No. 00-5069

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

COMMONWEALTH EDISON COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
In Case No. 97-269C, HONORABLE FRANCIS M. ALLEGRA

BRIEF *AMICUS CURIAE* OF MAINE YANKEE ATOMIC POWER COMPANY IN SUPPORT OF PLAINTIFF-APPELLANT

JERRY STOUCK
Spriggs & Hollingsworth
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5800
Counsel for Amicus Curiae
MAINE YANKEE ATOMIC POWER COMPANY

Of Counsel:
REBECCA A. WOMELDORF
MICHAEL R. MINER

May 17, 2001

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Maine Yankee Atomic Power Company, certifies as follows:

1. The full name of every party or amicus represented by me is:

MAINE YANKEE ATOMIC POWER COMPANY

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

MAINE YANKEE ATOMIC POWER COMPANY

3. The parent companies and publicly held corporations that own 10% or more of the stock of the party represented by me are:

a. Three wholly-owned subsidiaries of Northeast Utilities are stockholders of Maine Yankee, with the following ownership percentages: The Connecticut Light & Power Company – 12%; Public Service of New Hampshire – 5%; and Western Massachusetts Electric Company – 3%.

b. National Grid Group, PLC (Holding company for New England Power Co. which owns 20% of Maine Yankee's stock).

c. Energy East Corporation (Holding company for Central Maine Power Co., which owns 38% of Maine Yankee's stock).

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this Court are:

Law Firm:	Attorneys
Spriggs & Hollingsworth	A. Present Counsel: Jerry Stouck Rebecca A. Womeldorf Michael R. Miner B. Former Appearances: Catherine R. Baumer Glenn S. Greene David R. Lipson Paul V. Waters

May 17, 2001

_____

JERRY STOUCK
Counsel for *Amicus Curiae*
Maine Yankee Atomic Power Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST STATEMENT

Because a ruling by the Panel in this case may well control the disposition of Maine Yankee's parallel appeal, Maine Yankee has a direct interest in the outcome of this case. *See Maine Yankee Atomic Power Co. v. United States*, No. 99-5156 (Fed. Cir. Sept. 23, 1999). Maine Yankee also has a perspective on the legal issues here that has not been argued fully by any party. Given Maine Yankee's position (contrary to CommEd's) that the utilities' due process claims fall squarely within the CFC's Tucker Act jurisdiction, Maine Yankee has greater incentive to discuss due process clause principles and precedent that are responsive to questions this Panel raised at oral argument in requesting supplemental briefing. As importantly, Maine Yankee shows in this brief that prevailing factual assumptions about EPACT, and in particular the uses of the D&D Fund, are wrong.[1]

I. THE RETROACTIVE EPACT ASSESSMENTS VIOLATE DUE PROCESS PRINCIPLES EVEN MORE SO THAN OTHER RETROACTIVE "WHOLLY NEW TAXES."

The Supreme Court has long held that the Due Process Clause forbids the retroactive imposition of wholly new taxes. *E.g.*, *Blodgett v. Holden*, 275 U.S. 142 (1927); *Untermyer v. Anderson*, 276 U.S. 440 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927). The rationale for these decisions lies in the inherently unfair and

[1] Many of the points addressed in this *amicus* brief are further developed in Maine Yankee's briefing to the separate Panel that heard its appeal in No. 99-5156. *See, e.g.*, Brief of Maine Yankee in No. 99-5156 at 1-13, 24-47, 50-60; Reply Brief of Maine Yankee in No. 99-5156 at 1-22.

arbitrary quality of legislative acts that impose new legal costs (*i.e.*, taxes) on transactions completed in the past. *See, e.g.*, *Blodgett*, 275 U.S. at 147. As Justice O'Connor explained in *Carlton v. United States*:

> Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, *it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them.*

512 U.S. 26, 38 (1994) (O'Connor, J., concurring) (emphasis added). [2]

In *Carlton*, the Court did not consider a wholly new retroactive tax like the one at issue here, but instead upheld an amendment to correct a "mistake" in a recently promulgated tax deduction provision. In contrast, EPACT is a "wholly new tax," and it is imposed based upon transactions completed decades before EPACT's enactment. Moreover, and importantly for present purposes, in *Carlton* there was "no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions." *Id.* at 32.

