

January 5, 1998

**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))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S OPPOSITION TO THE STATE OF UTAH'S
AND CASTLE ROCK'S MOTIONS FOR LEAVE TO REPLY
TO THE NRC STAFF'S AND PRIVATE FUEL STORAGE
LLC'S RESPONSES TO PETITIONERS' CONTENTIONS**

Applicant Private Fuel Storage L.L.C. ("Applicant") files this response to the State of Utah's (the "State") "Motion for Leave to Reply to the NRC Staff's and Private Fuel Storage, L.L.C.'s Responses to Petitioners' Contentions," dated December 30, 1997, and the nearly identical motion filed by the petitioners Castle Rock Land and Livestock, L.C. and Skull Valley Co., LTD (collectively "Castle Rock") for "Leave to Reply to the NRC Staff's and Private Fuel Storage LLC's responses to Petitioner's Contentions," dated December 31, 1997.¹ In these motions, the State and Castle Rock seek leave to file on or

¹Applicant notes that Castle Rock's motion was not filed on behalf of Ensign Ranches of Utah, L.C., which is a joint petitioner with with Castle Rock. See "Castle Rock Land and Livestock, L.C., Skull Valley Company, LTD, and Ensign Ranches of Utah, L.C. Request for Hearing and Petition to Intervene," dated September 11, 1997.

before January 22, 1998, a written reply -- in addition to the oral reply provided for by the scheduled prehearing conference -- to the NRC Staff and Applicant's responses to Petitioners' contentions. The Applicant opposes both the State's and Castle Rock's motions for leave to file a written reply.

First, the leading legal authority relied upon by the State and Castle Rock -- Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979) -- only held that a petitioner must be permitted "some chance to be heard in response" to challenges raised to its contentions. 10 NRC at 525. The specific chance provided for in that case was an opportunity "to present oral argument" at the prehearing conference. Id. at 523.

Here, both the State and Castle Rock will be provided ample opportunity "to be heard in response" to the challenges raised by the NRC Staff and the Applicant to their contentions. The Board, in its teleconference with the NRC Staff, the Applicant and the Petitioners on December 8, 1997, stated that it would allow the Petitioners a chance to present argument with respect to the admissibility of their contentions at the prehearing conference. Moreover, the Board has set aside up to four days for such argument. This opportunity for response provided to both the State and Castle Rock and to the other Petitioners certainly satisfies the legal requirement set forth in Allens Creek that "the proponent of a contention . . . be given some chance to be heard in response." 10 NRC at 525. A written reply is neither required nor necessary.

Neither do the other legal precedents cited by the State and Castle Rock support their position that they are entitled to a written reply in addition to oral argument at the prehearing conference. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981) involved a situation where no prehearing conference was held with respect to the "particularized contention" filed by the petitioner there. Id. Accordingly, a written reply was the only means available to provide the petitioner "some chance to be heard in response" to the challenge to its contention. Similarly, the salient feature of Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37 (1994) is the absence of any prehearing conference at which oral argument could be presented.² Accordingly, neither Shoreham nor Vogtle involved a situation -- such as that here -- where the petitioners will be provided ample opportunity at a prehearing conference to respond to the challenges raised by the Applicant and the Staff to their contentions.

Likewise, Castle Rock's reliance on the Statement of Considerations to the 1989 amendments to the Rules of Practice is misplaced. The quotation from the Statement of Considerations set forth on page 2 of Castle Rock's motion is focused specifically on the intended effect of the "proposed amendments" adopted by the Commission which elaborated on the pleading requirements for contentions: "[T]he proposed amendments, if

² Additionally, the issue in Vogtle did not involve the admissibility of contentions but the propriety of considering a new basis proffered by an intervenor for an already admitted contention. See 40 NRC at 39-40.

vigorously enforced, could become an important tool in crystallizing disputes at an early state in the proceeding, thereby significantly improving the efficiency and quality of the hearing process." 54 Fed. Reg. 33,168, 33,169 (1989).³

