

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MARGENE BULLCREEK, et al,	)	
	)	
	)	
Petitioners,	)	
	)	No. 03-1018
v.	)	
	)	
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION, and the	)	
UNITED STATES OF AMERICA	)	
	)	
Respondents.	)	
	)	
	)	
STATE OF UTAH,	)	
	)	
	)	
Petitioner,	)	No. 03-1022
	)	
v.	)	
	)	
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION, and the	)	
UNITED STATES OF AMERICA	)	
	)	
Respondents.	)	

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**THE GOSHUTE PETITIONERS' OPPOSITION TO  
"SKULL VALLEY BAND OF GOSHUTE INDIANS'  
MOTION TO DISMISS"**

The Petitioners in No. 03-1018 (collectively "the Goshute petitioners") respectfully oppose the recently filed motion styled "Skull Valley Band of Goshute Indians' Motion to Dismiss" ("the Motion"). Contrary to the Motion's assertion, as a matter of fact and law the

Goshute petitioners have standing (in every sense) to bring their Petition for Review to this Court, including standing as “part[ies] aggrieved” within the meaning of 28 U.S.C. § 2344. The following sections so demonstrate.

## **I. THE FACTS PERTAINING TO THE GOSHUTE PETITIONERS’ STANDING**

### **1. The Skull Valley Band of Goshute Indians.**

The Skull Valley Band of Goshute Indians (“the Band”) is a federally recognized Indian tribe with a reservation of approximately 18,000 acres in Utah’s Skull Valley, about 45 miles west of Salt Lake City. The Band has approximately 125 members, including children. Of these, less than 20 (including children) reside on the reservation. The other Band members reside in surrounding communities and states.

The Band has no written constitution, but traditionally has been governed by a two-part form of government. The General Council consists of all adult members of the Band and has authority and responsibility to make policy and other fundamental decisions on behalf of the Band, including decisions relative to the use of tribal assets; to give direction to the Band’s Executive Committee; and to oversee the Executive Committee’s implementing work. The Executive Committee consists of three officers, a chair, a vice-chair, and a secretary.

Over recent years, dissension within the Band has led to conflicting claims of entitlement to the Executive Committee positions, conflicting claims arising from disputed and alternative “elections” and related proceedings. One faction has Leon Bear claiming to be the legitimate chair; another faction, Marlinda Moon. Another faction (“the Bullcreek faction”) asserts that no one is currently a legitimate tribal officer and that therefore the only legitimate governing entity

is the General Council. The factions pursued resolution of these conflicting claims by initiating Bureau of Indian Affairs (“BIA”) review. The local BIA superintendent ruled that the Band itself must resolve the leadership dispute internally but that, for the limited purpose of dispersing to the Band P.L. 93-638 funds, the Band would send those funds to Leon Bear. The regional BIA director in Phoenix affirmed, and the leadership dispute is now before the Interior Board of Indian Appeals.<sup>1</sup>

The “Skull Valley Band of Goshute Indians” that intervened in these consolidated cases and made the Motion is the Leon Bear faction, the legitimacy of which the other factions do not recognize.

## **2. The Goshute Petitioners.**

Among the Goshute petitioners, nine are adult members of the Band and members of the Band’s General Council. Two of them, Rex and Mary Allen (brother and sister), have served as tribal officers; Rex as secretary and Mary as vice-chair. In those capacities, they, along with Leon Bear, signed the 20 May 1997 lease with Private Fuel Storage (“PFS”) that plays an important role in the dispute now before this Court. (See section I.3. below.) Rex and Mary have since come out in opposition to the lease and the PFS project. Rex considers that he is still the Band’s legitimate secretary.

