

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

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USNRC
LBP-98-7

'98 APR 22 A9:51

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SERVED APR 22 1998

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

April 22, 1998

MEMORANDUM AND ORDER

(Rulings on Standing, Contentions,
Rule Waiver Petition, and
Procedural/Administrative Matters)

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Responding to a July 21, 1997 notice of opportunity for a hearing, 62 Fed. Reg. 41,099 (1997), the State of Utah (State or Utah); three Native American groups, Ohngo Gaudadeh Devia (OGD), Confederated Tribes of the Goshute Reservation (Confederated Tribes), and Skull Valley Band of Goshute Indians (Skull Valley Band); three ranching, farming, and land investment companies, Castle Rock Land and Livestock, L.C. (Castle Rock Land), Skull Valley Co., LTD. (Skull Valley), and Ensign Ranches of Utah, L.C. (Ensign Ranches); and one Native American individual, Confederated Tribes Chairman David Pete have filed five separate timely hearing requests/petitions to intervene that are before the Licensing Board. In addition, pending with the Board is a

late-filed intervention petition submitted by the Scientists for Secure Waste Storage (SSWS). Each petitioner seeks to be heard on a variety of issues in connection with the June 1997 application of Private Fuel Storage, L.L.C. (PFS), for a license under 10 C.F.R. Part 72 to possess and store spent nuclear reactor fuel in an independent spent fuel storage installation (ISFSI) located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. In addition, petitioners Castle Rock Land/Skull Valley/Ensign Ranches have invoked the provisions of 10 C.F.R. § 2.758 seeking a waiver of the application of the Commission's rules under (1) 10 C.F.R. Part 72, as it might be applicable to the proposed PFS ISFSI facility; and (2) 10 C.F.R. § 51.23, as that rule (i) makes a generic finding of Commission confidence that a repository will be built and available to accept high-level nuclear waste (HLW) in the first quarter of the next century, and (ii) excuses the need for any discussion of ISFSI spent fuel environmental impacts following the term of the ISFSI license.

For the reasons set forth below, we find petitioners State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and Skull Valley Band have established their standing to intervene. In addition, each of these petitioners has presented at least one admissible contention concerning the PFS application. We thus admit these petitioners as parties to this proceeding. On the other

hand, as is explained below, petitioners Pete and SSWS have failed to establish their standing to intervene while Ensign Ranches, although having standing, lacks an admissible contention. We therefore deny these participants hearing requests/intervention petitions. We also conclude that, having failed to establish a basis for waiver of 10 C.F.R. Part 72 or 10 C.F.R. § 51.23, the section 2.758 petition of intervenors Castle Rock Land/Skull Valley/Ensign Ranches must be denied. Finally, we outline certain procedural and administrative rulings, including the designation of "lead" parties and use of informal discovery, that will apply to the litigation of the parties' admitted contentions.

I. BACKGROUND

A. The PFS Application and Proposed ISFSI

To obtain a twenty-year Part 72 license for its proposed ISFSI, in June 1997 PFS filed with the agency an application consisting of, among other things, a safety analysis report (SAR), an environmental report (ER), an emergency plan (EP), a physical security plan (PSP), and a preliminary decommissioning plan (PDP). According to its application, PFS is a limited liability corporation owned by eight American utilities. Each of these utilities has one or more operating nuclear facilities. PFS intends to obtain the funds necessary to construct, operate, and decommission the Skull Valley ISFSI through equity contributions from its

owners, preshipment customer payments pursuant to service agreements that commit PFS to store customer spent fuel, and annual storage fee payments under those service agreements. See [PFS], License Application [for] Private Fuel Storage Facility at 1-1 to -4, 3-1 (rev. 0 June 1997) [hereinafter License Application].

The application also indicates that the ISFSI, which is to be on a one-quarter mile square site leased by PFS from the Skull Valley Band, will be used for above ground dry cask storage of up to 40,000 metric tons uranium (MTU) of spent nuclear fuel from commercial nuclear plants in the United States. The spent fuel is to be loaded into canisters at the originating reactors, which are then welded shut and placed into shipping casks for transport to Utah by rail. Because the PFS facility is located some twenty-five miles from the existing main rail line, the shipping casks containing the canisters would be moved to the PFS facility either by truck or a newly constructed rail spur. Once at the PFS site, the canisters would be removed from the shipping casks and placed in storage casks that would be placed vertically on concrete pads in a protected area at the site. See id. at 1-1 to -4, 3-1 to -2.

B. Timely Hearing Requests/Intervention Petitions

In response to the NRC staff's July 1997 notice of opportunity for a hearing regarding this application, a number of petitioners filed requests for hearings and

petitions to intervene asking that they be made a party to any adjudicatory proceeding conducted in connection with the application. First filed was the joint request of the Confederated Tribes, which seeks to intervene either as a party under 10 C.F.R. § 2.714(a) or as an interested governmental entity under section 2.715(c), and Tribal Chairman Pete, who appears both as a tribal leader and in his individual capacity. See Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete (Aug. 29, 1997) [hereinafter Confederated Tribes/Pete Petition]. The Confederated Tribes/Pete oppose granting the application.

Thereafter, the State, which seeks either party or interested governmental entity status, and three ranching, farming, and land investment companies, Castle Rock Land, Skull Valley, and Ensign Ranches (collectively Castle Rock), submitted hearing requests. See [State] Request for Hearing and Petition for Leave to Intervene (Sept. 11, 1997) [hereinafter State Petition]; [Castle Rock] Request for Hearing and Petition to Intervene (Sept. 11, 1997) [hereinafter Castle Rock Petition]. The State and Castle Rock oppose the application as well.

Also seeking party status under section 2.714(a) are the Skull Valley Band and OGD. See Verified Petition for Leave to Intervene (Sept. 12, 1997) [hereinafter Skull Valley Band Petition]; [OGD] Request for Hearing and

Petition to Intervene (Sept. 12, 1997) [hereinafter OGD Petition]. The Skull Valley Band is a federally recognized Indian tribe that leased tribal land to PFS for construction and operation of the proposed ISFSI. It supports the PFS application. OGD, on the other hand, is an organization that consists primarily of members of the Skull Valley Band who oppose the PFS application and its plan to construct and operate an ISFSI on reservation land.

In response to the Confederated Tribes/Pete petition, both applicant PFS and the NRC staff filed pleadings contesting both the standing of the Confederated Tribes and Mr. Pete to intervene as parties and the Confederated Tribes purported status as an interested governmental entity. See Applicant's Answer to Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Sept. 15, 1997) [hereinafter PFS Confederated Tribes/Pete Petition Response]; NRC Staff's Response to Request for Hearing and Petition to Intervene Filed by [Confederated Tribes/Pete] (Sept. 18, 1997) [hereinafter Staff Confederated Tribes/Pete Petition Response]. In contrast, both PFS and the staff did not contest the standing of the State, Castle Rock, OGD, and the Skull Valley Band to intervene as parties, and the applicant asserted the Skull Valley Band also would qualify as an interested governmental entity. See Applicant's Answer to Request for Hearing and Petition to Intervene of [Utah] (Sept. 26, 1997) [hereinafter PFS State Petition

Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [Castle Rock] (Sept. 26, 1997) [hereinafter PFS Castle Rock Petition Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [OGD] (Sept. 26, 1997) [hereinafter PFS OGD Petition Response]; Applicant's Answer to Petition to Intervene of [Skull Valley Band] (Sept. 29, 1997) [hereinafter PFS Skull Valley Band Petition Response]; NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) [Utah], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock] (Oct. 1, 1997) [hereinafter Staff Hearing Petitions Response]. Both PFS and the staff made the point, however, that these petitioners must present litigable contentions in order to be admitted as parties.

C. Supplements to Timely Hearing Requests/Intervention Petitions

1. Schedule for Filing Supplements

In this connection, in an initial prehearing order issued September 23, 1997, the Licensing Board established an October 1997 date for these petitioners to file supplements to their hearing/intervention requests that would include their contentions, with supporting bases. That directive also established a tentative schedule for a Board visit to the applicant's proposed ISFSI site and a prehearing conference to entertain participant presentations on whether the petitioners' have proffered information

sufficient to establish they have standing and admissible contentions. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) (unpublished). Within a week, however, the State filed two motions seeking to delay or suspend this schedule. In one, Utah asked that we suspend this proceeding pending the establishment of a local public document room (LPDR) and the applicant's submission of a "complete" application. See [Utah] Motion to Suspend Licensing Proceedings Pending Establishment of a[n LPDR] and Applicant's Submission of a Substantially Complete Application, and Request for Re-notice of Construction Permit/Operating License Application (Oct. 1, 1997). Petitioners Confederated Tribes/Pete, OGD, and Castle Rock supported both State motions. In the other motion, the State asked that the time for filing hearing request/intervention supplements be extended by forty-five days. See [State] Motion for Extension of Time to File Contentions (Oct. 1, 1997).

Applicant PFS and petitioner Skull Valley Band opposed the State's motions. The staff opposed the State's suspension motion, but declared it had no objection to a thirty-day extension of time for the filing of contentions. In an October 17, 1997 ruling, the Board denied the State's suspension request, but provided an additional thirty days to file intervention petition supplements, including contentions and supporting bases. See Licensing Board

Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions) (Oct. 17, 1997) (unpublished). Thereafter, the Board rescheduled the site visit and prehearing conference for the week of January 26, 1998.

Then, ten days before its petition supplement was due, the State filed a motion for a protective order to gain access to the applicant's physical security plan and to extend the time for filing contentions relating to that plan. See [State] Motion for a Protective Order to Review and File Contentions on the Applicant's [PSP] (Nov. 14, 1997). Both PFS and the staff filed responses declaring they had no objection to the State's protective order request. In a November 21 issuance, the Board granted the State's requests for a protective order and an extension of the filing deadline for security plan-related contentions. See Licensing Board Memorandum and Order (Ruling on [State] Motion for Protective Order) (Nov. 21, 1997) (unpublished). After obtaining a proposed order from the participants, the Board issued the protective order on December 17, 1997. See Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) (unpublished); see also Licensing Board Memorandum and Order (Protective Order Amendment) (Dec. 22, 1997) (unpublished); Licensing Board Memorandum and Order

(Additional Amendments to Protective Order) (Dec. 23, 1997)
(unpublished).

2. Supplemental Filings

Petitioners OGD and Castle Rock filed their supplemental petition with contentions on November 24, 1997. See [OGD] Contentions Regarding the Materials License Application of [PFS] in an [ISFSI] (Nov. 24, 1997) [hereinafter OGD Contentions]; Contentions of Petitioners [Castle Rock] on the License Application for the [PFS] Facility (Nov. 24, 1997) [hereinafter Castle Rock Contentions]. In the Castle Rock filing, petitioner Ensign Ranches indicated it was only joining in the first five contentions. See Castle Rock Contentions at 1. That same date, the State filed its nonsecurity plan-related contentions. See [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 24, 1997) [hereinafter State Contentions].

Petitioners Confederated Tribes/Pete filed an initial supplement on October 15 in which they addressed the standing aspects of their petition, with a second filing on November 24 that presented their contentions. See Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Oct. 15, 1997) [hereinafter Confederated Tribes/Pete First Supplemental Memorandum]; Statement of Contentions on Behalf of [Confederated Tribes/Pete] (Nov. 24, 1997) [hereinafter

Confederated Tribes/Pete Contentions]. Likewise, the Skull Valley Band submitted a supplemental petition setting forth its sole contention in support of the facility application. See Supplemental Petition to Intervene (Nov. 24, 1997) [hereinafter Skull Valley Band Contention].

This was not the end of the petitioners' standing and contention-related pleadings, however. On December 23, 1997, the State filed a request to accept two late-filed contentions asserted to deal with proprietary material on cask seismic stability and radiation shielding. See [State] Request for Consideration of Late-Filed Contentions EE and FF (Dec. 23, 1997) [hereinafter State Contentions EE and FF]. Six days later, Confederated Tribes/Pete filed a second supplemental memorandum on the matter of standing. See Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Dec. 29, 1997) [hereinafter Confederated Tribes/Pete Second Supplemental Memorandum]. The State then timely filed its security plan contentions on January 3, 1998. See [State] Contentions Security-A through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998). The State thereafter sought admission of an additional late-filed contention in the issue of cask seismic stability, which again was asserted to be based on proprietary information. See [State] Request for

Consideration of Late-Filed Contention GG (Jan. 8, 1998)
[hereinafter State Contention GG].

3. Responses to Supplemental Filings

Not unexpectedly, these pleadings were the subject of various participant responses and replies. Applicant filed responses to the various petitioners' contentions, opposing all but two of the timely filed nonsecurity contentions submitted by the petitioners opposing the application. See Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) [hereinafter PFS Contentions Response]; Applicant's Supplemental Answer to [State] Contentions Z to DD (Jan. 6, 1997) [hereinafter PFS Supplemental Contentions Response].¹ PFS also filed responses opposing the State's security plan contentions and its three late-filed contentions. See Applicant's Answer to [State] Request for Consideration of Late Filed Contentions EE and FF (Jan. 9, 1997) [hereinafter PFS State Contentions EE and FF Response]; Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998); Applicant's Answer to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998)

¹ The Board granted PFS leave to file a supplemental answer regarding the last six State contentions because PFS apparently was served inadvertently with a copy of the State's contentions that did not contain those six contentions. See Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) (unpublished).

[PFS State Contention GG Response]. Along with the Skull Valley Band, PFS also continued to oppose the admission of petitioners Confederated Tribes/Pete based on lack of standing. See Applicant's Answer to [Confederated Tribes/Pete] Supplemental Memorandum in Support of Petition to Intervene and for a Hearing (Dec. 12, 1997) [hereinafter PFS Confederated Tribes/Pete First Supplemental Memorandum Response]; Response of [Skull Valley Band] to Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Jan. 13, 1998) [hereinafter Skull Valley Band Confederated Tribe/Pete Second Supplemental Memorandum Response].

The staff responded to the petitioners' contentions as well, asserting that, with the exception of Ensign Ranches that joined only in the first five Castle Rock contentions, each had submitted at least one litigable contention. See NRC Staff's Response to Contentions Filed by (1) [State], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock], and (5) [Confederated Tribes/Pete] (Dec. 24, 1997) [hereinafter Staff Contentions Response]. The staff nonetheless opposed the admission of the State's three late-filed contentions and declared that only three of the State's nine security plan contentions were admissible in full or in part. See NRC Staff's Response to [State] Request for Consideration of Late-Filed Contentions EE and FF (Jan. 9, 1998) [hereinafter Staff State Contentions EE and FF Response]; NRC Staff's

Response to [State] Security Plan Contentions (Jan. 20, 1998) [hereinafter Staff State Security Plan Contentions Response]; NRC Staff's Response to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998) [hereinafter Staff State Contention GG Response]. In addition, in response to the supplemental filings of Confederated Tribes/Pete regarding their standing, the staff ultimately declared there was an adequate basis for admitting the tribe, but not Chairman Pete. See NRC Staff's Response to the Supplemental Memorandum Filed by [Confederated Tribes/Pete] in Support of Their Petition to Intervene (Dec. 23, 1997) [hereinafter Staff Confederated Tribes/Pete First Supplemental Memorandum Response]; NRC Staff's Response to "Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing" (Jan. 14, 1998) [hereinafter Staff Confederated Tribes/Pete Second Supplemental Memorandum Response].

Acting in response to requests from the State and Castle Rock Land/Skull Valley, the Licensing Board also permitted those participants to file replies to the PFS and staff responses to their contentions. See Licensing Board Memorandum and Order (Granting Leave to File Reply Pleadings and Requesting Information) (Jan. 6, 1998) (unpublished). The State and Castle Rock made those filings on January 16, 1998. See [State] Reply to the NRC Staff's and Applicant's

Response to [State] Contentions A Through DD (Jan. 16, 1997) [hereinafter State Contentions Reply]; Reply of Petitioners [Castle Rock] to the Responses of the NRC Staff and the Applicant (Jan. 16, 1998) [hereinafter Castle Rock Contentions Reply].

Finally, the State submitted a response to the contentions of OGD, Confederated Tribes/Pete, and Castle Rock in which it supported all these contentions and sought to adopt each as part of its contentions. See [State] Response to Contentions of [OGD, Confederated Tribes/Pete, and Castle Rock] (Dec. 19, 1997) [hereinafter State Adopted Contentions Response]. In response, PFS labeled this filing an unsupported attempt to submit late-filed contentions. See Applicant's Answer to [State] Late-Filed Contentions (Dec. 31, 1997) [hereinafter PFS State Adopted Contentions Response].

D. Late-Filed Intervention Request and Castle Rock Rule Waiver Petition

To add to these filings, one week before the scheduled prehearing conference, and some four months after the period for filing timely intervention requests had expired, a group of individuals represented by Dr. Richard Wilson filed a petition to intervene. In that petition, which they acknowledged was untimely, they sought an opportunity to participate in support of the PFS application as of right under 10 C.F.R. § 2.714 or by means of limited appearance

statements pursuant to section 2.715(a). See Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 20, 1998) [hereinafter SSWS Late-Filed Intervention Petition]; see also Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 22, 1998) [hereinafter SSWS Revised Intervention Petition]. Also, in the last week before the prehearing conference, Castle Rock submitted a petition pursuant to 10 C.F.R. § 2.758(b) asking for a waiver of two Commission rules: (1) 10 C.F.R. Part 72 to the extent it would permit the licensing of a privately operated ISFSI such as that proposed by PFS, and (2) 10 C.F.R. § 51.23, the so-called Waste Confidence Decision, under which the Commission has declared that, for purposes of preparing an ER and an environmental impact statement (EIS) relative to agency licensing actions, including a Part 72 ISFSI, it has made a generic determination that a permanent repository will be built and available for HLW within the first quarter of the next century. See Petition of [Castle Rock] for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Jan. 21, 1998) [hereinafter Castle Rock Waiver Petition].

E. Site Visit and Initial Prehearing Conference

On January 26, 1998, accompanied by representatives of the various participants, the Board took a bus tour of the eastern Tooele County, Utah area. This tour included views

of or stops at various sites in and around Skull Valley the petitioners had identified as potentially relevant to the issues in this proceeding. Among these were (1) Rowley Junction, the highway interchange at the intersection of Interstate 80 and Skull Valley Road where PFS would locate an intermodal transfer point (ITP) for transfer of waste transportation casks from the Union Pacific rail line to trucks or a railroad spur for transport south to the proposed Skull Valley ISFSI site; (2) the Skull Valley Band's reservation from along Skull Valley Road, the paved access road that runs approximately thirty-five miles south from Interstate 80 through the reservation and passes about two miles to the east of the proposed ISFSI; (3) the English Village at the United States Army's Dugway Proving Grounds, which is located ten miles south of the Skull Valley Band's reservation near the end of Skull Valley Road; and (4) State Roads 199 and 36, which connect Skull Valley Road with Tooele, Utah, the Tooele County seat, and afford views of the United States Department of Defense Tooele Chemical Agent Disposal Facility and the Tooele Army Depot.

Beginning the next day, the Board conducted a three-day prehearing conference during which it heard oral presentations regarding the standing of petitioners Confederated Tribes/Pete and the admissibility of most of the petitioners' ninety contentions. To avoid any discussion of nonpublic safeguards or proprietary

information, the Board limited presentations regarding the State's nine security plan contentions and three late-filed contentions to the issues of the expertise of the witness sponsoring the State's security plan contentions and whether the State satisfied the five late-filing standards of 10 C.F.R. § 2.714(a)(1), while permitting the State, PFS, and the staff to make additional post-prehearing conference filings on the substance of those contentions' admissibility.

F. Post-Prehearing Conference Filings

Following the prehearing conference, pursuant to a Board directive, Dr. Wilson filed an intervention petition supplement that denominated the group of individuals he was representing as the Scientists for Secure Waste Storage and indicated at least one member resided in Salt Lake City, Utah. See Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Feb. 2, 1998) [hereinafter SSWS First Intervention Petition Supplement]. The State, OGD, and the staff filed responses opposing intervention by SSWS, while PFS and the Skull Valley Band submitted answers supporting its participation as of right or as a discretionary intervenor. See [State] Opposition to Amended Petition to Intervene (Feb. 13, 1998) [hereinafter State SSWS First Intervention Petition Supplement Response]; OGD's Response to Wilson/ALF Amended Petition and Order Dated 2/2/98 Allowing Participant Responses to Said Petition

(Feb. 13, 1998) [hereinafter OGD SSWS First Intervention Petition Supplement Response]; NRC Staff's Response to Petition for Leave to Intervene Filed by Richard Wilson and [SSWS] (Feb. 13, 1998) [hereinafter Staff SSWS First Intervention Petition Supplement Response]; Response of [Skull Valley Band] to Petition of [SSWS] (Feb. 13, 1998) [hereinafter Skull Valley Band SSWS First Intervention Petition Supplement Response]; Applicant's Answer to Amended Petition of [SSWS] (Feb. 13, 1998) [hereinafter PFS SSWS First Intervention Petition Supplement Response].

