

American Bar Association

Section of Public Utility, Communications,  
and Transportation Law

Report of

## **NUCLEAR ENERGY COMMITTEE**

2010 Fall Council Meeting

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## **EXECUTIVE SUMMARY**<sup>1</sup>

On the legislative front, there were several bills that offered incentives for additional research and development in nuclear power. Senator Richard Burr introduced a bill that would establish an expedited procedure for the issuance of a Combined License (“COL”), and a bill by Senator George Voinovich proposed to eliminate the mandatory hearing for uncontested nuclear licensing proceedings. In addition, several bills encouraged investments in new technology for the advancement of nuclear power reactors and small modular reactors. The United States Nuclear Fuel Management Corporation Establishment Act of 2010 would create a corporation to provide for the management of spent nuclear fuel (“SNF”) and related products and services. An appropriations bill for energy and water development allocated \$1,053,483,000 for the necessary expenses of the Nuclear Regulatory Commission (“NRC” or “Commission”).

On the judicial front, the Court of Federal Claims issued several opinions regarding the Department of Energy’s (“DOE”) breach of the Standard Contract regarding its obligation to dispose of SNF under the Nuclear Waste Policy Act (“NWPA”), including two opinions where the Court assessed damages as between buyer and seller where the nuclear facility in question has been sold. In a noteworthy opinion under the Price-Anderson Act (“PAA”), the Court of Appeals for the Tenth Circuit vacated a judgment in favor of the plaintiff class of property owners totaling approximately \$926 million. The Court of Appeals for the Sixth Circuit affirmed the convictions of two former Davis-Besse employees on three counts each arising from false information in documents submitted to the NRC. Two opinions from the South Carolina Supreme Court have implications for new plant development. In the first, the Court found the state Public Service Commission had overstepped its bounds, and that a utility cannot charge its ratepayers to fund unexpected increases in the cost of constructing new nuclear reactors. In a companion case, the Court found that substantial evidence supported findings that nuclear was the least costly alternative source of energy and that a need for the new nuclear facility had been established.

On the administrative front, the NRC has completed and proposed several new rulemaking efforts. The NRC has published a final rule which authorizes the imposition of federal criminal

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<sup>1</sup> Chad A. Pilcher, Millicent W. Ronnlund and Derek Brice, associates at Balch & Bingham LLP, contributed to the Legislative and Judicial sections, and Tyson R. Smith, Emily J. Duncan and Rachel Miras-Wilson, associates at Winston & Strawn LLP, contributed to the Administrative section of this report.

penalties for the unauthorized introduction of weapons into regulated facilities. The NRC has proposed a rule implementing the firearms guidelines associated with the NRC's new authority to authorize security personnel to possess and use enhanced weapons. The NRC has also approved an NRC Staff proposal to amend its security regulations pertaining to the transport of SNF. Additionally, the NRC issued for comment a draft safety culture policy statement stressing the equal importance of safety and security within the overarching safety culture. The NRC Staff is expected to send the Commission its recommendations for a final safety culture policy by the end of January 2010. The Commission has also ordered NRC Staff to complete a plan for reviewing the safety of small modular reactors by March 2010.

Recent adjudicatory activity has focused on new power reactors and power reactor license renewal. The NRC is currently reviewing eighteen applications for new reactors and fifteen license renewal applications. In addition, the NRC licensed Louisiana Energy Service's uranium enrichment plant and Areva secured a DOE loan guarantee for its proposed uranium enrichment facility. Finally, DOE has filed a motion to withdraw its application for the Yucca Mountain repository and the NRC is involved in a variety of initiatives regarding long-term solutions for managing nuclear waste in the United States.

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## **I. LEGISLATIVE**

### **A. Nuclear Development**

#### **1. Next Generation Security Act of 2010**

On June 24, 2010, Senator Richard Burr (R-NC) introduced the “Next Generation Energy Security Act of 2010” (S. 3535), and the bill was referred to the Senate Committee on Finance. S. 3535 requires the NRC to establish an expedited procedure for issuing combined licenses for new nuclear reactors. In order to qualify for the expedited procedure, the applicant must be an existing nuclear power plant owner or operator as of the date of the application, have a substantial record of safe operation, and be in good standing with the NRC. In addition, the applicant must apply for the construction of a nuclear reactor based upon a design approved by the Commission, construct the reactor on a site at which an operating nuclear power plant exists and where an ESP has been granted, submit a COL application to the NRC, demonstrate sufficient financial commitment to the project and preparedness to proceed once the COL is issued, and establish that there exists broad local public support for the project.

The bill authorizes the Secretary of Energy to enter into contracts to provide regulatory risk insurance for up to twelve nuclear reactors, rather than the current six nuclear reactors. For reactors that receive combined licenses and upon which construction begins, the Secretary of Energy is directed to pay the full amount of covered delay costs (that occur after the initial 30-day period of covered delay) up to \$500 million per reactor. S. 3535 increases funding for the loan guarantee program, reduces the accelerated depreciation period for new nuclear power plants to five years, and provides a ten percent investment tax credit for certain expenditures for the construction of nuclear power facilities. The bill also amends the IRS Code to make nuclear power facilities eligible for the qualifying advanced energy project credit and allows the allocation of credit to private partnerships with public power.

S. 3535 directs the Secretary of Energy to begin construction of a spent fuel recycling research and development facility to serve as the lead site for continuing research and development of advanced nuclear fuel cycles and separation technologies. The bill also provides tax credits on a percentage of wages for any employer who operates a commercial nuclear power plant and employs certain qualified workers. Finally, the bill authorizes the Secretary of Energy to commit funds (in consultation with nuclear energy entities and organized labor) to expand workforce training to meet the high demand for workers skilled in nuclear power plant construction and operation.

#### **2. Enabling the Nuclear Renaissance Act**

On July 20, 2010, Senator George Voinovich (R-OH) introduced the “Enabling the Nuclear Renaissance Act” (S. 3618), and the bill was referred to the Senate Committee on Finance. The bill seeks to further enable a nuclear renaissance in the United States in order to improve energy security, reduce future pollution and greenhouse gas emissions, provide large, reliable sources of electricity, and create high-quality jobs.

Under S. 3618, nuclear energy would be considered a form of clean energy for the purposes of federal law. The bill offers incentives for the financing of the development of new nuclear

power facilities. Those incentives include a five-year accelerated depreciation period for new nuclear power plants, construction tax credits, the inclusion of nuclear power facilities in advanced energy project tax credits, and grants for qualified nuclear power facility expenditures in lieu of tax credits. The bill also proposes procedures for the development and licensing of small modular reactors.

S. 3618 would eliminate the mandatory hearing for uncontested nuclear licensing proceedings. In addition, any environmental impact statement (“EIS”) prepared by the Commission in a COL proceeding for a site for which an ESP has been issued would be prepared as supplement to the EIS that was prepared for the ESP. That supplemental EIS would then incorporate by reference the analysis, findings, and conclusions from the ESP EIS, and conclusions on matters resolved in the ESP proceeding would only address information that is new and significant to the extent that it would materially change the prior findings or conclusions.

### **3. Incentives for Energy Efficiency and Small Reactors**

Several bills were introduced that encourage additional research and the development of more efficient technology by offering incentives for the further development of nuclear power. On July 28, 2010, Representative Bart Gordon (D-TN), introduced the “Nuclear Energy Research and Development Act of 2010” (H.R. 5866), and the bill was referred to the House Committee on Science and Technology. H.R. 5866 requires the Secretary of Energy to carry out initiatives to advance innovation in nuclear energy technologies in order to make nuclear energy systems more competitive and to increase efficiency and safety of civilian nuclear power.

H.R. 5866 encourages research and development that will examine advanced reactor designs and nuclear technologies that are economically competitive with other electric power generation plans and have higher efficiency, lower cost, and improved safety over the nuclear reactors currently in operation. The bill also creates a small modular reactor program to promote the commercial development of small modular reactors. In addition, the bill proposes the development of a facility where a prototype nuclear reactor and associated plant would be constructed through an open and transparent competitive selection process.

On July 28, 2010, Representative Devin Nunes (R-CA) introduced H.R. 5899, “Roadmap for America’s Energy Future,” and the bill was referred to a number of House Committees. H.R. 5899 encourages the NRC to issue operating permits for 200 new commercial nuclear reactors by 2040 and to continue to pursue the approval of the license application for the Yucca Mountain repository. The bill seeks to use available appropriated funds to develop, construct, and operate a facility for the recycling of SNF, and directs the NRC to complete a rulemaking to establish a process for the licensing of SNF recycling facilities.

Representative Jason Altmire (D-PA) introduced the “Nuclear Energy Research Initiative Improvement Act of 2010” (H.R. 5163) on April 28, 2010, and the bill was referred to the House Committee on Science and Technology. H.R. 5163 directs the Secretary of Energy to conduct research to lower the cost of nuclear reactor systems and to develop and publish a schedule on the DOE website that outlines a five-year strategy to effectively lower the costs. The areas in which the research will focus include modular and small-scale reactors, balance of plant issues, cost-efficient manufacturing and construction, licensing issues, and enhanced proliferation controls.

