UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN RESPONSE TO APPLICANT'S BRIEF ON APPEAL OF ORDER GRANTING THE CONFEDERATED TRIBES' PETITION FOR INTERVENTION (LBP-98-7)

Sherwin E. Turk
Counsel for NRC Staff

May 14, 1998

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, the NRC Staff ("Staff") hereby responds to the appeal filed by Applicant Private Fuel Storage L.L.C. ("PFS" or "Applicant"),[1] from the Licensing Board's Order granting the petition for leave to intervene of the Confederated Tribes of the Goshute Reservation ("Confederated Tribes").[2] For the reasons set forth herein, the Staff submits that the Licensing Board failed to articulate the proper legal standard in granting the Confederated Tribes' Petition, in that it failed to state whether the Confederated Tribes had sustained its burden of proof in establishing its standing to intervene in this proceeding. Accordingly, the Staff supports the Applicant's appeal from the Licensing Board's Order, and

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[1] "Applicant's Brief on Appeal of Order Granting the Confederated Tribes' Petition for Intervention" ("App. Br."), dated May 4, 1998. A brief in opposition to the Applicant's appeal has been filed by the Confederated Tribes. *See* "Brief of the Confederated Tribes of the Goshute Reservation in Response to the Appeal of Applicant Regarding Standing," dated May 8, 1998 ("Confed. Tribes Br.").

[2] "Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters)," LBP-98-7, 47 NRC ___ (Apr. 22, 1998) ("Order"), slip op. at 28-32.

recommends that the Commission remand this matter to the Licensing Board for determination and/or articulation as to whether (and on what basis) the Confederated Tribes has met its burden of proof.

STATEMENT OF THE CASE

The procedural background of this matter is set forth by the Applicant (App. Br. at 2-7), and will not be reiterated at length herein. Stated briefly, this proceeding involves the application of PFS to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the reservation of the Skull Valley Band of the Goshutes (the "Skull Valley Band"), located in Tooele County, Utah. The facility would be licensed to receive, transfer and possess up to 4,000 casks containing spent fuel from domestic commercial nuclear power plants, for an initial license period of 20 years. On July 31, 1997, the NRC published a Notice of Opportunity for Hearing with respect to the application, informing "any person whose interest may be affected by this proceeding" of the need to file "a petition for leave to intervene . . . in accordance with the provisions of 10 C.F.R. § 2.714.[3]

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[3] *See* "Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for Hearing" ("Notice"), 62 Fed. Reg. 41099 (July 31, 1997). In pertinent part, and consistent with 10 C.F.R. §§ 2.714(a)(2) and (d)(1), the Notice further stated as follows:

> A petition . . . shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

On August 29, 1997, the Confederated Tribes (and David Pete, its Chairman) filed an initial request for hearing and petition for leave to intervene in this proceeding ("Initial Petition").[4] The Initial Petition asserted, *inter alia*, that the Confederated Tribes has an "aboriginal interest" in the lands comprising the Skull Valley Reservation (as well as a large portion of the State of Utah) -- although it recognized that the Skull Valley Band "is a separate federally recognized Indian tribe" -- and it asserted that its members had various interests in "the same aboriginal area" (Initial Petition at 3).

The Applicant and Staff filed responses in opposition to the Confederated Tribes' Initial Petition,[5] asserting, in part, that the Confederated Tribes and the Skull Valley Band constitute legally distinct entities, each of which occupies its own separate Reservation;[6] that the Reservation of the Confederated Tribes is located at a considerable geographic distance from the Skull Valley Band's Reservation (approximately 65 or 75 miles away), and is separated from that Reservation by extensive U.S. military reservations that are off-limits to the public, as well as by several mountain ranges; and that neither Mr. Pete nor the Confederated Tribes

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[4] "Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete," dated August 29, 1997.

[5] *See* "Applicant's Answer to Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete," dated September 15, 1997; "NRC Staff's Response to Request for Hearing and Petition to Intervene Filed by the Confederated Tribes of the Goshute Reservation and David Pete," dated September 18, 1997.