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<sup>1</sup> The Band’s leadership dispute has also led to on-going litigation over which faction may rightfully control some of the Band’s bank accounts with Salt Lake City banks. *Skull Valley Band of Goshute Indians, et al. v. Zions Bank, et al.*, Civil No. 2:01CV813(S) (D. Utah) (dismissed for lack of federal jurisdiction); *Skull Valley Band of Goshute Indians v. Brighton Bank, et al.*, Case No. 020913196 (3d Dist. Utah) (on-going).

Another Goshute petitioner is Margene Bullcreek. She and Lisa Bullcreek are among the few Band members who reside on the reservation, and Margene is the founder and head of Ohngo Gaudadeh Devia ("OGD"). OGD, another one of the Goshute petitioners, is an unincorporated association of Band members and others devoted to preserving the Goshute's traditional views towards and stewardship of their land; accordingly, since inception of the PFS project in 1997, OGD has actively and persistently opposed the project. The nine individual Goshute petitioners are members of OGD.

### **3. PFS's Proposed Nuclear Waste Storage Facility.**

PFS is a consortium of eight nuclear power utilities. Its conceptual predecessor was a consortium of 33 nuclear power utilities that, in the early 1990s, attempted to negotiate a lease with the Mescalero Apache in New Mexico, a lease that would allow the utilities to store on the Mescalero reservation the Nation's entire present inventory of commercially generated spent nuclear fuel ("SNF"). The consortium had the support of the Mescalero's powerful tribal chairman, Wendell Chino, but the proposal caused conflict and deep divisions between tribal members.<sup>2</sup> (This same pattern was to repeat itself with the Band in Utah a few

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<sup>2</sup> Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics*, 36 Nat. Resources J. 881, 887-890 (1996) (hereafter "Sachs-Mescalero").

years later.<sup>3</sup>) After three and one-half years of effort, negotiations broke down, with the Mescalero electing not to pursue the matter further.<sup>4</sup>

As noted, at the beginning, the Mescalero consortium had 33 members; by the time negotiations ended in April 1996, only 11 members.<sup>5</sup> After the New Mexico failure, however, eight members insisted on pursuing the idea of a private nuclear waste dump on an Indian reservation. Those eight formed PFS. PFS then negotiated with Leon Bear the May 1997 lease.

The lease covers 820 acres on the reservation. PFS proposes to place on 99 of those acres concrete slabs and then place on those slabs 4,000 storage casks, each containing 10 metric tons uranium ("mtu") of SNF. The 40,000 mtu represents the Nation's entire present inventory of commercially generated SNF, and the proposed facility will be some 60-times larger than any similar facility in the Nation.

#### **4. The Nuclear Regulatory Commission Proceeding.**

On 20 June 1997, PFS initiated a proceeding before the Nuclear Regulatory Commission, seeking a license for the Skull Valley nuclear waste dump. *In the Matter of Private Fuel*

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<sup>3</sup> Judy Fahys, *Family Feud: Goshutes Split Over Nuclear Waste Site*, Salt Lake Tribune, 18 August 2002, available at <http://www.sltrib.com/2002/aug/08182002/utah/762819.htm>; Dan Egan, *A Tribe Divided Over Waste: Plan to Store Nuclear Materials on Reservation Sows Rift*, Milwaukee Journal Sentinel, 28 September 2002, available at <http://www.jsonline.com/news/nat/sep02/83761.asp>.

<sup>4</sup> Sachs-Mescalero, *supra*, at 886.

<sup>5</sup> *Id.* at 885, 886 n.26.

*Storage, LLC (Independent Spent Fuel Storage Facility)*, Docket No. 72-22-ISFSI; ASLBP No. 97-732-02-ISFSI (“the licensing proceeding”). The State of Utah (“Utah”) moved to intervene on 11 September 1997; that motion was granted on 22 April 1998. OGD moved to intervene on 12 September 1997; that motion was granted on 22 April 1998.

The licensing proceeding continues, with some matters and contentions pending before the Commission and others still pending before the Atomic Safety Licensing Board.

