

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	March 9, 1998

STATE OF UTAH'S RESPONSE TO
SCIENTISTS FOR SECURE WASTE STORAGE'S
AMENDED AND SUPPLEMENTAL PETITION TO INTERVENE

In accordance with the Board's Order of February 17, 1998, the State responds to the Amended and Supplemental Petition ("Supplemental Petition") filed by Scientists for Secure Waste Storage ("SSWS") on February 27, 1998. The Petitioner still has not demonstrated standing to intervene as of right, has not met the late filed factors for petitions to intervene, and has not demonstrated that a grant of discretionary intervention is warranted. Furthermore, the contentions filed by SSWS do not meet the standards for admissibility under 10 CFR § 2.714(b) or the standards for late filed contentions under 10 CFR § 2.714(a)(1). Therefore, SSWS should not be allowed to participate as a party in this proceeding.

I. FACTUAL BACKGROUND

On July 31, 1997, the NRC published a notice of opportunity to request a hearing and petition to intervene in this proceeding on or before September 15, 1997. 62 Fed. Reg. 41,099. In addition, NRC Staff or the Licensing Board have posted numerous other Federal Register notices regarding the conduct of this proceeding. *See* State of Utah's Opposition to Amended Petition to Intervene at 2-3 (February 13, 1998) ("State's Opposition to Amended Petition"). In an Order dated October 17, 1997, the Board established November 24, 1997 as the deadline for timely filing contentions in this proceeding.

By e-mails received January 21 and January 22, 1998, Richard Wilson filed Petitions to Intervene in this proceeding variously on behalf of himself, a group of listed individuals, and the Atlantic Legal Foundation ("ALF"). *See* State's Opposition to Amended Petition at 2-3. (The petitions are referred to collectively as "Wilson/SSWS Petitions"). On February 2, 1998, Mr. Wilson filed an Amended Petition stating that the individual petitioners had formed SSWS, which now sought leave to intervene. The ALF was identified as SSWS's "legal advisor." None of the three Wilson/SSWS Petitions contained affidavits or any other indication that any of the listed individuals had given their permission for SSWS or Mr. Wilson to represent their interests in the proceeding.¹ To the contrary, one of the listed individuals in the

¹ On February 10, 1998, Martin S. Kaufman, Esq., an attorney with the Atlantic Legal Foundation, filed a notice of appearance stating he is "representing" SSWS and

first two Wilson Petitions, Professor William Kanes, University of Utah, wrote to Professor Wilson stating that his name had been put forward without his permission and he demanded that his name be withdrawn. See Exh. 3 to State's Opposition to Amended Petition. On February 13, 1998, the State and other parties filed responses to the three Wilson Petitions.

In an Order dated February 17, 1998, the Board granted SSWS until February 27, 1998 to file a final supplement to its intervention petition, which must include a list of contentions and supporting bases. SSWS filed an Amended and Supplemental Petition on February 27, 1998.²

II. THE SUPPLEMENTAL PETITION FAILS TO SATISFY THE NRC'S LATE-FILING STANDARD.

In considering non-timely filings, 10 CFR § 2.714(a)(1) requires the balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.

has been "duly authorized by SSWS to act as their legal advisor" in this matter. Included with Mr. Kaufman's Notice of Appearance, but not referenced therein or in any other pleading, was a declaration by Robert Hoffman stating he is a member of SSWS and that he appoints Professor Richard Wilson as his representative in this proceeding. However, this affidavit was not timely, and was not accompanied by any request for leave to file it late.

² Contrary to the Board's standing order in this proceeding, the Utah Attorney General's office was not served by e-mail on the filing deadline. Only Ms. Curran received an e-mail copy of the pleading by e-mail. Denise Chancellor received a hard copy of the petition in the mail on March 3, 1998.

- (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 late-filing test is no less rigorous for parties attempting to intervene on the side of the license applicant than it is for those opposing the license. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 403 (1983).

The first factor, good cause, is a crucial element in the analysis of whether a late filed petition should be admitted. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981).

As discussed in the State's Opposition to Amended Petition at 4-6, none of the three Wilson/SSWS Petitions demonstrated good cause for SSWS's late filing. The petitions merely asserted that the petitioners became aware of Private Fuel Storage, LLC's (PFS's) licensing proposal at a "late date," and vaguely stated that it has taken a "little time to collect the information."³ Apparently realizing that these vague excuses do not amount to good cause, SSWS now takes the new and scurrilous tack of accusing

³ See State's Opposition to Amended Petition at 4-6 for a discussion of why good cause was not met in the Wilson/SSWS Petitions.

the State of having "gagged" Utah's academicians from expressing their views on the PFS proposal. Supplemental Petition at 1-2.⁴ SSWS disavows any need to show that such a "gag order" exists, but merely alleges that "many persons in Utah, including the university communities, believe there is," and charges that the State has failed to reassure academics who fail to speak up because of fear of budget cuts. Supplemental Petition at 2. In light of the State's alleged silencing of the academic community in Utah, SSWS argues, "there is a special onus on others outside the state to help inform the citizens of the state and this licensing board." *Id.* Thus, according to SSWS,

SSWS's somewhat belated filing is explained by its members' reasonable expectations that scientists within Utah, particularly those on the faculties of universities in the state, would address the technical issues; when it became apparent that this would not occur, SSWS decided to seek to participate in order to give the Board an objective presentation of the scientific evidence relevant to this licensing proceeding.

