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Lessons Learned from the *Winstar* and Spent Nuclear Fuel Cases

Spent Nuclear Fuel Damages Cases: A Chronological "Cheat Sheet" of Some Key Decisions by the United States Court of Appeals for the Federal Circuit

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The Nuclear Waste Policy Act of 1982 required the U.S. Department of Energy to accept and dispose of spent nuclear fuel and high level radioactive waste "beginning not later than January 31, 1998," in return for fees paid by owners of such waste. The Act authorized the DOE to enter into contracts for such disposal—which came to be called "Standard Contracts"—with parties possessing spent nuclear fuel, and such contracts were effectively made mandatory for nuclear utilities. As the 1998 date approached with the prospect of DOE performance unlikely, industry groups petitioned the United States Court of Appeals for the D.C. Circuit, directly under the Act, to compel performance. The D.C. Circuit held that there was an unconditional statutory obligation on the part of DOE to commence performance by January 31, 1998, but stopped short of granting mandamus relief or compelling the DOE to actually commence acceptance of spent

nuclear fuel. The D.C. Circuit held that there was a potentially adequate alternative remedy for the utilities, namely damages for breach of contract.

With the spent nuclear fuel accumulating at reactor sites, utilities began to incur substantial costs for storage and management of the waste. The first "spent nuclear fuel," or "SNF," damages lawsuits were filed in the U.S. Court of Federal Claims in 1998, and by 2004 every utility in the country had filed such a lawsuit. Those cases inevitably resulted in appeals to the United States Court of Appeals for the Federal Circuit, and some of the key decisions to date are listed, chronologically, below.

- *Northern States Power Company v. United States*, 224 F.3d 1361 (Fed. Cir., August 31, 2000) and *Maine Yankee Atomic Power Company v. United States*, 225 F.3d 1336 (Fed. Cir., August 31, 2000).

  Resolved threshold question of jurisdiction: because DOE's breach "involved all of the utilities that had signed the contract—the entire nuclear electric industry," the claims were for breach, not claims arising under the remedies provisions of the contracts. Specifically, the "delays" clause of the contracts did not apply, and no administrative exhaustion requirement need be satisfied before claims for breach could be brought directly in U.S. Court of Federal Claims.

- *Roedler v. Department of Energy*, 255 F.3d 1347 (Fed. Cir., July 6, 2001).

  Purported class action by utility ratepayers in federal district court, seeking recovery from United States for fees paid to DOE and into Nuclear Waste Fund by utilities. Although district court had jurisdiction under the "Little Tucker Act," rate payers were not third party beneficiaries of utility contracts with DOE, and therefore could not state a claim for breach of contract. The Court also held that the facts did not establish implied-in-fact contracts between DOE and ratepayers, nor could ratepayers state claims for compensation under a "takings" theory.

- *Indiana Michigan Power Company v. United States*, 422 F.3d 1369 (Fed. Cir., September 9, 2005).

  First appeal after a trial on the merits of a utility's damages claims. Multiple significant

rulings which helped to define the landscape for subsequent cases. Confirmed the requirements of foreseeability, causation, and reasonable certainty for recovery of mitigation damages. Confirmed that damages actions by utilities under the applicable scheme were, necessarily, for "partial, not total, breach." Pre- and post-breach damages are potentially recoverable under a partial breach theory, but, in a "partial breach" case, there is no recovery of future damages, not yet incurred. Rather, successive claims or lawsuits must be brought. Those successive lawsuits are not barred by rules of merger or bar, and the applicable six year statute of limitations runs from the date that the last damages sought in the prior proceeding are incurred.

- *PSEG Nuclear v. United States*, 465 F.3d 1343 (Fed. Cir., September 26, 2006).

  After one Court of Federal Claims judge dismissed utility claims for lack of jurisdiction (in favor of judicial review provisions in courts of appeal in Nuclear Waste Policy Act), Federal Circuit held that Court of Federal Claims did, in fact, have jurisdiction over damages claims under the Tucker Act.

