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

OHNGO GAUDADEH DEVIA, and the STATE OF UTAH, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA, Respondents. PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors.	No. 05-1419, consolidated with Nos. 05-1420, 06-1087

FEDERAL RESPONDENTS' RESPONSE IN OPPOSITION TO MOTION TO VACATE FINAL AGENCY ACTION AS MOOT

The United States Nuclear Regulatory Commission ("NRC") and the United States (collectively, "Federal Respondents") oppose the State of Utah's motion to vacate, on mootness grounds, the NRC orders that are the subject of these Petitions for Review. The NRC license remains valid, and Utah has not identified any significant change in the circumstances underlying this Court's current stance of holding this case in abeyance rather than dismissing it as moot. Instead, Utah relies on (1) statements in a court decision that predated a joint motion filed more than a decade ago to continue this case in abeyance, and (2) Department of the

Interior documents that do not reveal any significant new developments. The only apparent basis for Utah filing this motion now is that additional time has passed. Utah's motion also appears to ask this Court to vacate orders that the Petitioners did not, in their briefs, raise for this Court's review. This Court should deny the motion.

The Private Fuel Storage project has still not proceeded forward. But the NRC license issued for the project, which is the subject of the instant case, remains valid and is not scheduled to expire until February 21, 2026. *See Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421, 423 (D.C. Cir. 2007) (referencing NRC's issuance on February 21, 2006, of a twenty-year license with a potential for renewal); *id* at 427 (explaining that the Court holding this case in abeyance does not invalidate the NRC license and that, accordingly, PFS "remain[s] free to conduct its business as it sees fit" (internal quotation marks omitted)). Utah concedes that Private Fuel Storage has not abandoned its NRC license, Motion at 4, and the mere fact that the project has not moved forward to date does not mean that no progress will or could be made in the future. The licensee maintains the right to exercise its rights under the license until the license expires in 2026, or potentially for longer than that if the licensee were to apply for renewal. *See* 10 C.F.R. § 72.42 (requiring a fixed term of license duration that is specified in the license but providing for a delay in license expiration if the licensee applies for renewal at least two years in advance);

5 U.S.C. § 558 ("When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency").

Utah cites to a Court of Federal Claims decision referencing testimony describing the project as "defunct," but that court decision was issued twelve years ago. Motion at 5; *Southern California Edison Co. v. U.S.*, 93 Fed. Cl. 337, 359 (2010). That court decision was also not attempting to resolve the question of whether the project could ever start moving forward again in the future. Rather, it examined whether a particular investor in the project—Southern California Edison Co.—could recover breach-of-contract damages from the Federal Government to cover the company's investment in the project.

Moreover, that Court of Federal Claims decision was issued on June 3, 2010, prior to the decision issued by the U.S. District Court for the District of Utah on July 26, 2010, that vacated and remanded the Department of the Interior decisions that had denied the Private Fuel Storage right-of-way application and disapproved the lease for the project site. *Skull Valley Band of Goshute Indians v. Davis*, 728 F.Supp.2d 1287 (D. Utah 2010). Following issuance of that District Court decision, the parties to the instant case—including Utah—jointly asked this Court to continue to hold the case in abeyance. Joint Motion of Petitioners, Respondents,

and Intervenors to Continue to Hold Case in Abeyance and to Reset Schedule for Status Reports at 1-2 (Aug. 25, 2010). Ultimately, Utah does not explain how testimony mentioned in another court decision that was issued *before* the parties filed that joint motion requesting continued abeyance in the instant case warrants the court acting *now* to issue the requested relief.

