

Nucleonics Week

Volume 50 / Number 4 / January 29, 2009

Siemens to quit Areva NP, explore pact with Russian industry

Siemens AG's board of directors told Areva January 26 that it would exercise its option to withdraw from the Areva NP joint venture "no later than 2012," Siemens CEO Peter Loescher said January 27.

Sources have said Siemens would seek to team up with Russian partners to pursue business in the nuclear power sector. They also said that some board members have reservations about doing that.

Siemens has held a 34% share in

Areva NP since the joint venture's formation in 2001 with Areva predecessor Framatome. In a statement January 27, Siemens said the decision was made because of "lack of exercising entrepre-

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neurial influence" at Areva NP.

Loescher spoke to journalists via a webcast press conference before a share-

holders' meeting. He said "it was not possible" for Siemens to participate in the global nuclear power plant market through its partnership with the French firm. Loescher said Siemens was committed to doing business in that market.

"We will have to negotiate with Areva over the details" of a separation agreement "beginning right away," Loescher said. "It has been agreed between myself and [Areva CEO Anne] (Continued on page 9)

US Supreme Court sides with USEC on enrichment antidumping duties

The US Supreme Court January 26 unanimously reversed a federal appeals court decision on antidumping duties applied to US imports of low-enriched uranium, ruling in favor of USEC and against European enricher Eurodif.

The ruling in the long-running case turned on whether uranium enrichment contracts known as "SWU contracts" are for goods or for services. Under US antidumping law, goods are

subject to import duties while services are not.

The high court ruled that the US government was "reasonable" in saying that the trade laws applied to the uranium enrichment contracts. Under the standard established in a 1984 case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, that is the threshold that must be met, as the second of a two-part test.

When courts review agency determinations, the first step is to look at the statute creating the regulations that the agency is interpreting and implementing. If, in the eyes of the court, the statute is clear, the analysis ends there. If the court believes there is latitude or ambiguity in the statute, the court is supposed to defer to the agency's interpretation if it is reasonable, even if that

(Continued on page 11)

Groups seek tax benefits for new US units

The US nuclear industry is urging Congress to consider giving tax benefits to companies constructing new nuclear power plants as part of a giant economic stimulus package under development.

In a January 22 letter to key House and Senate lawmakers, the Nuclear Energy Institute and three other trade associations representing public power and cooperative electric utilities offered three tax proposals targeted at growing the nuclear energy sector. They also

pushed for an expansion of the federal loan guarantee program for clean energy technologies. They emphasized the large number of jobs that would be created by the construction of additional nuclear power plants and noted nuclear energy's role in reducing the electric power industry's carbon emissions.

The letter, sent to the top Democrats and senior Republicans on the House Ways and Means Committee and the Senate Finance Committee, was signed

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by NEI, the American Public Power Association, National Rural Electric Cooperative Association and Large Public Power Council. Lawmakers expect to finish work on the stimulus legislation before Congress takes a break the week of February 16. The legislation is targeting a mix of tax cuts and investments in green energy technology, health care, and infrastructure construction.

One of the associations' tax proposals calls for modifying a provision in the 2005 Energy Policy Act that establishes production tax credits for new nuclear power plants that come online by 2021. Currently, public power and rural electric cooperatives cannot use the credit because they don't pay federal income taxes. NEI and the other associations urged that these not-for-profit utilities be allowed to assign their share of a new reactor project to their tax-paying partners, which can use those credits.

Richard Myers, executive director of NEI's policy development division and special assistant to the president, said January 26 that tax-exempt companies participating in nuclear power plant projects essentially lose the intended benefit under the existing law.

"Absent a statutory change, the tax-exempt entity can receive no benefit from the tax credits because it can't transfer them," he said. By changing the law, these companies would be able to reap some benefits by transferring their portion of a project to a tax-paying partner that could take

advantage of the tax benefit. Myers said that transfer would not be done for free. "There would be some arms-length negotiation as to what the value ought to be and that's up to the individual projects to work out," he said.

