

March 21, 2018
LIC-18-0012

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, DC 20555

Fort Calhoun Station, Unit No. 1
Renewed Facility Operating License No. DPR-40
NRC Docket No. 50-285

Fort Calhoun Station
Independent Spent Fuel Storage Installation
NRC Docket No. 72-054

Subject: Submission of Department of Energy Settlement RE: Omaha Public Power District
v. United States, No. 01-115C (Fed. Cl.)

As requested please find attached a copy of the settlement agreement signed by Mr. David M. Cohen, the Attorney General's authorized representative, of the "*Omaha Public Power District v. United States*, No. 01-115C (Fed. Cl.)," Department of Energy settlement Agreement.

If you should have any questions, please contact Mr. Bradley H. Blome at 402-533-6041.

No commitments to the NRC are made in this letter.

Respectfully,

Bradley H. Blome
Director, Licensing and Regulatory Assurance

BHB/epm

Enclosure: Omaha Public Power District v. United States, No. 01-115C (Fed. Cl.)

c: K. M. Kennedy, NRC Regional Administrator, Region IV
J. S. Kim, NRC Senior Project Manager
R. S. Browder, NRC Senior Health Physicist, Region IV

U. S. Nuclear Regulatory Commission
LIC-18-0012
Enclosure

ENCLOSURE

OMAHA PUBLIC POWER DISTRICT

Omaha Public Power District v. United States, No. 01-115C (Fed. Cl.)

FORT CALHOUN STATION

DOCKET NO.s 50-285 / 72-54



U.S. Department of Justice

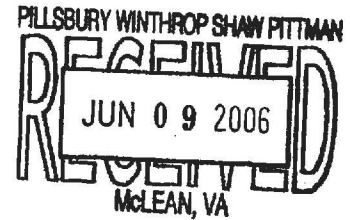
Civil Division

PDK:DMC:HDL:MESullivan
154-01-115

Telephone:
(202) 307-0365

Washington, D.C. 20530

June 9, 2006



VIA MESSENGER

Alex D. Tomaszczuk
Pillsbury Winthrop Shaw Pittman LLP
1650 Tysons Boulevard
McLean, Virginia 22102-4859

Re: Omaha Public Power District v. United States, No. 01-115C (Fed. Cl.)

Dear Mr. Tomaszczuk:

Enclosed are an original and a copy of the settlement agreement signed by Mr. David M. Cohen, the Attorney General's authorized representative. I will submit the necessary paperwork to the Judgment Fund so that Omaha Public Power District may be paid, pursuant to the terms of this settlement.

Thank you for your continued assistance in this matter.

Sincerely,

Marian E. Sullivan / *by HDJH*
MARIAN E. SULLIVAN
Trial Attorney
Commercial Litigation Branch
Civil Division

Enclosures

SETTLEMENT AGREEMENT

I. Recitals

For the purpose of disposing of Plaintiff's claims, without any further judicial proceedings and without there being any trial or adjudication of any issue of law or fact, and without constituting an admission of liability on the part of the United States, and for no other purpose, the parties stipulate and agree as follows:

A. "Plaintiff" for these purposes is Omaha Public Power District, a political subdivision of the State of Nebraska that operates as a public corporation which has no direct or indirect wholly-owned subsidiaries or affiliates. (Unless the context requires otherwise, the singular shall include the plural, and vice versa.) This Agreement shall inure to the benefit of, and be assignable to, successors or affiliates of Plaintiff, or other parties to whom the Standard Contract (as identified below) is assigned.

B. Plaintiff is the Purchaser under a Standard Contract with the United States Department of Energy (DOE) for the acceptance of spent nuclear fuel and high level waste ("SNF/HLW") under the Nuclear Waste Policy Act, the material terms of which are reproduced at 10 C.F.R. § 961.11, and which is numbered DE-CR01-83NE44401 (for these purposes, the "Contract").

C. The Contract covers the Fort Calhoun Nuclear Power Plant (for these purposes, the "Site").

D. The Contract required DOE to commence acceptance of SNF/HLW "not later than January 31, 1998." DOE did not so commence acceptance of SNF/HLW. Plaintiff has filed a lawsuit against the government, alleging entitlement to recovery of damages as a result of the alleged failure of DOE. That lawsuit is currently pending before the United States Court of Federal Claims, No. 01-115C (the "Lawsuit.")

E. The parties have entered into negotiations designed to resolve amicably Plaintiff's claims. Plaintiff has offered to settle the Lawsuit in exchange for payments as further defined below, with each party to bear its own costs, attorney fees, and expenses.

F. Plaintiff's offer has been accepted on behalf of the Attorney General.

G. Plaintiff agrees to join with the United States in stipulating to dismiss the Lawsuit with prejudice, subject to the terms of this Agreement, upon receipt of the first Allowable and Reasonable Cost Determination as hereinafter defined in the amount of \$4,948,118, payable to Omaha Public Power District.

