

April 9, 1998

For: The Commission  
 From: John F. Cordes, Jr. /s/  
 Solicitor  
 Subject: LITIGATION REPORT - 1998 - 1

City of Benton v. NRC, No. 95-1402 (D.C. Cir., decided (Feb. 27, 1998)

This long-running lawsuit challenged (on antitrust grounds) two NRC license amendments issued in 1995: one to transfer control of the River Bend nuclear power reactor from Gulf States Utilities to Entergy Corporation, and one to transfer operating responsibility of River Bend to Entergy Operations, Inc. Originally, Cajun Electric Power Cooperative joined a group known as Arkansas Cities and Cooperative (ACC) as petitioners, but Cajun ultimately dropped out of the suit as a result of a settlement agreement in bankruptcy proceedings.

The parties initially filed full briefs in the case three years ago. On the eve of oral argument, however, the court of appeals decided to hold the case in abeyance to await the outcome of the then-pending Cajun bankruptcy proceeding. Last summer, after Cajun withdrew its petition for review, the court reinstated the case to its active docket. The parties then filed fresh briefs. On February 27, the court (Williams, Sentelle & Henderson, JJ.) dismissed the case in its entirety for lack of jurisdiction.

The court held, as we had argued in our brief, that ACC's petition for review was fatally defective for failure to challenge a final agency order. ACC's petition had designated for review the NRC staff's interlocutory finding of no significant antitrust changes rather than the Commission's ultimate order actually granting the license amendments. The court stated that "[i]n a licensing proceeding, it is the order granting or denying the license that ordinarily is the final order," and concluded that "[w]hatever order ACC intended to ask the court to review, it named the wrong order in its petition."

ACC has until May 28 to seek certiorari in the Supreme Court, but we do not expect ACC to seek Supreme Court review.

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Ibrahim v. Jackson, No. 97-1269 (4th Cir., decided March 5, 1998)

This lawsuit claimed gender and age discrimination in the NRC's selection of an applicant for a senior staff scientist position. The district court granted summary judgment to the NRC last year on the ground that the NRC had offered sufficient reasons for its selection decision and that those reasons were not a "mere pretext for discrimination." Plaintiff appealed to the court of appeals, which in an unpublished opinion (Russell, Widener & Wilkins, JJ.) concluded that plaintiff had "failed to produce evidence creating a jury issue regarding whether the NRC's proffered reasons are pretextual."

Plaintiff has 45 days from March 5 to seek rehearing in the court of appeals, and if he does not, 90 days from March 5 to seek certiorari.

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Citizens Awareness Network v. NRC, No. 97-4368 (2d Cir., petition dismissed Feb. 17, 1998)

Late in 1997, petitioners filed this lawsuit seeking to set aside the NRC's 1996 decommissioning rule insofar as it did not guarantee an opportunity for a pre-decommissioning hearing. Petitioners also asked the court to prevent decommissioning activity at the shut-down Haddam Neck nuclear power reactor pending an agency hearing. The lawsuit followed upon a similar petition filed with the Commission. In response to that petition, the General Counsel sent petitioners a letter informing them of the NRC's established process for altering agency rules and holding their petition in abeyance pending a further indication whether petitioners intended to seek a rule change.

We immediately filed a motion to dismiss the suit on the grounds that the NRC letter holding the administrative petition in abeyance was not reviewable agency action and that it was too late now to challenge the NRC's 1996 decommissioning rule. Our motion pointed out that petitioners could obtain a reviewable order if they asked the NRC to modify or rescind its 1996 rule and were turned down. Petitioners subsequently indicated that they would file a petition for rulemaking in lieu of their lawsuit. They therefore stipulated to dismissal of the lawsuit, and the court of appeals duly dismissed the case on February 17.

Thus far, petitioners have filed no petition for rulemaking.

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American College of Nuclear Physicians v. NRC, No. 94-1787 (D.C. Cir., dismissed April 1, 1998)

This lawsuit, brought by two physicians groups, challenged the "Radiopharmaceutical Rule" issued by the Commission some years ago. Petitioners never articulated their precise grievance with the rule, but asked that the case be held in abeyance pending issuance of regulatory guidance. The court of

appeals subsequently issued an order holding the case in abeyance, and requiring the parties to file periodic status reports. Recently petitioners decided to withdraw their lawsuit, and the court of appeals granted their motion on April 1.

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General Atomics v. NRC, No. 95-70710 & 95-70842 (9th Cir., dismissed Feb. 17, 1998)

These petitions for review, filed by General Atomics in the Ninth Circuit and by Sequoyah Fuels Corporation in the Tenth Circuit, challenged a rule that the Commission issued in July, 1995, to clarify decommissioning funding obligations of nonreactor licensees. Petitioners, the subject of an NRC enforcement action arising out of a contaminated site in Gore, Oklahoma, apparently intended to argue that the Commission's 1995 rule unlawfully imposed "new financial assurance requirements" retroactively.

On our motion, the two cases were consolidated in the Ninth Circuit. The court of appeals held the consolidated cases in abeyance for several years because of the pendency at the NRC of administrative enforcement proceedings. Last summer, the Commission issued a final order approving a settlement of those proceedings. Petitioners then decided to withdraw their lawsuit. The court of appeals entered an order dismissing the case on February 17.

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Texas Instruments, Inc. v. United States, CV12812WGY (D. Mass., filed Dec. 23, 1997)

Plaintiff brought this lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to obtain reimbursement of cleanup expenses incurred at its property in Attleboro, Massachusetts. The suit was filed in December, 1997, but we did not receive notice of it until February 11, 1998. Plaintiff claims, among other things, that they incurred \$27 million for cleanup activities at its Attleboro site "in accordance with NRC approved plans." Plaintiff also claims that the old AEC and the federal government in general "induced private sector business enterprises to engage in research and manufacturing activities, under contracts and otherwise, related to military and civilian uses of radioactive material."

We are working with Department of Energy and Department of Justice attorneys in defending this suit.

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