

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBEFORE THE COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO  
"OHNGO GAUDADEH DEVIA'S JOINDER OF STATE OF UTAH'S PETITION  
 TO INSTITUTE RULEMAKING AND TO STAY LICENSING PROCEEDING"

INTRODUCTION

On October 18, 2002, Intervenor Ohngo Gaudadeh Devia ("OGD") filed a pleading in this proceeding, entitled "[OGD's] Joinder of State of Utah's Petition to Institute Rulemaking and to Stay Licensing Proceeding" ("Joinder"). Therein, OGD stated that it "adopts and incorporates by reference" the "Petition to Institute Rulemaking and to Stay Licensing Proceeding" ("Petition"), filed by the State of Utah ("State") on February 11, 2002.

The NRC Staff ("Staff") herein responds to OGD's Joinder. For the reasons set forth below, the Staff submits that, insofar as the Joinder seeks action by the Commission in this proceeding,<sup>1</sup> it constitutes an unauthorized and untimely response to the State's filing, and it should be rejected.

DISCUSSION

In its Petition of February 11, 2002, the State requested that the Commission amend its regulations governing independent spent fuel storage installations ("ISFSIs") in 10 C.F.R. Part 72, "to make clear that licensing is allowed only for federally owned and operated away-from-reactor, spent nuclear fuel ('SNF') storage facilities and not for an away-from-reactor storage facility when

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<sup>1</sup> The Staff expresses no position herein as to whether OGD should be permitted to join in the State's request for institution of a rulemaking proceeding, as that is a matter which is outside the scope of this proceeding.

privately owned” (Petition at 1). In this regard, the State argued that the Nuclear Waste Policy Act of 1982, as amended (“NWPA”), deprives the Commission of jurisdiction to license an away-from-reactor ISFSI, such as was proposed by Private Fuel Storage, L.L.C. (“PFS” or “Applicant”) in its application for a license to construct and operate an ISFSI on the Reservation of the Skull Valley Band of Goshute Indians (*Id.* at 4-36).<sup>2</sup> In addition, the State requested that the Commission stay the PFS license proceeding, pending final resolution of its petition for rulemaking (*Id.* at 41).

Timely responses to the State’s Petition were filed by the Applicant and Staff on February 21, and February 26, 2002, respectively.<sup>3</sup> Although OGD could have filed a response to the State’s Petition at that time, it did not do so.

On April 3, 2002, the Commission issued a Memorandum and Order in which it (a) denied the State’s request for stay, (b) set a schedule for interested parties to file briefs “on the substantive issue whether the NRC has authority under federal law to issue a license for the proposed privately-owned, away-from-reactor spent fuel storage facility,” and (c) deferred a decision on the State’s rulemaking petition until it has had “an opportunity to decide this threshold legal question.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 261-62 (2002).<sup>4</sup>

On October 18, 2002 -- more than eight months after the State filed its Petition -- OGD filed the instant Joinder, stating that it “adopts and incorporates by this reference the entirety of the

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<sup>2</sup> Although styled as a petition for rulemaking, the State challenges and argues against “positions” allegedly asserted by PFS in this proceeding. See, e.g., Petition at 22, 23, 28, and 31.

<sup>3</sup> See “Applicant’s Opposition to State of Utah’s Petition for Stay of Licensing Proceeding,” dated February 21, 2002; and “NRC Staff’s Response to the State of Utah’s (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction,” dated February 26, 2002; see *a/so*, “Applicant’s Response to Utah’s Suggestion of Lack of Jurisdiction,” dated February 21, 2002.

<sup>4</sup> OGD filed a brief in response to CLI-02-11 on May 15, 2002, supporting the State’s suggestion of lack of jurisdiction. See “[OGD]’s Brief in Support of Utah’s Suggestion of Lack of Jurisdiction,” dated May 15, 2002.

[State's] petition to institute rulemaking and to stay this licensing proceeding" (Joinder at 2).<sup>5</sup> OGD failed to explain, however, why it did not join in and "adopt" the State's Petition and stay request until now -- nor did it address the fact that the Commission has already denied the State's request to stay the proceeding, such that the stay request is no longer pending before the Commission.

OGD's attempt to join in the State's petition at this time is inexcusably late, without any demonstration of good cause. Moreover, its filing of a pleading seeking to "join in" or "adopt" another party's pleading -- eight months after the other party's pleading was filed -- runs contrary to the Commission's stated interest in assuring "the prompt and effective resolution of the matters set for adjudication" in Commission proceedings. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20, 25 (1998). In the absence of any showing why OGD should be permitted to join in the State's Petition at this time, the Staff respectfully submits that its Joinder should be rejected.

### CONCLUSION

For the reasons set forth above, the Staff respectfully submits that OGD's Joinder should be rejected as an untimely and unauthorized pleading in this proceeding.

Respectfully submitted,

**/RAI**

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 28<sup>th</sup> day of October 2002

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<sup>5</sup> Proceedings on OGD's sole admitted contention in this proceeding have concluded. On October 1, 2002, the Commission issued a Memorandum and Order in which it reversed the Licensing Board's decision directing a hearing on financial misconduct claims under Contention OGD O ("Environmental Justice"), and instructed the Board to grant the Applicant's motion for summary disposition of that contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC \_\_\_\_ (Oct. 1, 2002), slip op. at 18.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'OHNGO GAUDADEH DEVIA'S JOINDER OF STATE OF UTAH'S PETITION TO INSTITUTE RULEMAKING AND TO STAY LICENSING PROCEEDING,'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 28<sup>th</sup> day of October, 2002:

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