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U.S DEPARTMENT OF JUSTICE  
BEFORE THE HOUSE BUDGET COMMITTEE  
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Mr. Chairman, and members of the Committee, I am Michael F. Hertz, and I am a Deputy Assistant Attorney General of the Department of Justice, Civil Division. I am pleased to testify today regarding the status of litigation concerning the Department of Energy's obligations under the Nuclear Waste Policy Act ("NWPA") of 1982.

Let me note at the outset that much of the litigation about which you have asked the Department of Justice to provide testimony is still pending in the Federal courts. As a result, the Department's pending matter policy applies to any discussion of those cases. Pursuant to that policy, I will be happy to discuss matters that are in the public record.

Background

In 1983, pursuant to the NWPA, the Department of Energy ("DOE") entered into 76 standard contracts with entities, mostly commercial utilities, that were producing nuclear power. Through the standard contracts, DOE agreed that by January 31, 1998, it would begin accepting spent nuclear fuel and high-level radioactive waste (collectively, "SNF") created by the utilities. In return, the utilities agreed to make quarterly payments into the Nuclear Waste Fund ("NWF")

created by the statute. The utilities began making payments into the NWF in 1983.

In 1987, Congress designated Yucca Mountain in Nevada as the sole site for a Federal repository for disposal of the SNF. DOE has been unable to begin construction of the federal repository, however, and anticipates that it will be unable to begin SNF acceptance until at least 2017.

In May 1995, DOE published a notice in the Federal Register advising the utilities that held standard contracts and others that DOE would be unable to begin acceptance of SNF on January 31, 1998. The notice also explained that DOE's acceptance beginning on that date was conditioned upon the existence of an operational repository. 60 Fed. Reg. 21793 (May 3, 1995).

In response to this notice, several nuclear utilities filed suit in the United States Court of Appeals for the District of Columbia challenging DOE's understanding. The District of Columbia Circuit held that DOE was required to begin SNF acceptance in some type of facility by January 31, 1998. See Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272, 1277 (D.C. Cir. 1996). After DOE continued to inform utilities that it would be unable to begin accepting SNF by January 31, 1998, the utilities again sued and requested an order directing that DOE perform under the Standard Contract. The District of Columbia Circuit denied the utilities' request and instead found that the utilities' remedy

could be addressed through breach of contract claims. Northern States Power Co. v. United States, 128 F.3d 754, 759 (D.C. Cir. 1997), cert. denied, 525 U.S. 1015 & 1016 (1998). The court did, however, issue an order that barred DOE from asserting that its delays in performing the standard contract were “unavoidable,” and, therefore, excused pursuant to the “unavoidable delays” provision of the standard contracts.

#### Status Of Court Of Federal Claims Litigation

To date, utility companies have filed 67 cases in the United States Court of Federal Claims, alleging that DOE’s delay in beginning SNF acceptance constituted a breach of contract. The Court of Appeals for the Federal Circuit, in Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2000), has ruled that the delay constitutes such a breach.

The utilities’ damages claims largely are for the costs incurred to store SNF that they allege DOE would have accepted from them absent the breach. Specifically, storage costs that utilities allege they would not have expended had DOE begun timely performance under the Standard Contract. In addition, several utilities have alleged damages arising from the “diminution-in-value” of their plants

as the result of DOE's delay, claiming that they realized these damages when they sold their plants to other utilities as part of the sale.

Utility industry reports estimate that the claims will total about \$50 billion, which far exceeds the amount the utilities have paid into the NWF pursuant to the Standard Contract. DOE's most recent estimate of potential liability is \$7 billion, based upon a projected start date of 2017. These estimates do not fully take into account the Government's defenses or the possibility that plaintiffs will be able to prove the full extent of their claims.

In the first case to proceed to trial on the merits in March 2004, the trial court found that the utility had not incurred any damages as a result of the partial breach of contract through the date of trial and denied any monetary recovery, although it ruled that the utility may return to court if and when it incurs damage because of the delay in spent fuel acceptance. Indiana Michigan Power Co. v. United States, 60 Fed. Cl. 639 (2004). In affirming this ruling on appeal, the appellate court held that all claims for breach of the standard contracts may only be through the date of the complaint and that utilities must file new complaints with the trial court seeking damages as they are incurred. Indiana Michigan Power Co. v. United States, 422 F.3d 1369 (Fed. Cir. 2005).

As a result of this ruling, utilities must file new cases with the trial court at least every six years to recover any costs incurred as the result of DOE's delay, and we will continue to litigate these claims until after DOE begins performance of the standard contracts. We recently received our first new complaint implementing this ruling, filed by Northern States Power Company, which was filed shortly before the trial court issued a decision on the first claim filed by Northern States in 1998.

