

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

) Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC)
(Independent Spent Fuel)
Storage Installation))

) ASLBP No. 97-732-02-ISFSI

) January 15, 1999

**STATE OF UTAH'S REPLY TO NRC STAFF'S AND APPLICANT'S
RESPONSES TO CASTLE ROCK'S NOTICE OF WITHDRAWAL**

Pursuant to the Board's Order of January 7, 1999, the State of Utah files this Reply to the NRC Staff's and Applicant's Responses, dated January 5, 1999, to the Notice of Withdrawal by Castle Land and Livestock, L.C., and Skull Valley Company, Ltd. (collectively "Castle Rock").

The State, in its Response, addressed how it could adopt those portions of the consolidated contentions attributable to Castle Rock by describing the interrelatedness of the consolidated contentions. Furthermore, if any portion of the consolidated contentions could be attributable to Castle Rock, then the State showed how it met the late filed factors for adopting them. The State also showed how it met the late filed factors for adopting Castle Rock's unconsolidated contentions 17 and 20. Meanwhile, the Staff's and Applicant's Responses asserted that a certain portion of the consolidated contentions are attributable to Castle Rock and should be dismissed along with the three unconsolidated Castle Rock contentions.

ARGUMENT

The Board structured this case by interweaving contentions common to the various parties into consolidated contentions. Now the Staff and the Applicant want the Board to extract out of the consolidated contentions certain portions that they view as attributable solely to Castle Rock. The Staff and Applicant, both citing Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985), state that a withdrawal of an intervenor causes the withdrawing party's contentions to be dismissed. Interestingly, the Appeals Board in Houston Lighting did not endorse as a matter of law, that "the departure of one party from a proceeding may never be an element of good cause when deciding whether to permit a remaining intervenor to adopt contentions earlier submitted by another." Id at 384. The Appeals Board recognized that such a bar would encourage nominal co-sponsorship of all contentions at the outset, which may complicate litigation and settlement offers. The Appeals Board added, "If, in the circumstances of a particular case, there is a sound foundation for allowing one entity to replace another, it can, of course, be taken into account in making the 'good cause' determination." Id.

The State in its Response addressed the 10 CFR § 2.714(a)(1) late filed factors in order to adopt unconsolidated Castle Rock contentions 17 and 20 and also to adopt any portion of the consolidated contentions attributable solely to Castle Rock. The State has shown in its Response that there is a sound foundation and good cause for the

State replacing Castle Rock for the foregoing contentions.

The State submits that the Board should leave the consolidated contentions as written in LPB-98-7 because of the way in which the Board initially structured the case, the amount of resources the State has devoted to the case in reliance on the current structure of the case, and the implications that may be drawn from uncoupling the consolidated contentions.

The Board structured the case by admitting contentions as supported by the contention's bases. *See e.g., Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP 98-7, 47 NRC 142, 187 (1998).* The Board may decide to leave the consolidated contentions undisturbed. However, should the Board segregate out for dismissal any issue attributable to Castle Rock in the consolidated contentions then the Board must first scrutinize the bases of the State's contentions – or those of the Confederated Tribes – that were consolidated with Castle Rock's contentions to determine whether the item at issue is encompassed in the State's or Confederated Tribes' bases for their contentions.

The State is particularly concerned about the significance that may later be attached to those parts of the consolidated contentions that may be dismissed as they relate to the State's bases for the consolidated contentions. By extracting out a phrase or sentence from a melded contention that was formed out of two or three parties' contentions, the Applicant or the Staff may later argue that because of such a dismissal

the State cannot raise a particular issue – even though that issue is encompassed in the State’s bases for the consolidated contention. For example, if the Board were to dismiss all or part of paragraph 2 of the Financial Assurance contention (e.g., that PFS has not produced any documents evidencing its members’ obligations), a connotation may be drawn that the State cannot litigate PFS’s lack of documentation to show the viability of this newly formed entity. Yet, from the outset, as well as in Utah Contention E (Financial Assurance), the State has been decrying the Applicant’s lack of documentation, especially as it relates to the structure and obligations of the PFS limited liability company.

