

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
)	License Nos. IW023 and XW013
ENERGYSOLUTIONS)	Docket No. 110-05711 (import)
(Radioactive waste import/export)	and No. 110-05710 (export)
licenses for Italian waste))	June 26, 2009

**STATE OF UTAH’S REPLY TO ENERGYSOLUTIONS’
BRIEF IN RESPONSE TO THE COMMISSION’S MAY 20, 2009 ORDER**

The State of Utah replies to the above-mentioned brief, filed by EnergySolutions on June 19, 2009 (“EnergySolutions’ Brief” or “Brief”). As described below, the NRC Staff and the Commission still have an unsound footing on which to proceed with review of EnergySolutions’ import and export license applications, or to make a determination under 10 C.F.R. Part 110. The Commission should, therefore, continue to hold review of EnergySolutions’ import and export license applications and this proceeding in abeyance.

A. The Federal Litigation

Contrary to EnergySolutions’ position (Brief at 3-4), the dispute over the legal ability of the Northwest Interstate Compact on Low-Level Radioactive Waste Management (“Northwest Compact”) to exercise its exclusionary authority over EnergySolutions’ disposal facility at Clive, Utah, has not been fully resolved. As explained in “State of Utah’s Views on How the Commission Should Proceed” (“Utah’s Views”), filed June 19, 2009, the district court addressed a pure question of law, struggled with the interpretation and reconciliation of three pieces of federal legislation, and had extreme difficulty discerning Congress’ intent in the matter under review.

The District Court's ruling is being appealed.¹ The State of Utah filed a Notice of Appeal on June 23, 2009; the 10th Circuit Court of Appeals docketed Utah's appeal on June 24 (Case No. 09-4122). The Northwest Interstate Compact and the Rocky Mountain Low-Level Radioactive Waste Board filed Notices of Appeal today. The 10th Circuit Court of Appeals will review the district court's decision de novo. *See Utah's Views* at 4.

As described below, and in more detail in Utah's June 19 filing, the Commission should await a definitive decision from the 10th Circuit Court of Appeals before addressing whether there is an appropriate facility for the disposal of radioactive waste imported from Italy.

B. The *Shoreham* Decision

EnergySolutions believes *Shoreham*² provides guidance to the Commission on going forward with this case. EnergySolutions' Brief at 5-6. EnergySolutions' analogy to *Shoreham* is misplaced. In *Shoreham*, the applicant argued that it did not need to rely on state or local governments for emergency functions; instead, the applicant maintained it or its contractors could perform those emergency services. *Shoreham*, 21 NRC at 650. The Board held its proceeding in abeyance pending a state court decision on New York State law. *Id.* at 897. Later, a lower New York court ruled that the applicant, a private corporation, did not have the authority to exercise these powers, which fall within the State's historic police powers. *Id.* at 898. After the state court decision, the Board analyzed the preemption issues, found New York laws relating to emergency planning were not preempted by federal law, and also found it too

¹*Cf.* EnergySolutions' Brief at 5 (“[t]he **possibility** of an appeal provides no basis for further delay.”) (*emphasis added*).

²*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644 (1985).

speculative to rely on the “realism” or “immateriality” doctrines. *Id.* at 912, 916 and 919. The Commission, on appeal, reversed as to the realism and immateriality doctrines. CLI-86-13, 24 NRC 22 (1986).

Shoreham is distinguishable from the case here because in *Shoreham* the repercussions of the lower court rendering an incorrect decision are basically risk free. First, the Commission relied on the realism and immateriality doctrines, not the New York lower court’s ruling, to approve the emergency plan. Therefore, the facts in *Shoreham* do not apply here. Second, even if *Shoreham* applies and the New York lower court would have been proven wrong, reversal of that decision would have been risk-free to the NRC and the applicant, in that the applicant would have been able to carry out the emergency functions and the NRC would not have needed to rely on the realism and immateriality doctrines to uphold the applicant’s emergency plan.

