November 23, 1999

FOR: The Commission

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

SUBJECT: LITIGATION REPORT - 1999 - 6

Envirocare of Utah, Inc. v. NRC, Nos. 98-1426 & 98-1592 (D.C. Cir., decided Oct. 22, 1999)

These consolidated petitions for review challenged Commission decisions dismissing requests for hearings in two NRC license amendment proceedings. The license amendments granted authority to International Uranium (USA) Corporation (IUSA) and Quivira Mining Company to dispose of radioactive byproduct material from offsite sources. A competitor, Envirocare of Utah, sought NRC hearings on the license amendments. In separate opinions, the Commission rejected the hearing requests on the ground that Envirocare's claimed competitive harms did not satisfy the judicial "zone of interests" test for standing. In the IUSA case, the Commission also ruled that quite aside from the judicial test Envirocare's competitive harms did not satisfy the Atomic Energy Act's "interest" requirement for an NRC hearing.

The court of appeals (Randolph, Edwards & Sentelle, JJ) upheld the Commission's refusal to grant Envirocare a hearing and denied its two petitions for review. The court initially pointed out that "Envirocare spends all of its time" arguing that its claims of competitive harm meet the judicial test for standing. This emphasis was misplaced, according to the court, because as a regulatory agency rather than an Article III court, the Commission "is not bound to follow" judicial standing tests. The court said that "prudential standing requirements, of which the 'zone of interests' test is one, are ... inapplicable to an administrative agency acting within the jurisdiction Congress assigned it."

The court thus did not consider Envirocare's claims under the judicial test, but turned instead to the Commission's alternate rationale for its decision -- its view that Envirocare's competitive harm is not among the "interests" that trigger a right to a hearing under section 189 of the Atomic Energy Act. On that issue, the court deferred to the Commission's understanding that the Act offered hearing opportunities only to those with genuine safety or environmental concerns, not those claiming purely competitive harm. Nothing in the Act, stated the court, "indicates that the license requirement was intended to protect market participants from new entrants."

Envirocare has 45 days to seek rehearing in the court of appeals, and 90 days to seek review in the Supreme Court.

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National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir., decided Nov. 12, 1999)

This petition for review challenged the Commission's decision to reject a request for a hearing in the Calvert Cliffs license renewal proceeding. The Commission turned down the hearing request on the ground that the petitioner, the National Whistleblower Center (NWC), had failed to submit timely contentions.

A split panel of the court of appeals (Wald & Edwards, JJ., Williams, J., dissenting) granted NWC's petition for review. The court focused on the refusal of the Licensing Board and the Commission to grant NWC a two-month extension of time it had sought to file contentions. The Court held unlawful the Commission's insistence, in its initial order referring NWC's hearing request to the Board, that requests for extensions of time be granted only upon a showing of "unavoidable and extreme circumstances." According to the panel, the Commission's "unavoidable and extreme circumstances" test was so different from the NRC's traditional "good cause" test that it amounted to an amendment of NRC regulations requiring notice-and-comment rulemaking. The court remanded the case to the Commission with a directive that the agency "determine whether [NWC] had 'good cause' for an extension of time to file contentions under the interpretation of 'good cause' that the Commission had employed prior to the Calvert Cliffs application."

The panel decision was not wholly unfavorable to the Commission. The panel rejected NWC's argument that the vague and open-ended contentions it belatedly filed satisfied agency pleading requirements. The panel also appeared to have no difficulty with the Commission's position that potential intervenors' contentions must rest on the license application and ought not await NRC staff reviews.

We are awaiting Judge Williams's as-yet unissued dissent. Upon reviewing his dissent, we will recommend whether to seek further review of the panel decision. We have 45 days to seek rehearing in the court of appeals and 90 days to seek Supreme Court review.

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Natural Resources Defense Council, Inc. v. NRC, Nos. 99-1269 & 99-1383 (D.C. Cir., No. 99-1289 dismissed on Nov. 8, 1999, & No. 99-1383 filed on Sept. 20, 1999)

Several citizens groups filed two lawsuits challenging the Commission's recent decision to implement changes in its Sunshine Act rules allowing some forms of non-decisional Commission meetings outside the usual Sunshine Act strictures. The Commission's rule changes rest on a 1984 Supreme Court

decision construing the Sunshine Act, FCC v. ITT World Communications, 466 U.S. 463 (1984). The Commission first promulgated the rule changes some years ago, but deferred effectuating them until recently.

Petitioners initially filed suit after the Commission's initial announcement of its intent to implement its Sunshine Act rule changes, but before the Commission had completed its consideration of comments from the public and before it had actually effectuated the new rules. On its own motion, the court of appeals dismissed the initial petition for review (No. 99-1269) "as premature." In the meantime, however, petitioners had filed a second petition for review (No. 99-1383). This petition appears timely. It is awaiting the establishment of a briefing schedule.

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Eastern Navajo Dine Against Uranium Mining v. NRC, Nos. 99-1190 & 99-1387 (D.C. Cir., No. 99-1190 dismissed on Sept. 27, 1999, & No. 99-1387 dismissed on Oct. 25, 1999)

These lawsuits challenged a series of interlocutory decisions by a presiding officer and by the Commission in the pending Hydro Resources adjudication. On our motion to dismiss, the court of appeals dismissed the first set of challenges, which attacked presiding officer decisions that were on appeal to the Commission at the time of the lawsuit (No. 99-1190). The court pointed out that the NRC "licensing proceeding is still ongoing," and that the "NRC has thus not yet issued a decision that disposes of all issues in the licensing proceeding." The court also issued an order to petitioners to "show cause ... why the court should not assess sanctions for filing a clearly premature petition for review, in the amount of the costs and fees incurred by respondent in filing the motion to dismiss."

Petitioners have responded to the show cause order, but the court has taken no action on it. Petitioners also voluntarily withdrew their remaining petition for review -- challenging an interlocutory Commission appellate decision -- and the court has issued an order dismissing that petition (No. 99-1387).

The licensing adjudication remains pending before the Commission.

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