

TABLE OF CONTENTS

	Page
INTRODUCTION	1
CONTENTIONS OF FACT	7
I. SPENT FUEL STORAGE MITIGATION ACTIVITIES UNDERTAKEN BY SCE IN THE REAL WORLD.	9
A. The SONGS Units.....	9
B. Early spent fuel management: shipment of Unit 1 fuel to the Morris facility.	12
C. Early spent fuel management: transshipment of Unit 1 fuel and expansion of the Unit 2 and 3 pool capacities.....	14
D. Decommissioning of Unit 1.....	15
E. Construction of the ISFSI and dry storage.	17
G. Private Fuel Storage.	22
II. THE “BUT-FOR WORLD” OF DOE PERFORMANCE.....	23
A. Storage of Unit 1 spent fuel at the Morris facility.....	24
B. No construction of an ISFSI for storage of Unit 1 spent fuel or GTCC.....	25
C. No construction of an ISFSI for storage of Units 2 and 3 spent fuel.....	26
D. PFS storage option.	27
E. Summary of mitigation damages claimed.....	27
CONTENTIONS OF LAW	29
I. SCE IS ENTITLED TO MITIGATION DAMAGES TO REMEDY DOE’S PARTIAL BREACH.	29
A. The nature of mitigation damages.	29
B. Establishing mitigation damages.	30
1. Foreseeability.	31
2. Substantial causal factor: the 1987 ACR acceptance rates.....	32
3. Reasonable certainty.....	35

TABLE OF CONTENTS
(continued)

	Page
II. THE GOVERNMENT HAS THE BURDEN OF CHALLENGING MITIGATION DAMAGES AND ESTABLISHING REDUCTIONS OR OFFSETS.	36
III. CONTESTED ISSUES IN THE CASE.	39
A. Government Arguments Regarding Acceptance Rate.	39
1. The government’s refusal to follow <i>Pacific Gas et al.</i>	39
2. The government’s GTCC-based acceptance rate arguments.	39
B. GTCC storage costs.	44
C. “SAFSTOR” costs for Unit 1.	46
D. Private Fuel Storage.	49
E. Alleged costs “avoided” by DOE’s delay.	51
F. Overheads.	54
G. AFUDC.	55
CONCLUSION.	59

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Carolina Power & Light Co. v. United States, 82 Fed. Cl. 23
(2008)..... *passim*

Commercial Federal Bank, F.S.B. v. United States, 59 Fed. Cl.
338 (2004)43

Devia v. Nuclear Regulatory Commission, 492 F.3d 421 (D.C.
Cir. 2007)23, 49

Dominion Resources v. United States,
84 Fed. Cl. 259 (Fed. Cl. 2008)..... *passim*

Energy Capital Corp. v. United States, 302 F.3d 1314 (Fed. Cir.
2002).....43

Franconia Associates v. United States, 61 Fed. Cl. 718 (2004).....37

Indiana Michigan Power Company v. United States, 57 Fed. Cl.
88 (2003)34

Indiana Michigan Power Company v. United States, 422 F.3d
1369 (Fed. Cir. 2005) *passim*

In re: Kellett Aircraft Corp., 186 F.2d 197 (3rd Cir. 1950).....37, 38

Koby v. United States, 52 Fed. Cl. 493 (2002)37

LaSalle Talman Bank, F.S.B. v. United States, 317 F.3d 1363
(Fed. Cir. 2003).....43

Library of Congress v. Shaw, 478 U.S. 310 (1986)56

Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed
Cir. 1987).....38

TABLE OF AUTHORITIES

(Continued)

	Page
<i>Maine Yankee Atomic Power Company v. United States</i> , 225 F.3d 1336 (Fed. Cir. 2000)	2
<i>Mid-America Tablewares, Inc. v. Mogi Trading Co.</i> , 100 F.3d 1353 (7th Cir. 1996).....	43
<i>Northern States Power Company v. United States</i> , 78 Fed. Cl. 449 (2007)	6, 49, 50, 51, 52
<i>Old Stone Corp. v. United States</i> , 450 F.3d 1360 (Fed. Cir. 2006).....	37
<i>Pacific Gas & Electric Co. v. United States</i> , 73 Fed. Cl. 333 (2006).....	52
<i>Pacific Gas and Electric Company v. United States</i> , 536 F.3d 1282 (Fed. Cir. 2008)	<i>passim</i>
<i>Sacramento Municipal Utility District v. United States</i> , 70 Fed. Cl. 332 (2006).....	38, 52
<i>Sacramento Municipal Utility District v. United States</i> , Nos. 2007-5052, 2007-5097, 2008 WL 3539880 (Fed. Cir., August 7, 2008)	<i>passim</i>
<i>Southern Nuclear Operating Co. v. United States</i> , 77 Fed. Cl. 396 (2007)	<i>passim</i>
<i>System Fuels, Inc. v. United States</i> , 78 Fed. Cl. 769 (2007).....	7, 52
<i>System Fuels v. United States</i> , 79 Fed. Cl. 37 (2007).....	38, 52, 55
<i>Tampa Electric Co. v. Nashville Coal Co.</i> , 214 F. Supp. 647 (D. Tenn. 1963)	37
<i>Tennessee Valley Authority v. United States</i> , 60 Fed. Cl. 665 (2004).....	31

TABLE OF AUTHORITIES

(Continued)

	Page
<i>Tennessee Valley Authority v. United States</i> , 69 Fed. Cl. 515 (2006).....	<i>passim</i>
<i>Westfed Holdings, Inc. v. United States</i> , 52 Fed. Cl. 135 (2002)	56
<i>Wickham Contracting Co. v. Fischer</i> , 12 F.3d 1574 (Fed. Cir. 1994).....	7, 57
<i>Yankee Atomic Electric Co. v. United States</i> , 73 Fed. Cl. 249 (2006).....	53
<i>Yankee Atomic Electric Company v. United States</i> , 536 F.3d 1268 (Fed. Cir. 2008)	<i>passim</i>

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. § 1491(a)(1)	29
Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 <i>et seq</i>	7
10 C.F.R. § 61.55	21
10 C.F.R. § 61.55(a)(2)(iv)(1989).....	45
10 C.F.R. § 961.11	8
18 C.F.R. pt. 101	56
49 Fed. Reg. 6500 (February 22, 1984)	11

MISCELLANEOUS

McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 27 (1935).....	43
<i>Nuclear Non-Proliferation Policy</i> , Presidential Directive/NSC-8, 24 March 1977	13

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

<hr/>)
SOUTHERN CALIFORNIA EDISON COMPANY,)
)
Plaintiff,)
v.)
UNITED STATES OF AMERICA,)
)
Defendant.)
<hr/>)

Case No. 04-109C
Judge Baskir

PLAINTIFF’S PRETRIAL MEMORANDUM OF CONTENTIONS OF FACT AND LAW

INTRODUCTION

This is a spent nuclear fuel damages case, involving the San Onofre Nuclear Generating Station, Units 1, 2, and 3 (collectively “SONGS”). SONGS is operated, on behalf of its owners, by plaintiff Southern California Edison Company (“SCE”). SCE seeks an award of \$146,349,316 in this proceeding, as mitigation damages for the period prior to December 31, 2005. The major elements of those damages relate to construction of a “dry storage” facility for spent nuclear fuel at SONGS, and payments for storage of certain SONGS spent nuclear fuel that was shipped, and is still stored, offsite.

The applicable legal rules regarding liability and damages in spent nuclear fuel damages cases have now, in the main, been settled. For example, the Federal Circuit has confirmed that the failure of the Department of Energy (“DOE”) to commence accepting spent nuclear fuel in 1998 constituted a breach of its contracts with “all the utilities that had signed the contract—the entire nuclear electric industry.” *Maine Yankee Atomic Power Company v. United States*, 225 F.3d 1336, 1342 (Fed. Cir. 2000). The cases, necessarily, involve claims for “partial breach.” *Indiana Michigan Power Company v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005). As such, damages may only be recovered until a date certain prior to trial, with plaintiffs free to commence subsequent lawsuits for after-incurred damages, and with DOE still held to its duty to perform one day. *Id.* at 1374, 1377-78. The so-called “pick up rate,” or the acceptance rate by which legal liability of the DOE is to be measured from the required commencement of performance in 1998, has now been determined by the Federal Circuit to be the rate identified in certain 1987 DOE documentation. *Pacific Gas and Electric Company v. United States*, 536 F.3d 1282, 1288-1292 (Fed. Cir. 2008); *Yankee Atomic Electric Company v. United States*, 536 F.3d 1268 (Fed. Cir. 2008); *Sacramento Municipal Utility District v.*

United States, Nos. 2007-5052, 2007-5097, 2008 WL 3539880 (Fed. Cir., August 7, 2008).

Accordingly, the legitimately contested factual issues at trial will be few. The government dutifully recites the proposition that a spent nuclear fuel plaintiff (like all plaintiffs) must discharge a “burden of proof” in order to recover damages. When no contrary position or evidence is offered and the facts are essentially historical, however, assessment and discharge of such a burden by a plaintiff does not present a complicated or protracted endeavor. SCE and the government (to its credit) expended substantial resources performing a detailed review of SCE’s cost data, invoices, purchases orders, and other payment and expense records, with the result being agreement that all of the claimed costs have been adequately supported, and “properly recorded and/or accounted for within SCE’s general ledger system.” Disputes about certainty of costs or adequacy of proof for such costs will therefore not be presented.

