CASE LAW

Japan

Decision rejecting application to close down Tomari nuclear power plant (1999)

On 22 February 1999, the Sapporo District Court in Japan rejected a lawsuit calling for the two units of the Tomari nuclear power plant to cease operations. This lawsuit was brought by almost a thousand plaintiffs who live in Sapporo city and the area around the nuclear power plant. They claimed that their health is jeopardised by the radioactive emissions from the site during normal operations of the plant, accompanied also by the risk of accidents. The Court ruled that no tangible risk had been proved: radiation levels were far less than those from natural sources and adequate preventive measures against accidents were in place. Although the Court rejected the application, the presiding judge referred to the necessity to address the problems caused by radioactive waste.

In March 1999, the plaintiffs decided not to appeal this judgement, therefore the Sapporo District Court Decision became final.

Sweden

Judgement by the Supreme Administrative Court on the closing of Barsebäck 1 (1999)

Through its Decision of 5 February 1998, the Swedish Government ruled, with reference to the Act on the Phasing-out of Nuclear Power (SFS 1997:13320; see *Nuclear Law Bulletin* No. 61) that the right to produce nuclear energy in *Barsebäck* 1 under the terms of the current licence should cease to apply from the end of June 1998. Upon the request of the licence-holder, *Barsebäck Kraft Aktiebolag* (BKAB), the Court decided on 14 May 1998 to suspend the application with the consequence that the Government's Decision should not apply until further notice. At the same time as these proceedings before the Court, the parent company of BKAB, *Sydkraft* AB (*Sydkraft*), applied on 23 February 1998 to the European Commission and requested an intervention by the Commission to protect *Sydkraft's* rights under the 1957 Treaty establishing the European Economic Community. *Sydkraft* alleged that the Decision to close *Barsebäck* 1 is in conflict with competition rules, specifically Articles 86 and 90 of the Treaty establishing the EEC. The Commission has not yet taken position on this case.

Claims

The licence-holder, BKAB, its parent company, *Sydkraft*, and the German company *Preussen Elektra Aktiengesellschaft* (*PreussenElektra*), one of the owners of *Sydkraft*, applied for a judicial review of the Government Decision requesting that it be revoked. Futhermore, the applicants

requested that the Court obtain a preliminary ruling from the European Court of Justice on the interpretation of European law.

The applicants presented the following grounds for their action: they alleged that the Government Decision is in conflict with a number of legal instruments – the Swedish Constitution, national administrative law, the 1957 Treaty establishing the EEC [specifically Articles 34, 52, 73(b), 86 and 90] and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, *Sydkraft* and *PreussenElektra* claimed that the Decision is in conflict with the Energy Charter Treaty, which has been approved by a large number of countries, including Sweden and the European Community.

In short, the applicants pointed to deficiencies in the Phasing-out Act and in the Government's handling of the case, especially as an environmental impact assessment was not carried out prior to the Decision. Furthermore, it was maintained that the Decision is incompatible with EC rules dealing with a free market, namely the freedom of establishment, the free movement of capital, prohibition against restrictions and freedom of competition, as well as with the Electricity Market Directive (Directive 96/92/EC).

The outcome of the judicial review

The Supreme Administrative Court concluded in its judgement of 16 June 1999 that the Act on the Phasing-out of Nuclear Power is compatible with the Swedish Constitution and with the European Convention for the Protection of Human Rights and Fundamental Freedoms. As concerns the allegation that the Decision was not duly prepared by the Government, the Court found that the material supporting the application was of sufficient scope and quality and therefore the Decision does not conflict with the law. With regard to the lack of an environmental impact assessment, the Court concluded that the number of published government reports issued over a number of years prior to the Decision fulfils in substance the same requirements.

As regards the question of the starting point and the order of decommissioning of reactors, the Court stated that the criteria of geographical location, laid down in the Act on the Phasing-out of Nuclear Power, as concerns *Barsebäck* 1, is of special importance when determining the order of decommissioning. The criteria focus on the relationship between the density of population in the vicinity of the reactor and the possible consequences of a severe accident. The Government should be free to give weight to such circumstances as public opinion in Denmark and the observations that have been made by this country. In the view of the Court, the choice to close down *Barsebäck* 1 does not therefore seem to be objectively unfounded. The Court concluded therefore that the Decision could not be considered as discriminating towards the applicants.

On the European law issue, the Court stated that the Government Decision did not entail any breach of the Treaty establishing the EEC rules on establishment, nor did it conflict with the measures laid down in the Electricity Market Directive. Furthermore, the Court considered that the Decision does not affect any transaction that may be described as a movement of capital and therefore does not conflict with Article 73(b)(i) of the Treaty establishing the EEC.

