

NuSAC (2007) P21

Health and safety implications in the event a nuclear licensee enters into insolvency proceedings

Issue

1 This paper discusses the health and safety implications in the event a nuclear licensee enters into insolvency proceedings.

Background

2 Concerns regarding the possible impact of insolvency were first raised when British Energy (BE) approached DTI for financial assistance in 2002¹. The DTI decided to intervene as unplanned closures of BE's nuclear power stations would have had safety implications and put electricity supplies at risk. The safety implications considered were the need to maintain safety critical functions and the impact of uncertainty following administration on staff morale and on possible loss of skills and experience from staff leaving.

3 The National Audit Office (NAO) reported that under Insolvency law, the administrator's duty is owed to the creditors with no overriding health and safety duties. In coming to this view, the NAO may not have fully considered the HSW Act. Although the administrator is not subject to health and safety duties under the Insolvency Act, this does not affect duties under HSW Act (eg see paragraph 8-10).

Argument

4 This paper considers some possible areas of concern for existing nuclear sites and for potential new ones in relation to insolvency. These relate to health and safety responsibilities/duties and funding for safety.

Health and safety responsibilities/duties

5 When a company is in financial difficulties, there are various potential interventions such as the appointment of an administrator, receiver, liquidator or trustee to manage or rescue a company's asset/business depending on the circumstance. The legal position will vary depending on the type of intervention. This paper focuses on circumstances where an administrator or liquidator/receiver intervenes.

6 The Insolvency Act 1986 sets out the role and responsibilities of an Insolvency Practitioner (an administrator or a liquidator/receiver). The Act

¹ http://www.nao.org.uk/publications/nao_reports/05-06/0506943.pdf

says nothing about the responsibilities for health and safety, but this does not mean that the Insolvency Practitioner (IP) would not have health and safety duties under HSWA, although those duties would not be primary duties. Under NIA, the licensee would still have the overall responsibility for health and safety on the site.

A company in administration

7 A company in administration continues to exist as a legal personality and retains its health and safety duties. The administrator is an officer of the court and is appointed to manage the company's business and property for specified purposes for example keeping the business running as a going concern, or if this is not possible seeking to realise assets for creditors. In administration, until the company is formally dissolved it would continue to be the site licensee and would remain responsible for ensuring compliance with the licence.

8 Under NIA, the Site Licensed Company (SLC) has overall responsibility for health and safety. However, if the administrator takes such an interest in the day-to-day operation of the site as to affect health and safety decisions, and an offence is committed as a result of those decisions, then the administrator could as an officer of the licensee be liable under s.37 of the HSW Act as it was their decision that led to the offence and not the licensee's. An example here might be where an administrator makes a decision regarding protective clothing or work practices on grounds of cost saving. The extent of health and safety responsibilities depends on the degree of control the administrator has over safety matters.

Role and health and safety responsibilities of a receiver

9 A company in receivership is not necessarily in liquidation and therefore may be prosecuted. The appointment of a receiver/administrative receiver is to control the financial dealings of the directors and to ensure the debenture holder's interest is not prejudiced by the way the company is run. s37 of the HSW Act equally applies here as mentioned in paragraph 8 and s4 of the HSW Act may also apply if the term of appointment is wide enough as to make the receiver 'a person in control' of the premises.

Role and health and safety responsibilities of a liquidator

10 If the company is unlikely to be able to continue as a going concern, a liquidator is appointed. The role of the liquidator is to minimise future debts and realise any assets to the creditors. If the liquidator continues to operate the premises or installations, then they will need to apply for a license under NIA. The liquidator is likely to become 'a person in control' of the premises under s.4 of the HSW Act but s37 of the HSW Act will not apply in this scenario. Following liquidation a company is dissolved.

11 The Insolvency Act allows a liquidator to disclaim the 'onerous property' of the nuclear licensed sites in England and Wales. In such a case, the disclaimed property may revert to the Crown. In the case of a licensed site, the Crown could operate the site and would not require a licence; but would still be required to observe health and safety requirements as well as authorisations under the Radioactive Substances Act 1993. The legal position in Scotland is a little different. We understand that as a result the property would not revert to the Crown; there will be a transition period before the site is transferred to a new licensee. We are continuing to explore the legal implications of disclaiming property.

12 In any event, an IP (administrator or receiver/liquidator) will strive to protect their personal position in relation to remuneration and any personal liabilities which they may incur.

Funding

13 A fundamental issue in addressing insolvency or near insolvency is ensuring there is a finance structure in place to address safety issues like early shutdown of reactor or management of waste. This is considered below in relation to both existing nuclear facilities and potential new ones.

Existing nuclear facilities

14 Most of the existing nuclear facilities are in the public sector (owned by the Nuclear Decommissioning Authority (NDA) or MoD or have a major interest through the Shareholder Executive (British Energy), but are managed by private companies. If licensees experience financial difficulties, we might expect safety needs to be underwritten ultimately by the taxpayer. This scenario becomes more complex for privately owned sites, although there are few at the present.

New nuclear facilities

15 The Government made clear that if a decision were made to build new nuclear power stations, then these stations would be financed, owned and operated by the private sector. In that event, for new build, the Government proposes² to establish a financing structure in legislation to protect taxpayers against liabilities from decommissioning and waste management arising from any new nuclear power stations. The legislation would set the framework allowing the Government to place more detailed requirements and duties on new developers. For example, prospective operators of a new nuclear power station might have to provide a funding arrangement plan to Government for approval. The Government will consult when it has firmed up its proposals.

² The 'Future of Nuclear Power' Consultation Document 2007

16 The funding arrangements could be structured in a number of ways to ensure that adequate funds are available for decommissioning and waste management and disposal costs over the operating life of new nuclear power stations. These funds could be protected from the effects of insolvency and therefore in principle be available for safety purposes. There might also be a requirement on operators to put in place guarantees or insurance to 'top up' the fund if decommissioning takes place before the fund is mature. HSE will consider the details when available to see how far they meet this need.

Conclusion

17 To sum up, the health and safety implications in the event a SLC enters into insolvency or near insolvency are those relating to uncertainties over legal responsibilities for safety or over the availability of funding necessary for safety. Though the legal responsibility in most individual cases could be unclear when an IP intervenes, it remains the case the health and safety responsibility rests with the SLC or will be shared with the IP. HSE does have the power to take action against an IP if necessary; although HSE anticipates that it is very unlikely, that such officers would act in a way that would compromise safety.

18 The winding up of a company is more straightforward, as it would cease to exist though there may be a transition period before the license is reallocated, which could give rise to uncertainty over health and safety.

19 One of the lessons from the British Energy's near insolvency is that the Government may intervene to prevent insolvency where there is an impact on public safety. Even if insolvency proceedings do take place, HSE will continue to have powers to regulate, though individual cases could be complex. HSE's understanding of the likely risks attached to insolvency do not at this stage warrant changes to the Insolvency Act, but we will keep this under review. Some of the sites in the public domain may in future be sold to the private sector, in which case there will a need to consider suitable funding structures are in place similar to those anticipated in the event of any new build.

20 For new build, the funding issue is less of a problem as the proposed Energy Bill is expected to contain a financial safety blanket. HSE will continue to work with BERR to ensure that proposals that emerge meet safety needs and fit neatly with the licensing regime.

Action

21 NuSAC's views are welcomed.