

March 9, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO  
"AMENDED AND SUPPLEMENTAL PETITION OF  
SCIENTISTS FOR SECURE WASTE STORAGE TO INTERVENE"

Pursuant to 10 C.F.R. § 2.714(c) and the Licensing Board's Order of February 17, 1998,<sup>1</sup> the NRC Staff ("Staff") hereby responds to the "Amended and Supplemental Petition of Scientists for Secure Waste Storage to Intervene" ("Supplemental Petition"), dated February 27, 1998. For the reasons set forth below, the Staff submits that the Supplemental Petition fails to establish (a) that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) favors the grant of the late petition to intervene filed by the Scientists for Secure Waste Storage ("SSWS"), (b) that the SSWS is entitled to intervene in this proceeding as of right, or (c) that the SSWS should be granted discretionary intervention. Accordingly, the Staff opposes the SSWS' petition for leave to intervene in this proceeding, as modified by its Supplemental Petition, and recommends that it be denied.

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<sup>1</sup> "Order (Schedule Regarding Scientists for Secure Waste Storage Final Intervention Petition Supplement)," dated February 17, 1998.

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 installation (ISFSI), to be constructed and operated on the Skull Valley Indian Reservation in Tooele County, Utah. On July 31, 1997, the Commission published a "Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," concerning the PFS application. 62 Fed. Reg. 41,099 (July 31, 1997). The Notice stated, *inter alia*, that by September 15, 1997, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the subject materials license in accordance with the provisions of 10 C.F.R. 2.714." *Id.*

In response to the Notice of Opportunity for Hearing, five petitions for leave to intervene were timely filed by various persons and entities on or before the deadline of September 15, 1997; and contentions were then filed by those persons in accordance with the Licensing Board's scheduling orders. Following the filing of responses by the Applicant and Staff, a prehearing conference was held on January 27-29, 1998, at which the standing of the other petitioners and the admissibility of their contentions was addressed.

On January 20, 1998, an initial petition for leave to intervene in this proceeding was filed by Professor Wilson on behalf of himself and a group of other persons, which was amended on January 22, 1998. On February 2, 1998, Professor Wilson filed an "Amended Petition," as

Spokesman for "Scientists for Secure Waste Storage."<sup>2</sup> The Amended Petition was supported by (1) a letter from Ted Carpenter to the Secretary, NRC, dated February 2, 1998; (2) a "Declaration of Interest and Appointment of Representative" by Robert J. Hoffman, dated February 3, 1998; and (3) a Notice of Appearance by Martin S. Kaufman, Esq., dated February 10, 1998. Responses in support of the Amended Petition were then filed by Private Fuel Storage L.L.C. ("PFS" or the "Applicant") and the Skull Valley Band of Goshutes;<sup>3</sup> and responses in opposition to the Amended Petition were filed by the State of Utah, Ohngo Gaudadeh Devia, and the NRC Staff.<sup>4</sup>

On February 17, 1998, the Licensing Board issued its Order directing SSWS to file a "final supplement" to its petition for leave to intervene, which was to include "a list of contentions and supporting bases." *Id.* at 1. In accordance with the Licensing Board's Order, on February 27, 1998, SSWS filed its Supplemental Petition.

#### DISCUSSION

In the Staff's response to SSWS' Amended Petition, filed on February 13, 1998, the Staff set forth its views that (a) the Amended Petition failed to demonstrate good cause for its having

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<sup>2</sup> Letter from Richard Wilson to Secretary, NRC, dated February 2, 1998. The Licensing Board afforded Professor Wilson an opportunity to file the Amended Petition, during the prehearing conference on January 27, 1998. *See* Tr. at 29-33; "Memorandum and Order (Memorializing Initial Prehearing Conference Directives)," dated February 2, 1998, at 1.

<sup>3</sup> *See* (1) "Applicant's Answer to Amended Petition of Scientists for Secure Waste Storage," dated February 13, 1998; and (2) "Response of Skull Valley Band of Goshutes to Petition of the Scientists for Secure Nuclear Waste Storage," dated February 13, 1998.

<sup>4</sup> *See* (1) "State of Utah's Opposition to Amended Petition to Intervene," dated February 13, 1998; (2) "OGD's Response to Wilson/ALF Amended Petition and Order Dated 2/2/98 Allowing Participant Responses to Said Petition," dated February 12, 1998; and (3) NRC Staff's Response to Petition for Leave to Intervene Filed by Richard Wilson and Scientists for Secure Waste Storage," dated February 13, 1998 ("Staff Response").

been filed late, and failed to show that a balancing of good cause and the other factors specified in 10 C.F.R. § 2.714(a)(1) supports the grant of the petition, and (b) the Amended Petition failed to demonstrate that SSWS or any of the individuals affiliated with that group possesses the requisite standing to intervene in this matter. Accordingly, the Staff opposed the Amended Petition and recommended that it be denied. See Staff Response at 4-20. For the reasons set forth below, the Staff submits that the Supplemental Petition does not warrant a different conclusion with respect to these issues.