- *Pacific Gas & Electric Company v. United States,* 536 F.3d 1282 (Fed. Cir., August 7, 2008), *Yankee Atomic Power Company v. United States*, 536 F.3d 1268 (Fed. Cir., August 7, 2008), and *Sacramento Municipal Utility District v. United States,* 293 Fed. Appx. 766, 2008 WL 3539880 (Fed. Cir., August 7, 2008), *reconsideration denied,* (August 6, 2009).

  Trilogy of cases decided on the same day clarified a key determinant of damage calculations, namely, the legal "acceptance rate" by which DOE was obligated to take spent nuclear fuel upon commencement of performance on January 31, 1998. (The legal acceptance rate can have a significant impact upon damage calculations, with higher rates resulting in higher damages in some cases, because less utility storage mitigation activities would have been necessary under such assumptions.) The controlling acceptance rate was determined by the Court to be that set forth in certain 1987 DOE documentation, which was not a position specifically advocated by either party. The Court also determined that Greater-Than-Class-C waste, which is a type of radioactive waste different than spent nuclear fuel, was covered by the DOE Standard Contracts. In *Yankee Atomic*, Court held that, in a partial breach case, payments of fees due upon performance were not yet owed, and government could not secure offsets upon basis of such not-yet-due fees. In *Sacramento*, the Court rejected government challenges to recovery for costs associated with utility's internal labor efforts, and held that "foreseeability" did not require that the specific type of dry storage equipment utilized by utility for mitigation be foreseeable at time of contract formation.

- *Carolina Power & Light Company v. United States*, 573 F.3d 1271 (Fed. Cir., July 21, 2009).

  Remanded for consideration of damages in light of acceptance rates established in subsequent *Pacific Gas et al.* decisions, which had been issued after the Court of Federal Claims' decision. (Ultimate recovery by plaintiff on remand exceeded original award by some $9 million.) Rejected government challenges to recovery of fixed overhead and indirect costs, where those costs were properly allocated to the mitigation projects for which damages were being claimed. Also rejected government arguments that costs of loading hypothetical DOE canisters that were not supplied due to breach should be deducted from present damage award, as such costs were not "avoided," but, at most, only deferred.

- *Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir., January 12, 2010) (*en banc*).

  Prior D.C. Circuit rulings (in *Northern States Power Company v. U.S. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997)) that DOE could not avoid its statutory obligation to commence accepting spent nuclear fuel on January 31, 1998 by invocation of the "unavoidable delays" clause of the Standard Contract did not impermissibly intrude upon Court of Federal Claims' exclusive Tucker Act jurisdiction. Such rulings regarding the "unavoidable delays" clause by the D.C. Circuit must therefore be given preclusive *res judicata* effect, notwithstanding the fact that the rulings would necessarily affect subsequent contract-based litigation in the Court of Federal Claims.

- *Southern Nuclear Power Company v. United States*, 637 F.3d 1297 (Fed. Cir., March 11, 2011).

  For costs allegedly avoided due to DOE's breach, which government argues must be deducted from any damage award, government bears a burden of moving forward to point out any costs it believes the plaintiff has avoided, and in appropriate circumstances producing supporting evidence. Upon such showings, a plaintiff then bears a burden of establishing damages that rebut or account for such allegedly saved costs. With respect to the "unavoidable delays" clause addressed in *Nebraska Public Power District*, panel "need not reach" question posed in a concurrence to that decision regarding availability of a potential defense, in light of the fact that any such defense was waived by the government under the facts of the Southern Nuclear case.

- *Energy Northwest v. United States*, 641 F.3d 1300 (Fed. Cir., April 7, 2011).