Representative Altmire also introduced the “Nuclear Power 2021 Act” (H.R. 5164) on April 30, 2010, and the bill was referred to the House Committee on Energy and Commerce and the House Committee on Science and Technology. The bill instructs the Secretary of Energy to establish cooperative agreements with private sector partners to develop a standard design for two small modular reactors (one must have a rated capacity of not more than 50 megawatts), obtain a design certification from the NRC for each of the designs by January 1, 2018, and demonstrate the licensing of small modular reactors by developing applications for a combined license for each of the designs.

On June 9, 2010, Senator Dick Lugar (R-IN) introduced the “Practical Energy and Climate Plan of 2010” (S. 3464), and the bill was referred to the Senate Committee on Finance. The bill aims to establish an energy and climate policy framework in order to reach measurable gains in reducing dependence on foreign oil, saving Americans money, improving energy security, and cutting greenhouse gas emissions. Specifically, it provides an additional \$360,000,000 in funding for loan guarantees for advanced nuclear facilities.

## **B. Nuclear Waste**

### **1. SNF Management**

On May 6, 2010, Senator George Voinovich (R-OH) introduced the “United States Nuclear Fuel Management Corporation Establishment Act of 2010” (S. 3322), and Representative Fred Upton (R-MI) introduced the companion bill (H.R. 5979) in the House of Representatives. S. 3322 was referred to the Senate Committee on Environment and Public Works, and H.R. 5979 was referred to the House Committee on Energy and Commerce and the Committee on the Budget. The bills establish the United States Nuclear Fuel Management Corporation, which would enter into contracts on behalf of the United States to provide SNF management and related products and services. This organization would implement integrated programs for the management of SNF that are consistent with federal policy and assume responsibility for the activities, obligations, and use of the resources of the federal government with respect to SNF management.

### **2. Yucca Mountain**

On July 20, 2010, Representative Gary Peters (D-MI) introduced the “Reduce and End our Deficits Using Commonsense Eliminations in the Energy Program Act of 2010” (H.R. 5780), and the bill was referred to a number of House Committees. The bill instructs the Secretary of Energy to discontinue the application before the NRC for a license to construct a high-level nuclear waste geologic repository at Yucca Mountain.

## **C. Uranium**

On April 20, 2010, Senator John Barrasso (R-WY) introduced the “Surplus Uranium Disposition Act of 2010” (S. 3233), and Representative Cynthia Lummis (R-WY) introduced a companion bill (H.R. 5068) in the House of Representatives. S. 3233 was referred to the Senate Committee on Energy and Natural Resources, and H.R. 5068 was referred to the House Committee on Energy and Commerce. The bills authorize the Secretary of Energy to barter, transfer, or sell uranium at fair market value to eligible entities on a first come, first serve basis. In order to obtain

uranium under this Act, an entity must obtain a COL for a reactor approved by the NRC and possess a license from the NRC.

#### **D. Appropriations**

On July 22, 2010, Senator Byron Dorgan (D-ND) introduced the “Energy and Water Development and Related Agencies Appropriations Act, 2011” (S. 3635). The bill was sent to the Committee on Appropriations and placed on the Senate Legislative Calendar under General Orders. S. 3635 makes appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2011.

The bill appropriates \$783,170,000 for DOE expenses including the purchase, construction, and acquisition of plant and capital equipment, and other expenses necessary for nuclear energy activities in carrying out the purposes of the DOE Organization Act. The bill also allocates \$550,000,000 from the Uranium Enrichment Decontamination and Decommissioning Fund for necessary expenses for uranium enrichment facility decontamination and decommissioning, remedial actions, and other activities. Under S. 3635, up to \$17 billion is made available for loan guarantees for nuclear power facilities, which shall remain available until committed.

The bill appropriates \$1,053,483,000 for the necessary expenses of the NRC in carrying out the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954.

## **II. JUDICIAL**

### **A. SNF**

Beginning in 1998, nuclear utilities began filing suits against DOE for its failure to remove SNF from reactor sites pursuant to the terms of the Standard Contract and the Nuclear Waste Policy Act (“NWPA”). The following discussion summarizes the notable aspects of each SNF decision.

#### **1. Claims Relating to Facilities After Sale**

##### **a. *Consol. Edison Co. of N.Y., Inc. v. United States*<sup>2</sup>**

On May 5, 2010, the Court of Federal Claims awarded damages to Consolidated Edison (“Con Ed”) related to Indian Point Units 1 and 2. Con Ed sold the units to Entergy in a sale that closed September 6, 2001. Con Ed claimed \$137,489,087 in damages, all of which the Government opposed, and was awarded \$448,859 for SNF studies. The Court found that Con Ed had failed to preserve its rights to assert diminution-in-value claims in the sale agreement since it had retained only claims that accrued prior to the closing date. It also failed to prove that it would have received a higher price in the absence of DOE’s breach. Similarly, Con Ed had assigned its interests in PFS to Entergy in the sale of the plant. Entergy was awarded \$106,123,527 for spent

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<sup>2</sup> *Consol. Edison Co. of N.Y., Inc. v. United States*, Nos. 03-2622C and 04-33C, 92 Fed. Cl. 466 (2010).

fuel storage costs. The Court held that Entergy was not bound by Con Ed's previously submitted Delivery Commitment Schedules which requested that allocations based on the priorities of Unit 1 fuel be used to pick up fuel from Unit 2. The Court also allowed Entergy to recover for the extra costs incurred due to the decision to place all Unit 1 spent fuel assemblies in damaged fuel canisters in order to avoid the cost of testing each assembly for failed rods.

**b. *Boston Edison Co. v. United States; Entergy Nuclear Generation Co. v. United States***<sup>3</sup>

On May 6, 2010, the Court of Federal Claims awarded Entergy \$4,224,696 in damages for the DOE's partial breach of the Standard Contract through December 31, 2008. Entergy purchased Pilgrim nuclear power station from Boston Edison on July 13, 1999. The Court awarded Entergy damages for costs associated with the purchase and installation of high-density spent fuel pool racks and for NRC fees. The Court denied Entergy's claim for cost of capital expenses because, even if the permissive *Wickham* standard was applied rather than the restrictive *England* standard, Entergy "has presented no evidence of segregated funding, specific borrowing, or increased borrowing to meet its mitigation needs." It has "failed to establish that its claimed financing costs were directly related to required borrowing through specific debt instruments." The Court also rejected the Government's claim for recoupment of the diminution-in-value damages that the Court previously awarded Boston Edison. During the previous trial which addressed Boston Edison's damages, it was determined that the \$40.03 million was contributed by Boston Edison to the decommissioning trust fund (above the fund's regulatory minimum) in order to cover post-shut-down spent fuel storage costs caused by DOE's breach. The Government in this trial claimed that recoupment of this amount would avoid double-recovery. The Court ruled that recoupment would not be granted for two reasons. First, post-shut-down SNF storage and management is a distinct injury from the pre-shut-down wet storage expansion measures which Entergy seeks compensation for in this action. Second, because the Master Trust Agreement provides that the exclusive purpose of the trust is for decommissioning, and it is too speculative to conclude that the NRC would permit the funds to be withdrawn into a sub-account for non-decommissioning related activities, Entergy cannot access the pertinent funds it received in trust from Boston Edison until the plant ceases to operate. Final judgment for the previous award to Boston Edison was entered.

**2. *Yankee Atomic Power Co. v. United States***<sup>4</sup>

On September 7, 2010, in a decision on remand, the Court of Federal Claims applied the fuel acceptance rates of the DOE's 1987 Annual Capacity Report ("ACR") as required by the Federal Circuit decision in *Yankee Atomic Electric Co. v. United States*.<sup>5</sup> The Court reiterated its earlier finding that a market for the purchase and sale of allocations would have provided Yankee with additional acceptance allocations. The Court did not credit the Government's argument that considering exchanges in damages calculations could result in double liability for the Government.

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<sup>3</sup> *Boston Edison Co. v. United States; Entergy Nuclear Generation Co. v. United States*, 93 Fed. Cl. 105 (2010).

<sup>4</sup> *Yankee Atomic Power Co. v. United States*, No. 98-126C, 2010 U.S. Claims LEXIS 672 (Fed. Cl., Sept. 7, 2010).

<sup>5</sup> 536 F.3d 1268 (Fed. Cir. 2008) ("*Yankee IP*").

The Court also reversed its earlier finding that offsets to damages related to the costs that would have been incurred in loading to DOE on the grounds that such costs are deferred, not avoided. The Court referred to a “guiding principal” indicated in *Carolina II*<sup>6</sup> that SNF cases are to be determined with a common template regardless of prior positions.

### 3. *Arizona Pub. Serv. Co. v. United States*<sup>7</sup>

On June 18, 2010, the Court of Federal Claims awarded Arizona Public Service Company (“APS”) damages in the amount of \$30,222,146 for the larger-than-otherwise-necessary ISFSI it had to construct at its Palo Verde site. The Court rejected the Government’s argument that overhead costs cannot be awarded unless they are “incremental.” The Court rejected APS’s claim for cost of capital, represented by Allowance for Funds Used During Construction (“AFUDC”), because such costs were not “directly traceable” to the Government’s breach. APS did not take out specific debt for the ISFSI project and otherwise failed to connect any debt directly to it. The Court also declined to factor in Greater Than Class C (“GTCC”) waste into the “non-breach world” model.