Regarding substance, in spent fuel damages cases to date the government has typically presented any factual differences it might have with a plaintiff through its experts. In this case, however, those experts will not dispute that the major capital and other projects for which costs are claimed in this proceeding would, in fact, have been avoided by SCE had

DOE performed at the acceptance rates identified in *Pacific Gas*, 536 F.3d at 1292. More particularly, the government's experts will not contest SCE's showing of what a plausible "but for" world would have looked like, nor challenge the reasonableness of any activities or expenditures undertaken by SCE in the real world.

So, what will this trial be about? Ultimately, just a handful of relatively discrete issues. First, as suggested by government counsel comments in prior proceedings in this case,¹ the government will likely seek to "preserve its rights" and avoid the application of the acceptance rates dictated by the Federal Circuit in *Pacific Gas*. It will do so both through clinging to its rejected position outright, and by arguing that those rates cannot, really, be applied because of DOE's breach of its contractual duty to accept certain additional waste, referred to as Greater Than Class C ("GTCC") waste. For reasons described further below, neither position is well founded.

Second, in response to SCE's claims for certain costs relating to storage of GTCC waste, which amount to approximately 1% of SCE's claims, the government apparently will argue (contrary to *Yankee Atomic*) that DOE has no contractual obligation to accept such waste contemporaneously with its obligations to accept spent nuclear fuel and

¹ See, November 5, 2008 Proceedings, Tr. at 13-23.

other high level waste. Damages incurred by SCE in storing such GTCC wastes, the government will contend, are not recoverable.

Third and as described further below, DOE's performance would have resulted in SCE deferring, for a short period, the removal of spent fuel from SONGS Unit 1, which ceased operations in 1992. That would have resulted in SCE incurring certain additional costs associated with ongoing storage of that spent fuel, called "SAFSTOR" costs, in the but-for world of DOE performance. SCE has voluntarily deducted such costs from its claimed damages. If the proper amounts attributable to the additional SAFSTOR activities that SCE would have undertaken in the but-for world of DOE performance cannot be resolved prior to trial, the amounts attributable to such SAFSTOR activities may be disputed by the government.²

Fourth, SCE incurred certain costs (approximately \$2 million) in connection with a private industry spent fuel storage initiative, called Private Fuel Storage, or "PFS." The evidence will establish that these expenditures were undertaken as a reasonable alternative spent fuel storage mitigation strategy in direct response to DOE's breach, and are therefore recoverable. See *Northern States Power Company v. United*

² SCE has determined such costs would be approximately \$4 million. The government apparently contends that an additional \$2 million, over and above that, would have been incurred.

States, 78 Fed. Cl. 449, 467 (2007). The government will apparently nevertheless contest that element of damages.

Fifth, the government will contend that SCE's damages must be reduced or offset by certain cask loading and other costs allegedly avoided by SCE, as a result of DOE's failure to perform. Such costs have not been "avoided" in this partial breach case, however, but, at most, only deferred. For that reason, as well as the inherently speculative nature of the offset urged by the government, this Court has rejected such arguments in every single case in which the issue has been considered. *E.g.*, *Dominion Resources v. United States*, 84 Fed. Cl. 259, 278-79 (2008); *Carolina Power & Light Co. v. United States*, 82 Fed. Cl. 23, 52 (2008). No grounds for departing from that consistent precedent exist here.

Sixth, the government disputes certain overhead costs incurred by SCE in connection with the spent fuel storage activities that constitute SCE's claimed damages. The "non-incremental" argument in support of the reduction urged by the government is conceptually identical to the government's prior arguments regarding internal labor, rejected by the Federal Circuit in *Sacramento Municipal Utility District*, 2008 WL 3539880 *6, and no longer pursued by the government in this case (or, apparently, in other spent fuel cases). Again, the government's arguments regarding

such argued overhead damage reductions have been consistently rejected by this Court in those cases that have considered the issue. *E.g.*, *Dominion Resources*, 84 Fed. Cl. at 281; *Carolina Power*, 82 Fed. Cl. at 48; *System Fuels, Inc. v. United States*, 78 Fed. Cl. 769, 799 (2007); *Tenn. Valley Auth. v. United States*, 69 Fed. Cl. 515, 530 (2006). That should also be the result here.

Seventh and finally, the government contests a relatively small amount (approximately \$600,000) in costs for so-called Allowance For Funds Used During Construction, or “AFUDC.” The government contends that such costs amount to impermissible pre-judgment interest, and, like overheads, are not “incremental” to the claimed breach damages. We acknowledge that this Court has rejected claims for such AFUDC costs in most of the spent fuel damages cases to date (*but see Tenn. Valley Auth. v. United States*, 69 Fed. Cl. 515, 540-42(2006)), but respectfully suggest that such costs are a legitimate component of damages, and allowable under the law. *See Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994).

CONTENTIONS OF FACT

Pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“NWPA”), SCE, acting on its own behalf as well

as agent for the SONGS co-owners, entered into a single Standard Contract on June 10, 1983, covering the three SONGS units, No. DE-CR01-83NE44418.³ The material terms of the DOE Standard Contract are reprinted at 10 C.F.R. § 961.11, and relevant provisions have been summarized and described in the many published spent nuclear fuel damages decisions to date. SCE was the “Purchaser” under the SONGS contract. That contract obligated SCE to make ongoing quarterly payments into the Nuclear Waste Fund,⁴ and, in return, obligated the DOE to accept spent fuel beginning in 1998. DOE has not done so, and the current best estimates of the commencement of DOE performance are no earlier than 2020.

As a general matter, damages in a spent nuclear fuel case are measured by the costs actually incurred by SCE for its mitigation efforts in the real world, minus the costs that SCE would have incurred had DOE performed under the legally-required standards. *E.g., Yankee Atomic*, 536 F.3d at 1273. The difference is the damage attributable to DOE’s breach,

³ SCE is the majority owner and operator of all three units. A minority ownership interest in SONGS Unit 1 is held by San Diego Gas & Electric Company. Minority interests in SONGS Units 2 and 3 are held by San Diego Gas & Electric Company, and the City of Riverside.

⁴ Through December 31, 2005, SCE had paid more than \$373 million into the Nuclear Waste Fund. SCE has paid approximately \$15 million per year since 1983.

and an award of such damages is designed to place SCE in as good a position as it would have been in had DOE performed. *Indiana Michigan*, 422 F.3d at 1373. Accordingly, the following contentions of fact review: (i) SCE's spent fuel storage activities in the real world, and (ii) the activities that would have been avoided, had DOE performed as required.

I. SPENT FUEL STORAGE MITIGATION ACTIVITIES UNDERTAKEN BY SCE IN THE REAL WORLD.

A. *The SONGS Units.*

The SONGS site is located within the boundaries of a U.S. Marine Corps base, Camp Pendleton, approximately 60 miles south of Los Angeles, California.⁵ SONGS consists of one shutdown nuclear plant and two operating nuclear plants. SONGS Unit 1 began operation in 1967 and was permanently shut down on November 30, 1992. SCE began decommissioning activities at SONGS Unit 1 in June 1999, and those activities are being concluded. SONGS Units 2 and 3 are in operation and generate electricity today. SONGS Units 2 and 3 began commercial operation on August 18, 1983 and April 1, 1984, respectively, and are

⁵ SCE does not own the land upon which SONGS Units 1, 2, and 3 are sited. SCE is authorized to use the land under grants of easement and leases from the U.S. Department of Navy and the California State Lands Commission.

currently licensed to operate by the Nuclear Regulatory Commission (“NRC”) until February 16, 2022 and November 15, 2022, respectively.

The nuclear fuel used to power the reactors consists of uranium pellets, formed into long fuel rods, which are in turn put together in the form of “assemblies.” The SONGS 2 and 3 reactors each contain 217 fuel assemblies. During the period covered in this proceeding, SONGS 2 and 3 typically refueled every two years. The purpose of the refueling is to replace a certain number of spent fuel assemblies in the reactor, usually about 100, with new fuel assemblies which generate heat and electricity more efficiently. The permanently discharged spent fuel assemblies, which are “spent nuclear fuel,” remain highly radioactive and must remain submerged in the spent fuel pool until shipped offsite, removed to dry storage, or otherwise disposed of. The amount of uranium in a spent fuel assembly is measured in metric tons uranium or “MTUs.” The number of MTUs in a spent fuel assembly depends upon whether the reactor is a pressurized water reactor (“PWR”) or boiling water reactor (“BWR”).

SONGS 2 and 3 are PWR’s.⁶

⁶ Like a dozen or so other nuclear plants built by Combustion Engineering, the fuel from SONGS 2 and 3 slightly exceeded the defined length of “standard fuel” in the DOE Standard Contract, but DOE: (a) never took the position that the length of the fuel from such plants would be an issue regarding acceptance; (b) affirmatively

Nuclear power plants are constructed with spent fuel “pools” adjacent to the reactors. When the reactor is operating, it is contained and isolated from the spent fuel pool. When the plant is not at power, the reactor vessel can be opened and nuclear fuel removed and placed into the pools. SONGS Unit 1’s spent fuel pool was capable of storing 216 spent fuel assemblies. Unit 2 and Unit 3 have separate spent fuel pools, unconnected to each other. The Units 2 and 3 spent fuel pools each have a current storage capacity of 1,542 spent fuel assemblies. The spent fuel is stored vertically in racks within each pool.

