

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

STATE OF UTAH,)
)
Petitioner,)
)
v.)
)
NUCLEAR REGULATORY COMMISSION and)
THE UNITED STATES OF AMERICA)
)
Respondents.)
)

No. 05-1430

PETITION FOR REVIEW

The State of Utah (“Utah”) hereby petitions the Court in accordance with Rule 15 of the Rules of Appellate Procedure to review the final decision and actions of the Nuclear Regulatory Commission (“NRC”) in an adjudicatory licensing proceeding, NRC Docket No. 72-22-ISFSI. NRC’s decisions and actions relate to the application by Private Fuel Storage, LLC (“PFS”) to obtain a license to construct and operate an Independent Spent Fuel Storage Installation (“ISFSI”) to store large quantities of nuclear waste on lands owned by the Skull Valley Band of Goshute Indians. These Indian-owned lands are located within the State of Utah; an accident, a malfunction, or negligence at the ISFSI could cause significant harm to Utah, its citizens, and its environment. Therefore, Utah intervened in the NRC licensing proceeding and raised a number of contentions (*i.e.*, reasoned objections to the license application) in accordance with the then-applicable NRC regulation, 10 C.F.R. § 2.714(b) (2004). Utah petitions the Court to review the NRC’s adjudicatory rejection of all of Utah’s contentions and the NRC’s decision to issue a license to PFS. Under 42 U.S.C. § 2239(a)(1)(A) and (b), the Commission’s adjudicatory decisions over the course of this

proceeding became judicially reviewable on September 9, 2005, when the Commission issued CLI-05-19, 62 N.R.C. __ (Exhibit A), which states (slip op. at 27), “Our decision today concludes this protracted adjudication – which has generated more than 40 published Board decisions and more than 30 published Commission decisions,” and “[t]here are no remaining adjudicatory issues to resolve.” This petition is filed within 60 days of that date. See 28 U.S.C. § 2344; 42 U.S.C. § 2239(b).

Each of the contentions that Utah raised focused on a particular defect in PFS’s proposal. For a number of Utah’s contentions, the NRC Licensing Board and the Commission acted arbitrarily and capriciously and contrary to law by failing to comply with their own prior decisions (without articulating a basis for doing so); by failing to follow the NRC’s regulations or the federal statutes out of which those regulations arise; by failing to consider important evidence that would have changed the outcome of the various decisions; by violating Utah’s due process rights; and by committing other reversible errors.

On September 9, 2005, the Commission in CLI-05-19, 62 N.R.C. __, not only concluded its adjudication of all issues (as discussed above), but also instructed the NRC’s Staff to issue a license to PFS. This decision represented final agency decision and action, and made the other decisions from the PFS licensing process ripe for judicial review.

Utah intends by this petition to invoke the jurisdiction of this Court with respect to *all* of the decisions of the Commission and the Licensing Board leading up to and culminating with its final decision (*i.e.*, CLI-05-19, 62 N.R.C. __). Without in any way limiting the comprehensiveness of its invocation of this Court’s jurisdiction, however, Utah states that its present intention is to address in merits briefing the following specific decisions:

1. All NRC decisions relating to Contention Utah K.

2. All NRC decisions relating to Contention Utah UU.
3. All NRC decisions relating to Contention Utah E.
4. All NRC decisions relating to Contentions Utah X, Y, Z, HH, II, KK, and RR, which are grouped together because each of these contentions alleged that the PFS application and the NRC's consideration of it failed in a material way to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and applicable NRC regulations.

For the contentions listed in Paragraphs 1 through 4 above, Utah is attaching to this petition (as Exhibits A through P) the most relevant decisions that the NRC Licensing Board and the Commission issued. (It would overburden the Court if Utah included at this time all of the decisions that the Commission's September 9 decision made subject to judicial review; these decisions consume thousands of pages. Utah is invoking the Court's jurisdiction with respect to *all* of the decisions issued by the NRC and its adjudicative bodies in the PFS licensing process, whether or not copies of those decisions accompany this petition.)

Contention Utah K addressed, among other things, the risk that a credible accident from a crashing aircraft or bomb would occur at the ISFSI. The ISFSI site is overflowed annually by thousands of F-16s (some of which carry live ordnance) en route to the nearby military test and training range where pilots engage in war maneuvers and weapons testing. Utah is attaching a copy of CLI-05-19, 62 N.R.C. ___, dated September 9, 2005, which is the Commission's final decision (see Exhibit A). That decision denied Utah's request that the Commission review the Licensing Board's various decisions on Contention Utah K. As noted above, the Commission's decision also authorized the NRC Staff to issue a license to PFS. Utah is also attaching a copy of the published version of the Licensing Board's February 24, 2005, final partial initial decision on this contention,