Thereafter, in accordance with a further Board directive, SSWS filed a final intervention petition supplement setting forth its contentions for litigation. In addition, it provided further information concerning its Salt Lake City member and asserting that, if SSWS was not entitled to intervention as of right, it should be granted discretionary intervention status. See Amended and Supplemental Petition of [SSWS] to Intervene (Feb. 27, 1998) [hereinafter SSWS Second Intervention Petition Supplement]. The State and the staff again opposed SSWS's participation, while PFS and the Skull Valley Band continued to support its admission. See [State] Response to [SSWS] Amended and Supplemental Petition to Intervene (Mar. 9, 1998) [hereinafter State SSWS Second Intervention Petition Supplement Response]; NRC Staff's Response to "Amended and Supplemental Petition of [SSWS]" (Mar. 9, 1998) [hereinafter Staff SSWS Second Intervention

Petition Supplement Response]; Applicant's Answer to Amended and Supplemental Petition of [SSWS] (Mar. 9, 1998) [hereinafter PFS SSWS Second Intervention Petition Supplement Response]; [Skull Valley Band] Memorandum in Support of Petition of [SSWS] and the Atlantic Legal Foundation to Intervene (Mar. 9, 1998) [hereinafter Skull Valley Band SSWS Second Intervention Petition Supplement Response].

Also following the prehearing conference, the State, PFS, and the staff submitted a series of Board-approved pleadings concerning the admissibility of the State's nine security contentions and its three-late filed contentions. See [State] Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I (Feb. 11, 1998) [hereinafter State Security Plan Contentions Reply]; [State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF (Feb. 11, 1998) [hereinafter State Contentions EE and GG Reply]; NRC Staff's Response to "[State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF" (Feb. 23, 1998) [hereinafter Staff State Contentions EE and GG Surreply]; Applicant's Answer to [State] Reply Concerning Late-Filed Contentions EE and GG (Feb. 23, 1998) [hereinafter PFS State Contentions EE and GG Surreply]. These three participants

also submitted responses to the Castle Rock rule waiver petition, with the State supporting the petition and PFS and the staff opposing it. See [State] Response to [Castle Rock] Non-Application or Waiver of Commission Regulations, Rules and General Determinations (Feb. 18, 1998) [hereinafter State Castle Rock Waiver Petition Response]; Applicant's Answer to Castle Rock's Petition for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [PFS Castle Rock Waiver Petition Response]; NRC Staff's Response to Petition of [Castle Rock] for Non-Application of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [hereinafter Staff Castle Rock Waiver Petition Response].

G. Designation of Separate Board to Consider Physical Security Contentions

On March 26, 1998, the Chief Administrative Judge issued a notice establishing a separate three-member Atomic Safety and Licensing Board to consider and rule on all matters concerning the PFS physical security plan. See 63 Fed. Reg. 15,900, 15,900 (1998). Under the terms of that notice, this Board retains jurisdiction over all other issues relating to the PFS application. See id.

State contentions Security-A through Security-I fall within the jurisdiction of the recently established PSP

Board. As a consequence, that Board will rule on the admissibility of those nine contentions.²

With the materials described above before us, we turn to the questions of the intervening participants standing, the admissibility of their proffered, non-PSP contentions, and the efficacy of the Castle Rock rule waiver petition.

II. ANALYSIS

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. See 10 C.F.R. §§ 2.714(a)(1)-(2), (b)(2). Further, the Commission has recognized that, notwithstanding a potential party's failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2),

² Currently pending with the Chief Administrative Judge is a PFS motion seeking reconsideration of his action creating the new PSP Board. See Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters (Apr. 6, 1998).

CLI-76-27, 4 NRC 610, 614-17 (1976). In this instance, the different intervening participants have sought to establish they meet these requirements for party status.³

A. Late-Intervention/Standing

1. Standards Governing Late-Intervention and Standing

At the threshold, each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) support accepting the petition. Those factors include: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby

³ In addition, agency rules of practice afford states, counties, and municipalities that do not seek or qualify for full party status the opportunity to participate in proceedings in which they have an interest. As interested governmental entities, they are afforded the opportunity to introduce evidence or interrogate witnesses, albeit without any requirement to take a position regarding any of the issues that are the subject of litigation. See id. § 2.715(c).

Both Confederated Tribes and the Skull Valley Band have argued, in the alternative, they are entitled to participate as an interested governmental entity. See Confederated Tribes/Pete Petition at 2; Skull Valley Band Petition at 2-3. Because we find both Confederated Tribes and the Skull Valley Band have standing, and neither has expressed any interest in participating regarding any issue without taking a position on that issue, we see no reason to reach the issue whether, as a federally-recognized Native American tribe, either is entitled to interested governmental entity status under section 2.715(c).

the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Relative to the question of standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, when, as here, an organization such as Confederated Tribes or OGD seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board

must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

Even if a petitioner fails to comply with these requirements to demonstrate its standing as of right, it is not necessarily deprived of the opportunity to obtain party status in an agency adjudicatory proceeding. The Commission has recognized that a petitioner can be granted party status, as a matter of discretion, based upon the presiding officer's consideration of the following factors:

- (a) Weighing in favor of allowing intervention --
 - (1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- (b) Weighing against allowing intervention --
 - (4) The availability of other means whereby petitioner's interest will be protected.

- (5) The extent to which the petitioner's interest will be represented by existing parties.
- (6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Pebble Springs, CLI-76-27, 4 NRC at 616.

We apply these general guidelines in looking to each of the petitioners' standing presentations and the argument of SSWS as to why its January 1998 petition for intervention should be accepted even though late-filed.

2. State of Utah

DISCUSSION: State Petition at 9-18; PFS State Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: The reservation of the Skull Valley Band upon which the PFS facility it to be constructed is located within the borders of the State of Utah. The State's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing in this proceeding.

3. Castle Rock

DISCUSSION: Castle Rock Petition at 6-14; PFS Castle Rock Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: Castle Rock Land, Skull Valley, and Ensign Ranches are all business entities involved in farming and ranching in the Skull Valley area. Castle Rock owns, and Ensign Ranches leases and operates, a farm/ranch that is adjacent to the Skull Valley Band reservation less than 2000 feet from the boundary of the proposed PFS facility. Skull Valley owns, and Ensign Ranches leases and operates, a farm/ranch that is located within four miles of the north boundary of the Skull Valley Band reservation. These properties also are located along the proposed road transportation route to the facility. These entities asserted health, safety, and environmental interests relative to this property are sufficient to establish their standing in this proceeding.

4. OGD

DISCUSSION: OGD Petition at 7-17; PFS OGD Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: OGD is a group consisting of members of the Skull Valley Band or other Native Americans who oppose the PFS proposal. Attached to the group's petition are the affidavits of four members of the Skull Valley Band, each of whom states that OGD is authorized to represent his or her interests. All four reside on the Skull Valley Band reservation between 4000 feet and two and one-half miles from the proposed PFS facility. These individuals' asserted health, safety, and environmental interests and their

agreement to permit OGD to represent their interests are sufficient to establish OGD's standing to intervene in this proceeding.

5. Confederated Tribes/Pete

DISCUSSION: Confederated Tribes/Pete Petition at 5-10; PFS Confederated Tribes/Pete Petition Response at 14-20; Staff Confederated Tribes/Pete Petition Response at 8-14; Confederated Tribes/Pete First Supplemental Memorandum at 2-5; PFS Confederated Tribes/Pete First Supplemental Memorandum Response at 4-15; Staff Confederated Tribes/Pete First Supplemental Memorandum Response at 2-9; Confederated Tribes/Pete Second Supplemental Memorandum at 1-2; Skull Valley Band Confederated Tribes/Pete Second Supplemental Memorandum Response at 1-3; Staff Confederated Tribes/Pete Second Supplemental Memorandum Response at 2-4; Tr. at 10-26.

RULING: In their initial petition, the Confederated Tribes and Mr. Pete describe the Confederated Tribes as a federally recognized sovereign entity that consists of approximately 450 members. About half its membership resides on the Tribe's reservation, which straddles the Utah/Nevada border approximately seventy-five miles west of their Skull Valley Band "cousins" reservation that is to be the PFS ISFSI site. Most of the remainder of Confederated Tribes members live in communities surrounding the Confederated Tribes' reservation.

In his affidavit accompanying the petition, Mr. Pete states he is Chairman of the Confederated Tribes Business Council, its governing body, and seeks admission both in his official capacity and as an individual. Mr. Pete describes a vast 7.2 million acre area that includes both the Confederated Tribes and the Skull Valley Band reservations as the Goshute's aboriginal area in which Goshutes have hunted, fished, gathered, and lived for some time. He also states that activities such as hunting, fishing, and gathering are undertaken by Confederated Tribes members, including himself, in "the vicinity" of the Skull Valley Band reservation. Confederated Tribes/Pete Petition, Affidavit in Support of Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Aug. 28, 1997) at 16. He asserts that his health, safety, and environmental interests as well as those of Confederated Tribes would be adversely impacted by the planned PFS facility in Skull Valley.

In their subsequent supplemental memoranda on standing, these petitioners provide affidavits from two additional Confederated Tribes members, Genevieve Fields and Chrissandra Reed, who describe various contacts Confederated Tribes members have with the Skull Valley Band reservation; express concern about the health, safety, and environmental impacts of the proposed PFS facility; and authorize the Confederated Tribes and Chairman Pete to represent their

interests in this proceeding. More specifically, Ms. Reed states that her three-year-old granddaughter, who resides with her and is a member of the Confederated Tribes, visits Ms. Reed's cousins who live on the Skull Valley Band reservation approximately every other week. These visits last from one night to up to two weeks. Ms. Reed asserts that, as her granddaughter's legal guardian, she is concerned about the health and safety impacts of the facility upon her granddaughter during the child's visits. Ms. Reed further declares that she visits the Skull Valley Band reservation eight to ten times a year herself.

In resolving the question of standing for Confederated Tribes and Mr. Pete, any assertion of standing based on the general interests of Confederated Tribes or its members in Goshute "aboriginal lands" flies is inconsistent with the congressionally recognized status of the Confederated Tribes and the Skull Valley Band as distinct entities with separate reservations. Standing must, therefore, be established based on contacts of individual Confederated Tribes members with the Skull Valley Band reservation and the PFS facility located there. Chairman Pete's assertion he engages in activities in "the vicinity" of the Skull Valley reservation is too general to provide him with standing as of right individually or in a representational capacity.⁴ See Atlas

⁴ Chairman Pete has made no attempt to seek
(continued...)

Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (description of activities as "near," in "close proximity," or "in the vicinity" of facility in question insufficient to establish standing), aff'd, CLI-97-8, 46 NRC 21 (1997). The affidavit of Confederated Tribes member Genevieve Fields suffers from a similar deficiency because it fails to describe any recent activities she personally engages in on the Skull Valley Band reservation.

In contrast, Ms. Reed's two affidavits describe a pattern of visits onto the Skull Valley Band reservation by her and her granddaughter, for whom she acts as legal guardian, that bring one or both of them within distances of the facility we have found sufficient to provide standing for other participants. The record does contain information suggesting the visits by Ms. Reed and her granddaughter are not as frequent as she described. See PFS Confederated Tribes/Pete First Supplemental Memorandum Response, exh. 1, at 1-2. There also are conflicting claims about whether Ms. Reed's granddaughter will continue to visit her relatives on the Skull Valley Band reservation, albeit with the representation that such visits have not been terminated by the Skull Valley Band or any Band member. See Tr. at 23-26.

After reviewing all this information "in the light most favorable to the petitioner," we are unable to conclude that

⁴(...continued)
discretionary intervention status.

the pattern of familial association that brings Ms. Reed and her minor granddaughter onto the Skull Valley Band reservation to visit Ms. Reed's cousins has become so attenuated as to provide an insufficient basis for standing for Ms. Reed or her minor granddaughter, whose legal interests Ms. Reed represents as guardian. Having been authorized to represent Ms. Reed's interests, Confederated Tribes thus has standing to participate in this proceeding.

6. Skull Valley Band

DISCUSSION: Skull Valley Band Petition at 1-3; PFS Skull Valley Band Petition Response at 4-7; Staff Hearing Petitions Response at 4-5.

RULING: The Skull Valley Band, a federally recognized American Indian tribe, owns and will lease the land upon which the PFS facility is to be built. The Skull Valley Band's verified petition, which is signed by the three-member tribal Executive Committee that is elected by all adult voting members of the Skull Valley Band and authorized to conduct the tribe's daily business, declares the Band seeks to participate as a party in any proceeding that may be convened to protect its legal, health, safety, cultural, and financial interests.

Standing under 10 C.F.R. § 2.714 is not predicated on the position a petitioner wishes to take vis a vis a pending licensing application. Rather, it turns on the petitioner's ability to show that it has one or more cognizable interests

that will be adversely impacted if the proceeding has one outcome rather than another. See Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). In this instance, the Skull Valley Band has shown it and its members residing on the reservation have cognizable interests that will be affected adversely by one of the possible outcomes of this proceeding. The Skull Valley Band therefore has established its standing.

7. SSWS

a. Late-Filing Standards

DISCUSSION: SSWS Intervention Petition at unnumbered 1; SSWS Revised Intervention Petition at unnumbered 1; SSWS First Intervention Petition Supplement at unnumbered 1; State SSWS First Intervention Petition Supplement Response at 4-8; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2; Staff SSWS First Intervention Petition Supplement Response at 4-12; SSWS Second Intervention Petition Supplement at unnumbered 21-26; State SSWS Second Intervention Petition Supplement Response at 3-8; Skull Valley Band SSWS Second Intervention Petition Supplement Response at 5; Staff SSWS Second Intervention Petition Supplement Response at 5-9.

RULING: Of the participants now before us, only SSWS filed its intervention petition out of time. Its intervention petition was submitted more than four months

beyond the deadline specified in the agency's July 21, 1997 notice of opportunity for hearing. See 62 Fed. Reg. at 41,099. SSWS therefore must demonstrate that a balancing of the five factors in 10 C.F.R. § 2.714(a)(1)(i)-(v) weigh in favor of permitting late filing as it seeks to intervene either as of right or a matter of discretion.⁵ For the reasons outlined below, we find SSWS has failed to meet its burden in this regard.

On the first and most important factor -- good-cause for filing late -- SSWS fails to make a convincing showing. SSWS makes no assertions regarding the adequacy of the agency's notice. This is not surprising. Putting aside the fact that Federal Register notice generally is considered constructive notice to all residents of the United States, see 44 U.S.C. § 1508, any SSWS claim regarding a lack of actual notice would be problematic in the face of the State's showing in its first responsive pleading, which SSWS does not controvert, that one of SSWS's members, as a Utah Radiation Control Board official, received a copy of the Federal Register hearing opportunity notice on the PFS application shortly after the notice was issued.

⁵ Although there apparently is no definitive authority on whether a filing seeking discretionary intervention submitted beyond the deadline for filing intervention petitions must meet the late-filing standards, we find nothing in the general terms of 10 C.F.R. § 2.714 governing intervention petitions that would exempt a discretionary intervention request from its late-filing provisions.

SSWS instead attempts to justify its late filing as a reasonable failure to anticipate that members of the Utah university community would not be willing to discuss the scientific merits of the PSF facility. This assertion, however, does not account for the precept that the failure of some other group to "carry the ball" does not constitute good cause for late filing. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsid. denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd, Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 498 U.S. 896 (1990).

Thus lacking good cause for its late filing, SSWS must make a particularly strong showing on the other four factors. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977) (citing cases). Regarding factor two -- other means to protect the petitioner's interests -- despite the general rule that the ability to file 10 C.F.R. § 2.715(a) limited appearance statements or otherwise provide a group's expertise to other participants is not pertinent because it gives insufficient regard to the value of adjudicatory participation rights, see Duke Power Co. (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 & n.7 (1979), in this

instance, as the staff points out, the existence of those outlets has more resonance given the interests SSWS purports to champion. As is outlined below relative to SSWS's standing, the interests of SSWS and its members are not rooted in any particular concern about the health, safety, or environmental impacts of the PFS ISFSI upon those members. Instead, theirs is an academic and professional interest in bringing to bear SSWS members' scientific expertise to assure that record-development is "correct" and proceeds in a manner that does not "misrepresent and demean science and the scientific community." SSWS First Intervention Petition Supplement at unnumbered 2. So too, under factor four -- the extent to which the petitioner's interest will be represented by other participants -- while staff interests generally are assumed not to be coextensive with those of a private petitioner, see Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174-75 & n.22 (1983), in this instance SSWS's interest in ensuring the Board has "an objective presentation of the scientific evidence" by those without a "financial or political interest in the outcome," SSWS Second Supplemental Petition at unnumbered 25, 28, suggests SSWS sees itself fulfilling a role that, at least in part, mirrors the staff's general pursuits. Accordingly, these two factors, which in any event are accorded less significance in the balance, see Texas Utilities Electric

Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993), are, at best, minor in terms of the weight they afford to the "acceptance" side of the balance.

Factor three -- assistance in developing a sound record -- appears initially to be the strongest item supporting late acceptance of this petition. In its "contentions" provided in its last supplemental filing, SSWS states its position with respect to a number of the pending contentions filed by other participants, identifies prospective witnesses for those issues from among its members, and provides professional qualification statements for most of those witnesses that demonstrate considerable expertise in a variety of scientific and engineering disciplines that are relevant to the issues raised in this proceeding. As the State point out, however, this SSWS showing is flawed because it all too often reflects a lack of knowledge, understanding, or concern about the particulars of the PFS application, the focal point of this proceeding. This, in turn, suggests that the group's input will not be useful in helping to resolve the issues in this proceeding, which fundamentally deals with adequacy of the PFS proposal. Thus, this factor is, at best, also minor in terms of the weight it provides in favor of accepting the petition.

Finally, we look to factor five -- extent to which a late petitioner's participation will broaden the issues or delay the proceeding -- which, like factor three, generally is accorded more significance among the four "non-good cause" factors. At first blush, this factor too would appear to weigh in favor of accepting the late-filed application. Albeit four months late and filed only a week before the long-scheduled initial prehearing conference, the SSWS petition nonetheless was submitted before contentions were admitted. Consequently, the timing of the actual litigation of this proceeding up to this point has not been substantially affected, other than the additional time it has taken this Board to rule on the SSWS petition in conjunction with those that were timely filed. Moreover, given the scope of SSWS's proffered "contentions," in which it provides its views on a number of the other petitioners' contention, and the group's repeated assertion it intends only to provide clarity and perspective to existing issues, its petition would not appear to "broaden" the issues, at least in the conventional sense.

At the same time, we perceive a not insubstantial risk that by the very nature of its more "academic" interest in this proceeding and its own organizational structure, SSWS will "broaden" the issues in or otherwise delay this proceeding as it goes forward. For instance, SSWS has asked to be allowed "to participate in the preparation (and peer

review) of the Commission's Safety and Environmental reports to the extent consistent with this intervention." SSWS First Intervention Petition Supplement at unnumbered 3. This suggests a desire to cut a somewhat wider swath across this proceeding than simply responding to admitted contentions. SSWS also declares that in addressing any issues in the proceeding, it will prepare and circulate the proposed written comments among the twenty or so members of the group with the intent of arriving at a "group report" and circulate any oral comments by its spokesman for "subsequent checking." Id. at 1. Such "litigation by committee" could broaden or delay the proceeding by creating the potential for differing views from the same participant and by forcing the Board, if it wants the input of the "group," to set schedules that will accommodate group consultation.

Utilizing its authority to structure intervenor participation, the Board could attempt to mitigate these potential broadening and delay elements by, for instance, requiring SSWS to present only a single, organizational position under strict deadlines. But to do so may well impair SSWS's chosen "peer review" style of record development in ways that would be administratively and substantively deleterious to its stated goals. Given the uncertainty created by SSWS's own organizational structure,

we conclude that factor five likewise provides little if any weight in favor of accepting the SSWS late-filed petition.

Considering in sum all five factors, we find the attenuated showings under factors two, three, four, and five do not provide the type of "compelling" demonstration that is necessary to overcome the total lack of good cause for the late filing of the SSWS intervention petition. SSWS thus has failed to establish that, on balance, its late-filed intervention petition should be accepted.

b. Standing as of Right

DISCUSSION: SSWS Intervention Petition

at unnumbered 2-3; SSWS Revised Intervention Petition at unnumbered 2-3; SSWS First Intervention Petition Supplement at unnumbered 2-3; State SSWS First Intervention Petition Supplement Response at 9-14; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2-4; Staff SSWS First Intervention Petition Supplement Response at 16-20; State SSWS Second Intervention Petition Supplement at 8-9; Staff SSWS Second Intervention Petition Supplement Response at 9-10.

RULING: Even if SSWS had established that its late-filed intervention petition should be accepted, it still would not be entitled to party status in this proceeding as of right because, as we describe below, it has failed to establish its standing to intervene.

Because it seeks representational standing, SSWS must show that one or more of its members who has authorized it to represent him or her in this proceeding has or will suffer cognizable injury in fact as a result of the proposed PFS licensing action.⁶ Unlike the other petitioners, however, SSWS has not alleged there is any injury in fact to any of its members by reason of their proximity to the proposed facility. Indeed, the only PFS member listed as residing in the State of Utah lives and works in Salt Lake City, more than fifty miles from the PFS site. This is well beyond the range within which we have found impacted health, safety, or environmental interests. See supra pp. 27. Nor has there been any showing that he, or any other member of SSWS, engages in recreational or other activities anywhere near the PFS site.

