

## REPORT OF THE NUCLEAR REGULATION SUBCOMMITTEE

The following is the report of the Energy Bar Association’s Nuclear Regulation Subcommittee. In this report, the Committee summarizes significant court decisions and regulatory developments that have occurred in the area of nuclear energy regulation from January 1 to December 31, 2015.\*

I.	Court Decisions.....	101
	A. Brodsky v. NRC.....	101
II.	Regulatory Developments.....	103
	A. Continued Storage Rule and Associated Litigation .....	103
	B. South Texas Combined License Proceeding Other Developments on Foreign Ownership, Control, or Domination .....	104
	C. Fermi Unit 3 Combined License Proceeding.....	105
	D. De Facto License Amendment Proceedings .....	106

### I. COURT DECISIONS

#### A. *Brodsky v. NRC*

On February 26, 2015, the U.S. District Court for the Southern District of New York granted the Nuclear Regulatory Commission (NRC) summary judgment on a claim brought by Richard Brodsky, a former New York State Assemblyman, challenging NRC-granted exemptions.<sup>1</sup> The case stems from a longstanding dispute over exemptions the NRC had granted to Entergy relating to the Indian Point Nuclear Power Plant Unit 3 fire safety program. To comply with NRC fire-protection regulations, Entergy chose a fire barrier called Hemyc to enclose the cables of a safety shutdown system. In 2006, the NRC notified licensees that Hemyc could not withstand fire for the required one-hour burn time.<sup>2</sup> As a result, Entergy sought exemptions to continue the use of Hemyc.<sup>3</sup>

After the NRC granted the exemptions, Mr. Brodsky challenged them before the Second Circuit.<sup>4</sup> The Second Circuit originally dismissed Mr. Brodsky’s challenge for lack of jurisdiction.<sup>5</sup> Mr. Brodsky refiled his challenge in district

---

\* This report was prepared by Jonathan M. Rund and Kaitlin Sweeney, Nuclear Energy Institute.

1. Brodsky v. U.S. Nuclear Regulatory Comm’n, No. 09 Civ. 10594(LAP), 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015).

2. NRC Generic Letter 2006-03, Potentially Nonconforming HEMYC and MT Fire Barrier Configurations, (Apr. 10, 2006) available at <http://www.nrc.gov/reading-rm/doc-collections/gen-comm/gen-letters/2006/g1200603.pdf> (ADAMS Accession No. ML053620142); see also Notice of Issuance, Potentially Nonconforming HEMYC and MT Fire Barrier Configurations, 71 Fed. Reg. 24,871 (N.R.C. Apr. 27, 2006).

3. Letter from F.R. Dacimo, Site Vice President, Indian Point Energy Ctr., to Document Control Desk, NRC, Request for Revision of Existing Exemptions from 10 C.F.R. 50, Appendix R: One-House Hemyc Electrical Raceway Fire Barrier System, Fire Areas ETN-4 and PAB-2 (July 24, 2006), available at <http://pbadupws.nrc.gov/docs/ML0621/ML062140057.pdf> (ADAMS Accession No. ML062140057).

4. Brodsky v. U.S. Nuclear Regulatory Comm’n, 578 F.3d 175 (2d Cir. 2009).

5. *Id.* at 177-84.

court, but the court granted the NRC summary judgment.<sup>6</sup> Mr. Brodsky appealed and the Second Circuit affirmed the district court's judgment in all respects but one. The Second Circuit found that the record was insufficient to determine whether the NRC violated National Environmental Policy Act (NEPA) regulations that allow for public involvement on environmental assessments (EAs) where appropriate and practicable.<sup>7</sup> The Second Circuit remanded the case so the NRC could either "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable, or (2) take such other action as it may deem appropriate to resolve this issue."<sup>8</sup>

On remand, the NRC chose the second option, re-noticed the original exemptions, and invited comment on the EA.<sup>9</sup> After considering the comments, in 2013 NRC reissued the exemptions and found that NEPA did not require the EA to evaluate the impacts of a terrorist attack.<sup>10</sup> After Mr. Brodsky returned to the district court to challenge the exemptions and EA, the court granted summary judgment for the NRC.<sup>11</sup> The district court concluded that "the record demonstrates that the NRC has satisfied its public participation obligations as set out by the Court of Appeals" and "reveals no reason to disturb the prior rulings of this case."<sup>12</sup> With regard to the risk of terrorism, the court found that "[n]othing in the recent public comments adds credibility to Plaintiffs' concern, and NEPA does not require further consideration of the environmental impacts of terrorism-related fires."<sup>13</sup> Further, the court found that, even though the NRC was not required to do so, it "addressed commenters' concerns about a potential terrorist attack, noting that it 'has analyzed plausible threat scenarios' and concluded 'from its independent safety evaluation . . . that a severe fire is not plausible and the existing fire protection features are adequate.'"<sup>14</sup>

