

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 11/17/00

COMMISSIONERS:

SERVED 11/17/00

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
)
Private Fuel Storage Facility)
_____)

Docket No. 72-22-ISFSI

CLI-00-21

MEMORANDUM AND ORDER

This case involves the application of Private Fuel Storage, L.L.C., ("PFS") for a license to build and operate an independent spent fuel storage installation ("ISFSI") in Utah. On August 31, 2000, the Licensing Board issued an order denying the late-filed intervention petition of William D. Peterson. See LBP-00-23, 52 NRC 114 (2000). The Board ruled that (1) a balancing of the five late-filing criteria of 10 C.F.R. § 2.714(a)(1) did not support granting the petition; (2) Mr. Peterson did not establish standing to intervene as a matter of right; and (3) Mr. Peterson did not present a litigable contention. Id. On September 15, 2000, Mr. Peterson filed a second petition -- this one seeking "Intervention into the EIS". On September 25, 2000, the Board denied the second petition in an unpublished memorandum and order. On October 6, 2000, Mr. Peterson filed an "Appeal to the Commission for Intervener [sic] Status." We affirm both Board orders, for the reasons given by the Board and for the reasons we set forth below.

I. BACKGROUND

Nearly three years after the deadline for filing timely intervention petitions, Mr. Peterson filed a petition to intervene in this matter (hereinafter "Peterson's First Petition").⁽¹⁾ He identified himself as an applicant for an ISFSI at Pigeon Spur, Utah, and stated that his interests were aligned with those of PFS against intervenor, the State of Utah. Pursuant to an order of the Board, he later filed twenty-seven numbered contentions dealing primarily with his problems with the State of Utah regarding his proposed Pigeon Spur facility. PFS and the NRC staff responded to Mr. Peterson's filings and asserted that his First Petition should be denied. The State of Utah did not file a response.

The Board denied Peterson's First Petition because he failed to establish (1) that good cause existed for the late filing of his intervention petition or that the other four elements of the late-filing balancing test of 10 C.F.R. §2.714(a)(1) provided compelling support for the admission of his petition;⁽²⁾ (2) that he will suffer an injury which falls within the zone of interests and which can be redressed by this proceeding so as to show he has standing as of right; and (3) that any of the "contentions" set forth are admissible in accordance with the requirements of 10 C.F.R. §2.714(b), (d). See LBP-00-23, 52 NRC 114 (2000).

Mr. Peterson's explanation for his delay in filing was that the intervention of the State of Utah changed the original proceeding and negatively affected his Pigeon Spur application. The Board found that, whether or not the intervention of the State of Utah is deemed an appropriate trigger for late filing, Mr. Peterson provided no justification for the two-year delay between granting intervenor status to the State and the filing of his First Petition. The Board applied the other four elements of the balancing test for late intervention and concluded that Mr. Peterson had other means to challenge the State of Utah's policies; that his participation would not help to develop a sound record; that his interests would be adequately represented by PFS; and that his participation would broaden or delay the instant proceeding. See 10 C.F.R. § 2.714(a)(1)(ii)-(v). The Board further concluded that Mr. Peterson failed to establish standing because he asserted that the actions of Utah and its governor, not the PFS application for a license, would cause him injury. Similarly, the Board ruled that Mr. Peterson's contentions were inadmissible, primarily because they showed no genuine dispute with PFS.

Peterson subsequently filed a document entitled "Petition for Intervention into the EIS" (September 15, 2000) (hereinafter "Peterson's Second Petition"), which included five new "contentions" and a request for reconsideration of LBP-00-23.⁽³⁾ Both PFS and the NRC staff responded, requesting denial of the petition. The State of Utah did not respond. On September 25, 2000, the Board issued its unpublished Memorandum and Order, Denying Motion for Reconsideration/Intervention Petition

("Sept. 25 Order"). The Board noted that Peterson's Second Petition could be interpreted either as a motion for reconsideration of the Board's August 31, 2000, decision or as a new petition to intervene. Under either interpretation, the Board rejected the pleading.

