

REPORT OF THE NUCLEAR REGULATION COMMITTEE

This report summarizes regulatory developments, court decisions, and legislative actions that have occurred in the area of nuclear energy regulation from June 2009 to June 2010.*

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* The Nuclear Regulation Committee gratefully acknowledges the contributions to this report by Robert K. Temple, Jacqueline Belding, Robert Carlton, and special thanks to Tim Matthews.

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I. LITIGATION

Litigation is covered in two parts of this report. What follows immediately is a summary of significant litigation impacting the nuclear industry over the past year. Separately, following the update on combined construction and operating license (COL) activity, we also present an overview of the significant hearing decisions coming out of the new (Part 52) reactor licensing process.

A. *Alabama v. North Carolina*

This Supreme Court case involved a dispute between North Carolina and several other southern states (the Petitioners).¹ Eight states (the States) entered into an agreement in 1986 to create the Southeast Interstate Low-Level Radioactive Waste Management Compact (The Compact).² The Compact established a cooperative framework to develop new facilities for the disposal of radioactive waste.³ It also created a commission, the Southeast Compact Commission (SECC) with two members from each State to administer the

1. *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010). The states included in the Compact are Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

2. *Id.* at 2303. The provisions of the agreement are found in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, 99 Stat. 1859, 1871-80 (1986).

3. *Id.*

process.⁴ Eventually, the States agreed to build a new facility in North Carolina.⁵

Under the Compact, North Carolina's designation as the host state required that it "take appropriate steps to ensure that an application for a license to construct and operate a low-level radioactive waste storage facility [was] filed with and issued by the appropriate authority."⁶ Although under the Compact, the Petitioners were not required to aid North Carolina in the construction costs of the facility, the SECC adopted a resolution declaring it was "appropriate and necessary" for the other states to "provide financial assistance" to North Carolina.⁷ Between 1988 and 2000, North Carolina invested approximately \$34 million and the Petitioners invested almost \$80 million in the project; however, it became clear that the project could not be completed within the original budget estimates.⁸ Citing the cost overruns, in 1997 the Petitioners notified North Carolina that they would not provide additional funding.⁹ As a result, North Carolina commenced an orderly shutdown of the project without ever being granted a license.¹⁰

Subsequently, the Petitioners¹¹ filed an action with the SECC, alleging that North Carolina had failed to fulfill its obligations under the Compact, and requesting that the SECC force North Carolina to return the almost \$80 million paid by the other member states.¹² The SECC concluded that North Carolina needed to repay the \$80 million plus interest, a \$10 million penalty, and attorneys' fees.¹³ When North Carolina failed to comply, the Petitioners filed a bill of complaint with the Supreme Court of the United States, seeking to enforce the sanctions, invoking the Court's original jurisdiction.¹⁴ The bill of complaint contained five counts: violation of the States' rights under the Compact, breach of contract, unjust enrichment, promissory estoppel, and money had and received.¹⁵ The Court assigned a Special Master to hear the case, who partially granted each of the parties' motions for summary judgment.¹⁶ The parties then appealed the Special Master's findings.¹⁷

The Court agreed with the Special Master, first holding that the SECC lacked the authority to impose monetary sanctions because such authority was not expressly found in the contract.¹⁸ Next, the Court held that it did not need to

4. *Id.*

5. *Id.*

6. *Id.* (Internal brackets omitted) (quoting Art. 5(C), 99 Stat. at 1877).

7. *Id.* at 2304.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 2305.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2306. The sanctions clause in the contract provided that "[a]ny party [S]tate which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party [S]tate to this compact may be subject to sanctions by the [SECC], including suspension of its rights under the compact

give deference to the SECC's finding that North Carolina breached the agreement, concluding that it would be "bound by the [SECC]'s conclusion of breach only if there is 'an explicit provision or other clear indication[s]' in the Compact making the [SECC] the 'sole arbiter of disputes.'"¹⁹ Finding no such provision, the Court concluded that it did not need to follow the SECC's guidance on the issue.²⁰

Next, the Court analyzed the Petitioners' breach of contract claims.²¹ The Petitioners argued that North Carolina breached the contract by not "tak[ing] appropriate steps to ensure that an application for a license to construct and operate a low-level radioactive waste storage facility [was] filed with and issued by the appropriate authority."²² The Court, looking at the plain meaning of the word "appropriate," concluded that the parties' course of performance throughout the life of the Compact indicated that North Carolina's sole burden of bearing the cost of the facility was not "appropriate," and thus once the Petitioners stopped giving North Carolina monetary support, it no longer needed to seek the license.²³

Finally, the Petitioners argued that North Carolina violated its implied duty of good faith and fair dealing by withdrawing from the Compact after accepting \$80 million of the Petitioner's money.²⁴ The Court disagreed, holding that interstate compacts do not include an implied duty of good faith for sovereign states, making special note that the Compact did not expressly include such a provision.²⁵

The Court did not authoritatively end the litigation, and thus, the Petitioners' equitable claims were remanded to the Special Master for further adjudication.

B. Update on Yucca Mountain License Proceeding and Related Litigation

In the Nuclear Waste Policy Act of 1982 (NWPA), Congress tasked the Department of Energy (DOE) with building and operating a permanent underground nuclear disposal facility.²⁶ Twenty years later, in 2002, Congress

and revocation of its status as a party [S]tate." *Id.* (internal brackets omitted). The Court viewed the lack of a specific monetary sanctions provision, coupled with the fact that other similar compacts expressly allowed for monetary sanctions as sufficient evidence to prove that the Compact did not contemplate monetary sanctions. *Id.*

19. *Id.* at 2307 (quoting *Texas v. New Mexico*, 462 U.S. 554, 569–570 (1983) (internal brackets omitted)).

20. *Id.* at 2308 (giving the Court's explanation why a provision making the SECC "judge of the qualifications" of the "party State's [and of its members] compliance with the 'conditions' and . . . 'laws of the party [S]tates relating to the enactment of [the] compact'" was not such an express provision) (internal brackets omitted).

21. *Id.*

22. *Id.* at 2309 (quoting Art. 5(C), 99 Stat. at 1877).

23. *Id.* at 2310. Justice Breyer disagreed, concluding that in doing nothing between 1997 and 1999, North Carolina did not take appropriate steps, and thus, violated the contract. *Id.* at 2320 (Breyer, J., dissenting) (separately paginated in the slip opinion as pages two to three of Justice Breyer's separate opinion).

24. *Id.* at 2312.

25. *Id.*

26. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10270 (2006).

formally designated Yucca Mountain as the site of the facility.²⁷ While substantial money has been poured into the project, the facility has yet to accept any waste. In the waning days of the Bush administration DOE filed an application with the U.S. Nuclear Regulatory Commission (NRC or Commission) to construct a deep geologic repository for disposal of high-level radioactive waste at Yucca Mountain, Nevada.²⁸ This year January 24, 2010, the Obama Administration decided to terminate the project.²⁹ On March 3, 2010, the DOE filed a motion with the NRC to withdraw the Yucca Mountain license application.³⁰ Several states and local governments, however, have opposed the withdrawal of the application, arguing that it violates the NWPA, and that only Congress can terminate the project.³¹ This dispute has caused a proliferation of litigation.

There are currently three pending categories of litigation: (1) litigation before the NRC's Atomic Safety and Licensing Board (ASLB); (2) before the Federal Court of Appeals for the D.C. Circuit; and (3) before various other federal courts. In the NRC prong of the litigation, several states and local authorities intervened in the DOE's action before the ASLB to withdraw its request to build a repository at Yucca Mountain, and the DOE's related request to suspend license application procedures for the facility.³² The intervenors claim that withdrawal of the application breaches the NWPA.³³ On April 6, 2010, a three judge ASLB ruled to suspend the litigation before the NRC pending adjudication by the D.C. Circuit Court of Appeals on similar issues.³⁴ The DOE petitioned the Commission for interlocutory review of that order, and the Commission overturned the ASLB's order on April 23, 2010.³⁵ The Commissioners held that the action fell within the NRC's mission, and thus, the Court of Appeals would benefit from the development of an administrative

27. H.R.J. Res. 87, 107th Cong. (2002).

28. U.S. Nuclear Regulatory Comm'n, DOE's License Application for a High-Level Waste Geologic Repository at Yucca Mountain (June 3, 2008), <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html>.

29. Lisa Mascaro, *Obama Administration: 'We're Done With Yucca'*, LAS VEGAS SUN, Jan. 29, 2010, <http://www.lasvegassun.com/news/2010/jan/29/obama-administration-were-done-yucca-mountain/>.

30. U.S. Department of Energy's Motion to Withdraw, U.S. Dep't of Energy (High-Level Waste Repository), No. 63-001 (N.R.C. Mar. 3, 2010), available at http://www.energy.gov/media/DOE_Motion_to_Withdraw.pdf.

31. *Washington, Others Move To Block Termination Of Yucca Mountain Project*, 23-8 MEALEY'S POLL. LIAB. REP. 3 (May, 2010) [hereinafter *MEALEY'S*]. As an alternative to Yucca Mountain, the Obama administration has assembled a panel of blue-ribbon experts to assess the viability of other potential sites for a permanent nuclear waste storage facility. Editorial, *Nuclear Wasteland*, WASH. POST, June 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/13/AR2010061304143.html>. As of June 24, 2010, the panel has met twice, with a third meeting scheduled for July, but the panel will not propose a new site for the facility for another two years. *Id.*

32. U.S. Dep't of Energy (High-Level Waste Repository), No. 63-001 (N.R.C. Apr. 23, 2010) (memorandum and order), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2010/2010-13cli.pdf> (noting that South Carolina, Washington, Aiken County, South Carolina, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community have all petitioned to intervene).

33. *Id.* at 1. See, e.g., U.S. Dep't of Energy (High-Level Waste Repository), No. 63-001-HLW (N.R.C. Feb. 26, 2010) (memorandum and order), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2010/2010-13cli.pdf>.

34. U.S. Dep't of Energy (High-Level Waste Repository), *supra* note 32.

35. *Id.* at 2-3.

record.³⁶ On June 3, 2010, the ASLB again convened to hear arguments by both sides on the legality of the DOE's decision to suspend the facility.³⁷ On June 29, 2010, the ASLB ruled that the DOE could not withdraw its construction authorization application absent Congressional approval, as the NWPA compels the DOE to submit an application for a facility for disposal of high-level waste, and that provision does not authorize the DOE to unilaterally withdraw the application once it has been submitted.³⁸ Moreover, the ASLB ruled that the DOE may not withdraw the application with prejudice, stating "[w]hile the current Secretary may have no intention of refile, his judgment should not tie the hands of future Administrations for all time."³⁹ The DOE has announced its intention to seek review of the ASLB decision by the Commission⁴⁰ and, no matter how the Commission decides, it is likely the Commission's decision will be appealed to the U.S. Court of Appeals for the District of Columbia.

In the actions filed with the U.S. Court of Appeals for the D.C. Circuit, a number of states, local governments, and other entities filed suit seeking to block the cancellation of the project.⁴¹ The different petitions argued that termination of the project after Congress had already determined that the site was viable violated the NWPA.⁴² On April 8, 2010, the court consolidated the various suits into one case, with *In re Aiken County* being the lead case.⁴³ Finally, the court scheduled the case for expedited consideration, scheduling it for a further hearing in September of 2010, and specifically asking the parties to address in their arguments "whether final agency action is necessary to confer jurisdiction over a petition for review filed pursuant to the Nuclear Waste Policy Act . . . and, if so, whether final agency action has been taken."⁴⁴ In its May 3, 2010 Order, the court also denied Washington State's motion for a preliminary injunction, barring the DOE from shutting down the facility.⁴⁵

There are two related cases currently pending in the U.S. Court of Appeals for the District of Columbia. In each action, the plaintiffs have sued the Department of Energy (DOE), asking the court to force DOE to suspend collection of the one-tenth of a cent per kilowatt-hour surcharge that consumers pay on their monthly electric bills for the construction of the Yucca Mountain facility. One suit was filed on April 2, 2010, by The National Association of

36. *Id.* at 3-4.

37. Keith Rogers, *Panel Hears Arguments on Yucca Abandonment: Energy Department Defends Decision to End License Pursuit*, LAS VEGAS REV. J. (2010), <http://www.lvrj.com/news/panel-hears-arguments-on-yucca-abandonment-95599029.html>.

38. U.S. Dep't of Energy (High-Level Waste Repository), No. 63-001 (N.R.C. June 29, 2010) (memorandum and order), available at <http://graphics8.nytimes.com/packages/pdf/national/20100629-yucca-memo.pdf>.

39. *Id.* at 21.

40. Elaine Hiruo, *DOE to Appeal ASLB's Yucca Mt. Decision*, NUCLEONICS WEEK, July 1, 2010, at 1-3, available at <http://lexisnexis.com/lawschool/research/default.aspx?ORIGANATIONCODE=00092&signoff=off>.

41. *MEALEY'S*, *supra* note 31.

42. *Id.*

43. *Aiken County*, No. 10-1050, Slip op. (D.C. Cir. Apr. 8, 2010) (Order). The parties to the case now include Aiken County, Robert L. Ferguson, the State of South Carolina, and the State of Washington. *Id.*

44. *Id.* at 2.

