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Before the Atomic Safety and Licensing Board

OFFICE OF THE SECRETARY
REGULATORY AFFAIRS
ADJUDICATIONS STAFF

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

**APPLICANT'S RESPONSE TO WILLIAM D. PETERSON'S PETITION
FOR INTERVENTION INTO THE EIS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to Mr. William D. Peterson's "Petition for Intervention into the EIS," filed September 14, 2000 ("Petition"). Mr. Peterson seeks party status in this proceeding as a late-filing intervenor. Petition at 2. Mr. Peterson asserts that the Draft Environmental Impact Statement ("DEIS") for the Private Fuel Storage Facility ("PFSF") is deficient for failing to consider a site in Box Elder County, Utah as a potential alternative. *Id.* at 2-3. Mr. Peterson's petition also challenges claims made by the State of Utah and other individuals regarding spent fuel transportation and storage generally and the PFSF. *Id.* at 3-5. PFS respectfully submits that the petition to intervene should be denied based on lack of good cause for late filing of the contentions, lack of standing, and the absence of admissible contentions.

I. BACKGROUND

In June 1997, PFS filed its license application. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). The

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application included an Environmental Report (“ER”) in which PFS discussed potential alternative sites for the PFSF. ER Ch. 8. PFS initially considered 38 potential alternative sites for the facility. *Id.* at 8.1-2, Table 8.1-1; *see id.* § 8.1.3.1. PFS considered two sites in Utah, including the proposed Skull Valley site. *Id.* Table 8.1-1. Nevertheless, PFS did not consider, and the ER does not mention, a potential Box Elder County, Utah alternative site for the PFSF. *See id.*; *see also id.*, Rev. 0 (application as filed did not include Box Elder County, Utah site).

On June 23, 2000, the NRC Staff made the DEIS available to the public.¹ The DEIS discusses 38 potential alternative sites for the PFSF. DEIS at 2-33 to –34, 7-1 to –5; *see id.* App. F. These potential alternative sites are the same as the 38 sites PFS considered in the ER. *Compare* DEIS at 7-2 *with* ER Table 8.1-1. Like the ER, the DEIS discusses two sites in Utah, but does not mention a Box Elder County site. *Id.*

On June 5, 2000, Mr. Peterson filed a petition to intervene in this proceeding including contentions raising a variety of issues, mostly concerning actions taken and statements made by the State of Utah.² On August 31, 2000, the Atomic Safety and Licensing Board (“Licensing Board” or “Board”) denied the petition on the grounds that it was unjustifiably late, Mr. Peterson lacked standing to intervene, and Mr. Peterson’s contentions failed to raise a genuine dispute with PFS on a material issue of law or fact.³

¹ *See* 65 Fed. Reg. 39,206 (June 23, 2000) “Notice of Availability of Draft Environmental Impact Statement and Notice of Public Meetings for the Proposed Private Fuel Storage, L.L.C.; Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, UT.”

² *See* Petition to Intervene, Third Party Complaint for Intervenor’s Use of State Law to Deprive PFS and [Pigeon Spur Storage Facility] of Rights of Storage of Spent Nuclear Fuel by Federal Law (June 5, 2000) (“Initial Petition”).

³ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, ___ NRC ___ (August 31, 2000).

On September 7, 2000, Mr. Peterson filed comments on the DEIS with the NRC asserting that the Box Elder County site is superior to the PFSF Skull Valley site.⁴ On September 15, 2000, over 80 days after the DEIS had been made available to the public, and more than three years after PFS filed its license application, Mr. Peterson filed this petition to intervene with contentions that, *inter alia*, challenge the DEIS for failing to consider the Box Elder County site as a potential alternative for the PFSF. Petition at 3, 5. Mr. Peterson's contentions also challenge actions taken by the Governor of Utah, and statements made by Utah officials and private individuals concerning spent fuel transportation and storage. *Id.* at 3-4.⁵

II. DISCUSSION

In his petition, Mr. Peterson seeks the admission of environmental contentions more than 80 days after the NRC Staff published the PFSF DEIS and long after the information that assertedly supports Mr. Peterson's position was available to the public. Thus, Mr. Peterson's environmental contentions must be denied as unjustifiably late. Mr. Peterson's other contentions are also unjustifiably late and must be dismissed on those grounds as well as for failing to raise a genuine dispute with the Applicant on material issues of law or fact. Finally, Mr. Peterson lacks standing to intervene in this licensing proceeding.

⁴ Letter from William D. Peterson to Mark Delligatti, Senior Project Manager for the Box Elder Spent Fuel Storage Initiative (Sept. 7, 2000).

