

January 27, 2004

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
WILLIAM D. PETERSON'S "PETITION TO BOARD FOR
LICENSE OF PIGEON SPUR INTERIM SNF STORAGE"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedule for Responses to Petition)," dated January 21, 2004, the NRC Staff ("Staff") hereby responds to the "Petition to BOARD for License of Pigeon Spur Interim SNF Storage" filed by William B. Peterson on January 20, 2004 ("Petition"). Therein, Mr. Peterson requests that the Licensing Board issue a license for his proposed Pigeon Spur spent fuel storage facility in Box Elder County, UT, for a stated term of 300 years. Petition at 1, 6, 8.

For the reasons set forth below, the Staff submits that (a) Mr. Peterson is not a party to this proceeding and lacks standing to request that any action be taken by the Licensing Board herein; (b) the Licensing Board lacks jurisdiction to consider Mr. Peterson's request for action concerning any facility other than the PFS Facility which is the subject of this proceeding; and (c) the Licensing Board lacks authority to provide the relief requested in the Petition (*i.e.*, to award a license to Mr. Peterson). Accordingly, Mr. Peterson's Petition should be denied.

BACKGROUND

This proceeding concerns 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, in accordance with a Notice published in the Federal Register on July 31, 1997.¹

On June 5, 2000, Mr. Peterson filed a late "Petition to Intervene" ("First Petition") in this proceeding, which he amended on June 27 and 28, 2000. Therein, he identified himself as the applicant for an unrelated NRC license for an away-from-reactor ISFSI, which he proposed to construct and operate as the "Pigeon Spur Fuel Storage Facility" in Box Elder County, Utah.² The Licensing Board denied that petition on August 31, 2000, on the grounds 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. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114 (2000).

On September 15, 2000, Mr. Peterson filed a second petition, entitled "Petition for Intervention into the EIS (Responses to 9/5/00 Action of NRC Board)," in which he requested that the Licensing Board reconsider its denial of his first petition, and sought leave to intervene in this proceeding on the further grounds that the Draft Environmental Impact Statement ("DEIS") for the PFS Facility was inadequate for failing to consider his proposed Pigeon Spur Facility site as an alternative location for the PFS Facility. On September 25, 2000, the Licensing Board denied this

¹ "Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," 62 Fed. Reg. 41099 (July 31, 1997) ("Notice").

² Mr. Peterson applied to the NRC for a license for his proposed Pigeon Spur Facility on October 19, 1998. The NRC assigned Docket No. 72-23 to that application. However, on January 8, 1999, the Staff rejected that application and terminated its review, upon finding that the application was substantially deficient. *See* Letter from Mark Delligatti to William D. Peterson, dated January 8, 1999 ("Attachment 1" hereto). On September 2, 1999, the Staff further advised Mr. Peterson that it would not undertake any further review activities with respect to his proposed facility until he submits a new application which complies with NRC regulatory requirements and pays outstanding fees for the Staff's review of his initial application. *See* Letter from Susan F. Shankman to William D. Peterson, dated September 2, 1999 ("Attachment 2" hereto).

second petition in an unpublished "Memorandum and Order (Denying Motion for Reconsideration/Intervention Petition)." On September 28, 2000, Mr. Peterson filed a motion seeking reconsideration of the Board's decision, which the Board subsequently denied; and on October 6, 2000, he filed an "Appeal to the Commission for Intervener Status," appealing from the Board's decision.

On November 17, 2000, the Commission issued a decision affirming the Licensing Board's two decisions denying Mr. Peterson's petitions to intervene. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000). Mr. Peterson's participation in this proceeding thereupon terminated.

On January 20, 2004, Mr. Peterson filed the instant Petition, requesting that the Licensing Board in this proceeding issue a license for his proposed Pigeon Spur Facility. For the reasons set forth below, Mr. Peterson's current Petition should be denied.

DISCUSSION

A. Mr. Peterson Lacks Standing to Request That Any Action Be Taken by the Licensing Board in This Proceeding.

As set forth above, the Licensing Board has previously denied Mr. Peterson's petitions for leave to intervene in this proceeding, and those decisions have been affirmed by the Commission. In his instant petition, he adds nothing that would alter the foregoing. Accordingly, Mr. Peterson lacks standing to participate as a party in this proceeding or to seek any relief or action by the Licensing Board herein. See 10 C.F.R. § 2.715(a); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 334 (1983).

