

ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 11-1066 and 11-1068

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

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS; NUCLEAR ENERGY INSTITUTE, ET AL.,
Petitioners,

v.

THE UNITED STATES DEPARTMENT OF ENERGY AND
THE UNITED STATES OF AMERICA,
Respondents.

ON REOPENED PETITIONS FOR REVIEW OF FINAL ACTIONS OR
FAILURES TO ACT BY THE UNITED STATES DEPARTMENT OF ENERGY

**INITIAL BRIEF OF AMICI CURIAE
FLORIDA PUBLIC SERVICE COMMISSION AND
FLORIDA OFFICE OF PUBLIC COUNSEL IN SUPPORT OF
PETITIONERS AND REVERSAL OF DETERMINATION**

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND
RELATED CASES

The Florida Public Service Commission and the Florida Office of Public Counsel hereby certify, pursuant to D.C. Cir. Rule 28(a)(1), the following list of parties, rulings, and related cases and corporate disclosure information:

1. Parties and Amici:

[a] Respondents: The Respondents are the U.S. Department of Energy (DOE) and the United States of America.

[b] Amici: The Florida Public Service Commission and the Florida Office of Public Counsel are Amici Curiae in support of Petitioners.

[c] Petitioners: The Petitioners are the National Association of Regulatory Utility Commissioners (NARUC), the Nuclear Energy Institute (NEI), Florida Power & Light Co., NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, Omaha Public Power District, PSEG Nuclear LLC, Indiana Michigan Power Company, PPL Susquehanna, LLC, Northern States Power Co. d/b/a Xcel Energy, DTE Electric Company f/k/a The Detroit Edison Company, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company d/b/a Westar Energy, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Nebraska Public Power District.

2. Rulings Under Review: The rulings under review are set forth in DOE's Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee and the Nuclear Waste Fund Fee Adequacy Assessment Report (collectively referred to herein as the "2013 Determination"), which was filed with this Court on January 18, 2013. DOE filed a corrected version of the 2013 Determination, which is Joint Appendix ("JA") ____.

3. Related Cases: Case Nos. 11-1066 and 11-1068 were consolidated by this Court's March 10, 2011 order. In addition, NARUC and NEI brought suit, in Case Nos. 10-1074 and 10-1076, against DOE and the United States of America requesting that this Court direct DOE to perform a Nuclear Waste Fund fee adequacy review, 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 review had been completed. On December 13, 2010, the Court dismissed Case Nos. 10-1074 and 10-1076 as moot because DOE issued a fee review ("2010 Determination"). The Court stated, however, that "[g]iven the Secretary's recent completion of his annual assessment, petitioners may now be able to properly raise this claim through a challenge to that assessment."

NARUC and NEI brought suit in this case, Case Nos. 11-1066 and 11068, on the 2010 Determination. After briefing and oral argument, this Court issued its opinion on June 1, 2012, concluding that the 2010 Determination was legally

inadequate and remanded the case to the DOE. National Association of Regulatory Utility Commissioners v. United States Department of Energy, 680 F.3d 819, 825 (D.C. Cir. 2012). The Court ordered the Secretary of the DOE to respond to the remand within six months of the issuance of the mandate and stated that this Court would retain jurisdiction. Id. at 826. On February 27, 2013, the Court recalled the mandate, reopened the cases and established a briefing schedule.

4. Corporate Disclosure Statement: The Florida Public Service Commission and the Florida Office of Public Counsel are state government entities and are, thus, not required to file a corporate disclosure statement pursuant to D.C. Cir. Rule 26.1.

Respectfully submitted,

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Dated: May 3, 2013

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GLOSSARY OF ABBREVIATIONS

DOE Department of Energy

JA Joint Appendix

NARUC National Association of Regulatory Utility Commissioners

NEI Nuclear Energy Institute

I. STATUTES AND REGULATIONS

Except for the material included in the Addendum to this Brief, all applicable statutes and regulations are contained in the Consolidated Brief of Petitioners NARUC and NEI.

II. STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The Florida Public Service Commission and Florida Office of Public Counsel have a clear interest in the instant proceeding.¹ Pursuant to Chapter 366, Florida Statutes, the Florida Public Service Commission oversees rates charged by investor-owned electric utilities that operate nuclear power plants, including the pass-through costs of the nuclear waste fee. See Section 366.05, Florida Statutes.² The Nuclear Waste Policy Act, enacted in 1982, established the federal government's responsibility for safe disposal of high-level radioactive waste, including spent nuclear fuel. Under the Act, Florida utilities pay for the disposal of commercial nuclear waste through a fee paid into the Nuclear Waste Fund. Section 302(a)(2), 42 U.S.C. § 10222(a)(2). The utilities then pass the fee to ratepayers through a cost recovery mechanism that is subject to the approval of the

¹ All parties have consented to the Florida Public Service Commission and the Florida Office of Public Counsel participating as Amici Curiae in this consolidated case. Amici have previously filed a written representation to this effect, and we have reaffirmed with all parties that they consent to the filing of this Brief.

² Addendum, p. 3.

Florida Public Service Commission. See Section 366.041(1), Florida Statutes.³
The Florida Office of Public Counsel represents the ratepayers before the Florida
Public Service Commission. See Section 350.0611, Florida Statutes.⁴

Since the Nuclear Waste Policy Act was enacted in 1982, Florida ratepayers
have paid a total of \$810.1 million into the Nuclear Waste Fund.⁵ When interest is
taken into account, support of the federal government's nuclear waste disposal
program by Florida's ratepayers totals over \$1.4 billion.⁶ In 2012 alone, Florida's
ratepayers paid over \$15,760,594 into the Nuclear Waste Fund.⁷

As of December 31, 2012, nuclear generation composed 9.6 percent of
electric generation in Florida.⁸ There are four operating nuclear generating units
located in Florida that have a total summer capacity of 3098 megawatts,⁹ and one

³ Addendum, p. 2.

⁴ Addendum, p. 1.

⁵ See Nuclear Fund Payment Information by State through Q1 FY2011,
Nuclear Energy Institute, available at
[http://www.nei.org/resourcesandstats/documentlibrary/
nuclearwastedisposal/graphicsandcharts/nuclearwastefundpaymentinformationby
state/](http://www.nei.org/resourcesandstats/documentlibrary/nuclearwastedisposal/graphicsandcharts/nuclearwastefundpaymentinformationbystate/).

⁶ Id.

⁷ Florida Power & Light Company's Spent Nuclear Fuel Disposal Costs 2012,
Schedule A1, line 2, Addendum, p. 9.

⁸ See Review of 2012 Ten-Year Site Plans for Florida's Electric Utilities, Florida
Public Service Commission, December 2012, p. 38, available at
<http://www.floridapsc.com/publications/pdf/electricgas/TYSP2012.pdf>.

⁹ See Florida Reliability Coordinating Council 2012 Regional Load and Resource
Plan, pgs. 12, 24, available at
[http://www.floridapsc.com/utilities/electricgas/docs/FRCC_2012_
Load_Resource_Plan.pdf](http://www.floridapsc.com/utilities/electricgas/docs/FRCC_2012_Load_Resource_Plan.pdf).

unit that has ceased operations.¹⁰ Because of DOE's past failure to implement the requirements of the Nuclear Waste Policy Act, there are, as of December 2012, a total of 2,620 metric tons of uranium in spent fuel pools still stored on site and 436 metric tons in dry cask storage at these facilities.¹¹

Further, through a combination of new units and modifications to existing units, there are plans to increase substantially the amount of nuclear generating capacity in Florida, the need for which the Florida Public Service Commission approved to the extent of approximately 5,000 MW of additional nuclear capacity.¹² Thus, DOE's timely compliance with all of the requirements of the Nuclear Waste Policy Act, including those related to the collection of fees deposited in the Nuclear Waste Fund, is of great and growing importance to both the Florida Public Service Commission and Florida Office of Public Counsel.

III. STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Counsel for the Florida Public Service Commission and the Florida Office of Public Counsel wholly authored this Brief. The Florida Public Service Commission and the Florida Office of Public Counsel are state government

¹⁰ On March 13, 2013, the Nuclear Regulatory Commission acknowledged that Progress Energy Florida, Inc.'s (now known as Duke Energy Florida) Crystal River Unit 3 would permanently cease operations. Addendum, p. 10.

¹¹ See Affidavits of Steven Edwards, Christopher Fallon and Ruben Rodriguez, Addendum, pp. 5, 6, 7.

¹² See Review of 2012 Ten-Year Site Plans for Florida's Electric Utilities, *supra*, footnote 8, at p. 43.

entities. Counsel for the Florida Public Service Commission and the Florida Office of Public Counsel prepared this Brief in their normal course of employment. Money was not specifically allocated by the Florida Public Service Commission, the Florida Office of Public Counsel, or their Counsel to fund the preparation and submittal of this Brief. Moreover, no other person or entity contributed money that was intended to fund the preparation or submittal of this Brief.

VI. ARGUMENT

This Court found DOE's 2010 Determination to be legally inadequate. National Association of Regulatory Commissioners v. United States Department of Energy, 680 F.3d 819, 825 (D.C. Cir. 2012). DOE's 2013 Determination, including its review of 42 scenarios, is still legally inadequate. As a matter of both law and policy, the Nuclear Waste Policy Act allows for the collection of Nuclear Waste Fund fees to fund, inter alia, a permanent repository for the disposal of spent nuclear fuel, not a permanent repository for amassing billions of unspent ratepayer dollars. See Section 302(d). DOE's mere rhetorical envisioning of the ultimate disposal of nuclear waste, absent any tangible program in place to do so, does not justify the continued, unadjusted collection of Nuclear Waste Fund fees from Florida ratepayers pursuant to Section 302 of the Nuclear Waste Policy Act.

Pursuant to the provisions of Chapter 366, Florida Statutes, the Florida Public Service Commission and the Florida Office of Public Counsel seek to

assure that the rates that investor-owned electric utilities charge Florida's ratepayers, including those that are customers of nuclear utilities, are fair and reasonable. See Section 366.05, Florida Statutes.¹³ Under the regulatory scheme, utilities request authority from the Florida Public Service Commission to collect from their customers the costs that they necessarily and prudently incur. See Section 366.041(1), Florida Statutes.¹⁴

However, equally fundamental to the concept of fair and reasonable rates is the proposition that expenses incurred by the utility and borne by customers must be related to services provided on their behalf. See Gulf Power Company v. Florida Public Service Commission, 453 So. 2d 799, 803 (Fla. 1984) (affirming Florida Public Service Commission decision which excluded costs resulting from company's imprudent load forecasting from the total expenses that the utility could collect from its customers through rates). Accordingly, nuclear waste fees have been passed through to the ratepayers on the basis that those revenues would be used by DOE to construct the Yucca Mountain repository, and carry out the other aspects of the DOE civilian waste program, for the safe disposal of the utilities' nuclear waste pursuant to the requirements of the Nuclear Waste Policy Act.

DOE has terminated the Yucca Mountain project and the rest of the DOE civilian waste program, and its 2013 Determination does not provide for any

¹³ Addendum, p. 3.

¹⁴ Addendum, p. 2.

tangible program to replace what DOE has unilaterally cancelled. JA____. Thus, DOE's continued collection of the nuclear waste fees certainly vitiates the Florida Public Service Commission's explanation to Florida ratepayers as to why they should spend \$15,760,594 a year to reimburse the utilities' payment of the nuclear waste fee. As was the case with DOE's 2010 Determination, DOE's 2013 Determination allows millions of dollars to be paid to DOE, not to build a repository, but to think things over. It does not justify the collection of nuclear waste fees pursuant to Section 302(d) of the Nuclear Waste Policy Act.