II. Definitions of Recoverable Costs.

A. "Allowable Costs" means those costs incurred by Plaintiff for managing and storing SNF/HLW which were foreseeable in the event of DOE's Delay, and that Plaintiff would not have incurred but for, and which are directly related to, DOE's Delay in performance of its acceptance obligations under the Contract.

1. "Delay" for these purposes shall mean DOE's failure to commence acceptance of SNF/HLW on January 31, 1998, and continue acceptance of SNF/HLW in the aggregate amounts set forth in Table 1 at page 4 of the 1995 Acceptance Priority Ranking & Annual

Capacity Report, with a continued steady state acceptance of 900 MTUs/year until December 31, 2014, and 2100 MTU/year thereafter. (These obligations are hereinafter referred to as "DOE's Acceptance Obligations.")

2. Plaintiff's allocations for the acceptance of its SNF/HLW within the aggregate industry-wide DOE Acceptance Obligations for these purposes shall be based upon the principle of "oldest fuel first."

3. At the time when the aggregate MTUs of SNF/HLW actually accepted by DOE from Plaintiff after commencement of actual performance by DOE equals the aggregate MTUs of Plaintiff's allocations from DOE's Acceptance Obligations as defined above, the obligations of the parties under this Agreement shall terminate and be discharged. After that point, the government shall have no further compensation obligations under this Agreement, and Plaintiff shall have all rights under the Contract or otherwise.

B. "Reasonable Costs" mean:

(1) those costs that, in their nature and amount, do not exceed those that would be incurred by a prudent person or entity in the conduct of Plaintiff's competitive business. What is "reasonable" depends upon a variety of considerations and circumstances, including whether a cost: (a) is the type generally recognized as ordinary and necessary for the conduct of the Plaintiff's business or the Contract performance, taking into account normal and reasonable lead times for the design, procurement and fabrication of SNF/HLW storage equipment and facilities and ancillary activities related thereto; (b) is consistent with generally accepted sound business practices, arms length bargaining, and federal and state laws and regulations; (c) is incurred in accordance with the Plaintiff's established business practices; and

(2) those costs that are allocable to managing and storing SNF/HLW; *i.e.*, assignable or chargeable to one or more cost objectives established by Plaintiff on the basis of relative SNF/HLW management or storage benefits received or other equitable relationship to SNF/HLW management or storage activities, and (a) are incurred specifically as a result of the delay in DOE's performance; or (b) are attributable to both the delay in DOE's performance and other work, and can be distributed to them in reasonable proportion to the benefits received.

(3) A cost claimed by Plaintiff shall not be deemed unreasonable solely because Plaintiff incurred the cost on the assumption that DOE would not commence its actual acceptance obligation in accordance with DOE's official published schedule; provided, that Plaintiff's assumption was in accord with reasonable and prudent business judgment prevailing in the industry at the time the cost was incurred.

III. Allowable and Reasonable Costs to Date.

For the period January 31, 1998 until June 30, 2005, the parties have agreed that Plaintiff is entitled to Allowable and Reasonable Costs in the amount of \$4,948,118.

IV. Final Allowable and Reasonable Cost Determinations.

A. Submission of applications for Allowable and Reasonable Costs.

Plaintiff shall endeavor to submit applications for Allowable and Reasonable Costs twelve months from date of submission of the prior application. The first application after execution of this Agreement, however, shall be submitted on or before March 1, 2007. Thereafter, the second and subsequent applications shall be submitted not more than once annually, but not less than once every three years, on or about March 1, or when the amount of

allowable and reasonable costs to be sought is greater than \$500,000, whichever comes first. The application shall include claimed Allowable and Reasonable Costs incurred after the last date of the costs claimed in the prior submission. Claims for costs incurred prior to the date of the prior submission shall not be considered. Plaintiff shall also provide written notice to the then-current DOE Contracting Officer of its intention to submit a claim no less than 60 days prior to the submission of such a claim. The applications shall be in writing and submitted to the then-current DOE Contracting Officer for the Contract. An application shall be accompanied by sufficient supporting documentation to allow reasonable verification of the incurred costs, but need not include documentation beyond that necessary for such verification. An application must be signed by an authorized representative of the Plaintiff, and certified to be made in good faith, that the supporting data are accurate and complete to the Plaintiff's knowledge and belief, and that the amount requested accurately reflects the Allowable and Reasonable Costs for which the Plaintiff believes the government is liable under this Agreement.

