

No. 05-1419

Consolidated with 05-1420, 06-1087

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA and
STATE OF UTAH,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PRIVATE FUEL STORAGE, L.L.C. and
SKULL VALLEY BAND OF GOSHUTE INDIANS,
Intervenors.

On Petitions for Review of Orders and a License of the
Nuclear Regulatory Commission

ANSWER OF INTERVENOR PRIVATE FUEL STORAGE TO
STATE OF UTAH MOTION TO VACATE

Jay E. Silberg
Anne R. Leidich
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth St, NW
Washington, DC 20036
P: 202-663-8063
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com
Attorneys for Private Fuel Storage, LLC

INTRODUCTION

Petitioners in this case portray the Private Fuel Storage (PFS) project as *de facto*, if not *de jure*, “abandoned,” “defunct,” and “worthless,” arguing that even “[i]f the court upheld all of the challenged [Nuclear Regulatory Commission (NRC)] rulings in their entirety, the project would not be built.” But this characterization is neither a fact nor a matter of law—it is merely the Petitioner’s unsupported speculation. The facts show that the license remains valid, and the project is potentially viable and may resume at some point in the future.

Because Petitioner’s claims are unsupported and the license may still be used, the Petition to Vacate should be denied.

STATEMENT

1. PFS does not dispute Petitioner’s statement of the history of the PFS case at this Court. Utah Br. 2-4.

2. On February 21, 2006, the NRC granted the PFS license for a term of 20 years. Notice of Issuance of Materials License Snm-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006). Thus, the NRC license remains valid and does not expire until 2026, at

which point it may be renewed for up to 40 years pursuant to 10 C.F.R. § 72.42(a).

3. PFS filed to terminate its license at a time when the NRC charged hundreds of thousands of dollars in annual fees for all spent fuel storage facilities, regardless of operating status. *See* Revision of Fee Schedules, Fee Recovery for Fiscal Year 2012, 77 Fed. Reg. 35,809, 35,818 (June 15, 2012) (disclosing annual fees for 10 CFR part 72 licensees who do not hold a 10 CFR part 50 license). The NRC revised this rule in 2014, to only charge annual fees from spent fuel storage facilities when the licensee has the ability to use or to derive benefit from the license—that is, when the licensee notifies the NRC of its readiness to operate. *See* Revision of Fee Schedules; Fee Recovery for Fiscal Year 2014, 79 Fed. Reg. 37,123, 37,128 (June 30, 2014) (eliminating the annual fee until “the licensee has the ability to use or to derive benefit from the license”). After this rule change, PFS withdrew its request to terminate the license, and the license remains in place today. Utah Br. 4.

4. While it has been delayed, the PFS project is neither defunct nor abandoned. Indeed, in the decision cited by Petitioner, the Court of

Federal Claims did *not* find that “the [PFS] project is defunct” or “worthless,” and instead was discussing the testimony of a party arguing in favor of that position. *Southern California Edison Company v. United States*, 93 Fed. Cl. 337, 359 (2010).

5. It may take years for a facility to be built after a facility license is issued by the NRC, and a delay does not indicate abandonment. For example, the NRC issued a construction permit for Watts Bar Unit 2 in **1973** and extended that permit in **2013**. *See Tennessee Valley Authority Watts Bar Nuclear Plant Unit No. 2; Order Approving Extension of Construction Permit*, 78 Fed. Reg. 72,119, 72,120 (Dec. 2, 2013) (extending construction permit to 2016). The facility, however, was not completed and operational until 2015 when the NRC issued its operating license. *Issuance of Operating License and Record of Decision; Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 2*, 81 Fed. Reg. 28,905 (May 10, 2016) (issuing operating license).

6. The need for interim storage facilities is growing, as a number of nuclear power plants have begun to decommission. *See Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning*, 87 Fed. Reg. 12,254, 12,262 (Mar. 3, 2022)

(explaining that twelve nuclear power plants have started decommissioning since 2013). The growing market is demonstrated by the two new facilities that are currently seeking NRC licenses for the consolidated interim storage of spent fuel. *See, e.g.,* Holtec International HI-STORE Consolidated Interim Storage Facility Project, 83 Fed. Reg. 13,802 (Mar. 30, 2018) (noticing application for offsite spent nuclear fuel storage facility in New Mexico); Interim Storage Partners LLC WCS, Consolidated Interim Storage Facility, Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021) (issuing license for offsite spent nuclear fuel storage facility in Texas).

ARGUMENT

The Petition to Vacate should be denied as unsupported and speculative.

Petitioner argues that this case and the underlying agency actions should be vacated as “moot” because PFS has purportedly “abandoned the project,” and asserts that even “[i]f the Court upheld all of the challenged NRC rulings in their entirety, the project would not be built.” Utah Br. 6-7. This, however, is no more than unsupported and

inaccurate speculation. As Petitioner recognizes, the NRC license for the PFS facility is still operative and has not been terminated by the agency.¹ Utah Br. 4. Thus, it remains a licensed and potentially viable future option for the storage of spent nuclear fuel. Petitioner's only evidence that the project is "defunct" and abandoned is the testimony of a former employee of a 5% participant in PFS, seeking to downplay the value of its investment for litigation purposes, and the lapse of PFS's Bureau of Land Management (BLM) applications. This is hardly reliable evidence that the project will never be built.

