

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 PETITIONER
WILLIAM D. PETERSON'S "APPEAL TO
THE COMMISSION FOR INTERVENER STATUS"

Sherwin E. Turk */RA/*
Counsel for NRC Staff

October 16, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 PETITIONER
WILLIAM D. PETERSON'S "APPEAL TO THE
COMMISSION FOR INTERVENER STATUS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a), the NRC Staff ("Staff") hereby submits its brief in response to Petitioner William D. Peterson's "Appeal to the Commission for Intervener Status," filed on October 6, 2000. For the reasons set forth below, the Staff submits that Mr. Peterson's appeal from the Licensing Board's denial of his various petitions to intervene in this proceeding should be denied.

BACKGROUND

This proceeding, concerning the application of Private Fuel Storage, L.L.C. ("Applicant" or "PFS") to construct and operate an independent spent fuel storage installation ("ISFSI") on the Reservation of the Skull Valley Band of Goshute Indians, was commenced by publication of a Notice in the Federal Register on July 31, 1997. 62 Fed. Reg. 41099 (July 31, 1997). On June 6, 2000 -- almost three years after the commencement of this proceeding -- Mr. Peterson filed his initial "Petition to Intervene"

("First Petition"). On June 27 and 28, 2000, Mr. Peterson supplemented his First Petition with a list of 27 contentions that he sought to litigate herein.¹

On August 31, 2000, the Atomic Safety and Licensing Board (Board) denied Mr. Peterson's First Petition. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC ____ (2000) ("Memorandum and Order (Denying Late-Filed Intervention Petition))." In its ruling, the Board found that: (1) a balancing of the five late-filing criteria of 10 C.F.R. § 2.714(a)(1) did not support entertaining the petition; (2) Mr. Peterson had not established his standing to intervene as a matter of right; and (3) Mr. Peterson had not presented a litigable contention. *Id.*, slip op. at 1. On September 5, 2000, the Licensing Board issued a further memorandum decision, denying Mr. Peterson's motion for an enlargement of time to take some action (the nature of which was unclear).² See "Memorandum (Petitioner William D. Peterson's September 4, 2000 'Motion for Enlargement of Time')," dated September 5, 2000.

Mr. Peterson failed to file a timely appeal from the Licensing Board's Orders of August 31 and September 5, 2000. Instead, on September 14, 2000, he filed a second petition for leave to intervene, entitled "Petition For Intervention Into the EIS (Responses to 9/5/00 Action of NRC Board)" ("Second Petition"). Therein, Mr. Peterson requested (a) "reconsideration" of the Licensing Board's decision denying his First Petition (Second Petition at 2), and (b) leave to intervene in this proceeding based on new grounds -- the

¹ See (1) "Contentions Third Party Complaint Intervention," filed June 27, 2000; and (2) "Additional Contentions Petition to Intervene From Sept. 2, 1997 Complaint," dated June 28, 2000.

² "Motion for Enlargement Amendment, 60 days requested Ref: Third Party Complaint for Intervener's use of State Law to deprive Peterson and PSFSF of Storage of SNF by Federal Law," dated September 4, 2000.

Staff's June 2000 publication of a Draft Environmental Impact Statement ("DEIS")³ related to the proposed PFS facility. In this regard, Mr. Peterson asserted that the DEIS had improperly failed to consider his proposed "Pigeon Spur Fuel Storage Facility" ("PSFSF") site in Box Elder County, Utah, as an alternate site for the PFS facility; and he filed five new contentions in support of his effort to intervene (*Id.* at 2-5).⁴

On September 25, 2000, the Licensing Board denied Mr. Peterson's Second Petition. See "Memorandum and Order (Denying Motion for Reconsideration/Intervention Petition)," dated September 25, 2000. As set forth therein, the Licensing Board determined that Mr. Peterson's Second Petition (a) failed as a motion for reconsideration, in that it was untimely and failed to demonstrate any error in the Board's prior decision (*Id.*, slip op. at 2); and (b) failed as a new petition to intervene, in that it was untimely and failed to address the

³ NUREG-1714, "Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah" (June 2000).