[6] The Licensing Board recognized that the Confederated Tribes' assertion of an aboriginal interest in the Skull Valley Band's Reservation "is inconsistent with the congressionally recognized status of the [two groups] as distinct entities with separate reservations." LBP-98-7, slip op. at 30. *See also*, "NRC Staff's Response to the Supplemental Memorandum Filed by the Confederated Tribes of the Goshute Reservation and David Pete in Support of Their Petition to Intervene," dated December 23, 1997 ("Staff. Resp. to Supp. Mem."), at 3 n.4.

had made a particularized showing that they have an interest that may be affected by this proceeding.

On October 15, 1997, the Confederated Tribes and Mr. Pete filed a "Supplemental Memorandum" in support of their petition to intervene, together with signed "Declarations" by Chrissandra M. Reed ("Reed Declaration") and Genevieve P. Fields ("Fields Declaration");[7] the two Declarations sought to "show with particularity the nature and frequency of the contacts of [Confederated Tribes] members with their cousins at Skull Valley" (Supp. Mem. at 2). Although Ms. Fields' Declaration contained little information establishing personal contacts with the Skull Valley Reservation, the Reed Declaration presented a more specific showing -- stating, *inter alia*, that Ms. Reed "regularly" visits the cemetery at the Skull Valley Reservation; that she visits her cousins at that Reservation "on a regular basis"; and that she drives her granddaughter, Michaela, "to the Skull Valley Reservation approximately every other week" and leaves her there for stays of "one night to periods of up to two weeks" (Reed Declaration, at 2, 3).[8]

The Applicant and Staff filed responses to the Confederated Tribes' Supplemental Memorandum, in which they each concluded that the Confederated Tribes (a) had failed to establish its own organizational standing to intervene based on an interest in the "aboriginal area" of the Skull Valley Reservation, and (b) had failed to establish Ms. Fields' and

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[7] *See* "Supplemental Memorandum in Support of the Petition of the Confederated Tribes of the Goshute Reservation and David Pete to Intervene and for a Hearing, dated October 15, 1997 ("Supp. Mem.").

[8] Significantly, the Reed Declaration did not explain what was meant by its repeated use of the term "regular," and it did not indicate that Ms. Reed is the legal guardian for her granddaughter, Michaela.

Ms. Reed's individual standing to intervene -- and therefore had not established the Confederated Tribes' representational standing to intervene in this proceeding.[9] In addition, the Applicant and Staff reiterated and expanded upon their views (previously expressed in response to the Confederated Tribes' Initial Petition), that the Confederated Tribes did not appear to be eligible to participate in the proceeding as an interested State, county or municipality pursuant to 10 C.F.R. § 2.715(c).[10]

In its response to the Confederated Tribes' Supplemental Memorandum and Ms. Reed's Declaration, the Applicant provided the Declaration of Arlene Wash, who identified herself as Ms. Reed's cousin and a member of the Skull Valley Band, and the person with whom Michaela stays on the Skull Valley Reservation. In her Declaration, Ms. Wash challenged Ms. Reed's description of the frequency of her granddaughter's and her own visits to the Skull Valley Reservation. Ms. Wash stated that when Ms. Reed drops off and picks up her granddaughter, she does not come to the Reservation but, rather, drives to a location 25 miles (or further) away; that Michaela stays on the Reservation "about 3 or 4 times a year or more whenever [Ms. Reed] needs a place for Michaela to stay"; and that Ms. Reed seldom ("usually no more than once per year") visits with her and others on the Reservation (Wash Declaration, at 1, 2).

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[9] *See* "Applicant's Answer to the Confederated Tribes and David Pete's Supplemental Memorandum in Support of Petition to Intervene and for a Hearing," dated December 12, 1997 ("App. Resp. to Supp. Mem."); Staff Resp. to Supp. Mem. (as corrected in the Staff's filing of January 14, 1998), at 4 n.7. In addition, a response in support of the Confederated Tribes' Initial Petition and its Supplemental Memorandum was filed by the State of Utah on November 23, 1997.

[10] *See* Staff Resp. to Supp. Mem., at 9-13; App. Resp. to Supp. Mem., at 15-17.