The Staff and Applicant claim that certain portions of three contentions (Financial Assurance, Hydrology and Permits) were submitted solely by Castle Rock, and thus, should be excised from the admitted consolidated contentions. Staff Response at 5-6, Applicant’s Response at 5-8. In addition, the Applicant found portions of two other Castle Rock consolidated contentions (Credible Accidents and Decommissioning) that should suffer the same fate. Applicant’s Response at 6-7. The contentions at issue are discussed in detail below.

1. Financial Assurance. In its Response the State asserted that because this contention is an amalgamation of financial assurance contentions admitted by the Board comprising those submitted by the State, the Confederated Tribes and Castle Rock, it should remain undisturbed. In contrast, both the Staff and Applicant assert

that paragraph 10 of the contention, as written in Appendix A, is attributable solely to Castle Rock. Further, the Applicant – but not the Staff – seeks to carve out paragraph 2 from the contention. Neither of these paragraphs should be eliminated.

First, the State in its Response pointed out the interrelatedness of the issues brought to this contention, both overall and specifically relating to paragraph 10, by the State, Castle Rock, and the Confederated Tribes. State Response at 6-8. The State also addressed the late filed factors necessary to adopt any part of the Financial Assurance contention attributable solely to Castle Rock. *Id.* at 8-10.

Second, the State did not separately address paragraph 2 of the contention because, like the NRC Staff, it did not see this portion of the contention as attributable solely to Castle Rock. *See* NRC Staff Response at 4-5. As the Staff pointed out in its Response, the Confederated Tribes successfully adopted Castle Rock's financial assurance contention and bases. Confederated Tribes Contentions at 10. This alone should disqualify the dismissal of any portion of Castle Rock's financial assurance contention.

Third, paragraph 2 of the contention may also be derived from Utah Contention E. In its contention, the State claimed that the financial qualification of PFS – as a limited liability company and newly formed entity – should be evaluated against 10 CFR § 50.33(f) and Part 50, Appendix C.II. These regulations, used as guidance, encompass the issues in paragraph 2 of the contention that may be

attributable to Castle Rock. Furthermore, in part 5 of Utah Contention E's bases, the State protests the Applicant's lack of legally binding documents to meet its obligations. State Response at 35-36.

Finally, the State meets the late filed factors to adopt paragraph 2 should the Board consider that paragraph 2 is not encompassed in the State's or Confederated Tribes' financial assurance contentions. Instead of reiterating the late-filed factors, the State refers the Board to the State's Response at 7-10. The same late-filed factors appearing in the State's Response apply equally to paragraph 2 as to paragraph 10 of the Financial Assurance contention.

2. Hydrology. Both the Staff and Applicant want to extract reference to firefighting activities relating to contaminant pathways from the hydrology contention. In Utah Contention O, the State asserted that the Applicant had not analyzed contaminants or contaminant pathways from the operation of its ISFSI. State Contentions at 100-01. Contamination from firefighting efforts are encompassed in the type of operational activities that the Applicant has failed to analyze. Therefore, reference to firefighting activities should not be dismissed. The Board admitted a portion of Confederated Tribes' contention B that related to wildfires. 47 NRC at 235. While the Board consolidated the wildfire portion of Confederated Tribes Contention B with the Credible Accidents contention (Utah K and Castle Rock 6), a portion of the Confederated Tribes' bases for the contention may also apply to the

Hydrology contention. A basis for admitting the Confederated Tribes contention is that the Applicant has not provided an "adequate plan for handling the impacts stemming from natural disasters such as wildfires" Confederated Tribes Contentions at 4. Contamination from firefighting activities would be such an impact.

