
REPORT OF THE NUCLEAR REGULATION COMMITTEE

This report summarizes decisions and policy developments that have occurred in the area of nuclear power regulation. The timeframe covered by this report is July 1, 2007 to May 31, 2008.

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I. NRC RELATED LITIGATION

A. *Nuclear Information and Resource Service and Public Citizen v. NRC*¹

This case involved judicial review of the Nuclear Regulatory Commission’s (NRC) decisions leading to the issuance of a license to Louisiana Energy Services (LES) to construct and operate a uranium enrichment facility in New Mexico.² The petitioners, Nuclear Information and Resource Service and Public Citizen, raised an assortment of environmental and safety issues before the D.C. Circuit.³ In a decision issued December 11, 2007, the court affirmed the NRC licensing decision on all counts.⁴

First, the D.C. Circuit dealt with petitioners’ procedural claim that the NRC violated the licensing provisions of the Atomic Energy Act by “supplementing” the Environmental Impact Statement (EIS) for the facility after the close of hearings on the license application.⁵ In this regard, the Atomic Energy Act mandates that the EIS for the facility “shall be prepared *before the hearing* on

1. Nuclear Info. & Res. Serv. V. NRC, 509 F.3d 562, 565-571 (D.C. Cir. 2007).

2. *Id.* at 565.

3. *Id.* at 565-566.

4. *Id.* at 571.

5. *Id.* at 568.

the issuance of a license....”⁶ Although the NRC had issued an EIS for the LES facility prior to the adjudicatory hearing, it had supplemented the EIS with later rulings and opinions in the case.⁷ Despite this fact, the court found that the agency still “prepared” an EIS before the hearing was completed, which is all the Atomic Energy Act requires.⁸

Second, the court addressed the petitioners’ substantive claim that the NRC’s review under the National Environmental Policy Act (NEPA) was deficient.⁹ In particular, the “[p]etitioners argue[d] that the NRC’s NEPA review was deficient because the NRC did not sufficiently analyze the impact of disposal of uranium waste [primarily depleted uranium] from the enrichment facility.”¹⁰ In rejecting this argument, the court found that “the record makes clear that the NRC thoroughly considered the environmental issues surrounding uranium waste disposal.”¹¹

Third, the court addressed the petitioners’ “argu[ment] that the NRC erred in approving the license because, in [their] view, LES failed to present a reasonable cost estimate for disposing of radioactive waste from the facility.”¹² The court noted that under NRC precedent an applicant for a license for a uranium enrichment facility “must present a *plausible strategy* for the disposition of depleted uranium waste.”¹³ The court observed that “[t]he NRC granted the license here based on LES’s ‘public-sector strategy,’ in which the Department of Energy would take title to and dispose of the facility’s waste.”¹⁴ The court, acknowledging the deference owed to the agency, found this a reasonable and permissible decision:

As a reviewing court, our role here is necessarily limited: We are not authorized to micromanage the NRC’s licensure proceeding, or to second-guess its acceptance of reasonable cost estimates. We examine only whether the NRC reasonably concluded that LES presented a *plausible strategy* for waste disposal and a *reasonable* cost estimate to accompany that strategy – the plausible strategy being disposal by the Department of Energy, and the cost estimate including a 25-percent contingency above the Department’s estimate for the costs of near-surface disposal. We have no basis on this record, particularly given our deferential review, to disturb the NRC’s determination that LES’s cost estimate based on near-surface disposal was reasonable.¹⁵

Finally, the court rejected the petitioners’ argument “that NRC Commissioner McGaffigan... should have disqualified himself from considering the license application”¹⁶ based on remarks he made “in an unrelated proceeding”¹⁷ questioning the technical capability of one of the petitioners. As

6. *Id.* citing Atomic Energy Act, 42 U.S.C. § 2243(a)(2) (2000) (emphasis in original).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 569.

