

11 IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

OHNGO GAUDADEH DEVIA  
Petitioner

v.

U.S. NUCLEAR REGULATORY COMMISSION  
and the UNITED STATES OF AMERICA<sup>1</sup>  
Respondents.

No. 02-9583

MOTION OF THE NUCLEAR REGULATORY  
COMMISSION TO HOLD CASE IN ABEYANCE  
AND TO SUSPEND THE DEADLINES FOR FILING  
THE CERTIFIED LIST OF THE AGENCY RECORD  
AND RESPONDING TO MOTION OF  
PRIVATE FUEL STORAGE, L.L.C.,  
TO DISMISS FOR LACK OF JURISDICTION

Ohngo Gaudedeh Devia ("OGD") petitions this Court for review of a decision of the Nuclear Regulatory Commission ("NRC") disposing of an "environmental justice" contention raised by OGD in the NRC administrative licensing proceeding below. The United States Nuclear Regulatory Commission ("NRC") respectfully moves that this case be held in abeyance pending a final NRC licensing decision disposing of all of the contentions in the NRC administrative proceeding.

In conjunction with our request to hold this case in abeyance, we also request that this Court suspend the associated filing deadlines, including the deadline for filing a certified list of the agency record (currently due Jan. 10, 2003) and any applicable deadline for responding to the "Motion to Dismiss for Lack of Jurisdiction" filed on Dec. 16, 2002 by Private Fuel Storage, L.L.C. ("PFS") (currently due Dec. 24, 2002).<sup>2</sup> We have consulted with counsel for petitioner

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<sup>1</sup>By statute, the United States is a party to judicial challenges to NRC decisions. See 28 U.S.C. § 2344. Even though the petition for review does not formally mention the United States, we have added the United States to the caption.

<sup>2</sup>PFS submitted a Notice of Intervention with this Court dated Dec. 11, 2002. To our knowledge, however, this Court has not yet acted on PFS's notice.

and PFS, indicating our intent to file this motion. We understand that as of the time of this filing petitioner's counsel was still awaiting a response from his client. Counsel for PFS has authorized us to state that PFS does not oppose the motion.

The pertinent background, and our reasons for seeking to hold this case in abeyance and to suspend the associated filing deadlines, are as follows.

1. The NRC administrative proceeding below concerns a license application filed by PFS to construct and operate a temporary facility for storing spent nuclear fuel on Indian land in Utah. The Atomic Safety and Licensing Board ("Licensing Board"), a trial level board, admitted numerous contentions by various parties for a formal adjudicatory hearing on PFS's license application.<sup>3</sup> Therefore, OGD's environmental justice-related contention was only one of multiple contentions admitted for adjudication in the PFS licensing proceeding.

2. The NRC decision that is the subject of OGD's petition for review in this case is the outcome of an interlocutory review by the full Commission focused specifically on a Licensing Board ruling concerning OGD's contention. The administrative proceeding on the numerous other admitted contentions regarding PFS's license application is still ongoing. The parties below are currently awaiting an initial decision by the Licensing Board on those remaining contentions, which will be subject to review by the Commission.<sup>4</sup> The issuance of a final agency decision granting or denying PFS's license application, then, will mark the

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<sup>3</sup>See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 251 (1998).

<sup>4</sup>10 C.F.R. § 2.786. December 18, 2002 In addition, any initial Licensing Board decision granting PFS a license for the construction and operation of an away-from-the-reactor temporary spent fuel storage facility will become effective only upon order of the Commission. 10 C.F.R. § 2.764(c).

commencement of the period for seeking judicial review of the agency's final disposition of all contentions in support of its ultimate licensing decision.<sup>5</sup>

3. We believe that it would be in the interests of efficiency and judicial economy for the Court to hold this case in abeyance, including suspension of the associated deadlines for filing the certified index and responding to PFS's motion, pending a final agency decision on PFS's license application. In the event that PFS's application is ultimately denied by the agency, OGD's petition for review would be made unnecessary. And, in the event that PFS's license application is ultimately granted, this Court would have the option of consolidating OGD's petition for review with all of the other review petitions that are filed and perfected at that time, thus facilitating comprehensive review of all issues associated with the NRC's licensing decision at the same time in a single case. Moreover, we do not anticipate that holding this case in abeyance will lead to significant delays in its resolution or that the case will be put off indefinitely. The Licensing Board is expected to issue its initial decision in the mid to late January 2003 time frame,<sup>6</sup> an indication that the administrative process on PFS's license application is nearing its conclusion.

4. PFS has moved to dismiss OGD's lawsuit for lack of a final agency decision. Holding the case in abeyance pending a final NRC licensing decision would conserve judicial resources by allowing this Court to avoid deciding whether there is any legal basis for reviewing OGD's claim independently, separate from the pending NRC licensing decision.

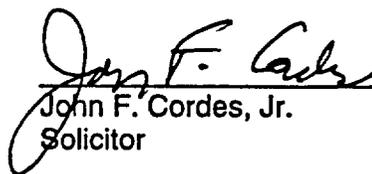
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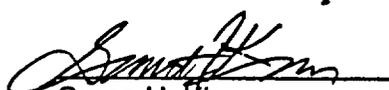
<sup>5</sup>We should also note that, as a technical matter, the Commission's ruling on OGD's contention has not been finalized, as the Board has not yet granted summary disposition in favor of PFS as directed by the Commission. See Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-02-20, slip op. at 18 (Oct. 1, 2002).

