10/28/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, ET AL.	)	Docket Nos. 50-445 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 25 (FINANCIAL QUALIFICATIONS)

Introduction and Background

Pursuant to 10 C.F.R. § 2.749, the NRC Staff ("Staff") hereby moves for summary disposition of Contention 25 (financial qualifications). The Staff submits that the affidavit attached hereto,[1/] together with the Staff's Safety Evaluation Report (SER)[2/] and Supplement No. 1 thereto (SSER),[3/] demonstrate that there are no genuine issues as to any fact material to the contention; that there are no factual issues requiring adjudication

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1/ The Staff has attached hereto the following documents which are submitted in support of this motion: "Affidavit of Jim C. Petersen," dated October 28, 1981 ("Petersen Affidavit"); and "Statement of Material Facts As to Which There Is No Genuine Issue to Be Heard," dated October 28, 1981 ("Statement").

2/ "Safety Evaluation Report Related to the Operation of Comanche Peak Steam Electric Station, Units 1 and 2" (NUREG-0797, July 1981).

3/ "Safety Evaluation Report Related to the Operation of Comanche Peak Steam Electric Station, Units 1 and 2" (NUREG-0797/Supplement No. 1, October 1981).

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upon a hearing; and that the Staff is entitled to a decision in its favor, granting summary disposition of Contention 25, as a matter of law. This motion is based upon the facts and arguments set forth herein, the affidavit and Statement submitted herewith, and upon all of the pleadings and other papers previously filed in this proceeding.

Contention 25 was admitted by the Licensing Board's Order of June 16, 1980,[4/] and alleges as follows:

> Contention 25. The requirements of the Atomic Energy Act, as amended, 10 C.F.R. § 50.57(a)(4) and 10 C.F.R. 50 Appendix C have not been met in that the Applicant is not financially qualified to operate the proposed facility.

The Staff has reviewed the financial data submitted by the Applicants in accordance with applicable Commission regulations and has concluded that they are financially qualified to operate and safely decommission the Comanche Peak facility. In the discussion which follows, the Staff sets forth the legal principles governing summary disposition and then explains why summary disposition of Contention 25 is warranted.

DISCUSSION

A. Legal Principles Underlying Summary Disposition

Pursuant to 10 C.F.R. § 2.749 of the Commission's Rules of Practice, summary disposition is available to a party in NRC proceedings as to all

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4/ "Order Subsequent to the Prehearing Conference of April 30, 1980," dated June 16, 1980, at 17. The contention was originally submitted by Intervenor Citizens Association for Sound Energy (CASE), as Contention 16 in its "Supplement to Petition for Leave to Intervene and Contentions," dated May 7, 1979, at 43.

or any part of the matters involved in the proceeding, as follows:

> (d) The presiding officer shall render the decision sought if the pleadings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law ....

The Commission's summary disposition rule is analogous to Rule 56 of the Federal Rules of Civil Procedure, governing motions for summary judgment, and Federal court decisions interpreting Rule 56 may be relied upon in NRC proceedings for the interpretation of 10 C.F.R. § 2.749. See, e.g., Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

Under both Rule 56 and 10 C.F.R. § 2.749, the party seeking summary judgment has been held to have the burden of proof, viz., the burden of demonstrating the absence of a genuine issue as to any material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977), citing Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). The proponent of the motion for summary disposition must meet its burden of proof even if the party opposing the motion fails to present evidentiary material to the contrary. Perry, supra, 6 NRC at 754. On the other hand, where a properly supported motion for summary disposition has been made, a party opposing the motion may not rest upon the mere allegations of its contention or answer. 10 C.F.R. § 2.749(b); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). Rather, pursuant

to 10 C.F.R. § 2.749(b), the party opposing summary disposition must present specific material facts showing there is no genuine issue to be heard:

> (b) ... When a motion for summary decision is made and supported ..., a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer ... must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered.

