

January 17, 2003

Patrick J. Fisher, Jr., Clerk  
U.S. Court of Appeals for the Tenth Circuit  
Office of the Clerk  
Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257

RE: Ohngo Gaudadeh Devia v. NRC, Case No. 02-9583

Dear Mr. Fisher:

Please file the enclosed "Reply of the Nuclear Regulatory Commission to Petitioner's Response to 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." We have submitted an original and three copies. Kindly date stamp the enclosed copy of this letter to indicate the date of receipt and return it to me in the enclosed envelope, postage pre-paid, at your convenience.

All correspondence to the NRC's Solicitor should be addressed to: John F. Cordes, Solicitor, Office of the General Counsel, U.S. Nuclear Regulatory Commission, O-15D21, Washington, D.C. 20555.

Thank you for your assistance.

Sincerely,

*/RA/*

Grace H. Kim  
Senior Attorney  
Office of the General Counsel

Enclosure: As stated

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

OHNGO GAUDADEH DEVIA	)	
Petitioner	)	
v.	)	No. 02-9583
U.S. NUCLEAR REGULATORY COMMISSION	)	
and the UNITED STATES OF AMERICA	)	
Respondents.	)	

REPLY OF THE NUCLEAR REGULATORY COMMISSION  
TO PETITIONER'S RESPONSE TO 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

By motion dated December 20, 2002, the Nuclear Regulatory Commission ("NRC") requested that the Court hold this case in abeyance and suspend associated filing deadlines pending a final NRC decision on a license application filed by Private Fuel Storage, L.L.C. ("PFS") for a facility to store spent nuclear fuel. The petitioner, Ohngo Gaudedeh Devia ("OGD"), has opposed the NRC's motion. The underlying premise for OGD's opposition is that delaying review would prolong the "serious harm" to its members caused by an allegedly unlawful refusal to provide information regarding PFS's lease payments. In essence, OGD's position appears to be that the incremental harm to its members that would result from delaying review until the conclusion of the NRC licensing proceeding would far outweigh any possible gain in efficiency and judicial economy that could be achieved by such delay.

We cannot agree that delaying review would result in such tangible or immediate harm to OGD that the judicial balance should be struck in favor of piecemeal judicial review, particularly now when the NRC licensing proceeding is nearing its conclusion. Our reasons are as follows.

1. As we made clear in our motion, postponing judicial review a short time to await a final NRC decision on PFS's license application will, above all, result in the conservation of judicial resources. If the NRC ultimately denies PFS's license application, judicial review of OGD's issue will be unnecessary. If the NRC grants PFS's application, this Court will then be in a position to engage in a comprehensive review of all issues relating to the PFS license application in a single case, and thus avoid the many inefficiencies associated with piecemeal, issue-by-issue review.<sup>1</sup>

In addition, as noted in our motion, holding this case in abeyance until the conclusion of the NRC licensing proceeding will conserve judicial resources by avoiding further filings and a judicial determination on PFS's pending motion to dismiss OGD's lawsuit for lack of a final agency decision.<sup>2</sup> The legal basis for OGD's filing suit prior to completion of the underlying agency proceeding is far from obvious; if this Court declines to hold this case in abeyance, we likely will support PFS's motion to dismiss. Holding the case in abeyance would allow this Court and the

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<sup>1</sup>OGD suggests that piecemeal review is preferable because this would enable the Court to focus on its contention separately and apart from the approximately 108 contentions that have been submitted in the licensing proceeding and therefore lead to a fuller and fairer review of its contention. OGD overlooks well-settled principles of judicial economy. Cf. Pfizer, Inc. v. Shalala, 182 F.3d 975, 980 (D.C. Cir. 1999); DRG Funding Corp. v. HUD, 76 F.3d 1212, 1214 (D.C. Cir. 1996); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 996 (10<sup>th</sup> Cir. 1996); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10<sup>th</sup> Cir. 1993); NRDC v. NRC, 680 F.2d 810, 816-17 (D.C. Cir. 1982). In addition, taken to its logical conclusion, OGD's approach appears to take the absurd position that separate judicial reviews for each of the 108 contentions raised before the NRC is necessary for a full and fair treatment of each contention - - clearly, an impractical and untenable outcome.

<sup>2</sup>OGD maintains (at 4) that any "argument that OGD's Petition for Review is premature until the Board enters an order granting summary disposition is a hyper-technical rationalization for further delaying review of the NRC's erroneous decision." The lack of a final disposition by the Board of OGD's contention raises jurisdictional issues that we sought to avoid by deferring review until the conclusion of the entire licensing proceeding. Suffice it to say, however, federal courts readily dismiss review petitions for lack of jurisdiction on the basis of "technical" rationales. See, e.g., City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998); Public Citizen v. NRC, 845 F.2d 1105, 1108-10 (D.C. Cir. 1988); Western Union Telegraph Co. v. FCC, 773 F.2d 375 (D.C. Cir. 1985).

parties to avoid having to entangle themselves in potentially time-consuming and complex jurisdictional analyses. And, from our perspective, there would be little or no detriment to OGD by delaying review, particularly since the NRC Licensing Board is on record that the administrative process is nearing its conclusion.

2. OGD says that “serious harm” would be prolonged by delaying review. But OGD fails to identify any concrete, tangible harm to be immediately avoided by this Court starting the judicial review process right away, except for the rather nebulous concept of lack of information - - specifically, “Leon Bear’s and PFS’s refusal to provide OGD with information regarding the misappropriation and unequal distribution of PFS lease payments received by Leon Bear....” Response at 3. We observe that OGD has avoided suggesting that receipt of the desired information will necessarily or promptly relieve the “burden on members of OGD who continue to suffer from unequal distribution of PFS lease benefits.” Response at 4. And, presuming that OGD’s lawsuit survives PFS’s motion to dismiss, the judicial review process itself will take up many months, perhaps a year or more. Notably, the underlying dispute between OGD’s members and Leon Bear as to distribution of PFS lease payments has been longstanding, involving allegations of a years-long course of conduct by Mr. Bear and others<sup>3</sup> -- indeed, it took OGD itself approximately three years from the time it filed its initial “environmental justice” contention in the NRC licensing proceeding to specifically raise the issue of Mr. Bear’s corrupt distribution of lease payments as part of that contention.<sup>4</sup> As the NRC noted in the underlying decision, tribal dissidents, including OGD’s members, are currently actively pursuing their corruption claims in other forums, including the Bureau of Indian Affairs, federal district court, and the Federal Bureau

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<sup>3</sup>See Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), LPB-02-8, 55 NRC 171, 180 (2002).

<sup>4</sup>See Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-02-20, slip op. at 14 (Oct. 1, 2002) (attached to OGD’s petition for review).

of Investigation.<sup>5</sup> Thus, immediate review by this Court is not OGD's sole recourse on those claims.

We remain of the view that sound principles of case management call for awaiting the NRC's pending PFS licensing decision before embarking on piecemeal judicial review of preliminary steps in the agency decisionmaking process.

For the foregoing reasons and for the reasons given in our December 20, 2002 motion, we respectfully request 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.

Respectfully submitted,

    /RA/      
John F. Cordes, Jr.  
Solicitor

    /RA/      
Grace H. Kim  
Senior Attorney  
Office of the General Counsel  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
(301) 415-3605

Dated: January 17, 2003

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<sup>5</sup>Id. at 17-18.

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Ohngo Gaudadeh Devia	)	
	)	
vs.	)	No. 02-9583
	)	
United States Nuclear Regulatory	)	
Commission	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2003, I served copies of the "Reply of the Nuclear Regulatory Commission to Petitioner's Response to 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" upon the following persons by deposit in the United States mail, first class:

Joro Walker, Esquire  
Director, Utah Office  
1473 South 1100 East, Suite F  
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Diane Curran, Esquire  
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