<sup>6</sup>Order Regarding Evidentiary Record and Timing of Decision, at 7 (Dec. 11, 2002) (copy attached).

For the foregoing reasons, the NRC respectfully requests that this Court hold this case in abeyance and suspend the deadline for filing the certified index of the record and responding to PFS's Motion to Dismiss for Lack of Jurisdiction. The NRC will file a motion with this Court upon issuance of a final licensing decision. At that time, in consultation with the other parties, we will propose that the current lawsuit be reactivated or terminated, as appropriate.

Respectfully submitted,

  
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Solicitor

  
Grace H. Kim  
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Dated: December 20, 2002

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 12/11/02

SERVED 12/11/02

Before Administrative Judges:

Michael C. Farrar, Chairman  
Dr. Jerry R. Kline  
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

December 11, 2002

ORDER REGARDING EVIDENTIARY RECORD  
AND  
TIMING OF DECISION

A. Over the course of the several months since the hearings in this matter were concluded, the parties have filed several joint motions related to the status of the evidentiary record on both the seismic and the aircraft issues. Those motions dealt with the admission of certain Exhibits, the correction of the Transcript, and other similar matters that needed to be resolved before the record could be deemed to correctly reflect the evidence adduced and the Board's rulings thereon, and thus to provide a reliable basis for review by the Commission and by any other appellate tribunals that may eventually become involved. To the same effect, the Board and its staff have also been reviewing for accuracy and completeness the materials in the record prepared by the court reporters.

In response to the parties' motions and in light of our own efforts, it is now appropriate to take or to record the following steps so as to complete the formal preparation of the evidentiary record:

1. On July 31, 2002, counsel for the Applicant filed on behalf of all parties a "Joint Report on Status of Utah Contention L/QQ Exhibits and Other Open Items . . ." that included, in addition to concerns about the seismic Exhibits, concerns about other matters including the court reporter's binding of pre-filed testimony into the Transcript. In accordance with the requests in that Joint Report, we take or record the following steps:

- The reference on Transcript page 10549, line 4 to Exhibit 86B is deemed changed to 86C.
- The references on Transcript page 10837, lines 2 and 7, to Exhibit III are deemed changed to GGG.
- On Transcript page 12566, the words "admit PFS Exhibit Nos. 241, 242, and 243" are deemed inserted at the end of line 22.
- State Exhibit 197, admitted as a confidential document (Tr. 9781), is replaced by the two documents accompanying the motion: State 197A, which contains all the non-confidential portions of Former Exhibit 197 and which may be made public; and State 197B, which contains the three-page EPRI report summary and is to be treated as confidential.
- The newly-provided PFS Exhibits 247 and 248 ( the initial exemption request and the subsequent modification, respectively) are admitted into evidence, as contemplated at Transcript 13522-23 and 13719.
- The tabular listing on page 3 of the July 31, 2002 Joint Report is accepted as identifying all the Exhibits (including those admitted, not admitted, and withdrawn) with proprietary status, which are to be maintained as confidential. Other proprietary documents distributed to the Board and the parties during the course of the proceeding but not made Exhibits are also to be maintained as confidential.

- The Applicant's pre-filed Trudeau-Wissa "Joint Testimony" that was intended to be inserted at Transcript 10834 has since replaced in the official record the "Deposition Transcripts" that had been mistakenly inserted at that point.
- The State's pre-filed Resnikoff testimony on radiation dose consequences and pre-filed Bartlett testimony on design conservatism, intended to be inserted in the Transcript at pages 12349 and 12776, respectively, but mistakenly omitted, have since been bound in the official record at those points.

2. On August 21, 2002, counsel for the Applicant filed on behalf of all parties a "Joint Report on Status of Utah Contention K Exhibits and Other Open Items . . ." that included, in addition to concerns about the aircraft Exhibits, concerns about other matters including the court reporter's binding of pre-filed testimony into the Transcript. In accordance with the requests in that Joint Report, we take or record the following steps:

- PFS Exhibits 79 and 83 are admitted without objection.
- State Exhibits 151, 154, and 157 are admitted without objection.
- PFS Exhibit QQQ, to which the State objected and which was in effect superseded by later, more complete documents (and to which no party referred in its post-trial briefs) is not admitted.
- PFS Exhibit 102 is admitted over the State's objection.
- PFS Exhibits WWW, XXX, YYY, and ZZZ are e-mail accounts of pilot action. Those accounts that were submitted directly by the pilot (XXX and the second portion of YYY) are admitted notwithstanding their hearsay character and notwithstanding the Board's suggestion during the trial that in some instances pilots testify in person rather than through hearsay accounts; those accounts that involve indirect reports by persons other than the pilot involved (WWW, the first portion of YYY, and ZZZ) are not admitted.