In April 2015, Mr. Brodsky filed notice of appeal from the district court decision. That appeal is pending before the Second Circuit.<sup>15</sup>

---

6. Brodsky v. U.S. Nuclear Regulatory Comm'n, 783 F. Supp. 2d 448 (S.D.N.Y. 2011).

7. Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113, 124-25 (2d Cir. 2013); *see also* Brodsky v. U.S. Nuclear Regulatory Comm'n, 507 F. App'x 48 (2d Cir. 2013).

8. *Brodsky*, 704 F.3d at 115.

9. Draft Environmental Assessment and Finding of No Significant Impact; Request for Public Comment, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, 78 Fed. Reg. 20,144 (N.R.C. Apr. 3, 2013).

10. Environmental Assessment and Finding of No Significant Impact; Issuance, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, 78 Fed. Reg. 52,987 (N.R.C. Aug. 27, 2013).

11. *Brodsky*, 2015 WL 1623824, at \*1.

12. *Id.*

13. *Id.* at \*8 (quoting *Brodsky*, 783 F. Supp. 2d at 462 & n.10).

14. *Id.*

15. Brodsky v. U.S. Nuclear Regulatory Comm'n, No. 15-1330 (2d Cir. Apr. 24, 2015).

## II. REGULATORY DEVELOPMENTS

### A. Continued Storage Rule and Associated Litigation

In 2015, the NRC's rule addressing the environmental impacts of continued storage of spent nuclear fuel faced a number of challenges.<sup>16</sup> This rule was a product of the D.C. Circuit's *New York v. NRC I* decision that vacated the agency's earlier "Waste Confidence Decision."<sup>17</sup> Shortly after the issuance of the revamped Continued Storage Rule and associated generic environmental impact statement (GEIS), several environmental groups challenged the rule and requested that the Commission suspend final reactor licensing decisions, claiming that the Atomic Energy Act requires the NRC to address the safety of spent fuel disposal in a repository when it issues reactor licenses.<sup>18</sup> In February 2015, the Commission rejected the petitions and held:

At no time have we, Congress, or the courts articulated a view that the Atomic Energy Act requires a 'finding' or 'predictive safety findings' regarding the disposal of spent fuel in a repository as a prerequisite to issuing a nuclear reactor license. We see no reason to alter our long-standing interpretation of the Atomic Energy Act.<sup>19</sup>

Several environmental groups also challenged the Continued Storage Rule by claiming that the NRC must supplement previously prepared, site-specific environmental impact statements (EISs) in ongoing licensing proceedings to expressly incorporate by reference the GEIS.<sup>20</sup> The rule, however, provides that the environmental impact determinations in the GEIS "shall be deemed incorporated" into the EIS associated with NRC license renewal and combined license applications.<sup>21</sup> On April 23, 2015, the Commission issued a decision rejecting the petitioners' argument. It reasoned that petitioners had misread 10 C.F.R. section 51.23(b), where language concerning "deemed incorporated" controls more general language in 10 C.F.R. Part 51.<sup>22</sup> The order also explained how NRC's approach to assessing the environmental impacts of continued storage satisfies the statutory purposes of an EIS by (1) ensuring that decision-makers have detailed information on significant environmental impacts (*e.g.*, impacts of continued storage) and (2) guaranteeing that the relevant information will also be made available (through the rulemaking and NEPA processes) to the larger public that may play a role in the decision-making process.<sup>23</sup>

Separately, the Commission denied several motions to reopen the record in the various licensing proceedings to admit "placeholder" contentions to ensure that any federal litigation involving the Continued Storage Rule applied to the

---

16. Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (to be codified at 10 C.F.R. pt. 51).

17. *New York v. U.S. Nuclear Regulatory Comm'n*, 681 F.3d 471 (D.C. Cir. 2012).