45. *Id.* at 1-2.

Regulatory Utility Commissioners, and one was filed on April 5, 2010, by the Nuclear Energy Institute, along with several electric utilities.⁴⁶

In addition to the three categories of litigation designed to force DOE to change its policies leading to abandonment of the Yucca Mountain project, there is a fourth type of litigation to enforce damages against the federal government for breaching its contract with utilities that has been ongoing for a number of years.⁴⁷ As part of the NWPA, the government entered into contracts with nuclear utilities across the country to accept and permanently store spent nuclear fuel.⁴⁸ Under the standard form contract, the government was to begin accepting this waste no later than January 31, 1998.⁴⁹ The Federal Circuit has already determined the government is liable, and thus, the only question is the issue of damages for each individual utility, which must be calculated individually.⁵⁰ The overall damages for utilities across the country, however, are likely to be high. For example, the U.S. Court of Federal Claims found that the Federal Government owed Southern California Edison Company over \$142 million for breaching the contract, nearly all of the \$146 million it sought in the damages action.⁵¹

C. *New York v. Nuclear Regulatory Commission*

In *New York v. Nuclear Regulatory Commission*, the States of New York, Connecticut, and the Commonwealth of Massachusetts (the Petitioners) petitioned the Second Circuit for review of a decision by the NRC, which denied rulemaking petitions filed earlier by Massachusetts and California.⁵² These rulemaking petitions asked the NRC to reverse its 1996 Generic Environmental Impact Statement, where it found that spent fuel pools at nuclear power plants do not create a significant environmental danger.⁵³ As a result of this finding, the analysis of spent fuel pools in licensing renewal proceedings is generic as to all nuclear power facilities, and an individual review does not take place.⁵⁴ Massachusetts and California, however, contended that the fire risk from the spent fuel is higher than first thought, and thus, the Commission should require individual plant specific evaluations before a renewed license to a facility is

46. Steve Tetreault, *Yucca Mountain: DOE Sued Over Nuclear Waste Fund*, LAS VEGAS REV. J., Apr. 3, 2010, available at <http://www.lvrj.com/news/doe-sued-over-nuclear-waste-fund-89826842.html>; Press Release, Nuclear Energy Inst., NEI, Electric Utilities File Suit to Suspend Collection of Fee for Reactor Fuel Management (Apr. 5, 2010), <http://www.nei.org/newsandevents/newsreleases/nei-electric-utilities-file-suit-to-suspend-collection-of-fee-for-reactor-fuel-management/>.

47. See also *S. Cal. Edison Co. v. United States*, 93 Fed. Cl. 337 (2010).

48. *Id.* at 340.

49. *Id.* at 341.

50. *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1273 (Fed. Cir. 2009).

51. *S. Cal. Edison Co.*, 93 Fed. Cl. at 340; see also *Bos. Edison Co. v. United States*, 93 Fed. Cl. 337, 107 (2010) (awarding Boston Edison Co. over \$40 million in damages in a similar suit); *Consol. Edison Co. of N.Y. v. United States*, Nos. 03-2622C & 04-33C, slip op. at 67 (N.D.N.Y. May 5, 2010) (awarding over \$106 million in damages).

52. *New York v. NRC*, 589 F.3d 551, 552-53 (2d Cir. 2009) (per curiam).

53. *Id.*

54. *Id.*

granted.⁵⁵ The Commission denied this petition, and the Petitioners appealed to the Second Circuit.⁵⁶

The Second Circuit refused to grant the Petitioners' relief, instead deferring to the expertise of the NRC.⁵⁷ The court accorded a high level of deference to the Commission's decision, noting that prior courts likened the administrative deference standard as "akin to non-reviewability."⁵⁸ Additionally, the court noted that the standard is even higher when dealing with technical and scientific disputes.⁵⁹ Thus, even though California and Massachusetts presented some evidence of fire risk from the spent fuel, the court refused to disturb the Commission's decision, concluding that the Commission's denial of the petition was reasoned as it considered relevant studies and took account of the relevant factors.⁶⁰

D. Whittaker Corp. v. American Nuclear Insurers

In a Summary Judgment Order issued on December 1, 2009, the Federal District Court for the District of Massachusetts decided the extent to which American Nuclear Insurers (ANI) was obligated to address environmental contamination and clean up costs at nuclear waste sites.⁶¹ In its updated Order, the Court held that ANI had a duty to defend Whittaker Corporation and Textron, Inc. – the operators of a nuclear site in Massachusetts (collectively as the Operators).⁶² The case arose when the Environmental Protection Agency (EPA) fined the operators over \$5 million for unlawful disposal, which led to nuclear contamination.⁶³ The Operators then tendered the EPA's demands to ANI, who refused to defend them in the action.⁶⁴

In determining that ANI was obligated to address the damages, the court used the principles of contract construction.⁶⁵ The insurance contract included a Facility Form, which promised to pay "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage caused by the nuclear energy hazard."⁶⁶ The Operators argued that this language included environmental cleanup costs, but ANI argued that Facility Form needed to be interpreted in the context in which it was drafted – under the Price Anderson Nuclear Industries Indemnity Act of 1957.⁶⁷ ANI tried to argue that the Price Anderson Act limited its liability, but the court disagreed, holding that the Act did regulate the nuclear insurance industry, but "does not prohibit insurers from

55. *Id.*

56. *Id.*

57. *Id.* at 554-55.

58. *Id.* at 554 (quoting *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992)).

59. *Id.* at 555.

60. *Id.*

61. *Whittaker Corp. v. Am. Nuclear Insurers*, 671 F. Supp. 2d 242 (D. Mass. 2009) (vacating and clarifying its previous Sept. 15, 2009 order).

62. *Id.* at 244.

63. *Id.* at 246.

64. *Id.*

65. *Id.* at 247.

66. *Whittaker Corp.*, 671 F. Supp. 2d at 247.

67. *Id.* at 249; Price Anderson Nuclear Industries Indemnity Act of 1957, 42 U.S.C. § 2210 (2006).

undertaking to provide coverage to nuclear plant operators for ‘conventional’ environmental harm should they choose to do so (wisely or not).⁶⁸ The court further noted that “[t]he Act leaves it to insurers to negotiate with insureds the terms of a nuclear policy like the Facility Form[;] [i]t does not dictate the contents of the policy itself.”⁶⁹ The court then used the principles governing contract interpretation, and persuasive legal precedent from the Kentucky Supreme Court, to conclude that there is nothing in the contract precluding ANI from insuring environmental harm.⁷⁰

As a result of an earlier similar lawsuit, ANI issued Endorsement 112, which specifically disclaimed liability as a result of environmental cleanup costs.⁷¹ The court viewed Endorsement 112 as an elimination in insurance coverage, and thus, ANI needed to adhere to the statutory requirements for undertaking an elimination or reduction of coverage.⁷² Massachusetts law requires that in the event of a reduction of coverage, the provider needs to provide the insured written notice specifying such reduction, which ANI failed to do.⁷³

Finally, once the court concluded that the policy did cover environmental contamination, the court addressed ANI’s duty to defend, holding that “[u]nder Massachusetts law, ANI must provide a defense for [the Operators] if there is even a remote chance that the Facility Form adumbrates the EPA’s demand.”⁷⁴ The court then held that regardless of the factual issues pertaining to the Operators’ liability to the EPA, “the insured must only be reasonably susceptible of an interpretation that they state a claim covered by the policy” to trigger an insurer’s duty to defend.⁷⁵ ANI, however, would not be liable if:

[t]he SJC [Supreme Judicial Court] – contrary to indications – decides that the threat of harm to adjacent property is insufficient in and of itself to trigger liability and if the EPA (or other expert authority) concludes that groundwater migration of nuclear and other contaminants has not in fact occurred (or at least is not imminent).⁷⁶

The Operators failed to prove that there was no dispute that environmental contamination took place from the Operators’ activities, and thus, the court denied summary judgment.⁷⁷ As of June 24, 2010, no material event has taken place in the case since the summary judgment order, but the Court did deny a motion to reconsider or alternatively certify the question for the Massachusetts Supreme Court on February 4, 2010.

68. *Whittaker Corp.*, 671 F. Supp. 2d at 249.

69. *Id.* at 249 (citing *Aetna Cas. & Sur. Co. v. Kentucky*, 179 S.W.3d 830, 839 (Ky. 2006)).

70. *Id.* at 249-250.

71. *Id.* at 250.

72. *Id.* at 250-251.

73. *Id.* at 253. This conclusion differed from the courts earlier Sept. 15th opinion.

74. *Id.*

75. *Id.* at 255.

76. *Id.* (italics omitted).

77. *Id.* at 255-256.

E. CPS Energy v. NRG Energy and Nuclear Innovation North America

In 2007, CPS Energy and Nuclear Innovation North America (NINA) entered into what will be referred to as the 2007 Agreement, where the parties agreed to jointly develop two 1,350 megawatt reactors as South Texas Project Units 3 & 4 (the project),⁷⁸ with each company owning a 50% interest in the project.⁷⁹ CPS Energy is a municipal utility owned by the City of San Antonio, and NINA is a partnership between NRG Energy, which owns 88% of NINA, and Toshiba, which owns the remaining 12%.⁸⁰

In late 2009, CPS Energy sought to withdraw from its development agreement and the project, claiming that CPS Energy had been misled regarding how much the project was going to cost.⁸¹ The 2007 Agreement provided remedies if a party defaults, and allowed the parties to unilaterally withdraw from the project; however, the agreement was silent as to subsequent ownership interests or other consequences of a withdrawal.⁸² As a result, CPS Energy sued NINA for declaratory judgment, seeking to know its ownership interest if it unilaterally withdrew.⁸³ CPS Energy further added claims for, among others, fraud, negligent misrepresentation, and fraudulent inducement, seeking \$2 billion in actual damages and \$30 billion in exemplary damages.⁸⁴

On January 29, 2010, a Texas State Court ruled that under the 2007 Agreement CPS Energy could withdraw from the project, but could not expect to maintain its 50% ownership interest in perpetuity if it withdrew.⁸⁵ The court further urged the parties to settle the dispute to avoid further litigation.⁸⁶ On February 17, 2010, heeding the court's advice, the parties agreed on a settlement. Under the settlement agreement, CPS Energy would reduce its share in the project from 50% to 7.625% (which becomes essentially a carried interest while the project is undergoing development), and NINA would raise its share of the project conversely to 92.325%.⁸⁷ The settlement also provides that NINA would

78. Currently, there are two units at the South Texas Project facility. Austin Energy (the City of Austin) owns 16% of those units, CPS Energy owns 40%, and NRG Energy, the majority owner of NINA, owns 44%. STPNOC, <http://www.stpnoc.com/About.htm> (last visited Oct. 6, 2010). The 2007 Agreement is titled "South Texas Project Supplemental Agreement," between the City of San Antonio, acting through the City Public Service Board of San Antonio, and NRG South Texas LP, dated Sept. 24, 2007.

79. *City of San Antonio v. Toshiba Corp.*, No. 2009-CI-19492, 2009 WL 5245149 at ¶ 21 (Tex. Dist. Ct. Dec. 23, 2009).

80. *CPS OKs New South Texas Reactor Agreement with NRG*, REUTERS (Mar. 1, 2010) <http://www.reuters.com/assets/print?aid=USN0110149520100301>.

81. *City of San Antonio*, 2009 WL 5245149, at ¶ 10.

82. *Id.* ¶ 25.

83. *Id.* ¶¶ 48–51.

84. *Id.* ¶¶ 52–82.

85. *NRG Energy, Inc.*, No. 04-10-00059-CV, 2010 WL 311040 (Tex. App.—San Antonio, Jan. 27, 2010) (pet. denied) (mem.); Scott DiSavino & Eileen O'Grady, *RPT-UPDATE 2-Texas Judge Warns CPS in Texas Nuclear Dispute*, REUTERS, Jan. 29, 2010, <http://www.reuters.com/article/idUSN2917747620100129>.