### 4. *Entergy Nuclear Fitzpatrick, LLC v. United States*<sup>8</sup>

On August 3, 2010, the Court of Federal Claims granted plaintiff Entergy’s motion to strike the “unavoidable delays” defense. The Government argued that the writ of mandamus does not bar the “unavoidable delays” defense as it relates to both liability and damages, but only as it relates to liability. The Court rejected the Government’s argument that a concurring opinion in *Nebraska Public Power Dist. v. United States*,<sup>9</sup> in which the Federal Circuit confirmed that the D.C. Circuit had jurisdiction to issue the writ and that the writ must be given *res judicata* effect in the Court of Federal Claims, provided the Government with authority to raise the unavoidable delays defense in order to limit Entergy’s remedy.

### 5. *Southern California Edison Co. v. United States*<sup>10</sup>

On June 3, 2010, the Court of Federal Claims awarded Southern California Edison (“SCE”) \$142,394,294 due to DOE’s partial breach of the Standard Contract. Damages included compensation for fuel storage costs associated with SCE’s two on-site ISFSIs and storage at the GE Morris reprocessing facility. Awarded damages included overhead expenses. They did not include AFUDC. Nor did the awarded damages include costs associated with the storage GTCC waste resulting from the decommissioning of SONGS Unit 1. Such an award for the storage of GTCC, the Court noted, would be inconsistent with its determination that the impact of GTCC on DOE’s SNF acceptance obligations are minimal (and thus were entirely discounted in the Court’s

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<sup>6</sup> *Carolina Power and Light Co. v. United States*, 573 F.3d 1271 (Fed. Cir. 2009) (“*Carolina II*”).

<sup>7</sup> *Arizona Public Service Co. v. United States*, 93 Fed. Cl. 384 (Fed. Cl. 2010).

<sup>8</sup> *Entergy Nuclear Fitzpatrick, LLC v. United States*, No. 03-2627C, 2010 U.S. Claims LEXIS 545 (Fed. Cl., August 3, 2010).

<sup>9</sup> 590 F.3d 1357 (Fed. Cir. 2010) (en banc).

<sup>10</sup> *So. California Edison Co. v. United States*, 93 Fed. Cl. 337 (Fed. Cl. 2010).

analysis). SCE did not present sufficient evidence that its one canister of GTCC would have been accepted during the damages period.

### **B. Low-Level Radioactive Waste Interstate Compact - *Alabama v. North Carolina*<sup>11</sup>**

On June 1, 2010, the United States Supreme Court issued an order on exceptions to the Special Master's reports in this litigation amongst member states of the Southeast Interstate Low-Level Radioactive Waste Management Compact and the Compact's Commission. Plaintiff states and the Commission sued North Carolina, the designated host state, for claims including breach of contract after North Carolina withdrew from the Compact after having failed to license a facility. In considering exceptions filed, the Court held, in part, that: the terms of the Compact do not authorize the Commission to impose monetary sanctions against North Carolina; because the express terms of the Compact do not make the Commission the "sole arbiter of disputes arising under the Compact, the Court is not bound by the Commission's conclusion that North Carolina breached its obligations under the Compact; the Compact requires North Carolina to take only those licensing steps that are "appropriate"; the Compact did not require North Carolina to bear the up-front licensing and construction costs, only to be recouped later through its regional monopoly on low-level radioactive waste disposal; the Compact does not contain a good-faith limitation and North Carolina did not breach an implied duty of good faith and fair dealing when it withdrew from the Compact under Article 7(G); the Commission's claims are not barred by sovereign immunity so long as the Commission asserts the same claims and seeks the same relief as the plaintiff States.

### **C. Price-Anderson Act - *Cook v. Rockwell Int'l Corp.*<sup>12</sup>**

On September 3, 2010, the Court of Appeals for the Tenth Circuit reversed the District Court judgment in a class action brought under the PAA against the former Rocky Flats Nuclear Weapons Plant ("Rocky Flats") operators, and remanded the case to the District Court, directing the judgment be vacated. Property owners near Rocky Flats alleged trespass and nuisance claims arising from the release of plutonium particles onto their properties. After trial, which resulted in a jury verdict in favor of the plaintiff class, and post-trial motions, the District Court entered judgment in favor of plaintiffs, awarding approximately \$926 million (including compensatory and punitive damages and prejudgment interest). The Court found that a federal court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over any suit asserting public liability under 42 U.S.C. § 2210. The Court then found that a "nuclear incident" was a threshold, substantive element" of any PAA claim. The Court held that a plaintiff wishing to sue under the PAA for nuclear-related damage to property must first establish actual damage to the property in question. When alleging loss of use, the Court explained that plaintiffs must prove that the particular level of risk created had the effect of actually depriving them of a specific use. The Court found that the jury was not properly instructed as to these showings, requiring the verdict be set aside and the

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<sup>11</sup> *Alabama, Florida, Tennessee, Virginia, and Southeast Interstate Low-Level Radioactive Waste Management Comm'n v. North Carolina*, 130 S. Ct. 2295 (2010).

<sup>12</sup> *Cook v. Rockwell Int'l Corp.*, Nos. 08-1224, 08-1226 and 08-1239, 2010 U.S. App. LEXIS 18643 (10th Cir. Sept. 3, 2010).

case remanded. The Court agreed with the District Court that § 2014(hh) does not expressly preempt state law, and clarified that the PAA’s 1988 amendment to preclude punitive damages when a defendant will be indemnified by the federal government for damages required that a jury only award punitive damages for occurrences prior to August 20, 1988 which caused injury to the plaintiff (regardless of when that injury manifested itself).

## **D. Enforcement**

### **1. *United States v. Siemaszko*<sup>13</sup>**

On July 15, 2010, the Court of Appeals for the Sixth Circuit found that there was sufficient evidence to support Andrew Siemaszko’s convictions on three counts of concealing material facts and making false statements to the NRC in violation of 18 U.S.C. §§ 1001 and 2. Arising out of a 2001 incident at the Davis-Besse Nuclear Power Station, the prosecution alleged Siemaszko was involved in preparing the documents that Davis-Besse submitted to the NRC in its subsequently granted request for a delayed inspection, which inspection uncovered five cracked nozzle heads and a football-sized cavity caused by boric acid erosion in the head of the reactor. The prosecution alleged that Siemaszko’s statements in draft documents prepared for Davis-Besse incorrectly portrayed the results of the relevant prior nozzle inspections. Reviewing the evidence presented, the Court found that a jury could convict Siemaszko on all three counts, specifically rejecting that his conviction was multiplicitous by convicting him more than once for identical statements made in response to identical questions, citing precedent that separate convictions may be supported for submitting separate documents at the same time and for submitting later documents summarizing earlier documents.

### **2. *United States v. Geisen*<sup>14</sup>**

On July 15, 2010, in a companion case to *Siemaszko*, the Sixth Circuit found there was sufficient evidence to support David Geisen’s conviction on three counts of concealing a material fact and making a false statement to the NRC in violation of 18 U.S.C. §§ 1001 and 2. Arising from the same 2001 incident at Davis-Besse, the prosecution likewise alleged that Geisen was involved in the preparation of materials submitted to the NRC. The Court found that a jury could convict Geisen on all three counts, expressly finding that the District Court did not err in giving the jury a “deliberate ignorance” instruction and that even if Geisen’s convictions could not be sustained under an actual knowledge theory, the evidence was sufficient to demonstrate that he acted with deliberate ignorance — in other words that a rational jury could infer that Geisen deliberately avoided culpable knowledge or chose not to inform himself when preparing submissions to the NRC.

## **E. Project Financing**

### **1. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*<sup>15</sup>**

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<sup>13</sup> *United States v. Siemaszko*, 612 F.3d 450 (6th Cir. 2010) (“*Siemaszko*”).

<sup>14</sup> *United States v. Geisen*, 612 F.3d 471 (6th Cir. 2010).

On August 9, 2010, the South Carolina Supreme Court held that South Carolina Electric & Gas Co. (“SCEG”) cannot charge its ratepayers to fund unexpected increases in the cost of constructing two nuclear reactors. The state Public Service Commission (“PSC”) originally approved a rate increase that would be used to establish a \$438 million contingency fund to help SCEG recoup some of the financing costs incurred for the \$10 billion project that is being built along with Santee Cooper. However, a group of industrial power users challenged this decision, and the Court held that the PSC overstepped its bounds. In its ruling, the Court stated that the law allows companies to recoup the cost of building new power plants, but that it does not expressly include contingency costs as a recoverable expense.

