

May 11, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of )  
 )  
PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22  
 )  
(Private Fuel Storage Facility) )

**APPLICANT'S BRIEF IN SUPPORT OF SCIENTISTS FOR SECURE WASTE  
STORAGE APPEAL FROM DENIAL OF PETITION TO INTERVENE**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.714a, Applicant Private Fuel Storage L.L.C.

("Applicant" or "PFS") hereby files this brief in support of the Appeal filed by the Scientists for Secure Waste Storage ("SSWS") from the denial of its Petition to Intervene. The petition was denied by the Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters), LBP-98-7, issued on April 22, 1998. Applicant supports the intervention of SSWS -- a distinguished group of **scientists, engineers, and scholars** -- in this proceeding. As observed by Judge Lam in dissenting from the denial of SSWS' Petition to Intervene, "the broad knowledge and experience of the members of SSWS in nuclear science and technology would make a significant contribution to the development of a sound record" in this proceeding. *Id.*, slip op. at 171. As further noted by Judge Lam, the intervention of SSWS "would not

broaden the issues to be heard or inappropriately delay the proceeding because SSWS seeks to intervene only on issues already raised" by other petitioners. Id.

SSWS has provided in its Supplemental Petition to Intervene specific contentions and bases sufficient to warrant the discretionary intervention of a petitioner supporting the issuance of a license application. Accordingly, in view of the significant contribution to the development of a sound record which such a distinguished group could make, Applicant respectfully submits that the Commission should, in accordance with Judge Lam's dissent, grant SSWS discretionary intervention in this licensing proceeding.

## II. STATEMENT OF THE CASE

PFS submitted a license application, dated June 20, 1997, to the Nuclear Regulatory Commission ("NRC") to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") pursuant to 10 C.F.R. Part 72. On July 31, 1997, a notice of opportunity for hearing was published in the Federal Register which provided for the filing of intervention petitions by September 15, 1997. 62 Fed. Reg. 41,099 (1997). An Atomic Safety and Licensing Board ("Board") was established on September 15, 1997, to rule upon any requests for hearings and any petitions to intervene. 62 Fed. Reg. 49,263 (Sept. 19, 1997). Various petitions to intervene were timely filed and, between November 24, 1997 and January 8, 1998, the petitioners filed some 92 contentions. The Applicant and the NRC Staff filed responses to the petitioners' contentions, and a prehearing conference was held before the Board on January 27-29, 1998.

SSWS filed a late Petition to Intervene on January 20, 1998, prior to the prehearing conference, an Amended Petition to Intervene on February 2, 1998<sup>1</sup> and, pursuant to an order of the Board, its final Supplemental Petition on February 27, 1998<sup>2</sup> in which it requested intervention as of right and by discretion. See "Brief of Scientists for Secure Waste Storage in Support of Appeal from Denial of Petition to Intervene" at 1 (May 1, 1998) ("SSWS Brief"); LBP-98-7, slip op. at 19. As part of its Supplemental Petition, SSWS filed specific contentions, which it framed as responses to the individual contentions that the other petitioners had filed earlier in the proceeding. See Supplemental Petition at 9-21 (unnumbered). SSWS also identified by name and area of technical expertise the individual witnesses who would testify with respect to each contention. See id. at 9-21 and Exhibit A

SSWS is a group of highly distinguished scientists, engineers, and scholars, possessing a wealth of knowledge and experience in the field of nuclear science, technology and related areas. The members of SSWS include four Nobel laureates in physics as well as a Nobel laureate in chemistry; numerous professors of physics, nuclear engineering, and other academic disciplines; current and former senior advisors to the President or to foreign governments on the issues of nuclear energy and nuclear safety;

---

<sup>1</sup> Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (February 2, 1998) ("Amended Petition").

<sup>2</sup> "Amended and Supplemental Petition of Scientists for Secure Waste Storage to Intervene," ("Supplemental Petition").

and former Chairmen of the NRC and its predecessor, the AEC. See Supplemental Petition, Exhibit A; SSWS Brief at 2, Appendix A.

SSWS' interest is in "promoting and presenting scientifically and technically accurate information to the Commission and its Licensing Boards on issues within its areas of expertise." SSWS Brief at 2. Its objective is to "make sure that the scientific and technical testimony is accurate and in proper context." Amended Petition at 1.

In its Memorandum and Order of April 22, 1998, the majority of the Board denied SSWS' petition to intervene, with Judge Lam dissenting. LBP-98-7, slip op. at 33-45, 171.