##### **5. The “Lawfulness” Issue.**

This case presents to this Court a pure question of law, what the parties in other proceedings have referred to as the “lawfulness” issue. The “lawfulness” issue is simply this: With enactment of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“the NWPA”), did Congress intend to authorize or to exclude from the Nation’s nuclear waste management program the creation and use of a privately owned, away-from-reactor, SNF storage facility? In other words, did Congress prohibit a PFS-type nuclear waste dump? The following paragraphs describe how the “lawfulness” issue got before this Court and, in the process, demonstrate that the Goshute petitioners are indeed “part[ies] aggrieved” pursuant to 28 U.S.C. § 2344.

Early in the licensing proceeding, Utah filed a contention that Congress intended to exclude a PFS-type facility. The Licensing Board ruled that this contention constituted an attack on NRC regulations and that it (the Board) was therefore not authorized to resolve the issue. 47

NRC 147, 182 (1998). Utah had no appeal of right to the Commission, so no Commission review occurred at that time.

The Licensing Board's reference to NRC regulations was premised on this: In 1980, two years before Congress enacted the NWPA, the NRC promulgated its Part 72 regulation, which governs "independent spent fuel storage facilities." 10 CFR Part 72. The regulation said (and says) nothing about whether such a facility is permitted away-from-reactor, but in that same year of 1980 the NRC interpreted the regulation as so permitting. 45 Fed. Reg. 74696.

With the licensing proceeding dragging on – without any judicial resolution of the fundamental question whether the proposed PFS facility was even permitted by governing federal law –, Utah decided in early 2002 to try to force such a resolution. Accordingly, on 11 February 2002 Utah filed with the NRC two documents. One was filed inside the licensing proceeding and was entitled "Utah's Suggestion of Lack of Jurisdiction." The other was filed outside the licensing proceeding and was entitled "Petition to Institute Rulemaking." The latter initiated what we hereafter refer to as "the rulemaking proceeding." The Petition to Institute Rulemaking petitioned the NRC to amend its Part 72 regulation so as to bring it into conformity with Utah's (and OGD's) view of the NWPA, that is, to limit Part 72's scope to at-reactor facilities.

Both PFS and the NRC staff opposed Utah's two filings, that is, opposed the effort to get the "lawfulness" issue resolved. But in an Order dated 3 April 2002, the Commission announced its decision to proceed to resolve the "lawfulness" issue. CLI-02-11; 55 NRC 260 (2002) (attached as Exhibit 1). The Order stated: "We have decided that the legal issue is better resolved in an adjudicatory format – i.e., through legal briefs – than in a rulemaking format."

Exhibit 1, at p. 6. In other words, the Commission opted to resolve the “lawfulness” issue by responding to the Suggestion of Lack of Jurisdiction in the licensing proceeding. Regarding the Petition to Initiate Rulemaking, the Order stated: “If the legal issue is ultimately resolved in Utah’s favor, then a formal revision clarifying Part 72 could be issued at that time.” *Id.*

The Order also noted:

The parties to this adjudication are intimately concerned and eminently well-informed about the legal question raised in Utah’s petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

*Id.* The Order then went on to give guidelines for further briefs by parties and by *amicus*. *Id.* at p. 7.

OGD, already a party to the licensing proceeding, then filed its own brief (dated 15 May 2002) on the “lawfulness” issue. Exhibit 2. OGD’s 15 May 2002 brief supported Utah’s position for the reasons Utah had already set forth. But OGD went on to make *additional* arguments, arguments pertaining in a unique way to the interests and concerns of OGD’s Goshute members, including the nine individual Goshute petitioners in this case. Exhibit 2, at pp. 1-2. Then, out of an abundance of caution because of the unusual “two proceedings” nature of the NRC review of the “lawfulness” issue, OGD filed in October 2002 a document wherein “OGD adopts and incorporates by this reference the entirety of the State of Utah’s petition to institute rulemaking . . . .” Exhibit 3, at p. 2.