## **2. *Friends of the Earth v. S.C. Pub. Serv. Comm’n*<sup>16</sup>**

On April 26, 2010, in a companion case to *S.C. Energy Users Comm.*, the South Carolina Supreme Court held that it will apply a deferential standard of review when reviewing a decision of the PSC issued under South Carolina’s Base Load Review Act and will affirm that decision when substantial evidence supports it. Friends of the Earth’s challenged that SCEG’s integrated resource plan was not adequately updated and its review of potential energy efficiency and demand side management load reductions was incomplete, thus failing to adequately demonstrate the need for the proposed capacity expansion of the facility. Citing overwhelming evidence, the Court found substantial evidence supported the PSC’s determination that SCEG considered all forms of viable energy generation and concluded that nuclear was the least costly alternative source. The Court also upheld the PSC’s finding that SCEG established a need for the facility.

### **III. ADMINISTRATIVE ACTIVITY**

#### **A. Nuclear Regulatory Commission Policy, Practices, and Procedures**

##### **1. Commission Developments - Three New Commissioners**

President Obama appointed three new Commissioners in 2010, George E. Apostolakis, William D. Magwood, IV, and William C. Ostendorff. Commissioner Apostolakis is a member and former Chairman of the statutory Advisory Committee of Reactor Safeguards and a former professor of nuclear science and engineering at the Massachusetts Institute of Technology. He is also the founder of the International Conferences on Probabilistic Safety Assessment and Management. Commissioner Magwood is the founder of Advanced Energy Strategies (“AES”). Prior to founding AES, Commissioner Magwood served as Director of the DOE’s Office of Nuclear Energy from 1998 to 2005. He is a former U.S. Senior Nuclear Technology Official, as which he led the creation of the “Nuclear Power 2010” initiative. Immediately prior to joining the Commission, Commissioner Ostendorff served as the Principal Deputy Administrator of the National Nuclear Security Administration (“NNSA”). Before joining the NNSA, Mr. Ostendorff was Counsel and Staff Director for the Strategic Forces Subcommittee of the House Armed

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<sup>15</sup> *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*, Opinion No. 26856, 2010 S.C. LEXIS 277 (S.C. Aug. 9, 2010) (“*S.C. Energy Users Comm.*”).

<sup>16</sup> *Friends of the Earth v. S.C. Pub. Serv. Comm’n*, 692 S.E.2d 910 (S.C. 2010).

Services Committee. Commissioner Ostendorff served in the United States Navy from 1976 to 2002, when he retired as a Captain. The three new Commissioners were sworn in to office in April 2010.

## **2. New Plant Developments**

### **a. DOE Loan Guarantee Activity**

DOE was given authority to use up to \$18.5 billion in federal loan guarantees, in which the government backs financing for most of a new nuclear project. In February, DOE offered conditional guarantees of up to \$8.3 billion to three partners in the Vogtle nuclear power plant expansion in Georgia. The remaining \$10.2 billion in loan guarantee funding is only enough for one project. Secretary of Energy Chu has said that the DOE needs a further \$9 billion in loan guarantee authority for projects before fiscal 2011 to be able to make offers to the three applicants still under consideration.

The loan guarantee program began in 2006 with \$2 billion in authority. In 2008, Congress expanded that authority to \$18.5 billion in nuclear power projects as well as \$2 billion for nuclear fuel enrichment facilities. Recently, a Senate panel approved a spending bill for the DOE that provides a further \$10 billion in loan guarantee authority for nuclear projects. Overall, the bill would give DOE \$28.3 billion for fiscal 2011, which is slightly less than the \$28.4 billion the White House requested, but about \$1.7 billion more than the department's fiscal 2010 funding level. The bill now goes to the full Senate for approval. Meanwhile a House of Representatives' panel approved \$25 billion in nuclear loan guarantees for fiscal 2011.

### **b. Discussion of Status of Applications**

#### **i. Impact of AP1000 shield design**

NRC approved Westinghouse's original AP1000 design in 2006. Westinghouse subsequently redesigned the shield building in response to a 2009 NRC requirement that new plans be resistant to aircraft impact. Westinghouse changed from a reinforced concrete shield building to a steel concrete composite design, which it submitted to the NRC in August 2009. In October, the NRC Staff sent a letter to Westinghouse indicating that the revised design would need to be modified and tested before it could be approved. Westinghouse tested the design and found that it meets NRC requirements. The NRC is currently reviewing seven application for units that use the AP1000 reactor design. After NRC review, Westinghouse plans to combine any changes into a new version of the design control document for the AP1000.

According to a group of anti-nuclear and environmental organizations, however, the revised Westinghouse AP1000 containment structure design is vulnerable to corrosion and lacks a barrier necessary to keep radioactive material out of the environment during an accident. These organizations asked NRC's Advisory Committee on Reactor Safeguards to investigate and suspend the licensing review of the design. In its April 21 report, the groups state that the AP1000 design is less safe than those of current reactors because open space between the steel containment vessel and concrete shield building increases the risk of corrosion. Subsequent cracks or holes in the containment vessel would allow radionuclides into the environment. Westinghouse disagreed with the group's analysis and the NRC Staff is continuing its review of the design.

## **ii. EPR Digital Instrumentation and Control**

Areva is modifying its US-EPR reactor design in response to NRC Staff concerns that the digital instrumentation and control system is too complex and interconnected to meet US regulations. Areva outlined changes to reduce communications between various parts of the digital systems that control independent safety systems, but it does not plan to completely separate all interconnections in the redesign. The NRC said in February 2010 that it would extend the schedule for the safety review of the US-EPR by six months. Accordingly, the estimated completion of the safety evaluation report was moved to December 2010.

## **iii. Submittal of Revised North Anna Combined Operating License**

In May 2010, Dominion announced that it was switching from GE Hitachi's ESBWR reactor design to Mitsubishi Heavy Industries' US-APWR for its North Anna Unit 3 in Virginia. Dominion switched to a different reactor design after failing to negotiate an EPC contract with GE Hitachi. The US-APWR was chosen over five other bids on the basis of a number of issues including certainty and specificity of the cost estimate as well as the level of risk allocation the vendor was willing to accept. Dominion expects to decide by the end of the year whether it will proceed with the project.

## **iv. PSEG Early Site Permit Application Docketed**

PSEG Power, LLC submitted its application for an early site permit ("ESP") on May 25, 2010. The application was accepted for docketing and noticed in the *Federal Register* on August 4, 2010. A hearing is required for an ESP pursuant to 10 CFR § 52.21. The Commission will announce in a future *Federal Register* notice the opportunity to petition for leave to intervene.

## **v. Petition to Intervene in Turkey Point**

Florida Power & Light ("FPL") submitted its application for a construction permit-operating license for two new units at Turkey Point on June 30, 2009. Requests to intervene in the proceeding were due by August 17, 2010. Citizens Allied for Safe Energy, the Village of Pinecrest, Florida, Southern Alliance for Clean Energy, National Parks Conservation Association, and several individuals petitioned to intervene and requested a hearing. The contentions state that FPL failed to adequately address various environmental impacts in its environmental review, including the need for power and the effects of transmission lines, access roads, increased salinity, sea level rise, reclaimed waste water, and radial collector wells on the surrounding environment.

## **c. South Texas COLA - Settlement in CPS Energy and Nuclear Innovation North America Dispute**

An NRG-Toshiba joint venture and CPS Energy are partners in developing two new units at the two-unit South Texas Project ("STP"). CPS threatened to withdraw from the project because of cost increases, while NRG said it would cancel the project if lawsuits drag on between the partners. CPS Energy filed a lawsuit against Nuclear Innovation North America ("NINA") and NRG Energy on December 7, 2009. However, in February, the two sides reached an agreement whereby NINA will increase its ownership in the STP from 42 to 92%, and will assume full

management control of the project. As part of the deal CPS Energy was responsible for all project development costs through January 31, 2010, and NINA incurred the responsibility thereafter.

#### **d. Electricite de France and Constellation Merger Approved**

In October 2009, both the Nuclear Regulatory Commission and the Maryland Public Service Commission approved a \$4.5 billion sale for a 49.99% ownership share in Constellation Energy Group's Calvert Cliffs, Nine Mile Point and Ginna nuclear plants to the French-owned Electricite de France ("EDF"). The deal has thus received all necessary approvals at both the federal and state levels. The remaining 50.01% of the plants is owned by Constellation Energy Nuclear Group, LLC. The issue of foreign ownership is currently the only admitted contention in the Calvert Cliffs Unit 3 COL proceeding.

#### **e. Watts Bar 2 Reactivation**

In 1988 Tennessee Valley Authority ("TVA") suspended construction of Unit 2 because of a reduction in the predicted growth of power demand. In summer 2007, TVA informed NRC of its plan to resume construction of Watts Bar Unit 2. In July 2008, the NRC issued an order extending the Watts Bar Unit 2 construction permit completion date to March 31, 2013. In 2009 TVA submitted a supplemental EIS and a notice of license application was published in the Federal Register. As most safety and quality related equipment was installed at Unit 2 during original construction, a procedure had to be developed to ensure the original specifications, design and licensing basis are met. In July 2010, the NRC approved TVA's plan for evaluating, refurbishing, replacing and testing components of Unit 2. TCA is refurbishing or replacing most active components and instruments and the NRC Staff performed a safety evaluation of the TVA program. The construction refurbishment program could serve as a model if utilities decide to reactivate other unfinished nuclear units.

