February 18, 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 ANSWER TO CASTLE ROCK'S PETITION FOR NON-APPLICATION OR WAIVER OF COMMISSION REGULATIONS, RULES, AND GENERAL DETERMINATIONS

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I. INTRODUCTION

On January 21, 1998, Castle Rock Land & Livestock L.C., Skull Valley Co. Ltd., and Ensign Ranches of Utah L.C. (collectively "Castle Rock") filed a "Petition" under 10 C.F.R. § 2.758(b) for "Non-Application or Waiver of Commission Regulations, Rules, and General Determinations" ("Waiver Petition" or "Petition"). In its Petition, Castle Rock seeks (i) a determination that 10 C.F.R. Part 72 is inapplicable to this proceeding because the Commission lacks the authority to license the Private Fuel Storage Facility ("PFSF") under 10 C.F.R. Part 72, and (ii) a waiver of, or an exception to, 10 C.F.R. § 51.23 and the Waste Confidence Decision as each applies to this proceeding. At the Prehearing Conference and in its February 2, 1998 Memorandum and Order

(Memorializing Initial Prehearing Conference Directives), the Atomic Safety and Licensing Board ("Board") ordered that responses to Castle Rock's Petition be filed on or before February 18, 1998. In accordance with the Board's Memorandum and Order, Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") submits this Answer to Castle Rock's Petition.

Castle Rock's Waiver Petition is deficient and must be rejected. Commission precedent is clear that a waiver of the applicability of NRC rules and regulations is an exceptional action that is to be granted only in unusual and compelling circumstances where an otherwise valid rule would not serve the purpose for which it was adopted. Here, Castle Rock has failed to establish a prima facie case of unusual or compelling circumstances as required under 10 C.F.R. § 2.758(d) for the Board to certify to the Commission whether its regulations should be waived as requested by Castle Rock.

Castle Rock's first request for a determination that the Commission lacks authority to license the PFSF under 10 C.F.R. Part 72 is not properly cognizable under 10 C.F.R. § 2.758(b). Castle Rock does not request the waiver of any particular safety or environmental rule or regulation as it may apply to the PFSF, but challenges the regulations in their entirety on the grounds that the Commission lacks the statutory authority to license an off-site Independent Spent Fuel Storage Installation ("ISFSI"), such as the PFSF. Castle Rock does not even attempt to establish that the licensing of an off-site ISFSI, such as the PFSF, would not serve the purpose for which 10 C.F.R. Part 72 was adopted, as required under 10 C.F.R. § 2.758(b), for plainly such a showing cannot be

made. The regulations and the Statements of Considerations which accompanied the promulgation of 10 C.F.R. Part 72 clearly reflect that Part 72 applies to both off-site and on-site ISFSIs. Further, no distinction can be found in either the regulations or the Statements of Considerations based on the size of a proposed ISFSI. Rather, the only applicable considerations for the licensing of a proposed ISFSI under 10 C.F.R. Part 72 are whether the health, safety and environmental requirements of 10 C.F.R. Part 72 are satisfied (which will be the subject of this proceeding). Thus, Castle Rock's request for a determination under 10 C.F.R. § 2.758(b) that the Commission lacks the statutory authority to license the PFSF must be rejected as an unallowable interlocutory request not cognizable under the requirements of 10 C.F.R. § 2.758(b) for certifying a petition for waiver of an NRC rule or regulation.

Moreover, Castle Rock is blatantly wrong in its assertion that the Commission lacks such statutory authority. The Commission has broad plenary authority under the Atomic Energy Act to license the possession and use of special nuclear, byproduct and source materials, which plainly encompasses the storage of spent nuclear fuel at both off-site and on-site ISFSIs. Castle Rock does not deny that the Atomic Energy Act provides such a grant of authority for the licensing of off-site ISFSIs, but rather argues that the Nuclear Waste Policy Act ("NWPA") lacks any such grant of authority, which according to Castle Rock "preempts" any preexisting authority under the Atomic Energy Act. Contrary to Castle Rock's claims, however, the NWPA did not expressly or implicitly repeal the Commission's preexisting authority under the Atomic Energy Act to license off-

site ISFSIs. Congress was well aware of the Commission's preexisting Atomic Energy Act authority and its promulgation of regulations to license both on-site and off-site ISFSIs as well as the Commission's actual licensing of such off-site facilities. Congress took no action to repeal this authority and therefore the Commission's authority under the Atomic Energy Act to license off-site ISFSIs, such as the PFSF, remains wholly intact.

Castle Rock's second request for a waiver of the Waste Confidence Decision as embodied in 10 C.F.R. § 51.23 is likewise deficient. Castle Rock has failed to establish -- as it cannot -- that the application of the Waste Confidence Decision in this proceeding would not serve the purpose for which it was adopted, the necessary showing for a waiver under 10 C.F.R. § 2.758. The Waste Confidence Decision was adopted to avoid litigating in each individual licensing proceeding the timing or availability of a permanent repository for the disposal of spent nuclear fuel. Yet, that is precisely what Castle Rock seeks here. Castle Rock has shown no unusual or compelling circumstances to require a waiver of this rule and a full blown litigation of the timing or availability of a permanent repository in this licensing processing.[1] Because the application of the Waste Confidence Decision in this proceeding would serve the very purpose for which it was adopted, Castle Rock's request for its waiver under 10 C.F.R. § 2.758 must be rejected.

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[1] As will be discussed in Section IV.A infra, Castle Rock's claims that spent fuel would remain at the PFSF at least until the year 2054 (Waiver Petition at 23) is based on an erroneous interpretation of DOE's acceptance rate for spent fuel upon the repository becoming operational.

II. LEGAL STANDARDS FOR WAIVER UNDER 10 C.F.R. § 2.758

A. OVERVIEW

The Commission's Rules of Practice provide that a party to an adjudicatory licensing proceeding may petition that the application of a specified Commission rule or regulation be waived, or an exception be made, for the particular proceeding. 10 C.F.R. § 2.758(b). The rule provides that:

> The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

10 C.F.R. § 2.758(b) (emphasis added).

The waiver of or exception to a Commission rule pursuant to 10 C.F.R. § 2.758(b) is an "exceptional action." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 234 (1989) ("Seabrook II"). The Commission has made clear that "a waiver or exception can be granted only in unusual and compelling circumstances." Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972) (emphasis added). Accord Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 239 (1989) (citing Monticello for the "unusual and compelling circumstances" requirement). The standards for a licensing board to certify a waiver petition are therefore "extremely high." Seabrook II at 245. The high standards "for setting aside an agency rule in a specific case" under 10 C.F.R. § 2.758(b) "are intended to

ensure that duly promulgated regulations are not lightly discarded." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16, reversed in part on other grounds, CLI-88-10, 28 NRC 573 (1988) (emphasis added).

The Appeal Board has commented that

> The relatively small number of waiver petitions filed in NRC adjudicatory proceedings and the fact that few, if any, such petitions have been successful evidence the difficulty of meeting the waiver standard. It also underscores the Commission's comment that such a petition "can only be granted in unusual and compelling circumstances."

Id. (footnote omitted).

The Commission has established a three-part test for certification of a waiver petition pursuant to 10 C.F.R. § 2.758(b) as follows:

> (1) The waiver petitioner must have presented "special circumstances" in the sense that the petitioner has properly pleaded one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived;
>
> (2) those special circumstances must be such as to undercut the rationale for the rule sought to be waived; [and]
>
> * * * * * * *
>
> (3) from the petition and other allowed papers it should be evident that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived.

Seabrook II, CLI-89-20, supra, 30 NRC at 235; see also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595 (1988) ("Seabrook I"). As stated by the Commission in Seabrook II, the first two parts follow from the explicit terms of the rule. 30 NRC at 235. The third prong of the test is "implicit in longstanding Commission law that a rule waiver would be granted only in unusual and *compelling* circumstances," which reflects that the Commission does not "exercise its discretion to waive a rule for less than significant safety reasons." Id. (emphasis in the original). Each prong of this three-part test is discussed further below.

B. Prong 1 -- "Special Circumstances"

The first prong of the test requires a prima facie showing of "'special circumstances' . . . not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived." Id. There is no showing of "special circumstances" where the circumstances raised by the petitioner apply to all facilities under the regulation. See Mississippi Power & Light Company (Grand Gulf Nuclear Station, Unit 1), LBP-84-19, 19 NRC 1076, 1081 (1984). To show "special circumstances" for a waiver or exception, a petitioner must establish that an otherwise generally applicable regulation should not apply because of special circumstances unique to the particular facility in the proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-73 (1981).

Thus, where the "special circumstances" alleged in a petition apply generically to a large class of facilities such that the rule would be rendered incorrect and inapplicable to the larger class of facilities, 10 C.F.R. § 2.758(b) is not the correct or acceptable procedural mechanism to address the issue. Rather, the proper mechanism for such a challenge is a petition for rulemaking under 10 C.F.R. § 2.802. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980) ("The proper response . . . is not waiver of the rule under 10 C.F.R. § 2.758 because this case presents no 'special circumstances,' but rulemaking to either amend or suspend the present rule"); accord Cleveland Electric Illuminating Power Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-57, 14 NRC 1037, 1039 (1981).

Moreover, uncertainties and speculation about possible future events are not enough to establish the "special circumstances" required under 10 C.F.R. § 2.758. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 130-31, reversed on other grounds, CLI-89-20, 30 NRC 231 (1989). Likewise, "prognostication" of a future "chain of events . . . is just too tenuous to meet the [petitioner's] burden under 10 C.F.R. § 2.758(c)." Seabrook, ALAB-895, supra, 28 NRC at 25. Similarly, an unprecedented event with "a certain visceral attraction,"-- such as bankruptcy of a major utility -- without more "can never be a proper substitute for the showing required under 10 C.F.R. § 2.758 -- the only basis on which [the Board is] authorized to act." Id.

