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

OHNGO GAUDADEH DEVIA AND STATE OF UTAH, Petitioners, v. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents, PRIVATE FUEL STORAGE, L.L.C., AND SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors.	Nos. 05-1419, 05-1420, 06-1087

JOINT PROPOSAL OF PETITIONERS STATE OF UTAH AND OHNGO GAUDADEH DEVIA REGARDING A FORMAT FOR BRIEFING

As instructed by the Court in its Order of June 23, 2006, petitioners State of Utah and Ohngo Gaudadeh Devia ("OGD") propose the following format for briefing:

(1) Brief of Petitioner State of Utah (no more than 21,000 words) and separate Brief of Petitioner OGD (no more than 14,000 words) to be filed on a date set by the Court;

(2) Briefs (no more than 7,000 words each) of Amici Curiae Supporting Petitioners to be filed on the date specified by FRAP or a later date set by the Court;

(3) Briefs of Respondent Nuclear Regulatory Commission ("NRC") (no more than 21,000 words) and joint or separate briefs of Intervenors Private Fuel Storage ("PFS") and Skull Valley Band of Goshute Indians (in aggregate, no more than 14,000 words for both Intervenors together) to be filed on the date specified by FRAP or a later date set by the Court;

(4) Brief of Amicus Curiae Nuclear Energy Institute Supporting Respondent (no more than 7,000 words) to be filed on the date specified by FRAP or a later date set by the Court; and

(5) Reply Brief of Petitioner State of Utah (no more than 10,500 words) and separate Reply Brief of Petitioner OGD (no more than 7,000 words) to be filed on the date specified by FRAP or a later date set by the Court.

The proposed briefing format gives each party and each intervenor the same number of words for briefing it would receive under FRAP 32(a)(7)(B), except that Utah would receive fifty percent more than the standard number of words (as requested in Utah's motion filed on April 17, 2006) and respondent and its supporters would receive a corresponding increase. For reasons discussed below, this proposal does not contemplate requiring petitioners Utah and OGD to file a joint brief. It also leaves intervenors the option of filing jointly or separately but limits their aggregate number of words.

1. Utah and OGD Should Not Be Forced to File a Consolidated Brief.

The Court should not require Utah and OGD to prepare a joint brief because the two petitioners raise very different issues. Utah's issues focus mainly on the safety of the nuclear waste facility. OGD, on the other hand, focuses on environmental justice. Furthermore, the magnitude and technical complexity of this case (which lasted almost 9 years before the agency) are such that each party's arguments cannot be adequately presented or comprehensively understood unless done separately and in the requested size of briefs.

Even where the Court generally requires parties to join in a single brief, that requirement is inapplicable to States. For instance, immediately following the statement "intervenors on the same side must join in a single brief to the extent practicable," the applicable rule states, "This requirement

does not apply to a governmental entity." D.C. Cir. R. 28(f)(4). The rule requiring amici to file a single brief where practicable is also followed by the sentence, "This requirement does not apply to a governmental entity." D.C. Cir. R. 29(d). The term "governmental entity," as used in the Court's rules, includes individual States. D.C. Cir. R. 28(f)(4). Thus, as a sovereign State and under this Court's rules, Utah is expected to speak in its own voice without altering its arguments to obtain the assent of private parties.[1]

The Skull Valley Band of Goshute Indians is the landlord for PFS's proposed nuclear waste storage facility. Petitioner OGD consists of individuals, most of whom are members of the Skull Valley Band of Goshute Indians, who oppose that facility. OGD's environmental justice contention is that it is a smaller but distinct and well-defined population "'suffering a disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others [in the Band] have their situation improve.'" CLI-02-20, 56 N.R.C. 147, 156 (2002) (quoting LBP-02-08, 55 N.R.C. 171, 189 (2002)) (OGD Pet. Ex. 2);[2] *see also* Exec. Order No. 12,898, 3 C.F.R.

