

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	May 11, 1998

**STATE OF UTAH'S BRIEF IN OPPOSITION TO
SCIENTISTS FOR SECURE WASTE STORAGE'S APPEAL
OF ORDER DENYING PETITION TO INTERVENE**

INTRODUCTION

Pursuant to 10 CFR § 2.714a, the State of Utah files this brief in opposition to Scientists for Secure Waste Storage's ("SSWS's") appeal of LBP-98-7, the Licensing Board's decision denying SSWS's petition for discretionary intervention in this proceeding. SSWS's appeal should be denied because it has failed to demonstrate that the Licensing Board abused its discretion in refusing to admit SSWS to the proceeding.

BACKGROUND

On July 31, 1997, the Nuclear Regulatory Commission ("NRC" or "Commission") 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. Subsequently, the NRC also published numerous other notices regarding the conduct of the proceeding. 62 FR 36320 (July 7, 1997); 62 FR 49263 (September 19, 1997); 62 FR 52364 (October 7, 1997); 62 FR 64239 (December 4, 1997). 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. On February 2, 1998, pursuant to a February 2, 1998 Order, which memorialized directives made by the Licensing Board in the January 27-29, 1998 initial prehearing conference, Mr. Wilson filed an Amended Petition stating that the individual petitioners had formed SSWS, which now sought leave to intervene, and included a request for discretionary intervention. As permitted by the Board in a February 17, 1998, order, SSWS filed an Amended and Supplemental Petition on February 27, 1998, setting forth its contentions.

On April 22, 1998, the Licensing Board issued LBP-98-7, Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters). The Board concluded that SSWS's

petition was inexcusably late, and that the lack of good cause was not outweighed by any other factors considered under 10 C.F.R. § 2.714(a). LBP-98-7 at 33-45. In addition, after analyzing and weighing all six of the Commission's criteria for assessing discretionary standing, the Board concluded that discretionary intervention was inappropriate because:

SSWS fail[ed] to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the proceeding (factor six)....

LBP-98-7 at 44-45. Judge Peter S. Lam filed a dissenting Opinion, stating his view that a balancing of the discretionary intervention factors weighed in favor of admitting SSWS. *Id.* at 170-71.

On May 1, 1998, SSWS appealed the Board's ruling. Brief of Scientists for Secure Waste Storage in Support of Appeal From Denial of Petition to Intervene (hereinafter "SSWS Brief").

ARGUMENT

I. THE LICENSING BOARD DID NOT ABUSE ITS DISCRETION IN DENYING SSWS'S PETITION TO INTERVENE.

On appeal, SSWS does not dispute that it has no standing as of right.

Rather SSWS appeals the Board's denial of discretionary intervention.

A. Standard for Review of Discretionary Decisions.

The standard of review on appeal is whether the Licensing Board abused its discretion in weighing both the late-filed factors of 10 CFR § 2.714(a) and the factors described by the Commission in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976) for discretionary standing. Texas Utilities Electric Co., (Comanche Peak Steam Electric Station, Unit 1), 25 NRC 912, 922 (1987) (review of the Licensing Board's balancing of late filed factors is necessarily limited to determining whether the Board abused its discretion); Project Management Corp. Tennessee Valley Authority Energy Research and Development Admin. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389 (1976) (10 C.F.R. § 2.714(a) confers "broad discretion" upon Licensing Boards "in the circumstances of individual cases); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532 (1991) (Licensing Board ruling on discretionary intervention will be reversed only if the Licensing Board abused its discretion) .

On appeal, a petitioner has a substantial burden to show that the Board abused its discretion. As noted 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 CFR § 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.

33 NRC at 532 (*internal references omitted*). See also Comanche Peak, 25 NRC at 922. SSWS has failed completely to meet this standard.

B. The Board Correctly Applied the "Good Cause" Standard to SSWS's Late Petition to Intervene.

There is no question that SSWS was at least four months late in filing its petition to intervene, and in fact SSWS admits it filed late. SSWS Appeal at 1.¹

Applying the late-filing criteria under 10 CFR § 2.714(a)(1)², the Licensing

¹ Although SSWS asserts that its Amended and Supplemental Petition was "timely filed" on February 27, 1998 (SSWS Brief at 1), SSWS was timely only in the sense that it complied with a Board order of February 17, 1998, setting a deadline for the filing. The Board's order did not establish the timeliness of the filing in relation to the original deadline of November 24, 1997, for filing of contentions.

²The Commission's standard for late-filing of contentions provides as follows:

Nontimely filings will not be entertained absent a determination by ...the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors ...:

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

Board held that SSWS had failed to make a "convincing showing" on the "first and most important factor – good cause." LBP-98-7 at 34. As the Board found, SSWS not only had constructive notice through the Federal Register, but one of SSWS's members, as a Utah Radiation Control Board official, "received a copy of the Federal Register hearing opportunity notice on the PFS application shortly after the notice was issued." Id. The Board also found that a balancing of the other factors provided only "minor" weight against the lack of good cause, and therefore did not justify admission of SSWS. LBP-98-7 at 36-37.