Supplemental Petition at 24-25.

SSWS's attack on the State is shamefully baseless, and provides no excuse for SSWS having waited six months to file a petition to intervene. The State has never stifled any of its employees, academics or anybody else from freely expressing their views on this proposal. Indeed, SSWS identifies not one of the alleged "many people" who have felt silenced by the State. Moreover, the assertion is patently belied by the vocal support of the PFS project that has been freely voiced, since at least February

⁴ The Supplemental Petition is not paginated. The State has hand numbered the hard copy of the petition and will use that pagination for purposes of referencing the petition.

As Revised

1997, by Robert Hoffman – one of SSWS's own members, and a public officer of the State. See Exh. 1 to State's Opposition to Amended Petition. It is disingenuous of SSWS to now trumpet its "gag order" argument given the level of knowledge and public statements of support for PFS by one of SSWS's own members.

It is also patently ridiculous to suggest that university faculty will suffer reprisals through budget cuts if they do speak out in favor of the PFS proposal. Supplemental Petition at 2. The University of Utah has explicit written policies and procedures protecting the academic freedom of its faculty members. The University has adopted and endorsed the American Association of University Professors' "1940 Statement of Principles on Academic Freedom and Tenure"; the "1970 Interpretive Comments" thereon; the "1970 Statement of Professors and Political Activity"; and the "1970 Statement of the Association's Council: Freedom and Responsibility." See University Regulations, Chapter IX, University Speech Policies, No. 8-9, Title II, Section 2 (Academic Freedom), attached hereto as Exhibit 1. Furthermore, every faculty member has the right to communicate ideas "even should such activities generate hostility or pressures against the faculty member or the university." *Id.*, Section 7, Academic Rights of Faculty Members. SSWS provides no factual information to show that these policies have been abrogated.

Accordingly, SSWS's unsupported attack on the integrity of the State is facially inadequate to show good cause for its late filing.

Withdrawn

1997, by Robert Hoffman – one of SSWS's own members, and an employee of the State. See Exh. 1 to State's Opposition to Amended Petition. It is disingenuous of SSWS to now trumpet its "gag order" argument given the level of knowledge and public statements of support for PFS by one of SSWS's own members.

It is also patently ridiculous to suggest that university faculty will suffer reprisals through budget cuts if they do speak out in favor of the PFS proposal. Supplemental Petition at 2. The University of Utah has explicit written policies and procedures protecting the academic freedom of its faculty members. The University has adopted and endorsed the American Association of University Professors' "1940 Statement of Principles on Academic Freedom and Tenure"; the "1970 Interpretive Comments" thereon; the "1970 Statement of Professors and Political Activity"; and the "1970 Statement of the Association's Council: Freedom and Responsibility." See University Regulations, Chapter IX, University Speech Policies, No. 8-9, Title II, Section 2 (Academic Freedom), attached hereto as Exhibit 1. Furthermore, every faculty member has the right to communicate ideas "even should such activities generate hostility or pressures against the faculty member or the university." *Id.*, Section 7, Academic Rights of Faculty Members. SSWS provides no factual information to show that these policies have been abrogated.

Accordingly, SSWS's unsupported attack on the integrity of the State is facially inadequate to show good cause for its late filing.

Where good cause is not demonstrated, a petitioner must make a "compelling" showing with respect to the remaining four factors. Braidwood, 23 NRC at 244. The second and fourth factors – availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest – are less important than the other factors and thus entitled to less weight. Texas Utilities Electric Co. (Comanche Peak Stream Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). As discussed, *infra* under Discretionary Intervention, SSWS has failed to demonstrate that it will assist in developing a sound record. Moreover, given its track record to date, it is much more likely that intervention by SSWS will delay and broaden the issues.

Finally, the Board should reject SSWS's unfounded argument that it need not consider the late-filing standard, particularly the "good cause" criterion, in reviewing SSWS's request for discretionary intervention. None of the cases cited by SSWS at pages 21-22 of its Supplemental Petition support its position. Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 24, 26-27 (1996), involved the consideration of a hearing request that was timely filed, but for which the petitioner organization did not meet a filing deadline for amending the hearing request to provide standing affidavits for its members. The Board found that the lateness of the standing affidavit was inexcusable, but went on to consider the hearing request on discretionary grounds. Millstone is hardly comparable to the

instant case, where SSWS delayed for four months after the deadline for filing hearing requests and petitions to intervene before making its initial filing. In Public Service Company (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1146-47, 1149 (1977), the Appeal Board found that the three late-filing factors other than good cause also bear on discretionary intervention. Contrary to the implication in SSWS's Supplemental Petition, the Appeal Board did not conclude that good cause could be ignored where a petition was late-filed. In Consolidated Edison Company of New York (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715, 721 (1982), the Board specifically addressed the factor of good cause in evaluating the petitioner's discretionary standing, and found that the lack of good cause was outweighed by other factors. In Duke Power Company (Oconee Power Station and McGuire Power Station), LBP-79-2, 9 NRC 90 (1979), the Licensing Board had already concluded that the petitioner had made "some showing of good cause" when it weighed the discretionary standing factors. Oconee, 9 NRC at 104-105. Nothing in that opinion can be read to support SSWS's argument that the Board has a choice between applying the "late-filed or discretion tests" to gain admission to the proceeding.

