In the United States Court of Federal Claims

No. 04-106C
(Filed: February 22, 2010)

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DAIRYLAND POWER COOPERATIVE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

****

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On December 23, 2009, the Court issued an Opinion awarding Dairyland Power Cooperative ("Dairyland") $37,658,902 in damages. *Dairyland Power Coop. v. United States*, No. 04-106C, 2009 WL 5178355, at *39 (Fed. Cl. Dec. 23, 2009). Included in that sum, the Court awarded Dairyland half the amount it sought, or $16,641,024, for continued operation of its wet pool, referred to by the parties as Dairyland's SAFSTOR damages. *Id.* at *21. The Court found that although Dairyland would have avoided $33,282,048 in SAFSTOR damages by utilizing exchanges to advance in the U.S. Department of Energy ("DOE") spent nuclear fuel ("SNF") removal queue to be out of SNF by 1998, Dairyland would have had to pay half of its benefits to purchase those early acceptance rights from those who held the earlier positions in the queue. *Id.* at *20. Despite the Court's decision, Dairyland would prefer to be awarded the full amount it requested and has moved the Court to reconsider its decision that Dairyland is entitled only to half of its SAFSTOR damages. Although Dairyland vigorously disagrees with the Court's findings, Dairyland fails to provide a valid basis for reconsideration to be granted.

Reconsideration of a prior decision by the Court is grounded in Rule 59(a)(1) of the Rules of the U.S. Court of Federal Claims ("RCFC").[1] The decision whether or not to grant a

[1] RCFC 59(a)(1) provides:

> The Court may . . . grant a motion for reconsideration on all or some of the issues—and to any party—as follows:
> (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;
> (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or

motion for reconsideration is in the sound discretion of the trial court. *Yuba Natural Res. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154, 157 (2006); *Henderson County Drainage District No. 3 v. United States*, 55 Fed. Cl. 334, 337 (2003); *Franconia Assocs. v. United States*, 44 Fed. Cl. 315, 316 (1999); *Fru-Con Constr. Co. v. United States*, 44 Fed. Cl. 298, 300-01 (1999); *Seldovia Native Assoc. Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996).[2] The court must exercise extreme care in deciding such a motion. *See Carter v. United States*, 518 F.2d 1199, 1199 (Fed. Cir. 1975); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594. The purpose served is not to afford a party dissatisfied with the result an opportunity to reargue its case. *Roche v. District of Columbia*, 18 Ct. Cl. 289, 290 (1883); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594; *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993); *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992). A motion for reconsideration "is not intended to give an unhappy litigant an additional chance to sway the court." *Circle K Corp. v. United States*, 23 Cl. Ct. 659, 664-65 (1991); *see also Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Bishop*, 26 Cl. Ct. at 286.

The moving party must support its motion for reconsideration by a showing of exceptional circumstances justifying relief, based on a manifest error of law or mistake in fact. *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 300; *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Franconia Assocs.*, 44 Fed. Cl. at 316; *Seldovia Native Assoc.*, 36 Fed. Cl. at 594; *Principal Mut. Life*, 29 Fed. Cl. at 164; *Bishop*, 26 Cl. Ct. at 286. "[T]he United States Court of Federal Claims permits reconsideration for one of three reasons: (1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice." *Parsons ex rel. Linmar Prop. Mgmt. Trust v. United States*, 174 Fed. Appx. 561, 563 (Fed. Cir. 2006); *Chippewa Cree Tribe*, 73 Fed. Cl. at 157; *Henderson County Drainage*, 55 Fed. Cl. at 337; *Fru-Con Constr.*, 44 Fed. Cl. at 301; *Bishop*, 26 Cl. Ct. at 286.

Here, Dairyland has not argued that there has been any intervening change in law, or that certain evidence is now available when it had not been available before. Rather, Dairyland believes that manifest injustice has resulted because, in Dairyland's view, the Court's Opinion is "improper as a matter of both law and fact." Pl.'s Mot. for Recons. 1. However, it becomes clear upon reading the motion that Dairyland does not seek to offer the Court any new information. Rather, Dairyland simply disagrees with the Court as to what conclusions are proper based on the evidence in the record, and wishes to reargue its case on this matter.