C. **Prong 2 -- "Undercut the Rationale for the Rule"**

The second prong of the test requires a prima facie showing by the petitioner that the "special circumstances" established in prong 1 "must be such as to undercut the rationale for the rule sought to be waived" with respect to the particular facility in the licensing proceeding. Seabrook II, CLI-89-20, supra, 30 NRC at 235. As stated by the Commission in Seabrook I:

> Under § 2.758, it is not just any "special circumstance" that satisfies the requirements for a *prima facie* showing, but only those special circumstances that "are such that application of the rule . . . would not serve the purposes for which the rule or regulation was adopted." We believe that this means, at a minimum, that the special circumstances must be such as to undercut the rationale for the rule sought to be waived.

Seabrook I, CLI-88-10, supra, 28 NRC at 597 (emphasis added). Accord Seabrook, ALAB-895, supra, 28 NRC at 12 (the "purpose underlying the [regulation] . . . is central to the resolution of the waiver petition[] . . .") (emphasis added).

The statement of considerations for the underlying rule is the primary source for determining the "purposes for which the rule or regulation was adopted." See, e.g., Seabrook I, CLI-88-10, supra, 28 NRC at 597-98; Seabrook, ALAB-895, supra, 28 NRC at 12; Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 432 (1984). In addition to explicit statements in the statement of considerations, the purpose of the underlying rule also includes future events that "would

logically have been anticipated by NRC when it [promulgated] its rules." Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, "merely conjectural statements that do nothing more than highlight the uncertainty surrounding" future events do not, in themselves, "undercut the rationale for which the rule was enacted." See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301 (1989) (citations omitted).

The Commission has recognized that a valid "purpose for which the rule or regulation was adopted," within the meaning of 10 C.F.R. § 2.758, includes "eliminat[ing] case-by-case review by the staff of an individual applicant's [addressing of a generic issue] . . . and . . . remov[ing] such issue from adjudication in any operating license proceeding." See Seabrook, ALAB-895, supra, 28 NRC at 16; see also Carolina Power and Light Company (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986) (a valid purpose is "to avoid unnecessary litigation"). A rulemaking on a generic issue can be used to "reduce the time of all participants in the operating license process spend reviewing" an applicant's information on that issue. See Seabrook, ALAB-895, supra, 28 NRC at 14.

D. Prong 3 -- "Significant Safety Problem"

The third prong of the test requires a prima facie showing "from the petition and other allowed papers [that] it should be evident that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived." Seabrook

II, CLI-89-20, supra, 30 NRC at 235 (emphasis added). Thus, to justify a waiver, the petitioner has the burden to establish that the issue raised represents a "significant safety problem," even if it is clear that there are "special circumstances" that "undercut the rationale for the rule." See, e.g., Seabrook, ALAB-920, supra, 30 NRC at 129 (waiver denied where no "significant safety problem" established, even though both "special circumstances" and "undercut the rationale for rule" prongs established). A waiver petition "must be denied" "where it is not needed to resolve any significant safety problem." Seabrook I, CLI-88-10, supra, 28 NRC at 579-80, 601 (emphasis added).[2]

To make a prima facie showing of a "significant safety problem" under 10 C.F.R. § 2.758. a petitioner must do more that allege a "conceivable" or "theoretical" safety issue. Seabrook II, CLI-89-20, supra, 30 NRC at 243-44.

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[2] Castle Rock argues that the requirement to establish a "significant safety problem" to justify a waiver under 10 C.F.R. § 2.758 "appears to be unique to Seabrook Station." Castle Rock Waiver Petition at 3 n.2. However, the Commission's setting forth a general three prong test and the broad language concerning the third prong quoted from the Commission's Seabrook decisions above clearly shows Castle Rock to be in error. Moreover, the Commission's rationale for the "significant safety problem" prong of the test as set forth in Seabrook I is plainly applicable beyond Seabrook:

> The Commission's agenda is crowded with significant regulatory matters . . .. It would not be consistent with the Commission's statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.

Seabrook I, CLI-88-10, supra, 28 NRC at 597. Further, in denying a request for reconsideration of its decision in Seabrook I challenging the "significant safety problem" prong of the § 2.758 waiver test, the Commission noted that this prong of the test is implicit in the requirement to show "'unusal and compelling circumstances'" for a waiver under § 2.758 intially articulated by the Commission in 1972 in Monticello, supra, CLI-72-31, 5 AEC at 26. See Seabrook, supra, CLI-89-3, 29 NRC at 239. Thus, Castle Rock's assertion that the "significant safety problem" requirement under 10 C.F.R. § 2.758 is "unique to Seabrook Station" is without merit.

> [T]here can be no doubt that the Commission intended that the indication of a significant safety problem be something more than simply showing that exceptional circumstances undercut a rule with some basis in safety. Since the vast majority of Commission rules have some basis in safety, if that was all the Commission meant it would have been superfluous for the Commission to announce to its Boards that it did not want a rule waiver certified absent the indication of a significant safety problem. The Commission used the terminology "significant safety problem" to note that it intended to require something more than a theoretical -- or conceivable -- issue, but insisted on there being a real matter that required resolution.

Id. at 244 (footnote omitted) (emphasis added).[3] The Commission also required that to establish a "significant safety problem," the petitioner must show that the problem raised "will overcome the substantial protections that the Commission has in place by means of all its requirements to prevent the occurrence of a significant nuclear safety problem." Id. (footnote deleted) (emphasis added).

III. COMMISSION AUTHORITY TO LICENSE THE PFSF UNDER 10 C.F.R. PART 72

A. Impermissible Interlocutory Determination

Castle Rock argues that "[s]pecial circumstances unique to this Proceeding" cause the granting of a license for the PFSF to be outside the Commission's authority. Waiver Petition at 4. The alleged special circumstance claimed by Castle Rock is that PFS seeks

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[3] In those instances where the request for waiver concerns a non-safety rule or regulation (e.g., rule of practice or an environmental regulation), this third prong of the test would still require a showing of a real, significant concrete matter that required resolution for the waiver to be granted, as reflected by the above quotation.

"a license for a private, off-site facility storing 40,000 MTU of spent nuclear fuel for an indefinite period into the future." Id. According to Castle Rock, this is (1) the first proceeding since enactment of the NWPA in which the Commission has been asked to approve "an initial application" for a private off-site ISFSI, and (2) the 40,000 MTU of spent nuclear fuel is more than two and one-half times as large as the amount even the federal government is authorized to store on an interim basis. Castle Rock claims that these special circumstances cause granting of the license to be outside the Commission's authority because the Commission lacks "authority to license an off-site, private 40,000 MTU storage facility under 10 C.F.R. Part 72 or otherwise." Id.

At the outset, Castle Rock's argument must be rejected for not falling within the ambit of 10 C.F.R. § 2.758(b). Castle Rock makes no argument why a particular rule or regulation should not apply to the PFSF, but rather challenges the regulations in their totality for alleged lack of Commission authority to license off-site ISFSIs, such as the PFSF, regardless of what the regulations provide for and regardless of any unique or special circumstances regarding the PFSF. As such, it is a generic challenge to a class of facilities and not properly the subject of a § 2.758 waiver petition.[4] See Section II.B supra. Also, more broadly, licensing boards have no authority, under § 2.758 or

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[4] Applicant notes that NAC International, Inc.is planning to develop a private off-site ISFSI of analogous size to PFSF. See "Owl Creek Energy Project Status," Ivan F. Stuart (Project Manager, NAC International), Presentation to the Institute of Nuclear Materials Management Spent Fuel Management Seminar XV, January 14, 1998. Further, nothing precludes other such facilities in the future. Simply because PFSF is the first does not make it unique. Castle Rock's arguments would apply equally to the proposed NAC ISFSI as well as to any other analogous ISFSI.

otherwise, "to consider challenges to a Commission regulation on the ground that it is contrary to the Atomic Energy Act." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-24, 24 NRC 132, 138 (1986).

Thus, Castle Rock is seeking an impermissible interlocutory determination on the Commission's statutory authority to license the PFSF under the guise of a 10 C.F.R. § 2.758 waiver petition and its Petition should be denied accordingly. Further, as set forth below, Castle Rock's Petition must be rejected because it does not satisfy any of the three prongs of the test set forth in Seabrook I and Seabrook II necessary for a licensing board to certify to the Commission whether its rules or regulations should be waived.

B. Lack of Special Circumstances

Castle Rock must first make a *prima facie* showing that licensing of the PFSF under 10 C.F.R. Part 72 represents "'special circumstances' . . . not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived." Seabrook II, CLI-89-20, supra, 30 NRC at 235. Castle Rock claims as "special circumstances" that the PFSF application is: (1) the "initial application for a private, off-site ISFSI since the enactment of the NWPA," and (2) "designed to hold up to 40,000 MTU of spent nuclear fuel."[5] Waiver Petition at 4. However, as shown below, these

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[5] Castle Rock also initially claims "special circumstances" in that the PFSF application is to store spent fuel "for an indefinite period into the future." See Waiver Petition at 4; see also id. at 5 ("PFS seeks a license under 10 C.F.R. Part 72 . . . for an extended, possibly permanent, period") (emphasis added). Needless to say, Applicant's license application makes it clear that the Applicant is not seeking a license

issues do not establish "special circumstances" because the Commission clearly considered both of these circumstances explicitly and by necessary implication in its rulemakings for 10 C.F.R. Part 72 both before, and after, the enactment of the NWPA.

