No. 11-1066 (consolidated with No. 11-1068)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Review Of Final Actions Or Failures
To Act By The United States Department Of Energy

RESPONDENTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

STUART F. DELERY
Assistant Attorney General

BRYANT G. SNEE
Acting Director

OF COUNSEL:

JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

ALLISON KIDD-MILLER
Senior Trial Counsel
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
(202) 305-3020
Allison.Kidd-Miller@usdoj.gov

Attorneys for Respondents

January 3, 2014

INTRODUCTION AND SUMMARY

This case presents a question of exceptional importance because the panel has issued a series of decisions that together effectively tell the Secretary of Energy "you are damned if you do, and damned if you don't." With its latest ruling, the panel has now said on the one hand that the Secretary cannot consider Yucca Mountain as a proxy to estimate the costs of permanent disposal of spent nuclear fuel, *and* on the other hand that the Secretary cannot consider non-Yucca Mountain cost assumptions. The sum of these inconsistent and erroneous rulings is that the panel has ordered the Secretary to cut a statutorily-established fee to zero, contrary to the plain language and intent of the Nuclear Waste Policy Act of 1982 (Waste Act). *En banc* rehearing is warranted under these unusual circumstances.

The panel's rulings violate the plain language of the Waste Act and fundamental principles of administrative law, and substitute the panel's judgment not only for that of the Secretary, but also for that of Congress. Congress established as a default that the fee will be 1.0 mill ($0.001) per kilowatt-hour, and specified two factual prerequisites for any fee adjustment, neither of which is present here. Unless Congress acts in the next 90 days of continuous session, the panel's order will change the statutory fee to zero in the absence of the necessary statutory prerequisites.

Moreover, the panel erred in holding that the Secretary of Energy can consider neither Yucca Mountain nor non-Yucca Mountain assumptions when estimating the costs of permanent disposal of spent nuclear waste. Together, these rulings impermissibly foreclose the entire spectrum of potential methodologies for estimating costs, effectively barring the Secretary from carrying out his statutory duty to determine whether the congressionally-mandated fee is sufficient. Separately, each of the panel's rulings also is flawed. The panel's determination that the Secretary cannot rely upon Yucca Mountain for his estimates because he has deemed that site "unworkable" is inconsistent with the Court's recent decision in *In re Aiken County*, which establishes that the Department's intentions concerning Yucca Mountain do not provide a proper basis for the Court to ignore the plain language of the Waste Act. 725 F.3d 255, 257 (D.C. Cir. 2013), *reh'g denied*, 725 F.3d 255 (Oct. 28, 2013). And the panel's determination that the Secretary cannot rely upon non-Yucca Mountain alternatives misreads the Waste Act as tying the obligation to pay into the Nuclear Waste Fund to a particular disposal site.

The panel's decision imposes an unsupported sanction based upon its apparent disagreement with the Secretary's overall policy determinations in administering the Waste Act. Rather than inject itself into what it described as a "political dilemma" surrounding permanent disposal of nuclear waste, the panel

should have remanded to the Secretary to conduct a new fee assessment. Rehearing *en banc* is necessary to correct the panel's inconsistent and erroneous rulings in this matter of exceptional national importance.[1] Fed. R. App. P. 35(a)(1)-(2).

STATEMENT

The Waste Act requires the Government to permanently dispose of nuclear waste resulting from the generation and sale of nuclear energy. 42 U.S.C. § 10131(a)(4), (b)(2). The costs of that disposal are to "be borne by the persons responsible for generating such waste," not the taxpayer. *Id.* § 10131(b)(4).

Congress set the default disposal fee, which is paid into the Nuclear Waste Fund, at 1.0 mill, and directed the Secretary to annually review the fee amount "to evaluate whether collection of the fee will provide sufficient revenues to offset the costs" of disposal. *Id.* §§ 10222(a)(2), (a)(4). If the Secretary "determines that either insufficient or excess revenues are being collected," he "shall propose an adjustment to the fee to insure full cost recovery." *Id.* § 10222(a)(4). Congress is permitted 90 days of continuous session to act on the Secretary's proposal; if Congress fails to do so, the Secretary's proposal becomes effective. *Ala. Power*

[1] Over our opposition, the panel granted a motion by petitioners to expedite issuance of the mandate, and the mandate issued on December 20, 2013. If the full Court decides to rehear this case, D.C. Circuit Rule 41(a)(4) provides for automatic recall of the mandate.

Co. v. Dep't of Energy, 307 F.3d 1300, 1307-08 (11th Cir. 2002) (applying *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983)).

The Secretary has conducted § 10222(a)(4) fee adequacy assessments since 1983. *Nat'l Ass'n of Regulatory Util. Comm'rs v. Dep't of Energy*, 680 F.3d 819, 822 (D.C. Cir. 2012) (*NARUC II*). In 1987, Congress designated Yucca Mountain, Nevada as the only repository site the Department of Energy could consider, and the Secretary began using assumptions specific to that site in his assessments. *Id.* at 823. In 2009, then-Secretary Chu announced that Yucca Mountain was no longer "a workable option" and, at the direction of the President, formed a commission to make recommendations on the future of the waste disposal program. *Id.* at 821.

In 2010, the Secretary determined that the Nuclear Waste Fund fee should remain at 1.0 mill. The Secretary cited the previous year's assessment—which showed that the fee was adequate for a repository at Yucca Mountain—as the "best available proxy" for program costs. *Id.* at 823. Petitioners challenged the 2010 determination.[2]

A panel of this Court (Brown, Silberman, and Sentelle) found it "arbitrary and capricious . . . to so blithely rely on a proxy that the Department itself has

[2] The Court dismissed a previous petition for review as moot upon issuance of the 2010 determination. *Nat'l Ass'n of Regulatory Util. Comm'rs v. Dep't of Energy*, 405 F. App'x 507 (2010) (*NARUC I*).

deemed unworkable." *Id.* at 824. The panel stated, "it may well be that, despite the public statements, the Department and the Administration really believe that it will eventually turn back to Yucca Mountain, but if that is so, it must be acknowledged." *Id.* at 825. The panel remanded to the Secretary, and retained jurisdiction over the case. *Id.* at 826.

The Administration issued its Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste (Strategy) in early 2013. The new Strategy proposes a consultative approach to siting and implementing a disposal system, which would require the consent of the jurisdiction where the permanent repository is to be located. *Nat'l Ass'n of Regulatory Util. Comm'rs v. Dep't of Energy*, 736 F.3d 517, 519 (2013) (*NARUC III*).