Finally, in this regard, all material facts set forth in the statement filed by the moving party in support of its motion for summary disposition "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).[5/]

In a recent Statement of Policy, the Commission underlined the availability of summary disposition in appropriate cases, as a means of expediting the hearing process. In Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28,533 (May 27, 1981), the Commission stated as follows:

> In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

5/ Pursuant to 10 C.F.R. § 2.749(a), answers to motions for summary disposition are to be filed within 20 days after service of the motion; and responses to "new facts and arguments presented in any statement filed in support of the motion" are to be filed within ten days after service thereof. In deciding a motion for summary disposition, "the record is to be viewed in the light most favorable to the party opposing the motion." Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974).

46 Fed. Reg. at 28,535. Similarly, the Appeal Board has stated that the summary disposition rule provides "an efficacious means of avoiding unnecessary and possibly time consuming hearings on demonstrably insubstantial issues." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980). As the Appeal Board noted recently, a hearing on each issue raised "is not inevitable," but "wholly depends upon the ability of the intervenors to demonstrate the existence of a genuine issue of material fact...." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC ____ (Sept. 11, 1981) (slip op., at 4). A party cannot avoid summary disposition "'on the mere hope that at trial he will be able to discredit movant's evidence,'" nor may a party "'go to trial on the vague supposition that something may turn up.'" Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975), quoting 6 Moore's Federal Practice § 56.15[3] and [4].

B. Standards for Determining Financial Qualifications

Section 50.33(f) of the Commission's regulations provides that an application for an operating license must contain information sufficient to demonstrate that "the applicant possesses the funds necessary to cover estimated operating expenses or that the applicant has reasonable assurance of obtaining the necessary funds, or a combination of the two." The regulation provides, more specifically, as follows:

> [S]uch information shall show that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated costs of operation for the period of the license or for 5 years, whichever is greater, plus the estimated costs of permanently shutting the facility down and maintaining it in a safe condition.

Appendix C to 10 C.F.R Part 50 provides further guidance, and is "intended to apprise applicants ... of the general kinds of financial data and other related information that will demonstrate the financial qualifications of the applicant to carry out the activities for which the ... license is sought."[6/] Appendix C indicates that "the Commission will require the minimum amount of information necessary" to determine an applicant's financial qualifications and that "[I]n many cases, the financial information usually contained in current annual financial reports, including summary data of prior years, will be sufficient for the Commission's needs." Additional information may be required by the Commission, particularly where a new entity has been formed for the purpose of submitting an application for an operating license, where the facility will be owned by two or more existing companies, or where "financing depends upon long-term arrangements for the sharing of power from the facility by two or more electrical generating companies" (id.).

The Commission has provided an interpretation of the "reasonable assurance" requirement of § 50.33(f) in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978). There, in a construction permit proceeding, the Commission upheld the Staff's view that the requirement of "reasonable assurance of obtaining funds" was satisfied where an applicant has a reasonable financing plan

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6/ "Appendix C - A Guide for the Financial Data and Related Information Required to Establish Financial Qualifications for Facility Construction Permits and Operating Licenses," promulgated at 33 Fed. Reg. 9704 (July 14, 1968).

in light of relevant circumstances:

> The "reasonable assurance" requirement of 10 C.F.R. § 50.33 ... contemplate[s] actual inquiry into the applicants' financial qualifications. It is not enough that the applicant is a regulated public utility. On the other hand, given the history of the present rule and the relatively modest implementing requirements in Appendix C, a "reasonable assurance" does not mean a demonstration of near certainty that an applicant will never be pressed for funds .... It does mean that the applicant must have a reasonable financing plan in the light of relevant circumstances.

(Id., at 18; footnote omitted). While the Commission did not specifically list what it considered to be "relevant circumstances", it approved the findings of the Licensing Board and Appeal Board that the Seabrook applicants were financially qualified, based upon evidence provided by source of fund sheets, the prospect of future rate increases, the applicants' bond ratings, prospective interest rates, return on equity granted by the State public utilities commission, and the applicants' general fund-raising history (id., at 20).

