

Washington Public Power Supply System

3000 George Washington Way P.O. Box 968 Richland, Washington 99352-0968 (509)372-5000

Docket No. 50-508

November 2, 1984
G03-84-688

Mr. H. R. Denton, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: SUPPLY SYSTEM NUCLEAR PROJECT NO. 3
CONSTRUCTION PERMIT AMENDMENT REQUEST

Dear Mr. Denton:

As we previously advised you, the Supply System approved, on July 8, 1983, an immediate construction delay of WNP-3 until an assured source of funding for continued construction can be obtained. It took this action after the Bonneville Power Administration (BPA) informed the Supply System that financing for completion of the construction of WNP-3 from BPA revenues was not available and that in its opinion a three-year delay in construction would not seriously jeopardize the availability of an adequate economical power supply.

The present plans call for construction restart in July 1985 and completion in July 1989. In view of these developments and in consideration of the requirement that the Construction Permit extension application be submitted no later than December 1, 1984, the Supply System requests that the Construction Permit for WNP-3 be amended to extend the latest construction completion deadline from January 1, 1985 until July 1, 1989.

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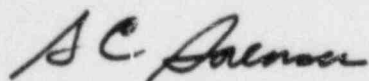
On November 1, 1984, BPA made a decision that funds for the construction of WNP-3 will not be included in its budgets for fiscal years 1986 and 1987 or in its rate case for the period extending from July 1, 1985 to September 30, 1987. The decision further indicated that preservation costs for WNP-3 will be included in FY-1986 and 1987 budgets and in BPA rates to preserve the project as a viable option. The decision of BPA in this regard is based on its projections for further power demands in the Region, which indicate that the electricity to be generated by WNP-3 may not be needed until the early 1990's. Should the recent BPA decision lead to a change in schedule, the Supply System will promptly notify the NRC and modify this request for Construction Permit extension.

The temporary lack of demand for the energy to be produced by WNP-3 and the temporary inability to finance the continued construction of WNP-3 are beyond the control of the Supply System. In addition, the deferral of construction in light of these developments is for valid business purposes. Finally, the duration of the requested Construction Permit is reasonable because it will not frustrate regulatory oversight by the NRC and because it is commensurate with the reasons for the requested Construction Permit extension. Accordingly, there is good cause for the requested extension and it is for a reasonable period of time. 10 C.F.R. ¶ 50.55(b); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984); Washington Public Power Supply System (WNP-1), ALAB-771, 19 NRC 1183 (1984).

The requested Construction Permit amendment involves no significant hazards consideration. This is because the requested amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated, create the possibility of a new or different kind of accident from any accident previously evaluated; or involve a significant reduction in a margin of safety. 10 C.F.R. ¶ 50.92.

Pursuant to 10 C.F.R. ¶ 170.21, a check is enclosed for \$150.00 as is required for a Construction Permit amendment application.

Very truly yours,



G. C. Sorensen
Manager, Regulatory Programs

- cc: J. A. Aams, NESCO
G. W. Knighton, NRC
N. S. Reynolds, Bishop, Liberman, Cook, Purcell, & Reynolds
B. K. Singh, NRC
J. P. Sluka, Ebasco
D. Smithpeter, BPA
S. F. Swearingin, BPA
A. A. Tuzes, CE
Ebasco Files, Elma
WNP-3 Files, 703

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

3 BONNEVILLE POWER ADMINISTRATION)
4 and PETER T. JOHNSON,)
5 Plaintiffs,)
6 vs.)
7 WASHINGTON PUBLIC POWER SUPPLY)
8 SYSTEM, et al.,)
9 Defendants.)

No. C82-1252 (BILBY)

ORDER

10 Pending before the Court are cross motions for summary
11 judgment on certain issues framed by the parties involving the
12 slowdown of the construction of Washington Public Power Supply
13 System's nuclear power plant known as Project 3.

14 The issues and rulings are:

15 1. Whether the Ownership, Project and Net Billing Agree-
16 ments require net billing the Supply System's seventy percent
17 ownership share of construction costs in the event the Supply
18 System is unable to finance by sale of long term tax free bonds
19 or by bank loans or otherwise. Yes.

20 2. Whether the Ownership Agreement has been materially
21 breached by the mothballing of Project 3. Yes, there
22 has been a breach. The issue of materiality contains issues of
23 fact, and is reserved for trial.

24 3. Whether the Investor Owned Utilities are third party
25 beneficiaries of the Project and Net Billing Agreements and
26 whether said agreements have been materially breached by the

1 mothballing of Project 3.

Yes, the investor

2 owned utilities are third party beneficiaries and both agreements
3 have been breached. The issue of materiality contains issues of
4 fact and is reserved for trial.

5 4. Whether any claim or judgment in favor of the Investor
6 Owned Utilities against the Supply System in connection with the
7 mothballing of Project 3 must be net billed under the terms of
8 the agreement.

No.

9
10 Background

11 Washington Public Power Supply System's Project 3 is a
12 nuclear power plant to be built, owned and operated by Washington
13 Public Power Supply System (Supply System) and certain investor
14 owned utilities in conjunction with Bonneville Power Administra-
15 tion (BPA) and the participant utilities. Several contracts
16 negotiated and executed in the 1970's set forth the various rights
17 and obligations of the parties. It is these contracts which
18 govern the issues currently before the Court.

19 The Supply System owns seventy percent of Project 3, and
20 the investor owned utilities own the remaining thirty percent
21 (Pacific Power and Light Co. owns 10%; Portland General Electric
22 Co. owns 10%; Puget Sound Power and Light owns 5%; Washington
23 Water Power Co. owns 5%). A contract entitled the Ownership
24 Agreement was signed by the owners on September 17, 1973.
25 Pursuant to the Ownership Agreement the owners provide the
26 financial means for constructing a certain percentage of the

1 project, and they control the same percentage of the Project's
2 electrical output. Costs resulting from the ownership, operation
3 and maintenance are to be billed according to the ownership
4 percentage.