Shortly thereafter, the Secretary completed the present fee assessment. Rather than using Yucca Mountain as a "proxy," the Secretary modified the cost estimates for Yucca Mountain for the various geologies in which a repository might be constructed. *Id.* at 519. The Secretary then assessed fee adequacy assuming continued funding at 1.0 mill; he did not evaluate any other fee amount, such as zero. *See id.* The Secretary concluded that, at 1.0 mill, ending Nuclear Waste Fund balances could range from a $2 trillion deficit to a $4.9 trillion surplus over the nearly 150-year life cycle of the program. *See id.* The Secretary again determined that no adjustment to the fee was warranted. *See id.*

On review, the panel concluded the Secretary failed to make the statutorily-required determination, finding the approximately $7 trillion range in ending Nuclear Waste Fund balances "so large as to be absolutely useless as an analytical technique." *Id.* at 519-20. The panel further held that, even if the Secretary had made the required determination, the 2013 assessment still would be invalid because it is "based on assumptions directly contrary to law," "most glaring[ly]," "the conflict between the statutory requirement that a site other than Yucca Mountain cannot even be considered . . . and the 'strategy's' assumption that whatever site is chosen, it will *not* be Yucca Mountain." *Id.* at 519 (emphasis in original).

The panel summarized its rulings in this and its previous opinion as follows: "[The government] cannot renounce Yucca Mountain and then reasonably use its costs as a proxy. . . . And it does not follow that . . . the government can now use non-Yucca Mountain assumptions that are contrary to the statutory scheme." *Id.* Finding the Secretary "apparently unable to conduct a legally adequate fee assessment," the panel ordered the Secretary "to submit to Congress a proposal to change the fee to zero until such a time as either the Secretary chooses to comply with the Act as it is currently written, or until Congress enacts an alternative waste management plan." *Id.* at 521. That "proposal" will become effective absent Congressional action. *Ala. Power*, 307 F.3d at 1307-08.

ARGUMENT

The panel's evident frustration with the difficult public policy questions surrounding disposal of nuclear waste appear to have caused it to ignore both the plain language of the Waste Act and fundamental principles of administrative law, and to substitute its judgment not only for that of the Secretary, but also for that of Congress. These serious errors, together with the exceptional national importance of this matter, warrant rehearing *en banc*.

I. The Panel's Inconsistent And Erroneous Rulings Warrant Rehearing *En Banc*

A. The Panel's Decision Violates The Plain Language Of The Waste Act

As a result of its erroneous and inconsistent rulings that the Secretary cannot rely upon either Yucca Mountain or non-Yucca Mountain assumptions in his fee assessments, the panel ordered the Secretary of Energy to propose reducing the statutorily-established 1.0 mill fee to zero. The panel's decision violates the plain language of the Waste Act.

Congress set the Nuclear Waste Fund fee at 1.0 mill per kilowatt-hour, and directed the Secretary to propose adjusting that amount "[i]n the event" he finds that it will generate "either insufficient or excess revenues" to cover the full costs of waste disposal. 42 U.S.C. §§ 10222(a)(2), (a)(4). If the Secretary makes such a finding, then the Waste Act also requires the Secretary to determine what adjusted

fee amount will "insure full cost recovery." *Id.* § 10222(a)(4); *see also id.* §§ 10222(a)(2), (d). The Waste Act thus creates a rebuttable presumption that the 1.0 mill amount strikes the appropriate balance between the interest of utilities and their customers in avoiding greater than necessary charges, and the interest of the United States in ensuring that taxpayers bear none of the costs of disposing of utilities' nuclear waste. Moreover, the Waste Act ties the obligation to pay fees into the Nuclear Waste Fund to the generation and sale of electricity, *id.* § 10222(a)(2), not the Secretary's completion of a fee assessment.

Thus, under the scheme Congress established, the Nuclear Waste Fund fee may be reduced to zero only when the Secretary finds both that: (1) the current fee is too high; and (2) no further fees need to be collected to "insure full recovery" for the total life cycle costs of the waste disposal program. *See id.* §§ 10222(a)(2), (a)(4). The Secretary did not make any such findings here. The panel erred by directing the Secretary to propose reducing the fee to zero—a "proposal" that becomes effective unless Congress acts to require a different outcome—in the absence of the necessary statutory prerequisites.

Indeed, not even the panel purported to find that the 1.0 mill fee is collecting excessive revenues, much less that collection of any fee greater than zero would result in excess amounts. The panel's view that the Secretary has not "cho[sen] to comply" with the Waste Act provides no proper basis for reducing the fee to zero.

NARUC III, 736 F.3d at 521. Compounding this error, the panel does not limit its order to the 2013 fee assessment under review. Rather, absent congressional action implementing a new waste disposal program, the panel purports to limit the conditions under which the Secretary can propose to reinstate the fee in future annual assessments. The panel's decision essentially imposes a sanction based upon policy differences surrounding permanent disposal of nuclear waste, injecting the Court into the type of "abstract policy disagreements" it "lack[s] both expertise and information to resolve." *Norton v. S. Ut. Wilderness Alliance*, 542 U.S. 55, 66 (2004).

Congress has explicitly prescribed the circumstances under which the Nuclear Waste Fund fee can be modified, including reduced to zero; it is not for the panel to substitute its judgment of what is fair for the clear scheme established by Congress. *See, e.g., Immigration & Naturalization Serv. v. Pangilinan*, 486 U.S. 875, 883 (1988) (courts cannot "disregard statutory and constitutional requirements"); *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 853 (D.C. Cir. 1998) ("[A] court's enforcement powers are restricted by the dictates of the legislature."). Thus, even if the Secretary erred, the Waste Act provides for the fee to remain at 1.0 mill; it does not provide for the fee to be reduced to zero.

B. The Panel's Inconsistent And Erroneous Rulings Effectively Bar The Secretary From Determining The Adequacy of Nuclear Waste Fund Fee

Contrary to the panel's holding, the Secretary is not "unable to conduct a legally adequate fee assessment." *NARUC III*, 736 F.3d at 521. Rather, by foreclosing the entire spectrum of potential methodologies, the panel's inconsistent rulings incorrectly bar the Secretary from carrying out his statutory duty to determine whether the congressionally-mandated fee is sufficient. The panel erred in holding *both* that the Secretary of Energy cannot consider Yucca Mountain as a proxy to estimate the costs of permanent disposal of spent nuclear fuel and high-level radioactive waste, *and* that the Secretary of Energy cannot consider non-Yucca Mountain assumptions.

