Department of Justice

STATEMENT

OF

MICHAEL F. HERTZ
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CIVIL DIVISION

BEFORE THE

COMMITTEE ON THE BUDGET
U.S. HOUSE OF REPRESENTATIVE

CONCERNING

“BUDGETING FOR NUCLEAR WASTE MANAGEMENT”

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Mr. Chairman, and members of the Committee, I am Michael F. Hertz, and I am a Deputy Assistant Attorney General of the Department of Justice, Civil Division. I am pleased to testify today regarding the status of litigation concerning the Department of Energy's (DOE) obligations under the Nuclear Waste Policy Act (NWPA) of 1982.

Let me note at the outset that much of the litigation about which you have asked the Department of Justice to provide testimony is still pending in the Federal courts. As a result, the Department's pending matter policy applies to any discussion of those cases. Pursuant to that policy, I will be happy to discuss matters that are in the public record.

Background

In 1983, pursuant to the NWPA, the DOE entered into 76 standard contracts with entities, mostly commercial utilities,that were producing nuclear power. Through the standard contracts, DOE agreed that by January 31, 1998, it would begin accepting spent nuclear fuel and high-level radioactive waste (collectively, SNF) created by the utilities. In return, the utilities agreed to make quarterly payments into the Nuclear Waste Fund (NWF) created by the statute. The utilities began making payments into the NWF in 1983. In 1987, Congress designated Yucca Mountain in Nevada as the sole potential site for a Federal repository for disposal of the SNF. In May 1995, DOE published a notice in the Federal Register advising the utilities that held standard contracts and others that DOE would be unable to begin acceptance of SNF on January 31, 1998. The notice also explained that DOE's acceptance beginning on that date was conditioned upon the existence of an operational repository. 60 Fed. Reg. 21793 (May 3, 1995).

In response to this notice, several nuclear utilities filed suit in the United States Court of Appeals for the District of Columbia challenging DOE's understanding. The District of Columbia Circuit held that DOE was required to begin SNF acceptance in some type of facility by January 31, 1998. *See Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996). After DOE continued to inform utilities that it would be unable to begin accepting SNF by January 31, 1998, the utilities again requested an order directing that DOE perform under the standard contracts. The District of Columbia Circuit denied the utilities' request and instead found that the utilities' remedy could be addressed through breach of contract claims. *Northern States Power Co. v. United States*, 128 F.3d 754, 759 (D.C. Cir. 1997), *cert. denied*, 525 U.S. 1015 & 1016 (1998). The court did, however, issue a mandamus order [added to accord with later reference to DC Cir mandamus writ] that barred DOE from asserting that its delays in performing the standard contract were "unavoidable" and, therefore, excused pursuant to the "unavoidable delays" provision of the standard contracts.

Status Of Court Of Federal Claims Litigation

To date, utility companies have filed 71 cases in the United States Court of Federal Claims, alleging that DOE's delay in beginning SNF acceptance constituted a breach of contract. The Court of Appeals for the Federal Circuit, in *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000), has ruled that the delay constitutes such a breach.

The utilities' damages claims largely are for the costs incurred to store SNF that they allege DOE would have accepted from them absent the breach—specifically, storage costs that utilities allege they would not have expended had DOE begun timely performance under the standard contracts. In addition, several utilities have alleged damages arising from the

"diminution-in-value" of their plants as the result of DOE's delay, claiming that they realized these damages when they sold their plants to other utilities.

Utility industry reports have estimated that the claims will total about $50 billion, which far exceeds the amount the utilities have paid into the NWF pursuant to the standard contracts. DOE's most recent estimate of potential liability is $12.3 billion, based upon a projected start date of 2020. These estimates do not fully take into account the Government's defenses or the possibility that plaintiffs will not be able to prove the full extent of their claims, and they were developed before the Administration's recent announcement about the general cessation of Yucca Mountain activities.

In the first case to proceed to trial on the merits in March 2004, the trial court found that the utility had not incurred any damages as a result of the partial breach of contract through the date of trial and denied any monetary recovery, although it ruled that the utility may return to court if and when it incurs damage because of the delay in spent fuel acceptance. *Indiana Michigan Power Co. v. United States*, 60 Fed. Cl. 639 (2004). In affirming this ruling on appeal, the appellate court held that all claims for breach of the standard contracts may only run through the date of the complaint and that utilities must file new complaints with the trial court seeking damages as they are incurred. *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005).

As a result of this ruling, utilities must file new cases with the trial court at least every six years to recover any costs incurred as the result of DOE's delay, and we expect to continue to litigate these claims until after DOE begins performance of the standard contracts. We have received a total of five complaints filed by utilities while their first claims were still pending

before the trial or appellate courts.

Of the 71 lawsuits filed, 51 cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit, 10 have been settled, six were voluntarily withdrawn, and four have been litigated through final unappealable judgment.