#### **f. Draft Rule Regarding ITAAC Maintenance**

In fall 2010, the NRC Staff is expected to present to the Commission a proposed rulemaking and provide guidance on the inspections, tests, and analyses that the licensee shall perform and the acceptance criteria that are necessary to provide reasonable assurance that a new reactor has been constructed and will operate in conformity with the license, the Atomic Energy Act, and the Commission's rules and regulations. The proposed rulemaking will present possible amendments to 10 C.F.R. §§ 2.340 and 52.99 that would, if adopted, require applicants to inform the Commission promptly when an ITAAC acceptance criteria is no longer being met. The revised regulations would require multiple notifications from applicants at various stages of the ITAAC process. For instance, the licensee must notify the NRC within 7 days after it has made a determination that new information materially alters the basis for determining that an ITAAC has been met.

#### **g. Small Reactor Design Program**

In September 2010, the Commission ordered the NRC Staff to, within six months, complete a plan for reviewing the safety of small modular reactors ("SRM"). Specifically, the Commission directed the NRC Staff to investigate how to integrate the use of risk insights into pre-application activities in anticipation of SRM design certification and license applications. The

NRC expects to receive the first SRM design certification application in 2012. Key issues are whether the NRC will charge the same reactor fee as it does for larger units and whether an SRM would have the same security requirements, as well as whether NRC will require separate licenses for each reactor module.

### **3. Groundwater Task Force/Vermont Yankee Tritium Leaks**

In January 2010, Entergy reported that samples taken from an on-site groundwater monitoring well contained radioactive tritium at concentrations above historical background levels. The source of the current leak is within the confines of the same underground pipe system associated with a 2005 leak. The discovery of a leak of radioisotope material from underground piping resulted in criticism of statements made by Entergy before the Vermont Public Service Board in 2009. During the state relicensing proceeding, Entergy reportedly denied the existence of underground piping that transports radioactive material.

On February, 24, 2010, Entergy announced that it had provided the Vermont Attorney General with the results of its independent internal investigation into statements made by its officials. Although the report did not find that Entergy officials “intentionally misled” the Vermont Public Service Board, it concluded that their statements were “incomplete and misleading.” These disclosures prompted the NRC to issue a formal *Demand for Information* (“DFI”) on March 1, 2010. The DFI required additional information from Entergy to confirm that information provided by the officials to the NRC was complete and accurate. In May 2009, the NRC released its assessment of Entergy’s response to the leakage event. In the report, the NRC concluded that Entergy took prompt and effective action to identify the source of the leakage, halt it and develop an effective plan to address any resulting groundwater contamination.

### **4. License Renewal**

#### **a. State Regulators Reject Extension of Vermont Yankee License**

In February 24, 2010, the Vermont Senate voted in favor of closing Entergy’s Vermont Yankee plant. A majority of the Vermont Senate opposes allowing state regulators to extend Entergy’s state license for its Vermont Yankee plant. The Senate’s vote followed the discovery of a tritium leak at the plant and conflicting statements from Entergy officials about the presence of buried piping carrying radionuclides. The plant’s current operating license will expire March 2012 without a license renewal.

#### **b. Status of License Renewal Applications**

NextEra Energy submitted an application for the renewal of its Seabrook, Unit 1 operating license for an additional 20 years on May 25, 2010. The NRC accepted the Seabrook, Unit 1 license renewal application, and in a July 21, 2010 *Federal Register* notice, provided an opportunity for the public to request a hearing and to intervene. The public has 60 days to intervene.

Pacific Gas & Electric (“PG&E”) submitted a license renewal application for its Diablo Canyon site on November 24, 2009. The Commission accepted the application and issued an opportunity for a hearing on January 21, 2010. San Luis Obispo Mothers for Peace intervened,

and the Atomic Safety and Licensing Board (“ASLB”) admitted three contentions related to management of plant’s design/licensing basis, Severe Accident Mitigation Alternatives Analysis, and the effects of a potential spent fuel pool accident caused by an earthquake. The applicant has appealed the ASLB order to the Commission.

Energy Northwest submitted an application for license renewal for its Columbia Generating Station Facility on January 20, 2010. The NRC accepted and docketed the application. The deadline for hearing requests and petitions to intervene was May 14, 2010. No parties intervened. The Commission expects to issue its decision on the application on July 18, 2012.

Additionally, on August 31, 2010, the NRC delayed, for the second time, the final supplemental environmental impact statement (“FSEIS”) on Entergy’s license renewal request for Indian Point Nuclear Power Plant Units 2 and 3. As with the first delay announced on May 25, 2010, the NRC Staff cited the significant amount of comments from stakeholders as the reason for the second delay. The NRC expects to issue the FSEIS by November 19, 2010. If approved, the license renewals will allow Units 2 and 3 to stay in operation through 2033 and 2035 respectively.

The NRC issued license renewals for Susquehanna’s Steam Electric Station Units 1 and 2 as well as Beaver Valley Power Station on November 24 and November 5, 2009 respectively. The NRC received the applications for these license renewal requests on September 13, 2006 and August 28, 2007 respectively.

Finally, on August 30, 2010, the NRC received a license renewal application for FirstEnergy Nuclear Operating Company’s Davis-Besse Nuclear Power Plant. If approved by the NRC, the license renewal would allow the plant to operate until 2037. License renewal reviews generally take about 22 months.

## **5. Explanation of Decommissioning Funding (SECY-10-0084)**

On June 25, 2010, The NRC Staff issued SECY-10-0084, explaining the changes to the final Regulatory Guide 1.159, Revision 2, “Assuring the Availability of Funds for Decommissioning Nuclear Reactors.” The NRC Staff initially proposed the following changes: (1) increase the frequency of covering a shortfall in decommissioning financial assurance for merchant plants from 2 years to 1 year, and for utility licensees from every 6 years to every rate case; (2) clarify when a real rate of return greater than two percent may be credited, and (3) clarify that the earnings credit allowed during a safe storage period following permanent shutdown must reflect withdrawals necessary to maintain the facility in safe storage mode.

However, in response to comments on the increased frequency of adjustments, the NRC Staff revised its proposal. While merchant plant licensees are now required (as of March 31 of each year) to adjust the actual amount of financial assurance annually, utility licensees do not have to address decommissioning funding in each rate case. Instead, these licensees should make a “good faith effort to obtain rate relief by asking their rate regulator to address the issue within the year, and to obtain rate relief as necessary within 5 years.”

## **6. Introduction of Final Rule Regarding Unauthorized Weapons**

On October 14, 2009, the NRC published a final rule which authorizes federal criminal penalties for the introduction of weapons or explosives into certain facilities and installations regulated by the NRC.<sup>17</sup> The rule became effective on April 12, 2010 and requires the installation of specified signage warning individuals against unauthorized introduction of weapons or explosives. The purpose of the rule is to broaden Federal prosecutorial authority, not to change licensee security practices. Under the final rule, whoever willfully introduces without authorization weapons or explosives into any protected facility or installation that is enclosed by a fence, wall, floor, roof or other barrier would be guilty of a misdemeanor punishable by a fine not to exceed \$5,000 or imprisonment by not more than one year or both.

## **7. Approval of Proposed rule to Amend Security Regulations**

On July 21, 2010, the Commission approved a NRC Staff proposal to amend its security regulations at 10 C.F.R. § 73.57 pertaining to the transport of SNF. The proposed rule would establish generically applicable security requirements similar to those previously imposed by Commission Orders issued after the terrorist attacks of September 11, 2001. The proposed rule would establish acceptable performance standards and objectives for the protection of SNF from theft, diversion, or radiological sabotage. An amended § 73.57 would also address, in part, a State of Nevada petition for rulemaking (PRM-73-10) that requested that the NRC initiate rulemaking to strengthen the regulations governing the security of SNF against malevolent acts. The proposed rule would require that licensees shipping SNF develop normal and contingency procedures to cover: (1) notifications; (2) communication protocols; (3) loss of communication; and (4) responses to actual, attempted, or suspicious activities.

## **8. Proposed Rule “Enhanced Weapons, Firearms, Background Checks and Security Event Notifications” (SECY-10-0085)**

On June 27, 2010, the NRC issued a draft rule to implement the firearms guidelines issued by the NRC under a new section 161A of the Atomic Energy Act. Section 161A permits the NRC to authorize a licensee’s security personnel to use enhanced weapons and to preempt State, local, and certain Federal firearms laws. In addition, security personnel with access to any weapon must undergo a firearms background check that would include fingerprinting and a check against the Federal Bureau of Investigation’s National Instant Criminal Background Check System database. The NRC is proposing that these checks be conducted at least once every three years with the option for licensees to conduct the checks more often if desired.

