

ADJUDICATORY ISSUE INFORMATION

September 7, 2004

SECY-04-0162

FOR: The Commission

FROM: John F. Cordes, Jr.
Solicitor

SUBJECT: LITIGATION REPORT - 2004 - 04

Skull Valley Band of Goshute Indians v. Nielson, No. 02-4149 (10th Cir., decided August 4, 2004)

In this case the United States Court of Appeals for the Tenth Circuit (*Henry, McConnell & Seymour, JJ*), affirmed a federal district court decision striking down various Utah laws regulating storage and transportation of spent nuclear fuel.

The court of appeals found the Utah laws -- enacted to make difficult or impossible the proposed Private Fuel Storage facility for interim storage of spent nuclear fuel -- preempted by federal law. PFS-related health and safety issues, the court reasoned, are for the NRC, not the state, to decide. The court stressed that Utah's concerns "have been considered in the extensive regulatory proceedings before the NRC." The court said that it was "hopeful that Utah's concerns -- and those of any state facing this issue in the future -- will receive fair and full consideration there."

In its opinion the court expressed its agreement with *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), where the D.C. Circuit rejected Utah's argument that the Nuclear Waste Policy Act prohibited the NRC from licensing an away-from-reactor spent fuel storage facility. The court also agreed with the government's *amicus curiae* brief that issues relating to NRC licensing authority cannot be litigated in ordinary federal district court litigation, but only through the special judicial review scheme (direct review in the court of appeals) established by the Atomic Energy Act and the Hobbs Act.

The court of appeals granted Utah a one-month extension of time, until September 20, 2004, to seek rehearing *en banc*.

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Calif. Public Utility Comm'n v. NRC, No. 02-72735 (9th Cir., dismissed May 5, 2004)

This lawsuit challenged a Commission adjudicatory decision in the *Diablo Canyon* license transfer proceeding. The Commission decision had found petitioners' various safety contentions inadmissible. The parties filed briefs in the court of appeals. But before the case was set for oral argument, Diablo Canyon's owner, Pacific Gas & Electric Company, agreed to

a bankruptcy settlement that avoided any license transfer. Accordingly, the court of appeals dismissed this case as moot.

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Northern Calif. Power Agency v. NRC, No. 03-1038 (D.C. Cir., order entered July 26, 2004)

This lawsuit challenged a Commission antitrust decision in the *Diablo Canyon* license transfer proceeding. The license transfer proceeding, and hence this lawsuit, became moot once Diablo Canyon's owner, Pacific Gas and Electric Company, agreed to a bankruptcy settlement precluding a license transfer. The court of appeals has set for briefing and oral argument the question whether the court should vacate the Commission decision on the ground that mootness prevented judicial review.

We recently filed a short brief saying, (1) it is too late to issue a *vacatur* order because the court had already found the case moot and issued its mandate, and (2) we lack sufficient information on the bankruptcy settlement to speak definitively to the merits of the *vacatur* issue. We made clear that the Commission devotes substantial resources to its adjudicatory orders and would not like to see them vacated lightly.

A companion lawsuit (No. 03-1184) challenging the NRC staff's now-moot transfer order was dismissed without controversy.

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Public Citizen v. NRC, No. 04-1293 (D.C. Cir., filed August 31, 2004)

This lawsuit challenges recent Commission security orders directed against licensees who transport spent nuclear fuel. As in an already-pending lawsuit due to be argued on September 10 (*Public Citizen v. NRC*, No. 03-1181 (D.C. Cir.)), petitioner likely will maintain that the NRC's security order ought to have been promulgated through notice-and-comment rulemaking. Petitioner also has made its notice-and-comment claim in a hearing request filed with the NRC. The Commission has held the hearing request in abeyance.

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Connecticut Coalition Against Millstone v. NRC, No. 04-3577 (2d Cir., filed June 25, 2004)

In this lawsuit, petitioner contests two Commission orders that rejected an argument that the "old" Part 2 process, rather than the new one, should apply to the *Millstone* license renewal proceeding. Petitioners also filed contentions in that proceeding, which remains pending at the Commission. We have filed a motion to dismiss petitioner's judicial action as improper and premature.

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Nuclear Information and Resource Service v. NRC, No. 04-71432 (9th Cir., filed Mar. 26, 2004)

Petitioners in this case seek judicial review of the NRC's recent amendments to its transportation safety regulations (10 C.F.R. Part 71). The court of appeals has held the suit in abeyance to await completion of a related rulemaking at the Department of Transportation.

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Citizens Awareness Network v. United States, No. 04-30114-MAP (D. Mass., filed June 16, 2004)

This is a Freedom of Information Act suit seeking release of a 1967 OGC note. The NRC previously had released most of the note on an administrative FOIA appeal. While the NRC might have defended withholding the remainder of the document as privileged (attorney-client), we released the entire document after determining (in consultation with the United States Attorney's Office) that extensive litigation over a relatively innocuous 1967 document would not be cost-beneficial. We have filed a motion to dismiss the suit as moot. Plaintiff is opposing dismissal.

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