Here, unlike *Carlton*, the government's course of dealing long ago with its enriched uranium customers *fostered* and *reinforced* expectations on the part of

---

[2] Revealingly, in its original merits brief in this case (and in *Maine Yankee*) the government did not even attempt to distinguish the Supreme Court's precedents invalidating "wholly new taxes." *See, e.g.*, Brief of Defendant/Appellee United States (failing to distinguish "wholly new tax" cases cited by CommEd); *see also*, Reply Brief of Maine Yankee in No. 99-5156 at 13 (noting the government's failure to distinguish "wholly new tax" cases).

those utilities that they would *not* incur any future financial liability arising from the utilities' purchases of enriched uranium. These expectations of *closure* arose from the government's direct commercial dealings with the utilities, from the government's fixed-priced sales transactions with the utilities, and from the government's regulatory "uranium enrichment criteria" (discussed further in CommEd's supplemental brief).

This case, therefore, presents an even more compelling due process violation than the Supreme Court's "wholly new tax" precedents. In those cases, the taxpayer's "expectations" arose only from the absence of a particular type of tax -- akin to governmental "silence." Citizens relied on that silence to engage in certain transactions, and the Supreme Court held that Congress could not later tax those transactions because retroactive application of a wholly new tax would be impermissibly unfair and "arbitrary." In this case, the utilities' expectations arose not only from the prior absence of a tax on enriched uranium, but also from the government's *affirmative participation* in creating utility expectations of no future liability. Given the government's role in fostering the utilities' expectations of closure, it would be impossible (and inappropriate) to conclude here that the

utilities had the *opposite* expectation -- namely that they might someday long in the future be made to pay the EPACT special assessments.[3]

In addition, it is uncontroverted that the government imposed the EPACT special assessments retroactively on prior enriched uranium purchasers in order to allow the government, prospectively, to privatize its uranium enrichment business (also pursuant to EPACT, *see* 42 U.S.C. § 2297d, 2297d-1), to sell that business to Wall Street investors free of the enormous clean-up liability, and to reap proceeds to the U.S. Treasury of $1.9 billion. *See* Brief of Maine Yankee in No. 99-5156 at 10. The government's self-dealing underscores its illegitimate use of the taxing power. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 544 (1998) (Kennedy, J., concurring in the judgment) ("the Government's self-enrichment may make it all the more evident a taking has occurred"); *cf. United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996) (Souter, J.) (plurality opinion) (noting significance to liability determination of "the Government's self-interest").

---

[3] Even in *Carlton*, it could fairly be said that Mr. Carlton (the decedent's executor) had reason to expect that the pertinent tax "loophole" would be closed. Mr. Carlton had reason to know, and must have known, that the transaction he engaged in was decidedly not within the purpose of the ESOP stock sale deduction he was trying to use. Thus, Congress' closing of that loophole was, as the Supreme Court said, the mere correction of a "mistake" in the existing estate tax law that should have been – and likely was – apparent to all. In *Carlton*, moreover, both the creation of the pertinent estate tax deduction and the modification to the provision at issue in that case came *after* the decedent taxpayer's death. Because the taxpayer died before the deduction even existed, she could not have altered her economic transactions in reliance upon that deduction. *Carlton*, 512 U.S. at 28-29.

Further, this case also does not involve any of the "factors" that courts have looked to in non-tax retroactivity cases to "justify" the imposition of retroactive liability. The government's position that historical "benefits received" can justify retroactive liability would create a gaping exception to the long-standing judicial hostility to imposition of retroactive laws. If past benefits received were enough to justify the retroactive imposition of liability, then any citizen who *at any time in the past* received a benefit from a government program -- a social security check, a passport, a medical procedure paid for by Medicaid -- could be required years later to pay for unexpectedly increased costs of the government program. Not surprisingly, the government has not identified a single example of a retroactive tax scheme premised on "benefits received."[4]

Nor does this case involve any utility culpability for the contamination or other problems the special assessments are used to clean-up, or any agreement by the utilities to pay the costs of solving those problems, or any other factor that courts have relied upon to "justify" retroactive liability. Those factors all may give rise to some expectation of future liability, thus justifying its later retroactive imposition. Here, of course, the government expressly concedes that the

[4] *See Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 403 (D.C. Cir. 1997) ("Many persons and firms receive one-time tax breaks, as well as other forms of financial incentives, and to hold that this allows legislators forever after to impose financial burdens upon the earlier beneficiaries would largely gut the takings clause.").

retroactive special assessments are *not* justified on the basis of either culpability or any agreement by the utilities. *See* Brief of Appellee United States at 31.