## **9. Status of Draft Safety Culture Policy**

In November 2009, the NRC issued for comment a draft safety culture policy statement setting forth the Commission’s expectation that all licensees establish and maintain a positive safety culture to protect public health and safety and the common defense and security when carrying out licensed activities. Among other things, the NRC asked for public input on its definition of safety culture, which includes “nuclear security.” The new definition encapsulates the Commission’s view that safety and security are equally important to safety culture. The Commission’s reasoning builds on the fact that safety and security have the same ultimate goal of

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<sup>17</sup> 74 Fed. Reg. 52667.

protecting the public health and safety. As of July 2010, the NRC had received 66 sets of comments requesting guidance on implementation, questioning the decision to issue a policy statement rather than initiate a rulemaking, and addressing whether security should be included in the definition of safety culture. The NRC Staff is expected to send the Commission its recommendations for a final safety culture policy in January 2011.

### 10. Enforcement Summary

The NRC’s 2010 mid-cycle safety assessment of commercial nuclear plants reveals that 97 of the 104 operating plants require only routine agency oversight or minimal supplemental agency oversight. Seven plants are performing at the third level of performance with one degraded safety aspect that requires additional NRC inspections and senior management attention. Nevertheless, all 104 plants continue to be operated in a manner that preserves public health and safety.

The escalated enforcement trends for *Traditional, i.e.*, those involving Severity Levels and possibly civil penalties (“CPs”), and the Significance Determination Process (“SDP”) of the Reactor Oversight Process from 2001 to 2009 *not identified during security inspections* are provided below in the following data tables:

**Table 1 -- Traditional Historical Enforcement Summary**

	<b>Number of Escalated Enforcement Actions</b>	<b>Number of Escalated Enforcement Actions w/CP</b>	<b>Number of Escalated Violations</b>	<b>Proposed CP Amount</b>	<b>Average CP per Escalated Enforcement Action</b>
<b>2002</b>	<b>3</b>	<b>2</b>	<b>4</b>	<b>\$348,000</b>	<b>\$174,000</b>
<b>2003</b>	<b>6</b>	<b>2</b>	<b>6</b>	<b>\$120,000</b>	<b>\$60,000</b>
<b>2004</b>	<b>8</b>	<b>4</b>	<b>8</b>	<b>\$208,000</b>	<b>\$52,500</b>
<b>2005</b>	<b>12</b>	<b>8</b>	<b>17</b>	<b>\$5,886,000</b>	<b>\$735,750</b>
<b>2006</b>	<b>10</b>	<b>3</b>	<b>10</b>	<b>\$229,000</b>	<b>\$76,333</b>
<b>2007</b>	<b>6</b>	<b>3</b>	<b>6</b>	<b>\$260,000</b>	<b>\$52,000</b>
<b>2008</b>	<b>3</b>	<b>2</b>	<b>3</b>	<b>\$930,000</b>	<b>\$465,000</b>
<b>2009</b>	<b>5</b>	<b>1</b>	<b>7</b>	<b>\$65,000</b>	<b>\$65,000</b>
<b>As of Sept. 2010</b>	<b>4</b>	<b>1</b>	<b>5</b>	<b>\$70,000</b>	<b>\$70,000</b>

**Table 2 -- Historical SDP Enforcement Summary**

	<b>Number of Escalated Enforcement Actions</b>	<b>Number of Escalated Findings</b>	<b>White Findings</b>	<b>Yellow Findings</b>	<b>Red Findings</b>
<b>2002</b>	<b>24</b>	<b>26</b>	<b>24</b>	<b>0</b>	<b>1</b>
<b>2003</b>	<b>13</b>	<b>16</b>	<b>11</b>	<b>2</b>	<b>2</b>
<b>2004</b>	<b>15</b>	<b>16</b>	<b>15</b>	<b>0</b>	<b>0</b>
<b>2005</b>	<b>17</b>	<b>17</b>	<b>14</b>	<b>2</b>	<b>1</b>
<b>2006</b>	<b>16</b>	<b>17</b>	<b>14</b>	<b>0</b>	<b>0</b>
<b>2007</b>	<b>11</b>	<b>11</b>	<b>9</b>	<b>2</b>	<b>0</b>
<b>2008</b>	<b>8</b>	<b>8</b>	<b>8</b>	<b>0</b>	<b>0</b>
<b>2009</b>	<b>13</b>	<b>13</b>	<b>13</b>	<b>0</b>	<b>0</b>
<b>As of Sept. 2010</b>	<b>10</b>	<b>12</b>	<b>9</b>	<b>3</b>	<b>0</b>

- 1 Under the revised Enforcement Policy, the SDP is used to evaluate most inspection findings to determine the safety significance. For those actions issued under this approach, escalated actions are categorized as: (1) either low to moderate risk significance (“**White**”); (2) moderate to substantial risk significance (“**Yellow**”); or (3) great risk significance with a significant reduction in safety (“**Red**”). Very low risk significance findings (“**Green**”) are not included.
- 2 Often escalated actions involve multiple findings. As a result, the number of escalated findings tends to exceed the total number of escalated actions issued in a given year.

### **11. Status Options for LLW Blending**

The NRC continues to review the potential for intentional blending of Class B and C low-level waste (“LLW”) to lower the waste’s classification to Class A. The question of whether the NRC should authorize LLW blending arose after the Barnwell LLW disposal facility was closed to generators located outside of South Carolina, Connecticut, and New Jersey. While NRC regulations do not explicitly prohibit waste blending, agency guidance on that point is considered by many to be confusing. The NRC has stated in the past that waste should not be blended solely for the purpose of lowering its classification. NRC Chairman Gregory Jaczko asked the NRC Staff

in October 2009 to prepare a paper on the topic. In April, 2010, The NRC Staff recommended that LLW blending be addressed in a depleted uranium rulemaking already underway. That rulemaking, which commenced in early 2010, will require a specific intruder analysis for facilities that dispose of unique LLW streams. The NRC Staff is awaiting Commission direction.

### **12. VA Medical Hospital fined \$227K**

On March 17, 2010, the NRC issued a notice of violation and proposed imposition of a \$227,500 civil penalty to the Department of Veterans Affairs, Philadelphia Veterans Affairs Medical Center (“PVAMC”). The penalty, one of the largest NRC penalties ever imposed on a medical facility, stems from a six-year period of noncompliance with NRC regulations governing PVAMC’s prostate implant brachytherapy program. In May 2008, PVAMC notified the NRC of a prostate cancer procedure in which the patient received a radioactive dose more than twenty percent lower than prescribed. A subsequent investigation revealed that ninety-seven medical events occurred at PVAMC between February 2002 and May 2008. In approximately two-thirds of the events the dose delivered to the prostate was less than prescribed and in approximately one-third the events involved an unintended dose to an organ or tissue. Virtually none of the substandard implants were reported to the NRC or Veterans Affairs regulator. According to the NRC, the errors went uninvestigated for months and sometimes years, during which many patients were unaware of their flawed treatment. The NRC determined that the overall root cause of the violations at PVAMC was a lack of management oversight by the Radiation Safety Officer and the Radiation Safety Committee, and a lack of safety culture at PVAMC.

### **13. NRC Staff Seeks Approval of Part 72 Final Rule**

Pending before the Commission is a final rule “License and Certificate of Compliance [“CoC”] Terms,” SECY-10-0056, that would clarify the term limits for dry storage cask CoCs and independent spent fuel storage installation (“ISFSI”) specific licenses by amending 10 C.F.R. §§ 72.238 and 72.42, respectively. Specifically, the final rule (if approved) would extend the initial and renewal license terms for site-specific ISFSI licenses from a term not to exceed 20 years to a term not to exceed 40 years. To address the lack of consistency between the general and specific ISFSI license term requirements, the proposal would impose a similar 40-year license renewal term on general licensees. The proposed final rule also would allow general licensees to implement changes associated with CoC amendments to previously loaded casks without agency approval, provided certain conditions are met.

### **14. Waste Confidence Decision**

On June 15, 2009, the NRC issued SECY-09-0090 which addresses an update to the Commission’s 1990 Waste Confidence findings and proposes a draft rule amending 10 C.F.R. § 51.23(a). The Waste Confidence proceedings, which the NRC first initiated in October 1979, resulted in five findings. 49 FR 34658; August 31, 1984. SECY-09-0090 proposed amendments to Findings 2 and 4. The NRC proposed a revised Finding 2, which would state that there is reasonable assurance that sufficient repository capacity will be available within 50-60 years beyond the licensed life for operation (including the term of any revised or renewed license) of any reactor. Finding 4 would reflect the NRC’s confidence that spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the life of a reactor’s

license (including the term of any revised or renewed license) in spent fuel storage basins or dry storage facilities.

On September 15, 2010, the NRC approved these revisions to the Waste Confidence regulation, expressing confidence that SNF can be safely stored for at least sixty years beyond the licensed life of any reactor and that sufficient repository capacity will be available when necessary. Additionally, the Commission directed the NRC Staff to initiate a long-term rulemaking to address impacts of storage at onsite storage facilities, offsite storage facilities, or both for extended periods of time. The Commission clarified that the revisions of the waste confidence findings and rule are not intended to signal an endorsement of indefinite storage of spent fuel at reactor sites.