- **State Exhibit 224 is admitted in order that excerpts from all the relevant manuals will be before the Board. See footnote 1 on page 3 of the Joint report. (In light of the first full sentence on page 3 of the Joint Report, the Board would entertain a motion for reconsideration of this ruling, but such a motion would need to be extraordinarily well-founded in order for the Board to depart from the principles concerning the admissibility of evidence it attempted to apply in a consistent manner throughout the proceeding.)**
- **The additional changes and deletions made by the Applicant to PFS Exhibit O, in order to complete its implementation of prior Board rulings, are accepted; the replacement pages have been placed in the official record.**
- **The applicant's pre-filed Cole/Jefferson/Fly testimony (and the summary identifying the principal witness responsible for each answer), pre-filed Vigeant testimony, and pre-filed Johns testimony, intended to be inserted in the Transcript at pages 3061, 3090, and 3206, respectively, but mistakenly omitted, have since been bound in the official record at those points.**
- **The State's pre-filed Horstman testimony, intended to be inserted in the Transcript at page 4214 but mistakenly omitted, has since been bound in the official record at that point.**
- **The Staff's pre-filed Campe/Ghosh testimony, intended to be inserted in the Transcript at pages 4078 but mistakenly omitted, has since been bound in the official record at that point.**
- **The State's July 1, 2002 cross-examination of the Applicant's rebuttal witnesses, mistakenly omitted from the Transcript beginning at page 13113, has since been provided and included in an amended official Transcript.**

- The material on jettisoned ordnance consequences referred to in the last two paragraphs of the Joint Report (pages 5-6) is stricken, in keeping with the thrust of the Board's ruling on the In limine motions and the position of the Staff and the State as recounted in the Joint Report. Specifically, the stricken material includes the following items: the second paragraph (except for the first two sentences) on page 112 of the Cole/Jefferson/Fly testimony; the corresponding material on page 38 of PFS Exhibit O; State Exhibits 62 and 63; and Question and Answer 74 of the Horstman testimony.

3. The parties filed on December 4, 2002 Proposed Joint Corrections to the Transcript of testimony on Contention Utah K, dealing with aircraft issues. The parties represented therein that "given the size of the transcript, the parties have not attempted to undertake a comprehensive identification and listing of every potential correction to the transcript," going on to explain that they "have not sought to identify and correct obvious typographical or spelling errors." They further represented that they were "aware of no contested issue of fact whose resolution turns on a proposed correction to the transcript." On those understandings, the proffered corrections are accepted and the Transcript is deemed revised accordingly.

4. The parties filed on December 6, 2002 Proposed Joint Corrections to the Transcript of testimony on Contention Utah L/QQ, dealing with seismic issues. The parties made essentially the same representations therein that they did on the aircraft transcript, reflected in ¶ 3, above. On that understanding, the proffered corrections are accepted and the Transcript is deemed revised accordingly.

B. We believe that the above steps allow for the formal closing of the evidentiary record in appropriate fashion. But given the volume and complexity of the record, and the many external and internal organizations involved in creating, transmitting and filing that record, if it

appears that additional measures must be taken, or controversies resolved, to put the record in a proper state, the parties should bring those matters to our attention. For instance, if the manner in which the Transcript recorded the Board's countless questions, comments and rulings over the course of the nine-week hearing becomes both in dispute and of significance, the parties can seek the Board's help to resolve the matter. In that regard, the Board wishes again to compliment counsel for all the parties for the many ways in which they were able to work cooperatively during the course of the proceeding to agree upon or otherwise to resolve procedural matters and thus to keep those matters from consuming time and effort better devoted to substantive issues.

C. The post-trial briefing schedule established at the conclusion of the hearing was later slightly altered (at the request of the State in one instance and the NRC Staff in another), such that the last briefs were received on October 16 rather than on the originally-contemplated October 7. (In that regard, the three parties' opening and reply briefs on the two safety issues before us total over 2,000 pages;<sup>1</sup> the earlier briefs on the environmental issue involving rail-line alternatives were considerably shorter.) As the parties are aware, the Commission has urged Presiding Officers, as a general matter, to render decisions within 60 days of the filing of the last briefs in a proceeding.<sup>2</sup> Under that timetable, the Board's decision would have been expected by mid-December, 2002.

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<sup>1</sup> The average length of those twelve briefs was just under 170 pages. The longest was the Applicant PFS's 337-page opening brief on seismic issues; the shortest was the State's 57-page reply brief on aircraft issues.

<sup>2</sup> Specifically, in its Statement of Policy on Conduct of Adjudicatory Proceedings (CLI-98-12, 48 NRC 18, 20-21 (1998)), the Commission, after noting that throughout the proceeding schedules for prompt decisions should give "due regard to the complexity of the contested issues and the interests of the parties," went on to "strongly encourag[e] presiding officers to issue decisions within 60 days after the parties file the last pleadings . . . ."

Although decision drafting has been proceeding at a considered pace, and has been conducted with the Commission's guideline in mind, it has become apparent that the mid-December target is unattainable, given the bulk, complexity and significance of the case. To allow the parties to plan their year-end staffing needs, they are advised that a decision will not be issued before mid to late January, 2003.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RAJ*

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Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 11, 2002