

## ADJUDICATORY ISSUE INFORMATION

March 27, 2001

SECY-01-0052

FOR: The Commission

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

SUBJECT: LITIGATION REPORT - 2001- 01

National Whistleblower Center v. NRC, No. 00-422 (S. Ct., certiorari denied Jan. 8, 2001)

This lawsuit claimed that the Commission ought to have granted petitioner more time to frame issues for agency adjudication in the Calvert Cliffs license renewal proceeding. In January the United States Supreme Court declined to review a court of appeals decision upholding the Commission's refusal to grant petitioner a hearing. A litigation report that we forwarded last spring summarized the court of appeals decision. See Litigation Report 2000-02, SECY-00-0103. The Supreme Court order turning down the Center's certiorari petition is the final step in this long-running case.

CONTACT: Marjorie S. Nordlinger  
415-1616

Orange County v. NRC, No. 01-1073 (D.C. Cir., filed Feb. 16, 2001)

This lawsuit challenges the immediate effectiveness of a license amendment permitting Carolina Power and Light Company to put into service two previously unused spent fuel pools at CP&L's Shearon Harris facility. The NRC staff issued the immediately effective license amendment upon a determination that the amendment posed "no significant hazards consideration." The petitioner in the court of appeals is Orange County, North Carolina. Orange County also is an intervenor in the Shearon Harris license amendment proceeding. That proceeding currently is before the Commission on Orange County's petition for review of an adverse Licensing Board decision.

Orange County has informed us that it will ask the court of appeals to hold its lawsuit in abeyance to await the Commission's disposition of the County's pending petition for Commission review and pending motion for a stay.

CONTACT: Charles E. Mullins  
415-1618

State of Maine v. NRC, No. 00-1476 (D.C. Cir., dismissed Jan. 10, 2001)

Petitioner in this lawsuit, the State of Maine, challenged the NRC's rule certifying the so-called NAC-UMS dry cask storage system for spent nuclear fuel. Maine moved for a stay of the rule, and we filed an opposition to the stay motion. Prior to any judicial decision, however, we reached a settlement agreement with Maine whereby Maine withdrew its lawsuit, and the NRC gave the Department of Energy an opportunity to comment on the transportation aspects of the NAC-UMS system.

The court of appeals subsequently granted Maine's motion for voluntary dismissal of its suit.

CONTACT: Steven F. Crockett  
415-1622

Grand Canyon Trust v. NRC, Civ. No. 2:00CV 0288 ST (D. Ut., dismissed Dec. 14, 2000)

This lawsuit, filed under the Freedom of Information Act, sought judicial review of the NRC's denial of a fee waiver for plaintiff, the Grand Canyon Trust, which was seeking access to documents related to the Atlas-Moab mill tailings site. Working through the United States Attorney's office, we reached a settlement with plaintiff, and provided plaintiff documents and indexes of documents. We also agreed to pay a portion of plaintiff's legal costs. The district court subsequently granted plaintiff's motion to dismiss its case voluntarily.

Meanwhile, in a related case, Grand Canyon Trust v. NRC, No. 99-70922 (9<sup>th</sup> Cir.), where the Grand Canyon Trust seeks relief against the NRC under the Endangered Species Act, we and the Trust agreed to a joint motion holding the case in abeyance in light of last fall's legislation that, when fully implemented, will transfer authority over the Atlas-Moab site to the Department of Energy.

CONTACT: Catherine M. Holzle  
415-60

Kelley v. United States, No. 01-69C (U.S. Court of Federal Claims, filed Feb. 6, 2001)

This lawsuit, brought by an NRC retiree, seeks an adjustment in his retirement eligibility date, and a consequent increase in his retirement benefits. The United States Office of Personnel Management, not the NRC, decided on the appropriate retirement eligibility date, and hence OPM presumably will work with the Department of Justice in defending the case. But we will provide any back-up litigating support that DOJ requires.

CONTACT: John F. Cordes  
415-1600

National Whistleblower Center v. NRC, No. 00-422 (S. Ct., certiorari denied Jan. 8, 2001)

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20543

January 8, 2001

Ms. Marjorie Nordlinger  
Office of the General Counsel  
U.S. Nuclear Regulatory Comm.  
Washington, DC 20555

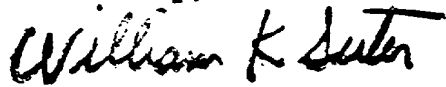
Re: National Whistleblower Center  
v. Nuclear Regulatory Commission, et al.  
No. 00-422

Dear Ms. Nordlinger:

The Court today entered the following order in the above  
entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

  
William K. Suter, Clerk

Orange County v. NRC, No. 01-1073 (D.C. Cir., filed Feb. 16, 2001)

