

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

National Association of Regulatory
Utility Commissioners,

Petitioner

v.

United States Department of Energy,

Respondent

No. 11-1066 (Consolidated with 11-
1068)

PETITIONERS' MOTION TO REOPEN

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Circuit Rule 27 of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, and this Court's decision in *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 680 F.3d 819 (D.C. Cir. 2012) ("*NARUC*"), Petitioners respectfully move the Court to reopen this consolidated case to review and reject Respondent U.S. Department of Energy's ("DOE's") compliance with the Court's remand, and to direct the Secretary of Energy ("Secretary") to suspend further collection of the Nuclear Waste Fund fee.¹

¹ In light of the Court's ruling that "[t]he panel will retain jurisdiction over this case so that any further review would be expedited," *NARUC*, 680 F.3d at 820, counsel for Petitioners consulted with the Deputy Special Counsel to the Clerk on the appropriate procedure to obtain expedited review of the 2013 Fee

In *NARUC*, this Court declared the Secretary's 2010 fee adequacy determination "legally defective," and "remand[ed] to the Secretary with directions to comply with the [Nuclear Waste Policy Act] within six months." *NARUC*, 680 F.3d at 820, 826. On January 18, 2013, the last day of the six month remand period, the DOE filed with the Court a "Notice of Compliance with Remand Order" attaching the "Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee and U.S. Department of Energy Nuclear Waste Fund Fee Adequacy Assessment Report" ("2013 Fee Adequacy Report" or "Report"). Contrary to the caption of Respondent's pleading, Petitioners submit that DOE failed to comply with the remand and that this new Report, like the 2010 report, is defective and should be set aside. Recognizing the Court's "power to direct the Secretary to suspend the fee," *NARUC*, 680 F.3d at 826, Petitioners renew their request that the Court so direct. DOE's second bite at the fee adequacy apple is fundamentally flawed, and further fee collection should thus be suspended.

DOE claims that the 2013 Fee Adequacy Report is a "new evaluation consistent with the Court's opinion."² To the contrary, the Report falls far short of the requirements set forth in the Nuclear Waste Policy Act (42 U.S.C. § 10101 *et*

Adequacy Report. The Deputy Special Counsel to the Clerk identified a motion to reopen as one means to seek expedited review. Should the Court determine that a different mechanism should have been used, such as filing a new petition for review, Petitioners respectfully request that this Motion be treated as such.

² Respondent's Notice of Compliance with Remand Order (Jan. 18, 2013) at 1.

seq.) (the “Act”) and the *NARUC* decision. DOE claims that its Nuclear Waste Fund fee adequacy assessment is based on a new waste disposal “Strategy.” *Id.* at ES-2. In fact, the Report is based on an assumed nuclear waste disposal program that departs in numerous respects from existing law. Until such time as Congress acts, the key components of DOE’s assumed program have not been approved. As DOE concedes, the Strategy is based on an “assumed disposal system” and is a “plan for developing” a waste disposal program. *Id.* at ES-1, 7. DOE states that it “intends” to work with Congress to enact legislation to implement the Strategy. *Id.* at 7-8. At bottom, DOE has based its conclusion to continue to collect the Nuclear Waste Fund fee, unabated, on a plan that has not been, and may never be, authorized and implemented by Congress.

DOE’s evaluation also fails to consider whether DOE needs to collect any further fees to fund a waste disposal program. The Report analyzes 42 different scenarios. But none of these scenarios assesses the adequacy of the Fund if no new fee revenues are added, even though this has been a central focus of Petitioners’ criticisms since 2009.³ DOE’s conclusion that there is no compelling evidence of either insufficient or excessive funds is further belied by the extreme (to say the

³ *See, e.g., NARUC*, 680 F.3d at 825 (emphasis added) (“Assuming that the Fund continues to accumulate interest at its present rate, rudimentary calculations suggest the Fund could reach \$66 billion in less than twenty years*even if no new fee revenues were added after 2011.*”)

least) uncertainty in the ending waste fund balance scenarios predicted by DOE. DOE's 42 scenarios have a range of \$7 *trillion*, from the Nuclear Waste Fund having \$4.9 *trillion* more than is needed to having \$2 *trillion* too little. Report at 27.

And even though most of the scenarios show that the Nuclear Waste Fund is overfunded, DOE admits that it made no effort to assess the probability of any of these scenarios. *Id.* at 33. The scenarios are thus as speculative as they are uncertain, and show that DOE has failed to conduct a meaningful analysis.

