

February 19, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

February 19, 2004 (3:29PM)

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

NRC STAFF'S RESPONSE TO
WILLIAM D. PETERSON'S "NOTICE OF APPEAL"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a), the NRC Staff ("Staff") hereby responds to the "Notice of Appeal From Atomic Safety and Licensing Board" ("Appeal") filed by William B. Peterson on February 9, 2004.¹ Therein, Mr. Peterson requests Commission review of the Licensing Board's decision of January 30, 2004, denying his "Petition to BOARD for License of Pigeon Spur Interim SNF Storage" dated January 20, 2004 ("License Petition")² -- in which Mr. Peterson had requested that the Board issue a license for his proposed Pigeon Spur spent fuel storage facility in Box Elder County, UT, for a term of 300 years. See Notice of Appeal at 4, 5; License Petition at 1, 6, 8.

For the reasons set forth below, the Staff submits that the Licensing Board's decision was entirely correct, and Mr. Peterson has shown no error in the Board's decision or other grounds that would warrant reversal of the Board's decision rejecting his License Petition. Accordingly, the Licensing Board's Memorandum and Order of January 30, 2004 should be affirmed.

¹ To the extent that Mr. Peterson's Appeal may be construed to constitute a petition for review of the Licensing Board's decision under 10 C.F.R. § 2.786(b), the instant response should be viewed as a response in opposition to the Petition under 10 C.F.R. § 2.786(b)(3).

² See "Memorandum and Order (Dismissing Petition to License Pigeon Spur Interim Spent Nuclear Fuel Storage Facility" ("Memorandum and Order"), dated January 30, 2004.

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, 1997.³

On June 5, 2000, Mr. Peterson filed a late “Petition to Intervene” 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. 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 second petition in an unpublished “Memorandum and Order (Denying Motion for Reconsideration/Intervention Petition).” On September 28, 2000, Mr. Peterson filed a motion

³ “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”).

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 his License Petition, in which he requested that "the Licensing Board" issue a license for his proposed Pigeon Spur Facility for a term of 300 years. License Petition at 8. Mr. Peterson served his License Petition on the Licensing Board members designated to preside over the PFS proceeding. On January 30, 2004, after receiving responses to the petition from the Applicant and Staff,⁴ the Licensing Board in this proceeding issued its Memorandum and Order denying Mr. Peterson's License Petition. Therein, the Board held that Mr. Peterson's request is outside the scope of the Licensing Board's jurisdiction in this proceeding "which concerns whether a Part 72 license should be granted to PFS to construct and operate its proposed Skull Valley, Utah ISFSI facility," and the Board therefore lacks authority to entertain his petition. Memorandum and Order at 2. The Board further indicated that to the extent that its decision constitutes a ruling on an intervention petition, it may be appealed to the Commission within ten days after service thereof, pursuant to 10 C.F.R. § 2.714a(a). *Id.* at 3-4. Mr. Peterson then filed the instant Notice of Appeal.

⁴ See "NRC Staff's Response to William D. Peterson's 'Petition to Board for License of Pigeon Spur Interim SNF Storage,'" dated January 27, 2004 ("Staff Response"); and "Applicant's Response to Petition of William D. Peterson Regarding a License for the Pigeon Spur Interim Spent Nuclear Fuel Storage Facility," dated January 28, 2004.

DISCUSSION

I. Applicable Regulation Governing Consideration of Mr. Peterson's Notice of Appeal.

Pursuant to 10 C.F.R. § 2.714a(a), "an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order."⁵ Accordingly, to the extent that Mr. Peterson's License Petition may be deemed to constitute a petition for leave to intervene, his appeal would be governed by § 2.714a(a). See Memorandum and Order at 3-4.

II. The Licensing Board Correctly Ruled that It Lacked Authority to Consider Mr. Peterson's Petition for Issuance of A License.

In his License Petition, Mr. Peterson had requested that "the Licensing Board" issue a license to him to construct and operate a "spent fuel storage bank" at his proposed Pigeon Spur ISFSI site in Box Elder County, UT for a period of 300 years. License Petition at 1, 6, 8.⁶ In dismissing that petition, the Licensing Board observed that Mr. Peterson's License Petition did not concern the PFS facility, and was outside the scope of this proceeding:

Mr. Peterson's request is wholly outside the scope of this Board's jurisdiction (and seemingly that of the co-existing Licensing Board chaired by Administrative Judge Michael C. Farrar) relative to this proceeding, which concerns whether a Part 72 license should be granted to PFS to construct and operate its proposed Skull Valley, Utah ISFSI facility. As such, this Board is without authority to entertain Mr. Peterson's petition.

Memorandum and Order at 3.

⁵ In contrast, 10 C.F.R. § 2.786(b) establishes the appeal process for "a party" to an NRC proceeding, including petitioners for leave to intervene who have been granted intervenor status, on matter other than rulings on intervention petitions addressed in § 2.714a. See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC ____ (2003).

⁶ Mr. Peterson further requested, in the alternative, that if licensing his proposed facility is "not now possible, . . . that the [Department of Energy (DOE)] provide funds . . . to complete the Pigeon Spur license application, ref NRC Docket No. 72-23." License Petition at 8.