First, the determination that the Secretary cannot rely upon Yucca Mountain to estimate disposal costs because he has deemed that site "unworkable" is inconsistent with the Court's recent decision in *In re Aiken County*. In that case, the Court directed the Nuclear Regulatory Commission to comply with a provision of the Waste Act requiring it to process the Department of Energy's application to construct a repository at Yucca Mountain, even though the Department no longer intends to proceed at that location. 725 F.3d at 267. As in *Aiken County*, the Department's intentions concerning Yucca Mountain do not provide a proper basis for the Court to ignore the plain language of the Waste Act setting the default fee

at 1.0 mill, or for the Court to trump the Secretary's authority by ordering an adjustment to that amount in the absence of the necessary factual prerequisites. *See also Pangilinan*, 486 U.S. at 883; *LaShawn*, 144 F.3d at 853.

Alternatively, prohibiting the Secretary from basing a fee assessment upon non-Yucca Mountain options imports additional requirements into the Waste Act that Congress did not specify. The Waste Act does not make the obligation to pay into the Nuclear Waste Fund contingent upon a repository at Yucca Mountain or any other particular site. Rather, payment of fees is the consideration for the Department of Energy's undisputed obligation to dispose of utilities' waste. 42 U.S.C. § 10222(a)(5)(B) ("[I]n return for the payment of fees established by this section, the Secretary . . . will dispose of the high-level radioactive waste or spent nuclear fuel. . . ."); *see also Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1276, 1276 (D.C. Cir. 1996) ("Nowhere, however, does the statute indicate that the obligation [to pay fees] . . . is somehow tied to the commencement of repository operations. . . . The only limitation placed on the Secretary's duties . . . is that that duty is 'in return for the payment of fees established by this section.'") (citation omitted).

Even under circumstances where each of the Secretary's approaches to estimating the costs of permanent waste disposal is subject to criticism, and even where there is significant doubt as to which is preferable, Congress has entrusted

the Secretary with the broad discretion to choose between competing methodologies. *See NARUC II*, 680 F.3d at 824 (recognizing the Secretary has discretion in the manner in which he conducts fee assessments); *Alabama Power*, 307 F.3d at 1307 (Congress gave the Secretary "full discretion to alter the fee" absent contrary congressional action). It is not for the Court to do so *de novo*. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (court should not "substitute its judgment for that of the agency").

The panel was mistaken when it concluded that remand would not "serve any purpose." *NARUC III*, 736 F.3d at 520. Having found that the Secretary erred by failing to narrow the range of projected ending Waste Fund balances, *id.* at 519, it was incumbent upon the panel to remand the matter to the Secretary for the correction of any demonstrated error, and to permit him to exercise his statutory authority in the first instance regarding what effect, if any, that correction would have upon fee adequacy. *See Immigration & Naturalization Serv. v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (remand is usual remedy upon finding that an agency has acted contrary to law); *see also Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Hill Dermaceuticals, Inc. v. Fed. Drug Admin.*, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013). By failing to do so, the panel improperly limited the

Secretary's administration of this intricate and policy-laden statute. The Court should grant rehearing *en banc* to correct these serious errors.

II. The Exceptional National Importance Of This Issue Further Warrants Rehearing *En Banc*

Further warranting rehearing, the panel's ruling is likely to have significant adverse consequences for this issue of exceptional national importance. Collectively, nuclear utilities pay into the Waste Fund approximately $750 million per year. *NARUC II*, 680 F.3d at 820. Utilities have an obvious interest in ensuring that they and their customers do not pay too much for disposal of their nuclear waste. And the Government has a statutory duty to ensure that it collects sufficient funds to prevent taxpayers from paying any of the costs of disposing of utilities' nuclear waste. 42 U.S.C. § 10131(b)(4).

Under the panel's decision, absent Congressional action, nuclear utilities will make no new payments into the Nuclear Waste Fund for an indeterminate number of years. The Secretary's analysis demonstrated that, although continued collection of a 1.0 mill fee might result in a surplus, it might result in a deficit of as much as $2 trillion. *NARUC III*, 736 F.3d at 519. The Waste Act as currently written does not provide any mechanism for the Secretary to collect fees retroactively in the event the Nuclear Waste Fund proves to be underfunded in the future, including approximately 60 years during which no new nuclear power is expected to be generated and, accordingly, no fees will be collected. *See id.*;

42 U.S.C. § 10222(a)(2) (fees collected prospectively, when electricity is generated and sold). Although the panel stated that its decision does not relieve nuclear utilities and their customers "of their obligation to *ultimately* pay for the cost of their waste disposal," the panel does not—indeed cannot on this record—know whether that is true. *NARUC III*, 736 F.3d at 519 (emphasis in original). Rehearing *en banc* is warranted.

CONCLUSION

For the foregoing reasons, the full Court should rehear this case.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

s/Bryant G. Snee
BRYANT G. SNEE
Acting Director

OF COUNSEL:

s/Allison Kidd-Miller
ALLISON KIDD-MILLER
Senior Trial Counsel
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20044
(202) 305-3020
Allison.Kidd-Miller@usdoj.gov

JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

January 3, 2014

Attorneys for Respondent

ADDENDUM

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United States Court of Appeals,
District of Columbia Circuit.
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Petitioner
v.
UNITED STATES DEPARTMENT OF ENERGY, Respondent.

Nos. 11–1066, 11–1068.
Argued Sept. 25, 2013.
Decided Nov. 19, 2013.

Background: Owners and operators of nuclear power plants petitioned for review of final actions of Department of Energy that allegedly violated Nuclear Waste Policy Act (NWPA) by refusing to suspend or adjust annual fees collected from owners and operators totaling $750 million per year to cover costs of government's long-term disposal of civilian nuclear waste, without conducting cost evaluation. The Court of Appeals, Silberman, Senior Circuit Judge, 680 F.3d 819, granted petition and remanded. Following the Secretary of Energy's decision on remand, owners and operators again petitioned for review of final actions of Department of Energy.

Holding: The Court of Appeals, Silberman, Senior Circuit Judge, held that collection of annual fees to cover government's cost of long-term disposal of civilian nuclear waste would be suspended.

Petition granted.