In their responses to the Supplemental Memorandum, both the Applicant and Staff indicated, *inter alia*, that Ms. Reed's assertion that she makes unspecified "regular" visits to the Reservation did not satisfy her obligation to show with particularity her contacts with the area; that the Wash Declaration showed she made only a limited number of visits to the Skull Valley Reservation -- so that those visits were no more than "occasional" or "intermittent," and thus were insufficient to establish standing under Commission case law;[11] and that she could not assert the interests of her granddaughter in the absence of any indication that she is the little girl's legal guardian.[12] Accordingly, the Applicant and Staff each concluded that the Confederated Tribes had failed to establish standing to intervene.

On December 29, 1997, the Confederated Tribes and Mr. Pete filed a "Further Supplemental Memorandum" in support of their petition to intervene, together with a second declaration by Ms. Reed ("Second Declaration") which disputed certain statements in the Wash Declaration. In particular, Ms. Reed acknowledged that she "usually drops off her granddaughter at the I-80 truck stop (Rowley Junction) through which junction Applicant proposes to transship nuclear waste),"[13] but asserted that "[a]bout one-fourth of the pick-ups are on the Skull Valley Reservation" (Second Declaration at 2). Further, Ms. Reed stated that, "on the average, [she] visits the Skull Valley Reservation about 8-10 times each year"; and she

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[11] *See, e.g., Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336, 338 (1979); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1447, 1449 (1982).

[12] *See* Staff Resp. to Supp. Mem., at 7-9; App. Resp. to Supp. Mem., at 9.

[13] The Rowley Junction intermodal transfer point ("ITP") is located about 25 miles north of the Skull Valley Reservation, and is the subject of various contentions in the proceeding.

stated (albeit without supporting documentation) that she is the legal guardian of her granddaughter, Michaela (*Id.* at 1, 2).

In response to this Further Supplemental Memorandum, the Staff withdrew its opposition to the Confederated Tribes' intervention in the proceeding.[14] The Staff based this determination on Ms. Reed's statement that she visits the Skull Valley Reservation -- by her count, about 8-10 times per year, a number which is contested by Ms. Wash -- and drops off her granddaughter at Rowley Junction (where spent fuel is expected to be transshipped to the ISFSI), in connection with Michaela's visits to the Reservation; in addition, the Staff concluded that "[a]lthough the record contains conflicting information concerning the frequency of Michaela's visits to the Skull Valley Reservation, on balance it appears that her visits are sufficiently frequent, and of sufficient duration" to establish her standing to intervene (Staff Resp. to Further Supp. Mem., at 2-3). The Staff concluded that Ms. Reed had established her own and her granddaughter's individual standing to intervene, that Ms. Reed's assertion of legal guardianship for Michaela was uncontested, that Ms. Reed had authorized the Confederated Tribes to represent her and her granddaughter's interests in this proceeding, and that the Confederated Tribes therefore appeared to have established representational standing to intervene in the proceeding (*Id.* at 4).[15]

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[14] *See* "NRC Staff's Response to 'Further Supplemental Memorandum in Support of the Petition of the Confederated Tribes of the Goshute Reservation and David Pete to Intervene and for a Hearing," dated January 14, 1998 ("Staff Resp. to Further Supp. Mem.").

[15] On January 13, 1998, the Skull Valley Band of Goshutes filed a response in opposition to the Confederated Tribes' Further Supplemental Memorandum. *See* "Response of Skull Valley Band of Goshutes to Further Supplemental Memorandum in Support of the Petition of the Confederated Tribes of the Goshute Reservation and David Pete to Intervene and for a Hearing," filed January 13, 1998. No response to the Confederated Tribes' Further Supplemental Memorandum was filed by the Applicant.

Oral argument concerning the Confederated Tribes' standing to intervene was presented at the Prehearing Conference on January 27, 1998. *See* LBP-98-7, slip op. at 31; Tr. 10-26. Counsel for the Applicant and the Confederated Tribes agreed that Michaela had not visited the Skull Valley Reservation in three months, since late October 1997 (Tr. 11, 20) -- although the Applicant, the Confederated Tribes and the Skull Valley Band expressed disagreement as to who was responsible for discontinuing those visits and as to whether the child's visits would resume in the future (Tr. at 20, 23-26).[16] No evidence was presented with respect to the matters addressed in the conflicting Declarations.[17]

