from the discovery process, contrary to the purpose of the discovery provisions of 10 C.F.R. Part 2, and provide the State an unfair advantage.

After Dr. Resnikoff's denial that he would be testifying on any issues other than risks from aviation in the region and asserted radioactive emissions from Dugway, PFS could not have elicited any additional information. Any attempt by PFS to continue questioning Dr. Resnikoff on all of the other issues subsumed under Utah K would have been manifestly wasteful and even inappropriate.⁹ The Board has stated that a party's failure to timely disclose information that was the subject of an interrogatory would be grounds for seeking to bar the admission of the information at the hearing. Order (Ruling on Applicant's 4/22/99 Motion to Compel) (May 11, 1999) at 2 n.1.¹⁰ Dr. Resnikoff's responses to the questions in the deposition constituted a failure to provide a timely response to a discovery request, or the failure to appear for cross-examination at a hearing, in that they prevented PFS from obtaining relevant information in the State's (Dr. Resnikoff's) possession before the Board would potentially make a decision concerning a substantive issue in the case (the alleged hazard to the PFSF from Tekoi).

⁹ Cf. 10 C.F.R. § 2.740(c) (parties may seek protective orders to shield them from "annoyance, . . . oppression, or undue burden" from discovery requests).

¹⁰ See also Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), 17 NRC 1076, 1088 n.13 (1983) (failure to appear for cross-examination at a hearing is grounds for barring the admission of a witness's testimony); Carolina Power & Light Company (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986) (failure to respond to discovery request is grounds for dismissing a contention).

Thus, because the State and Dr. Resnikoff effectively denied PFS the opportunity to depose him and to hence ascertain prior to the filing of summary disposition motion the basis (if any) for the State's claim, the Board should strike the portion of the State's response concerning alleged hazards to the PFSF from Tekoi, Utah Resp. at 11-12; St. Mat. Facts at ¶¶ 1-2, which relied on Dr. Resnikoff's unsupported and unsubstantiated declaration for its only support.

III. Conclusion

For the forgoing reasons, the Board should strike the portion of the State's response to PFS's motion for partial summary disposition of Utah K related to alleged risks to the PFSF from the Tekoi Rocket Engine Test Facility.

Respectfully submitted,

Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

July 30, 1999

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COMMENTS:

Attached are the Exhibits to Applicant's Motion to Strike Part of the State of Utah's Response to the Applicant's Motion for Summary Disposition of Contention Utah K.

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the Matter of	:	
	:	Docket No. 72-22
PRIVATE FUEL STORAGE	:	ASLBP No. 97-732-02-ISFSI
L.L.C.	:	
	:	Deposition Of:
(Private Fuel Storage	:	<u>WILLIAM M. WALLNER</u>
Facility)	:	
	:	

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Deposition of WILLIAM M. WALLNER, taken at the law offices of Parsons, Benle & Latimer, 201 South Main, Suite 1800, Salt Lake City, Utah, on the 11th day of May 1999, at the hour of 9:00 a.m., before David A. Thacker, a Certified Shorthand Reporter, Registered Professional Reporter, Utah License No. 22-105417-7801 and Notary Public in and for the State of Utah.

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ASSOCIATED PROFESSIONAL REPORTERS, L.C.

1 Q. And do you see that that would pose a
2 hazard to the PFS facility?

3 A. That should not.

4 Q. Is there anything else, any other
5 activities that you know of out there that might
6 pose a hazard?

7 A. Not that I can think of. Actually
8 potential from transporting the motors to and from
9 the facility, because it would come on the highway
10 there.

11 Q. And how would that pose a hazard?

12 A. It's just transporting of an explosive
13 along a highway there. Safety precautions that
14 they're taking during transporting, if something
15 happened there, there would be the potential for a
16 detonation in that instance also.

