

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 OPPOSITION TO
APPEAL OF SCIENTISTS FOR SECURE WASTE STORAGE
FROM DENIAL OF PETITION TO INTERVENE (LBP-98-7)

Robert M. Weisman
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May 18, 1998

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, the NRC Staff ("Staff") hereby files its brief in opposition to the appeal dated May 1, 1998, of Scientists for Secure Waste Storage ("SSWS") from that portion of the Atomic Safety and Licensing Board's "Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition and Procedural/Administrative Matters)," dated April 22, 1998 (LBP-98-7), in which the Board denied SSWS' Petition to Intervene in the above-captioned proceeding. For the reasons set forth below, the Staff submits that the "Brief of Scientists for Secure Waste Storage in Support of Appeal from Denial of Petition to Intervene," dated May 1, 1998 ("SSWS Brief"), fails to establish (a) that the Board abused its discretion in denying SSWS' petition for discretionary intervention and (b) that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) favors the grant of the SSWS late Petition to

Intervene. Accordingly, the Staff opposes the SSWS appeal of LBP-98-7 and recommends that the Board's Memorandum and Order denying the SSWS Petition to Intervene be affirmed.

STATEMENT OF THE CASE

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 -- one week before the Prehearing Conference -- Professor Richard Wilson filed an initial petition for leave to intervene in this proceeding on behalf of himself and a group of other persons. Letter dated January 20, 1998, requesting leave to intervene in licensing hearing on proposal of Private Fuel Storage LLC, from Professor Richard Wilson to the Secretary of the Commission. Professor Wilson revised the petition on January 22, 1998. On February 2, 1998, Professor Wilson filed an "Amended Petition," as Spokesman for "Scientists for Secure Waste Storage."¹ 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. PFS and the Skull Valley Band of Goshutes then filed responses in support of the Amended Petition;² and the State of Utah, Ohngo

¹ 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.

² *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.

Gaudadeh Devia (OGD), and the NRC Staff filed responses in opposition to the Amended Petition.³

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 "Amended and Supplemental Petition of Scientists for Secure Waste Storage to Intervene" ("Supplemental Petition"), dated February 27, 1998. PFS and the Skull Valley Band of Goshutes then filed responses in support of the Supplemental Petition;⁴ and the State of Utah and the NRC Staff filed responses in opposition to the Supplemental Petition.⁵ The Board denied the SSWS Petition to Intervene in its entirety. "Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition and Procedural/Administrative Matters)," LBP-98-7, 47 NRC ___, slip op. at 33-45 (Apr. 22, 1998).

³ 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 February Response").

⁴ See (1) "Applicant's Answer to Amended and Supplemental Petition of Scientists for Secure Waste Storage," dated March 9, 1998; and (2) "Skull Valley Band of Goshutes Memorandum in Support of Petition of the Scientists for Secure Nuclear Waste Storage and the Atlantic Legal Foundation to Intervene," dated March 9, 1998.

⁵ See (1) "State of Utah's Response to Scientists for Secure Waste Storage's Amended and Supplemental Petition to Intervene," dated March 9, 1998 ("Utah March Response"); and (2) "NRC Staff's Response to Amended and Supplemental Petition of Scientists for Secure Waste Storage to Intervene," dated March 9, 1998 ("Staff March Response").

STANDARD OF REVIEW

A licensing board's determination on discretionary intervention will only be reversed on a finding that the board abused its discretion. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, *aff'd*, CLI-91-13, 34 NRC 185 (1991). Under this standard, SSWS has a substantial burden. As stated by the Atomic Safety and Licensing Appeal Board in *Turkey Point*:

It is not enough for [the Petitioner] to establish simply that the Licensing Board might justifiably have concluded that the totality of the circumstances bearing upon the [10 C.F.R. § 2.714] factors tipped the scales in favor of [the grant] of the petition. *In order to decree that outcome, we must be persuaded that a reasonable mind could reach no other result.*

ALAB-952 at 532, quoting *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983)(emphasis added); *see generally INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1293 (7th Cir.1993)(explaining application of the "abuse of discretion" standard of review in general).⁶

ARGUMENT

In LBP-98-7, the Licensing Board evaluated the SSWS' petition for leave to intervene with regard to (1) the standards of 10 C.F.R. § 2.714(a) applicable to late-filed petitions

⁶ WPPSS involved application of the standards of 10 C.F.R. § 2.714(a) regarding late-filed petitions to intervene, which involves consideration of issues similar to those involved in discretionary intervention. Inasmuch as the standard of review applicable to that appeal is identical to that set forth above, decisions on the application of the standard of review to rulings on late-filed petitions should also be instructive here. *See also Public Service Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 482 (1989); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987).