5 The Supply System, BPA and one hundred three (103) of
6 BPA's preference customers (public utilities, cities and
7 cooperatives) executed contracts known as Net Billing Agreements
8 which provide for the allocation of the Supply System's seventy
9 percent ownership obligations and energy share. Under the Net
10 Billing Agreements, also executed in September, 1973, BPA's
11 preference customers, known as participants, purchased a certain
12 percentage of the Project's generating capability, for which each
13 participant is obligated to pay the Supply System the same
14 percentage of costs. Each participant assigned its share of
15 generating capability to BPA which assumed its cost obligation.
16 BPA was to credit the participant's wholesale power bill, or to
17 pay cash if the participant's obligation to the Supply System is
18 larger than its power bill. This process is referred to as net
19 billing.

20 At the same time, BPA and the Supply System also executed a
21 contract called the Project Agreement delineating some of the
22 Supply System's rights and obligations as project manager, and
23 granting to BPA certain rights of review.

24 All of the parties anticipated that the Supply System would
25 pay its seventy percent share of construction costs pursuant to
26 the sale of municipal bonds. The Bond Resolution was adopted by

1 the Supply System board of directors in December, 1975. To date
2 the Supply System's share of construction costs has been paid
3 for from the bond proceeds. The Supply System is now apparently
4 unable to sell more bonds, and the construction of Project 3 is
5 only partially completed (approximately 75%). The current
6 controversy arose when the Supply System implemented a slowdown
7 of construction of Project 3.

8
9 Special Board Proceeding

10 On October 11, 1983, the Court determined that the Supply
11 System's proposal to implement a slowdown on construction was
12 referable to a Special Board. Amended Order of October 11, 1983.
13 Pursuant to the terms of the contracts, and at the direction of
14 the Court, a Special Board was convened to consider whether the
15 proposed three year slowdown was consistent with the parties'
16 contracted standard of "Prudent Utility Practice" as defined in
17 the Ownership Agreement, Section 1(o). The Court directed the
18 Board to assume that funding for the Project was available. See
19 Transcript of Hearing of November 10, 1983.

20 The Report of the Special Board was filed with the Court
21 on January 6, 1984. It provided in relevant part:

22 In May 1983, the Supply System was effectively fore-
23 closed from the capital markets. Therefore, the proposed
24 three year slowdown was a prudent utility practice as
25 defined in Section 1(o) of the Ownership Agreement, based
26 on the assumption that sufficient funds were not available
from other sources to enable the Supply System to continue
scheduled construction of WNP-3. If sufficient funds from
other sources were available to the Supply System in May

1 1983, the slowdown proposal would not be a prudent utility
2 practice as so defined.

3 Report of the Special Board at
4 1-2

5 The Board was not directed by the Court, nor permitted by the
6 relevant contracts, to make any findings on the availability of
7 funds for the Project. By doing so it exceeded its jurisdiction.
8 The parties contracted for the Prudent Utility Practice standard
9 to govern the Special Board's decisions on certain specified
10 matters.

11 (o) "Prudent Utility Practice" at a particular time
12 means any of the practices, methods and acts, which, in
13 the exercise of reasonable judgment in the light of the
14 facts (including but not limited to the practices, methods
15 and acts engaged in or approved by a significant portion of
16 the electrical utility industry prior thereto) known at the
17 time the decision was made, would have been expected to
18 accomplish the desired result at the lowest reasonable cost
19 consistent with reliability, safety and expedition.
20 Prudent Utility Practice shall apply not only to functional
21 parts of the Project, but also to appropriate structures,
22 landscaping, painting, signs, lighting, other facilities
23 and public relations programs reasonably designed to pro-
24 mote public enjoyment, understanding, and acceptance of the
25 Project. Prudent Utility Practice is not intended to be
26 limited to the optimum practice, method or act, to the
exclusion of all others, but rather to be a spectrum of
possible practices, methods or acts. In evaluating
whether any Matter conforms to Prudent Utility Practice,
Supply System, the Committee and any special board
established pursuant to Section 4 hereof shall take into
account:

(i) The fact that Supply System is a municipal
corporation and operating agency under the laws of
the State of Washington, with prescribed statutory
duties and responsibilities; and

(ii) the objective to integrate the Project
Capability with the generating resources of the
Federal Columbia River Power System and the generating
resources of other systems operated by the Parties to
achieve optimum utilization of the resources of such
systems.

1 Despite contrary assertions by various parties, the Court
2 rules that this standard of review refers to what is prudent for
3 the Project, and not what is prudent for any of the individual
4 parties. The term applies primarily to the non-financial aspects
5 of utility practice, but it does include those financial issues
6 which relate to cost effectiveness.

7 It is ordered that the findings of the Special Board which
8 relate to the availability of funding are stricken (page 1, lines
9 21 through 25; page 2, lines 1 to 2). The remaining portion of
10 the report is the only operative part:

11 If sufficient funds from other sources were available to
12 the Supply System in May, 1983, the slowdown proposal
would not be a prudent utility practice as so defined.

13 Report of the Special Board,
14 page 2, lines 2-4.

15 DO THE OWNERSHIP AGREEMENT, PROJECT AGREEMENT AND NET
16 BILLING AGREEMENTS REQUIRE NET BILLING THE SUPPLY SYSTEM'S
SEVENTY PERCENT OWNERSHIP SHARE OF CONSTRUCTION COSTS IN THE EVENT
17 THE SUPPLY SYSTEM IS UNABLE TO FINANCE BY SALE OF LONG TERM TAX
FREE BONDS OR BY BANK LOANS?

18 In a contractual dispute such as this one, summary judgment
19 is properly granted only if the contract provisions are unambiguous
20 and there are no disputed material issues of fact. See Bower v.
21 Bunker Hill Co., 725 F.2d 1221, 1223 (9th Cir. 1984); Nat. Union
22 Fire Ins. Co., Etc. vs. Argonaut Ins. Co., 701 F.2d 95, 97 (9th
23 Cir. 1983).