As a routine conservative operating practice, SCE generally seeks to maintain sufficient room in the SONGS Unit 2 and Unit 3 spent fuel pools to discharge a full reactor core into each spent fuel pool, or maintain a “full core reserve.” *See generally, Yankee Atomic Elec.*, 536 F.3d at 1275 (“[U]tilities ideally maintain sufficient pool capacity to permit discharge of all fuel assemblies from the reactor core into the pool to accommodate maintenance and repair operations.”) A full core for both Unit 2 and Unit 3

informed utilities with long fuel that they should sign the Standard Contract as-is, and DOE would address the technical length specifications later; and (c) published a Federal Register notice, noting that DOE agreed that it would be “appropriate” for the Standard Contract to define “standard fuel” in a manner so as to encompass fuel from the Combustion Engineering plants. *See* 49 Fed. Reg. 6500-6501 (February 22, 1984).

is 217 assemblies. Accordingly, maintenance of “full core reserve” at each unit requires 217 open rack spaces in each pool, and 1,325 assemblies (1542 minus 217) can be stored in each pool without additional storage measures or expenditures. SCE’s claims for damages in this matter are based upon mitigation steps that were actually taken by SCE, but would not have been necessary if DOE had performed its obligations, in order to maintain “full core reserve.”

B. *Early spent fuel management: shipment of Unit 1 fuel to the Morris facility.*

At the time SONGS Unit 1 was constructed and commenced commercial operation, SCE planned to reprocess, or recycle, the remaining uranium in the spent fuel produced by the plant. Spent fuel removed from the reactor was to be temporarily stored in the Unit 1 spent fuel pool until it had cooled sufficiently to allow it to be transported to an offsite reprocessing facility. In 1974 and 1976, SCE shipped 48 and 51 spent fuel assemblies, respectively, from Unit 1 to the General Electric (“GE”) facility at Morris, Illinois (“Morris facility”), to be reprocessed at that facility. The GE Morris reprocessing facility never became operational. In 1977, President Carter indefinitely deferred the spent fuel reprocessing program

in the United States.⁷ As a result, with each refueling outage, SONGS Unit 1 fuel accumulated in that Unit's spent fuel pool. Therefore, in order to continue to operate Unit 1, SCE subsequently shipped 171 additional Unit 1 spent fuel assemblies from the Unit 1 spent fuel pool to the Morris facility in 1980, such that a total of 270 Unit 1 spent fuel assemblies were stored there.⁸ Those 270 Unit 1 assemblies remain stored at Morris today.

After the cancellation of reprocessing, SCE eventually entered into a fuel storage contract with GE-Morris for the Unit 1 fuel that had been shipped there. Pursuant to the terms of the Nuclear Fuel Storage Contract, GE agreed to continue to store the 270 Unit 1 spent fuel assemblies at a monthly Base Storage Charge of \$800 per month per assembly, plus an Adjusted Monthly Storage Charge. The contract which was signed on January 1, 1987 was originally set to expire on May 31, 2002 but was amended on April 11, 2002 (Amendment 1) and then again on November 30, 2006 (Amendment 2). For a time SCE also had an option with GE to store 88 additional Unit 1 fuel assemblies at Morris, but ultimately did not

⁷ *Nuclear Non-Proliferation Policy*, Presidential Directive/NSC-8, 24 March 1977.

⁸ Although President Reagan later reversed President Carter's directive, GE never commenced reprocessing activities at the Morris facility. To date, reprocessing has not been undertaken on a commercial scale in the United States.

exercise that option for a variety of technical and economic reasons. From July 1, 1998 through December 31, 2005, SCE had paid GE a total of \$26,827,548, for storage of the 270 assemblies of Unit 1 spent nuclear fuel which would not have been paid had DOE performed as required.

C. *Early spent fuel management: transshipment of Unit 1 fuel and expansion of the Unit 2 and 3 pool capacities.*

In 1985, SCE formed a Spent Fuel Storage Task Force to evaluate spent fuel storage options. Among the options considered at that time were spent fuel pool reracking and fuel consolidation. Reracking involved replacing the existing spent fuel racks with higher density racks that were capable of storing fuel assemblies in a tighter configuration such that more assemblies could be stored in the same amount of pool space. Fuel consolidation involved the disassembly of a spent fuel elements to allow two spent fuel assemblies to be stored in one spent fuel pool storage location, theoretically doubling the amount of available storage. (Fuel consolidation, which presents a host of technical challenges, has been done experimentally but has not been pursued on a commercial scale as a storage option at any plant in the United States.)

In 1986, SCE decided to transship Unit 1 spent fuel to the Units 2 and 3 spent fuel pools, in order to provide adequate storage capacity within the Unit 1 spent fuel pool for continued refuelings and maintenance. In the late

1980s and early 1990s, a total of 188 Unit 1 spent fuel assemblies were shipped to and stored in the Units 2 and 3 spent fuel pools. For those transshipments, SCE used an "IF-300" spent fuel transfer cask, which at the time was licensed for such transfers and held a total of 7 spent fuel assemblies. Transfer of the 139 assemblies from Unit 1 to Units 2 and 3 required only minor modifications to the Units 1, 2, and 3 spent fuel handling equipment, including the cranes used in each unit to move the approximately 70 ton IF-300 transfer cask. Those cranes handled the transfer casks for the transshipments between the units.

During 1986, SCE also decided to rerack the Units 2 and 3 spent fuel pools, which would nearly double the storage capacity of each pool, from 800 to 1,542 assemblies. The new racks were installed between May 1990 and July 1991. Because these transshipment and reracking activities occurred so early and because they would have been necessary even had DOE performed, none of the costs incurred with those projects are claimed by SCE as damages.

D. *Decommissioning of Unit 1.*

SONGS Unit 1 was permanently shut down in November 1992. At that time, its reactor contained 157 fuel assemblies. However, only 115 rack spaces were available in the SONGS Unit 1 spent fuel pool. To

accommodate the 157 assemblies to be discharged from the Unit 1 reactor, SCE moved an additional 49 fuel assemblies from the Unit 1 spent fuel pool to the Unit 3 pool in 1993. After the 157 spent fuel assemblies were removed from the Unit 1 reactor and placed in the Unit 1 spent fuel pool later in 1993, that pool contained 207 fuel assemblies.

After removal of the fuel from the reactor in 1993, the SONGS Unit 1 spent fuel pool remained intact, and the plant was maintained in a “SAFSTOR” condition. “SAFSTOR” is one of three alternative decommissioning strategies authorized by the NRC, and it involves maintaining and monitoring the nuclear facility in a condition that allows the radioactivity to naturally decay until the time when the facility is actually dismantled. Full decommissioning (also referred to as “DECON”), which involves complete dismantlement of the facility and reducing residual radioactivity to a level that permits release of the property and termination of the NRC operating license, must be completed within 60 years of the plant ceasing operations. SCE originally planned to maintain Unit 1 in SAFSTOR until the planned shutdown of Units 2 and 3 in 2022.

SCE soon determined, however, to undertake full decommissioning of SONGS Unit 1, and commenced that process in June 1999. SCE decided that decommissioning Unit 1 at that time was appropriate because,

among other things, it would resolve uncertain customer liability, it could be accomplished safely using available, proven technologies, and personnel with significant knowledge of the Unit 1 design were currently available. The majority of the plant's structures and facilities have now been decontaminated, dismantled and removed from the site.

E. Construction of the ISFSI and dry storage.

In 1990, DOE announced that it would not begin operations at the geologic repository (Yucca Mountain is the currently-designated location of the repository) until at least 2010. Moreover, in 1991, DOE published the 1991 ACR, in which DOE stated that it would accept spent fuel from the industry at a rate no greater than 900 metric tons of uranium ("MTUs") per year, after a short ramp-up period, based on oldest-fuel first. See generally, *Pacific Gas*, 536 F.3d at 1287. Given these developments, SCE realized that the SONGS allotment of spent fuel MTUs to be accepted by DOE was significantly less than the anticipated rate at which spent fuel would be produced by SONGS.

Between 1991 and 1992, SCE performed another study to analyze spent fuel storage needs for Units 2 and 3. In particular, SCE again evaluated fuel consolidation, as well as dry storage, as potential storage options. SCE subsequently selected dry storage over fuel consolidation for

the following reasons: (1) dry storage technology had, by 1992, sufficiently advanced to be practical; (2) other utilities had installed and licensed dry fuel storage facilities; and (3) it was the more cost effective storage method over the storage- and handling-life of spent fuel. In June 1992, SCE projected that Units 2 and 3 would lose full core reserve capability ten years later, in 2002.

During the early to mid 1990s, it became increasingly apparent to SCE that the DOE's forecasted completion date for the geologic repository was continuing to slip. Other events further undermined SCE's confidence in DOE's ability to proceed with any plans to accept spent fuel from utilities—DOE had not yet designated a site or performed any characterization studies for a monitored retrieval storage facility (that was being touted by DOE as a temporary repository before the permanent repository at Yucca Mountain became operational) and annual appropriations for the Yucca Mountain repository continued to be deficient.⁹

Further, SCE could not proceed with full decommissioning and dismantlement of Unit 1 until the spent fuel was removed from the Unit 1 spent fuel pool. In accordance with the decommissioning project schedule,

⁹ Although DOE has collected many billions of dollars from SCE and other utilities under the NWPA that remain unspent, each year Congress must appropriate funds to DOE for repository activities.

SCE had planned to move the spent fuel from the Unit 1 spent fuel pool onto the Independent Spent Fuel Storage Installation (“ISFSI”) in 2004. In addition, because of DOE’s continued delays in accepting spent fuel, SCE also projected in 2000 that due to the Unit 1 fuel assemblies residing in the Units 2 and 3 pools, Units 2 and 3 would lose full core reserve in 2006. SCE therefore determined at that time that fuel from the Units 2 and 3 spent fuel pools would also need to be removed to maintain full core reserve capability beyond 2006.