86. DiSavino & O'Grady, *supra* note 85.

87. Press Release, CPS Energy, NINA Reach Agreement (Feb. 17, 2010), http://www.cpsenergy.com/About_CPS_Energy/News_Features/News/02172010_CPS_NINA_Agreement_NR.asp [hereinafter *CPS Energy*]; Nuclear Innovation North America (NINA) Moving Forward with South Texas Project (STP) Expansion, BUSINESS WIRE (Feb. 17, 2010, 5:54 PM), <http://www.businesswire.com/news/home/20100217007066/en/Nuclear-Innovation-North-America-NINA-Moving-South>.

pay all project development costs after January 31, 2010, NINA would pay \$10 million to a San Antonio area non-profit, and if the DOE approved the site for loan guarantees, NINA would pay CPS Energy an additional \$80 million in two \$40 million payments.⁸⁸ CPS Energy will have to pay its pro rata share of operating and other expenses once the new units start commercial operation.⁸⁹

F. In Re Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2)

Although the Tennessee Valley Authority (TVA) has not issued its final decision whether to complete its Bellefonte Units 1 and 2 or build new Bellefonte Units 3 and 4, TVA sought NRC consent to reinstate the 10 CFR Part 50 licenses for the Bellefonte Units 1 and 2.⁹⁰ This request was controversial, because, in 2006, at TVA's request, the NRC permitted TVA to withdraw the construction permits.⁹¹ The construction permits had been pending since 1974.⁹² Subsequently, "in 2008, TVA changed its mind" and, when requesting that Commission reinstate the permits from deferred status, said that increased opportunities in power generation constituted good cause for reinstating the construction permits.⁹³

The NRC authorized issuance of an order reinstating the permits from terminated status. The NRC also offered a "hearing opportunity on the question of whether TVA had established 'good cause' for reinstatement" of its construction permits.⁹⁴ Various petitioners sought to prevent TVA from reviving the Bellefonte construction permits and opportunity to seek operating licenses for Units 1 and 2 both in federal court and in hearings before an Atomic Safety and Licensing Board (ASLB).⁹⁵ The Commission directed that all contentions be held in abeyance while it heard arguments and ruled on the issue of whether it had the authority to reinstate the construction permits.⁹⁶ While petitioners argued that the expired permits are forfeited and section 185 of the Atomic Energy Act (AEA)⁹⁷ prohibits reinstating the permits, the Commission found that the AEA neither provides for, nor prohibits it, from reinstating a construction permit.⁹⁸ Petitioners also argued that the NRC was required to convene a hearing prior to reinstating the construction permits.⁹⁹ As the NRC made reinstatement of the construction permits subject to holding hearings and the remaining contentions were remanded to an ASLB for hearings, the

88. *CPS Energy*, *supra* note 87.

89. *Id.*

90. Tenn. Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), Nos. 50-438-CP & 50-439-CP, 1 (Jan. 7, 2010) (memorandum and order), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2010/2010-06cli.pdf>.

91. *Id.* at 5.

92. *Id.* at 4 (noting that the construction permits were first extended at TVA's request to 1994 and 1997, for Units 1 and 2 respectively, then were deferred on two separate occasions ultimately extending the expiration dates to 2011 and 2014, for Units 1 and 2 respectively).

93. *Id.* at 5.

94. *Id.* at 6.

95. *Id.* at 7.

96. *Id.*

97. *Id.* at 8 (citing to Atomic Energy Act, 42 U.S.C. §§ 2011-2297h-13, 2235 (2006)).

98. *Id.* at 9.

99. *Id.* at 8 (citing to 42 U.S.C. § 2239).

Commission concluded it had not violated the AEA with respect to its hearing requirements.¹⁰⁰ With respect to reinstatement of the construction permits, the majority of the Commission first reasoned that the voluntary surrender of the permits did not constitute a forfeiture.¹⁰¹ Next, the Commission reasoned that in the absence of express prohibition it was in the position to exercise its broad statutory discretion in reinstating the permits.¹⁰²

The Commission's decision was a split decision with Chairman Jaczko dissenting. Chairman Jaczko maintained that Congress intended that construction permits that are not maintained are forfeited, and that allowing reinstatement is an end-around a licensee's and the Commission's regulatory obligations.¹⁰³ Nevertheless, the result of the opinion was a finding that the Commission has the authority and discretion to reinstate permits, and the matter was remanded to an ASLB for hearings on other contentions raised by petitioners.

II. REGULATORY DEVELOPMENTS

A. Rulemaking

1. Waste Confidence Rule Update

In 2008, the NRC undertook a review of its Waste Confidence findings; these findings were previously reviewed and revised in 1990.¹⁰⁴ After seeking public comment on proposed revisions to the Waste Confidence Decision in 2008, the NRC issued an update, and a draft final rule, on June 15, 2009.¹⁰⁵ The Waste Confidence Decision consists of five findings relevant to environmental analysis for new reactor licensing. The NRC proposed to reaffirm Findings 1, 3, and 5, which provide that safe disposal of high-level radioactive waste and spent nuclear fuel is technically feasible, and that high-level waste and spent nuclear fuel can be safely managed until there is a permanent repository available.¹⁰⁶

The draft final rule would have amended Finding 2, which predicts when a repository will become available, and Finding 4, which concludes that storage is safe and environmentally benign for a period of years.¹⁰⁷ The NRC concluded that events since 1990 support "a continued finding of reasonable assurance" that safe independent onsite spent fuel storage or offsite spent fuel storage will be available if such storage capacity is necessary.¹⁰⁸ Revised Finding 2 reflects the NRC's expectation that "repository capacity will be available within 50-60 years

100. *Id.* at 9, 14-19.

101. *Id.* at 11.

102. *Id.* at 12.

103. *Id.* at 21-22.

104. STEPHEN G. BURNS, NUCLEAR REGULATORY COMM'N, SECY-09-0090, RULEMAKING ISSUE MEETING (2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2009/secy2009-0090/2009-0090scy.html>.

105. *Id.* encl. 2 (proposing amendment to 10 C.F.R. § 51.23(a)(2009)).

106. *Id.* encl. 1, at 4-5.

107. *Id.* encl. 1, at 2.

108. *Id.* encl. 1, at 123.

beyond the licensed life for operation . . . of any reactor.”¹⁰⁹ The revisions to Finding 4 reflect the determination that spent fuel can be safely stored in dry casks for a period of at least sixty years without significant environmental impacts.¹¹⁰

Two members of the Commission declined to approve the complete draft final rule on the Waste Confidence findings, with both Commissioners approving only a portion of the draft final rule.¹¹¹ Although they did not question the conclusion in the draft final rule, both Commissioner Klein and Commissioner Svinicki cited the need for additional public comment in light of the current administration’s statements that it would not open a repository at Yucca Mountain as a reason for their votes.¹¹² Commissioner Klein specifically addressed the concern over how the Administration’s efforts to pursue alternatives to Yucca Mountain might influence the public’s views.¹¹³ At the time of this vote, the NRC was composed of only three commissioners. Accordingly, the failure of two commissioners to approve the final draft rule in its entirety resulted in the update to the Waste Confidence findings remaining unapproved.¹¹⁴ Since this determination, all vacancies on the Commission have been nominated and confirmed.

2. 10 CFR Part 72 License and Certificate of Compliance (CoC) Terms

The NRC is amending its regulations that govern licensing requirements for the independent storage of spent nuclear fuel. One amendment will “extend the license term for Part 72 specific licenses from the current 20 years from the date of initial license issuance, or from the date of license renewal, to a length of time not to exceed 40 years from the date of issuance or license renewal.”¹¹⁵ Another change will “extend the license term of a storage cask CoC from a period of at least 20 years to a period not to exceed 40 years.”¹¹⁶

B. Proposed Rules

1. Physical Protection of Byproduct Material

The NRC has proposed “to amend its regulations to establish security requirements for the use and transport of Category 1 and Category 2 quantities of

109. *Id.* encl. 1, at 2.

110. *Id.*

111. Notation Vote Response Sheet From Commissioner Klein (Sept. 16, 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-dek.pdf> [hereinafter *Klein Notation Vote*]; Notation Vote Response From Commissioner Svinicki (Sept. 24, 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009-0090vtr-cls.pdf> [hereinafter *Svinicki Notation Vote*].

112. *Klein Notation Vote*, *supra* note 111, at 1; *Svinicki Notation Vote*, *supra* note 111, at 1.

113. *Klein Notation Vote*, *supra* note 111, at 1.

114. Jeff Beattie, *NRC Withholds “Waste Confidence Finding, Citing Yucca Decision*, MANAGING POWER (Nov. 02, 2009), http://www.managingpowermag.com/supply_chains/NRC-Withholds-Waste-Confidence-Finding-Citing-Yucca-Decision_212.html.

115. R. W. BORCHARDT, NUCLEAR REGULATORY COMM’N, SECY-10-0056, RULEMAKING ISSUE AFFIRMATION (2010), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2010/secy2010-0056/2010-0056scy.pdf>.

116. *Id.* at 2.

radioactive material.”¹¹⁷ “Category 1 and Category 2 thresholds are based on [thresholds] established in the International Atomic Energy Agency (IAEA) Code of Conduct on the Safety and Security of Radioactive Sources,” which has been endorsed by the NRC.¹¹⁸ These proposed regulations also include security requirements for the transportation of irradiated reactor fuel that weighs 100 grams or less in net weight.¹¹⁹ “The proposed rule would affect[:] [1] any licensee that is authorized to possess Category 1 or Category 2 quantities of radioactive material, [2] any licensee that transports these materials using ground transportation, and [3] any licensee that transports small quantities of irradiated reactor fuel.”¹²⁰ This proposed rule opened for comment on June 15, 2010, with an expiration date of October 13, 2010; however, “comments specific to the information collection aspects of this proposed rule” were due by July 15, 2010.¹²¹

2. Withdrawal of Proposed Rule Domestic Licensing of Source Material – Amendments/Integrated Safety Analysis

The NRC is proposing to amend regulations 10 CFR Part 40 by adding additional requirements for “source material licensees possessing significant amounts of uranium hexafluoride.”¹²²

The proposed amendments would[:] [1] require such licensees to conduct integrated safety analyses (ISAs) similar to the ISAs performed by 10 CFR Part 70 licensees; [2] set possession limits for [uranium hexafluoride] for determining licensing authority . . . ; [3] add an additional evaluation criterion for applicants who submit an evaluation in lieu of an emergency plan; and [4] make administrative changes to the structure of the [regulation]. The proposed ISA requirements would not apply to facilities that are currently decommissioning¹²³

Since this proposal was released, the NRC has directed the staff to refrain from adopting the proposed changes and to look into two issues: “(1) [s]ome Agreement States have issued Part 40 licenses for possession of . . . [uranium hexafluoride] in quantities far larger than the threshold of 2000 kg proposed . . . (2) [a] petition for rulemaking from Nuclear Energy Institute, dated April 16, 2009, [that] may involve changes to Part 40 and Part 70.”¹²⁴

117. Proposed Rulemaking, Physical Protection of Byproduct Material, 75 Fed. Reg. 33902 (2010) (to be codified at 10 C.F.R. pts. 30, 32-37, 39, 51, 71, & 73).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. R. W. BORCHARDT, NUCLEAR REGULATORY COMM’N, SECY-10-0022, RULEMAKING ISSUE (NOTATION VOTE) (2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2010/secy2010-0022/2010-0022scy.pdf>.

123. *Id.* at 86.

124. Memorandum from Annet L. Vietta-Cook on Staff Requirements – SECY-10-0022 – Proposed Rule: Domestic Licensing of Source Material – Amendments/Integrated Safety Analysis (RIN 3150-AI50) (June 8, 2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2010/2010-0022srm.pdf>.

C. Other Regulatory Activity

1. Power Uprates

Although significant on-site construction has yet to start on any new plants, this has not stopped commercial reactor licensees from developing new nuclear capacity. The move of many licensees to seek power uprates has not escaped the Commission's attention. In a staff report dated May 20, 2010, the NRC reports that since May 2009, its staff "has approved four plant-specific power uprates."¹²⁵ NRC staff is "currently reviewing 16 power uprates [and] [o]ver the next 5 years, the staff expects that licensees will submit an additional 39 power uprate applications."¹²⁶

2. License Renewal

In addition to power uprates, commercial nuclear power plants owners are seeking, almost in lock-step, to renew licenses shortly after entering the twenty year window to do so. With the notable exceptions of license renewal efforts at Indian Point, Pilgrim, and Vermont Yankee,¹²⁷ license renewals have largely become almost routine occurrences. Thirty-two applications have been approved and the NRC is currently reviewing fourteen additional license renewal applications.¹²⁸ "The license renewal process requires that both a technical review of safety issues and an environmental review be performed for each application."¹²⁹ NRC regulations (10 C.F.R. Part 51 and 10 C.F.R. Part 54) "contain the requirements for these reviews and various other publications provide general process guidance to both the applicant and the [NRC staff] reviewer[s]."¹³⁰ In May 2010, the NRC released a draft report of its Standard of Review Plan for reviewing renewal applications and a draft second revision of its Generic Aging Lessons Learned guidance document.¹³¹ Comments were requested within forty-five days of the release of these documents.

3. Independent Report Examining the New Reactor Licensing Program

On April 6, 2010, the Bipartisan Policy Center (BPC) released a report reviewing the NRC licensing process for new reactors. The BPC interviewed

125. LUIS A. REYES, NUCLEAR REGULATORY COMM'N, SECY-05-0098, POLICY ISSUE (INFORMATION), 1 (2010), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2010/secy2010-0070/2010-0070scy.html>.

126. *Id.*

127. NUCLEAR REGULATORY COMM'N, STATUS OF LICENSE RENEWAL APPLICATIONS AND INDUSTRY ACTIVITIES, <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html#underreview> (last visited June 24, 2010).

128. *Id.*

129. NUCLEAR REGULATORY COMM'N, REACTOR LICENSE RENEWAL PROCESS, <http://www.nrc.gov/reactors/operating/licensing/renewal/process.html> (last visited June 24, 2010).

