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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

OFFICE OF THE CLERK
RULES AND PRACTICE
ADJUTANT GENERAL

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22 - ISFSI
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S ANSWER TO PETITION TO INTERVENE AND
CONTENTIONS OF MR. WILLIAM D. PETERSON**

Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this answer to Mr. William D. Peterson's ("Mr. Peterson") Petition to Intervene, filed June 6, 2000 ("Peterson Pet."),¹ and Contentions, filed June 27, 2000 ("Peterson Cont.")² PFS submits this answer pursuant to the Licensing Board's Memorandum and Order (Setting Schedule for Supplement and Responses to Late-Filed Intervention Petition) dated June 7, 2000. PFS respectfully submits that the Board should deny Mr. Peterson's petition to intervene based on lateness, lack of standing, and absence of admissible contentions.

I. FACTUAL AND LEGAL BACKGROUND

Mr. Peterson states that he is the developer of a proposed Interim Spent Fuel Storage Installation ("ISFSI") to be located in Box Elder County, Utah. Mr. Peterson states that he began work on his ISFSI seven years ago and has sought unsuccessfully,

¹ "PETITION TO INTERVENE, Third Party COMPLAINT, for Intervener's use of State Law to deprive PFS and PSFSF of rights of Storage of SNF by Federal Law."

² "CONTENTIONS, Third Party COMPLAINT, INTERVENTION 10 C.F.R. § 2.714(b)(2), for Intervener's use of State Law to deprive PFS and PSFSF of rights of Storage of SNF by Federal Law." Mr. Peterson also filed on June 28, 2000 "ADDITIONAL CONTENTIONS, PETITION TO INTERVENE From Sept. 2, 1997, Complaint" ("Add. Peterson Cont."), which is apparently a copy of a 1997 complaint filed by Mr. Peterson against Governor Leavitt.

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beginning in 1997, to bring the matter before the Utah Division of Radiation Control. Peterson Pet. at 1-2. He further states that he submitted a license application to the NRC for his ISFSI which was assigned NRC Docket Number 72-23. *Id.* at 2.

PFS submitted its license application to develop the Private Fuel Storage Facility in June, 1997. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998) ("LBP-98-7"). In response to the submittal of the PFS application, on July 21, 1997, the NRC published a notice of opportunity for hearing in the Federal Register. 62 Fed. Reg. 41,099 (1997). The Federal Register notice required that all timely requests for intervention to be filed on or before September 15, 1997 and stated that a non-timely request "[would] not be entertained absent a determination" by the Board that it should be considered based on a balancing of the five late-filing factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Id.* Those factors include:

(1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

LBP-98-7 at 167; see also 10 C.F.R. § 2.714(a)(1)(i)-(v). Even if a non-timely filing is entertained following a balancing of the five factors, in order to be admitted as an intervenor to the proceeding, the petitioner must demonstrate that he has standing and that he has proffered at least one admissible contention. LBP-98-7 at 167-168.

On June 6, 2000, Mr. Peterson filed a petition to intervene in this proceeding. Peterson Pet. at 1, 15. Mr. Peterson's filing attempted to address the five late-filing factors in 10 C.F.R. § 2.714(a)(1), but did not provide a statement of contentions. See Board's June 7, 2000 Memorandum and Order at 1. The Board provided Mr. Peterson

until June 28, 2000 to provide a statement of contentions, as well as any additional information to establish his standing or compliance with the five late-filing factors. *Id.* On June 27, 2000, Mr. Peterson filed a statement of his proposed contentions but provided no additional information regarding his standing or the five late-filing factors in 10 C.F.R. § 2.714(a)(1). Peterson Cont. at 1.

