

Receipt number 9998-4049498

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
JUN 30 2017
U.S. COURT OF
FEDERAL CLAIMS

_____)		
ENTERGY ARKANSAS, INC. and)		
SYSTEM FUELS, INC.,)		
)		
)		
Plaintiffs,)		
)		
v.)	No. <u>17-899 C</u>	
)		
THE UNITED STATES,)		
)		
Defendant.)		
_____)		

COMPLAINT

Plaintiffs Entergy Arkansas, Inc. (“Entergy Arkansas”) and System Fuels, Inc. (“SFI”) (collectively, “Plaintiffs”) allege as follows:

NATURE OF THE CASE

1. This is the “third round” spent nuclear fuel lawsuit regarding the Arkansas Nuclear One power plant (“ANO”) near Russellville, Arkansas. Entergy Arkansas, the owner of ANO, and SFI, bring this lawsuit pursuant to 28 U.S.C. § 1491 to recover significant damages caused by the Department of Energy’s (“DOE”) material partial breach of its unconditional obligation to begin disposing of spent nuclear fuel and high level nuclear waste (collectively, “SNF”) generated by ANO. Plaintiffs incurred the costs claimed as damages in this lawsuit during the period from April 1, 2012 to the present.

2. Pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“NWPA”), DOE and SFI, as agent for Arkansas Power & Light Company (predecessor-in-name to Entergy Arkansas) entered into Contract No. DE-CR0183NE44363, under which substantial fees—to date more than \$370 million—have been paid in return for

DOE's obligation to remove and dispose of SNF beginning no later than January 31, 1998. Plaintiffs have fully complied with the fee payment obligations and all other obligations under the contract. DOE, however, has failed to perform its reciprocal obligation to dispose of SNF, and currently does not plan to meet these obligations until 2048, if at all. Plaintiffs have incurred and will continue to incur significant costs associated with procuring additional SNF storage capacity, and other damages as a result of DOE's failure to comply with its contractual obligations.

PARTIES

3. Entergy Arkansas is the owner of ANO, which is a two-unit pressurized water reactor nuclear power plant. The Atomic Energy Commission ("AEC") issued a license to Entergy Arkansas for Unit 1 in May 1974. The Nuclear Regulatory Commission ("NRC"), the successor to the AEC, issued a license to Entergy Arkansas for Unit 2 in July 1978. On June 30, 1983, SFI, as agent for Arkansas Power & Light Company (predecessor-in-name to Entergy Arkansas), executed the Standard Contract. The ANO units have generated and continue to generate SNF, which is stored at the plant site.

4. Defendant is the United States of America (the "Government"), acting through DOE.

JURISDICTION

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1491(a)(1). *See PSEG Nuclear, LLC v. United States*, 465 F.3d 1343, 1349 (Fed. Cir. 2006) (holding that the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to hear plaintiff's breach of contract claims against DOE for failure to pick up plaintiff's SNF as required under the Standard Contract).

6. DOE's failure to comply with its essential contractual obligation to begin disposing of SNF by January 31, 1998 constitutes a partial material breach of the Standard Contract. *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1374, 1378 (Fed. Cir. 2005). Further, this Court has previously found that DOE partially breached the Standard Contract with respect to ANO. *System Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 177 (2005) (granting Plaintiffs summary judgment on liability for partial breach of contract); *Sys. Fuels, Inc. v. United States*, 79 Fed. Cl. 37 (2007), *recons. denied*, 79 Fed. Cl. 182 (2007) ("*System Fuels IV*"), *aff'd in part, rev'd in part*, *System Fuels, Inc. v. United States*, 457 Fed. Appx. 930 (Fed. Cir. 2012); *Sys. Fuels, Inc. v. United States*, 110 Fed. Cl. 583 (2013) (on remand, granting Plaintiffs \$47.8 million in damages on "Round 1" claim); *Sys. Fuels v. United States*, 120 Fed. Cl. 737 (2015) (granting Plaintiffs \$29 million on "Round 2" claim), *rev'd in part and remanded*, *Sys. Fuels v. United States*, 818 F.3d 1302 (Fed. Cir. 2016) (reversing as to denial of cask loading damages); *System Fuels, Inc. v. United States*, No. 12-389C, slip op. at 1 (Fed. Cl. July 6, 2016) (on remand on cask loading issue).