In relation to the claim that this Decision, affecting a privately-owned reactor, constitutes an abuse of the publicly-owned *Vattenfall's* dominant position on the relevant market, the Court came to the conclusion that no breach of competition rules had taken place. In addition, the Court stated that the Decision cannot be declared void with reference to the compensation rules of the Act on the

Phasing-out of Nuclear Power. The stipulations on the subject made in the Energy Charter Treaty do not lead to any other assessment.

To summarise, the Court came to the conclusion that none of the objections raised by the applicants constitute grounds for revocation of the Government Decision. The Court did not find either that there is a need to request a preliminary ruling from the European Court of Justice. Furthermore, the Court sees no reason to await the European Commission's investigations connected with the shut-down of *Barsebäck* 1.

The Supreme Administrative Court therefore declared that the Government Decision shall remain in force although the right to operate the nuclear power reactor *Barsebäck* 1 shall not cease before the end of November 1999.

United States

Litigation relating to the Department of Energy's obligations under the Nuclear Waste Policy Act to accept spent nuclear fuel and high-level radioactive waste (1998-1999)

The Department of Energy (DOE) continues to be involved in litigation relating to its contractual obligations under the 1982 Nuclear Waste Policy Act (see *Nuclear Law Bulletin* Nos. 26 and 31) to commence acceptance of spent nuclear fuel and high-level radioactive waste from utilities as of 31 January 1998. Some ten utilities have filed law suits against the DOE for more than 8 billion dollars in damages associated with additional storage costs they have or will incur while waiting for DOE to commence disposal operations.

The Decision of 29 October 1998 handed down by the US Court of Federal Claims in one of those law suits, *Yankee Atomic Electric Co. v. United States*[1] (see *Nuclear Law Bulletin* No. 63) made it clear that the utility, after having fully paid all required fees into the Nuclear Waste Fund pursuant to its Standard Contract with the DOE, and after having shut-down its nuclear power plant in Massachusetts, was entitled to make a claim for damages[2] in court against DOE in respect of the latter's failure to accept spent nuclear fuel from that site on the grounds that the Standard Contract did not provide complete relief for the utility's extra costs incurred in extended storage of that spent nuclear fuel[3].

The Decision of 6 April 1999 handed down by that same Court in another of those law suits, *Northern States Power Co. v. United States*[4] (see *Nuclear Law Bulletin* No. 63) made it equally clear, however, that where a utility still operates a commercial nuclear power plant[5] and is still paying fees

1. Case No. 98-126C.

2. It was erroneously reported in *Nuclear Law Bulletin* No. 63 that *Yankee Atomic's* claim for damages was USD 270 million. The amount of this claim was in fact USD 70 million.

3. Similar decisions were handed down by the same Court in Connecticut *Yankee Atomic Power Co. v. United States*, case No. 98-154C on October 30, 1998 and in Maine *Yankee Atomic Power Co. v. United States*, case No. 98-474C on 3 November 1998 (see *Nuclear Law Bulletin* No. 63).

4. Case no. 98-484C.

5. Seven other utilities who have filed suits in the US Court of Federal Claims all have currently operating nuclear power reactors.

into the Nuclear Waste Fund under its Standard Contract with the DOE, that utility must exhaust the administrative remedies available to it under its Standard Contract with DOE in respect of the latter's failure to commence accepting spent nuclear fuel as of 31 January 1998 before it may seek alternative remedies in court, such as a claim for breach of contract.

Interestingly, the Wisconsin Electric Power Company claimed to have attempted to resolve its dispute with the DOE on extended storage costs by using the administrative remedies available under its Standard Contract[6], but without success. It then filed a petition for review in the US Court of Appeals for the District of Columbia Circuit[7] requesting that DOE, *inter alia*, accept emergency deliveries of waste if necessary to avoid shutdown of the Point Beach nuclear power plant, take title to spent fuel when it is placed in dry storage and take title to all remaining Point Beach spent fuel at a site removed from the plant not later than 5 ½ years after the plant shut-down.

Both the *Yankee Atomic* and the *Northern States Power* cases have been appealed to the US Court of Appeals.

6. Wisconsin Electric Power Company has stated that it is following the 1998 Decision of the US Court of Federal Claims in *Northern States Power Co. v. United States*, case no. 98-484C.

7. *Wisconsin Electric Power Company v. US Department of Energy*, US Court of Appeals for the District of Columbia Circuit, case no. 99-1342.