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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:)	
)	Docket No. 72-22-ISFSI
PRIVATE FUELS STORAGE, LLC)	
)	ASLBP No. 97-732-02-ISFI
(Independent Spent Fuel Storage)	
Installation))	December 4, 2003
)	
)	

**OGD PETITION FOR REVIEW OF INTERLOCUTORY BOARD
ORDERS AS DIRECTED IN CLI-03-16**

Ohngo Gaudadeh Devia ("OGD") hereby submits its Petition for Review of Interlocutory Board Orders in accordance with 10 C.F.R. § 2.786, and as Directed in CLI-03-16.

OGD petitions the Commission to review the following interlocutory orders of the Board:

- A. **OGD Contention B – Emergency Plan Fails to Address the Safety of Those Living Outside of the Facility.**

OGD seeks review of the Board's April 22, 1998 order ruling OGD Contention B inadmissible. *See* LBP-98-7, 47 N.R.C. 142. The Board ruled OGD Contention B inadmissible on the grounds that the contention and its supporting bases fail to establish with specificity any genuine dispute,

impermissibly challenge the Commissioner's regulations or generic rulemaking-associated determinations, lack adequate factual or expert opinion support, and/or fail properly to challenge the PFS application.

The matters of fact and law related to OGD Contention B were previously raised in OGD's Supplemental Petition with Contentions (November 24, 1997), at page 6. These matters were also discussed in PFS Contentions Response at 486-93 and the Staff's Contentions Response at 78-79. In its submission entitled "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," OGD correctly pointed out that the PFS license application fails to include emergency-response and safety provisions as required by 10 C.F.R. § 72.32, and the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Pub. L. 99-499.

The Board erred by failing to recognize the above-referenced shortcomings of the PFS license application. The Board improperly placed the burden of producing information about the lack of proper emergency/safety provision on OGD. The factual evidence of the PFS application shortcomings is the lack of information in the application itself. PFS should provide this emergency/safety information to the public, and particularly the Reservation residents, who are affected the most. The Commission should review the Board's decision with respect to OGD Contention B because these matters of emergency response and safety provisions have a direct and serious health and

welfare impact on OGD members and members of the Skull Valley Band who live in the vicinity of the proposed storage facility site. OGD should have been given the opportunity to conduct discovery and have these matters fully and fairly considered by the Board.

The allegations of improper compliance with the requirements of 10 C.F.R. § 72.32, the Emergency Planning and Community Right-to-Know Act of 1986, and related emergency response and safety concerns fairly raised in OGD Contention B raise material questions of fact, involve a legal conclusion without governing precedent, and raise substantial and important questions of law and public policy. Accordingly, the Commission should grant review of the Board's interlocutory order regarding OGD Contention B.

B. OGD Contention E – License Application Fails to Provide Information and a Plan to Deal with Casks That May Leak or Become Contaminated During the 20 to 40 Year Storage Period.

OGD seeks review of the Board's April 22, 1998 order ruling OGD Contention E inadmissible. *See* LBP-98-7, 47 N.R.C. 142. The Board ruled OGD Contention E inadmissible on the grounds that the contention and its supporting bases fail to establish with specificity any genuine dispute, impermissibly challenge the Commissioner's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.23, lack materiality, lack adequate factual or expert opinion support, and/or fail properly to challenge the PFS application.

The matters of fact and law related to OGD Contention E were previously raised in OGD's Supplemental Petition with Contentions (November 24, 1997), at pages 17-18. These matters were also discussed in PFS Contentions Response at 521-29, and the Staff's Contentions Response at 83-84. In its submission entitled "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," OGD correctly pointed out that the PFS license application proposes construction of a storage facility that poses an undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the proposed 20-40 year storage period.

OGD also set forth a number of reasons why sending leaking or contaminated casks back to the generating reactor may not be an option. (OGD Supplemental Petition with Contentions at p. 17.) OGD Contention E also correctly pointed out that the application is deficient because it does not properly and adequately provide assurances that the storage at the proposed PFS facility will be only "interim" or that there will be an alternative location where the canisters/casks can be shipped if they become defective while stored on the Skull Valley Reservation.

The application contained no adequate procedures for dealing with safety implicating events such as: canisters/casks that have become defective, unavailability of place to which defective casks can be returned, or accidents

affecting the integrity of the canisters/casks. 10 C.F.R. § 72-32 requires an application to include a description of the means of restoring the proposed facility to a safe condition after an accident. OGD Contention E correctly points out the absence of any assurance in the application (because there cannot be any such assurances) that there will be an alternative location to which defective or damaged canisters/casks can be shipped if they become defective or damaged.

OGD Contention E also correctly points out that the application does not account for the uncertainties of Yucca Mountain or another site being constructed and authorized as a suitable repository site following the “interim” storage at the proposed PFS facility. *See* Exhibit 3 to OGD’s Contentions.

The Board erred by failing to recognize the above-referenced deficiencies in the PFS license application. The Board improperly placed the burden of producing information about the above-referenced deficiencies on OGD where it is clearly the applicant’s obligation to file a complete and adequate application. The factual evidence of the PFS application shortcomings is the lack of information in the application itself. PFS should provide this emergency/safety information to the public, and particularly the Goshute Reservation residents who are most directly affected. The Commission should review the Board’s decision with respect to OGD Contention B because these issues of adequately addressing defective or damages canisters/casks have a direct and serious health and welfare impact on OGD members and members

of the Skull Valley Band who live in the vicinity of the proposed storage facility site. OGD should have been given the opportunity to conduct discovery and have these matters fully and fairly considered by the Board.

The safety-related allegations fairly raised in OGD Contention E raise material questions of fact, involve a legal conclusion without governing precedent, and raise substantial and important questions of law and public policy. Accordingly, the Commission should grant review of the Board's interlocutory order regarding OGD Contention E.