Myers said lawmakers on the Senate Finance Committee were receptive to the proposal on production tax credits last year and showed an "awareness of the need to fix the problem."

The associations also proposed an investment tax credit for companies that expand the manufacturing base for the US nuclear supply chain. In a recent white paper on the impact of nuclear power plant construction on the US economy, NEI estimated the nuclear industry has invested \$4 billion over the past several years and created as many as 10,000 new jobs in preparation for building new reactors. Some of those jobs were to expand manufacturing facilities for nuclear components or to build new facilities, while other hires were for site preparation activities or to provide nuclear services.

NEI said most of the new positions were "high-quality skilled craft and engineering jobs."

A third proposal would provide tax credits to companies that invest in training programs for skilled craft labor and nuclear plant technicians. NEI said in its white paper that tens of thousands of more jobs would be created if construction begins, as anticipated, starting in 2011. It estimates that

platts *Nucleonics Week*

Volume 50 / Number 4 / January 29, 2009
(ISSN: 0048-105X)

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Nucleonics Week is published 51 times yearly by Platts, a division of The McGraw-Hill Companies, registered office: Two Penn Plaza, 25th Floor, New York, N.Y. 10121-2298.

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ly after the 50-50 NPI partnership was converted into the joint venture in which Siemens had only a minority share only. The identity of the joint venture in Germany “became more and more French,” one former executive said. “First we were NPI, then ANP [Advanced Nuclear Power], then Framatome ANP, and then finally Areva.”

One German Areva NP executive said that “whenever a strategic decision comes up about a foreign market — India, China, Turkey, you name it — the French are always in charge.” Another German executive said Areva’s Lauvergeon “promised to prioritize the SWR-1000,” an advanced German BWR design developed by Siemens after Gundremmingen-B and -C. “But so far, the project hasn’t gone anywhere.”

A third executive said, “Every single senior German manager [at Areva NP] who has been promoted upstairs to work at Paris headquarters has come back isolated and disenchanting.” Siemens officials have also complained that Areva has favored partnering with Alstom over Siemens for supplying turbines for the EPR.

Areva officials have strenuously denied that was the case. Areva has also been attacked by Alstom for favoring Siemens as a conventional island supplier for the first EPR at Olkiluoto-3 in Finland. In fact, the Siemens-Areva shareholders’ agreement on Areva NP requires Areva to take Siemens technology for balance of plant in any turnkey nuclear power plant contract, according to one source. But that clause hasn’t been put into effect anywhere, because Areva hasn’t won any turnkey nuclear power plant contracts and there are not likely to be any, the source said. The contract for Olkiluoto-3 is held jointly by Areva and Siemens.

During 2008, German political leaders, including Chancellor Angela Merkel, urged French counterparts to support Siemens’ participation in Areva NP. Some industry leaders in France, in particular Alstom Chairman/CEO Patrick Kron, have urged President Nicolas Sarkozy to create a French national “champion” nuclear company merging Alstom and Areva. That would in practice eject Siemens — Alstom’s biggest rival — from Areva.

In reaction to Siemens’ announcement it will pull out of Areva NP, a Merkel spokesman declined comment January 27 and said the federal government “would not intervene” in the matter. French media reported last week that Merkel had already called Sarkozy to request that the “non-competition” period of eight years be waived or shortened. The reports were denied by a Merkel spokesman.

Loescher suggested that Siemens had little leverage over Areva in 2001 when it agreed to enter the Areva NP partnership as a minority shareholder. The year before, Germany had promulgated a nuclear power phase-out, putting Germany’s nuclear industry on the defensive, he noted.

Sarkozy has pointed to Germany’s political hostility to nuclear power as a difficulty for the Franco-German nuclear alliance, and urged Merkel to push for reversing the phase-out (NW, 13 Sept. ’07, 3).

Other German industry sources said they recalled that the prime motivation for Siemens agreeing to the minority

shareholding was not the phase-out but instead a successful global campaign beginning in 1999 by antinuclear doctors to boycott Siemens’ important medical technology business. One executive said, “New orders plummeted, and top management got the message that [Siemens’] commitment to nuclear was a liability which affected the whole holding company’s bottom line.” Folding Siemens’ nuclear activities quickly into a joint venture with Areva “seemed to some managers like an easy fix to Siemens’ public relations problems,” he said. Thereafter, one German nuclear waste executive said, Siemens “learned what it meant to have the French state sitting at the table every time there was a major strategic decision to be made.” German nuclear professionals “were shocked and disappointed, but they were also naïve,” the executive said.

Essential

Loescher said that Siemens is firmly committed to doing business in the nuclear energy field without Areva. “For us, nuclear power is an essential part of a balanced energy mix,” he told shareholders.

“Last night we announced that we cannot continue with the partnership with Areva,” he said at the Munich shareholders’ assembly January 27. Loescher was greeted with applause when he said Siemens would be a player in the global nuclear market but that “the partnership with Areva cannot be the basis” of that effort.

Loescher said the election of Barack Obama as US president supports Siemens’ expectation that power producers worldwide “are going to be replacing old technologies with new technologies,” including nuclear power, wind power, and efficiency technologies, to reduce greenhouse gas emissions, he said.

During fourth-quarter 2008, revenue in the company’s energy sector was up 24% over the same period in 2007, about double the increases tallied in Siemens’ two other main business divisions, Loescher said.

—Mark Hibbs, Bonn; Ann MacLachlan, Paris

Supreme Court ... from page 1

interpretation is not — in the court’s view — the best one.

The Supreme Court opinion, written by Justice David Souter, said, “Where a domestic buyer’s cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as the sale of a good.”

While referring to the Chevron standard, the high court — as several observers noted — also went beyond it to rebut key arguments by Eurodif, an Areva subsidiary.

The US government sided with USEC in the case. The Ad Hoc Utilities Group, a coalition of US nuclear operators, sided with Eurodif in arguing that enrichment should not be subject to the antidumping duties because it is a service rather than a good.

The case focused on SWU contracts, under which utilities

provide natural-uranium “feed,” and payment, to an enricher and receive enriched uranium in return. (“SWU” stands for “separative work units,” a standard measure of uranium enrichment.) SWU contracts reportedly make up the bulk of the nuclear fuel business.

Less common are “enriched uranium product,” or EUP, contracts; under those contracts, the utility does not provide the uranium feed. The two sides in the Supreme Court case agreed that exports under EUP contracts are subject to the antidumping duties.

The case began in 2000, when USEC, the only company currently enriching uranium in the US, argued that US antidumping duties should apply to LEU exported to the US by Eurodif. In the eight years since then, the case has been under agency review or in the courts. The decision that the Supreme Court reviewed came from the Court of Appeals for the Federal Circuit in Washington.

In 2005, a Federal Circuit panel decided the case in Eurodif’s favor. The court partly based its decision on a 2002 case, *Florida Power & Light Co. v. United States*, in which the court said enrichment is a service. While that case was based on the Contract Disputes Act rather than the antidumping statute, USEC and the US government did not offer any persuasive arguments as to why the analysis should be different in the antidumping case, the Federal Circuit panel said (NuclearFuel, 14 March ‘05, 1).

But the Supreme Court decision re-established Commerce’s authority. Mark Herlach, a lawyer with Sutherland who has worked on uranium trade cases, called the ruling a “very powerful” vindication of the US government’s position. “There’s no reluctance in this opinion,” he said. It makes clear that Commerce is “very much in control, very much the manager” of decisions on imports of uranium products, he said.

He characterized it as a “direct application” of Chevron principles that does not create any new law.

Douglas Jacobson, who chairs Strasburger & Price’s international trade practice group, offered a similar assessment, saying that the opinion showed that, to the justices, “at the end of the day, this was simply an administrative law case.” He also said that it did not break any new ground.

Jacobson wrote an analysis of the case for the American Bar Association before the Supreme Court heard oral arguments last November (NF, 17 Nov. ‘08, 6).