SSWS contends that the Board erred because the "good cause" element of the late-filing standard does not apply to discretionary intervention. SSWS Brief at 3-4. SSWS attributes significance to the fact that the Commission omitted the good cause test when it incorporated the other elements of the late-filed standard into the Pebble Springs discretionary intervention test. Id. However, nothing in Pebble Springs states, or even suggests, that the late-filing

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- (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.

standard is inapplicable to petitions for discretionary intervention. Pebble Springs merely provides a substitute standard for granting standing to petitioners who cannot meet the Commission's requirements for standing to intervene as of right. Moreover, as the Board noted, although there is "no definitive authority" on whether a petition for discretionary intervention must meet the late-filing standards, 10 CFR § 2.714 contains no language that would exempt a discretionary intervention request from the NRC's late-filing provisions. LBP-98-7 at 34 n. 5. Nor is there any merit to SSWS's conceptual argument that the good cause standard is more appropriately applied to intervention as of right, but is not relevant to intervention petitions which generally seek to support the public good. Whatever the motivation of the petitioner, late filing inevitably causes some disruption of the proceeding and additional burdens on other parties, which the good cause standard is intended to counteract. SSWS has offered no justification for treating its petition differently than any other. In fact, in the past the Commission has applied the late-filed standard to petitions for discretionary intervention. *See, e.g., Consolidated Edison Co. of New York* (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715, 721 (1982) (in considering petition for discretionary intervention,

lack of good cause found to be outweighed by other factors).³

C. The Board Did Not Abuse Its Discretion In Holding That Consideration of the Late-Filing and Discretionary Intervention Criteria Weighed Against Admission of SSWS.

Other than arguing that the good cause element of the late-filing standard should not apply, SSWS does not dispute the Board's finding that SSWS's lack of good cause outweighed the other relevant late-filing factors. Instead, SSWS claims that the Board abused its discretion in ruling that SSWS failed to justify discretionary intervention.⁴

³Although SSWS claims that NRC case law supports its position, none of the cases cited by SSWS in its brief or its previous pleadings explicitly rules that the late-filed contention standard is inapplicable to discretionary intervention petitions. See Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 24, 26-27 (1996); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1146-47, 1149, aff'g Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), LBP-77-17, 5 NRC 657 (1977); Consolidated Edison Company of New York (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715, 720-21 (1982); Duke Power Company (Oconee Power Station and McGuire Power Station), LBP-79-2, 9 NRC 90, 99-102, 104-05 (1979).

⁴ The following are the factors the Commission directed licensing boards to consider in determining whether to grant discretionary intervention:

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

SSWS focuses on the first factor in the discretionary intervention test, assistance in developing a sound record. As noted by the Licensing Board, this factor has "significant sway." LBP-98-7 at 44. SSWS argues that it "will make a valuable contribution to the proceeding because of the expertise of its members and the witnesses it proposes to call, because of the reputation of its members as nuclear scientists and administrators, and because of its lack of financial or political interest in the outcome." SSWS Brief at 5. SSWS complains that the Board inappropriately discounted the value of SSWS's academic interest in contributing to a sound record, and that the Board inappropriately emphasized SSWS's lack of knowledge, understanding, or concern about the particulars of the PFS license application. SSWS Brief at 5.

SSWS's argument does not come close to demonstrating cause for

(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.

Pebble Springs, 4 NRC at 616.

disturbing the sound discretion of the Licensing Board, which found – after giving SSWS three full opportunities to plead its case – that SSWS's showing was "flawed, because:"

it all too often reflects a lack of knowledge, understanding, or concern about the particulars of the PFS application, the focal point of this proceeding. This, in turn, suggests that the group's input will not be useful in helping to resolve the issues in this proceeding, which fundamentally deals with adequacy of the PFS proposal. Thus, this factor is, at best, also minor in terms of the weight it provides in favor of accepting the petition.

LBP-98-7 at 37. The Board's decision is fully consistent with the

Commission's holding in Pebble Springs, that permission to intervene:

should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.

4 NRC at 617 (*emphasis added*). See also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983) (under the "development of a sound record test" a petitioner must set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony). SSWS's general assertions regarding its members' expertise and interests, without more, are insufficient to meet this standard.

Nor do SSWS's contentions fill the gap. As discussed in State of Utah's Response to SSWS's Amended and Supplemental Petition to Intervene at 11 and 17-33 (March 9, 1998) (hereinafter "State's Response"), the contentions filed by SSWS – and on which the Licensing Board judged SSWS's ability to contribute to the record – fall far short of this standard. Rather, they are so vague, off-hand, and tangential to the concerns raised in the other parties' 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.⁵ Moreover, SSWS makes no attempt to defend the actual contents of the PFS application, and in fact, it does not appear that SSWS has even read the application: 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. SSWS provides no grounds for disturbing the reasoned discretionary decision of the Board that SSWS has not shown an ability to focus

⁵The Board did not address at all the admissibility of SSWS's contentions. Were the Commission to reverse the Board regarding the late-filing and discretionary intervention standards, the Board would still be required to address the admissibility of SSWS's contentions. As discussed in the State's Response at 17-33, the State believes that SSWS has not filed a single admissible contention.

on the application at hand. SSWS's complaint that the Board's demand for focus on the contents of the license application as "front loading" the intervention requirements is disingenuous. SSWS Brief at 5. Furthermore, SSWS's request to "get up to speed" on the specifics of the application comes three months after the other parties were required to plead their concerns with basis and specificity. Id. at 6. SSWS's complaint is all the more frivolous given the fact that the Board gave it no less than three opportunities to plead its standing and contentions. In light of the foregoing, the Board's conclusion that SSWS's input will not be useful in helping to resolve the adequacy of the PFS proposal is reasonable and should be upheld.

CONCLUSION

SSWS has merely restated the arguments that were rejected in LBP-98-7 and has made no showing of any abuse of discretion by the Board. Accordingly the Commission should affirm the aspect of LBP-98-7 appealed by SSWS.

DATED this 11th day of May, 1998.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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