

February 13, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO  
PETITION FOR LEAVE TO INTERVENE FILED BY  
RICHARD WILSON AND SCIENTISTS FOR SECURE WASTE STORAGE

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the petition for leave to intervene filed by Professor Richard Wilson and other persons on February 2, 1998, under the name of "Scientists for Secure Waste Storage" (SSWS) ("Amended Petition"),<sup>1</sup> as supplemented by (1) a letter submitted by Ted Carpenter on February 2, 1998,<sup>2</sup> (2) a "Declaration of Interest and Appointment of Representative" submitted

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<sup>1</sup> Letter from Richard Wilson to Secretary, NRC, dated February 2, 1998. This is the third version of the petition filed by Professor Wilson in this proceeding, superseding earlier versions filed on January 20 and 22, 1998. The Licensing Board permitted Professor Wilson to file this amended petition during the prehearing conference on January 27, 1998, to allow him to correct the names of the petition's sponsors; he was also directed to provide the sponsors' residential addresses, and to submit a notice of appearance for the Atlantic Legal Foundation. See Tr. at 29-33; "Memorandum and Order (Memorializing Initial Prehearing Conference Directives)," dated February 2, 1998, at 1.

<sup>2</sup> Letter from Ted L. Carpenter to Secretary, NRC, dated February 2, 1998.

by Robert J. Hoffman on February 10, 1998, and (3) a Notice of Appearance submitted by Martin S. Kaufman, Esq., on February 10, 1998.<sup>3</sup>

For the reasons set forth below, the Staff submits (a) that the petition fails to demonstrate good cause for its late filing, or that a balancing of good cause and the other factors specified in 10 C.F.R. § 2.714(a)(1) supports the grant of the petition, and (b) that the petition fails to demonstrate that SSWS or any of the individuals affiliated with that group possesses the requisite standing to intervene in this matter. Accordingly, the Staff opposes the petition and recommends that it be denied.

#### BACKGROUND

On June 20, 1997, Private Fuel Storage L.L.C. ("PFS" or "Applicant") applied for a license, pursuant to 10 C.F.R. Part 72, to receive, transfer and possess power reactor spent fuel and other radioactive material associated with spent fuel storage in an independent spent fuel storage installation (ISFSI), to be constructed and operated on the Skull Valley Indian Reservation in Tooele County, Utah. On July 31, 1997, the Commission published a "Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," concerning the PFS application. 62 Fed. Reg. 41,099 (July 31, 1997). The Notice stated that the license, if granted, will authorize PFS to store spent fuel in dry storage cask systems at the ISFSI that PFS proposes to construct and operate on the Skull Valley Goshute Indian Reservation, for a license term of 20 years. *Id.* The Notice further

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<sup>3</sup> "Notice of Appearance on Behalf of Scientists for Secure Waste Storage," dated February 9, 1998. Therein, Mr. Kaufman indicated that he is Senior Vice President and General Counsel of the Atlantic Legal Foundation ("ALF"), that he is authorized to represent the SSWS in this proceeding, and that the ALF "is itself not an intervenor." *Id.*

provided that by September 15, 1997, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the subject materials license in accordance with the provisions of 10 C.F.R. 2.714." *Id.*

In response to the Notice of Opportunity for Hearing, five petitions for leave to intervene were timely filed by various persons and entities prior to the filing deadline of September 15, 1997. Pursuant to certain scheduling orders issued by the Licensing Board, contentions were then filed by each of those petitioners, and responses to those contentions were filed by the Applicant and Staff. A prehearing conference was held on January 27-29, 1998, at which the standing of those petitioners and the admissibility of their contentions was addressed.

