

January 5, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO
CASTLE ROCK'S NOTICE OF WITHDRAWAL

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedule for Response to Notice of Withdrawal)" (Order), dated December 22, 1998, the staff of the Nuclear Regulatory Commission (Staff) responds to the December 21, 1998, notice of withdrawal and request for dismissal of the contentions and bases proposed by Castle Rock Land and Livestock, L.C. and Skull Valley Co., LTD. (collectively referred to herein as "Castle Rock").¹

BACKGROUND

On June 20, 1997, Private Fuel Storage L.L.C. (PFS or Applicant) applied for a license, pursuant to 10 C.F.R. Part 72, to receive, transfer and possess power reactor spent fuel and other radioactive material associated with spent fuel storage in an independent spent fuel storage

¹ The petition for leave to intervene filed by Castle Rock Land and Livestock, L.C., and Skull Valley Company, LTD., was co-filed by Ensign Ranches of Utah, L.C. (Ensign Ranches). Ensign Ranches' petition to intervene was dismissed by Memorandum and Order dated April 22, 1998, from which Ensign Ranches did not appeal. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 247 (1998).

installation, to be constructed and operated on the Skull Valley Indian Reservation in Tooele County, Utah. On September 11, 1997, Castle Rock submitted a timely request for hearing and petition to intervene in the proceeding. See "Castle Rock Land and Livestock, L.C., Skull Valley Company, LTD., and Ensign Ranches of Utah, L.C. Request for Hearing and Petition to Intervene" (Sept. 11, 1997). Thereafter, on November 21, 1997, Castle Rock submitted twenty-four contentions and their bases. See "Contentions of Petitioners Castle Rock Land & Livestock, L.C., Skull Valley Co., LTD. and Ensign Ranches of Utah, L.C. on the License Application for the Private Fuel Storage Facility" (Nov. 21, 1997).

By Memorandum and Order dated April 22, 1998, the Licensing Board admitted five intervenors, including Castle Rock, as parties to the proceeding and approved twenty-six contentions for litigation. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 206-11 (1998). Of Castle Rock's twenty-four contentions, the Board rejected thirteen in their entirety, admitted six in their entirety, and admitted five in part or with qualifications as noted by the Board.² See *id.*, 47 NRC at 211-25. Of Castle Rock's eleven contentions that were admitted in whole or in part, the Board consolidated eight contentions and their related bases with some of the State of Utah's admitted contentions and the Confederated Tribes'

² The thirteen contentions rejected in their entirety were: Castle Rock 1, 2, 3, 4, 5, 9, 11, 14, 15, 18, 19, 23, and 24. The six admitted in their entirety were: Castle Rock 8, 10, 12, 17, 20, and 21. The five admitted in part or with Board qualification were: Castle Rock 6, 7, 13, 16, and 22. The Board, in a subsequent ruling on motions for reconsideration, rejected portions of Castle Rock 17. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-10, 47 NRC 288, 297-98 (1998).

admitted contentions.³ *Id.* at 242-43. Three of Castle Rock's admitted contentions were not consolidated with other contentions.⁴

On December 21, 1998, Castle Rock submitted a notice that it is voluntarily and with prejudice withdrawing from the proceeding. "Notice of Withdrawal of Castle Rock Land and Livestock, L.C. and Skull Valley Company, LTD." (Dec. 21, 1998). On December 22, 1998, the Board issued its Order providing an opportunity for party responses to Castle Rock's notice of withdrawal, concerning the issue of the impact of Castle Rock's withdrawal on the litigation of admitted contentions in the proceeding.

DISCUSSION

The withdrawal of an intervenor in an NRC proceeding causes the withdrawing party's contentions to be removed from litigation. *See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985)*. Issues based upon the contentions of the withdrawing party are likewise dismissed. *See Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 431 (1990)*. To this end, it is well recognized that acceptance of contentions for litigation in a proceeding does not convert them into cognizable issues for litigation absent their sponsoring intervenor. *See South Texas, 21 NRC at 383*. A remaining party in the proceeding can adopt a withdrawing party's contentions only by demonstrating that a balance of the late-filed petition factors of 10 C.F.R. § 2.714(a)(1) weighs in its favor. *See id.*

³ The Board designated Castle Rock as the lead party for the purpose of litigation with respect to one of its consolidated contentions (Castle Rock 13/Utah AA). LBP-98-7, 47 NRC at 243. Thereafter, at the request of Castle Rock and the State of Utah, the Board changed the lead party designation for this contention to the State of Utah. *See "Order (Approving Lead Party Designation Change . . .)"* (Nov. 27, 1998).