### **15. Gas Centrifuge Enrichment Facility Licensing Developments**

Three corporations are developing gas centrifuge enrichment facilities in the United States, Louisiana Energy Services (“LES”), USEC Inc., and AREVA Enrichment Services, LLC. In June 2006 the NRC issued a license to LES to construct and operate a gas centrifuge enrichment plant in New Mexico and construction began later that year. LES commenced operations on June 11, 2010. Construction of the project will continue until the plant reaches the planned 5.7 SWU capacity. The NRC also issued a license to USEC for the American Centrifuge Plant in Ohio in April 2007 and construction of the plant began in May of that year. Due to uncertainty of funding, USEC demobilized the project in 2009 but is currently pursuing a DOE loan guarantee and has maintained the ability for quick remobilization once funding becomes available. AREVA’s license application for the Eagle Rock Enrichment Facility is currently pending before the NRC. AREVA was awarded a conditional commitment of a two billion dollar loan guarantee from DOE in May 2010.

### **16. Nuclear Fuel Services Performance Issues**

On September 2, 2010, the NRC proposed a \$140,000 fine to Nuclear Fuel Services (“NFS”) located in Erwin, Tennessee, for violations stemming from an October 2009 event. In response to the event, the NRC sent an Augmented Inspection Team to investigate. In March 2010, the AIT identified a number of concerns regarding NFS’ ability to provide reasonable assurance of its ability to safely operate the Erwin facility. Those concerns involved: (1) the adequacy of NFS’ management oversight of facility process changes, and perceived production pressures; and (2) a lack of questioning attitude by workers and management and poor communications. Performance issues were also identified involving procedural compliance, technical reviews, safety reviews, and written evaluations that were required to support decisions made without prior NRC approval. In addition, the NRC identified concerns with the decisions made by NFS’ management, in both October and November 2009, to restart the Uranium Aluminum process lines without fully understanding the causes of the events and correcting the underlying problems that caused them. That concern led to NFS voluntarily halt production of all process lines in December 2009; and the NRC issuing a Confirmatory Action Letter in January 2010. The NRC approved a partial resumption of production activities at NFS in July 2010.

### **17. Office of Inspector General Report: Audit of NRC’s Process for Closed Meetings**

The NRC's Office of the Inspector General ("OIG") released audit report OIG-10-A-14, "Audit of NRC's Process for Closed Meetings," on June 9, 2010. The purpose of OIG-10-A-14 was to determine whether the agency's process for conducting meetings that are closed to the public hinders the transparent transaction of nuclear regulation. Although the OIG concluded that the NRC has a policy in place to share information regarding closed meetings (in compliance with the 1977 *Sunshine Act* and more recently, the December 2009 the Office of Management and Budget Directive M-10-06, "Open Government Directive"), the implementing guidance is ambiguous. This ambiguity, OIG concluded, has led to the inconsistent dissemination of closed meeting notices and closed meeting summaries. OIG concluded that only 67 and 21 percent of closed meeting notices and closed meeting summaries are available to the public, respectively. On August 6, 2010, the NRC agreed to clarify its guidance by December 2011 to ensure that closed meeting notices and summaries are appropriately available to the public.

## **B. Important NRC Adjudication Developments**

### **1. Status of Active COLA Proceedings**

#### **a. Calvert Cliffs**

The Nuclear Information and Resource Service ("NIRS") petitioned to intervene and requested a hearing in the Calvert Cliffs COLA proceeding. The ASLB granted NIRS's petition and admitted three contentions relating to EDF's partial ownership of Calvert Cliffs Unit 3, the timing of the financial test for a parent guarantee for decommissioning, and LLW. Subsequently, the latter two contentions were dismissed. NIRS submitted three late-filed contentions in April and June 2010. The Board dismissed the contentions challenging the validity of an NRC Safety Evaluation Report regarding LNG impacts and US-EPR I&C systems separation issues. However, the Board's decision on the remaining contention—the validity of the DEIS, and specifically its evaluations of the need for power, energy alternatives, the combination of energy alternatives, and associated costs—is still pending.

#### **b. Fermi 3**

On June 15, 2010, the ASLB admitted a new contention in the Fermi 3 licensing proceeding. Contention 15, as reformulated by the Board, alleges that Detroit Edison ("DTE") failed to comply with Appendix B to 10 C.F.R Part 50 to establish and implement its own quality assurance ("QA") program when it entered into a contract with Black and Veatch ("B&V") for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by B&V. This violation allegedly began in March 2007 and continued through at least February 2008.

#### **c. North Anna**

In June 2010, Dominion Nuclear North Anna, LLC notified the ASLB that it was switching its reactor design from GE Hitachi's ESBWR to Mitsubishi Heavy Industries' US-APWR. Intervenor Blue Ridge Environmental Defense League ("BREDL") submitted a new contention arguing that the change in design was against the law and that Dominion must submit a new application for a COL to allow the public to participate fully in the proceeding. The ASLB

rejected the contention finding it unsupported by any regulation or law. BREDL has until October 4, 2010, to submit further contentions related to the new reactor design.

#### **d. Comanche Peak**

In March 2010 the Board in the Comanche Peak licensing proceeding denied five late filed contentions relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which concern “guidance and strategies” for addressing potential beyond-design-basis explosions and fires. The Board also determined that the Intervenor’s initial contention pertaining to this same issue was moot due to the applicant’s submission of a “Mitigative Strategies Report.” In June 2010, the ASLB denied an additional eight late-filed contentions and dismissed a contention related to “accident scenarios not considered” as moot. The Board dismissed as moot in part and admitted as a revised contention related to failure to consider an alternative consisting of a combination of solar and wind energy with storage methods and supplemental natural gas. In addition the Board admitted a related late-contention alleging that the applicant failed to address alternatives combination of solar, wind, storage, and natural gas to produce baseload power.

#### **e. Levy County**

The Green Party, Ecology Party and NIRS intervened and requested a hearing in Progress Energy’s Levy County proceeding. The Board initially granted three of the intervenors’ contentions, which discussed the applicant’s failure to assess aquatic and other environmental impacts of the plant, the environmental impacts of on-site storage of low-level radioactive waste, and compliance with Parts 20 and 50 in the event this waste is stored on site. The Commission affirmed the Board’s decision in large part. The NRC is also seeking comments on the draft environmental impact statement (“DEIS”) for the proposed Levy nuclear power plant. The DEIS recommends that the Commission approve the combined license.

#### **f. South Texas Project**

On January 29, 2010, a Licensing Board directed the NRC Staff to re-evaluate its refusal to provide Intervenor’s (the Sustainable Energy and Economic Development Commission, the South Texas Association for Responsible Energy, and Public Citizen) with access to DC/COL-ISG-016 (“ISG-016”), a draft interim staff guidance document that the NRC Staff has designated as containing Sensitive Unclassified Non-Safeguards Information (“SUNSI”). The NRC Staff had denied Intervenor’s access to ISG-016 because the Intervenor’s had not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention. The Licensing Board determined this standard to be too high, and stated that the Intervenor’s need only show that access to the guidance may enable them to participate more meaningfully in the proceeding in order to receive access.

The Licensing Board also found inadmissible all seven of the Intervenor’s newly-proffered contentions challenging the adequacy of the South Texas Project Nuclear Operating Company’s (“STP”) Mitigative Strategies Report, which addressed the possible loss of large areas of the plant due to fires or explosives. The Licensing Board’s discussion of the Intervenor’s contentions contains SUNSI information and is not publically available.

### **g. Vogtle**

The Board in the Vogtle Electric Generating Plan, Units 3 and 4 proceeding resolved all issues then pending on May 19, 2010 when it granted Southern Nuclear Operating Company's ("Southern") motion for summary disposition of a safety contention concerning storage of low-level waste. However, the joint intervenors, including the BREDL and other environmental groups, subsequently submitted a new contention challenging the adequacy of Southern's containment/coating inspection program for the proposed units. The Board found that it no longer had jurisdiction because it terminated the proceeding in May and referred the issue to the Commission. The Commission established a new Board and delegated the contention to the newly-formed Board. On August 30, 2010, the new Board set the matter for briefing and oral argument. Oral argument was initially scheduled for September 17, 2010, but the intervenors' counsel withdrew and, left searching for new counsel, the intervenors failed to file a timely reply. The Board directed intervenors to address the issue prior to September 22, 2010.

## **2. Status of Active License Renewal Proceedings**

### **a. Pilgrim**

Entergy Nuclear submitted the license renewal application for its Pilgrim Nuclear Power Station on January 27, 2006. On June 17, 2010, the Commission denied intervenor Pilgrim Watch's motion seeking review of the ASLB decision in the license renewal proceeding. In October 2008, the ASLB rejected the contentions filed by Pilgrim Watch, finding no problems with Entergy Nuclear's aging management program for buried piping and tanks at Pilgrim and no need to reconsider the company's Severe Accident Mitigation Alternatives Analysis. Chairman Jaczko was the only member of the Commission to dissent in part from the majority decision because he believes the Commission should develop a nationwide approach for considering terrorism issues under NEPA.

