

8/24/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before The Atomic Safety And Licensing Board

In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Jocket Nos. 50-387
50-388

NRC STAFF ANSWER SUPPORTING APPLICANTS' MOTION
FOR PARTIAL SUMMARY DISPOSITION OF CONTENTION 11

I. INTRODUCTION

On July 28, 1981, "Applicants' Motion for Partial Summary Disposition of Contention 11" (Motion) was served on the NRC Staff. In that Motion Applicants move the Board for summary disposition in their favor of that part of Contention 11 dealing with on-site storage of spent fuel. That part of the Contention alleges that the Susquehanna facility creates an unreasonable risk of harm to the Intervenor and their private property and violates the Commission's standards for protection against radiation in 10 CFR §§ 20.1 and 20.105(a) in that the Applicants have failed to provide adequately for safe on-site storage of spent fuel for periods of up to 10 to 15 years. Applicants assert that there is no genuine issue of material fact to be heard with respect to that part of Contention 11 dealing with on-site storage of spent fuel and that Applicants are entitled to a decision in their favor as a matter of law.

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The NRC Staff supports Applicants' motion. The Staff has concluded that Applicants' Motion and supporting documentation clearly demonstrate the absence of any genuine issue of material fact regarding the adequacy of provisions for safe on-site storage of spent fuel for periods of up to 10 to 15 years. The Board should grant Applicants motion.

The law applicable to motions for summary disposition is discussed in Section II of this pleading. The Staff's reasons for concluding that there is no genuine issue of material fact to be heard regarding that part of Contention 11 dealing with on-site storage of spent fuel are discussed in Section III.

II. GENERAL POINTS OF LAW

The Commission's Rules of Practice provide for summary disposition of certain issues on the pleadings where the filings in the proceeding show that there is no genuine issue as to any material fact and that the movant is entitled to a decision as a matter of law. 10 CFR § 2.749. Because the Commission's summary disposition rule is analogous to Rule 56 of the Federal Rules of Civil Procedure (summary judgment), Federal court decisions interpreting Rule 56 may be relied on for an understanding of the operation of the summary disposition rule.^{1/} In Adickes v.

^{1/} Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

Kress & Co., 389 U.S. 144, 157 (1970), the Supreme Court held that the party seeking summary judgment has "the burden of showing the absence of a genuine issue as to any material fact."^{2/} To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact.^{3/} To further this goal, the summary disposition rule provides that all material facts, set out in the statement mandatorily accompanying summary disposition motions, will be deemed to be admitted unless controverted by the opposing party. 10 CFR § 2.749(a).

Any other party may serve an answer supporting or opposing the motion for summary disposition. 10 CFR § 2.749(a). Attached to a motion opposing summary disposition must be a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard. 10 CFR § 2.749(a). A material fact is one which may affect the outcome of the litigation.^{4/} The opposing party need not show that it would prevail on the issues but only that there are genuine material issues to be tried.^{5/} Furthermore, the record and affidavits supporting and opposing the motion must be

^{2/} See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-433, 6 NRC 741, 752 - 54 (1977).

^{3/} Poller v. Columbia Broadcasting Co., 368 U.S. 464, 468 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

^{4/} Mutual Fund Investors Inc. v. Putnam Mgt. Co., 533 F. 2d 620, 624 (9th Cir. 1977).

^{5/} American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F. 2d 272, 280 (2d Cir. 1976).

viewed in the light most favorable to the party opposing the motion.^{6/} Finally, the proponent of a motion for summary disposition must meet its burden of establishing that it is entitled to judgment as a matter of law even if the opponent of such a motion fails to submit evidence controverting the conclusions reached in documents submitted in support of the motion.^{7/}

III. STAFF ARGUMENT

That part of Contention 11 dealing with on-site storage of spent fuel alleges that the Susquehanna facility creates an unreasonable risk of harm to Intervenor and their private property and violates the Commission's standards for protection against radiation in 10 CFR §§ 20.1 and 20.105(a) in that the Applicants' have failed to provide adequately for safe on-site storage of spent fuel for periods of up to 10 to 15 years. The Staff believes that there is no genuine issue of material fact remaining to be heard regarding the adequacy of provisions for safe on-site storage of spent fuel at the Susquehanna plant for periods of up to 10 to 15 years and thus that the part of Contention 11 dealing with on-site storage of spent fuel should be summarily disposed of in Applicants' favor.

^{6/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877 (1974).

^{7/} Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 7 NRC 741, 753 - 54 (1977). Courts have, however, granted motions for summary judgment even though certain facts have been disputed when the disputed facts were found not material to the resolution of the legal issues presented. *Riedel v. Atlas Van Lines*, 272 F. 2d 901, 905 (8th Cir. 1959), cert. denied, 362 U.S. 942 (1960); *Newark Morning Ledger Co. v. U.S.*, 416 F. Supp. 689, 693 (D.N.J. 1975); *Aluminum Co. of America v. Burlington Truck Lines, Inc.*, 342 F. Supp. 166, 175 (N.D. Ill. 1972).

The Staff has reviewed the design of the Applicants' systems for storage of spent fuel and has concluded that they conform to the guidance in pertinent Commission regulatory guides and to the requirements in pertinent Commission regulations and can safely store spent fuel for periods in excess of 10-15 years. (Affidavit of William T. LeFave at paragraphs 4, 5, 6 and 8). The Staff has also concluded that the integrity of the spent fuel will not be compromised by storage for periods well in excess of 10-15 years. (LeFave at paragraph 7.) Therefore, the Staff has concluded that the design of the Susquehanna plant is adequate to provide for safe on-site storage of spent fuel for periods in excess of 10-15 years. (LeFave at paragraph 9.)

IV. CONCLUSION

For the reasons set forth above, the Staff believes that Applicants' motion for summary disposition in their favor of that part of Contention 11 dealing with on-site storage of spent fuel should be granted.

Respectfully submitted,



James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of August 1981.