1. Licensing of Private, Off-Site IFSFIs Has Clearly Been Considered by the Commission in Part 72 Rulemakings

10 C.F.R. Part 72 has been the subject of many rulemaking proceedings since it was first proposed in October 1978. Throughout these rulemakings, the Commission has explicitly and by necessary implication considered the licensing of private, off-site ISFSIs.

a) Text of the Regulation

The text of the regulation itself explicitly shows that the Commission considered and that 10 C.F.R. Part 72 includes the licensing of private, off-site ISFSIs. In fact, the definition of "ISFSI" in Part 72 explicitly identifies "[a]n ISFSI that is located on the site

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for an "indefinite," "possibly permanent period." The License Application unambiguously states that the "PFSF is designed to store spent fuel for up to 40 years," that the initial request for a license is "for a term of 20 years," and that prior to the end of the initial license term, "an application for license renewal" will be submitted for an additional 20 year term. License Application at 3-1;Emergency Plan at 1-2. Castle Rock subsequently refutes its own claim by acknowledging that "the Application seeks a twenty year initial permit and contemplates a twenty year renewal . . .." Waiver Petition at 17 (emphasis added). In the accompanying Affidavit of Bryan T. Allen, Mr. Allen states that

> Section 1.1 of the EP [Emergency Plan] further provides that the Application is for a twenty year license; nevertheless PFS intends to file an application for license renewal for an additional 20 year term, if necessary.

Allen Affidavit at 2 (emphasis added). The affidavit attaches the relevant pages of the Applicant's Emergency Plan which unambiguously state that the application is "for a term of 20 years." See Allen Affidavit, Tab B at 2. Thus Castle Rock's own admissions directly refute its claim of "special circumstances" based on the application assertedly being for an "indefinite," "possibly permanent period." See Waiver Petition at 4, 5.

of another facility" (on-site ISFSIs) as a subset of the general definition of ISFSI, which by necessary implication means the general definition of ISFSI must also include off-site ISFSIs. See 10 C.F.R. § 72.3 (emphasis added)[6]

The emergency planning regulations in Part 72 provide the most explicit acknowledgment that the Commission considered private, off-site ISFSIs in promulgating the regulations in Part 72. See 10 C.F.R. § 72.32. These regulations explicitly differentiate the requirements for off-site ISFSIs from those for on-site ISFSIs. The text of 10 C.F.R. § 72.32(a) unambiguously shows that off-site ISFSIs are considered under Part 72, and provides specific requirements tailored to

> an ISFSI that is licensed under this part which is: Not located on the site of a nuclear power reactor, or not located within the exclusion area as defined 10 CFR part 100 of a nuclear power reactor, or located on the site of a nuclear power reactor which does not have an operating license, or located on the site of a nuclear power reactor that is not authorized to operate . . ..

10 C.F.R. § 72.32(a) (emphasis added).[7]

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[6] Accord, 10 C.F.R. § 72.24(a) which provides additional requirements for analysis of "potential interactions between the ISFSI . . . and such other facility" where "the proposed ISFSI . . . is to be located on the site of a nuclear power plant or other licensed facility." 10 C.F.R. § 74.24(a) (emphasis added).

[7] Other provisions of Part 72 also specifically address off-site ISFSIs. For example, 10 C.F.R. § 72.46(d), concerning public hearings, explicitly addresses requirements for "construction and operation of an ISFSI located at a site other than a reactor site." See 10 C.F.R. § 72.46(d). Accord 10 C.F.R. § 2.764(c) which provides specific requirements for "the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site."

b) Statements of Considerations

The Commission's Statements of Considerations for 10 C.F.R. Part 72 rulemakings are equally explicit and even more extensive in showing that the Commission considered the licensing of private, off-site ISFSIs in Part 72 rulemakings, both prior to as well as after the enactment of the NWPA.

(1) Prior to Enactment of the NWPA

In the Statement of Considerations for the initial proposed rule in October 1978, the Commission made clear that it was considering the licensing of off-site ISFSIs:

> there is a need for independent spent fuel storage installations (ISFSI), or as these are sometimes called, away-from-reactor (AFR) storage installations, to accommodate some of the accumulating spent fuel.

43 Fed. Reg. 46,309, 46,309 (1978) (emphasis added). In this rulemaking, the Commission cited and relied on the draft Generic Environmental Impact Statement (GEIS), NUREG-0404, prepared by the NRC Staff in support of the Part 72 rulemaking. Id. The draft GEIS addresses methods for dealing with spent fuel storage, and concludes that "[l]icensing of independent spent fuel storage installations" "represents the major means of providing interim AFR [Away From Reactor] spent fuel storage." NUREG-0404, Vol. 1 at ES-6. As examples of such "interim AFR spent fuel storage," the draft GEIS discussed the Nuclear Fuel Services West Valley facility and the General Electric Morris facility, two private, off-site ISFSIs. NUREG-0404, Vol. 1 at ES-6.

The Statement of Considerations for the final rule makes it equally clear that 10 C.F.R. Part 72 encompasses both on-site and off-site ISFSIs. Some commenters had explicitly raised the question of whether the Commission regulations favored at-reactor siting (on-site) or away-from-reactor siting (off-site). In response, the Commission stated:

> The NRC is not aware of any compelling reasons generally favoring either at-reactor or away-from-reactor siting of an ISFSI. There are many factors to be considered in each situation and in the license actions involved; accordingly, the rule permits either.

45 Fed. Reg. 74,693, 74,696 (1980) (emphasis added). In the same vein, the Commission stated later in the same Statement of Considerations that

> An ISFSI may be a free-standing, away-from-reactor, fully independent type of facility or it may be located on the site of an existing facility such as a nuclear power plant. . . . The rule is applicable to either type of location . . ..

Id. at 74,698 (emphasis added). The Statement of Considerations also cited three existing private, off-site ISFSIs, the G.E. Morris, NFS West Valley, and AGNS Barnwell facilities, as examples of types of facilities that could be licensed under the new Part 72:

> In the event of an application for use of one of the above facilities as an ISFSI, a license would be issued if the facility meets the requirements of Part 72.

Id.

In summary, the Commission not only clearly considered the licensing of private, off-site ISFSIs in the rulemaking proceeding leading to 10 C.F.R. Part 72, it in fact explicitly enabled the licensing of such facilities under Part 72.

(2) After Enactment of the NWPA

A review of Part 72 Statements of Considerations after enactment of NWPA shows that the Commission did not consider the NWPA to have repealed its authority to license private off-site ISFSIs. Rather, its rulemakings under 10 C.F.R. Part 72 continued to consider and provide for the licensing of private, off-site ISFSIs. Both the initial proposed rule (May 1986) and final rule (August 1988) to amend 10 C.F.R. Part 72 in order to implement the NWPA make it clear that the intent of the rulemaking is "to add language to its regulations in 10 CFR Part 72 to provide for licensing the storage of spent nuclear fuel and HLW in an MRS" [Monitored Retrievable Storage facility, i.e., an independent spent fuel storage installation built by DOE under NWPA]. See 51 Fed. Reg. 19,106, 19,106 (1986) (emphasis added) (proposed rule); see also 53 Fed. Reg. 31,651, 31,651 (1988) (final rule). Neither the proposed rule nor the final rule, nor the accompanying Statements of Considerations, say anything at all about deleting any regulations, or repealing the ability to license private, off-site ISFSIs. See generally, 51 Fed. Reg. at 19,106; 53 Fed. Reg. at 31,651.[8]

To the contrary, the proposed rule explicitly considers the effect of the revisions on the G.E. Morris facility, a private, off-site ISFSI. The Commission notes that

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[8]Thus, in implementing the NWPA following its passage, the Commission clearly did not interpret the NWPA to affect or limit its authority under the Atomic Energy Act to license private off-site ISFSIs. It is a well established rule of statutory interpretation that the contemporaneous interpretation of a statute or regulation by those charged with its implementation is entitled to great weight. See, e.g., Watt v. Alaska, 451 U.S. 259, 272-73 (1981) ("[t]he Department's contemporaneous construction carries persuasive weight"). Accord Udall v. Tallman, 380 U.S. 1, 16 (1965).

> [t]here is now one facility which has been licensed as an ISFSI under the existing Part 72. This is the General Electric Company. Morris Operations at Morris, Ill.

The Commission continues on to state that:

> Under the proposed rule, the Morris facility would still be considered an ISFSI and no changes or additional reviews of its license would be required at this time.

51 Fed. Reg. at 19,107 (emphasis added).[9] The proposed rule also refers favorably to the final GEIS, NUREG-0575, prepared in support of the initial Part 72 rulemaking. The final GEIS referenced by the Commission in 1986 explicitly discusses "ISFSI located either at reactor sites or at separate sites" and uses the G.E. Morris facility (a private, off-site facility) as an example of an ISFSI within the meaning of Part 72. NUREG-0575, Vol. 1 at ES-6.

Subsequent statements of considerations under 10 C.F.R. Part 72 continue to explicitly address and provide regulatory provisions for off-site ISFSIs. In the May 1993 proposed amendments to Part 72 for emergency planning, the Commission clearly considers, and establishes different requirements under Part 72 for, "an ISFSI located on a reactor site" (which can rely on the "current reactor emergency plans"), and "[a]n ISFSI that is to be licensed for a stand-alone operation" (which "will need an emergency plan

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[9] Indeed, Amendments 2 through 9 to G.E. Morris license were issued after the passage of the NWPA. See e.g., Exhibit 2, Amendment No. 9 to Licene SNM-2500, dated June 16, 1995 (Docket No. 72-1).

established.") 58 Fed. Reg. 29,795, 29,797 (1993) (emphasis added). The Statement of Considerations for the June 1995 final rule is equally explicit, stating

> current reactor emergency plans cover all at- or near-reactor ISFSI's. [However] [a]n ISFSI that is to be licensed for stand-alone operation will need an emergency plan established in accordance with the requirements of this rulemaking.