18. *DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3)*, CLI-15-04, Docket No. 52-033-COL, at 1-2 (N.R.C. Feb. 26, 2015).

19. *Id.* at 16.

20. *DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3)*, CLI-15-10, Docket No. 52-033-COL, at 2 (N.R.C. Apr. 23, 2015).

21. 10 C.F.R. § 51.23(b) (2011).

22. *Fermi*, CLI-15-10, Docket No. 52-033-COL, at 5.

23. *Id.* at 7.

ongoing affected proceedings.<sup>24</sup> As the Commission explained in the *Callaway* license renewal proceeding, although such contentions are inadmissible, they are also “not necessary to ensure that . . . [the] . . . challenges to the Continued Storage Rule and GEIS receive a full and fair airing,” because challenges to the Rule are appropriately before the U.S. Court of Appeals for the D.C. Circuit.<sup>25</sup>

*B. South Texas Combined License Proceeding Other Developments on Foreign Ownership, Control, or Domination*

In April 2015, the Commission denied a challenge by intervenors to an Atomic Safety and Licensing Board decision ruling in favor of applicant Nuclear Innovation North America LLC (NINA) on a foreign ownership, control, or domination (FOCD) issue in the combined license proceeding for South Texas Project (STP) Units 3 and 4.<sup>26</sup> After a full evidentiary hearing, the Board rejected intervenors’ contention and NRC staff arguments alleging that statutory and regulatory provisions relating to FOCD preclude licensing of proposed STP Units 3 and 4.<sup>27</sup>

The Commission found that the Board properly focused its FOCD analysis on nuclear safety, security, and reliability. As the Commission noted, under longstanding precedent, FOCD provisions “should be given an orientation toward safeguarding the national defense and security.”<sup>28</sup> The Commission also found that intervenors mischaracterized the Board’s ruling to the extent they suggested that it focused exclusively on nuclear safety, security, and reliability. Rather, as the Commission explained, the Board “found that these are the most significant considerations among the numerous factors it considered in its decision.”<sup>29</sup> The Board concluded that Toshiba America Nuclear Energy (TANE, a minority owner of NINA and an ultimate subsidiary of the Japanese Toshiba Corporation) “did not control or dominate NINA, either with respect to nuclear safety, security, or reliability concerns or with respect to any other concern.”<sup>30</sup>

The Commission also addressed intervenors’ concern that the Board disregarded the Standard Review Plan’s directive that foreign control may exist even where the power to control has not been exercised.<sup>31</sup> The NRC staff agreed with intervenors on this point and argued that the Board’s decision erred by requiring evidence of actual, direct foreign control.<sup>32</sup> The Commission dismissed these arguments:

---

24. See, e.g., Union Elec. Co. (Callaway Nuclear Power Plant Unit 1), CLI-15-11, Docket No. 50-483-LR (N.R.C. Apr. 23, 2015); DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, Docket No. 52-033-COL (N.R.C. Apr. 23, 2015); Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 & 2), CLI-15-15, Docket No. 52-018-COL (N.R.C. June 9, 2015).

25. *Callaway*, CLI-15-11, Docket No. 50-483-LR, at 5.

26. Nuclear Innovation North America, LLC (South Texas Project Units 3 & 4), CLI-15-07, Docket No. 52-012-COL (N.R.C. Apr. 14, 2015).

27. Nuclear Innovation North America, LLC (South Texas Project Units 3 & 4), LBP-14-03, 79 N.R.C. 267 (Atomic Safety & Licensing Board 2014).

28. *South Texas Project*, CLI-15-07, Docket No. 52-012-COL, at 11 (citation omitted).

29. *Id.* at 19.

30. *Id.*

31. *Id.* at 19-20.

32. *South Texas Project*, CLI-15-07, Docket No. 52-012-COL, at 20.

