

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
SOUTHERN CALIFORNIA EDISON COMPANY,)	Docket Nos. 50-361 OL
<u>ET AL.</u>)	50-362 OL
(San Onofre Nuclear Generating)	
Units 2 and 3))	

NRC STAFF MOTION FOR SUMMARY DISPOSITION

I. Introduction

The United States Nuclear Regulatory Commission Staff (Staff) moves that Joint Intervenors ^{1/} contention ^{2/} dealing with the uranium costs used in the cost/benefit analysis for the San Onofre Nuclear Generating Station, Units 2 and 3 (SONGS 2 and 3), be dismissed pursuant to 10 C.F.R. §2.749 for want of a genuine material issue of fact to be adjudicated at the operating license hearings in this proceeding.^{3/} The Staff is of the opinion that the attached affidavits,^{4/} together with the Intervenors' response to a discovery request, demonstrate that there is not a sufficient factual basis for this

1/ Friends of the Earth, Mr. and Mrs. August Carstens, Mr. and Mrs. Lloyd von Haden, Mr. Donald May and Mrs. Donis Davey and GUARD.

2/ The stipulated contention was admitted by the Licensing Board in its Memorandum and Order dated January 27, 1978 at 3.

3/ Applicants Southern California Edison Company et al have also applied for summary disposition on Intervenors' contention 9 in their June 6, 1980 Motion for Summary Disposition of Intervenor Friends of the Earth, et al. Contentions 1a (Dewatering Wells) and 4 (Uranium Fuel Costs). The dewatering wells portion of that motion is replied to by the Staff in a separate pleading.

4/ Affidavits of John A. Patterson of DOE (Attachment 1) and Jack O. Roberts of the NRC (Attachment 2).

contention and that there are no issues of fact worthy of adjudication at the hearing. Accordingly, this Atomic Safety and Licensing Board (Licensing Board) should dismiss this contention as a matter of law.

Section II of this pleading will discuss, in general terms, the law applicable to summary disposition motions. By means of the attached affidavits of an NRC Staff member and a Department of Energy consultant, Section III of this pleading will show that there are no material issues of fact raised by the Intervenors' contention 9. Legal arguments and statements of material facts as to which there are no genuine issues will be listed infra, in Section V along with the supporting Staff affidavits relating to the Intervenors' uranium contention.^{5/}

II. General Points of Law

The requirement that there be a factual basis for each contention in issue in a Nuclear Regulatory Commission proceeding derives from the summary disposition provisions of 10 C.F.R. §2.749. As will be shown below, a motion to dismiss will lie if there is not sufficient factual basis for such a contention.

^{5/} This pleading is considered by the Staff to be a submission in support of Applicants' Motion for Summary Disposition on the same subject within the provisions of the Stipulation of Counsel attached to the Licensing Board's Memorandum and Order on Prehearing Conference of July 17, 1980 dated August 6, 1980.

A. Summary Disposition Under 10 C.F.R. Section 2.749

The Commission's rules provide that a moving party is entitled to summary disposition if it can be shown that there are no material issues of fact to be adjudicated at the hearing and that he is entitled to judgment as a matter of law. 10 C.F.R. §2.749. That section states:

Summary Disposition on Pleadings

§2.749 Authority of presiding officer to dispose of certain issues on the pleadings.

(a) Any party to a proceeding may, at least forty five (45) days before the time fixed for the hearing, move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding.... [by demonstrating that]...there is no genuine issue to be heard.

B. Burden of Proof

The Supreme Court and the NRC have clearly held that it is the party seeking summary judgment, not the party opposing it, which has "the burden of showing the absence of a genuine issue as to any material fact...." Adickes v. Kress & Co., 398 U.S. 144, 157 (1970); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant ALAB-443, 6 NRC 741 (November 8, 1977)).