### III. LEGAL ARGUMENT

The Applicant believes that SSWS has set forth sufficient information in its Supplemental Petition to be granted discretionary intervention, under the standards articulated by the Commission in Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976). Although identifying six factors by which to judge whether a petitioner should be granted discretionary intervention, the Commission made clear in Pebble Springs that "the primary consideration concerning discretionary intervention is the first factor -- assistance in developing a sound record." General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996). See also Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743-44 (1978) ("the most important factor to be

considered [in determining whether to grant discretionary intervention] is the extent of the contribution which might be expected of the petitioner”); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977) (“foremost among [the Pebble Springs factors] is whether the petitioner’s participation would likely produce a valuable contribution . . . to our decision-making process”) (internal quotations and citations omitted).

In assessing a petitioner’s likely contribution to the record, previous licensing boards and the Appeal Board have consistently emphasized the value, or lack thereof, of a petitioner’s relevant expertise or experience concerning the issues being heard in the licensing proceeding. See Sheffield, ALAB-473, 7 NRC at 744 (“considerable training and experience in various areas of nuclear technology”); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1149 (1977) (“Given [expert’s] educational and vocational background [Ph.D. in nuclear engineering and experience as reactor engineer], we can scarcely quarrel with the Licensing Board’s assessment of the potential value of his testimony”); Duke Power Company (Catawba Nuclear Station, Units 1 and 2 - Antitrust), LBP-81-1, 13 NRC 27, 33 (1981) (no “reasonable expectation that [the petitioner] would provide expertise, expert assistance or additional testimony that would be helpful in any proceeding”).<sup>3</sup>

---

<sup>3</sup> See also Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990); Oyster Creek, LBP-96-23, 44 NRC at 160; Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 26-27 (1996).

In accordance with this emphasis placed on the factors governing discretionary intervention by the Commission, Judge Lam stated in his dissent that he would have granted SSWS discretionary intervention on the grounds that:

(1) the broad knowledge and experience of the members of SSWS in nuclear science and technology would make a significant contribution to the development of a sound record; and (2) SSWS's intervention would not broaden the issues to be heard or inappropriately delay the proceeding because SSWS seeks to intervene only on issues already raised.

LBP-98-7, slip op. at 171 (Lam, J., dissenting) (citing Pebble Springs, CLI-76-27, 4 NRC at 614-17; Sheffield, ALAB-473, 7 NRC at 743-44). Applicant believes that Judge Lam's analysis is amply supported by the record and, in accordance with the above precedent, calls for the granting of discretionary intervention to SSWS in this proceeding.

First, it is difficult to imagine or describe a group more capable of making a significant contribution to the development of a sound record than SSWS, given the broad knowledge and experience of its members in nuclear science and technology. As stated in SSWS' Amended Petition:

Most of the petitioners have worked much of their lives in research on the science and technology of nuclear energy and in planning and regulating nuclear energy . . . and the collective knowledge and experience of the petitioners can be of help to the board and therefore to the public at large.

Amended Petition at 2. The information provided in SSWS' Supplemental Petition further demonstrates the valuable contribution SSWS could make 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 who would provide expert testimony on each of these issues (together with attached resumes), and the general nature and bases of their intended testimony. See Supplemental Petition at 9-21. Furthermore, the specific contentions set forth facts, expert opinion, and citations to scientific journals and text in support of the positions taken by SSWS. Both the Appeal Board and the licensing board found similar information sufficient for granting the Chicago Section of the American Nuclear Society discretionary intervention with respect to the renewal and amendment of the license for the Sheffield facility.<sup>4</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.

The Memorandum and Order denying SSWS intervention status expressly found that SSWS had “considerable expertise in a variety of scientific and engineering disciplines that are relevant to the issues raised in this proceeding” and further that SSWS had stated its positions concerning the other petitioners’ contentions, identified perspective witnesses, and provided the professional qualifications of those witnesses.

---

<sup>4</sup> See Sheffield, ALAB-473, 7 NRC at 744-45; 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.

LBP 98-7, slip op. at 37.<sup>5</sup> It expressed concern, however, about the contribution that SSWS could make to the record because of SSWS' ostensible lack of knowledge of "the particulars of the PFS application." Id.

The Applicant respectfully submits that this was an unreasonably high standard to employ at this stage of the proceeding in assessing the potential contribution of a petitioner who favors a license application, such as SSWS. A petitioner favoring an application, who seeks discretionary intervention, does not need to be intimately familiar with all the details of the application before its petition may be granted. See Sheffield, ALAB-473, 7 NRC at 743 n.5 (once issues raised in opposition have surfaced, board may call on petitioner to take position on them). Furthermore, SSWS has expressly framed the contention in its Supplemental Petition as responses to the contentions of those petitioners who oppose the application, exactly as envisioned by the Appeal Board in Sheffield.<sup>6</sup> Hence, those are the documents with which SSWS should be, and is, most familiar.<sup>7</sup>

---

<sup>5</sup> Thus, the Board found that SSWS had filed a "bill of particulars" of the issues it sought to address, witnesses to be called, and the technical qualifications and nature of proposed testimony of witnesses that may be required of petitioners seeking discretionary intervention. See Commonwealth Edison Company (Braidwood Nuclear Power Station), CLI-86-8, 23 NRC 241, 246 (1986); see also Sheffield, ALAB-473, 7 NRC at 745; cf. Pebble Springs, CLI-76-27, 4 NRC at 617.