For these and many other reasons, the 2013 Fee Adequacy Report fails to comply with the Act, and Petitioners again seek redress from this Court. In light of this DOE's "disposition to delay," and in accordance with this Court's order that the *NARUC* panel retain jurisdiction so that any further review may be expedited, *NARUC*, 680 F.3d at 820, 826, Petitioners respectfully request this Court to reopen the case and set a schedule for the expedited review of the 2013 Fee Adequacy Report.⁴

⁴ This motion is accompanied by a Circuit Rule 28(a)(1)(A) Certificate as to Parties, Rulings, and Related Cases and a Circuit Rule 26.1 Corporate Disclosure Statement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing “Petitioners’ Motion to Reopen” was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on this 31st day of January, 2013 through the CM/ECF electronic filing system, and thus also served on counsel of record.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Consolidated Petitioners the National Association of Regulatory Utility Commissioners (“NARUC”), the Nuclear Energy Institute (“NEI”), Florida Power & Light Company (“FPL”), NextEra Energy Seabrook, LLC (“NextEra Seabrook”), NextEra Energy Duane Arnold, LLC (“NextEra DAEC”), NextEra Energy Point Beach, LLC (“NextEra Point Beach”), Omaha Public Power District (“OPPD”), PSEG Nuclear, LLC (“PSEG”), Indiana Michigan Power Company (“I&M”), PPL Susquehanna, LLC (“PPL Susquehanna”), Northern States Power Company d/b/a Xcel Energy (“Xcel Energy”), The Detroit Edison Company (“Detroit Edison”), Wolf Creek Nuclear Operating Corporation (“WCNOC”), Kansas Gas and Electric Company d/b/a Westar Energy (“KGE”), Kansas City

Power & Light Company (“KCPL”), Kansas Electric Power Cooperative, Inc., (“KEPCo”), and Nebraska Public Power District (“NPPD”) certify as follows:

1. **Parties:** In addition to Consolidated Petitioners, parties to this action are Respondents U.S. Department of Energy (“DOE” or the “Department”) and the United States of America. The Florida Public Service Commission and the Florida Office of Public Counsel were each granted leave to participate in the consolidated cases as amicus curiae in support of Petitioners.

2. **Rulings Under Review:** The agency rulings under review in these consolidated cases are the Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee, signed by the Secretary of Energy and dated January 16, 2013 (“Determination”), and the U.S. Department of Energy Nuclear Waste Fund Fee Adequacy Assessment Report, dated January 2013 (“2013 Fee Adequacy Report” or “Report”). DOE prepared the Determination and Report in response to this Court’s remand in *Nat’l Ass’n of Regulatory Util. Comm’rs v. DOE*, 680 F.3d 819 (D.C. Cir. 2012) (“*NARUC*”). On January 18, 2013, Respondents electronically filed with the Court its Notice of Compliance with Remand Order, to which the Determination and Report are appended.

3. **Related Cases:** In Petitions for Review dated April 2, 2010 and April 5, 2010, the consolidated Petitioners filed their first challenge concerning DOE’s Nuclear Waste Fund fee adequacy determination (Case Nos. 10-1074 and

10-1076). That challenge had requested that this Court direct DOE to perform a Nuclear Waste Fund fee adequacy assessment, as required by Section 302 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10222; and to suspend further collection of the fee until such time as an appropriate fee assessment had been completed. Petitioners also requested that the Court direct DOE to suspend the fee in light of the current status of the DOE waste disposal program.

On November 1, 2010, after briefing had been completed and oral argument scheduled, DOE issued a fee adequacy assessment. By order dated December 13, 2010, the Court dismissed the consolidated Petitions for Review, finding, *inter alia*, that issuance of the determination rendered “moot” the requests that the Court “order the Secretary to conduct an annual assessment under the [Nuclear Waste Policy] Act and to suspend the NWF fee pending completion of his annual assessment.” 405 Fed. Appx. 507 (D.C. Cir. 2010). The Court also ruled unripe Petitioners’ request that the Court order DOE to suspend the fee given the status of the waste disposal program, but noted that this claim might be properly raised in a challenge to the November 2010 assessment.