Petitioner relies heavily on the testimony of Southern California Edison (Edison) in *Southern California Edison Company v. United States*, 93 Fed. Cl. 337 (2010), in which Edison sued the Department of Energy (DOE) for partial breach of the Standard Contract requiring the disposal of Spent Nuclear Fuel and High Level Waste. Utah Br. 6-7. In that case, Edison attempted to recover \$2 million from DOE for its

¹ While PFS in 2012 requested that NRC terminate the PFS license, that request was withdrawn after the NRC eliminated the hundreds of thousands of dollars in fees that were levied each year against inactive spent fuel storage facilities. *Compare* 77 Fed. Reg. 35,818 (disclosing the annual fee), *with* 79 Fed. Reg. 37,128 (eliminating the annual fee prior to usefulness of the facility license).

investment in PFS as mitigation damages, asserting that the investment was an attempt to mitigate the DOE's breach. *Edison*, 93 Fed. Cl. at 359. In order to obtain full recovery for its investment, Edison's witness alleged that the \$2 million investment was ultimately worthless as the project was "defunct." *Id.* If the project had retained any value, then Edison would not be able to recover the full \$2 million from DOE. *Id.* at 362.

Such statements, made in service of litigation, were restated by the Court of Federal Claims in its decision. *Id.* at 359. However, Edison's characterization of the project was not part of the facts or findings of the court.² Indeed, the court declined to find the PFS project worthless or of no value, since some utilities were able to sell shares in the project. *Id.* at 361-362. As a result, the court stated that it would not have allowed Edison to recover its full investment as if the project were a total loss had Edison not already been barred from recovery for other reasons. *Id.* In sum, claims that PFS is "defunct" were only part

² In its decision the court was only repeating Edison's characterization of the facts. *Edison*, 93 Fed. Cl. at 359 ("Although the partnership is intact, and SCE's shares in PFS could theoretically be sold, SCE executives at trial testified that the project is defunct and the entire investment in PFS is worthless.").

of Edison's characterization of the PFS project and are insufficient to definitively establish that the project will never be built.

Nor does the current status of the PFS BLM applications establish that the project will never be built. PFS's NRC license is valid until 2026, and it can be renewed for up to another 40 years. 10 C.F.R. § 72.42(a). That is sufficient time for PFS to pursue the BLM approvals and other authorizations necessary to build the project.³ The current status of the BLM applications may be indicative of a present delay, but PFS can still move forward with the project at an appropriate time in the future.

Indeed, the existence of a delay does not indicate abandonment of a project. It is not unusual for an NRC-licensed facility to be built many years after the license is first issued. For example, the NRC issued a construction permit for Watts Bar Unit 2 nuclear power plant in **1973** and renewed that permit 40 years later in **2013**, *see* Order Approving Extension of Construction Permit, 78 Fed. Reg. at 72,120 (extending construction permit to 2016), while the facility was not operational until

³ Among other authorizations, PFS would have to renegotiate a lease for the site, the prior lease having expired.

2015, forty-two years after the initial construction permit was issued, Issuance of Operating License Watts Bar Nuclear Plant, Unit 2, 81 Fed. Reg. at 28,905.

Recent changes in the need for interim spent fuel storage, may also result in the PFS project moving forward. While the PFS project was visionary and, perhaps, ahead of its time when it was licensed in 2006, the current state of the nuclear power industry has demonstrated an increased need for the offsite consolidated storage of spent nuclear fuel due to the recent numbers of nuclear power plants being decommissioned. From 1998 to 2013, no nuclear power plants were being decommissioned, and spent nuclear fuel was easily stored onsite. *See* Regulatory Improvements for Transitioning to Decommissioning, 87 Fed. Reg. at 12,262. However, from 2013 to 2021, twelve nuclear power plants entered decommissioning. *Id.* Nuclear power plant sites cannot be fully decommissioned until the spent fuel is moved off site. This has prompted others to enter the market and two other facilities are currently seeking NRC licenses for the offsite consolidated interim storage of spent fuel. *See, e.g.,* HI-STORE Consolidated Interim Storage, 83 Fed. Reg. at 13,802; WCS Consolidated Interim Storage

Facility, 86 Fed. Reg. at 51,926. Clearly the market has demonstrated a need for facilities like PFS, and it would be premature and speculative to declare the project “defunct.”

For the reasons set forth above, the Petition to Vacate should be denied.

Respectfully submitted,

/s/ Anne R. Leidich

Jay E. Silberg

Anne R. Leidich

PILLSBURY WINTHROP SHAW

PITTMAN LLP

1200 Seventeenth St, NW

Washington, DC 20036

P: 202-663-8063

jay.silberg@pillsburylaw.com

anne.leidich@pillsburylaw.com

Attorneys for Private Fuel Storage, LLC

May 9, 2022

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

OHNGO GAUDADEH DEVIA, et, al.,
Petitioners,

v.

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

No. 05-1419, 05-1420
06-1087
(consolidated)

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), that on May 9, 2022, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: May 9, 2022

/s/ Anne R. Leidich
Anne R. Leidich