

GHR Energy Law Quarterly – December 2013

Update on Swiss Nuclear Energy Law

This current edition of the *GHR Energy Law Quarterly* outlines the newest developments in Swiss nuclear energy law. Apart from a landmark decision by the Swiss Federal Supreme Court in respect of the operating license for the nuclear power plant Mühleberg, the upcoming revision of the Ordinance on the Decommissioning and Nuclear Waste Disposal Fund is discussed.

Swiss Federal Supreme Court Decision on the NPP Mühleberg

With its [decision dated 28 March 2013 \(BGE 2C 347/2012 / 2C 357/2012\)](#); available only in German), the Swiss Federal Supreme Court granted an unlimited operating license to the nuclear power plant Mühleberg operated by Swiss energy supplier BKW FMB Energie AG (now BKW Energie AG) („BKW“) for the first time since its commissioning 40 years ago. As early as in 2009, BKW had obtained an open-ended license from the Federal Department for the Environment, Transport, Energy and Communication (DETEC). However, subsequently the Swiss Federal Administrative Court partially endorsed a corresponding objection and imposed a time-cap on the operating license until 28 June 2013. BKW was required to submit an application for extension, including a comprehensive maintenance program, in order to obtain a license beyond that date. In the opinion of the Federal Administrative Court, the nuclear power plant Mühleberg’s unresolved safety issues were too important to ensure their rectification via the Swiss Federal Nuclear Safety Inspectorate IFSN only. The Federal Administrative Court specifically judged as critical the condition of the core shroud, the earthquake security and the cooling option independent of the river Aare.

Due to an appeal under public law by BKW and IFSN, this decision has now been overruled by the Federal Supreme Court. Public safety is guaranteed by the constant monitoring by the Nuclear Safety Inspectorate IFSN, according to the Federal Supreme Court.

In this context, in its decision the Federal Supreme Court also made a statement on the allocation of competencies in the area of nuclear energy. According to this, IFSN acts as supervisory authority and is the expert body for the evaluation of open norms based on the technical and/or scientific character of a matter.

DETEC as granting authority is responsible for the execution of approval procedures. DETEC may only deviate from the IFSN evaluations if there are valid grounds for it. As a second opinion in evaluating the question of whether such valid grounds exist, DETEC is supported by the Swiss Federal Commission for Nuclear Safety CNS in an advisory capacity.

The Federal Administrative Court constitutes the appeals authority. In this function, it exercises unrestricted legal, factual and discretionary powers. However, it must respect the particular expertise and related technical discretion of the previous instance, in this case that of DETEC. This applies notably when the previous instance has already investigated the issues to be settled and has carefully carried out the necessary evaluations, as DETEC did when granting the unlimited operating license. An exception would only arise if there were conclusive reasons for departing from this evaluation. According to the decision of the Federal Supreme Court, the Federal Administrative Court has thus gone beyond its competencies by its evaluation of the technical aspects on its own and without conclusive reasons.

Revision of the Ordinance on the Decommissioning and Waste Disposal Fund

According to Art. 31 para. 1 of the Nuclear Energy Act of 21 March 2003 ([NEA](#)), owners of nuclear plants are required to pay for disposal costs incurred on an ongoing basis and must safely dispose of radioactive waste at their own expense.

However, such costs as arise from decommissioning a nuclear power plant and costs arising after decommissioning are covered by the Decommissioning Fund on the one, and the Waste Disposal Fund on the other hand (Art. 77 para. 1 and 2 NEA).

The Decommissioning Fund is meant to cover the costs of shutting down and dismantling obsolete plants and the disposal of the waste created by that – right up to recreating the green meadow at the plant's location.

The Waste Disposal Fund is meant to cover costs for the disposal of operating waste and the spent nuclear fuel after decommissioning a nuclear power plant. Both Funds are fed by contributions from the operators (Art. 77 para. 3 NEA).