West Headnotes

[1] Environmental Law 149E 484

149E Environmental Law
149EX Radiation and Nuclear Materials
149Ek484 k. Radioactive or nuclear waste in general. Most Cited Cases

Secretary of Energy may not comply with his statutory obligation to conduct a cost evaluation required by Nuclear Waste Policy Act (NWPA) by "concluding" that a conclusion is impossible.

[2] Environmental Law 149E 485

149E Environmental Law
149EX Radiation and Nuclear Materials
149Ek485 k. Nuclear power plant wastes and effluents; storage and disposal. Most Cited Cases

Collection of annual fees from nuclear plant owners and operators to cover government's cost of long-term disposal of civilian nuclear waste would be suspended until such a time as either the Secretary of Energy chose to comply with his statutory obligation to conduct a cost evaluation required by Nuclear Waste Policy Act (NWPA), or until Congress enacted an alternative waste management plan. Nuclear Waste Policy Act of 1982, § 148(d)(1), 42 U.S.C.A. § 10168(d)(1).

***518** Jay E. Silberg argued the cause for petitioner. With him on the briefs were Timothy J.V. Walsh, James Bradford Ramsay, Holly Rachel Smith, and Anne W. Cottingham.

Joseph A. McGlothlin, Cynthia B. Miller, and Richard C. Bellak were on the brief for amici curiae Florida Public Service Commission, et al., in support of petitioners.

Allison Kidd–Miller, Senior Trial Counsel, U.S. Department of Justice, argued the cause for respondent. With her on the brief were Stuart F. Delery, Acting Assistant Attorney General, and Jeanne E. Davidson, Director.

Before: BROWN, Circuit Judge, and SILBERMAN and SENTELLE, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

SILBERMAN, Senior Circuit Judge:

Petitioners, a group of nuclear power plant operators, appear again before us to claim, essentially, that so long as the government has no viable alternative to Yucca Mountain as a depository for nuclear waste they should not be charged an annual fee to cover the cost of that disposal. We agree.

I.

Last year we decided that the Secretary of Energy had not complied with his statutory obligation to determine annually the adequacy of the fee petitioners pay to the government. *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy,* 680 F.3d 819 (D.C.Cir.2012), *reh'g denied* (July 2, 2012). We rejected the government's argument that the Secretary was not obliged to determine the fee's adequacy unless someone (a "deus ex machina"?) brought to the Secretary evidence that the fee was excessive or inadequate. *Id.* at 824. We held that the Secretary had an affirmative obligation to examine the facts himself and come to a determination as to the adequacy of the fee.

We noted also that the Department of Energy's opinion had abandoned, without explanation, its previous policy of producing sophisticated analyses of potential costs. It had ignored the enormous amount of interest—$1.3 billion—accruing annually in the fund built up by previous assessments, and it had not excluded costs already paid and costs associated with the disposition of defense-related waste for which the generators are not responsible. And we thought that using Yucca Mountain's depository cost as a proxy was unreasonable because the government had abandoned that program. But the key defect in the government's position was its failure to make the statutorily required determination as to whether the fee was adequate. We remanded to the Secretary with instructions to conduct a new fee assessment within six months; the panel retained jurisdiction to expedite any further review.

***519** II.

[1] On remand the Department has again declined to reach the statutorily required determination. Instead, we are presented with an opinion of the Secretary that sets forth an enormous range of possible costs. According to the Secretary, the final balance of the fund to be used to pay the costs of disposal could be somewhere between a $2 trillion deficit and a $4.9 trillion surplus. This range is so large as to be absolutely useless as an analytical technique to be employed to determine—as the Secretary is obligated to do—the adequacy of the annual fees paid by petitioners, which would appear to be its purpose. (This presentation reminds us of the lawyer's song in the musical, "Chicago,"—"Give them the old razzle dazzle.") Thus, the Secretary claims that the range is so great he cannot determine whether the fees are inadequate or excessive, which is essentially the same position we rejected only last year as in derogation of his responsibility under the statute. The Secretary may not comply with his statutory obligation by "concluding" that a conclusion is impossible. *See Pub. Citizen v. Fed. Motor Carrier Safety,* 374 F.3d 1209, 1221 (D.C.Cir.2004) ("[R]egulation would be at an end if uncertainty alone were an excuse to ignore a congressional command to 'deal with' a particular regulatory issue."); *Consolidated Edison Co. of N.Y. v. U.S. Dep't of Energy,* 870 F.2d 694, 698 (D.C.Cir.1989).

The Secretary's position—his "non determination"—is purportedly predicated on a Departmental report issued in 2011 termed a "Strategy for the Management and Disposal of Used Nuclear Fuel and High–Level Radioactive Waste." Even if that so-called strategy led to a statutorily required determination, it would still be problematic because, as petitioners point out, the strategy is based on assumptions directly contrary to law.

Most glaring is the conflict between the statutory requirement that sites other than Yucca Mountain cannot even be considered as an

alternative to Yucca Mountain, 42 U.S.C. § 10172, and the "strategy's" assumption that whatever site is chosen, it will *not* be Yucca Mountain. The other conflicts are related to this prime conflict. The "strategy" suggests that a temporary storage facility might be operational by 2025 and that the temporary facility could be constructed *without* NRC first issuing a license for the construction of a permanent facility. But the statute requires that precondition. The statute is obviously designed to prevent the Department from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities. 42 U.S.C. § 10168(d)(1). Finally—and this is quite revealing—the strategy assumes that the Department would be required to obtain the consent of the jurisdiction where the permanent depository is to be sited. That is, of course, reflective of the political considerations the Department faces but, unfortunately, it is directly contrary to the statute, which explicitly allows Congress to override a host state's disapproval. 42 U.S.C. § 10135; *accord In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C.Cir.2013) ("[A]n agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates."). Finally, the strategy projects completion of a permanent depository (located somewhere) not until 2048, in contrast to the statute, which directed completion by 1998. 42 U.S.C. § 10222(a)(5)(B). That is truly "pie in the sky."

In response to petitioners' argument—that a position predicated on a policy that so palpably rejects current law cannot be ***520** in accordance with the Secretary's obligation, even if it does lead to a specific determination—the government responds that some of the Secretary's previous determinations had also assumed statutory changes. That is so, but even assuming those prior determinations were legal, it is one thing to anticipate minor statutory additions to fill gaps, and quite another to proceed on the premise of a wholesale reversal of a statutory scheme. The latter is flatly unreasonable.