The only other factual basis Utah provides to support its mootness argument is a set of documents that, Utah asserts, indicates that there are not currently active proceedings at the Department of the Interior regarding a right-of-way for the project. Motion at 5 (citing Motion Attachments A and B). But the lack of current Department of the Interior activity regarding a right-of-way for the project is not a new development. In fact, the sixteenth status update of the parties, filed almost a decade ago (on December 14, 2012), was the most recent 120-day status update filed in the case that reported any developments related to Department of the Interior proceedings. Since then, and up until the Court administratively terminated the case in 2018, the parties' 120-day status updates repeatedly stated that "no further official action has occurred on the remanded right of way application or lease approval." *See, e.g.*, 31st Report on Status of Remanded Actions to the Department of the Interior for Approval of Lease and Right-of-Way Application at 2 (Nov. 20, 2017). It also remains an open question in this litigation whether Department of the Interior approval of the right-of-way is even necessary

for the project to proceed. *See Devia*, 492 F.3d at 425 (describing Intervenors' arguments).

In sum, the NRC license for the Private Fuel Storage project is scheduled to expire in 2026, but for now it remains valid, and the State of Utah has pointed to no new developments that would warrant this Court preemptively vacating the NRC license and associated NRC orders.

If, however, the Court were to find this lawsuit moot and considered vacatur an appropriate step under *A.L. Mechling Barge Lines, Inc. v. U.S.*, 368 U.S. 324 (1961) and its progeny, *see* Motion at 1-2, 7, Utah is *not* correct that the Court must then vacate "all of the decisions of the [NRC] and the Licensing Board leading up to and culminating with its final decision" in the Private Fuel Storage licensing proceeding. Motion at 8-9. As discussed below, Utah's brief (and the brief of its fellow petitioner Ohngo Gaudadeh Devia) challenged—and therefore preserved for judicial review—the NRC's decisions only on certain specific issues, rather than challenging every aspect of every NRC decision in the proceeding. Even if vacatur is warranted, that remedy must necessarily be confined to the agency decisions that are under review in this case.

Utah cites no case law supporting its sweeping assertion about the scope of vacatur for mootness, referring instead only to case law and an Administrative Procedure Act provision describing the permissible scope of judicial review.

Motion at 8. In fact, a case cited by the State of Utah indicates that the scope of vacatur for mootness need *not* be all-encompassing and depends instead on the issues actually raised and argued in the case. In *Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373, 1382 (D.C. Cir. 1979), this Court did not, upon finding the petition for review before it moot, indiscriminately vacate everything in the agency proceeding below; rather, the Court "vacate[d] the orders under review insofar as they hold that petitioner's curtailment practices were in violation of section 4(b) of the Natural Gas Act," which was the specific issue the petitioner raised in that case. *Id.* at 1378, 1383. After all, the purpose of vacatur on mootness grounds is to rectify a petitioner's inability, due to circumstances beyond the petitioner's control, to obtain judicial review of an adverse ruling. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). It would make little sense, then, for a court to order vacatur on mootness grounds of agency orders a petitioner was not even challenging in the mooted court action.

Petitioners' merits briefs in the instant case raised very specific arguments regarding particular issues resolved in particular NRC adjudicatory decisions; Petitioners did not challenge every NRC decision issued during the proceeding. *See generally* Brief of State of Utah (arguing that the NRC erred in its disposition of Utah contentions regarding (1) risks to the facility from aircraft crashes and missiles; (2) the NRC Final Environmental Impact Statement's assumptions about

potential spent-fuel-repackaging needs and whether the U.S. Department of Energy would ultimately accept spent fuel stored at the project site for disposal; and (3) the NRC's decision not to analyze potential terrorist attack risks in the Final Environmental Impact Statement); Brief of Ohngo Gaudadeh Devia (arguing that NRC should have granted hearing request on an environmental justice contention); *see also* Brief of Federal Respondents, Certificate as to Parties, Rulings, and Related Cases (listing the subset of Board and Commission decisions in the licensing proceeding that are "pertinent to this lawsuit").

