

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
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S ANSWER TO AMENDED AND SUPPLEMENTAL  
PETITION OF SCIENTISTS FOR SECURE WASTE STORAGE**

In accordance with the February 17, 1998 Memorandum and Order (Schedule Regarding Scientists for Secure Waste Storage Final Intervention Petition Supplement) of the Atomic Safety and Licensing Board ("Board"), Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") submits this Answer to the "Amended and Supplemental Petition of Scientists for Secure Waste Storage to Intervene" ("Supplemental Petition"). Applicant does not oppose intervention in this proceeding by the Scientists for Secure Waste Storage ("SSWS"). As set forth in Applicant's February 13, 1998 Answer to the Amended Petition of SSWS ("Applicant's Answer"), and as amplified below, SSWS has provided sufficient information in its petitions to be granted discretionary intervention. Further, SSWS has set forth contentions and bases in its Supplemental Petition sufficient for admitting a petitioner supporting the issuance of a license application, such as SSWS.

As set forth in Applicant's Answer, the most important of the six factors articulated in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976) in determining whether to grant discretionary intervention is the extent to which the petitioner's participation may be reasonably expected to assist in developing a sound record.<sup>1</sup> As noted in Applicant's Answer, the members of the Scientists for Secure Waste Storage are highly distinguished scientists and scholars, including six Nobel Laureates, and can certainly be expected to provide a valuable contribution to the development of a sound record.

The information provided in the Supplemental Petition further reflects the potential valuable contribution by SSWS to the decision-making process. SSWS has identified in the form of contentions the specific issues on which it intends to participate, the members of the group that would provide expert testimony on each of these issues (together with attached resumes), and the general nature and bases of their intended testimony. Both the Appeal Board and the licensing board found similar information sufficient for granting the Chicago Section of the American Nuclear Society ("ANS") discretionary intervention with respect to the renewal and amendment of the license for

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<sup>1</sup> The suggestion in OGD's Response to Wilson/ALF Amended Petition ("OGD Response") at page 4 that the "test for discretionary intervention seems to rest on petitioner's interest" is clearly wrong in view of the numerous cases cited in Applicant's Answer (at 2-3) that foremost among the Pebble Springs factors is whether a petitioner's participation would likely produce a valuable contribution to the decision-making process.

the Sheffield facility.<sup>2</sup> The potential contribution of SSWS to the development of a sound record in this proceeding clearly meets or exceeds that of the Chicago Section in Sheffield.

Further, SSWS has set forth contentions and related bases sufficient for admitting a petitioner supporting the issuance of a license application. The Appeal Board in Sheffield observed that once specific issues have been raised by petitioners in opposition to a license application, a licensing board is "free to call upon any intervenors supporting the license application to take a position on them." 7 NRC at 743 n. 5.<sup>3</sup> Here, SSWS through its contentions has taken a position on those issues raised by the petitioners opposing the license application on which SSWS seeks to participate, exactly as envisioned by the Appeal Board in Sheffield.<sup>4</sup> Further, SSWS has set forth a factual

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<sup>2</sup> See Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744-45 (1978); Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 300 n.1 (1978); Licensing Board Order Granting Further Request for Leave to Intervene as a Matter of Discretion by Chicago Section, American Nuclear Society, Docket No. 27-39 at 5, June 20, 1978.

<sup>3</sup> The Appeal Board in Sheffield noted that it would be unreasonable to require of a petitioner supporting a license application anything more than a general pleading in support of the application prior to being informed of the basis of any opposition that might be filed to the application. Id.

<sup>4</sup> The 18 numbered contentions set forth in the Supplemental Petition take issue with specific contentions and issues raised by the petitioners opposing the project. (Applicant suggests that the headings to each of these contentions could be viewed as the contention and the stated contention viewed as the bases.) Further, although the general contention set forth at page 3 of the Supplemental Petition does not identify any specific contention with which it takes issue, it would appear to take direct issue with parts of OGD Contention C. See Ohngo Gaudadeh Devia's Contentions regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation at 8 dated November 24, 1997; Applicant's Answer to Petitioners' Contentions at 499-501 dated December 24, 1997.

bases for the positions taken in its contentions. Five pages of the Supplemental Petition are devoted to "important facts which underlie" the positions taken by SSWS in its contentions. These important facts are based on references to various scientific journals and texts, some which were authored by SSWS members. Additionally, the specific contentions set forth further facts, expert opinion and citations to scientific journals and text in support of the positions taken by SSWS in opposition to the contentions raised by the other petitioners that oppose the license application.

