



Department of Justice

STATEMENT

OF

MICHAEL F. HERTZ
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

COMMITTEE ON THE BUDGET
U.S. HOUSE OF REPRESENTATIVE

ENTITLED

"BUDGET IMPLICATIONS OF CLOSING YUCCA MOUNTAIN"

PRESENTED ON

JULY 27, 2010

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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 obligations under the Nuclear Waste Policy Act ("NWPA") of 1982. I testified before the Committee in October 2007 and July 2009 regarding the same subject, and this testimony updates and supplements the testimony that I have previously provided.

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 Department of Energy ("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. To date, DOE has not yet commenced accepting SNF. The commencement date for SNF acceptance at a Federal facility is currently unknown; however, DOE has clearly stated its continued commitment to meeting its obligations for disposing of spent nuclear fuel and high-level radioactive waste.

Status Of Court Of Federal Claims Litigation

In response to DOE’s delay, utility companies have filed 72 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, 1341 (Fed. Cir. 2000), has ruled that the delay constitutes such a breach.

The utilities’ damages claims are largely 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 as part of the sale.

DOE's most recent estimate of potential liability, which was formulated in 2009 and assumed a projected start date of SNF acceptance of 2020, was as much as \$13.1 billion. This estimate does not fully account for the Government's defenses or the possibility that plaintiffs will not be able to prove the full extent of their claims, and they were created before the Administration's 2009 announcement that it would not proceed to build a repository at Yucca Mountain, Nevada.

The United States Court of Appeals for the Federal Circuit has held that, because the utilities are continuing to perform their obligations under the standard contracts by paying money to the NWF with the expectation of future performance, all claims for breach of the standard contracts are "partial" rather than "total" and damages are only available through the date of the complaints that have been filed. Indiana Michigan Power Co. v. United States, 422 F.3d 1369 (Fed. Cir. 2005). To comply with the applicable statute of limitations, 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, absent settlement, we will continue to litigate these claims until after DOE begins accepting SNF.

Of the 72 lawsuits filed, 50 cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit, 11 have been settled, six were voluntarily withdrawn, and five have been litigated through final unappealable judgment. Of the 50 pending cases, the trial court has entered judgment in 17 cases, 13 of which are pending on appeal and the time to appeal on the remaining four of which has not yet elapsed. Six of the 72 cases represent “second-round” claims -- that is, claims that seek recovery for expenditures incurred after the claim period for their initial claims and that are required to be brought in a second lawsuit as a result of the partial nature of the Government’s breach.

The Government’s liability for judgments that have already been entered (most of which are not final because of appeals or remands) and settlements currently stands at approximately \$2.0 billion. This amount covers approximately 60% of the claim-years of liability (that is, the total number of individual years in which individual contract-holders could seek damages for DOE’s failure to accept SNF) that accrued between January 31, 1998 and the end of 2009. In total, the Government has paid approximately \$760 million pursuant to settlements and one trial court judgment that was not appealed. In addition to the approximately 40% of the claim-years through 2009 that are not already the subject of settlements or

judgments, additional Government liability will accrue for as long as DOE is delayed in commencing SNF acceptance at contractually required rates.

As noted, I provided testimony to this Committee concerning these cases in October 2007 and July 2009. Both prior to and since these times, the Department has been actively involved in trying cases, and the judgments issued in these cases have resulted in a large number of appeals being filed and handled. The following chart depicts the progression of SNF cases through trial and to appeal as of October 2007, July 2009, and July 2010:

Status	2007	2009	2010
Voluntarily withdrawn	2	6	6
Settled	7	10	11
Final unappealable judgments	2	4	5
Final judgments on appeal	6	7	13
Final judgments pending determination to appeal	2	0	4
Pending before the trial court	48	44	33
Total	67	71	72

The Department of Justice has conducted 2 SNF trials in 2010. Barring settlements and excluding cases that may be remanded for further proceedings by the Federal Circuit, our current estimate is that we will conduct 8 trials in 2011 and 6 trials in 2012. Because the plaintiffs are suing for partial breach, we also anticipate that, absent settlement, the number of pending cases will increase as additional utilities file second-round claims.

While asserting legitimate defenses to plaintiffs' claims in litigation, we also have made concerted efforts to settle claims. The settlements resolving claims on 17 of the standard contracts in 11 of the cases involve six companies: Exelon Generation, LLC; South Carolina Electric & Gas Company; Omaha Public Power District; Duke Power Company; Florida Power & Light Company; and PSEG Nuclear LLC. These settlements provide for the periodic submission of claims to the contracting officer for costs incurred since the date of the last submission.

We have also recently begun discussions with the utilities as a group to explore the possibility of reaching a standard settlement with a larger segment of the utilities whose claims are currently pending. Because many of the major recurring issues have been resolved as the cases have worked their way through trial and the appellate process, the ultimate success of many types of claims is now more predictable to both the Government and the utilities. Because the claims of a substantial number of the utilities are not substantially affected by issues that require resolution at the appellate level, it may be possible to implement an administrative claims process with these utilities that is less expensive and more efficient than litigation and that achieves largely the same results.

Proceedings In Other Forums

There are several matters currently pending in the United States Court of Appeals for the District of Columbia Circuit and before the Nuclear Regulatory Commission (“NRC”) that are related to DOE’s obligation to accept SNF. Those cases do not directly implicate the breach of contract cases in the Court of Federal Claims and the Federal Circuit, but could have some effect upon the issues likely to arise during the litigation.

In In Re Aiken County (D.C. Cir.), the States of South Carolina and Washington, a county in South Carolina, and three individuals are seeking review of the Secretary of Energy’s decision to move to withdraw the license application and to terminate other activities related to development of the Yucca Mountain site for a permanent repository for nuclear waste. The District of Columbia Circuit has consolidated the various petitions and is handling them on an expedited basis, with the Government’s brief currently due to be filed on July 28, 2010. In a related matter, an Atomic Safety and Licensing Board of the Nuclear Regulatory Commission has recently held that the Secretary of Energy lacks authority to withdraw the previously submitted license application for Yucca Mountain, and the full NRC has requested briefing from interested parties regarding whether it should “review, and reverse or uphold, the Board’s decision.”

In addition, in National Association of Regulatory Utility Commissioners v. United States Department of Energy (D.C. Cir.), two industry groups and several nuclear reactor owners have filed petitions, which have been consolidated, challenging the continued collection of NWF fees.

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. We are also unaware of any statutory requirement that DOE be required to reimburse the Judgment Fund for judgments paid, unlike other statutory schemes that govern the adjudication of contract and other monetary disputes with the Government.

Litigation Costs

The costs to the Government to litigate these cases are significant. The Department of Justice has expended approximately \$29 million in attorney costs, \$111 million in expert funds, and \$52 million in litigation support costs in defense of these suits. In addition, DOE has expended many manhours to support this

effort. Absent settlement, these litigation costs will continue to be incurred into the foreseeable future, just as, until DOE begins SNF acceptance (or other suitable arrangement is made with the industry), the Government's underlying liability will continue to accrue.