17 Q. But the potential for--would you say that
18 that's the potential for an explosion of a motor in
19 transit?

20 A. Yes.

21 Q. How often do they transport motors to
22 Tekoi?

23 A. I think at present, I think this year they
24 are planning on doing six test firings out there.

25 Q. And what kind of motors are those, or how

1 big are they?

2 A. That I'm not sure. I'm not sure just what
3 motors they're going to be testing out there. They
4 have a number of programs going on.

5 Q. Do you have an idea, based on your
6 professional knowledge and experience, of the
7 likelihood that a motor being transported would
8 explode?

9 A. I don't.

10 Q. Do you know of any instances where that has
11 happened before?

12 A. I do not.

13 Q. Do you know any--are you familiar with any
14 of the safety precautions that are taken to prevent
15 motors from exploding in transit?

16 A. All I know is that there is DOT testing,
17 DOD testing, that needs to take place before motors
18 can be transported.

19 Q. And what does that testing entail?

20 A. It's just mainly testing to see how stable
21 the material is in transit.

22 Q. And stable with respect to what?

23 A. Shocks, static electricity, things of that
24 nature.

25 Q. And these motors, where are they

1 transported from?

2 A. Most of these would be transported from the
3 Bacchus Works.

4 Q. And what route would they take to Tekoi, do
5 you know?

6 A. My guess is Highway 111, and then from
7 there probably jogging by Kennecott and out to I-80.
8 But that's just guessing.

9 Q. Is there any other route that you know of
10 that they would take?

11 A. They could also ship things by rail.

12 Q. And how would they get to Tekoi ultimately
13 by rail?

14 A. They would have to offload somewhere along
15 I-80 and then transport by truck to Tekoi.

16 Q. Is it possible that rocket motors could be
17 transported through Johnson Pass from Bacchus Works
18 to Tekoi?

19 A. I would say it's possible.

20 Q. Other than the transportation of rocket
21 motors, do you see any other activities that take
22 place at the Tekoi site as posing a significant
23 hazard to the PFS facility?

24 A. Not other than already was mentioned.

25 Q. Other than the potential for explosions and

1 discovery requests?

2 A. Just my personal knowledge of the
3 operation.

4 Q. So you did not do any separate calculations
5 or assessments or research?

6 A. No, I did not.

7 Q. You mentioned that calculations of the
8 relationship between quantity of explosives and safe
9 offset distance.

10 A. Un huh (affirmative).

11 Q. Would you consider that, based on your
12 experience and knowledge, to be a standard
13 calculation that's used in the industry?

14 A. Yes.

15 Q. That's a standard relationship that the
16 industry practice would rely upon?

17 A. Yes. It's either DOD--DOD has
18 requirements, ATF has requirements.

19 Q. ATF being--

20 A. Alcohol, Tobacco and Firearms. And then
21 the explosive manufacturing industry has their own.

22 Q. And do you think--are they generally the
23 same or are they different?

24 A. I'd say they're similar.

25 Q. They would produce similar offset, safe

IN THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In Matter of: : Docket No. 72-22
PRIVATE FUEL STORAGE, L.L.C : ASLBP No.
(Private Fuel Storage Facility) : 97-732-02-ISFI

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Washington, D.C.

Wednesday, May 19, 1999

Deposition of MARVIN RESNIKOFF, was called
for examination by counsel, commenced pursuant to
notice, at 10:10 a.m., at the offices of Shaw,
Pittman, Potts & Trowbridge, 2300 N Street, NW,
Washington, D.C., before Karen K. Brynteson,
Registered Professional Reporter and Notary Public.

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Washington, D.C. 20036
(202) 842-0034

1 Apache helicopters training up in the northern part
2 of the UTTR on the Private Fuel Storage facility
3 itself as opposed to the ITP?

4 A I don't.

5 Q That was my question. So we have
6 discussed the Apache helicopters. You discussed the
7 flights of airplanes from Hill Air Force Base and
8 the training range on UTTR as it may affect the
9 Private Fuel Storage facility and the ITP.