The Commission rejected OGD's (and Utah's) position on the "lawfulness" issue in an Order dated 18 December 2002. CLI-02-09, \_\_ NRC \_\_ (2002). On its last page, that Order specified that it constituted a rejection of the position OGD had supported both inside the licensing proceeding and in the rulemaking proceeding.

The rejection of the petition to initiate rulemaking was immediately appealable. OGD appealed, initiating this case before this Court. Some weeks later, Utah also decided to appeal. Immediately after Utah appealed, this Court by its own order consolidated the two appeals.

## II. OGD IS AN "AGGRIEVED PARTY" WITH STANDING TO APPEAL

Both we and the Motion agree on an entirely unremarkable principle of law: To petition for review by the Circuit Court of an NRC order, the petitioner must have been a party to the proceedings leading to the order. *E.g., Simmons v. Interstate Commerce Commission*, 716 F.2d 40, 42 ("This circuit has consistently interpreted the phrase 'party aggrieved' [in 28 U.S.C. § 2344] to require as a general matter that petitioners be parties to any proceedings before the agency preliminary to issuance of its order.")

Where the Motion goes wrong is in its assertion that OGD was somehow not a party to the "proceedings before the [NRC] preliminary to issuance of its order." That assertion is simply wrong as a matter of demonstrable facts; the demonstration appears in the preceding section and in the attached exhibits.

It appears that the Motion was prepared in ignorance of OGD's 15 May 2002 brief to the Commission (Exhibit 2). Thus, the Motion at page 3 seems to suggest that OGD's 18 October 2002 filing with the Commission (Exhibit 3) constituted OGD's only filing or other participation

in the proceedings leading to the NRC's 18 December 2002 Order. That suggestion, of course, is unfortunately wrong and misleading.

Or it may be that the Motion is arguing that OGD's participation in the key NRC proceedings (which participation must now be fully, not partially, acknowledged) is somehow quantitatively or qualitatively "insufficient." Perhaps the Motion is suggesting that, when it comes to allowing parties to agency proceedings to appeal, the parties must be categorized as either "first-class" or "second-class," with only the former being deemed worthy to appeal. If this is what the Motion is really arguing, it has certainly advanced no law in support of the argument.

What the law says on the required level of participation at the agency level is this: "The degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). The idea is to assure that, whatever "formality" or mechanisms the agency chose for participation, the appealing party (the petitioner to the circuit court) provided the agency with whatever might be fairly required in the way of law, facts, policy, and/or analysis. *See Gage v. U.S. Atomic Energy Commission*, 479 F.2d 1214, 1219 (D.C. Cir. 1973) ("The 'party' status requirement operates to preclude direct *appellate* court *review* without a record which at the least has resulted from the fact-finder's focus on the alternative regulatory provisions which petitioners propose." Emphasis in original.)

In light of the particular realities of the "lawfulness" issue before the Commission, OGD did all that reasonably could be expected. The Commission itself correctly saw at the outset that

it was dealing with a pure question of law. Exhibit 1, at p. 6. The Commission itself correctly saw at the outset that Utah and PFS had already set forth “extensive arguments” on the legal issue, which arguments the Commission promised to “consider.” *Id.* at p. 7. (The Commission was almost suggesting that it already had enough.) But it allowed other parties and even non-parties to file briefs if they desired. *Id.* (What we have just summarized is what the Commission specified as necessary for the making of an adequate record and an adequate basis for full and fair consideration of the legal issue.)

OGD complied. It timely served its 15 May 2002 brief, and in that brief supported Utah’s arguments and added additional arguments highly relevant to OGD’s Goshute members, including the nine individual Goshute petitioners in this case. The Commission’s Order (Exhibit 1) allowed OGD to do no more. Yet the Motion now seems to be suggesting that OGD had somehow to do something (unspecified) “more” to qualify as a participant in the NRC proceedings on the “lawfulness” issue and thus to qualify as a petitioner to this Court. That suggestion is contrary to the law. OGD did all the agency allowed it to do. Under settled law, that is enough. *Water Transport Ass’n v. ICC, supra*, 819 F.2d 1189; *Gage v. U.S. Atomic Energy Commission, supra*, 479 F.2d 1214.