11. *Id.*

12. *Id.*

13. *Id.* citing *In re La. Energy Servs., L.P.*, 34 NRC 332, 337 (1991) (emphasis in original).

14. *Id.*

15. *Id.* at 570-571 (emphasis in original).

16. *Id.* at 571.

17. *Id.*

the court stated, “[g]iven the roles that agency officials must play in the give-and-take of sometimes rough-and-tumble policy debates, courts must tread lightly when presented with this kind of challenge.”¹⁸

*B. Massachusetts v. United States*¹⁹

The Commonwealth of Massachusetts sought judicial review in the First Circuit of the NRC’s refusal to hear Massachusetts’ contentions in the license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants.²⁰ In the proceedings before the NRC, Massachusetts sought to participate as a party and submitted contentions under the National Environmental Policy Act (NEPA) claiming that the NRC had failed to examine adequately the environmental consequences of potential zirconium fires occurring in the plants’ spent fuel pools.²¹ The NRC’s Atomic Safety and Licensing Board panels, and subsequently the Commission, ruled that the contentions were inadmissible for litigation and denied Massachusetts party status in the proceedings.²²

The agency ruled in essence that the contentions were an impermissible collateral attack on the findings in the NRC’s Generic Environmental Impact Statement (GEIS) for license renewal.²³ The NRC’s GEIS categorized spent fuel storage as a “Category 1 issue,” finding that storing spent fuel in pools for an additional twenty-year renewal period would have insignificant environmental impacts.²⁴ The effect is that “generic Category 1 issues cannot be litigated in individual licensing adjudications.”²⁵ In light of the NRC’s ruling, Massachusetts submitted a petition for rulemaking pursuant to seek a change in the NRC’s environmental regulations for renewal on this issue.²⁶

Massachusetts also sought judicial review, in the First Circuit, of the Commission’s decision rejecting its contentions.²⁷ On appeal, the NRC took the litigation position that Massachusetts could seek to participate in the proceedings as an interested state, and in addition could then petition to suspend the proceedings under 10 C.F.R. section 2.802(d) pending disposition of its petition for rulemaking.²⁸

In a decision handed down on April 8, 2008, the First Circuit held that the NRC acted within its authority when it rejected Massachusetts’ proposed contentions and denied it party status in the two proceedings.²⁹ However, the court stated that it expects the NRC to adhere to the representations and position it took during the appeal to the effect that Massachusetts could participate in the

18. *Id.*

19. *Massachusetts v. U.S.*, 522 F.3d 115, 117-133 (2008).

20. *Id.* at 117-118.

21. *Id.* at 121-122.

22. *Id.* at 124-125.

23. *Id.* at 125.

24. *Id.* at 121, 121 n.4.

25. *Id.* at 127 (citations omitted).

26. *Id.* at 125-126.

27. *Id.* at 126.

28. *Id.* at 125 *citing* 10 C.F.R. § 2.802(d) (2003).

29. *Id.* at 129-130.

proceedings as an interested state and request that the NRC delay issuance of renewed licenses for the plants until the commonwealth's petition for rulemaking is resolved.³⁰ In doing so, the court indicated that a petition for rulemaking is an appropriate way for the NRC to address new and significant information relating to its environmental review for license renewal.³¹

To allow Massachusetts a meaningful opportunity to participate in the NRC license renewal proceedings, the Court granted a brief stay of the close of the hearings in both cases (for fourteen days from the date of issuance of the Court's mandate).³² Massachusetts filed a notice of intent to participate as an interested state in the proceedings on May 8, 2008.

*C. United States v. Eurodif S.A. and USEC Inc. v. Eurodif S.A.*³³

On April 21, 2008, the Supreme Court granted certiorari in two related cases to examine the correct application of federal antidumping statutes to "separative work unit" (SWU) contracts for uranium enrichment services and the production of low enriched uranium (LEU) for nuclear fuel.³⁴ The United States had sought certiorari in this matter, which is believed to be the first time the United States government has sought the Supreme Court's review in an antidumping case.