Indeed, the Licensing Board in this proceeding has previously ruled against other requests for relief filed by Mr. Peterson, on this basis. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), Memorandum and Order (Ruling on Motions for Decision and for Appointment of Special Assistants)" (unpublished), slip op. at 1-2 (Sept. 26, 2000) (denying

Mr. Peterson's request that the Board appoint special assistants to arbitrate his dispute with the State of Utah over the licensing of his proposed Pigeon Spur Facility, finding that he "has no standing before the Board to seek such relief."). Mr. Peterson's current request for action by the Licensing Board should be resolved in the same manner.

B. The Licensing Board in This Proceeding Lacks Jurisdiction to Authorize a License for Any Facility Other than the PFS Facility.

This proceeding was commenced for one reason only: To consider the application filed by PFS to construct and operate an ISFSI on the Reservation of the Skull Valley Band of Goshute Indians, as specified in the Federal Register Notice published on July 31, 1997. *See* Notice, 62 Fed. Reg. at 41099 (1997).³ It is fundamental that the action described in the Federal Register Notice framed the issues to be considered in this proceeding -- and the Licensing Board lacks jurisdiction to consider any issues which are not embraced by that Notice. *See, e.g., Fansteel, Inc.* (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96, 100-01 (2003) (Bollwerk, J., declining to grant a hearing request on an application that had not been the subject of a notice of hearing, holding that "a presiding officer generally only has the jurisdiction and power that he or she is delegated by the Commission and . . . such delegation generally is made by the Commission's hearing or hearing opportunity notice"). *Accord, Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71, 173 (1976).

³ As the Licensing Board has previously stated in connection with Mr. Peterson's petition to intervene, "[t]he focus of this proceeding is the efficacy of the PFS application to construct and operate an ISFSI facility on the Skull Valley Band reservation." *PFS*, LBP-00-23, 52 NRC at 123.

Here, Mr. Peterson raises issues which do not relate to the PFS Facility, but relate solely to the Pigeon Spur Facility which he proposed to construct and operate at a distant site elsewhere in Utah. That facility is not the subject of this proceeding -- and indeed, following the Staff's rejection of his license application in 1999, that facility is no longer the subject of any NRC proceeding. Accordingly, the Licensing Board in this proceeding lacks jurisdiction to consider Mr. Peterson's Petition seeking a license for that facility.

C. The Licensing Board Lacks the Requisite Legal Authority to Award a License to Mr. Peterson.

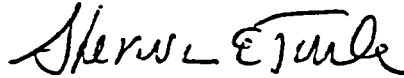
As Administrative Judge Bollwerk held in *Fansteel, supra*, a presiding officer's [or Licensing Board's] "jurisdiction and power" are limited to the authority which has been delegated to it by the Commission. Here, the Commission has delegated to the Licensing Board the authority to resolve contested issues raised by parties to the *PFS* proceeding, insofar as those issues pertain to the *PFS* application. See, e.g., 10 C.F.R. § 2.105(a)(7). No contested issues exist in this proceeding concerning the Pigeon Spur Facility, and the Board lacks the authority to consider, much less "grant", a license for that other facility in the absence of any pending license application or adjudicatory proceeding concerning that facility. Accordingly, the Licensing Board lacks the authority to take the action requested in the Petition, i.e., to award a license to Mr. Peterson.⁴

⁴ It is not altogether clear whether Mr. Peterson intended to file his Petition in the *PFS* proceeding or before the Atomic Safety and Licensing Board Panel independently from the *PFS* proceeding. In any event, however, the Licensing Board would lack the authority to take the action requested by Mr. Peterson, prior to the filing of that application and issuance of a notice of opportunity for hearing thereon. See 10 C.F.R. §§ 2.105(a)(7).

CONCLUSION

For the reasons set forth above, the Licensing Board should deny Mr. Peterson's Petition.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sherwin E. Turk".

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of January 2004



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20545-0001

72-23

January 8, 1998⁹

Attachment 1

Mr. William D. Peterson
P&A Engineers
2127 Lincoln Lane
Holladay, UT 84124

SUBJECT: APPLICATION INSUFFICIENT FOR REVIEW (TAC NO. L22767)

Dear Mr. Peterson:

The staff of the Nuclear Regulatory Commission (NRC) has completed an initial review of the October 19, 1998, application you filed for the Pigeon Spur Storage Facility. The staff finds this application insufficient for review in accordance with Chapter 10 of the Code of Federal Regulations (10 CFR Part 72).

The NRC staff believes that a valid quality assurance (QA) program is of great importance to the protection of public health and safety for all activities which fall under the Commission's purview. In Chapter 11 of the Safety Analysis Report (SAR), you claim to have an NRC-approved QA program. However, the program that you reference is the QA program for Private Fuel Storage, L.L.C. (PFS), another applicant for a license to construct and operate an away-from-reactor independent spent fuel storage installation. You cannot use the PFS QA program. A new organization, such as yours, must submit its own proposed QA program pursuant to Subpart G of 10 CFR Part 72.