24 The intent of the parties is irrelevant when the terms of
25 a contract are unambiguous. S.A. Empresa Etc. v. Boeing Co.,
26 641 F. 2d 746, 750 (9th Cir. 1981) citing Grant County Constructors

1 v. E.V. Lane Corporation, 77 Wash. 2d 110, 459 P. 2d 947, 954
2 (Wash. 1969). See also Taylor-Edwards Warehouse Transfer Co. v.
3 Burlington Northern, 715 F. 2d 1330, 1333 (9th Cir. 1983). The
4 role of the court is to ascertain the parties' intention from the
5 contracts themselves, and then to give them effect. See Matter of
6 Estate of Hollingsworth, 88 Wash. 2d 322, 326, 510 P 2d 348, 350-
7 51 (Wash. 1977).

8 To determine the meaning of any of the relevant contractual
9 language, the Court must look at all of the instruments that are
10 part of the transaction, and construe each with reference to the
11 other. Levinson v. Linderman, 50 Wash. 2d 855, 322 P. 2d 863, 866
12 (Wash. 1958). The Ownership Agreement, Project Agreement, and
13 Net Billing Agreements were all executed in September, 1973 as
14 part of one transaction. The Bond Resolution was not enacted
15 until 1975, but it is referred to in the earlier documents, and
16 is clearly part of the same transaction.

17 Although the contractual scheme created as a result of the
18 various documents is complicated, the contracts are not ambiguous.
19 The Ownership Agreement, the Net Billing Agreements and the
20 Project Agreement have a common primary purpose the construction
21 operation and maintenance of a nuclear power plant to meet
22 anticipated needs for power. The contracts must be construed to
23 give effect to this primary purpose. Continental Ill. Nat. Bank,
24 Etc. v. State of Wash. 696 F. 2d 692 (9th Cir. 1983). Under the
25 Ownership Agreement, the Supply System contracted to pay for a
26 seventy percent share of the construction, operation and main-

1 tenance of Project 3. All of the parties anticipated that the
2 Supply System's share of construction costs would be bond
3 financed.¹ None of the documents expressly provides whether or
4 not construction costs may be net billed in the event that bond
5 financing is unavailable. Viewing the express contractual
6 language while bearing in mind the underlying purpose of the
7 contracts, the court concludes that the contracts provide for
8 the net billing of construction costs.

9 According to the various agreements, costs that are to be
10 net billed are included in the Annual Budget. Net Billing Agree-
11 ment §§ 1(b), 6 & 7. The Annual Budget is defined as:

12 the budget adopted by Supply System not less than 45 days
13 prior to the beginning of each Contract Year which item-
14 izes the projected costs of Supply System's Ownership Share
15 of the Project applicable to such Contract Year, or, in the
16 case of an amended Annual Budget, applicable to the remain-
17 der of such Contract Year. The Annual Budget, as amended
18 from time to time, shall make provision for all such Supply
19 System's costs (including cost of fuel), and maintenance of
20 the Project and repairs, renewals, replacements and addition
21 to the Project, including, but not limited to, the amounts
22 which Supply System is required under the Bond Resolution to
23 pay in each Contract Year into various funds provided for in
24 the Bond Resolution for debt service and all other purposes
25 and shall include the source of funds proposed to be used;
26 provided however, that the Annual Budget for any portion of
a Contract Year prior to the Date of Commercial Operation
or September 1, 1981, whichever occurs first, shall include

22 1. Section 7(b) of the Project Agreement contemplated
23 that if any amounts for "renewals, repairs, replacements and
24 betterments, and for capital additions necessary to achieve design
25 capability or required by governmental agencies . . ." exceed
26 certain limits, then the "Supply System shall, in good faith, use
its best efforts to issue and sell bonds to pay such excess. . ."
While evidencing the desire to finance construction costs
by the sale of bonds as a first choice, it does not rule out the
necessity for net billing the Supply System's seventy percent
share, if bonds cannot be sold.

1 only such amounts as may be agreed upon by Supply System
2 and the Administrator.

3 Net Billing Agreement 1(a);
4 Project Agreement 1(a).

5 A "Contract Year" is defined as:

6 the period commencing on the Date of Commercial Operation,
7 or on January 1, 1981, whichever occurs first, ending at
8 12 PM on the following June 30...

9 Net Billing Agreement 1(f).

10 Reading these terms in conjunction, we see that there can be no
11 Annual Budget for a year commencing prior to January 1, 1981.
12 Since January 1, 1981, occurred before Commercial Operation,
13 there could be no net billing prior to January 1, 1981.

14 To determine whether construction costs can be net billed,
15 the pertinent inquiry is does "all such Supply System's costs. . .
16 resulting from the ownership. . .of the Project" include con-
17 struction costs? The plain language of this description is
18 inclusive. "All costs" of project ownership should include
19 construction costs in the absence of a specific prohibition or
20 limitation in the contract. There are no specific prohibitions or
21 limitations. The Participants citing the doctrine of ejusdem
22 generis claim that the specific mention of types of post-
23 construction costs indicates an overriding intent to exclude
24 construction costs from "all costs". This doctrine is rendered
25 inapplicable by the specific language "including, but not limited
26 to" included in the definition of Annual Budget.

The Participants also claim that it is evident from other
portions of the contract that the parties did not intend "all

1 costs" of project ownership to include construction costs. Some
2 of the arguments are very persuasive, and they emphasize the fact
3 that at the time of contracting the parties anticipated bond
4 financing would cover the Supply System's share, and that
5 construction costs would not need to be net billed. Unfortunately,
6 none of the cited contractual language sheds any light on the
7 situation with which we are now faced, no available bond financing.