On January 20, 1998 (one week before the prehearing conference), Professor Wilson filed a petition for leave to intervene in this proceeding on behalf of himself and an *ad hoc* group of scientists and other persons,<sup>4</sup> which he amended on January 22, 1998.<sup>5</sup> Professor Wilson attended a portion of the prehearing conference session held on January 27, 1998; and on February 2, 1998, he filed the instant Amended Petition, as "Spokesman for Scientists for

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<sup>4</sup> The initial petition of January 20, 1998, was submitted by Professor Wilson on behalf of himself, the Atlantic Legal Foundation, and nine other individual petitioners, as follows: William T. Anders, Hans Bethe, Nicolaas Bloembergen, Bernard L. Cohen, Sheldon L. Glashow, William K. Kanes, Marcus T. Rowden, Glenn T. Seaborg, and Jacob Shapiro. The petition also indicated that other persons were expected to join this group. *Id.* at 4.

<sup>5</sup> The January 22, 1998, petition stated that the petitioners requested leave to intervene "as a group," although the group was not identified by name. *Id.* at 1. The amended petition of January 22 also stated that it was filed "on behalf of the Atlantic Legal Foundation . . . who will act as legal advisor to the group"; added the names of Manning Muntzing, Esq., and Norman F. Ramsay to the list of individuals who had been named in the initial petition; and stated that additional persons were anticipated to join this "group of petitioners." *Id.* at 4.

Secure Waste Storage.”<sup>6</sup> The Amended Petition states that the named petitioners “have formed a group ‘Scientists for Secure Waste Storage’ and request leave to intervene, as a group” in this proceeding. Amended Petition at 1. On February 2, 1998, a letter was submitted by Ted L. Carpenter, stating that he supports the Amended Petition of SSWS and that he is one of the individuals who “request leave to intervene”; and on February 10, 1998, a “Declaration of Interest and Appointment of Representative” was filed by Robert J. Hoffman (one of the individuals listed in the Amended Petition), in which he stated that he lives and works in Salt Lake City and is a member of SSWS, and authorized Professor Wilson to represent him in this proceeding.

#### DISCUSSION

A. The Petition Is Untimely and Does Not Satisfy the Balancing Test of 10 C.F.R. § 2.714.

As indicated in the discussion above, the Commission’s Notice of Opportunity for Hearing, published in the *Federal Register* on July 31, 1997, provided that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a request for a hearing and petition for leave to intervene “by September 15, 1997,” in accordance with the provisions of 10 C.F.R. 2.714. 62 Fed. Reg. at 41,099. Notwithstanding this requirement, the instant petition for leave to intervene -- even in its earliest form -- was not

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<sup>6</sup> The instant Amended Petition named each of the persons listed in the amended petition of January 22, 1998, except that it (a) deleted the names of William K. Kanes and Manning Muntzing, Esq., (b) deleted the statement that the petition was submitted “on behalf of” the Atlantic Legal Foundation, and identified that organization as its “legal advisor,” and (c) added the names of Allan Bromley, Max Carbon, Bruce W. Church, Gerard Debreu, Robert J. Hoffman, Daniel M. Kammen, John Landis, Ralph Lapp, Otto G. Raabe, and Allen Lee Sessoms as members of the group. It further stated that “other scientists are likely to join the group at a later time.” *Id.* at 6.

filed until January 20, 1998 -- nearly six months after the Notice of Opportunity for Hearing had been published, four months after the filing deadline had passed, and just one week prior to the commencement of the prehearing conference. It is clear, as the petitioners concede, that "[t]his request is late." Amended Petition at 1.

The Commission's regulations look with disfavor upon the filing of late petitions for leave to intervene, and require late petitioners to demonstrate that the request should be granted based on a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1). That regulation provides, in pertinent part, as follows:

The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the . . . Atomic Safety and Licensing Board designated to rule on the petition and/or request . . . . Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer, or 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 in addition to those set out in paragraph (d)(1) of this section:

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

*Id.*; emphasis added. The burden of proof is on the petitioner, and the petitioner is obliged to affirmatively address the five lateness factors in its petition, and to demonstrate that a balancing

of the five factors warrants overlooking the petition's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). Further, the Commission can summarily reject a petition which fails to address the five factors or the standing requirements set forth in 10 C.F.R. § 2.714(d)(1). *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993).