The NRC's rules governing summary disposition are analogous to the provisions for summary judgment in the federal courts under the Federal

Rules of Civil Procedure,^{6/} in that the moving party must demonstrate that there is no genuine issue of fact remaining to be decided and that the uncontroverted facts entitle him to judgment as a matter of law.^{7/} Affidavits setting forth the material facts about which there are no genuine issues to be heard may accompany the motion to dispose of issues on the pleadings, and the affidavits may be supplemented or opposed by depositions, answers to interrogatories or further affidavits.

While it is not necessary to present evidence in order to defeat a motion for summary disposition since the motion itself and accompanying affidavits must discharge the movant's burden (and no defense to an insufficient showing by movant is required), the rule clearly states that the party opposing the summary disposition motion may not rest upon mere allegations or denials in his answer but rather must provide by affidavit, deposition or answers to interrogatories, specific facts showing there is a genuine issue of fact in controversy. 10 C.F.R. §2.749(b); Perry, supra, at 754; accord, Virginia Electric Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 (March 24, 1980).

^{6/} Alabama Power Company (Joseph M. Farley Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (March 7, 1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878 (May 17, 1974); Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 247 (March 20, 1957); Power Authority of the State of New York (Green County Nuclear Power Plant), LBP-79-8, 9 NRC 339, 340 (1979).

^{7/} Adikes v. Kress, supra at 158-161 (1970).

In this regard, a Licensing Board has said that:

In order to defeat a motion for summary disposition the Intervenor must establish (or the Board perceive from the record) that there does exist a genuine issue of material fact with respect to each contention so attacked. At this stage, mere allegations in the pleadings are not sufficient to establish the existence of an issue of material fact. 10 CFR §2.749(b); See Orvis v. Brickman, 95 F.Supp. 605 (USDC, D.C. 1951), aff'd. 196 F.2d 762 (D.C. Cir. 1952); see also 6 Moore §56.15[3].

To defeat summary disposition an opposing party must present facts in the proper form; conclusions of law will not suffice. The opposing party's facts must be material, substantial, not fanciful, or merely suspicious.

One cannot avoid summary disposition "on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact" 6 Moore's Federal Practice §50.15[4]. One cannot "go to trial on the vague supposition that something may turn up." 6 Moore's Federal Practice §56.15[3]. See Radio City Music Hall v. U.S. 136 F.2d 715 (2nd Cir. 1943). In Orvis v. Brickman, 95 F.Supp. 605 (D.C.D.C. 1951), the Court, in granting the defendant's motion for summary judgment under the Federal Rules said:

All the plaintiff has in this case is the hope that on cross-examination ...the defendants ...will contradict their respective affidavits. This is purely speculative and to permit trial on such basis would nulify the purpose of Rule 56....^{8/}

Moreover, the rule itself provides that "all material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." 10 C.F.R. § 2.749(a).

^{8/} Gulf States Utilities Company, (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (March 20, 1975) (Footnotes omitted).

Summary disposition is desirable in administrative hearings because it makes possible the prompt disposition of a case on its merits without a formal hearing by permitting a party to pierce his opponent's pleadings by presenting material evidence in affidavit form which establishes that no factual dispute exists.^{9/} The Staff submits that such a procedure for conserving hearing time by culling out baseless allegations is particularly appropriate in the instant case since, as will be shown below by affidavits, there is no factual basis for the Intervenors' contention number 9 which deals with the cost of uranium used in the cost/ benefit balance for San Onofre Nuclear Generating Station, Units 2 and 3.

III. Argument

A. Intervenors' Contention

Intervenors' contention 9 provides that:

The Applicants' projection of fuel costs over the life of the plants does not adequately account for escalation of uranium prices and therefore the cost-benefit analysis is in error.

It is this contention which the NRC Staff believes to have no basis in fact.

^{9/} Gellhorn and Robinson, Summary Judgment in Administrative Adjudication, 84 Harvard L.Rev. 612 (1971).

