ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2007

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

Nos. 05-1419, 05-1420, and 06-1087

OHNGO GAUDADEH DEVIA, and
STATE OF UTAH,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS TO REVIEW ORDERS OF AND LICENSE ISSUED BY THE
U.S. NUCLEAR REGULATORY COMMISSION

SUPPLEMENTAL BRIEF FOR PETITIONER STATE OF UTAH

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

* - Authorities on which we chiefly rely are marked with asterisks.

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

* - Authorities on which we chiefly rely are marked with asterisks.

STATEMENT

On February 21, 2006, NRC issued PFS a license to construct an independent spent fuel storage installation (ISFSI) in Utah. PFS can build its ISFSI only at the site that the license specifies. On March 6, 2006, Utah filed a timely petition for review. There is no dispute that, as of that date, Utah had standing: PFS's facility would impose the brunt of its substantial environmental, health, and safety consequences and risks on Utah and its citizens. Also, Utah's challenge was undoubtedly ripe because NRC had issued both a final decision and a license to PFS. 28 U.S.C. § 2344.

On September 7, 2006, the Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM) denied other approvals to PFS. *See* OGD Br. Addendum 3-19, 22-50. Those decisions rejected PFS's lease with the Indian tribe whose land was the NRC-approved site on which PFS planned to construct its ISFSI, and curbed PFS's ability to transport spent nuclear fuel (SNF) to the proposed ISFSI.

In accordance with the Court's October 3, 2006, scheduling order, the parties submitted merits briefs between November 2006 and March 2007. On March 16, 2007, the Court called for supplemental briefs about whether BIA's and BLM's decisions or passage of the National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, 119 Stat. 3136, on which the BLM action relied, called into question petitioners' standing or rendered the case unripe for adjudication.

Only PFS and the Skull Valley Band of Goshute Indians know whether they will challenge BIA's and BLM's decisions. If they do not, this case would be moot because PFS could not deliver SNF to Skull Valley and would be unable to exercise its site-specific NRC license to store SNF on tribal lands. Binding Supreme Court precedent would require that the challenged NRC actions be vacated as moot. *Mech-ling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961). In the unlikely event BIA's and BLM's decisions are overturned, however, Utah's NRC challenge would have real-world effect and be fit for judicial determination. PFS has declined so far to apprise the Court of its intention to challenge BIA's and BLM's decisions, stating only that it is "contemplating seeking judicial review of these decisions" and that a challenge is "under active consideration." PFS Br. 29. To build its proposed ISFSI, PFS must file such a challenge *and prevail* – a highly speculative contingency.

ARGUMENT

I. THE EVENTS CITED IN THIS COURT'S ORDER DO NOT CALL INTO QUESTION UTAH'S STANDING TO CHALLENGE NRC'S ISSUANCE OF A SITE-SPECIFIC LICENSE TO PFS.

To have standing, a party "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," and "that injury must be fairly traceable to the defendant's conduct and likely to be redressed by a favorable decision." *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal references omitted), *quoted in Worth v. Jackson*, 451 F.3d 854, 857-58 (D.C. Cir. 2006). Neither BIA's and BLM's decisions nor the NDAA undermines Utah's standing. PFS has concrete, particularized plans – which NRC has licensed for at least the next 20 years – to store 40,000 tons of spent nuclear fuel in the middle of Utah, with attendant environmental, health, and safety consequences and risks. If this Court were to vacate PFS's NRC-issued license, the facility could not be constructed and the fuel could not be stored in Utah. That fact distinguishes the present case from *City of Orrville v. FERC*, 147 F.3d 979 (D.C. Cir. 1998), in which petitioner no longer had a permit, so that its claims were speculative. Here, PFS still has an operative license and 20 years in which to use it. A favorable decision would provide true relief to Utah because, if this Court vacates PFS's NRC-issued license, the facility could not be constructed and the fuel could not be stored in Utah. Utah's injury is therefore not speculative and is both fairly traceable to NRC's conduct and redressable by a favorable decision on the challenges Utah has briefed in this Court.