Thus, Applicant believes that SSWS has provided a sufficient foundation for the granting of discretionary intervention to a petitioner supporting a license application in accordance with the Appeal Board and licensing board decisions in Sheffield.<sup>5</sup> The objections raised by the State and OGD to discretionary intervention in their responses to the February 2, 1998 Amended Petition have either been answered by the Supplemental Petition or are without merit.<sup>6</sup> The State's objection that SSWS was "too vague" in showing how it would make a contribution to the "specific issues of law and fact" raised in the case<sup>7</sup> has been addressed by the Supplemental Petition which sets forth the specific

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<sup>5</sup> Applicant notes, however, that the specific contentions raised by SSWS should be admitted only to the extent that the underlying contentions of the petitioners opposing the project, challenged in SSWS's contentions, are admitted by the Board.

<sup>6</sup> The NRC Staff did not address discretionary intervention in its response to the February 2, 1998 Amended Petition. See NRC Staff's Response to Petition for Leave to Intervene Filed by Richard Wilson and Scientists for Secure Waste Storage, dated February 13, 1998 ("NRC Staff Response").

<sup>7</sup> See State of Utah's Opposition to Amended Petition to Intervene at 16-17, dated February 13, 1998 ("State Opposition").

issues of law and fact on which SSWS seeks to participate as well as the expert witnesses and general nature and basis of the proposed testimony with respect to each such issue.

Further, the State's claim that the second and third of the Pebble Springs factors (the nature and extent of the petitioner's interest in the proceeding and the possible effect of any order on that interest) cut against discretionary intervention because SSWS's "only interest appears to be an academic interest" misconstrues the import of those two factors in the context of discretionary intervention.<sup>8</sup> These two factors are drawn from those ordinarily used to determine whether a petitioner has standing and may intervene as of right. See 10 C.F.R. § 2.714(d); Pebble Springs, CLI-76-27, 4 NRC at 616. Even where a petitioner lacks standing as of right because its interest is too "generalized" or "academic," those factors can favor discretionary intervention. See Ohio Edison Company (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 249-51 (1991). In this regard, the Chicago Section of the ANS sought intervention in Sheffield to "vindicate broad public interests said to be of particular concern to [it] and [its] members," 7 NRC at 741, no different than the broad public interests sought to be vindicated in the instant proceeding by SSWS.

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<sup>8</sup> State Opposition at 17. As already noted earlier (footnote 1, supra), OGD's claim that the test for discretionary intervention "rest[s]" on the petitioner's interest in the matter at hand (OGD Response at 4) is mistaken. The most important factor is the contribution the petitioner will make to the sound development of the record.

Similarly, OGD's claim (OGD Response at 4) that "the specific interests represented by . . . all of the other proposed intervenors" will ensure that "the public good" -- sought to be represented by SSWS -- will be properly considered is clearly erroneous as reflected by the Supplemental Petition. There, SSWS takes positions directly contrary to those of the other petitioners concerning the scientific and technical merits of the license application. Obviously, therefore, the other petitioners would not represent SSWS's perception of the public good as it pertains to evaluating the scientific and technical soundness of the proposed facility.

In a somewhat similar vein, the Staff argues in the context of applying the five factors for late filing under 10 C.F.R. § 2.714(a)(1) that SSWS's "academic interest in the advancement of sound scientific testimony may well be represented by other parties," singularly or in concert. See NRC Staff's Response at 9-10. SSWS differs, however, from all other parties, including the Applicant, in terms of its status, perspective, and potentially its approach to the issues. Moreover, denying discretionary intervention on such a basis would deprive both the Board and the Commission of the potentially valuable contribution that the distinguished scientists and scholars comprising SSWS -- acting on their own volition -- could make to the development of a sound record, which as enunciated by the Commission in Pebble Springs and the Appeal Board in Sheffield, is the foremost consideration in determining whether discretionary intervention should be granted. Indeed, the active and independent involvement of such eminent scientists

should enhance the "public confidence" in the licensing process, one of the underlying considerations for the Commission's allowance of discretionary intervention in its licensing proceedings.<sup>9</sup>

