

September 21, 2000

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 FOR INTERVENTION INTO THE EIS"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedule for Responses to Petition and to Evidentiary Material Disclosure Request)" dated September 18, 2000, the staff of the Nuclear Regulatory Commission ("Staff") hereby submits its response to the September 14, 2000, "Petition for Intervention into the EIS" ("Second Petition"), filed by William D. Peterson ("Petitioner"). For the reasons set forth below, the Staff submits that Mr. Peterson's Second Petition 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 5, 2000 -- almost three years after the commencement of this proceeding -- Mr. Peterson filed his initial "Petition to Intervene" ("First Petition") herein.

On August 31, 2000, the Atomic Safety and Licensing Board (Board) denied Mr. Peterson's First Petition. See "Memorandum and Order (Denying Late-Filed Intervention Petition)," LBP-00-23, 52 NRC ____ (2000). 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). "Memorandum (Petitioner William D. Peterson's September 4, 2000 'Motion for Enlargement of Time')," dated September 5, 2000.

On September 14, 2000, Mr. Peterson filed the instant "Petition For Intervention Into the EIS (Responses to 9/5/00 Action of NRC Board)." Therein, Mr. Peterson appears to seek (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 Staff's June 2000 publication of a Draft Environmental Impact Statement ("DEIS") related to the proposed PFS facility.¹ In this regard, Mr. Peterson asserts that the June 2000 DEIS 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 files five new contentions in support of his intervention petition (*Id.* at 2-5).

¹ 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).

DISCUSSION

A. Mr. Peterson's Second Petition Should Be Denied as a Motion for Reconsideration.

While Mr. Peterson states that he seeks reconsideration of the Licensing Board's denial of his First Petition (Second Petition at 2), he fails to point to any error in the Licensing Board's consideration of that Petition. Rather, Mr. Peterson appears to reassert an issue which he had raised in his First Petition, viz, that the Governor of Utah has misled the public and adopted an incorrect policy concerning the storage of spent fuel (*Id.* at 3). These statements, however, merely reiterate or expand upon his previous statements, and fail to show that the Board's decision was erroneous. Accordingly, Mr. Peterson fails to show any grounds for "reconsideration" of the Licensing Board's prior decision.

Second, it is apparent that most of the matters raised in his Second Petition constitute new matters which were not included within his First Petition. In this regard, Mr. Peterson's Second Petition cites alleged deficiencies in the June 2000 DEIS, and statements made by Utah officials and other persons in August 2000 (*Id.* at 2-3, 4-5). These matters, however, relate to events which occurred after Mr. Peterson filed his First Petition (on June 7, 2000), and thus were not raised in his First Petition and were not discussed in the Board's decision denying that Petition.

Similarly, with respect to the Licensing Board's determination that he had failed to proffer an adequate contention in his First Petition (LBP-00-23, slip op. at 11-13), Mr. Peterson does not argue that the Board's ruling was erroneous but, instead, attempts to raise new contentions based on recent events. However, having failed to show any error in the Licensing Board's decision based on any facts or arguments he had made previously, the Second Petition fails to establish grounds for "reconsideration" of the Board's 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). Accordingly, his Second Petition fails to establish grounds for reconsideration of the Licensing Board's decision.

B. **Mr. Peterson's Second Petition Fails to Establish That It Should Be Granted as a Late-Filed Petition to Intervene.**

To the extent that the Second Petition may be considered to be a new petition for leave to intervene, it fails to establish good cause for its lateness, or that a balancing of the factors in 10 C.F.R. § 2.714(a)(1) weighs in favor of its admission.

First, Mr. Peterson has had actual or constructive knowledge of the PFS application since July 31, 1997, the date on which Notice of this proceeding was published in the Federal Register. Pursuant to that Notice, Mr. Peterson was required to file his petition by September 15, 1997 (62 Fed. Reg. at 41,099). In view of the continued lapse of time, his delay in filing the instant petition to intervene is even more pronounced and requires a clear showing of good cause for its lateness.

While Mr. Peterson seeks to justify his latest intervention effort by citing the June 2000 publication of the DEIS and statements made in August 2000 (Second Petition at 2-3, 4-5), those matters do not establish a new opportunity to intervene; nor is his three-year delay in filing excusable due to his asserted lack of experience "in dealing with the NRC for licensing," or any alleged deficiencies in his communications with NRC Staff members (*Id.* at 2). See generally, *Atlas Corporation* (Moab, Utah), LBP-98-18, 48 NRC 78, 81 (1998); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 116 (1983); *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Unit 1 and 2), LBP-79-16, 9 NRC 711, 714-15 (1979).

Nor do Mr. Peterson's references to the DEIS establish good cause for filing a petition to intervene at this time. While Mr. Peterson claims that the "NRC erred in not

considering the PSFSF in the DEIS . . . [and] in not informing Peterson” of this (Second Petition at 3), he is incorrect in his apparent belief that a new opportunity to intervene was created by these alleged facts.² Contrary to his apparent belief, a new proceeding has not been commenced to consider the Staff’s DEIS; rather, the DEIS relates to the Applicant’s license application (including its Environmental Report), which is the subject of this ongoing proceeding. While publication of the DEIS may support the filing of new contentions by admitted parties (or late petitioners who satisfy the requirements of 10 C.F.R. § 2.714(a)(1)), it did not create a new opportunity to request a hearing; moreover, even if it did, Mr. Peterson has failed to show good cause for waiting three months to file the instant Petition or that a balancing of the factors in 10 C.F.R. § 2.714(a)(1) supports his untimely intervention request.

In sum, the Licensing Board determined in LBP-00-23 (slip op. at 4-9), *inter alia*, that Mr. Peterson’s First Petition failed to establish good cause for its late filing or that a balancing of the factors in 10 C.F.R. § 2.714(a)(1) weighed in its favor. Nothing in Mr. Peterson’s Second Petition affects this determination.³

² Petitioner Peterson is also incorrect in his apparent belief that the Staff had an obligation to inform him personally of the issuance of the DEIS for the PFS facility, or to inform him that his proposed site was not addressed therein. Mr. Peterson fails to show any reasonable basis for these assertions.

³ Mr. Peterson’s statements could be viewed as comments on the adequacy of the DEIS (see Second Petition at 5). As such, they may be considered by the Staff regardless of whether his Second Petition is granted. Indeed, Mr. Peterson has filed substantially similar comments on the DEIS, including some “23 lbs 9.4 oz” of material. 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.

C. Mr. Peterson's Second Petition Fails to Establish His Standing to Intervene.

The Licensing Board has previously determined in LBP-00-23 that Mr. Peterson's First Petition failed to establish his standing to intervene in this proceeding. Significantly, the Board stated 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).

The Licensing Board's determination 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, in his Second Petition, on the Staff's publication of its 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, and his references to the DEIS and the Pigeon Spur site fail to establish his standing to intervene in this proceeding.

CONCLUSION

For the reasons set forth above, the Licensing Board should reject Mr. Peterson's Second Petition seeking leave to intervene in this proceeding.

Respectfully submitted,



Sherwin E. Turk
Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of September 2000

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO WILLIAM D. PETERSON'S 'PETITION FOR INTERVENTION INTO THE EIS'" 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 21st day of September, 2000:

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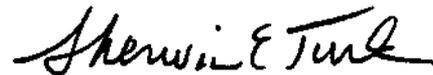
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