It is true that Utah *also* will be relieved of the consequences of construction and operation of the proposed PFS facility *if* the BIA and BLM decisions remain in effect, but a petitioner does not lose standing to challenge one agency's decision just because a decision of a different agency, still potentially subject to judicial review,

could lead to the same result. If Utah's petition were dismissed for lack of standing, and the BIA and BLM decisions were subsequently overturned, the PFS project would be able to go ahead without *any* judicial review of the highly consequential decisions NRC has made in this case. The standing doctrine cannot possibly require that result. *See generally Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1498 (D.C. Cir. 1996) ("the proposition that a plaintiff loses its standing to challenge allegedly unlawful Government action by obtaining * * * a private remedy against the realistic danger of direct injury caused by that Government action * * * is too absurd to require refutation"). Rather, the proper way for this Court to avoid rendering an opinion that is merely advisory, while also ensuring that NRC's decisions do not escape review by this Court, is to hold this case in abeyance.

Utah does not claim that its standing arises merely because it participated at the agency level. *Cf. City of Orrville v. FERC*, 147 F.3d at 987. Rather, if BIA's and BLM's decisions are overturned, then as a direct result of NRC's licensing process Utah will be inundated with tens of thousands of tons of deadly nuclear waste that would degrade Utah's environment and jeopardize its citizens. The mere fact that a license applicant must clear additional hurdles to build a facility does not render an otherwise-justiciable claim nonjusticiable. *See Town of Stratford v. FAA*, 285 F.3d 84, 88 n.5 (D.C. Cir. 2002) ("Although the City of Bridgeport must still obtain certain

permits in order for the airport redevelopment to progress, the Decision itself is ripe for review even if the sponsor has yet to get all of the permits required for construction"), *reh'g denied*, 292 F.3d 251 (D.C. Cir. 2002).

II. THIS COURT'S DECISIONS SUGGEST THAT, BASED ON PRUDENTIAL CONCERNS, UTAH'S CHALLENGE MAY NOT BE RIPE AT THIS TIME.

This case does not fit the traditional paradigm of an unripe case. This is not a case in which judicial review was sought before it seemed realistically likely that agency action would have any effect on the petitioner. *Cf. Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (challenge to FDA regulations was premature because the rules had not yet been applied, their effect was merely speculative, and the record was incomplete). Nor does Utah's challenge implicate mere "abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *see also Worth*, 451 F.3d at 860. NRC has completed its licensing proceedings. NRC's action is final. Congress has given courts of appeals jurisdiction over final NRC actions. *See* 28 U.S.C. §§ 2342(2), 2344; 42 U.S.C. § 2239. "The finality of agency action in the context of formal adjudication is usually settled either by statute or by regulation. Generally, judicial review of formal agency adjudication is a simple, straightforward matter that does not require extended discussion. The lack of cases in this area is testimony that the problem of ripeness is virtually non-

existent." 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 14.21[1], at 431 (2d ed. 1997) (footnote omitted). Thus, there should be no question of *dismissing* Utah's petition for review on the ground of unripeness.

Nevertheless, some decisions of this Court treat as *prudentially* unripe – and therefore appropriate for deferred adjudication (not dismissal) – certain challenges to agency decisions whose real-world effect is illusory because of supervening events. Given that one of NRC's Commissioners recently noted that the agency-licensed PFS project "is no closer" to being built "than it was back in 1997," this case is a prime candidate for such treatment. *See* Addendum 4 (Commissioner Jaczko).

Judicial economy sometimes favors deferring review even though the case is "technically ripe for consideration." *American Airlines, Inc. v. Civil Aeronautics Bd.*, 495 F.2d 1010, 1021 n.37 (D.C. Cir. 1974). Thus, in *Town of Stratford v. FAA*, 292 F.3d 251 (D.C. Cir. 2002), citing "considerations of prudential ripeness," this Court "issued an order holding the case in abeyance" until the Army disposed of property necessary for an FAA-approved plan to take effect. *Id.* at 252. The Court's "concern was a prudential one – we did not wish to devote judicial resources when it might not be necessary." *Id.* at 252-53. There, as here, the petitioner wished to keep its challenge alive, and might have lost its ability to bring the challenge if this Court had *dismissed* the case as unripe. There, as here, however, the Court knew that the underly-

ing agency decision could have no real-world effect unless and until a different agency acted favorably on the proposed project. Here, the agencies other than NRC have acted *unfavorably* on the proposed project.

There is no cognizable prejudice to any party if this Court holds this case in abeyance. *See AT&T v. FCC*, 349 F.3d 692, 700 (D.C. Cir. 2003) ("where there are strong interests militating in favor of postponement, we must weigh the potential hardship of delay"). Provided its petition is not dismissed, Utah alleges no prejudice from postponement of judicial review. To exercise its NRC license, PFS must get BIA's and BLM's decisions reversed, whether or not this Court first reviews NRC's proceedings, so holding the case in abeyance does not prejudice PFS. *See City of Houston v. HUD*, 24 F.3d 1421, 1431-32 (D.C. Cir. 1994) ("the burden of having to [engage in] another suit" will not overcome a challenge to ripeness). PFS might *like* to know this Court's views on petitioners' challenges to NRC's decisions – but any party wanting an inappropriate advisory opinion could make the same argument.