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
ORANGE COUNTY, NORTH CAROLINA, )  
Petitioner, ) No. \_\_\_\_\_  
v. )  
UNITED STATES NUCLEAR REGULATORY )  
COMMISSION and the UNITED STATES )  
OF AMERICA, )  
Respondents )  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify that on February 16, 2001, copies of the foregoing Petition for Review were served on the following by first-class mail:


John Ashcroft, Esq.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue  
Washington, D.C. 20530

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

John F. Cordes, Esq.  
Charles E. Mullins, Esq.  
Office of General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

John H. O'Neill, Esq.  
Douglas Rosinski, Esq.  
ShawPittman  
2300 N Street N.W.  
Washington, D.C. 20036

Respectfully submitted,

  
Diane Curran  
Harmon, Curran, Spielberg & Eisenberg, L.L.P.  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036

February 16, 2001

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
FEB 16 2001  
RECEIVED

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY  
COMMISSION and the UNITED STATES  
OF AMERICA,

Respondents

No. **01-1073**

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
FILED FEB 16 2001  
CLERK

**PETITION FOR REVIEW**

The Board of Commissioners of Orange County, North Carolina (hereinafter "Orange County"), hereby petitions the Court for review of the following final order by the U.S. Nuclear Regulatory Commission in a license amendment proceeding concerning the Shearon Harris Nuclear Power Plant: United States Nuclear Regulatory Commission, Carolina Power & Light Company, Docket No. 50-400, Notice of Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration (December 21, 2000). A copy of the decision is attached as an Exhibit. The order was issued pursuant to 42 U.S.C. § 2239(a)(2)(A) and 10 C.F.R. § 50.92(c).

Orange County seeks review and reversal of the order on the grounds that it violated the Atomic Energy Act and its implementing regulations, the Administrative Procedures Act, and the National Environmental Policy Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Diane Curran". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping underline.

Diane Curran

Harmon, Curran, Spielberg & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

Attorney for Orange County

February 16, 2001



UNITED STATES NUCLEAR REGULATORY COMMISSION  
CAROLINA POWER & LIGHT COMPANY  
DOCKET NO. 50-400  
NOTICE OF ISSUANCE OF AMENDMENT TO  
FACILITY OPERATING LICENSE  
AND FINAL DETERMINATION OF NO SIGNIFICANT HAZARDS CONSIDERATION

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 103 to Facility Operating License No. NPF-63 issued to Carolina Power & Light Company (CP&L, the licensee), which revised the Technical Specifications (TS) for operation of the Shearon Harris Nuclear Power Plant, Unit 1 (HNP), located in Wake and Chatham Counties, North Carolina. The amendment is effective as of the date of issuance.

The amendment modified the TS to support a modification to HNP to increase the spent fuel storage capacity by adding rack modules to spent fuel pools (SFPs) C and D and placing the pools in service. Specifically, the amendment consists of: 1) a revision to TS 5.6 to identify pressurized water reactor fuel burnup restrictions, boiling water reactor fuel enrichment limits, pool capacities, heat load limitations, and nominal center-to-center distances between fuel assemblies in the racks to be installed in SFPs C and D; 2) an alternative plan in accordance with the requirements of 10 CFR 50.55a to demonstrate an acceptable level of quality and safety in completion of the component cooling water (CCW) and SFPs C and D cooling and cleanup system piping; and 3) an unreviewed safety question for additional heat load on the CCW system.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was published in the FEDERAL REGISTER on January 13, 1999 (64 FR 2237). A request for a hearing was filed on February 12, 1999, by the Board of Commissioners of Orange County, North Carolina (BCOC).

On July 12, 1999, the Atomic Safety and Licensing Board (ASLB) ruled that BCOC had standing and had submitted two admissible contentions. The two contentions related to (1) whether General Design Criterion 62 allows the use of administrative controls to prevent criticality (TC-2); and (2) the adequacy of the licensee's proposed alternative plan for the cooling system piping (TC-3). On July 29, 1999, the ASLB granted CP&L's request to hold the hearing in accordance with the hybrid hearing procedures of 10 CFR Part 2, Subpart K. On January 4, 2000, all parties filed written summaries and on January 21, 2000, the ASLB heard oral arguments related to the two admitted contentions. On May 5, 2000, the ASLB issued a decision in favor of CP&L, stating that "(1) there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing; and (2) contentions TC-2 and TC-3 are disposed of as being resolved in favor of CP&L."