7. Plaintiffs may seek recovery of damages without exhausting any administrative remedies. The Federal Circuit has conclusively rejected the Government's exhaustion of remedies jurisdictional defense. *See Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed. Cir. 2000) ("*Northern States*"); *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000) ("*Maine Yankee*").

8. Furthermore, Article XI of the Standard Contract states, "Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law."

FACTUAL BACKGROUND

The Standard Contract

9. In 1982, Congress enacted the NWPAs, codifying DOE's commitment to accept responsibility and provide for the timely disposal of commercial SNF. Pursuant to Section 302(a)(5)(B) of the NWPAs, 42 U.S.C. § 10222(a)(5)(B), DOE was required to commence disposing of commercially-generated SNF no later than January 31, 1998, in return for the payment of fees into the Nuclear Waste Fund by utilities and others that generated or held title to SNF.

10. Pursuant to Section 302 of the NWPAs, in 1983 DOE developed the Standard Contract. The Standard Contract embodies the reciprocal obligations mandated by the NWPAs, pursuant to which contract holders agree to pay fees into the Nuclear Waste Fund in return for the provision of SNF disposal services by the DOE, beginning no later than January 31, 1998. *See* 10 C.F.R. § 961.11. Specifically, the Standard Contract provides that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF . . . has been disposed of." 10 C.F.R. § 961.11, Art. II.

11. SFI executed this Standard Contract on behalf of itself and Arkansas Power & Light (Entergy Arkansas' predecessor-in-name) on June 30, 1983. Entergy Arkansas has paid approximately \$370 million to date into the Nuclear Waste Fund pursuant to the Standard Contract.

DOE's Anticipatory Repudiation of the Contractual Deadline

12. Notwithstanding the obligation imposed upon the DOE by the Standard Contract, the DOE failed to meet most of the early milestones established by the NWPAs. These early

failures eventually led to problems further along the program schedule, particularly in establishing the disposal facilities called for by the NWPA. Nonetheless, DOE continued to make commitments and representations that it would begin to dispose of SNF by the 1998 deadline.

13. For example, in a September 7, 1984 letter by Donald P. Hodel, then Secretary of Energy, to United States Senator J. Bennett Johnston, Secretary Hodel stated, “Pursuant to my authority, it is my intention that this commitment together with the overall thrust of the [NWPA], will create an obligation for [DOE] to accept spent fuel in 1998 whether or not a repository is in operation.”

14. In its 1987 Mission Plan Amendment, DOE announced that the geologic repository called for by the NWPA would not be available until 2003. DOE indicated, however, that it would be able to begin accepting SNF by 1998 at a Monitored Retrievable Storage (“MRS”) facility designed to store SNF until commencement of repository operations.

15. Congress amended the NWPA in 1987. As amended, the NWPA required DOE to focus its entire repository development effort on Yucca Mountain, Nevada—one of the earlier-identified candidate sites—to determine its suitability as the nation’s first geologic repository for SNF. 42 U.S.C. § 10133. Congress also authorized DOE to construct a MRS facility but did not name a specific site. Rather, the NWPA provided two different options for siting a MRS facility. Under the first option, a MRS facility could be sited through the efforts of the Nuclear Waste Negotiator, an Executive Branch position created by the 1987 Amendments. 42 U.S.C. §§ 10242-10249. Under the second option for MRS facility siting, the Government was authorized to site and develop a MRS facility on its own, but on a schedule that was linked by the NWPA to the development of the repository. 42 U.S.C. §§ 10165(b), 10168(d).