"[T]he primary focus of the ripeness doctrine as it concerns judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against * * * the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 915

(D.C. Cir. 1985). Here, no party has an interest in prompt consideration of allegedly unlawful NRC action that outweighs this Court's interest in avoiding unnecessary adjudication. Thus, this case should be held in abeyance until PFS succeeds in overturning the BIA and BLM decisions. Should PFS not succeed in overturning those decisions, NRC's decisions and license should be vacated as moot.

III. UTAH'S PETITION FOR REVIEW SHOULD BE HELD IN ABEYANCE, BUT NOT DISMISSED.

Claims that are unripe in the traditional sense are dismissed without prejudice. *See, e.g., Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 510 (D.C. Cir. 1995). That disposition would be improvident and unfair in the present case, however, and it is not the course this Court took in the *Town of Stratford* case when considerations of prudential ripeness suggested that adjudication be deferred.

A party may generally refile a challenge that a court dismissed for being unripe, and the jurisdictional statute is tolled until the challenge ripens. For example, this Court has previously held that, even though a petition for review under the Hobbs Act was ostensibly due within 60 days of final agency action, petitioner could still bring a challenge (more than 60 days later) when the case eventually ripened. *Baltimore Gas & Electric Co. v. ICC*, 672 F.2d 146, 149-50 (D.C. Cir. 1982) ("Pending the development of such a controversy, BG&E need not fear preclusion by reason of the 60-day stipulation in 28 U.S.C. § 2344. A time limitation on petitions for judicial re-

view, it should be apparent, can run only against challenges ripe for review."); *see also Atl. States Legal Found. v. EPA*, 325 F.3d 281, 285-86 (D.C. Cir. 2003).

Here, however, Utah's claim was ripe when Utah petitioned for review from final NRC agency action, but subsequent events arguably made it prudentially unripe. Thus, in this case (unlike the cases cited above), dismissal would undoubtedly lead to litigation about whether and for how long Utah's period for seeking review could be tolled. It is difficult if not impossible to bind a future panel to any particular disposition of the question when Utah's 60-day period for seeking judicial review began to run, if it did *not* begin to run when NRC completed its proceedings. And "the inability of a petitioner to bring its claim at a later time would indeed pose a significant hardship." *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996). If the choice were either *dismissal* or continuation of the litigation – rather than either holding the case in abeyance or adhering to the present schedule for argument and decision – then finding unripeness would indeed cause extreme and lasting hardship to Utah, and the ripeness "balance[]," *Eagle-Picher*, 759 F.2d at 915, would favor a holding that the case is ripe.

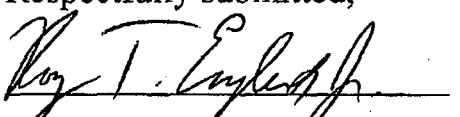
Holding this complex case in abeyance would spare the Court unnecessary effort and prevent prejudice to petitioners. The Court applied that approach in *Town of Stratford v. FAA*, *supra*. Were the Court to follow the same approach here, the

Court would not perform unnecessary work now, the Court would preclude any wasteful future dispute over the timeliness of Utah's claims, and the parties would be spared the burdensome need to refile petitions for review and briefs and voluminous appendices. This case, if the Court treats it as unripe, should be held in abeyance.

CONCLUSION

This case should not be dismissed, but, for prudential reasons, the Court should hold this case in abeyance until the BIA and BLM decisions are overturned. If judicial review of those decisions is not sought, or they are upheld on judicial review, NRC's actions in this case should be vacated as moot.

Respectfully submitted,



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March 23, 2007

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B): It is proportionally spaced, has a typeface of 11 points or more, and, in accordance with the Court's Order of March 16, 2007, does not exceed 10 pages (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2)).