In addition to the concern described above, the materials submitted in your application do not contain sufficient information to allow the staff to conduct an adequate and proper financial review as indicated in 10 CFR 72.22. To carry out its financial review, the staff needs a description of a company's financial structure, including the identification of senior management, directors, and key personnel. This information has not been provided. We must be able to review the proposed capital structure which should identify, exactly, sources of assets and liabilities. This information has not been provided. An applicant must provide a 20-year cash flow statement concurrent with the 20-year license. You have not provided these. If they exist, you must provide any memoranda of understanding from key financial players. You must identify who owns the land and casks (see comment below regarding cask vendors). You must provide clear, unambiguous information regarding decommissioning funding. You have not done so.

Finally, you reference in your application outdated versions of the SARs for the storage cask systems you plan to use at the proposed Pigeon Spur Storage Facility. The versions of the SARs for the Holtec HI-STAR/HI-STORM cask systems and the BNFL/Sierra Nuclear TranStor

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cask system are no longer valid. The information in the more recent versions of the SARs for both the Holtec and BNFL/Sierra Nuclear products differs significantly from the versions which you have referenced.

Each of the three examples cited above involves either incomplete or inaccurate information. You should be aware that the regulatory requirement at 10 CFR 72.11 states that information provided to the Commission by an applicant for a license "...shall be complete and accurate in all material respects."

For the reasons discussed above, the staff is rejecting your application and closing the associated TAC No. L22767. If you require any further information, you may contact Eric Leeds, Chief of the Spent Fuel Licensing Section, at 301 415-8540 or me at (301) 415-8518.

Sincerely,

ORIGINAL SIGNED BY /s/

Mark S. Delligatti, Senior Project Manager
Spent Fuel Licensing Section
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

Docket No.: 72-23

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| OFC | SFPO* | | SFPO* | | SFPO | SFPO | SFPO | SFPO |
| NAME | MSDelligatti:jh | | VLTharpe | | EJLeeds | SFSShankman | WFKane | |
| DATE | 01/5/99 | | 01/5/99 | | 01/7/99 | 01/7/99 | 01/8/99 | |

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September 2, 1999

Mr. William D. Peterson
P&A Engineers
2127 Lincoln Lane
Holladay, UT 84124

Attachment 2

SUBJECT: REPLY TO YOUR LETTER DATED AUGUST 6, 1999

Dear Mr. Peterson:

I am responding to your August 6, 1999, letter to Mark Delligatti. By Mr. Delligatti's January 8, 1999, letter to you, the U.S. Nuclear Regulatory Commission (NRC) staff rejected your application for a license for an away-from-reactor independent spent fuel storage installation in Box Elder County, UT. At that point, the staff ended its review of your application. The NRC staff will not undertake any further review activities associated with your project until such time as a new application (meeting the applicable requirements of 10 CFR 72.16 through 10 CFR 72.34) has been submitted. Please see details in our January 8, 1999, letter (enclosed).

Further, our review will not proceed until, pursuant to 10 CFR 170.41, any outstanding financial obligations incurred by P&A Engineers to NRC for the period of October 19, 1998, through January 8, 1999, have been resolved.

If you wish to discuss this further, I can be reached at (301) 415-8510. Questions about license fees should be directed to Mr. Doug Weiss at (301) 415-7348. The current amount owed was detailed in Invoice FL0223-99.

Sincerely,

ORIGINAL SIGNED BY /s/

Susan F. Shankman, Deputy Director
Licensing and Inspection Directorate
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

Docket No.: 72-23

Enclosure: As stated

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| OFC: | SFPO* | E | SFPO* | E | OGC* | E | SFPO* | E |
| NAME: | MSDelligatti | | VLTharpe | | ENJensen | | CRChappell | |
| DATE: | 8/16/99 | | 8/25/99 | | 8/25/99 | | 8/26/99 | |
| OFC: | OCFO | E | SFPO | N | | | | |
| NAME: | DDandole (via fax) | | SFShankman | | | | | |
| DATE: | 8/31/99 | | 9/2/99 | | | | | |

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PRIVATE FUEL STORAGE L.L.C.

(Independent Spent
Fuel Storage Installation)

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Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO WILLIAM D. PETERSON'S 'PETITION TO BOARD FOR LICENSE OF PIGEON SPUR INTERIM SNF STORAGE'" 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 27th day of January, 2003:

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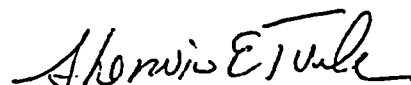
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