8 The Project Agreement requires the Supply System to prepare
9 two different types of budgets, construction budgets and annual
10 budgets. Project Agreement, § 7. Construction budgets, under
11 the Ownership Agreement, specify the costs which all of the owners
12 must incur. The initial construction budget was approved by the
13 execution of the Ownership Agreement, and subsequent construction
14 budgets are to be prepared each year for approval by the Owners
15 Committee until the date of commercial operation. Ownership
16 Agreement §§ 1(f), 5. Annual Budgets are prepared commencing no
17 later than January 1, 1981, whether or not the project is complete.
18 Net Billing Agreement §§ 1(a), 1(f). The Annual Budget covers
19 only the Supply System's share of costs. Although this scheme may
20 indicate that the parties did not expect a need for construction
21 funds to come out of the Annual Budget, it does not show that
22 they cannot, nor does it render the budgetary scheme meaningless
23 if the budgets overlap.

24 If the parties had intended to exclude construction costs
25 from the term "all costs" as defined in the Annual Budget, they
26 should have said so. This is particularly true where the common

1 primary purpose was to construct and operate a nuclear power plant.
2 It is totally unrealistic to intrepret these contracts in such a
3 manner that if the project was 98% complete and no more bonds could
4 be sold, it would have to be terminated for failure to finance.

5 The problem here is that Project 3 was 75% complete rather than 98%

6 The fact that construction costs are expressly mentioned in
7 other sections and are not expressly in the definition of Annual
8 Budget does not dictate that they cannot be included in the Annual
9 Budget. See e.g. Net Billing Agreement § 10(a); Project Agreement
10 § 4. The express listing of construction costs in those sections
11 indicates situations in which the parties expected to need to ad-
12 dress those costs. All of the parties agree, and the Court found
13 that t' parties anticipated that the Supply System's share of con-
14 struction costs would be bond financed. Amended Order of October
15 11, 1983. To determine what the contracts dictate in the unexpected
16 event we must look to the broader language of the contracts to
17 determine whether they cover the situation. The Net Billing Agree-
18 ments do cover this event when they provide that the Annual Budget
19 "shall" include "all such" Supply System's "costs of ownership";
20 the Supply System "shall" include these costs in a billing state-
21 ment which "shall" specify the amounts the participants shall pay
22 to the Supply System; and, BPA "shall" pay to the parcipiants.
23 Net Billing Agreement § 1(a)(b), § (a) and (b), 7(a). Each step
24 of this complex process is mandated by the use of the word "shall."

25 Further indication that Bond Financing need not be the sole
26 method of financing is section 4 of the Net Billing Agreement. The

1 obligation under this paragraph was not to use its best efforts to
2 finance its interest solely through the sale of bonds but to use its
3 best efforts "and finance its interest therein." Had the parties in-
4 tended the Supply System's sole method of financing its interest
5 to be through the sale of bonds this was the place to indicate
6 that intention. They did not do so.

7 Section 6 of the Project Agreement does provide more strong-
8 ly that:

9 Supply System shall, in good faith and with due
10 diligence, use its best efforts to issue and sell
11 Bonds to finance Supply System's Ownership Share
12 of the costs of the Project and the completion
13 thereof, as such costs are defined in the Bond
14 Resolution Project Agreement § 6(a).

15 Even here there is no clear statement that the financing must come
16 solely from the sale of bonds. The Court can only assume that had
17 all the parties agreed that the Supply System's sole obligation to
18 finance was through the sale of bonds they would have clearly and
19 unequivocally said so. They did not.

20 The Participants also contend that the Bond Resolution pro-
21 hibits net billing of current construction costs. The Bond Resolu-
22 tion contains a complicated system of various funds for different
23 purposes. Several creative arguments have been made for why certain
24 provisions in the Bond Resolution indicate that the parties must not
25 have meant that current construction costs should be net billed.

26 An examination of the actual language of the document shows nothing
to prohibit the net billing of construction costs. Thus, it does
not contravene the broader language used in the Ownership Agreement
and Net Billing Agreements. For example, the Bond Resolution

1 identifies certain money which must be deposited in the Construct-
2 ion Fund, but it does not indicate what may be deposited in that
3 fund. Bond Resolution § 6.8.

4 The Court has reviewed and considered the other numerous
5 arguments made on this issue, and finds them not helpful.

6 Bonneville Power Administrative Veto

7 Bonneville Power Administration (BPA) claims that it has the
8 authority to disapprove the net billing of construction costs. Al-
9 though BPA has special approval rights under certain circumstances,
10 the Court finds that BPA does not have the authority to disapprove
11 the current net billing of construction costs during this relevant
12 period. (Post September 1, 1981 to ninety days prior to completion).

13 BPA is not an owner, but it has the right to designate one
14 of the Supply System's representatives on the Owners Committee.
15 Ownership Agreement § 3(a). This Committee has the authority
16 to review various types of proposals. Ownership Agreement § 3(g).
17 Approval of proposals must be by more than eighty percent of
18 the voting shares. Voting rights of members are equal to their
19 ownership share, except that the BPA representative on the
20 Committee has special rights to vote part of the Supply System's
21 share. Ownership Agreement § 3(a); Project Agreement § 4. The
22 Court has previously ruled that the slowdown of the Project was a
23 matter properly referable to the Owners Committee and then to
24 the Special Board. Amended Order of October 11, 1983. Any rights
25 that BPA may have exercised pursuant to its membership and voting
26 rights on the ownership committee have been vitiated by the

1 Special Board decision finding the slowdown not to be prudent
2 utility practice. (See pages 4-6 supra)

3 Under the Project Agreement, BPA's special rights of review
4 are set forth. The Administrator of BPA has the right to approve
5 the Bond Resolution.