March 23, 2007

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ADDENDUM

NRC NEWS

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No. 07-010

"A Commissioner's Perspective on Nuclear Regulation"

Prepared Remarks for

The Honorable Gregory B. Jaczko
Commissioner
U.S. Nuclear Regulatory Commission

at the
Regulatory Information Conference
Rockville, MD

March 14, 2007

This is my third Regulatory Information Conference Speech. I look at these speeches as an opportunity to take a step back and reflect on broad themes. In my first RIC speech, I spoke about my philosophy of government focused on openness, transparency, and communication with stakeholders. Last year, I discussed the importance of earning public confidence in the U.S. Nuclear Regulatory Commission (NRC).

After I gave that speech, I spoke with my colleagues about how challenging that goal is. After all, we can not control how others feel about the work of the agency. But I do believe there is a way we can work toward that goal and it involves a focus on our true customer. It is that topic I intend to expand on this year but before I do, I would like to take a few minutes to discuss a couple of my colleagues who will be leaving the Commission this year - Commissioners McGaffigan and Merrifield.

I met Commissioner Jeff Merrifield just before I started at the agency back at the beginning of 2005. He gave me a warm welcome and offered me sound and practical advice, including on how to organize my office, which helped cement our relationship from the very beginning. He brings a unique and important perspective to the Commission as its sole attorney.

Jeff and I have different backgrounds and have not agreed on every policy issue. But I have personally appreciated his dedication to the principle that the decision-making process we follow

should be disciplined and differing views should be respected. Together we have sought consensus where it could be found, and ensured that the process provided us with the opportunity to professionally explain our differences, where necessary. I know he has truly enjoyed his government service, I will miss working with him, and I wish him well in his next career.

I would also like to share a few thoughts about Commissioner McGaffigan. We share a bond of having fathers who immigrated to this country and his life is the quintessential American success story. He represents something I have a tremendous amount of respect for - public servants who dedicate their lives to government service. Throughout his three decade long career in the executive and legislative branches, he has responded honorably to the call to service and shown the moral courage that are legacies of President Kennedy's Administration.

He also has such a nimble mind and a keen attention to detail that he challenges each of us to be better Commissioners – to be certain we can clearly explain the logic of our beliefs and positions in our discussions with him. Some of my most challenging and enjoyable times at the NRC have been when Commissioner McGaffigan and I have disagreed on policy issues and then engaged in lively and productive discussions.

Commissioner McGaffigan and Commissioner Merrifield have been tremendous assets to this nation and the Commission, and I will miss them. These types of departures are always difficult transitions, but as you clearly heard yesterday, neither of these gentleman has left just yet. They still have a lot to say about how the agency functions and important issues to weigh in on, so with that in mind I better turn to my views on what the Commission should be focusing on next.

I will begin with an anecdotal story about the renowned 20th century Austrian philosopher Ludwig Wittgenstein. As the story goes, he asked a friend: "Tell me. Why do people always say it was natural for man to assume that the Sun went around the Earth rather than that the Earth was rotating?" His friend replied, "Well obviously because it just *looks* as though the Sun is going around the Earth!" Wittgenstein reportedly replied, "Well, what would it have looked like if it had looked as though the Earth was rotating?"

I bring up this story because it makes vividly clear how something that everyone accepts as truth may sometimes not be the true reflection of reality. Since the earth does indeed rotate, our initial perception of reality was misguided. So I ask you to keep this idea in mind as I continue my remarks today.

The NRC should be, and is, a customer oriented agency. The NRC has been exploring the business process management strategy known as "six sigma." Its focus is on the "voice of the customer." This strategy requires that an organization analyze what it does, who it serves, and then survey those customers to see if it is meeting their needs. Organizations use this strategy to gather data and then redesign their processes in a fact-based way to meet the customer's requirements.

I believe that an NRC analysis such as this clearly shows that our customer is the public at large. We sometimes have a tendency to narrow our focus to those members of the public who we interact with on a daily basis. As I mentioned in last year's speech, however, the public includes a wide variety of stakeholders including individuals, citizen groups, vendors, licensees, applicants, and

elected officials. The public - our customer - includes those who do and even those who do not actively participate in our formal processes.

The NRC has a talented, well educated, and dedicated staff. But most of the contact they have on a daily basis is with licensees and is focused on highly technical issues. It is on these issues that our agency and licensees speak a common language and face similar challenges. Contact with other members of the broader public is much less frequent. Over time, I believe this has naturally led to a focus more on what licensees need from the NRC and less on what the broader customer needs.

I think that view is incorrectly focused, just as it was wrong to believe the sun revolved around the earth because that was 'the way it looked.' The NRC's true customers are the public as a whole.

