

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-5083

NEBRASKA PUBLIC POWER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 01-CV-116, Judge Francis M. Allegra.

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges.

PER CURIAM.

ORDER

This case was argued before a panel of this court on December 3, 2007. Thereafter, a poll of the judges in regular active service was conducted to determine whether the appeal should be heard en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The court by its own action grants a hearing en banc. The parties are directed to file supplemental briefs that address the following question:

Does the mandamus order issued by the United States Court of Appeals for the District of Columbia Circuit in Northern States Power Co. v. United States Dep't of Energy, 128 F.3d 754 (D.C. Cir. 1997) preclude the United States from pleading the "unavoidable delay" defense to the breach of contract claim pending in the United States Court of Federal Claims, and if so, does the order exceed the jurisdiction of the District of Columbia Circuit?

(2) This appeal will be heard en banc on the basis of supplemental briefs addressing the issue set forth above. Thirty copies of the supplemental briefs shall be filed, and two copies shall be served on opposing counsel. The parties shall file simultaneous supplemental briefs which are due in the court within 30 days of the date of filing of this order. No further briefing will be entertained. Supplemental briefs shall adhere to the type-volume limitations for principal briefs set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(3) Briefs for amici curiae may be entertained if accompanied by a motion for leave of court and if the briefs comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29. Any such briefs are due within 30 days of the date of filing of this order.

(4) Oral argument will be resolved at a later date.

FOR THE COURT

June 4, 2009

Date

/s/ Jan Horbaly

Jan Horbaly

Clerk

cc: Alexander D. Tomaszczuk, Esq.
Harold D. Lester, Jr., Esq.