While the Board attached significance to the lack of past instances where Toshiba or TANE exerted control over NINA, it did not hold that unexercised, potential control would not constitute improper foreign ownership, control, or domination. Rather, the Board examined the record for avenues of “potential” control and found none.<sup>33</sup>

On a related FOCD matter, the Commission in May 2015 approved NRC staff’s recommended option 3 from SECY-14-0089, “Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities.”<sup>34</sup> “Under this option, the staff will revise the foreign ownership, control, or domination . . . Standard Review Plan . . . and develop a regulatory guide to include graded negotiation action plan (NAP) criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity.”<sup>35</sup>

### C. *Fermi Unit 3 Combined License Proceeding*

In a January 2015 order, the Commission denied a group of intervenors’ petition for review and the Atomic Safety and Licensing Board’s related request for sua sponte review of two issues in the Fermi Nuclear Power Plant Unit 3 combined license proceeding.<sup>36</sup> The intervenors had petitioned for review of the Board’s rejection of their untimely contention challenging the NRC staff’s compliance with NEPA as it relates to the anticipated environmental impacts of the proposed transmission line corridor for Fermi Unit 3.<sup>37</sup> The intervenors argued that the NRC staff’s consideration of the impacts of building new transmission was inadequate.<sup>38</sup>

Although the Board twice rejected their late-filed contention, it found some merit to intervenors’ arguments and requested authority from the Commission to undertake sua sponte review.<sup>39</sup> Specifically, the Board sought to review: (1) whether building offsite transmission lines intended solely to serve the new Fermi plant qualifies as a connected action under NEPA and, therefore, requires the staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3; and (2) whether the NRC staff’s consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA’s “hard look” requirement.<sup>40</sup>

The Commission denied the petition for review because the intervenors failed to demonstrate a substantial question warranting review of the Board’s dismissal of their contention.<sup>41</sup> On the sua sponte review question, the Commission found that the first question raised by the Board was moot, as the NRC staff had already discussed the proposed transmission corridor in its final environmental impact

---

33. *Id.* (citing LBP-14-03, 79 N.R.C. at 302-05).

34. NRC Staff Requirements Memorandum, SECY-14-0089—Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities (May 4, 2015) *available at* <http://pbadupws.nrc.gov/docs/ML1512/ML15124A940.pdf>.

35. *Id.* at 1.

36. DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-01, Docket No. 52-033-COL, at 1 (N.R.C. Jan. 13, 2015).

37. *Id.* at 2.

38. *Id.* at 2-3.

39. *Id.* at 3-4.

40. *Id.* at 9.

41. DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-01, Docket No. 52-033-COL, at 9, 14.

statement.<sup>42</sup> Moreover, the Commission noted that “much of the Board’s request fundamentally challenges the agency’s Limited Work Authorization Rule.”<sup>43</sup> Under NRC precedent, litigants (or, in this case, the Board) may not challenge a regulation in an NRC adjudicatory proceeding absent a showing of extraordinary circumstances. The Commission found that the Board failed to articulate such circumstances.<sup>44</sup> Finally, the Commission pointed out that whether the NRC staff had taken the requisite hard look at the environmental impacts of the transmission corridor is among the range of issues that are appropriately before the Commission in the upcoming mandatory uncontested hearing for Fermi 3.<sup>45</sup>

The Commission subsequently held the mandatory hearing on February 4, 2015 and issued its decision on the combined license on April 30, 2015.<sup>46</sup> The Commission concluded that the staff’s review was adequate to support the findings set forth in 10 C.F.R. sections 52.97(a) and 51.107(a).<sup>47</sup> The NRC issued the combined license on May 1, 2015.<sup>48</sup>

#### D. *De Facto License Amendment Proceedings*

In 2015, the NRC addressed a pair of cases involving petitioners asserting hearing rights in connection with oversight activities on grounds that they constitute *de facto* license amendments.

In March 2015, the Commission denied a hearing request by the Sierra Club relating to confirmatory action letters (CALs) associated with restart activities at Fort Calhoun.<sup>49</sup> The Commission rejected the hearing request and reasoned that 10 C.F.R. section 50.59 and other compliance concerns are to be addressed through the 10 C.F.R. section 2.206 process for requesting enforcement action.<sup>50</sup> The Commission emphasized the distinction between NRC’s hearing and oversight processes. As it explained, “inspections and CALs, in and of themselves, are oversight activities normally conducted for the purpose of ensuring that licensees comply with existing NRC requirements and license conditions and, therefore, do not typically trigger the opportunity for a hearing.”<sup>51</sup> Sierra Club failed to point to anything in the CALs or otherwise, that would expand the licensee’s operating authority or modify the operating license.<sup>52</sup> The Commission also found that “the prospect of a possible future license amendment does not trigger hearing rights now” and that “hearing rights do not attach to licensee changes made under section 50.59 because those changes

---

42. *Id.* at 11.