B. Final Allowable and Reasonable Cost Determination: DOE Finding.

1. Within ninety (90) days of the submission by Plaintiff of an application for Allowable and Reasonable Costs, the DOE Contracting Officer or his designee shall issue a DOE Finding identifying those claimed costs deemed to be Allowable and Reasonable. Should the DOE Contracting Officer or his designee conclude that Plaintiff has not supplied supporting documentation sufficient to allow reasonable verification of the incurred costs, the DOE Contracting Officer or his designee shall so inform Plaintiff and specify the nature of the additional documentation requested, in time for Plaintiff to supply supplemental documentation and for the DOE Contracting Officer or his designee to issue the DOE Finding within the original ninety (90) days from the first submission of the application. Should the DOE

Contracting Officer or his designee find that any claimed costs are not Allowable and Reasonable, the DOE Contracting Officer or his designee shall identify such costs and state the reason(s) for that decision in writing.

2. If Plaintiff accepts the DOE Finding regarding the claimed costs, that finding shall become a Final Allowable and Reasonable Cost Determination.

C. Final Allowable and Reasonable Cost Determination: Resolution of disputes.

If Plaintiff disagrees with the DOE Finding rendered in accordance with Section IV.B.1, above, or if DOE fails to act within the 90-day period provided by Section IV.B.1 above, the parties agree that any dispute will be resolved as follows:

1. Plaintiff shall, within 30 days of receipt of the DOE Finding, deliver to the DOE Contracting Officer in writing notice of and reasons for their disagreement. The parties shall then negotiate in good faith to resolve the disagreement and agree upon a Final Allowable and Reasonable Cost Determination.

2. If the parties cannot resolve the disagreement, within 30 days of the date of Plaintiff's written disagreement with the DOE Finding, the Plaintiff shall make a submission to the DOE Contracting Officer (hereinafter the "Plaintiff's Finding"), which may include an opinion on the disagreement and a determination of an amount due to Plaintiff by a knowledgeable individual retained by Plaintiff. If the amount set out in Plaintiff's Finding is not more than 5% greater than the amount of the DOE Finding, the average of the two amounts shall be the Final Allowable and Reasonable Cost Determination. If the amount set out in Plaintiff's Finding is more than 5% greater than the amount of the DOE Finding, Plaintiff's Finding shall nonetheless be the Final Allowable and Reasonable Cost Determination, unless, within 30 days

of receipt of Plaintiff's Finding, the DOE Contracting Officer delivers to Plaintiff's representative written notice of and the reasons for disagreement by the DOE Contracting Officer.

3. Upon Plaintiff's receipt of the DOE Contracting Officer's written notice of disagreement with Plaintiff's Finding, the parties shall jointly select an independent neutral to render a Final Allowable and Reasonable Cost Determination, or, if the parties cannot agree on an independent neutral within 30 days of Plaintiff's receipt of the DOE Contracting Officer's written notice of disagreement, then either party may submit a request to the Armed Services Board of Contract Appeals for appointment of a member of that Board to act as an independent neutral. The independent neutral shall review only the written submissions of the parties (Plaintiff's initial application, the DOE Finding, Plaintiff's Finding, and the DOE Contracting Officer's written notice of disagreement with Plaintiff's Finding) and render an opinion within thirty (30) days upon the disagreement and a finding of an amount that should be paid to Plaintiff (hereinafter, the "Neutral's Finding"). So long as the amount of the Neutral's Finding is within 5% of either the DOE Finding or the Plaintiff's Finding, the average of the two determinations that are closest to one another shall be the Final Allowable and Reasonable Cost Determination. If the highest and lowest findings differ from the middle finding by equal amounts, the middle finding shall be the Final Allowable and Reasonable Cost Determination. If the Neutral's Finding is not within 5% of either the DOE Finding or the Plaintiff's Finding, then the Neutral's Finding shall be the Final Allowable and Reasonable Cost Determination.

D. Submission of Final Allowable and Reasonable Cost Determinations For Payment. Once a Final Allowable and Reasonable Cost Determination is reached by the methods set forth in either Section IV.B or C above, it is hereby agreed that that Final Allowable and Reasonable Cost Determination shall be deemed to be a compromise settlement, made by the

Attorney General or persons authorized by him, of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, for purposes of 28 U.S.C. § 2414. The parties intend that such a Final Allowable and Reasonable Cost Determination shall constitute a "compromise settlement" under 31 U.S.C, § 1304. Plaintiff may immediately present to the government a Final Allowable and Reasonable Cost Determination for payment. The Authorized Representative of the Attorney General shall execute all necessary approvals to effectuate such payment, including but not limited to any necessary certification that no appeal shall be taken or further review sought, and that it is in the interest of the United States to pay such amounts.

E. Initial Final Allowable and Reasonable Cost Determination. The initial Final and Allowable Cost Determination shall be in the amount of \$4,948,118.