As a result of these developments and the dim prospects for meaningful DOE performance, SCE embarked upon the dry storage project. The SONGS ISFSI originally consisted of: (1) a seismically-designed steel reinforced concrete pad; (2) a fenced facility within the SONGS Unit 1 industrial area with required security features; (3) seismically designed reinforced concrete Advanced Horizontal Storage Modules (“AHSMs”); and (4) seismically designed Dry Storage Canisters (“DSCs”) that can each accommodate up to 24 spent fuel assemblies. AHSMs are highly engineered concrete overpacks, into which the DSCs are inserted, and which are themselves stored horizontally on the ISFSI. DSCs are the stainless steel canisters into which the spent fuel assemblies

are directly inserted from the spent fuel pool. Actual construction of the ISFSI began in 2001 and was completed in 2002.

In addition, because of ongoing industry concerns with the supply and the quality of DSCs available from spent fuel cask vendors at that time, SCE decided to construct the DSCs onsite at SONGs pursuant to a license from the designer, rather than purchase them already manufactured from a vendor. This decision was subject to co-owner approval and was independently reviewed and approved by outside consultants. As a result, SCE constructed a DSC fabrication facility on site. SCE also purchased equipment and upgraded certain plant equipment required to transfer the spent fuel in loaded transfer casks (each weighing greater than 100 tons) to the ISFSI. Further, specialized personnel training was required to safely move the fuel onto the ISFSI.

SCE completed loading the 207 spent fuel assemblies stored in the Unit 1 spent fuel pool onto the ISFSI in September 2004. SCE also loaded the Unit 1 assemblies stored in the Unit 3 spent fuel pool onto the ISFSI in 2004 and the Unit 1 assemblies stored in the Unit 2 spent fuel pool in 2005. The Unit 1 spent fuel is stored in 17 DSCs, which were loaded into the AHSMs placed on the ISFSI.

One additional modified DSC/AHSM includes SONGS Unit 1 reactor vessel internal materials that are classified as Greater Than Class C (“GTCC”) radioactive waste. GTCC, as defined by the NRC, has concentrations of certain radionuclides above the Class C limits for Low Level radioactive waste as described in 10 C.F.R. § 61.55. GTCC principally consists of activated metals from pieces of the reactor vessel and internal components generated during decommissioning. Because the NRC requires that GTCC be disposed of in a geologic repository, SCE chose to temporarily store the SONGS Unit 1 GTCC on the ISFSI until such time as a permanent repository is available. Unlike spent fuel, however, GTCC does not require special security protection measures, and the restrictions upon maintenance and storage are much different (and less onerous) than spent nuclear fuel.

SCE decided to use the remaining space on the first, existing ISFSI pad to store spent fuel from Units 2 and 3. SCE loaded 13 additional AHSMs/DSCs with spent fuel from Units 2 and 3 in 2007.¹⁰ SCE also

¹⁰ The damages cut-off employed by SCE for the present proceeding was December 31, 2005, and the current claim includes only those dollars actually spent by SCE prior to that period. Certain progress and other payments for the Unit 2 and 3 AHSMs/DCSs were incurred prior to December 31, 2005, but the bulk of the Unit 2 and 3 costs will be sought in future proceedings, pursuant to *Indiana Michigan*, 422 F.3d at 1377-78.

began constructing a second ISFSI pad in 2007 to accommodate spent fuel storage needs as Units 2 and 3 continue to operate beyond 2008.

G. *Private Fuel Storage.*

In 1994, SCE joined the Private Fuel Storage, LLC (“PFS”) project as part of an overall company effort to investigate economically competitive, potentially viable, interim spent fuel storage alternatives for spent fuel stored at SONGS Units 1, 2, and 3 and at Morris. The PFS consortium was formed by eight electric utility companies for the purpose of developing and managing a temporary storage facility for spent nuclear fuel. PFS partnered with the Skull Valley Band of Goshute Indians in Utah to build and operate the storage facility.

SCE participated in PFS because of uncertainties arising from ongoing, prolonged delays in development of a federal spent fuel repository and spent fuel acceptance program, potential problems siting an ISFSI at SONGS due to the compact nature of the SONGS site, and the clear absence of other viable spent fuel storage options. From 1994 to 1999, SCE committed \$2,088,656 to PFS to develop and license this alternate

storage option.¹¹ In return for its payments, SCE would secure priority for any acceptance allocations, should the project ever commence operations.

In 1999, when it became apparent that construction of an ISFSI at the SONGS site was logistically possible, it could be constructed in time to support the fuel storage needs at SONGS, and the required regulatory approvals for dry spent fuel storage at SONGS could be obtained, SCE stopped making payments to PFS. SCE nominally remains a member of PFS, based on its initial payments, but is no longer involved with the venture in any active way. Indeed, the PFS project itself has ceased activity and is currently and effectively “dead,” due to the lack of certain required federal agency approvals and state and local political opposition. *See Devia v. Nuclear Regulatory Commission*, 492 F.3d 421, 425 (D.C. Cir. 2007). Since the cessation of PFS activities, no member has sold or otherwise disposed of its nominal interest in the venture.

II. THE “BUT-FOR WORLD” OF DOE PERFORMANCE.

Had DOE performed its contractual obligations at the legally-required acceptance rates identified in certain 1987 DOE documentation (the “1987 ACR rates”), DOE would have: (1) removed all of SONGS’ spent fuel

¹¹ The PFS LLC was formed in 1996. Prior to 1996, SCE made payments in support of this project to predecessor companies, including Northern States Power Co. and Mescelaro Fuel Storage LLC.

stored offsite at the GE Morris facility by 2001, thereby saving SCE payments to GE; (2) removed all spent fuel stored at SONGS Unit 1 by 2005, which would have allowed SCE to decommission Unit 1 without constructing an ISFSI; and (3) removed sufficient spent fuel from SONGS Units 2 and 3 to allow SCE to continue to operate those units and maintain full core reserve in each associated spent fuel pool without constructing an ISFSI. Moreover, in the but-for world, SCE's participation in the PFS project would not have been necessary, because DOE's performance would have rendered unnecessary the exploration of such an alternative spent fuel storage option.

A. *Storage of Unit 1 spent fuel at the Morris facility.*

As discussed above, if DOE had begun accepting spent fuel in accordance with its obligations under the Standard Contract, DOE would have removed all of SONGS' Unit 1 spent fuel stored at Morris (270 assemblies) by 2001. Specifically, under the 1987 ACR rates, DOE would have removed 207 assemblies in 1998, 53 assemblies in 1999, and 10 assemblies in 2001. Therefore, SCE is claiming as damages prorated payments to GE for spent fuel storage at Morris between 1998 and 2001, and all such payments after 2001 (up through the 2005 damages period for this proceeding).

B. No construction of an ISFSI for storage of Unit 1 spent fuel or GTCC.

If DOE had performed in accordance with the Standard Contract, DOE would have removed all of the spent fuel from SONGS Unit 1 by mid-year 2005.¹² Therefore, SCE could have proceeded with decommissioning Unit 1 without constructing the ISFSI. In addition, if the DOE had complied with its obligation to remove GTCC concurrently with the spent nuclear fuel, (see *Yankee Atomic*, 536 F.3d at 1277-78), SCE would not have incurred any of the storage costs for the SONGS Unit 1 GTCC that SCE incurred in the real world.¹³ Accordingly, SCE's damages at SONGS Unit 1 include costs associated with the design and construction of the ISFSI, fabrication of the DSCs and AHSMs, and loading of 395 Unit 1 spent fuel assemblies and the GTCC waste onto the ISFSI.

SCE would, however, have incurred some ten extra months of SAFSTOR costs at Unit 1 under the 1987 ACR acceptance rates (i.e., from September 2004 through June 2005). The additional SAFSTOR costs that

¹² SCE assumed DOE spent fuel acceptance occurs at the midpoint of each year, an approach consistent with that used by government expert witnesses in their reports.

¹³ As the evidence will confirm, if DOE had only removed spent nuclear fuel from SONGS, and not GTCC waste, no ISFSI would have been required for the storage of the GTCC waste. There are a number of potential options for storage of GTCC waste, which has fewer security restrictions and is far less radioactive than spent nuclear fuel.

SCE would have incurred during those ten months, prior to DOE's acceptance of the last of the SONGS Unit 1 fuel from the site, are being voluntarily deducted by SCE from its claimed damages. Actual 2004 SAFSTOR cost data provides the best measure of assessment of what those costs would have been.

C. *No construction of an ISFSI for storage of Units 2 and 3 spent fuel.*

If DOE had performed in accordance with the Standard Contract, DOE would have removed sufficient spent fuel from the SONGS Unit 2 and 3 spent fuel pools to maintain full core reserve through the end of the Unit 2 and 3 current operating licenses. As demonstrated by the application of the 1987 ACR rates to the factual circumstances of the SONGS Unit 2 and 3 pools, SCE would not have had to load any spent fuel from SONGS Unit 2 or 3 onto the ISFSI. Accordingly, SCE's damages at SONGS Units 2 and 3 through December 31, 2005 include costs associated with the design and construction of the ISFSI, and design and manufacture of the initial set of 13 AHSMs and DSCs.