It is well established that the most important factor is whether the petitioner has shown "good cause" for the lateness of the petition. *See, e.g., State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993). In this regard, the petitioner must show not only why it did not file in the time provided in the notice of opportunity for hearing, but also why it did not file as soon thereafter as possible. *Id.* Where good cause has not been shown to support the late filing of a petition for leave to intervene, "a petitioner must show a compelling case on the remaining factors." *Id.*, 38 NRC at 296. It has also been held that where good cause for a petition's lateness is not shown, "the petitioner's demonstration on the other factors must be particularly strong." *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977).

In evaluating the five lateness factors, two factors -- the 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 are therefore entitled to less weight. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). With respect to the third factor (the potential contribution to the development of a sound record), the petitioner is obliged to "set out with as much particularity as possible the precise issues it plans to cover, identify its potential witnesses, and summarize

their proposed testimony.” *Id.*, citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988), *aff’d sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), *cert denied*, 111 S. Ct. 246 (1990). Finally, it should be noted that where a petitioner demonstrates a strong interest in the proceeding such that the petition would have been granted if timely filed, and the petition is not egregiously late and will not substantially delay the start of the proceeding, these considerations may outweigh the fact that the balance of the five factors tips slightly against the petitioner. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982).

A balancing of these factors, as applicable to the Amended Petition, demonstrates that it should be denied. First, the sole explanation offered by the petitioners as to the lateness of their petition is stated as follows: “Petitioners were only aware of the proposal and the proposed hearings thereon at a late date and it has taken a little time to collect the information, and discuss a position thereon.” *Id.* Nowhere do the petitioners explain when they learned of the application, or why they could not have learned of it sooner; nor is any explanation offered as to why they were unable to learn of the application through reading the *Federal Register* or any other means.<sup>7</sup> Further, no explanation is provided as to why it was necessary for the petitioners to “collect . . . information, and discuss a position thereon” prior to filing a petition for leave to intervene; and nowhere do the petitioners indicate how soon they filed their petition after they

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<sup>7</sup> Professor Wilson did not clarify the reasons for the petition’s lateness in his remarks at the prehearing conference. He stated: “I’ve only been aware of this particular development moderately recently, and the Atlantic Legal Foundation has only been approached recently,” and he attributed some of the delay to the petitioners’ need to ascertain the existence of any conflicts of interest. Tr. at 27.

learned of the application. Accordingly, good cause has not been shown to support the late filing of the petition. *State of New Jersey, supra*, CLI-93-25, 38 NRC at 295.

With respect to the other factors specified in 10 C.F.R. § 2.714(a)(1), the petition offers little information -- nor are the factors in § 2.714(a)(1) specifically addressed. On this basis alone, the petition could be rejected. *Pilgrim, supra*, 22 NRC at 466 n.22; *Comanche Peak, supra*, 37 NRC at 255. Further, even when the petition is evaluated in light of these factors, it is difficult to find that a balancing of the lateness factors supports the grant of the petition.

Specifically, with respect to factor (2), it is possible that no other means are available to protect the petitioners' interests -- however, the petitioners have not shown that they have an interest which could be adversely affected by the proceeding. In this regard, the petition states that "none of the petitioners have personal financial or property interests in the proceeding"; rather, they are described as having "solely an interest in the public good and a desire to ensure that the public good be properly considered." Amended Petition at 2. To be sure, the petition states that "one of the petitioners live[s] and works in the State of Utah, not far from the proposed site, and his personal interest in the hearing therefore is the same as other residents of the State of Utah." *Id.* However, even this individual is not described as having interests which could be affected by the proceeding,<sup>8</sup> and there is no basis to presume that all persons who reside within the State of Utah necessarily have interests which could be affected by this

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<sup>8</sup> Presumably, this individual is Robert Hoffman, the only resident of Utah named in the Amended Petition. Mr. Hoffman's "Declaration of Interest and Appointment of Representative" states that he lives and works in Salt Lake City, and asserts that he has a personal interest in the safety of the facility "as a resident of the State of Utah, living and working in proximity to the [PFS] site." *Id.* The Declaration, however, fails to state the distance between Mr. Hoffman's residence and the facility, or to indicate how his interests could be affected by this proceeding.

proceeding. Therefore, the petition fails to demonstrate that this factor favors the grant of the petition.

