

January 5, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PRIVATE FUEL STORAGE, LLC) Docket No. 72-22-ISFSI
)
(Independent Spent)
Fuel Storage Installation))

NRC STAFF'S RESPONSE TO STATE OF UTAH'S
MOTION FOR LEAVE TO REPLY TO THE NRC STAFF'S AND
PRIVATE FUEL STORAGE, LLC'S RESPONSES TO PETITIONERS' CONTENTIONS

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedule for Responses to Motion for Leave to File Reply," dated December 31, 1997 (Board Order), and 10 C.F.R. § 2.730(c), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "State of Utah's Motion for Leave to Reply to the NRC Staff's and Private Fuel Storage, LLC's Responses to Petitioners' Contentions" (State's Motion), dated December 30, 1997. For the reasons set forth below, the State's Motion should be denied.¹

¹ On December 31, 1997, petitioners Castle Rock Land and Livestock, L.C. and Skull Valley Co., LTD filed a motion for leave to reply to the Staff's and Applicant's responses to contentions. See "Motion of Petitioners Castle Rock Land & Livestock, L.C. and Skull Valley Co., LTD. For Leave to Reply to the NRC Staff's and Private Fuel Storage, LLC's Response to Petitioner's Contentions," dated December 31, 1997. This motion contains essentially the same arguments as the State's Motion and, therefore, for the same reasons as set forth herein, the motion of Castle Rock Land & Livestock, L.C. and Skull Valley Co., LTD should be denied.

BACKGROUND

Pursuant to the "Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions)" (Extension Order), issued on October 17, 1997, the Board ordered that hearing request/intervention petition supplements, including contention lists be filed by November 24, 1997.² Extension Order at 11. Further, in its Extension Order, the Board provided December 22, 1997, as the date for filing responses to any hearing request/intervention petition supplements. *Id.* The Board did not provide for further responses.³

On or about November 24, 1997, contentions were filed by each of the petitioners for leave to intervene in this proceeding.⁴ On December 24, 1997, the Staff and Private Fuel Storage, L.L.C. (Applicant) filed their responses to the Petitioners' contentions. *See* Staff's Response to Contentions; "Applicant's Answer to Petitioners' Contentions," (Applicant's Response). Thereafter, on December 30, 1997, the State filed its Motion for leave to file a reply to the Staff's and Applicant's Responses by January 22, 1998. On December 31, 1997, the Board issued its Order, requiring responses to the State's Motion to be filed by January 5, 1998.

² This date reflected the Board's grant of a thirty-day extension of time for the filing of contentions at the request of the State. *See* Extension Order at 8-9; *see also* "State of Utah's Motion for Extension of Time to File Contentions," dated October 1, 1997.

³ This date was subsequently moved to December 24, 1997. *See* "Order (Granting Motion for Extension of Time to File Responses to Contentions and Supplemental Petitions," dated December 18, 1997.

⁴ A list of the various Petitioners' filings is set forth in the Staff's December 24, 1997, "NRC Staff's Response to Contentions Filed by (1) the State of Utah, (2) the Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, (4) Castle Rock Land and Livestock L.C., Et Al., and (5) the Confederated Tribes of the Goshute Reservation and David Pete," at 1-2 & nn. 2-6. (Staff's Response to Contentions).

DISCUSSION

The State should not be provided an opportunity to file a reply to the Staff's and Applicant's Responses because neither the Board's Extension Order, nor 10 C.F.R. § 2.714(c), provide for a party to submit a further reply to responses to contentions. Moreover, the State has not demonstrated good cause for leave to file a reply, in accordance with 10 C.F.R. § 2.730. The State claims that "some written reply" to the voluminous responses of the Staff and Applicant would help define the issues in the proceeding and that NRC case law confirms petitioner's right to reply to objections to contentions.⁵ See State's Motion at 1-2. The State, however, through its participation in the prehearing conference scheduled for January 27, 1998, will be able to raise issues concerning contentions.⁶ The State has not provided any reason for why this opportunity would not be sufficient to protect its interests. Therefore, any additional written reply would only increase the voluminous record in the proceeding without any demonstrated benefit.

⁵ In support of its Motion, the State additionally refers to the intervening holiday periods and the Applicant's expected January 6, 1998, response to the State's Contentions Z through DD. State's Motion at 2. With respect to the Applicant's response to the remaining contentions, the Board on December 31, 1997, granted the Applicant's request to file its response on January 6, 1998, and in so doing, did not provide for further responses. See "Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions)," dated December 31, 1997.

⁶ On December 1, 1997, the Board issued a "Memorandum (Site Visit and Prehearing Conference)" in which the Board set the tentative schedule for the site visit and prehearing conference for the week of January 26, 1998. Thereafter, on December 8, 1997, the Board held a telephone conference with the parties to discuss the site visit and prehearing conference. During the telephone conference, the Board Chairman, in response to a question from the Applicant's counsel, stated that the parties would have an opportunity to comment on the contentions. Moreover, in its December 31, 1997, "Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions)" (Order Granting Leave), the Board recognized that there may be oral argument at the prehearing conference and it may involve matters which concern proprietary information. Order Granting Leave at 3.

In support of its Motion, the State cites *Long Island Lighting Co.*, (Shoreham Nuclear Power Station), LBP-81-18, 14 NRC 71, 72-73 (1981), quoting *Houston Lighting and Power Co.*, (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979). In *Shoreham*, the Licensing Board sought to preserve the intervenor's opportunity to be heard with respect to its contention and, therefore, entertained its reply to responses to its contentions. Unlike the instant proceeding, however, it is not apparent that the *Shoreham* intervenor was given an opportunity to provide oral argument. In the instant proceeding, on the other hand, the State and other petitioners are being afforded an opportunity to respond. In the *Allens Creek* decision, which was quoted by the *Shoreham* Licensing Board, the Appeal Board stated that "[b]efore any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard." *Id.* at 525. In that case, the Appeal Board was primarily concerned with the Licensing Board's decision to prohibit the intervenor from presenting oral argument at the prehearing conference in support of the contentions it had advanced and did not require that the intervenor be given an opportunity to file a written reply. *See Allens Creek* at 523. The instant petitioners, by contrast, will have that opportunity at the prehearing conference. Therefore, since the State has not shown any special circumstances warranting the relief it seeks, the State's Motion should be denied.⁷

⁷ In the event, however, that the Board determines that the State should, nevertheless, have an opportunity to reply to the Staff's and Applicant's responses, the State should be required to serve its reply no later than Wednesday, January 14, 1998, to ensure receipt by the Staff and Board by 4:30 pm EST. The Staff needs time to consider the information to be submitted by the State in order to prepare a meaningful response at the prehearing conference. The Staff strongly opposes the State's proposed date because the Staff would have an inadequate opportunity to prepare a response for presentation at oral argument.

CONCLUSION

For the reasons set forth above, the State's and Castle Rock's Motions for leave to reply to the Staff's and Applicant's responses to contentions should be denied.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of January 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION FOR LEAVE TO REPLY TO THE NRC STAFF'S AND PRIVATE FUEL STORAGE LLC'S RESPONSES TO PETITIONERS' CONTENTIONS" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk, by Email (with confirming copies by deposit in the Nuclear Regulatory Commission's internal mail system or by deposit in United States mail, first class) this 5th day of January, 1998:

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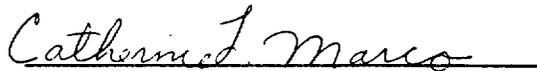
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