3. Permits. The Staff mentions dismissing Utah Groundwater Protection Rules while the Applicant raises dismissing the Skull Valley Band of Goshute's Clean Water Act permitting authority and the Utah Division of Air Quality Rules from the consolidated Permits contention.

Part of the State's admitted Contention T (Permits) is that the Applicant's facility and operations require a Utah Groundwater Discharge Permit and Air Quality Approval Order (a type of permit). The Staff's and Applicant's desire for the Board to dismiss State rules (*i.e.* regulations) from this contention exemplifies the narrowness of their focus and their misunderstanding of required State approvals. The Staff and the Applicant should realize that to obtain a State groundwater or air quality permit requires compliance with applicable State rules. See Utah Administrative Rules R317-6-6 and R307-401. It is axiomatic that to obtain a permit one must comply with applicable rules – just like PFS must comply with Part 72 regulations to obtain an ISFSI license. Therefore, reference to Utah Groundwater Protection Rules or Air Quality Rules in the admitted contention should remain.

4. Credible Accidents. Only the Applicant raises for dismissal "issues concerning the threats to the ISFSI posed by activities at the following facilities[:] ... The Department of Defense Chemical Weapons Incinerator, Tooele Army Depot, the Aptus hazardous waste incinerator, the Laidlaw Clive hazardous waste incinerator, the Laidlaw Grassy Mountain landfill, and the Envirocare of Utah low level waste disposal facility." Applicant's Response at 6. The Staff did not raise these issues for dismissal.

First, it should be noted that the consolidated contention as written uses the exact same language as appears in the Utah's Contention K, with the exception of wildfires which was raised by the Confederated Tribes. Thus, the Applicant wants to probe the bases for admitting the contention. The State believes that this is unnecessary; however, should the Board agree with the Applicant, the State meets the late filed factors to adopt Castle Rock's basis.

Second, under Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-9422, 40 NRC 37 (1994), once a contention has been admitted, the test to determine whether a new basis should be admitted is "whether the motion was timely and whether it presents important information regarding a significant issue." As discussed in the late filed factors below, the State's motion to adopt the bases for Castle Rock's contention is timely and presents important information regarding significant safety issues from the hazardous activities that occur in the vicinity of the PFS operations and facility.

Third, the State meets the late filed factors in 10 CFR § 2.714(a)(1) and has good cause for adopting those portions of the bases supporting the Credible Accidents contention that were raised by Castle Rock. The State has not been standing idly by without devoting any effort to this issue. The State as lead party for this contention has been preparing to litigate the effects that all the commercial and military facilities, including those PFS wants dismissed, may have on the Applicant's operation. In order to quantify and qualify risks of credible accidents and because of the significance to the State and its citizens of adding yet another dangerous activity (*i.e.* storage of high level nuclear waste) in the area, it is essential that the State be permitted to explore the issue to its fullest extent. In its Petition to Intervene the State enumerated the various hazardous industrial and military facilities that are located within a thirty-five mile radius of the proposed PFS site. Of great concern to the State is the Army's Deseret Chemical Depot located 20 miles east of the proposed ISFSI site. A major chemical weapons storage site, it also destroys chemical weapons, including deadly nerve gas and blister agent. See State of Utah's Request for Hearing and Petition to Intervene at 4-5. The Tooele Army Depot, located in the same general area as Deseret Chemical, stores, detonates, burns and destroys conventional munitions and is also of concern.

The State has an integrated and coordinated emergency response system with the Deseret Chemical Depot incinerator and the Tooele Army Depot. The State has good cause to include Castle Rock's basis because PFS has made no attempt to

coordinate or integrate its activities with the State and thus incidents at other facilities may adversely affect operations at PFS. Conversely, incidents at PFS may have a detrimental effect on the State's planning efforts and regulation of and response to incidents other facilities.

Furthermore, the State has good cause now for adopting Castle Rock's basis for the contention because until Castle Rock's recent notice of its intention to withdraw from the proceeding, the State had no reason to believe that Castle Rock would not pursue the issue, thus protecting the State's interest. In addition, allowing the State to adopt the basis would preserve the status quo.