III. THE SUPPLEMENTAL PETITION DOES NOT DEMONSTRATE STANDING TO INTERVENE BY ANY ORGANIZATION OR INDIVIDUAL AS OF RIGHT.

The Supplemental Petition adds nothing to the earlier Wilson/SSWS Petitions

regarding standing as of right, and in fact is devoid of any discussion of the topic. The only reference to standing as of right is an argument heading on page 21, entitled "INTERVENTION AS OF RIGHT." The heading is misleading, however, because the entire discussion which follows relates only to late filed factors under 10 CFR § 2.714(a)(1). Supplemental Petition at 22-26. Accordingly, as discussed in the State's Opposition to Amended Petition at 9-14, SSWS has failed to demonstrate standing as of right.

Also, as discussed in the State's Opposition to Amended Petition at 7, SSWS has other opportunities available to participate that are more suitable to its broad interests than the narrowly focused forum of the licensing hearing. Moreover, SSWS's interests are adequately represented in this proceeding by PFS.⁵

Furthermore, as discussed below, SSWS has failed to file one admissible contention.

IV. NO SHOWING HAS BEEN MADE THAT A GRANT OF DISCRETIONARY INTERVENTION IS WARRANTED.

As discussed in the State's Opposition to Amended Petition at 15-17, the

⁵ In fact, at times, SSWS's Supplemental Petition appears to reflect a merging of identities between SSWS and PFS. Thus, on page 29, SSWS refers to the Applicant's response to SSWS's Amended Petition as "our response." In footnote 4 on page 29, SSWS also refers to "Answer, note 1, supra," as if referring to its own Supplemental Petition. The reference apparently is to be to the Applicant's Answer to the contentions filed by other parties.

Wilson/SSWS Petitions fail to meet the test for discretionary standing set forth in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Neither does the Supplemental Petition meet the test. The factors outlined in Pebble Springs are:

1. Weighing in favor:
 - (a) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
 - (b) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and
 - (c) the possible effect of any order which may be entered in the proceeding in the petitioner's interest.

2. Weighing against:
 - (a) the availability of other means whereby petitioner's interest will be protected;
 - (b) the extent to which the petitioner's interest will be represented by existing parties; and
 - (c) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

The primary consideration is the first factor: assistance in developing a sound record. Pebble Springs, 4 NRC at 617; General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996). The Commission recognized that permission to intervene should be 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, 4 NRC at

617. The Commission further determined that to avoid the possibility of "adventitiousness or delay," adjudicatory boards may demand specificity from prospective intervenors and may limit their participation in discretionary cases to the issues they have specified as of particular concern to them. *Id.* at 617.

The crux of SSWS's argument is that it will make a valuable contribution to the proceeding because of the academic achievements of its experts. Supplemental Petition at 28. However, SSWS's showing to date does not support any such expectation. SSWS's contentions' discussion of the State's and other parties' contentions is generally so vague, off-hand, and tangential to the concerns raised in the contentions that it is impossible to identify a material dispute between the parties on any of the specific issues raised by the opponents of the license. SSWS makes no attempt to defend the actual contents of the application, and in fact, it does not seem that SSWS has even read the Application, because there is not one reference in the entire petition to the License Application, Safety Analysis Report, Environmental Report or Emergency Plan. In fact, some of the Petitioner's statements are at odds with those made in the application. Under the circumstances, it is difficult to perceive how SSWS could make a significant, or even relevant, contribution to the record.

Moreover, SSWS has failed to satisfy the other criteria for intervention. With respect to the availability of other means to protect the petitioner's interest and the extent to which the petitioner's interests are represented by other parties, SSWS asserts

that it has "substantial" and "unique" technical and administrative experience with respect to licensing and the policies underlying the federal nuclear power program. Supplemental Petition at 24. This argument is simply irrelevant to the criteria. As discussed in the State's Opposition to Amended Petition at 7, SSWS has other opportunities available to participate that are more suitable to its broad interests than the narrowly focused forum of the licensing hearing.

Furthermore, as discussed below, SSWS has failed to file one admissible contention.

V. RESPONSE TO SSWS's CONTENTIONS

A. General Standards for Admissibility of Contentions

Pursuant to 10 C.F.R. § 2.714(b), intervenors shall file a supplement to their petitions to intervene which must include of a list of contentions petitioners wish to litigate. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted, and petitioners must provide the following additional information with respect to each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

- (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute . . .

10 CFR § 2.714(b)(2).

To be admitted as a party in a licensing proceeding, a petitioner must demonstrate the required interest in the proceeding pursuant to 42 USC § 2239(a), and submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.714. 10 C.F.R. § 2.714(b)(1); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). Failure to comply with any one of these requirements is grounds for dismissing the contention. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-156 (1991).