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[1] This Court's rules require that "[*i*]*ntervenors* on the same side must join in a single brief to the extent practicable." D.C. Cir. R. 28(f)(4)(emphasis added). Similarly, "[*a*]*mici curiae* on the same side must join in a single brief to the extent practicable." D.C. Cir. R. 29(d) (emphasis added). There is no analogous requirement in the rules for parties, however. To the contrary, the Federal Rules of Appellate Procedure anticipate that parties will file separate briefs. *See* F.R.A.P. R. 28(i) ("In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees *may* join in a brief, and *any party may adopt by reference a part of another's brief.*") (emphasis added). Nevertheless, Utah understands that the Court has a policy of requiring parties to file consolidated briefs unless there is good cause for filing separate briefs. Such justification exists in this case as discussed in the text above.

[2] Almost all of the decisions cited in this Joint Proposal were attached as exhibits to OGD's and/or Utah's Petitions for Review. "OGD Pet. Ex. __" refers to an exhibit to OGD's petition based on the numbered list of cases that accompanied its petition. The citation "Utah Pet. Ex. __" refers to an exhibit to Utah's petition.

859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998). In filing its contentions with NRC, OGD alleged, "Skull Valley Band tribal Chairman Leon Bear misappropriated funds paid by PFS under the lease PFS entered into with the Band in 1997, and used these funds for his own personal use or to bribe other tribe members into supporting his administration." CLI-04-9, 59 N.R.C. 120, 122 n.1 (2004). In NRC's words, "OGD alleged that Chairman Bear wrongfully had [refused] to share money obtained from the PFS lease with tribe members that either opposed the PFS project or his chairmanship of the tribe." *Id.* Based on discussions between petitioners, OGD intends to raise these factual allegations in support of its underlying legal arguments. In the NRC proceeding, Utah has vigorously litigated safety and environmental issues relating to the PFS facility but it has avoided taking a position on intra-tribal disputes. Utah does not take a position on OGD's factual allegations. However, requiring Utah and OGD to submit a joint brief would have exactly that effect.

OGD's environmental justice factual underpinnings are founded in the Band's intra-tribal dealings. Accordingly, while Utah does not doubt the veracity of OGD's declarations, Utah has no independent means to substantiate key material facts laid out by OGD.

Additionally, OGD and Utah are addressing different substantive issues. OGD is challenging the NRC's failure to consider an executive order that requires each federal agency to identify and address any disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States. *See* Exec. Order No. 12,898. Utah agrees that this is an important issue that the NRC should have evaluated, but it is not an issue that Utah intends to litigate before this Court. Likewise, OGD will not address any of the issues (discussed in Section 2 below) that Utah intends to brief. As a

result, there will be no duplication between the briefs other than the Statement of Facts. And, to avoid burdening the Court with reading nearly identical Statements of Fact, Utah and OGD undertake to incorporate by reference as much of one another's factual background as possible (while, of course, making sure to avoid entangling Utah in intra-tribal disputes). This approach is anticipated by the court rule "any party may adopt by reference a part of another's brief." FRAP 28(i).

2. The Court Should Allow Utah and Respondent to Exceed the Court's Standard Word Limit.

Although this Court disfavors expanding the word limit for briefs, D.C. Cir. R. 28(f)(1), it is not unusual to grant the parties additional words when complex agency cases come before it. *See, e.g., Transmission Access Policy Study Group* v. *FERC*, 1998 WL 633827 (D.C. Cir. 1998) (allowing briefs of up to 62,500 words). Providing parties with extra words in such cases protects their ability to address properly the numerous, complicated issues involved in those cases. This case is an appropriate situation in which to authorize Utah to exceed the limit because of the size and technical nature of the administrative record that is being challenged, the number of issues on which it is seeking review, and the complexity of the regulatory framework. Petitioners acknowledge that their adversaries should receive extra words to respond to petitioners' arguments if Utah receives (as it should) extra words to make them.

This is a massive case. On June 20, 1997, intervenor Private Fuel Storage L.L.C. ("PFS") submitted a license application to the Nuclear Regulatory Commission ("NRC") to construct and operate a facility at which to store nuclear waste. Over the years, more than 125 contentions (*i.e.*, challenges to PFS's proposal) were filed with the NRC, most of which were filed by petitioners. *See*

LBP-05-29, slip op. at Appendix-3, (Feb. 24, 2005) [as redacted to protect Safeguards information on October 28, 2005], 62 N.R.C. 635 (Utah Pet. Ex. B) ("the petitioners submitted some 125 contentions challenging the proposed facility"). In the course of the litigation, the number of contentions in dispute was narrowed through procedural rulings, summary dismissal and settlement. *Ibid.* Given that there were hundreds of procedural orders and approximately 70 decisions below, petitioners have already culled the many issues they could appeal down to fewer than 10 for purposes of this Court's review. The following discussion explains why Utah needs extra words to address in its brief the various reversible errors that the NRC committed.