The contrary is true here. To accept EnergySolutions’ position, the Commission needs to rely on the federal district court to find that an appropriate facility will accept the Italian radioactive waste for disposal. If the federal district court is reversed, any affirmative “appropriate facility” findings made by the Commission under 10 C.F.R. § 110.45 would be without merit. As a consequence, radioactive waste may have been unlawfully disposed of at Clive, or it could be orphaned or need to be placed in indeterminate storage in the United States. Unlike *Shoreham*, here there is substantial risk to the Commission, the applicant, and the public if the outcome of the lower court’s decision is reversed on appeal.³

³Juxtaposed against the cases cited by EnergySolutions in its Brief at footnote 23, is the fact that the Commission must make an “appropriate facility” finding in light of the Northwest Interstate Compact having exercised exclusionary authority over the Clive facility for almost two decades. Moreover, in the Part 110 final rule on the import and export of radioactive waste, the NRC said: “That the host State and compact do not object to the importation of the waste will be part of the determination regarding the appropriateness of the facility that has agreed to accept

Another distinguishing feature is that in *Shoreham* the Board deferred on a question of **state** law and later analyzed **federal** preemption law. By contrast, here the Commission, on its own volition, halted this proceeding because it chose not to delve into the interpretation of **federal** law. CLI-08-24, slip op. at 5 (“the Commission will not wade into the legal dispute between EnergySolutions and the Northwest Compact now before the federal district court in Utah.”). The Commission should continue to hold this proceeding in abeyance until the challenging legal issue of Congress’ intent in granting the Northwest Compact exclusionary authority under a compact is resolved on appeal.

C. Continued Abeyance

EnergySolutions admits that 10 C.F.R. Part 110 governs this proceeding, not the Rules of Practice in 10 C.F.R. Part 2. EnergySolutions’ Brief at 7. Nonetheless, EnergySolutions imputes into this proceeding the standards governing emergency injunctive relief. *Id.* (citing 10 C.F.R. § 2.342(e)). The Commission is not requesting the potential parties address any hypothetical stay provisions. The State will, however, reply to the substance of EnergySolutions’ arguments.

EnergySolutions takes the position that the Commission review the elements required for obtaining a stay in determining whether or not to proceed with this adjudication and Staff review of the applications. EnergySolutions’ Brief at 7-8. EnergySolutions suggests there is no irreparable harm because the waste can be returned to Italy and, as a consequence, the Staff should review its applications; there is no certainty the federal district court will be overturned; EnergySolutions will suffer economic harm; and the public interest lies in its favor. These issues

the waste for management purposes or disposal.” 60 Fed. Reg. 37,562 (July 21, 1995).

are addressed in turn, with the exception of the federal compact litigation, which is addressed above.

1. Returning the Waste to Italy

EnergySolutions says even if the federal court of appeals reverses the lower court after an import license is granted, “there would still be no irreparable injury because the waste could simply be returned to Italy.” EnergySolutions’ Brief at 8. There is nothing simple about attempting to return imported radioactive waste back to Italy.

In September 1990, the International Atomic Energy Agency (IAEA) Code of Practice adopted the International Transboundary Movement of Radioactive Waste (“IAEA Code”). NRC’s final rule on the import and export of radioactive waste, 10 C.F.R Part 110, is “intended to reflect the principles of the Code.” 60 Fed. Reg. 37,556 (July 21, 1995). One of the basic principles of the IAEA Code states, in relevant part: “no receiving state should permit the receipt of radioactive waste for management or disposal unless it has the administrative and technical capacity and regulatory structure to manage and dispose of such waste in a manner consistent with international safety standards.” IAEA Code, Basic Principle No. 7. Adherence to the IAEA Code raises the prospect that NRC may need to satisfy itself that Italy has the necessary administrative and technical capacity and regulatory structure to manage the returned waste shipments, if Italian waste already imported into the United States cannot be disposed of at Clive. If, for example – as the Nuclear Information and Resource Service *et al.*, petitioners suggest – EnergySolutions were to import depleted uranium currently stockpiled for Italy in France,⁴ would Italy have the capability under the IAEA Code to manage the return shipment?