130. *Id.*

131. NUCLEAR REGULATORY COMM'N, STANDARD REVIEW PLAN FOR REVIEW OF LICENSE RENEWAL APPLICATIONS FOR NUCLEAR POWER PLANTS – DRAFT REPORT FOR COMMENT (NUREG-1800, REVISION 2), <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1800/r2/index.html> (last visited June 24, 2010); NUCLEAR REGULATORY COMM'N, GENERIC AGING LESSONS LEARNED (GALL) REPORT – DRAFT REPORT FOR COMMENT (NUREG-1801, REVISION 2), <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1801/r2/index.html> (last visited June 24, 2010).

NRC staff and former NRC Commissioners, representatives of reactor vendors, applicants for Combined Licenses, nuclear engineering firms, and representatives of organizations that have actively engaged in the licensing process. The BPC “also hosted a half-day forum [for] stakeholders to discuss issues raised during the individual interviews.”¹³² The BPC’s report determined that although many stakeholders have encountered some problems in maneuvering through the licensing process, they almost all agreed that the NRC acted appropriately and in good faith to resolve any problems.¹³³ The report concluded “that the difficulty of obtaining financing [appears to be] a bigger obstacle to nuclear plant construction . . . than licensing issues.”¹³⁴

4. Small Modular Reactors

After meeting with the DOE and some Small Modular Reactor (SMR) designers, the NRC staff has issued policy information related to licensing and key technical issues for SMR designers.¹³⁵ The NRC staff identified a number of potential policy and licensing issues, most resulting “from the key differences between the new designs and current-generation pressurized-water reactors . . . but . . . also result[ing] from industry-proposed review approaches and industry-proposed modifications to current policies and practices.”¹³⁶ The NRC identified some challenges to licensing SMRs: (1) implementation of the defense-in-depth philosophy for advanced reactors; (2) appropriate source term, dose calculations, and siting for SMRs; (3) appropriate requirements for operator staffing for small or multi-module facilities; (4) security and safeguard requirements for SMRs; (5) application of Price Anderson insurance to SMRs; and (6) emergency planning requirements for SMRs.¹³⁷ The NRC staff plans to develop proposed resolutions to these issues by continuing to get information from the DOE, applicants, and other sources.¹³⁸

5. Tritium Groundwater Contamination at Nuclear Plants

The NRC is reviewing several instances of unintended tritium releases to determine if nuclear plant operators have taken appropriate action and to determine if any changes are needed to the agency’s rules and regulations.¹³⁹ One recent unintended release occurred in Vermont at the Vermont Yankee

132. Letter from the Bipartisan Policy Center, to Gregory B. Jaczko, Chairman of the Nuclear Regulatory Comm’n (Apr. 6, 2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2010/boxer-04-12-2010.pdf>.

133. *Id.*

134. *Id.*

135. R. W. BORCHARDT, NUCLEAR REGULATORY COMM’N, SECY-10-0034, POLICY ISSUE INFORMATION (2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2010/secy2010-0034/2010-0034scy.pdf>.

136. *Id.* at 3.

137. *Id.* at 3-5, 6, 8, 13, 16, 18, & 20.

138. *Id.* at 1.

139. NUCLEAR REGULATORY COMM’N, GROUNDWATER CONTAMINATION (TRITIUM) AT NUCLEAR PLANTS, <http://www.nrc.gov/reactors/operating/ops-experience/grndwtr-contam-tritium.html> (last visited June 24, 2010).

Nuclear Power Station.¹⁴⁰ The NRC's Petition Review Board determined that there is no immediate health and safety issue that would warrant immediate shutdown of the Yankee site.¹⁴¹ The Board concluded that "the licensee is operating within its license conditions and within NRC regulations; there has been no detectable tritium in the off-site water supply, any drinking water wells, or the Connecticut River; and there is currently no negative environmental impact associated with the tritium leakage."¹⁴² Nevertheless, the local fallout from the tritium release has been significant. When Entergy purchased the plant in 2002, as a condition of the sale, the Vermont Public Service Board was given a say in whether the plant operating license could be extended. Subsequently, the Vermont legislature passed a law requiring approval of both houses of the state legislature for the plant to operate after 2012.¹⁴³ On February 24, 2010, the Vermont Senate voted to block a license extension for the Yankee nuclear plant, citing, in part, radioactive leaks and misstatements by plant officials.¹⁴⁴

In response to concerns over the adequacy of federal oversight of licensees with a history of tritium releases, the NRC formed a Groundwater Task Force that released a report on June 17, 2010.¹⁴⁵ This report was based on evaluations of the agency's past, current, and planned actions regarding radioactive contamination of groundwater and soil at nuclear plants.¹⁴⁶ The task force identified sixteen conclusions and four recommendations which the NRC is now considering.¹⁴⁷ It recommended that the NRC identify policy issues associated with assessing its groundwater protection regulatory framework, implement appropriate enhancements, and consider developing specific actions to address the report's conclusions.¹⁴⁸ A management review group will deliver a paper to

140. Letter from Gregory B. Jaczko, Chairman of the Nuclear Regulatory Comm'n, to the Honorable John W. Olver, U.S. House of Representatives (Mar. 29, 2010), *available at* <http://www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2010/olver-03-29-2010.pdf>.

141. *Id.* at 2.

142. *Id.*

143. LEGIS. J. FISCAL OFFICE, STATE OF VT. LEG., VERMONT YANKEE ECONOMIC AND FISCAL IMPACT STUDY PROJECT (Mar. 5, 2010), *available at* <http://www.leg.state.vt.us/JFO/VY%20Legislative%20Briefing/Economic%20Analysis%20-%20Executive%20Summary10.pdf>.

144. Matthew L. Wald, *Vermont Senate Votes to Close Nuclear Plant*, N.Y. TIMES, Feb. 24, 2010, *available at* <http://www.nytimes.com/2010/02/25/us/25nuke.html>. Vermont is not the only state recently taking an active role in response to a reported tritium release from a commercial nuclear power plant. See Abby Gruen, *Exelon Forced to Clean Up Tritium Leak at Oyster Creek Nuclear Plant*, THE STAR-LEDGER, May 17, 2010, *available at* http://www.nj.com/business/index.ssf/2010/05/exelon_forced_to_clean_up_trit.html (stating that the State of New Jersey issued a directive to Exelon, operator of the Oyster Creek nuclear plant, to cooperate with an investigation and clean up of a radioactive tritium leak).

145. Memorandum from R. W. Borchardt, Exec. Dir. For Operations, on Senior Mgmt. Review of Groundwater Task Force Report (June 17, 2010), *available at* http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=101790218.

146. U.S. NUCLEAR REGULATORY COMM'N, GROUNDWATER TASK FORCE FINAL REPORT 1 (2010), *available at* http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=101790218 (located as an enclosure subsequent to the memorandum).

147. *Id.* at 7.

148. *Id.*

the NRC presenting options for addressing issues related to groundwater protection.¹⁴⁹

6. Construction Oversight and ITAAC Update

The NRC has charged its staff with completing, by the end of 2010, the proposed revisions to the regulatory guidance that address Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) maintenance and supplemental reporting.¹⁵⁰ NRC staff has been directed to focus on when changes to structures, systems, or components related to closed ITAAC result in the ITAAC not being met such that a license amendment would be required and report their progress to the NRC in Fall 2010. The NRC has released draft threshold concepts related to the supplemental ITAAC closure letter.¹⁵¹ The staff is still working to further define the term “materially altered” through developing thresholds.¹⁵² The NRC has identified three additional notifications that should be included in NRC guidance documents and regulations: (1) supplemental ITAAC closure letters; (2) component replacement letters; and (3) ITAAC-all-complete letter.¹⁵³ The NRC staff plans to propose that the NRC supplement 10 CFR Part 52 in a rule change to include these additional notification requirements.¹⁵⁴ NRC staff has analyzed “the construction assessment process by engaging stakeholders in [an attempt] to identify alternative means of assessing licensee performance . . . and to develop construction assessment program options” for the NRC to consider.¹⁵⁵

7. DOE Loan Guarantee Program Update

The DOE has informally short-listed four of seventeen nuclear project applicants for which the developers may be able to obtain DOE loan guarantees (Vogtle, VC Summer, Calvert Cliffs, and South Texas Project).¹⁵⁶ On February 16, 2010, DOE announced that it was ready to extend a conditional commitment

149. *Memorandum from R. W. Borchardt, supra* note 145, at 1.

150. Memorandum from Annette L. Vietti-Cook on Staff Requirements-SECY-09-0075-Safety Culture Policy Statement (Oct. 16, 2009), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2009/2009-0075srm.html>.

151. R. W. BORCHARDT, NUCLEAR REGULATORY COMM’N, SEC-09-0119, STAFF PROGRESS IN RESOLVING ISSUES ASSOCIATED WITH INSPECTIONS, TESTS, ANALYSES, AND ACCEPTANCE CRITERIA 4 (2009), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2009/secy2009-0119/2009-0119scy.html>.

152. *Id.*

153. *Id.* at 1-2.

154. *Id.* at 4.

155. MICHAEL R. JOHNSON, NUCLEAR REGULATORY COMM’N, SECY-09-0113, UPDATE ON THE DEVELOPMENT OF CONSTRUCTION ASSESSMENT PROCESS POLICY OPTIONS AND THE CONSTRUCTION INSPECTION PROGRAM INFORMATION MANAGEMENT SYSTEM (2009), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2009/secy2009-0113/2009-0113scy.pdf>.

156. *Calvert Cliffs Unit 3 on DOE Loan Guarantee Shortlist*, POWERNEWS (May 20, 2009), *available at* <http://www.powermag.com/POWERnews/1926.html>; *see also* Press Release, DEP’T OF ENERGY, DOE Announces Loan Guarantee Applications for Nuclear Power Plant Construction (Oct. 2, 2008), *available at* <http://lpo.energy.gov/wp-content/uploads/2010/09/100208.pdf>.

of \$8.33 billion for Vogtle Units 3 and 4.¹⁵⁷ After significant review, on June 18, 2010, Southern Company's Georgia Power has accepted the condition commitment for its share of loan guarantees to develop the new units at the Vogtle site. In light of the current limit of \$18.5 billion for nuclear loan guarantees and the allocation of \$8.33 billion for Vogtle taking up about 45% of the current nuclear loan guarantee program capacity, the demand for new nuclear loan guarantees has already well outstripped the supply.¹⁵⁸ In addition to loan guarantees for commercial reactor projects, DOE has offered loan guarantees for a front end final enrichment facility to be built in Idaho.¹⁵⁹ The \$3.3 billion Areva fuel enrichment facility, which was designated to receive a \$2 billion loan guarantee (subject to obtaining an NRC license and other conditions), is designed to use low enrichment centrifuge technology.¹⁶⁰

8. Low Level Waste Disposal

The issue of low level waste disposal capacity is becoming an increasing constraint on all entities that create such waste, from hospitals to power plants, since there are few licensed repositories for disposal.¹⁶¹ Some nuclear waste disposal sites that are licensed to accept only Class A radioactive waste are attempting to accept Class B and C wastes, by blending the three together.¹⁶² The NRC is now reconsidering its rules on waste blending, and is reviewing a policy paper on the topic. The NRC is expected to reach a decision regarding blending in the next few months.¹⁶³ "In September 2009, the Texas Commission on Environmental Quality issued a license for" a new disposal facility to be located in Andrews County, Texas.¹⁶⁴ This facility will accept class A, B, and C waste from Texas, Vermont, and the federal government.¹⁶⁵

157. Press Release, WHITE HOUSE, Obama Admin. Announces Loan Guarantees to Construct New Nuclear Power Reactors in Georgia (Feb. 16, 2010), available at <http://www.whitehouse.gov/the-press-office/obama-administration-announces-loan-guarantees-construct-new-nuclear-power-reactors>.

158. Press Release, SOUTHERN COMPANY, Southern Company, DOE Agree to Conditional Nuclear Loan Guarantee Terms (June 18, 2010), available at <http://southerncompany.mediaroom.com/index.php?s=43&item=2118>. Of the six participants in the Vogtle project (Georgia Power, Oglethorpe, three MEAG entities and the City of Dalton), only the City of Dalton declined to pursue loan guarantees. Georgia Power Accepts Vogtle Loan Guarantee, WORLD NUCLEAR NEWS (June 21, 2010), available at http://www.world-nuclear-news.org/NN-Georgia_Power_accepts_Vogtle_loan_guarantee-2106107.html.

159. Press Release, DEP'T OF ENERGY, DOE Offers Conditional Loan Guarantee for Front End Nuclear Facility in Idaho (May 20, 2010), available at <http://www.energy.gov/news/8996.htm>.

160. *Id.*

161. Matthew L. Wald, *Nuclear Agency Weighs a Plan to Dilute Waste*, N.Y. TIMES, June 17, 2010, available at <http://www.nytimes.com/2010/06/18/business/energy-environment/18nuke.html?emc=tnt&tntemail0=y>.

162. *Id.*

163. *Id.*; see also Press Release, NUCLEAR REGULATORY COMM'N, Opening Remarks of NRC Chairman Gregory B. Jackzo at Today's Blending of Low Level Waste Meeting (June 17, 2010), available at <http://www.nrc.gov/reading-rm/doc-collections/news/2010/10-109.html>.