⁴ Mr. Peterson has made numerous other filings in the proceeding (the purpose and propriety of which are somewhat unclear), many of which challenge the Governor of Utah's policy against the storage of spent nuclear fuel in Utah. See, e.g., (1) Letter from William D. Peterson to the Licensing Board, dated June 19, 1999 [sic] ("Subject: Utah R, Emergency Plan - Fire Protection"); (2) "Reply and Motion for Findings . . .," dated July 21, 2000; (3) "Motion for Amendment . . .," dated July 24, 2000; (4) "Motion to Find Misuse of State Law . . .," dated August 1, 2000; (5) "Motion for Enlargement of Time Amendment . . .," dated August 1, 2000; (6) "Motion for Decision for Peterson to Intervene Into the EIS (Responses to 9/15/00 Action of NRC Board)," dated September 25, 2000; (7) "Petition for Special Assistants per § 2.718(k) to Find Compromise (Response to 9/15/00 Action of NRC Board)," dated September 25, 2000; (8) "Motion to Strike Action, See Docket No 72-23 (Response to 9/24/00 Action of PFS)," dated September 26, 2000; and (9) "Motion to Strike Action and Motion for Consideration (Response to late 9/24/00 Actions of PFS, staff and 9/27/00 NRC)," dated September 28, 2000.

late-filed factors in 10 C.F.R. § 2.714, and failed to resolve the Petitioner's "standing" deficiencies which the Board had identified in LBP-00-23 (*Id.* at 3).⁵

On October 6, 2000, Mr. Peterson filed the instant "Appeal" before the Commission, which appears to challenge the Licensing Board's decision denying his Second Petition. As more fully set forth below, the Staff submits that Mr. Peterson has failed to state any basis upon which the Commission could conclude that the Licensing Board erred in its decision of September 25, either in denying his Second Petition or in denying his request to reconsider its denial of his First Petition. Accordingly, the Staff opposes Mr. Peterson's "Appeal" and recommends that it be denied.

ARGUMENT

Petitioner William D. Peterson resides at some (unspecified) distance from the proposed PFS facility. He has proposed the construction of a separate independent spent Fuel storage facility ("ISFSI"), to be located at the Pigeon Spur of the Southern Pacific Railroad, in western Box Elder County, Utah. The Petitioner has not alleged that a decision concerning the licensing of the PFS facility could result in injury to him; rather, he generally asserted that his own application for an ISFSI license (for his Pigeon Spur facility) could be adversely affected by the State of Utah's policy against spent nuclear fuel storage in Utah, and (more recently, in his Second Petition) that his proposed facility should have been considered by the Staff in its DEIS as an alternate site for the PFS facility. *See generally*, First Petition at 2-6, 9-12; Second Petition at 1-3.

⁵ The Licensing Board has subsequently issued two Orders with respect to other pleadings filed by Mr. Peterson: (1) "Memorandum and Order (Ruling on Motions for Decision and for Appointment of Special Assistants), dated September 26, 2000; and (2) "Order (Denying Motions to Strike and for Reconsideration)," dated October 11, 2000.

In disposing of Mr. Peterson's First Petition, the Licensing Board determined (a) that a balancing of the five late-filing criteria in 10 C.F.R. § 2.714(a)(1) did not support the petition, (b) that Mr. Peterson had not established his standing to intervene as of right, and (c) that he had failed to present a litigable contention. LBP-00-23, slip op. at 1. On this basis, the Licensing Board denied Mr. Peterson's First Petition.

The Licensing Board's reasoning, which is described in detail in its decision (*Id.* at 5-13), demonstrates the propriety of the Board's decision. In particular, with respect to standing, the Licensing Board determined as follows:

The focus of this proceeding is the efficacy of the PFS application to construct and operate an ISFSI facility on the Skull Valley Band reservation. . . .

