

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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LBP-99-6

ATOMIC SAFETY AND LICENSING BOARD

'99 FEB 17 P1:23

Before Administrative Judges:

OF
AC

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

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

February 17, 1999

~~RECEIVED~~ FEB 17 1999

MEMORANDUM AND ORDER
(Approving Notice of Withdrawal
and Denying Request to Adopt
Contentions as Late-Filed)

Applicant Private Fuel Storage, L.L.C., (PFS) has requested agency authorization to construct and operate a 10 C.F.R. Part 70 independent spent fuel storage installation (ISFSI) on the Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band). Pending with the Licensing Board is the December 21, 1998 notice of intervenors Castle Rock Land and Livestock, L.C., and Skull Valley Company, Ltd., (Castle Rock) declaring their intent to withdraw from this proceeding convened to adjudicate various intervenor concerns about the PFS application. In response to that notice, intervenor State of Utah (State) has requested that it be permitted to litigate two of the three contentions for which Castle Rock has had sole

responsibility as well as all portions of those Castle Rock contentions that previously were consolidated with other intervenors' issues by the Licensing Board. Applicant PFS opposes the State's request in toto, while the NRC staff accepts it in part and opposes it in part.

For the reasons set forth below, we accept the Castle Rock notice of withdrawal, with prejudice, and dismiss all the Castle Rock unconsolidated contentions and portions of the consolidated contentions.

I. BACKGROUND

On December 21, 1998, Castle Rock filed a notice of withdrawal, declaring that they "hereby voluntarily and with prejudice withdraw from this proceeding" Notice of Withdrawal of [Castle Rock] (Dec. 21, 1998) at 1. In the letter accompanying that request, Castle Rock asked that the Board approve the withdrawal notice. See Letter from Bryan T. Allen, Counsel for Castle Rock, to the Licensing Board (Dec. 21, 1998) at 1. The Board permitted party comments on the Castle Rock withdrawal notice, and the State, PFS, and the staff responded.

Regarding the Castle Rock contentions, or portions of contentions, admitted by the Board in LBP-98-7, 47 NRC 142 (1998), the State declared that notwithstanding the Castle Rock departure from this proceeding, it wished to pursue (1)

two of the three Castle Rock contentions -- Castle Rock 17 and 20 -- that were admitted but not consolidated with other intervenor contentions; and (2) all facets of the seven contentions that contained consolidated portions of Castle Rock contentions. See [State] Response to Castle Rock's Notice of Withdrawal (Jan. 5, 1999) at 1 [hereinafter State Response]. According to the State, most of the Castle Rock contentions are "inextricably intertwined" with the State's contentions so as to preclude any dissection of their contentions from the other parties' issues. Nonetheless, for those that are not, the State asserted it meets the late-filing criteria of 10 C.F.R. § 2.714(a)(1) so as to permit their adoption now. Id.

PFS and the staff contended that with Castle Rock's withdrawal, all three unconsolidated contentions and different portions of the seven consolidated contentions should be dismissed. See Applicant's Response to Notice of Withdrawal of [Castle Rock] (Jan. 5, 1999) [hereinafter PFS Response]; NRC Staff's Response to Castle Rock's Notice of Withdrawal (Jan. 5, 1999) [hereinafter Staff Response]. PFS sought dismissal of portions of five consolidated contentions -- Utah E/Castle Rock 7/Confederated Tribes F; Utah K/Castle Rock 6/Confederated Tribes B; Utah O/Castle Rock 8 and 10; Utah S/Castle Rock 7; and Utah T/Castle Rock 10, 12, and 22 -- while the staff declared that parts

of only three -- Utah E/Castle Rock 7/Confederated Tribes F; Utah O/Castle Rock 8 and 10; and Utah T/Castle Rock 10, 12, and 22 -- should be excised. See PFS Response at 5-9; Staff Response at 4-5. In addition, PFS declared that any State attempt to have the admitted Castle Rock contentions (or portions thereof) remain in the proceeding under the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1) should be rejected. See PFS Response at 9-10.

In simultaneous reply filings submitted on January 15, 1999, the State, PFS, and the staff offered their positions concerning the earlier party filings. With regard to the consolidated contentions, the State asserted those issues should be left as specified in LBP-98-7 because of the way the Board initially structured the proceeding, the amount of resources the State has devoted to the case in reliance on its current structure, and the implications that can be drawn from uncoupling the consolidated contentions. See [State] Reply to NRC Staff's and Applicant's Responses to Castle Rock's Notice of Withdrawal (Jan. 15, 1999) at 2-4 [hereinafter State Reply]. Alternatively, the State maintained it should be permitted to litigate the Castle Rock consolidated contentions, as well as the unconsolidated contentions, as late-filed because they independently are admissible under the section 2.714(a)(1) criteria. See id. at 4-13. PFS, on the other hand, declared the Castle Rock

consolidated and unconsolidated contentions identified in its initial filing should be dismissed because the State's attempt to retain them in this proceeding is impermissibly late-filed. See Applicant's Reply to [State] Response to Castle Rock's Notice of Withdrawal (Jan. 15, 1999) [hereinafter PFS Reply]. With one minor revision, the staff maintained its position regarding the dismissal or retention of the Castle Rock consolidated and unconsolidated contentions. See NRC Staff's Reply to [State] Response to Castle Rock's Notice of Withdrawal (Jan. 15, 1999) [hereinafter Staff Reply].