164. NUCLEAR ENERGY INST., *Key Issues: Low Level Radio Active Waste*, <http://www.nei.org/keyissues/nuclearwastedisposal/lowlevelradioactivewaste/> (last visited Oct. 8, 2010).

165. *Id.*

III. LEGISLATIVE DEVELOPMENTS

A. *Proposed Senate Energy Bills*

The American Power Act will be introduced by Senators Kerry and Lieberman, but a discussion draft of the legislation has been released.¹⁶⁶ Among other goals, the bill seeks to encourage domestic nuclear power generation.¹⁶⁷ The draft bill increases the funding for the Innovative Technology Loan Guarantee Program to \$54 million.¹⁶⁸ It also would amend the 2005 Energy Policy Act to provide regulatory risk insurance for up to twelve reactors, as opposed to the current limit of six, and directs the Secretary to pay the full amount of covered delay costs for each reactor up to \$500 million.¹⁶⁹ The proposed bill also amends the Atomic Energy Act of 1954 by: (1) removing the requirement for administrative hearings on non-contested issues prior to granting construction permits and operating licenses for nuclear facilities; (2) amending section 185(b) to ensure that prescribed inspections, tests, and analyses are met following the issuance of a combined license; and (3) amending section 185(b) to allow for the supplementation of environmental impact statements in certain circumstances.¹⁷⁰ The bill, if enacted, also modifies the tax treatment of nuclear power.¹⁷¹

Senator Lugar has introduced the Practical Energy and Climate Plan Act of 2010.¹⁷² It currently awaits consideration by the Senate Finance Committee.¹⁷³ Senator Lugar's bill only addresses nuclear power in section 303 of the bill, which would authorize an additional \$36 billion in loan guarantee authority to help deploy first new nuclear power generation facilities.¹⁷⁴

B. *Other Legislative Activity*

The American Clean Energy and Security Act of 2009 passed the U.S. House on June 26, 2009, and currently awaits consideration in the Senate.¹⁷⁵ It proposes two major changes to the current DOE loan guarantee program.¹⁷⁶ First, it expressly limits DOE's loan guarantee authority to amounts appropriated.¹⁷⁷ Second, the bill ties obtaining loan guarantees for nuclear

166. American Power Act (Discussion Draft), 111th Cong. (2nd Sess. 2010).

167. *Id.* §§ 1101-1109.

168. *Id.* § 1102.

169. *Id.* § 1103.

170. *Id.* §§ 1105, 1108 & 1109.

171. *Id.* §§ 1121-1126.

172. Practical Energy and Climate Plan Act of 2010, S. 3464, 111th Cong. (2010).

173. LIBRARY OF CONGRESS, *Bill Summary & Status – 111th Congress (2009-2010) – S. 3464*, http://thomas.gov/home/bills_res.html (follow “Bills, Resolutions” hyperlink; then follow “Search Bill Summary & Status” hyperlink; then search “Bill Number” for “S.3464”).

174. S. 3464.

175. LIBRARY OF CONGRESS, *Bill Summary & Status – 111th Congress (2009-2010) – H.R. 2454*, http://thomas.gov/home/bills_res.html (follow “Bills, Resolutions” hyperlink; then follow “Search Bill Summary & Status” hyperlink; then search “Bill Number” for “S.2454”).

176. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

177. H.R. 2454 § 181 (which prohibits a guarantee from being made unless: “(A) an appropriation for the cost has been made; (B) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited [it] into the Treasury; or (C) a combination of appropriations or payments . . . has

projects to payment of prevailing wage by contractors and subcontractors.¹⁷⁸ Even while this bill was pending at least one contractor saw the need to enter into a project labor agreement in compliance with an Executive Order encouraging such agreements, effective April 13, 2010.¹⁷⁹ Executive “encouragement” became law when section 1702 of Title XVII of the 2005 Energy Policy Act was amended to make the Davis-Bacon Act prevailing wage provisions apply to projects receiving DOE loan guarantees.¹⁸⁰

C. Agreements of Cooperation

1. US-Australia Agreement of Cooperation

On May 5, 2010, President Obama submitted to Congress an “Agreement between the Government of the United States of America and the Government of Australia Concerning Peaceful Uses of Nuclear Energy.”¹⁸¹ Also known as a “1-2-3 Agreement” after sections 123b and 123d of the Atomic Energy Act of 1954, the agreement would extend an agreement set to expire in 2011 that establishes the legal framework for the U.S. and Australia to cooperate in developing nuclear energy for peaceful purposes. The proposed agreement permits the transfer of information, material, equipment (including reactors), and components for nuclear research and nuclear power production; however, it does not permit transfers of Restricted Data, sensitive nuclear technology, sensitive nuclear facilities, or major critical components of such facilities. In the agreement it acknowledges that Australia, a significant exporter of yellow cake uranium, is already a member of the Nuclear Suppliers Group, which issues non-legally binding guidelines, with standards, for the responsible export of nuclear commodities for peaceful use.

been made to cover the cost of the obligation.”). The language in the Energy Policy Act of 2005 was ambiguous on that issue, and it has been argued that since it is only a guarantee that is funded by the borrower no appropriation is required.

178. H.R. 2454 § 181(k) (“No loan guarantee shall be made under this title unless the borrower has provided to the Secretary reasonable assurances that all laborers and mechanics employed by contractors and subcontractors in the performance of construction work financed in whole or in part by the guaranteed loan will be paid wages at rates not less than those prevailing on projects of a character similar to the contract work in the civil subdivision of the State in which the contract work is to be performed as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of part A of subtitle II of title 40, United States Code”).

179. Exec. Order No. 13502, 74 C.F.R. 6985 (2009); *see also* Press Release, BLDG. AND CONSTR. TRADES DEP’T, Final Rule Issued on Obama PLA Exec. Order (Apr. 16, 2010), *available at* <http://www.buildingtrades.org/Newsroom/Latest-News/Industry-Headlines/Final-Rule-Issued-on-Obama-PLA-Executive-Order.aspx>; Press Release, WHITE HOUSE, Use of Project Labor Agreements for Fed. Constr. Projects (Feb. 6, 2009), *available at* <http://www.whitehouse.gov/the-press-office/executive-order-use-project-labor-agreements-federal-construction-projects> (providing detail on the Executive Order); *see also* Press Release, FLUOR, Fluor Executes Project Labor Agreement with Building Trades Unions for South Texas Project Nuclear Expansion (Apr. 8, 2010), *available at* <http://investor.fluor.com/phoenix.zhtml?c=124955&p=newsarticle&id=1411099>.

180. Energy and Water Development and Related Agencies Appropriations Act, Pub. L. No. 111-85, § 310, 123 Stat. 2845, 2873 (2010) (amending the 2005 Energy Policy Act).

181. Presidential Determination No. 2010-07 of May 4, 2010, 75 Fed. Reg. 27,161 (May 14, 2010); *see also* Press Release, WHITE HOUSE, Message to the Congress Concerning a Nuclear Agreement with Australia (May 5, 2010), *available at* <http://www.whitehouse.gov/the-press-office/message-congress-concerning-a-nuclear-agreement-with-australia>.

2. US-Russia Agreement of Cooperation

On May 10, 2010, President Obama submitted to Congress a proposed “Agreement Between the Government of the United States of America and the Government of the Russian Federation for Cooperation in the Field of Peaceful Uses of Nuclear Energy.”¹⁸² This agreement, which would allow the two countries to trade nuclear materials, technology, and services, was originally submitted to Congress for review by President Bush on May 13, 2008.¹⁸³ Following the August 2008 conflict between Russia and Georgia, the U.S.-Russian relationship deteriorated and the Bush administration withdrew the agreement from Congress.¹⁸⁴ In its current iteration “the proposed agreement will allow the two parties to cooperate in scientific research related to nuclear reactors and the nuclear fuel cycle, radioactive waste handling, . . . and shipments . . . of moderator material, nuclear material, technologies and equipment, as well as services in the area of the nuclear fuel cycle.”¹⁸⁵ Unlike U.S. cooperation pacts with non-nuclear weapon states, the U.S.-Russian agreement does not allow the parties to require the return of transferred material in the event of a nuclear weapons test, as required by the 1954 Atomic Energy Act.¹⁸⁶

3. US-Kuwait Memorandum of Cooperation

On June 23, 2010, DOE’s National Nuclear Security Administration announced that the US has signed a Memorandum of Cooperation with Kuwait on nuclear safeguards and other nonproliferation topics. The memorandum proposes cooperation with Kuwait “in nuclear legislation and regulations; human resource planning and modeling; nuclear safeguards and security; radiation protection; environmental, safety and health issues; low- and intermediate-level radioactive waste management; and reactor operations, safety, and best practices.”¹⁸⁷ Kuwait has not announced any plans to build nuclear power plants. In order for the US and Kuwait to fully cooperate on the development of commercial nuclear plants and other peaceful uses of nuclear energy, the Memorandum of Cooperation would have to be replaced by a full “123 Agreement,” which must be submitted to Congress for approval.

182. Presidential Determination No. 2010-08 of May 10, 2010, 75 Fed. Reg. 27,163 (May 14, 2010).

183. Presidential Determination No. 2008-19 of May 5, 2008, 73 Fed. Reg. 27,719 (May 14, 2008).

184. Press Release, DEP’T OF STATE, Georgia and Russia (Sept. 17, 2008), *available at* <http://merln.ndu.edu/archivepdf/russia/State/109825.pdf> (testimony of William J. Burns, Under Secretary for Political Affairs, before the Senate Committee on Foreign Relations).

185. Press Release, NIT, The U.S.-Russian Agreement for Peaceful Nuclear Cooperation (June 22, 2010), *available at* http://www.nti.org/e_research/e3_us_russia_123_agreement.html (internal quotations omitted).

186. 42 U.S.C. § 2153(a)(4).

187. Press Release, NAT’L NUCLEAR SEC. ADMIN., NNSA Signs Memorandum with Kuwait to Increase Cooperation on Nuclear Safeguards and Nonproliferation (June 23, 2010), *available at* <http://nnsa.energy.gov/mediaroom/pressreleases/kuwait062310>.

D. Update on State Cost Recovery for New Nuclear Projects

1. Missouri

Ameren Corporation suspended plans to construct a second nuclear plant in Missouri.¹⁸⁸ Ameren's decision was likely based on the failure of a Construction Work in Progress (CWIP) bill during Missouri's 2009 legislative session. The bill, which failed to pass, would have repealed Missouri's ban on charging ratepayers for construction work in progress.¹⁸⁹

2. Florida

A group of plaintiffs have brought a suit against Progress Energy claiming that charging customers for CWIP violates the state's constitution because it gives special privileges to Progress Energy.¹⁹⁰ After a hearing in September 2009, the Florida Public Service Commission approved cost recovery of CWIP for Florida Power & Light Company (FPL) and Progress Energy Florida (PEF).¹⁹¹ Costs will be recovered, beginning in 2010, through the capacity cost recovery charge on customer bills.¹⁹² FPL's approved cost recovery is \$62,676,816, and PEF's approved cost recovery amounts to \$206,907,726.¹⁹³ Both of these cost recovery amounts take into account costs associated with the uprate of existing nuclear generating plants and construction of proposed nuclear power plants.¹⁹⁴

3. South Carolina

Friends of the Earth appealed a decision by the South Carolina Public Service Commission to the Supreme Court of South Carolina.¹⁹⁵ The Commission's decision authorized South Carolina Electric & Gas to proceed with a two-reactor nuclear project and to begin collecting rates to pay for the project while development is underway.¹⁹⁶ On appeal, the South Carolina Supreme Court affirmed the Commission's decision.¹⁹⁷

188. *Ameren Suspends its Plan to Construct Nuclear Plant in Missouri*, ENERGY BUS. REV., Apr. 23, 2009, available at http://solar.energy-business-review.com/news/ameren_suspends_its_plan_to_construct_nuclear_plant_in_missouri_090423; see also Jason Rosenbaum, *Meltdown in Missouri Legislature Over CWIP Preceded Ameren's Decision Not to Seek a Nuclear Plant*, ST. LOUIS BEACON, Apr. 22, 2009, available at <http://www.stlbeacon.org/content/view/8289/122/>.

189. *Id.*

190. Fred Hiers, *Suit Challenges Progress Energy's Charges for Proposed Nuclear Plant*, OCALA, Feb. 23, 2010, <http://www.ocala.com/article/20100223/ARTICLES/100229891?tc=ar> (last visited Oct. 8, 2010) ("The group cites article III, section 11, part of which reads: 'There shall be no special law or general law of local application pertaining to . . . private incorporation or grant of privilege to a private corporation'").

191. Press Release, FLA. PUB. SERV. COMM., *PSC Votes on Nuclear Cost Recovery for Florida Power & Light Company and Progress Energy Florida* (Oct. 16, 2009), available at <http://www.floridapsc.com/home/news/index.aspx?id=591>.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 692 S.E.2d 910 (S.C. 2010); see also Kristy Eppley Rupon, *Nuclear Plant Opponents Take Case to High Court*, THE STATE (Mar. 5, 2010), available at <http://www.thestate.com/2010/03/05/1186944/nuclear-plant-opponents-take-case.html>.