### **III. AS MEMBERS OF OGD, THE NINE INDIVIDUAL GOSHUTE PETITIONERS QUALIFY AS PARTIES ENTITLED TO PETITION FOR REVIEW OF THE NRC ORDER.**

The nine individual Goshute petitioners, as members of the unincorporated association OGD, participated in the proceedings leading to the NRC’s 18 December 2002 Order. That conclusion follows from the purely representational character of an unincorporated association.

An unincorporated association has no rights or interests separate and apart from – or distinct from – the rights and interests of the individuals who chose to join together to advance what they see as a common cause. *E.g., Jund v. Town of Hempstead*, 941 F.2d 1271, 1282 (2d Cir. 1991) (“In contrast to partnerships and corporations, unincorporated associations are not artificial entities and thus have no existence independent of their membership absent statutory recognition or authorization.”)

Thus, when OGD spoke to the NRC, it was speaking not the words of some corporate entity with a distinct legal persona. Rather, OGD was speaking the words of Margene Bullcreek, Lisa Bullcreek, Rex Allen, Mary Allen, Abby Bullcreek, Daniel Moon, Delford Moon, Lena Knight, and Linda Williams. Accordingly, to now argue that those individuals did not participate before the NRC is to elevate sterile, metaphysical form over living substance.<sup>6</sup>

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<sup>6</sup> The Leon Bear faction has attempted to punish, denigrate and marginalize those Band members who do not agree with that faction’s agenda. *E.g., Judy Fahys, Goshutes Who Have Opposed Nuclear Waste Are Out in the Cold*, Salt Lake Tribune, 6 January 2003, available at <http://www.sltrib.com/2003/Jan/01062003/utah/17715.asp>. The spirit of that approach can be seen in the Motion’s references to the Goshute petitioners as “no more than intermeddlers,” Motion, at p. 5, and in the Motion’s suggestion that somehow the Goshute petitioners are compliant tools of Utah, at least relative to the timing of their petition to this Court. *Id.* The Goshute petitioners are independent, represented by independent counsel, and have a uniquely personal investment in the issue presented by this case.

#### IV. CONCLUSION

In light of all the foregoing, the Goshute petitioners respectfully request that this Court deny the Motion in its entirety.

Date: 2 April 2003

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For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC has authority under federal law to issue a license for the proposed privately-owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

### I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material.<sup>2</sup> This was two years before Congress enacted the NWPA.

In both its Petition for Rulemaking and "Suggestion of Lack of Jurisdiction," Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from-reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

Notwithstanding any other provision of law, nothing in this act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.<sup>3</sup>

Thus, says Utah, the NWPA cannot be said to "authorize" a private, away-from-reactor ISFSI like the proposed the PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel.

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<sup>2</sup>See 45 Fed. Reg. 74,693 (Nov. 12, 1980).

<sup>3</sup>NWPA § 135(h).

PFS opposes Utah's petitions, and argues that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. PFS emphasizes that the NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah's petitions on procedural grounds.

## II. Discussion

### A. Request for Stay of Proceedings Pending Review

We find that Utah's request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: 1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; 2) whether the petitioner faces irreparable injury if a stay is not granted; 3) whether the issuance of a stay would harm other interested parties; and 4) where the public interest lies.<sup>4</sup> The proponent of the stay has the burden of demonstrating that these factors are met<sup>5</sup>

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that "*nothing in this act ... encourage[s], authorize[s], or require[s]*" the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately-

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<sup>4</sup> See *Sequoyah Fuels Corp.*, (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); *Cf. Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC \_\_\_, slip op. at 3 n. 7 (2002). This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer's decision. 10 C.F.R. § 2.788(e).