In fact, while expressing support for the application, SSWS has made no showing that the grant or denial of the PFS request would have any impact on any interests of its members, even financial, that are normally put forth as a

⁶ The State makes the point that the SSWS petition, as supplemented, is not accompanied by any affidavits of members declaring the organization has the right to represent their interests. The closest thing, the State asserts, is a February 3, 1998 affidavit of Robert J. Hoffman that appoints SSWS spokesman Wilson as his representative and was not timely filed. See State SSWS First Intervention Petition Supplement Response at 3 n.1. Because we find SSWS has failed to demonstrate any of its members has the requisite injury in fact to provide it with organizational standing as of right, we need not determine whether this affidavit is adequate.

basis for standing in agency proceedings. Rather, the primary interest SSWS and its members seek to espouse is the desire as "nuclear scientists and administrators" with considerable expertise and experience but without a "financial or political interest in the outcome" of this proceeding to "inform the citizens of the state [of Utah] and this licensing board" about scientific and engineering principles that may be pertinent to the matters at issue. SSWS Second Intervention Petition Supplement at unnumbered 2, 28. This interest in presenting "sound science" is laudable, but it provides no basis for SSWS's standing either as an interest cognizable for standing purposes or as one that will be the subject of actual or imminent injury upon the grant or denial of the license. See Sheffield, ALAB-473, 7 NRC at 743 (legal and nuclear organizations seeking to support low-level waste site renewal application lack standing because no showing that granting or denying application would injure any cognizable interest of either organization or its members); Allied General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976) (when no showing of injury to cognizable interests of its individual members by licensing action, asserted ability of civil liberties organization and its members to provide information and data on civil rights issues inadequate to

provide basis for standing). SSWS thus lacks standing o
intervene as of right in this proceeding.

c. Discretionary Standing

DISCUSSION: SSWS Intervention Petition
at unnumbered 1; SSWS Revised Intervention Petition at
unnumbered 1-2; SSWS First Intervention Petition Supplement
at unnumbered 1-2; State SSWS First Intervention Petition
Supplement Response at 15-17; OGD SSWS First Intervention
Petition Supplement Response at unnumbered 4-5; Skull Valley
Band SSWS First Intervention Petition Supplement Response
at 3-4; PFS SSWS First Intervention Petition Supplement
Response at 1-5; SSWS Second Intervention Petition
Supplement at unnumbered 26-28; State SSWS Second
Intervention Petition Supplement Response at 9-12; PFS
Second Intervention Petition Supplement Response at 1-9;
Skull Valley Band SSWS Second Intervention Petition
Supplement Response at 5; Staff SSWS Second Intervention
Petition Supplement Response at 10-12.

RULING: Even without standing as of right, however,
SSWS could become a party if it can fulfill the requirements
for discretionary standing set out in the Commission's
Pebble Springs decision. After analyzing the guidelines in
that decision, we again conclude SSWS is not eligible for
party status.

Of the six Pebble Springs factors for assessing a
discretionary intervention request, factors one, four, five,

and six are basically coextensive with last four factors of the late-filing standard of 10 C.F.R. § 2.714(a)(1), with Pebble Springs factor one -- assistance in developing a sound record -- having significant sway. See Pebble Springs, CLI-76-27, 4 NRC at 616-17. We assess these four individually as we did in section II.A.7.a. above, likewise concluding they provide little support for admitting SSWS as a party.

This leaves factor two -- nature and extent of petitioner's interest in the proceeding -- and factor three -- possible effect of any order entered on the petitioner's interest -- to be considered. In both instances, these are not positive factors relative to SSWS. As we have noted above, although expressing support for the application, the interests SSWS champions are primarily academic, tied to its concern about ensuring the dissemination of "correct" scientific and engineering information. The generalized interests of SSWS in overseeing the record simply are not of the type that support permitting discretionary intervention.

In summary, given SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the

real possibility SSWS participation will inappropriately broaden or delay the proceeding (factor six), we find discretionary intervention is not appropriate in this instance.⁷

B. Contentions

1. Contention Admissibility Standards

a. Pleading Requirements

i. General Requirements. For a proffered legal or factual contention to be admissible, it must be plead with specificity. In addition, the contention's sponsor must

⁷ Both PFS and SSWS seek to support SSWS's discretionary admission by reference to the Appeal Board's decision in Sheffield, ALAB-473, 7 NRC at 743-44, remanding to the Licensing Board the petition of a local chapter of the American Nuclear Society (ANS) for consideration of whether it should be afforded discretionary intervention. This intervenor subsequently was admitted to the proceeding. See Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 300 n.1 (1978). Although there is no published opinion providing the basis for Licensing Board's ruling admitting the local ANS chapter, SSWS has quoted a portion of the Board's unpublished decision in its final intervention petition supplement. See SSWS Second Intervention Petition Supplement at unnumbered 30.

Besides being of questionable significance as an unpublished decision, the quoted portion of the Licensing Board's Sheffield ruling tells us nothing about the Board's analysis of the Pebble Springs factors. Lacking any knowledge of the exact basis for that Board's determination on remand, we simply note that any number of factors, such as a further showing about the nature of the organization's interest, may have counseled a different result there. See Sheffield, ALAB-473, 7 NRC at 741 & n.3 (many of local ANS organization's members assertedly involved in work utilizing the facility in question and whether they would be harmed by license termination or conditions would depend on nature of work and availability of other similar facilities).

provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. See 10 C.F.R.

§ 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief.

Id. § 2.714(d)(2).

From these general principles, agency caselaw and regulations suggest there are a number of more specific corollaries regarding contention admissibility, which can be summarized as follows:

ii. Challenges to Statutory Requirements/Regulatory Process/Regulations. An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.758; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states

the petitioner's views about what regulatory policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20-21 & n.33.

iii. Challenges Outside Scope of Proceeding. The scope of an adjudicatory proceeding as specified by the notice of hearing and contentions that deal with matters outside that defined scope must be rejected. See, e.g., Public Service Co. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

iv. Materiality. Any issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief. See 10 C.F.R. § 2.714(d)(2)(ii); 54 Fed. Reg. 33,168, 33,172 (1989). This requirement of materiality embodies the notion that an alleged error or deficiency regarding a proposed licensing action must have some significance relative to the agency's general responsibility and authority to protect the public health and safety and the environment. See Seabrook, LBP-82-106, 16 NRC at 1656 (1982) (safety contention "must either allege with particularity that an applicant is not complying with a specified [safety] regulation, or allege with particularity the existence and detail of a substantial

safety issue on which the regulations are silent" (footnote omitted)); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, contentions concerning alleged deficiencies in a decommissioning plan must not only allege and provide sufficient bases to show the deficiencies but also show that the purported deficiencies have "some independent health and safety significance" such that reasonable assurance of the public health and safety with respect to decommissioning is no longer assured. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75, aff'd, CLI-96-7, 43 NRC 235 (1996); see also Yankee Nuclear, CLI-96-7, 43 NRC at 258 ("Petitioners must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke."). In this same vein, when challenging the adequacy of a decommissioning funding plan cost estimate, a contention lacks materiality absent an additional showing there is not reasonable assurance the amount in dispute can be paid, thereby avoiding a mere formalistic redraft of the funding plan. See Yankee Nuclear, CLI-96-1, 43 NRC at 9. Similarly, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures

for those provisions fails to present a material issue. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

v. Need for Adequate Factual Information or Expert Opinion as Contention Basis. The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); see also Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980). Nor does mere speculation provide an adequate basis for a contention. See Yankee Nuclear, CLI-96-7, 43 NRC at 267. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention. See Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995).

With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Board is not to accept uncritically the assertion that a document or other factual information

or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990); see also Yankee Nuclear, LBP-96-2, 43 NRC at 90 ("[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show"); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) ("where a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source"). By the same token, an expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

vi. Failure Properly to Challenge Application. In framing contentions regarding a proposed licensing action, the focus of a petitioner's concern should be the license application. See 10 C.F.R. § 2.714(b)(2)(iii). In this regard, a contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal. See Rancho Seco, LBP-93-23, 38 NRC at 247-48; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991).

b. Scope of Contentions

Although licensing boards generally are to litigate "contentions" rather than "bases," it has been recognized that "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). In this instance, applicant PFS in an effort to provide greater specificity to the various petitioners' contentions restated them by incorporating many of the contention bases as subparts of the contentions. In a number of instances the petitioners objected to these redrafts, but in a several other instances, often after further negotiations and revision, the changes were adopted by the petitioner. As set forth

below, the language of the petitioners' contentions reflects those agreed-upon changes. Moreover, as is outlined below, exercising our authority under 10 C.F.R. § 2.714(f), we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more petitioners appear related or when redrafting would clarify the scope of the contentions.

c. Adoption/Incorporation by Reference

Three of the petitioners, Castle Rock Land/Skull Valley, Confederated Tribes, and the State, have sought to incorporate by reference one or more of the contentions of other participants. As the staff points out, such adoption has been permitted in other proceedings. See Staff Contentions Response at 133 n.82 (citing cases).

We likewise will permit adoption here by Castle Rock Land/Skull Valley and Confederated Tribes, with two caveats. First, if the language of the adopted contention was revised as a result of the process described in section II.B.1.b. above, that is the language that will be considered to be adopted.⁸ Second, as is set forth more fully in section III.A. below, for any contention subject to adoption, a

⁸ Applicant PFS apparently did have discussions with Confederated Tribes concerning language changes in contentions it had adopted and was told Confederated Tribes would advise the Board on its position. See Applicant's Response to Revised Contentions and Proposed Transcript Corrections (Feb. 17, 1998) at 3. We, however, have heard nothing from Confederated Tribes in this regard.

"lead" party is appointed with primary responsibility for marshaling the parties' case relative to that contention.

As to the State, it sought to incorporate by reference all the other participants contentions in a filing submitted well after the November 24, 1997 deadline for filing contentions. See State Adopted Contentions Response at 2. As PFS points out, the State has not addressed the late-filing factors in seeking to add these to the list of contentions it is sponsoring. See PFS State Adopted Contentions Response at 1-2. Because we agree with the applicant, we deny the State's late-filed contentions request.

d. Criteria for Admitting Late-Filed Contentions

Of the contentions discussed below, two (Utah EE and GG) were submitted after the time for filing intervention petition supplements had expired. As such, they must be assessed under a five-factor test to determine whether, on balance, they should be considered even though late filed. As set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest

will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).

With these general precepts before us, we turn to each of the petitioners' claims regarding their contentions.

2. State Contentions

Utah A -- Statutory Authority

CONTENTION: Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

DISCUSSION: State Contentions at 3-9; PFS Contentions Response at 22-25; Staff Contentions Response at 6-14; State Contentions Reply at 9-15; Tr. at 45-64.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's existing regulatory provisions or rulemaking-associated generic determinations. See section II.B.1.a.ii. above. Nothing in the language of the 10 C.F.R. Part 72 provisions describing an ISFSI and the "persons" authorized to apply for and be issued a license to construct and operate an ISFSI, indicates PFS is ineligible to seek such permission. See 10 C.F.R. § 72.2(b); id. § 72.3 (definitions of "Independent spent fuel storage installation" and "Person"); id. § 72.6(a). Indeed, when adopting Part 72 in 1980 the Commission specifically contemplated the possibility of

stand alone, "away from reactor" sites as well as the possibility that there could be "large" installations. See 45 Fed. Reg. 74,693, 74,696, 74,698-99 (1980). Thereafter, when the Commission revised Part 72 following the passage of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 5841, 10101-10270 -- the lodestone for the State's assertion the Board lacks jurisdiction -- it made revisions to accommodate the statutory provisions for a monitored retrievable storage (MRS) installation to be constructed and operated by the Department of Energy (DOE). It did not, however, make changes to the original scope of Part 72 that would preclude the creation of an installation such as that now contemplated by PFS. In these circumstances, in which the Commission clearly has established the scope of Part 72, inquiry into that determination is beyond our authority.⁹

Utah B -- License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that:

1. The Rowley Junction operation is not merely part of the transportation operation but a de facto

⁹ Although we agree with petitioner Confederated Tribes point that an adjudicatory body generally has the authority to consider its own jurisdiction, see Tr. at 100, in this instance we do not find sufficient ambiguity in the Commission's regulatory declaration of its jurisdiction (and concomitantly ours) to permit further inquiry into that question consistent with the dictates of 10 C.F.R. § 2.758.

interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel for extended periods of time.

2. The anticipated volume and quantity of fuel shipments that will pass through Rowley junction is a large magnitude that is unlike the intermodal transfer operations that previously occurred with respect to shipments of spent nuclear fuel from commercial nuclear power plant sites.
3. The volume of fuel shipments will not be capable of passing directly through Rowley Junction and some type of temporary storage of casks will be necessary at the site of the ITP, thus, making Rowley Junction a spent nuclear fuel storage facility. Further PFS fails to discuss the number of heavy haul trucks that will be available to haul casks, the mechanical reliability of these units, and their performance under all weather conditions which is necessary to analyze the amount of queuing and storage that will occur at Rowley Junction.
4. Because the ITP is stationary, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

DISCUSSION: State Contentions at 10-15; PFS Contentions Response at 25-42; Staff Contentions Response at 14-19; State Contentions Reply at 15-19; Tr. at 133-63.

RULING: Paragraphs two and three of this contention are inadmissible in that they and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility. See section II.B.1.a.ii. above. Regarding paragraphs one and four, as is relevant here, the Part 71 regulations authorize

transportation of spent fuel under a general license for a Commission licensee or "carrier," which is defined as a "common, contract, or private carrier," that complies with the general controls and procedures requirements, quality assurance measures, and other provisions of Subparts A, G, and H of Part 72. 10 C.F.R. §§ 71.0(d), 71.4, 71.12. In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. See State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62.

This contention is admitted, albeit limited to paragraphs one and four.¹⁰ Revised language reflecting this ruling is set forth at page 1 of Appendix A to this memorandum and order.

¹⁰ Although PFS suggests the issue of license authority over the Rowley Junction ITP is outside the scope of this proceeding, see PFS Contentions Response at 158-59, this seemingly runs contrary to the staff's apparent belief that it may, in the context of acting on the PFS license, exert regulatory authority relative to PFS activities at Rowley Junction, see Staff Contentions Response at 19 n.29.

Utah C -- Failure to Demonstrate Compliance With NRC Dose Limits.

CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. § 72.106(b) can and will be complied with in that:

1. License Application uses data for HI-STORM and TranStor casks that have not been fully reviewed or approved by the NRC.
2. License Application erroneously states that the loss of confinement accident is not credible.
3. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.
4. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
5. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.
6. In the dose calculation, PFS appears to assume local residents will be evacuated until contamination is removed, although this is not expressly discussed in the License Application.
7. PFS fails to calculate doses to children
8. PFS uses the ICRP-30 dose model which is outdated and inadequate. PFS should be required to use the new ICRP-60 dose model.

DISCUSSION: State Contentions at 16-21; PFS Contentions Response at 42-58; Staff Contentions Response at 19-23; State Contentions Reply at 20-28; Tr. at 165-203.

RULING: Paragraph one of this contention is inadmissible in that it and its supporting basis impermissibly challenge the Commission's regulatory scheme, provisions, or rulemaking-associated generic determinations,

which establish a separate cask design approval process under rulemaking procedures and cask design approval prior to licensing of the PFS facility.¹¹ See section II.B.1.a.ii. above. Paragraph two also is inadmissible in that it and its supporting basis lack materiality; lack adequate factual and expert opinion support; and/or impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, by seeking to litigate transportation-related sabotage matters. See section II.B.1.a.i., ii., iv., v. above. Paragraph six is inadmissible in that it and its supporting basis fail to provide any support, from the application or otherwise, for its assertion there is an evacuation assumption in the PFS application. See section II.B.1.a.i., v., vi. above. Finally, paragraphs seven and eight are inadmissible in that they and their supporting bases impermissibly challenge the agency's regulatory standards or rulemaking-associated generic determinations, including 10 C.F.R. Part 20, and make no showing that, even taking into account dose rates to children and/or the ICRP-60 dose model, the Part 20

¹¹ In discussing this paragraph of the contention, the State asserts that a central concern is that any Part 72 license not be issued until the certification process is completed for the storage casks PFS proposes to use at its facility, See State Contentions Reply at 20-21. The staff agrees that this will not happen. See Tr. at 174-75, 183-84. As a consequence, we find nothing to litigate regarding this paragraph.

standards will not be met. See section II.B.1.a.i., ii., iv., v.

Paragraphs three, four, and five are admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. A revised contention reflecting these rulings is set forth at page 1 of Appendix A to this memorandum and order.

Utah D -- Facilitation of Decommissioning

CONTENTION: The proposed ISFSI is not adequately designed to facilitate decommissioning, because PFS has not provided sufficient information about the design of its storage casks to assure compatibility with DOE repository specifications. Moreover, in the reasonably likely event that PFS's casks do not conform to DOE specification, PFS fails to provide any measures for the repackaging of spent fuel for ultimate disposal in a high level radioactive waste repository. Moreover, PFS provides no measures for verification of whether the condition of spent fuel meets disposal criteria that DOE may impose.

DISCUSSION: State Contentions at 22-26; PFS Contentions Response at 58-68; Staff Contentions Response at 23-26; State Contentions Reply at 28-33; Tr. at 189-219.

RULING: As this contention and its supporting basis allege incompatibility with DOE repository specifications, it is inadmissible because it seeks to challenge the Commission's regulatory program, regulations, or rulemaking-associated generic determinations under which DOE cask criteria, admittedly incomplete at present, need only be addressed as they become available, and has not demonstrated any specific inadequacy in the application's discussion of any existing DOE specifications that creates a

genuine dispute. See section II.B.1.a.i., ii., vi. above. As this contention and its supporting basis assert the need for a facility "hot cell" for spent fuel canister inspection to ensure compatibility with future DOE spent fuel acceptance limits, avoid storage removal operational safety problems, or provide a fuel repackaging capability for fuel transfer to casks compatible with later DOE requirements or for transfer of degraded fuel prior to shipment to a HLW repository, the contention also is inadmissible as impermissibly challenging the agency's regulations or rulemaking-associated generic determinations and lacking the necessary factual information or expert opinion support. See section II.B.1.a.i., ii., v.

Utah E -- Financial Assurance

CONTENTION: Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license.

DISCUSSION: State Contentions at 27-38; PFS Contentions Response at 69-83; Staff Contentions Response at 26-27; State Contentions Reply at 34-38; Tr. at 222-32.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. We note, however, that while differences between the financial qualifications requirements of 10 C.F.R. Part 50, including Appendix C, and those in 10 C.F.R. Part 72 suggest the Part 50 provisions are not applicable in

toto to Part 72 applicants, we agree with the staff that Part 50 should be used as guidance in reviewing PFS's financial qualifications. See Staff Contentions Response at 108 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997)).

Because of the similarity of this contention with Castle Rock 7 and Confederated Tribes F, see infra pp. 109, 144, we consolidate those issue statements as set forth in the revised contention specified at page 1 of Appendix A to this memorandum and order.

Utah F -- Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.

DISCUSSION: State Contentions at 39-41; PFS Contentions Response at 84-91; Staff Contentions Response at 28; State Contentions Reply at 38-40; Tr. at 261-64.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the second portion of the contention's basis concerning physical and mental condition of operators has been resolved/withdrawn. See State Contentions Reply at 39; Tr. at 261-62.

In addition, as is noted below, see infra p. 74, the portion of Utah P (subparagraph b. of paragraph seven) that deals with training for the PFS radiation protection

program, is consolidated with this contention. A revised contention reflecting this ruling is set forth on page 3 of Appendix A to this memorandum and order.

Utah G -- Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

DISCUSSION: State Contentions at 42-51; PFS Contentions Response at 92-101; Staff Contentions Response at 28-30; State Contentions Reply at 40-43; Tr. at 269-80.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, but limited to its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program. The contention's basis two regarding inadequate QA descriptions for PFS quality control over spent fuel canister packaging operations and materials and handling at originating reactor sites, shipping cask materials and construction, and welding on shipping casks and spent fuel canisters is inadmissible as impermissibly challenging the agency's regulatory program, standards, and/or rulemaking-associated generic determinations. See section II.B.1.a.ii. above. So too, the contention's basis three concerning inconsistency between the QA program description and the SAR is inadmissible as lacking materiality. See section II.B.1.a.i., iv. above.

Utah H -- Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110°F.
2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.
3. PFS's projection that average daily temperatures will not exceed 100°F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.
4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.
5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.
6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.
7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

DISCUSSION: State Contentions at 52-59; PFS

Contentions Response at 101-20; Staff Contentions Response at 30; State Contentions Reply at 43-47; Tr. at 280-90.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

Utah I -- Lack of a Procedure for Verifying the Presence of Helium in Canisters

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. §§ 72.122(f) and 10 C.F.R. § 72.128(a), and poses undue risk to the public health and safety, because it lacks a procedure, or any evidence of a procedure, for verifying the presence of helium inside spent fuel canisters.

DISCUSSION: State Contentions at 60-62; PFS Contentions Response at 121-31; Staff Contentions Response at 30-31; State Contentions Reply at 47-49; Tr. at 291-300.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning the need for canister inspection and testing; and/or lack adequate factual information or expert opinion support. See section II.B.1.a.i., ii., v. above.