196. *Id.*

197. *Friends of the Earth*, 692 S.E.2d at 910.

4. Georgia

As reported last year, the Georgia Public Service Commission (Georgia Commission) had issued an order allowing recovery through Georgia Power's rates of its share of construction work in progress on the Vogtle Units 3 and 4 while construction proceeds. Southern Alliance for Clean Energy (SACE) sued Southern Co. in state district court in an attempt to block construction on two new reactors at Plant Vogtle.¹⁹⁸ SACE claimed that the Georgia Commission failed to establish a record needed for allowing recovery of construction costs while the Vogtle Units were being built. On May 5, 2010, a judge in Fulton County remanded the case to the Georgia Commission for the Commission to make necessary findings of fact and conclusions of law.¹⁹⁹ Following the judge's ruling, the Georgia Commission is expected to issue a new order supported with findings of fact and conclusions of law for its decision to allow recovery of construction work in progress while construction proceeds.²⁰⁰

IV. NEW REACTORS: COL APPLICATION-RELATED ACTIVITY

A. Summary Overview

According to the NRC, to date it has received eighteen combined construction and operating license (COL) applications for twenty-eight new nuclear units. The current status of each COL application is summarized in the table below and other related hearing and administrative review activity is discussed in the information that follows. COL applications that appear with a gray background in the table are in a state of suspension, have been withdrawn, or are being delayed at the request of the Applicant(s). This table, like other parts of this report, includes information up to June 2010.

Proposed New Reactor(s), Docket	Design	Applicant	COL Status
Bell Bend Nuclear Power Plant, 52-039	U.S. EPR	PPL Bell Bend, L.L.C.	Initial intervention denied. Final Safety Evaluation Report (FSER) expected by August 2012, but NRC COL schedule tied to review of the application for the EPR reference plant, Calvert Cliffs 3.

198. *Judge's Ruling Questions Georgia Power Nuclear Expansion*, SAVANNAH MORNING NEWS, Apr. 30, 2010, available at <http://savannahnow.com/latest-news/2010-04-30/judges-ruling-questions-georgia-power-nuclear-expansion>.

199. *S. Alliance for Clean Energy, Inc. v. Ga. Pub. Serv. Comm'n*, 2009-CV-170648 (Sup. Ct. Fulton County May 5, 2010) (Final Order on Petition for Judicial Review), available at <http://www.cleaneenergy.org/images/testimony/FinalOrderPetitionforJudicialReview050510.pdf>.

200. *Ga. Power Co.'s 2010 Rate Case*, No. 31958, Application of Georgia Electric Membership Corporation for Leave to Intervene (Ga. PSC Jun. 23, 2010) (citing the need to follow the "[p]rocedure for changing any rate, charge, classification, or service; recovery of financing costs," O.C.G.A. § 46-2-25(c)).

Proposed New Reactor(s), Docket	Design	Applicant	COL Status
Bellefonte Nuclear Station, Units 3 and 4, 52-014 & 52-015	AP1000	Tennessee Valley Authority (TVA)	NRC completion of the COL application review process will not be completed pending TVA's evaluation of the viability of completing Bellefonte Nuclear Plant Units 1 and 2 rather than proceeding with Units 3 and 4. ²⁰¹
Callaway Plant, Unit 2, 52-037	U.S. EPR	AmerenUE	On June 23, 2009, AmerenUE requested that the NRC suspend its review of the Callaway Plant, Unit 2 application. ²⁰²
Calvert Cliffs, Unit 3, 52-016	U.S. EPR	Calvert Cliffs 3 Nuclear Project, L.L.C. and UniStar Nuclear Operating Services, L.L.C.	NRC reviews continue for this the reference COL for the US EPR. Following dispositive motions Intervenor's had one contention admitted that is subject to further hearings.
Comanche Peak, Units 3 and 4, 52-034 and 52-035	US-APWR	Luminant Generation Company, L.L.C. (Luminant)	NRC reviews continue for this the reference COL for the US-APWR. Intervenor's had two contentions admitted that are subject to further hearings.
Fermi, Unit 3, 52-033	ESBWR	Detroit Edison Company	While not originally the reference COL, Fermi 3 is currently the sole applicant continuing to pursue ESBWR development.

201. *COL Applications, Nuclear Power in the USA Appendix 3*, WORLD NUCLEAR ASSOCIATION, updated June 21, 2010, available at http://www.world-nuclear.org/info/inf41a/iii_COL_applications.html.

202. AMERENUE attributed the suspension to the failure of the Missouri legislature to permit recovery of plant development costs until the new nuclear unit is in operation. Letter from T.E. Herrmann, Vice President or Engineering for AMERENUE, to the Nuclear Regulatory Comm'n on the suspension of efforts to build proposed nuclear power plant (Apr. 28, 2009), available at <http://www.nrc.gov/reactors/new-reactors/col/callaway/documents/app-2009.html> (follow the "04/28/09" hyperlink).

Proposed New Reactor(s), Docket	Design	Applicant	COL Status
Grand Gulf, Unit 3, 52-024	ESBWR	Entergy Operations, Inc. (EOI)	On January 9, 2009, EOI requested that the NRC suspend its review of the Grand Gulf, Unit 3 application. ²⁰³
Levy County, Units 1 and 2, 52-029, 52-030	AP1000	Progress Energy Florida, Inc. (PEF)	Intervenors had three contentions admitted that are subject to further hearings.
Nine Mile Point, Unit 3, 52-038	U.S. EPR	Nine Mile Point 3 Nuclear Project, L.L.C. and UniStar Nuclear Operating Services, L.L.C. (UniStar)	On December 1, 2009, UniStar requested that the NRC suspend its review of the Nine Mile Point, Unit 3 application. ²⁰⁴
North Anna, Unit 3, 52-017	US-APWR	Dominion Virginia Power (Dominion)	Originally Dominion selected the ESBWR as its reactor design. One party and one contention were admitted related to the COL based on that design. On May 18, 2010, Dominion announced it was changing its choice of reactor design to the MHI US-APWR. ²⁰⁵

203. EOI attributed the need to request the NRC to suspend its COL application review activities to its inability to negotiate commercial terms with the ESBWR vendor and other information related to the technology. Letter from William K. Hughey, EOI, to the U.S. Nuclear Regulatory Comm'n on the Grand Gulf Unit 3 and River Bend Station Unit 3 COLA Reviews (Jan. 9, 2009), available at <http://www.nrc.gov/reactors/new-reactors/col/grand-gulf/documents/app-2009.html> (follow the "01/09/09" hyperlink) [hereinafter *Hughey Letter January 2009*].

204. UniStar attributed the need to request the NRC suspend its COL application review activities to its inability to obtain federal loan guarantees for Nine Mile Point, Unit 3 development. Letter from Greg Gibson, UniStar, to the Nuclear Regulatory Comm'n on the UniStar Nuclear Energy, NRC Docket No. 52-038 Nine Mile Point 3 Nuclear Power Plant-COLA Review (Dec. 1, 2009), available at <http://www.nrc.gov/reactors/new-reactors/col/nine-mile-point/documents/app-2009.html> (follow the "12/01/09" hyperlink).

205. Dominion's replacement selection of MHI US-APWR over the ESBWR reactor technology followed an extensive competitive bidding process for a North Anna Unit 3 reactor. Letter from Eugene S. Grecheck, Dominion, to the Nuclear Regulatory Comm'n (May 18, 2010), available at <http://www.nrc.gov/reactors/new-reactors/col/north-anna/documents/app-2010.html> (follow "05/18/10" hyperlink).

Proposed New Reactor(s), Docket	Design	Applicant	COL Status
River Bend Station, Unit 3, 52-036	ESBWR	Entergy Operations, Inc. (EOI)	On January 9, 2009, EOI requested that the NRC suspend its review of the Grand Gulf, Unit 3 application. ²⁰⁶
Shearon Harris, Units 2 and 3, 52-022, 52-023	AP1000	Progress Energy Carolinas, Inc. (PEC)	While one party met the standing criteria, no admissible contentions based on review of initial filings.
South Texas Project, Units 3 and 4, 52-025, 52-026	ABWR	South Texas Project Nuclear Operating Company (STPNOC)	NRC reviews continue for this the reference COL for the (Toshiba) ABWR. Three groups have a single contention admitted for ASLB consideration.
Turkey Point, Units 6 and 7, 52-040, 52-041	AP1000	Florida Power and Light Company (FPL)	COL application accepted for docketing in October 2009, ²⁰⁷ however, the deadline to petition to intervene is currently August 17, 2010. ²⁰⁸
Victoria County Station, Units 1 and 2, 52-042 ²⁰⁹	ESBWR	Exelon Nuclear Texas Holdings, L.L.C. (Exelon)	COL application review suspended at the Applicant's request; changed to an Early Site Permit application. ²¹⁰

206. *Hughey Letter January 2009, supra* note 203. EOI used the same letter to request the NRC its COL application review activities related to Grand Gulf, Unit 3 and River Bend Station, Unit 3.

207. Fla. Power & Light Co., Acceptance for Docketing of an Application for Combined License for Turkey Point Units 6 & 7 Nuclear Power Plants, 74 Fed. Reg. 51,621 (Oct. 7, 2009).

208. Fla. Power & Light Co., Combined License Application for Turkey Point Units 6 & 7, Notice of Hearing, 5 Fed. Reg. 34,777 (June 18, 2010).

209. *See* Letter from Janelle B. Jessie, Project Manager Nuclear Regulatory Comm'n, to Marilyn C. Kray, Exelon on the acceptance review for an early site permit application for Victoria County Station (June 8, 2010), *available at* <http://www.nrc.gov/reactors/new-reactors/col/victoria/documents/app-2010.html> (follow the "06/08/10" hyperlink).

210. Exelon first informed the NRC that it was choosing an alternative reactor technology and vendor. Email from Ken Ainger to Mark Tonacci (Nov. 24, 2008), *available at* <http://www.nrc.gov/reactors/new-reactors/col/victoria/documents/app-2008.html> (follow the "11/24/08" hyperlink). Subsequently, Exelon determined that it would pursue an Early Site Permit for its site in Victoria County rather than a COL at this time. Letter from Kenneth A. Ainger, Exelon, to Nuclear Regulatory Comm'n (July 1, 2009), *available at* <http://www.nrc.gov/reactors/new-reactors/col/victoria/documents/app-2009.html> (follow the "07/01/09" hyperlink).

Proposed New Reactor(s), Docket	Design	Applicant	COL Status
Virgil C. Summer, Units 2 and 3, 52-027, 52-028	AP1000	South Carolina Electric & Gas (SCE&G)	Two intervenors and at least one contention were admitted in this proceeding. Following dispositive motions the remaining contention was dismissed.
Vogtle, Units 3 and 4, 52-025, 52-026	AP1000	Southern Nuclear Operating Company (SNC)	NRC reviews continue for this the reference COL for the AP1000. At least one safety contention raised by five groups was admitted in this proceeding; however, this contention was subsequently dismissed.
William States Lee III, Units 1 and 2, 52-018 & 52-019	AP1000	Duke Energy	At Duke Energy's request, the NRC has altered its COL application review schedule to support a new commercial operation date for this project of 2021. ²¹¹

B. COL-related Litigation

This section highlights significant arguments raised and the disposition of contentions in various COL dockets.

1. Bell Bend Nuclear Power Plant

Two requests for a hearing, with a total of nine contentions,²¹² were timely filed on May 18, 2009, by Gene Stilp and Taxpayers and Ratepayers United (Stilp/TRU) and Eric Joseph Epstein (Epstein). In the case of Stilp/TRU, the claim of standing was based on living within or having members living within the fifty mile emergency planning zone for the planned unit. In the case of

211. Letter from Frank Akstulewicz, Nuclear Regulatory Comm'n, to Bryan J. Dolan, Duke Energy, on the William States Lee III Nuclear Station, Units 1 and 2 combined application license review schedule (Jan. 5, 2010), available at <http://www.nrc.gov/reactors/new-reactors/col/lee/documents/nrc-2010.html> (follow the "01/05/10" hyperlink).

212. PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant), No. 52-039-COL, 2009 N.R.C. Lexis 79, at *1 (Aug. 10, 2009) (slip op.). At a summary level, the contentions raised by the parties were: (1) high level radioactive waste generated by PPL at Bell Bend; (2) low level radioactive nuclear waste generated by PPL at Bell Bend; (3) health and safety impacts of an act of terrorism; (4) lack of certification for the Applicant's chosen reactor type; (5) & (6) the Applicant lacks sufficient funds for decommissioning; (7) failure to demonstrate the means to store Class B and C wastes beyond the life of the planned facility; (8) foreign ownership or control by Bell Bend participant UniStar; and (9) flawed assumptions in the Application of the socio economic impacts of the planned facility. *Id.* at *31, *40, *47, *50-51, *55, *64, *71, *76, *83-84.

Epstein, he claimed standing based on the location of his commute to work, and to “meetings at offsite locations [that bring him within] the 50-mile proximity zone for substantial periods of time.”²¹³ On August 10, 2009, an Atomic Safety and Licensing Board (ASLB) granted Stilp/TRU standing; however, the ASLB denied Epstein standing, and denied both the Stilp/TRU and Epstein petitions to intervene, as the former had no admissible contentions.