<sup>5</sup> See *Hydro Resources Inc.*, CLI-98-08, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

owned, away-from-reactor facility—which is Utah's position. We are willing to consider Utah's complex legislative history and statutory structure arguments, but we are not prepared to say that Utah's arguments are likely to prevail.

Second, we find no evidence that Utah faces "irreparable injury" if an immediate stay is not granted. Utah claims that it will suffer a loss of "costs, expenses, and attorneys' fees" resulting from its participation in the PFS licensing proceeding.<sup>6</sup> It is well-established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision.<sup>7</sup> Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over four years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

#### **B. Commission Consideration of NWSA Issue on the Merits**

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<sup>6</sup>Rulemaking Petition at 37-38.

<sup>7</sup>See *Sequoyah Fuels Corporation and General Atomics*, CLI-94-9, 40 NRC at 6. See also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

Both the NRC staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A.<sup>8</sup>

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board.<sup>9</sup> On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations.<sup>10</sup> Utah's newly-filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling.<sup>11</sup> Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the staff and applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a

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<sup>8</sup>See "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction," (Feb. 26, 2002), at 7-8; "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb. 21, 2002), at 4-7.

<sup>9</sup>See "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility," (Nov. 23, 1997). ("Congress has not authorized the NRC to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.")

<sup>10</sup>*Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 183 (1998).

<sup>11</sup>See 10 C.F.R. §2.786(b).

waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

We have decided that the legal issue is better resolved in an adjudicatory format—*i.e.*, through legal briefs—than in a rulemaking format. We therefore take review in the exercise of our inherent supervisory authority over adjudications and rulemakings.<sup>12</sup>

The parties to this adjudication are intimately concerned and eminently well-informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

### III. Briefs

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<sup>12</sup>See, e.g., *North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998); Cf. *Kansas Gas and Elec. Co.*, (Wolf Creek Generating Station, Unit 1), CLI-99-05, 49 NRC 199 (1999).

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit *amicus curiae* briefs by May 15. Briefs should be no longer than 30 pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of Commission by the due date), with paper copies to follow. Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

#### IV. Conclusion

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested *amicus curiae* are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission<sup>13</sup>

/RA/

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<sup>13</sup> Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

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ANNETTE VIETTI-COOK  
Secretary of the Commission

Dated at Rockville, MD  
This 3<sup>rd</sup> day of April, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

PRIVATE FUEL STORAGE L.L.C. )

(Independent Spent Fuel Storage  
Installation) )

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-11) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
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Docket No. 72-22-ISFSI  
COMMISSION MEMORANDUM  
AND ORDER (CLI-02-11)

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Docket No. 72-22-ISFSI  
COMMISSION MEMORANDUM  
AND ORDER (CLI-02-11)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 3<sup>rd</sup> day of April 2002

RAS 4437

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED  
USNRC

May 24, 2002 (11:12AM)

OFFICE OF SECRETAR  
RULEMAKINGS AND  
ADJUDICATIONS STAF

In the Matter of:

PRIVATE FUELS STORAGE, L.L.C.

(Independent Spent Fuel Storage  
Installation)

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Docket No. 72-22

ASLBP No. 97-732-02-ISFI

OHNGO GAUDADEH DEVIA ("OGD")'S BRIEF IN SUPPORT OF UTAH'S  
SUGGESTION OF LACK OF JURISDICTION

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Counsel for Ohngo Gaudadeh Devia (OGD)

Dated: May 15, 2002

Pursuant to the Commission's Memorandum and Order (CLI-02-11), dated April 3, 2002, Ohngo Gaudadeh Devia (OGD) submits this brief in support of Utah's Suggestion of Lack of Jurisdiction (Suggestion) and the Petition to Institute Rulemaking (Petition) filed contemporaneously therewith. For the same reasons expressed by the State of Utah, OGD supports the suggestion that the Commission lacks authority to license PFS' proposed away from reactor spent fuel storage facility.