Utah J -- Inspection and Maintenance of Safety Components, Including Canisters and Cladding

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. §§ 72.122(f) and 72.128(a), and poses undue risk to the public health and safety, because it lacks a hot cell or other facility for opening casks and inspecting the condition of spent fuel.

DISCUSSION: State Contentions at 63-71; PFS Contentions Response at 131-46; Staff Contentions Response at 32-33; State Contentions Reply at 49-53; Tr. at 204-19.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning canister inspection and repair; and/or lack

adequate factual information or expert opinion support. See section II.B.1.a.i., ii., v. above.

Utah K -- Inadequate consideration of credible accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, intermodal transfer site, and transportation corridor along Skull Valley Road, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity.

DISCUSSION: State Contentions at 72-79; PFS Contentions Response at 146-65; Staff Contentions Response at 32-33; State Contentions Reply at 54-58; Tr. at 300-17.

RULING: Relative to the State's assertions regarding the impact on the PFS facility of accidents involving materials or activities at or emanating from the Tekoi Rocket Engine Test facility, Dugway Proving Ground, Salt Lake City International Airport, Hill Air Force Base, and the Utah Test and Training Range, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. Further, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry regarding the State's assertions concerning the impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from the facilities specified above, or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the

Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill.¹² Finally, in connection with the State's assertions regarding lack of consideration of accidents involving trucks or railcars transporting spent fuel casks as they travel to the ITP facility from reactor sites and thereafter along Skull Valley Road, these are inadmissible as impermissibly challenging the basic structure of the agency's regulatory processes, requirements, or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, which places such matters within the ambit of DOT regulation and control.¹³ See section II.B.1.a.ii. above.

A revised contention reflecting this ruling, as well as the consolidation of this contention with Castle Rock 6 and a related portion of Confederated Tribes B, see infra

¹² In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

¹³ In considering this contention, we agree with the staff that the State has not provided any basis for challenging the PFS determination that its facility is sufficiently far from Skull Valley Road that an explosion involving Dugway military ordinance being transported on the road will not exceed the one pound per square inch (psi) overpressure requirement at the facility. See Staff Contentions Response at 33. Further, although the staff observes that portions of the bases for Utah K could be construed as a challenge to the discussion of transportation accident risk in the PFS ER, see id., we do not interpret it that way. Even if it is, however, that same issue is considered below in the context of Utah V.

pp. 107, 142, is set forth at page 4 of Appendix A to this memorandum and order.

Utah L -- Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

DISCUSSION: State Contentions at 80-95; PFS Contentions Response at 165-68; Staff Contentions Response at 33-34; State Contentions Reply at 58-59; Tr. at 331-33.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁴

Utah M -- Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.
2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

¹⁴ In response to a staff concern regarding a portion of the basis for this contention, the State agreed that its contention should not be construed as asking for evaluation of faults other than "capable faults" as they are defined in 10 C.F.R. Part 100, App. A. See Tr. at 332.

DISCUSSION: State Contentions at 96-97; PFS Contentions Response at 168-69; Staff Contentions Response at 34; State Contentions Reply at 59; Tr. at 333-34.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

Utah N -- Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.

DISCUSSION: State Contentions at 98-99; PFS Contentions Response at 169-72; Staff Contentions Response at 34-35; State Contentions Reply at 59-60; Tr. at 334-39, 350.

RULING: Admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry.¹⁵

Utah O -- Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation and decommissioning of the ISFSI and the potential impacts of transportation of spent fuel on groundwater, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

¹⁵ In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

1. Contaminant pathways from the applicant's sewer/wastewater system, the retention pond, facility operations and construction activities.
2. Potential for groundwater and surface water contamination.
3. The effects of applicant's water usage on other well users and on the aquifer.
4. Impact of potential groundwater contamination on downgradient hydrological resources.

DISCUSSION: State Contentions at 100-08; PFS Contentions Response at 172-86; Staff Contentions Response at 35-36; State Contentions Reply at 59-60; Tr. at 339-60.

RULING: Except as it seeks to litigate the groundwater impacts of spent fuel shipments on transportation routes, which is inadmissible as an impermissible challenge to the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, see section II.B.1.a.ii. above, this contention is admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁶

In addition, as is noted below, see infra pp. 110, 112, the similarity of this contention and Castle Rock 8 and 10 warrants consolidating this contention and its supporting bases with those issue statements. The consolidated

¹⁶ In admitting this contention, we include its bases relating to construction-related groundwater impacts and groundwater impacts relative to the Rowley Junction ITP. We note, however, that further litigation on this contention's merits relative to the ITP may be subject to any merits disposition of Utah B.

contention is set forth at page 5 of Appendix A to this memorandum and order.

Utah P -- Inadequate Control of Occupational and Public Exposure to Radiation

CONTENTION: The Applicant has not provided enough information to meet NRC requirements of controlling and limiting the occupational radiation exposures to as low is reasonably achievable (ALARA) and analyzing the potential dose equivalent to an individual outside of the controlled area from accidents or natural phenomena events in that:

1. The Applicant has failed to provide detailed technical information demonstrating the adequacy of it's policy of minimizing exposure to workers as a result of handling casks, nor does it describe the design features that provide ALARA conditions during transportation, storage and transfer of waste. Specifically, if the design has incorporated ALARA concepts, the storage casks used at the ISFSI should have the lowest dose rate.
2. The Applicant has failed to provide an analysis of alternative cask handling procedures to demonstrate that the procedures will result in the lowest individual and collective doses.
3. The Applicant has failed to adequately describe why the Owner Controlled Area boundaries were chosen and whether the boundary dose rates will be the ultimate minimum values compared to other potential boundaries.
4. The Applicant has failed to indicate whether rain water or melted snow from the ISFSI storage pads will be collected, analyzed, and handled as radioactive waste.
5. The Applicant has failed to provide design information on the unloading facility ventilation system to show that contamination will be controlled and workers will be protected in a manner compatible with the ALARA principle. In addition, procedures to maintain and ensure filter efficiency and replace components are not provided.

6. The Applicant has failed to provide adequate or complete methods for radiation protection and failed to provide information on how estimated radiation exposures values to operating personnel were derived to determine if does rates are adequate.
7. The Applicant has failed to describe a fully developed radiation protection program that ensures ALARA occupational exposures to radiation by not adequately describing:
 - a. the management policy and organizational structure to ensure ALARA;
 - b. a training program that insures all personnel who direct activities or work directly with radioactive materials or areas are capable of evaluating the significance of radiation doses;
 - c. specifics on personnel and area, portable and stationary radiation monitoring instruments, and personnel protective equipment, including reliability, serviceability, equipment limitation specifications;
 - d. a program for routine equipment calibration and testing for operation and accuracy;
 - e. a program to effectively control access to radiation areas and movement of radiation sources;
 - f. a program to maintain ALARA exposures of personnel servicing leaking casks;
 - g. a program for monitoring and retaining clean areas and monitoring dose rates in radiation zones to ensure ALARA; and
 - h. specific information on conducting formal audits and review of the radiation protection program.
8. The Applicant has completely failed to include an analysis of accident conditions, including accidents due to natural phenomena, in accordance with 10 C.F.R. §§ 72.104 and 72.126(d).

9. The Applicant has failed to control airborne effluent which may cause unacceptable exposure to workers and the public, Contention T, Basis 3(a) (Air Quality) is adopted and incorporated by reference.

DISCUSSION: State Contentions at 109-13; PFS Contentions Response at 187-206; Staff Contentions Response at 37-39; State Contentions Reply at 61-66; Tr. at 367-80.

RULING: Inadmissible as to all paragraphs except subparagraph b. of paragraph seven in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the applicable ALARA provisions; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iv., v., vi. above. With regard to subparagraph b. of paragraph seven, this portion of the contention is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry and is incorporated into Utah F, which deals generally with PFS training program adequacy. See supra p. 63. The revised contention is set forth at page 3 of Appendix A to this memorandum and order.

Utah Q -- Adequacy of ISFSI Design to Prevent Accidents

CONTENTION: The Applicant has failed to adequately identify and assess potential accidents, and, therefore, the Applicant is unable to determine the adequacy the ISFSI

design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

DISCUSSION: State Contentions at 114-15; PFS Contentions Response at 207-15; Staff Contentions Response at 39-40; State Contentions Reply at 66; Tr. at 390-94.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine material dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iii., v., vi. above.¹⁷

Utah R -- Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site, at the transfer facility, or offsite during transportation in that:

1. PFS has not adequately described the facility, the activities conducted there, or the area in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan, nor has PFS considered specific impediments to emergency response such as flooding, ice, snow, etc.

¹⁷ Some of the bases for this contention rely upon the possibility of accidents at the Rowley Junction ITP, which we have found to be a permissible subject for other State contentions. In this instance, however, the basis for the contention concerns purported accidents involving storage casks rather than shipping casks, the latter being the casks that would be handled at the ITP.

2. PFS has not identified adequate emergency and medical facilities and equipment to respond to an onsite emergency.
 - a. Tooele County capabilities and equipment are not addressed adequately.
 - b. No provision for extra onsite preparedness given time for Tooele County to respond, particularly in adverse weather conditions.
3. The plan was not adequately coordinated with the State or other government (local, county, state, federal) agencies.
 - a. PFS has not supported its claim regarding absence of extremely hazardous substances and that no assistance will be required external to Tooele County.
 - b. PFS does not address transportation accidents or accidents at the intermodal transfer point.
4. PFS has not adequately described means and equipment for mitigation of accidents, because it:
 - a. Does not address how it would procure crane within 48 hours for tip over cask accident.
 - b. Does not adequately support capability to fight fires.
5. The Emergency Plan does not provide adequate detail to meet provisions of Reg. Guide 3.67, § 5.4.1 regarding equipment inventories and locations.

DISCUSSION: State Contentions at 116-22; PFS Contentions Response at 215-36; Staff Contentions Response at 40-49; State Contentions Reply at 66-69; Tr. at 792-803.

RULING: Admitted with regard to paragraph one and subparagraph b. of paragraph three as they relate to the Rowley Junction ITP and subparagraph b. of paragraph four relating to onsite firefighting capabilities as supported by

bases establishing a genuine material dispute adequate to warrant further inquiry.¹⁸ Inadmissible as to all other portions of paragraph one, paragraph two, subparagraph a. of paragraphs three and four, and paragraph five in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iv., v., vi. above.

A revised contention reflecting this ruling is set forth at page 6 of Appendix A to this memorandum and order.

Utah S -- Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to

¹⁸ In admitting this contention as it relates to the Rowley Junction ITP, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

decommission the facility, as required by 10 C.F.R. § 70.3(b).

DISCUSSION: State Contentions at 123-30; PFS Contentions Response at 236-56; Staff Contentions Response at 49-52; State Contentions Reply at 69-74; Tr. at 394-409.

RULING: Admitted as it is supported by bases one, two, four, five, ten, and eleven, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry,¹⁹ with the caveat that for the decommissioning cost estimates at issue under basis four, the costs of nonradiological solid and hazardous waste disposal are a consideration only to the extent necessary for license termination, see 53 Fed. Reg. 24,018, 24,019 (1988). Inadmissible as to the matters specified in bases three, six, seven, eight, and nine provided in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 51.23; lack materiality; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., iv., v. above.

Because of the similarity of the issues raised in this contention and Castle Rock 7, see infra p. 110, the portions of that contention and their supporting bases that

¹⁹ Further litigation on the merits of this contention relative to basis eleven regarding the ITP may be subject to any merits disposition of Utah B.

specifically relate to decommissioning (i.e., paragraphs c. and f.) are hereby consolidated with this contention, which is revised as set forth at page 7 of Appendix A to this memorandum and order.

Utah T -- Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. § 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has failed to show that it is entitled to use the land for the ISFSI site and if it does have such right whether there are any legal constraints imposed on the use and control of the land: the NRC must require the Applicant to fully disclose all provisions of the Applicant's lease with the Skull Valley Band in order to fully evaluate under what conditions that Applicant is entitled to use and control the site.
2. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there; nor has it identified the number of casks expected on each shipment, or explained the effects of rail congestion or whether Rowley Junction has the capacity of handling the expected number of casks; nor has it shown that Union Pacific is willing and capable to handle shipments to Rowley Junction.
3. The Applicant has shown no ability or authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.
4. The Applicant has shown no basis that it is entitled to widen Skull Valley Road or that the proposed 15-foot roadway would satisfy health, safety and environmental concerns nor does the application describe and identify State and local permits or approvals that are required.
5. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. § 51.45 in

that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts in ER 4.3.3 is inadequate; and a state air quality approval order under Utah Code Ann. § 19-2-108 will be required.

6. The Applicant has not addressed the requirement to obtain a Utah Groundwater discharge permit.
7. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements in that the Applicant merely states that it "might" need a Clean Water Act Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor and that it will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.
8. The applicant must show legal authority to drill wells on the proposed ISFSI site and that its water appropriations will not interfere with or impair existing water rights and identify and describe state approvals that are required.

DISCUSSION: State Contentions at 131-43; PFS Contentions Response at 256-82; Staff Contentions Response at 52-53; State Contentions Reply at 74-83; Tr. at 467-94.

RULING: Admissible as to paragraphs two through eight and their supporting bases, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving appropriate governmental (as

opposed to nongovernmental/private) entities.²⁰
Inadmissible as to paragraph one and its supporting basis, which fail to establish with specificity any genuine dispute and impermissibly challenge the Commission's regulatory processes, regulations or rulemaking-associated generic determinations, including those relating to site ownership.²¹ See section II.B.1.a.i., ii. above.

A revised contention reflecting this ruling, as well as the consolidation of all or parts of Castle Rock 10, 12 and 22, see infra pp. 112, 115, 125, is set forth at page 7 of Appendix A of this memorandum and order.

Utah U -- Impacts of Onsite Storage not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

DISCUSSION: State Contentions at 142-43; PFS Contentions Response at 282-92; Staff Contentions Response at 53-54; State Contentions Reply at 83-84; Tr. at 525-50.

²⁰ Further litigation on the merits of this contention relative to paragraph two regarding the ITP may be subject to any merits disposition of Utah B. In this regard, however, we are unable to find admissible the language of paragraph two that relies on rail shipment volume as a basis for the contention. As with Utah B, see supra p. 57, we consider this an insufficient basis to merit the admission of paragraph two. Accordingly, we appropriately revise paragraph two of Utah T, which is set forth at page 7 of Appendix A to this memorandum and order.

²¹ Regarding this contention, the Board also notes that an allegation concerning compliance with the requirements of 10 C.F.R. Part 75 was withdrawn. See Tr. at 486-87.

RULING: Admissible as to basis one, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry.²² Inadmissible as to bases two, three, and four proffered in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenging the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

Utah V -- Inadequate Consideration of
Transportation-Related Radiological Environmental
Impacts

CONTENTION: The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that:

1. In order to comply with NEPA, PFS and the NRC Staff must evaluate all of the environmental impacts, not just regional impacts, associated with transportation of spent fuel to and from the proposed ISFSI, including preparation of spent fuel for transportation to the ISFSI, spent fuel transfers during transportation to the ISFSI, transferring and returning defective casks to the originating nuclear power plant, and transfers and transportation required for the ultimate disposal of the spent fuel.
2. PFS's reliance on Table S-4 is inappropriate and inadequate. 10 C.F.R. § 51.52 applies only to light-water-cooled nuclear power plant construction permit applicants, not to offsite

²² Further litigation on the merits of this contention relative to basis two regarding the ITP may be subject to any merits disposition of Utah B.

ISFSI applicants. Even if 10 C.F.R. § 51.52 applied, PFS does not satisfy the threshold conditions for using Table S-4, and its reliance on NUREG-1437 is misplaced. Since the conditions specified in 10 C.F.R. § 51.52(a) for use of Table S-4 are not satisfied, the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. § 51.52(b).

3. The SAR is inadequate to supplement Table S-4 in that:
 - a. The Applicant fails to adequately address the intermodal transfer point in that the analysis utilizes unreasonable assumptions regarding rail shipment volume and its associated effects.
 - b. The Applicant fails to calculate impacts of the return of substandard or degraded casks to the originating nuclear power plant licensees, including additional radiation doses to workers and the public.
 - c. The Applicant fails to address the environmental impacts of any necessary intermodal transfer required at some of the originating nuclear power plants due to lack of rail access or inadequate crane capability.
4. New information shows that Table S-4 grossly underestimates transportation impacts in that:
 - a. WASH-1238, which is the basis for Table S-4, uses poor and outdated data, and hence the Applicant's reliance on WASH-1238 and Table S-4 is inadequate to demonstrate compliance with NEPA:
 - b. WASH-1238 does not quantify the risks of spent fuel transportation. 10 C.F.R. § 51.45(c) requires that, to the extent practicable, the cost and benefits of a proposal should be quantified.
 - c. WASH-1238 does not address accidents caused by human error or sabotage;

- d. WASH-1238 does not include up-to-date analyses of maximum credible accidents;
- e. WASH-1238 does not address the potential for degradation of fuel cladding caused by dry fuel storage;
- f. WASH-1238 does not address the greater release fraction from severe accident consequences demonstrated in recent analyses;
- g. WASH-1238 does not address specific regional characteristics of impacts on the environment from transportation and therefore is inadequate to satisfy 10 C.F.R. § 72.108;
- h. WASH-1238 does not address circumstances and consequences of a criticality event of a representative rail transportation cask with a large capacity (capacity greater than a critical mass of fuel);
- i. WASH-1238 does not contain information from the more recent and more accurate dose modeling RADTRAN computer program;
- j. WASH-1238 does not address a representative transportation distance for the shipment of spent fuel from the originating nuclear power plants. WASH-1238 assumes an approximate distance of 1000 miles. The PFS acknowledges that the distance may be more than twice that amount. ER at 4.7-3.

DISCUSSION: State Contentions at 144-61; PFS Contentions Response at 292-310; Staff Contentions Response at 54-63; State Contentions Reply at 84-88; Tr. at 551-93, 600-03.

RULING: Admissible as to paragraph two and its supporting basis as it alleges the weight for a loaded PFS shipping cask is outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4), which is sufficient to establish a genuine material dispute adequate to warrant further

inquiry. Inadmissible as to paragraph one, the balance of the assertions in paragraph two, and paragraphs three and four and their supporting bases,²³ which fail to establish with specificity any genuine dispute; impermissibly challenge the applicable Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.52, 72.108, and "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants," WASH-1238 (Dec. 1972), as supplemented, NUREG-75/038 (Supp. 1 Apr. 1975); lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

A revised version of this contention that incorporates this ruling is set forth at page 8 of Appendix A to this memorandum and order.

Utah W -- Other Impacts not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that:

²³ Notwithstanding our admission of Utah B dealing with the need for licensing of the Rowley Junction ITP and our general agreement with the State's observation that "where the intermodal transfer facility constitutes part of the storage facility for purposes of compliance with safety regulations, its environmental impacts must nevertheless be addressed by the Applicant and the NRC," State Contentions Reply at 88, we are unable to find that paragraph 3.a of this contention admissible because it relies on rail shipment volume, a consideration we consider insufficient to support the admission of Utah B or this contention.

1. The Applicant has not discussed the cumulative impacts of this facility in relationship to hazardous and industrial facilities/activities located in the region of the ISFSI site and the intermodal transfer point.
2. The Applicant has not evaluated the potential for accidents from the heavy haul trucks that could make up to 400 trips per year along the Skull Valley Road, a secondary two-way paved road.
3. The Applicant has not considered the impact of flooding on its facility or the intermodal transfer point.
4. The Applicant has not adequately discussed the degradation of air quality and water resources due to construction, operation, and maintenance of the ISFSI.
5. The Applicant has not fully assessed the environmental impact of placing 4,000 casks over a site with such complex seismicity, capable of faults and potentially unstable soils.
6. The Applicant has not adequately considered the cost of the visual impact of the proposed ISFSI and of the transportation of spent fuel by heavy haul trucks along Skull Valley Road on the public's use and enjoyment of the area.

DISCUSSION: State Contentions at 162-64; PFS Contentions Response at 310-23; Staff Contentions Response at 63-64; State Contentions Reply at 88-89; Tr. at 604-21.

RULING: Admissible as to paragraph three as it asserts a failure to consider the impact of flooding at the Rowley Junction ITP, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry.²⁴

Inadmissible as to paragraphs one and two, paragraph three

²⁴ Further litigation on the merits of this contention relative to basis two regarding the ITP may be subject to any merits disposition of Utah B.

as it relates to the PFS facility, and paragraphs four, five, and six in that they and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

A revised contention reflecting this ruling is set forth at page 9 of Appendix A to this memorandum and order.

Utah X -- Need for the Facility

CONTENTION: The Applicant fails to demonstrate there is a need for the facility as is required under NEPA.

DISCUSSION: State Contentions at 165-66; PFS Contentions Response at 323-30; Staff Contentions Response at 64-65; State Contentions Reply at 89-90; Tr. at 652-57.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual and expert opinion support. See section II.B.1.a.i., ii., v. above.

Utah Y -- Connected Actions

CONTENTION: The Applicant fails to adequately discuss the link between this proposal and the national high level waste program, a connected action, as is required under NEPA.

DISCUSSION: State Contentions at 167-68; PFS Contentions Response at 330-35; Staff Contentions Response at 65-68; State Contentions Reply at 90-95; Tr. at 122-33.