Both the State and OGD, as well as the NRC Staff, also argue that SSWS should not be allowed to intervene because its petition does not satisfy the five-factor test for late intervention set forth in 10 C.F.R. § 2.714(a)(1). Whether SSWS must independently satisfy the five-factor test for late intervention in addition to the six factor test for discretionary intervention set forth in Pebble Springs (four of which are identical to factors for late intervention) is unsettled under NRC case law.<sup>10</sup>

In any event, however, SSWS does so because of its unique ability -- by virtue of the great collective experience and expertise of its members in the field of nuclear

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<sup>9</sup> See Pebble Springs, 4 NRC at 615-16, quoting Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975). Similarly the State's suggestion (State Opposition at 7) that limited appearance statements may provide an alternate means for SSWS to protect its interests would not truly protect SSWS's interests and would deprive both the Board and the Commission of the potentially valuable contribution that SSWS could make to the development of a sound record. Neither the Appeal Board nor the licensing board in Sheffield suggested that limited appearance statements would be an equally effective means for obviously qualified petitioners to "supply enlightenment" on pending scientific and technical issues. See 7 NRC at 744.

<sup>10</sup> The most recent Appeal Board opinion concerning the issue indicated that a late-filing petitioner must satisfy both the late intervention and discretion tests to intervene. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 (1983). The Appeal Board did not address in that decision, however, a prior Appeal Board decision affirming a licensing board's admission of a late-filed petition as a matter of discretion alone. See Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1146-49, aff'g Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), LBP-77-17, 5 NRC 657 (1977). Moreover, recently, a licensing board allowed a late-filing petitioner to intervene as a matter of discretion despite its failure to address the late intervention test. See Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 24, 26-27 (1996).

technology -- to make a strong contribution to the sound development of the record (the third factor), as already demonstrated above. In addition, SSWS seeks to intervene only with respect to issues already raised by the other petitioners, and has done so relatively early in the proceeding. Accordingly, its participation would not broaden the issues to be heard in this proceeding and should not unduly delay the proceeding (the fifth factor).<sup>11</sup> Further, while SSWS, like the Applicant, supports the application, SSWS differs from the Applicant in terms of its status, perspective, and potentially its approach to the issues; thus, only SSWS can really protect its interests (the second and fourth factors).<sup>12</sup> Therefore, because SSWS can make a very strong contribution to the record, and because the other factors discussed above also tend to favor SSWS's late intervention, SSWS has made the compelling showing necessary to overcome any alleged lack of good cause for late filing.

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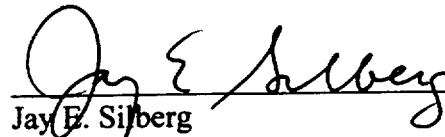
<sup>11</sup> See Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987); compare Commonwealth Edison Company (Braidwood Nuclear Power Station), CLI-86-8, 23 NRC 241, 250 (1986). None of the parties opposing intervention by SSWS (the State, NRC Staff or OGD) has come forward to show any broadening of the issues or delay that would occur as a result of SSWS's late intervention except for potential delays related to additional filings and discovery caused by another party to the proceeding. Such potential for delay, however, would exist whether the petition were timely filed or not and therefore, as reflected by the Appeal Board's decision in Comanche Peak, does not by itself constitute delay within the scope of 10 C.F.R. 2.714(a)(1). The NRC Staff also claims that delay could result from SSWS's proposal to "conduct themselves . . . as a collegial body." NRC Staff Response at 11. Any such potential for delay, however, would be subject to the Board's plenary authority under 10 C.F.R. § 2.718 "to take appropriate action to avoid delay . . . ."

<sup>12</sup> See Ohio Edison Company (Perry Nuclear Power Plant, Unit 1), LBP-92-19, 36 NRC 98, 108-09 (1992).



In sum, Applicant believes that it would be appropriate for the Board to grant  
SSWS discretionary intervention in this proceeding.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jay E. Silberg", is written over a horizontal line.

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Dated: March 9, 1998

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Answer to Amended and Supplemental Petition of Scientists for Secure Waste Storage" dated March 9, 1998, were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 9th day of March 1998.

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