I. **The Supplemental Petition Fails to Demonstrate Good Cause for the Late Filing of SSWS' Petition, or that a Balancing of the Factors Specified in 10 C.F.R. § 2.714(a)(1) Supports the Grant of Its Petition.**

As discussed in the Staff's answer to SSWS' Amended Petition, late petitions for leave to intervene are governed by 10 C.F.R. § 2.714(a)(1). See Staff Response at 4-7. That regulation provides, in pertinent part, as follows:

. . . Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Staff has previously stated its view that SSWS' Amended Petition failed to show that a balancing of these five factors favors the grant of its petition. See Staff Response at 7-12. The effect of SSWS' Supplemental Petition on this determination is discussed below.

A. Good Cause for the Late Filing of Its Petition.

In its Amended Petition of February 2, 1998, SSWS explained that the late filing of its petition was due to the fact that SSWS "were only aware of the [PFS] proposal and the proposed hearings thereon at a late date and it has taken a little time to collect the information, and discuss a position thereon." Amended Petition, at 1. In the Staff's response to that assertion, the Staff expressed its view that this statement did not demonstrate good cause for the late filing of SSWS' petition. See Staff Response at 7-8. In particular, the Staff noted that SSWS had not explained when it first learned of the application or why it could not have learned of it earlier; why it was necessary for the members of SSWS to collect information and discuss a position thereon prior to filing their petition; or how soon they filed their petition after learning of the application. *Id.* Accordingly, the Staff indicated that SSWS had not shown good cause for the late filing of its petition.

In its Supplemental Petition, SSWS provides little additional information with respect to this matter, other than to state that its delay in filing resulted from its belief that views similar to its own would be expressed by members of the scientific community in Utah; upon finding that such views were not expressed (which SSWS suggests may have resulted from actions by the State of Utah), SSWS decided to file its petition to "help inform the citizens of the state and

this licensing board.” Supplemental Petition at 2. SSWS further explained its decision as follows (*Id.*):

This lack of involvement and uncommunicativeness of the faculties of the universities in Utah is unusual and it was unreasonable for members of SSWS to anticipate the silence of that group. The members of SSWS only slowly became aware of it, beginning in December 1997, and filed their initial petition soon thereafter.

The Staff submits that these statements do not establish good cause for the late filing of SSWS’ petition. As in its Amended Petition, SSWS fails to provide specific dates as to when it learned of the application, or how soon it filed its petition after learning thereof. In addition, although SSWS states that it expected other persons located within the State of Utah to express views similar to its own, it does not identify those persons or indicate any contacts it had with them, nor does SSWS otherwise identify the basis upon which it formulated a belief that those (unnamed) persons would petition for leave to intervene in this proceeding or publicly express views similar to those of SSWS’ members. Further, while SSWS states that it “only slowly became aware of [the silence of Utah’s scientific community] beginning in December 1997” (*Id.*), it provides no explanation as to why it did not speak with those persons prior to December, so as to assure the timely filing of a petition for leave to intervene.

In sum, the Staff submits that SSWS has not demonstrated good cause for the late filing of its petition, and this factor weighs against the grant of its untimely petition to intervene.

B.     The Other Factors Specified in 10 C.F.R. § 2.714(a)(1)  
          Do Not Support the Grant of SSWS’ Late Petition to Intervene.

The Staff has previously expressed its view that SSWS’ Amended Petition did not demonstrate that the five factors specified in 10 C.F.R. § 2.714(a)(1) favor the grant of its

petition. See Staff Response at 8-12. In its Supplemental Petition, SSWS presents further legal argument concerning these factors, but provides very little additional factual information with respect to factors (2), (4), and (5). See Supplemental Petition at [unnumbered] 21-26. SSWS attempts to show that factors (2) and (4) favor the grant of its petition, stating:

. . . [W]hen it became apparent that [scientists in Utah would not address the technical issues], SSWS decided to seek to participate in order to give the Board an objective presentation of the scientific evidence relevant to this licensing proceeding.

SSWS intends to present a unique perspective -- that of disinterested scientists whose breadth and depth of experience in the fields of nuclear physics, environmental impact of nuclear facilities, nuclear engineering and the legislative background of the Atomic Energy Act are unlikely to be matched by any other party.