Epstein was denied standing notwithstanding his claims to having “a significant pattern of regular contacts within the [50]-mile radius around the plant,”²¹⁴ and this pattern having been found to be of sufficient “duration to establish his injury in fact” to establish standing in other NRC proceedings. All nine contentions were dismissed, as well as the petitions to intervene.²¹⁵ Following Epstein’s appeal to the Commission, the Commission upheld the denial of standing for Epstein (notwithstanding the fact that he was found to have standing in other NRC proceedings), and declined to rule on Epstein’s appeal of a contention as a result of it being rendered moot by its ruling on Epstein’s lack of standing.²¹⁶

2. Bellefonte Nuclear Station, Units 3 and 4

In 2008, three organizations, Bellefonte Efficiency and Sustainability Team, the Blue Ridge Environmental Defense League, and the Southern Alliance for Clean Energy petitioned to intervene in the Bellefonte COL proceeding. Ultimately the ASLB admitted two contentions pertaining to the disposal of low-level radioactive waste and the Board suggested that the Commission consider instituting “a low-level waste confidence rulemaking” proceeding.²¹⁷ On review, the Commission reversed the ASLB’s admission of both contentions and declined to accept the ASLB’s rulemaking suggestion.²¹⁸ The ASLB’s rulings admitted two other contentions – one concerning aquatic resources, and one concerned construction cost estimates – but these were not considered in the Commission’s review.

While the NRC’s COL application review will be halted short of issuing an environmental impact study for Units 3 and 4 at Bellefonte (while awaiting TVA’s decision whether it will pursue completion of Units 1 and 2 or development of this project), the NRC has issued a generic ruling on this docket as well as on the docket for William States Lee III, Units 1 and 2 (Lee) as a result of common contentions being raised in both proceedings. In this ruling the Commission considered contentions related to environmental impacts relevant to greenhouse gas emissions referred to it by two separate ASLBs, recognizing the issue would likely be raised in other COL proceedings.

213. *Id.* at *18.

214. *Id.* at *21-22 (citing PPL Susquehanna L.L.C. (Susquehanna Steam Elec. Station, Units 1 & 2), LBP-07-10, 66 N.R.C. 1, 21 (2007)).

215. *Id.* at *23.

216. PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant), No. 52-039-COL, Nuclear Reg. Rep. P 31,610, 2010 WL 87744 (N.R.C.), at *1 (Jan. 7, 2010).

217. Tenn. Valley Auth., Nos. 52-014-COL & 52-015-COL, 68 N.R.C. 361, 2008 WL 7445675 (N.R.C.), at *361 (Sept. 12, 2008).

218. Tenn. Valley Auth., Nos. 52-014-COL & 52-015-COL, 69 N.R.C. 68, 2009 WL 406793 (N.R.C.), at *68 (N.R.C. Feb. 17, 2009).

Specifically, the claims raised in Bellefonte were alleged omissions by the Applicant to address (1) an analysis of the emission of “greenhouse gases . . . in the process of the production of raw materials and components, [and] the transportation of these materials and components and the [construction] processes required to build [Bellefonte 3 and 4;]” and (2) “[an analysis] of greenhouse gas emissions associated with each step in the uranium fuel [cycle],” including reprocessing.²¹⁹

Both the Bellefonte and Lee ASLBs rejected the proposed “carbon footprint” contentions on the ground that the petitioners failed to satisfy the contention admissibility requirements with respect to those contentions. The Commission’s ruling did not review the specific contentions; rather, the Commission provided generic guidance should similar contentions be raised in other proceedings. The Commission observed that the NRC staff is continuing its development of guidance regarding greenhouse gas impact analyses.²²⁰ The Commission instructed the staff to ensure its analysis of greenhouse gas impact covers emissions from the uranium fuel cycle as well as the facility being licensed and comports with the requirements of the National Environmental Policy Act. The Commission concluded by directing the NRC staff to update its guidance documents as necessary in light of the findings from its analysis.²²¹

3. Calvert Cliffs, Unit 3

Four separate groups petitioned to intervene in the Calvert Cliffs, Unit 3 proceeding. In ASLB proceedings in early 2009, all four groups were found to have standing,²²² and the ASLB assigned to the matter admitted a total of three contentions (two as modified by the Board itself).²²³ The ASLB asked to be briefed immediately on a contention related to the proper timing of when an applicant must demonstrate that its parent company guarantees provide adequate assurance of decommissioning funding capability.²²⁴ The Board found the Applicants demonstrated that, as a result of correspondence submitted in 2007, it had already provided information demonstrating the adequacy of parent

219. Duke Energy Carolinas, L.L.C., Nos. 52-018 & 52-019-COL, 68 N.R.C. 431, 2008 WL 7439305 (N.R.C.), at *431 (Sept. 22, 2008).

220. NUCLEAR REGULATORY COMM’N, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE COMBINED LICENSE (COL) FOR NORTH ANNA POWER STATION UNIT 3, § 5.11 (2008), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1917/#pubinfo> (follow the “NUREG-1917-Draft Report for Comment” hyperlink) (Global Warming, Climate Change, and Greenhouse Gas Impacts).

221. Duke Energy Carolinas, L.L.C. (Combined License Application for William States Lee III Nuclear Station, Units 1 & 2), Nos. 52-018-COL & 52-019-COL, Nuclear Reg. Rep. P 31601 (N.R.C.), 2009 WL 3659545 (N.R.C.), at *1 (N.R.C. Nov. 3, 2009).

222. Members of each group live and/or work within fifty miles of the proposed facility, which meets the “presumption” for having standing. Calvert Cliffs 3 Nuclear Project, L.L.C., No. 52-016-COL, 69 N.R.C. 170, 2009 WL 1492096 (N.R.C.), at *170 (Mar. 24, 2009).

223. *Id.* at 175. The contentions as admitted by the ASLB are: (1) whether the facility will be owned, dominated or controlled by foreign interests; (2) whether the applicant has provided sufficient parent company guarantees to provide adequate assurance of decommissioning funding capability and when such a showing is required; and (3) whether the application has adequately addressed long-term storage of radioactive wastes (other than spent fuel, licensing of a low level waste deposit site and greater than Class C waste); *Id.* at 190, 196, 201. The latter two contentions were narrowed by the board.

224. *Id.* at 200-201.

company guarantees for decommissioning funding, which rendered that contention moot.²²⁵

The co-applicants, Calvert Cliffs 3 Nuclear Project, L.L.C. and UniStar Nuclear Operating Services, L.L.C.,²²⁶ appealed to the Commission the Board's decisions to find the intervenors had standing, and to admit the remaining two contentions. The Commission left undisturbed the Board's decision regarding standing for the four organizations. They then affirmed the admission of the two remaining contentions.²²⁷ Intervenors had argued, given the ownership interests in the co-applicants by Electricite de France, the facility was more than 50% controlled by foreign interests. The Commission found that, with respect to foreign ownership or control, there is no absolute test of what percentage of a facility is foreign owned that serves as a litmus test for foreign ownership or control. Rather, several factors must be considered, including,

- (1) the extent of the proposed partial ownership of the reactor;
- (2) whether the applicant is seeking authority to operate the reactor;
- (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;
- (4) whether the applicant would have any access to restricted data; and
- (5) details concerning ownership of the foreign parent company.²²⁸

The Commission declined to disturb the Board's finding that a material dispute exists regarding whether there are adequate safeguards to prevent foreign ownership or control of the facility. Regarding the other contention, whether the environmental report adequately addresses long-term storage or radioactive waste, the Commission noted the Board had narrowed the original contention to require consideration of potential impacts from long-term low level waste storage in the environmental report sufficient to satisfy the National Environmental Policy Act (NEPA). As the co-applicants' environmental report does not discuss a plan to transfer the wastes to a particular treatment facility, the Commission considered it a potential error by omission by the co-applicants and let stand the contention (as narrowed by the Board).²²⁹

4. Comanche Peak, Units 3 and 4

On August 6, 2009, an ASLB granted the hearing request of intervenors, comprised of three groups and one State official,²³⁰ admitting two of intervenors'

225. *Id.* at 205-210.

226. As described in the Calvert Cliffs 3 COL application, Calvert Cliffs 3 Nuclear Project, L.L.C., is an indirect subsidiary of UniStar Nuclear Energy, L.L.C. UniStar Nuclear Energy, L.L.C., in turn, is owned by Constellation New Nuclear, L.L.C., and EDF Development, Inc. Constellation New Nuclear, L.L.C., is part of Constellation Energy Group, Inc., while EDF Development, Inc. is an indirect subsidiary of Electricite de France, SA. UniStar Nuclear Operating Services, L.L.C., similarly is an in-direct subsidiary of UniStar Nuclear Energy, L.L.C. U.S. NUCLEAR REGULATORY COMM'N, Combined License Application Documents for Calvert Cliff, Unit 3 Application, at Rev. 6 pt. 1 (2009), available at <http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs/documents.html#application> (follow the "Rev. 6" hyperlink).

227. Calvert Cliffs 3 Nuclear Project, L.L.C., No. 52-016-COL, Nuclear Reg. Rep. P 31600 (N.R.C.), 2009 WL 3297553 (N.R.C.) (Oct. 13, 2009).

228. *Id.* at *6 (citing NRC policy stated in Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999)).

229. *Id.*

230. Luminant Generation Co., No. 52-034-COL & 52-035-COL, slip. op. at 8 (N.R.C. Aug. 6, 2009). The intervenors are Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and State Representative Lon Burnam. Previously, in a request that was rejected by the

nineteen contentions and reserving ruling on a third.²³¹ The ASLB reconsidered its ruling on this “reserved” contention and, in light of the Applicant filing supplemental information, the Board ruled that the contention was moot.²³² After obtaining access under a protective order to sensitive unclassified non-safeguards information (SUNSI), Intervenors filed five additional contentions, but those were rejected in the same proceeding. However, the Board ruled that Intervenors would have the opportunity to file additional contentions once they were granted access under a protective order to an NRC staff guidance document which was also protected from public disclosure as SUNSI material.²³³ The Board said it may not have made the same ruling with “potential parties” to a proceeding, but in light of the fact that the Intervenors were parties admitted to the proceeding and had admitted contentions, the Board ruled it appropriate to provide Intervenors access to the guidance document. The Board noted that it would only consider late filed contentions if they were filed with supporting information clearly demonstrating that they could not have been filed absent having access to information in the NRC guidance document.²³⁴ The NRC staff appealed the Board’s decision granting access to the NRC staff guidance document to the Commission.

After submitting application updates to address the two admitted contentions, the Board dismissed one of the original admitted contentions that addressed the impacts of a severe radiological accident at one unit on operation of the other units also located at the site.²³⁵ The Board also rejected several proposed new contentions that sought to challenge the Applicant’s new evaluation of the issue.²³⁶ However, the Board refused to completely dismiss the second original admitted contention, which addressed the consideration of alternative energy generation sources, and this narrowed contention remains for further review before the ASLB.²³⁷

5. Fermi, Unit 3

Five groups and several individuals sought to intervene in the Fermi Unit 3 COL proceeding.²³⁸ The Board found the intervening parties had standing and

Commission, the then prospective-Intervenors had asked that the Commission to stay the COL application adjudication and hold it in abeyance pending completion of the design certification rulemaking for the US-APWR. Luminant Generation Co., (Comanche Peak Nuclear Power Plant, Units 3 & 4) Nos. 52-034-COL & 52-035-COL, at 1 (N.R.C. Apr. 27, 2009) (Commission order denying stay).

231. Luminant Generation Co., No. 52-034-COL, slip. op. at 84-85 (N.R.C. Aug. 6, 2009). The contention for which the Board reserved its ruling was a claim that the Applicant’s COL application is incomplete because it fails to include a description and plans for implementation of the guidance strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities with the loss of large areas of the plant due to explosions and/or fires as required by 10 CFR 50.54(hh)(2). *Id.*

232. Luminant Generation Co., No. 52-034-COL, slip. op., at 10 (N.R.C. Mar. 11, 2010).

233. *Id.* at 13. See also NUCLEAR REGULATORY COMM’N, *Interim Staff Guidance DC/COL-ISG-016, – Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d)* (Oct. 2009), available at <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf>.

234. Luminant Generation Co., No. 52-034-COL, slip. op. at 16-17 (N.R.C. Mar. 11, 2010).

235. Luminant Generation Co., No. 52-034-COL & 52-035-COL, slip op. (N.R.C. June 25, 2010).

236. *Id.* at 24, 28, 31, 34 & 37.

237. *Id.* at 44.