Initially, treating Peterson's Second Petition as a Motion for Reconsideration, the Board found that it failed for two reasons. First, the Board found the motion untimely because a petition for reconsideration of a final decision must be filed within ten days of the date of the decision. See 10 C.F.R. § 2.1259(b), incorporating by reference 10 C.F.R. § 2.771. Second, the Board noted that reconsideration motions are an opportunity to request correction of a Board error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper. See *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, CLI-97-2, 45 NRC 3,4 (1997). Peterson's Second Petition did not address any error of the Board; rather, Mr. Peterson attempted to introduce matters related to a DEIS that was issued after he had filed his First Petition. In the Board's view, "[Mr.] Peterson has provided nothing that gives the Board reason to take ... action." See Sept. 25 Order, slip op. at 2.

The Board ruled that Peterson's Second Petition could not be considered a valid new petition to intervene regarding the DEIS. Taken as such, the Board ruled, Peterson's Second Petition was inexcusably late⁽⁴⁾ and did not establish good cause for lateness or address the other late-filing factors set forth in 10 C.F.R. § 2.714. Further, the Board pointed out that Peterson's Second Petition neither established standing⁽⁵⁾ nor set forth any admissible contentions.⁽⁶⁾

Mr. Peterson submitted this appeal "for intervener [sic] status" in response to the Board's denial of his Second Petition.⁽⁷⁾

II. DISCUSSION

We affirm. The Board's handling of Mr. Peterson's petitions was entirely reasonable. Mr. Peterson did not describe in any pleading a legally cognizable interest in the PFS proceeding or propose an admissible contention. Nor did he provide good cause for failure to file on time or provide a clear statement of how his participation would contribute to the proceeding. His failure to articulate a legal theory supporting his intervention is fatal to his cause. Mr. Peterson's brief on appeal points to no error of law or abuse of discretion which might serve as grounds for reversal of the Board's decision. See, e.g., *International Uranium Corp. (White Mesa Uranium Mill)*, CLI-98-6, 47 NRC 116, 118 (1998); *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 201 (1998).

III. CONCLUSION

We affirm the Licensing Board's rulings denying Mr. Peterson's intervention requests. We specifically approve both the Board's reasoning and its result.⁽⁸⁾

IT IS SO ORDERED.

For the Commission

[Original signed by Annette L. Vietti-Cook]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of November, 2000.

1. See *Petition to Intervene, Third Party Complaint, for Intervener'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).

2. The five factors are (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 interests will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. See 10 C.F.R. § 2.714(a)(1).

3. Two of the "contentions" were based on the NRC staff's draft environmental impact statement ("DEIS") for the proposed ISFSI that is the subject of this proceeding. See "Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Nuclear Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians," NUREG-1714 (June 2000). The DEIS did not consider the Pigeon Spur site as an alternative. The other three contentions relate to Mr. Peterson's general complaints against the State of Utah and to statements of Utah officials and others regarding storage of spent nuclear fuel.

4. The NRC Staff made the DEIS available to the public on June 23, 2000. See Fed. Reg. 39,206 (June 23, 2000). Thirty-eight potential alternative sites for PFS's ISFSI are discussed therein. Although the Pigeon Spur site advocated by Mr. Peterson is not

addressed, the potential alternative sites are the same as those considered in the environmental report filed by PFS with its license application in June, 1997. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). Peterson's Second Petition was filed more than 80 days after the DEIS was publicly noticed and more than three years after the information became available in this proceeding.

5. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).
6. New environmental contentions based on the Staff's DEIS are permitted if data or conclusions in the DEIS differ significantly from the applicant's environmental report. 10 C.F.R. § 2.714(b)(2)(iii). See n. 4.
7. Mr. Peterson also filed an unauthorized reply brief. See Reply - Appeal to the Commission for Intervener Status (Response to 10/16/00 Actions of the NRC Staff and PFS attorneys) (October 28, 2000); 10 C.F.R. § 2.714a(a).
8. See LBP-00-23, 52 NRC 114 (2000); Order Denying Motion for Reconsideration/Intervention Petition (unpublished)(Sept. 25, 2000).