6 Notwithstanding any other provision of this agreement,
7 the Bond Resolution shall be subject to the approval of
8 the Administrator. Project Agreement 6 (b)

8 This section does not grant BPA any authority over the Annual
9 Budget. Under Project Agreement § 7 (b), BPA has certain rights
10 of review over the Annual Budget. This section provides in
11 relevant part:

12 (b) Annual Budget. At least 90 days prior to the
13 expected Date of Commercial Operation, Supply System
14 shall submit to the Administrator a proposed Annual
15 Budget for the period from the expected Date of Commercial
16 Operation to the next succeeding July 1, and if the Date of
17 Commercial Operating occurs subsequent to April 1 in a
18 calendar year, a similar Annual Budget for the next
19 succeeding Contract Year. Thereafter, on or before April 1
20 of each year Supply System shall submit to the Administrator
21 a similar Annual Budget for the next succeeding Contract
22 Year, which budget shall take into account the cumulative
23 difference between total moneys received and expenditures
24 for the prior Contract Year and provide for adjustment, as
25 necessary, of the appropriate working cash fund. . .

20 If in any Contract Year the amounts in the Annual
21 Budget for renewals, repairs, replacements, and betterments,
22 and for capital additions necessary to achieve design
23 capability or required by governmental agencies (Amounts
24 for Extraordinary Costs), whether or not such amounts are
25 Costs of Operation or Costs of Construction as defined in
26 the Ownership Agreement, exceed the amount of reserves, if
any, maintained for such purpose pursuant to the Bond
Resolution plus the proceeds of insurance, if any, available
by reason of loss or damage to the Project, by the lesser of

(1) an amount of \$3,000,000 or

1 (2) an amount by which the amount of the Adminis-
2 trator's estimate of the total of the Administrator's
3 net billing credits available in such Contract Year to
4 Participants pursuant to section 7(a) of the Net Bill-
5 ing Agreements and the amounts of such reserves and
6 insurance, if any, exceeds the Annual Budget for such
7 Contract Year exclusive of Amounts for Extraordinary
8 Costs.

9 Supply System shall, in good faith, use its best efforts to
10 issue and sell Bonds to pay such excess in accordance with
11 section 6(a).

12 Notwithstanding any other provision of this agreement,
13 Supply System's Ownership Share of costs incurred by Supply
14 System in an emergency or to protect the safety of the
15 Project or the public, and unbudgeted expenditures necessary
16 in the normal course of business for the continued safe
17 operation and maintenance of the Project prior to approval
18 of the Annual Budget or revised Annual Budget, shall be
19 added to the Annual Budget as incurred. Promptly after any
20 such occurrence, and prior to expenditures of any other
21 funds not contemplated in the effective Annual Budget, Supply
22 System shall submit a revised Annual Budget to the
23 Administrator.

24 The Annual Budget and revised Annual Budget shall
25 become effective unless disapproved by the Administrator
26 within thirty days, and seven days respectively, after
27 submittal. Any item disapproved shall be referred to the
28 Project Consultant as provided in section 8.

29 Project Agreement § 7 (emphasis
30 added)

31 Project Agreement Section 8 sets forth the way in which the
32 Administrator may exercise his rights:

33 8. Administrator's Approval and Project Consultant.

34 (a) All proposals of Supply System, including but
35 not limited to, budgets, plans, actions, activities or
36 matters submitted to the Administrator under any provisions
37 of this agreement shall include itemized cost estimates and
38 other detail sufficient to support a comprehensive review,
39 including but not limited to, a copy of all supporting
40 reports, analyses, recommendations, or other documents
41 pertaining thereto. If the Administrator does not dis-
42 approve the proposal within the time specified, or if no

1 time is specified, within seven days after receipt, the
2 proposal shall be deemed approved. Any proposal dis-
3 approved shall be segregated so that the exact items of
4 difference are identified and shall become effective
5 immediately as to items not disapproved.

6 (b) Disapproval by the Administrator shall be given
7 in writing and, except as provided in section 6(b), shall
8 be based solely on whether the proposal or item is
9 consistent with Prudent Utility Practice. Such disapproval
10 shall describe in what particular the proposal or item is
11 not consistent with Prudent Utility Practice and shall at
12 the same time recommend what would meet that standard.

13 When any proposal or item is so disapproved by the
14 Administrator, Supply System shall adopt the suggestion of
15 the Administrator or within seven days after receipt of
16 such disapproval, shall appoint a Project Consultant
17 acceptable to the Administrator to review the proposal or
18 item in the manner described in this section. If the
19 parties shall not agree upon the selection of the Project
20 Consultant, Supply System shall promptly request the Chief
21 Judge of the United States District Court for the judicial
22 district of Washington in which the Project is located to
23 appoint the Project Consultant.

24 (c) The Project Consultant shall consider all
25 written arguments and factual materials which have been
26 submitted to it by either party within the ten days
following its appointment, and as promptly as possible after
the expiration of such period, make a written determination
as to whether the proposal or item disapproved by the
Administrator referred to it by Supply System would or
would not have been consistent with Prudent Utility Practice.
If the Project Consultant determines that the proposal or
item referred to it was not consistent with Prudent Utility
Practice it shall, at the same time, recommend what would,
under the same circumstances, have met such test.

Proposals or items found by the Project Consultant to
be consistent with Prudent Utility Practice shall become
immediately effective. Proposals or items found by the
Project Consultant to be inconsistent with Prudent Utility
Practice shall be modified to conform to the recommendation
of the Project Consultant or as the parties otherwise agree
and shall become effective as and when modified.

(d) All costs incurred by Supply System for or by
reason of employing a Project Consultant under this agree-
ment and the Net Billing Agreements and all reasonable
costs of Supply System related to presentations to the

1 special board which may be convened pursuant to the
Ownership Agreement, shall be a cost of the Project.

