

RAS 2312

DOCKETED
USNRC

'00 OCT 20 P 4:42
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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S BRIEF ON APPEAL OF ORDER DENYING WILLIAM D.
PETERSON'S PETITION FOR INTERVENTION**

Template = SECY-021

SECY-02

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 2

III. LEGAL ARGUMENT..... 4

 A. The Licensing Board’s Decision to Deny Mr. Peterson’s Second Petition
 Was Correct and Should Be Affirmed 4

 1. Mr. Peterson Failed to Demonstrate His Standing..... 4

 2. Mr. Peterson Did Not Address the Late-Filed Intervention Criteria6

 B. In the Alternative Mr. Peterson’s Appeal Should Be Dismissed for
 Lateness and for Failing to Brief the Issues that Formed the Basis for the
 Board’s Denial of His First Petition..... 6

 1. Lateness.....7

 2. Failure to Brief Issues on Appeal.....8

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

<u>Baltimore Gas & Electric Co.</u> (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998).....	6
<u>Commonwealth Edison Co.</u> (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983 (1981).....	8
<u>Consumers Power Co.</u> (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982)	8
<u>Georgia Institute of Technology</u> (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).....	5
<u>General Public Utilities Nuclear Corp.</u> (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996).....	5
<u>Gulf States Utilities Co.</u> (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994)	5
<u>Ohio Edison Co.</u> (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), <u>aff'd on other grounds</u> , CLI-92-11, 36 NRC 41 (1992), <u>petition for review denied, sub nom. City of Cleveland v. NRC</u> , 60 F.3d 1561 (D.C. Cir. 1995)	5
<u>Philadelphia Electric Co.</u> (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985)	6
<u>Private Fuel Storage, L.L.C.</u> (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998).....	2
<u>Private Fuel Storage, L.L.C.</u> (Independent Spent Fuel Storage Installation), LBP-00-23, 53 NRC __ (August 31, 2000)	2, 5, 7, 8
<u>Public Service Electric and Gas Co.</u> (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 & n.7 (1981).....	8
<u>Yankee Atomic Electric Co.</u> (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).....	5

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2),
CLI-93-10, 37 NRC 192, 198 (1993).....8

CODES, STATUTES, REGULATIONS

10 C.F.R. § 2.714(b)(2).....2
10 C.F.R. § 2.714a(a).....7
10 C.F.R. § 2.771(a).....7
65 Fed. Reg. 39,206 (2000)2

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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S BRIEF ON APPEAL OF ORDER DENYING WILLIAM D.
PETERSON'S PETITION FOR INTERVENTION**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") respectfully submits this brief in opposition to the appeal of William D. Peterson¹ of the denial of intervention status to him by the Memorandum and Order (Denying Motion for Reconsideration/Intervention Petition) (unpublished), issued by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") on September 25, 2000 (hereinafter "Order"). The Applicant respectfully requests the Commission to affirm the determination of the Board that Mr. Peterson's petition did not warrant admitting him to this proceeding and deny Mr. Peterson's appeal.

¹ Appeal to the Commission for Intervenor Status (Response to 9/26/00 Action of NRC) (Oct. 6, 2000) ("Appeal").

II. STATEMENT OF THE CASE

In June 1997, PFS filed its license application for the Private Fuel Storage Facility (“PFSF”). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). The application included an Environmental Report (“ER”) in which PFS discussed potential alternative sites for the PFSF. ER Ch. 8. On June 23, 2000, the NRC Staff made the Draft Environmental Impact Statement (DEIS) for the PFSF available to the public.² The DEIS also discusses potential alternative sites for the PFSF. DEIS at 2-33 to -34, 7-1 to -5; see id. App. F.

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.³ On August 31, 2000, the Licensing 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. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC ____ (August 31, 2000).

² 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.”

³ 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) (“First Petition”). After he filed his First Petition, the Licensing Board gave Mr. Peterson additional time to file contentions and any additional information to establish his standing or compliance with the Commission’s late-filing factors. See Contentions, Third Party Complaint, Intervention 10 C.F.R. § 2.714(b)(2), for Intervenor’s use of State Law to deprive PFS and PSFSF of rights of Storage of SNF by Federal Law (June 27, 2000) (“Peterson Contentions”); Additional Contentions, Petition to Intervene From Sept. 2, 1997, Complaint (June 28, 2000) (“Add’l Peterson Contentions”).

On September 7, 2000, Mr. Peterson filed comments on the DEIS with the NRC asserting that a Box Elder County, Utah site that he has proposed for a spent fuel storage facility is superior to the PFSF Skull Valley site.⁴ The PFSF ER and the DEIS both considered two potential sites for the PFSF in Utah, but neither considered Mr. Peterson's Box Elder County site. Compare DEIS at 7-2 with ER Table 8.1-1. 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 a second petition to intervene with additional contentions that, inter alia, challenged the DEIS for failing to consider the Box Elder County site as a potential alternative for the PFSF.⁵ Second Petition at 3, 5. Mr. Peterson's additional contentions also challenged 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.