The 2013 Determination again shows that the difficulty has not been to get the regulated utilities to pay the fees, which have been collected, in turn, from the ratepayers, but to get DOE to perform its responsibilities under the contract. As stated by the Court in Maine Yankee Atomic Power Company, et al., v. U.S., 225 F.3d 1336, 1343 (Fed. Cir. 2000):

The government does not, and could not, deny that it failed to meet the contractual requirement to begin accepting nuclear waste no later than January 31, 1998. "Failure to perform a contractual duty when it is due is a breach of the contract." [citation omitted] As the Court of Federal Claims noted, the parties do not dispute "that Yankee has paid all the contract fees and . . . that DOE has not begun accepting, transporting, and disposing of Yankee's SNF. Accordingly, DOE has breached the contract."

See also Indiana Michigan Power Co. v. DOE, 88 F.3d 1272, 1277 (D.C. Cir. 1996)(stating that DOE cannot assert lack of federal repository to excuse failure to take waste by contract date), and Entergy Nuclear FitzPatrick, LLC v. U.S., 2013

U.S. App. LEXIS 6551,*8, *21 (Fed. Cir. 2013)(prohibiting DOE from excusing its liability for damages based on alleged unavoidable delays).

DOE has abandoned Yucca Mountain, the Congressionally approved project providing justification for the fees that have been collected thus far. It is outrageous for DOE to continue to assert in the 2013 Determination that it is due still more money for absolutely no performance at all. JA____. Just as the intercession of the Court was necessary to establish that DOE's failure to perform on January 31, 1998, was a breach of the contract (and the statutory disposal obligation) and that DOE's excuses for non-performing were meritless, Maine Yankee, 225 F.3d at 1343, the Court should conclude at this time that DOE's "determination" to continue to collect fees that are plainly excessive and disproportionate to DOE's current inaction is inconsistent with Section 302(a)(4) of the Nuclear Waste Policy Act.¹⁵

DOE's 2013 Determination continues to show that the fees are plainly excessive and disproportionate:

The fee currently results in the deposit of approximately \$750 million of receipts annually into the Waste Fund. In addition to those receipts, the Waste Fund's value is now growing by approximately \$1.5 billion per year, as a result of accrued interest and the increasing

¹⁵ See U.S. Department of Energy (High Level Waste Repository), LBP-10-11, 71 N.R.C. 609, 618 (2010) ("Unless Congress directs otherwise, DOE may not singlehandedly derail the legislated decision-making process [established by Congress in the NWPA] by withdrawing the application [to license the Yucca Mountain nuclear waste repository]. DOE's motion must therefore be denied.").

book value of the Zero Coupon Bonds. The current value of the Waste Fund is approximately \$28.2 billion.

2013 Determination, p. 2, JA _____. Therefore, there is a compelling basis for NARUC's assertion that an adjustment to the fees collected for the Nuclear Waste Fund in the form of a temporary suspension thereof would be appropriate.

In its 2013 Determination, DOE states two broad rationales -- the same two rationales that it provided in its 2010 Determination -- as reasons for rejecting NARUC's assertion that the fees should be temporarily rescinded. First, DOE notes that its obligation to take and dispose of spent nuclear fuel and high level waste continues, notwithstanding the termination of the Yucca Mountain repository project.¹⁶ This remains insufficient to support the continued collection of fees. DOE's mere recognition that it has a current obligation to perform is not the equivalent of performing.

In the absence of any current plan to perform its obligation other than to consider options, DOE is not performing any activities which justify the ongoing collection of fees pursuant to Section 302(d). Thus, any such fees would be "excessive," requiring adjustment pursuant to Section 302(a)(4) of the Nuclear Waste Policy Act.