2 (e) If any proposal or item referred to the Project
3 Consultant has not been resolved and will affect the
4 continuous operation of the Project, Supply System shall
5 continue to operate the Project. Supply System may proceed
6 with the item (1) as proposed by it, or (2) as proposed by
7 the Administrator, or (3) as modified by mutual agreement
8 by Supply System and the Administrator prior to the time
9 such item affects operation of the Project; provided, how-
10 ever, that if Supply System proceeds with a disapproved
11 item reviewable under this agreement and if the determina-
12 tion made by the Project Consultant is that the item is
13 not consistent with Prudent Utility Practice, Supply System
14 shall bear any net increase in the cost of construction or
15 operation of the Project resulting from such item without
16 charge to Supply System's Ownership Share of the Project
17 in the Annual Budget to the extent such item was incon-
18 sistent with what the Project Consultant determined would
19 under such circumstances have met such test. Notwithstand-
20 ing other provisions of this section 8(e), whenever a pro-
21 posal has been referred to the Project Consultant, Supply
22 System shall operate in accordance with Supply System's
23 proposals until such proposal has been resolved by the
24 Project Consultant, whenever Supply System determines that
25 the Administrator's proposals would create an immediate
26 danger to the safe operation of the Project.

(f) The Administrator's approval or failure to dis-
approve any plan, proposal or item pursuant to the terms of
this agreement shall not render the Government, its officers,
agents or employees, liable or responsible for any injury,
loss, damage, or accident resulting from ownership, design,
construction, operation, or maintenance of the Project.

(g) Supply System shall not proceed with the follow-
ing elective items under the Ownership Agreement without the
concurrence of the Administrator's representative on the
Committee; (1) notice to repair damage to the Project,
pursuant to section 16(b), (2) a capital addition to the
Project pursuant to section 18, and (3) construction of the
Project pursuant to section 22(b). The Administrator
shall evidence his approval of any such items in writing
and Supply System's share of costs associated with any item
so approved shall become Project costs related to Supply
System's Ownership Share.²

²This "veto" power does not give the Administrator any power over
including or excluding construction costs in the Annual Budget ex-
cept those specifically listed in this subparagraph.

1
2 (h) Items subject to review by the Committee under
3 the Ownership Agreement shall not be reviewable hereunder.

4 (i) The word "item" as used in this section means the
5 item described including the cost specified therefor.

6 Project Agreement § 8.

7 These clauses in the Project Agreement grant the Administrator
8 substantial authority to review and to disapprove items in the
9 Annual Budget. However, as the underlined portion of Section 7(b)
10 reflects, none of these rights come into play until just prior
11 to the expected date of commercial operation. Since construction
12 costs cannot possibly be in an Annual Budget which is "for the
13 period from the expected Date of Commercial Operation to the next
14 succeeding July," BPA has no right under these sections of the
15 Project Agreement to disapprove the inclusion of construction
16 costs in the Annual Budget.

17 BPA's other right of review of the Annual Budget is con-
18 tained in the paragraph quoted above from both the Project Agree-
19 ment and the Net Billing Agreements which defines the Annual
20 Budget. Project Agreement § 1(a); Net Billing Agreement § 1(a).

21 The relevant part provides:

22 provided, however, that the Annual Budget for any portion
23 of a contract year prior to the Date of Commercial
24 Operation or September 1, 1981, whichever occurs first,
25 shall include only such amounts as may be agreed upon the
26 Supply System and the Administrator.

Project Agreement § 1(a); Net Billing
Agreement § 1(a).

This language, apparently granting a blanket veto power to both

1 the Supply System and the Administrator, is also limited by its terms to a
2 period of time that is not applicable to the current controversy. This
3 section gave the Administrator the right to approve an Annual
4 Budget up until September 1, 1981, and it has no relevance now.

5 In sum, none of the rights expressly granted to the Admin-
6 istrator of BPA in the contracts gives it the authority to disap-
7 prove the current net billing of construction costs. BPA argues
8 that the parties could not have intended such a gap in its right of
9 review. Moreover, in 1973 when the relevant contracts were signed,
10 it was an agency subject to Congressional appropriations and thus,
11 they claim could not have so contracted. See 16 U.S.C. § 832 j;
12 31 U.S.A. § 1341(a)(1).

13 It is not the province of the Court to rewrite the contract
14 for the parties. e.g. Corbin on Contracts, §§ 95, 541 and cases
15 cited therein. The contracts themselves set forth the rights of
16 BPA. The gap in time (September 1, 1981 until 90 days prior to
17 completion) when BPA had no right of disapproval or veto over the
18 Annual Budget was created by the parties, not the Court. When the
19 contracts are not ambiguous, the Court must assume that the parties
20 intended what they wrote. See S.A. Empresa, Etc. v. Boeing Co., 641 F. 2d 746,
21 750 (9th Cir. 1981) and cases cited at 6-7, supra.

22 Conclusion

23 Net billing of construction cost is allowable under the Net
24 Billing Agreement and was mandatory in this case due to the
25 ruling of the Special Board that it was a Prudent Utility Practice
26 to continue with construction assuming sufficient funds were
available to Supply System from other sources

1 HAS THERE BEEN A MATERIAL BREACH OF THE OWNERSHIP
2 AGREEMENT BY THE MOTHBALLING OF PROJECT 3?

3 As described above, the "mothballing" of Project 3 was
4 submitted to the Special Board for determination whether it was
5 prudent utility practice, and the Board determined that it was
6 not. At the time the matter was submitted to the Special Board,
7 there was a factual issue whether there were sound utility reasons
8 to mothball the plant. The Board determined there were not suf-
9 ficient reasons to mothball the plant other than funding.

10 The Ownership Agreement provides:

11 The board shall decide whether the Matter pro-
12 posed by Supply System is in accordance with Pru-
13 dent Utility Practice. If the board decides in
14 the affirmative, Supply System shall proceed as
proposed by it; if in the negative, Supply System
shall not so proceed. The decision of the majority
of the board shall be final and conclusive.
Ownership Agreement § 4(d).

15 Since the Board decided in the negative, the Supply System should
16 not have proceeded with the slowdown proposal. It did proceed
17 with the mothballing, and this breached the Ownership Agreement.