While asserting legitimate defenses to plaintiffs' claims in litigation, we also have made concerted efforts to settle claims. The settlements resolving claims on 12 of the standard contracts in 10 of the cases involve five companies: Exelon Generation, LLC; South Carolina Electric & Gas Company; Omaha Public Power District; Duke Power Company; and, Florida Power & Light Company. These settlements provide for the periodic submission of claims to the contracting officer for costs incurred since the date of the last submission. In total, the Government has paid $565 million pursuant to these settlements and one trial court judgment that was not appealed.

Of those 51 pending cases, the trial court has entered judgment in 13 cases. Six of those cases are currently on remand to the trial court and seven are pending on appeal. Between judgments (most of which are not final because of appeals or remands) and settlements, the Government's liability currently stands at $1.3 billion. The time periods covered by these judgments vary, from as short a period as 1998-2001 to as long a period as 1998-2006. The time period for the amounts paid in settlement is 1998-2007.

The following chart summarizes the status of the 71 cases that have been filed:

Number of cases	Status/Comments
6	Voluntarily withdrawn
10	Settled
4	Final unappealable judgments
7	Final judgments on appeal
44	Pending before the trial court
71	Total

Significant Issues On Appeal

There are two major issues that should be decided in the pending appeals which will have a significant effect upon the Government's continuing liability in these cases. The first issue concerns the Government's ability to present a defense based upon the "unavoidable delays" clause in the contracts. As noted, the District of Columbia Circuit, in *Northern States*, mandated that the Government could not rely upon such a defense in its litigation of delay claims arising from its breach. One of the trial court judges at the Court of Federal Claims found the District of Columbia Circuit's writ of mandamus to be void and that DOE is entitled to raise the "unavoidable delays" defense. *Nebraska Public Power District v. United States*, 73 Fed. Cl. 650 (2006). On appeal, the Federal Circuit recently announced *sua sponte* that it would accept the case for *en banc* review. Supplemental briefing is due August 5, 2009. If the trial court ruling is affirmed, the Government may be able to pursue an absolute defense to the utilities' damages claims.

The second major issue to be decided in the cases on appeal is the scope of the Government's obligation to utilities regarding the amount of SNF to be accepted. In decisions issued in August 2008, the Federal Circuit ruled that DOE's performance obligation is set forth in a document issued in 1987, prior to the passage of the 1987 amendments to the NWPA.

Yankee Atomic Electric Co. v. United States, 536 F.3d 1268 (Fed. Cir. 2008); *Pacific Gas & Electric Co. v. United States*, 536 F.3d 1282 (Fed. Cir. 2008); *Sacramento Municipal Utility District v. United States*, Nos. 2007-5052, -5097, 2008 WL 3539880 (Fed. Cir. Aug. 7, 2008). The rates set forth in this document are higher than the rates that the Government has sought to have the trial court apply in determining damages. These cases are currently on remand to the trial court. We may seek rehearing *en banc* of the appellate decisions if these cases are appealed again or may seek review in another spent nuclear fuel case.

Payment Of Judgments And Settlements

To date, all payments to the utilities have come from the Judgment Fund. In *Alabama Power Co. v. United States Department of Energy*, 307 F.3d 1300 (11th Cir. 2002), the Court of Appeals for the Eleventh Circuit ruled that the Government could not use the NWF to pay for any of the damages that the utilities incur as a result of DOE's delay. The only other available funding source that has been identified to date is the Judgment Fund. There is no statutory requirement that DOE be required to reimburse the Judgment Fund.

Litigation Costs

The costs to the Government to litigate these cases are significant. The Department of Justice has expended approximately $24 million in attorney costs, $91 million in expert funds, and $39 million in litigation support costs in defense of these suits. In addition, DOE and the Nuclear Regulatory Commission have expended thousands of hours to support this effort. To date, DOE has not provided any funding for the litigation effort. There is every reason to believe that these cases will continue to be filed and litigated into the foreseeable future, and these costs will continue to be incurred.

Unless we are successful in being permitted to mount an "unavoidable delays" defense in the near future, or there is some other resolution to the current and potential litigation, the liability associated with delays in DOE's ability to accept SNF will only increase.. Further, in addition to the contracts under which DOE is already in breach, we understand that, in Fall 2008, DOE executed several new contracts with entities that hope to open new commercial nuclear reactors in the future and that, in those new contracts, DOE agreed to accept and dispose of SNF from those new nuclear reactors at a certain point after they open. If DOE is unable to accept SNF, the United States may incur additional liabilities under these recently executed contracts unless a method of resolving utility delay claims can be developed through some type of legislative action.

We understand that the Administration intends to convene a "blue ribbon" panel of experts to make recommendations for alternative options for the long-term storage and disposal of SNF that could provide a basis for revising the statutory framework that now governs these obligations. Any legislative solution to these issues should also consider provisions to address the Government's outstanding liability. A legislative solution would be preferable to the current drain on the resources of the courts and the Department of Justice caused by the seemingly endless litigation.

In summary, the SNF litigation has already cost the Government significant sums in terms of liability and litigation costs and will most likely continue to do so into the foreseeable future.