II. ANALYSIS

With Castle Rock's exit from this proceeding, which we approve, those admitted contentions for which it is the sole sponsor also depart. Accordingly, in the absence of prior timely adoption by another intervenor, those contentions can be preserved for further consideration only if an intervenor shows that the issues are admissible under the late-filing standards of 10 C.F.R. § 2.714(a)(1). See Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985). We have described and applied those criteria in several other instances in this proceeding. See LBP-99-3, 49 NRC ____, ____ (slip op. at 5-6) (Feb. 3, 1999) (citing cases).

With the exception of contention Castle Rock 21, the State now seeks to preserve all of Castle Rock's admitted contentions, whether those issues stand alone or have been consolidated with another party's contentions. Neither PFS nor the staff contest the fact that two of the seven consolidated contentions -- Utah AA/Castle Rock 13 and Utah DD/Castle Rock 16 -- should remain intact as State contentions. We now redesignate those issues as Utah AA and Utah DD. As to the others, however, in addition to considering the State's arguments about the scope of certain consolidated contentions, each Castle Rock contention the State seeks to preserve must be judged in accordance with the late-filing standards of section 2.714(a)(1).

A. Unconsolidated Contentions -- Castle Rock 17 and Castle Rock 20

DISCUSSION: State Response at 10-15; PFS Response at 9-10; Staff Response at 10-15; State Reply at 2-3; PFS Reply at 2-6; Staff Reply at 4-8.

RULING: Relative to factor one -- good cause for late-filing -- we are unable to find that the State has made the showing needed to place this important factor on the admissibility side of the section 2.174(a) balance. The State (unlike intervenor Confederated Tribes of the Goshute Reservation (Confederated Tribes), see infra p. 9) did not initially express a "shared concern" with Castle Rock about certain of their issues, a factor the South Texas Appeal

Board found significant in concluding that a subsequent attempt to adopt other contentions of a departing intervenor was not supported by good cause. See ALAB-799, 21 NRC at 383-84 & n.106. Instead, the State in this instance waited until approximately one month later to seek to adopt these Castle Rock contentions (as well as the contentions of all other intervenors), albeit without addressing the late-filing standards, which was a defect we later found warranted rejection of its request. See LBP-98-7, 47 NRC at 163, 182. Despite these differences, however, the result here is the same as in South Texas.

Acknowledging the South Texas Appeal Board's concern that a blanket stricture on the later adoption of a withdrawing party's contentions would complicate litigation and settlement by encouraging "nominal" contention co-sponsorship at a proceeding's outset, see ALAB-799, 21 NRC at 384, in this instance that consideration is not implicated. As is apparent from its previous late-filed pleading seeking to adopt all intervenor contentions, the State sought early on to impose those complexities in this proceeding. Having failed to make the appropriate arguments at that time, we see no reason it now should have a second bite at the apple, especially when its ultimate justification is based on no more than the "trusted others

to vigorously pursue" line of argument rejected in South Texas. See id. at 382-83.

As we have observed elsewhere, a failure to demonstrate good cause for late-filing requires there be a "compelling showing" regarding the other four late-filing factors. LBP-98-7, 47 NRC at 208. As the staff has noted, see Staff Reply at 7, factors two and four -- availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by other parties -- generally favor late admission of these contentions. These criteria, however, are accorded less weight in the balance than factors three and five -- assistance in developing a sound record and broadening the issues/delaying the proceeding. See LBP-98-7, 47 NRC at 208; see also LBP-98-29, 48 NRC 286, 294 (1998). In this instance, the State's showing relative to factor three, provides perhaps only minimal support for accepting these contentions. See id. at 208-09. On the other hand, factor five clearly does not weigh in favor of admission, given that, as they now stand, these two issues otherwise would not be part of this proceeding. See South Texas, ALAB-799, 21 NRC at 382 (rejecting argument applicant will not be prejudiced if required to litigate previously admitted contentions of withdrawing intervenor because applicant already knew those issues would be explored).

Thus, even with the modest support afforded by factors two, three, and four, the State has not made the compelling showing required to overcome the lack of good cause for its late-filing. The State's request to permit it to litigate contentions Castle Rock 17 and 20 therefore is denied.

