

**September 25, 1998**

**SECY-98-223**

**For:** The Commission

**From:** John F. Cordes, Jr. /s/  
Solicitor

**Subject:** LITIGATION REPORT - 1998 - 4

American Public Power Ass'n v. NRC, No. 98-1219 (D.C. Cir., decided Aug. 31, 1998)

In a one-page order, the court of appeals (Wald, Silberman & Henderson, JJ.) dismissed a petition for review filed by a trade association of municipal power companies and by other petitioners. Petitioners had challenged the lawfulness of a 1997 NRC policy statement on economic deregulation insofar as the policy statement suggested that there may be circumstances in which the NRC would hold co-owners of nuclear power reactors jointly and severally liable for operating and decommissioning costs. We filed a motion to dismiss the lawsuit as unripe. We pointed out that the policy statement did not state a binding NRC legal interpretation and has never been applied to an actual case.

The court of appeals granted our motion and dismissed the case because the "agency action at issue is not ripe for judicial review at this time." The court stated that its dismissal was "without prejudice to any right petitioners may have to challenge the agency action at issue in an appropriate circumstance."

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Thermal Science, Inc. v. NRC, No. 98-3147 (8<sup>th</sup> Cir., stay denied Sept. 10, 1998)

This is the continuation of an effort by Thermal Science to derail NRC consideration of a proposed \$900,000 civil penalty for alleged false statements to the agency about the testing of Thermal Science's Thermo-Lag product. This summer, after a lengthy delay, the district court dismissed the suit outright as premature and also refused to stay administrative proceedings pending appeal. Thermal Science then appealed and sought a stay from the court of appeals. We opposed the stay. In a one-sentence order the court of appeals denied the stay motion. The court also set a briefing schedule on the merits of the appeal. Thermal Science continues to argue that NRC consideration of a civil penalty violates the Constitution's Double Jeopardy Clause and is beyond the agency's statutory authority. The court of appeals is likely to hear oral argument on the appeal early next year.

In the meantime, in the absence of a stay, NRC administrative proceedings can move forward. Thermal Science has filed a response to the notice of violation and proposed civil penalty. The NRC's Office of Enforcement currently is considering the response. If a civil penalty is assessed, Thermal Science may request a hearing before an NRC Licensing Board.

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Envirocare of Utah, Inc. v. NRC, No. 98-1426 (D.C. Cir., filed Sept. 15, 1998)

This petition for review challenges a Commission adjudicatory decision, CLI-98-11, rejecting Envirocare's standing to pursue a Licensing Board hearing on the NRC's grant of a license to Quivira Mining Company, a competitor of Envirocare in the waste disposal business. Envirocare claims that the NRC did not require Quivira to satisfy the same costly environmental and safety standards applied to Envirocare. According to Envirocare, the NRC's lenient review of the Quivira application leaves unanswered significant safety and environmental questions and also gives Quivira an unfair competitive advantage in the marketplace.

Citing judicial concepts of standing that the Commission historically has followed, the Licensing Board dismissed the request for a hearing, and the Commission affirmed, on the ground that only persons who themselves suffer health and safety or environmental harms have an "interest" sufficient for intervention under section 189a. The Board and the Commission ruled that Envirocare, whose facility lies hundreds of miles from Quivira's, was claiming purely economic injury from increased competition and that such injury does not fall within the "zone of interests" protected by the AEA or NEPA.

The case likely will not be briefed or argued until early next year.

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Fields v. NRC, 1:98CV01714 (D.D.C., filed July 9, 1998)

Plaintiffs in this lawsuit, filed under the Privacy Act, were licensed operators at the Crystal River Nuclear Plant in Florida. In 1994, after becoming frustrated by their management's inattention to an alleged safety problem at the plant, plaintiffs conducted their own "experiment" to substantiate their safety concerns. Plaintiffs' concerns turned out to be well-founded, and led to the NRC's imposition of a large civil penalty (\$500,000) against Crystal River's operator, Florida Power Corporation. The NRC took no enforcement action against plaintiffs for their unilateral actions but in correspondence pointed out that their actions violated the law, and that the "ends do not justify the means." Plaintiffs lost their positions as licensed operators at Crystal River.

Plaintiffs demanded correction of their records under the Privacy Act. The NRC refused to alter the records, and plaintiffs have now sought relief in federal district court. We are working with the United States Attorney's office in defending this lawsuit. In the meantime, plaintiffs are seeking relief as "whistleblowers" before the Department of Labor. Plaintiffs lost in their initial effort, but now are before the United States Court of Appeals for the Eleventh Circuit seeking reinstatement of their grievance.

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United International Investigative Services, Inc. v. United States, No. 98-729 C (U.S. Court of Federal Claims, filed Sept. 18, 1998)

This lawsuit challenges the NRC's termination of a contract for security guard services at the NRC's Rockville facilities. The lawsuit argues that the NRC terminated plaintiff's contract in July for failure to possess a Maryland license, but failed to provide plaintiff a ten-day period to "cure" the default, as the contract allegedly required. The lawsuit also maintains that plaintiff was under no obligation to obtain or maintain a state license. Plaintiff has indicated that it will seek an injunction ordering the NRC to revoke the license termination.

We are working with the Department of Justice in Washington in defending this suit.

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