

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of:	)	
	)	License Nos. IW023 and XWO13
ENERGYSOLUTIONS	)	Docket No. 110-05711 (import)
(Radioactive waste import/export	)	and No. 110-05710 (export)
licenses for Italian waste)	)	June 19, 2009

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**STATE OF UTAH’S VIEWS ON HOW THE COMMISSION SHOULD PROCEED**

In response to an Order dated May 20, 2009, the State of Utah submits its views on how the Commission should proceed in the EnergySolutions import and export licensing proceeding. For the reasons stated below, the Commission should continue to hold the proceeding in abeyance until the Northwest Compact’s authority over the Clive site has been fully resolved and, in addition, until EnergySolutions has submitted all material information required under 10 C.F.R. Part 110.

On October 6, 2008, the Commission issued an Order, CLI-08-24, holding in abeyance EnergySolutions’ import and export applications relating to Italian radioactive waste and, as well, a decision on the State of Utah’s hearing request (and another request) on those import and export applications. In CLI-08-24, the Commission (quoting from 60 Fed. Reg. at 37,560) emphasized, “the NRC will not grant an import license for waste intended for disposal unless **it is clear** that the waste will be accepted by a disposal facility, host state, and compact (where applicable).” CLI-08-24 slip op. at 5. The Commission found “it would be inefficient to devote further adjudicatory (and NRC Staff) resources to this proceeding . . . [u]ntil a court of competent jurisdiction determines that the Northwest Compact cannot exclude foreign waste from the Clive facility.” Id. at 5-6.

The State of Utah submits that it is still inefficient to devote adjudicatory and Staff resources to this proceeding until the matter of the Northwest Compact's authority over the Clive site has been finally resolved and until EnergySolutions has submitted all material information required under 10 C.F.R. § 110.32(f). The State requests the Commission defer dealing with this contentious issue<sup>1</sup> until the NRC's administrative record is complete and until the 10<sup>th</sup> Circuit Court of Appeals has reviewed a pure question of law on what the Court acknowledged to be a very difficult issue.<sup>2</sup>

A. The Federal Litigation

EnergySolutions filed a declaratory action in Utah federal district court on three counts. In Count I, EnergySolutions alleged the Northwest Compact has no authority over the Clive site. In Counts II and III, it alleged, even if the Northwest Compact has authority over the Clive site, (a) the Compact's authority over foreign low-level radioactive waste (LLRW) is preempted by the NRC, and (b) the Compact's discrimination against foreign LLRW is in violation of the

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<sup>1</sup>It is undisputed that this application is contentious. The NRC received thousands of public comments from across the country protesting EnergySolutions' application. Congressional representatives, such as Reps. Gordon (Tenn.), Matheson (Utah) and Markey (Mass.) also voiced concern about and opposition to NRC issuing EnergySolutions a license to import radioactive waste generated from past nuclear operations in Italy.

<sup>2</sup>At the beginning of oral argument on cross motions for summary judgment, the Court said:

Something that always troubles me is whenever parties stand up in a case such as this where it is not clear, if it was clear none of us would be here today, and they use terms such as it's absolutely clear what the law is, what Congress intended, et cetera, et cetera. . . . [T]his is a very, very difficult issue. It is not clear to the Court after reading everything that you all have submitted what Congress intended. When all is said and done, that's what I'm being asked to do.

EnergySolutions v. Northwest Interstate Compact, et al., Case No. 2:08-CV-352TS, February 26, 2009 Motion Hearing, Tr. at 4-5.

dormant Commerce Clause. On May 15, 2009, U.S. District Court Judge Ted Stewart ruled on cross motions for summary judgment on Count I, finding the Northwest Compact has authority to regulate the disposal of LLRW generated within the Compact boundaries; the Northwest Compact may restrict the flow of out-of-Compact waste to its regional disposal facility; but the Northwest Compact does not have authority over out-of-region waste having access to the Clive facility, which is not a regional disposal facility. EnergySolutions v. Northwest Interstate Compact on Low Level Radioactive Waste Mgmt. et al., No. 2:08-CV-352 TS, 2009 WL 1392836 (D.Utah).

The Court recognized it was presented “with only one question of law.” Id. at \*2. That question was to determine “the intent of Congress in passing legislation in 1980 and 1985 regulating the disposal of LLRW . . . .” Id. at \*6. The Court reviewed three pieces of legislation, the Low Level Radioactive Waste Policy Act of 1980, the Low Level Radioactive Waste Policy Amendments Act of 1985 and the Omnibus Low Level Radioactive Waste Interstate Compact Consent Act (the “Acts”). The Court found that interpreting those Acts separately posed “problems of interpretation for the Court,” but reconciling Congress’ intent from “the combination of all three Acts pose special difficulties” to the Court in this case. Id. at \*9. The Court found that “the plain language of the three Acts is insufficient to resolve the issue before the Court” and it turned to legislative history to “determine if it is possible to clarify how much exclusionary authority Congress intended to grant [the] Northwest [Compact] and other compacts under the Acts.” Id. at \*12.