The Board may also consider the availability of alternative forums in which the petitioner could raise its concerns [citation omitted]. . . . There is no practical alternative forum in which SSWS and its members can articulate their views and ensure that the Board has the benefit of SSWS's expertise.

Supplemental Petition at [unnumbered] 24-25. These statements, however, show that SSWS' interest in this proceeding essentially consists of an academic or professional interest in assuring that the opinions held by its members are considered by the Licensing Board. Such an interest can be advanced by means other than participation as a party in the proceeding, such as by filing limited appearance statements, submitting written comments concerning the Staff's draft environmental impact statement, or appearing as expert witnesses on behalf of a party to the proceeding. In addition, as the Staff has stated previously, the Staff and Licensing Board share SSWS' interest in assuring the advancement of sound scientific testimony in this proceeding; and SSWS' interest in the advancement of such testimony may well be represented by other parties,

including the Staff. *See* Staff Response at 9-10. Accordingly, the Staff submits that SSWS has not shown that factors (2) and (4) favor the grant of its petition.

With respect to factor (5), SSWS states, “[b]ecause this proceeding is in an early stage, and is very far from decision, we submit that allowing SSWS to intervene will have little or no impact on the schedule. . . .” Supplemental Petition at [unnumbered] 26. This argument, however, does not advance SSWS’ intervention. The Staff recognizes that this proceeding is at an early stage; indeed, SSWS filed its petition before any ruling has been made on other petitioners’ standing to intervene. However, the delay (and broadening of the issues) that is of concern to the Staff results not from the timing of SSWS’ filing, but from SSWS’ proposal to circulate its proposed testimony among a broad group of scientists in an effort to obtain consensual positions -- which would inevitably lead to discovery as to each individual’s opinions and the bases therefor, and the extent to which his individual views may differ or diverge from the views expressed by other members of the group. *See* Staff Response at 10-11. Similarly, as set forth in the Staff’s answer to the Amended Petition, SSWS’ proposal to serve as an advisory committee to the Licensing Board “upon any and all scientific issues that are, or will come before the board” (Amended Petition at 1), and “to participate in the preparation (and peer review)” of the Staff’s SER and EIS (*Id.* at 3) would likely result in a broadening of the issues in this proceeding beyond those raised by other parties. *See* Staff Response at 11-12. SSWS has not addressed these concerns in its Supplemental Petition; and the Staff submits that factor (5) weighs against the grant of SSWS’ petition.

In contrast, with respect to factor (3) it is apparent that the Supplemental Petition does provide substantial new information beyond that which was provided in the Amended Petition

(see Supplemental Petition at [unnumbered] 9-21), and SSWS has shown that this factor favors the grant of its petition. In its Supplemental Petition, SSWS states its position with respect to many of the contentions filed by other parties, and identifies its prospective witnesses with respect to those issues; SSWS also provides the professional qualifications of most of its prospective witnesses (with the exception of Dr. Steven Barrowes), which demonstrate those persons' considerable expertise in physics, chemistry, engineering, health physics, and other disciplines that may be relevant to many issues raised in this proceeding. This specific demonstration, which was lacking in its Amended Petition, appears to satisfy the Commission's requirement that a late petitioner must summarize its proposed testimony and identify its witnesses, in order to establish its potential contribution to the development of the record. See Staff Response at 9. Accordingly, the Staff submits that SSWS has demonstrated that factor (3) supports the grant of its petition.

In sum, the Staff submits that factors (1), (2), (4), and (5) do not support the grant of SSWS' petition for leave to intervene, but factor (3) weighs in favor of the petition. Notwithstanding SSWS' demonstration of its potential contribution to the development of the record, however, a balancing of these factors weighs against the grant of the petition.

II. The Supplemental Petition Fails to Show that SSWS is Entitled to Intervene as of Right.

The Supplemental Petition filed by SSWS provides no additional information whatsoever concerning the standing of SSWS or any of its individual members to intervene as of right in this proceeding; rather, it argues that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) supports the grant of its petition. See Supplemental Petition at [unnumbered] 21-26. Thus, the issue of standing and potential injury to SSWS' interests must be resolved on the basis of the

statements contained in the Amended Petition and answers filed in response thereto. For the reasons stated in the Staff's answer to the Amended Petition, the Staff submits that SSWS has failed to show that this proceeding may result in injury in fact to its interests, or that the SSWS is entitled to intervene as of right in this proceeding. See Staff Response at 12-20.

III. The Supplemental Petition Fails to Show that  
SSWS Should Be Granted Discretionary Intervention.

It is well established that where a petitioner lacks standing to intervene in a proceeding as of right, the Licensing Board may admit the petitioner as a party, as a matter of discretion, upon consideration of all the facts and circumstances of the case. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1977). In this regard, the Commission has indicated that the following factors should be considered:

(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.