While the factors determined to be relevant by the Commission in Seabrook were derived from the factual record of a construction permit case, the same factors are relevant at the operating license stage. At the operating license stage, however, the fund-raising history of an applicant may be de-emphasized, and more importance may be placed on the applicant's ability to generate revenues through the sale of electricity. As one Licensing Board has reasoned:

> The question is whether an operating facility will pay its own way with the electricity it sells. It is to be noted that local state agencies or the Federal Energy Regulatory Commission (FERC), not the Nuclear Regulatory

> Commission, are the primary source of evaluation of rates necessary for a utility to operate in an efficient manner and receive an adequate return on its investment.

Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-79-13, 9 NRC 489, 525 (1979). In McGuire, the Licensing Board found that the applicant was financially qualified to operate and decommission the plant, based upon evidence of the financial strength of the company (e.g., its credit and securities ratings), the changes made to improve the company's financial capabilities, the past treatment of the company by rate setting bodies, the prospect of future rate increases, the company's earnings trend over a 5-year period, and the likelihood that the company would be able to cover its decommissioning costs from revenues (id., at 522-29).[7/]

While § 50.33(f) requires that an applicant submit information showing it possesses or has reasonable assurance of obtaining the funds necessary to cover the proposed period of operation (or 5 years, whichever is greater), as well as "the estimated costs of permanently shutting the facility down and maintaining it in a safe condition," there is no requirement that any particular decommissioning plan be identified at

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7/ It has been repeatedly observed that state and federal public service commissions, which under law must grant utilities a fair rate of return, properly must allow utilities to recover operating and maintenance costs (including the cost of decommissioning) through the electricity rates charged to their customers. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 77-78 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), LBP-77-68, 6 NRC 1127, 1162 (1977), aff'd, ALAB-491, 8 NRC 245 (1978). Accordingly, absent indications to the contrary, it is generally assumed in the financial review of a public utility that rational regulatory policies with respect to rate-setting will prevail, which will enable the company to cover its operating costs. See, e.g., North Anna, supra, 6 NRC at 1162; Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), LBP-77-74, 6 NRC 1314, 1330 (1977).

the time an operating license is sought.[8/] Rather, the Commission's safety regulation, set forth in 10 C.F.R. § 50.82, "only comes into effect when a licensee seeks to dismantle or decommission a facility." Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), LBP-79-6, 9 NRC 291, 313 (1979).

An applicant's decommissioning cost estimates may be based on a particular method of decommissioning, taking into consideration cost estimates from reliable studies or detailed costs experienced in actual decommissionings. See, e.g., McGuire, supra, 9 NRC at 527; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), LBP-77-3, 5 NRC 301, 340 (1977). When ratemaking statutes allow recovery of decommissioning costs, and the estimated cost is not prohibitive, Licensing Boards have concluded that an applicant is financially able to decommission a facility. See, e.g., McGuire, supra, 9 NRC at 527; North Anna, supra, 6 NRC at 1162-63.

Finally, in this regard, the Staff notes that the Commission has pending before it a proposed rule which, if adopted, will eliminate or significantly alter the issues required to be litigated with respect to financial qualification contentions in operating license proceedings.[9/]

8/ At the end of the facility's useful life, or at any time prior thereto, a licensee may submit a decommissioning plan for the Commission's approval under the regulations then in effect. Presently, there are three major decommissioning alternatives: mothballing, entombment, or dismantling. See Regulatory Guide 1.86. New terminology for these alternatives is found in NUREG-0436, Revision 1, Supplement 2 (March 1981).

9/ Proposed rule, "Financial Qualifications; Domestic Licensing of Production and Utilization Facilities," 46 Fed. Reg. 41786 (Aug. 18, 1981).