43. *Id.*

44. *Id.* at 11-12.

45. *Id.* at 13-14.

46. DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-13, Docket No. 52-033-COL, at 1 (N.R.C. Apr. 30, 2015).

47. *Id.* at 50-51.

48. Combined License and Record of Decision; Issuance, DTE Electric Company; Fermi 3, 80 Fed. Reg. 26,302, 26,303 (N.R.C. May 7, 2015).

49. Omaha Public Power District (Fort Calhoun Station, Unit 1), CLI-15-05, Docket No. 50-285, at 12-13 (N.R.C. Mar. 9, 2015).

50. *Id.* at 11.

51. *Id.* at 7.

52. *Id.* at 8-9.

do not require NRC approval but are instead subject to normal NRC oversight through the inspection process.”<sup>53</sup>

In May 2015, the Commission addressed a hearing request by Friends of the Earth (FOE) on Diablo Canyon seismic issues to an Atomic Safety and Licensing Board.<sup>54</sup> Rather than initially addressing the petition itself, the Commission referred a portion of the *de facto* license amendment hearing request to the Atomic Safety and Licensing Board.<sup>55</sup> FOE argued the NRC conducted a *de facto* license amendment proceeding allowing PG&E to address new seismic information in its response to the NRC’s request for a seismic hazard reevaluation under 10 C.F.R. section 50.54(f) and through changes to its final safety analysis report under 10 C.F.R. section 50.71.<sup>56</sup> In referring the petition to the Board, the Commission narrowed the scope of review, stating:

The scope of the referral is limited to whether the NRC granted PG&E greater authority than that provided by its existing licenses or otherwise altered the terms of PG&E’s existing licenses. . . . We emphasize that claims regarding inadequacies in a licensee’s technical evaluations or non-compliance with its license, standing alone, do not suffice to identify an activity that may constitute a license amendment.<sup>57</sup>

On September 28, 2015, the Board denied FOE’s hearing request and rejected the claim that the plant was operating outside its seismic licensing basis and NRC’s failure to suspend PG&E’s license amounted to a *de facto* amendment.<sup>58</sup> As the Board explained, the NRC’s post-Fukushima review to reevaluate every nuclear power plant’s seismic and flood design basis, under 10 C.F.R. section 50.54(f), was not a *de facto* amendment since that process was being used to “determine whether *future* changes to any of the plants’ design bases might be warranted . . . [and did] not revise the design basis of the plant.”<sup>59</sup> Nor did the licensee’s update to its final safety analysis report under 10 C.F.R. section 50.71(e), to incorporate newly discovered seismic information, amount to a licensing amendment, since the licensee’s compliance with that regulation fell within the NRC’s oversight function.<sup>60</sup> As such, the Board found that the petitioners may not “create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis,” but rather needed to use the 10 C.F.R. section 2.206 process.<sup>61</sup>

FOE has appealed the Board’s decision to the Commission.<sup>62</sup> That appeal remains pending before the Commission.

---

53. *Id.* at 9-10, 12.

54. Pacific Gas & Elec. Co. (Diablo Canyon Power Plant, Units 1 & 2), CLI-15-14, Docket Nos. 50-275, 50-323 (N.R.C. May 21, 2015).

55. *Id.* at 12.

56. *Id.* at 6-7.

57. *Id.* at 7.

58. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-15-27, Docket Nos. 50-275, 50-323 (Atomic Safety & Licensing Bd. Sept. 28, 2015).

59. *Id.*

60. *Id.* at 18.

61. *Id.* at 9.

62. Friends of the Earth’s Notice of Appeal of LBP-15-27, Docket Nos. 50-275, 50-323 (N.R.C. Oct. 23, 2015); Brief of Friends of the Earth In Support of Appeal of LBP-15-27, Docket Nos. 50-275, 50-323 (N.R.C. Oct. 23, 2015) (ADAMS Accession No. ML15296A550).





## **NUCLEAR REGULATION SUBCOMMITTEE**

Jonathan M. Rund, Chair  
Annalisa M. Bloodworth, Vice Chair

Harold M. Blinderman  
Sachin Desai  
Gerald Garfield  
William A. Horin  
Kevin A. McNamee

Delia D. Patterson  
Priyanka Sundareshan  
Kaitlin Sweeney  
Scott A. Vance