



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: May 15, 1998

TO: JULIA L. JOHNSON, CHAIRMAN
J. TERRY DEASON, COMMISSIONER
SUSAN F. CLARK, COMMISSIONER
JOE GARCIA, COMMISSIONER
E. LEON JACOBS, COMMISSIONER
BILL TALBOTT, EXECUTIVE DIRECTOR
JAMES WARD, DEPUTY EXECUTIVE DIRECTOR/ADM.
MARY BANE, DEPUTY EXECUTIVE DIRECTOR/TECH.
ROB VANDIVER, GENERAL COUNSEL
DAVID SMITH, DIRECTOR OF APPEALS
NOREEN DAVIS, DIRECTOR OF LEGAL SERVICES
JOE JENKINS, DIRECTOR OF ELECTRIC & GAS
BOB TRAPP, DIVISION OF ELECTRIC & GAS
KATRINA TEW, DIVISION OF ELECTRIC & GAS
BEVERLEE DEMELLO, DIRECTOR OF CONSUMER AFFAIRS
BLANCA BAYO, DIRECTOR OF RECORDS & REPORTING

FROM: RICHARD C. BELLAK, DIVISION OF APPEALS RCB

RE: U.S. COURT OF APPEALS, D.C. CIRCUIT ORDER, MICHIGAN V. DOE;
NORTHERN STATES POWER V. DOE (NUCLEAR WASTE LITIGATION)

Attached is the Court of Appeals order which, on p. 2-3, ¶III,
addresses the state petitioners' latest filing. The order denies
immediate but not necessarily eventual, relief on the issue of
barring payment by DOE of damages out of the nuclear waste fund.
The order does, however, declare the issues of payment of nuclear
waste fund fees into escrow during DOE's failure to perform and a
ban on receipt of foreign or domestic nuclear waste shipments to
DOE facilities pending the filing by DOE of a plan to perform its
contract obligations to be contract matters beyond the scope of the
court's mandate in Northern States.

- ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG RCB Attachment
LIN
OPC
RCH NUCLITI.RCB
SEC
WAS
OTH

DOCUMENT NUMBER-DATE
05546 MAY 18 98
PESC-RECORDS/REPORTING

May 7 1998 2:04PM

No. 8543 F. 6/5

From: CHUCK

United States Court of Appeals
 For The District of Columbia Circuit

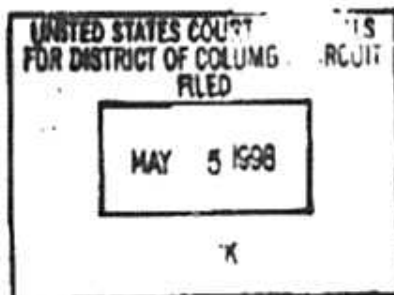
No. 97-1064**September Term, 1997**

Northern States Power Company (Minnesota), et al.,
 Petitioners

v.

Department of Energy and United States of America,
 Respondents

IES Utilities, Inc., et al.,
 Interveners



Consolidated with 97-1065, 97-1370, 97-1398

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg,
 Sentelle, Henderson, Randolph, Rogers, Tatel and Garland,
 Circuit Judges

ORDER

Upon consideration of respondents' Suggestion for Rehearing in Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
 Mark J. Langer, Clerk

BY:

Robert A. Bonner
 Robert A. Bonner
 Deputy Clerk

Circuit Judges Silberman and Garland did not participate in this matter.

May 7 1998 2:03PM

Ms 3643 P 2/6

From:BUCK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1064

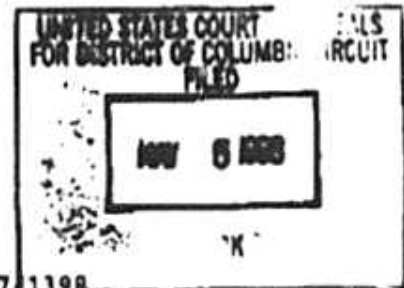
September Term, 1997

Northern States Power Company, et al.,
Petitioners

v.

United States Department of Energy and
United States of America,
Respondents

IES Utilities, Inc., et al.,
Intervenors



Consolidated with Nos. 97-1065, 97-1370 and 97-1198

No. 98-1069

In Re:
Maine Yankee Atomic Power Co., Petitioner

No. 98-1070

In Re:
Southern Nuclear Operating Co., et al., Petitioners

Before: WILLIAMS, GROSSBERG and SWEETLES, Circuit Judges.