As recognized by this Licensing Board in its Order of October 23, 1981, the proposed rule indicates that the Commission "has tentatively concluded that the present financial qualifications review can appropriately be eliminated for electric utility applicants" and that an alternative rule, at least for the interim, is being considered which would require only an examination of an applicant's ability to finance "the permanent shutdown and maintenance of the facility in a safe condition."[10/] Notwithstanding the significance of the proposed rule change (which is to be applied, when effective, to ongoing operating license proceedings), the Staff notes that until the proposed rule is adopted, the present financial qualifications rule continues to govern the scope of the issues to be litigated with respect to Contention 25 in this proceeding--if summary disposition of the contention is not granted prior thereto by the Licensing Board.[11/]

C. Evaluation of Applicants' Financial Qualifications

An application of these principles to Contention 25, upon evaluating the financial information submitted by the Applicants pursuant to 10 C.F.R § 50.33(f), leads the Staff to conclude that the Applicants are financially qualified to operate and safely decommission the Comanche Peak facility, in accordance with the Commission's regulatory requirements. Accordingly, the Staff believes that summary disposition of Contention 25 is warranted.

10/ Memorandum and Order dated October 23, 1981, at 2, 4.

11/ In the event the proposed rule is adopted prior to any hearing on Contention 25, the final formulation of that rule would have to be examined to determine the scope of the issues which may properly be raised at the hearing.

As set forth in the Staff's SER, which is adopted and incorporated in the attached Affidavit of Jim C. Petersen,[12/] the Applicants and their respective ownership shares in the Comanche Peak facility are as follows:

Participant	% Ownership Interest
Dallas Power & Light Company (DP&L)	18-1/3
Texas Electric Service Company (TESCO)	35-5/6
Texas Power and Light Company (TP&L)	31-1/2
Brazos Electric Power Cooperative, Inc. (Brazos)	3-4/5
Texas Municipal Power Agency (TMPA)	6-1/5
Tex-La Electric Cooperative of Texas, Inc. (Tex-La)	4-1/3

(SER § 20.1; SSER § 20.1). Applicants DP&L, TESCO and TP&L are the three operating subsidiaries of Texas Utilities Company, a utility holding company; the business of these and the other Applicants is set forth in Section 20 of the SER (id.).

The rates for electricity charged by the Applicants (other than TMPA) are established by the Public Utility Commission (PUC) of Texas (SER § 20.5).[13/] The PUC is required by law to fix a utility's revenues at a level which will permit the utility to recover its operating expenses together with a

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12/ Section 20 of the Staff's SER and Section 20 of the Staff's SSER are incorporated by reference in the Affidavit of Jim C. Petersen attached hereto (Petersen Affidavit, ¶3).

13/ As noted in the SER with respect to TMPA (§ 20.5):

> TMPA has power sales contracts with its member cities that obligate the cities to establish rates sufficient to pay TMPA all amounts required to service its debt and cover all operating costs, including TMPA's share of Comanche Peak costs. TMPA has its own rate-setting authority independent of any regulatory agency.

reasonable return on its investment (id.).[14/] Pursuant to this statutory authority, the PUC has adopted rules which require that overall revenues be set at such a level and, in addition, that the rate of return be sufficient to assure confidence in the utility's financial integrity and "be adequate under efficient and economical management to maintain proper discharge of its public duty" (id.). In addition, the cooperative participants (Brazos and Tex-La) will receive additional assurance of obtaining the funds for operation of the facility through wholesale power agreements with their respective member cooperatives (SER § 20.5; SSER § 20.5).

The Applicants have estimated the facility's first 7 years of operating costs, based upon the assumption that the first year of commercial operation will be 1983 for Unit 1 and 1985 for Unit 2. These estimates are set forth in Table 20.1 of the SER; as an element of conservatism, the estimated operating costs are calculated for capacity factors of 50, 60 and 70 percent (Table 20.1, SER § 20.2).[15/] The Applicants plan to recover all costs of operation through revenues derived from customers in system-wide sales of electricity (SER § 20.5). Under Texas rate regulation, rate base inclusion of the facility will enable the Applicants to recover the capital cost associated with facility construction (interest on debt and a reasonable return) (SER § 20.5).