II. ANALYSIS

A. Mr. Peterson's Request to Intervene is Unjustifiably Late

Because Mr. Peterson's petition to intervene was filed almost three years beyond the deadline specified in the NRC's notice of opportunity for hearing, Mr. Peterson must demonstrate that a balancing of the five factors in 10 C.F.R. § 2.714(a)(1)(i)-(v) weighs in favor of permitting late-filing in order for the Board to entertain his petition. Mr. Peterson does not make a convincing showing regarding the first and most important factor, good cause for late-filing. Federal Register notice is generally considered constructive notice to all residents of the United States. *See* 44 U.S.C. § 1508. Moreover, as the developer of an ISFSI since 1993, similar to the Private Fuel Storage Facility, Mr. Peterson has had actual knowledge for several years of the PFS License Application and subsequently related proceedings from the trade and other press.

Mr. Peterson's stated justification for his late-filing is that "[t]he intervention of Utah and Governor Leavitt changed the original proceeding, which change affects NRC Docket No. 72-23. . . ." Peterson Pet. at 10. Setting aside the fact that another party's intervention is not an appropriate trigger for the "good cause" test, the State requested to intervene in this licensing proceeding on September 11, 1997, and was granted intervenor status on April 22, 1998. LBP-98-7 at 142, 158. Thus, even assuming that the State's intervention is an appropriate trigger, Mr. Peterson's petition was still filed at least two years too late, with no justification for this delay. In a similar instance earlier in this proceeding, the Board found that a petitioner did not have good cause for late-filing

where the petition was filed four months too late, without justification. Id. at 172-173 (determination that SSWS had not demonstrated good cause for late-filing).

Lacking good cause for his late-filing, Mr. Peterson must make a particularly strong showing on the other four factors. See id. at 173. Regarding factor two, the availability of other means to protect the petitioner's interests, Mr. Peterson says nothing directly related to this factor. Peterson Pet. at 10. Because (as discussed in Section C, infra) Mr. Peterson's complaint lies with the policies and actions of Governor Leavitt and the State of Utah, rather than PFS, Mr. Peterson has other means – including State and Federal court litigation and the political process – available to protect his interests and to seek change of the State's policies and actions.

Regarding factor three, the extent to which the petitioner's participation may help develop a sound record, Mr. Peterson's filings do not suggest that his participation would help in developing a sound record in this proceeding. The contentions raised by Mr. Peterson do not concern issues that are subject to resolution by the NRC in connection with the licensing of the Private Fuel Storage Facility and would therefore not help to develop a sound record.

Regarding factor four, the extent to which the petitioner's interests will be represented by existing parties, Mr. Peterson states that both he and PFS are "contending with the 'policy' of no SNF transport or storage in Utah brought in by the intervenor Governor Michael Leavitt" and that he "will aid PFS" with respect to this "'policy' issue" Peterson Pet. at 11. Regardless of whether Governor Leavitt's "'policy' of no SNF transport or storage in Utah" underlies the State's intervention here, that policy is not the subject of this proceeding. Therefore, this is not the proper forum for Mr. Peterson to challenge the Governor's policies. To the extent that Mr. Peterson's interests include refuting the specific claims raised by the State in this proceeding and achieving

the successful licensing of the Private Fuel Storage Facility, those interests will be adequately represented by PFS.

Regarding factor five, the extent to which the petitioner's participation will broaden the issues or delay the proceeding, Mr. Peterson asserts, without justification, that the Governor's policy "more directly affects" his ISFSI (to be located on Utah land) and that therefore he "has a right" to pursue Governor Leavitt's policy "and bring the matter before the NRC judges." *Id.* This, he claims "will narrow the issues and speed up the proceedings." *Id.* (emphasis added). However, Mr. Peterson's pleadings demonstrate that allowing his intervention into this proceeding would unquestionably broaden the issues in this proceeding and complicate and delay this proceeding's completion.

Thus, none of the four remaining factors clearly weigh in favor of considering Mr. Peterson's late-filed request to intervene, and taken together the four factors fail to make the type of compelling demonstration that is necessary to overcome the lateness of Mr. Peterson's petition. Thus, Mr. Peterson has failed to establish, on balancing the five factors in 10 C.F.R. § 2.714(a)(1)(i)-(v), that his late-filed intervention petition should be accepted by the Licensing Board.