In addition, in the but-for world where DOE was performing, spent fuel assemblies shipped to DOE from Units 1, 2, and 3 would have been loaded into whatever canister DOE supplied only once. SCE would therefore have only incurred costs associated with such loading activities

once. In the real world, by contrast, SCE has had to (and will have to) load spent fuel assemblies into its own casks used for storage on the ISFSI. In addition, whenever DOE shows up, SCE will have to discharge its obligations to “arrange for . . . loading activities necessary for the transportation of SNF and/or HLW to the DOE facility,”¹⁴ and thereby incur loading costs again. Clearly, the contract contemplates that such loading costs only be incurred once, in conjunction with actual DOE performance. In this partial breach case, that DOE performance duty (and SCE’s corresponding contractual loading obligations) are still due and owing.

D. PFS storage option.

If DOE had been performing at the 1987 ACR rates, SCE would have had sufficient storage options at the SONGS site. Costs associated with potential offsite storage such as the PFS project would not have been required. Accordingly, SCE is claiming as damages all costs associated with the pursuit of the PFS storage option.

E. Summary of mitigation damages claimed.

Calculation of the dollars claimed by SCE in this proceeding was a straightforward and mechanical process. The starting point was the total actual dollars spent by SCE in the real world for all spent fuel dry storage-

¹⁴ DOE Standard Contract, Article IV.A.2.(a).

related activities. Under the assumptions of DOE performance at the required 1987 ACR rates, SCE managers and personnel then determined which of those real-world projects and costs would have been avoided. If the projects would not have been undertaken and the recorded costs therefore *not* incurred had DOE performed, the costs are claimed as damages.

For example, the costs associated with shipments of SONGS Unit 1 spent fuel to Morris and to the SONGS Units 2 and 3 spent fuel pools are not being claimed, because those activities and related costs would have been incurred even if DOE had performed in accordance with the Standard Contract. On the other hand, SCE's claimed damages at SONGS Unit 1 include costs associated with the design and construction of the ISFSI, fabrication of the DSCs and AHSMs, and loading of 395 Unit 1 spent fuel assemblies and the GTCC waste onto the ISFSI, because SCE would not have incurred those costs had DOE performed.

A chart summarizing SCE's currently claimed damages, under the 1987 ACR rates and incurred through December 31, 2005, follows:

PROJECT	COST¹⁵
Morris Facility	\$26,827,548
Unit 1 ISFSI	\$81,525,973
Unit 1 SAFSTOR Costs	(\$3,757,908)
Units 2 & 3 ISFSI	\$39,665,047
Private Fuel Storage	\$2,088,656
Total	\$146,349,316

CONTENTIONS OF LAW

I. SCE IS ENTITLED TO MITIGATION DAMAGES TO REMEDY DOE'S PARTIAL BREACH.

A. *The nature of mitigation damages.*

The basic legal principles that control SCE's claim against DOE for its partial breach of the Standard Contract are straightforward. As an initial matter, the Court has jurisdiction over SCE's partial breach of contract claim pursuant to 28 U.S.C. § 1491(a)(1), and the government's liability for partial breach of the Standard Contract has been firmly established. See *generally, Yankee Atomic*, 536 F.3d at 1272 (citing *Indiana Michigan Power*, 422 F.3d at 1376-77)). As with the other spent fuel cases,

¹⁵ These figures also incorporate the adjustments identified in letters to the government dated February 1, 2007, March 5, 2007, and February 12, 2009, as well as the adjustments in response to the Federal Circuit decisions in August 2008, submitted to the government on October 17, 2008.

therefore, only the measure of SCE's damages is at issue. See, e.g., *Dominion Resources*, 84 Fed. Cl. at 261.

When it became clear that DOE's performance under the Standard Contract would be delayed indefinitely, nuclear power utilities had two options: (1) allow their spent fuel pools to completely fill, forcing a shutdown of its plants, or (2) obtain additional storage to mitigate what would otherwise be a catastrophic impact from DOE's delay. *Southern Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396, 421 (2007). If a nuclear power generator has no place to store spent fuel, it can no longer operate its reactor and must shut down. The damages caused by allowing a spent fuel pool to fill up, therefore, would be staggering. As a result, it is "beyond debate" that utilities were obligated to mitigate DOE's partial breach by finding alternative storage until DOE performs. *Indiana Michigan*, 422 F.3d at 1375.

B. *Establishing mitigation damages.*

As an action for partial, not total, breach, utilities hold the government to the terms of the Standard Contract and seek reimbursement of their actual costs spent mitigating DOE's delay. *Indiana Michigan*, 422 F.3d at 1373-74. In other words, in this action, SCE seeks to recover the additional expenses it incurred to store spent fuel until DOE picks it up. A utility

injured by the government's partial breach of the Standard Contract should recover damages sufficient to place it "in as good a position as it would have been had the breaching party fully performed." *Id.* at 1373. The Federal Circuit described the showings required by a plaintiff in a spent nuclear fuel damages case: "(1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty." *Indiana Michigan*, 422 F.3d at 1373.

1. Foreseeability.

In this case, foreseeability will not be contested or at issue. Indeed, there can be no serious dispute that it was foreseeable that nuclear power generators, such as SCE, would take steps to mitigate the harm caused by DOE's failure to meet its contractual obligation and begin picking up spent fuel not later than January 31, 1998 as required under the Standard Contract. *E.g., Tenn. Valley Auth. v. United States*, 60 Fed. Cl. 665, 675 n.10 (2004) ("[T]he intent of the NWPA and the parties [to the Standard Contract] was to avoid the construction by utilities of additional at-reactor storage [after January 31, 1998]. DOE's failure to perform under the Standard Contract thus has led to the very thing the NWPA and the

Standard Contract were designed to forestall.” *Id.* (internal citation omitted).)

2. Substantial causal factor: the 1987 ACR acceptance rates.

Whether the government’s partial breach is a “substantial causal factor” of the damages is a very straightforward factual inquiry in this case: Was DOE’s delay in performing under the Standard Contract a substantial causal factor of the additional spent fuel storage activities for which costs are being claimed? See *Southern Nuclear*, 77 Fed. Cl. at 405 (“The breach must be a ‘substantial causal factor’ in the mitigation decisions.”) To determine causation, this Court has “discretion to use the substantial factor test” or “the more traditional ‘but-for’ test.” *Yankee Atomic*, 536 F.3d at 1272-73. Under either standard, SCE will show that the government’s indefinite delay in picking up spent fuel caused SCE to pursue long-term storage alternatives for which it is entitled to recover.

For many years, one of the government’s primary defenses in these spent nuclear fuel damages cases involved its effort to limit its liability by arguing that its “acceptance rate” obligations, after 1998, were limited to the industry-wide aggregate 900 MTU/year rates set forth in certain 1991 documentation generated under the contracts by DOE. The government argued that damages in many cases could not be shown by the utilities to

have been “caused” by DOE’s delay under those tainted and artificially low rates, and the government thereby sought to reduce its financial exposure. In August 2008, the Federal Circuit definitively rejected the government’s arguments. *Pacific Gas and Electric*, 536 F.3d at 1288-1292; *Yankee Atomic*, 536 F.3d 1268; *Sacramento Municipal Utility District*, 2008 WL 3539880.

The “pick-up rates” established as legally controlling for these purposes by the Federal Circuit in *Pacific Gas and Electric, et al.*, are those set forth in the 1987 DOE Annual Capacity Report, which in turn adopts the rates identified in the 1987 DOE Mission Plan Amendment. Those rates are: 1,200 MTU/year for 1998-2002, 2,000 MTU/year for 2003, 2,650 MTU/year for 2004-2007, and 3,000 MTU/year thereafter. It is those rates that now dictate the calculation of damages in this, and the remaining, spent nuclear fuel damages cases. *Dominion Resources*, 84 Fed. Cl. at 265-67. Various DOE documents, including Annual Priority Rankings, provide listings of industry-wide spent fuel discharges, by age of the spent nuclear fuel discharge. It is a straightforward and mechanical exercise to apply those age-based rankings to the annual acceptance obligations, in an “oldest fuel first” queue as identified in the Standard Contract, and determine whether additional storage capacity beyond the existing spent

fuel pools would be required under assumed DOE performance. If it would not, then the real world efforts to secure such additional capacity (*i.e.*, the construction of an ISFSI and loading of casks) are, necessarily and obviously, a result of DOE's breach. Costs expended toward such efforts are therefore recoverable as breach damages. Such an exercise can be illustrated with a spreadsheet, summarizing the factual discharge and storage data for the SONGS units and the mandated assumptions of DOE performance.

The original claims of SCE were based upon a somewhat higher "ramp up" to a 3000 MTU/year rate, reflected in the substantial early documentation and testimony generated by DOE and the industry. See *generally, Carolina Power*, 82 Fed. Cl. at 37-41; *Indiana Michigan v. United States*, 57 Fed. Cl. 88, 97-101 (2003). Under that set of assumptions, SCE's damage claims were (very slightly) higher. When the Federal Circuit issued its decisions in August 2008, SCE made the determination to apply those controlling acceptance rates to its claims in a straightforward manner, without elaborate alternative theories. Because of the slightly different "ramp up" in rates, a portion of SCE's claim increased, and another portion decreased, with the end result being a slight net reduction in claimed damages.