The standards in 10 CFR § 2.714 ensue from a 1989 amendment intended to "raise the threshold for admission of contentions." Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (1989). The sufficient information section of 10 CFR § 2.714 (b)(2)(iii) "will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view," a demand that ensures the

intervenor will "show that a genuine dispute exists between the petitioner and the applicant or the licensee on a material issue of law or fact." 54 Fed. Reg. at 33,170. Consequently, a contention that does not directly challenge an aspect of the application or specifically discuss deficiencies in the application must be dismissed. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992) (dismissing contention which failed to directly dispute application, failed to show a genuine dispute exists with the applicant, and failed to include references to the specific portions of the application that petitioner disputes); *see also* Palo Verde, CLI-91-12, 34 NRC at 155-156; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167 (1991).

Contentions must be rejected where

- (i) The contention and supporting material fail to satisfy the requirements of [§ 2.714(b)(2)]; or
- (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

10 CFR 2.714(d)(2); *see also* Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 78, *aff'd.* CLI-96-7, 43 NRC 235 (1996); Shoreham, LBP-91-35, 34 NRC at 167.

The purposes of the basis requirements of § 2.714 are to assure that the contention raises a matter appropriate for adjudication in a particular proceeding and applies to the facility at issue, to establish a sufficient foundation of the contention to

warrant further inquiry into the subject matter addressed by the assertion, and to put the other parties sufficiently on notice of the issues so that they will know what they have to defend against or oppose. Arizona Public Service Co. (Palo Verde Nuclear Station, Unit Nos. 1, 2, and 3), LBP-91-19, 33 NRC 397, 400 (1991), referring to Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1976). Further, there must be strict observance of the intervention requirements to assure that the adjudicatory process is invoked only by persons with a real interest at stake and who seek resolution of concrete issues. Peach Bottom, ALAB-216, 8 AEC at 21.

B. A Petition in Support of the Application Is Unable to Raise Any Litigable Issues.

An intervenor must comply with all of the requirements of 10 CFR § 2.714(b). By definition, a petitioner who supports an application filed with the NRC will not challenge or controvert a position taken in the application or discuss deficiencies in the application. Thus, such an intervenor cannot comply with the requirements of 10 CFR § 2.714(b), which demand that the intervenor must "show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 CFR § 2.714(b)(2)(iii). In supporting Applicant's position, Petitioner SSWS does not raise any case or controversy with PFS's application and does not include any references to the application stating the "applicant's position and the petitioner's opposing view." 54

Fed. Reg. at 33,170. Such a petitioner has no reason to invoke an evidentiary hearing.

SSWS relies on Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978) in stating that a petitioner intervening in favor of an application "should be able to satisfy the contentions requirement 10 C.F.R. § 2.714(b) by asserting that the license application is meritorious and should be granted." SSWS's Supplemental Petition at 29. However, the grant of discretionary intervention to the petitioner in the Sheffield case was "not accompanied by a reasoned analysis of the sufficiency of the [petitioner's] showing on its ability to contribute to the development of the record. This being so, it is not entitled to any precedential effect." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 401 (1983). It is impermissible that "there is one test for untimely petitioners who would oppose the license application in contest and another, and more lenient, test for those who seek to support the application." *Id.* at 403.

C. Even If a Petition in Favor of the Application is Capable of Obtaining Intervention Status, the Petitioner Must File Contentions to Show the Existence of a Genuine Dispute of Material Fact or Law with the Opponent's Contentions

Assuming for purposes of argument that the NRC's admissibility standard allows for the filing of contentions in support of a license application, such contentions must fulfill the key purpose of the requirement, which is to show the existence of a

genuine dispute that should be litigated. Because SSWS has no dispute with PFS, the dispute must lie with the State and other petitioners. Just as petitioners in opposition to the application must articulate a material dispute with the applicant that is specific and supported by documentation and/or expert opinion, SSWS must show with specificity and basis that it has a material dispute with the State. This it has failed to do. As discussed below, SSWS's claims regarding the contentions raised by the State are extremely vague, and often downright irrelevant to the issues raised in the contention. Moreover, SSWS's attempts to support the adequacy of the license application are not supported by a single citation to the application, the Environmental Report, or the Emergency Plan. Given the fundamental lack of specificity or basis in these contentions, they cannot be accepted as grounds for admission of SSWS as an intervenor.

D. State's Response to SSWS's Contentions

SSWS "General Contention" and "Important General Facts"

At the beginning of its list of contentions, SSWS asserts as a "General Contention" the statement that the "details of radionuclides produced in nuclear fission are well known and exceptionally well documented." Supplemental Petition at 3. This is followed by a recitation of "Important General Facts" which assertedly

"underlie" SSWS's response to the other petitioners' contentions. Whether or not these asserted facts are true is of no import to the admissibility of SSWS's contentions, because SSWS provides no indication of their relevance to any specific dispute with the State or any other petitioner. Absent any explanation of their materiality to some specific contention, they must be disregarded.

