

June 3, 1997

For: The Commission
 From: John F. Cordes, Jr. /s/
 Solicitor
 Subject: LITIGATION REPORT - 1997 - 2

City of West Chicago v. NRC, No. 96-1125 (D.C. Cir., dismissed May 16, 1997)

This lawsuit challenged a Commission adjudicatory decision that: (a) terminated as moot a proceeding seeking NRC authorization for onsite burial of mill tailings at Kerr-McGee's Rare Earths facility in West Chicago, Illinois; and (b) vacated Licensing Board and Appeal Board decisions that the Commission had not reviewed. See CLI-96-2, 43 NRC 13 (1996). The City of West Chicago and the State of Illinois sought judicial review of the Commission's vacatur order.

After the case had been held in abeyance for about a year, the City and State decided to withdraw it, apparently after reaching a settlement with Kerr-McGee. On May 16, the court of appeals formally dismissed the petition for review.

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Mabey v. NRC, Nos. 95-1399 & 95-1400 (D.C. Cir., dismissed May 8, 1997)

This lawsuit, formerly known as Cajun Electric Power Cooperative v. NRC, challenged two NRC license amendments accommodating a merger between Gulf States Utilities, principal owner of the River Bend nuclear power reactor, and Entergy. Cajun Electric (now represented by bankruptcy trustee Ralph Mabey) and a group of small Arkansas cities and cooperatives ("ACC") argued that the NRC wrongly had rejected their antitrust claim that "significant changes" had occurred since River Bend's initial licensing and warranted a hearing. Last year, after the case was fully briefed but prior to oral argument, the parties jointly sought and obtained an order from the court of appeals holding the case in abeyance pending implementation of a settlement of a bankruptcy proceeding involving Cajun. That settlement called for a withdrawal of Cajun's petitions for review.

On May 8, at trustee Mabey's request, the court of appeals issued an order formally dismissing Cajun's petitions. That court order does not terminate the lawsuit, however, because ACC's petition for review remains before the Court. The parties must file a motion to govern further proceedings by July 2, 1997.

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Reytblatt v. NRC, No. 95-1578 (D.C. Cir., rehearing denied April 10, 1997)

As reported in Litigation Report 1997-1, [SECY-97-040](#), the court of appeals in this case rejected a challenge to 1995 changes in [10 C.F.R. Part 50, Appendix J](#). The lawsuit attacked only the information-reporting aspects of the new rule. One of the petitioners, Dr. Zinovy Reytblatt, sought panel rehearing and/or rehearing en banc from the full court of appeals. On April 10, the court issued orders denying both requests.

The petitioners have until July 9 to seek Supreme Court review.

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Thermal Science v. NRC, No. 4:96-CV-2282 CAS (E.D. Mo., Order holding case in abeyance entered May 9, 1997)

This lawsuit challenges the NRC's constitutional and statutory power to impose a civil penalty against plaintiff, the manufacturer of Thermo-Lag, for alleged misrepresentations about its product. Plaintiff's constitutional claim arises under the Double Jeopardy Clause. Plaintiff contends that its acquittal on criminal charges for some alleged misrepresentations prevents the NRC from pursuing a civil penalty. A case currently before the Supreme Court, *Hudson v. United States*, will address the relationship between civil penalties and the Double Jeopardy Clause. Hudson case is unlikely to be decided before 1998.

Accordingly, the district court (Shaw, J.) has decided to hold the current lawsuit in abeyance pending the Supreme Court's Hudson decision. What is

unclear is whether the court left the NRC free in the meantime to pursue its administrative civil penalty proceeding. On the one hand, the court seemed to suggest that further proceedings against plaintiff might cause irreparable injury, but on the other hand the court denied "all pending motions," including the motions plaintiff had filed seeking a halt to NRC proceedings.

We have filed a motion for clarification.

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Jones v. Jackson, No. 97 C 3087 (N.D. Ill., filed April 29, 1997)

This complaint was filed by an NRC employee for alleged violations of the Age Discrimination in Employment Act and the Rehabilitation Act in a promotion decision. The complaint seeks both injunctive and monetary relief. A copy of the complaint is available from OGC.

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