3. Reasonable certainty.

Finally, largely as a result of the extensive pre-trial damages disclosure by SCE and audit efforts by the government, as set forth in the Court's June 5, 2006 Order, the requisite "reasonable certainty" of the measure of damages sought will not be disputed. SCE financial and project personnel spent thousands of hours collecting and producing documents, responding to inquiries from the government, and explaining company cost data. For their part, government auditors likewise spent hundreds if not thousands of hours pouring over SCE's cost documentation. Tens of thousands of pages of such documentation were produced by SCE, multiple meetings were held, and multiple on-the-record depositions of SCE financial personnel were taken by the government. Partly as a result of those efforts by both sides, SCE voluntarily reduced its initial claim by some \$200,000, and undertook certain additional voluntary reductions to arrive at the currently claimed amount of \$146,349,316. While the government recites its "plaintiff bears a burden" mantra in declining to admit to any recoverable damages at all, not one single dollar of that claimed \$146 million in actual incurred costs will be alleged by the government to be unsupported or improperly recorded in SCE's cost accounting systems.

II. THE GOVERNMENT HAS THE BURDEN OF CHALLENGING MITIGATION DAMAGES AND ESTABLISHING REDUCTIONS OR OFFSETS.

The initial burden rests on the non-breaching party to present evidence about its condition, assuming full government performance, to allow the Court to compare the breach and non-breach worlds and accurately assess damages. *Yankee Atomic Elec. Co.*, 536 F.3d at 1273. In other words, SCE “must establish a plausible ‘but-for’ world to recover expectancy damages.” *Dominion Resources*, 84 Fed. Cl. at 270 (2008) (internal quotation marks omitted).

After the plaintiff has satisfied its burden of establishing its loss as a result of the breach, “defendant may attempt to reduce damages by showing either that plaintiffs did not undertake reasonable mitigation efforts or that the efforts they did undertake were unreasonable.” *Dominion Resources*, 84 Fed. Cl. at 270 (citing *Ind. Mich.*, 422 F.3d at 1375). See also *Southern Nuclear*, 77 Fed. Cl. at 407 (“[D]efendant bears the burden of establishing that mitigating decisions or expenditures were unreasonable.”); *Tenn. Valley Auth.*, 69 Fed. Cl. at 523 (“To eliminate or reduce TVA’s mitigation-related damages, the government bears the burden of showing that TVA’s mitigation efforts were unreasonable.”).

“[T]he established standard for evaluating the reasonableness of mitigation efforts is ‘from the perspective of one viewing the situation at the time the problem was presented.’” *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 744 (2004) (quoting *Koby v. United States*, 52 Fed. Cl. 493, 498 (2002)); *Tampa Elec. Co. v. Nashville Coal Co.*, 214 F. Supp. 647, 652 (D. Tenn. 1963) (“The critical factor in determining . . . a plaintiff’s duty to mitigate is whether the method which he employed to avoid consequential injury was reasonable under the circumstances existing at the time.”).

“[R]easonable conduct is to be determined from all the facts and circumstances of each case.” *In re: Kellett Aircraft Corp.*, 186 F.2d 197, 198 (3rd Cir. 1950). Another “guiding principle is whether plaintiff acted with reasonable commercial judgment.” *Southern Nuclear*, 77 Fed. Cl. at 406 (internal quotation marks omitted). *See also Old Stone Corp. v. United States*, 450 F.3d 1360, 1370 (Fed. Cir. 2006) (“The government has not shown that it was unreasonable for OSC to replace the entire amount of regulatory capital that was eliminated by FIRREA.”).

“After-the-fact criticism by the breaching party is irrelevant so long as the mitigating decisions were reasonable.” *Southern Nuclear*, 77 Fed. Cl. at 427. And “[w]here a choice is required between two reasonable courses of action, the party that caused the injury may not complain that one

course, rather than the other, was chosen.” *Sacramento Mun. Util. Dist. v. United States*, 70 Fed. Cl. 332, 367 (2006). See also *Kellett Aircraft Corp.*, 186 F.2d at 198-99 (“The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter.”); *Southern Nuclear*, 77 Fed. Cl. at 407 (“Generally, the breaching party may not complain that one of several reasonable courses of action were taken.”).

The government also bears the burden if it seeks “to reduce damages where, as a result of defendant’s breach, [plaintiff] avoided an expense.” *Dominion Resources*, 84 Fed. Cl. at 270 (citing *Lisbon Contrs., Inc. v. United States*, 828 F.2d 759, 769 (Fed. Cir. 1987)). “Any ‘benefits’ the government seeks to offset must be shown to a reasonable certainty, or they must be denied as too speculative to meet the standards set forth by the Federal Circuit in *Indiana Michigan*.” *Carolina Power & Light Co.*, 82 Fed. Cl. at 44 (quoting *System Fuels v. United States*, 79 Fed. Cl. 37, 44 (2007)).

III. CONTESTED ISSUES IN THE CASE.

A. *Government Arguments Regarding Acceptance Rate.*

1. The government's refusal to follow *Pacific Gas et al.*

In several recent, post-*Pacific Gas* cases, the government has sought to “preserve its position” by seeking to introduce evidence in support of its argument, rejected in *Pacific Gas*, that DOE’s legal acceptance rate obligations were limited to those reflected in the tainted 1991 ACR. To the extent that the government were permitted to introduce such evidence, however, a full and accurate record would require SCE to introduce the voluminous evidence to the contrary. It would be as if *Pacific Gas et al.* had never been issued by the Court of Appeals. In a prior status conference, this Court stated its desire to not “open the door even a crack” with regard to the now-settled acceptance rate obligations. November 5, 2008 Proceedings, Tr. at 18. SCE believes that to be the correct and appropriate approach. We expect to file an *in limine* motion to that effect, in order to preclude the government from unnecessarily burdening the record or protracting the trial of this matter, in contravention of *Pacific Gas*.

2. The government's GTCC-based acceptance rate arguments.

Besides just ignoring *Pacific Gas*, another way in which the government has sought in recent cases to avoid the legal acceptance rate

obligations prescribed by the Federal Circuit has been to invoke the contemporaneous ruling by the Court of Appeals that DOE has a contractual obligation to accept Greater-Than-Class-C (GTCC) waste. See *Yankee Atomic*, 536 F.3d at 1277-78. In particular, the government argues that the 1987 ACR rates and associated acceptance queue cannot (despite what the Federal Circuit said) really be applied to establish a plaintiff's spent nuclear fuel mitigation damages, because those industry-wide acceptance obligations might—in some indeterminate, unquantifiable, and unspecified way—have been affected by DOE's hypothetical acceptance of GTCC. And, according to the government, it is of course a plaintiff's burden to figure out how DOE might have satisfied its GTCC obligations, and, to the extent such an inquiry implicates any argued speculation (which it always does, according to the government), the plaintiff cannot recover at all.

The fatal deficiencies with the government's position are many, but include the following. First, the government misreads the import of the *Pacific Gas* and *Yankee Atomic* decisions with respect to burdens and GTCC, and in particular errs when it contends that DOE's GTCC acceptance obligations somehow excuse the spent nuclear fuel acceptance obligations found by the Court of Appeals to be controlling. In *Yankee*

Atomic, the Federal Circuit affirmed this Court's determination that GTCC was covered by the Standard Contract and a utility's costs incurred in storing GTCC were therefore recoverable. In *Pacific Gas* (as well as *Yankee Atomic*), the Federal Circuit identified 1987 ACR acceptance rates, which by their terms defined DOE's obligations with regard spent nuclear fuel only, as being required to be applied by this Court in the remands. See, *Pacific Gas*, 536 F.3d at 1292; *Yankee Atomic*, 536 F.3d at 1274. The Court of Appeals said not one word about recalculating those 1987 ACR allocations or acceptance obligations to accommodate the court's simultaneous holdings regarding GTCC—the government, after the remands, has made up its most recent arguments out of whole cloth. And, those arguments are inconsistent with the Federal Circuit's holding that DOE "planned to (and would have) removed the GTCC with the SNF." *Yankee Atomic*, 536 F.3d at 1278 (emphasis supplied). Notably, the Federal Circuit said the GTCC would be taken "with" the spent nuclear fuel identified in the 1987 ACR documentation—not "in place of," or "instead of," or "in lieu of" spent nuclear fuel.

Second, the purported "burden" on a plaintiff urged by the government necessarily involves uncertainties that are occasioned entirely by DOE's breach. For example, Appendix E of the Standard Contract

required DOE to develop “detailed acceptance criteria and general specifications for [high level] waste,” which DOE has not done with respect to GTCC. Indeed, to date DOE has undertaken no contractual performance at all with regard to GTCC, such as development of packaging guidelines, identification of measurement criteria, or any of the myriad other steps that would be required to illuminate the specifics of its required performance. We do not even know what unit of measurement DOE would have used, or will use, for GTCC. Unconstrained by any steps toward actual performance, DOE is free to now argue in damages litigation that any GTCC acceptance scenario postulated by a plaintiff is suspect or incorrect. Even the amount of GTCC that exists in the real world, which one would think would be an objective and verifiable fact, has been called into question by the government upon the basis that the entire industry would have acted differently with respect to its waste management practices if DOE had correctly discerned its contractual obligations from the outset.

It is apparent that these circumstances implicate a fundamental principle of recovery, namely that a party cannot benefit from uncertainty that its own breach has created. *E.g., Energy Capital Corp. v. United States*, 302 F.3d 1314, 1327 (Fed. Cir. 2002) (quoting *Mid-America*

Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1366 (7th Cir. 1996)); *Dominion Resources*, 84 Fed. Cl. at 270; see also *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1374 (Fed. Cir. 2003) (“[W]hen damages are hard to estimate, the burden of imprecision does not fall on the innocent party.”); *Commercial Federal Bank, F.S.B. v. United States*, 59 Fed. Cl. 338, 350-51 (2004); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §27 (1935)) (“Where the defendant’s wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty.”) (citations omitted). This well-settled principle controls, and requires rejection of the government’s position.