The government claims it is put in a catch–22 position because our prior opinion said it was unreasonable for the Department to use Yucca Mountain as a proxy to estimate disposal costs, and petitioners now argue that the government cannot assume a hypothetical non-Yucca Mountain depository. But the government's problem is of its own making. It certainly could have used Yucca Mountain's costs if it were still pursuing that site, but it cannot have it both ways. It cannot renounce Yucca Mountain and then reasonably use its costs as a proxy. The government was hoist on its own petard. And it does not follow that the corollary to our previous opinion is that the government can now use non-Yucca Mountain assumptions that are contrary to the statutory scheme.

In our last opinion we noted accounting defects in the Secretary's prior determination that have now been remedied. Specifically, the Department now takes into account the interest accruing on the enormous sums that have already been paid. The Department deducts costs already expended and excludes costs for disposal of defense-related waste for which petitioners are not responsible. But these are truly peripheral issues; the key defect in the government's position is that the Secretary still declines to carry out his basic statutory obligation.

* * * * * *

The government asks us, if we conclude the Department's latest position is contrary to law, to, once again, remand rather than order the Secretary to suspend the fee. But the Secretary's position is so obviously disingenuous that we have no confidence that another remand would serve any purpose. As we noted, we are not unaware of the political dilemma in which the Department is placed. But until the Department comes to some conclusion as to how nuclear wastes are to be deposited permanently,[FN1] it seems quite unfair to force petitioners to pay fees for a hypothetical option, the costs of which might well—the government apparently has no idea—be already covered.

FN1. It may be that the Secretary simply cannot imagine any permanent depository other than Yucca Mountain, but if that is true the implications are obvious.

To be sure, as the government contends, if the present fee is suspended, that could mean that the costs of nuclear waste disposal would be transferred to future rate payers. But that possibility is inherent in the statutory scheme which obliges the Secretary to make the annual fee determination. "Intergenerational equity" is implicated any time the fee is adjusted.

[2] Finally, the government argues that we should not order the fee set to zero because petitioners are already being compensated for the government's breach of its statutory and contractual duty to dispose of existing waste, through breach of contract suits in the Court of Federal Claims. The generators are currently storing their waste at the generation facilities, and the government is compensating them for the cost of this storage. But the government's failure to dispose of prior wastes on schedule is not the legal wrong that we are remedying, and we do not base ***521** our decision on principles of contract. The issue here, rather, is the government's failure to conduct an adequate present fee assessment, as required by the statute. Our ruling here does not provide petitioners with any form of compensation, nor does it relieve them of their obligation to *ultimately* pay for the cost of their waste disposal. When the Secretary is again able to conduct a sufficient assessment, either because the Yucca Mountain project is revived, or because Congress enacts an alternative plan, then payments will resume (assuming that some future determination concludes that further fees are necessary).

III.

Because the Secretary is apparently unable to conduct a legally adequate fee assessment, the Secretary is ordered to submit to Congress a proposal to change the fee to zero until such a time as either the Secretary chooses to comply with the Act as it is currently written, or until Congress enacts an alternative waste management plan.

So ordered.

C.A.D.C.,2013.
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jurisdiction of the federal courts under some circumstances. 294 F.3d at 98–99. In the Foreign Sovereign Immunities Act Congress defined circumstances when foreign states and their instrumentalities may be subject to the jurisdiction of United States courts, see 28 U.S.C. §§ 1602, 1605, and it is not at all clear why that determination should not be given full effect.

These concerns suggest that in a suitable case it may be valuable for courts to reconsider both the merits of the assumption in *Asahi Metal* and kindred cases that private foreign corporations deserve due process protections, and (perhaps more significantly) the application of that assumption to entities owned by a foreign state but not subject to the state's plenary control or otherwise treated as a state.

This said, if the Supreme Court were to find the due process clauses inapplicable to the question of jurisdiction over private foreign corporations, or if we were to do the same for state-owned but not state-equivalent entities, it would not follow ineluctably that they could henceforth be exposed to the United States courts' jurisdiction regardless of minimum contacts. Quite apart from the instances where the FSIA itself imposes requirements substantially equivalent to minimum contacts, see 28 U.S.C. § 1605(a)(2); see also *S & Davis Intern., Inc. v. Republic of Yemen*, 218 F.3d 1292, 1304 (11th Cir.2000) (noting similarity of the standards), courts might well extend the current practice on the ground of its substantial duration (most clearly in the case of private corporations), but subject to any congressional provisions to the contrary. Such an approach would be quite different from the constitutional straightjacket that appears to prevail currently.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, Respondent.

Nos. 11–1066, 11–1068.

United States Court of Appeals, District of Columbia Circuit.

Argued April 20, 2012.

Decided June 1, 2012.

Background: Owners and operators of nuclear power plants petitioned for review of final actions of Department of Energy that allegedly violated Nuclear Waste Policy Act (NWPA) by refusing to suspend or adjust annual fees collected from owners and operators totaling $750 million per year to cover costs of government's long-term disposal of civilian nuclear waste, without conducting cost evaluation.

Holding: The Court of Appeals, Silberman, Senior Circuit Judge, held that Secretary of Energy failed to perform valid cost evaluation required by NWPA.

Petition granted; remanded.

Environmental Law ⚿485

Department of Energy's determination denying adjustment of annual fees collected from owners and operators of nuclear power plants to cover government's cost of long-term disposal of civilian nuclear waste lacked valid cost evaluation, under NWPA, requiring annual evaluation of whether collection of fees would provide sufficient revenues to offset costs, where Department failed to identify any costs or

expected revenues and instead indicated that fees were adequate based on estimates for formerly-designated disposal site as proxy, but government had abandoned that site, did not account for enormous delay in selecting new site, provided estimates inflated by $30 billion, and departed from long-standing cost evaluation policy without explanation. Nuclear Waste Policy Act of 1982, § 302(a)(4), 42 U.S.C.A. § 10222(a)(4).

On Petitions for Review of Final Actions of the Department of Energy.

Jay E. Silberg argued the cause for petitioners. With him on the briefs were Timothy J.V. Walsh, James Bradford Ramsay, and Anne W. Cottingham. Michael A. Bauser entered an appearance.

Joseph A. McGlothlin and Richard C. Bellak were on the brief for amici curiae Florida Public Service Commission, et al. in support of petitioners. Cynthia B. Miller entered an appearance.

Harold D. Lester Jr., Assistant Director, U.S. Department of Justice, argued the cause for respondent. With him on the brief were Tony West, Assistant Attorney General, and Jeanne E. Davidson, Director.