On January 31, 2000, BCOC filed four late-filed environmental contentions that challenged the adequacy of the staff's December 21, 1999, environmental assessment related to CP&L's amendment request. On March 3, 2000, the NRC and CP&L responded to the late-filed contentions, and on March 13, 2000, BCOC submitted its reply to the responses. On August 7, 2000, the ASLB issued its Ruling on Late-filed Environmental Contentions. In its ruling, the ASLB admitted one environmental contention (EC-6) regarding the probability of occurrence of BCOC's postulated accident scenario. On November 20, 2000, all parties filed written summaries and on December 7, 2000, the ASLB heard oral arguments related to EC-6.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in

advance of the holding or completion of any required hearing, where it has determined that no significant hazards considerations are involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards considerations. The basis for this determination is contained in the Safety Evaluation related to this action. Accordingly, as described above, the amendment has been issued and made immediately effective and any hearing will be held after issuance.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of the amendment will not have a significant effect on the quality of the human environment (64 FR 71514).

For further details with respect to the action see (1) the application for amendment dated December 23, 1998, as supplemented on March 15, April 5, April 30, June 14, July 23, September 3, October 15, and October 29, 1999, and April 14, and July 19, 2000, (2) Amendment No. 103 to License No. NPF-63, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (<http://www.nrc.gov>).

Dated at Rockville, Maryland, this 21st day of December 2000.

FOR THE NUCLEAR REGULATORY COMMISSION



Richard P. Correia, Chief, Section 2  
Project Directorate II  
Division of Licensing Project Management  
Office of Nuclear Reactor Regulation

State of Maine v. NRC, No. 00-1476 (D.C. Cir., dismissed Jan. 10, 2001)

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EZS  
JFC  
SFC

No. 00-1476

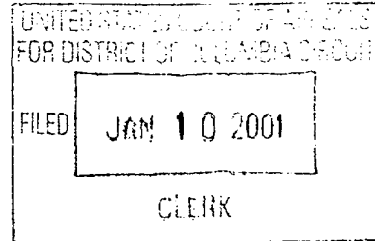
September Term, 2000

State of Maine,  
Petitioner

v.

Nuclear Regulatory Commission and United States of  
America,  
Respondents

Filed On:



Maine Yankee Atomic Power Company and NAC  
International,  
Intervenors

**ORDER**

Upon consideration of petitioner's motion to dismiss the petition for review, it is

**ORDERED** that the motion be granted and this case is hereby dismissed.

The Clerk is directed to transmit forthwith to the respondent a certified copy of this order in lieu of formal mandate.

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: *Robert A. Bonner*  
Robert A. Bonner  
Deputy Clerk

A True copy:

United States Court of Appeals  
for the District of Columbia Circuit  
By: *Michael W. Hall* Deputy Clerk

Grand Canyon Trust v. NRC, Civ. No. 2:00CV 0288 ST (D. Ut., dismissed Dec. 14, 2000)

DEC 18 2000

MARKUS B. ZIMMER, CLERK IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, CENTRAL DIVISION  
DEPUTY CLERK

RECEIVED CLERK  
DEC 14 2000  
U.S. DISTRICT COURT

GRAND CANYON TRUST,

Plaintiff,

Civil No. 2:00CV 02888T

vs.

ORDER OF DISMISSAL


U.S. NUCLEAR REGULATORY COMMISSION,

Defendants.

Based upon the Stipulation of the parties and good cause appearing therefore IT IS  
HEREBY ORDERED that plaintiff's claims against the United States Nuclear Regulatory  
Commission are dismissed with prejudice and on the merits.

DATED this 18<sup>th</sup> day of December, 2000.

BY THE COURT:

  
HON. DALE A. KIMBALL  
United States District Judge

24

United States District Court  
for the  
District of Utah  
December 19, 2000

kam

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:00-cv-00288

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

W. Cullen Battle, Esq.  
FABIAN & CLENDENIN  
215 S STATE STE 1200  
PO BOX 510210  
SALT LAKE CITY, UT 84151  
JFAX 9,5962814

Marie A. Kirk, Esq.  
EARTHJUSTICE LEGAL DEFENSE FUND  
1631 GLENARM PL STE 300  
DENVER, CO 80202  
JFAX 8,303,6238083

Ms. Carlie Christensen, Esq.  
US ATTORNEY'S OFFICE  
JFAX 9,5245985

---



Kelley v. United States, No. 01-69C (U.S. Court of Federal Claims, filed Feb. 6, 2001)

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Action, File Number 01-69 C

JAMES L. KELLEY )

v. )

STEVEN COHEN )

ACTING DIRECTOR )

UNITED STATES )

OFFICE OF PERSONNEL )

MANAGEMENT )

FILED FEB 6 2001

COMPLAINT FOR  
DECLARATORY JUDGMENT

Plaintiff alleges that:

1. The Court has jurisdiction of this claim pursuant to 28 U.S.C 1491 (a)(1), (2). Plaintiff's claim arises under 5 U.S.C. 8336(d)(2), 42 U.S.C 415(a)(7)(A) and related provisions of the Social Security Act, as amended.