ORDER

Upon consideration of the Motions to Consolidate from Maine Yankee and Southern Nuclear; the Motions from the Department of Energy to Dismiss the suits of Maine Yankee and Southern Nuclear; the Motions for Enforcement of the Mandate from the State Petitioners, the Utility Petitioners, and Connecticut Yankee; and the Petitions for Rehearing from Yankee Atomic and the Department

May 7, 1998 2:03PM

No 8640 P 3/6

From: CHUCK

2

of Energy, and the responses thereto and the replies, it is hereby

ORDERED that the Motions to Consolidate are granted. The Petitions and Motions are otherwise denied.

I. Maine Yankee and Southern Nuclear Operating Company are parties to the Department of Energy's ("DOE") Standard Contract for Disposal of Spent Nuclear Fuel ("SNF"). Their suits against the DOE present issues identical to those raised by the Utility Petitioners in Northern States Power Co. v. DOE, 128 F.Jd 754 (D.C. Cir. 1997). To make clear that they are entitled to identical relief, we grant the motion to consolidate. Our disposition of the motions for enforcement and petitions for rehearing, discussed below, applies in full measure to Maine Yankee and Southern Nuclear.

II. The DOE moves for dismissal of the actions of Maine Yankee and Southern Nuclear. Those utilities are entitled to the same relief as the other Utility Petitioners; consequently, we do not dismiss their suits but instead consolidate them with Northern States. The relief awarded in that decision extends to them. To the extent that they join in the Utility Petitioners' motions, the following dispositions also apply to them. The DOE's motion is denied.

III. The State Petitioners request an order that (1) bars the DOE from using utility and ratepayer-supplied monies from the Nuclear Waste Fund ("NWF") or fee collections to pay any costs or damages awarded to utilities under the Standard Contract; (2) authorizes the payment of NWF fees into an interest-bearing escrow account; and (3) requires the DOE to file a plan for disposing of SNF before receiving any more shipments of foreign or domestic SNF at its existing facilities.

We express no opinion on the legality of the DOE's using utility or ratepayer-supplied monies to pay costs or damages, nor on the adequacy of any particular type of equitable adjustment of fees that might be awarded to utilities under the Delays Clause of the Standard Contract. Our decision in Northern States barred the DOE from interpreting the Contract as imposing only a contingent disposal obligation; such an interpretation, we ruled, would place the DOE in violation of its statutory duties under the Nuclear Waste Policy Act ("NWPA"), which required it to undertake an unconditional obligation. Beyond that clarification of the statute's requirements, we remitted the utilities to their remedies under the Standard Contract. Suits based on the Contract may present issues of the permissible forms of equitable

May 7, 1998 2:03PM

No. 8643 P. 4/5

From: CHUCK

3

adjustment, and possibly the award of some forms of equitable adjustment would place the DOE in violation of the NWPA and again properly trigger our jurisdiction (as opposed to that of the Court of Federal Claims) under either the NWPA or the APA. But as the DOE has not yet taken any of these actions, the issues are not ripe for review as presented to us in these petitions.

The second and third elements of the State Petitioners' requested order constitute equitable contract remedies against the DOE and fall outside the scope of the Northern States mandate. Northern States describes the nature of the DOE's obligation, which was created by the NWPA and undertaken by the DOE under the Standard Contract. It does not place the question of contract remedies in this court, nor set up this court as a source of remedies outside the Standard Contract.

IV. The Utility Petitioners request essentially the same relief as the State Petitioners. For the same reasons, their request is denied.

V. Yankee Atomic requests an order requiring the DOE to begin to dispose of its SNF, asserting that monetary damages are inadequate. We do not address the question of the adequacy of damages or of any contract remedy. The order cannot issue because enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

VI. Connecticut Yankee requests an order prohibiting the DOE from using NWF monies to compensate utilities for delay, and requiring the DOE to move Connecticut Yankee's spent fuel. This request is covered by the discussion above: the issue of recycling NWF monies is not ripe, and the move-fuel order is beyond our mandate.

VII. The DOE petitions for rehearing, suggesting that this Court has erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is

May 7 1998 2:04PM

No. 8543 P. 5/8

From:CEUCK


4

independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA. The DOE's petition is denied.

FOR THE COURT:

Mark J. Langer, Clerk

BY:


Michael C. McGrail
Deputy Clerk