60 Fed. Reg. 32,430, 32,431 (1995) (emphasis added).

The Commission also explicitly considered private, off-site ISFSIs in the proceeding for the rulemaking to revise the approval for site-specific licensing of ISFSIs under Part 72. In that rulemaking the Commission determined not to eliminate the requirement for specific Commission approval to issue a Part 72 license for an MRS or an ISFSI at other than a reactor site. 60 Fed. Reg. 20,879, 20,883 (1995). In the context of this rulemaking the Commission referred to

> various plans have received mention recently regarding possible private ISFSIs at non-DOE sites (e.g., a new off-site ISFSI for the Prairie Island plant located within Goodhue County, Minnesota at a site not on Prairie Island).

Id. at 20,884 (emphasis added). It noted that the requirement for prior Commission approval would not be eliminated for such ISFSIs which were "not located at a reactor site." Id. The Commission's statements concerning private off-site ISFSIs in the Statement of Considerations occurred 12 years after the enactment of the NWPA and clearly reflect continued, explicit consideration of, and provision for, the licensing of private off-site ISFSIs.

2. ISFSI Size Considered by the Commission in Part 72 Rulemakings

PFSF's proposed size of up to 40,000 MTU also fails to establish "special circumstances" under 10 C.F.R. Part 72. Nowhere in the regulation or its accompanying Statements of Considerations is it suggested that the size of a proposed ISFSI is critical to the applicability of 10 C.F.R. Part 72. Rather than make a bright line prescription of the maximum capacity of an ISFSI, the Commission's regulations focus on standards for the health, safety, and environmental impacts of a proposed facility as the mechanism to ensure the facility provides reasonable assurance of protecting the public health and safety. There is no suggestion in the regulations or the accompanying the Statements of Consideration that size alone will automatically produce health, safety, and environmental impacts beyond the standards in Part 72. Nor has Castle Rock provided any basis to show that the size of the PFSF alone somehow violates one of the health, safety, and environmental standards required in Part 72.

Specifically, the Statements of Considerations show that the rulemaking proceedings leading up to the original 10 C.F.R. Part 72 considered off-site storage requirements up to 79,000 MTU of spent fuel by the year 2000. Although recognizing this potential, the Commission neither proposed or promulgated any requirements limiting the maximum size of an ISFSI, but chose instead to ensure that a proposed ISFSI would comply with the applicable health and safety standards regardless of size. Moreover, the Statement of Considerations reflect that the Commission has chosen to differentiate

ISFSIs on the basis of scope of activities performed at the ISFSI, rather than the size of the ISFSI.

a) Commission Explicitly Considered Total Off-Site Storage Requirements in Excess of 40,000 MTUs

The October 1978 Statement of Considerations accompanying the proposed 10 C.F.R. Part 72, states that "[t]he GEIS [draft Generic Environmental Impact Statement] concludes that these is a need for independent spent fuel storage installations (ISFSI) . . . to accommodate some of the accumulating spent fuel." 43 Fed. Reg. at 46,309. The draft GEIS, NUREG-0404, cited by the Commission was the "Commission['s] . . . evaluat[ion] of the environmental impacts of the accumulation of spent fuel . . ." in support of the Part 72 rulemaking. See id. The draft GEIS estimated the requirement for away-from-reactor spent fuel storage to be up to 79,000 MTU by the year 2000. NUREG-0404, Vol. 1 at ES-4. The draft GEIS selected as a "reference case" away-from-reactor spent fuel storage requirements of 41,000 MTU in the year 2000. Id. at ES-12. In establishing this reference case, the draft GEIS noted that there will be a need for "a large amount of spent fuel requir[ing] away-from-reactor storage" if there is serious slippage in the projected date for DOE disposal from 1985 to "the last decade of this century." Id.

Thus, the Statement of Considerations accompanying the proposed rule and the supporting draft GEIS show that the Commission considered the need for off-site ISFSI storage of 41,000 MTU by the year 2000 (which by necessary implication would continue

to increase as the date for disposal was delayed beyond 2000), and considered off-site ISFSI storage requirements of up to 79,000 MTU.[10]

b) Commission Considered ISFSI Size by Necessary Implication

While the Commission considered the possibility of off-site ISFSI storage of up to 79,000 MTU in the rulemaking proceeding leading up to Part 72, the Commission never proposed nor promulgated any regulation mandating a maximum size for an ISFSI. There is no regulation in 10 C.F.R. Part 72 now, nor has there ever been, that establishes a maximum size restriction for an ISFSI. Nor is there any indication that any person commenting on any Part 72 rulemaking suggested such a limitation on ISFSI size. The Commission chose to authorize licensing ISFSIs based on their compliance with a set of health, safety, and environmental standards. Where an applicant can show that a proposed ISFSI complies with all of these health, safety, and environmental standards, the Commission will issue a license for that ISFSI. See 10 C.F.R. § 72.40. Under the regulatory scheme established by Part 72, the only impact ISFSI size has on licensing is if the size of the facility somehow causes it not to comply with one of the health, safety, and environmental standards, which Castle Rock has not even attempted to show.

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[10] The estimated storage requirements for spent fuel by the year 2000 were decreased in the Final GEIS to 27,000 MTU due to reduced projections of the amount of spent fuel expected to be generated and the reracking of spent fuel pools. NUREG-0575, Vol.1 at ES-3, ES-4, ES-11. The Commission, however, did not modify its proposed rules in any respect based on the lower estimate for away-from-reactor spent fuel storage.

Thus, ISFSI size alone cannot invalidate an ISFSI application under the licensing mechanism established by the Commission through rulemaking for 10 C.F.R. Part 72. Since the Commission considered the potential for off-site ISFSI storage of up to 79,000 MTU, but still chose to establish the licensing mechanism based on health, safety, and environmental standards, the necessary implication is that the Commission considered the possibility of ISFSIs with storage of up to 79,000 MTU and decided not to establish a limit on allowable ISFSI size under 10 C.F.R. Part 72.

c) Commission Chose to Differentiate ISFSIs on Basis of Scope of Activities, Not Size

To the extent that the Commission has differentiated types of ISFSIs, it has chosen to differentiate ISFSIs on the basis of scope of activities performed at the facility, not the size of the facility. For example, when the Commission revised the emergency planning requirements of Part 72, it differentiated the emergency planning requirements on the basis of the scope of activities performed at the ISFSI, rather than the size of the ISFSI. In the June 1995 Statement of Considerations for the final rule, the Commission stated that

> the Commission believes it appropriate to require enhanced offsite emergency planning at an MRS (as well as any ISFSI that conducts similar operations) because of the broader scope of activities which could be performed at such a facility.

60 Fed. Reg. at 32,432 (emphasis added). The Commission concluded that it was prudent to provide for an enhanced level of emergency planning should the "operation of a MRS

(or any ISFSI conducting similar operations) present accident risks that exceed those analyzed in NUREGs 1140 and 1092," which accompanied the rule. Id.

In sum, Castle Rock has failed to make the required prima facie showing that the Commission did not -- "either explicitly or by necessary implication" -- consider the licensing of private off-site ISFSIs with the potential for storing 40,000 MTU or more. To the contrary, as demonstrated above, both the Part 72 regulations and the Statement of Considerations reflect that the Commission did consider licensing of private off-site ISFSIs potentially of that size. Accordingly, Castle Rock has failed to establish special circumstances in accordance with the precedent set forth in Section II.B supra.

C. Alleged Special Circumstances Do Not Undercut Rationale of Part 72

Castle Rock also fails to meet the second prong of the three-part test for a 10 C.F.R. § 2.758 rule waiver set out by the Commission in Seabrook that the alleged special circumstances "undercut the rationale of the rule sought to be waived." Here, even assuming Castle Rock has established special circumstances, those special circumstances do not undercut the rationale of 10 C.F.R. Part 72 and therefore its Petition must be rejected on this basis as well. Licensing of the PFSF is wholly in accordance with the purposes of 10 C.F.R. Part 72 as reflected by both the terms of the regulation itself and its related Statements of Considerations. In its analysis, Castle Rock completely discounts the Statements of Considerations for Part 72, which as discussed in Section II.C, supra, are the primary source for determining the purposes of the rule or regulation subject to a waiver request. Rather it focuses on the NWPA. That reliance is, however, misplaced

because the NWPA does not explicitly or implicitly repeal the Commission's authority under the Atomic Energy Act upon which 10 C.F.R. Part 72 is based.

1. Purpose of 10 C.F.R. Part 72 Is to License Both Off-Site and On-Site ISFSIs Subject to Adequate Protection of Public Health and Safety

As set forth in Section III.B above, both the regulations and the related Statements of Considerations clearly reflect that 10 C.F.R. Part 72 is intended to apply to both on-site and off-site ISFSIs. The purpose of 10 C.F.R. Part 72 was to provide a more focused licensing mechanism for licensing ISFSIs, either on-site or off-site, as chosen by the applicant for the license. See 45 Fed. Reg. at 74,696, 74,698.[11] The regulation does not purport to favor one form over the other, but merely sets forth the licensing requirements necessary to protect the public health and safety in either case. The Commission has not decreed or suggested that size of an ISFSI is a factor, as there is no scientific or technical reason why a large ISFSI, such as that proposed by Applicant, cannot be constructed and operated to protect the public health and safety and the environment.