2. Plaintiff is a former federal employee who opted to take a voluntary "early out" retirement from the United States Nuclear Regulatory Commission on April 17, 1987, following over twenty-one years of federal service with the NRC, the Department of Energy, and the Department of Justice. Plaintiff became fifty years of age on May 30, 1985. He receives monthly pension payments for his federal service. Office of Personnel Management ("OPM") Claim No. A2969122.

3. Shortly before his sixty-fifth birthday, Plaintiff applied to the Social Security Administration (“the Administration”) for Social Security benefits earned during non-federal employment. He was advised that, pursuant to 42 U.S.C 415(a)(7)(A), the date of his *eligibility* to retire from the federal government—not the actual date of his retirement—would determine whether he was entitled to full benefits or whether his benefits would be reduced. That statute provides that Social Security benefits for a person receiving a pension for employment not covered by the Social Security Act, including federal employment, are to be reduced substantially if he or she becomes eligible to retire after December 31, 1985.

4. Information obtained from the Administration’s computerized data base at the time Plaintiff applied for Social Security benefits indicated that Plaintiff’s eligibility date to retire from federal employment fell in January 1986 and that, accordingly, his monthly benefit payments would be reduced, pursuant to 42 U.S.C.415(a)(7)(A). Reduced benefits to Plaintiff were subsequently commenced, effective February 1, 2000, and continue to the present date.

5. On information and belief, the full monthly Social Security benefits to which Plaintiff is entitled would be approximately double the reduced benefits he is currently receiving.

6. The Administration informed Plaintiff that information from its data base was sometimes incomplete and that, because that information had produced an eligibility date for him which fell only a few days after December 31, 1985, the cut-off date for receiving full benefits, he was

advised to apply to OPM for a written determination of his eligibility date.

7. Plaintiff requested OPM to determine his eligibility to retire from federal employment. By letter dated July 21, 2000, OPM advised Plaintiff, without explanation, that his eligibility date was January 22, 1986, twenty-two days after the cut-off date for full Social Security benefits under 42 U.S.C. 415(a)(7)(A). OPM reaffirmed that eligibility date by letter dated August 1, 2000.

8. By letter dated August 17, 2000, OPM “corrected” its prior correspondence and changed its position, contending that the date Plaintiff actually retired, April 17, 1987, was also his eligibility date for retirement because he “retired under a RIF situation.” Copies of the cited OPM letters are attached hereto as Attachment A. Plaintiff had taken a voluntary retirement pursuant to authority granted to the NRC pursuant to 5 U.S.C. 8336(d)(2). See Attachment B, letter of Curtis J. Smith, OPM, to James McDermott, Director of Organization and Personnel, NRC.

9. OPM has failed to determine the correct date of Plaintiff’s eligibility to retire under 42 U.S.C. 415(a)(7)(A) and, as a direct result, Plaintiff’s Social Security benefits are being wrongfully reduced. OPM’s position is wrong on the facts. Based on Plaintiff’s actual time of service as a federal employee and on his active duty in the United States Army Reserve, Plaintiff had twenty years of service creditable toward retirement on December 26, 1985, five days before the deadline for full benefits. His periods of service are summarized in Attachment C. Attachments A–C are incorporated herein by reference.

10. Beginning as a GS-11 attorney in the Civil Rights Division of the Department of Justice in 1964, subsequently serving as GS-18 Deputy General Counsel of the NRC, as a Senior Executive Service–Level 3 supervisor with the Department of Energy, and completing over 21 years of service in 1987 as an Administrative Judge of the NRC, Plaintiff is entitled to have his time of service fully credited.

11. OPM’s alternative basis for its position on Plaintiff’s eligibility date is wrong as a matter of law. The statute speaks of a person “who first become *eligible* [for a federal pension] after 1985.” Given its ordinary meaning, eligibility turns on facts and characteristics personal to the employee—such as his or her age, length of service, income, education, etc. It does not refer, as OPM appears to interpret its “early retirement” regulation (5 CFR 842.213), to actions by an employing agency or by OPM over which the employee has no control. Under that regulation, the only relevant conditions of eligibility are that the applicant for early retirement be fifty years of age and have twenty years of creditable service. Beyond that, in order to receive full Social Security benefits, the applicant must meet those two conditions before January 1, 1986, as Plaintiff does.

12. Unless Plaintiff’s eligibility date is corrected by OPM, given his present life expectancy some \$50,000 and possibly more will be unlawfully withheld from him.

13. The Administration has advised Plaintiff that if his eligibility date is determined by OPM to precede January 1, 1986, full benefits will be paid to him retroactive to February 2000.

Therefore, Plaintiff does not seek money damages.

**Wherefore,** Plaintiff demands a declaratory judgment against the Defendant Cohen stating that Plaintiff's eligibility for retirement under 42 U.S.C. 415(a)(1)(A) was December 26, 1985.

JS/ SUK

James L. Kelley, pro se  
217 Spring Avenue  
Takoma Park, MD 20912  
(301) 270-6574