RULING: Inadmissible in that this contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenges the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.23, 51.61; and/or lacks adequate factual or expert opinion support. See section II.B.1.a.i., ii., v. above.

Utah Z -- No Action Alternative

CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.

DISCUSSION: State Contentions at 169-70; PFS Supplemental Contentions Response at 2-13; Staff Contentions Response at 68; State Contentions Reply at 95-96; Tr. at 658-64.

RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Utah AA -- Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

DISCUSSION: State Contentions at 172-74; PFS Supplemental Contentions Response at 13-20; Staff Contentions Response at 69; State Contentions Reply at 96-98, Tr. at 675-84.

RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of the contention is limited to the issue of the adequacy of the PFS alternative site analysis.

As is explained below, this contention is consolidated with a portion of Castle Rock 13. See infra p. 117. The revised contention is set forth at page 9 of Appendix A to this memorandum and order.

Utah BB -- Site Selection and Discriminatory Effects

CONTENTION: The Applicant's site selection process does not satisfy the demands of the President's Executive Order No. 12,898 or NEPA and the NRC staff must be directed to conduct a thorough and in-depth investigation of the Applicant's site selection process.

DISCUSSION: State Contentions at 175-77; PFS Supplemental Contentions Response at 20-32; Staff Contentions Response at 69; State Contentions Reply at 98-99; Tr. at 693-707, 716-29.

RULING: Inadmissible, in that the contention and its supporting bases seek to litigate the issue of "discrimination in the site selection process," State Contentions at 177, which is not a cognizable subject for agency licensing proceedings relative to compliance with NEPA. See Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC ___, ___ (slip op. at 27-35) (Apr. 3, 1998).

Utah CC -- One-Sided Cost-Benefit Analysis

CONTENTION: Contrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification in that:

1. Applicant's Environmental Report makes no attempt to objectively discuss the costs of the project.
2. Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P, against the alleged benefits of the facility.
3. Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.
4. Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design.
5. Applicant makes no attempt to quantify the costs associated with the impacts of the facility, many of which are amenable to quantification in that:
 - a. costs related to accidents and contamination may be quantified in terms of health effects and dollar costs;
 - b. decommissioning impacts can be quantified;
 - c. visual impacts can be quantified in terms of lost tourist dollars; and
 - d. emergency response costs can be quantified based on the cost of those services.

DISCUSSION: State Contentions at 178-79; PFS Supplemental Contentions Response at 32-43; Staff Contentions Response at 70-71; State Contentions Reply at 99-101; Tr. at 739-45.

RULING: Inadmissible as the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

Utah DD -- Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and NEPA in that:

1. The License Application does not discuss the long term impacts of construction activities on the overall ecological system in Skull Valley.
2. The License Application fails to address adverse impacts of contaminated ground or surface waters on various species, and fails to provide for sampling of the retention pond for contaminants.
3. The License Application fails to include both protective and mitigation plans in conjunction with appropriate authorities for Horseshoe Springs, Salt Mountain Springs, Timpie Springs Waterfowl Management Area, and raptor nests.
4. The License Application has not estimated potential impacts to ecosystems and "important species" in that:
 - a. The License Application does not discuss the importance of the variety of species found in the Skull Valley ecological system, including aquatic organisms, and does not discuss the interdependence of various species on one another or impact on the ecological system as a whole.
 - b. The License Application fails to assess the individual and collective impacts on various species, including wetland species, aquatic organisms, plants, fish, and birds from

additional traffic, fugitive dust, radiation and other pollutants.

- c. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.
 - d. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.
 - e. The License Application fails to determine whether "culturally or medically (scientific) significant" plant species may be impacted by the PFSF.
 - f. The License Application fails to identify aquatic plant species which may be adversely impacted by the proposed action.
 - g. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two "high interest" plants, Pohl's milkvetch and small spring parsley.
 - h. License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.
5. License Application fails to assess the potential impacts on Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs.
 6. License Application fails to include the results of detailed site-specific surveys and analyses to determine species in the vicinity of the PFSF. 10 C.F.R. §§ 72.100(b) and 72.108 require that detailed surveys of species plus mitigation or prevention plans be prepared now.

DISCUSSION: State Contentions at 180-87; PFS

Supplemental Contentions Response at 43-70; Staff

Contentions Response at 71-75; State Contentions Reply at 101-04; Tr. at 766-83.

RULING: Admissible as to subparagraphs c., d., g., and h. of paragraph four, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraphs one through three, subparagraphs a., b., e., and f. of paragraph four, and paragraphs five and six in that these paragraphs and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

A revised contention reflecting this ruling, as well as the consolidation of this contention with a portion of Castle Rock 16 that raises similar issues, see infra p. 120, is set forth at page 9 of Appendix A to this memorandum and order.

Utah EE -- Failure to Demonstrate Cask-Pad Stability
During Seismic Event

CONTENTION: The Applicant has failed to demonstrate that storage casks and pads will remain stable during a seismic event. Accordingly, the Applicant fails to satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a) in that:

1. The Holtec analysis is inadequate to support the safety of Applicant's proposed design during a seismic event at the PFS facility.
 - a. The Applicant has not provided enough information about inputs to the model to support the credibility of the analysis.

- b. The Holtec analysis is not based on an adequate inquiry into site conditions and how they affect the stability of the casks.
2. It is impossible to verify from the Holtec Seismic Report if the three independent components of seismic time histories have been properly and conservatively evaluated such that three statistically independent time histories were used in the Holtec report.
3. The Applicant's cask-pad model oversimplifies the behavior of the dynamic loads at the PFS facility, by failing to sufficiently consider the potential for bending, structural deterioration of the concrete surface, translation, and rotation of the pad.
 - a. In the Holtec report, the Applicant has not considered the effects of simultaneous rotation and translation of the pad, in conjunction with the movement of the casks in the Holtec report.
 - b. In the Holtec report, the Applicant, by assuming that the casks move uniformly in the same direction oversimplifies or ignores the phenomena that the casks may move in different directions and at different speed from each other as a result of the differences in movement of the pad and casks.
 - c. In the Holtec report, the Applicant did not consider that the coefficient of friction (i.e., the resistance of the surface of the pad to movement of the casks) may vary over the surface of the pad. There is no indication that the shift from the static friction case to the kinetic case was considered.
 - d. The assumption that the 30' x 64' pad will remain rigid is unreasonable and oversimplified. Thus, in the Holtec report, the Applicant failed to provide sufficient information about the soil structure and characteristics at the PFS facility site to rule out the potential for differential upheaval and subsidence of the soil beneath the concrete which may cause the pad to bend, crack, and possibly spall.

- e. In the Holtec report, the Applicant failed to consider the effects of the embedment of the pad in the compacted granular soil on the site or its destabilizing effect on the casks.
4. In the Holtec report, the Applicant fails to adequately consider site-specific soil characteristics.
 - a. A reliable seismic analysis should be based on more comprehensive knowledge of soil types; soil features; such as stratigraphy; and measurements of each soil type's ability to respond to dynamic loading, such as dynamic passive resistance, damping, Young's modulus, and Poisson's ratio.
 - b. In the Holtec report, the Applicant fails to account for the differences in strata beneath the pad, or the impacts on the cask/pad system of different acceleration rates and directional movements for each of the different strata.
 - c. In the Holtec report, the Applicant fails to account for the potential for cemented and/or collapsible soil on the site, which may also have an effect on the rate and direction of movement of the cask/pad system.
 - d. State Contention L (Geotechnical) whose basis 4, Soil Stability and Foundation Loading, regarding the failure to consider collapsible soils, is adopted and incorporated herein by reference.
 5. In the Holtec analysis, the Applicant does not consider the impact of dynamic loads on the structural integrity of the pad which may cause damage to the concrete surface, including cracking, spalling, and crushing of the concrete which may become a contributing factor to instability of the casks.
 6. In the Holtec report, it does not appear that the Applicant performed uncertainty or sensitivity analyses on the various soil-pad interaction aspects of its seismic analysis.

7. In the Holtec report, the Applicant's earthquake analysis for the Canister Transfer Building is inadequate. The report does not contain any analysis of the seismic response of the cask, transfer cask, and overhead bridge crane. The Applicant must provide an analysis of earthquake impacts on this facility, under postulated accident conditions.
8. It is impossible to evaluate the adequacy of the computer codes used in the Holtec analysis unless the codes are adequately identified.

DISCUSSION regarding Late-Filing Standards: State Contentions EE and FF at 1-3; PFS State Contention EE and FF Response at 1-8; Staff State Contentions EE and FF Response at 3-6; State Contentions EE and GG Reply at 2-9, 11-13; PFS State Contentions EE and GG Surreply at 2-20; Staff State Contentions EE and GG Surreply at 3-6; Tr. at 419-44.

RULING: We dismiss this contention, which concerns the site-specific seismic stability of one of the two PFS-designated cask systems that is to be used at the PFS facility, for failure to meet the late-filing requirements of 10 C.F.R. § 2.714(a)(1). Concerning the first factor -- good cause for failing to file on time -- the State's assertion that good cause exists for late filing because it needed to await receipt of the proprietary information is misplaced. The State acknowledges it received a nonproprietary version of Holtec International's cask-pad seismic stability report for its HI-STORM 100 system on September 22, 1997. It nonetheless maintains two proprietary portions of the report not available to it until

mid-November were integral to its contention preparation so as to justify filing Utah EE in late December, nearly a month late. See State Contentions EE and GG Reply at 8-9 (citing Holtec Int'l, Multi-Cask Seismic Response at the PFS ISFSI for PFS, Holtec Report No. HI-971631 (Proprietary Version) (May, 19, 1997) Fig. 4-1 (Hi-Storm 100 Dynamic Model); id. Attach. A (Theoretical Equations of Motion for a Single Cask)). After reviewing both documents and the pertinent nonproprietary materials timely available to the State, we conclude neither proprietary document was necessary to the development of Utah EE, in whole or in part, such that the delay was justified. See Catawba, CLI-83-19, 17 NRC at 1043, 1045 (if contention's factual predicate otherwise available, unavailability of document does not constitute good cause for late filing); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Lacking good cause for the one-month delay in filing Utah EE, the State must make a compelling showing on the other four factors. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). It fails to do so, however. Factors two and four support the late-filing in that there appear to be no other means to protect the State's interests in this

contention or other parties to represent those interests. This duo are, however, to be accorded less weight than factors three and five. See id. at 245.

And as to these two elements, factor three -- sound record development -- and factor five -- broadening and delaying the proceeding -- provide, at best, only lukewarm support for late-admission. In connection with factor three, notwithstanding the Commission's directive that the proponent of a late-filed contention should with as much particularity as possible "identify its prospective witnesses, and summarize their proposed testimony," id. at 246 (quoting Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)), the State has done little more than point to the two affiants supporting the contention, without providing any real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention.²⁵ Further, regarding factor five,

²⁵ In this regard, while our decision to reject Utah EE as late-filed means we need not address its admissibility, we note that based on our review of the parties' submissions, see State Contentions EE and FF at 4-12; PFS State Contentions EE and FF Response at 8-45; Staff State Contentions EE and FF Response at 7; State Contentions EE and GG Reply at 13-27, even if timely filed, the bases for the contention, as supported by the witness affidavits, we would have been sufficient to gain admission only for portions of the contention, in particular, subparagraph d. of paragraph three and paragraph seven. The other portions (paragraphs one and two, subparagraphs a. through c. and e. of paragraph three, paragraphs four through six, and

(continued...)

while submitted before contentions have been admitted and having some alleged relationship to admitted issue Utah L so as not to portend a protracted delay in the proceeding, as the staff points out, this contention involves the use of proprietary information so that litigation on its merits carries the likelihood of some delay simply because of the additional procedures that must be utilized to ensure nondisclosure.²⁶ Accordingly, while the other four factors all support late-filed admission, whether taken individually or in concert, we do not find them sufficiently compelling

²⁵ (...continued) paragraph eight.) would have been inadmissible as failing to establish with specificity any genuine dispute; impermissibly challenging the Commission's regulations and/or generic rulemaking-associated determinations; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

²⁶ While not requiring the same level of protection that must be afforded the safeguards information involved in the contentions that are before the PSP Licensing Board, dealing with proprietary information nonetheless requires the use of separate, closed hearing sessions, and potentially separate, public and nonpublic versions of any Board issuances.

In this regard, responding to our inquiry, the parties have advised us that the terms of Utah EE and Utah GG do not include proprietary information. See Letter from Ernest L. Blake, Counsel for PFS, to Licensing Board 1 (Mar. 18, 1998); NRC Staff's Response to Memorandum and Order (Request for Information Regarding Contentions Involving Proprietary and Safeguards Material) Dated March 9, 1998 (Mar. 18, 1998) at 1 n.1; see also [State] Response to the Board's Request for Information Regarding Contentions Involving Proprietary and Safeguards Information (Mar. 18, 1998) at 1-2.

to warrant the admission of Utah EE given the lack of good cause for its late filing.

Utah FF -- Inadequate Analysis of Radiation Shielding

CONTENTION: PFS has not demonstrated satisfaction of NRC dose limits at 10 C.F.R. § 72.104, because its analysis of radiation shielding for the proposed PFS facility is inadequately documented or explained.

DISCUSSION: State Contentions EE and FF at 13-17; PFS State Contentions EE and FF Response at 45-66; Staff State Contentions EE and FF Response at 7-11; State Contentions EE and GG Reply at 1.

RULING: This contention was withdrawn by the State.

See State Contentions EE and GG Reply at 1.

Utah GG -- Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a) in that:

1. The Sierra Nuclear site-specific analysis gives inadequate consideration to site-specific soil characteristics.
2. Insufficient information is provided about the input to the model of the PFS site soil characteristics to support the credibility of the analysis.
3. Sierra Nuclear's analysis demonstrates there is a potential stability problem with the casks during a design basis seismic event. Applicant's conclusion that the cask will not topple is inconsistent with Sierra Nuclear's recommendation that the possibility of tipover should be analyzed using the ANSYS finite element code.
4. The conclusion reached in the Sierra Nuclear Report demonstrates that the Holtec analysis is

not based on an adequate inquiry into the vertical acceleration of the casks, tipover analysis, and soil site conditions and how these factors affect the stability of the casks.

5. Sierra Nuclear's consultant, Advent Engineering Services, Inc. did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

- a. Late-Filing Standards

DISCUSSION: State Contention GG at 1-3; PFS State Contention GG Response at 2-4; Staff State Contention GG Response at 4; State Contentions EE and GG Reply at 2-7, 9-13; PFS State Contentions EE and GG Surreply at 21-25; Staff State Contentions EE and GG Surreply at 1-2; Tr. at 419-44.

RULING: Relative to Utah GG, the State has identified two proprietary reports, see State Contention GG at 1 (citing Sierra Nuclear Corp., Soil-Structure Interaction Analysis for Evaluation of TranStor™ Storage Cask Seismic Stability, SNC No. PFS01-10.02.04 (Proprietary) (rev. 0 July 1997); Sierra Nuclear Corp., TranStor™ Storage Cask Seismic Stability Analysis for PFS Site, SNC No. PFS01-10.02.05 (Proprietary) (rev. 0 July 1997)), it timely sought and did not receive until some three weeks after the November 24, 1997 contention-filing deadline. We conclude those documents are relevant to the development of paragraphs three, four, and five so as to provide good cause for the delay in filing these portions of the contention less than a

month later. In contrast, after reviewing the two proprietary documents and the germane nonproprietary documents timely available to the State, we conclude neither proprietary report was necessary to the development of paragraphs one and two, in whole or in part, such that the seven-week delay in submitting these concerns was justified. See supra p. 97 (citing cases).

As to the other four factors, our analysis parallels that we outlined in connection with Utah EE in which we concluded these elements support late-filing, albeit only moderately so. See supra p. 97. In the case of paragraphs three, four, and five, in light of the good cause for late filing, the overall balance clearly favors further consideration, late-filing notwithstanding. For paragraphs one and two, however, these factors are not sufficient to provide the compelling showing needed to offset the lack of good cause for the filing delay. See Braidwood, CLI-86-8, 23 NRC at 244. We thus conclude that balancing the five late-filing standards only sanctions further consideration of the admissibility of paragraphs three, four, and five, which we do below.²⁷

²⁷ Although we need not reach the issue, we note that paragraphs one and two would have been inadmissible as failing to establish with specificity any genuine dispute; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

b. Admissibility

DISCUSSION: State Contention GG at 4-8; PFS State Contention GG Response at 5-13; Staff State Contention GG Response at 6-9; State Contentions EE and GG Reply at 27-32.

RULING: Regarding paragraphs three, four, and five of this late-filed contention, the admissibility of which we have concluded appropriately can be considered, we find paragraphs three and four inadmissible because these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above. Paragraph five is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry. The contention as revised to reflect this ruling is set forth at page 10 of Appendix A to this memorandum and order.

3. Castle Rock Contentions

Castle Rock 1 -- Absence of NRC Authority

CONTENTION: The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed PFSF.

DISCUSSION: Castle Rock Contentions at 2-10; PFS Contentions Response at 336-40; Staff Contentions Response at 99; Castle Rock Contentions Reply at 7-17; Tr. at 65-86.

RULING: For the reasons given in our discussion regarding Utah A, see supra p. 55, we find this contention inadmissible in that the contention and its supporting basis impermissibly challenge the agency's regulatory provisions or rulemaking-associated generic determinations. See also section II.B.1.a.ii. above.

Castle Rock 2 -- Non-Compliance with Regulations

CONTENTION: PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72 in that:

- a. In order to harmonize the NRC regulations with the NWPA and Atomic Energy Act, the regulation defining ISFSI must be interpreted to exclude the proposed PFSF.
- b. NRC regulations must be construed to require PFS to demonstrate maximization of the use of existing storage capability at reactor sites.
- c. NRC regulations must be construed to require PFS to demonstrate that DOE has exhausted all means for providing off-site storage capacity.
- d. NRC regulations must be construed to require a showing that DOE has attempted to establish a cooperative program for on-site storage under 42 U.S.C. § 10198.

DISCUSSION: Castle Rock Contentions at 10-15; PFS Contentions Response at 340-43; Staff Contentions Response at 99-101; Castle Rock Contentions Reply at 17-19; Tr. at 65-86.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge the agency's

regulatory structure, provisions, or rulemaking-associated generic determinations. See section II.B.1.a.ii. above.

Castle Rock 3 -- Conflict with DOE Duties and Prerogatives

CONTENTION: The Application must be denied because the proposed PFSF interferes with DOE duties and prerogatives under the NWPA.

DISCUSSION: Castle Rock Contentions at 15-18; PFS Contentions Response at 343-46; Staff Contentions Response at 102-04; Castle Rock Contentions Reply at 19-20; Tr. at 65-85.

RULING: Inadmissible in that the contention and its supporting basis fails to establish with specificity any genuine dispute; impermissibly challenge the agency's regulatory structure, provisions, or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v. above.

Castle Rock 4 -- Attempts to Evade the Requirements of the NWPA

CONTENTION: The status of the Application suggests that DOE has either tacitly or directly agreed with PFS and its member utilities to allow the Application to proceed in an attempt to evade the statutory mandates of the NWPA.

DISCUSSION: Castle Rock Contentions at 18-22; PFS Contentions Response at 346-49; Staff Contentions Response at 104-05; Castle Rock Contentions Reply at 20-22; Tr. at 77-86.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determination; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v. above.

Castle Rock 5 -- Application For Permanent Repository

CONTENTION: The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository in that:

- a. no repository or other storage facilities capable of absorbing the 40,000 MTU of spent fuel to be stored at the PFSF exist, or likely will exist at the time PFS proposed to decommission the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.
- b. even if a permanent repository is operational at the time the PFSF is proposed to be decommissioned, such repository will not be able to absorb 40,000 MTU at once or at a rate that will permit decommissioning of the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.

DISCUSSION: Castle Rock Contentions at 22-26; PFS Contentions Response at 349-53; Staff Contentions Response at 105-07; Castle Rock Contentions Reply at 22-29; Tr. at 100-19.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's

regulatory provisions or rulemaking-associated generic determinations. See section II.B.1.a.ii. above.

Castle Rock 6 -- Emergency Planning and Safety Analysis Deficiencies

CONTENTION: The Application does not provide for reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF.

DISCUSSION: Castle Rock Contentions at 26-30; PFS Contentions Response at 353-66; Staff Contentions Response at 107-08; Castle Rock Contentions Reply at 29-33; Tr. at 317-25, 686-87.

RULING: Relative to the Castle Rock's assertions regarding the impact on the PFS facility of fires in Skull Valley or accidents involving materials or activities at or emanating from the Dugway Proving Ground, the Department of Defense Chemical Weapons Incinerator, the Tooele Army Depot, Wendover Air Force Bombing Range, Hill Air Force Bombing Range, APTUS Hazardous Waste Incinerator, Laidlaw Hazardous Waste Incinerator and Landfill, and Envirocare of Utah Low Level Waste Disposal Facility, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. The contention's basis regarding the effect of the 2002 Olympic Winter Games was withdrawn. See Tr. at 686-87.