B. Consolidated Contentions

1. Utah E/Castle Rock 7/Confederated Tribes F

DISCUSSION: State Response at 5, 6-10; PFS Response at 6; Staff Response at 4-5; State Reply at 4-6; Staff Reply at 10-11.

RULING: As the staff correctly points out, see Staff Response at 4 & n.6, the Board previously ruled that Confederated Tribes had properly adopted Castle Rock 7, although in doing so we failed to acknowledge that portions of that contention had been admitted and consolidated with this issue statement. Compare LBP-98-7, 47 NRC at 215 with id. at 237. As a consequence, all portions of this consolidated contention remain in this proceeding. The contention is redesignated as contention Utah E/Confederated Tribes F.

2. Utah K/Castle Rock 6/Confederated Tribes B

DISCUSSION: State Response at 5, 7-10; PFS Response at 6-7; Staff Response at 4-5; State Reply at 8-12; PFS Reply at 8-15; Staff Reply at 14-15.

RULING: Initially, we find unpersuasive the State's consolidated contention-related arguments regarding inextricable intertwining, lead party status, and maintaining the status quo.¹ The first point is not borne out by a careful review of the contentions, the second does not account for the separate status each party retains under the "lead party" scheme,² and the third does not account for the general Commission policy of encouraging settlements.

As a consequence, based on a review of the admitted portions of these consolidated contentions and their supporting bases, absent a State showing it has met the late-filing standards relative to Castle Rock 6, this contention is now limited to the activities affecting the PFS facility or the Rowley Junction intermodal transfer

¹ Nor do we find persuasive the asserted contrary authority in the Licensing Board decision in Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-22, 40 NRC 37, 39 (1994), relied upon by the State, see State Response at 7-8, given that (1) the earlier Licensing Board case relied on for the Vogtle standard dealt with the admission of a contention in the context of a motion to reopen the record, a significantly different concept; and (2) the State's failure to make a convincing timeliness argument so as to meet the Vogtle standard.

² In establishing the "lead party" procedure, we made it clear that while consultation and accommodation should be the norm between the lead party and any other parties involved with a consolidated contention, it is possible for a nonlead party that disagrees with a lead party to bring disputes to the Board's attention. See LBP-98-7, 47 NRC at 243 n.29.

point (ITP) specified in our ruling on Utah K,³ and the concern about wildfires specified in Confederated Tribes B. Further, upon balancing the late-filing standards, for the reasons we have noted already, see supra pp. 6-8, we find the State lacks good cause for late-filing. Nor, for the reasons we specified earlier, see supra p. 8, does a balancing of the other four factors produce the "compelling showing" necessary to overcome the lack of good cause.

The State's request to litigate the admitted portions of Castle Rock 6 that were consolidated with the admitted portions of Utah K and Confederated Tribes B thus is denied and the scope of the consolidated contention is limited as specified above. This contention is redesignated as Utah K/Confederated Tribes B.

3. Utah O/Castle Rock 8 and 10

DISCUSSION: State Response at 6, 7-10; PFS Response at 7; Staff Response at 5; State Reply at 6-7; PFS Reply at 9-15; Staff Reply at 10-15.

³ As we declared in LBP-98-7, 47 NRC at 190, this would encompass relative to (1) the PFS facility, those 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; or (2) the Rowley Junction ITP, those activities at or emanating from the facilities specified above, or hazardous materials that pass through the ITP 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.

RULING: As we have previously indicated, see supra p. 10, we find unpersuasive the State's consolidated contention-related arguments regarding inextricable intertwining, lead party status, and maintaining the status quo.

Further, based on a review of the admitted portions of these contentions and their supporting bases, absent a State showing it has met the late-filing standards relative to Castle Rock 8, paragraph one of this consolidated contention encompasses only routine facility operations, thereby excluding firefighting activities. And with respect to the late-filing standards, for the reasons we already have noted, see supra pp. 6-8, we find the State lacks good cause for late-filing. Nor, for the reasons we specified earlier, see supra p. 8, does a balancing of the other four factors produce the "compelling showing" necessary to overcome the lack of good cause.

Accordingly, the State's request to litigate the admitted portion of Castle Rock 8 concerning firefighting activities that was consolidated with the admitted portions of Utah 0 is denied. Paragraph one of that contention is revised as follows:

1. Contaminant pathways from the Applicant's sewer/wastewater systems; routine facility operations; and construction activities.

Further, this contention is redesignated as Utah O.

4. Utah S/Castle Rock 7

DISCUSSION: State Response at 4, 7-10; PFS Response at 7-8; Staff Response at 4-5; State Reply at 12-13; PFS Reply at 8-15; Staff Reply at 10-15.