⁴ These contentions were Castle Rock 17, 20 and 21.

In accordance with these principles, the Staff submits that, with one exception, Castle Rock's contentions and related bases should depart with Castle Rock. The three admitted contentions sponsored solely by Castle Rock should be dismissed, inasmuch as they have not been adopted successfully by any other party.⁵ For the same reason, most of Castle Rock's eight contentions that have been consolidated with those of other parties should be dismissed. Only one of those contentions has been successfully adopted or co-sponsored by another party: The Board permitted the Confederated Tribes to adopt contentions submitted by the State of Utah and Castle Rock (LBP-98-7, 47 NRC at 182, 237) -- and one of the contentions they adopted from Castle Rock (Castle Rock 7, on financial qualifications) was found to be admissible in part. *See id.* at 214-15.⁶ With this exception,⁷ all of Castle Rock's other contentions and their bases should be dismissed from the proceeding.⁸

The wording of consolidated contentions that include Castle Rock's contentions is set forth in an Appendix to the Licensing Board's Memorandum and Order admitting contentions. *See* LBP-98-7, 47 NRC at 251-58. Based on a comparison of the language of the consolidated

⁵ Significantly, the State of Utah tried to incorporate by reference all of the other parties' contentions, including those of Castle Rock. *See* LBP-98-7, 47 NRC at 182. The Board rejected the State's request as having failed to satisfy the requirements for late-filed contentions. *Id.*

⁶ The Staff notes that the Board, in ruling on the Confederated Tribes' request to incorporate five of Castle Rock's contentions, stated that they were all found to be inadmissible (LBP-98-7, 47 NRC at 237); in fact, however, one of these Castle Rock contentions (Castle Rock 7) was admitted in part.

⁷ *See* discussion *infra* at 5.

⁸ The Staff further notes that Castle Rock was permitted to incorporate the State's contentions, some of which were found to be admissible. LBP-98-7, 47 NRC at 225. This incorporation effectively added Utah's contentions to Castle Rock's contentions. Now, with Castle Rock no longer a party, Utah remains the sole sponsor of its contentions.

contentions with the contentions and bases of Castle Rock and the other intervenors, it appears that little needs to be changed in order to remove the language and/or issues that were submitted solely by Castle Rock, in that the language of the admitted contentions generally reflects the contentions of parties other than Castle Rock.⁹ Three contentions do appear to require revision: First, regarding consolidated contention 3 (Utah E/Castle Rock 7/ Confederated Tribes F, "Financial Assurance"), paragraph 10 is unique to Castle Rock's contention 7 and should be deleted.¹⁰ Second, paragraph 1 of consolidated contention 11 ("Hydrology") should not contain the reference to firefighting activities; this matter was raised by Castle Rock in contention 8 and not by the State. Finally, paragraph 5 of consolidated contention 14 ("Inadequate Assessment of Required Permits and Other Entitlements") should be limited to the requirement to obtain a Utah Groundwater Discharge Permit; the applicability of the Utah Groundwater Protection Rules was raised by Castle Rock and no other party and, therefore, this reference should be deleted. In order to effect this revision to consolidated contention 14, the words "or the applicability of the Utah Groundwater Protection Rules which apply" should be replaced by the phrase "which applies."

⁹ The Staff herein addresses only the wording of the contentions. In addition, however, to the extent that any bases for admitted contentions were submitted only by Castle Rock, those bases should be removed from litigation of the contention even if not explicitly reflected in the wording of the contention.

¹⁰ While some of the language used by Castle Rock in its contention 7 appears in paragraphs 2 and 3 of consolidated contention 3, the content of those paragraphs also appears to have been raised by the Confederated Tribes; therefore, the Staff believes that no revision of paragraphs 2 and 3 is required.

CONCLUSION

For the reasons and to the extent set forth above, Castle Rock's contentions and supporting bases should be dismissed from the proceeding, and the consolidated contentions should be reworded as set forth above, removing the matters raised solely by Castle Rock.

Respectfully submitted,

Catherine Marco

Catherine Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of January 1999

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CASTLE ROCK'S NOTICE OF WITHDRAWAL" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 5th day of January, 1999.

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