

ORIGINAL

FILED

MAY 28 2015

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

**U.S. COURT OF
FEDERAL CLAIMS**

_____)
KANSAS GAS AND ELECTRIC COMPANY,)
KANSAS CITY POWER & LIGHT)
COMPANY, and)
KANSAS ELECTRIC POWER)
COOPERATIVE, INC.,)

Plaintiffs,)

v.)

THE UNITED STATES,)

Defendant.)
_____)

15 - 547 C

No.: _____
Judge: _____

COMPLAINT

Pursuant to Rule 7 of the Rules of the United States Court of Federal Claims, Plaintiffs Kansas Gas and Electric Company, Kansas City Power & Light Company, and Kansas Electric Power Cooperative, Inc. (collectively, "Plaintiffs") hereby allege as follows:

SUMMARY OF PLAINTIFFS' CLAIMS

1. This case involves the U.S. Department of Energy's ("DOE") breach of its contractual obligation to implement and operate a program for the removal and ultimate disposal of spent nuclear fuel and high-level radioactive waste (collectively, "SNF") from commercial nuclear power plants. Pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* ("NWPA"), Defendant the United States (the "Government"), represented by DOE, and Plaintiffs entered into a Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (the "Standard Contract") in 1984. Under that contract, Plaintiffs have paid substantial fees in return for the Government's obligation to remove and dispose of SNF beginning no later than January 31, 1998. Although Plaintiffs have fully complied with their fee payment obligations, the Government has failed to perform its reciprocal SNF removal

obligations under the contract. As a result, Plaintiffs have suffered and continue to suffer damages.

2. In 2004, Plaintiffs brought a lawsuit against the Government for, *inter alia*, partial material breach of the Government's obligations to begin removing and disposing of SNF generated at the Wolf Creek Generating Station ("Wolf Creek"), which Plaintiffs own. *See generally Kansas Gas & Elec. Co. v. United States*, 95 Fed. Cl. 257 (2010), *aff'd in part, rev'd in part*, 685 F.3d 1361 (Fed. Cir. 2012). The United States Court of Appeals for the Federal Circuit has held 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." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1376 (Fed. Cir. 2005). In accordance with *Indiana Michigan*, Plaintiffs' initial claim sought damages for costs incurred through December 31, 2008. The trial on Plaintiffs' claims before Judge Christine Miller was conducted over several weeks during June 2010. On November 30, 2010, the Court issued an Opinion and Order granting in part and denying in part Plaintiffs' claims. *See generally Kansas Gas & Elec. Co.*, 95 Fed. Cl. 257. On appeal, the Federal Circuit affirmed in part and reversed in part the Court's November 30, 2010 Opinion and Order. *See generally Kansas Gas & Elec. Co.*, 685 F.3d 1361.

3. In accordance with the Federal Circuit's instruction in *Indiana Michigan* to bring separate actions for damages "as they are incurred," Plaintiffs bring this lawsuit to recover the significant damages incurred from June 1, 2009 through March 31, 2015 caused by the Government's continuing partial material breach of its unconditional obligation to begin disposing of SNF generated by Wolf Creek.

JURISDICTION

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1491(a)(1).

PARTIES

5. Plaintiffs are electrical utility companies that provide electrical power to residents of Kansas and Missouri.

6. Defendant is the United States of America.

SUMMARY OF FACTS

7. Plaintiffs are joint owners of the Wolf Creek Nuclear Operating Corporation, which operates Wolf Creek, a single-unit nuclear reactor located near Burlington in Coffey County, Kansas. Wolf Creek commenced operation in September 1985. The license authorizing operation of Wolf Creek expires in March 2045.

8. Wolf Creek is fueled by enriched uranium contained in assemblies, otherwise known as nuclear fuel. Periodically, as the plant generates electricity, the nuclear fuel must be replaced with fresh nuclear fuel. The removed fuel is referred to as SNF.

9. In 1982, Congress enacted the NWPA, which created a program for the removal and eventual disposal of SNF generated by commercial nuclear power plants. The NWPA codifies the Government's responsibility to remove and eventually dispose of SNF. Under the NWPA, utilities are responsible for the costs of this program.

10. Consistent with the NWPA, Plaintiffs entered into their Standard Contract with DOE on October 10, 1984. To date, Plaintiffs have paid more than \$224 million into the Nuclear Waste Fund pursuant to this contract.

11. Plaintiffs' contract provides that they would pay the Government certain fees that, together with fees paid by other utilities pursuant to similar contracts under the NWPA, would be sufficient for DOE to implement and operate a program for the prompt removal of Plaintiffs' SNF.

12. Plaintiffs' contract further provides that, in return for the payment of such fees, DOE would implement a program for the removal and eventual disposal of all SNF that Plaintiffs would be ready to deliver. The contract requires DOE to commence removal of Plaintiffs' SNF no later than January 31, 1998. The contract also requires DOE to provide transportation casks and all necessary transportation of SNF from Wolf Creek to a DOE facility.