10 Are there any other potential hazards for
11 which you would expect, on the UTTR, for which you
12 expect to do an analysis of potential impact on
13 either the ITP or the Private Fuel Storage facility?

14 A My role is just to look at the accident
15 probability, you know, as it relates to the PFS
16 transfer facility and storage facility, look at
17 those probabilities.

18 And my only other role is to look at
19 radioactive releases from Dugway as to how those
20 releases might confound the radiation monitors at
21 the PFS facility. Those are my two roles as
22 concerns this contention.

1 Q As it concerns the contention case. So
2 you will be calculating the accident probabilities
3 with respect to particular events?

4 A Yes.

5 Q But you won't be testifying to the nature
6 of the events as such in terms of how many sorties
7 are flown or what type of activities take place on
8 Hill Air Force Base?

9 A The number of accidents that have been
10 flown?

11 Q The number of sorties that have been flown
12 or the accidents that have taken place, or the
13 activities that actually take place on Hill Air
14 Force Base or UTTR?

15 A Well, I would look into, yes, the
16 consequences of an accident at the PFS facility.

17 Q You'll look into the consequences of
18 accidents, but you are not going to be testifying to
19 the activities underlying the accident or the
20 potential, the nature of the activities underlying
21 the accidents?

22 A No, I assume we would have someone else

1 who would be discussing the nature of activities at
2 UTTR, yes.

3 Q Okay Let's take a short break and check
4 on something.

5 (Recess.)

6 MR. GAUKLER: Back on the record.

7 BY MR. GAUKLER:

8 Q Based on your discussion with General
9 Matthews, did you identify any other potential
10 accidents for which you intend to calculate the
11 probability of impact on the Private Fuel Storage
12 facility or the ITP?

13 A No, I don't think so, no.

14 Q Do you have any other -- are there any
15 notes or other records of your one-hour conversation
16 with General Matthews?

17 A Notes? I might have scribbles.

18 Q I would request a copy of them.

19 A Okay. You are probably going to want to
20 depose me to read these scribbles to you.

21 (Laughter.)

22 BY MR. GAUKLER:

1 Q Fair enough. Have you identified any
2 other potential accidents for which you intend to
3 calculate the probability of impact on the Private
4 Fuel Storage facility or the ITP?

5 A Well, as I said, I have this one other
6 role, which is to look into the radiological part to
7 see if any releases from Dugway, radiological
8 releases could confound the systems at PFS.

9 Q There are potential releases from
10 facilities around the area, such as biological and
11 chemical?

12 A I am not working on that.

13 Q You are not looking at those potential
14 releases?

15 A No.

16 Q So you are also looking at potential
17 radiologic releases from Dugway Proving Ground?

18 A Yes.

19 Q Do you know of -- what activities at
20 Dugway Proving Ground involve radiological
21 materials, do you know?

22 A I mentioned that there was tritium release

1 A I haven't done that.

2 Q Do you intend to do that?

3 A Yes. As we speak I am writing a note to
4 myself.

5 Q So if I understand your testimony
6 correctly, there is no other activities from Dugway
7 for which you are calculating potential accidents
8 impacting the Private Fuel Storage facility; is that
9 correct?

10 A Radiological, yes.

11 Q Other than radiological.

12 A And then these air accidents.

13 Q That's what we talked about at the UTTR.
14 Did you do anything with respect to Michael Air
15 Field?

16 A Yes.

17 Q You are going to do something on Michael
18 Air Field?

19 A Yes, we are going to look into that
20 because that's where some of these sorties would --
21 some of these air, these flights that have problems
22 land.

1 Q You are not doing anything with respect to
2 smoke or potential of adverse impacts of smoke as
3 they may relate to Utah K?

4 A No.

5 Q You mentioned earlier in the deposition
6 something about potential of hot air being sucked up
7 into the casks by a flame. Are you doing anything
8 with respect to that?