This has the ring of a self evident truth - our government is of, by, and for the people after all. Examine it in light of one of the main things we do which is to review and issue licenses. I believe even licenses themselves are for the broadly defined public. A license certainly has substantial intrinsic value for an applicant, but it should be thought of as a recognition that the recipient has met *our* responsibilities to the public to provide a reasonable assurance of adequate protection. We act as the stewards of the public interest to provide them with the technical expertise and knowledge they may not have the time or resources to acquire. And as the Atomic Energy Act makes clear, we also have a responsibility to ensure that everyone whose interests may be affected by an NRC action has the right to participate in the decision making process.

There is, therefore, a social contract: The public grants applicants the right to possess and manage potentially harmful substances when they *earn* it from us by demonstrating they can and will meet the rules and requirements we establish. We must keep our regulatory focus on ensuring we are meeting the needs of our true customers.

The agency has made tremendous strides in meeting this goal, but I believe we can do better. For instance, we organize signing ceremonies for license approvals at the end of what are detailed, technical, and sometimes emotional license review processes. Representatives of the agency and licensees attend, and sometimes even local officials are present. We should aim for a level of such true customer service that these events would be attended not only by those members of the public, but also by every intervenor in the proceedings. They may not be in perfect agreement with every decision made during the process, just as the applicant probably is not, but they would believe their concerns have been heard and really addressed, and have faith in us as their trustees that public health and safety will be protected. This should be our goal, and is a good way to look at whether our focus is on the right process.

So, we have more work to do in this area. The decision to issue a license is, and should be, a public process precisely because it is a statement for the public's benefit.

Let me give you a couple of examples of what I mean. In 1997 a consortium formed by eight large electric utility companies called Private Fuel Storage (PFS) submitted a license application to the Commission with the hope of operating an away-from-reactor spent nuclear fuel storage facility in Utah. Nine years later, the Commission approved a license. One would think that after almost nine years of exhaustive work to get a license, the applicant would waste no time beginning construction

leading to eventual operations.

It is over a year later, however, and the applicant is no closer to building the facility today than it was back in 1997. Instead, members of the public whom the Commission's license is supposed to benefit, largely rejected our decision to issue the PFS license for a host of reasons. Somehow our process failed because the license we issued did not provide adequate assurance of public health and safety in the view of the members of the public most affected by the action - those who live near the site and those elected to represent them, including the government of the State of Utah.

I am not saying the NRC necessarily erred in issuing the licence, but because the process was flawed, the end result of years of regulatory work is the same as if the license had been rejected. A license granted should be a license implemented, and if it is not, there is obviously a problem. Now, I am not arguing for a longer review time, or that it is necessary to appease every party involved. But a license review that does a better job of addressing our customer's needs would ultimately be more efficient and effective, and probably even faster.

Let us take a look at another region of the country. A license issued by a federal regulator under a consistent regulatory regime should be just as valid in one part of our country as in another. But in the Northeast, the customer is very different and there are other challenges to the validity of our licensing actions. Here the social contract has gone so wrong that a wide variety of stakeholders across the political spectrum have called for independent safety assessments at several nuclear power plants.

Independent of whom, you might ask? Independent of the *independent* safety regulator. And it is important to note that these concerned customers include not only members of public interest groups but also elected officials from all levels of government.

I am on record as saying I do not believe that the independent safety assessment model from ten years ago is the most effective way to address this issue. But the continued requests for this action, again by a wide group of stakeholders from different states, demonstrate to me that we are not doing a good job of serving our customer.

Again, I am not saying that every idea any member of the public has should be adopted by the NRC. We should have a stable regulatory regime and our decisions must be based on sound scientific, technical, and regulatory policy. But they must also be based on sound public policy. This requires a subtle shift that will have profound ramifications. It requires clear public communication and education. It requires that the Commission lead, and provide the staff with the resources to accomplish the additional customer service work. And it requires that the Commission clearly convey that we see this effort as being a high staff priority.

Two excellent tools we have to help us are the adjudicatory and rulemaking processes, which I consider great big regulatory 'suggestion boxes.' We should take advantage of comments, concerns, and contentions raised in the context of hearings and rulemakings to learn more about how our customer feels about the job we are doing as regulators and to incorporate new ideas.

People want and deserve answers to their questions about the use of radioactive materials in their communities, and we should not only seek to answer these concerns but to truly resolve them. If

we do that, our customers will know we are listening and incorporating there concerns into our regulatory structure and licensing actions.