such as that of SSWS, (2) the Commission's standards for granting intervention as of right, and (3) the Commission's standards for discretionary intervention set forth in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1977). LBP-98-7, slip op. at 33-45. The Board denied the SSWS' petition with regard to each of these three issues. In its appeal from the Licensing Board's decision, SSWS challenges only one of these determinations: the denial of discretionary intervention (SSWS Brief at 3-7). For the reasons set forth below, the Staff submits that SSWS does not present any reasons warranting reversal of LBP-98-97 with respect to discretionary intervention.

I. Standards for 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 as follows:

In determining in a particular case whether or not to permit intervention by petitioners who do not meet the tests for intervention as a matter of right, adjudicatory boards should exercise their discretion based on an assessment of *all the facts and circumstances of the particular case*. Some factors bearing on the exercise of this discretion are suggested by our regulations, notably those governing the analogous case where the petition for intervention has been filed late, 10 CFR 2.714(a), but also the factors set forth in 10 CFR 2.714(d)[,] governing intervention generally:

(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. (Emphasis added; footnote omitted). As the above discussion shows, the Commission's decision in *Pebble Springs* provides that the licensing boards should consider *all* the facts and circumstances of a particular case in making a determination on discretionary intervention.

II. The Licensing Board's Determination Regarding Discretionary Intervention

The Licensing Board considered the six factors enumerated in *Pebble Springs* as set forth below. LBP-98-7, slip op. at 43-4. With regard to factor (1), the extent to which SSWS' participation may reasonably be expected to assist in developing a sound record, the Board specifically considered the considerable expertise of the members of SSWS. LBP-98-7, slip op. at 37, 43-4. The Board weighed the SSWS members' professional qualifications but, at the State of Utah's urging (Utah March Response at 10-11),

considered that the SSWS showing "all too often reflected a lack of knowledge, understanding, or concern about the particulars of the PFS application," which suggested that SSWS' input would not be useful in helping to resolve the issues in this proceeding. *Id.* Consideration of a petitioner's knowledge of the particulars of an application is permissible in evaluating this factor. *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-91-38, 34 NRC 229, 247 (1991).

The Staff, as stated in its March Response at 11, believes SSWS has shown that its members and prospective witnesses possess substantial expertise in disciplines relevant to the contentions that have been filed by other petitioners, and that SSWS would likely make a valuable contribution to the Commission's decision making process in this proceeding. The staff believes that reasonable minds could differ in the treatment of this factor in considering discretionary intervention for SSWS. Even if the Board did not properly treat this factor, the Staff believes this factor was outweighed by the others, particularly the likelihood that intervention by SSWS would delay the proceeding. Staff March Response at 12; *see infra*, pp. 9-10. Accordingly, the Staff submits that the Board's denial of SSWS' petition for discretionary intervention based upon its balancing of all the *Pebble Springs* factors does not constitute an abuse of discretion. The other argument in the SSWS Brief,

regarding SSWS' ability to become familiar with the issues, does not warrant a different result because this argument is speculative.⁷ SSWS Brief at 5.⁸

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.⁹ LBP-98-7, slip op. at 36, 44. 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. *Id.* at 44. Where any injury is not within the "zone of interests" protected by the Commission, factors (2) and (3) should be considered as weighing against granting discretionary intervention. *See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2)*, LBP-78-11, 7 NRC 381, 388 *aff'd*, ALAB-470, 7 NRC 473 (1978). SSWS argues that its interest in "seeing that all relevant and important information within its members' field of expertise are considered . . . is, or should be, a major . . . component of the

⁷ SSWS did demonstrate familiarity with the proposed contentions in its numbered comments in its Supplemental Petition, but did not necessarily apply that knowledge to the application, which was the Board's concern.

⁸ SSWS refers to the dissenting opinion in LBP-98-7 as support for its position. SSWS Brief at 2, 5. The dissent, however, does not establish that "a reasonable mind could reach no other result" than to conclude that SSWS would make a significant contribution to the development of a sound record in deciding to grant discretionary intervention. LBP-98-7, slip op. at 171. The dissent does not demonstrate the majority opinion to be an abuse of discretion.

⁹ 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 February Response* at 15-20.