Under the Commission's Rules of Practice as amended, this crystallization is to occur in the body of the contentions and their bases as filed by a petitioner, not in a written reply by the petitioner, on which both the amended rules and the Statement of Considerations are completely silent. As discussed in Applicant's Answer to Petitioners' Contentions, the proposed amendments as adopted by the Commission raise the threshold for the admission of contentions by requiring the proponent of a contention to submit some alleged fact or facts and other supporting information to show that a genuine issue of material fact or law exists. 54 Fed Reg. at 33,168-170. It is this increased threshold for contentions, and not a petitioner's written reply, that provides the mechanism by which disputes are to be "crystalliz[ed] . . . at an early stage in the proceeding." *Id.* at 33,169.

Additionally, the State's request appears to seek the opportunity to reply to the Applicant's and NRC Staff's responses to all contentions, not just those of the State. Thus, the title of the State's filing refers to "Petitioners' Contentions," rather than "Petitioner's" or "the State's" contentions. The State also refers to the need to reply to "PFS's 672 page response and the Staff's 136 page response," not just to those portions

³ Surprisingly, the actual phrase quoted by Castle Rock is the Commission's summary of the "opinion of some commentators" and not, as represented by Castle Rock, the Commission's explanation of the proposed revisions to 10 C.F.R. Part 2.

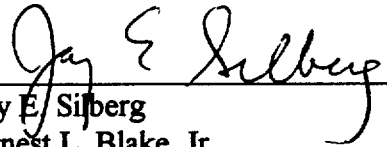
addressing the State's contentions. NRC's Rules of Practice clearly restrict answers to petitions to intervene or supplements to such petitions to "any party to a proceeding." 10 C.F.R. § 2.714(c). The State is not yet a party. If the NRC regulations do not permit the State to respond to other petitioners' supplements to petitions to intervene (which is the mechanism for filing contentions, see 10 C.F.R. § 2.714(b)(1)), the rules certainly do not permit the State to respond to the Applicant's and the Staff's answers to other Petitioners' contentions.⁴

Finally, while Applicant submits that no written replies are warranted, even if the Board were to allow such written responses, the schedule proposed by the State and Castle Rock is grossly unreasonable. The date proposed by the State and Castle Rock for the filing of their replies -- January 22, 1998 -- is one business day before the site visit and prehearing conference. Counsel for Applicant would not have adequate time to review the replies or to consult with their client before traveling to Utah for the site visit and prehearing conference. The proposed schedule for the State and Castle Rock to file written replies would not allow sufficient time for the Applicant to properly review any such replies in preparation for the prehearing conference.

⁴ Castle Rock's motion is ambiguous in this respect. Although the title refers to seeking "Leave to Reply to the NRC Staff's and Private Fuel Storage, LLC's Response to Petitioner's Contentions" (emphasis added), the body of the motion refers to the need to reply to the Applicant's "672 page response" and the Staff's "136 page response" without indicating any intent to limit such reply to those portions of the responses applicable to Castle Rock's contentions. To the extent Castle Rock seeks to reply to the Applicant's and the Staff's responses to other petitioners' contentions, it must be denied for the same reasons as set forth above with respect to the State.

For the foregoing reasons, the Applicant respectfully requests that the Board deny both the State's and Castle Rock's motions to file written reply to the Applicant's and NRC Staff's responses to Petitioners' contentions.

Respectfully submitted,


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Dated: January 5, 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Opposition to the State of Utah's and Castle Rock's Motion for Leave to Reply to the NRC Staff's and Private Fuel Storage, LLC's Responses to Petitioners' Contentions" dated January 5, 1998 were served on the persons listed below (unless otherwise noted) by facsimile with conforming copies by US mail, first class, postage prepaid, this 5th day of January 1998.

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**Attention: Rulemakings and Adjudications
Staff**
(Original and two copies)

* By U.S. mail only


Paul A. Gaukler