With respect to factor (3) (the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record), the credentials of many of the individuals named in the Amended Petition would reasonably lead one to conclude that they could contribute to the development of a sound record in this proceeding. However, the petition fails to satisfy Commission requirements that it show with particularity "the precise issues" the petitioner plans to address, or that it "identify its potential witnesses, and summarize their proposed testimony." *State of New Jersey, supra*, CLI-93-25, 38 NRC at 296; *Comanche Peak, supra*, CLI-92-12, 36 NRC at 74. Accordingly, this factor has not been shown to support the grant of the petition.

With respect to factor (4) (the extent to which the petitioner's interest will be represented by existing parties), no showing has been made that this factor favors the grant of the petition. While no other party is likely to advance precisely the same views as these petitioners, it is likely that the Applicant will offer relevant testimony and conduct itself in a manner that substantially corresponds to the petitioners' views. Further, the petitioners are free to offer their opinions to the Applicant, Staff or other parties to the proceeding; and, to the extent that any party wishes to do so, it may engage some or all of the petitioners as consultants or witnesses in this proceeding. While the petitioners assert that they are interested in "the public good" and want "to ensure that the science and technology is sound" (Amended Petition at 2, 3), certainly the Staff and the Licensing Board, itself, share this interest; and to the extent that any party submits expert testimony that is unsound, opposing parties may be expected, with the assistance

of their own experts, to point out the testimony's flaws. Thus, the petitioners' academic interest in the advancement of sound scientific testimony may well be represented by other parties. In any event, however, even if this factor is found to support the petition, this factor (like the second factor), is entitled to less weight than factors (1), (3), and (5). *Comanche Peak, supra*, CLI-92-12, 36 NRC at 74.

Finally, with respect to factor (5) (the extent to which the petitioner's participation will broaden the issues or delay the proceeding), the grant of the petition at this early stage of the proceeding could indeed result in a broadening of the issues or delay. The petition states that the petitioners do not intend to "enlarge the issues in the hearing: only to be able to clarify them and put them into perspective." Amended Petition, at 3. However, it would be only reasonable to expect that the participation in this litigation of an unstructured group of scientists with no apparent standing to intervene (*see* discussion *infra* at 12-20) -- however well-intentioned and qualified they may be -- will almost certainly result in a broadening of the issues and delay. This proceeding will certainly entail all the normal attributes of an adjudicatory proceeding, including the filing of interrogatories, document production and other discovery; the scoping and filing of testimony; direct and cross-examination of expert witnesses; and the filing of various motions, proposed findings of fact, and appeals. The petitioners' participation in the proceeding will certainly result in the need for additional discovery, testimony and cross-examination, and will inevitably cause a broadening of the issues and delay in the proceeding.

Indeed, the likely delay in the proceeding posed by the petitioners' proposed intervention is demonstrated, in part, by the difficulty the petitioners have already shown in timely coordinating the filing of their petition for leave to intervene. Thus, the petitioners state that

one of the reasons for their late filing of the petition was that "it has taken a little time to collect the information, and discuss a position thereon." Amended Petition at 1. Further, the potential for delay will increase as the proceeding progresses, given the petitioners' novel proposal to conduct themselves in this litigation as a collegial body -- in essence, serving as an unauthorized advisory committee to the Licensing Board. The petition states as follows:

Petitioners would like to have the opportunity to review and comment (preferably in writing) upon any and all scientific and technical issues that are, or will come before the board. We desire this right to make sure that the scientific and technical testimony is accurate and in proper context. It is the intention of the petitioners that written comments would be circulated among the petitioners and the group report would then represent their views rather than merely represent the views of a spokesman. To the extent that oral comments may be made by a spokesman for the petitioners, these will be sent to each and every petitioner for subsequent checking. The comments of the group will of course, be available for cross examination and it is expected that the spokesman will be the person so examined.