16. By 1987, the repository program was already significantly behind schedule. Despite the fact that, in less than five years, the repository program had already significantly fallen behind schedule, the Government relied solely on the efforts of the Nuclear Waste Negotiator for development of the MRS facility. The Government did not develop any contingency plans for meeting the January 31, 1998 deadline in the event that the Negotiator was unsuccessful, a state of events that continued even after the Negotiator's authority expired with the unsuccessful completion of his mission. The Government's waste disposal program fell further behind schedule.

17. In 1995, DOE issued a Final Interpretation of Nuclear Waste Acceptance Issues ("Final Interpretation") wherein DOE retreated from its earlier acknowledgments that it had an unconditional obligation to begin disposing of SNF by January 31, 1998. 60 Fed. Reg. 21793, 21794 (May 3, 1995). In its Final Interpretation, DOE stated that, since passage of the NWPA, it "has become apparent that neither a repository nor an interim storage facility constructed under the Act will be available by 1998," and that it would commence disposing of SNF at a repository by 2010 at the earliest. 60 Fed. Reg. at 21794. The Final Interpretation also stated DOE's conclusion that the NWPA does not impose an obligation on DOE to commence disposing of contract holders' SNF in 1998 in the absence of a disposal or interim storage facility. *Id.* at 21794-95.

DOE's Breach of its Contractual Obligation

18. Various nuclear utilities filed petitions for review of the Final Interpretation in the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit ruled in favor of the petitioners and held that the NWPA imposed on DOE an unconditional obligation to begin

disposing of SNF by January 31, 1998. *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996).

19. Notwithstanding the D.C. Circuit's ruling, DOE advised Standard Contract holders that it would not begin to dispose of SNF by the January 31, 1998 deadline. Specifically, DOE announced in a December 17, 1996 letter to contract holders "that DOE anticipates it will be unable to begin acceptance of SNF for disposal in a repository or interim storage facility by January 31, 1998." DOE further took the position that its failure to meet the deadline was excused because its delay was unavoidable.

20. In response, various nuclear utilities filed another petition with the D.C. Circuit for a writ of mandamus to compel DOE to comply with the mandate in *Indiana Michigan*. In *Northern States Power Co. v. United States Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) ("*Northern States I*"), the D.C. Circuit reiterated that DOE had an unconditional obligation under both the NWPA and the Standard Contract to begin disposing of utilities' SNF by January 31, 1998. The Court also held that DOE had a clear duty to act in accordance with this unconditional obligation and issued a writ of mandamus precluding the Government from arguing that its failure to meet the January 31, 1998 deadline was unavoidable. On November 30, 1998, the United States Supreme Court denied the Government's petition for a writ of certiorari in the *Northern States I* case, 525 U.S. 1016 (1998). On January 12, 2010, the Federal Circuit denied the Government's challenge to the jurisdiction of the D.C. Circuit to issue the writ of mandamus in *Northern States I*. See *Nebraska Pub. Power Dist. v. United States*, 590 F.3d 1357 (Fed. Cir. 2010).

21. DOE did not begin to dispose of SNF by January 31, 1998, as required by the NWPA and Standard Contract. For almost twenty years since the 1998 performance deadline,

DOE has continued its retreat on the date it will begin performance at a repository from 2010 to 2017 to 2020 and now 2048, and has failed and refused to provide any firm commencement date for the disposal of SNF.

22. In *Maine Yankee*, decided by the Federal Circuit on August 31, 2000, the Federal Circuit concluded that the Government's admitted failure to begin accepting SNF by the January 31, 1998 contractual deadline constituted a breach of the Standard Contract. 225 F.3d at 1342. In the companion *Northern States* case, the Federal Circuit held that the unavoidable delays provision of the contract "does not bar a suit seeking damages for the Government's failure to begin performance at all by the statutory and contractual deadline of January 31, 1998." *Northern States*, 224 F.3d at 1367. In summary, the Federal Circuit has determined as a matter of law that the Government breached the contract, and that Plaintiffs and other similarly situated utilities that are parties to the Standard Contract can bring an action for breach of contract damages in this Court.

