

January 5, 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**APPLICANT'S RESPONSE TO NOTICE OF WITHDRAWAL OF CASTLE
ROCK LAND AND LIVESTOCK, L.C. AND SKULL VALLEY COMPANY, LTD.**

Pursuant to the Atomic Safety and Licensing Board's Order (Schedule for Responses to Notice of Withdrawal) of December 22, 1998, Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits its response to the notice of withdrawal filed by intervenors Castle Rock Land and Livestock, L.C. and Skull Valley Company, Ltd. (collectively "Castle Rock").¹ PFS respectfully submits that the Board should accept and approve Castle Rock and Skull Valley's withdrawal and that all admitted contentions solely sponsored by Castle Rock -- including those portions of admitted contentions solely sponsored by Castle Rock and consolidated by the Board with the contentions of other intervenors -- should be promptly dismissed.

¹ "Notice of Withdrawal of Castle Rock Land and Livestock, L.C. and Skull Valley Company, Ltd.," dated December 21, 1998 (hereinafter "Notice of Withdrawal").

A. Acceptance and Approval of Notice of Withdrawal

Castle Rock, through counsel, has voluntarily and with prejudice withdrawn from this proceeding and has withdrawn its Request for Hearing and Petition for Leave to Intervene and its contentions filed in this proceeding. See Notice of Withdrawal. The Board should promptly accept and approve the Notice of Withdrawal as requested by Castle Rock. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-94-23, 40 NRC 81, 82 (1994). Additionally, allowing Castle Rock to withdraw and to dismiss its contentions is fully consistent with the Commission's policy of encouraging parties to resolve matters among themselves in that Castle Rock's Notice of Withdrawal follows an agreement between Castle Rock and PFS addressing its concerns with respect to the project. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981); see Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

B. Dismissal of Castle Rock's Contentions

Following well-established Commission precedent, the three admitted contentions sponsored solely by Castle Rock and for which it is the sole intervenor-litigant -- Board Contention Numbers 22, 23, and 24 -- should be immediately dismissed. Also, those portions of the admitted contentions sponsored solely by Castle Rock but consolidated by the Board with the contentions of other intervenors must likewise be dismissed. As set forth in subsection 2 below, these include portions of Board Contentions 3, 7, 11, 13, and 14.

1. Legal Basis for Dismissal of Contentions of Withdrawing Intervenors

It is well established under NRC precedent that when an intervenor withdraws from a proceeding, its contentions are withdrawn as well:

Where there is more than one intervenor in a case, the withdrawal of one . . . serve[s] to remove the withdrawing party's contentions from litigation. The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.

Houston Lighting & Power Company (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985) (footnotes omitted). Furthermore, this holding applies independent of any claim of status as an "interested State" that might be advanced by the State of Utah. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 430-31 (1990) (citing Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768-69 (1977)).²

The Board's consolidation of some of Castle Rock's contentions with those of other intervenors, see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 214-19, 221, 224 (1998), does not change this result. The portions of the consolidated contentions sponsored solely by Castle Rock must be dismissed and the remaining intervenors must be left to litigate only those portions of the

² In that case, the State of Massachusetts was seeking to adopt contentions abandoned by a withdrawing intervenor, on the basis of its status as an "interested State." Seabrook, LBP-90-12, 31 NRC at 430. The licensing board in that case rejected Massachusetts' attempt, stating: "If it wishes to have issues heard in an NRC proceeding, it must observe the procedural requirements applicable to other participants." Id. at 430-31 (quoting River Bend, ALAB-444, 6 NRC at 768-69).

admitted contentions that they sponsored.³ The Board, exercising its inherent authority to control the conduct of the proceeding, chose to consolidate some of the contentions of different intervenors "because of their related subject matter." Id. at 242 (citing 10 C.F.R. § 2.714(f)-(g)). Thus, consolidation was a matter of administrative convenience and did not grant other intervenors the right to litigate independently issues raised solely by Castle Rock.⁴ The South Texas Appeal Board's rationale for dismissing the contentions of a withdrawing intervenor -- despite the desire of other, non-sponsoring intervenors to litigate them -- provides an equally compelling reason for the Board to dismiss those portions of the consolidated contentions sponsored solely by Castle Rock in addition to the three Castle Rock admitted contentions that were not consolidated with those of other intervenors. As the Appeal Board stated:

This approach is neither unfair to remaining intervenors nor inconsistent with the public interest. Intervenors, after all, choose the issues they wish to advance. To be sure, . . . an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. But that does not elevate the intervenor's status to that of a co-sponsor of the contentions. Because contentions can be withdrawn or (as in the instant case) settled through negotiation, a non-sponsoring party assumes at least some risk that the pursuit of its interests may not be wholly within its control. Indeed,

³ We identify the specific portions of the consolidated contentions sponsored solely by Castle Rock in subsection 2 below.