Because of the similarity of this contention and its supporting bases to Utah K, which Castle Rock Land/Skull Valley have adopted by reference, and a portion of

Confederated Tribes B dealing with wildfires, see supra p. 68, infra p. 142, this contention and its bases are consolidated with Utah K and Confederated Tribes B, as is specified at page 4 of Appendix A to this memorandum and order.

Castle Rock 7 -- Inadequate Financial Qualifications

CONTENTION: The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. § 72.22(e) in that:

- a. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license;
- b. the Application does not adequately account for possible shortfalls in revenue if customers become insolvent, default on their obligations, or otherwise do not continue making payments to the proposed PFSF;
- c. the Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel;
- d. the Application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the Service Agreements to be entered with customers, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS;

- e. the Application fails to describe the legal obligations of the Skull Valley Band of Goshute Indians and provide assurance that third parties will have adequate legal remedies if injured as a result of the its acts or omissions; and
- f. the Application fails to itemize cost estimates and otherwise provide enough detail to permit evaluation of the tenability of such estimates.

DISCUSSION: Castle Rock Contentions at 30-40; PFS Contentions Response at 366-77; Staff Contentions Response at 108; Castle Rock Contentions Reply at 33-40; Tr. at 232-38.

RULING: Admissible with regard to paragraphs a. through d. and f. in that these portions of the contention and their supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraph e. in that this portion of the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 72.22; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v. above.

As we noted above, see supra pp. 63, 78, because of the similarity of the admitted portions of this contention to Utah E and Utah S, both of which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate some aspects of this contention with those issue statements. In the case of Utah E, which concerns financial

assurance generally, at page 1 of Appendix A to this memorandum and order the Board has set forth a revised contention that incorporates the issues raised by Castle Rock in paragraphs a.-d. and f. With regard to Utah S, which concerns decommissioning, the Board finds that the specific concerns expressed in paragraphs c. and f. of Castle Rock 7 relating to decommissioning costs are covered in bases four and five of Utah S, and thus should be litigated in conjunction with that contention as it is set forth at page 7 of Appendix A to this memorandum and order.

Castle Rock 8 -- Groundwater Quality Degradation

CONTENTION: The Application, including the ER, is defective and therefore raises the issue of risk to public health and safety because the proposed site of the PFSF will not, or cannot, be adequately protected against ground water contamination due to facility design, its location, contaminants it will generate, and the nature of the soils and bedrock of the area.

DISCUSSION: Castle Rock Contentions at 40-41; PFS Contentions Response at 377-81; Staff Contentions Response at 109; Castle Rock Contentions Reply at 40-41; Tr. at 360-66.

RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

As we noted above, see supra p. 71, because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate this contention and its supporting basis

into that issue statement. The Board sets forth the consolidated contention at page 5 of Appendix A to this memorandum and order.

Castle Rock 9 -- Regional and Cumulative Environmental Impacts

CONTENTION: The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. §§ 72.98(b) & (c) and 72.100, and NEPA, in that:

- a. the SAR and ER fail to address the cumulative regional health and safety impact of the ISFSI and other dangerous facilities in Tooele County, including without limitation issues regarding the cumulative impact to the regional environment and population;
- b. the SAR and ER fail to address the cumulative quantitative risk to the public of numerous dangerous facilities in one area and the interrelated transportation, sabotage, and accident risks arising from concentration of such facilities.

DISCUSSION: Castle Rock Contentions at 41-44; PFS Contentions Response at 381-86; Staff Contentions Response at 109-11; Castle Rock Contentions Reply at 41-43; Tr. at 621-34.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. § 72.122; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

Castle Rock 10 -- Retention Pond

CONTENTION: The Application, including the ER, is defective and therefore raises public health and safety risks because it does not adequately address the potential of overflow and groundwater contamination from the retention pond and the environmental hazards created by such overflow, in that

- a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
- b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
- c. The ER should address the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.

DISCUSSION: Castle Rock Contentions at 44-45; PFS Contentions Response at 386-90; Staff Contentions Response at 111; Castle Rock Contentions Reply at 43-44; Tr. at 360-66.

RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, with one exception the Board consolidates this contention and its supporting basis into that issue statement. See supra p. 71. The exception is paragraph c., which is consolidated into Utah T, also incorporated by reference by Castle Rock Land/Skull Valley. See supra

p. 81. The Board has set forth the consolidated contentions at pages 5 and 7 of Appendix A to this memorandum and order.

Castle Rock 11 -- Radiation and Environmental Monitoring

CONTENTION: The Application poses undue risk to the public health and safety and fails to comply with 10 C.F.R. § 72.24, § 72.122(b)(4), and § 72.126 because it fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning, and notification, including systematic baseline measurements of soils, forage, and water either near the PFSF site, or at Petitioners' adjoining lands in that:

- a. PFS has taken no background radiological samples of nearby vegetation and groundwater.
- b. PFS has provided no radioactive effluent monitoring system to detect radioactive contamination in surface runoff water that collects in a retention pond on the PFSF site.

DISCUSSION: Castle Rock Contentions at 45-47; PFS Contentions Response at 390-96; Staff Contentions Response at 112-13; Castle Rock Contentions Reply at 44; Tr. at 381-85, 388.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v., above.

Castle Rock 12 -- Permits, Licenses and Approvals

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to address adequately the status of compliance with all Federal, State, regional and local permits, licenses and approvals required for the

proposed PFSF facility (see, e.g., 10 C.F.R. §§ 51.45(d) and 51.71(d)) in that:

- a. The ER does not contain a list of all permits, etc. which must be obtained as required by 10 C.F.R. § 51.45(d).
- b. The ER fails to include a discussion of the status of compliance with applicable environmental quality standards and requirements as required by 10 C.F.R. § 51.45(d) in that:
 - i. the discussion of the Army Corps of Engineers permitting requirements for construction along the new corridor is inadequate;
 - ii. the discussion of requirements at the Site is inadequate; and
 - iii. the conclusory sentence that no air quality permitting requirements apply is inadequate.
- c. Section 9.2 of the ER discussing Utah permitting requirements is inadequate.
- d. Sections 4.1.3 and 4.2.3 of the ER concerning Utah air quality permits are inadequate.
- e. ER discussion of widening Skull Valley Road is inadequate.

DISCUSSION: Castle Rock Contentions at 47-50; PFS Contentions Response at 397-407; Staff Contentions Response at 114; Castle Rock Contentions Reply at 44-45; Tr. at 494-503.

RULING: Admissible in that the contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving

appropriate governmental (as opposed to nongovernmental/private) entities.

As we noted above, see supra p. 81, because of the similarity of this contention to Utah T, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at page 7 of Appendix A to this memorandum and order.

Castle Rock 13 -- Inadequate Consideration of Alternatives

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to alternatives, including alternative sites, alternative technologies, and the no-action alternative, see 10 C.F.R. § 51.45(c), in that:

- a. There is no discussion in the ER on the required topics of environmental effects and impacts, economic, technical and other costs and benefits of the alternatives.
- b. The evaluation and comparison of the no build or no action alternative is inadequate.
- c. The analyses of alternatives ignores every potential negative factor with respect to the PFSF. Such an analysis must include:
 - i. the environmental and safety benefits associated with maintaining and expanding a decentralized, onsite storage system;
 - ii. the environmental and safety impacts and risks associated with the proposed privately operated, centralized system;
 - iii. the state-by-state, plant-by-plant facts which create the need PFS asserts is present for moving the spent fuel to another location;

- iv. the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location; and
- v. the environmental benefits of a combination of expanded onsite storage and regional ISFSIs.

DISCUSSION: Castle Rock Contentions at 50-52; PFS Contentions Response at 407-19; Staff Contentions Response at 114-15; Castle Rock Contentions Reply at 45-47; Tr. at 684-89, 692-93.

RULING: Admissible as to paragraph a., in that this portion of the contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of this portion of the contention is limited to the issue of the adequacy of the PFS alternative site analysis.

Inadmissible as to paragraphs b. and c. in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above. We also note that the lack of any ER discussion of a HLW storage legislative solution and the 2002 Winter Olympic games as bases was withdrawn. See Tr. at 684-85, 686-87.

As we noted above, see supra p. 89, because of the similarity of the admitted portion of this contention to Utah AA, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting basis into that issue statement. The Board has set forth the consolidated contention at page 9 of Appendix A to this memorandum and order.

Castle Rock 14 -- Inadequate Consideration of Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to the adverse impacts of the proposed PFSF, including the risk of transportation accidents, the risks of contamination of human and livestock food sources, the risks of contamination of water sources (including ground water contamination arising from leaching of contaminated soils), the risks of particulate emissions from construction and cement activities and similar risks (10 C.F.R. § 72.100) in that:

- a. Section 5.2 discussing transportation accidents contains no site specific information on the "effects on populations in the region" as required by the rule.
- b. Chapter 4 of the ER contains no meaningful evaluation of impact of unlined retention pond and other PFSF operations on surrounding subsoils and ground water.
- c. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of contamination of human and livestock food sources.
- d. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of particulate emissions from construction and cement activities.

DISCUSSION: Castle Rock Contentions at 52-53; PFS Contentions Response at 420-25; Staff Contentions Response at 115-16; Castle Rock Contentions Reply at 47; Tr. at 621-34.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determination; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

Castle Rock 15 -- Cost-Benefit Analysis

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not contain a reasonable and legitimate comparison of costs and benefits, 10 C.F.R. § 51.45(c), in that:

- a. ER Chapter 7 cost-benefit analysis is overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley.
- b. Cost-benefit analysis fails to account for the "loss of property values, economic opportunities and other business and economic losses" imposed by mere existence of PFSF.
- c. Chapter 7 of the ER fails to discuss applicant's financial arrangements with the Skull Valley Band which is essential to the cost-benefit analysis.
- d. The Castle Rock Petitioners intend to offer evidence on true costs of the proposed facility.

DISCUSSION: Castle Rock Contentions at 53; PFS Contentions Response at 425-30; Staff Contentions Response

at 116-17; Castle Rock Contentions Reply at 47; Tr. at 745-50.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., v. above.

Castle Rock 16 -- Impacts on Flora, Fauna and Existing Land Uses

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately address the impact of the proposed PFSF upon the agriculture, recreation, wildlife, endangered or threatened species, and land quality of the area, see 10 C.F.R. § 72.100(b), in that:

- a. the ER fails to evaluate both usual and unusual site characteristics throughout all of Northwestern Utah;
- b. the ER fails to provide sufficient facts to enable one to understand the true impacts of the PFS on the environment, including without limitation information from a survey of endangered or threatened species in the area (including small spring parsley, Pohl's milkvetch, peregrine falcon, and the Skull Valley Pocket gopher);
- c. the precise transportation corridor has not been identified, and thus the Application does not contain specific information about affected species in the transportation corridor.

DISCUSSION: Castle Rock Contentions at 54-55; PFS Contentions Response at 430-37; Staff Contentions Response at 117-18; Castle Rock Contentions Reply at 47-48; Tr. at 783-90.

RULING: Admissible as to paragraph b. in that this portion of the contention and its supporting basis is sufficient to establish a genuine material dispute adequate

to warrant further inquiry, with the caveat that it is limited to the small spring parsley, Pohl's milkvetch, and pocket gopher. Inadmissible as to paragraphs a. and c. in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., v. above.

As we noted above, see supra p. 93, because of the similarity of the admitted portions of this contention to portions of Utah DD, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contention at page 9 of Appendix A to this memorandum and order.

Castle Rock 17 -- Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see, e.g., 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

- a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;

- b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;
- c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;
- d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and
- e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

DISCUSSION: Castle Rock Contentions at 56-58; PFS Contentions Response at 437-48; Staff Contentions Response at 118-19; Castle Rock Contentions Reply at 48-50; Tr. at 634-44.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Castle Rock 18 -- Impacts on Public Health

CONTENTION: The Application violates NRC regulations and NEPA because the Environmental Report (ER) does not adequately consider the impact of the proposed PFSF upon the production of the agricultural products for human consumption by Petitioners, their tenants and others in the area (see 10 C.F.R. § 72.98(b)) in that:

- a. The ER fails to analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants or animals destined for human consumption.
- b. The ER provides no detailed description at all of the coordinated ranching, farming, and livestock

production activities currently carried on by Petitioners.

DISCUSSION: Castle Rock Contentions at 58; PFS Contentions Response at 448-55; Staff Contentions Response at 119; Castle Rock Contentions Reply at 50; Tr. at 634-44.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

Castle Rock 19 -- Septic Tank

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of a septic tank system on the ground water and ecology of the area and the related potential of this system to injure Petitioners (See 10 C.F.R. §§ 72.98(b) and 72.100(b)), in that:

- a. The ER contains very little information on how sewage wastes will be managed at the proposed facility during both the construction and operation facilities.
- b. The ER fails to discuss in detail how the septic system will be designed so as to eliminate the risk of contamination to groundwater and petitioner's property.

DISCUSSION: Castle Rock Contentions at 58-59; PFS Contentions Response at 455-57; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 360-66.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion

support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

Castle Rock 20 -- Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail spur access alternative over the other and the implications of such selection in light of such considerations. See 10 C.F.R. §§ 51.45(c) and 72.100(b), in that:

- a. The ER is deficient because it fails to properly analyze the transportation alternatives.
- b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.
- c. The ER is defective because PFS is considering a third option not discussed in the ER.
- d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

DISCUSSION: Castle Rock Contentions at 59-60; PFS Contentions Response at 457-60; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Castle Rock 21 -- Exact Location of Rail Spur

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (see 10 C.F.R. § 72.90(a)), in that:

- a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.
- b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

DISCUSSION: Castle Rock Contentions at 60-61; PFS Contentions Response at 460-62; Staff Contentions Response at 120-21; Castle Rock Contentions Reply at 51-52; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

Castle Rock 22 -- Road Expansion Authorizations

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe adequately the nature and ownership of right-of-way that would permit PFS's contemplated improvements of the Skull Valley Road and what permits and approval from, or agreements with, the owner or owners thereof are needed for such improvements. See 10 C.F.R. § 72.90(a).

DISCUSSION: Castle Rock Contentions at 61-62; PFS Contentions Response at 462-64; Staff Contentions Response at 121; Castle Rock Contentions Reply at 52; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.

As we noted above, see supra p. 81, because of the similarity of this contention to a portion of Utah T, which Castle Rock has incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at page 7 of Appendix A to this memorandum and order.

Castle Rock 23 -- Existing Land Uses

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe with particularity, using appropriate maps, land use patterns and ownership as to lands in the vicinity of the proposed PFSF and along the 24-mile access route, including without limitation, homes, outbuildings, corrals and fences, roads and trails, pastures, crop producing areas, water wells, tanks and troughs, ponds, ditches and canals. See 10 C.F.R. §§ 72.90(a) & (c), 72.98(b), in that:

- a. PFS fails to discuss in detail the various impacted property rights and owners around the site and along the 24-mile transportation corridor.
- b. PFS fails to discuss the legal basis for the right of way along the 24-mile transportation corridor.
- c. PFS fails to identify existing structures that would be impacted by the ISFSI and the various transportation corridors suggested by PFS.
- d. PFS fails to discuss impacts to existing grazing patterns and rights that would be impacted by the ISFSI and the various transportation corridors proposed by PFS.
- e. PFS fails to discuss all impacts to those living near to the ISFSI and the proposed transportation corridors.
- f. The PFS application has "other deficiencies."

DISCUSSION: Castle Rock Contentions at 62-63; PFS Contentions Response at 464-73; Staff Contentions Response at 122-23; Castle Rock Contentions Reply at 52-53; Tr. at 523-25.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

Castle Rock 24 -- Adoption by Reference

CONTENTION: Petitioners Castle Rock and Skull Valley Co. by this reference adopt in its entirety each and every contention filed by the State of Utah and incorporate each herein by this reference.

DISCUSSION: Castle Rock Contentions at 63; PFS Contentions Response at 473-74; Staff Contentions Response at 123; Castle Rock Contentions Reply at 53; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.c. above, the Board will permit Castle Rock to incorporate the State's contentions, some of which we have found inadmissible, subject to the restrictions described in section III.A. below.

4. OGD Contentions

OGD A -- Lack of Sufficient Provisions for Prevention of and Recovery From Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for prevention of and recovery from accidents during storage resulting from such causes as sabotage, fire, cask drop and bend, lid drop damage and/or improper welds.

1. The license application does not address the full range of accidents which could occur.
2. The license application does not adequately address the accident impacts of human error or intentional human actions.
3. The license application does not include a "hot cell" and the associated remote fuel handling equipment to safely unload, replace or reload a damaged fuel canister.
4. The ever present risk of accidents will adversely impact members of OGD.

DISCUSSION: OGD Contentions at 1-5; PFS Contentions Response at 474-86; Staff Contentions Response at 76-78; Tr. at 219-22.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.²⁸ See section II.B.1.a.i., ii., v., vi. above. Moreover, to the extent

²⁸ Although this contention seeks to litigate issues involving the Rowley Junction ITP, we find it inadmissible because those issues, whether raised in connection with the PFS facility or the ITP, lack a sufficient basis.

this contention seeks to introduce the issue of "psychological stress," it does not have a cognizable basis. See Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-79 (1983).

OGD B -- Emergency Plan Fails to Address the Safety of Those Living Outside of the Facility

CONTENTION: The license application, specifically the emergency plan submitted with the license application fails to address the safety provisions made for those individuals living outside of the facility within a five mile radius of the facility. The emergency plan addresses only those measures that pertain to employees and have not addressed the provisions that would apply to those people living around the facility. The emergency plan does not address a warning system such as would be implemented to put the residents on notice of an accident.

1. Adequate backup means for offsite communications for notification of emergencies or requests for assistance are not included in the license application.
2. Means for compliance with the Emergency Planning and Community Right-To-Know Act of 1986, Title III, Pub. L. 99-499 is lacking in the license application.
3. The license application fails to meet all the requirements of 10 C.F.R. § 72.32(a)(8).

DISCUSSION: OGD Contentions at 6; PFS Contentions Response at 486-93; Staff Contentions Response at 78-79; Tr. at 803-09.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail

properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

OGD C -- License Application Lacks Sufficient Provisions for Protection Against Transportation Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident.

1. The license application fails to provide sufficient protection against transportation accidents because of the design of the shipping cask.
2. The license application lacks sufficient measures for protection of shipping casks during harsh summers and sub-zero temperatures of winter.
3. The license application fails to consider the historical record and consequences of spent nuclear fuel transportation accidents and incidents as well as the number of incidents that might occur given that record.
4. The license application fails to provide sufficient information about the radiological characteristics of the spent fuel to be shipped to fully evaluate the impacts and risks of spent nuclear fuel transportation to PFS.
5. The license application fails to provide sufficient detail about the anticipated shipment characteristics necessary for evaluation of transportation impacts and risks.
6. The license application ignores the potentially severe consequences of a successful terrorist attack against a spent fuel shipping cask using a high energy explosive device or an anti-tank weapon.
7. The license application ignores the significant radiation exposures which members of OGD and other residents of Skull Valley may receive as a result of gridlock traffic incidents and other routine transportation activities.

DISCUSSION: OGD Contentions at 6-16; PFS Contentions Response at 493-514; Staff Contentions Response at 79-82; Tr. at 593-600.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4) and 10 C.F.R. Parts 71 and 73; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iii., v., vi. above. Moreover, to the extent this contention seeks to include consideration of "psychological stress" as an environmental impact under NEPA, it does not have a cognizable basis. See Metropolitan Edison Co., 460 U.S. at 772-79.

OGD D -- License Application Lacks Procedures for Returning Damaged Casks to the Generating Reactor

CONTENTION: The license application poses undue risk to public health and safety because it has not provided procedures for returning casks to the generating reactor. The SAR indicates that the casks will be inspected for damage prior to "accepting" the cask and before it enters the Restricted Area. SAR p. 5.1-4. If the casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19 there is no provision for housing the casks prior to shipping the cask back to the generating reactor.

DISCUSSION: OGD Contentions at 16; PFS Contentions Response at 514-21; Staff Contentions Response at 82-83; Tr. at 254-58.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iii., v., vi. above.

OGD E -- License Application Fails to Provide Information and a Plan to Deal With Casks That May Leak or Become Contaminated During the 20 to 40 Year Storage Period

CONTENTION: The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been decommissioned, and there are no assurances that the storage will be only "interim". The license application provides no assurance that there will be an alternative location to which canisters and/or casks can be shipped if they become defective while in storage at PFS.

1. The license application provides very little procedure for dealing with defective canisters and/or casks that may leak or become contaminated.
2. No alternative location is designated in the license application should a canister become defective while in storage especially if the reactor that originally shipped the canister is decommissioned.

3. The license application does not adequately address the uncertainties about the suitability of Yucca Mountain as a repository site, and if ever, spent fuel stored at PFS should be shipped to Yucca Mountain.

DISCUSSION: OGD Contentions at 17-18; PFS Contentions Response at 521-29; Staff Contentions Response at 83-84; Tr. at 258-61.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.23; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iv., v., vi. above.

OGD F -- License Application Fails to Make Clear Provisions for Funding of Estimated Construction Costs, Operating Costs, and Decommissioning Costs

CONTENTION: The license application fails to make clear provisions for funding of estimated construction costs, operating costs, and decommission costs. It also fails to make clear as part of the construction costs who the contractors will be.