⁵ Mr. Peterson at several points in his petition suggests that he is seeking reconsideration of the Board's previous denial of his initial intervention petition. Petition at 2. However, he points to no alleged error in LBP-00-23 nor does he argue for the admission of his 27 contentions set forth in his Initial Petition. Rather, he sets forth and argues for the admission of new contentions in the Petition. Therefore, the Board should treat the Petition as a new, subsequent petition for intervention and not a request for reconsideration of LBP-00-23.

A. Mr. Peterson's Environmental Contentions Are Unjustifiably Late

Mr. Peterson's environmental contentions, Contentions 1 and 5, assert that the DEIS is deficient because it does not consider the Box Elder County site as an alternative site for the PFSF. Petition at 3, 5. These contentions must be dismissed. First, they were filed more than 80 days after the publication of the DEIS and second, they were filed long after the information that assertedly supports them was available to the public. Since Mr. Peterson provides no valid explanation for the lateness, and the other factors used by the Commission to determine the admission of late contentions do not provide compelling support for the admission of his environmental contentions, the contentions must be rejected.

1. The Environmental Contentions Are Late Without Good Cause

At the outset, the Licensing Board has clearly stated that "any contentions based on [the NRC Staff's DEIS] should be submitted no later than thirty days after [the] document[] [is] made available to the public." Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5. Even assuming that this Order did not apply to Mr. Peterson as a non-party, the Licensing Board has stated in other contexts that 45 days "approach[es] the outer boundary of 'good cause'" for a non-party petitioner. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47, aff'd, CLI-99-10, 49 NRC 318 (1999). Here, the DEIS was made available to the public on June 23, 2000 (65 Fed. Reg. at 39,206), while Mr. Peterson filed his petition on September 15, over 80 days later. Mr. Peterson claims that "[t]he NRC erred when it did not notify Peterson of consideration of the PSFSF [Box Elder] site." Petition at 3. NRC regulations, however, only require that the public availability of the DEIS be announced in the Federal Register; they do not

require the NRC to provide specific notice to private individuals who may be interested in the contents of the DEIS.

Second, and more importantly, Mr. Peterson's environmental contentions are late without good cause, in that Mr. Peterson could have raised them based on Applicant's ER, rather than waiting until the publication of the DEIS, in that neither document discusses the Box Elder site. Compare DEIS at 7-2 with ER Table 8.1-1. In fact, the information necessary for Mr. Peterson to have filed his environmental contentions has been available to the public ever since PFS filed its license application in June 1997, over three years ago. Because of this delay, the environmental contentions must be rejected.

NRC rules allow the filing of a new contention on the basis of the Staff's DEIS only "if there are data or conclusions in the [DEIS] that differ significantly from the data or conclusions in the applicant's [ER]." 10 C.F.R. § 2.714(b)(2)(iii). The Board has explained the rule previously as follows:

the Commission has stated "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected "to raise issues as early as possible"). And along this same line, a Licensing Board previously has indicated that where "a new contention purportedly is based on information contained in a document recently made publicly available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." LBP-98-29, 48 NRC 286, 292 (1998).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 307 (1999), review declined, CLI-00-2, 51 NRC 77 (2000). The Commission has explained that this standard applies with equal force to environmental contentions:

The rule [10 C.F.R. § 2.714(b)(2)(iii)] makes clear that to the extent that an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document. The NRC staff in its DE[IS] . . . may well take a different position than the applicant. 10 CFR 2.714(b)(2)(iii) explicitly recognizes for environmental matters existing precedent regarding the right to amend or supplement contentions based on new information. The Commission wishes to emphasize that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw, e.g., [Catawba], CLI-83-19, 17 NRC 1041 . . . , respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,172 (1989) (emphasis added).

Therefore, because the information necessary for Mr. Peterson to have filed his environmental contentions was available at the time the license application was filed three years ago, and no new information on which the contention is based is contained in the Staff's DEIS, the contentions are late without good cause.

2. The Other Factors Do Not Justify Admission of the Late-Filed Contentions

“In the absence of good cause, Mr. Peterson must make a compelling showing that the remaining four section 2.714(a)(1) factors outweigh factor one so as to favor admission.” LBP-99-43, 50 NRC at 315 (emphasis added). Those factors are: (ii) the availability of other means to protect the petitioner's interest, (iii) the extent to which petitioner will assist in the development of a sound record, (iv) the extent to which the

petitioner's interest will be represented by other parties, and (v) the extent to which admitting the contention will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1). Of those factors, the third and fifth are to be accorded more weight than the second and fourth. LBP-98-7, 47 NRC at 207-209.