On September 25, the Licensing Board denied Mr. Peterson's September 15 (second) petition on the grounds that Mr. Peterson failed to address the standards for late-filed intervention and failed to demonstrate that he had standing to intervene. Order at 3. Because Mr. Peterson had stated that he was petitioning the Board for "reconsideration," the Board also considered Mr. Peterson's second petition as a motion for reconsideration of the Board's August 31 decision (LBP-00-23) which denied Mr. Peterson's June 5 (first) petition to intervene. Order at 2. The Board declined to reconsider LBP-00-23 on

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

⁵ Petition for Intervention into the EIS (Sept. 14, 2000) ("Second Petition").

the grounds that Mr. Peterson's second petition was filed more than 10 days after the Board's August 31 decision and that it did not satisfy the Commission's standards for reconsideration. Id.⁶

III. LEGAL ARGUMENT

PFS requests the Commission to affirm the Board's determination that Mr. Peterson has failed to demonstrate that he has standing to intervene as of right and that he failed to address the criteria for late intervention. In the alternative, if the Commission takes Mr. Peterson's appeal to be an appeal from the Licensing Board's denial of Mr. Peterson's first petition to intervene, in that the appeal follows from the Board's declining to reconsider its decision denying Mr. Peterson's first petition, the Commission should deny the appeal on the grounds of lateness and that Mr. Peterson does not brief the issues that formed the basis for the Board's denying his first petition.

A. The Licensing Board's Decision to Deny Mr. Peterson's Second Petition Was Correct and Should Be Affirmed

1. Mr. Peterson Failed to Demonstrate His Standing

On appeal, Mr. Peterson does not show that he has standing to intervene in this proceeding. Mr. Peterson asserts that he "has a stake in the outcome of the EIS," in that the State of Utah's actions may affect Mr. Peterson's development of his proposed Pigeon Spur Fuel Storage Facility in Box Elder County. Appeal at 2. He asserts that he may

⁶ Mr. Peterson pointed to no alleged error in LBP-00-23 nor did he argue for the admission of the 27 contentions set forth in his First Petition. See generally Second Petition; see also Order at 2.

need intervenor status to contend with the State's wrongful contentions and to require answers from the State in this proceeding. Id. at 3. He says nothing more, however, to show that he meets the NRC's standing requirements.

"In the absence of a clear misapplication of the facts or misunderstanding of law," a licensing board's determination regarding a petitioner's standing to intervene "is entitled to substantial deference." Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994); accord Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). As the Licensing Board pointed out in LBP-00-23, Mr. Peterson does not meet the NRC's requirements for standing. LBP-00-23, slip op. at 11 (citing Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)). Mr. Peterson's asserted injury arises not from the PFS license application, but from the actions of the State and its Governor. Appeal at 2, 3. His interest is akin to an interest to avoid "bad precedent" that might affect his Box Elder County proposal. Such injury, however, is insufficiently concrete to provide standing in PFS's licensing proceeding. General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996); Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 248-49 (1991), aff'd on other grounds, CLI-92-11, 36 NRC 41 (1992), petition for review denied, sub nom. City of Cleveland v. NRC, 60 F.3d 1561 (D.C. Cir. 1995). It also does not fall within the zone of interest arguably protected by the Atomic Energy Act or the National Environmental Policy Act. See Yankee Nuclear, CLI-96-1, 43 NRC at 6. Because Mr. Peterson's injury arises out of the conduct of the State and the Governor, it also is not

traceable to the PFS license application or the PFS facility and is hence not likely to be redressed by a decision of the Licensing Board. See id. Thus, the Board's decision should be affirmed.

2. Mr. Peterson Did Not Address the Late-Filed Intervention Criteria

Similar to his second petition, Mr. Peterson's appeal does not address the criteria for late intervention under 10 C.F.R. § 2.714(a)(1). He acknowledges that his petition was late and states that he has provided excuses, but he nevertheless does not address the section 2.714(a)(1) test. See Appeal at 4.

A licensing board has broad discretion in ruling on the section 2.714(a)(1) test for late-filed intervention or late-filed contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985). Its ruling will not be overturned unless no reasonable justification for it can be found. Id. As the Licensing Board stated, see Order at 3, the failure of a late petitioner to address the late-filing factors in section 2.714(a)(1) is grounds for dismissing the petition. Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998). Therefore, the Board's decision to deny Mr. Peterson's petition was correct and should be affirmed on this ground as well.