The petition for certiorari challenges a ruling by the United States Court of Appeals for the Federal Circuit in two cases involving the importation of LEU from Europe.³⁵ In those cases, United States nuclear utilities purchased unenriched natural uranium and delivered it to European uranium enrichers, paid the enrichers for the service of enriching the uranium, and received back LEU product.³⁶ The Federal Circuit, rejecting the view of the Commerce Department and affirming the Court of International Trade, ruled that this method of acquiring LEU constitutes the purchase of a service, not a good, and therefore is not subject to the antidumping law, which applies to imported products sold or likely to be sold in the United States.³⁷

In its petition for certiorari, the United States argued that the Federal Circuit's decision opens a "potentially gaping loophole" in United States trade law that would allow foreign sellers and domestic buyers of various products to avoid the antidumping laws by structuring their transactions as contracts for services along the lines of the SWU contracts.³⁸ The cases have been

30. *Id.* at 129 n.8, 130.

31. *Id.*

32. *Id.* at 130.

33. *United States v. Eurodif S.A.*, 506 F.3d 1051 (Fed. Cir. 2007), *cert. granted*, 128 S. Ct. 2054 (2008); *USEC Inc. v. Eurodif S.A.*, 506 F.3d 1051 (Fed. Cir. 2007), *cert. granted*, 128 S. Ct. 2056 (2008).

34. *Id.*

35. *Petition for Writ of Certiorari, United States v. Eurodif S.A.*, 2008 WL 437010 (2008); *see also, Petition for Writ of Certiorari, USEC Inc. v. Eurodif S.A.*, 2008 WL 465552 (2008).

36. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1357-1359 (Fed. Cir. 2005); *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005).

37. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1362 (Fed. Cir. 2005); *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005).

38. *Petition for Writ of Certiorari, United States v. Eurodif S.A.*, 2008 WL 437010 (2008); *see also, Petition for Writ of Certiorari, USEC Inc. v. Eurodif S.A.*, 2008 WL 465552 (2008).

consolidated for review and will be argued and decided during the Supreme Court's next term, beginning in October 2008.

II. OTHER DEVELOPMENTS

A. *Final Policy Statement on the Conduct of New Reactor Licensing Proceedings*

On April 17, 2008, the NRC issued a Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, updating its policy for the expected increase in hearings for new nuclear power plant license applications.³⁹ Among the key policy revisions are the following:

- The NRC aims to improve the hearing process by allowing for common issues across multiple combined license applications (COLAs) referencing the same standardized design to be determined in a single hearing. While the COLAs must be submitted relatively close in time to be consolidated into such a combined hearing, the NRC notes that subsequent applicants referencing the same standard reactor design can potentially benefit from the general findings made during an earlier hearing;
- The Policy Statement clearly sets forth the position that issues relating to a standard reactor design under a design certification review should be resolved in the design certification rulemaking, and not in a related COL hearing. Further, if the initial reference COL for a given standardized design resolves a specific issue, the NRC staff need only confirm that a subsequent applicant has adopted and implemented an identical approach; and
- The Commission states in the Policy Statement that it will preside over any request for a hearing on a specific plant's completion of the inspections, tests, analyses and acceptance criteria, known as ITAAC, needed to demonstrate that plant construction has been completed in compliance with applicable requirements and that the plant will operate safely.⁴⁰

The NRC's revised policy does not alter the public's right to petition to intervene on issues in a specific application, nor does it deviate from the NRC's traditional adjudicatory hearing policy objectives. Rather, the NRC believes that the new protocol will help to ensure a fair hearing process while at the same time avoiding inefficient and unnecessary procedural delays for new reactors.⁴¹

B. *FERC Mandatory Reliability Standard for Nuclear Plant Coordination*

The Federal Energy Regulatory Commission (FERC) published a proposed rule on March 28, 2008, to approve the reliability standard issued by the North American Electric Reliability Corporation (NERC) for coordination between

39. Final Policy Statement, *Conduct of New Reactor Licensing Proceedings*, 73 Fed. Reg. 20,963 (2008).

40. *Id.* at 20,964 – 20,973.

