

NRC to Texas, Utah and Last Energy: You Have No Power Here

March 25, 2025 Ellen Conley, Diana Liebmann, Michael Mazzone, Jacob Bolinger, Léa Dickinson, Sam Richards

PRACTICES Energy, Power and Natural Resources, Nuclear Energy

UPDATE: On June 18, 2025, the U.S. Supreme Court, in an 6-3 opinion delivered by Justice Kavanaugh, said the state of Texas and a mineral owner could not challenge the Nuclear Regulatory Commission's approval of a temporary nuclear waste storage facility in the state because they failed to formally intervene in the agency's licensing proceeding. The Supreme Court's decision reversed the lower-court's ruling that held the agency was not authorized to license such facilities and upheld the NRC's current licensing proceedings. The justices avoided addressing whether the Atomic Energy Act authorizes the NRC to approve temporary interim storage facilities or the Nuclear Waste Policy Act's mandate for the federal government to build *permanent* spent-fuel facilities, instead deciding the matter on procedural grounds. As the NRC continues to react to the various executive orders, directive of the ADVANCE Act and industry feedback to amend its rules and regulations, the Supreme Court decision reinforces the Commission's authority to dictate its licensing procedures.

On Dec. 30, 2024, the State of Texas, the State of Utah and Last Energy, Inc. (Plaintiffs) challenged the authority of the United States Nuclear Regulatory Commission (NRC) to regulate microreactors and small modular reactors (SMRs). The Plaintiffs are challenging the NRC's Utilization Facility Rule under the Atomic Energy Act of 1954. In response, the [NRC filed a motion to dismiss](#) the case for lack of subject matter jurisdiction, failure to state a claim and improper venue. For additional background, [please read our previous Client Alert](#).

In its motion to dismiss, the NRC first asserts that the Plaintiffs' claims are without merit and inconsistent with the [ADVANCE Act of 2024, Pub. L. No. 118-67, § 208\(a\)\(1\), 138 Stat. 1447 \(2024\)](#), which requires the NRC to develop guidance to "license and regulate micro-reactors[.]" The NRC does not address the Plaintiffs' remaining substantive arguments presented in the original complaint.

Next, the NRC argues that despite the meritless claims, the court lacks subject matter jurisdiction to hear the Plaintiffs' challenges. According to the NRC, the Administrative Orders Review Act, commonly referred to as the Hobbs Act, confers exclusive jurisdiction upon the courts of appeals to review final orders of the NRC, including rules and regulations dealing with the activities of NRC licensees. The NRC contends that the definition of "utilization facility" falls squarely within this category, making the courts of appeals the proper and exclusive venue for such challenges.

Additionally, the NRC argues that Texas's claims are time-barred under the six-year statute of limitations applicable to the American Procedures Act (APA). The definition of "utilization facility" was established in 1956 and Texas has been operating reactors under this definition since at least 1957. Therefore, the NRC argues, the right to bring a facial challenge to the regulatory definition accrued long before the six-year window preceding the filing of this lawsuit.

The NRC also contends that venue in the Eastern District of Texas is improper. The NRC argues that the Plaintiffs' only basis for venue in that district is Texas's residence. However, if Texas's claims are dismissed as time-barred, no basis for venue remains in that district. The NRC points out that none of the events or omissions giving rise to the claim occurred in the Eastern District of Texas and no proper Plaintiff resides there.

To summarize, the NRC argues that the Plaintiffs' challenge to the definition of "utilization facility" is without merit in light of the ADVANCE Act and should be dismissed for lack of subject matter jurisdiction, as time-barred under the APA, and for improper venue. The motion notes that Plaintiffs would not be foreclosed from seeking relief through other means upon dismissal, highlighting alternative avenues the Plaintiffs could take. The NRC states that the Plaintiffs could petition the agency to change the definition of "utilization facility" or seek exemptions from the licensing requirements. If dissatisfied with the NRC's administrative decision, the Plaintiffs could then seek judicial review of the agency's resolution.

Throughout the motion to dismiss, the NRC emphasizes that the current lawsuit is not the appropriate mechanism for the Plaintiffs' challenge. This case underscores the complexities of jurisdictional and procedural requirements in regulatory litigation, particularly involving longstanding federal rules and definitions.

Parallel to the litigation, Last Energy recently submitted a regulatory engagement plan to the NRC, announcing that "Last Energy plans to submit an Early Site Permit ... for at least one site currently under Last Energy's control in Texas." The company also provided plans to the Electric Reliability Council of Texas for the phased deployment of 30 SMRs, representing 600 megawatts of capacity in the state. Texas has been developing a plan for future nuclear deployment through the Texas Advanced Nuclear Reactor Working Group under the leadership of the Public Utility Commission of Texas (PUCT). The PUCT issued a report to the Texas Legislature in November 2024 titled [Deploying a World-Renowned Advanced Nuclear Industry in Texas](#) (the Report), which pointed to advanced nuclear reactors as targets for development in Texas. These include a molten salt advanced nuclear research reactor being developed by Natura Resources LLC and Abilene Christian University, along with a demonstration program by Dow Chemical and X-Energy for XE-100 advanced SMRs. The Report also identified immediate siting opportunities for advanced nuclear reactors in Texas, including 61 sites that have already been assessed by the screening tool at Oak Ridge National Laboratory, a federally funded research and development center sponsored by the Department of Energy.

Alluding to modernizing efforts at the NRC, most prominently the drafting of the new 10 CFR Part 53, "Risk-Informed, Technology-Inclusive Regulatory Framework for Commercial Nuclear Plants," permitting pathway for advanced reactors, Last Energy's regulatory engagement plan noted "[t]he specific licensing pathway(s) that Last Energy chooses to take to ultimately construct and operate the project will depend on how various modernization efforts currently underway materialize." A recent draft of Part 53 has met with some critiques echoing those embodied in Last Energy's lawsuit—a "[Stakeholder Consensus](#)" comment facilitated by the Breakthrough Institute reported that "improvements are necessary to ensure clarity, efficiency, and effectiveness of implementation."

For more information or assistance with nuclear development projects, federal litigation or energy regulatory guidance, please contact one of the Haynes Boone lawyers below.