

## ADJUDICATORY ISSUE INFORMATION

December 28, 2004

SECY-04-0235

FOR: The Commission

FROM: John F. Cordes, Jr. /*RA by E. Leo Slaggie Acting For*/  
Solicitor

SUBJECT: LITIGATION REPORT - 2004 - 05

***Citizens Awareness Network v. United States***, Nos. 04-1145 & 04-1359 (1<sup>st</sup> Cir., decided Dec. 10, 2004)

In these cases various advocacy groups challenged the NRC's new Part 2 hearing process. Petitioners claimed that the NRC is required by law – the Atomic Energy Act (AEA) and the Administrative Procedure Act (APA) – to provide formal, “on-the-record” adjudicatory hearings in reactor licensing cases. Without reaching that question, the court of appeals (*Selya & Howard, JJ., Lipez, J., concurring*) agreed with our argument that the NRC's new procedures meet the APA's requirements for “on-the-record” hearings. The court explicitly left open the question whether the AEA's hearing requirement (§ 189) requires such hearings or, as the NRC has argued, leaves room for the agency to provide a less formal process.

The court addressed the subjects of discovery and cross-examination in some detail. The court said that the APA does not mandate discovery of any kind and that, in any event, the new rules' requirement of “mandatory disclosure” seemingly compensates for the loss of “traditional discovery.” As for cross-examination, the court pointed out that the NRC's new rules do not ban cross-examination outright but, like the APA, allow cross-examination when necessary to complete an adequate record. The court brushed aside as “meritless” petitioners' constitutional arguments for additional procedures at NRC hearings.

The court, and particularly the concurring Judge, expressed some concern that the NRC had taken the position that its new rule satisfied APA requirements “belatedly,” thus forcing an extended and unnecessary debate during the Part 2 rulemaking on the NRC's authority to depart from the APA. But in the end the judges agreed that “we cannot say that the Commission's desire for more expeditious adjudications is unreasonable, nor can we say that the changes embodied in the new rules are an eccentric or plainly inadequate means for achieving the Commission's goals.”

Petitioners have 45 days to seek rehearing before the panel or before the full court of appeals, and failing that, 90 days to seek review in the Supreme Court.

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***State of Oklahoma v. NRC***, Nos. 04-9503 & 04-9523 (10<sup>th</sup> Cir., order issued Dec. 9, 2004)

These petitions for review challenged a Commission adjudicatory decision holding that some waste at Sequoyah Fuels Corporation's Oklahoma site qualifies as 11e(2) byproduct material, and should be regulated as such. These lawsuits, as well as related Licensing Board proceedings, were held in abeyance for many months to accommodate settlement negotiations between Oklahoma and Sequoyah Fuels. Those parties recently reached a settlement agreement and jointly sought dismissal of all pending litigation. The settlement does not bind the NRC in any way, and allows our agency to take any regulatory steps it deems necessary or appropriate.

The court of appeals issued an order dismissing the petitions for review.

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***Connecticut Coalition Against Millstone v. NRC***, No. 04-0109 (2d Cir., decided Oct. 14, 2004)

This lawsuit attacked a Commission decision rejecting petitioner's intervention contentions in a license amendment proceeding. Dominion Nuclear Connecticut sought the amendment to effect changes to safety mechanisms with respect to fuel handling accidents at Millstone. An NRC licensing board, and the Commission itself, found petitioner's contentions overly conclusory and not supported in fact or expert opinion. Although the board and the Commission found that petitioner had standing to intervene, they terminated the proceeding for lack of an admissible contention.

After briefing and oral argument, the court of appeals (Miner, Cabranes & Straub, JJ.) denied the petition for review. The court agreed that it was reasonable for the Commission to terminate the proceeding under NRC hearing rules where petitioner submitted no "fact or expert opinion evidence to contravene Dominion's analysis showing that any increased risk of offsite radiological exposure was well below federal regulatory allowances." In an unusual action, the court noted "a change in the status of counsel" for petitioner -- she had been disbarred in Connecticut -- and directed petitioner's counsel to "apprise her clients of her changed status, as well as the means available to bring late-filed contentions."

Petitioner did not seek rehearing, and has until mid-January to seek Supreme Court review

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***Connecticut Coalition Against Millstone v. NRC***, No. 04-3577 (2d Cir., decided Oct. 6, 2004)

Petitioner filed this lawsuit to challenge a Commission decision to apply its "new" Part 2 to the Millstone license renewal proceeding. The Commission turned down petitioner's original petition seeking to apply the "old" Part 2 on the ground that petitioner filed it before the license renewal adjudicatory proceeding had actually started. Petitioner later sought to intervene in the proceeding when it was officially noticed, but petitioner simultaneously went to the court of

appeals to argue that the “old” Part 2 should apply.

Granting our motion to dismiss, the court of appeals (Miner, Cabranes & Miner, JJ.) ruled that it lacked jurisdiction to review the Commission’s handling of petitioner’s premature challenge to the NRC’s choice of hearing procedures. Petitioner did not seek rehearing, and has until early January to seek Supreme Court review.

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