RULING: We find the portion of contention Castle 7 at issue, i.e., paragraph c, is within the ambit of contention Utah S, so there is no need to revise this contention, other than to redesignate it as Utah S.⁴

5. Utah T/Castle Rock 10, 12, 22

DISCUSSION: State Response at 5, 7-10; PFS Response at 8-9; Staff Response at 4-5; State Reply at 7; PFS Reply at 9-15; Staff Reply at 8-15.

RULING: Initially, we find unpersuasive the PFS and staff arguments seeking dismissal of those portions of the consolidated contention concerning the Utah Groundwater Protection Rules and the Utah Division of Air Quality Rules, which appear to be relevant to the air and water quality authorizations ultimately at issue in paragraphs four and five of the contention.

⁴ To the extent PFS has a concern about the viability of this contention relative to spent nuclear fuel disposal costs and off-site transportation radiological accidents, see PFS Response at 8 n.12, it remains free to seek summary disposition on such matters. See LBP-98-10, 47 NRC 288, 295 n.10 (1998).

In connection with the other matter at issue regarding this contention, we once again find unpersuasive the State's consolidated contention-related arguments regarding inextricable intertwining, lead party status, and maintaining the status quo. See supra p. 10. Further, based on a review of the admitted portions of these contentions and their supporting bases, absent a State showing it has met the late-filing standards relative to Castle Rock 12, this contention is revised to excise the portion of paragraph six regarding the Skull Valley Band's Clean Water Act (CWA) permitting authority. That paragraph should now read as follows:

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; 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.

Relative to the late-filing standards, for the reasons we already have noted, see supra pp. 6-8, we find the State lacks good cause for late-filing relative to the Skull Valley Band's CWA permitting authority. Nor, for the reasons we specified earlier, see supra p. 8, does a

balancing of the other four factors produce the "compelling showing" necessary to overcome the lack of good cause.⁵

Accordingly, the State having failed to establish it has met the late-filing standards in connection with portion of paragraph six regarding the Skull Valley Band's Clean Water Act (CWA) permitting authority, the scope of that paragraph is limited as set forth above. We redesignate this contention as Utah T.

III. CONCLUSION

With Castle Rock's withdrawal, with prejudice, from this proceeding, its admitted contentions and its contentions admitted as part of a consolidated issue statement, but which now have no other sponsor, are no longer litigable. Although the State attempts to have these contentions admitted as late-filed under the 10 C.F.R. § 2.714(a)(1) criteria, we find its efforts are unavailing. As a result, we dismiss from this proceeding all Castle Rock

⁵ We also note that the language in the PFS environmental report (ER) regarding the Skull Valley Band's CWA authority that apparently was the focus of this Castle Rock concern is not in the most recent ER revision. Compare [PFS] Environmental Report [for] Private Fuel Storage Facility at 9.1-4 (rev. 0 June 1997) with id. at 9.1-7 (rev. 1 Aug. 1998).

contentions, including portions of otherwise consolidated contentions that are attributable solely to Castle Rock.⁶

For the foregoing reasons, it is this seventeenth day of February 1999, ORDERED, that:

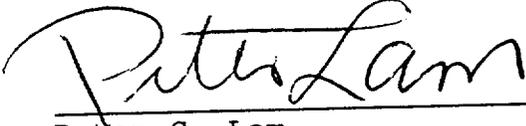
1. The December 21, 1998 notice of withdrawal of intervenor Castle Rock is accepted and approved, with prejudice.
2. The following contentions are dismissed from this proceeding: Castle Rock 17; Castle Rock 20; Castle Rock 21.
3. The following contentions are revised as set forth in section II above: Utah E/Castle Rock 7/Confederated Tribes F; Utah K/Castle Rock 6/Confederated Tribes B; Utah O/Castle Rock 8 and 10; Utah S/Castle Rock 7;

⁶ Having modified the titles of certain contentions, in a separate issuance today we revise the general schedule for this proceeding to reflect those changes. See Licensing Board Order (Revised General Schedule) (Feb. 17, 1999) at 1 (unpublished).

Utah T/Castle Rock 10, 12, 22; Utah AA/Castle Rock 13;
Utah DD/Castle Rock 16.

THE ATOMIC SAFETY
AND LICENSING BOARD⁷


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE


Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 17, 1999

⁷ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) the applicant PFS; (2) intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes, Castle Rock, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

Judge Kline was unavailable to participate in final deliberations regarding, or to sign, this memorandum and order.

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 MEMO & ORDER (LBP-99-6) 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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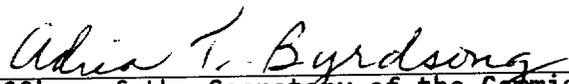
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Dated at Rockville, Md. this
17 day of February 1999


Office of the Secretary of the Commission