Plaintiffs' Previous Lawsuits Against the Government Regarding ANO

23. "First Round" Case. In 2003, Plaintiffs brought a lawsuit against the Government for, *inter alia*, partial material breach of the Government's obligation to begin disposing of SNF generated at ANO. *System Fuels, Inc. v. United States*, No. 03-2623 (Fed. Cl.) (Lettow, J.). In compliance with the Federal Circuit's holding in *Indiana Michigan Power Co. v. United States*, that in a suit for partial breach of contract, a plaintiff may recover "damages for nonperformance only to the time of trial and may not recover damages for anticipated future nonperformance," Plaintiffs' claim sought damages for costs incurred by Plaintiffs through June 30, 2006. 22 F.3d 1369, 1376 (Fed. Cir. 2005). The trial on Plaintiffs' claims before Judge Lettow was conducted over seventeen days in February, March, and April of 2007. On October 16, 2007, the Court

issued an Opinion and Order granting in part and denying in part Plaintiffs' claims. *System Fuels, Inc. v. United States*, 79 Fed. Cl. 37, *recon. denied* 79 Fed. Cl. 182 (2007). On appeal, the Federal Circuit affirmed-in-part, reversed-in-part, and remanded the Court's October 16, 2007 Opinion and Order. *System Fuels, Inc. v. United States*, 457 Fed. Appx 930 (Fed. Cir. 2012).

24. "Second Round" Case. In accordance with the Federal Circuit's instruction in *Indiana Michigan* to bring separate actions for damages "as they are incurred," Plaintiffs brought a second lawsuit to recover significant damages incurred during the period between July 1, 2006 and March 31, 2012 caused by the Government's partial material breach of its unconditional obligation to begin disposing of SNF generated by ANO. *System Fuels, Inc. v. United States*, No. 12-389C (Fed. Cl.) (Lettow, J.). The trial on Plaintiffs' claims for this second round suit were tried before Judge Lettow over eight days in September of 2014. On April 15, 2015, the Court issued an Opinion and Order granting in part and denying in part Plaintiffs' claims. *System Fuels, Inc. v. United States*, 120 Fed. Cl. 737 (2015). On appeal, the Federal Circuit reversed the denial of cask loading costs and remanded the Court's April 15, 2015 Opinion and Order. *System Fuels, Inc. v. United States*, 818 F.3d 1302 (Fed. Cir. 2016). On remand, Judge Lettow issued an amended judgment consistent with the Federal Circuit's decision. *System Fuels, Inc. v. United States*, No. 12-389C, slip op. at 1 (Fed. Cl. July 6, 2016).

25. In accordance with the Federal Circuit's instruction in *Indiana Michigan*, Plaintiffs bring this "third round" case to recover significant damages incurred during the period from April 1, 2012 to the present caused by the Government's continuing partial material breach of its unconditional obligation to begin disposing of SNF generated by ANO.

Nature of Damages Sustained by Plaintiffs as a Result of the Government's Breach

26. As a direct consequence of the Government's disregard of its contractual obligations, Entergy Arkansas has been and will be forced to incur substantial additional costs to provide for extended on-site storage of its SNF, including but not limited to the acquisition and loading of dry fuel storage casks, acquisition and maintenance of required ancillary equipment, monitoring spent fuel storage facilities, modifications to security facilities, expansion of storage facilities, and plant modifications necessary to facilitate storage.

27. Moreover, Plaintiffs have incurred and will continue to incur other substantial damages, including but not limited to regulatory costs, taxes and fees associated with efforts to ensure sufficient on-site storage capacity or alternative off-site storage capacity to permit continued operation of its nuclear plant.

28. More specifically, as a direct and proximate result of DOE's continuing partial breach of the ANO Standard Contract, Plaintiffs have incurred damages including, but not limited to: (1) continuing engineering costs associated with dry fuel storage equipment and facilities; (2) costs for modifications to security facilities as a result of dry fuel storage; (3) continuing maintenance costs associated with the ISFSI; (4) licensing and regulatory costs associated with obtaining pertinent NRC approvals and NRC preoperational demonstrations; (5) costs associated with the design, procurement, testing, training, and operation of dry fuel storage ancillaries; (6) costs associated with the development of procedures and the training of employees, management, craftsmen, and contractors in support of dry fuel storage; (7) ongoing dry fuel storage loading campaign costs consisting of capital expenditures and operational and maintenance costs, including costs for acquisition of additional storage cask systems and cask

loading costs; and (8) seismic stability related damages or damages otherwise related to the cask transfer facility.