18 Several parties claim that the Supply System did not breach
19 the agreement because it was suffering from an inability to finance.
20 A party's inability to finance does not prevent its non-performance
21 under a contract from being a breach unless the contract so pro-
22 vides. See e.g. Dworman v. Mayor & Ed. of Aldermen, Etc., Morris-
23 town, 370 F. Supp. 1056, 1070 (N.J. 1974). Under section 15 of the
24 Ownership Agreement the parties did provide that no party "shall be
25 considered to be in default" if the failure of performance is due
26 to uncontrollable forces. Ownership Agreement § 15. Uncontrollable

1 forces as defined in the contract does not include the inability
2 of any party to finance. Ownership Agreement § 15.

3 Section 22 of the Ownership Agreement deals with the in-
4 ability of a party to finance and provides for the termination of
5 the project.

6 22. END OF PROJECT. (a) When the Project can no
7 longer be made capable of producing electricity consistent
8 with Prudent Utility Practice or the requirements of govern-
9 mental agencies having jurisdiction or is no longer licensed
10 by the AEC, or when the Project is ended pursuant to Section
11 16, Supply System shall sell for removal all salable parts
12 of the Project exclusive of Fuel to the highest bidders.
13 After deducting all costs of ending the Project, including,
14 without limiting the generality of the foregoing, the cost
15 of decommissioning, razing all structures and disposing of
16 the debris and meeting all applicable requirements of law,
17 Supply System shall close the appropriate Trust Account and,
18 if there are net proceeds, distribute to each Party its
19 Ownership Share of such proceeds. Supply System shall
20 liquidate the Fuel, and after making all required payments
21 and receiving all due receipts, shall disburse the proceeds
22 to the Owners as their interests appear. In the event such
23 costs of ending the Project exceed available funds, each
24 Party shall pay its Ownership Share of such excess as in-
25 curred.

16 (b) (i) If the Parties are unable to reach agreement
17 to any of the items (i) through (v) described in Section
18 3(j), one or more of the Parties may, within ninety (90)
19 days after the date of the notice to the Parties provided
20 for in Section 3(j), elect to proceed with the Project.

19 (ii) If one or more of the Parties is rendered in-
20 capable of proceeding with its obligations hereunder by
21 reason of one or more of the conditions listed below,
22 which condition is beyond the ability of such party to
23 remedy by reasonable means within a reasonable time, one
24 or more of the other Parties may, within ninety (90) days
25 after notice by a Party of the occurrence of the condition,
26 elect to proceed with the project without the disabled
Party; provided, however, that if such disabled Party is
proceeding with all due diligence to remove such disability,
the election shall not be made until 90 days after final
order or other final disposition of the matter; provided
further, that if delay would cause substantial additional
costs to be incurred if the election were so postponed,
the electing Parties may proceed as necessary to avoid or

1 minimize delay, preserving the rights of the disabled
2 Party until final order or other final disposition. The
conditions are:

3 1. Inability to finance.

4 2. Failure to obtain necessary legal authorizations,
5 including regulatory approvals.

6 (iii) Upon the election for any of the reasons set
7 forth in (i) and (ii) above, the Parties so electing shall
8 promptly reimburse each non-electing Party for its Costs
9 of Construction and costs of Fuel, if any, incurred here-
10 under; provided, however, that such reimbursement shall not
11 occur with regard to a disabled Party until final order or
12 other final disposition in the Matter confirming the
13 disability. Upon such reimbursement, the non-electing
14 Parties' interest in the Project and in this Agreement, and
15 any related rights or interest acquired by them hereunder,
16 shall forthwith vest in the electing Parties in such
17 proportion as the election Parties may agree.

18 Ownership Agreement § 22.

19 The use of the words "may" and "elect" makes clear that this
20 section is an option of the non-disabled parties.

21 Default is defined in the Ownership Agreement in § 17.

22 17. DEFAULT. (a) Upon failure of a Party to make any
23 payment when due, or to perform any obligation herein, any
24 other Party may make written demand upon said Party, and
25 if said failure is not cured within 10 days from the date
of such demand it shall constitute a default at the
expiration of such period.

(b) If a Party in good faith disputes the legal validity
of said written demand, it shall make such payment or per-
form such obligation within said 10 day period under written
protest directed to each of the other Parties. Such protest
shall be in writing and shall specify the reasons upon
which the protest is based. Payments not made by the default-
ing Party pursuant to said written demand may be advanced by
the other Parties and, if so advanced, shall bear interest
until paid, at the highest lawful rate. Upon resolution of
such dispute, then any payments advanced or made between the
Parties, as in this section provided, shall be adjusted
appropriately.

(c) In addition to the rights granted in this Section 17,

1 any nondefaulting Party may take any action, in law or
2 equity, including an action for specific performance, to
3 enforce this Agreement and to recover for any loss, damage
4 or payment advances, including attorneys' fees in all trial
5 and appellate courts and collection costs incurred by
6 reason of such default.

7 Ownership Agreement § 17.

8 The Supply System claims that it has not "failed to make any pay-
9 ment when due" because it has made all of its payments under the
10 budget that was approved by BPA, the mothballing budget. That is
11 insufficient, in view of the Special Board ruling and the Supply
12 System obligations under the Ownership Agreement.

13 BPA was without the power to veto the Annual Budget during
14 the relevant time period. See 13 - 19, supra. Thus, the
15 Supply System should not have submitted the budget to the Adminis-
16 trator for approval. The Supply System's action in submitting the
17 slow down budget was the start of the chain of events which
18 culminated in the breach, i.e. the mothballing issue which was
19 the basis for the proposed Annual Budget, went to the Special
20 Board. The Special Board ruled against the mothballing. When
21 the Supply System continued with the mothballing after the
22 Special Board's action it breached its obligation to the Investor
23 Owned Utilities under the Ownership Agreement. Furthermore, even
24 if BPA did have the power to disapprove the Annual Budget (as it
25 does 90 days prior to commercial operation), it did not have the
26 power to disapprove the budget based on its own rate structure.
The Administrator's review is to be based on the Prudent Utility
Practice. Project Agreement § 8. Prudent Utility Practice is

1 defined in the Project Agreement the same as it is in the Owner-
2 ship Agreement. Project Agreement § 1(p); Ownership Agreement §
3 1(o). This definition applies to the project, and not to what is
4 prudent for BPA and its customers.