41. *Id.* at 20,973.

nuclear power plants and transmission entities.⁴² The proposed rule would approve the NERC's Nuclear Plant Interface Coordination Reliability Standard (Reliability Standard).⁴³

The Reliability Standard requires nuclear power plants and the transmission entities that serve them to establish Nuclear Plant Interface Requirements (NPIRs) to govern communications, and coordinated operations and planning to ensure safe nuclear plant operation and shutdown during grid disturbances or plant events.⁴⁴ Among the specific compliance requirements of the Reliability Standard are:

- Nuclear plant operators and transmission entities must enter into interface agreements specifying mutually acceptable NPIRs;
- Transmission entities are to incorporate the NPIRs into planning and operating analyses, and communicate with nuclear plant operators when they lose the ability to assess system performance;
- Nuclear operators and transmission entities are to coordinate outages and maintenance activities in a manner consistent with the interface agreements; and
- Nuclear operators and transmission entities must notify each other of changes that affect the NPIRs.⁴⁵

The FERC's proposed rule would put the responsibility on the nuclear plant operator to notify its transmission entities that they are responsible for meeting the requirements of the rule after it is promulgated.

As the FERC notes in the proposed rule, the Electricity Modernization Act of 2005, contained in the Energy Policy Act of 2005, added section 215 to the Federal Power Act, requiring the Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable reliability standards, to be approved and overseen by the FERC, and enforced by the ERO.⁴⁶ The FERC has certified the NERC as the ERO.⁴⁷ In the proposed rule, the FERC notes that most, if not all, nuclear plant operators already coordinate operations and planning with transmission entities pursuant to interface agreements.⁴⁸

Certain aspects of the FERC's proposed rule deserve attention by nuclear generators and transmission providers:

1. Enforcement/Risk Factors.

The FERC proposes to increase the risk factor assigned to several of the specific compliance requirements of the Reliability Standard.⁴⁹ This would also raise the potential enforcement stakes by increasing the severity level associated with violations of these requirements. The FERC offers only a general

42. Notice of Proposed Rulemaking, *Mandatory Reliability Standard for Nuclear Plant Interface Coordination*, 73 Fed. Reg. 16,586 (2008) (to be codified at 18 C.F.R. pt. 40).

43. *Id.*

44. *Id.* at 16,589.

45. *Id.* at 16,588.

46. *Id.* at 16,586.

47. *Id.* at 16,587-16,588.

48. *Id.* at 16,586.

49. *Id.* at 16,590.

justification for this proposed change, stating that requirements associated with safe and reliable nuclear power plant operation and shutdown merit higher violation risk factors because of the reliability benefits of nuclear power and the impact of removing a nuclear generating facility from the grid.⁵⁰ The FERC acknowledged, however, that many of the compliance requirements are administrative in nature.⁵¹ Rather than directly affecting plant reliability, many of these requirements serve to ensure that proper procedures are developed to create and implement the NPIRs. The FERC nevertheless chose to assign heightened risk factors even for these types of requirements.⁵² This will put a premium on making sure that implementing procedures are comprehensive and sound.

2. Disputes.

The proposed rule does not address a potential situation where parties to interface agreements are unable to reach agreement about the contents of the NPIRs.

3. Integrated Utilities.

Another situation that is not addressed is how the NPIRs would be implemented when a single entity functions as both a nuclear power plant operator and the transmission owner.