F. Releases.

1. Upon satisfaction of the terms set forth in this Agreement, including but not limited to payment under Sections IV.D. and E., Plaintiff releases, waives, and abandons all claims against the United States, its political subdivisions, its officers, agents, and employees, that: (a) arise out of or relate to DOE's Delay in performance of its acceptance obligations under the Contract, and (b) which are covered by payments under Sections IV. D. and E., regardless of whether such claims were included in the Lawsuit, including but not limited to any claims for costs, expenses, attorney fees, compensatory damages, and exemplary damages.

2. Nothing herein shall release DOE from claims arising from failure to perform or the breach of any other obligation not directly related to Delays in accepting SNF/HLW from

Plaintiff's Site under the Contract.

3. The failure of the government to undertake any act required by this Agreement, including but not limited to any act in connection with determination or payment to Plaintiff of a Final Allowable and Reasonable Cost Determination, shall constitute a breach of this Agreement. Suit upon such breach may be commenced by Plaintiff within six years of such failure directly in the United States Court of Federal Claims. It shall not be a defense by the government to any such lawsuit that the government was mistaken about an existing material fact that constituted a basic assumption underlying this Agreement.

IV. Other provisions.

A. DOE shall, in its sole discretion, have the right to take possession of any equipment, including storage and/or transportation casks or canisters, for which it has compensated Plaintiff pursuant to this Agreement, as is, where is, when no longer needed for use by Plaintiff. Should DOE elect not to exercise this option, Plaintiff will be responsible for the disposition of such equipment, but the costs of such disposition shall be Allowable and, if otherwise Reasonable, payable to Plaintiff. DOE shall inform Plaintiff of its election regarding such equipment one year prior to any termination of obligations under this Agreement pursuant to Section II.A.3 above, in order to allow Plaintiff (if DOE elects not to take possession of the equipment) an opportunity to then make an application for recovery of the expected costs associated with disposition of the equipment.

B. This Agreement is in no way related to or concerned with income or other taxes for which Plaintiff is now liable or may become liable in the future as a result of this Agreement.

C. Plaintiff warrants and represents that it is the holder of the Contract, and that no other actions or suits by Plaintiff are pending with respect to the claims advanced in the Lawsuit, nor will such actions or suits be filed by Plaintiff in any other court, administrative agency, or legislative body, except as contemplated by this Agreement. Plaintiff also warrants and represents that it owns all claims arising under the Contract attributable to DOE's delays. Plaintiff agrees to indemnify and reimburse the Government for any monies that the Government may be required to pay to other parties for claims arising under the Contract attributable to DOE's delays. Plaintiff further warrants and represents that it has made no assignment or transfer of any of the claims advanced in the Lawsuit, although Plaintiff may be obligated by certain contractual arrangements or otherwise to distribute portions of recoveries received by Plaintiff to other parties. Any such distribution shall be the sole obligation of the Plaintiff. Should there be now or in the future any violation by Plaintiff of these warranties and representations, any amount paid by the United States to Plaintiff pursuant to this Agreement shall be refunded promptly by Plaintiff, together with interest thereon at the rates provided in 41 U.S.C. § 611, computed from the date the United States makes payment.

D. This Agreement is for the purpose of settling the Lawsuit, and for no other purpose. Accordingly, this Agreement shall not bind the parties, nor shall it be cited or otherwise referred to, in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as is necessary to effect the terms of the Agreement.

E. Plaintiff's counsel represents that he has been and is authorized to enter this Agreement on behalf of Plaintiff.

F. Any provision of this Agreement which is held, after the date of the execution of this Agreement, to be illegal, invalid, or unenforceable by a court or agency of competent jurisdiction under present or future laws which apply to this Agreement, shall be fully severable. In place of any severed provision, the parties agree to substitute a legal, valid and enforceable provision which is as similar as possible to the severed provision.

G. This document constitutes a complete integration of the Agreement between the parties and supercedes any and all prior oral or written representations, understandings or agreements among or between them.

H. This Agreement is intended to benefit only the parties, their successors and assignees. It is not intended to benefit, directly or indirectly, any other individual, group of individuals, organization or entity.

AGREED TO:

FOR THE GOVERNMENT:



DAVID M. COHEN

Director
Commercial Litigation Branch,
Civil Division
U.S. Department of Justice
1100 L Street, N.W.,
Attn: Classification Unit
8th Floor
Washington, D.C. 20530

6/7/06
Date

AUTHORIZED REPRESENTATIVE OF THE
ATTORNEY GENERAL

FOR THE PLAINTIFF:



ALEX D. TOMASZCZUK
PILLSBURY, WINTHROP, SHAW, PITTMAN, LLP
1650 Tysons Blvd. Suite 1400
McLean, Virginia 22102

June 5, 2006
Date

ATTORNEY AND AUTHORIZED
REPRESENTATIVE OF
OMAHA PUBLIC POWER DISTRICT