Utah's requested broad-scope vacatur would needlessly and baselessly disturb a significant collection of adjudicatory precedents at the NRC that were issued over the course of the licensing proceeding and which neither Petitioner attempted to challenge in their merits briefs.[1] Moreover, even if Petitioners were to win this case on the merits, the Court, if vacating anything, would presumably vacate only those agency actions, findings, and conclusions the Court found to be

[1] For examples of other NRC orders that were not the subject of Petitioners' arguments in their merits briefs, *see, e.g.*, CLI-00-13, 52 N.R.C. 23 (2000) (deciding interlocutory appeal from Board decision on financial qualification issues); LBP-00-35, 52 N.R.C. 364 (2000) (ruling against Utah regarding contention challenging adequacy of onsite fire protection measures in emergency plan); CLI-01-9, 53 N.R.C. 232 (2001) (reviewing the Board ruling on Utah's onsite fire protection contention); LBP-03-8, 57 N.R.C. 293 (2003) (ruling on Utah contentions regarding seismic-related issues); CLI-05-16, 62 N.R.C. 1 (2005) (ruling on State of Utah petition to review a Board order relating to proposed redactions in various documents related to financial assurance and decommissioning funding assurance issues).

arbitrary and capricious, not supported by substantial evidence, or otherwise contrary to law, based on the arguments petitioners actually raised in their briefs. *See* 5 U.S.C. § 706(2); *Fox v. Government of Dist. of Columbia*, 794 F.3d 25, 29 (D.C. Cir. 2015) (holding that arguments not raised in opening brief are forfeited). Utah is thus requesting a much broader remedy on mootness grounds that it could even hope to obtain from full judicial review. Put another way, if this case were now legitimately moot and required dismissal as a result, it would not affect the Petitioners' rights to judicial review of issues not argued in their merits briefs, because the Petitioners have already waived those issues by not raising them.

Indeed, in its merits brief, Utah requested only that the Court, if ruling for Utah on the merits, "reverse, remand, and/or vacate the decisions of the NRC and its Licensing Board *discussed in this brief*" Utah Br. at 61 (emphasis added). And in connection with a mootness argument raised in that same brief, Utah requested only that "NRC's *challenged orders and its issuance of a license to [Private Fuel Storage]* should be vacated as moot." *Id.* (emphasis added). Utah has now, inexplicably, expanded its remedial request to include vacatur of *every decision* issued by the agency's adjudicatory bodies throughout the entire licensing proceeding, even those not specifically challenged in Petitioners' briefs in this case.

Further illustrating the overbreadth of Utah's expansive vacatur request is that one Commission order issued in the Private Fuel Storage licensing proceeding has already been reviewed—and upheld—by this Court, in a case featuring the State of Utah as a petitioner. *See Bullcreek v. NRC*, 359 F.3d 536 (2004) (upholding Commission decision in CLI-02-29, 56 N.R.C. 390 (2002)). The Commission's CLI-02-29 decision rejected Utah's assertion that the Commission lacks authority under the Atomic Energy Act of 1954 to issue licenses for away-from-reactor spent fuel storage facilities and also denied a related Utah petition for rulemaking that was based on the same assertion. 359 F.3d at 539-40. Given that the purpose of vacatur for mootness is to rectify a missed opportunity to obtain judicial review, *Bonner Mall Partnership*, 513 U.S. at 25, it would be nonsensical to vacate an NRC order that already underwent judicial review on the grounds that a *subsequent* petition for judicial review raising *different* legal challenges has become moot.

Accordingly, if the Court were to find that this case has now become moot—a proposition that, as discussed above, is not supported by Utah's motion—the Court should limit any vacatur remedy to those portions of NRC orders actually challenged by Petitioners' arguments in this case.

CONCLUSION

For the foregoing reasons, the Court should deny Utah's motion to vacate.

Respectfully submitted,

/s/ Michael T. Gray
MICHAEL T. GRAY
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
michael.gray2@usdoj.gov
(202) 532-3147

/s/ Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor

/s/ James E. Adler
JAMES E. ADLER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
james.adler@nrc.gov
(301) 287-9173

May 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,103 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ James E. Adler
JAMES E. ADLER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
james.adler@nrc.gov
(301) 287-9173