Moreover, the Commission is clearly authorized under the Atomic Energy Act to license and regulate such ISFSIs. Section 53 of the Atomic Energy Act authorizes the Commission to "issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import or export special

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[11] As required by Section 133 of the NWPA, the Commission's regulations, 10 C.F.R. Part 72,Subpart K, also provide for general licenses for on-site ISFSIs under specified conditions. 55 Fed. Reg. 29,181, 29,182 (1990).

nuclear material." 42 U.S.C. § 2071. Sections 63 and 81 of the Act contain similar grants of authority for source and by product materials. 42 U.S.C. §§ 2093 and 2111. The regulations in 10 C.F.R. Part 72 recognize that spent fuel includes special nuclear, byproduct and source materials subject to Commission jurisdiction, 10 C.F.R. § 72.3, and the authority cited for the 10 C.F.R. Part 72 regulations includes the above provisions of the Atomic Energy Act.[12] Those provisions provide the Commission with broad plenary authority to license and regulate the storage of spent nuclear fuel, on-site or off-site, and the courts have so held.[13] Indeed, Castle Rock grudgingly acknowledges that the Atomic Energy Act does grant the Commission such authority. Waiver Petition at 12-13.

2. NWPA Does Not, and Could Not, Alter The Purpose of 10 C.F.R. Part 72

Castle Rock's entire Waiver Petition rests on the erroneous premise that the NWPA somehow acts to modify or supersede the Atomic Energy Act and 10 C.F.R. Part 72 as promulgated and implemented by the Commission. Such is clearly not the case.

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[12] The authority cited for 10 C.F.R. Part 72 also includes other provisions of the Atomic Energy Act such as section 161b which authorizes the Commission to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. . . ." 42 U.S.C. § 2201.

[13] See e.g., Jersey Central Power & Light Co. v. Lacey Township., 772 F.2d 1103, 1112 (3d 1985), cert. denied, 475 U.S. 1013 (1986) (the "pervasive scheme of federal regulation established the [Atomic Energy Act] and NRC regulations . . . include[s]] the storage and shipment of spent fuel."); People of the State of Illinois v. General Electric Company, 683 F.2d 206, 215 (7th Cir. 1982), cert denied, sub nom., Hartigan v. General Elec. Co., 461 U.S. 913 (1983) ("the Commission's authority to regulate the storage of spent nuclear fuel" under the Atomic Energy Act "preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel").

Castle Rock claims that the "NWPA unambiguously denies the Commission authority to license a private, off-site 40,000 MTU facility under 10 C.F.R. Part 72, or otherwise" and argues that any general authority that the Commission may have had under the Atomic Energy Act has been "indisputably preempted" by the NWPA. Waiver Petition at 12-13. Castle Rock's argument is, however, incorrect for a host of reasons.

Foremost, the NWPA simply did not repeal the above statutory authority vested with the Commission under the Atomic Energy Act to license the storage of spent nuclear fuel, off-site or on-site. No provision of the NWPA, expressly or implicitly, repeals this pre-existing authority of the NRC. Castle Rock repeatedly refers to and quotes from Section 135(h) of the NWPA (e.g., Waiver Petition at 12, 13, 16) which provides as follows:

> Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize or require the private or Federal use, purchase, lease or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 3, 1983.

42 U.S.C. § 10155(h).[14] The language of this provision, however, effectuates no repeal of any portion of the Atomic Energy Act because its effect is confined to the NWPA. The word "chapter" in 42 U.S.C. § 10155(h) refers to the NWPA, not the Atomic Energy Act.

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[14] As explained in Applicant's Answer to Petitioners' Contentions at 339 n. 66, dated December 24, 1997 (hereinafter "Applicant's Answer"), this provision and the related provision of the NWPA are now defunct. In any event, as discussed in the text, these provisions do not show a lack of authority for the NRC to license off-site ISFSIs.

See Pub. L. No. 97-425 § 135(h), 96 Stat. 2201, 2237 (1982) ("nothing in this Act shall be construed . . .") (emphasis added); 42 U.S.C.A. §§ 2011 et. seq. and 10101 et seq. (the AEA comprises Chapter 23, while the NWPA comprises Chapter 108).

It is a well established rule of statutory interpretation that a tribunal is "to give effect, if possible, to every clause and word of a statute." South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986), quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1882). It would therefore be inappropriate to treat statutory terms as surplusage or words of no consequence. Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994). Here, Congress chose the words "this Act" in the NWPA (and "chapter" in the U.S. Code) instead of language that could have reached beyond the NWPA (e.g., "this Act and the Atomic Energy Act," or "this title," or simply omitting any limitation). Congress' careful choice of words must be given effect and the effect of 42 U.S.C. § 10155(h) must therefore be limited to the NWPA.

Nor can Castle Rock rely upon the interim storage provisions (Subtitle B) or the Monitored Retrievable Systems provisions (Subtitle C) of the NWPA to claim repeal by implication. Repeals by implication are strongly disfavored as a matter of law. Morton v. Mancari, 417 U.S. 535, 549 (1974); accord Traynor v. Turnage, 485 U.S. 535, 547 (1987). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton, 417 U.S. at 550. As further stated by the Supreme Court in Morton

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest."

Morton, 417 U.S. at 551 (citations omitted); Traynor, 485 U.S. at 548.

Here, the Atomic Energy Act and the NWPA are capable of co-existence and both can be given effect. See Applicant's Answer at 344-46. Moreover, Congress' lack of clear and manifest intent to repeal the existing authority under the Atomic Energy Act is reflected in Congress' choice of words in Section 135(h) above which limits its effect to the NWPA. Further, any repeal by implication is also strongly refuted by the legislative history of the NWPA which shows that Congress was well aware of the NRC's pre-existing authority under the Atomic Energy Act to license away-from-reactor storage facilities (i.e., off-site ISFSIs).

Congress was aware that the NRC had already licensed three such facilities at "Morris, Illinois . . . , Barnwell, South Carolina . . ., and West Valley, New York . . .." S. Rep. No. 97-282, 97th Cong. 1st Sess. at 65 (1981) (hereinafter "S. Rep. 97-282") (Supplemental views of Senator Tsongas arguing that because there are private away-from-reactor ISFSI's "[t]here is no need for a Federal role"). Further, Congress was specifically advised by the Chairman of the NRC that the Commission had just promulgated 10 C.F.R. Part 72 which provided for the licensing of spent fuel storage

either at-reactor sites or away-from-reactor sites. See S. Rep. 97-282 at 44, Statement of Chairman Pallidino ("in anticipation of requests to license away from reactor facilities, the NRC last fall promulgated 10 CFR Part 72 . . . [and] is ready and able to take prompt action for any licensing actions relating to interim spent fuel storage"). As testified to in more detail by the Executive Director for Operations, William J. Dircks:

> The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away from reactor sites. Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or away-from-reactors using either wet or dry storage technologies.[15]

Thus, Congress was clearly aware of the NRC's pre-existing authority and its use of that authority to license off-site ISFSIs. However, Congress neither expressly nor implicitly precluded the use of existing private off-site storage facilities or the licensing by the NRC of new private off-site storage facilities.[16] Faced with testimony that NRC stood

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[15] Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 97th Cong. 326 (1981) (statement of William J. Dircks, Executive Director for Operations, U.S. Nuclear Regulatory Commission). (emphasis added).

[16] Indeed, initial drafts of the NWPA required as one of the criterion for access to federal interim storage the unavailability of private off-site storage facility capacity. See S. Rep. 97-282 at 19 (Report lisitng, among other criteria governing access to federal interim storage, the "use of private off-site storage facilities"). Subsequent drafts deleted the use of private off-site storage facilities as a criterion for such access. H.R. Rep. No. 97-785 (Part I), 97th Cong. 2d Sess. (1982) states as follows in this regard:

> Another alternative for additional storage capacity is the utilization of a large capacity centralized storage facility, sometimes referred to as an away-from-reactor (AFR) facility, because it would not be located at

ready and willing to license private off-site storage facilities, and that such facilities were already operational, if Congress had intended to prohibit the use of private away-from-reactor ISFSIs or to revoke the NRC's preexisting authority to license such facilities, it would have said so in express terms. Indeed, in those instances where Congress intended the NWPA to modify NRC's preexisting licensing authority, Congress did not hesitate to state those modifications in express terms.[17] In short, in enacting the NWPA, Congress neither repealed, nor intended to repeal, the NRC's authority for the licensing of off-site ISFSIs under the Atomic Energy Act. That authority remains wholly intact.

Castle Rock's attempts to argue otherwise are simply without merit. First, Castle Rock argues that the interim storage provisions of the NWPA provide a "comprehensive program for the interim storage of spent fuel" which it claims "preempt[s]" any contrary authority under the Atomic Energy Act. Waiver Petition at 11-13 (emphasis added) However, preemption doctrine is inapplicable in analyzing the interrelationship of two federal statutes and, by the same token, the "comprehensive" nature (or lack thereof) of

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> the site of any of the reactors using it. . . . The Committee bill does not require that storage capacity at a private AFR be exhausted or unavailable before a utility would be eligible for storage capacity provided by the Secretary.

Id. at 41 (emphasis added). Thus, the now defunct interim storage provisions of the NWPA relied upon by Castle Rock did not preclude the use of private off-site storage facilities, but simply did not "require" their use as a condition for access to federal interim storage under Subtitle B of the NWPA.