Before: SENTELLE, Chief Judge, BROWN, Circuit Judge, and SILBERMAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

SILBERMAN, Senior Circuit Judge:

Petitioners, nuclear power plant owners and operators, ask us to review a November 2010 determination by the Secretary of Energy finding that there was no basis for suspending, or otherwise adjusting, annual fees collected from them totaling some $750 million a year. Those fees are intended to cover the full costs of the government's long-term disposal of civilian nuclear waste. But the Administration has discontinued development of Yucca Mountain, which was the designated location for the disposal of the waste. According to petitioners, the Secretary's 2010 determination, made subsequent to that decision, failed to examine (or even mention) the anticipated costs of disposal, or compare them to expected revenues from the fees (and associated interest and investment income). The Secretary's determination is claimed, thereby, to have violated the 1982 Nuclear Waste Policy Act ("the Act"), which obliges the Secretary to annually "evaluate whether collection of the fee will provide sufficient revenues" to offset program costs. In the absence of such evaluation, it is argued, the determination was invalid, and because no future program has replaced Yucca Mountain, petitioners contend that the Secretary is obliged to suspend the fees and report his action to Congress.

We conclude that the Secretary has failed to perform a valid evaluation, as he is obliged to do under the Act, but we do not think it appropriate to order the suspension of the fee at this time. Instead, we remand to the Secretary with directions to comply with the statute within six months. The panel will retain jurisdiction over this case so that any further review would be expedited.[1]

1. We also remind the parties that our Handbook of Practice and Internal Procedures states that "parties are strongly urged to limit the use of acronyms" and "should avoid using acronyms that are not widely known." Brief-writing, no less than "written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble." George Orwell, "Politics and the English Language," 13 Horizon

I.

The Act made the federal government responsible for permanently disposing of spent nuclear fuel and high-level radioactive waste produced by civilian nuclear power generation and defense activities. It provided that the government would do so through geologic disposal, which involves constructing a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact. The Department of Energy was required to begin disposal by January 31, 1998. Since 1987, when the Act was amended, the Department has been directed to consider the suitability of one site only—Yucca Mountain, Nevada—for the repository.[2]

Congress's best-laid plans have been frustrated. In 1995, the Department announced that it would be unable to meet the 1998 deadline; the earliest conceivable date for disposal was 2010.[3] In early 2009, the Department said that construction at Yucca Mountain would not begin until at least 2011, and that transportation and disposal of waste would not occur until 2020. Only a few months later the new Administration announced, in an abrupt volte face, that Yucca Mountain "was not a workable option." Instead, it established a Blue Ribbon Commission to reconsider "all alternatives" for permanently disposing of nuclear waste. But the Commission's 2011 Draft Report conceded that geologic disposal was really the only viable option. The Commissioners, however, were directed not to consider any particular site—whether Yucca Mountain or elsewhere. They estimated that selection and evaluation of a site would take another 15 to 20 years (the cliché "kick the can down the road" seems inadequate). Nevertheless, the Department has reaffirmed its obligation to permanently (if eventually) dispose of civilian nuclear waste. In the meantime, civilian nuclear plant operators and owners have stored their waste themselves, usually on-site.[4]

The Act also made the generators of nuclear waste responsible for the full costs of the disposal of *civilian* nuclear waste. The owners and operators were to pay an initial fee to cover the costs of disposing of pre–1983 waste, as well as an annual fee of 1.0 mil (one-tenth of a cent) per kilowatt-hour of nuclear-generated electricity to cover ongoing waste generation. These funds are deposited in the government-managed Nuclear Waste Fund, where they earn interest and investment income. According to budget accounting rules, these funds also count against the federal government's budget deficit ("aye, there's the rub"). When this suit was filed in 2010, owners and operators had paid the fees for nearly three decades (about $750 million a year on top of the initial charge). With

76 (1946). Here, both parties abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not, and littering their briefs with references to "SNF," "HLW," "NWF," "NWPA," and "BRC"—shorthand for "spent nuclear fuel," "high-level radioactive waste," the "Nuclear Waste Fund," the "Nuclear Waste Policy Act," and the "Blue Ribbon Commission."

2. 42 U.S.C. § 10101(18); *id.* § 10131(a)(4)–(5); *id.* § 10131(b); *id.* § 10132; *id.* § 10172; *id.* § 10222(a)(5).

3. *See Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1277 (D.C.Cir.1996); Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,794 (May 3, 1995).

4. As a result of lengthy litigation before us and the Federal Circuit, the government has paid them about $1 billion in retrospective damages to cover some of the costs of storage since 1998, on claims of $6.4 billion. Those claims are not at issue here.

investment income, the Fund's balance exceeded $24 billion, and by the end of this year, it will exceed $28 billion.

Although the Act mandates that the Fund cover the lifetime costs of the civilian disposal program—estimated to last over a hundred years—any excess funds must be returned to the payors. Congress anticipated that costs would be uncertain and could well change as the program progressed, so the Secretary was obliged to "annually review the amount of the fees to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) herein." Those costs include the identification, development, construction, operation, and maintenance of repositories for the waste, as well as associated facilities; research and development; and administration. "[I]n the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government . . . the Secretary shall propose an adjustment to the fee to insure full cost recovery" and submit it to Congress. The Act—which pre-dated *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)—provides that the proposed adjustment shall become effective unless, within 90 days of submission, either house of Congress adopts a resolution disapproving it.[5]

The Secretary has never proposed an adjustment to the fee. Since at least 1990, the Department's policy has been "to conduct a thorough analysis annually and to recommend a change in the fee when there is a compelling case for the change." Between 1983 and 2008, fee adequacy assessments identified the expected costs of geologic disposal and compared them to projected revenues from the fee (which were based on projections of future nuclear power generation and interest accumulation).[6] Fee adequacy was calculated by creating models that adjusted for different key variables—for instance inflation, interest rates, future nuclear generation, program timing and total life cycle estimates—and forecasting whether the Fund would likely have a positive balance by the end of the program.

Between 1983 and 1987, the governing assumption was that two repositories would be used, but the Department had to account for a number of uncertainties that dramatically affected costs and revenues. It was unsure what type of rock—salt, tuff, basalt, or crystalline rock—would host the waste, or where the repositories would be located, and projected operational time frames varied widely. Fee adequacy reports dealt with these uncertainties by using a range of bounding cases; while there was tremendous variability among the different models, the Department nonetheless generated rough estimates of the expected margins of revenues over costs. The Secretary concluded that no fee adjustment was warranted during this period because under most, though not all, scenarios, the Fund showed only a modest positive balance at the end of the program's expected life cycle, and there was great uncertainty about future costs.