Petitioners did just that. In consolidated Case Nos. 11-1066 and 11-1068, Petitioners argued that DOE’s November 2010 assessment violated the Nuclear Waste Policy Act, and that DOE was obligated to suspend collection of the Nuclear Waste Fund fee. DOE had cancelled the Yucca Mountain waste disposal

program absent any replacement program and thus could not evaluate the costs of a program that did not exist. Nor did DOE attempt to estimate expected revenues from the fee and associated interest and investment income. In a decision dated June 1, 2012, this Court determined that DOE's November 2012 fee adequacy determination was "legally defective" and remanded the matter to DOE. *NARUC*, 680 F.3d at 826. Although the Court did not direct DOE to suspend the fee, it ruled that it had the authority to do so. *Id.* In addition, the Court ordered DOE to comply with the remand within six months and directed that the "panel will retain jurisdiction over this matter so that any further review would be expedited." *Id.* at 820.

On January 18, 2013, DOE filed with this court the Determination and 2013 Fee Adequacy Report, asserting compliance with the Court's remand. Petitioners disagree. The Determination and 2010 Fee Adequacy Report DOE do not comply with this Court's remand, or the requirements of the Nuclear Waste Policy Act. Petitioners have thus moved to reopen the case.

Respectfully submitted,

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I&M, PPL Susquehanna, Xcel
Energy, Detroit Edison, WCNOC,
KGE, KCPL, KEPCo, and NPPD

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I hereby certify that the electronic original of the foregoing “Certificate as to Parties, Rulings, and Related Cases” was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on this 31st day of January, 2013 through the CM/ECF electronic filing system, and thus also served on counsel of record.

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JOINT CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Consolidated Petitioners the National Association of Regulatory Utility Commissioners (“NARUC”), the Nuclear Energy Institute (“NEI”), Florida Power & Light Company (“FPL”), NextEra Energy Seabrook, LLC (“NextEra Seabrook”), NextEra Energy Duane Arnold, LLC (“NextEra DAEC”), NextEra Energy Point Beach, LLC (“NextEra Point Beach”), Omaha Public Power District (“OPPD”), PSEG Nuclear, LLC (“PSEG”), Indiana Michigan Power Company (“I&M”), PPL Susquehanna, LLC (“PPL Susquehanna”), Northern States Power Company d/b/a Xcel Energy (“Xcel Energy”), DTE Electric Company f/k/a The Detroit Edison Company, Wolf Creek Nuclear Operating Corporation (“WCNOC”), Kansas Gas and Electric Company d/b/a Westar Energy (“KGE”), Kansas City Power & Light

Company (“KCPL”), Kansas Electric Power Cooperative, Inc., (“KEPCo”), and Nebraska Public Power District (“NPPD”) respectfully submit this Joint Corporate Disclosure Statement identifying (1) the parent corporation for each Petitioner and any publicly held corporation that owns 10% or more of each Petitioner’s stock or other ownership shares; and (2) the general nature and purpose for each Petitioner, insofar as is relevant to this litigation:

1. NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commission members and through revenues generated by meetings of those members held three times each year.

2. NEI is a trade association organized under Section 501(c)(6) of the Internal Revenue Code. NEI has no parent corporation and no share owners. NEI is responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including matters governed by the Nuclear Waste Policy Act (the “Act”). NEI’s members include all entities licensed to generate electricity from civilian nuclear power reactors in the United States, who pay fees into the Nuclear Waste Fund in accordance with the provisions of Section 302(a) of the Act, 42 U.S.C. § 10222(a).

3. NextEra Energy, Inc. is the parent company of FPL and owns all of its stock. FPL is an electric utility company and owns and operates the Turkey Point Nuclear Plant, Units 3 and 4, located in Florida City, Florida, and also owns and operates the St. Lucie Nuclear Plant, Unit 1, and is the majority owner and operator of the St. Lucie Nuclear Plant, Unit 2. Both St. Lucie Units are located in Jensen Beach, Florida. FPL pays fees into the Nuclear Waste Fund for these four reactor units. FPL is a member of NEI.