Varied reactions

In a January 26 press statement, USEC general counsel Peter Saba praised the high court for ruling “in favor of effective U.S. trade laws by holding that the U.S. antidumping law applies to all dumped imports of LEU.” By reversing the Federal Circuit decision, which “would have excluded a large number of dumped imports based solely on the type of contract under which the LEU was sold, the Supreme Court leveled the playing field for domestic producers and their workers competing against these unfairly priced imports,” he said.

Areva spokeswoman Pauline Briand said January 27 that her company’s lawyers are “studying” the Supreme Court’s

ruling and what measures the company might take as a result.

Over the years, Areva has placed \$213 million into an escrow account with US Customs and Border Protection, and will be able to recover the portion of that money that was not affected by this week’s ruling, she said. The recoverable portion — a minority of the money — represents guarantees for alleged LEU price subsidies by the French government. Commerce imposed so-called countervailing duties in response, and Areva challenged those.

As with the antidumping duties, the Federal Circuit ruled against USEC on that issue. But that point was not part of the appeal to the Supreme Court.

Areva exports of LEU to the US currently are subject to a duty of 14.6%.

Stuart Rosen, of Weil, Gotshal & Manges, which represented Areva in the case, said he was “disappointed” in the ruling. Areva has lost “that aspect of the fight.” But, as he noted, the case that the Supreme Court took was only one of a group of related cases. The others were put on hold until the underlying goods-versus-services issue was resolved.

Areva will continue to challenge a finding by the US International Trade Commission that the US domestic industry was injured by the imports from Areva, he said. Areva also will pursue cases in which it is questioning the specifics of Commerce’s findings in its review of the case, he said.

Rosen also questioned the decision of the Supreme Court to take the case in the first place.

The Federal Circuit and the Court of International Trade — the first court to hear the USEC case — are specialized courts created so that the Supreme Court does not have to take such cases, Jacobson said. And, Jacobson said, the three-judge panel from the Federal Circuit was “unanimous and clear” in its decision.

Echoing a comment made by several observers, Jacobson said a significant factor was that the US Solicitor General filed the appeal, backed by top officials from four departments. In the USEC press statement, Saba said, “We appreciate the strong support on this case from the U.S. government.”

USEC and the US agencies argued that if the Federal Circuit ruling were allowed to stand, the door would be open for Russia to flood the market with inexpensive LEU.

But since the Supreme Court’s decision to take the case, Congress enacted legislation — sponsored by then-Senator Pete Domenici, a New Mexico Republican — that set yearly quotas for imports of Russian material and specified that LEU produced under SWU contracts was to be counted toward the quota (NF, 6 Oct. ‘08, 19).

During oral arguments in the case in November, none of the justices’ questions touched on the Russian angle, and it was not mentioned in the court’s opinion.

EC to discuss ruling

Meanwhile, a European source said European Commission officials would meet quickly to discuss the implications of the Supreme Court ruling for European enrichment trade.

He said the discussion would be within the EC staff for the time being, but that the Euratom Supply Agency's advisory committee — representing government, industry and utilities in EU countries — would be consulted on the issue as well.

The European Court of Justice, or ECJ, ruled in 2006 that separative work is a service, not a good, mirroring the jurisprudence of US courts at the time (NF, 25 Sept. '06, 15). The judgment means that European enrichers are no longer obligated to submit their contracts to the Euratom Supply Agency, or ESA, for countersignature, although they still are supposed to notify the agency of the contracts' main features — which, according to ESA sources, do not include price.

The ECJ ruling does not apply to EUP, which is considered a good, giving the ESA the right to countersign EUP import contracts and to refuse them if they are not considered in the interest EU users' diversity of supply.

The US ruling has no immediate impact on the EU situation, since "we apply the [EU] law," the European source said. He said that with the Supreme Court ruling, the US can more closely monitor SWU imports and will be in a better position to check that prices for imported SWU — for example, from Russia — "do not deviate from world prices."