5. 42 U.S.C. § 10222(a)(4).

6. The Department did not consistently publish its fee adequacy reviews, and in some years—for instance when the reference cost estimate and other assumptions remained the same—apparently no new fee adequacy assessment was completed. The Department also completed a separate series of assessments, called "total system life cost" estimates, to periodically reassess program costs in light of recent developments. Fee adequacy assessments then used these cost estimates and compared them to expected revenues.

After Yucca Mountain was designated in 1987 as the only site the Department could consider, the Department estimated costs, and assessed fee adequacy, using assumptions specific to that site. Thus, the FY 2008 assessment assumed a program life cycle until 2129. The total estimated program cost was $97 billion, including historical costs since 1983; that also included anticipated defense-generated waste disposal costs for which petitioners are not responsible.[7] Construction authorization was anticipated in 2011, operations—the point when the greatest expenditures would be incurred—were to start in 2020, and emplacement of waste was to end in 2069, by which point 71 percent of all future costs would have been incurred.[8] Using a cash flow analysis (adding expected fee and investment income and subtracting estimated costs for each year from 2008 to 2129), the assessment concluded that the fee was certainly adequate because most scenarios showed the Fund would have a positive balance in 2129. No downward adjustment was deemed warranted, however, because the Secretary did not see compelling evidence it was appropriate—the analysis from a single year, the Secretary suggested, would not be enough to make a judgment.

After the Administration abandoned Yucca Mountain in 2009, the Secretary apparently did not issue a fee evaluation or determination that fiscal year, but the Department did announce that all the fees being paid by civilian nuclear generators and owners were still considered "essential" to meet the government's waste disposal obligations. The Secretary's inaction gave rise to an initial suit by petitioners dismissed as moot only when, after briefs were filed, the Secretary issued the 2010 determination, the subject of this suit. It stated that the Secretary would *not* propose an adjustment of the fee based on an enclosed memorandum from the Director of the Office of Standard Contract Management. That memorandum, although affirming that the Department was committed to disposing of civilian waste and that the fees needed to cover all future program costs, did not identify any of those costs, nor did it mention expected revenues. Instead, it stressed the Secretary's discretion in reviewing fee adequacy, and concluded that "we are aware of no evidence that would provide a reasoned and sound basis for determining that excess or insufficient revenues are being collected for the costs for which the Department is responsible." It noted that the Blue Ribbon Commission had not yet made any recommendations about future disposal methods. The Director added that, in any event, the current fee was adequate because, using Yucca Mountain as the best available proxy, the most recent estimate of its life cycle cost (in the FY 2008 assessment) was "$97 billion," and the fee had previously been deemed adequate based on that estimate.

II.

Petitioners argue that the Secretary violated his statutory obligation to annually

7. The Act originally provided that the federal government would pay the costs of defense-generated nuclear waste directly into the Nuclear Waste Fund. However, Congress in 1993 changed that requirement to instead establish a separate Defense Nuclear Waste Disposal appropriation. That appropriation is administered, and counted, separately from the Nuclear Waste Fund; to date, it has a balance of $3.7 billion. Since FY 2011, however, the federal government has not made any requests for appropriations to cover the costs associated with disposal of this waste.

8. After emplacement ends, the repository would remain in operation for another fifty years for decommissioning and monitoring in preparation for closing.

"evaluate whether collection of the fee will provide sufficient revenues to offset . . . costs" because he neither conducted a cost evaluation nor accounted for the disposal program's uncertain schedule. They also object that the Department's alternative approach, using Yucca Mountain to estimate future costs, was arbitrary and capricious (violating the APA) in light of the Department's unequivocal decision to discontinue use of that site. Petitioners contend that any validly conducted fee adequacy review would require the Secretary to find the current fee excessive, and therefore it should be adjusted to zero. Now that Yucca Mountain has been terminated, the program's future course is uncertain and no costs can be quantified. Accordingly, petitioners seek an order directing the Secretary to determine that the fees be suspended pending development of a new waste disposal program and to submit that determination to Congress.

The government responds that the Act's only requirement is that the Secretary review the fee annually; he has complete discretion as to the manner in which he identifies and evaluates costs. And if, in his judgment, there is insufficient information available to determine the fee is either insufficient or excessive, he is not obliged to call for an adjustment. According to the government, that is the situation here. As a fallback, the government insists that Yucca Mountain's costs can be used as a continuing proxy, and thereby justifies the Secretary's failure to make any new evaluations of potential costs juxtaposed against revenues.

Although the government contends that its statutory interpretation is the obvious one, it also asserts that even if we regarded the language as ambiguous, we should afford it *Chevron* deference, which leads to an argument as to whether *Chevron* deference is warranted. We think it unnecessary to resolve that issue because we believe the government's interpretation is unacceptable—whatever the degree of deference afforded.

The government focuses on the statutory language requiring the Secretary to propose an adjustment "if [he] determines that either insufficient or excess revenues are being collected," arguing that this wording bestows discretion on the Secretary. There is certainly some discretion given to the Secretary in the *manner* in which he calculates costs, but the government's argument suggests the Secretary has no affirmative obligation to conduct the sort of inquiry and analysis done in the past. He may, like an ostrich, put his head in the sand; so long as he is unaware of any information that questions the existing fee structure, he is not obliged to propose an adjustment. That interpretation is farfetched, almost absurd. It ignores the preceding sentence, obliging the Secretary "to evaluate whether the collection of the fee will provide sufficient revenues" to offset program costs. That plain language utterly destroys the Secretary's claim that he can remain entirely passive and only act if some *deus ex machina* were to bring him information.

The Secretary's alternate justification, that he can continue to rely on the FY 2008 assessment's cost calculations for Yucca Mountain as a proxy, fares no better. It is unreasonable (therefore arbitrary and capricious) to so blithely rely on a proxy that the Department itself has deemed unworkable. The Secretary has not said why Yucca Mountain was rejected, nor has he indicated what characteristics of Yucca Mountain might make it typical of any site. Moreover, to assume the validity of Yucca Mountain's cost estimate without taking into account the enormous delay in even selecting a new site ignores what the Department's own previous esti-

mates have regarded as a critical aspect of fee adequacy—the timing of costs. The FY 2008 assessment assumed construction would begin in 2011 and operations would start in 2020. That schedule would have resulted in major near-term expenditures, and therefore a reduction in interest earned by the Fund. If these expenditures are to be pushed far back—which the Secretary must assume—he must compare them against a likely significant increase in the Fund through interest accumulation.