Addressing the second late filed factor, the State has no other forum where its interests will be protected. One reason the State is participating in this proceeding is to have a voice in how the State and its citizens will be protected from the effects of accidents at the PFS facility. Another reason is to explore how the consequences of an incident at PFS will impact the surrounding military and industrial operations. This is critical in light of the fact that PFS has no coordinated strategy for dealing with emergencies with any State agency that regulates surrounding facilities.

It has come to the State's attention that when it attempts to raise issues before the Board, the NRC Staff objects to the State's contentions yet often these same rejected issues are taken up by the Staff reviewing the PFS application. For example, in the Staff's Request for Additional Information (RAI) to the Applicant dated December

10, 1998, the Staff requests the Applicant to "[d]iscuss the role of the Goshute or other appropriate authorities in emergency preparedness activities at PFSF." RAI at 28.

When the State tried to raise this issue in its Emergency Plan contention it was soundly rejected by NRC Staff. See State Contention at 119; Staff Reponse at 40-49. Here, if the Board rejects the State's adoption of Castle Rock's basis the issue will likely be shunted over to the Staff to review. However, a question raised by the Staff and responded to by the Applicant goes untested and is no substitute to the State's litigating the issue before the Board. The procedure as it is regularly playing out does not afford the State a fair participation in the licensing process. Consequently, the only forum available to the State to protect its interest and those of its citizens is before the Board.

The State as the regulator of all the facilities enumerated in Castle Rock's basis has a vast knowledge base to assisting in developing a sound record. In some instances, the State has resident inspectors at the facilities, or inspectors who visit the facilities daily. The State has also defended permits it has issued for some of these facilities (e.g., the Deseret Chemical incinerator) and thus State personnel have added experience in dealing with the activities that occur at these facilities. Whether the State is litigating the effects of Dugway Proving Ground or the Deseret Chemical incineration, the witness will be the same. Moreover, the State would expect the NRC Staff to support the State's adoption of Castle Rock's basis because of safety concerns, and because there

is no entity other than the State of Utah with the depth of knowledge about the area.

Finally, the State's adoption of Castle Rock's basis will not broaden or delay the proceedings. The parties have been on notice for a year as to the scope of the proceeding and the Board's hearing schedule already accounts for litigating this issue. Furthermore, the basis for Castle Rock's contention is only part of the entire basis of the State's contention; so it should not delay the proceeding. In any event, the safety of the facility warrants this contention encompassing all facilities that may impact the ISFSI or, likewise, how the ISFSI may impact the surrounding facilities.

5. Decommissioning. Only the Applicant raises the dismissal of non-routine expenses other than those arising from large accidents and associated releases of contamination at the ISFSI because the issue is claimed to be raised solely by Castle Rock. The Board in admitting and consolidating a portion of Castle Rock Contention 7 with Utah Contention S stated:

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....

47 NRC at 215. The Board has already recognized that all portions of the Castle Rock decommissioning contention are covered by Utah Contention S. Furthermore, the language used by the Board for the Decommissioning contention is the exact language Utah submitted in Utah Contention S (Decommissioning). Cf 47 NRC at 255 with Utah Contentions at 123. Castle Rock's withdrawal should have no effect on the

Decommissioning contention.

CONCLUSION

The State urges the Board not to de-construct the consolidated contentions into fractional parts in order to dismiss any portion that may be attributable to Castle Rock. If such is the case, the State requests that the Board rule that the State may adopt those portions of the contentions or bases attributable to Castle Rock because the State meets the late filed factors. The State also meets the late filed factors to adopt Castle Rock Contentions 17 and 20.

DATED this 15th day of January, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO NRC STAFF'S AND APPLICANT'S RESPONSES TO CASTLE ROCK'S NOTICE OF WITHDRAWAL was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 15th day of January, 1999:

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