'public interest.'" SSWS Brief at 5. This argument is not availing inasmuch as such an interest is clearly outside the zone of interests protected by the Commission. *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-8 (1994); *Pebble Springs*, CLI-76-27, 4 NRC at 613-4. The *Perry* decision cited by SSWS as support is clearly distinguishable, as the petitioner in that proceeding alleged an injury *within* the "zone of interest" relevant to that proceeding. *Perry*, LBP-91-38, 34 NRC at 250 (1991).

In addition, with respect to factor (4), because SSWS' interest is essentially an interest in assuring that sound scientific views are considered, the Staff believes that other means are available to protect this interest (such as the opportunity to make limited appearance statements or to submit written comments on Staff documents). In this regard, the Board noted that SSWS' stated interest in ensuring the Board has an "objective presentation of the scientific evidence" suggests that SSWS sees itself fulfilling a role that, at least in part, mirrors the staff's general pursuits. LBP-98-7, slip op. at 36. 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 may 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.¹⁰ With regard to this factor,

¹⁰ If SSWS had proposed a more limited role for itself in this proceeding, there would

(continued...)

the Licensing Board determined that the "litigation by committee" proposed by SSWS could broaden or delay the proceeding by creating the potential for differing views from the same participant and by forcing the Board, if it wants the input of the "group," to set schedules that will accommodate group consultation. SSWS now promises that "if there is no consensus within SSWS [on a technical issue], it will not take a position." SSWS Brief at 6. SSWS raises this argument for the first time on appeal. As the Board did not have the opportunity to consider SSWS' promise, it should not be considered here in determining whether the Board abused its discretion in denying discretionary intervention to SSWS. In any event, SSWS' procedure for reaching consensus, as described in LBP-98-7 at 38-40, would result in delay, and does not warrant a different conclusion with respect to this factor.¹¹

¹⁰(...continued)

be less potential for delay or broadening of the issues. See, e.g., *Perry*, LBP-91-38, 34 NRC at 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).

¹¹ In its brief in support of appeal, SSWS does not discuss the applicability of the "good cause" factor for late filing required by 10 C.F.R. § 2.714(a)(1)(i), but intimates that this factor (one of the factors in the late filing standards of § 2.714(a)) does not apply to discretionary intervention, even if the petition is late. By its plain language, 10 C.F.R. § 2.714(a) applies to any petition for leave to intervene, whether the petition requests intervention as of right or discretionary intervention under the standards set forth in *Pebble Springs*. Accordingly, it would be entirely appropriate for a licensing board to consider a petitioner's stated "good cause, if any, for failure to file on time" in determining whether to grant or deny discretionary intervention. Consideration of this and other factors is clearly contemplated by *Pebble Springs*. See *Public Service Co. of Oklahoma, Associated Electric Cooperative, Inc., Western Farmers Electric Cooperative, Inc.* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977) *aff'g* LBP-77-17, 5 NRC 657 (1977). In *Black Fox*,
(continued...)

In sum, the Licensing Board set forth in LBP-98-7 a list of reasonable bases to conclude that each of the six factors enumerated by the Commission in *Pebble Springs* weighs against granting SSWS' request for discretionary intervention. SSWS' assertion that the Board abused its discretion, *i.e.*, that "a reasonable mind could reach no other result" than to grant discretionary intervention, is without merit and should be rejected.

CONCLUSION

For the reasons set forth above, the Staff submits that the Atomic Safety and Licensing Board's decision in LBP-98-7 denying SSWS' petition for discretionary intervention should be affirmed.

Respectfully submitted,

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of May 1998

¹¹(...continued)

the Appeal Board affirmed the Licensing Board's decision in which that Board performed a "unitary analysis" of the factors governing late intervention as a matter of right and discretionary intervention. *Black Fox*, ALAB-397 at 1147; LBP-77-17 at 659, 667. In determining whether to grant discretionary intervention, the Licensing Board in *Black Fox* clearly considered all the factors enumerated by the Commission in *Pebble Springs*, as well as the "good cause" factor for late-filed petitions set forth in 10 C.F.R. § 2.714(a).

If the "good cause" factor were considered in making a determination on SSWS' petition for discretionary intervention, it would give additional weight to denying SSWS' petition. As the Board explained, this factor would weigh against granting SSWS' intervention. LBP-98-7 at 33-5.

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with § 2.713(b), 10 C.F.R. Part 2, the following information is provided:

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Respectfully submitted,

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of May, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL OF SCIENTISTS FOR SECURE WASTE STORAGE FROM DENIAL OF PETITION TO INTERVENE" and "NOTICE OF APPEARANCE" for Robert M. Weisman 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, by electronic mail as indicated, this 18th day of May, 1998:

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