In sum, the enactment of EPACT in 1992 retroactively imposed a "wholly new tax" that interfered with expectations even more profound than those involved in prior cases invalidating such new taxes. The utilities' expectations of closure here arose not merely from the government's prior "silence," but rather from government conduct that fostered the very expectations that the government later frustrated. *A fortiori,* the Supreme Court's due process precedents invalidating "wholly new taxes" require the same result here.

II. THE COURT SHOULD NOT DECIDE THE CONSTITUTIONAL ISSUES PRESENTED HERE ON THE BASIS OF FACTUAL ASSUMPTIONS THAT ARE BOTH INCORRECT AND CONTRARY TO PLAINTIFFS' ALLEGATIONS.

The decision below proceeds from the fundamental assumption that EPACT's retroactive special assessments are used to pay clean-up costs for contamination that results *inherently* from commercial enrichment operations at the government's uranium enrichment plants. This basic assumption -- which also underlies the several other CFC decisions addressing the constitutional validity of the EPACT special assessments, and even this Court's own prior decision in *Yankee Atomic* -- is blatantly wrong. EPACT's statutory terms, as well as the Department of Energy's annual reports on the D&D Fund, demonstrate that nearly half a billion dollars of that Fund are earmarked to clean up privately-owned

uranium and thorium processing plants that have *nothing* to do with the enriched uranium purchased by the utilities. *See* 42 U.S.C. §§ 2296a, 2296a-2.[5] Further, the record demonstrates that the retroactive special assessments are devoted to cleaning up contamination that resulted from the government's early military use of its enrichment plants, as well as contamination resulting from government negligence and outright misconduct at those plants (such as dispersal of hazardous substances in the ground and groundwater *outside* the plants).[6] Such contamination is neither "inherent" nor foreseeable in the enrichment process. The utilities could not have expected, and did not expect, to incur liability for such contamination costs.

The inaccurate factual assumptions that shadow the D&D litigation are not limited to assumptions concerning the contamination and its causes, but extend to the most basic explanations offered for the structure of the D&D Fund and its use. A prime example arises from the fact that the utilities are being made to pay a

---

[5] *See also* U.S. Dep't of Energy, Uranium Enrichment Decontamination & Decommissioning Fund 1998 Annual Report (excerpts submitted in the parties' Joint Appendix in *Maine Yankee*, No. 99-5156 ("Maine Yankee JA"), at 70-72, 74-75).

[6] *See Commonwealth Edison* Joint Appendix at 525, 562-66. *See also* Brief of Maine Yankee in No. 99-5156, at 6, n.3 (citing Memorandum to Capt. J.W. Pennington, Kentucky State Police, from Investigator D.W. Senf (Apr. 12, 1991) submitted by Thomas B. Cochran, Ph.D. to Subcommittee on Oversight & Investigations of the House Commerce Committee, United States House of Representatives (Sept. 22, 1999)) (included in Maine Yankee JA at 58-59).

fixed amount of money (more than $2.25 billion over 15 years) into the D&D Fund even though estimated costs of clean-up continue to decline significantly, thus demonstrating that the government's "68/32" cost-sharing mantra is pure fiction. This Court's recent decision in *Consolidated Edison Co. of New York, Inc. v. United States*, No. 99-1464, slip op. (Fed. Cir. May 3, 2001) apparently (and erroneously) accepted the 68/32 split as true. *See* slip op. at 3. In fact, since Congress established the D&D Fund in 1992, the government's original estimate of $21 billion for all work to be paid by the D&D Fund has been reduced by one-half – to $10.72 billion; and since 1995, the government's estimate just for decontamination and decommissioning of the government's enrichment plants has been reduced by two-thirds – from $9.22 billion then to $3.28 billion in 1998. *See* Brief of Maine Yankee in No. 99-5156 at 11-12; JA at 73, 76. The $2.25 billion industry-wide assessment thus represents *two-thirds* of the recent $3.28 billion D&D cost estimate. Yet the government has not reduced by one penny the utilities' overall $2.25 billion assessment, or the pro rata share of that assessment imposed retroactively on each utility.