5 Finally, the Supply System argues that even if the budget
6 that did not include the slowdown was the appropriate budget, it
7 did everything within its power to implement it. Since BPA dis-
8 approved that budget, the Supply System could not proceed with the
9 preparation of the billing statements.

10 This argument overlooks the fact that the Supply System
11 abdicated its own responsibilities under the Ownership Agreement
12 by adopting the BPA three year slowdown proposal as its own
13 proposal and submitting it to the Owners Committee. Executive
14 Board Resolution No. 147. At that time BPA and the Supply System
15 were as one, both seeking a mothballing of Project 3.

16 The issue of whether the breach was a material one is
17 reserved for later determination. Various parties have asserted
18 that there are material issues of fact which bear on the issue,
19 making summary adjudication inappropriate.

20
21 ARE THE INVESTOR OWNED UTILITIES THIRD PARTY BENEFICIARIES
22 OF THE PROJECT AGREEMENT AND THE NET BILLING AGREEMENTS, AND HAVE
23 THESE AGREEMENTS BEEN MATERIALLY BREACHED?

24 To be a third party beneficiary of a contract, the contract
25 must evidence an intent that the promisor shall assume a direct
26 obligation to the third party. Detweiler Bros., Inc. v. John
Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976); Burke & Thomas

1 v. Intern Organization of Masters, 92 Wash. 2d 762, 600 P.2d 1282,
2 1285 (Wash. 1979). "We must look to the terms of the contract
3 to determine whether the performance under the contract would
4 necessarily and directly benefit the petitioners." Lonsdale v.
5 Chesterfield, 99 Wash. 2d 762, 662 P.2d 385, 390 (Wash. 1983)
6 (en banc).

7 As co-owners of Project 3, the investor owned utilities
8 are necessarily and directly benefitted by the terms of the
9 Project Agreement and the Net Billing Agreements. They are
10 third party beneficiaries of those contracts.

11 For all the reasons previously set forth there has been
12 a breach of all three agreements (Ownership Agreement, Net Billing
13 Agreement and Project Agreement) by the Supply System and BPA.

14 WHETHER ANY CLAIM OR JUDGMENT IN FAVOR OF THE INVESTOR
15 OWNED UTILITIES AGAINST THE SUPPLY SYSTEM IN CONNECTION WITH
16 THE MOTHBALLING OF PROJECT 3 MUST BE NET BILLED UNDER THE TERMS
17 OF THE AGREEMENT.

18 While the Court has determined that the three agreements
19 provide for the net billing of the Supply System's seventy percent
20 share of construction costs, the same is not true for damages
21 resulting from the Supply System/BPA breach of the contracts.
22 This is so for four reasons.

23 1. The term "all costs" set forth in the definition of
24 Annual Budget (Net Billing Agreement § 1(a) and Project Agreement
25 § 1(a)) refers to costs stemming from the performance of these
26 contracts not their breach.

2. The Ownership Agreement in an effort to comply with

1 Washington law, Wash. Rev. Code, § 54-44-030, provided in section
2 2(d) of the Ownership Agreement.

3 The duties, obligations and liabilities of the
4 Parties are intended to be several and not joint
5 or collective, and none of the Parties shall be
6 jointly or severally liable for the acts, om-
7 missions, or obligations of any of the other
8 Parties. No provision of this agreement shall
9 be construed to create an association, joint
10 venture, partnership, or impose a partnership
11 duty, obligation or liability, on or with regard
12 to any one or more of the Parties. No Party
13 shall have a right or power to bind any other
14 Party without its or their express written con-
15 sent, except as expressly provided in this agree-
16 ment. Ownership Agreement § 2(d).

17 There is nothing in any of the three agreements whereby the Par-
18 ticipants agree to foot the bill for the breaches of either BPA
19 or Supply System. To do so would directly contravene both the
20 language of the Ownership Agreement and Wash. Rev. Code § 54-44-
21 030.

22 3. Section 4 of the Project Agreement provides no basis
23 for net billing the damages as it deals only with "costs and
24 expenditures... made at the written request of the Administrator."
25 It borders on the ludicrous to claim that damages for a breach
26 of contract fall within section 4. Costs for damages for one party's
breach of contract are amounts paid outside the contract not with-
in it. Only costs for the performance of the contract may be
net billed.

27 4. Notwithstanding the fact that the Participants may
28 approve of the actions of BPA and the Supply System in ordering
29 the mothballing, the breach was not that of the Participants. It

1 would contravene public policy of the State of Washington to make
2 a non-breaching public party to a contract pay damages for the
3 misconduct of another party to the contract. Wash. Rev. Code
4 § 54-44-030.

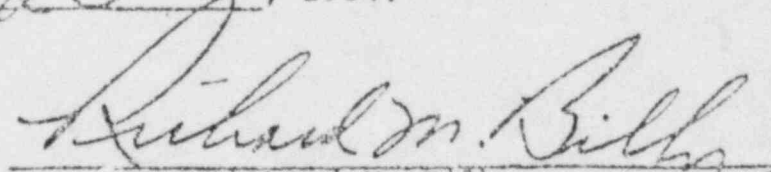
5 In short, any damages that can be proven to have resulted
6 from a material breach of these contracts must be borne by the
7 breaching parties. They may not be passed on to the Participants
8 by virtue of the Net Billing arrangement.

9
10 Summary

11 Final judgment on the various motions for summary judgment
12 will await trial or other disposition of the materiality of the
13 breaches in question.

14 The parties are given until March 29, 1985, to complete
15 discovery and file any dispositive motions in connection with the
16 materiality issues. Absent any motions, the matter will be set
17 for trial shortly thereafter.

18 DATED: November 23, 1984.

19
20 
21 Richard M. Bilby
22 United States District Judge
23
24
25
26