[17] See, e.g., NWPA Section 121 (NRC required to promulgate technical requirements and criteria under its preexisting authority to apply in approving or disapproving applications to construct, operate, close, and decommission repositories) and NWPA section 133 (NRC required, by rule, to establish procedures for the licensing of dry storage technologies for use at the site of a reactor).

the related federal program, an indicia of preemption, is not controlling here.[18] The simple fact is that, as already discussed, the interim storage provisions of the NWPA did not repeal any preexisting authority under the Atomic Energy Act or preclude the use of off-site ISFSIs.[19]

Second, Castle Rock repeatedly claims that storing 40,000 MTU of spent fuel at a private ISFSI is incompatible with quantity limitations placed by the NWPA on DOE's storage of spent fuel, i.e. 1900 MTU for interim storage pursuant to NWPA § 135 and 15,000 MTU for Monitored Retrievable Storage pursuant to NWPA §§ 141-149. See, e.g., Waiver Petition at 13. That simply is not the case. The limitations in the NWPA only apply to DOE storage and not private storage. For whatever reasons, political or otherwise, that Congress may have seen fit to impose such capacity limitations on federally operated storage facilities, Congress did not impose them on privately operated facilities.

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[18] For the same reason, Castle Rock's quotation (Waiver Petition at 4, 8) from Indiana Michigan Power Co. v. DOE, 88 F.3d 1272, 1273 (D.C. Cir. 1996) that "[i]n the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants" is misplaced. Moreoever, the next sentence of the opinion reflects the focus of the court's statement as follows:

> NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for interim storage of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter. 42 U.S.C. 10131(a)(5).

[19] Moreover, the U.S. Court of Appeals for the Ninth Circuit has held that "the interim storage provisions of the Nuclear Waste Policy Act are not comprehensive regulations governing all federal storage of nuclear waste, but remedial legislation addressed to a specific problem." Idaho v. U.S. Dep't of Energy, 945 F2d 295, 298-99 (9th Cir. 1991), cert. denied, 504 U.S. 956 (1992) (emphasis added).

Third, apparently recognizing that the legislative history of the NWPA (as already discussed) is not supportive of its position, Castle Rock argues that the legislative history of the NWPA is indeterminate and that, as a general matter, legislative history "shed[s] very little light on legislative intent." See Waiver Petition at 14-16. Castle Rock's claim that the legislative history of the NWPA is unimportant is, however, refuted by the very cases it cites in its petition. Castle Rock's suggestion that committee reports are not helpful generally (see Waiver Petition at 14 & n.5 quoting Puerta v. United States, 121 F.3d 1338, 1344 (9th Cir. 1997)) is belied by Chrysler, where the Supreme Court cites and discusses committee reports for 12 pages in interpreting one statute. Chrysler Corp. v. Brown, 441 U.S. 281, 296-302, 308-12 (1979), cited in Waiver Petition at 15.[20] Similarly, Castle Rock's argument that remarks of individual legislators or witnesses are of limited, if any, relevance is also refuted by the cases it cites. See Weinberger, 456 U.S. at 33-34 & n. 11 (quoting remarks); Amalgamated Transit Union, 809 F.2d at 916-17; Davis County, 101 F.3d at 1407-10.[21] In particular, the courts have found that testimony by

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[20] Castle Rock's claim that committee reports are of little import is further belied by similar, albeit less extensive, discussions in Davis County, Weinberger, and Amalgamated Transit Union. See Davis County Solid Waste Management v. United States E.P.A., 101 F.3d 1395, 1407-10 (D.C. Cir. 1996); Weinberger v. Rossi, 456 U.S. 25, 32-36 (1982), cited in Waiver Petition at 15; Amalgamated Transit Union v. Brook, 809 F.2d, 909, 916-17 (D.C. Cir. 1987). Further, courts interpreting the NWPA have also looked to committee reports. See, e.g. Idaho v. U.S. Dept. of Energy, supra, 945 F.2d at 299.

[21] Furthermore, Castle Rock's quote (Waiver Petition at 15) of Weinberger ("one isolated remark by a single Senator, . . . is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent . . . ") is incomplete and misleading as presented; the full quote reads: "Be that as it may, it suffices to say that one isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in 13 international agreements." Weinberger, 456 U.S. at 35 (omitted material underlined).

agency witnesses, such as NRC Chairman Pallidino and Executive Director Dircks' quoted above, to be particularly relevant and helpful concerning the scope of application of federal programs. See, e.g., Power Reactor Develp. Co. v. International Union, 367 U.S. 396, 408-411 (1961).

Fourth, Castle rock argues that to the extent the NWPA is "not interpreted to unambiguously expressly prohibit private, off-site storage," then analysis must be undertaken on the second part of the two part test in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) of whether the Commission's interpretation of the NWPA "is reasonable and consistent with the statute's purpose." Waiver Petition at 6, 16. Castle Rock ignores, however that the Commission's Part 72 regulations implement primarily the Atomic Energy Act and not the NWPA. Therefore, the statutory scheme against which to justify the reasonableness of the Commission's regulations is the Atomic Energy Act and not the NWPA. To accept Castle Rock's analytical framework, analyzing the regulations in 10 C.F.R. Part 72 solely against the NWPA, would result in repealing the Commission's authority under the Atomic Energy Act, when such was clearly not the intent of Congress, as demonstrated above.

Moreover, under the second part of the two-part Chevron test, the Commission's interpretation of how the NWPA modified its existing authority to license ISFSIs under 10 C.F.R. Part 72 appears to be clearly "reasonable and consistent with the statute's purpose." The Commission determined that

> The Nuclear Waste Policy Act . . . requires that monitored retrievable storage facilities (MRS) for spent nuclear fuel and high-level radioactive waste (HLW) be subject to licensing by the Nuclear Regulatory Commission (NRC). The NRC is adding language to its regulations in 10 CFR part 72 to provide for licensing the storage of spent nuclear fuel and HLW in an MRS. The Commission intends to have the appropriate regulation to fulfill the requirements of the NWPA in place in a timely manner.

53 Fed. Reg. at 31,651 (final rule). Since the NWPA did not repeal the Commission authority to license either on-site or off-site ISFSIs, the Commission did not repeal these provisions of 10 C.F.R. Part 72 in implementing "the requirements of the NWPA." Far from it, the Commission actually explicitly acknowledged that the licensing of private, off-site ISFSIs was unaffected by the changes made to 10 C.F.R. Part 72 to implement the requirements of the NWPA. See 51 Fed. Reg. at 19,107, discussed in Section III.B, supra.

D. Failure to Establish a Significant Safety Problems

Castle Rock must also make a *prima facie* showing "from the petition and other allowed papers . . . that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived." Seabrook II, CLI-89-20, supra, 30 NRC at 235. Thus, even if Castle Rock establishes "special circumstances" that "undercut the rationale for the rule," Castle Rock must still establish that the very use of 10 C.F.R. Part 72 to license the PFSF raises a "significant safety problem," as defined under 10 C.F.R. § 2.758, in order to justify a waiver. Castle Rock has failed to make such a showing, and therefore its waiver petition must be denied.

Castle Rock identifies three alleged "significant safety problems" in its waiver petition: "serious transportation risks;" "financial stability of PFSF;" and "removing spent fuel from the facility." Waiver Petition at 3, n.2. However, the Commission has held that to establish a "significant safety problem," the petitioner must show that the problem raised will overcome "the substantial protections that the Commission has in place by means of all its requirements to prevent the occurrence of a significant nuclear safety problem. Seabrook II, CLI-89-20, supra, 30 NRC at 244 (footnote deleted) (emphasis added). Because each of these issues is explicitly addressed by the Commission's requirements, Castle Rock has completely failed to establish a "significant safety problem" within the meaning of 10 C.F.R. § 2.758 and its waiver petition must be denied.

The first "significant safety problem" alleged by Castle Rock is that "serious transportation risks associated with a centralized storage facility" require a waiver of 10 C.F.R. Part 72. Waiver Petition at 3, n.2. (emphasis added). Castle Rock ignores, however, the safety protections provided for the shipment of spent nuclear fuel by the Commission's transportation regulations under 10 C.F.R. Part 71. Those protections apply whether transportation is to or from a private, away-from-reactor ISFSI or to and from any other location. Castle Rock has completely failed to show how its alleged significant safety problem "will overcome" these substantial protections, as required in order to certify a waiver of the Commission's rules under 10 C.F.R. § 2.758.

The second "significant safety problem" alleged by Castle Rock is that "the financial stability of PFSF and whether it will engage in shortcuts as revenues fall short"

requires a waiver of 10 C.F.R. Part 72. Waiver Petition at 3, n.2. (emphasis added). Castle Rock's allegation is speculative and simply hypothesizes a future chain of events the petitioner believes is conceivable (first, that PFSF "revenues [will] fall short" in the future, and second, as a result, PFSF will choose to "engage in shortcuts"). Castle Rock provides no factual basis for its conjecture contrary to the Commission's requirement that a petitioner must do more than allege "what is conceivable" in order to meet the standard for a "significant safety problem." See Section II.D, supra.

Moreover, the issue raised by Castle Rock, the "financial stability of PFSF," is explicitly addressed by the Commission's regulations in 10 C.F.R. § 72.22(e) ("financial qualifications"). This provision must be complied with by the Applicant before the Commission will issue a license for the PFSF to operate. See 10 C.F.R. § 72.40(a)(6). The regulations in 10 C.F.R. Part 72 require that in order for the Commission to issue a license to the PFSF, it must determine that the financial qualification of the Applicant will not be a "significant safety problem." Castle Rock again has completely failed to show how its alleged "significant safety problem" "will overcome" the substantial protections provided for by the Commission's regulatory scheme.