The Licensing Board's dismissal of Mr. Peterson's License Petition in this proceeding was entirely correct, and should be affirmed. 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).⁷ 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 lacked jurisdiction to consider any issues which are not embraced by that Notice. See, e.g., *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); *Fansteel, Inc.* (Muskogee, Oklahoma Facility), LBP-03-13, 58 NRC 96, 100-01 (2003).⁸

Here, Mr. Peterson raised 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. As the Licensing Board observed, no license application is currently pending for such a

⁷ 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.

⁸ In addition, as the Staff noted in its response to Mr. Peterson's License Petition, Mr. Peterson lacked the requisite standing to request that any action be taken by the Licensing Board in the PFS proceeding, inasmuch as he is not a party herein following the denial of this two petitions for leave to intervene. 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); *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).

facility. Memorandum and Order at 2 n.2.⁹ Accordingly, the Licensing Board in this proceeding lacked jurisdiction to consider Mr. Peterson's Petition seeking a license for that facility. This principle was succinctly summarized by the Appeal Board nearly 20 years ago, as follows:

Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings. Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act and use licensing boards "to conduct such hearings as the Commission may direct." The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them. The various hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985) (footnotes omitted). Here, the Commission delegated to the Licensing Board the authority to resolve contested issues raised in the *PFS* proceeding that 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 therefore lacked the authority to consider, much less "grant", a license for that other facility.

In his Notice of Appeal, Mr. Peterson restates many of the assertions made in his License Petition, concerning (a) the usefulness of his proposed 300-year storage facility, (b) the benefits that such a facility might have over an ISFSI licensed for 20 years or a permanent waste repository, (c) the advantages afforded by his proposed site, and (d) the need to solve the nation's nuclear

⁹ 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" to Staff Response of January 27, 2004). 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" to Staff's Response of January 27, 2004).

waste disposal "dilemma." Notice of Appeal, *passim*. Nowhere, however, does Mr. Peterson address the Licensing Board's determination that it lacked jurisdiction to consider his request that it issue a license for his proposed Pigeon Spur facility.

Significantly, Mr. Peterson does not address the jurisdictional determination which is central to the Board's decision, nor does he provide any reason to believe that some other tribunal should have considered his Petition. Rather, Mr. Peterson argues that the Board, rather than he, chose to address his Petition in the context of the PFS proceeding -- thus appearing to argue that he intended to file his Petition before the Atomic Safety and Licensing Board Panel independently from the Licensing Board in the PFS proceeding and that his Petition should have been considered in that context. See Notice of Appeal at 3, 6. However, if that was Mr. Peterson's intention, he failed to make that clear in his Petition -- and any consequence of that lack of clarity properly rests with him. Moreover, Mr. Peterson served his Petition on the three Licensing Board members designated to preside over the PFS proceeding; he repeatedly alluded to his previous efforts to intervene in that proceeding; and he argued that the Licensing Board in this proceeding should consider his proposed facility as an alternative to the PFS Facility. See License Petition at 3, 5, 6, 7, 8. Under these circumstances, it was entirely reasonable for Chief Administrative Judge Bollwerk to assume that Mr. Peterson intended to file his Petition before him as Chairman of the Licensing Board in the PFS proceeding.¹⁰

Finally, even if Mr. Peterson had intended to file his License Petition before the Atomic Safety and Licensing Board Panel independently from the *PFS* proceeding, it should have been dismissed. As set forth above, the Pigeon Spur facility is not the subject of any NRC license proceeding, following the Staff's rejection of Mr. Peterson's license application in 1999. As the


¹⁰ It is unclear whether Mr. Peterson contests the Board's determination to address his Petition in this proceeding. Although he asserts that the Board undertook to consider his License Petition in the PFS proceeding on its own, he simultaneously expresses his "support" for the Board's action in doing so. See Notice of Appeal at 3.

Staff has repeatedly advised Mr. Peterson (*see, e.g.*, License Petition at 7, *citing* letter from James R. Hall to Mr. Peterson, dated March 19, 2003), his application was rejected long ago -- and no further application has been submitted for his proposed facility. Accordingly, neither the Atomic Safety and Licensing Board Panel nor the Licensing Board in any existing NRC adjudicatory proceeding had jurisdiction to consider Mr. Peterson's request for issuance of a license, and the Licensing Board Panel would have had no authority to take the action requested by Mr. Peterson. *See* 10 C.F.R. §§ 2.105(a)(7). Thus, even if Mr. Peterson's Petition had been filed before the Licensing Board Panel rather than the Licensing Board designated to preside over the PFS proceeding, Chief Administrative Judge Bollwerk would have been obliged to dismiss the Petition as Chairman of the Licensing Board Panel.

CONCLUSION

For the reasons set forth above, the Commission should affirm the Licensing Board's Memorandum and Order dismissing Mr. Peterson's License Petition.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of February 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO WILLIAM D. PETERSON'S 'NOTICE OF APPEAL FROM ATOMIC SAFETY AND LICENSING BOARD'" 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 19th day of February, 2004:

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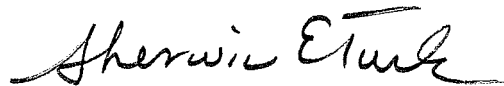
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