  For certain site modifications undertaken in connection with mitigation activities, plaintiff must prove that such modifications would not have been necessary to accommodate DOE performance. With respect to indirect overhead expenses, as in *Carolina Power*, such costs are recoverable. Finally, costs associated with financing of the mitigation measures taken may not be recovered as damages, pursuant to the "no interest" rule applicable to claims against the government.

- *Dominion Resources, Inc. v. United States*, 641 F.3d 1359 (Fed. Cir., April 25, 2011).

  Nuclear Waste Policy Act provision allowing for "rights and duties of a party to a contract" to be assigned allowed assignment of right to pursue pre-assignment damages claims—such assignments were not barred by the Anti-Assignment Acts. Also, as in *Yankee Atomic*, government could not, as a matter of law, seek discovery or an offset based upon alleged benefits conferred by non-payment of fees that are not due until actual DOE performance.

- *Dairyland Power Cooperative v. United States*, 645 F.3d 1363 (Fed. Cir., June 24, 2011).

  Affirmed trial court's award of damages based upon causation theory that utility would have participated in a market for "exchanges" of DOE acceptance allocations, pursuant to the "exchanges" clause of the Standard Contract, and affirmed the trial court's deduction from the damage award costs that utility would have expended to acquire such DOE acceptance allocations. Properly allocated fixed overhead costs are recoverable, as in *Energy Northwest et al.*

- *Southern California Edison Company v. United States,* 655 F.3d 1319 (August 23, 2011).

  Indirect overhead costs are recoverable as damages, as in *Carolina Power* and *Energy Northwest.*

- *Boston Edison Company v. United States*, 658 F.3d 1361 (Fed. Cir., September 28, 2011).

  A seller of a nuclear power plant could not recover damages from the government under a "diminution in value" theory in these partial breach cases, because such damages necessarily involve the sort of speculation about future non-performance (and attempted quantification of damages attributable to that future non-performance) that cannot be recovered under *Indiana Michigan* in a partial breach case. In addition: recovery of certain allegedly increased NRC fees required further factual development; properly

allocated fixed indirect overhead costs are recoverable as in *Southern California Edison*, *Energy Northwest*, and *Carolina Power*; and financing/cost of capital damages are precluded under the "no interest" rule, as in *Energy Northwest*.

- *System Fuels, Inc. v. United States*, 666 F.3d 1306 (Fed. Cir., January 19, 2012), and *System Fuels, Inc. v. United States*, 2012 WL 255301 (January 19, 2012).

  Financing/cost of capital damages are precluded under the "no interest" rule, as in *Energy Northwest et al.* Properly allocated fixed overhead costs are recoverable, as in *Carolina Power et al.* Award of damages for certain plant modification costs was permissible, notwithstanding the failure by the trial court to recite the burdens analysis identified in the subsequent *Southern Nuclear* and *Energy Northwest* cases, issued after decision of the trial court. And, government may not seek an offset upon the basis of fees not yet due, as in *Yankee Atomic* and *Dominion.*

- *Pacific Gas & Electric Company v. United States*, ___ F.3d ___ (Fed. Cir., February 21, 2012).

  "Mandate rule" did not bar trial court's award of damages on remand. Recovery of costs expended for potential off-site storage project was not barred as unforeseeable or speculative, on record in that case. Finally, damages awarded upon the basis of "exchanges" of DOE acceptance allocations were not barred upon the basis of the mandate rule, and were sufficiently supported as an evidentiary matter.

- *Consolidated Edison Company of New York, Entergy Nuclear Indian Point v. United States*, ___ F.3d ___ (Fed. Cir., April 16, 2012).

  Where evidence was that certain claimed storage costs would have been incurred even had DOE performed, award of such storage costs as damages was reversed. Award of damages for allegedly increased NRC fees also failed as a matter of proof. Financing/cost of capital damages are precluded under the "no interest" rule, as in *Energy Northwest et al.* Properly allocated fixed overhead costs are recoverable, as in *System Fuels, Inc.* and *Boston Edison.*