A. Statement of Facts In Utah's Brief. To place the issues Utah has culled for review in context, Utah must summarize those issues from a licensing proceeding before the NRC which took place over the course of almost nine years and generated tens of thousands of pages of transcripts, expert reports, and pleadings. Describing the applicable statutes and regulations will also take a significant amount of space. Given that the proceedings involved a highly technical matter – the storage of nuclear waste – in a heavily regulated field, and that Utah intends to raise several distinct appellate issues, anything less than a detailed Statement will compromise, rather than enhance, the Court's understanding of the case. Even with any efficiencies that arise from citing to OGD's factual discussion, Utah estimates that it will need a minimum of 8,000 words for its Statement of Facts.

B. Argument Section. Of the many issues Utah perfected for appeal, Utah expects to raise only the following issues.

i. Air Crashes (Contention Utah K).

Utah will argue that the NRC committed a number of reversible errors in its decisions about the likelihood of an aircraft crash and whether there would be an excessive release of radiation. Utah intends to make five sub-arguments in this part of its brief:

1. NRC arbitrarily failed to consider critical evidence when it set the standard for whether an accident is credible at 1.0×10^{-6}/year rather than, as it previously did for nuclear reactors, at 1.0×10^{-7}/year.
2. NRC improperly refused to assess whether a loss of protective shielding would lead to an excessive release of radiation.
3. NRC made obvious computational errors by failing to include the probabilities of certain events – such as the probability of a cruise missile from one of the nearby military bases striking the storage site – in its overall calculation of the probability of an air crash.
4. The NRC failed to follow its own precedents that events with a probability on the order of magnitude of 1.0×10^{-6}/year are credible threats and instead treated the 10^{-6} standard as a bright-line rule.
5. The NRC arbitrarily and capriciously failed to follow a Department of Energy standard relating to the effect of an airplane crash on a metal storage container.

The regulatory and factual complexity of this contention make clear to Utah that these five sub-arguments cannot be made, in any form that informs the Court properly about the issues, unless an expansion of the usual word limit is granted.

Contention Utah K states:

> [PFS] has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, intermodal transfer site, and transportation corridor along Skull Valley Road, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity.

LBP-98-7, 47 N.R.C. 142, 190 (1997) (Utah Pet. Ex. L). After Utah filed the contention, PFS moved for summary disposition to prevent Utah from introducing evidence to support this contention. Although PFS prevailed on several component elements of the risk of an accident at the PFS facility, NRC allowed Utah to present evidence on other events that might cause an accident. LBP-99-35, 50 N.R.C. 180, 200-01 (1999). In ruling on a second motion for summary disposition, NRC prevented Utah from introducing evidence that certain military ordnance, cruise missiles, or other airborne objects would strike the storage facility. LBP-01-19, 53 N.R.C. 416, 455-56(2001), *aff'd*, CLI-05-19, 62 N.R.C. 403 (2005) (Utah Pet. Ex. A). Utah is challenging as arbitrary these decisions for failing to consider all of the relevant factors in the overall calculation of the risk of an accident that would release radiation.

NRC's Licensing Board also granted PFS's motion to set the regulatory standard used to assess whether an accident is credible at a lower level than NRC uses for nuclear reactors. The Board certified that issue to the Commission. 62 N.R.C. at 456-57. The Commission affirmed the standard that the Board applied, but did so over the dissent of one of the judges, who thought the Board failed to assess adequately whether PFS's facility would be more similar to a facility called a "GROA" or to nuclear power reactor for purposes of setting the probability of an accident. CLI-01-22, 54 N.R.C. 255 (2001) (Utah Pet. Ex. C). Utah will argue that NRC failed to consider material evidence when it established the standard for determining whether an event is "credible."