9 A I am not certain if I am or not, but I
10 didn't mention hot flame. I mentioned fuel, a fuel
11 oil fire.

12 Q So you were focusing on fuel oil?

13 A Sucked into the intake.

14 Q Okay.

15 A I don't believe I am working on that.

16 Q Okay. What documents have you generated
17 with respect to Contention K, if any?

18 A With regard to what?

19 Q What documents have you generated yourself
20 with respect to Utah Contention K, if any?

21 A None so far.

22 MS. CURRAN: Can you give us a second?

1 (Counsel confers with the witness.)

2 THE WITNESS: Counsel thinks I may have
3 written a memo. I don't think I wrote a memo.

4 MS. CURRAN: It would have been way back
5 at the beginning. I don't remember whether he did
6 or not, just was raising the possibility.

7 MR. GAUKLER: I have no further questions.

8 EXAMINATION

9 BY MR. TURK:

10 Q You have mentioned a few times that you
11 intend to do some calculations. When do you intend
12 to do that?

13 A When do I have to do it? What is our
14 deadline? It is the staff that's taking all the
15 time.

16 Q Is there some date that you have discussed
17 with the State of Utah?

18 A I haven't discussed a date, no. Excuse me
19 for a bit of levity. We haven't discussed a date.

20 Q Is there a general time frame by which you
21 are hoping to have that concluded? Are you thinking
22 just in terms of preparing testimony in the case or

1 some time before that?

2 A Yeah, sometime before that, sure, sometime
3 before that. I don't have the timing, the schedule
4 in my head, so I can't answer this question very
5 well.

6 Definitely you need the information before
7 the draft DIS comes out, but I don't know the
8 relative timing of all of this.

9 Q Can I ask counsel if there is some time by
10 which you are hoping to have these analyses
11 completed?

12 MS. CURRAN: We don't have a set date for
13 it. As a practical matter, we are anticipating a
14 motion for summary disposition, and we know we are
15 going to have to do more analyses in response to
16 that, so I would say that's one practical time
17 frame. I don't know if that will be everything, but
18 if something more will be done in that time frame --
19 we are trying to do everything as quickly as
20 possible.

21 MR. TURK: I would ask that whenever you
22 have done your analyses that you provide copies to

1 Q Can I get a copy of that?

2 A Yes.

3 MS. CURRAN: Are you sure you haven't
4 given him that already? I kind of remember that.

5 MR. GAUKLER: I thought I asked for that,
6 but I don't think we got it is my recollection. I
7 know I asked for it previously. I don't think I got
8 it. I will double-check. If you don't hear from
9 me, that means we don't have it.

10 MS. CURRAN: Okay.

11 BY MR. GAUKLER:

12 Q Are there any other accident scenarios
13 related to other facilities under K for which you
14 intend to do a probability calculation of potential
15 impact on the Private Fuel Storage facility or ITP?

16 A Regarding any of these other facilities
17 located around PFS?

18 Q Yes, the facilities subject of K.

19 A No.

20 Q Are you doing anything in connection with
21 fires, wild fires that may relate to Utah K?

22 A No.

1 us and I assume to other parties in the proceeding,
2 PFS, without delay. And I have no other questions.

3 MS. CURRAN: I don't have any follow-up.

4 MR. BLAKE: I think then that completes
5 the subject areas that Dr. Resnikoff has been
6 nominated for as a State expert.

7 MR. GAUKLER: With respect to group 1
8 contentions.

9 MR. BLAKE: Yes. Did you want an
10 opportunity to review the deposition before we
11 finalize it? I think your counsel indicated at the
12 beginning of the deposition that the answer would be
13 affirmative. That's a hint.

14 THE WITNESS: Usually I do just to check
15 minor errors, spelling, and things like that.
16 Usually I do that.

17 MR. BLAKE: We will plan on doing that
18 then. Anything else anybody wants to add to the
19 record? Thank you for your courtesy. We appreciate
20 it. And that concludes the deposition.

21 (Whereupon, at 3:45 p.m., the deposition
22 was concluded.)