

July 29, 1999

SECY-99-194

FOR: The Commission

FROM: John F. Cordes, Jr. /s/
Solicitor

SUBJECT: LITIGATION REPORT - 1999- 4

Thermal Science, Inc. v. NRC, No. 98-3147 (8th Cir., decided July 23, 1999)

For nearly three years the NRC has been attempting to get the *Thermal Science* civil penalty proceeding off the ground, but the agency's efforts have been tied up by a pre-enforcement lawsuit brought by TSI. Last summer, a federal district court dismissed the lawsuit as premature. *Thermal Science, Inc. v. NRC*, 29 F.Supp.2d 1068 (E.D. Mo. 1998). Recently, "relying largely on the well-supported opinion of the district court," the United States Court of Appeals for the Eighth Circuit (McMillian, Arnold & Sachs, JJ.) affirmed the district court decision.

Although the court of appeals agreed with our position on prematurity, it saw "troubling procedural issues" in the case -- principally the lapse of time since the underlying violations and the "institutional loyalties" at the NRC that might "have some influence in resolving the merits." The court indicated that it might have stepped in to decide the controversy now "if TSI's double jeopardy and lack of regulatory authority arguments had been compelling (or if they could have been summarily rejected)." The court concluded, however, that it lacked a sufficient record to decide the case on the merits, particularly the question whether NRC has the statutory authority to impose civil penalties on non-licensees for violation of the Wrongdoer Rule. (As the court noted, we did not offer a full-scale merits argument on the civil penalty issue, on the theory that judicial review must await a definitive Commission decision.)

The court concluded its opinion with the admonition that "the questions should be carefully and promptly examined at the agency level. Prudence would seemingly dictate determining the legal soundness of a penalty proceeding before preparing to relitigate the criminal case with a reduced burden of proof."

TSI now has 45 days to seek rehearing in the court of appeals and 90 days to seek certiorari in the Supreme Court.

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Natural Resources Defense Council v. Dicus, No. 99-1269 (D.C. Cir., filed July 9, 1999)

This lawsuit, brought by four citizens' groups (Natural Resources Defense Council, Nuclear Information and Resource Service, Public Citizens' Critical Mass Energy Project, and Union of Concerned Scientists), challenges the Commission's May 10 announcement in the Federal Register of its intent to implement 1985 amendments to the agency's Sunshine Act regulations. Subsequent to the lawsuit, the Commission issued another Federal Register notice containing responses to comments the agency had received.

It is unclear at this point precisely what claims petitioners intend to pursue in the court of appeals. We will consult with the Department of Justice on the defense of this case.

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