C. *United States Ratification of the Convention on Supplementary Compensation for Nuclear Damage*

On May 21, 2008, the United States deposited its instrument of ratification for the Convention on Supplementary Compensation for Nuclear Damage (CSC) with the Director-General of the International Atomic Energy Agency (IAEA).⁵³ The CSC is an international treaty designed to create a global legal framework governing liability for nuclear incidents.⁵⁴ More specifically, the CSC is intended to link, and supplement existing, treaties and national laws pertaining to legal liability and compensation, in the event of a nuclear accident at a nuclear power plant or other related facilities.⁵⁵ Once it goes into effect, the CSC would expand the nuclear liability coverage available for suppliers of goods and services to nuclear facilities outside the United States and increase the funds available for domestic nuclear incidents covered under the Price-Anderson Act.⁵⁶

50. *Id.* at 16,586.

51. *Id.* at 16,594.

52. *Id.* at 16,586.

53. INT'L ATOMIC ENERGY AGENCY, CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE – LATEST STATUS (2008), http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf. [hereinafter CSC Latest Status]. CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE, INT'L ATOMIC ENERGY AGENCY, July 22, 1998, available at <http://www.iaea.org/Publications/Documents/Infocircs/1998/infocirc567.pdf>. [hereinafter CSC].

54. CSC, *supra* note 52.

55. *Id.*

56. The Anderson-Price Atomic Energy Damages Act, Pub. L. No. 85-256, 71 Stat. 576 (1957).

In a related development, the United States enacted legislation to implement the CSC when it passed the Energy Independence and Security Act of 2007 (EISA) on December 19, 2007.⁵⁷ The EISA contains provisions in section 934 to implement the CSC, which are discussed further below.⁵⁸

The United States first signed the CSC in 1997.⁵⁹ Since then, the CSC has been signed by thirteen states, and ratified by three (Romania, Argentina, and Morocco).⁶⁰ While the United States Senate has passed implementing legislation for the CSC several times, the House of Representatives did not get on board until the passage of the EISA. With the United States depositing its instrument of ratification with the IAEA, the CSC has received four of the minimum five state ratifications or approvals necessary for it to go into effect.⁶¹ The CSC will not become effective until it has been ratified or approved by at least one more country.⁶²

Among other provisions, the CSC would:

- Provide expanded nuclear liability coverage to United States suppliers operating abroad;
- Create a contingent international supplementary compensation fund, to be activated in the event a nuclear incident exhausts the primary coverage available under the domestic law where the incident occurs. Assuming widespread adherence, the international fund could provide nearly 500 million dollars in supplemental compensation for nuclear damage. Half of the contingent international fund is reserved for transboundary damage;
- Provide the contingent international fund ninety percent of its contributions based on the installed nuclear generating capacity in a member country (with nuclear power reactors). The remaining ten percent will be based on the United Nations rate of assessment of a member country; and
- Obligate the United States, as a party to the CSC, to contribute to the CSC fund in the event of an accident.⁶³

Under section 934 of the EISA, the financial responsibility for contributing to the international fund would be apportioned to United States nuclear suppliers using a formula to be developed by the Department of Energy.⁶⁴ This system is modeled after the retrospective premium system for nuclear power plants under the Price-Anderson Act. The CSC would also assure that potential victims of a nuclear incident outside the United States will have general assurance of prompt

57. The Energy Independence & Security Act of 2007, Pub. L. No. 110-140, 121 Stat 149 (2007).

58. *Id.*

59. CSC Latest Status, *supra* note 52.

60. *Id.*

61. CSC, *supra* note 52.

62. The CSC will not take effect until a minimum of five states hosting at least 400,000 thermal nuclear megawatts (MW) ratify it. CSC, *supra* note 52. With U.S. ratification, the total capacity of the CSC's ratifying states is brought to 305,000 MW. CSC Latest Status, *supra* note 52. If a large nuclear state – such as France or Japan – provides the fifth ratification, then the CSC should have enough combined MW among its ratifying states to go into effect.

63. CSC, *supra* note 52.

64. The Energy Independence & Security Act of 2007, Pub. L. No. 110-140, 121 Stat 149 (2007).

and adequate compensation in their countries in the event of a civil nuclear incident.