⁴ Additionally, as part of its consolidation of contentions, the Board also designated a "lead party" for each of the consolidated contentions. Similar to the consolidation of the contentions, this designation was also solely a matter of administrative convenience. See LBP-98-7, 47 NRC at 242-44. Thus likewise, such designation does not grant any other intervenor the right to litigate those portions of the consolidated contentions sponsored solely by Castle Rock given its withdrawal as an intervenor in this proceeding.

an approach that accorded a remaining intervenor more or less an equal right to pursue contentions earlier put forth by another party would frustrate the Commission's policy of encouraging legitimate efforts by applicants and intervenors to reach good faith, mutually satisfactory resolution of issues without the need for litigation.

South Texas, ALAB-799, 21 NRC at 383 (emphasis added; footnotes omitted).

Here, the other intervenors chose the issues they wished to advance when they filed their contentions. South Texas, ALAB-799, 21 NRC at 383 n.102.⁵ Thus they should be left to litigate only those issues now. Moreover, allowing the other intervenors to litigate Castle Rock's contentions would directly frustrate the Commission's policy of encouraging settlement, as previously discussed. Therefore, all of the contentions sponsored solely by Castle Rock, including parts of the consolidated contentions, must be dismissed as discussed below.

2. Specific Contentions to be Dismissed in this Proceeding

In accordance with the foregoing, the three Castle Rock contentions that the Board admitted which were not consolidated with those of other intervenors -- Castle Rock Contentions 17, 20 and 21 admitted as Board Contentions 22, 23, and 24, see LBP-98-7, 47 NRC at 257-58 -- must be dismissed in their entirety. Further, the following issues must be dismissed from the following consolidated contentions, in that they were sponsored solely by Castle Rock:⁶

⁵ "[O]ne may not introduce affirmative evidence on issues raised by another intervenor's contentions." South Texas, ALAB-799, 21 NRC at 383 n.102.

⁶ See Contentions of Petitioners Castle Rock Land & Livestock, L.C., Skull Valley Co., Ltd., and Ensign Ranches of Utah, L.C. on the License Application for the Private Fuel Storage Facility, dated November 21, 1997 (hereinafter "Castle Rock Contentions").

Board Contention 3 – Financial Assurance. Subpart 2 (PFS's members' obligations and potential early termination) and Subpart 10 (potential non-routine expenses from, e.g., accidents), LBP-98-7, 47 NRC at 251-52, of Board Contention 3 must be dismissed. Those subparts were sponsored only by Castle Rock. See LBP-98-7, 47 NRC at 214 (Castle Rock 7, bases 'a' and 'c').⁷ The State of Utah filed a related contention (Contention E), but never raised the issues of the obligations of the members of PFS, the potential early termination of PFS, or potential non-routine costs from accidents. See Utah Contentions at 32-38. The State's contention was admitted in its entirety as Subparts 1 and 3 through 9 of Board Contention 3, but not Subparts 2 and 10. Compare id. with LBP-98-7, 47 NRC at 251-52. Therefore, Subparts 2 and 10 must be dismissed.

Board Contention 7 – Credible Accidents. The issues concerning the threats to the ISFSI posed by activities at the following facilities must be dismissed: the Department of Defense Chemical Weapons Incinerator, Tooele Army Depot, the Aptus hazardous waste incinerator, the Laidlaw Clive hazardous waste incinerator, the Laidlaw Grassy Mountain landfill, and the Envirocare of Utah low level waste disposal facility. The threats from those specific facilities to the ISFSI were raised only by Castle Rock. See LBP-98-7, 47 NRC at 214 (Castle Rock Contention 6).⁸ The State filed a related conten-

⁷ Compare "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility," dated November 23, 1997, (hereinafter "Utah Contentions") at 32-38 (Utah Contention E); "Statement of Contentions on Behalf of the Confederated Tribes of the Goshute Reservation and David Pete," dated November 23, 1997, at 8-9 (Confederated Tribes Contention F) (hereinafter "Confederated Tribes Contentions").

⁸ Compare Castle Rock Contentions at 28-30 with LBP-98-7, 47 NRC at 190-91 (Utah Contention K), and id. at 234-35 (Confederated Tribes Contention B).

tion (Contention K), but alleged threats to the ISFSI only from the Tekoi Rocket Engine Test Facility, Dugway Proving Ground, and aircraft crashes. Utah Contentions at 72-79.⁹ Therefore, the issues concerning potential threats to the ISFSI from all other facilities must be dismissed from Board Contention 7 since the State never alleged any effect of such facilities on the proposed ISFSI nor provided any factual basis to support a claim of any such effect.

Board Contention 11 – Hydrology. The issue of contaminant pathways from ISFSI firefighting activities, see LBP-98-7, 47 NRC at 254, must be dismissed. That specific issue was raised only by Castle Rock 10. Castle Rock Contentions at 40-41.¹⁰ The State's contention on hydrology (Contention O) raised issues concerning contaminant pathways generally, but did not allege that firefighting activities would produce any contaminants or that firefighting might lead to groundwater contamination. Utah Contentions at 100-08. Therefore, this issue must be dismissed.