Third, even accepting for argument’s sake all of the government’s GTCC arguments, the facts in this case will demonstrate that SCE’s damages would not be affected. There is enough “margin” in the causation showing that SCE will present at trial to allow for full recovery even giving the government the full benefit of its arguments, namely to “displace” SCE’s spent fuel acceptance allocations with its GTCC materials. The same would be true regarding the best available industry-wide data. In short, the government’s GTCC-based effort to avoid the legal acceptance rate obligations imposed by *Pacific Gas* will miss the mark.

B. GTCC storage costs.

As noted in the Contentions of Fact above, a limited amount of GTCC was generated in connection with the decommissioning of SONGS Unit 1. Although there would be a number of options for temporarily storing such waste by itself, the fact that SCE was already constructing an ISFSI and fabricating canisters (due to DOE's breach) presented a convenient approach to the required storage. Accordingly, SCE fabricated a single modified canister, cut the GTCC up into a form to fit the canister, and loaded it onto the ISFSI. SCE incurred approximately \$1.3 million in connection with its storage efforts, which it of course would not have incurred had DOE accepted the GTCC. SCE therefore claims these GTCC storage costs as damages.

The basis for the government disputing the approximately \$1.3 million incurred by SCE to store GTCC remains unclear—the government's cost expert merely deducts the amounts at "the direction of counsel." Contrary to its potential above-noted argument regarding GTCC displacing spent nuclear fuel acceptance by DOE, the government may (inconsistently) argue that there is no date by which DOE can be said to have been obligated to accept the GTCC, and that SCE would have incurred the storage costs even had DOE "performed."

In any event, the government's liability here is conclusively established by the Federal Circuit's decision in *Yankee Atomic*. As explained at length by the Court of Appeals in that decision, the DOE Standard Contract defines high level waste as including "other highly radioactive material that the NRC, consistent with existing law, determines by rule requires permanent isolation." Standard Contract, Article I(12)(b); *Yankee Atomic*, 536 F.3d at 1277. In 1989, the NRC, by rule, confirmed that GTCC "must be disposed of in a geologic repository." 10 C.F.R. § 61.55(a)(2)(iv)(1989); *Yankee Atomic*, 536 F.3d at 1277. Extensive evidence adduced in the *Yankee Atomic* case further confirmed that DOE intended to accept GTCC "with" spent nuclear fuel and other high level waste, *Yankee Atomic*, 536 F.3d at 1277, and the evidence provided "firm footing" for the trial court's holding that it would be "very unlikely that DOE would remove all SNF without also taking plaintiff's GTCC." *Yankee Atomic*, 536 F.3d at 1278.

Here, all of the SONGS Unit 1 spent nuclear fuel would have been removed by DOE by 2005. At that point, pursuant to *Yankee Atomic*, SCE is entitled to assume that DOE would have accepted and removed the SONGS 1 GTCC. The \$1.3 million in storage-related costs incurred by

SCE in the real world would not have been incurred, and are clearly recoverable as damages under controlling precedent.

C. “SAFSTOR” costs for Unit 1.

As noted above, if DOE had performed, no ISFSI would have been necessary for storage of Unit 1 spent fuel. That fuel, along with all of the fuel at the Morris facility, would have gone directly to DOE. The schedule of decommissioning Unit 1 in such a but-for world of DOE performance, however, would have been adjusted slightly. In order to avoid incurring the tens or hundreds of millions of dollars to construct an ISFSI to store Unit 1 fuel for only a few months, SCE would have simply delayed or adjusted the decommissioning schedule slightly to ensure that all of the fuel was gone when it needed to be in order to support the balance of the decommissioning activities. That adjustment would represent a slippage or delay of approximately ten months, as compared to the real world time frame during which Unit 1 was decommissioned. The evidence that SCE would have employed such an eminently sensible approach in a but-for world of DOE performance will be uncontradicted.

When a nuclear power plant is undergoing decommissioning and the spent fuel remains in the spent fuel pool, the situation is called, under NRC regulations, “SAFSTOR.” For a period of time prior to 2005, actual

SAFSTOR costs were incurred by SCE in connection with Unit 1. Those costs, prospective estimates of which were reviewed and approved by state regulatory bodies, provided a basis to assess the SAFSTOR costs that would have been incurred for the short additional period during which the Unit 1 pool would have had to have been maintained in a but-for world of DOE performance. SCE initially performed such a calculation on the basis of certain SAFSTOR cost projections done in 2000, and voluntarily deducted approximately \$3.8 million from its actual incurred ISFSI costs to reflect the additional SAFSTOR costs that would have been incurred. The government (at least through its experts) has expressed no disagreement with the basic validity of this general approach.

Two issues—both minor, in the grand scheme of things—have nevertheless arisen in connection with these circumstances. First, SCE initially used a half-year increment for assessing additional SAFSTOR costs that would have been incurred, essentially as a rounding method. The government observed, correctly, that the actual period of additional SAFSTOR costs would have been more like ten months, under the applicable causation principles and the 1987 ACR acceptance rates. SCE has adjusted its voluntary offset accordingly, and this issue should therefore no longer be a point of dispute between the parties.

Second, SCE originally used a 2000 projection of SAFSTOR costs. For its counter-calculation, the government used certain 2003 actual SAFESTOR cost figures, and upon that basis arrived at a higher deduction. Actual 2004 SAFSTOR cost figures, however, are also available (and were produced during discovery and made available to the government's experts). Those more recent cost figures are somewhat lower than the 2003 figures, because as the decommissioning of Unit 1 progressed, more and more equipment was dismantled and fewer and fewer resources were required to be kept on site. Given the nature of the deduction presently at issue, which involves a slight assumed delay at the end of the decommissioning activities relating to the spent fuel pool, the end-of-project cost numbers are the most appropriate and reliable for purposes of assessing costs for that delay. SCE therefore revised its calculation to use monthly average SAFSTOR costs from the last period of available actual cost data, namely 2004, to determine the amount of the proper damage reduction. If this issue cannot be resolved between the parties prior to trial, the appropriate calculation (which involves a dispute of something less than \$2 million) will have to be resolved by the Court.

D. Private Fuel Storage.

The evidence at trial will confirm that SCE became involved in the Private Fuel Storage (“PFS”) project as a potential alternative reasonable solution for its spent fuel storage needs, given DOE’s non-performance. SCE contributed modest funds, in order to secure priority for spent nuclear fuel acceptance should the project ever commence operations. Immediately upon determining that its own on-site dry storage project would in fact be viable and become operational, SCE ceased further financial contributions to PFS. Although SCE retained its membership and ownership interest in the venture, PFS is, today and for all intents and purposes, dead, having failed to secure certain necessary transportation easements. *See Devia v. Nuclear Regulatory Commission*, 492 F.3d 421, 425 (D.C. Cir. 2007).

This Court’s prior thorough assessment of another utility’s much larger financial commitment to PFS is instructive, and confirms that this portion of SCE’s damages is recoverable. In *Northern States Power Co. v. United States*, 78 Fed. Cl. 449 (2007), a spent nuclear fuel damages case, the plaintiff utility sought recovery for some \$25 million in PFS-related expenditures. The Court noted that that plaintiff, just like SCE here, pursued such expenditures as a “reasonable solution to the risk of a future

plant shutdown owing to a failure to perform by DOE.” *Northern States Power*, 78 Fed. Cl. at 465; see also *Southern Nuclear*, 77 Fed. Cl. at 446 (awarding PFS expenditures as spent fuel damages). The Court distinguished the different factual circumstances that precluded recovery for PFS-related expenditures by the plaintiff in *Indiana Michigan*, 422 F. 3d at 1376, noting that the *Indiana Michigan* plaintiff’s motivations for PFS expenditures were (unlike *Northern States Power* there and *SCE* here) driven by speculation rather than breach-related spent fuel storage mitigation. *Northern States Power*, 78 Fed. Cl. at 465; *Southern Nuclear*, 77 Fed. Cl. at 445-46. The Court also rejected as “not analytically sound” the government arguments, suggested by one of the experts in this case, that the claims suffered from a failure by the plaintiff to establish that the PFS interest is “valueless.” *Northern States Power*, 78 Fed. Cl. at 466. In sum, just as in *Northern States Power*, *SCE*’s PFS expenditures represented “a reasonable course of action to pursue given the ongoing uncertainty of *DOE*’s ability to perform and the utility’s need to establish a fuel storage capacity sufficient to ensure its continued operations into the future.” *Northern States Power*, 78 Fed. Cl. at 467; see also *Southern Nuclear*, 77 Fed. Cl. at 446. The costs are recoverable.

E. *Alleged costs “avoided” by DOE’s delay.*

According to the government, SCE’s damages should be reduced by the costs SCE would have incurred to load spent fuel into DOE-supplied canisters had DOE commenced acceptance of spent fuel from the industry in 1998.¹⁶ In the real world, however, when DOE begins accepting spent fuel, SCE will incur costs to transfer the fuel to DOE. Costs for loading DOE’s casks, therefore, have not been “avoided” as a result of DOE’s breach, they have only been deferred.

The DOE Standard Contract provides, at Article IV.B.2., that DOE will “arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser’s site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries.” For its part, SCE is required, at Article IV.A.2.(a), to “arrange for, and provide, all preparation, packaging, required instructions,

¹⁶ Such hypothesized costs encompass DOE loading both from SONGS and from the Morris facility. In addition to estimated loading costs to DOE, the government relies upon the same argument in urging that real world costs incurred for certain training and spent fuel characterization activities, which were undertaken to load the casks actually sitting on the SONGS ISFSI, should be denied. Those same types of activities, however, will be necessary for a DOE-supplied canister when and if DOE ever does perform, and the government arguments regarding these costs are therefore the same as for the asserted “DOE loading” offset.

and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility.”