To add to the irrationality of the Department's choice of Yucca Mountain as a proxy is the 2010 determination's estimation of the life cycle costs of Yucca Mountain—i.e., $97 billion. The government's brief emphasized that that cost is "nearly four times" the balance in the Fund. Unfortunately, and somewhat embarrassingly, this figure is obviously inflated. As the Department's FY 2008 determination explained, $97 billion includes amounts that the Fund (and, therefore, petitioners) need not cover. Those amounts include program costs already paid, as well as the costs of disposing of waste the government generated from defense-related activities. Indeed, expected future costs are $82.5 billion, of which, according to the FY 2008 assessment, only 80 percent ($66 billion) stems from expected civilian waste disposal costs. In other words, the government submits to us a calculation that appears to be off by $30 billion—which, even today, is real money. Assuming that the Fund continues to accumulate interest at its present rate, rudimentary calculations suggest the Fund could reach $66 billion in less than twenty years—i.e., well within the range of time the Blue Ribbon Commission estimates it would take to even designate a new site—even if no new fee revenues were added after 2011.

Moreover, the 2010 determination is an unexplained departure from long-standing Department policy and therefore arbitrary and capricious on that ground as well. Long before the Yucca Mountain program was chosen, the Secretary, as we have noted, ran rather sophisticated evaluations of the potential costs of a hypothetical repository as part of his policy of conducting a "thorough analysis." His 2010 determination falls far below the Department's own previous standard. Of course, it may well be that, despite the public statements, the Department and the Administration really believe that it will eventually turn back to Yucca Mountain, but if that is so, it must be acknowledged.

* * *

In sum, we readily conclude that the Secretary's determination is legally inadequate. Which brings us to the remedy. Petitioners ask us to order the Secretary to determine that fees should be suspended unless and until a new disposal program is commenced, and that, in accordance with the statute, such a determination should be submitted to Congress.

As we have noted, the Act, as originally enacted, antedated *INS v. Chadha* and provided that any fee adjustment by the Secretary had to be submitted to Congress for 90 days, where it could be defeated by a one-house veto. The Eleventh Circuit held, as it was obliged, that that procedure was unconstitutional, and that the remedy was to read the Act to say that if the Secretary were to make a determination that the fee was either excessive or inadequate, he should submit it to Congress, to become effective within 90 days of submission (which is not much different than any agency action). *See Ala. Power Co. v. U.S. Dep't of Energy,* 307 F.3d 1300, 1306–08 (11th Cir.2002). Interpreting an analogous statute, we have taken essentially the same position on remedying similarly defective statutes. *See Alaska Airlines v. Donovan,* 766 F.2d 1550 (D.C.Cir.1985).

With the one-house veto no longer in the picture, we think our authority to review the Secretary's 2010 determination under the Administrative Procedure Act includes the power to direct the Secretary to suspend the fee.[9] But it is premature to do so now. It is appropriate for us simply to declare that the Secretary's determination is legally defective and to remand. However, we are mindful that petitioners were obliged to first file suit in October 2010, in light of the Secretary's failure to conduct any fee adequacy determination since FY 2008. It was only after initial briefing was submitted that the Secretary issued his 2010 determination, thereby rendering the initial case moot. In light of that Departmental disposition to delay, we will order the Secretary to respond to the remand within six months of the issuance of the mandate and this panel will retain jurisdiction.

So ordered.

UNITED STATES DEPARTMENT OF THE AIR FORCE, Luke Air Force Base, Arizona, Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY, Respondent

American Federation of Government Employees, Local 1547, Intervenor.

No. 11–1281.

United States Court of Appeals, District of Columbia Circuit.

Argued March 19, 2012.

Decided June 1, 2012.

Background: Union appealed the refusal of the Department of the Air Force to negotiate over union's proposals for handling reduction-in-force (RIF) at air force base. The Federal Labor Relations Authority (FLRA), 2011 WL 2433112, determined Air Force had an obligation to negotiate over two of three disputed proposals. Air Force petitioned for review.

Holdings: The Court of Appeals, Brown, Circuit Judge, held that:

(1) FLRA's determination, that union proposal did not interfere with Air Force's right to layoff employees, as would preclude Air Force's obligation to negotiate over proposal, was not arbitrary and capricious, and

(2) FLRA's determination, that Air Force had duty to negotiate over proposal because proposal concerned "appropriate" arrangements for employees adversely affected by Air Force's exercise of its right to hire employees, was not arbitrary and capricious.

Petition denied.

1. Labor and Employment ⚿1860

On petition for review of Federal Labor Relations Authority (FLRA)'s determination that Air Force had obligation to negotiate over union's proposals regarding reduction-in-force (RIF) at air force base, Air Force's failure to raise before FLRA

9. Of course, notwithstanding any decision we would make, the Secretary, while complying with any order of the court, would also be free to advise Congress as he wished.

CERTIFICATE OF PARTIES AND AMICI CURIAE

Respondents, United States and United States Department of Energy, certify as follows:

All parties and amici appearing in this Court are listed at page i of the Initial Brief of Petitioners in these consolidated cases, filed April 29, 2013, and include: respondents, United States and the Department of Energy; petitioners, the National Association of Regulatory Utility Commissioners, the Nuclear Energy Institute, Inc., Florida Power & Light Company, NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, Omaha Public Power District, PSEG Nuclear, LLC, Indiana Michigan Power Company, PPL Susquehanna, LLC, Northern States Power Company d/b/a Xcel Energy, DTE Electric Company f/k/a The Detroit Edison Company, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company d/b/a Westar Energy, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Nebraska Public Power District; and *amici curiae*, the Florida Public Service Commission and the Florida Office of Public Counsel.

s/Allison Kidd-Miller
ALLISON KIDD-MILLER
Attorney for Respondents

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on this 3rd day of January, 2014, I caused the foregoing "RESPONDENTS' PETITION FOR REHEARING AND REHEARING *EN BANC*" to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system and, thus, also served counsel of record.

s/Allison Kidd-Miller
ALLISON KIDD-MILLER
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
Department of Justice
PO Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 305-3020
Fax: (202) 514-7969