The second rationale offered by DOE as an explanation for its rejection of NARUC's assertion that the fees should be suspended temporarily is that a

¹⁶ 2013 Determination, p. 6, JA _____.

decision to adjust the current fee, which has been collected since the commencement of the Nuclear Waste Policy Act, requires a compelling reason.¹⁷ Again, this rationale does not support DOE's continued collection of the unadjusted fee. The fact that DOE has terminated the very project approved by Congress for which fees have been justified for decades without identifying any other current alternatives is itself a compelling reason to adjust the fees. DOE itself is the source of the "uncertainty" that it invokes for its refusal to suspend the collection of the fee. When the termination of the project is added to the fact of DOE's ongoing breach of the contract which is the purported basis for collecting the fees,¹⁸ the reason to suspend the fees becomes even more compelling. Further, that the federal government is paying damages to utilities for DOE's 15-years-and-counting breach is hardly evidence of progress in DOE's commitment to fulfill its contractual obligations.

DOE's weak assertion that suspending the collection of fees would be unfair to certain ratepayers¹⁹ is, under these circumstances, equivalent to the claim that the statutory requirement to adjust excessive fees should be rendered a nullity. Such statutory interpretation is disfavored.²⁰ Moreover, the very opposite of

¹⁷ 2013 Determination, pp. 2-4, JA ____.

¹⁸ 2013 Determination, p. 6, JA ____.

¹⁹ 2013 Determination, pp. 33-34, JA ____.

²⁰ See U.S. v Aldrich, 566 F.3d 976, 978 (11th Cir. 2009) (stating that statute should be construed so that no clause, sentence, or word shall be superfluous, void

DOE's claim is true. It would be unfair to Florida ratepayers not to suspend the fees under these circumstances. Cost-shifting to future ratepayers is not at issue. Paying DOE for doing nothing is at issue, because it contravenes Section 302(a)(4).

Finally, in light of the facts that (1) DOE prepared no determination at all in 2009, (2) DOE undertook to prepare the 2010 Determination only when petitioners filed suit, (3) this Court concluded that DOE's 2010 Determination was legally inadequate, and (4) the 2013 Determination continues to be inadequate, DOE's assertion that the fee should remain in effect now because a decision to adjust the fee requires years of evidence and observation rings hollow.²¹

Florida utilities currently have plans to build four new nuclear plants in addition to the four currently operating in the State.²² Therefore, Florida is very supportive of the Nuclear Waste Policy Act.²³ However, allowing DOE to ignore

or insignificant). Section 302(a)(4) provides that if "excess revenues are being collected, in order to offset the costs incurred by the Federal Government that are specified in Subsection [302](d), the Secretary shall propose an adjustment to the fee...." (emphasis added).

²¹ 2013 Determination, p. 34, JA ____.

²² See Review of 2012 Ten-Year Site Plans for Florida's Electric Utilities, supra, footnote 8, at p. 43.

²³ While the planned new nuclear plants will add fuel diversity and reliability factors to Florida's electric plants, they will also make DOE's performance of its Nuclear Waste Policy Act responsibilities that much more important. See In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc., Order No. PSC-08-0518-FOF-EI, 2008 Fla. PUC LEXIS 278,*6-*17 (August 12, 2008); In re: Petition to determine need for Turkey

the requirements of the Nuclear Waste Policy Act, including those requiring the adjustment of excess fees, is unfair to Florida ratepayers, for whom those protections are important. Section 302 of the Nuclear Waste Policy Act should not be interpreted to require ratepayers to continue paying fees while DOE fails to implement the other requirements of the Act.

Point Nuclear Units 6 and 7 electrical power plant, by Florida Power and Light Company, Order No. PSC-08-0237-FOF-EI , 2008 Fla. PUC LEXIS 443, *16-*30 (April 11, 2008).

V. CONCLUSION

In view of the foregoing, the Court should direct DOE to suspend the fee until such time as the Secretary of Energy has evaluated the actual costs of a nuclear waste program against the billions of dollars already deposited in the Nuclear Waste Fund.

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Dated: May 3, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and contains 3,798 words. In making this certification, the undersigned relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font Times New Roman type style.

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Case Nos. 11-1066
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2013, an electronic copy of the Initial Brief of Amici Curiae (including the Addendum to the Brief) was filed with the Court through the CM/ECF electronic filing system, and, thus, also served on counsel of record. Also, two paper copies of the brief and addendum were served by U.S. mail to the following persons:

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