However, this source predicted that the difference between US and EU jurisprudence on SWU imports would eventually cause "someone" in Europe to challenge the ECJ decision.

"This is a global market," he said. "People will ask how we can have different rules for the same market."

Until that happens, Russian industry may be tempted to market SWU more aggressively into Europe, since the control procedures will be less constraining than those in the US, he said.

The Supreme Court case is *United States v. Eurodif S.A. et al.* (No. 07-1059). The case was consolidated with *USEC Inc. et al. v. Eurodif S.A. et al.* (No. 07-1078). The decision is on the Supreme Court's web site at www.supremecourt.us/opinions/08pdf/07-1059.pdf.

—Daniel Horner, *Washington*; Ann MacLachlan, *Paris*

Siemens' departure seen putting Areva under financial stress

Siemens' announced exit from the Areva NP joint venture with Areva puts the Paris-based vendor under "tremendous financial stress" that could force it to rein in its ambitious investment plan and strain its ability to raise more money, industry observers said this week.

But they also said the move would force the French government, which owns about 84% of Areva, to clarify the company's ownership structure. Siemens' departure would also likely lead to the entry of one or more French industry flagship companies as Areva shareholders, they said. The expert valuation of Siemens' 34% stake in Areva NP, needed to finalize the split, will establish a market value for Areva equity that will allow other companies to buy in, the

observers said.

Siemens announced January 27 that it will exercise its option to withdraw from Areva NP by 2012 or before (see story, page 1).

Previously, Siemens officials had publicly stated their desire to remain in Areva NP. But they were unhappy with Siemens' minority stake in an Areva subsidiary, saying it gave Siemens no direct say in strategic decisions and no way of expanding their company's activities in nuclear power or the fuel cycle.

Areva is engaged in a vast investment program that some outside the company have estimated as high as Eur14 billion (US\$18.5 billion). The program includes two uranium enrichment plants, a new UF6 conversion complex, new uranium mining projects, construction of a reactor components plant in the US and similar facilities in France, and certification in several countries of Areva's flagship EPR PWR and the smaller Atmea-1 PWR it is designing with Mitsubishi Heavy Industries.

According to the French financial daily *Les Echos*, Areva CEO Anne Lauvergeon told the government last week that her company needs some Eur3 billion to support the investment program in this year alone.

The French vendor's liabilities include a potential loss on the Olkiluoto-3 EPR project it is conducting with Siemens in Finland — unquantified but widely believed to exceed Eur1 billion — and the Siemens put, or option to sell, on the Areva NP shares. The Siemens put was estimated in Areva's mid-2008 financial accounts at Eur2.1 billion.

Areva "has been increasing its debt for about the last 18 months," said Dominique Vignon, former president of Areva NP predecessor Framatome. He noted that Areva's operating cash flow was minus Eur2 billion in 2007 and its financial debt increased by Eur1.7 billion. Vignon, in a January 27 e-mail, said Areva's Ebitda (earnings before interest, tax, depreciation and amortization) can "reasonably" support a debt level of about Eur4 billion, but is much too low to support all the ongoing investments in addition to Eur2.1 billion for the Siemens put.

Areva announced net debt of Eur2.4 billion at the end of June 2008. Areva is scheduled to release its 2008 sales figures on January 29 and full-year financial results on February 25.

According to information made public by Siemens January 27, Finnish utility Teollisuuden Voima Oy, or TVO, is seeking Eur2.4 billion in compensation from Areva and Siemens. The money is for delays in startup of the Olkiluoto-3 EPR that forced TVO to buy electricity in the market. Areva and Siemens, in turn, are seeking Eur1 billion in compensation from TVO for the utility's delays in processing project documentation, Siemens said in an appendix to its interim financial figures for 2008.

On January 27, Standard & Poor's Ratings Services put Areva's short-term corporate credit rating on CreditWatch "negative" in reaction to the Siemens announcement.

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S&P said Areva's A-1 rating might be lowered to A-2 if Areva fully finances the buyout with new debt. But it said it