Dairyland first argues that an offset is premature because if exchanges occur in the future, Dairyland will incur costs then. Pl.'s Mot. for Recons. 4-6. The Court does not disagree that if

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(C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

[2] Although the cases cited in this paragraph and the next predate the current version of RCFC 59(a)(1), the substance of the rule remains unaltered.

and when DOE performs, Dairyland may have an opportunity to enter into exchanges once again, to benefit therefrom, and to pay for those benefits accordingly. However, Dairyland cannot possibly incur exchange costs for 1998 removal rights at some future time. Therefore, expenses Dairyland would have incurred to advance to 1998 in the SNF removal queue cannot be considered deferred costs. Dairyland inaptly compares its cost of exchanges with costs of loading DOE casks, citing authority for the proposition that the cask-loading costs utilities avoided when DOE failed to pick up their SNF should not reduce their damages awards because such expenses are truly deferred rather than avoided. Pl.'s Mot. for Recons. 5 (citing *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1277 (Fed. Cir. 2009)). In the case of cask-loading costs, courts have refused to allow such avoided or deferred expenses as an offset to damages because "such an offset would effectively require utilities to pay loading costs twice." *Carolina Power & Light Co.*, 573 F.3d at 1277. By contrast, Dairyland will never have an opportunity to purchase 1998 removal rights in the future. In awarding Dairyland damages for operating expenses it would not have incurred had it purchased 1998 removal rights to be out of SNF by that year, the Court necessarily accounted for what Dairyland would have had to pay to obtain such rights.

Dairyland next argues that the Court erred because, in Dairyland's view, the Government did not satisfy a burden it carried to show what the proper offset amount was. Pl.'s Mot. for Recons. 6-7. Regarding the burden of proof, the Court observes that each side or its expert addressed—even if only briefly—the issue of costs of exchanges. *See Dairyland Power Coop.*, 2009 WL 5178355, at *20. Neither side was able to precisely calculate this cost satisfactorily. However, the Government argued that an offset was necessary to prevent a damages award exceeding what was due, and the Court agreed. The Court found that the evidence before it allowed it to fashion a fair damages award with "reasonable certainty." *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005); *see Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) ("Certainty is sufficient if the evidence adduced enables the court to make a fair and reasonable approximation of the damages."); *Elec. & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1358 (Ct. Cl. 1969) ("where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision"); *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1563 (quoting *Elec. & Missile Facilities, Inc.*, 416 F.2d at 1358).

Next, Dairyland states that the Court's offset was based on the concession by its economic expert, Mr. Graves, that in his analysis the cost of exchanges could range as high as $21.2 million. Pl.'s Mot. for Recons. 7. Dairyland misunderstands the role of this information in the Court's Opinion. The Court found that Mr. Graves concluded that under almost any circumstances, Dairyland would have had the incentives to purchase the exchanges necessary to be out of SNF in 1998. However, the Court also took note that differing circumstances would lead to varying amounts that Dairyland might have had to pay for those early acceptance rights. The Court did not base its offset calculation on any of Mr. Graves's calculations because the Court was not persuaded by his study's findings regarding offset amounts. Rather, the Court simply noted that the testimony it heard led it to conclude that Dairyland's costs of exchanges could have varied widely.

Finally, Dairyland insists that the Court's offset is contrary to "basic economic principles." Pl.'s Mot. for Recons. 8. According to Dairyland, the Court's decision "fails to [properly] recognize [] the results of Mr. Graves' economic sequence model." *Id.* The Court notes that, despite finding Mr. Graves's testimony useful and convincing in some respects, the Government's economic expert was considerably more credible and persuasive as to basic economic principles, the potential cost of exchanges to Dairyland, and lack of a reason to believe that Dairyland could have captured a disproportionate share of the benefits of exchanges. While Dairyland reiterates its view that there would have been multiple sellers, it fails to address whether there would also have been multiple buyers competing with Dairyland. *See* Pl.'s Mot. for Recons. 9-10.

Reargument of cases has never been "permitted upon the sole ground that one side or the other is dissatisfied with the conclusions reached by the court." *Roche*, 18 Ct. Cl. at 290. Accordingly, the Court will not entertain Dairyland's attempt to reargue a portion of its case now. Dairyland's Motion for Reconsideration of Damages Offset for Cost of Exchanges is denied.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge