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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

**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**

Ohngo Gaudadeh Devia ("OGD"), through its attorneys, EchoHawk Law Offices, and pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure, and the Court's Order filed December 26, 2002, submits this response to the Nuclear Regulatory Commission's ("NRC") motion to hold this case in abeyance and to suspend the

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deadlines for filing the agency record and responding to the Private Fuel Storage, L.L.C. ("PFS") motion to dismiss for lack of jurisdiction.¹

The NRC administrative proceeding below relates to a license application filed by PFS to locate a nuclear waste storage facility on the small Utah reservation of the Skull Valley Band of Goshute Indians (the "Band"). OGD's Environmental Justice contention was one of a number of contentions admitted for adjudication in the PFS licensing proceeding, but was the only remaining OGD contention being considered by the NRC. Counsel for the NRC accurately reports that the NRC decision that is the subject of OGD's Petition For Review is the outcome of the NRC's review of a decision of an Atomic Safety and Licensing Board (the "Board") ruling concerning OGD's Environmental Justice contention. The parties are awaiting the Board's decision on the remaining contentions, which are also subject to review by the Commission.

OGD disagrees with the suggestion that the proper time for this Court to review the NRC decision on OGD's contention is upon final disposition of all contentions in the PFS licensing proceeding for the following reasons:

1. The fact that the Board has not actually entered an order granting summary disposition of OGD's contention is simply a technical matter that will not alter or affect the NRC decision that is the subject of OGD's Petition For Review. The order at the conclusion of the NRC's October 1, 2002 decision (CLI-02-20) left no discretion to the Board in disposing of OGD's Environmental Justice contention

¹ The NRC's motion to hold this case in abeyance indicates that PFS does not oppose the NRC's motion to suspend the deadline for filing a response to its motion to dismiss for lack of jurisdiction dated December 16, 2002. (NRC Motion at p.2.) Accordingly, OGD interprets PFS's lack of opposition as a withdrawal of the PFS motion to dismiss pending the Court's decision on the NRC's motion to hold this case in abeyance.

because the order clearly states: "For the foregoing reasons, the Board's partial denial of summary disposition on OGD's environmental justice contention, OGD O, is *reversed*, and the Board is *directed* to grant summary disposition for PFS on OGD O." (NRC Memorandum and Order CLI-02-20, 10/1/02) (emphasis in original). Thus, the 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.²

2. This case should not be held in abeyance because delaying review of the NRC's decision will substantially prolong the serious harm to individual Band members who are affected by 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, who claims to be the legitimate leader of the Band. Band members who are part of OGD have not received equal benefits from the PFS lease payments and are being denied tribal government services due to their opposition to the proposed waste storage facility. Putting off review of the NRC's decision will have a direct negative effect on a number of Band members who are affected by the NRC's erroneous decision.

3. In support of its motion, the NRC argues that holding this case in abeyance pending a final licensing decision is in the interests of efficiency and judicial economy. While delaying review of the NRC order disposing of OGD's contention would relieve the NRC of its obligation to file an agency record and brief the issues

² OGD will further address the finality of the NRC's order in its response to PFS's motion to dismiss for lack of jurisdiction, if necessary, following the Court's decision on the NRC's motion to hold this case in abeyance.

presented, the burden on the NRC of responding to the instant petition for review is far outweighed by the burden on members of OGD who continue to suffer from unequal distribution of PFS lease benefits. Delaying review of the NRC decision in this case is clearly not in the interest of justice when considering the gravity of the competing interests of the parties.

4. In addition to prolonging the ongoing harm to OGD members, this Court should not postpone review of the NRC's decision in order to permit consolidation of the review of OGD's contention with other contentions. There have been approximately 108 separate contentions filed by a number of parties opposing the proposed nuclear waste storage facility including the State of Utah, Castle Rock, OGD, Confederated Tribes, and the Southern Utah Wilderness Alliance. Postponing review of the NRC's decision on OGD's contention pending consolidation with all other appeals from the licensing will seriously prejudice OGD's ability have a full and fair review of the NRC's decision affecting OGD's Environmental Justice contention.

5. The NRC's motion states that "[the NRC] does 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." (NRC motion at p.3.) This assertion is speculative and ignores the slow progress of the PFS licensing proceeding. The suggestion that a final Board decision and NRC review of the contentions in this matter will happen in the near future is unrealistic. The PFS licensing application in this matter was first filed on June 20, 1997. There is simply no way to know how much longer it will take for the Board to decide and the NRC to review the decisions on the other contentions in this matter. OGD should not be required to wait until other contentions filed by

other parties are adjudicated to obtain review. For the reasons set forth above, the NRC's motion to hold this case in abeyance should be denied.

DATED: January 10, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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