Amended Petition at 1. The petitioners' proposal to conduct themselves in this litigation as a collegial body will cause each of the petitioner's individual views and the grounds therefor to become the subject of extensive discovery and cross-examination, will result in an expansive broadening of the issues and sub-issues before the Licensing Board, and will inevitably cause substantial delay in the outcome of this proceeding.<sup>9</sup>

Moreover, the petitioners' stated ambition to "review and comment . . . upon any and all scientific and technical issues that are, or will come before the board. . . . to make sure that

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<sup>9</sup> In addition, although the petitioners propose to circulate their individual views, seeking consensus among themselves, there is no assurance that a consensual view will be reached in each instance; and the petitioners appear to recognize the potential for differing or conflicting views among themselves. The petition states, "[t]he spokesman may not always be able to fully represent the details of the various opinions." Amended Petition at 3.

the scientific and technical testimony is accurate and in proper context” (*Id.*; emphasis added), and their request “to participate in the preparation (and peer review)” of the Staff’s environmental and safety documents (*Id.* at 3), demonstrates the potential that their proposed advisory role will result in a broadening of the issues beyond those raised by other parties, and may well delay the proceeding.<sup>10</sup> Accordingly, factor (5) should be viewed as weighing against the grant of the petition.

In sum, good cause has not been shown for the lateness of the SSWS petition; and a balancing of the five factors specified in 10 C.F.R. § 2.714(a)(1) weighs against the grant of the petition. For these reasons, the petition should be denied.

**B. The Petitioners Fail to Demonstrate that They Possess Cognizable Interests Which Could Be Adversely Affected by This Proceeding.**

**1. Legal Requirements for Intervention.**

It is fundamental that any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that it has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (“the Act” or “AEA”), provides:

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<sup>10</sup> The Staff objects to the petitioners’ request that they be permitted to participate in the preparation and peer review of the Staff’s environmental and safety documents (Amended Petition at 3). Such a proposal would impermissibly intrude upon the Commission’s responsibility (delegated to the Staff) to perform such reviews. Nonetheless, the Staff notes that to the extent that drafts of its review documents are made public, the petitioners will have an opportunity to provide written comments thereon. The Staff does not oppose the petitioners’ further request that they be permitted to make limited appearance statements in this proceeding (*Id.* at 1-2), subject to the Licensing Board’s determination as to the proper timing, conditions and number of opportunities for limited appearance statements to be made. *See* Tr. at 6-7.

In any proceeding under this Act, for the granting, suspending, or amending of any license . . . , the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding.”

*Id.*; emphasis added.

The Commission’s regulations in 10 C.F.R. § 2.714(a)(2) provide that a petition to intervene, *inter alia*, “shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors set forth in [§ 2.714(d)(1)].” Pursuant to 10 C.F.R. § 2.714(d)(1), in ruling on a petition for leave to intervene, the presiding officer or Licensing Board is to consider:

- (i) The nature of the petitioner’s right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner’s property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner’s interest.

Finally, a petition for leave to intervene must set forth “the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene,” 10 C.F.R. § 2.714(a)(2); and a petitioner must advance at least one admissible contention in order to be permitted to intervene in a proceeding. 10 C.F.R. § 2.714(b).

In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). In order to

establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). In Commission proceedings, the injury must fall within the zone of interests sought to be protected by the AEA or the National Environmental Policy Act. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985).

To establish injury in fact and standing, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, 38 NRC at 32.<sup>11</sup> It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels, supra*, 40 NRC at 71-72. The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan, supra*, 504 U.S. at 560. A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact for standing; while this stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979).

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<sup>11</sup> A determination that the injury is fairly traceable to the challenged action does not depend "on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requestor must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing *Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).<sup>12</sup> An organization may meet the injury in fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *Houston Lighting and Power Co.* (South Texas Project Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff'g* LBP-79-10, 9 NRC 439, 447-48 (1979).