14/ Similar rate provisions pertain to TMPA. See n.13, supra.

15/ The Staff notes that the Applicants have recently announced a twelve-month delay in the completion of construction from June 1982 to June 1983. The Staff does not believe that this announced delay significantly alters the conclusions reached in the SER as to estimated operating costs, particularly in view of the 7-year period set forth in the SER and the alternative capacity factors for which estimates have been made. See Table 20.1, SER § 20.2.

The NRC Staff has reviewed the Applicants' long-term statements of operation, which demonstrate the consistent recovery of historical costs of operation (SER § 20.5).[16/] The Staff has concluded that since the Applicants have demonstrated the ability historically to achieve consistent recovery of capital and operating costs for other facilities, their plan to finance the Comanche Peak facility's operation through revenues derived from rates charged to customers for utility service represents a reasonable financing plan in light of relevant circumstances (SER § 20.5).

The Applicants have estimated the costs to decommission the facility, assuming the use of the immediate dismantlement mode (SER § 20.3); these estimated costs of decommissioning are consistent with the estimated costs of decommissioning found in NUREG/CR-0130 (SER § 20.3). The Applicants have indicated that they believe they will be able to recover decommissioning costs in the rate process, and intend to build the collection of these funds into depreciation rates of the facility under the "negative net salvage" approach (SER § 20.6).

The Staff has reviewed the Applicants' plan to recover decommissioning costs and has concluded that it provides reasonable assurance for financing the decommissioning of the facility upon the end of its serviceable life (SER § 20.6). This conclusion is based on the nature of the Applicants'

16/ Long-term statements of operation are not available, of course, for Tex-La, a new entity which has no historical operating results (SER § 20.5). As to Tex-La, the Staff has concluded that the $180 million loan guarantee provided by the U.S. Rural Electrification Administration--an amount substantially in excess of Tex-La's estimated $135 million capital contribution to the facility--demonstrates that Tex-La has satisfied the NRC's financial qualification requirements (SSER § 20.5).

business, their present and historical financial strength, the fact that utilities customarily adjust their annual charges for negative net salvage amounts to compensate for changes in decommissioning estimates, and other considerations set forth in the SER (SER § 20.6). Also, because the NRC requires that any operating reactor be safely decommissioned when it is retired (for the protection of the public health and safety), it is reasonable to assume that those amounts will be allowed in customer rate charges as necessary and reasonable expenses. Accordingly, the Staff has concluded that the Applicants' plan to finance these expenses from customer revenues constitutes a reasonable financing plan in light of relevant circumstances (SER § 20.6).

As the foregoing discussion demonstrates, the Staff has reviewed the financial qualifications of the Applicants in accordance with 10 C.F.R § 50.33(f) and Appendix C to 10 C.F.R Part 50. The Staff has concluded that the Applicants have provided a reasonable financing plan in light of relevant circumstances to operate, shutdown (if necessary) and maintain the Comanche Peak facility in a safe condition (SER § 20.7). Accordingly, and pursuant to the guidance provided by the Commission in its Seabrook decision (CLI-78-1, supra), the Staff has determined that the Applicants have reasonable assurance under 10 C.F.R § 50.33(f) of obtaining the necessary funds to cover estimated operating costs to the extent of their respective ownership interests in the facility (SER § 20.7). As a consequence, the Staff has found the Applicants financially qualified to operate and safely decommission the Comanche Peak facility (Petersen Affidavit, ¶ 4; SER § 20.7).

Finally, based upon its review of the Applicants' financial qualifications, the Staff has determined that there is no basis in fact which supports Contention 25 (Petersen Affidavit, ¶ 5). Accordingly, summary disposition of that contention is warranted.

CONCLUSION

For all the reasons stated above, the Staff submits that its motion for summary disposition of Contention 25 should be granted and that Contention 25 should be dismissed.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of October, 1981