. . . [B]ecause petitioner Peterson does not assert that his purported injury is a result of the PFS ISFSI application or its final outcome, the injury of which he complains cannot be traced back to the PFS ISFSI application. From this it follows that no determination of the Board regarding the license application would be likely to redress that asserted injury, regardless of the final outcome of this proceeding. Thus, for a variety of reasons, petitioner Peterson lacks standing to intervene as a matter of right in this proceeding.

LBP-00-23, slip op. at 9-10 (emphasis added; footnotes omitted).

Mr. Peterson's "Appeal" fails to point to any error in LBP-00-23 -- either with respect to its ruling on standing, the timeliness of his First petition, or the admissibility of his contentions.⁶ Nowhere does Mr. Peterson's appeal demonstrate any error of law or abuse of discretion by the Licensing Board in LBP-00-23. Accordingly, absent any such error or

⁶ Indeed, Mr. Peterson does not appeal directly from the Licensing Board's decision in LBP-00-23, but instead appeals from the Board's subsequent decision of September 25 to deny his Second Petition, both as (a) a new petition to intervene, and (b) as a request for reconsideration of the Board's denial of his First Petition, in LBP-00-23.

abuse of discretion, the Board's decision denying his First Petition is entitled to substantial deference and should be affirmed. *See e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998); *International Uranium Corp.* (White Mesa Uranium Mill), CLI-98-6, 48 NRC 116, 118 (1998); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998).

With respect to Mr. Peterson's Second Petition, the Licensing Board determined that the Second Petition failed to demonstrate his standing to intervene, either (a) as a request for reconsideration of the Board's previous decision or (b) as a new petition to intervene (Order of September 25, at 2-3). These rulings were correct.

Mr. Peterson's Second Petition challenged the adequacy of the June 2000 DEIS and certain statements made by Utah officials and others in August 2000 (Second Petition at 2-3, 4-5). These matters related to events which occurred after he had filed his First Petition on June 7, and were not addressed in his First Petition or LBP-00-23. Thus, the Licensing Board correctly concluded that these matters failed to establish a basis for reconsideration of LBP-00-23, in that they constituted new information or arguments rather than an attempt to correct an error based on "an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual misapprehension" (Order of September 25, 2000, at 2; citations omitted).⁷ Having failed

⁷ As the Staff indicated in its response to Mr. Peterson's Second Petition, some of his statements may be viewed as comments on the adequacy of the DEIS and, as such, they may be considered by the Staff regardless of whether his Second Petition is granted. *See* "NRC Staff's Response to William D. Peterson's 'Petition for Intervention into the DEIS,'" dated September 21, 2000, at 5 n.3. Indeed, as the Staff pointed out (*Id.*), Mr. Peterson has submitted substantially similar comments on the DEIS. *See* letter from William D. Peterson to Mark Delligatti, dated September 7, 2000 (Second Petition, Attachment 1); and E-mail letter and "Petition for Consideration" from William D. Peterson to Mark Delligatti, dated September 13, 2000, at 1.

to show any error in the Licensing Board's decision based on any facts or arguments he had made previously, the Second Petition failed to establish grounds for "reconsideration" of the Board's earlier rulings, and the Board therefore correctly declined to reconsider its earlier rulings. See 10 C.F.R. § 2.771; *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

Further, viewed as a new petition for leave to intervene, the Licensing Board correctly rejected the Second Petition. As the Board found, Mr. Peterson's Second Petition failed to address the late filing factors set forth in 10 C.F.R. § 2.714, failed to establish good cause for the petition's lateness (particularly since the Applicant's license application and Environmental Report were filed three years earlier), and failed to address the Board's previous determination, in LBP-00-23, that the Petitioner's showing of standing to intervene was deficient since he had not shown how he could be injured by a decision in this proceeding (Order of September 25, 2000, at 2-3; see LBP-00-23, slip op. at 9-10.⁸