Current law

The Ordinance on the Decommissioning Fund and the Disposal Fund for nuclear power plants (Ordinance on the Decommissioning and Disposal Fund [SEFV](#) of 7 December 2007) that applies at present regulates in particular the costs, their calculation, compulsory contributions by the owners and determining the amount of contributions, possible claims by contributing owners, investment policy as well as the organization and supervision of the Funds.

The planned decommissioning of Swiss nuclear power plants within the next decades and the disposal associated with it will incur substantial costs. In principle, the operator of each plant is obliged to secure the financing for decommissioning and to pay the costs for the waste disposal (Art. 27 para. 2 lit. f and Art. 31 para. 1 NEA). However, based on Art. 80 para. 2 NEA, there exists an obligation for the other operators to pay a limited additional contribution, i.e. similar to joint and several liability,

if an operator is unable to bear the cost of decommissioning or disposal of its facility. In this case, the other operators are required to absorb the costs not borne by the operator in proportion to the contributions paid by them into the Funds. According to current law, it is even possible that the Swiss Federation has to contribute financially if the operators are unable to completely meet their obligations. The obligation to pay an additional contribution is proportionately limited to an operator's contributions to the individual Funds and must be financially feasible for the individual operator. As far as is possible, provision should thus be made to ensure that the relevant financing is largely secured before commencing decommissioning and disposal operations. According to the present SEFV regulation, contributions have to be made to the Decommissioning and Waste Disposal Funds until final decommissioning, up to an amount (including the interest) that will guarantee that the costs arising later will be covered. As from decommissioning, financing is carried out by the relevant Fund under applicable law solely using the income from the Fund's assets.

Goals of the revision

It has become evident that, under the present regulations, financing to cover the decommissioning and disposal costs is not fully guaranteed – on the one hand this has been caused by rising costs during the last few years which exceeded the assumed present inflation rate of 3% and on the other hand because the targeted return rate on investment of 5% has not been realized for either Fund.

Thus, in spite of the joint and several liability of the other operators, there is the risk that the Swiss Federation – and therefore the tax payer – will have to share the decommissioning and disposal costs. This risk is aggravated by the continuously rising costs for decommissioning power stations and the disposal of radioactive waste and also by the reduced return assumptions on the financial markets. The present revision of the SEFV therefore aims at reducing these risks: Anticipated yield on investment is to be decreased from 5% to 3.5% and the inflation rate from 3% to 1.5%. In addition,

tion, a lump-sum security premium of 30% on the estimated decommissioning and disposal costs is planned. With this security premium, the insecurities of the sector-specific cost increases due to new technical, planning and regulatory requirements are taken into account.

As the new return rate on investments has to be balanced, operators will have to pay correspondingly higher contributions. In order to absorb this additional financial burden, these additional costs are to be distributed over the hypothetical remaining term of the power plants.

Further, the liability of operators to pay contributions is no longer to end with the decommissioning of a power plant. Rather, owners shall continue to be obliged to pay into both Funds even after closedown. In concrete terms, the liability to pay contributions in respect of decommissioning costs shall now continue to the end of the closedown activities and in respect of disposal costs until transport of the waste to a geological repository.

Furthermore, the range of allowable deviations from the debit fund holdings is to be more narrowly defined and anchored in the SEFV. Defining a debit value curve of moneys in both Funds and a top and bottom range in relation to this curve serves to stabilize the Fund portfolio at decommissioning of a plant in spite of possible variations in the capital market. At present these values are anchored only in the regulations of the Administrative Commission of both Funds¹.

Finally, stricter guidelines are planned in respect of refund of excess capital paid in.

The consultation period for the revision of the SEFV expired on 22 November 2013. The revised SEFV will come into force at the earliest in the middle of 2014.

¹ The Administrative Commission is the leading body of the Decommissioning and the Waste Disposal Fund. The members of the Commission are nominated by DETEC.

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