B. Mr. Peterson Does Not Have Standing

In order to determine whether or not a petitioner has standing, the NRC has applied contemporaneous judicial standing concepts that require a party to establish that:

- (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA));
- (2) the injury is fairly traceable to the challenged action; and
- (3) the injury is likely to be redressed by a favorable decision.

LBP-98-7 at 167-68 (emphasis added).

Mr. Peterson's petition states that he "has no dispute with the NRC's and PFS's efforts to site SNF storage on the Skull Valley Goshute Reservation." Peterson Pet. at 5-6 (emphasis added). Rather, his dispute is with Governor Leavitt and the State of Utah. Mr. Peterson alleges that he is being harmed by "Governor Leavitt's use of [Utah] State law to prevent storage of SNF in Utah." *Id.* at 5. The specific harm that Mr. Peterson will suffer from the State of Utah is identified as follows in his petition:

Mr. Peterson is...seeking a license [under 10 C.F.R. Part 72] in his application of NRC Docket No. 72-23. Mr. Peterson petitions for intervenor status in the matter of NRC Docket No. 72-22 where the proceeding of the Docket No. 72-22 matter affects the outcome in NRC Docket No. 72-23.

Id. at 6. Thus, the injury that Mr. Peterson is alleging from Governor Leavitt and the State of Utah, as it relates to Private Fuel Storage Facility licensing proceeding, is that the State's actions will establish precedents in this proceeding that could adversely affect Mr. Peterson's ability to license his proposed ISFSI. NRC case law establishes, however, that potential "bad precedent" cannot form the basis to establish standing as of right. General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996).

Because Mr. Peterson's concerns are with the policy and actions of Governor Leavitt and the State of Utah, Mr. Peterson also lacks standing because his alleged injury is not "fairly traceable to the challenged action" and is not "likely to be redressed by a favorable decision." See LBP-98-7 at 168. First, Mr. Peterson's alleged injury is traceable to Governor Leavitt and the State of Utah, not to PFS's License Application.³ Second, Mr. Peterson's alleged injury cannot be redressed by this Licensing Board

³ For instance, Mr. Peterson's petition states: "Specifically, intervening petitioner Peterson complains that Governor Leavitt state or governor 'policy' of not allowing the travel and storage of SNF in Utah is a use of Utah law to infringes [sic] upon Peterson rights in the Federal law to do his work of storage of SNF. Ref - Title 42 U.S.C. § 1983." Peterson Pet. at 11.

because the Board does not have the authority to direct the policies and actions of the State of Utah and its Governor.

Mr. Peterson's petition must be rejected therefore for lack of standing to intervene in this licensing proceeding.

C. Mr. Peterson Has Not Proffered an Admissible Contention

Mr. Peterson has not proffered any contentions admissible under the NRC's requirements for a litigable contention set out in 10 C.F.R. § 2.714(b)(2)(i)-(iii). None of Mr. Peterson's contentions show a genuine dispute with the Applicant, nor identify any alleged deficiency in the PFS License Application, as required by 10 C.F.R. § 2.714(b)(2)(iii) for an admissible contention. Nor has Mr. Peterson proffered any contentions taking issue with specific admitted contentions of the existing intervenors opposing the PFS License Application.⁴ Rather, Mr. Peterson's proposed contentions assert a number of disputes with the State of Utah, not concerned with the State's admitted contentions, which cannot serve as a valid basis for an admitted contention concerning the PFS License Application. This is clearly illustrated in the final paragraph of Mr. Peterson's contentions filing, which states in summary as follows:

27. a) Peterson complains against the State of Utah for monetary damages for interfering with storage of SNF in the amount of \$160 million, b) interfering with reprocessing of SNF damages in the amount of \$200 million, c) from work moving the Vitro tailings, for not having a proper payment bond and for withholding pertinent information \$16.2 million, and d) for allowing false filings in Ut Corp 118115 in Utah's Department of Commerce, Division of Corporations \$10 million, e) without interest applied, f) total \$386.2 million.