CLAIMS FOR RELIEF

Count I

(Partial Breach of Contract)

29. Paragraphs 1 through 28 are incorporated herein by reference as if set forth in full.

30. Plaintiffs have complied and continues to comply with all of the obligations under the Standard Contract, including the payment of all required fees into the Nuclear Waste Fund.

31. The Government has failed to perform its obligation under the Standard Contract to dispose of SNF beginning no later than January 31, 1998, and thereby has partially and materially breached the Standard Contract.

32. As a direct and proximate result of the Government's partial breach of the Standard Contract, Plaintiffs have incurred and will incur substantial damages including but not limited to those set forth in paragraph 28 above.

Count II

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

33. Paragraphs 1 through 32 are incorporated herein by reference as if set forth in full.

34. The Standard Contract between Plaintiffs and the Government contains an implied covenant of good faith and fair dealing, pursuant to which the Government has a duty to perform its obligations under the contract in good faith and not to take actions detrimental to Plaintiffs' contractual rights. The Government has breached the covenant of good faith and fair dealing by failing and refusing to make any effort to meet the contractual deadline for beginning to dispose of SNF; by attempting to avoid its obligations under the contract as defined by the

D.C. Circuit; by failing to make any effort to dispose of Plaintiffs' SNF or even to provide Plaintiffs with a firm date on which the Government will begin to do so; and by insisting on Plaintiffs' continued performance of its reciprocal obligation to pay fees into the Nuclear Waste Fund despite the Government's refusal to perform.

35. The Government's failure to act has not been the result of inadequate resources. The Government's annual expenditures from the Nuclear Waste Fund have historically been below the level of annual receipts into the Nuclear Waste Fund. There are ample funds available to the Government to comply with its contractual obligations.

36. In contrast to the Government's failure to take any action to meet its contractual commitments, the Government has taken action to receive, transport, and store SNF from other entities. For example, the Government has accepted and continues to store SNF from foreign research reactors.

37. As a direct and proximate result of the Government's breach of the implied covenant of good faith and fair dealing, Plaintiffs have suffered and will continue to suffer damages as alleged above.

Count III

(Taking Without Just Compensation)

38. Paragraphs 1 through 37 are incorporated herein by reference as if set forth in full.

39. Based on its commitment to dispose of SNF, which was codified with a date certain in the NWPA, the Government was and is obligated under the Standard Contract and NWPA to commence acceptance and disposal of SNF generated by Standard Contract holders no later than January 31, 1998.

40. The Government's failure and refusal to comply with the requirements of the Standard Contract for acceptance and disposal of SNF generated at the ANO nuclear plant constitutes a taking of the vested real property rights of Plaintiffs. For example, the Government's failure to honor its commitments under the Standard Contract will prevent Plaintiffs from being able to complete the decommissioning of the ANO nuclear plant site and devote that site to commercial uses as soon as it otherwise would have been able to do so. The Government's conduct has deprived, and will continue to deprive, Plaintiffs of the full valuable economic use of that site, as well as the real property on which the SNF is stored and from which it cannot lawfully be removed.

41. Plaintiffs are entitled to just compensation for this taking of their real property in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Entergy Arkansas and SFI respectfully request that the Court enter judgment in their favor and against the United States as follows:

- (a) on Count I, for damages in an amount to be established at trial;
- (b) on Count II, for damages in an amount to be established at trial;
- (c) on Count III, for damages in an amount to be established at trial;
- (d) pre-judgment and post-judgment interest as permitted by law;
- (e) costs of suit, including reasonable attorneys' fees as permitted by law; and
- (f) such other and further relief as this Court may deem proper.

Dated: June 30, 2017

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Respectfully submitted,

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