SSWS Contention 1 (Dose Limits)

In Contention 1, SSWS claims to dispute State's Contention C, which challenges the Applicant's compliance with applicable dose limits. Supplemental Petition at 9. The State's Contention C lists with specificity, and supports with references to the license application and other documents, various aspects in which the design of the PFSF is inadequate to ensure that PFS will comply with applicable dose limits. SSWS does not engage the State on any of these specific points, but merely asserts that (a) it is "very simple" to achieve dose limits and (b) if dose limits are not achieved, they can be detected through monitoring. The first assertion is so generalized that it utterly fails to show a material dispute with the State on any of the specific design deficiencies outlined in the contention. The second assertion is simply irrelevant – the ability to detect a regulatory violation during operation of a facility is not an excuse for failing to design the facility so that it can meet the regulation's requirements. Finally, even if these assertions could be considered sufficiently specific

or relevant to raise a material dispute, they are unsupported by any documentation, or even an explanation of the basis for the assertions. Accordingly, SSWS abysmally fails to meet the admissibility standard for Contention 1.

SSWS Contention 2 (Hot Cell)

In Contention 2, SSWS disputes State's Contentions D and J, and OGD Contentions A, D, and E, to the extent that they criticize the lack of a hot cell for opening casks and inspecting the condition of spent fuel. Supplemental Petition at 9. SSWS Contention 2 merely asserts a disagreement with the State and OGD, without providing any factual support for the dispute, or engaging the specific concerns raised by the State and OGD. For instance, in flatly asserting that there is "nothing in the history and record of the use of spent fuel casks to suggest that they will need to be opened in a hot cell on site," SSWS completely ignores the voluminous evidence to the contrary that was submitted by the State in Contention J. See State's Contentions at 63-71. SSWS also contradicts its own assertion that the capability to inspect the fuel is unnecessary. First, it asserts (without providing any documentation whatsoever) that the spent fuel inside the cask "will be static; it will be in a solid form; there will be no driving force to change the form." *Id.* at 10. In the next breath, however, SSWS concedes the possibility of a "slowly developing" leak of material from the casks. *Id.* Thus, at the same time it argues a leak is impossible, SSWS concedes that it can happen.

SSWS breezily asserts that in the event of a leak, the solution proposed by PFS, of replacing the storage casks inside the shipping casks and sealing them, is "obvious" and "easy." *Id.* Again, SSWS completely ignores the substantial evidence presented by the State that this solution is neither "obvious" nor "easy." Similarly, SSWS contends that damaged fuel "can safely be removed from the site - perhaps to a hot cell at another location," without addressing the specific evidence presented by the State that hot cells at other locations may not be readily available, and that shipment of damaged fuel poses unacceptable risks. Moreover, SSWS does not provide a single documentary citation to any of its vague assertions.

In sum, by neglecting to address the specific factual concerns raised by the State, SSWS utterly fails to meet its burden of showing a genuine dispute with the State. It is simply insufficient, at this stage of the proceeding where the specific and documented articulation of disputed issues is required, to generally assert, without explanation or support, that the application is adequate, or that the problems posed by a contention are easily solved.

SSWS Contention 3 (Verification of Presence of Helium)

This contention is not only unsupported by any documentation, it misconstrues the point of the State's contention. The State's concern is not with the toxic effects of leaked helium on the public, as SSWS appears to believe, but with the

effects on stored fuel if helium is lost. SSWS's assertion that if helium is lost, the air that replaces it will perform the same function of heat transfer to the outside, also completely misconstrues the purpose of using helium inside the canister, which is to substitute for air as a more effective heat transfer mechanism. Given this fundamental lack of understanding of the State's contention, and the lack of any support for SSWS's assertions, SSWS's contention should be rejected.

SSWS Contention 4 (External events and facilities that could cause credible accidents):

Contention 4 consists of nothing more than a disconnected series of generalities on the following topics, whose relevance to the State's Contention K remains undemonstrated: safety goal for nuclear reactors, the probability of a direct hit on a fuel cask by a large meteorite, the consequence of an atom bomb falling on the citizens living in or near Salt Lake City, a vague reference to videos of high speed railroad and tanker truck collisions, a vague reference to tests in support of a nuclear powered aircraft program, and the availability of a video on cask tests. Supplemental Petition at 11-12. These general statements are neither supported nor tied with any specific explanation to the Contention K or any other contention. Their relevance remains completely obscured. Thus, Contention 4 utterly fails to raise any genuine dispute with any contention put forward in this proceeding and, thus, the contention is inadmissible.

SSWS Contention 5 (Ground water contamination):

SSWS argues that State's Contention O is without merit because "[t]he casks will be raised above anticipated flood water, and flood water and rain water will not enter the casks and therefore there is no reason to anticipate contaminated water flowing from the site." Supplemental Petition at 12. SSWS provides no support for this assertion, and in fact it is contradicted by the SAR. As the SAR states, "[t]he pads are nearly flush with grade for direct access by the cask transporter." SAR at 4.2-39. In addition, inasmuch as this contention addresses flooding, SSWS overlooks State's Contention M which disputes the Applicant's calculation of Probable Maximum Flood and questions the adequacy of the diversion berms and drainage. State's Contentions A through DD at 96. Thus, SSWS has raised nothing relevant or material that specifically addresses ground water contamination at the proposed PFS facility.