LBP-05-29, 62 N.R.C. ___ (as redacted October 28, 2005) (see Exhibit B), which the Commission declined to review (see CLI-05-19, 62 N.R.C. ___). An NRC commissioner and a member of the Licensing Board dissented from, respectively, the decisions attached as Exhibit A and Exhibit B. (“Safeguards” material that the Commission has protected from disclosure in accordance with 42 U.S.C. § 2167 and the NRC’s applicable regulations, 10 C.F.R. § 73.21, has been redacted from the published version of the decision attached as Exhibit B. Utah anticipates that the parties will, by appropriate motion, provide the Court with the full versions of Exhibit B and other “Safeguards” materials under seal, but the public version should suffice to invoke the jurisdiction of this Court for present purposes.) Utah is also attaching a decision (CLI-01-22, 54 N.R.C. 255) in which the Commission determined the legal standard that must exist for an accident to be considered “credible” (see Exhibit C). One commissioner refused to join the majority opinion, indicating that she would have remanded the issue to the Licensing Board for additional fact-finding (Exhibit C, 54 N.R.C. at 265-66). In LBP-05-29, 62 N.R.C. ___, the Licensing Board acted inconsistently with a previous decision, LBP-03-04, 57 N.R.C. 69, and committed other reversible errors. A copy of LBP-03-04, 57 N.R.C. 69, is attached as Exhibit D.

Contention Utah UU addressed, among other things, the risk that the Department of Energy will not collect and transport nuclear waste from PFS’s facility for permanent storage at a geologic repository at Yucca Mountain unless it is first unsealed and repackaged elsewhere. Utah is attaching a copy of CLI-05-12, 61 N.R.C. 345, which is the Commission’s decision denying review of the Licensing Board’s decision on Contention Utah UU (see Exhibit E). Utah is also attaching a copy of the Licensing Board’s decision on this contention, LBP-05-05, 61 N.R.C. 108 (see Exhibit F).

Contention Utah E addressed, among other things, PFS's failure to provide assurance that it had the financial means (or access to those means) to safely construct, operate, and decommission the ISFSI. Utah is attaching a copy of CLI-04-10 (public version), which is the Commission's decision denying review of Contention Utah E (*see* Exhibit G). Utah is also attaching a copy of the following three significant Licensing Board decisions, which the Commission declined to review: the Licensing Board's May 27, 2003, Partial Initial Decision on Contention Utah E, LBP-05-21 (public version) (*see* Exhibit H); the Licensing Board's May 27, 2003, Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand From CLI-00-13), LBP-05-20 (public version) (*see* Exhibit I); and the Licensing Board's January 5, 2004, Reconsideration Ruling, LBP-05-23 (public version) (*see* Exhibit J). (Some of the decisions arising in connection with Contention Utah E contain material that the Commission determined to be confidential proprietary information relating to PFS's financial qualifications. Utah anticipates that the parties will, by appropriate motion, provide the Court, under seal, with the full versions of Exhibits G, H, I and J and other proprietary materials.)

As noted above, Contentions Utah X, Y, Z, HH, II, KK, and RR all relate to the Commission's failure to consider adequately (as required by the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and NRC regulations) the environmental costs, benefits, and/or consequences of building (or electing not to build, or of building in an alternative location) an open air facility to store nuclear waste (including the rail line that would lead to the facility). The Commission declined in CLI-04-04, 59 N.R.C. 31, to review the Licensing Board's treatment of Contentions Utah X, Y, Z, HH, II, and KK (*see* Exhibit K). In LBP-98-07, 47 N.R.C. 142, the Licensing Board declined to admit Contentions Utah X and Y (*see* Exhibit L, 47 N.R.C. at 202). In LBP-01-23, 54 N.R.C. 163,

the Licensing Board granted PFS's summary disposition motion on Contention Utah Z (see Exhibit M). In LBP-98-29, 48 N.R.C. 286, the Licensing Board declined to admit Contentions Utah HH and II (see Exhibit N). In LBP-00-27, 52 N.R.C. 216, the Licensing Board declined to admit Contention Utah KK (see Exhibit O). For Contention Utah RR, the Commission accepted for review the Licensing Board's decision, and held (in CLI-02-25, 56 N.R.C. 340) that PFS was not required to consider the environmental effects of a terrorist attack on the ISFSI (see Exhibit P).

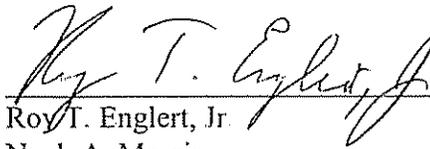
Under the Hobbs Act, 28 U.S.C. § 2342, this Court has jurisdiction to review the NRC's decisions and actions pursuant to 42 U.S.C. § 2239(b).

Venue in this Court is proper under 28 U.S.C. § 2343.

Utah respectfully requests that the Court grant the following relief:

- (1) Grant this petition for review;
- (2) Declare that the NRC's decisions relating to the PFS license application are arbitrary and capricious and inconsistent with applicable law;
- (3) Direct the NRC to revoke any license issued to PFS, to withdraw its approval of that license, and to refrain from issuing a license to PFS; and
- (4) Grant such other relief as the Court deems just and proper.

Respectfully submitted,



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November 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2005, true and correct copies of the State of Utah's
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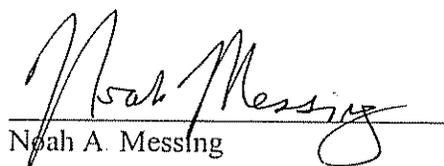
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