The third "significant safety problem" alleged by Castle Rock is that "removing spent fuel from the facility and decommissioning will of necessity take decades, creating safety problems related to possibly dwindling revenues from only partial occupancy and ongoing transport of spent fuel," and that resolving this "significant safety problem" requires a waiver of 10 C.F.R. Part 72. Waiver Petition at 3-4, n.2. This entire scenario

raised by Castle Rock regarding "tak[ing] decades" to "remov[e] spent fuel from the facility" and "possibly dwindling revenues" is precisely the type of unsupported speculative conjecture that the Commission has clearly held does not establish a "significant safety problem." Seabrook II, CLI-89-20, supra, 30 NRC at 243. Further, the implicit issue raised here regarding the availability of a geologic repository to facilitate "removing spent fuel from the facility" is ensured for purposes of licensing under 10 C.F.R. Part 72 by the Waste Confidence Decision, as codified in 10 C.F.R. §§ 51.23 and 51.60, the waiver of which is explicitly discussed in Section IV of this Answer. As demonstrated there, Castle Rock is unable to justify a waiver of the Waste Confidence Decision, and therefore the availability of a geologic repository must be presumed for purposes here.

Moreover, the specific issues raised here, "removing spent fuel from the facility" and "decommissioning" are again explicitly covered by the Commission's regulations in 10 C.F.R. Part 72. The Commission's regulations in 10 C.F.R. § 72.42 ("Duration of license; renewal") establish that the license period for an ISFSI "must not exceed 20 years . . .," subject to renewal. Under the Commission's regulations, spent fuel cannot remain at an ISFSI site after the facility's license has expired. See 10 C.F.R. §§ 72.6(c), 72.54(c). Likewise, decommissioning of an ISFSI is regulated by, *inter alia*, 10 C.F.R. §§ 72.30 ("Financial assurance and recordkeeping for decommissioning") and 72.54 ("Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas"). It is the precise purpose of these Commission regulations in 10 C.F.R.

Part 72 to ensure that the hypothetical "significant safety problems" conceived by Castle Rock do not occur. Castle Rock has again completely failed to show how the alleged "significant safety problem" it has hypothesized "will overcome" these substantial protections provided for by the Commission regulatory scheme in 10 C.F.R. Part 72.

In sum, each of the three alleged "significant safety problems" are specifically addressed by Commission safety regulations to provide reasonable assurance that the issue does not become a "significant safety problem." Castle Rock has completely failed to show how these alleged "significant safety problems" overcome these substantial protections provided by Commission regulations, and accordingly, pursuant to Commission precedent, Castle Rock has failed to establish a single "significant safety problem." Castle Rock's waiver petition therefore "must be denied" because "it is not needed to resolve any significant safety problem." Seabrook I, CLI-88-10, supra, 28 NRC at 579-80, 601 (emphasis added).

IV. REQUEST FOR WAIVER OF WASTE CONFIDENCE RULE

Castle Rock's request for a waiver of the Waste Confidence Decision as embodied in 10 C.F.R. § 51.23 is equally deficient. As with respect to its request for waiver of 10 C.F.R. Part 72, Castle Rock does not meet any of the prongs of the three prong test set forth in Seabrook I and Seabrook II necessary for a licensing board to certify to the Commission a whether its rules and regulations should be waived.

A. Lack of Special Circumstances

1. Alleged Occurrence of Significant and Unexpected Events

As set forth in Applicant's Answer (pages 350-353), the Waste Confidence Decision is a generic determination by the Commission that the "safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible" and that "at least one mined geologic repository will be available within the first quarter of the twenty first century." 55 Fed Reg. 38,474, 38,475 (1990) ("Review and Final Revision of Waste Confidence Decision"). Castle Rock argues, however, that "[s]ignificant and pertinent unexpected events have occurred that make reconsideration of the Waste Confidence Decision and 10 C.F.R. § 51.23 necessary as part of this Proceeding." Waiver Petition at 19.

Specifically, Castle Rock claims that a 5.6 magnitude earthquake occurring 8 miles from Yucca Mountain in 1992 and evidence suggesting that water may percolate into the mountain faster than previously estimated and contaminated water from the repository may flow into and contaminate surrounding ground water raise questions about the technical adequacy of the Yucca Mountain site. Castle Rock also refers to DOE's repeated failures "to meet mandatory deadlines" and other events, such as potential enactment of the Nuclear Waste Policy Act of 1997, as constituting "special circumstances."[22] Castle Rock claims that "[e]ach of these events is significant,

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[22] As part of its laundry list of alleged events, Castle Rock argues that "the governor of Nevada, who has a right to veto the proposed repository, has publicly announced his opposition to a permanent repository in the State of Nevada." Waiver Petition at 19 (emphasis added). The Governor of Nevada, however, has no absolute right to veto the permanent repository at Yucca Mountain. Any "notice of disapproval" by the

unexpected" and "casts doubt on the conclusion that 'at least one-mined geological repository will be available within the first quarter of the twenty-first century.'" Waiver Petition at 19-20.

Castle Rock's laundry list of events are applicable to every ISFSI licensed under 10 C.F.R. Part 72, and therefore does not satisfy the first prong of the Seabrook test that the "special circumstances" must consist of properly plead facts

> not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking processing leading to the rule sought to be waived.

Seabrook II, CLI - 89-20, supra, 30 NRC at 235. The alleged events listed by Castle Rock are not unique or peculiar to PFSF but are common to all facilities -- MRSs, on-site ISFSIs and off-site ISFSIs -- that store spent nuclear fuel, as well as all reactors with spent fuel pools. Therefore, as the Commission has held, the proper mechanism for the petitioner's concerns is not a waiver under 10 C.F.R. § 2.758, as requested by Castle Rock, but rather a rulemaking to either amend or suspend the rule.[23] See Section II.B supra.

Governor may be overridden by Congressional resolution. 42 U.S.C. §10135(c). Moreover, the Governor's statement is hardly a post-Waste Confidence Decision "unexpected event."

[23] Applicant notes in this regard that the Commission has committed to reviewing its Waste Confidence Decision "at least every ten years." 55 Fed. Reg. at 38,475. Since the last formal review was completed September 1990, the next review should be scheduled by the year 2000.

Further, Castle Rock's claim that its alleged laundry list of events "casts doubt" on the availability of mined geologic repository by 2025 is a speculative "prognostication" of a future "chain of events . . . too tenuous" to meet its burden of special circumstances under 10 C.F.R. § 2.758(b). Mere uncertainties and speculation of the future course of events is not sufficient to establish the necessary special circumstances for waiver under § 2.758. See Section II, B supra. In this regard, DOE has not identified any information to date that would make the Yucca Mountain site unsuitable for a permanent repository.[24] Furthermore, DOE continues to project that the geologic repository will begin operations in 2010.[25]

Moreover, the Commission explicitly considered in the Waste Confidence Decision the potential for unexpected events to affect the viability of a mined geologic repository at Yucca Mountain. As stated in the Statement of Considerations for the Commission's 1990 reaffirmance of the Waste Confidence Decision.

> The NRC does not believe it is necessary to change the proposed second finding to reflect DOE's revised date for

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[24]The Nuclear Waste Policy Act of 1997: Hearing on H.R. 1270 Before the Subcomm. on Energy & Power (April 29, 1997) (statement of Lake H. Barrett, Acting Director, DOE Office of Civilian Radioactive Waste Management, at 3) ("Barrett Testimony") ("Thus far, we have found nothing to indicate that the Yucca Mountain site would be unsuitable for a permanent geologic repository."). See also Repository Safety Strategy: U.S. Department of Energy's Strategy to Protect Public Health and Safety after Closure of a Yucca Mountain Repository at 17, YMP/96-01 (Rev. 1, January 1998) ("If the water contacting the waste packages is as small as current interpretations suggest, and remains small through future climate and thermally induced changes, waste packages will corrode very slowly and waste will be contained in them for thousands of years. As waste packages eventually fail, multiple lines of defense such as solubility limits of the radionuclides, dispersion and depletion during transport, and dilution are expected to result in acceptably low annual doses.")

[25]See Barrett Testimony, supra, at 3.

> repository availability of 2010. NRC anticipated an extension of several years in DOE's schedule when it issued its proposed revised second finding. NRC took the position that if the Yucca Mountain site were found to be unsuitable on or before the year 2000, it was reasonable to expect that an alternative site could be identified and developed in time for repository availability by 2025.
>
> NRC continues to believe that if DOE determines that the Yucca Mountain site is unsuitable, it will make this determination by about the year 2000.

55 Fed. Reg. 38,477 (emphasis added). DOE is currently scheduled to issue a viability Assessment Report for the site in September 1998, and to make a recommendation on the suitability of the Yucca Mountain site in 2001.[26] Thus, even assuming DOE were to conclude that the recent alleged events made Yucca Mountain unsuitable for a permanent repository, that would not constitute special circumstances under 10 C.F.R. §2.758, because the Commission has explicitly considered such a potential eventuality in the rulemaking for the Waste Confidence Decision. See Section II.B supra.