It is obvious that SSWS has not read the Application. The Applicant itself acknowledges that "[t]here is a potential for the presence of some contamination on the exterior surface of the canisters as a result of submergence in spent fuel pools during spent fuel loading operations" and that "[i]t is possible that some removable contamination may be dislodged from the canister exterior and result in contamination of the . . . storage casks." ER at 3.4-1. In addition, in its Contention O, the State identifies a number of other contaminate sources and pathways to ground and surface water, e.g., sewer/wastewater system, retention pond, routine operation, and

construction. State's Contentions A through DD at 100-08.

SSWS's argument that "routine monitoring of rain and snow melt or any runoff can easily be performed" misses the point. Supplemental Petition at 12. The concern raised by the State is not whether monitoring can be performed. The State's concern is that the Applicant has not proposed any type of monitoring of potential contaminant sources or contaminant pathways.

SSWS's Contention 5 is unsupported by expert opinion or documentation, and does not raise a material issue of law or fact. It is, therefore, inadmissible. CFR § 2.714(b)(2).

SSWS Contention 6 (Radiation monitoring and control):

SSWS argues that State's Contention P is without merit because "regular and adequate monitoring could easily be performed." Supplemental Petition at 13. SSWS does not reference any portion of the application or other documentation to demonstrate that the Applicant's monitoring program would be adequate to meet 10 CFR § 72.24(e) and (m) and the guidance cited in State's Contention P. State's Contentions A through DD at 109. In addition, SSWS has not provided a concise statement of its expert opinion on which it plans to rely. 10 CFR § 2.714(b)(2). Thus, SSWS Contention 6 should be rejected.

SSWS Contention 7 (Protection Against Potential Accidents):

SSWS summarily dismisses any potential from ordinary traffic accidents as "incredible" because of the remoteness of Skull Valley. Supplemental Petition at 13. SSWS offers no support for this statement. *Id.* As support for its claim that State's Contention Q is without merit, SSWS describes the risk of a person in the United States being killed by a falling aircraft as 4×10^{-6} and equates this statistic to the risk of a cask being hit by a falling aircraft and causing a leak. Supplemental Petition at 13-14. First, State's Contention K – not State's Contention Q – addresses the risks due to high hazards, including aircraft hazards. *See* State's Contentions A through DD at 73. State's Contention Q addresses casks, canisters and vulnerable fuel. Second, SSWS does not even address the same crash data as used by the Applicant in its assessment of aircraft crashes, again pointing out that the Petitioner has not bothered to read the application. Third, the Petitioner fails to address any of the specific hazardous activities raised in State's Contention K, such as military restricted airspace in Skull Valley, hanging bombs and nearby live air-to-air combat training. This contention should be rejected because it fails to meet any of the admissibility standards set forth in 10 CFR § 2.714(b)(2).

SSWS Contention 8 (Transportation of Spent Fuel)

SSWS claims to dispute the State's Contention V, which asserts that the

Environmental Report fails to give adequate consideration to transportation-related environmental impacts of the proposed ISFSI. SSWS does not make the slightest attempt to defend the adequacy of the analysis in the Environmental Report. Instead, it lists a string of unsupported assertions, all apparently intended to show that transportation of spent fuel is safe enough. Not a single one of these assertions is supported by a citation to a documented source of the information. Moreover, none of them is related to the adequacy of the Environmental Report to satisfy NEPA. The contention simply does not engage the State's Contention V in any respect, and therefore it must be rejected.

SSWS Contention 9 (Need for and alternatives to the PFS Facility):

The bases for State's Contention X (Applicant's failure to demonstrate a need for the facility), Contention Z (Applicant's failure to adequately discuss the "no action alternative"), Contention AA (Applicant's failure to evaluate a reasonable range of alternative actions), and Contention CC (Applicant's failure to prove an adequate balancing of the cost and benefits) are founded on 10 CFR § 51.45 and the National Environmental Policy Act (NEPA). State's Contentions A through DD at 165-178.

SSWS's arguments that State's Contentions X, Z, AA and CC are without merit completely misses the point. It is obvious by the following claims that SSWS does not comprehend the purpose of NEPA:

[d]evelopment of nuclear power has developed somewhat differently in the U.S.A. from some other countries. The Atomic Energy Act, as modified in the Eisenhower administration, envisaged several commercially competing alternatives whenever possible. Thus, there is more than one supplier of radionuclides for medicine. There is more than one manufacture of nuclear power reactors (Westinghouse Electric corporation, General Electric Company, Combustion Engineering and Babcock and Wilcox). There is more than one architect-engineer doing the construction work (Stone and Webster Corp, Ebasco Corporation, Bechtel Corporation, etc.) More than one company began to cope with radioactive waste products.. *(sic)*Unless specifically stated to the contrary, (and the petitioners contend that it has not been) and the intervenors fail to prove that it has been) *(sic)*, the plan for another permanent or temporary storage facility, or even its execution, should not inhibit the plan for an alternate, competing facility.

(emphasis added). Supplemental Petition at 15. SSWS convolutes the NEPA requirement for an analysis of a "no action" alternative into consideration of an "alternate, competing facility." There is no basis in law for such a consideration.

Again, showing its ignorance of NEPA, SSWS suggests that four of its members can testify about legislative intent of the development of atomic energy and its regulation from the beginnings in 1945. *Id.* Testimony about the legislative intent of developments of atomic energy regulation is not relevant to address the requirement to comply with National Environmental Policy Act of 1969.