238. The groups seeking to intervene were Beyond Nuclear, Citizens for Alternatives to Chemical Contamination (CACC), Citizens Environmental Alliance of Southwestern Ontario (CEASO), Don’t Waste

granted hearings on four of the contentions (one narrowed and two partially admitted) raised by Interveners.²³⁹ The Applicant has continued to supplement its application and sought dismissal of contentions it considers rendered moot by the supplemented record.²⁴⁰

6. Levy County, Units 1 and 2

Three entities²⁴¹ challenged Progress Energy Florida's (PEF's) application, and successfully intervened in the Levy County license proceeding. In a ruling issued in July 2009, the ASLB admitted (or partially admitted) three contentions raised by Interveners.²⁴² On appeal the Commission affirmed admission of one contention and affirmed in part and reversed in part admission of the remaining two contentions.²⁴³ The Commission found that admission of portions of contentions related to Greater Than Class C waste were inadmissible because it is part of a licensee's spent fuel, and that is outside of the scope of the licensing proceeding for a new commercial nuclear power facility.

7. North Anna, Unit 3

In an initial hearing on a petition to intervene in 2008, one petitioner group was found to have standing, and an admissible contention, and the North Carolina Utilities Commission was permitted to participate as a non-party

Michigan (DWM), and the Sierra Club. Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), No. 52-033 (N.R.C.) (Dec. 14, 2009).

239. *Id.* The contentions as admitted were (1) failure of the Applicant to address environmental impacts of the 'low-level' radioactive waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment; (2) omissions exist related to site hydrology, radionuclide transport, including measurements of distribution coefficients, retardation factors, and porosity, and modeled concentrations of a number of radionuclides calculated at potential exposure locations exceed effluent concentration limits and on-site measurements demonstrating compliance with regulations are absent; (3) omissions exist related to environmental impacts to (algae blooms in) Lake Erie's Western Basin and Maumee River/Maumee Bay; and (4) omissions from and errors in the analysis required by 10 C.F.R. § 51.45(b) and (e) and NEPA regarding impacts and alternatives for threats to the eastern fox snake, a species listed as threatened by the Michigan Department of Natural Resources, and to consider alternatives that would reduce or eliminate those impacts. *Id.* at 252, 269, 275, 285.

240. *See also* Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), No. 52-033-CLO, Nuclear Reg. Rep. P 31,602, 2009 WL 4016483 (N.R.C.), at *1 (Nov. 17, 2009) (memorandum and order).

241. Interveners were Nuclear Information and Resource Service (NIRS), The Ecology Party of Florida (EPF), and the Green Party of Florida (GPF). Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), Nos. 52-029-COL & 52-030-COL, 70 N.R.C. 51 (2009), 2009 NRC LEXIS 65.

242. The contentions as admitted were: (1) failure adequately address (and underestimate) impacts from plant construction and operation from dewatering on the Outstanding Florida Waters, from cooling towers affecting the salt drift (salt water-fresh water interface) and impacts and mitigation of impacts on listed species; (2) & (3) two contentions (one related to the environmental report and the other related to the safety report) alleging failure to adequately analyze keeping low-level radioactive waste including Greater than Class C (GTCC) waste on site for extended periods in light of closure of the operating repository. *Id.* at *83-84, *116-17. The ASLB also referred to the Commission consideration of whether having another nuclear facility, Crystal River, within ten miles of the proposed facility is adequately addressed in the emergency plans for a proposed facility. *Id.* at *106.

243. Progress Energy Fla., Inc. (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), Nos. 52-029-CLO & 52-30-CLO, Nuclear Reg. Rep. P 31,605, 2010 WL 87737 (N.R.C.), at *1 (Jan. 7, 2010) (memorandum and order).

interested State.²⁴⁴ In light of the fact that Dominion has selected a different reactor technology,²⁴⁵ and must submit new COL application sections (significantly amending the existing application) for the new reactor technology, there will be other opportunities for intervention in the COL process. Since the North Anna site was previously granted an early site permit (ESP),²⁴⁶ generally only significant environmental issues not resolved in the ESP proceeding, or environmental issues involving the impacts of construction and operation of the facility that were resolved in the ESP proceeding, but for which significant new information has been identified, are admissible in any future COL proceeding.²⁴⁷

8. Shearon Harris, Units 2 and 3

In 2008, two petitioners were admitted to the Shearon Harris COL application review proceeding. One of the petitioners raised an admissible contention related to the fact that the AP 1000 design and safety systems had not been given final NRC approval.²⁴⁸ The Applicant appealed the ASLB's finding to the Commission claiming that NC WARN, with a general allegation about the incomplete state of the certified design referenced for the application, and the fact that safety information was omitted or incomplete, fails to meet the standard for admissibility for the contention.²⁴⁹ The Commission agreed with the Applicant (and NRC staff) and remanded the contention to the ASLB for further consideration.²⁵⁰ The Board ultimately denied admission of NC WARN's contention, leading to dismissal of NC WARN's petition to intervene.²⁵¹ NC

244. The Petitioner is Blue Ridge Environmental Defense League (BREDL), and its Virginia-based chapter, People's Alliance for Clean Energy (PACE), and the admitted contention is an error of omission of safety information, related to the closure of the Barnwell facility and failure to consider long-term on-site storage of radioactive waste, from the Applicant's Final Safety Analysis Report. Virginia Elec. & Power Co., No. 52-017-COL, 68 N.R.C. 294, 2008 WL 6155058 (N.R.C.), at *294 (Aug. 15, 2008).

245. *Id.* at 338.

246. Order Approving Transfer of Early Site Permit, 73 Fed. Reg. 65,889 (Nov. 5, 2008).

247. Virginia Elec. & Power Co., No. 52-017-COL, 68 N.R.C. 294, 2008 WL 6155058 (N.R.C.), at *294; *see also* 10 C.F.R. § 52.39(c)(iv).

248. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant Units 2 and 3), Nos. 52-022-CLO & 52-023-CLO, 68 N.R.C. 1, 2008 WL 2853228 (N.R.C.), at *1 (July 23, 2008). North Carolina Waste Awareness and Reduction Network (NC WARN) initially unsuccessfully sought to halt the COL review proceeding with discovery demands and demands that the AP 1000 design be certified before the review could go forward. *See also*, Progress Energy Carolinas, Inc., Nos. 52-022-COL & 52-023-COL, 68 N.R.C. 544, 2008 WL 6653357 (N.R.C.), at *554 (Oct. 30, 2008). Later that year an ASLB issued an opinion finding NC WARN has standing to intervene and finding it raised one "admissible contention" – again related to the fact that the AP 1000 design had not been certified in its final form and cannot be reviewed in its final form. Two state regulatory bodies, the South Carolina Office of Regulatory Staff and the North Carolina Utilities Commission, were also granted standing to participate as interested governmental bodies. *Id.*

249. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant Units 2 and 3), Nos. 52-022-CLO & 52-023-CLO, Nuclear Reg. Rep. P 31,588, 2009 WL 1393857 (N.R.C.), at *1 (May 18, 2009). The ASLB was directed to not only consider whether the contention might be admissible but also whether the contention raised issues that the NRC staff should address in the AP 1000 design certification rulemaking proceeding, rather than the Shearon Harris Nuclear Power Plant Units 2 and 3 COL proceeding.

250. *Id.*

251. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant Units 2 and 3), 69 N.R.C. 736, 746, 2009 WL 6700323 (N.R.C.), at *736 (June 30, 2009).

WARN's subsequent appeal to the Commission of virtually every prior Board and Commission decision in the proceeding was also denied.²⁵²

9. South Texas Project, Units 3 and 4

Three organizations timely filed petitions to intervene, and were granted standing, in the South Texas Project COL proceeding.²⁵³ Upon initial review, the ASLB admitted five contentions as it continued to consider others.²⁵⁴ Intervenors sought and, following ASLB review and entering a protective order, were granted access to Sensitive Unclassified Non-Safeguards Information (SUNSI) material referenced in the COL application. In response to intervenors' motion with respect to a document to which NRC staff denied them access, the Board saw the NRC's obligations under the Freedom of Information Act,²⁵⁵ as compelling the NRC staff to make available SUNSI information to intervenors who have demonstrated standing in a proceeding without having to also demonstrate a need to know.²⁵⁶ The Board concluded that, while there is a clear exception to having to disclose information classified as "Safeguards Information," the same protection from public disclosure is not afforded for SUNSI material, particularly when information segregable from that which is exempted may be made available, and when access may be granted under a protective order.²⁵⁷ While the Board dismissed the last seven contentions, it said it would allow intervenors to file additional contentions if additional issues were identified once intervenors had a chance to review the report to which they were previously denied access.²⁵⁸

10. Virgil C. Summer, Units 2 and 3

As a result of an ASLB ruling, initial attempts to intervene in the V.C. Summer COL proceeding were denied.²⁵⁹ In addition to not finding an admissible contention, the Board ruled that only one petitioner, Sierra Club, demonstrated that it had standing to intervene. On review by the Commission,

252. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant Units 2 & 3), Nos. 52-022-CLO & 52-023-CLO, Nuclear Reg. Rep. P31,612, 2010 WL 942151 (N.R.C.), at *1, (Mar. 11, 2010).

253. Parties found to have standing are Sustainable Energy and Economic Development Coalition (SEED), the South Texas Association for Responsible Energy, and Public Citizen. S. Tex. Project Nuclear Operating Co. (South Texas project, Units 3 and 4), 2009 NRC LEXIS 99 (Aug. 27, 2009).

254. S. Tex. Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), LBP-09-21, slip op. at 60-61 (N.R.C. Aug. 27, 2009) (admitting Intervenors as parties to the proceeding and ruling on nineteen of twenty-eight proposed contentions); S. Tex. Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), LBP-09-25, slip. op. at 31 (N.R.C. Sept. 29, 2009) (ruling on the remaining nine contentions). "The five admitted contentions are Contentions 8" (failure to analyze radiological hazards that will occur from operation of the STP Units 3 and 4 units from discharge of water that contains radioactive particulates to the Main Cooling Reservoir), "9" (failure to predict or evaluate the effects of increasing groundwater tritium concentrations), "14" (failure to analyze unregulated discharge path), "16" (underestimating the predicted effect of the proposed expansion on groundwater availability to wells on adjacent property), "and 21" (failure to address impacts from severe radiological accident scenarios on the operation of other units at the STP site).

255. 5 U.S.C. § 552(b)(9) (2009).

256. S. Tex. Project Nuclear Operating Co. (South Texas Project, Units 3 & 4), LBP-10-02, slip op. at 5 (N.R.C. Jan. 29, 2010).

257. *Id.* at 5, 9-11.

258. *Id.* at 19.

259. S.C. Electric & Gas Co., 69 N.R.C. 87, 2009 WL 3340129 (N.R.C.), at *87 (Feb. 18, 2009).

however, the Board's decision was affirmed in part and reversed in part.²⁶⁰ The Commission found the ASLB had erred in not finding that FOE also had standing, as its petition to intervene was supported with affidavits of people living within 50 miles of the proposed facility.²⁶¹ In addition, the Commission found that the Board erred in rejecting a contention based on the Applicants' failure to consider demand side management as an alternative to building the plant.²⁶²

11. Vogtle, Units 3 and 4

Southern Nuclear Operating Company separately sought an early site program (ESP) for the Vogtle site and approval of two AP 1000 reactors for that site.²⁶³ In 2009, in two separate rulings ASLBs found five groups had standing to intervene and they presented one admissible safety, and three environmental contentions that merited further consideration.²⁶⁴ Following hearings on the admitted environmental contentions the ASLB ultimately decided to dismiss those contentions.²⁶⁵ The Commission, on one hand, declined to disturb admission of the safety contention and, on the other hand, declined to disturb the Board's decision to dismiss the environmental contentions.²⁶⁶

260. S.C. Electric and Gas Co., CLI-10-01 (N.R.C. Jan. 7, 2009) (memorandum and order), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/orders/2010/> (follow the "CLI-10-01" hyperlink).

261. *Id.*

262. *Id.*

263. S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Nos. 52-011-ESP, 65 N.R.C. 237, 2007 WL 21953473 (N.R.C.), at *246 (Mar. 12, 2007).

264. S. Nuclear Operating Co., Nos. 52-025-CLO & 52-026-CLO, 69 N.R.C. 139, 2009 WL 3812209 (N.R.C.), at *139 (Mar. 5, 2009) (finding five intervenors with standing and admitting one contention, regarding whether the application has adequately addressed long-term storage of radioactive wastes (other than spent fuel, licensing of a low level waste disposal site and greater than Class C waste - see similar contention in *Calvert Cliffs 3*, *supra* note 227)); S. Nuclear Operating Co., No. 52-011-ESP, 65 NRC 237, 2007 WL 2195473 (N.R.C.), at *237 (Mar. 12, 2007) (collectively admitting three environmental contentions related to failure to address impacts of cooling system intakes and discharges on aquatic resources; affects of dry cooling system on biological resources; and impacts of dredging on navigation along the Savannah River).

265. S. Nuclear Operating Co., No. 52-011-ESP, 69 N.R.C. 613, 2009 WL 6700322 (N.R.C.), at *613 (June 22, 2009).

266. S. Nuclear Operating Co., Nos. 52-025-CLO & 52-026-CLO, Nuclear Reg. Rep. P 31,596, 2009 WL 2383011 (N.R.C.), at *1 (July 31, 2009); S. Nuclear Operating Co., No. 52-011-ESP, Nuclear Reg. Rep. P 31,608, 2009 WL 5246219 (N.R.C.), at *1 (Jan. 7, 2009).

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