B. In the Alternative Mr. Peterson's Appeal Should Be Dismissed for Lateness and for Failing to Brief the Issues that Formed the Basis for the Board's Denial of His First Petition

In addition to denying Mr. Peterson's second petition on the grounds of failing to demonstrate standing and failing to address the standards for late-filed intervention, the

Board also treated Mr. Peterson's petition as a motion for reconsideration of the Board's earlier denial, in LBP-00-23, of Mr. Peterson's first petition to intervene. Order at 2-3. The Board declined to reconsider its decision. Id. at 2. If the Commission considers Mr. Peterson's appeal as an appeal from the Board's denial of his first petition to intervene, it should reject the appeal on the grounds that it is late and Mr. Peterson does not brief the issues that formed the basis for the Board's denial of his first petition.

1. Lateness

If Mr. Peterson's appeal is considered as an appeal from the Licensing Board's denial of his first petition, then it is late. The Board denied Mr. Peterson's first petition on August 31. LBP-00-23, slip op. at 1. Mr. Peterson filed his second petition, which the Board alternatively considered as a motion for reconsideration of its denial of his first petition, on September 15. Section II, supra. As the Board noted, that was 15 days after the Board's order and hence it was five days late. 10 C.F.R. § 2.771(a); Order at 2. The Board denied his second petition on September 25. Id. at 1. Mr. Peterson filed this appeal on October 6. Appeal at 1. That was 11 days after the Board's order and hence it was also one day late. 10 C.F.R. § 2.714a(a). More importantly, the lateness of Mr. Peterson's second petition (if considered as a motion for reconsideration) has effectively extended without authorization, by five days, the time for filing an appeal from the Board's August 31 denial of Mr. Peterson's first petition. Therefore, the appeal is late

and should be denied. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982).⁷

2. Failure to Brief Issues on Appeal

If Mr. Peterson's appeal is considered as an appeal from the Licensing Board's denial of his first petition, then it should also be dismissed for failure to brief the issues that formed the basis of the Board's denial. Failure to brief issues on appeal, even where the appellant is acting pro se, is grounds for dismissing the issues. Public Service Elec. and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 & n.7 (1981). "A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'" Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993).

In LBP-00-23, the Licensing Board dismissed Mr. Peterson's first petition on the grounds that (1) a balancing of the five factors of section 2.714(a)(1) did not support entertaining the petition; (2) Mr. Peterson did not establish his standing to intervene; and (3) Mr. Peterson did not present a litigable contention. LBP-00-23, slip op. at 1. On appeal, Mr. Peterson does not address the five factors of section 2.714(a)(1). See supra. Nor

⁷ While board consideration of an authorized and timely motion for reconsideration tolls the period for filing an appeal, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983 (1981), the Board's consideration of Mr. Peterson's second petition does not account for the five days by which it was late or the one day by which his appeal was late.

does he attempt to demonstrate his standing to intervene. Id. In his first petition, Mr. Peterson submitted 27 numbered contentions dealing primarily with his interactions with the State of Utah regarding his Box Elder County proposal. See Peterson Contentions. The contentions in Mr. Peterson's first petition did not assert that the Box Elder County site should have been considered as an alternative to the PFS site. See id. On appeal, Mr. Peterson addresses the Box Elder County site contention from his second petition but does not address any of the 27 contentions from his first petition. See Appeal at 2-4. Therefore, even if it is considered as an appeal from the Licensing Board's denial of his first petition, Mr. Peterson's appeal should be denied.

IV. CONCLUSION

For the reasons stated above, the Commission should deny Mr. Peterson's appeal.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

Dated: 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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Brief on Appeal of Order Denying William D. Peterson's Petition for Intervention" 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 16th day of October 2000.

Richard A. Meserve, Chairman
OCM/RAM
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 17-D1
Mail Stop 16 C1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: CHAIRMAN@nrc.gov

Edward McGaffigan, Jr., Commissioner
OCM/EXM
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 18-G1
Mail Stop 16 C1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmmcgaffigan@nrc.gov

Greta J. Dicus, Commissioner
OCM/GJD
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 17-D1
Mail Stop 16 C1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Jeffrey S. Merrifield, Commissioner
OCM-JSM
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 18-F1
Mail Stop 16 C1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmmerrifield@nrc.gov

G. Paul Bollwerk III, Esq., Chairman Ad-
ministrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Nils J. Diaz, Commissioner
OCM/NJD
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 18 E1
Mail Stop 16 C1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Office of the Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
One White Flint North, Rm. 14-G13
Mail Stop 16 C1
Washington, DC 20555-0001
email: rmf@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

* Susan F. Shankman
Deputy Director, Licensing & Inspection
Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety &
Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

*Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

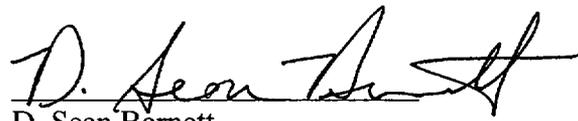
Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
e-mail: joro61@inconnect.com

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

William D. (Bill) Peterson
Pigeon Spur Fuel Storage Facility
4010 Cumberland Road
Holladay, Utah 84124
e-mail: BillPeterson@OlympicHost.com;
paengineers@juno.com

* By U.S. mail only


D. Sean Barnett