Nowhere in his "appeal" does Mr. Peterson point to any error in the Board's determination to reject his Second Petition, either as a new petition or as a motion for reconsideration of its denial of his First Petition. While Mr. Peterson "offers his pleadings

⁸ The Licensing Board's determination in LBP-00-23 that Mr. Peterson had failed to show how the outcome of this proceeding could cause him to be injured is not affected by Mr. Peterson's reliance on the Staff's DEIS. Even if Mr. Peterson is correct in asserting that his Pigeon Spur site is superior to the PFS site and that the DEIS should have considered it as an alternate site for the PFS facility, that would not establish his standing to intervene herein. Simply stated, even if his Pigeon Spur site is "obviously superior" to the PFS site and the PFS license application is denied, that would not result in the selection of his site for the PFS facility -- since that would require a business decision by PFS to submit a new application for the Pigeon Spur site, and would be beyond the scope of this proceeding on the current PFS license application. See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 68 (1977). Accordingly, a decision in this proceeding on the PFS application would not result in any injury to Mr. Peterson.

in this matter leading up to this point” (Appeal at 4), those filings do not point to or establish any error by the Board. Further, while Mr. Peterson reiterates certain claims he made previously, he fails to address the Licensing Board’s resolution of those claims, and does not show that the Licensing Board committed any error in denying his Second Petition.⁹ Finally, nowhere in his appeal does Mr. Peterson address the Board’s determination, in denying his motion for reconsideration of LBP-00-23, that he had not shown any error or misapprehension of fact or law in that decision. See Order of September 25, at 2.

In sum, Mr. Peterson has failed to show any grounds for reversal of the Licensing Board’s prior decisions. In the absence of any apparent error of law or abuse of discretion, the Board’s decision is entitled to substantial deference and should be affirmed.¹⁰

CONCLUSION

For the reasons set forth above, the Commission should deny Petitioner Peterson’s appeal from the Licensing Board’s Order of September 25, 2000.

Respectfully submitted,

Sherwin E. Turk **/RA/**
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of October 2000

⁹ Mr. Peterson states that he has a “stake in the outcome of the EIS”; that Utah Governor Leavitt “has a policy to resist SNF storage in Utah”; that the State’s policy could affect development of his own ISFSI at Pigeon Spur in Box Elder County, UT; that he disputes the State’s contentions in this proceeding; that his proposed facility “has substantial advantages” over the proposed PFS facility and should be considered as a potential alternative site for the PFS facility; and that the Licensing Board should appoint assistants to form an arbitration panel to resolve his concerns (Appeal at 2-4).

¹⁰ See discussion *supra*, at 5-6.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 PETITIONER WILLIAM D. PETERSON'S 'APPEAL TO THE COMMISSION FOR INTERVENER STATUS'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 16th day of October, 2000:

G. Paul Bollwerk, III, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to
HEARINGDOCKET@NRC.GOV)

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg, Esq.**
Ernest Blake, Esq.
Paul A. Gaukler, Esq.
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, DC 20037-8007
(E-mail copy to jay_silberg, paul_gaukler,
and ernest_blake@shawpittman.com)

Danny Quintana, Esq.**
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101
(E-mail copy to quintana
@Xmission.com)

Denise Chancellor, Esq.**
Fred G Nelson, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873 (E-mail
copy to dchancel@State.UT.US), and
jbraxton@email.usertrust.com)

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to cnakahar@state.UT.US)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
1385 Yale Ave.
Salt Lake City, UT 84105
(E-mail copy to john@kennedys.org)

Joro Walker, Esq.**
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
(E-mail copy to joro61@inconnect.com)

Land and Water Fund of the Rockies**
2260 Baseline Road, Suite 200
Boulder, CO 80302

William D. (Bill) Peterson**
Pigeon Spur Fuel Storage Facility
2127 Lincoln Lane
Holladay, UT 84124
(E-mail copy to paengineers@juno.com and
BillPeterson@OlympicHost.com)

Sherwin E. Turk **/RA/**
Counsel for NRC Staff