B. Absence of Litigable Facts

As noted in the attached Affidavits of John Patterson at 3 and Jack O. Roberts at 2 (hereinafter, Patterson or Roberts), Applicants in 1977 submitted an Environmental Report in support of their operating license application wherein they projected a levelized uranium cost for San Onofre Nuclear Generating Station 2 and 3 (SONGS 2 & 3). That submittal projected a price of \$42/lb. for U_3O_8 in 1977 dollars and assumed a constant escalation rate of 7%/year for years to come, resulting in a \$51.45/lb. cost for uranium in 1980. The Staff, in November of 1978, published its Draft Environmental Statement relating to the operation of SONGS 2 and 3 and concluded therein that projected escalations in uranium fuel costs would not reverse the favorable cost/benefit analysis for the plant. Roberts at 2; DES (NUREG-0490) at 9-15, 10-3.

As noted in the attached Affidavit of John A. Patterson, Director of the Division of Resource Assessment Operations of the Office of Uranium Resources and Enrichment of the U.S. Department of Energy, an adequate supply of uranium exists in the reserves and probable potential resources categories in the United States to fuel SONGS 2 and 3 for their lifetimes. Patterson at 3. In addition, Mr. Patterson's affidavit makes it clear that experience with uranium prices since 1977 has borne out the reasonableness of the Applicants' use of \$42 per pound with a 7% escalation rate for U_3O_8 . As shown in that affidavit, while spot prices have hit a high of the low \$40's per pound of uranium, the current trend is for

price decreases in constant dollar terms. Patterson at 3. This is evidenced by the fact that current spot prices of U_3O_8 are in the low \$30's per pound. Patterson at 4. It is submitted that the current spot prices and generally available market prices which are below the \$51.45 price which Applicants predicted for uranium costs in 1980, demonstrate the reasonableness of the assumptions made by them in their Environmental Report and supports the conclusions drawn by the Staff in its cost/benefit analysis in the SONGS 2 & 3 DES. See Patterson at 5; Roberts at 2. This is especially so since, as reflected in the affidavit of Jack O. Roberts, nuclear fuel costs including carrying charges account for less than 12% of all nuclear electrical generation costs. For that reason, even if current nuclear fuel prices doubled, the cost/benefit balance for the now almost constructed SONGS 2 and 3 Units would not be tipped against operation of the plant. Roberts at 3.

It is evident from the Intervenor Friends of the Earth's July 28, 1978 Answers to Interrogatories Propounded by Southern California Edison, that no factual basis for Intervenors' contention exists. As that document indicates, the primary bases for Intervenors' contention on uranium prices and the San Onofre cost/benefit balance are materials by Lapp, Carley, and Moody which were written in 1975 and 1976.^{10/} The bibliography contained in the discovery response and also the Carstens article submitted in the same pleading indicate^{11/} that those analyses

^{10/} Intervenors, FOE et al. Answers to Interrogatories Propounded by Southern California Edison dated July 28, 1978 at page 28.

were based on cost data from the 1973 to 1975 era which the Patterson Affidavit shows to be atypical escalations in price and thus inappropriate for extrapolation for the 30-year operation of SONGS 2 & 3. Patterson at 5.

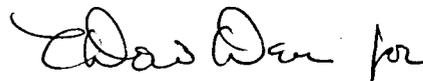
IV. Conclusion

For the foregoing reasons, the NRC Staff believes that it has sustained its burden of showing the absence of a genuine issue as to any material fact to be adjudicated as to uranium availability, prices and/or the SONGS 2 and 3 cost/benefit balance. Accordingly, the NRC Staff believes that summary disposition should be granted as a matter of law in accordance with 10 C.F.R. § 2.749.

Respectfully submitted,



L. Dow Davis, IV
Counsel for NRC Staff



Lawrence J. Chandler
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of August, 1980.

11/ Appendix I: Realistic Uranium Energy Yields and Costs by Ron Carstens and Robert Lamson. The bibliography and article at 1 indicates that much of the cost data used come from the 1973 to 1975 era. See also Deposition of Ronald Allen Carstens dated February 28, 1979 at 53.