13. The mutual intent of the parties at the time of contract formation was that DOE would remove SNF from Plaintiffs' generating station on a reasonable schedule, commencing no later than January 31, 1998. The parties intended that, after January 31, 1998, Plaintiffs would not need to incur additional costs for on-site storage of SNF.

14. In accordance with the contract, Plaintiffs have paid to DOE all of the fees owed to date.

15. In the more than thirty years since the enactment of the NWPA, DOE has failed to take actions to develop and implement the SNF removal and disposal program and to perform its obligations to remove Plaintiffs' SNF.

16. The Federal Circuit has held that the Government's failure to commence removal of SNF by January 31, 1998 constitutes a breach of the Government's contractual obligations to the nuclear utilities that signed contracts with DOE pursuant to the NWPA. *See generally Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000).

17. DOE has informed Plaintiffs that it will not commit to any date upon which it will remove any of Plaintiffs' SNF. In addition, DOE has unilaterally terminated the Yucca Mountain program mandated by the NWPA, making the timing of the Government's performance of its contractual obligations even more uncertain.

CLAIMS FOR RELIEF

COUNT I

(Damages for Breach of Contract)

18. Paragraphs 1 through 17 are incorporated herein by reference as if set forth in full.

19. The 1984 Standard Contract between Plaintiffs and DOE imposed an unconditional obligation on DOE to remove Plaintiffs' SNF promptly according to a reasonable acceptance schedule to begin no later than January 31, 1998, in return for Plaintiffs' payment of the specified fees.

20. Plaintiffs have paid in full all of the fees required to date under the terms of the Standard Contract.

21. DOE has breached its contractual obligations to commence SNF removal by January 31, 1998, and to continue to remove Plaintiffs' SNF on a reasonable schedule thereafter.

22. As a direct and proximate result of DOE's actions and failure to act, Plaintiffs have suffered and will continue to suffer damages resulting from the additional costs to design, construct, and operate facilities to store additional SNF until DOE complies with its contractual obligation to remove SNF, as well as other damages.

23. Plaintiffs will continue to incur further costs to augment and maintain their SNF storage capacity in the future in order to store additional SNF generated through Wolf Creek's continued operation, as a result of the failure of DOE to remove SNF currently stored in Plaintiffs' existing facilities. These additional costs would not be incurred if DOE had performed its contractual obligations.

24. In this Count, Plaintiffs seek to recover damages arising from the Government's failure to perform through March 31, 2015, which results from the Government's present partial material breach of contract. Plaintiffs reserve all rights to join claims for damages arising from

subsequent partial material breaches in this action, or to assert new and separate partial material breach claims in another action.

COUNT II

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

25. Paragraphs 1 through 24 are incorporated herein by reference as if set forth in full.

26. 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 to not take actions detrimental to Plaintiffs' contractual rights. The Government has breached the covenant of good faith and fair dealing by failing to meet and refusing to make any effort to meet the contractual deadline for beginning to dispose of SNF, by steadfastly attempting to avoid its obligations under the contract, 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 their reciprocal obligation to pay fees into the Nuclear Waste Fund despite the Government's refusal to perform.

27. 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 consistently been well 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.

28. 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 and domestic research reactors.

29. 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)

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

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

32. The Government's failure and refusal to comply with the requirements of the Standard Contract for acceptance and disposal of SNF generated at Wolf Creek constitutes a taking of the vested real property rights of Plaintiffs. The Government's conduct has deprived, and will continue to deprive, Plaintiffs of the full valuable economic use of the plant site, as well as the real property on which the SNF is stored and from which it cannot lawfully be removed.

33. 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 Kansas Gas and Electric Company, Kansas City Power & Light Company, and Kansas Electric Power Cooperative, Inc. 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;

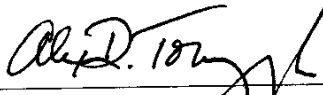
- (d) Pre-judgment and post-judgment interest as permitted by law;
- (e) Costs of suit, including reasonable attorneys' fees as permitted by law; and
- (f) Such other and further relief as this Court may deem proper.

Dated: May 28, 2015

Respectfully submitted,

Of Counsel:

Jay E. Silberg
Clare M. Cavaliero
**PILLSBURY WINTHROP
SHAW PITTMAN LLP**
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 663-8000
(202) 663-8007 (fax)



Alex D. Tomaszczuk
**PILLSBURY WINTHROP
SHAW PITTMAN LLP**
1650 Tysons Boulevard
McLean, VA 22102
(703) 770-7940
(703) 770-7901 (fax)
alex.tomaszczuk@pillsburylaw.com

Counsel for Plaintiffs
Kansas Gas and Electric Company,
Kansas City Power & Light Company, and
Kansas Electric Power Cooperative, Inc.