<sup>6</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.

<sup>7</sup> Moreover, it is not as though the likely schedule in this proceeding would require cramming on the part of SSWS to familiarize itself with the particulars of the PFS application before any hearing. This may be some year or so away, and Applicant suggests that SSWS with its background is capable of overcoming any head start that the other petitioners may have by petitioning some four months or so earlier.

Second, SSWS will not, as concluded by Judge Lam, inappropriately broaden or delay the proceeding, as is confirmed by the representations made by counsel for SSWS in its appeal brief. 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.<sup>8</sup>

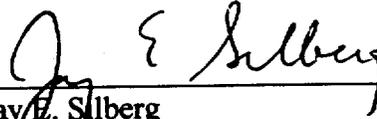
The Memorandum and Order denying SSWS intervention status acknowledged that SSWS was not likely to broaden or delay the proceedings, "at least in the conventional sense," because the SSWS' petition had been "submitted before contentions were admitted" and had been tailored to reflect issues already raised by other parties. LBP-98-7, slip op. at 38. Nevertheless, it expressed concern that SSWS' more "academic" interest and proposed "litigation by committee" would broaden the issues or cause delay. *Id.* at 38-39. However, this concern should no longer exist by virtue of the representation by counsel for SSWS in its appeal brief. Counsel represents that SSWS will speak with "one voice," or not speak at all in this proceeding. SSWS Brief at 6. Moreover, as recognized by the Board, it has plenary authority "to take appropriate action to avoid delay . . . ." 10 C.F.R. § 2.718.

---

<sup>8</sup> See Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 927 (1987); compare Braidwood, *supra*, CLI-86-8, 23 NRC at 250.

In sum, Applicant believes that the Commission should, in accordance with Judge Lam's dissent, grant SSWS discretionary intervention in this licensing proceeding.

Respectfully submitted,



Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

SHAW, PITTMAN, POTTS &

TROWBRIDGE

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage L.L.C.

Dated: May 11, 1998

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Brief in Support of Scientists for Secure Waste Storage Appeal from Denial of Petition to Intervene" dated May 11, 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 11th day of May 1998.

Shirley A. Jackson, Chairman  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16 G15  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: chairman@nrc.gov

Greta J. Dicus, Commissioner  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16 G15  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: cmrdicus@nrc.gov

Edward McGaffigan, Jr., Commissioner  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16 G15  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: sfc@nrc.gov

Nils J. Diaz, Commissioner  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16 G15  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: cmrdiaz@nrc.gov

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: hrb@nrc.gov

G. Paul Bollwerk III, Esq., Chairman  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: GPB@nrc.gov

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: PSL@nrc.gov

Catherine L. Marco, Esq.  
Sherwin E. Turk, Esq.  
Office of the General Counsel  
Mail Stop O-15 B18  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
e-mail: SET@nrc.gov; CLM@nrc.gov

Denise Chancellor, Esq.  
Assistant Attorney General  
Utah Attorney General's Office  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140873  
Salt Lake City, Utah 84114-0873  
e-mail: dchancel@state.UT.US

\* Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Dr. Jerry R. Kline  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: JRK2@nrc.gov

\* Charles J. Haughney  
Acting Director, Spent Fuel Project Office  
Office of Nuclear Material Safety and  
Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attention: Rulemakings and Adjudications  
Staff  
e-mail: elj@nrc.gov  
(Original and two copies)

Joro Walker, Esq.  
Land and Water Fund of the Rockies  
165 South Main, Suite 1  
Salt Lake City, UT 84111  
e-mail: joro61@inconnect.com

John Paul Kennedy, Sr., Esq.  
Confederated Tribes of the Goshute  
Reservation and David Pete  
1385 Yale Avenue  
Salt Lake City, Utah 84105  
e-mail: john@kennedys.org

Clayton J. Parr, Esq.  
Castle Rock, et al.  
Parr, Waddoups, Brown, Gee & Loveless  
185 S. State Street, Suite 1300  
P.O. Box 11019  
Salt Lake City, Utah 84147-0019  
e-mail: karenj@pwlaw.com

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
2001 S Street, N.W.  
Washington, D.C. 20009  
e-mail: DCurran.HCSE@zzapp.org

Danny Quintana, Esq.  
Skull Valley Band of Goshute Indians  
Danny Quintana & Associates, P.C.  
50 West Broadway, Fourth Floor  
Salt Lake City, Utah 84101  
e-mail: quintana@xmission.com

Martin S. Kaufman, Esq.  
Senior Vice President/General Counsel  
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

\* By U.S. mail only

  
Paul A. Gaukler