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[16] For its part, the Staff indicated that while Ms. Reed's and her granddaughter's contacts with the proposed facility appeared sufficient to establish their individual standing, "there is not a clear and convincing statement of standing on behalf of either the little girl or Ms. Reid [sic]. On balance, however, . . . we think the balance has tipped so that you can find standing for both the grandmother and the granddaughter" (Tr. at 18-19). After summarizing the conflict in evidence presented by the Declarations of Ms. Reed and Ms. Wash (Tr. at 19), the Staff stated: "On balance, if you look at the statements by Ms. Reid [sic] and you give them credence, we believe that you can find standing for the Confederated Tribes. But there is that conflict of evidence, and that is something that would have to be resolved by the [Board]." Tr. at 19-20. The Staff further pointed out as follows (Tr. at 25):

> One thing that we didn't address is the question of burden of proof. As the proponent of standing, it is incumbent upon the Confederated Tribes to establish it. Here you do have conflicting information with respect to the number of visits by the little girl to the reservation, as well as with respect to the number of times that Ms. Reid [sic] herself comes to the reservation.
>
> In your decision on standing, you'll have to consider whether the burden itself has been satisfied by the Confederated Tribes.

[17] A suggestion of the need for further evidence was made Counsel for the Skull Valley Band of Goshutes, who stated that "if the affidavits of the Confederated Goshutes are closely scrutinized, and those individuals are examined, I think this honorable body will find that those affidavits will probably not be held up." Tr. at 13-14. In addition, the Applicant offered to present a fact witness to testify concerning the reason for the cessation of Michaela's visits to the Skull Valley Band's reservation, which was ruled to be unnecessary (*see* Tr. at 23-24).

In its decision on standing, the Licensing Board concluded that the Confederated Tribes had failed to establish its own organizational standing to intervene, and that it had failed to establish its representational standing except to the extent that it relied upon Ms. Reed's two Declarations. *See* LBP-98-7, slip op. at 30-31. With respect to Ms. Reed's Declarations, the Licensing Board reviewed the conflicting evidence (*Id.* at 31), and then concluded as follows:

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

Id. at 31-32.

ARGUMENT

In its brief on appeal, the Applicant urges the Commission to reverse the Licensing Board's determination that the Confederated Tribes has standing to intervene in this proceeding, on the grounds that (1) the Licensing Board "failed to place the burden of proof on the Confederated Tribes, as required under judicial concepts of standing utilized by the Commission" (App. Br. at 8), and (2) even if Ms. Reed and her granddaughter were correctly found to have individual standing to intervene, the Confederated Tribes had not established representational standing to intervene in this proceeding, since the interests it seeks to protect in this proceeding are not "germane to the organization's purpose" (*Id.* at 12). For the reasons set forth below, the Staff supports the Applicant's appeal from the Licensing Board's decision,

on the grounds that it failed to determine and/or articulate whether the Confederated Tribes had satisfied its burden of proof.[18]

I. The Licensing Board Improperly Failed to Determine or Articulate Whether the Confederated Tribes Had Satisfied Its Burden of Proof.

It is well established that the Commission applies "'contemporaneous judicial concepts' of standing to determine whether a petitioner has a sufficient interest in a proceeding to be entitled to intervene as a matter of right." *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989), *citing Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332-33 (1983). In turn, "contemporaneous judicial concepts" of standing establish that the party seeking to invoke federal jurisdiction bears "the burden of proof" in establishing its standing to do so. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[19] The Commission has previously described this requirement as follows:

> [T]he petition must . . . set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, and the specific aspect of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 C.F.R. § 2.714(a)(2). The burden is on the petitioner to satisfy these requirements. 10 C.F.R. § 2.732.

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[18] Inasmuch as the interests sought to be protected by the Confederated Tribes in this proceeding include the health and safety of its members, the Staff does not support the Applicant's argument that those interests are not reasonably related to the purposes of the organization (App. Br. at 12-14).

[19] *See* n. 22, *infra*.

TMI, supra, 18 NRC at 331; emphasis added. As the Commission has further stated, an organization that seeks to intervene in an NRC proceeding "must particularize a specific injury that it or its members would or might sustain" as a result of the licensing action in question. *Id.*, at 332; emphasis added.