### **b. Indian Point**

Entergy Nuclear submitted an application for license renewal for its Indian Point Units 2 and 3 in 2007. The Commission issued a notice of opportunity for hearing and petition to intervene on August 1, 2007. In response, various citizens groups, local and state governments, the Sierra Club, and New York State Assemblyman Richard Brodsky intervened. The ASLB admitted New York State and two environmental groups as intervenors. The Board admitted fifteen contentions related to, among other things, radionuclide leaks, low-income and minority populations, aging management program, real estate values, and energy alternatives analysis. Most recently, in June 2010, the Board admitted new contentions from New York State related to a Severe Accident Mitigation Alternative Analysis.

### **c. Diablo Canyon**

On November 23, 2009, Pacific Gas & Electric ("PG&E") submitted an application to renew the operating licenses for its Diablo Canyon Power Plant. The ASLB in Diablo Canyon's license renewal proceeding, on August 4, 2010, accepted four of the five contentions proposed by intervenor San Luis Obispo Mothers for Peace. The contentions include that PG&E failed to demonstrate it can safely manage the aging plant, failed to provide information on the seismic risks

to the plant, did not address the airborne environmental impacts of a potential spent fuel pool accident or discuss how it would mitigate a terrorist attack on the plant. The Applicant and the NRC Staff have appealed the ASLB's decision.

#### **d. Vermont Yankee**

In July 2009, the ASLB in the Vermont Yankee licensing proceeding denied the New England Coalition's ("NEC") motion for leave to file a new contention challenging the adequacy of Entergy's final metal fatigue analysis, finding that NEC's challenges were either made and rejected previously, or were untimely. NEC filed a timely petition for review of the ASLB order. On July 8, 2010, the Commission determined that NEC was not given a proper opportunity to revise its original Contention 2. As originally admitted, Contention 2 alleged that Entergy's License Renewal Application does not include an adequate plan to monitor and manage the effects of aging [due to metal fatigue] on key reactor components that are subject to an aging management review, pursuant to 10 C.F.R. § 54.21(a) and an evaluation of time limited aging analysis, pursuant to 10 C.F.R. § 54.21(c). The Commission remanded the proceeding to the Board for the purpose of allowing NEC and the Department of Public Services of the State of Vermont the opportunity to submit a revised Contention 2. The Commission added that the proceeding will remain open during the pendency of the remand and that NEC and Vermont are free to submit a motion to reopen the record pursuant to 10 C.F.R. §2.326, should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised. NEC submitted a revised contention on August 20, 2010. The ASLB has not yet ruled on this new contention.

#### **e. Prairie Island**

On January 5, 2010, the ASLB in the Prairie Island Nuclear Generating Plant ("PINGP") licensing proceeding issued an order granting Northern States Power Co.'s ("NSPM") motion to dismiss Contention 5, as moot based on the NRC Staff's DEIS, filed on November 13, 2009. Contention 5 alleged that NSPM's ER contains a seriously flawed environmental justice analysis that did not adequately assess the impacts of the PINGP on the adjacent minority population. Prairie Island Indian Community ("PIIC") filed new contentions following the issuance of the SER and DEIS in 2009. The ASLB admitted a new safety culture contention on January 28, 2010. As limited and reworded by the Board, PIIC's new contention alleges that PINGP's safety culture is not adequate to provide reasonable assurance that PINGP can manage the effects of aging during the requested period of extended operation.

### **3. Shieldalloy Metallurgical Corp – CLI-10-08**

On January 7, 2010, the Commission denied Shieldalloy Metallurgical Corp.'s ("SMC") motion to stay transfer of regulatory authority over its Newfield, New Jersey site to the New Jersey State Department of Environmental Protection ("NJDEP"), pending judicial review of the transfer. SMC sought the stay to prevent NJDEP from assuming oversight of decommissioning at its source materials site. SMC had a plan pending before the NRC to cap and monitor the wastes, which New Jersey opposed. In 2008 New Jersey formally applied to become an Agreement State, and the NRC determined that the State's program is adequate to protect public health and safety and is compatible with the NRC's program. Accordingly, the NRC discontinued its review of SMC's

proposed plan and forwarded the matter to NJDEP. NJDEP requested a state-compliant plan that will require removal of the source material at substantially higher cost. The NRC denied the motion, determining that SMC failed to demonstrate either irreparable harm or likelihood of success on the merits.

#### **4. Pa'ina Hawaii, LLC – CLI-10-18**

On July 9, 2010, the Commission issued CLI-10-18. The decision addressed the ASLB's initial decision regarding three environmental contentions filed by Concerned Citizens of Honolulu regarding Pa'ina Hawaii's license application for an industrial irradiator at the Honolulu International Airport. Pa'ina intends to use the facility to irradiate fresh fruit, vegetables, cosmetics, and other products en route to the continental United States from Hawaii. The NRC Staff originally issued the license in 2007.

The Commission admitted amended Contention 3 and remanded it to the Board for further consideration. Contention 3 initially claimed five omissions in the NRC Staff's final EA: failure to respond to comments on the draft EA; insufficient analysis of the potential effects of the proposed irradiator; overly general statements about possible risks; inadequate analysis of a terrorist attack; and failure to consider health effects of the consumption of irradiated fruit and vegetables. The Commission affirmed the Board's admission of the first four omissions, finding that NEPA does not require the NRC to assess the potential health effects of consuming irradiated food. The Commission also affirmed the Board's admission of Contention 4. Contention 4 argued that the final EA failed to consider reasonable alternative technologies and sites, and specifically the relative costs and benefits of two pest control technologies and electron beam irradiator technology.

### **C. High Level Waste Storage and Disposal Developments**

#### **1. Suspension of Proceeding; Denial of Motion to Withdraw; Recusals**

On March 3, 2010, DOE filed a motion seeking consent to withdrawal of its application, with prejudice, for a license from the NRC to authorize construction of a the Yucca Mountain geologic repository. On June 29, 2010, the ASLB denied the motion to withdraw. One day later, the Commission issued an order inviting all parties to file briefs with the Commission as to whether the Commission should review, and reverse or uphold the ASLB decision. Initial briefs were filed July 9, 2010, and reply briefs were filed July 19, 2010. The NRC Staff and the State of Nevada support reversal of the Board decision. Several other parties, including the Nuclear Energy Institute, the State of Washington, the National Association of Regulatory Utility Commissioners, and the State of South Carolina, support affirmation of the Board's decision. The Commission has not yet issued a decision.

On July 15, 2010, Commissioner Apostolakis recused himself from consideration of DOE's motion for withdrawal due to repository-related work he did while chairing an independent panel that reviewed the adequacy of the long-term performance assessment for the proposed Yucca repository. Aiken County, South Carolina, the State of South Carolina, Washington state and White Pine County, Nevada, had filed a brief on July 9, 2010 seeking recusal/dismissal of the Commission's three newest members because of their responses to whether they would "second

guess” DOE’s decision to withdraw the application during their respective confirmation hearings. Commissioner Apostolakis maintains that his recusal decision was not related to the motion, upon which the Commission has not ruled. The two other Commissioners addressed in the motion, Ostendorff and Magwood, declined to disqualify themselves from a decision on the matter on August 11, 2010.

## **2. New Petitions to Intervene**

In response to DOE’s motion for withdrawal, five parties sought and were granted intervention in the Yucca Mountain proceeding: the State of Washington, the State of South Carolina, Aiken County, South Carolina, PIIC, and the National Association of Regulatory Utility Commissioners. All five new parties oppose DOE’s motion to withdraw.

## **3. Blue Ribbon Panel Appointed**

On January 29, 2010, Energy Secretary Chu announced the formation of a Blue Ribbon Commission on America’s Nuclear Future to provide recommendations for developing a safe, long-term solution to managing used nuclear fuel and nuclear waste. The Blue Ribbon Commission is to conduct a comprehensive review of policies for managing the back end of the nuclear fuel storage, including options for permanent disposal of high-level nuclear waste (inclusive of deep geological disposal.) The Commission is being co-chaired by former Congressman Lee Hamilton and former National Security Advisor Brent Scowcroft. The other thirteen members are Mark Ayers, Vicky Bailey, Albert Carnesale, Pete Domenici, Susan Eisenhower, Chuck Hagel, Jonathan Lash, Allison Macfarlane, Richard Meserve, Ernie Moniz, Per Peterson, John Rowe, and Phil Sharp. The Commission will produce an interim report within eighteen months and a final report within twenty-four months.

## **4. Commission Directs Staff to Revisit Paradigm for SF Storage and Transportation**

In a February 10, 2010, staff requirements memorandum, the Commission directed the NRC Staff to undertake a thorough review of regulatory programs for spent fuel storage and transportation. The review is to evaluate the programs’ adequacy for ensuring safe and secure storage and transportation of SNF for extended periods beyond the 120 year timeframe considered up to this point, and should include assessment of standards, regulations, guidance, review processes, and inspection and enforcement procedures. The Commission directed the NRC Staff to undertake research to bolster the technical basis of the NRC's regulatory framework to support extended periods and identify risk-informed, performance-based enhancements that will bring increased predictability and efficiency to the regulatory process. Further, the NRC Staff should investigate ways to incentivize these processes to encourage the adoption of state of the art technology for storage and transportation and develop a project plan, including schedules.