This contentions should be rejected because it fails to meet the standards for admissibility under 10 CFR §2.714(b)(2). SSWS fails to provide a concise statement of expert opinion or specifically cite how the Applicant's Environmental Report complies with NEPA requirements cited in the State's Contention X, Z, AA, and CC. In

addition, SSWS Contention 9 does not demonstrate the existence of a genuine dispute on a material issue of fact or law.

SSWS Contention 10 (Transportation of Spent Fuel Casks):

SSWS argues that State's Contentions B, N, "R2, R4", and V "are irrelevant because transportation should not be an issue in this licensing proceeding." Supplemental Petition at 16. At the outset, the contention is inadmissible for its vagueness in even identifying which of the State's contentions it disputes. SSWS's reference to State's Contention R2 and R4 is hopelessly confusing. State's Contention R addresses the Applicant's failure to provide an adequate emergency plan. *See* State's Contentions A through DD at 116. State's Contention R, Basis, paragraph 2, addresses "adequate emergency and medical facilities and equipment to respond to an onsite emergency," *id.* at 117; State's Contention R, Basis, paragraph 4, addresses "the means and equipment provided for mitigating the consequences of each type of accident." *Id.* at 121. Neither paragraph 2 nor paragraph 4 addresses transportation of spent fuel casks. General references to State's Contention B (Rowley Junction) and Contention N (Flooding) are similarly unhelpful.

To the extent the State addresses transportation in its contentions, the issue is raised under NEPA. Transportation-related impacts are clearly cognizable in this proceeding. *See, e.g.*, 10 CFR § 72.108. Therefore, there is no basis for SSWS's

Contention 10.

SSWS Contention 11 (NRC Authority):

The entire contention consists of SSWS's statement that "[t]he Atomic Energy Act has as its main purpose the restriction of use of nuclear and radioactive materials to those who can safely and properly use them" and that if the Atomic Energy Act were invalid certain dire consequences would follow. Supplemental Petition at 16. The State in its Contention A is not requesting "invalidation" of the Atomic Energy Act. Contention A addresses a fundamental principle of administrative law that the power of administrative agencies to make rules is limited to the scope of the agency's statutory authorization. Bowen v. Georgetown Univ. Hosp., 448 U.S. 204, 208 (1988).

This contention should be rejected because it fails to meet the standards for admissibility under 10 CFR §2.714(b)(2). SSWS fails to provide a concise statement of expert opinion or specifically cite how the Atomic Energy Act authorizes the Nuclear Regulatory Commission to issue a license to a private, away-from-reactor, centralized, spent nuclear fuel storage facility. Furthermore, SSWS does not address any specific argument raised in State's Contention A, including the applicability of the Nuclear Waste Policy Act.

SSWS Contention 12 (State's Contention P)

This contention purports to take issue with the State's contention P, which asserts that PFS has not provided enough information to demonstrate compliance with the NRC's ALARA standard. The State's Contention has nine subparts and bases criticizing specific aspects of the license application. SSWS addresses none of the State's specific charges, but merely sets forth SSWS's view on how the ALARA formula should be calculated, and vaguely states – without any supporting documentation – that the dose to the public is small. SSWS makes no effort to respond to the specific assertions in State's Contention P, or even to explain why it thinks the license application is adequate. Accordingly, the SSWS contention must be rejected.

SSWS Contention 13 (Dugway Proving Ground and the effects of nerve gas)

The recitation in Contention 13 about dead sheep and the toxic effect of nerve gas release from Dugway is totally without support. There is not one referenced document in the entire contention. Even the Petitioner's reference that Dugway is about 20 miles from the proposed ISFSI is wrong. The application itself states that Dugway Proving Ground (Dugway) is 9 to 12 miles south of the facility. SAR at 2.2-2, 8.2-21.

The contention utterly fails to meet the admissibility requirements of 10 CFR § 2.714(b)(2). Moreover, there is no reference to any contention submitted by any other

participant. Therefore, no litigable dispute has been raised by SSWS.

SSWS Contention 14 (Sabotage of the ISFSI)

SSWS asserts in this contention that it is "[h]ard to see that sabotage with anything less than an atomic bomb will have any effect on the public health and environment outside the Skull Valley Reservation." Supplemental Petition at 19. Once again, SSWS fails to support its assertion with a shred of documentation, or to answer the documented arguments made by the State in Contention U and Contention V basis 3(b), which is incorporated by reference into Contention U. Moreover, whether or not it is true, SSWS's argument that a spent fuel storage facility is less attractive than freight trains running along the Union Pacific tracks through Rowley Junction is beside the point of the State's Contention U, which is that the Environmental Report has failed to give adequate consideration to storage-related impacts, including sabotage. Having failed to respond to the contention with any documented relevant factual information, the contention must be rejected.

SSWS Contention 15 (NEPA and the Atomic Energy Act)

SSWS argues that "[c]laims that the application is defective because NEPA changes the fundamental bases of the Atomic Energy Act . . . are without merit." Supplemental Petition at 19. Inasmuch as this contention addresses NEPA issues raised

by the State, the State is filing this response. Once again, SSWS fails to understand that NEPA is a separate statute from the Atomic Energy Act in which the Applicant must fully comply. As this relates to SSWS's Contention 9, the State's response to Contention 9 is incorporated by reference herewith. The State submits that this contention should also be rejected for failure to meet admissibility standards set forth in 10 CFR § 2.714(b)(2).