In its decision, the Licensing Board stated that "after reviewing all this information 'in the light most favorable to the petitioner,' we are unable to conclude that 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." LBP-98-7, slip op. at 31-32; emphasis added.[20] This determination, however, appears to have incorrectly placed the burden of proof on opponents of the Confederated Tribes' intervention to show the lack of standing to intervene; in addition, it fails to indicate whether the previous pattern of visits was sufficient to establish standing, focusing instead only upon whether the recent interruption of those visits deprived Ms. Reed and her granddaughter of standing.

Further, inasmuch as a conflict in evidence was present, the Licensing Board appears to have incorrectly applied a standard of viewing the evidence "in the light most favorable to the petitioner." Although application of that standard would have been proper in the absence of any evidentiary rebuttal of the petitioner's evidence, in view of the conflict of evidence

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[20] In reaching this determination, the Licensing Board appears to have relied upon the Commission's decision in *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). *See* LBP-98-7, slip op. at 31-32. Thus, the Licensing Board stated, "in assessing a petition to determine whether these elements [of standing] 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)." LBP-98-7, slip op. at 24-25.

before it, the Licensing Board either (a) should have required the Confederated Tribes to satisfy its burden of proof (through the filing of additional evidence or a mini-hearing), or (b) should have articulated a basis for finding that burden had been satisfied (such as finding that the uncontroverted evidence was sufficient to establish standing), before finding that the Confederated Tribes has standing to intervene in this proceeding.

The Commission's decision in *Georgia Tech*, upon which the Licensing Board based its determination that it must "view the evidence in the light most favorable to the petitioner," does not warrant a different outcome. First, that decision did not involve a conflict in evidence as to the factual bases for the petitioner's contacts with the site (needed to show standing), but rather involved a complicated technical issue as to whether the petitioner, in light of its uncontroverted contacts with the site, could be harmed by the challenged licensing action. *See Georgia Tech*, CLI-95-12, 42 NRC at 114, 115-16.[21] In those circumstances, it was not improper for the Commission to "construe the petition in favor of the petitioner," *Id.* at 115, rather than conduct a merits-type determination as to whether the facility could have an impact on persons in the area, and to conclude that the Licensing Board's determination that some injury could occur within ½ mile of the reactor was not unreasonable. *Id.* at 117. In contrast, here, the facts needed to establish the petitioner's contacts with the site are contested, and a simple presentation of any additional required facts could resolve the conflict.

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[21] In determining to view the evidence in the light most favorable to the petitioner, CLI-95-12, 42 NRC at 115, the Commission reiterated the standard that had been enunciated by the Licensing Board in the decision on appeal. *See Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 286, *aff'd*, CLI-95-12, 42 NRC 111 (1995). *See also Id.*, 41 NRC at 287.

Second, the Commission's determination in *Georgia Tech* to "construe the petition in favor of the petitioner," 42 NRC at 115, relies upon *Kelley v. Selin,* 42 F.3d 1501, 1508 (6th Cir. 1995); that decision, in turn, draws its fundamental support from the Supreme Court's decision in *Warth v. Seldin*, 422 U.S. 490, 501 (1975). However, in *Warth v. Seldin*, the Court indicated that "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* at 501; emphasis added. Here, a different procedural posture is presented than existed in either *Georgia Tech* or *Warth v. Seldin*: Here, the Applicant's presentation of conflicting evidence equated to a contested motion for summary judgment rather than a motion to dismiss. In these circumstances, the Staff submits that the Licensing Board should not have viewed the controverted evidence in the petitioner's favor, but rather, should have found either that certain uncontroverted evidence was sufficient to support the petitioner's standing, or that a mini-hearing or the submission of further evidence was required to resolve the conflict in evidence. *See Lujan v. Defenders of Wildlife, supra*, 504 U.S. at 560-61.[22]

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[22] In *Lujan*, the Supreme Court stated as follows:

> The party invoking federal jurisdiction bears the burden of establishing these elements [to show standing]. . . . Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of the litigation. . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere

(continued...)