⁴See “Hearing Petitioners’ Response to Commission Order Requesting Views on How to Proceed after Federal District Court Decision on EnergySolutions v. Northwest Compact” at 2

Moreover, how would EnergySolutions retrieve waste already disposed of at Clive for return shipment?

Another question to ask is why would NRC issue an import license allowing radioactive waste to be shipped 5,000 miles across the Atlantic Ocean to the United States, and then find the radioactive waste must undertake another 5,000 mile-journey back to Italy, thereby doubling the potential for a mishap. And why would NRC issue a license when, in light of recently filed appeals, the question of the availability of a disposal facility has not been finally resolved.

The prudent action at this time is to continue holding the proceeding in abeyance until the Commission can satisfy itself that it would not be faced with these potential future dilemmas.

2. Staff Review of EnergySolutions' Applications

EnergySolutions says there is no reason to continue delay in the Staff's review of its applications. EnergySolutions' Brief at 7-8. The State submits that EnergySolutions has brought delay upon itself because it has failed to supply the NRC with material information needed to review its applications. The State again reiterates that EnergySolutions will not classify or characterize radioactive waste streams from past Italian nuclear operation until it has an import license in hand. NRC has an interest in not squandering its resources on review of the generalized information contained in EnergySolutions' applications and RAI responses. Until all material information has been supplied to the Staff, the Commission should direct the Staff to refrain from reviewing EnergySolutions' generic applications.⁵

(June 19, 2009).

⁵Even though EnergySolutions is applying to the NRC for specific import and export licenses, the applications EnergySolutions submitted are for "generic" import and export licenses. *See* EnergySolutions' Application (a) IW023, NRC Form 7, Box 15 ("This is a request for a **generic** license to allow the importation of up to approximately 20,000 tons of

3. Economic Harm and Public Interest

EnergySolutions' alleged economic harm, from being "unable to perform work under its contracts" (Brief at 8), ignores the fact that by not submitting all material information to the NRC, EnergySolutions is a factor in its own delay. EnergySolutions has the unreasonable expectation that it may perform under its contracts after receiving an import license, and then comply with NRC regulations. The material information listed in 10 C.F.R. § 110.32 that an applicant must submit to NRC is a regulatory requirement an applicant must fulfill before NRC may issue a license. EnergySolutions has not fulfilled this regulatory requirement. In addition, delay is a cost of doing business when an applicant proposes a controversial scheme that crosses multiple jurisdictions, and one that ignores the long-established exclusionary authority that the Northwest Interstate Compact has historically exercised over EnergySolutions' facility at Clive, Utah. In sum, failure to comply with the regulations does not constitute economic harm.

Finally, EnergySolutions claims there is "substantial public interest" in "the orderly and prompt resolution of proceedings before the NRC." EnergySolutions' Brief at 8-9. While there is a public interest in the "orderly and prompt resolution of proceedings," that interest should be tempered here where going forward may ultimately render NRC's "appropriate facility" findings unsupportable. The potential repercussions from a reversal of the lower federal court's decision require the Commission to take extra care and caution with this proceeding. Accordingly, the Commission should continue to hold the proceeding in abeyance.

radioactively contaminated material"); and (b) XW013, NRC Form 7, p 3 ("We [EnergySolutions] are requesting a **generic** license to allow the return export of up to approximately 1,000 ton of radioactively contaminated waste material") (*emphasis added*). ADAMS Accession No. ML072950080.

D. Conclusion

For the reasons stated above and in its June 19, 2009 Response, the State of Utah requests the Commission continue to hold this proceeding in abeyance, and to reject EnergySolutions' import and export license applications or continue to hold review of them in abeyance.

DATED this 26th day of June, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO ENERGYSOLUTIONS' BRIEF IN RESPONSE TO THE COMMISSION'S MAY 20, 2009 ORDER was served on the persons listed below via the NRC Electronic Information Exchange (EIE), unless otherwise noted, this 26th day of June, 2009:

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