2. Alleged Special Circumstances Concerning the PFSF

Castle Rock also claims special circumstances by virtue of the fact that, "[e]ven if a permanent repository is constructed," because the PFSF is of "unprecedented size . . . the repository will not be able to timely absorb the spent nuclear fuel to be stored therein at the end of the license period, or within a reasonable period thereafter." Waiver Petition at 21. According to Castle Rock, once a repository is operational it would "receive no more

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[26] See Barrett Testimony, supra, at 3.

than 900 MTU of spent nuclear fuel per year." Id. at 22. Thus, Castle Rock concludes that, taking into account that spent fuel from sources other than PFSF will be sent to the repository, "the repository will not be able to absorb all of the fuel stored at the proposed PFSF until at least the last quarter of the twenty-first century -- if at all." Id.

Castle Rock's claimed special circumstances must be rejected for several reasons. Foremost, it is based on an erroneous interpretation of DOE's Acceptance Priority Ranking & Annual Capacity Report (DOE/RW-0457, March 1995) upon which it relies for the purported 900 MTU limit per year for the receipt of spent fuel at the repository. There is no such limit. Rather, as discussed further below, DOE is projecting and planning for a steady-state receipt rate of 3,000 MTU per year of commercial spent fuel at the repository after the first several years of operation.

Specifically, the 900 MTU limit referred to in the DOE Acceptance Priority Ranking and Annual Capacity Report ("APR/ACR") relied upon by Castle Rock is the rate of acceptance and capacity at a MRS, not the geologic repository. This fact is reflected at pages 3 and 4 of the Report, which states as follows:

> In the previous ACR [Annual Capacity Report] the projected nominal acceptance rate was based on the assumption of [spent nuclear fuel] acceptance beginning in 1998 at a Monitored Retrievable Storage facility prior to repository operation. Due to the uncertainty associated with the date of commencement of operation of the waste management system, the annual nominal acceptance rates [in the current ACR] are presented by year(s) of operation of the system rather than by specific calendar year(s). The projected nominal acceptance rates also reflect the capacity

limit imposed by the [Nuclear Waste Policy] Act on such [MRS] storage prior to repository operations.

APR/ACR at 3-4 (emphasis added). The fact that the projected 900 MTU is based on storage at an MRS is significant because, as reflected in the above quotation, the amount of spent fuel storage allowed at an MRS prior to the operation of a permanent repository is limited by the NWPA, to 10,000 MTU prior to operation of the repository. NWPA § 148(d)(3), 42 U.S.C. § 10168(d)(3); see also 10 C.F.R. § 72.44(g)(3). The 900 MTU limit referenced by Castle Rock is simply not applicable to the acceptance rate of spent nuclear fuel at the repository. The basis for Castle Rock's petition is erroneous.

Further, DOE has established in its technical baseline documents for the repository a schedule for the receipt of spent nuclear fuel once the repository becomes operational. See Civilian Radioactive Waste Management Requirements Document, DOE/RW-0406 Rev. 3 at 11 (November 1996); Mined Geologic Disposal System Requirements Document, DOE/RW-0404P Rev. 2 DCN 2 at 35-36a (December 1996). These documents reflect that DOE is planning for a steady-state acceptance rate of 3,000 MTU per year of commercial spent fuel at the repository beginning in the fifth year of repository operation. See DOE/RW-0406 Rev. 3 at 11; DOE/RW-0404P Rev. 2 DCN 2 at 35-36a.

Specifically, the acceptance of commercial spent fuel at the repository is scheduled to begin in the year 2010 with a start-up acceptance rate of 300, 600, 1,200, 2,000 and 3,000 MTU for the first five years of operation and steady-state acceptance rate of 3,000 thereafter. Id. At this rate, using the same assumptions as Castle Rock -- the permanent

repository is operational in 2010 and receives only fuel from the PFSF which is filled to its maximum 40,000 MTU capacity (Waiver Petition at 22) -- the repository would receive all of the spent fuel stored at the PFSF by year 2026. Moreover, even if the spent fuel acceptance from the PFSF were to cover the entire period of operation currently projected at the repository (see DOE/RW-046 Rev.3 at 11), the fuel would be removed from the PFSF and accepted at the repository by the year 2033.

Thus, Castle Rock's claim that the unprecedented size of the PFSF requires waiver of the Waste Confidence Decision is completely lacking in merit. Based on current expectations, the spent fuel would be removed from the PFSF to the repository well before the end of forty years of operation. Therefore, PFSF is in no different situation than any other facility that stores spent fuel and therefore Castle Rock's claims of special circumstances must be rejected. Any remaining claims that PFSF will not be able to timely remove spent fuel from the PFSF would be based on mere speculation and prognostications of future events equally affecting all facilities storing spent nuclear and simply fails to establish the requisite "special circumstances" under the definition established by the Commission discussed in Section II.B supra.

B. Alleged Special Circumstances Do Not Undercut Rationale of the Rules

The second leg of the three-part test for a 10 C.F.R. §2.758 rules waiver set out by the Commission in Seabrook I is whether alleged special circumstances undercut "the rationale of the rule sought to be waived." The Waste Confidence Decision is a "generic rulemaking proceeding" that is applicable to all nuclear power reactors licensed by the

Commission and all facilities intended for the storage or disposal of spent fuel from these reactors.[27] The purpose of the Commission's Waste Confidence Decision

> is solely to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or offsite storage will be available, and to determine whether radioactive wastes can be safely stored on site past the expiration of existing facility licensees until offsite disposal or storage is available.

49 Fed. Reg. 34,658 (1984) (emphasis added) ("10 CFR Parts 50 and 51; Waste Confidence Decision"). The Commission clearly stated that intent of the rule is to "'provid[e] that the environmental and safety implications of continued onsite storage after the termination of licenses need not be considered in individual licensing proceedings.'" Id. at 34,666 (emphasis added), citing 44 Fed. Reg. 61,372, 61,373 (1979) ("10 CFR Parts 50 and 51; Storage and Disposal of Nuclear Waste"). As stated further by the Commission in this regard, the Waste Confidence Rule

> continu[es] the Commission's practice . . . of limiting consideration of environmental impacts of spent fuel storage in licensing proceedings to the period of the license in question and not requiring the NRC staff or the applicant to address the impacts of extended storage past expiration of the license applied for.

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[27] Though the Waste Confidence Decision was initiated on remand from the U.S. Court of Appeals for the D.C. Circuit of two specific licensing actions, the Commission decided to broaden the proceeding into a generic rulemaking that would be applicable to all nuclear power reactors and facilities intended to store or dispose of spent nuclear fuel. See 44 Fed. Reg. 61,372, 61,373 (1979); see also 49 Fed. Reg. at 34,659 n.2 (defining scope of the Waste Confidence Decision). Licensing boards have recognized that the Waste Confidence Decision is a "generic judgment" by the Commission. See Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 78 (1996).

49 Fed. Reg. 34,688 (1984) (emphasis added) ("10 CFR Parts 50 and 51; Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses") (proposed rule to promulgate 10 C.F.R. §§ 51.23 and 51.61).

The Commission has recognized in analyzing waiver petitions under 10 C.F.R. § 2.758 that eliminating case-by-case evaluation of generic issues by the NRC staff and applicants and avoiding litigation of that generic issue in individual licensing proceedings is a valid purpose for a generic Commission rulemaking. See Section II.C supra; see also Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412, 416-417 (D.C. Cir. 1979) ("[the Commission] could properly consider the complex issue of nuclear waste disposal in a 'generic' proceeding such as a rulemaking, and then apply its determinations in subsequent adjudicatory proceedings"). Applying the Waste Confidence Decision to this proceeding serves the very purpose for which the rule was promulgated, to avoid having the NRC staff and the Applicant address the generic issue of repository availability on a case-by-case basis.

Through its waiver request, Castle Rock seeks a full blown adjudicatory litigation of the timing and availability of a permanent repository in this licensing proceeding. The litigation requested by Castle Rock would require the NRC staff and the Applicant to address the generic issue of repository availability in this specific licensing proceeding. Castle Rock, however, has shown no special circumstances unique to the PFSF under which licensing the PFSF would fall outside the bounds of the Waste Confidence Decision.

Therefore, the application of the Waste Confidence Decision here serves the very purpose for which it was adopted and it must not be waived.

C. Lack of Significant Safety Problem

Castle Rock in its petition claims a host of potential safety problems in the event a permanent repository were unable "to timely absorb all spent fuel at the PFSF." Waiver Petition at 22-23. In particular, Castle Rock claims that any safety or environmental analysis must extend at least to the year 2075. Id. at 24. Castle Rock ignores, however, that the Commission, after extensive analysis, concluded in the Waste Confidence Decision as follows:

> On the basis of experience with wet and dry spent fuel storage and related rulemaking and licensing actions, the Commission concludes that spent fuel can be safely stored without significant environmental impact for at least 100 years, if necessary.

55 Fed. Reg. at 38,513 (emphasis added); see also Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 78 (1996). Even under Castle Rock's mistaken yearly acceptance limit of 900 MTU, the oldest spent fuel being stored at the PFSF would have been transferred to the repository long before it approached the 100-year mark. Thus, even under Castle Rock's mistaken hypothesis, no significant safety problem would result that would require waiver of the Waste Confidence Decision. See Section II.D supra.

In short, Castle Rock's request for waiver of the Waste Confidence Decision fails to meet the third prong -- as well as the first two -- of the three prong test necessary for

the Board to certify this issue to the Commission, and its request to do so must therefore be rejected.

V. CONCLUSION

For the reasons set forth above, the Applicant respectfully submits that Castle Rock's Waiver Petition under 10 C.F.R. 2.758(b) for the "Non-Application or Waiver of Commission Regulations, Rules, and General Determinations" must be denied.

Respectfully submitted,

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Dated: February 18, 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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to Castle Rock's Petition for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations" dated February 18, 1998, were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 18th day of February 1998.

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