



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 13, 2005

Mark J. Langer, Clerk
U. S. Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: Ohngo Gaudadeh Devia, et al. v. Nuclear Regulatory Commission, No. 05-1419 and 05-1420 (consolidated)

Dear Mr. Langer:

Enclosed you will find an original and four copies of the Unopposed Motion of the U.S. Nuclear Regulatory Commission to Hold Case in Abeyance and Notice of Appearance in the above-reference case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

Grace H. Kim
Senior Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Case Caption: Ohngo Gaudadeh Devia, et al.

v.

Case No: 05 - 1419 and 05 - 1420
(Consolidated)

U.S. Nuclear Regulatory Commission

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

Appellant(s)/Petitioner(s) Appellee(s)/Respondent(s) Intervenor(s) Amicus Curiae

U.S. Nuclear Regulatory Commission

Names of Parties

Names of Parties

Counsel Information

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.
Names of non-member attorneys listed above will not be entered on the court's docket.
Applications for admission are available on the court's web site at <http://www.cadc.uscourts.gov/>

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA, et al.,)	
)	
Petitioners)	
)	
v.)	Nos. 05-1419 and
)	05-1420 (consolidated)
U.S. NUCLEAR REGULATORY COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

**UNOPPOSED MOTION OF THE U.S. NUCLEAR REGULATORY
COMMISSION TO HOLD CASE IN ABEYANCE**

The United States Nuclear Regulatory Commission ("NRC") respectfully moves that this case be held in abeyance until the issuance of a final NRC decision on a motion pending with the agency to reopen the record of the administrative proceeding below. Counsel for petitioners the State of Utah ("Utah") and Ohngo Gaudedeh Devia ("OGD") have authorized us to state that they consent to this motion. Counsel for both Private Fuel Storage, L.L.C. ("PFS") and The Skull Valley Band of Goshute Indians, which have pending motions to intervene in the consolidated cases, have authorized us to state that they also consent to the grant of this motion.

The background and basis for this motion are as follows:

1. In a Memorandum and Order issued on September 9, 2005, the NRC completed adjudication of all contested issues in the administrative proceeding on PFS's license application to construct and operate a facility for the interim

storage of commercial spent nuclear fuel. *In the Matter of Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 N.R.C. __ (Sept. 9, 2005). With no remaining adjudicatory issues left to resolve, the NRC authorized the NRC staff to issue a license to PFS for the interim spent fuel storage facility.¹

2. On November 3, 2005, Utah filed before the NRC a motion to reopen the record of the NRC adjudication on PFS's license application. Utah bases its motion to reopen on environmental, safety and policy questions that Utah contends arise out of the Department of Energy's recent announcement that it is developing a proposal for a standardized cannister design for the permanent spent nuclear fuel repository. Utah's motion is currently pending before the NRC.

3. Within 60 days of CLI-05-19 but subsequent to filing its motion asking the NRC to reopen the adjudicatory record, Utah, in Case No. 05-1420, petitioned this Court for review of the NRC's license authorization and underlying decisions. OGD, in Case No. 05-1419, also filed a petition for review of the NRC's licensing decision. By order dated November 14, 2005, this Court consolidated the two cases.

4. Under the Hobbs Act and the Atomic Energy Act, this Court has jurisdiction to review all "final orders" in NRC licensing proceedings. See

¹For various reasons unrelated to the adjudicatory proceeding on the license application, an NRC license for the PFS interim storage facility has not yet issued.

28 U.S.C. 2342 (4); 42 U.S.C. § 2239(b). Here, though, Utah's still-pending motion to reopen the record of the NRC proceeding -- filed prior to its petition for review in this Court (No. 05-1420) -- raises a substantial question about the finality of the NRC's licensing decision and hence about this Court's jurisdiction to review the NRC decision as to Utah. Were the parties to brief the jurisdictional issue, the NRC would rely on case law in this Circuit indicating that the filing of a motion to reopen renders the agency action non-final and unreviewable as to the filing party. *See, e.g., United Transportation Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989).

5. In view of the substantial question as to this Court's jurisdiction over Utah's petition for review, counsel for Utah, counsel for OGD, and undersigned counsel for the NRC have together agreed that the most efficient course would be to hold this consolidated case in abeyance pending a final agency decision on Utah's motion to reopen the NRC adjudicatory record. All parties believe it would be in the interests of judicial economy to hold the consolidated case in abeyance rather than engage in a jurisdictional dispute before the Court at this time.

6. If this Court grants the motion to hold this case in abeyance, the NRC (after consulting all other parties) will file a motion to govern further proceedings in this Court no later than twenty-one days after the NRC acts on the pending motion to reopen or in any event no later than March 15, 2006.

For the foregoing reasons, the NRC respectfully requests that this Court hold this case in abeyance pending a final NRC decision on Utah's motion to reopen the record of the adjudicatory proceeding below.

Respectfully submitted,


JOHN F. CORDES
Solicitor


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Dated: December 13, 2005

CERTIFICATE OF SERVICE

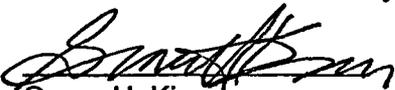
I hereby certify that on December 13, 2005, copies of the foregoing Unopposed Motion of the U.S. Nuclear Regulatory Commission to Hold Case in Abeyance and Notice of Appearance were served by mail, postage prepaid, upon the following counsel:

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