Peterson Cont. at 8.

⁴ See *Nuclear Engineering Company, Inc.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978); LBP-98-7, 47 NRC at 237-38.

Although Mr. Peterson's statement of proposed contentions includes 27 numbered paragraphs, only a small number of these include allegations in the nature of contentions. See Peterson Cont. at 2-8. Apart from paragraph 27, quoted above, these are essentially limited to the following:

9. a) With the matter determined by the DRC Board to have Federal primacy, b) the matter may not be seen by the Utah Legislature and the Governor, c) according to Utah law.
10. The Utah Legislature and Utah Governor have made unconstitutional law (law contrary to the law and rules of the U.S. NRC), ref Ut Code 19-3-105 and 19-3-301.
12. a) Where Utah's Governor is inhibiting storage of SNF by PFS in Tooele County and inhibiting storage of SNF by Peterson in Box Elder County as provided according to the Federal law, b) Utah's Governor is liable to PFS and c) liable to Peterson for damages, per Title 42 U.S.C. § 1983.
14. a) The Governor is making and implementing a "policy" against storage of SNF by PFS and Peterson which is unlawful, b) and for doing this the Governor is liable for damages.
19. On December 1, 1997, Peterson made formal application to Utah's Division of Radiation Control (DRC) Board for storage of SNF at Pigeon Spur. b) the DRC board has stalled acting on Peterson's application....g) Utah's delay has damaged Peterson in this in excess of \$160M[.]
20. On December 2nd, 1997, Peterson made formal application to Utah's Division of Radiation Control (DRC) Board for reprocessing of SNF. b) the DRC board has stalled acting on Peterson's application....g) Utah's delay has damaged Peterson in this in excess of \$200M.
22. ...d) Governor Leavitt and Dr. Neilson are wrongfully using NRC Docket No. 72-22 to fight against Peterson's solution for SNF in NRC Docket No. 72-23. e) Peterson has valid third party complaints in NRC Docket No. 72-22 against Utah and Governor Leavitt for their damages to Peterson and Pigeon Spur in NRC Docket No. 72-23.
24. ...m) [These actions] all stem from Federal money paid to Utah to Move the Vitro uranium tailings, where Utah did not properly bond the

project and Peterson was not paid for supplying equipment and doing the engineering for the moving of the uranium tailings. Peterson was not paid \$250,000 on the project and lost his \$7 million business.

Peterson Cont. at 3-8 (emphasis added). Mr. Peterson's dispute in these contentions is with representatives of the State of Utah. In none does Mr. Peterson allege a dispute with the PFS License Application. Nor does Mr. Peterson take issue with any contentions admitted by the Board for hearing in this proceeding. Therefore, none of the proposed contentions complies with the Commission's pleading requirements for an admissible contention.⁵

The Board should therefore deny admission of Mr. Peterson's proposed contentions for raising issues beyond the scope of this licensing proceeding and for lack of compliance with the Commission's pleading requirements for litigable contentions, 10 C.F.R. § 2.714(b)(2)(ii) and (iii).

III. CONCLUSION

For the foregoing reasons, the Board should deny Mr. Peterson's petition to intervene in this licensing proceeding.

Respectfully submitted,



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Dated: July 12, 2000

⁵ The Add. Peterson Cont. filed June 28, 2000 is apparently a copy of a complaint filed by Mr. Peterson against Governor Leavitt in 1997. It similarly does not allege a dispute with the PFS License Application or any admitted contention and, therefore, is also inappropriate for this forum.

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(Private Fuel Storage Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Answer to Petition to Intervene and Contentions of Mr. William D. Peterson 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 12th day of July 2000.

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