Two good examples of where the agency has successfully accomplished that goal are in changes to emergency preparedness regulations and safety culture. I want to take this opportunity to commend the preparedness and response and office of enforcement staff on their outreach efforts over the last two years. The agency's successes in both developing new emergency preparedness regulations and guidance, and in finding a way to better incorporate attributes of safety culture into the reactor oversight process, are laudable. Both dealt with complex, controversial, and emotional issues and both required that extensive stakeholder input be gathered and incorporated into the final product. I would note that both also resulted in solutions that were not foreseen at the beginning of the process but were developed through the dynamic two-way conversation the staff initiated with the public.

Some opportunities to take advantage of these regulatory suggestion boxes and therefore help ensure the legitimacy of our licensing actions are pretty straightforward.

The Tennessee Valley Authority is studying whether to re-start construction of Watts Bar Unit 2, which has existed in a state of partial construction for decades. They have a construction permit issued back in 1973 that the NRC has renewed multiple times. In 1976 they applied for an operating license and this agency noticed a public hearing opportunity that is now closed.

On the news that TVA may want to restart construction, the NRC has begun to consider whether the public should be provided a new opportunity for a hearing on the operating license. If we decide not to, we run the risk that we could end up disenfranchising our customer.

After all, many of the people living near Watts Bar today were not there in 1976. Many were not even born. If we truly focus on our customer, we will provide an opportunity for the public to participate in the decision about whether or not to approve an application to operate a nuclear power plant in their community. If we can resolve all of the questions about the review process we follow, there should not be any questions about the outcome of that process.

Another slight shift in focus that could have profound effects involves our approach to schedules. Some stakeholders have encouraged the NRC to focus on streamlining our review process as much as possible and to secure the resources necessary to review every application they are considering submitting.

I wholeheartedly agree that review schedules and predictability are important. The NRC alone ultimately controls the pace at which reviews can be done in a manner that ensures safety. Schedules should be the hallmarks of how we maximize the opportunities for public participation, for the public to know their tax dollars are being spent wisely, and to allow the NRC to ensure public health and safety. We should therefore reach out to people who may not even know they can participate in our processes and make sure they have an understanding of these schedules. It is only by following this approach to schedules that we can be sure a review process that results in a license approval will also be one that leads to the actual construction and operation of a facility.

I would like to close with a discussion of one controversial decision the Commission has before

it. I have proposed that the Commission complete an expedited rulemaking which would require any new nuclear power plants built in the U.S. be designed to withstand a large commercial aircraft impact. If we look at this issue from a customer service perspective, we should reach out and make sure we know what our customer's expectations are. I believe I have a sense of those expectations, but I also believe we should discuss this issue publicly to make sure we fully understand the broader public's views.

It was not easy to address new security threats for the fleet of existing reactors, but the Commission thought it was vital to do so following September 11, 2001. The agency, therefore, issued orders requiring licensees to identify and implement strategies to maintain or restore cooling for the reactor core, containment building, and spent fuel pool. The NRC directed licensees to identify mitigative strategies - or measures they could take to reduce the potential consequences of a large fire or explosion - that could be implemented with resources already existing or readily available. This was what we could realistically do with billions of dollars of built infrastructure and it was sufficient to provide a reasonable assurance of adequate protection. It is not, however, sufficient, to miss an opportunity to design away the requirement for these strategies in new plants. We should act today, as the regulator of one critical infrastructure sector, to require improvements that will limit the damage that may occur from such an impact.

Now is the time, before any applications have even been submitted, to require reasonable design changes including redundancy, separation of safety systems, and structural modifications to address the commercial aircraft threat. I urge my colleagues to use this issue as an opportunity to demonstrate that our focus is on serving the public as our one and only true customer.

So to close, I believe we often find ourselves in a discussion with a narrower subset of our customer base. Just as our perception that the sun revolved around the earth was misguided, it may look like our true customer is limited to licensees and applicants. But I believe that if we step back and really look at this issue, we will see that our true customer is the much larger and broader public.

If we put a stronger focus on serving our customer we will be successful. It will lead to more realistic and effective regulatory approaches to all of the important public policy issues we face.

Thank you for your attention and I would welcome any questions you may have.

CERTIFICATE OF SERVICE

I hereby certify that prior to 4:00pm on March 23, 2007, a copy of the Supplemental Brief For Petitioner State of Utah was served by electronic mail to counsel for the parties listed below. Additionally, two copies of the Supplemental Brief For Petitioner State of Utah were served by first class mail upon the following:

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