1. The license application does not demonstrate that PFS "either possesses the necessary funds, or . . . has reasonable assurance of obtaining the necessary funds" as required by 10 C.F.R. § 72.22(e).

DISCUSSION: OGD Contentions at 18-19; PFS Contentions Response at 529-33; Staff Contentions Response at 84; Tr. at 241.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

OGD G -- License Application Fails to Provide for Adequate Radiation Monitoring

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide for adequate radiation monitoring to protect the health of the public and workers. It also fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification.

1. The license application does not meet the requirements of 10 C.F.R. § 72.32(6).
2. The license application does not address releases outside of the ISFSI site.

DISCUSSION: OGD Contentions at 19-20; PFS Contentions Response at 533-44; Staff Contentions Response at 85-86; Tr. at 385-88.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

The Board also notes that petitioner's request for onsite radiation monitoring measures as specified in paragraphs A-D of its contention was withdrawn. See Tr. at 385-86.

OGD H -- The License Application Poses Undue Risk to Public Health and Safety Because It Fails to Provide Adequate Protection of the Site Against Intruders

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide adequate protection of the ISFSI against intruders. The site is in such a remote area that it would take at least two (2) hours for access to the [site] to be made by emergency personnel.

DISCUSSION: OGD Contentions at 20-22; PFS Contentions Response at 544-56; Staff Contentions Response at 86-89; Tr. at 465.

RULING: As is reflected in the record, see Tr. at 465, this contention was withdrawn by petitioner OGD.

OGD I -- The Cask Design is Unsafe and Untested for Long Periods of Time

CONTENTION: The license application poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time and which has not been certified for either transportation or long term storage.

1. The license application fails to meet the requirements of 10 C.F.R. § 72.22(e) because the cask design is not certified.
2. No meaningful EIS under NEPA can be completed until the cask design is certified.

DISCUSSION: OGD Contentions at 22; PFS Contentions Response at 556-62; Staff Contentions Response at 89-90; Tr. at 290-91.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v. above.

OGD J -- The License Application Fails to Address the Status of Compliance with All Permits, Licenses, and Approvals for the Facility

CONTENTION: The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility.

DISCUSSION: OGD Contentions at 23-24; PFS Contentions Response at 562-70; Staff Contentions Response at 90-91; Tr. at 510-18.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above. Moreover, to the extent this contention is footed in a purported "trust responsibility" owed to individual members of a Native American tribe by a federal regulatory agency exercises its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis.

We also note that OGD revised this contention to withdraw any portion of the contention that deals with OGD A. See Tr. at 510.

OGD K -- There are No Provisions for Paying for Casks That May Need to be Returned to the Generating Facility

CONTENTION: The license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned.

DISCUSSION: OGD Contentions at 24-25; PFS Contentions Response at 570-78; Staff Contentions Response at 91-92; Tr. at 418-19.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

OGD L -- Operators will not be Trained for the Specific Job When Hired and Operators will Undergo On-the-job Training

CONTENTION: The license application poses undue risk to public health and safety because it provides that operators will not be trained for the specific job when hired and that operators will undergo on-the-job training, and classroom training leading to certification. The license application states that "of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors." See, License Application, LA Chapter 7 p. 7.1. This doesn't protect public health and safety in any manner.

1. The license application does not meet the requirements of 10 C.F.R. § 72.32, in that persons being trained on the job will not be able to carry out their responsibilities under 10 C.F.R. § 72.32(a)(7).

DISCUSSION: OGD Contentions at 25-26; PFS Contentions Response at 578-83; Staff Contentions Response at 92-93; Tr. at 264-68.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

OGD M -- No Provisions for Transportation Accidents are Made

CONTENTION: The license application poses undue risks to public health and safety because it makes no provisions for transportation accidents that might occur.

1. The license application does not adequately address the requirements of 10 C.F.R. § 72.32(a)(2) by failing to address transportation accidents near the site.

DISCUSSION: OGD Contentions at 26-27; PFS Contentions Response at 583-87; Staff Contentions Response at 93-94; Tr. at 328-31.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail

properly to challenge the PFS application. See section II.B.1.a.i., ii., iii., v., vi. above.

OGD N -- There may be a Leak that Contaminates the Present Water System

CONTENTION: The license application poses undue risk to public health and safety because it fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on. The application admits that several wells are going to have to be built to meet the demand that will be presented by the facility. Neither contingencies to deal with contamination nor lowering of the present water table are discussed.

DISCUSSION: OGD Contentions at 27; PFS Contentions Response at 587-91; Staff Contentions Response at 94-95; Tr. at 366-67.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above. Moreover, to the extent this contention is rooted in a purported "trust responsibility" owed to individual members of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis.

OGD O -- Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make

achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

DISCUSSION: OGD Contentions at 27-36; PFS Contentions Response at 591-611; Staff Contentions Response at 95-97; Tr. at 664-70, 707-16.

RULING: Admissible as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the contention is limited to the disparate impact matters outlined in bases one, five, and six. Moreover, basis six is limited to the effects of the PFS facility on property values in and around the Skull Valley Goshute community as a component in the "environmental justice" assessment of any disparate impacts suffered by minority and low-income communities. It also is not admissible to permit consideration of "psychological stress" as an environmental impact under NEPA, which is not a cognizable basis for the contention. See Metropolitan Edison Co., 460 U.S. at 772-79. Bases two, three, and four do not support admission of this contention because the

facility cost-benefit issues they seek to raise are not relevant to this contention.

OGD P -- Members of OGD will be Adversely Impacted by Routine Operations of the Proposed Storage Facility and Its Associated Transportation Activities

CONTENTION: The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts resulting from the physical presence of the facility are: visual intrusion, noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community. Those impacts that are not as obvious but nonetheless serious are: individual and collective social, psychological, and cultural impacts such as a sense of loss of well-being because of the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.

The ability of OGD members to pursue a traditional Goshute life style will be adversely affected by routine transportation operations of spent nuclear fuel and/or the presence of trucks, especially very large heavy haul trucks. The other obvious and other effects include the same kind of effects that are listed above, including fear that a transportation accident might happen, fear of acts of terrorism or sabotage which could expose members of OGD and their families, their homes, the community and their ancestral land.

DISCUSSION: OGD Contentions at 36-37; PFS Contentions Response at 612-29; Staff Contentions Response at 97-99; Tr. at 644-52.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above. Moreover, to the extent this contention seeks consideration of "psychological stress" as an environmental impact under

NEPA, it does not have a cognizable basis. See Metropolitan Edison Co., 460 U.S. at 772-79.

5. Confederated Tribes Contentions

Confederated Tribes A -- Decommissioning Plan
Deficiencies

CONTENTION: PFS has not provided reasonable assurance that the ISFSI can be cleaned up and adequately restored upon cessation of operations.

DISCUSSION: Confederated Tribes Contentions at 2-3; PFS Contentions Response at 619-29; Staff Contentions Response at 124-26; Tr. at 409-18.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iv., v., vi. above.

Confederated Tribes B -- Lack of Protection Against
Worst Case Accidents

CONTENTION: PFS has violated both NRC regulations and NEPA requirements by not adequately dealing with certain reasonably foreseeable accidents and failing to fully evaluate their potential impacts on health and the environment, to protect against them in an adequate manner, or to provide adequate emergency response measures.

DISCUSSION: Confederated Tribes Contentions at 3-4; PFS Contentions Response at 630-43; Staff Contentions Response at 126-28; Tr. at 327-28.

RULING: Admitted as supported by the basis in paragraph five regarding wildfires, which establishes a genuine material dispute adequate to warrant further inquiry. Inadmissible as to its other supporting bases in that the contention and these supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iii., v., vi. above.

Because of the similarity of the admitted portion of this contention with Utah K and Castle Rock 6, see supra pp. 68, 107, the Board consolidates that portion of this contention and its supporting basis with those issue statements. The Board has set forth the consolidated contention at page 4 of Appendix A to this memorandum and order.

Confederated Tribes C -- Inadequate Assessment of Costs under NEPA

CONTENTION: PFS has not adequately described or weighed the environmental, social, and economic impacts and costs of operating the ISFSI. Indeed, there is no adequate benefit-cost analysis which even demonstrates a need for the ISFSI. On the whole, Petitioners contend that the costs of the project far outweigh the benefits of the proposed action. See, e.g., Public Service Co. of New Hampshire, 6 NRC 33, 90 (1977).

DISCUSSION: Confederated Tribes Contentions at 5-7; PFS Contentions Response at 643-54; Staff Contentions Response at 128-30; Tr. at 750-64.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., v., vi. above.

Confederated Tribes D -- Inadequate Discussion of No-Action Alternative

CONTENTION: PFS has failed to satisfy the requirements of NEPA because it does not adequately discuss the alternatives to the proposed action.

DISCUSSION: Confederated Tribes Contentions at 7; PFS Contentions Response at 654-58; Staff Contentions Response at 130-31; Tr. at 669-75.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

Confederated Tribes E -- Failure to Give Adequate Consideration to Adverse Impacts on the Historic District

CONTENTION: PFS has failed to comply with NEPA in that it has not adequately discussed the impacts upon the historic district and the archeological heritage of the area.

DISCUSSION: Confederated Tribes Contentions at 7-8; PFS Contentions Response at 658-62; Staff Contentions Response at 131-32; Tr. at 790-92.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., v., vi. above.

Confederated Tribes F -- Failure to Adequately Establish Financial Qualifications

CONTENTION: PFS has failed to demonstrate that it is financially qualified to build and operate the ISFSI.

DISCUSSION: Confederated Tribes Contentions at 8-9; PFS Contentions Response at 662-71; Staff Contentions Response at 132; Tr. at 239-40.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

Because of the similarity of this contention and its supporting bases to portions of contentions Utah E and Castle Rock 7, see supra pp. 63, 109, the Board consolidates this contention and its supporting bases with those issue statements. The Board has set forth the consolidated contention at page 1 of Appendix A to this memorandum and order.

Confederated Tribes G -- Adoption by Reference of Specified Castle Rock Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the following Contentions and the Bases stated by Castle Rock Land & Livestock, L.C.:

1. Absence of NRC Authority. The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed ISFSI.

2. Non-Compliance with Regulations. PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72.

3. Application for Permanent Repository. The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository.

4. Inadequate Financial Qualifications. The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. § 72.22(e).

5. Regional and Cumulative Environmental Impacts. The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. §§ 72.98(b) & (c), NEPA.

DISCUSSION: Confederated Tribes Contentions at 10; PFS Contentions Response at 672; Staff Contentions Response at 132-33; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.C. above, however, the Board will permit Confederated Tribes to incorporate these five Castle Rock

contentions, all of which we have found inadmissible, subject to the restrictions described in section III.A. below.

Confederated Tribes H -- Adoption by Reference of Specified State Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the Contentions and the Bases stated by the State of Utah including without limit the following:

A. Statutory Authority. Congress has not authorized NRC to issue a license to a private entity for 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

B. License Needed for Intermodal Transfer Facility. PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point, in violation of 10 C.F.R. § 72.6(c)(1).

DISCUSSION: Confederated Tribes Contentions at 10-11; PFS Contentions Response at 672; Staff Contentions Response at 134; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.3. above, however, the Board will permit Confederated Tribes to incorporate these two State contentions, of which we have found only Utah B admissible, subject to the restrictions described in section III.A. below.

6. Skull Valley Band Contention

CONTENTION: The License Application for the Private Fuel Storage facility filed by Private Fuel Storage, LLC is meritorious and should be granted.

DISCUSSION: Skull Valley Band Contention at 1-3; PFS Contentions Response at 20-21; Staff Contentions Response at 134-36; Tr. at 179-80.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. See Sheffield, ALAB-473, 7 NRC at 743. As is noted in section III.A. below, the Skull Valley Band will be required to specify which of the admitted contentions of the other intervenors it wishes to contest and will be subject to the limitation that, absent some other agreement with the applicant, PFS is designated to serve as the "lead" party for litigation of all intervenor issues that challenge the PFS application.

C. Castle Rock 10 C.F.R. § 2.758 Petition to Waive Commission Rules

1. Standards Governing Rule Waiver Petitions

Although, as we have previously observed, agency rules are not subject to challenge in adjudicatory proceedings, see section II.B.1.a.ii. above, the Commission nonetheless has provided a procedure whereby a party to an agency hearing can seek a waiver of a regulation it believes should not be applicable. The standard for seeking such a waiver is set forth in 10 C.F.R. § 2.758(b), which provides:

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.

Procedurally, section 2.758(b) requires that the petition must be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the "special circumstances" alleged to justify the waiver or exception requested. Further, paragraphs (c) and (d) of section 2.758 state that a party's failure to make a prima facie showing on the section 2.758(b) standard precludes further consideration of the matter, while a presiding officer that finds a prima facie showing has been made must certify the petition to the Commission for its consideration.

In defining the scope and application of this rule, the Commission has further explained that a petitioner seeking to establish a prima facie case must make three showings. First, relative to establishing the requisite "special circumstances" exist to support the waiver, the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989). Put another way, the circumstances

alleged must be unique to the particular facility at issue. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-74 (1981). Speculation about future events is, however, an inadequate basis to establish the necessary "special circumstances." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 24-26, rev'd in part on other grounds, CLI-88-10, 28 NRC 573 (1988).

Also with respect to the need to demonstrate "special circumstances," the petitioner must show application of the rule will not serve the purposes for which it was adopted. See Seabrook, CLI-89-20, 30 NRC at 235. Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule or regulation was adopted. See, e.g., Seabrook, CLI-88-10, 28 NRC at 598-600; Seabrook, ALAB-895, 28 NRC at 12. Further, in ascertaining a rule's purposes and whether those purposes would be impaired, it is permissible to consider future events the agency logically would have anticipated in promulgating its rules. See Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, in seeking to establish that the rationale for the rule has been undercut, conjectural statements that merely highlight the uncertainty surrounding future events are not, in and of themselves,

sufficient. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301 (1989). Moreover, it has been established that a valid purpose for which the rule or regulation was adopted, within the meaning of 10 C.F.R. § 2.758, includes eliminating staff case-by-case review of a generic issue in individual applications and removing such an issue from adjudication in any operating license proceeding. See Seabrook, ALAB-895, 28 NRC at 14, 16-17; see also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986).

The third showing that must be made by a rule waiver petition is that the circumstances involved are "unusual and compelling" such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a "significant safety problem" relative to the rule at issue. Seabrook, CLI-89-20, 30 NRC at 235. Justifying a waiver, therefore, requires that a petitioner establish the issue raised is a significant safety problem, even if there clearly are special circumstances that undercut the rationale for the rule. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 129 (1989). Safety issues that are "conceivable" or "theoretical" do not fulfill this requirement, however. See Seabrook, CLI-89-20, 30 NRC at 243-44. Further, any claim of significance must be

viewed in the context of any other protective measures that are in place to prevent safety problems. See id. at 244.

With this background, we consider Castle Rock's request that we grant rule waivers in connection with two regulatory provisions -- 10 C.F.R. Part 72 and 10 C.F.R. § 51.23, often referred to as the Waste Confidence Decision -- as they otherwise might apply to the licensing of the PFS facility.

2. Waiver of Authority to License PFS Facility Under 10 C.F.R. Part 72

DISCUSSION: Castle Rock Waiver Petition at 4-17; State Castle Rock Waiver Petition Response at 2-5; PFS Castle Rock Waiver Petition Response at 12-41; Staff Castle Rock Waiver Petition Response at 4-10.

RULING: Putting aside the question of whether this portion of the petition, which is rooted in a lack of agency statutory authority to license the PFS facility under Part 72, see Castle Rock Waiver Petition at 17, even constitutes a legitimate section 2.758 waiver request, we find it must be denied for failing to meet the three-pronged test outlined above.

On the factor of whether special circumstances have been established by showing facts that apply uniquely to the PFS facility that were not considered in promulgating Part 72, as we observed in our analysis regarding Utah A, there was consideration of PFS-type circumstances as part of that rulemaking process. See supra pp. 55-56. Moreover,

contrary to Castle Rock's assertions, we find nothing in the NWPA that supports the conclusion its provisions undercut the rationale for Part 72 so as to provide the requisite special circumstances. Among other things, the passage of NWPA section 135(h), 42 U.S.C. § 10155(h), the principal provision Castle Rock relies upon to support its conclusion the Commission is statutorily precluded from licensing a private, off-site ISFSI like that proposed by PFS, did not repeal or otherwise affect the Commission's pre-existing AEA authority to license a private ISFSI, but simply indicated that nothing in the NWPA impacted on that AEA authority.

Finally, Castle Rock has failed to demonstrate there is a significant safety problem relative to the application of Part 72 to the PFS licensing request. Castle Rock declares that licensing the PFS facility under Part 72 raises questions about transportation risks, PFS financial stability, and the ultimate removal of spent fuel from the facility. See Castle Rock Waiver Petition at 3 n.2. Putting aside the hypothetical nature of these asserted problems, as our various rulings in section II.B. above indicate, these are all matters addressed in the context of existing protective measures, including 10 C.F.R. Part 71 dealing with transportation and various provisions of 10 C.F.R. Part 72 concerned with financial qualifications and facility decommissioning. As such, these claims do not

provide the type of "significant safety problems" that support the grant of Castle Rock's waiver petition.

3. Waiver of Waste Confidence Decision Embodied in 10 C.F.R. § 51.23

DISCUSSION: Castle Rock Waiver Petition at 18-24; State Castle Rock Waiver Petition Response at 6-8; PFS Castle Rock Waiver Petition Response at 41-52; Staff Castle Rock Waiver Petition Response at 10-22.

RULING: This portion of the Castle Rock petition challenges the continued applicability of the 1990 Commission generic determination in 10 C.F.R. § 51.23(a) that (1) reactor spent fuel can be safely stored without significant environmental impacts for at least thirty years beyond any current reactor's licensed operating life (as extended), and (2) at least one mined HLW geologic repository will be available within the first quarter of the twenty-first century and sufficient capacity for storage of spent fuel from operating reactors will be available at such facilities within the same thirty-year "beyond operating life" time period. It also seeks a waiver of the rule's generic determination in section 51.23(b) that, in light of these findings, in a licensing proceeding such as this one there need be no EIS discussion of the impacts of ISFSI spent fuel storage following the term of the ISFSI license. In both instances, however, Castle Rock again fails to meet the three-pronged test set forth above.

Castle Rock alleges various "significant" and "unexpected" technical events provide the necessary "special circumstances" needed to support its request for a waiver of the Commission's generic repository determinations under section 51.23(a), including a 1992 earthquake near the proposed Yucca Mountain, Nevada HLW repository site and questions about Yucca Mountain groundwater percolation rates and groundwater contamination in areas surrounding the site. It also puts forth a variety of legal or policy matters, such as DOE's failure to meet mandatory NWPA deadlines, pending legislation that would provide for interim storage at the Yucca Mountain site, and official opposition from the State of Nevada. These considerations, however, are either inappropriately rooted in speculation about future events (e.g., the passage of pending legislation) or fail to present PFS-specific matters that were not considered, either explicitly or by implication, in the rulemaking proceeding for the Waste Confidence Decision, see 55 Fed. Reg. 38,474, 38,486 (1990) (tectonic uncertainties); id. at 38,488 (hydrology complexities); id. at 38,494-95 (DOE schedule slippage and unavailability of Yucca Mountain site); id. at 38,495-97 (Nevada opposition); id. at 38,498, 38506-07 (funding adequacy). Castle Rock also fails to make its case in connection with the "special circumstances" second prong as it requires a showing the rule will not serve the purposes for which it was adopted. The Commission

has made clear the rule's generic approach was adopted to avoid just the kind of case-by-case adjudication PFS seeks. See 49 Fed. Reg. 34,658, 34,666 (1984). Castle Rock also does not fulfill the third prong because it does not establish a "significant safety problem" with the requisite concreteness.

To secure a waiver of the EIS analysis provision of section 51.23(b), Castle Rock asserts the inability of the proposed HLW repository to absorb the PFS fuel in a timely manner provides the requisite factor one unique "special circumstances." Again, however, this purported circumstance is either inappropriately rooted in speculation, which seemingly is incorrect, about the rate at which PFS stored fuel can be transferred to the repository, see PFS Castle Rock Waiver Petition Response at 46-48, or fails to present a PFS-specific matter that was not considered, either explicitly or by implication, in the rulemaking proceeding for the rule, see 55 Fed. Reg. at 38,501-04. And, as with its challenge to the repository determinations portion of the rule, Castle Rock fails to show this section of the rule will not serve the "generic rather than case-by-case resolution" purpose for which it was adopted. Finally, Castle Rock's claim that the repository's inability to absorb the PFS stored fuel until "at least" the last quarter of the twenty-first century increases fuel removal and decommissioning costs, extends

environmental impacts, and may cause funding shortfall-related safety problems, is insufficient to establish the requisite "significant safety problem" in light of the Commission's own Waste Confidence Decision pronouncement that spent fuel can be safely stored without significant environmental impact for "at least" 100 years, if necessary, see 55 Fed. Reg. at 38,513.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As the foregoing discussion indicates, five intervenors -- the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band -- are admitted as parties to this proceeding because they have standing and have presented at least one admissible contention. Below, we provide procedural guidance regarding further litigation of the admitted matters by these parties, taking into account the parties' request they be provided an opportunity to present the Board with suggestions on a further schedule for litigation. See Tr. at 809-10.