*Id.* It has been observed that of these factors, the most important is whether the petitioner's participation would likely produce a valuable contribution to the Commission's decision making process. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977).<sup>5</sup>

As set forth above, the Supplemental Petition establishes that SSWS' members and prospective witnesses possess substantial expertise in disciplines relevant to the contentions that have been filed by other petitioners; and the Staff concludes that SSWS will likely make a valuable contribution to the Commission's decision making process in this proceeding. With respect to the other pertinent factors, however, the Staff submits that SSWS has not shown that these factors favor the grant of discretionary intervention. Thus, with respect to factor (2), SSWS has not established the nature and extent of its property, financial, or other interest in the proceeding; rather, the members of SSWS have been shown to have no more than an academic or professional interest in the proceeding,<sup>6</sup> and, with respect to factor (3), SSWS has not shown that any order which may be entered in the proceeding may have a possible effect on its interest.

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<sup>5</sup> The Commission has stated that "[p]ermission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them." *Pebble Springs, supra*, 4 NRC at 617; *accord, Black Fox, supra*, 5 NRC at 1145.

<sup>6</sup> Indeed, SSWS has stated that "[n]one of the petitioners have personal financial or property interests in the proceeding. Their interest however is great, but is solely an interest in the public good . . . ." Amended Petition at 2. An academic or general "interest" in a proceeding, such as has been asserted by SSWS, does not constitute a cognizable "interest" in the proceeding within the context of the intervention doctrine. See Staff Response at 15-20.

In addition, with respect to factor (4), the Staff believes that other means are available (such as the opportunity to make limited appearance statements or to submit written comments on Staff documents) whereby petitioner's interest will be protected. Similarly, with respect to factor (5), the Staff submits that it shares the petitioner's interest in the filing of sound scientific testimony, and to this extent, SSWS' interest will be represented by existing parties. Finally, with respect to factor (6), the Staff submits that SSWS' participation will indeed "inappropriately broaden or delay the proceeding," particularly in light of SSWS' stated intention to serve as an advisory committee to the Licensing Board on all scientific and technical issues in the proceeding, and to participate in the preparation (and peer review) of the Staff's environmental and safety documents.<sup>7</sup> Accordingly, the Staff submits that SSWS has not demonstrated that it should be afforded discretionary intervention in this proceeding.

#### IV. The Admissibility of SSWS' Contention.

Finally, SSWS observes that a petitioner is required to file at least one admissible contention; and it cites the Appeal Board's decision in *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978), in support of its assertion that where a petitioner supports an application, "all that need be initially asserted in fulfillment of [the contentions] requirement is that the application is meritorious and should be granted." Supplemental Petition at [unnumbered] 29. Although SSWS fails to state

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<sup>7</sup> If SSWS had proposed a more limited role for itself in this proceeding, there would be less potential for delay or broadening of the issues. See, e.g., *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991) (discretionary intervention granted where, *inter alia*, the petitioner represented that it sought to provide only legal argument rather than evidentiary presentations, leading the Licensing Board to conclude that its participation would not inappropriately broaden or delay the proceeding).

this contention specifically, the Staff believes that it intended to do so, as indicated by the fact that it underlined this language in the *Sheffield* decision, cited above. *See id.* Assuming that this was indeed SSWS' intention, the Staff believes that SSWS has satisfied the contention requirement, for the reasons stated by the Staff in response to the identical contention that was filed by the Skull Valley Band of Goshutes.<sup>8</sup>

### CONCLUSION

For the reasons set forth above, the Staff submits that the petition for leave to intervene filed by the Scientists for Secure Waste Storage, as supplemented by its Supplemental Petition of February 27, 1998, (a) fails to establish that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) favors the grant of its petition, (b) that the SSWS is entitled to intervene in this proceeding as of right, or (c) that the SSWS should be granted discretionary intervention. Accordingly, the Staff opposes the SSWS' petition as supplemented by its Supplemental Petition, and recommends that it be denied.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 9th day of March 1998

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<sup>8</sup> See "NRC Staff Response to Contentions Filed by (1) the State of Utah, (2) the Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, (4) Castle Rock Land and Livestock L.C., *et al.*, and (5) the Confederated Tribes of the Goshute Reservation and David Pete," dated December 24, 1997, at 134-36.

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| (Independent Spent          | ) |                        |
| Fuel Storage Installation)  | ) |                        |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'AMENDED AND SUPPLEMENTAL PETITION OF SCIENTISTS FOR SECURE WASTE STORAGE TO INTERVENE'" 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 9th day of March, 1998:

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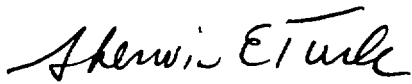
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