Once the Commission's review was complete, the Board held a three-week evidentiary hearing to decide whether there was a credible risk of an accident at the nuclear waste site. The Board concluded that the probability of a crash at the nuclear waste site was *four times greater* than that allowed even under the standard that NRC adopted, which (as noted in the previous paragraph) Utah is challenging as being too lenient and not protective of public health and safety. LBP-03-04, 57 N.R.C. 69, 122 (2003) (Utah Pet. Ex. D).

Rather than requiring PFS to revise its design plan, NRC held a second hearing to address the "consequences" of a crash. Shortly before the hearing, NRC narrowed the scope of the hearing to look only at the likelihood that a "cask"[3] would be breached. The Board prevented Utah from introducing evidence of whether radiation would be released in the event of a crash. In rejecting Utah's attempt to introduce such evidence, the Board held that there would be a third hearing (if necessary) to address the consequences of the breach of a "cask."

Following the second hearing, the Board concluded that the canisters that hold the nuclear waste would, barely, be likely enough to survive a crash that PFS's plans satisfied the applicable regulations. The Board, however, declined to apply a peer-reviewed aircraft crash standard adopted by the U.S. Department of Energy ("DOE") for assessing whether a metal container would rupture under extreme pressure. It instead used a test created by PFS that had not been peer reviewed or approved by any other federal agency. The Board's result depended on which test is applicable: Had the Board applied the DOE's standard for measuring strain on metal, it would have concluded that the canisters would rupture in the event of a crash. One of the three judges dissented because he concluded that the Board applied the wrong standard. LBP-05-29, slip op. at D-4 through D-6

[3] The meaning of the term "cask" as used by the NRC is disputed by the parties.

(February 24, 2005) [as redacted to protect Safeguards information on October 28, 2005], 62 N.R.C. 635 (Utah Pet. Ex. B). Utah intends to challenge as arbitrary NRC's decision not to apply the DOE standard.

NRC held that there was no need to conduct a third hearing, *see* LBP-05-29, slip op. at 6, because it concluded that there was "no more than a .86 (less than one) in a million chance of anything that would cause a radiological release," which is just below the maximum risk level permitted by the applicable regulations. LBP-05-29, slip op. at A-17. But Utah believes this conclusion ignored that a crash would breach the protective shielding surrounding the canister. Utah therefore filed a motion for reconsideration asking the Board to hold a third hearing to assess whether a loss of shielding would lead to a release of radiation. This hearing would have looked at the "consequences" of a crash, as the Board originally planned to do during the second hearing. The Board denied Utah's motion. LBP-05-12, 61 N.R.C. 319, 322 (2005).

On review of the two hearings and the resulting decisions, the Commission affirmed over the dissent of one of the Commissioners, who argued that the Board had arbitrarily ignored its past precedents by treating the 10^{-6} standard as a bright-line rule. CLI-05-19, 62 N.R.C. 403, slip op. 28-32 (2005) (Utah Pet. Ex. A). Utah intends to brief what it believes is NRC's deviation from its past use of the 10^{-6} standard.

Utah estimates that it will need **7,000** words to address Contention Utah K.

ii. Fuel Containers Ineligible For Yucca Mountain (Contention Utah UU).

Contention Utah UU arose following a statement by a DOE official that Utah understood as indicating that PFS-stored spent nuclear fuel would be ineligible for eventual disposal at the proposed Yucca Mountain permanent repository if shipped in the welded canisters stored at the PFS

site and, further, that DOE has no obligation to collect spent nuclear fuel from PFS's away-from-reactor nuclear storage facility. Utah filed to reopen the record and amend its contention immediately after DOE announced significant new conceptual design criteria for the permanent repository at Yucca Mountain. As Utah understood the comment, rather than accept bare fuel assemblies in various types of canisters as DOE had previously announced, spent fuel would now be packaged at reactor sites in DOE standardized canisters (PFS has no repackaging capability at its site).

Utah will argue that, when deciding whether to hold an evidentiary hearing on Utah's initial contention, NRC ignored its own precedents, and improperly dismissed the issue without a hearing. Utah believes that NRC resolved a factual dispute improperly under the applicable legal standard and arbitrarily refused to draw inferences or view facts in favor of the appropriate party.