At the outset, factor five clearly weighs against admitting Mr. Peterson's contentions in that he seeks to litigate new issues (i.e., the alleged superiority of the site for the Pigeon Spur Fuel Storage Facility to the Skull Valley site for the PFSF) that could raise numerous factual issues which would undeniably broaden and likely delay the proceeding. Mr. Peterson has made no compelling showing why, given his complete lack of good cause, that the Board should undertake the litigation of the lengthy issues that he seeks to raise to the detriment of the efficiency of this licensing proceeding and to PFS. As set forth below, he has identified neither standing nor any legally protectable interest in his intervention in this proceeding. Lacking such interest, factors 2 and 4, with the little weight to be accorded them, are of no avail to Mr. Peterson here. Further, although Mr. Peterson has filed lengthy attachments with his Petition attesting to the undeniable broadening of the issues that his intervention would cause, he has not shown how he would assist in the developing of a sound record. He has not identified who would testify on his behalf or what expertise they would bring to the issues that he seeks to raise.

Thus, the four factors taken together militate against admitting his contentions, and therefore clearly do not make the compelling showing required to overcome Mr. Peterson's lack of good cause.

B. Mr. Peterson's Other Contentions are Unjustifiably Late and Fail to Raise a Material Dispute with Applicant's License Application

Mr. Peterson raises three additional contentions in his Petition. In his second numbered contention, Mr. Petersen essentially restates his general complaint against the State of Utah, and related leaders and representatives, that was theme of the 27 contentions set forth in his Initial Petition. The third and fourth numbered contentions are later, more recent instances of statements made by State officials and others, unrelated to PFS and its License Application, with which Mr. Petitioner takes issue and seeks to litigate in this proceeding. For the reasons set forth in the Board's rejection of Mr. Peterson's Initial Petition, these contentions must be rejected for being unjustifiably late and failing to meet Commission requirements for the admission of contentions.

At the outset, Mr. Peterson's challenge to the course of State action referred to in these contentions comes more than 28 months after the admission of the State as an intervenor in this proceeding. Therefore, even assuming that the State's admission could be the trigger for judging Mr. Peterson's good cause, his Petition is exceedingly late with no justification for good cause provided. Equally important, these contentions, as those raised in his Initial Petition, seek to raise issues not currently before the Board, and not related to the PFS License Application, and would greatly broaden the issues of this proceeding and likely result in its delay. Thus, for reasons similar to those set forth by the Board in LBP-00-23, these contentions must be rejected for being unjustifiably late.

Further, and equally important, the contentions fail to meet the NRC's requirements for a litigable contention set out in 10 C.F.R. § 2.714(b)(2)(i)-(iii). None of these contentions shows a genuine dispute with the Applicant, nor identifies any alleged deficiency in the PFS License Application, as required by 10 C.F.R. § 2.714(b)(2)(iii) for

an admissible contention. Nowhere do the contentions controvert or raise any specific issue with respect to PFS's License Application as required by NRC regulation and precedent. Rather, they seek to litigate claims and differences that Mr. Peterson has with the State and others generally opposing the shipment and away from reactor storage of spent nuclear. Nor does Mr. Peterson provide a concise statement of alleged facts or expert opinion supporting the contention, on which he would rely in proving the contentions at hearing, also required by NRC regulation and precedent for the admission of a contention. Thus, similar to the reasons set out in LBP-00-23, the Board should also reject these contentions for failing to meet the Commission's requirements for the admission of contentions in NRC licensing proceedings.

C. 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.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 167-68 (1998) (emphasis added).

For the reasons set forth in the NRC Staff Response to William D. Peterson's Petition for Intervention into the EIS (September 21, 2000) ("NRC Staff Response"), Mr. Peterson has not established his standing to intervene in his proceeding. As stated by the Licensing Board in LBP-00-23, the "focus of this proceeding is the efficacy of the PFS

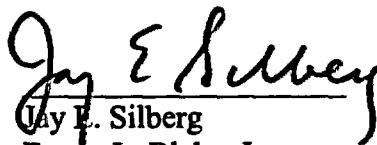
application to construct and operate an ISFSI facility on the Skull Valley Band reservation.” Slip op. at 9. As in LBP-00-23, Mr. Peterson “does not assert that his purported injury is a result of the PFS ISFSI application or its final outcome.” *Id.* Thus, “the injury of which he complains cannot be traced back to the PFS ISFSI application,” and 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. *Id.* (emphasis added). As stated in the NRC Staff Response (page), this would be true even if Mr. Peterson were to prove that his proposed Pigeon Spur Fuel Storage Facility were superior to the PFSF.

Thus, Mr. Peterson lacks standing to intervene in this proceeding and his Petition must therefore be denied.

III. CONCLUSION

For the foregoing reasons, the Applicant requests that the Board deny Mr. Peterson’s “Petition for Intervention into the EIS”.

Respectfully submitted,



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Dated: September 22, 2000

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to William D. Peterson's Petition for Intervention into the EIS 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 22nd day of

September 2000.

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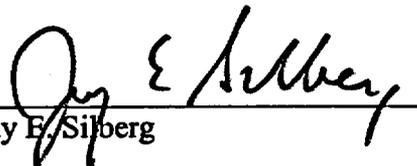
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