The Court finally concluded that the Northwest Compact has authority over in-region LLRW but it does not have authority to curtail access to the Clive site for out-of-region waste,

including foreign waste. Id. at \*1, and \*\*14-15. Two days ago (June 17, 2009), the Court entered final judgment on Count I.<sup>3</sup> The Defendants – the State of Utah, the Northwest Interstate Compact on Low-Level Radioactive Waste Management and the Rocky Mountain Low-Level Radioactive Waste Management Board – will appeal the district court’s decision to the 10<sup>th</sup> Circuit Court of Appeals.

B. There is Just Cause for Continuing to Hold the Proceeding in Abeyance

The Commission, by its own action, initiated holding this proceeding in abeyance, primarily because of ongoing litigation relating to the Compact’s exclusionary authority over the Clive site. CLI-08-24 slip op. at 5-6. In the State’s view, there is just cause for the Commission to continue holding the proceeding in abeyance.

It is clear from the Utah district court’s opinion that the Court struggled with how to resolve the legal issue presented. The legal standard on review of this decision is de novo, with no deference given to the district court on questions of law. *See e.g.,* Elephant Butte Irrigation Dist. of New Mexico v. U.S. Dept. of Interior, 538 F.3d 1299, 1301 (10<sup>th</sup> Cir. 2008) (“We review de novo both the district court's statutory interpretation, and its grant of summary judgment.”); and Ward v. Allstate Ins. Co., 45 F.3d 353, 354 (10<sup>th</sup> Cir. 1995) (“the controversy consists of a pure question of statutory interpretation, which we review de novo.”). Therefore, there is a reasonable potential for the district court to be reversed on appeal. Important implications flow from this potential because the only site identified in EnergySolutions’ import license application for the disposal of the Italian radioactive waste is at Clive, Utah.

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<sup>3</sup>The Court found “no just reason to delay entry of final judgment on Count I because the summary judgment order . . . renders unnecessary the relief sought by Plaintiff in Counts II and III.” Order Granting EnergySolutions’ Motion for Entry of Judgment on Count I under Rule 54(b) and to Stay Proceedings on Counts II and III, Case No. 2:08-CV-352-TS (Doc. 105).

If the Utah district court's decision were to be overturned on appeal and the Northwest Compact's exclusionary authority affirmed, Italian waste awaiting disposal could become orphaned or may need to be placed in indeterminate storage in the United States. Moreover, imported Italian waste already disposed of at Clive may need to be recovered and exported back to Italy. Under these circumstances, the Commission should defer acting on the import license application because of the uncertainties associated with the management and ultimate disposal of the imported radioactive waste. *See* 10 C.F.R. §§ 110.32(f)(5) and (6) and 110.45(b)(4).

Another just cause for continuing to hold the proceeding in abeyance is that EnergySolutions has not submitted all material information required to process the application, to adjudicate the issues raised by the State of Utah (should the Commission grant the State's hearing request), or for the Commission to make an informed determination under 10 C.F.R. Parts 51 and 110. The State of Utah has raised serious deficiencies with the material information contained in EnergySolutions' import and export applications and responses to the Staff's Requests for Additional Information (RAIs).<sup>4</sup> Since that time, EnergySolutions has not provided new or supplemental material information to the NRC Staff.

Regardless of the underlying reasons why EnergySolutions will not characterize or classify the Italian waste until it has an import license and an export license in hand, the regulations require otherwise. To satisfy the Commission's safety findings, the material information an applicant must submit for a license to import radioactive material includes, *inter alia*, "the volume, classification (as defined in § 61.55 of this chapter), [and] physical and chemical characteristics . . . of the waste." 10 C.F.R. § 110.32(f)(5). Independent of the

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<sup>4</sup>*See e.g.*, Utah Reply to EnergySolutions' Answer to Utah's Request for a Hearing and Petition for Leave to Intervene (July 21, 2008) at 7-15.

availability of a disposal site for the Italian radioactive waste, if EnergySolutions is unwilling to provide this material information to the NRC now, its application should be rejected or any further review held in abeyance until EnergySolutions fully complies with the regulations.

Conclusion

For the reasons stated above, the State of Utah requests the Commission continue to hold this licensing proceeding in abeyance; and to either (a) deny EnergySolutions' import and export license applications, or (b) continue to hold review of them in abeyance.

DATED this 19<sup>th</sup> day of June, 2009.

Respectfully submitted,

/signed electronically by Denise Chancellor/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S VIEWS ON HOW THE COMMISSION SHOULD PROCEED was served on the persons listed below via the NRC Electronic Information Exchange (EIE), unless otherwise noted, this 19<sup>th</sup> day of June, 2009:

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