

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1074

September Term, 2010

FILED ON: DECEMBER 13, 2010

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS,
PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY AND
UNITED STATES OF AMERICA,
RESPONDENTS

Consolidated with 10-1076

Petition for Review of a Decision of the
United States Department of Energy

Before: SENTELLE, *Chief Judge*; BROWN, *Circuit Judge*; and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record and the briefs submitted by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. CIR. R.36(d). It is

ORDERED AND ADJUDGED that the petition for review is dismissed.

The Nuclear Waste Policy Act (the “Act”), 42 U.S.C. § 10101 *et seq.*, authorizes the Secretary of Energy to enter into contracts with generators of high-level radioactive waste and spent nuclear fuel (together, “nuclear waste”). 42 U.S.C. § 10222(a)(1). The contracts must require the Secretary to dispose of the nuclear waste and, in exchange, require payment from the producers of the waste according to the terms of the Act. § 10222(a)(1), (5). For nuclear waste sold on or after 90 days after the enactment of the Act, the Secretary must charge a fee of 1 mil per kilowatt-hour, § 10222(a)(2), which is to be deposited into the Nuclear Waste Fund (“NWF”), § 10222(c). Thereafter, the Secretary must conduct an annual assessment of the NWF fee to determine whether it is adequate to offset the costs of its statutorily enumerated waste

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disposal activities. § 10222(a)(4). If the Secretary determines that “insufficient or excess revenues” are being collected, he shall propose to Congress an adjustment of the fee. *Id.*

Petitioners ask us to order the Secretary to conduct an annual assessment under the Act and to suspend the NWF fee pending completion of his annual assessment. Because the Secretary has since conducted his annual assessment, these two claims are moot and we lack jurisdiction to address them. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”). Petitioners also request that we order the Secretary to suspend the NWF fee in light of the current status of Department of Energy’s waste disposal program. This request is unripe. *See Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 917 (D.C. Cir. 1985) (“[T]he interest in postponing review is strong if the agency position whose validity is in issue is not in fact the agency’s final position.” (quoting *Continental Air Lines, Inc. v. Civil Aeronautics Bd.*, 522 F.2d 107, 125 (D.C. Cir. 1975) (en banc))). Given the Secretary’s recent completion of his annual assessment, petitioners may now be able to properly raise this claim through a challenge to that assessment.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk