

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGENE BULLCREEK, et al.
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY
COMMISSION and the

UNITED STATES OF AMERICA
Respondents.

STATE OF UTAH
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY
COMMISSION and the

UNITED STATES OF AMERICA
Respondents.

No. 03-1018

No. 03-1022

MOTION OF
PRIVATE FUEL STORAGE, L.L.C.
FOR LEAVE TO INTERVENE

Private Fuel Storage, L.L.C. ("PFS") respectfully moves, pursuant to 28 U.S.C. § 2348, Rule 15(d) of the Federal Rules of Appellate Procedure, and Circuit Rule 15(b), for leave to intervene as of right in the above-entitled actions commenced by the Petitioners in Case No. 03-1018 on January 30, 2003¹ and by Petitioner State of Utah ("State") in Case No. 03-1022 on February 11, 2003.² In support of its motion, PFS states the following:

¹ Petition for Review, Margene Bullcreek et al. v. United States Nuclear Regulatory Commission and the United States of America, No. 03-1018, (Jan. 30, 2003).

² Petition for Review, State of Utah v. United States Nuclear Regulatory Commission and the United States of America, No. 03-1022, (Feb. 11, 2003). The Court on its own motion consolidated these two Cases by Order of February 12, 2003.

The Petitioners have commenced these actions to seek review of the denial by the United States Nuclear Regulatory Commission ("NRC" or "Commission") of the State's February 11, 2002 Petition for Rulemaking.³ In its Petition for Rulemaking, the State requested that the NRC amend 10 C.F.R. Part 72 of the NRC regulations, governing independent spent nuclear fuel storage installations ("ISFSIs"), to specifically provide that the NRC lacks statutory authority to license privately-owned and operated away-from-reactor ISFSIs. The State's Petition for Rulemaking specifically focused on PFS's application to the NRC for a license under 10 C.F.R. Part 72 to construct and operate a privately-owned, away-from-reactor ISFSI to be located in Skull Valley, Utah, (the "Private Fuel Storage Facility" or "PFSF") and also requested the Commission to stay the PFSF licensing proceeding pending final resolution of the petition.⁴ Approximately eight months later, on October 18, 2002, Ohngo Gaudadeh Devia ("OGD"), one of the named petitioners in Case No. 03-1018 and an intervenor in the PFS licensing proceeding, filed in the NRC's licensing docket for the PFSF a pleading "join[ing] and adopt[ing] the State of Utah's petition to institute rulemaking and stay [the PFS] licensing proceeding."⁵

On February 11, 2002, the State filed simultaneously with its Rulemaking Petition a "Suggestion of Lack of Jurisdiction" in the NRC's licensing docket for the PFSF.⁶ In its Suggestion of Lack of Jurisdiction, the State requested that the NRC dismiss the PFS license application for the same reasons argued in its Rulemaking Petition, *i.e.*, the NRC's purported lack of authority to license privately-owned and operated, away-from-reactor ISFSIs.⁷ On

³ State of Utah Petition to Institute Rulemaking and Stay Licensing Proceeding, (Feb. 11, 2002) ("Petition for Rulemaking" or "Rulemaking Petition").

⁴ Id.

⁵ Ohngo Gaudadeh Devia ("OGD") Joinder of State of Utah's Petition to Institute Rulemaking and to Stay Licensing Proceeding, NRC Docket No. 72-22-ISFSI, (Oct. 18, 2002), at 2. Margene Bullcreek and the other individual petitioners in Case No. 03-1018 were not parties to OGD's October 18, 2002 filing.

⁶ Utah's Suggestion of Lack of Jurisdiction, NRC Docket No. 72-22-ISFSI, (Feb. 11, 2002) ("Suggestion of Lack of Jurisdiction").

⁷ Id.

February 21, 2002, PFS filed briefs opposing both the State's request to stay the PFSF licensing proceeding and its Suggestion of Lack of Jurisdiction.⁸

On April 3, 2002, the Commission denied the requested stay and concluded that the common legal issue of its authority to license privately-owned, away-from-reactor ISFSIs presented both by the State's February 11, 2002 Rulemaking Petition and its Suggestion of Lack of Jurisdiction would be better resolved in the adjudicatory format of the PFSF licensing proceeding (i.e., through legal briefs) than the rulemaking format.⁹ At the same time, the Commission put the rulemaking process "on hold" until it had ruled on the threshold issue of whether it possessed authority to license privately-owned, away-from-reactor ISFSIs.¹⁰ In accordance with the briefing schedule established by the Commission on the PFSF docket,¹¹ on May 15, 2002, PFS filed a brief opposing the State's claim that the NRC lacked authority under 10 C.F.R. Part 72 to license privately-owned, away-from-reactor ISFSIs, such as the proposed PFSF.¹² OGD filed a brief supporting the State's Suggestion of Lack of Jurisdiction.¹³

On December 18, 2002, the Commission issued a Memorandum and Order on the PFSF licensing docket in which it held that the NRC has the authority to license privately-owned, away-from-reactor ISFSIs and rejected the attempt to have the PFS license application dismissed for a purported lack of jurisdiction.¹⁴ In the same Memorandum and Order, the Commission

⁸ Applicant's Opposition to State of Utah's Petition for Stay of Licensing Proceeding (Feb. 21, 2002); Applicant's Response to Utah's Suggestion of Lack of Jurisdiction, (Feb. 21, 2002).