SSWS fails to provide a concise statement of expert opinion or specifically cite how the Applicant meets the applicable requirements of NEPA. In addition, SSWS fails to provide sufficient information to demonstrate that a genuine dispute on a material issue of fact or law exists between the petitioners and the Applicant concerning NEPA issues.

SSWS Contention 16 (Emergency Planning):

Contention 16 consists of two unsupported statements. First, SSWS states there is a vast difference in the need for advanced emergency planning for a water reactor accident than for a fuel storage accident. Second, planning for a fuel storage accident is less important than planning for a tank car accident on the railroad or highway. Supplemental Petition at 19-20. A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating

Station), LBP-93-23, 38 NRC 200, 246 (1993). The two sentence contention submitted by SSWS does not address any specific arguments raised in State's Contention R (Emergency Planning). Contention 16 is inadmissible.

SSWS Contention 17 (Permanent Storage Facility)

SSWS argues that "[c]laims . . . that the facility would become a permanent storage facility and should be licensed as such are without merit. . ." Supplemental Petition at 20. Inasmuch as this contention addresses issues raised by the State that the proposed spent fuel storage has a potential to become a de facto permanent site, the State is responding to this contention. See State's Contentions A through DD at 168. Moreover, whether this site becomes a de facto permanent site is critical to the safe design and operation of the facility.

SSWS's reference (C page S107) does not provide any site specific information and is a general reference that several suitable sites may be located in unnamed and uninvestigated places. First, SSWS fails to provide the reference in hard copy or electronic copy as an exhibit. Second, the statement is an unsubstantiated statement that is meaningless in the context of a site specific licensing procedure.

This contention should be rejected because it also fails to meet the standards for admissibility under 10 CFR § 2.714(b)(2). SSWS fails to provide a concise statement of expert opinion, not just mere generalized speculation, or to specifically cite how the

Applicant will ensure that the site is temporary. SSWS also fails to provide sufficient information to demonstrate that a genuine dispute on a material issue of fact or law exists between other petitioners and the Applicant concerning whether the facility may become a defacto permanent site.

SSWS Contention 18 (Risks attributable to the proposed ISFSI)

Contention 18 is yet again another generalized and baseless contention. First, there is the unsupported claim that risks attributable to a waste storage facility are "very small." Supplemental Petition at 21. Second, the reference to a publication by Wilson & Spengler about the national risks of particulate air pollution is irrelevant.⁶ Third, SSWS's conclusion that the Skull Valley Band has not been unduly discriminated against because particulate concentration is less in Skull Valley than in Salt Lake City is a non sequitur. *See id.*

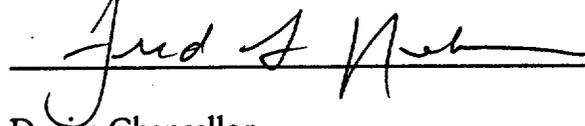
Contention 18 is inadmissible under 10 CFR § 2.714(b)(2). To the extent that Contention 18 may relate to State's Contention BB (Site Selection and Discriminatory Effects), the Petitioner has made no effort to address any of the specifics raised in State's Contention BB.

⁶ Table 7.5 cited in the Wilson & Spengler publication is not attached as an exhibit – either in hard copy or electronically. The same is true for the reference to an article in the Deseret News written by Mr. Bear in "February 1998." Supplemental Petition at 21.

V. CONCLUSION

For the foregoing reasons, SSWS's Amended and Supplemental Petition should be denied.

Respectfully submitted,



Denise Chancellor
Fred G Nelson
Assistant Attorneys General
Diane Curran
Connie Nakahara
Special Assistant Attorneys General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City UT 84114-0873
Telephone: (801) 366-0286
Fax: (801) 366-0292

March 9, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S RESPONSE TO SCIENTISTS FOR SECURE WASTE STORAGE's AMENDED AND SUPPLEMENTAL PETITION TO INTERVENE, were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 9th day of March, 1998:

Attn: Docketing & Services Branch
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Mail Stop: O16G15
11555 Rockville Pike, One White Flint
North
Rockville, MD 20852-2738
(original and two copies)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com

Clayton J. Parr, Esq.
Parr, Waddoups, Brown, Gee &
Loveless
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147-0019
E-Mail: karenj@pwlaw.com

John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Jean Belille, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, Colorado 80302
E-Mail: landwater@lawfund.org

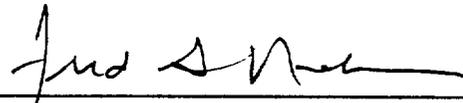
Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

Martin S. Kaufman, Esq.
Atlantic Legal Foundation
205 E. 42nd Street
New York, New York 10017
E-mail: mskaufman@yahoo.com

Richard Wilson
Department of Physics
Harvard University
Cambridge, Massachusetts 02138
E-mail: WILSON@HUHEPL.
HARVARD.EDU

James M. Cutchin
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*United States mail, first class only*)



Fred Nelson
Assistant Attorney General
State of Utah