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<sup>12</sup> It is well established that a person may obtain a hearing or intervene as of right on his own behalf but not on behalf of other persons whom he has not been authorized to represent. *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977) (mother could not represent son attending university unless he is a minor or under legal disability); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents).

An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 1991). Where the organization relies upon the interests of its members, it must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Georgia Institute of Technology, supra*, 42 NRC at 115.

2. The Petitioners Have Failed to Establish Their Standing to Intervene in Accordance with These Requirements.

An application of these principles to the Amended Petition filed by SSWS demonstrates that neither that group nor any of its individual members have established their standing to intervene in this proceeding, in that they have not shown an "injury in fact" to their interests that is fairly traceable to the licensing of the PFS facility. First, with respect to the SSWS, no showing has been made that this organization possesses any "interest" of its own whatsoever -- much less that it has an interest that could be affected by the outcome of this proceeding. Accordingly, SSWS lacks organizational standing to intervene on its own behalf.

With respect to the standing of the individuals listed by SSWS, most of those persons are described as living outside the State of Utah, far from the site of the proposed facility. As the Licensing Board is aware, this is an important consideration (*see* Tr. at 31-32). These individuals have been shown to have no more than an academic or professional interest in the proceeding, rather than any health, safety, property, financial, or other personal interest that could be affected by the results of the proceeding. Accordingly, these persons have not been shown to have a "real stake" in the outcome of the proceeding, as is required to establish injury

in fact for standing to intervene. *See, e.g., South Texas, supra*, 9 NRC at 447-48. Similarly, no showing has been made that these distant persons may suffer a "distinct and palpable" harm that can fairly be traced to the challenged action, or any "concrete and particularized" injury that is "actual or imminent" rather than "conjectural or hypothetical." These petitioners' general or academic interest in the proceeding is simply insufficient to confer standing upon them. *Barnwell, supra*, 3 NRC at 422; *Skagit/Hanford, supra*, 16 NRC at 983; *Skagit/Hanford, supra*, 15 NRC at 743. Accordingly, SSWS may not rely upon these distant persons' interests to establish its representational standing to intervene.

The SSWS petition states that "one of the petitioners live[s] and works in the State of Utah, not far from the proposed site, and his personal interest in the hearing therefore is the same as other residents of the State of Utah." Amended Petition at 2. This appears to be a reference to Robert J. Hoffman, who filed a separate Declaration on February 3, 1998. However, Mr. Hoffman's Declaration sheds little additional light on this matter: It indicates only that he lives and works in Salt Lake City, that he is a member of SSWS, and that he has a personal interest in the safety of the facility "as a resident of the State of Utah, living and working in proximity to the [PFS] site." *Id.* Neither the Amended Petition nor Mr. Hoffman's Declaration states the precise distance between his home or office and the facility, but his residence in Salt Lake City appears to place him approximately 50 miles away from the proposed site.<sup>13</sup> However, neither the petition nor Mr. Hoffman's Declaration indicates how his interests could be affected by this proceeding, nor is there any basis to presume that any person who lives or works in Salt Lake City has interests which could be affected by this proceeding.

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<sup>13</sup> Official Highway Map of the State of Utah, Utah Dep't. of Transportation (1995).

Similarly, the letter submitted by Ted Carpenter does not show that he has any current interest that could be affected by this proceeding. Dr. Carpenter's letter states that he currently resides in Idaho Falls, Idaho; that he has "no personal financial or property interests in the proceeding"; that his interest is in "the public good"; that he lived in Orem, Utah during the years 1992 - 1995; and that he "continue[s] to work in Utah." *Id.* at 2. However, the precise location and frequency of Dr. Carpenter's current contacts with the State of Utah are not described; and no showing is made that his interests could be affected by this proceeding. Rather, Dr. Carpenter asserts only that his "personal interest in the hearing . . . approximately equals that of any member of the State of Utah." *Id.*<sup>14</sup>

The petitioners' failure to specify the precise locations of their property or activities in the vicinity of the proposed site, or to show how any of their interests could be affected by an order entered in this proceeding, makes it impossible to conclude that they may suffer a "distinct and palpable" or "concrete" harm, as is required to demonstrate injury in fact. This omission is particularly significant in light of the Commission's generic determination that an independent spent fuel storage installation of the type proposed here is unlikely to have any significant offsite consequences. *See discussion infra* at 19-20.