As to Utah's attempt to reopen the record, Utah will argue, among other things, that the Commission's decision violated the reopening standard (*i.e.*, that a different result would have been reached had the newly proffered evidence been initially considered) when it held that DOE's newly announced plan for Yucca Mountain "does not unequivocally exclude PFS-stored waste." CLI-06-03, slip op. at 7, 63 N.R.C. __ (2006) (Utah Pet. Ex. Q).

Utah estimates that it will need **4,000** words to address Contention Utah UU.

iii. Environmental Effects of the Nuclear Waste Storage Facility (Contention Utah RR and Other NEPA Contentions).

Utah contended that the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, required NRC to assess the environmental consequences of a terrorist attack on the proposed nuclear waste storage facility. The Ninth Circuit recently reached this same conclusion in

a case that involved this exact issue and that also arose out of an NRC licensing proceeding. *San Luis Obispo Mothers for Peace* v. *Nuclear Regulatory Com'n*, 449 F.3d 1016 (9th Cir. 2006) ("*Diablo*"). Illustrative of the conservative nature of Utah's request for extra words is that, unlike Utah's brief (which will address multiple issues), petitioner's brief in *Diablo* spent 11,500 words (not including a separate discussion of the statutory framework) exclusively on the subject matter of Contention Utah RR.

Utah estimates that it will need 3,000 words to address Contention Utah RR and other NEPA issues.

iv. Adequacy of Financial Assurance (Contention Utah E).

Utah expects to argue that the NRC acted arbitrarily and capriciously, contrary to law, and without substantial evidence when it resolved Contention Utah E in PFS's favor by holding that PFS had provided adequate assurance that it had the financial means (or access to those means) to construct, operate, and decommission its proposed nuclear-waste storage facility safely.

Utah estimates that it will need 1,000 words to address Contention Utah E.

C. Cumulative Need For Extra Words. As the Court will note, Utah's section-by-section estimates (which do not include any allocation for a Summary of Argument) add up 23,000 words rather than the 21,000 that Utah requests: Utah believes that with careful editing and concise phrasing it can shave off the necessary number of words to allow the State to meet its proposed limit without compromising the factual discussion or legal analysis. Utah's estimates are conservative because any of the issues that Utah is raising could easily consume a full brief.[4]

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[4]As noted above, Utah RR (terrorist strike) *did* consume a full brief in a recent Ninth Circuit case.

NRC and intervenors likewise can anticipate a challenge in presenting their contrary views succinctly. The proposed word limits strike an appropriate and conservative balance between the need of the Court not to be burdened with excessive briefing and the needs of the Court and the parties to have the complex issues from this lengthy litigation presented (by both sides) in a comprehensible and maximally persuasive fashion.

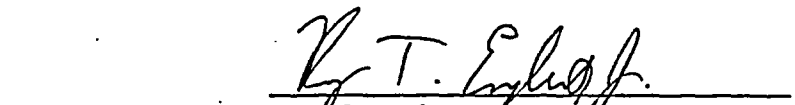
3. The Court Should Allow OGD to File a Brief of Standard Length.

In ordinary circumstances, OGD would be permitted to file a brief of 14,000 words to explain to this Court why NRC acted arbitrarily and capriciously. There is no reason to deviate from this rule. If Utah were not in this case, OGD would receive 14,000 words to raise its arguments. Because Utah's brief will not address the points that OGD intends to make, there is good cause for OGD to retain the traditional number of words a petitioner has to make its own arguments.

CONCLUSION

For the foregoing reasons, Utah and OGD respectfully request that the briefing format set out on pages 1-2 of this Joint Proposal be adopted.

Respectfully submitted,



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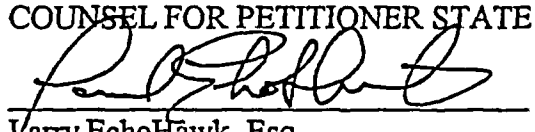

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July 24, 2006

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I hereby certify that on July 24, 2006, true and correct copies of the Joint Proposal of Petitioners State of Utah and Ohngo Gaudadeh Devia Regarding a Format For Briefing were served by first class mail, postage prepaid, upon:

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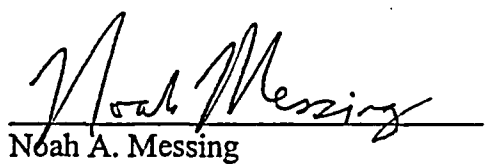

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