A. Lead Parties

In accordance with 10 C.F.R. § 2.714(f)-(g), a presiding officer is authorized to control the general compass of the hearing by consolidating issues and limiting party participation to avoid the presentation of irrelevant, duplicative, or repetitive evidence. In this instance, as we have indicated above, some of the State's admitted

contentions challenging the PFS application have been adopted by other intervenors, while other contentions proposed by different parties challenging the application have been consolidated because of their related subject matter. In addition, one of the parties, the Skull Valley Band, has filed a single contention expressing general support for the PFS application. In these circumstances, we find it appropriate to designate "lead" parties for the litigation of the various admitted contentions.

The party assigned the role of lead party has primary responsibility for the litigating a contention. Absent some other Board directive, the party with the lead role in support of a contention is to conduct all discovery on the contention; file or respond to any dispositive or other motions regarding the contention; submit any required prehearing briefs on the issue; prepare prefiled direct testimony, conduct any redirect examination, and provide any surrebuttal testimony regarding the contention; and prepare posthearing proposed findings of fact and conclusions of law on the contention. The party that has the lead role in opposing a contention has similar duties, with its hearing responsibilities including conducting witness cross-examination and recross-examination and preparing rebuttal testimony as appropriate. For any given contention, the lead party is responsible for consulting with the other "involved" parties (i.e., any party that

adopted its contention, filed a contention that has been consolidated, or has opposed the same contention) regarding litigation activities, but the ultimate litigating responsibility for the contention rests with the lead party.²⁹

The party that proffered an admitted contention challenging the PFS application is the lead party for that contention if it has not been consolidated with another party's contention. Accordingly, for each of the admitted State contentions adopted by Castle Rock Land/Skull Valley and Confederated Tribes, the State is the lead party. Further, for those contentions that have been consolidated with the contentions of other parties, we suggest that the following parties serve as the "lead":

Utah E/Castle Rock 7/Confederated Tribes F --
Financial Assurance: Confederated Tribes

Utah K/Castle Rock 6/Confederated Tribes B --
Inadequate Consideration of Credible
Accidents: State

Utah O/Castle Rock 8 and 10 -- Hydrology: State

Utah S/Castle Rock 7 -- Decommissioning: State

²⁹ The Board anticipates that consultation between the lead party and any involved parties will ensure involved parties' litigation interests and concerns regarding any particular contention are accommodated. If an instance arises when such discussions fail to yield a resolution, the involved parties may request Board consideration of the matter. Such a request must be in writing, on the record, and presented in a time frame that will allow for Board resolution without requiring the extension of any outstanding schedules.

Utah T/Castle Rock 10, 12, and 22 -- Inadequate
Assessment of Required Permits and Other
Entitlements: State

Utah AA/Castle Rock 13 -- Range of Alternatives:
Castle Rock

Utah DD/Castle Rock 16 -- Ecology and Species:
State

If, after consultation between the lead party and all involved parties, the parties agree that a party other than the one we have suggested should be the lead party for a contention, they jointly should seek Board approval for this change in the "lead" designation in accordance with the schedule set forth below.

In the case of the Skull Valley Band, as part of the schedule set out below we require that it provide us with a statement indicating which of the admitted contentions it wishes to contest. In addition, we designate PFS as the lead party in opposition to all admitted contentions that are contested by PFS and the Skull Valley Band, subject to any joint request by PFS and the Skull Valley Band to designate the Skull Valley Band as the lead party in opposition to one or more of the contentions the Skull Valley Band wishes to oppose.

In recognition of its independent status, the staff is not the subject of a lead party designation in connection with any contention.

B. Summary Disposition/Discovery

As part of the schedule set forth below, we request that the parties provide us with their views on which, if any, of the admitted contentions are subject to summary disposition either before or after discovery, and an appropriate schedule for filing such motions. In addition, we request that the parties provide us with their views on a schedule for discovery, taking into account any pre-discovery dispositive motions, the timing of the staff's Safety Evaluation Report (SER) and Final Environmental Impact Statement (FEIS),³⁰ and the time needed for the following two-step discovery process:

1. An initial informal discovery process during which lead parties and the staff are to:
 - a. Provide opposing lead parties and/or the staff with a description of the specific types of information, including documents, data compilations, and tangible things, to which they wish to have access as being relevant to the admitted contentions and their supporting bases.
 - b. Make available to opposing lead parties and/or the staff a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the lead party, other involved parties, and/or the staff that have been requested by the opposing lead party and/or the staff pursuant to paragraph 1.a. above.

³⁰ During the January prehearing conference, the Board discussed the status of the staff's preparation of its SER and FEIS and the potential impact of those activities on the litigation schedule for this proceeding. See Tr. at 812-15. We anticipate that the status of these staff activities, including any staff decision on segmentation of the SER, would be reflected in any schedules proposed by the parties as part of the filing requested below.

- c. Make available to opposing lead parties and/or the staff for interviews those individuals, particularly those persons who it is anticipated may provide evidentiary hearing testimony on behalf of a lead party or the staff, that have information relevant to the admitted contentions and their supporting bases.
2. A formal discovery process during which lead parties and the staff are subject to the following requirements:
 - a. Without prior leave of the Board or written stipulation, for each admitted contention:
 - i. the lead party supporting the contention may serve on the lead party challenging the contention and the staff,
 - ii. the lead party challenging the contention may serve on the lead party supporting the contention and the staff, and
 - iii. the staff may serve upon the lead party challenging the contention and the lead party supporting the contention
- not more than ten interrogatories per responding lead party or the staff, including all discrete subparts, and not more than three deposition notices per responding lead party or the staff.
- b. As part of any motion for protective order/motion to compel filed by a lead party or the staff in connection with a formal discovery request, counsel for the moving party shall provide a certification that he or she previously has:
 - i. provided counsel for the lead party or the staff to whom the motion is directed a clear and concise written statement of the asserted deficiencies or objections and the requested action relative to the discovery request, and
 - ii. after providing this statement, consulted with lead counsel in an attempt to resolve all the disputed matters without Board action.

If counsel are able to resolve a potential objection on the basis of the presubmission

conference, that resolution should be reduced to writing with copies provided to each counsel involved.

The Board expects that in the informal discovery process all parties will be specific in their information requests and provide access to requested information and knowledgeable individuals to the maximum degree possible. The Board anticipates monitoring the informal discovery process through a series of status reports and/or conferences. Failure to participate in the informal discovery process consistent with the outline set forth above will result in appropriate Board sanctions. In addition, the lead party is expected to coordinate informal or formal discovery requests in connection with a particular contention with all involved parties to ensure the discovery response includes all relevant materials from all parties with interests relating to the contention.

C. Joint Status Report, Other Filings, and Prehearing Conference

As was noted above, during the January 1998 prehearing conference, the parties indicated that once a determination on standing and contentions was issued, they would try to reach some agreement about future scheduling they would present to the Board. To this end, on or before Wednesday, May 6, 1998, the parties should file with the Board a joint status report that reflects their discussions regarding scheduling in light of this issuance.

In that report, the parties should discuss scheduling for dispositive motions and discovery in light of the requirements set forth in section III.B. above. They also should provide estimates of how long will be needed to try each of the admitted contentions if those issues go to hearing.³¹ Further, they should discuss the status of any settlement negotiations relative to the admitted contentions, and indicate whether a "settlement judge" would be of assistance in connection with one or more of the admitted contentions. If the parties are unable to agree on any of these matters, separate views may be included as part of the report.

In addition to this status report, in accordance with section III.A. above, on or before Wednesday, May 6, 1998, the Skull Valley Band should file its designation of contested issues. Also on that date, any requests should be submitted for revision of the lead party designations set forth in section III.A.

³¹ With regard to Utah T/Castle Rock 10, 12, and 22, concerning the assessment of required permits and other entitlements, in describing any schedule for the litigation of this contention the parties should provide their views about the propriety and efficiency of seeking an opinion/judgment in some other judicial forum relative to questions such as the scope of State regulatory authority on tribal lands. Compare Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 896 (1985) (at behest of Licensing Board, intervenors sought state court declaratory judgments on validity of state statutory limitations on utility emergency plan responses).

With these filings and the joint status report in hand, the Board will conduct an additional prehearing conference to discuss scheduling and other matters. That conference will be held in the Atomic Safety and Licensing Board Hearing Room, Room T-3B45, Third Floor, Two White Flint North Building, 11545 Rockville Pike, Rockville, Maryland, on Tuesday, May 19, 1998, beginning at 1:00 p.m. EDT (11:00 a.m. MDT). The Board anticipates the prehearing conference will last no more than two hours. For this prehearing conference, counsel may appear in person or, assuming there is sufficient interest, participate by teleconference from Room 212 in Milton Bennion Hall on the University of Utah campus in Salt Lake City, Utah.³² Counsel for each party should advise the Board in writing on or before Wednesday, April 29, 1998, whether they intend to appear in person in Rockville or by teleconference from Salt Lake City.

D. Other Administrative Rulings

Previously, the Board has issued directives concerning same day submission of courtesy copies of filings (e.g., e-mail or facsimile transmission); a ten-page limitation on motions and responses; and requests for leave to extend a filing date, exceed the ten-page limit, or file a reply

³² This is the same room that was used for the videoconferencing demonstration during the January 1998 prehearing conference.

pleading. See Licensing Board Memorandum and Order (Memorializing Initial Prehearing Conference Directives) (Feb. 2, 1998) at 3-5 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) at 1-3 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-7 (unpublished). The parties are reminded of these requirements and the Board's expectation they will be complied with.

In this connection, the filings provided for in section III.C. of this memorandum and order should be served on the Board, the Office of the Secretary, and counsel for the other parties by e-mail; facsimile transmission, or other means that will ensure receipt by close of business (4:30 p.m. EDT) on the day of filing.

IV. CONCLUSION

For the reasons set forth above, we find that petitioners State of Utah, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band, have established their standing to intervene and have put forth at least one litigable contention so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. We also conclude the intervention petitions of David Pete, SSWS and Ensign Ranches should be dismissed, the first having

failed to establish his standing to intervene as of right, the second having failed to show it was entitled to either standing as of right or discretionary intervention, and the third having failed to put forth an admissible contention. Finally, we deny the request of Castle Rock for a waiver of 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 as they are applicable to the PFS application, concluding Castle Rock has not made a prima facie showing that meets the standards set forth in 10 C.F.R. § 2.758 for obtaining a rule waiver.

For the foregoing reasons, it is this twenty-second day of April 1998, ORDERED,

1. Relative to the contentions specified in paragraph three below, the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band requests for a hearing/petitions to intervene are granted and these petitioners are admitted as parties to this proceeding.

2. The requests for a hearing/petitions to intervene of David Pete, SSWS, and Ensign Ranches are denied.

3. The following intervenor contentions are admitted for litigation in this proceeding: Utah B (paragraphs one and four), Utah C (paragraphs three, four, and five), Utah E (as consolidated with portions of Castle Rock 7 and Confederated Tribes F), Utah F (as consolidated with a portion of Utah P), Utah G (bases one and four), Utah H,

Utah K (in part, as consolidated with Castle Rock 6 and a portion of Confederated Tribes B), Utah L, Utah M, Utah N, Utah O (bases one, two (in part), three, and four, as consolidated with Castle Rock 8 and a portion of Castle Rock 10), Utah P (subparagraph b. of paragraph seven, as consolidated with Utah F), Utah R (paragraph one (in part) and subparagraph b. of paragraphs three and four), Utah S (bases one, two, four, five, ten, and eleven, as consolidated with a portion of Castle Rock 7), Utah T (paragraphs two through eight, as consolidated with a portion of Castle Rock 10 and Castle Rock 12 and 22), Utah U (basis one), Utah V (paragraph two (in part)), Utah W (paragraph three (in part)), Utah Z, Utah AA (as consolidated with a portion of Castle Rock 13), Utah DD (subparagraphs c., d., g., and h. of paragraph four, as consolidated with a portion of Castle Rock 16), Utah GG (paragraph five), Castle Rock 6 (as consolidated with portions of Utah K and Confederated Tribes B), Castle Rock 7 (paragraphs a. through d., and f., as consolidated with Utah E and a portion of Utah S), Castle Rock 8 (as consolidated with a portion of Utah O), Castle Rock 10 (as consolidated with portions of Utah O and T), Castle Rock 12 (as consolidated with a portion of Utah T), Castle Rock 13 (paragraph a., as consolidated with Utah AA), Castle Rock 16 (paragraph b., as consolidated with Utah DD), Castle Rock 17, Castle Rock 20, Castle Rock 21, Castle Rock 22 (as

consolidated with a portion of Utah T), OGD O (bases one, five, and six), Confederated Tribes B (basis five, as consolidated with portions of Utah K and Castle Rock 6), Confederated Tribes F (as consolidated with Utah E and a portion of Castle Rock 7), and the Skull Valley Band contention.³³

4. The following intervenor contentions are rejected as inadmissible for litigation in this proceeding: Utah A, Utah B (paragraphs two and three), Utah C (paragraphs one and two, paragraph six, and paragraphs seven and eight), Utah D, Utah G (bases two and three), Utah I, Utah J, Utah K (in part), Utah O (basis 2 (in part)), Utah P (paragraphs one through six, subparagraphs a. and c. through h. of paragraph seven, and paragraphs eight and nine), Utah Q, Utah R (paragraphs one and two (in part), subparagraph a. of paragraphs three and four, and paragraph five), Utah S (paragraph three and paragraphs six through nine), Utah T (paragraph one), Utah U (bases two through four), Utah V (paragraphs one and two (in part), paragraphs three and four), Utah W (paragraphs one and two, paragraph three (in part), and paragraphs four through six), Utah X, Utah Y, Utah BB, Utah CC, Utah DD (paragraphs one through three (in part), subparagraphs a., b., e., and f. of paragraph four, and paragraphs five and six), Utah EE, Utah GG (paragraphs

³³ The language of these admitted contentions is set forth in Appendix A to this memorandum and order.

one through four), Castle Rock 1, Castle Rock 2, Castle Rock 3, Castle Rock 4, Castle Rock 5, Castle Rock 7 (paragraph e.), Castle Rock 9, Castle Rock 11, Castle Rock 13 (paragraphs b. and c.), Castle Rock 14, Castle Rock 15, Castle Rock 16 (paragraphs a. and c.), Castle Rock 18, Castle Rock 19, Castle Rock 23, Castle Rock 24, OGD A, OGD B, OGD C, OGD D, OGD E, OGD F, OGD G, OGD I, OGD J, OGD K, OGD L, OGD M, OGD N, OGD O (bases two through four), OGD P, Confederated Tribes A, Confederated Tribes B (bases one through four), Confederated Tribes C, Confederated Tribes D, Confederated Tribes E, Confederated Tribes G, and Confederated Tribes H.

5. The December 19, 1997 State request to adopt the contentions of the other petitioners opposing the PFS application is denied.

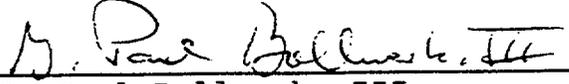
6. The January 21, 1998 petition of Castle Rock for waiver of the Commission's rules in 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 is denied.

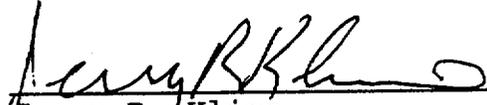
7. The parties are to make the filings required by section III.C. above in accordance with the schedule established therein.

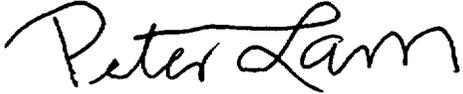
8. Motions for reconsideration of this memorandum and order must be filed on or before Monday, May 4, 1998, and are subject to the ten-page limitation described in section III.D. above.

9. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon intervention petitions, this memorandum and order may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD³⁴


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE


Jerry R. Kline
ADMINISTRATIVE JUDGE


Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 22, 1998

³⁴ Copies of this memorandum and order were sent this date to counsel for the applicant PFS, and to counsel for petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock, SSWS, and the State by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

Dissenting Opinion of Judge Lam on Denial of Discretionary Intervention to Petitioner Scientists for Secure Waste Storage:

I join in this memorandum and order in all respects except the Board's denial of discretionary intervention to petitioner Scientists for Secure Waste Storage (SSWS). After considering the arguments of the various petitioners, applicant Private Fuel Storage, L.L.C., and the NRC staff, I conclude that (1) the broad knowledge and experience of the members of SSWS in nuclear science and technology would make a significant contribution to the development of a sound record; and (2) SSWS's intervention would not broaden the issues to be heard or inappropriately delay the proceeding because SSWS seeks to intervene only on issues already raised. Based on the Commission's guidelines in its Pebble Springs decision, see Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976), and the Appeal Board's Sheffield ruling, see Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978), I would have granted SSWS discretionary intervention in this proceeding.

APPENDIX A

ADMITTED CONTENTIONS

1. Utah B -- License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

2. Utah C -- Failure to Demonstrate Compliance With NRC Dose Limits.

CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. § 72.106(b) can and will be complied with in that:

1. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.
2. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
3. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

3. Utah E/Castle Rock 7/Confederated Tribes F -- Financial Assurance

CONTENTION: Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license it that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license

applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. See 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.

2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.
3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The applicant must submit a copy of each member's Subscription Agreement, see 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.
4. To demonstrate its financial qualifications, the applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, see 10 C.F.R. Part 50, Appendix C, § II.
5. The applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the "possessor" of the spent fuel casks. The applicant must address these issues. See 10 C.F.R. § 72.22(e).
6. The applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. See 10 C.F.R. Part 50, App. C, § II.

7. The applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
 8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.
 9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.
 10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.
4. Utah F/Utah P -- Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel, including radiation protection training, fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.

5. Utah G -- Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

6. Utah H -- Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110°F.
 2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.
 3. PFS's projection that average daily temperatures will not exceed 100°F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.
 4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.
 5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.
 6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.
 7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.
7. Utah K/Castle Rock 6/Confederated Tribes B --
Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects of wildfires.

8. Utah L -- Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

9. Utah M -- Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. § 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. § 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.
2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

10. Utah N -- Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.

11. Utah O/Castle Rock 8 and 10 -- Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI and the ITP, as required by 10 C.F.R. §§ 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the applicant's sewer/wastewater system; facility operations,

including firefighting activities; and construction activities.

2. Contaminant pathways from the applicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of applicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

12. Utah R -- Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.
2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.
3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

13. Utah S/Castle Rock 7 -- Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(e).

14. Utah T/Castle Rock 10, 12, and 22 -- Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. § 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there.
2. The Applicant has shown no authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.
3. The Applicant has shown no basis that it is entitled to widen Skull Valley Road in that the application does not describe and identify State and local permits or approvals that are required.
4. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. § 51.45 in that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts as it relates to Utah air quality permits in ER sections 4.1.3 and 4.2.3 is inadequate; and a state air quality approval order under Utah Code Ann. § 19-2-108 will be required.

5. The Applicant has not addressed the requirement to obtain a Utah Groundwater Discharge Permit or the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.
6. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements of 10 C.F.R. § 51.45 in that the Applicant merely states that it "might" need Army Corps of Engineers and State approvals in connection with any Clean Water Act (CWA) Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor; PFS provides an inadequate discussion of Site requirements relative to the Skull Valley Band of Goshute's CWA permitting authority; and PFS will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.
7. The applicant must show legal authority to drill wells on the proposed ISFSI site by identifying and describing the State approvals that are required.

15. Utah U -- Impacts of Onsite Storage not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

16. Utah V -- Inadequate Consideration of Transportation-Related Radiological Environmental Impacts

CONTENTION: The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. § 51.52(a) for use of Summary Table S-4, so that the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. § 51.52(b).

17. Utah W -- Other Impacts not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that the Applicant has not considered the impact of flooding on the intermodal transfer point.

18. Utah Z -- No Action Alternative

CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.

19. Utah AA/Castle Rock 13 -- Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

20. Utah DD/Castle Rock 16 -- Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and NEPA in that the License Application has not estimated potential impacts to ecosystems and "important species" as follows:

1. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.
2. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.
3. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two "high interest" plants, Pohl's milkvetch and small spring parsley.

4. The License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

21. Utah GG -- Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. §§ 72.122(b)(2) and 72.128(a), in that Sierra Nuclear's consultant, Advent Engineering Services, Inc., used a nonconservative "nonsliding cask" tipover analysis that did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

22. Castle Rock 17 -- Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see, e.g., 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

- a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;
- b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;
- c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy

operations, residential development, or commercial development;

- d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and
- e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

23. Castle Rock 20 -- Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail spur access alternative over the other and the implications of such selection in light of such considerations. See 10 C.F.R. §§ 51.45(c) and 72.100(b), in that:

- a. The ER is deficient because it fails to properly analyze the transportation alternatives.
- b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.
- c. The ER is defective because PFS is considering a third option not discussed in the ER.
- d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

24. Castle Rock 21 -- Exact Location of Rail Spur

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (see 10 C.F.R. § 72.90(a)), in that:

- a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.

- b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

25. OGD O -- Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage
Installation)

Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-98-7) DTD 4/22 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)72-22-ISFSI
LB M&O (LBP-98-7) DTD 4/22

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Dated at Rockville, Md. this
22 day of April 1998


Office of the Secretary of the Commission

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
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