Moreover, the notion of a "cap" on utility liability is fanciful. There is absolutely nothing to prevent Congress from enacting subsequent legislation to retroactively collect more money from the utilities. The 68/32 cost-sharing split is even more dubious given Congress' history of underfunding the D&D Fund. In

contrast to utility contributions to the Fund, which are statutorily-fixed and mandatory, actual federal appropriations to the Fund since 1992 have been nearly $700 million *less* than authorized by EPACT,[7] and nothing prevents Congress from refusing to appropriate any moneys at all to the D&D Fund in future years.

At bottom, the D&D Fund is a "slush fund," available for whatever purpose Congress chooses to appropriate it. The record shows that Congress has devoted the Fund to public purposes: cleaning up the government's own enrichment plants (which were *fully* contaminated, prior to any commercial use, by federal military weapons production activities) and discharging an obligation the government believes it has (on behalf of the public) to pay to clean up privately-owned thorium and uranium processing plants. Thus, as this Court recognized in *Yankee Atomic* -- albeit without a full appreciation of the "slush fund" quality of the D&D Fund -- the retroactive EPACT special assessments represent "a general exercise of Congress's taxing power." *Yankee Atomic*, 112 F.3d at 1577. But because EPACT's imposition of a wholly new tax changes the economic consequences of transactions completed years ago, it violates the Due Process Clause.[8]

---

[7] *See* Office of Envtl. Mgmt., U.S. Dep't of Energy, Uranium Enrichment Decontamination & Decommissioning Fund Triennial Report (May 3, 1996) (excerpt included in Maine Yankee JA at 68-69).

[8] Likewise, because the D&D Fund is used to achieve public purposes, the EPACT assessments violate the fundamental purpose of the Taking Clause -- "to bar Government from forcing some people alone to bear public burdens which, in all

CONCLUSION

In addressing the very substantial constitutional doubt that surrounds EPACT's retroactive special assessments, Maine Yankee urges the Court to reject the prevailing -- but, respectfully, superficial and incorrect -- assumptions about the uses of the D&D Fund and the nature of the contamination the Fund is used to clean up. Rather, to the extent the Court does not declare the retroactive EPACT assessments unconstitutional on the present record -- which it should do -- the Court should remand this case (and the other pending, related cases) for appropriate factual development. At this pre-discovery stage of the D&D litigation, any factual void that may exist should be filled by the utilities' well-plead allegations, not by unsupported -- and, Maine Yankee submits, demonstrably wrong -- assumptions.

Respectfully submitted,

Of Counsel:

REBECCA A. WOMELDORF
MICHAEL R. MINER

/s/ Jerry Stouck
JERRY STOUCK
SPRIGGS & HOLLINGSWORTH
1350 I Street, NW, Ninth Floor
Washington, D.C. 20005
(202) 898-5800
(202) 682-1639 (fax)
Counsel for *Amicus Curiae*
Maine Yankee Atomic Power Company

(continued)
fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF MAINE YANKEE ATOMIC POWER COMPANY IN SUPPORT OF PLAINTIFF/APPELLANT was served this 17th day of May, 2001, by hand delivery, on the following:

James G. Bruen
Special Litigation Counsel
U.S. DEPARTMENT OF JUSTICE
Commercial Litigation Branch, Civil Division
1100 L Street, NW, Room 10100
Washington, D.C. 20005
Counsel for United States

Robert A. Mangrum
WINSTON & STRAWN
1400 L Street, NW
Washington, D.C. 20005
Counsel for Commonwealth Edison

/s/ Rebecca A. Womeldorf
Rebecca A. Womeldorf