Loading costs to DOE have not been avoided, but only deferred, and no deduction is therefore warranted. Indeed, in *every single* spent nuclear fuel damage case to address the issue, this Court has rejected the government’s proposed deduction for loading costs. *E.g., Dominion Resources*, 84 Fed. Cl. at 278 (“While it is true that the Standard Contract obligates plaintiffs to bear the cost of loading casks provided by DOE, plaintiffs remain obligated to pay for loading costs when DOE arrives to pick up plaintiffs’ SNF in the future.”); *Carolina Power & Light*, 82 Fed. Cl. at 52 (“The loading costs have merely been deferred.”); *Tennessee Valley Auth.*, 69 Fed. Cl. at 542 (“As matters now stand, any benefit inhering in TVA because of delayed loading costs would be entirely speculative.”). *See also Sys. Fuels Inc v. United States.*, 79 Fed. Cl. at 70-71; *Sys. Fuels, Inc.*, 78 Fed. Cl. at 797 (2007); *Northern States Power*, 78 Fed. Cl. at 468-69; *Southern Nuclear*, 77 Fed. Cl. at 450-51; *Pacific Gas & Elec. Co. v. United States*, 73 Fed. Cl. 333, 416 (2006), *rev’d in part on other grounds*, 536 F.3d 1282 (Fed. Cir. 2008); *Sacramento Mun. Utility Dist.* 70 Fed. Cl. at 372 (2006), *rev’d in part on other grounds*, 2008 WL 3539880 (Fed. Cir.

Aug. 7, 2008); *Yankee Atomic Elec. Co. v. United States*, 73 Fed. Cl. 249, 286 (2006), *rev'd in part on other grounds*, 536 F.3d 1268 (Fed. Cir. 2008).

In continuing to pursue this damage reduction here, the government is ignoring the nature of this partial breach case. SCE mitigated DOE's partial breach by creating temporary on-site storage and incurred costs loading fuel into the temporary storage. The temporary storage is not substitute performance. *See Dominion Resources*, 84 Fed. Cl. at 278. So, with the government deduction, SCE would be forced to "pay" for DOE loading now and "pay" for it again in the future. In a partial breach case such as this, DOE's performance will be what it will be when and if that performance ever occurs, but there is no basis for forcing SCE to effectively pay these loading costs twice. *Dominion Resources*, 84 Fed. Cl. at 278.¹⁷

¹⁷ The government's argued offset will also fail due to the government's inability to meet the reciprocal "reasonable certainty" standards it must satisfy in order to establish such a reduction. DOE has not committed to supply any particular cask, nor to accept the dual-purpose shipping and storage cask utilized by SCE. Loading costs do vary, depending upon the size and nature of the casks. The government therefore cannot establish with the requisite reasonable certainty what the loading costs would have been, even if logic or the law allowed it to take a deduction for such costs.

F. Overheads.

SCE incurs costs to maintain and operate internal resources necessary to conduct capital projects. These overhead costs, however, are not directly assignable to a specific project and are thus allocated proportionately to all eligible projects. The government argues that overheads are not recoverable because they are not “incremental” to the government’s breach. According to the government, overheads are a fixed cost that should not be recovered. Overhead costs, however, are true costs incurred to conduct capital projects, including the breach-related projects. Absent DOE’s partial breach, SCE could have allocated its internal resources to other projects and activities.

Without a doubt, overheads are part of the cost of conducting breach-related projects. If a portion of overhead costs is not allocated to breach-related projects, then SCE’s other projects would assume a disproportionate amount of these expenses. In other words, “[p]laintiffs’ other projects would be more expensive than anticipated.” *Carolina Power*, 82 Fed. Cl. at 48. As a result, “[t]his Court has previously held that overhead costs are recoverable as long as a utility can demonstrate that ‘overhead costs were incurred and are properly attributable to mitigation projects and activities.’” *Dominion Resources*, 84 Fed. Cl. at 281 (quoting

Carolina Power, 82 Fed. Cl. at 48). See also *Sys. Fuels*, 79 Fed. Cl. at 63-64; *Tenn. Valley Auth.*, 69 Fed. Cl. at 542 (disallowing recovery for overhead costs because plaintiff failed to present evidence establishing the relationship or utility between the overhead and breach-related projects). SCE will establish, and the government will not dispute, that the overheads in its claim are attributable to projects conducted to mitigate the government's breach. The overheads were applied to the breach-related projects in the normal course of business at the time the projects were being conducted. SCE's overhead costs, therefore, are recoverable.¹⁸

G. AFUDC.

In the normal course of business, SCE calculates the Allowance for Funds Used During Construction ("AFUDC") for certain capital projects, and includes such costs as part of the recorded total cost of the capital project.¹⁹ AFUDC is the cost of the debt issued by the company to finance

¹⁸ Indeed, the government's arguments about "incrementality" are, conceptually, no different than the arguments regarding internal labor that it has long made in these spent fuel damages cases, but which it has now apparently abandoned in the face of the Federal Circuit's specific rejection of such argued reductions. *Sacramento Municipal Utility District*, 2008 WL 3539880. The logic of *SMUD* dictates a similar rejection of the government's claimed overhead deductions.

¹⁹ Because of the nature of how the SONGS Unit 1 activities were funded, i.e., through a decommissioning trust, AFUDC was not incurred, or recorded, by SCE in connection with such activities. The claimed

major projects. Including AFUDC in the cost of capital projects is “an industry-wide practice that is consistent with requirements promulgated by the Federal Energy Regulatory Commission (“FERC”).” *Tenn. Valley Auth.*, 69 Fed. Cl. at 541 (citing 18 C.F.R. pt. 101 Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, Electric Plant Instructions, ¶ 3.A(17)).

The government’s expert asserts that AFUDC is equivalent to pre-judgment interest and is thus not recoverable. AFUDC, however, is not interest on the damages claimed due to DOE’s breach.²⁰ Rather, it is part of the cost SCE and the SONGS co-owners incurred to mitigate DOE’s breach. The Federal Circuit has recognized that the cost of funds used as a result of a breach are recoverable: “Although interest on equity capital is

AFUDC amounts in this proceeding relate to SONGS Unit 2 and 3 activities.

²⁰ Although it represents a real cost and harm arising from DOE’s breach, SCE does not seek “cost of capital” or after-the-fact calculated interest expense, based upon hurdle rates and expert opinions, of the sort rejected by the Court in *Southern Nuclear*, 77 Fed. Cl. at 396, and in recognition of the rule in cases such as *Library of Congress v. Shaw*, 478 U.S. 310 (1986). However, AFUDC, unlike such pre-judgment interest claims, is different. It is a cost incurred in real time and recorded contemporaneously in the books and records of the company. Even if one calls it “interest,” it is clearly not interest “on a claim,” but, rather, interest as “an element of damages.” *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 163 (2002), *aff’d in relevant part*, 407 F.3d 1352 (Fed. Cir. 2005). As such, it is recoverable.

not recoverable, a contractor may recover interest actually paid on funds borrowed because of the government's delay in payments and used on the delayed contract." *Wickham Contracting Co.* 12 F.3d at 1582. In *Wickham*, a contractor recovered interest paid on funds that it borrowed to finance a construction contract that was delayed due to the government's breach.

To recover under *Wickham*, a plaintiff must show that "borrowed funds were used in connection with the . . . project." *Id.* at 1583. The government will apparently contend that this means that, in order to recover AFUDC, SCE must demonstrate that it borrowed funds specifically to finance the particular mitigation projects for which costs are claimed. Like most utilities, however, SCE does not issue debt instruments for specific capital projects. Rather, on a regular basis, it issues short- and long-term general debt. This capital structure is commercially reasonable and widely-accepted. *Tenn. Valley Auth.*, 69 Fed. Cl. at 542. Indeed, it conforms to the FERC standard for calculating the cost of the funds used in capital projects. SCE incurred a cost to raise capital at the same time as it expended capital on breach-related projects. AFUDC allocates the costs of raising capital to the projects that use capital and is thus part of the cost

incurred in SCE's efforts to mitigate DOE's breach. AFUDC, therefore, should be included in SCE's damages.²¹

²¹ We acknowledge that, with the exception of *Tenn. Valley Auth.*, 69 Fed. Cl. at 540-42, other spent fuel damages cases to date have denied recovery for AFUDC, mostly on the grounds that company debt for utilities is typically not assigned or attributed to a specific project such as construction of a dry storage facility. *E.g., Dominion Resources*, 84 Fed. Cl. at 285. We respectfully disagree with those decisions and their rationale. In the real world, it is unquestionably more efficient for most utilities to issue "general," as opposed to "specific," debt, and that is the standard industry practice. We do not believe the applicable legal principles should effectively penalize utilities for such efficient and well-recognized practices. An award of AFUDC is necessary to place the plaintiff in as good a position as if DOE had performed, and is allowed by the controlling authorities.

CONCLUSION

SCE requests that judgment be entered in its favor, for the claim period through December 31, 2005, in the amount of \$146,349,316, and for such other relief as the Court deems just and proper.

Respectfully submitted,

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February 13, 2009

CERTIFICATE OF FILING

I hereby certify that on this 13th day of February 2009, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Brad Fagg