Board Contention 13 – Decommissioning. The issue of non-routine expenses other than those arising from large accidents and associated releases of contamination at the ISFSI, see LBP-98-7, 47 NRC at 214, must be dismissed. Only Castle Rock raised

⁹ The State's allegations concerning the Aptus hazardous waste incinerator, the Laidlaw Clive incinerator, the Laidlaw Grassy Mountain landfill, and the Envirocare of Utah low-level and mixed waste facility concerned only the potential threat to the Rowley Junction ITP posed by the shipment of hazardous materials from those sites, and were admitted solely as such subject to the eventual resolution of Utah Contention B. Utah Contentions at 78; LBP-98-7, 47 NRC at 190. The only part of Confederated Tribes Contention B that was admitted and consolidated under Board Contention 7 concerned wildfires. See LBP-98-7, 47 NRC at 234-35.

¹⁰ Compare LBP-98-7, 47 NRC at 192-93 (Utah Contention O) and Utah Contentions at 101-03.

the issue of non-routine expenses generally, "including without limitation the costs of a worst case accident in transportation, storage, or disposal of spent fuel." See LBP-98-7, 47 NRC at 214-15 (Castle Rock 7, basis 'c').¹¹ The State of Utah included only expenses arising from large accidents and associated releases of contamination at the ISFSI in its decommissioning contention (Contention S). Utah Contentions at 127-128. Therefore, the issue of non-routine expenses other than those arising from large accidents and associated releases of contamination at the ISFSI, as raised solely by Castle Rock, must be dismissed.¹²

Board Contention 14 – Permits. The following issues with respect to Board Contention 14 must be dismissed: the site requirements relative to the Skull Valley Band of Goshute's Clean Water Act permitting authority and the applicability of Utah Division of Air Quality Rules. See LBP-98-7, 47 NRC at 255. Those issues were raised only by Castle Rock.¹³ The State of Utah's Contention on permits and entitlements (Contention T) raised other issues concerning environmental quality standards and requirements but not these. Utah Contentions at 137-40.

In sum, the above identified portions of Board Contentions 3, 7, 11, 13, and 14 were clearly sponsored solely by Castle Rock. Accordingly, under the South Texas decision, the above identified portions of these contentions -- as well as Board Contentions

¹¹ Compare Utah Contentions at 127-28 (Utah Contention S).

¹² Further, as discussed in Applicant's Motion for Reconsideration and Clarification at 7-9, dated May 6, 1998, both the cost for disposal of spent nuclear fuel and the costs associated with radiological accidents for off-site transportation are beyond the scope of this proceeding.

¹³ Compare Castle Rock Contentions at 48-49 with Utah Contentions at 137-40 (Utah Contention T).

22, 23 and 24 in their entirety -- should be dismissed given Castle Rock's withdrawal from this licensing proceeding.

C. Readmission of Castle Rock Contentions

If any party seeks to have Board Contentions 22, 23 and 24 or the portions of Board Contentions 3, 7, 11, 13, and 14 identified above, sponsored solely by Castle Rock, readmitted to this proceeding, it must show that such readmission would satisfy the Commission's five-factor test for late filings. South Texas, ALAB-799, 21 NRC at 382; see 10 C.F.R. § 2.714(a)(1)(i-v). Under the five-factor test, good cause for lateness is the most important factor and where it is lacking, the late-filing party must make a compelling showing on the other factors. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-98-29, 48 NRC __, __, slip op. at 12 (1998).

For an intervenor to show good cause where it seeks the readmission of contentions dismissed upon the sponsoring intervenor's withdrawal from a proceeding, the other intervenor must demonstrate that it had an "independent concern," at the outset of the proceeding, about the matters in the dismissed contentions. South Texas, ALAB-799, 21 NRC at 383-84 & n.106. Such a showing will not be possible to make here, where Castle Rock filed its contentions more than a year ago, and no other intervenor promptly expressed a concern about the issues sponsored solely by Castle Rock.¹⁴ Indeed, the Board

¹⁴ Some of the intervenors did express independent concerns -- in their own contentions -- about some issues raised in the Castle Rock Contentions, which were included in the consolidated contentions. We only argue that those issues for which Castle Rock was the sole sponsor must be dismissed.

summarily rejected an attempt by the State of Utah to incorporate Castle Rock's contentions by reference one month after the filing deadline. LBP-98-7, 47 NRC at 163, 182. Therefore, the Board should certainly not allow any intervenors to adopt Castle Rock's contentions at this late date.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to Notice of Withdrawal of Castle Rock Land and Livestock, L.C. and Skull Valley Company, Ltd." 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 5th day of January 1999.

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