As the Commission noted in its Memorandum and Order (CLI-02-11), it is faced with the pure legal issue whether the Commission has authority under federal law to issue a license for the proposed privately-owned, away from reactor spent fuel storage facility. (Order CLI-02-11, at 1). As all parties agree, albeit to differing degrees, resolution of this issue turns on the Commission's interpretation of Congressional intent.

Significantly, the Commission pointed out that it "already [has] before [it] extensive arguments by Utah and PFS" addressing the issue. (Order CLI-02-11, at 6). Accordingly, in the interest of brevity, OGD adopts and incorporates herein by this reference the points and authorities advanced by the State of Utah in support of the Suggestion and Petition. OGD adds only one argument.

In examining whether Congress intended to allow for the type of privately owned, away-from-reactor storage facility proposed by PFS, the Commission should reflect upon the relative enormity<sup>1</sup> of the proposed facility and contemplate whether the inaction of Congress in expressly addressing the NRC's regulations allowing for licensing of ISFSI's when it passed the NWPA should be interpreted as affirmative approval of a scheme Congress never

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<sup>1</sup> In addressing the spent fuel storage problem, Congress apparently agonized over a 2,800 MTU or a 1,900 MTU aggregate limit. See Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101, Subtitle B. Such a limit pales in comparison to the size of the 40,000 MTU of the proposed facility.

consciously considered. Members of OGD stand to have the Nation's entire present inventory of spent nuclear fuel stored on their permanent homeland. OGD relies upon fundamental notions of democracy in arguing that such a decision should be the product of conscious and deliberate Congressional action, especially where the Nuclear Waste Policy Act clearly prohibits the type of facility proposed in this case.

Respectfully submitted,



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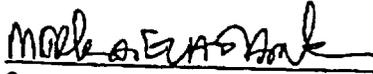
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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
PRIVATE FUELS STORAGE, L.L.C. ) Docket No. 72-22-ISFSI  
(Independent Spent Fuel Storage ) ASLBP No. 97-732-02-ISFI  
Installation) )  
\_\_\_\_\_ )

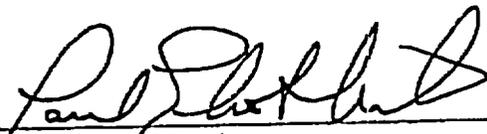
OHNGO GAUDADEH DEVIA ("OGD") JOINDER OF STATE OF  
UTAH'S PETITION TO INSTITUTE RULEMAKING AND TO STAY  
LICENSING PROCEEDING

On February 11, 2002, the State of Utah filed a petition to institute rulemaking pursuant to 10 CFR 2.802(a), and to stay this licensing proceeding until final resolution of Utah's petition to amend its regulations governing independent spent fuel storage installations ("ISFSIs"), 10 CFR Part 72, to the extent those regulations may be deemed to relate to a privately owned, away-from-reactor, spent nuclear fuel storage facility. Specifically, Utah petitioned that the Commission amend the ISFSI regulations to make clear that licensing is allowed only for federally owned and operated away-from-reactor, spent nuclear fuel ("SNF") storage facilities and not for an away-from-reactor storage facility when privately owned.

Having reviewed the State of Utah's petition to institute rulemaking and to stay this licensing proceeding and the attached appendices, OGD adopts and incorporates by this reference the entirety of the State of Utah's petition to institute rulemaking and to stay this licensing proceeding and all documents filed in support thereof.

For the reasons set forth in Utah's petition to institute rulemaking and incorporated herein by reference, OGD hereby joins and adopts the State of Utah's petition to institute rulemaking and stay this licensing proceeding.

Respectfully submitted this 18<sup>th</sup> day of October, 2001.



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