4. NextEra Energy, Inc. is the parent company and owns all the stock of NextEra Energy Capital Holdings, Inc., which is the parent company of and owns NextEra Energy Resources, LLC, which in turn is the parent company of and owns ESI Energy, LLC, which in turn is the parent company of and owns Petitioners NextEra Seabrook, NextEra DAEC, and NextEra Point Beach. NextEra Seabrook is the majority owner and operator of Seabrook Station, a single reactor unit located near Seabrook, New Hampshire. NextEra DAEC is the majority owner and operator of the Duane Arnold Energy Center, a single reactor unit located near Palo, Iowa. NextEra Point Beach owns and operates the Point Beach Nuclear Plant, Units 1 and 2, located near Two Rivers, Wisconsin. NextEra Seabrook, NextEra DAEC, and NextEra Point Beach each pay fees into the Nuclear Waste Fund for their respective reactors and are each members of NEI.

5. OPPD is a public corporation and political subdivision of the State of Nebraska which has no parent corporation or other share owner. OPPD owns and operates the Fort Calhoun Station, a single reactor unit located near Omaha, Nebraska. OPPD pays fees into the Nuclear Waste Fund for the Fort Calhoun Station. OPPD is a member of NEI.

6. PSEG is a wholly-owned subsidiary of PSEG Power, LLC, which is a wholly-owned subsidiary of Public Services Enterprise Group, a publicly traded holding company. PSEG solely owns and operates Unit 1 of the Hope Creek Nuclear Generating Station, and is the majority owner and operator of Units 1 and 2 of the Salem Nuclear Generating Station. All three units are located in Salem County, New Jersey. PSEG pays fees into the Nuclear Waste Fund for these three nuclear reactor units. PSEG is a member of NEI.

7. American Electric Power Company, Inc. is the parent company of I&M and owns all of its stock. I&M is an electric utility company and owns and operates the Donald C. Cook Nuclear Plant, Units 1 and 2, located near Bridgman, Michigan. I&M pays fees into the Nuclear Waste Fund for these two reactor units. I&M is a member of NEI.

8. PPL Susquehanna is a wholly-owned subsidiary of PPL Generation, LLC, which is a wholly-owned subsidiary of PPL Energy Supply, LLC, which is a wholly-owned subsidiary of PPL Energy Funding Corporation, which is a wholly-

owned subsidiary of PPL Corporation, a publicly traded holding company. PPL Susquehanna is the majority owner and operator of Units 1 and 2 of the Susquehanna Steam Electric Station, located near Berwick, Pennsylvania. PPL Susquehanna pays fees into the Nuclear Waste Fund for the Susquehanna Steam Electric Station. PPL Corporation is a member of NEI.

9. Xcel Energy Inc. is the direct and ultimate parent company of Xcel Energy. Xcel Energy owns and operates the Prairie Island Nuclear Generating Plant, Units 1 and 2, near Red Wing, Minnesota, and the Monticello Nuclear Generating Plant, a single reactor unit in Monticello, Minnesota. Xcel Energy pays fees into the Nuclear Waste Fund for the Prairie Island and Monticello units. Xcel Energy Inc., is a member of NEI.

10. DTE Electric Company is a wholly-owned subsidiary of DTE Energy Company. DTE Electric Company owns and operates the Fermi Nuclear Power Plant Unit 2, a single reactor unit near Newport, in Monroe County, Michigan. DTE Electric Company pays fees into the Nuclear Waste Fund for the Fermi Nuclear Power Plant Unit 2. DTE Electric Company is a member of NEI.

11. KGE is a wholly-owned subsidiary of Westar Energy, Inc., a publicly traded company. KCPL is a wholly-owned subsidiary of Great Plains Energy Incorporated, a publicly traded company. Petitioner KEPCo is an electric utility and a cooperative, non-profit membership corporation that issues no stock and has

no owners. Petitioners KGE, KCPL, and KEPCo are each partial owners of the Wolf Creek Generating Station, a single reactor unit located in Coffey County, Kansas. Petitioner WCNOG is a wholly-owned subsidiary of KGE, KCPL, and KEPCo and operates the Wolf Creek Generating Station on behalf of its owners. WCNOG, as agent for its owners, pays fees into the Nuclear Waste Fund for the Wolf Creek Generating Station. WCNOG, KGE, KCPL, and KEPCo are members of NEI.

12. NPPD is a public corporation and political subdivision of the State of Nebraska which has no parent corporation or other share owner. NPPD owns and operates the Cooper Nuclear Station, a single reactor unit located near Brownville, Nebraska. NPPD pays fees into the Nuclear Waste Fund for the Cooper Nuclear Station. NPPD is a member of NEI.

Respectfully submitted,

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