⁹ Private Fuel Storage, LLC (Independent Spent Fuel Storage Facility), CLI-02-11, 55 NRC 260 (2002).

¹⁰ Id. at 265

¹¹ Id.

¹² Applicant's Brief in Opposition to Utah's Suggestion of Lack of Jurisdiction, (May 15, 2002).

¹³ Ohngo Gaudadeh Devia ("OGD") Brief in Support of Utah's Suggestion of Lack of Jurisdiction, (May 15, 2002). Margene Bullcreek and the other individual petitioners in Case No. 03-1018 did not join in this brief as they were not parties in the NRC licensing proceeding for the PFSF.

¹⁴ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-02-29, 56 NRC ___, slip op. (Dec. 18, 2002).

denied the State's February 11, 2002 Petition for Rulemaking, which was premised on the same claim of a purported lack of Commission jurisdiction.¹⁵ Petitions for Review with this Court seeking review of the Commission's denial of the State's Rulemaking Petition were filed on January 30, 2003 by Margene Bullcreek, et al., and on February 11, 2003 by the State respectively.¹⁶

PFS is entitled to intervene as a matter of right in these actions, because PFS is a party in interest in the matter before the NRC whose interests would be adversely affected if the Commission's Memorandum and Order were enjoined, set aside, or suspended. 28 U.S.C. § 2348. PFS is the applicant to the NRC adjudatory licensing proceeding in which the Commission issued its December 18, 2002 Memorandum and Order resolving the legal issue of its authority to license privately-owned away-from-reactor ISFSIs and denying the State's February 11, 2002 Rulemaking Petition. As set forth above, PFS fully participated in the NRC process that resulted in the Commission's decision denying the Petition for Rulemaking – a petition explicitly focused on the PFSF. Since the purpose of both the Rulemaking Petition and the State's Suggestion of Lack of Jurisdiction was to prohibit the NRC's licensing of the PFSF, PFS has a direct and substantial interest in the resolution of the jurisdictional issue. Without an NRC license, PFS cannot construct or operate the proposed PFSF and hence cannot receive any return on its considerable investment to date or receive any of the other expected benefits.

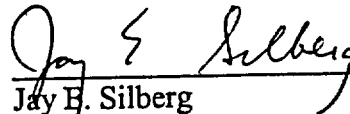
Thus, because of the common legal issue presented by the February 11, 2002 Rulemaking Petition – the subject of the instant Petitions for Review – and the issuance of the PFSF license for which both the State and OGD claim that the Commission lacks jurisdiction on the same grounds as advanced in the Rulemaking Petition, PFS has substantial, direct, and tangible interests in this Court's affirmance of the Commission's denial of the February 11, 2002

¹⁵ Id. slip op. at 28.

¹⁶ Both Petitions for Review state that they do not seek review of the Commission's December 18, 2002 Memorandum and Order insofar as it rejects the State's Suggestion of Lack of Jurisdiction in the PFSF licensing docket.

Rulemaking Petition. Accordingly, PFS is entitled to intervene as of right in these actions. 28
U.S.C. § 2348.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jay B. Silberg", written over a horizontal line.

Jay B. Silberg
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(202) 663-8000
Counsel For Private Fuel Storage, L.L.C.

Dated: February 27, 2003

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Motion of Private Fuel Storage, L.L.C. for Leave to Intervene and Private Fuel Storage, L.L.C.'s Corporate Disclosure Statement were served upon the following by United States mail, first class, postage prepaid, on this 27th day of February, 2003:

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Jay E. Silberg

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Private Fuel Storage, L.L.C. (“PFS”) submits this Corporate Disclosure Statement. PFS is a Delaware limited liability company, whose members are eight electric utility companies: Northern States Power Company doing business as XcelEnergy; Genoa FuelTech, Inc.; Indiana Michigan Power Company; Southern California Edison Company; Southern Nuclear Operating Company, Inc.; GPU

Nuclear, Inc.; Entergy Nuclear Indian Point 2, L.L.C.; and Florida Power and Light Company.

No other publicly held company has 10 percent or more equity interest in PFS.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jay E. Silberg", is written over a horizontal line.

Jay E. Silberg

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Dated: February 27, 2003

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