Of the 67 lawsuits filed, 56 cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit, seven have settled, two were voluntarily withdrawn, and only two have been litigated through final unappealable judgment.

While asserting legitimate defenses to plaintiffs' claims in litigation, we also have made concerted efforts to settle claims. The settlements resolving seven of the cases involve four companies: Exelon Generation, LLC, South Carolina Electric & Gas Company, Omaha Public Power District and Duke Power Company. These settlements provide for the periodic submission of claims to the contracting officer for costs incurred since the date of the last submission. In total, the Government has paid \$290 million pursuant to these settlements and one trial court judgment that was not appealed.

Of those 56 pending cases, the trial court has entered judgment in eight, and so far six of those have been appealed. The past damages awarded in these eight judgments total approximately \$420 million, with the trial court holding that the plaintiffs could return to court after they had incurred additional damages as a result of DOE's delay. Between judgments and settlements, the Government's liability currently stands at \$710 million. This reflects costs claimed by utilities from 1998 through 2004 for the nine judgments, and through 2006 for the seven settlements.

The following chart summarizes the status of the 67 cases that have been filed:

<b>Number of cases</b>	<b>Status/Comments</b>
2	Voluntarily withdrawn
7	Settled (settlements cover 1998 through 2006)
2	Final unappealable judgments (judgments cover 1998 through 2004)
6	Final judgments on appeal (judgments cover 1998 through 2004)
2	Final judgments/time to appeal has not yet run (judgments cover 1998 through 2004)
48	Pending/no judgment (includes new complaint filed August 2007)
67	Total

## Significant Issues On Appeal

There are two major issues that should be decided in the pending appeals which will have a significant effect upon the Government's continuing liability in these cases. The first issue concerns the Government's ability to present a defense based upon the "unavoidable delays" clause in the contracts. As noted, the District of Columbia Circuit, in Northern States, mandated that the Government could not rely upon such a defense in its litigation of delay claims arising from its breach. One of the trial court judges at the Court of Federal Claims found the District of Columbia Circuit's writ of mandamus to be void and that DOE is entitled to raise the "unavoidable delays" defense. Nebraska Public Power District v. United States, 73 Fed. Cl. 650 (2006). That ruling is on appeal to the Federal Circuit and, if affirmed, the Government may be able to pursue an absolute defense to the utilities' damages claims.

The second major issue to be decided in the cases on appeal is the scope of the Government's obligation to utilities regarding the amount of SNF to be accepted. The utilities' claims are uniformly premised upon arguments that DOE was contractually obligated to accept much larger amounts of SNF on an annual basis than the Government believes that obligation to be. This issue is squarely presented in several of the pending appeals and, depending upon how the appellate

court decides the issue, will significantly inform the size of the damages awards that utilities receive in these cases.

### Payment Of Judgments And Settlements

To date, all payments to the utilities have come from the Judgment Fund. In Alabama Power Co. v. United States Department of Energy, 307 F.3d 1300 (11th Cir. 2002), the Court of Appeals for the Eleventh Circuit ruled that the Government could not use the NWF to pay for any of the damages that the utilities incur as a result of DOE's delay. The only other available funding source that has been identified to date is the Judgment Fund. We are also unaware of any statutory requirement that DOE be required to reimburse the Judgment Fund for judgments paid, unlike other statutory schemes that govern the adjudication of contract and other monetary disputes with the Government.

### Litigation Costs

The costs to the Government to litigate these cases are significant. The Department of Justice has expended approximately \$17 million in attorney costs, \$55 million in expert funds and \$22 million in litigation support costs in defense of these suits. These costs represent nearly a third of the expenditures since 1998, for the component within the Civil Division responsible for litigating these suits. In addition, DOE and the Nuclear Regulatory Commission have expended many

manhours to support this effort. Given that these cases will continue to be filed and litigated into the foreseeable future, these costs will continue to be incurred.

Although these cases are similar in dollar amount to other cases defended by the Commercial Litigation Branch of the Department of Justice, these cases are distinct in two key aspects. First, the standardized contract at issue requires the Government to provide the services at issue and the utilities pay the costs for those services, rather than the reverse. Second, the Government will continue to incur liability for its inability to perform these contracts until after DOE begins to accept SNF waste – either at Yucca Mountain or some other facility – in amounts that DOE would have accepted if performance had begun in January 1998.

In summary, the SNF litigation has already cost the Government significant sums in terms of liability and litigation costs and will most likely continue to do so into the foreseeable future.