C. OGD Contention J – The License Application Fails to Address the Status of Compliance with All Permits, Licenses, and Approvals for the Facility.

OGD seeks review of the Board's April 22, 1998 order ruling OGD Contention J inadmissible. *See* LBP-98-7, 47 N.R.C. 142. The Board ruled OGD Contention J inadmissible on the grounds that the contention and its supporting bases fail to establish with specificity any genuine dispute, lack adequate factual and expert opinion support, and/or fail properly to challenge the PFS application. The Board also ruled that "to the extent this contention is footed in a purported "trust responsibility" owed to individual members of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis." 47 N.R.C. 142, 231.

The matters of fact and law related to OGD Contention J were previously raised in OGD's Supplemental Petition with Contentions (November 24, 1997),

at page 23-24. These matters were also discussed in PFS Contentions Response at 562-70, and the Staff's Contentions Response at 90-91. In its submission entitled "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," OGD correctly pointed out that the PFS license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses, and approvals required for the facility. Specifically, the ER fails to demonstrate compliance with federal water discharge requires and compliance with relevant certification and permit requirements for water and storm discharges, erosion and sediment control, and compliance with air quality requirements under the exacting fiduciary and trust responsibility owed to the Skull Valley Band and its membership by the federal government.

The Board erred in ruling OGD Contention J inadmissible by failing to evaluate the PFS application's treatment of water and air regulatory compliance in light of the federal government's special Indian trust responsibility. The NRC, as a federal agency, has an obligation to ensure that Indian lands, air, and water resources are adequately protected from improper contamination and pollution. By summarily denying OGD an opportunity to explore the land and environmental resource protection concerns raised in OGD Contention J without an opportunity for discovery or a hearing, the NRC fails to fulfill its trust obligations to the Skull Valley Band membership.

There is no question that the federal government owes a trust responsibility to the Skull Valley Band of Goshute Indians. “The federal government has charged itself with moral obligations of the highest responsibility and trust in its relationships with Indians, and its conduct should therefore be judged by the most exacting fiduciary standards.” Cobell v. Norton, 240 F.3d 1081, 1085-88 (D.C. Cir. 2001); see also United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1131-32 (2003); Nevada v. United States, 463 U.S. 110 (1983); Seminole Nation v. United States, 316 U.S. 286 (1942) (holding that the trust duty extends to protection of Indians from their own improvidence).

In this licensing application proceeding and the Board’s order ruling OGD Contention J inadmissible, OGD has been denied the opportunity to litigate tribal members’ concerns about the inadequate protections of Tribal land, water, and air contained in the PFS application. The Board erred in failing to evaluate OGD Contention J and the PFS application in accordance with the heightened scrutiny required by the federal government’s trust responsibility.

The allegations fairly raised in OGD Contention J raise material questions of fact, involve a legal conclusion without governing precedent, and raise substantial and important questions of law and public policy. Accordingly, the Commission should grant review of the Board’s interlocutory order regarding OGD Contention J.

D. OGD Contention O – Environmental Justice.

OGD seeks review of the Board's April 22, 1998 order ruling that bases two, three, and four of OGD Contention O are not inadmissible contentions. *See* LBP-98-7, 47 N.R.C. 142. The Board ruled that bases two, three, and four of OGD Contention O are inadmissible on the grounds that the facility cost-benefit issues they seek to raise are not relevant to this contention. The Board provided no explanation to support this finding.

The matters of fact and law related to bases two, three, and four of OGD Contention O were previously raised in OGD's Supplemental Petition with Contentions (November 24, 1997), at pages 27-36. These matters were also discussed in PFS Contentions Response at 591-611, and the Staff's Contentions Response at 95-97.

In its submission entitled "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," OGD correctly pointed out that, with respect to basis two, the ER submitted in relation to the PFS license application fails to adequately address the direct and indirect costs to the Skull Valley Band derived from socioeconomic and environmental impacts of the proposed facility. *See* OGD Contention O, basis 2, at p. 30. The license application completely fails to discuss and address the environmental, sociological, and psychological costs with which those living within a few miles of the facility will have to contend if the proposed facility is constructed.

The ER and PFS application also fail to address the negative impacts of the proposed facility on the Tribal culture and traditional practices of Tribal members living near to the proposed facility or visiting the Reservation for cultural reasons.

The Board erred by ruling OGD Contention O, basis three, inadmissible based on the Board conclusion that it is irrelevant. Basis three of OGD Contention O correctly alleges that the application is deficient because it does not address the high cost of operating the “temporary” storage facility in light of the cost of leaving the waste on-site until a permanent storage facility is approved and constructed.

Basis 4 of OGD Contention O also should have been admitted by the Board. OGD’s contention established a genuine issue of fact regarding the unavailability of storage space for existing waste to be shipped to and stored at the proposed PFS facility.

In sum, the allegations contained in basis two, three, and four of OGD Contention O should have been admitted by the Board because they fairly raise material questions of fact, involve legal conclusions without governing precedent, and raise substantial and important questions of law and public policy. Accordingly, the Commission should grant review of the Board’s interlocutory order regarding basis two, three, and four of OGD Contention O.

For the reasons set forth above, OGD hereby requests the Commission to grant review of the above-referenced interlocutory Board orders.

Respectfully submitted this 4th day of December, 2003.

A handwritten signature in black ink, appearing to read "Paul C. EchoHawk", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2003, I caused to be served a true and correct copy of the OGD PETITION FOR REVIEW OF INTERLOCUTORY BOARD ORDERS by United States Mail, First Class and conforming copies by electronic mail, unless otherwise noted, and addressed to the following:

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