In Commission proceedings involving initial power reactor licensing, a showing of geographic proximity within about 50 miles of the reactor has been presumed sufficient to satisfy

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<sup>14</sup> It has been held that the alleged injury-in-fact to the member must fall within the purposes of the organization. *Curators of the University of Missouri* (TRUMP-S Project), LBP-90-18, 31 NRC 559, 565 (1990). To the extent that Mr. Hoffman or Dr. Carpenter may have a health and safety or other personal interest that could be adversely affected by this proceeding, that interest would appear to fall outside the stated purposes of the organization, and would not appear to support the organization's representational standing to intervene.

the injury in fact requirement. *See, e.g., Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.21 (1977). In some materials licensing cases, injury in fact based upon close geographic proximity may be presumed where "the potential for offsite consequences is obvious." *Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982). Generally, however, in materials licensing cases, standing will depend upon an analysis of the particular material at issue in the proceeding and the specific circumstances alleged by each petitioner.<sup>15</sup> Similarly, in other proceedings, it has been held that a determination of how close a petitioner must live or engage in activities relative to the source of radioactivity to establish standing depends on the nature of the proposed action and the significance of the radioactive source.<sup>16</sup>

In the instant proceeding involving a proposed ISFSI, there is no basis to apply a 50-mile or similar geographic distance presumption for standing. The Commission has recognized that the consequences of a "postulated worst-case accident involving an ISFSI is insignificant in terms of public health and safety,"<sup>17</sup> and the Commission has therefore concluded that offsite

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<sup>15</sup> *See generally*, Statement of Consideration, "Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989); Proposed Rule, "Informal Hearing Procedures for Materials Licensing Adjudications," 52 Fed. Reg. 20089, 20090 (May 29, 1987).

<sup>16</sup> *See, e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (petition for leave to intervene on a reactor licensee's request for exemption denied, where no "obvious potential for offsite consequences" was alleged to result from the action at issue in the proceeding).

<sup>17</sup> Statement of Consideration, "Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Installation (ISFSI) and Monitored Retrievable Storage Facilities (MRS)," 60 Fed. Reg. 32430 (1995) (emphasis added). *See also* NUREG-1140, "A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees" (1991), at 61-63.

emergency preparedness is not necessary for dry cask spent fuel storage. Here, there is no "obvious potential for offsite consequences" associated with the operation of this ISFSI, and the petitioners have not shown that the facility has the potential for offsite consequences that could affect them.

Further, the Petitioners have not identified any close, regular, or frequent contacts in the immediate area where the ISFSI is to be located. Mr. Hoffman's assertion that he lives and works "in proximity to the site" is too vague and generalized to confer standing upon him, and the approximate distance of 50 miles from his residence in Salt Lake City to the proposed ISFSI is too remote to support standing. Thus, the Petitioners have not shown that they would suffer any injury in fact that is "fairly traceable to the proposed action," and their petition to intervene pursuant to 10 C.F.R. § 2.714 should therefore be denied.

#### CONCLUSION

For the reasons set forth above, the petition for leave to intervene filed by the Scientists for Secure Waste Storage fails to satisfy the requirements of 10 C.F.R. § 2.714. Accordingly, the Staff opposes the petition and recommends that it be denied.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 13th day of February 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22-ISFSI  
)  
(Independent Spent )  
Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITION FOR LEAVE TO INTERVENE FILED BY RICHARD WILSON AND SCIENTISTS FOR SECURE WASTE STORAGE" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 13th day of February, 1998:

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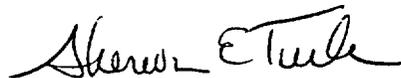
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