Indeed, the Licensing Board Chairman has previously recognized (albeit in a different proceeding), that the petitioner carries the burden of proof to establish its standing to intervene -- and where a conflict of evidence exists, a petitioner's claims must be established with a higher degree of proof than is required where such claims are uncontroverted. *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, *appeal dismissed*, CLI-93-9, 37 NRC 190 (1993). There, the Presiding Officer stated as follows:

> For purposes of assessing injury in fact (or any other aspect of standing), a hearing petitioner's factual assertions, if uncontroverted, must be accepted. . . . In this instance, however, in response to the hearing petition supplement and additional, related information submitted in support of a request by the Petitioners to stay decommissioning activities, both [the applicant] and the staff have presented sworn statements and supporting documentary information that raise material challenges to the validity of the Petitioners' factual allegations in support of their standing. Consequently, the issue of the Petitioners' standing now rests in an unusual procedural posture. Because of the contravening factual submissions made by [the applicant] and the staff, it is appropriate in this instance, in a manner akin to a summary disposition determination, to undertake a merits-type evaluation of the sufficiency of the Petitioners' factual bases for their claims of standing. n26
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> [26] *See Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978). *See also* 13A Wright, *et al.*, [Federal Practice and Procedure (2d ed. 1984)], § 3531.15, at 97-99.

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[22](...continued)

> allegations," but must "set forth" by affidavit or other evidence "specific facts," . . . which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan, supra, 504 U.S. at 560-61; emphasis added.

Id., 37 NRC at 82-83 (other footnotes omitted). In fact, the *Midland* decision, cited by the Presiding Officer in *Apollo, supra,* indicates that standing to intervene "may appropriately be the subject of an evidentiary inquiry before intervention is granted." *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n.1 (1978).

In sum, the existence of controverted evidence required a showing, by a preponderance of the evidence, that standing had been established. Although the Licensing Board may have implicitly determined that the Confederated Tribes had met their burden of proof, its decision does not articulate this fact; and the Licensing Board's statement that it would view the evidence "in the light most favorable to the petitioner" does not resolve the burden of proof requirement.[23]

II. The Commission Should Remand to the Licensing Board the Issue of Whether the Confederated Tribes Had Satisfied Its Burden of Proof.

The Staff has previously expressed its view that the evidence as to Ms. Reed's and her granddaughter's contacts in the area is in conflict, and "there is not a clear and convincing statement of standing on behalf of either" Ms. Reed or her granddaughter; at the same time, the Staff indicated its view that, "on balance, . . . we think the balance has tipped so that you

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[23] In its brief in opposition to the Applicant's appeal, the Confederated Tribes reasserts its "aboriginal interest" in the Skull Valley Band's reservation, reiterates its assertion that other tribal members have contacts with the area and could be adversely affected by the proposed licensing of this facility; and that the facts support Ms. Reed's standing to intervene (Confed. Tribes Br. at 2-8). The Staff notes that the Confederated Tribes' assertion of an aboriginal interest was rejected by the Licensing Board as insufficient to confer standing upon it (*see* LBP-98-7, slip op. at 30); the other persons referred to by the Confederated Tribes did not file affidavits or authorize the Confederated Tribes to represent them in this proceeding, and their interests therefore cannot support the Confederated Tribes' representational standing to intervene; and certain of the facts presented concerning Ms. Reed and her granddaughter's contacts with the area are contested, at least in part, by the Declaration of Arlene Wash.

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PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
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(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO APPLICANT'S BRIEF ON APPEAL OF ORDER GRANTING THE CONFEDERATED TRIBES' PETITION FOR INTERVENTION (LBP-98-7)," in the above captioned proceeding have been served on the following by electronic mail as indicated, with copies by 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, this 14th day of May, 1998:

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can find standing for both the grandmother and the granddaughter" (Tr. at 18-19). *See* n.16, *supra*. While the Staff's balancing of the controverted and uncontroverted evidence indicates its own view that the Confederated Tribes' representational standing had been established, the Staff indicated that the Licensing Board would need to consider the conflicting evidence and determine whether "the burden itself has been satisfied by the Confederated Tribes." Tr. at 25. In view of the conflict in evidence discussed above, and the lack of articulation in the Licensing Board's decision as to whether (or upon what basis) the Confederated Tribes has satisfied its burden of proof, the Staff believes the Commission should remand this matter to the Licensing Board for further elucidation or resolution.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Commission should remand this matter to the Licensing Board, for determination and/or articulation as to whether (and upon what basis) the Confederated Tribes has satisfied its burden of proof with respect to its standing to intervene in this proceeding.

Respectfully submitted,

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Dated at Rockville, Maryland
this 14th day of May 1998

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