

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)
CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, ET AL.)
)
(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket No. 50-440 OL
50-441 OL

NRC STAFF RESPONSE TO APPLICANTS'
MOTION FOR SUMMARY DISPOSITION OF ISSUE #16

I. INTRODUCTION

By motion dated February 5, 1985 the Cleveland Electric Illuminating Co. et al. (CEI or Applicants) requested the Atomic Safety and Licensing Board (the Board) to grant summary disposition of Issue #16 based on affidavits, a statement of material facts as to which Applicants assert there is no genuine issue, and supporting documents. The NRC Staff hereby responds in support of Applicants' motion.

II. DISCUSSION

A. Legal Standards for Summary Disposition

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(d).

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Use of summary disposition has been encouraged by the Commission and the Appeal Board to resolve contentions where the intervenor has failed to establish that a genuine issue exists. ^{1/} Under the Commission's rule authorizing summary disposition, as in Rule 56 of the Federal Rules of Civil Procedure, the issue may be summarily dismissed only where no genuine issue remains for trial when the record is viewed in the light most favorable to the party opposing the motion. ^{2/} Consequently, the burden of proof lies upon the movant for summary disposition who must demonstrate the absence of any genuine issue of material fact. A material fact is one that may affect the outcome of the litigation. ^{3/}

However, where no evidence exists to support a claim asserted, the Commission has made clear that intervenors must show that a genuine issue exists prior to hearing, and if none is shown to exist, the Board may summarily dispose of the contentions on the basis of the pleadings. ^{4/} This obligation of intervenors is reflected in 10 CFR § 2.749(b) which states that:

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- ^{1/} Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241 (1973), aff'd sub nom, BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 91980). See also, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).
 - ^{2/} Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962).
 - ^{3/} Mutual Fund Investors Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).
 - ^{4/} Prairie Island, CLI-73-12, supra at 242.

[w]hen a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section 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.

The Staff submits that the documents of record, the affidavits and statement of material facts submitted in support of Applicants' motions, along with the affidavit and safety evaluation of a member of NRC's TDI Project Group, and an evaluation by Pacific Northwest Laboratory, provided with Staff's response, demonstrate there is no genuine issue of material fact raised by Issue #16. Accordingly, no issue exists for litigation on this subject, as discussed below.

B. The Issue

Issue #16 as admitted by the Board in 1983 states:

Applicant has not demonstrated that it can reliably generate emergency onsite power by relying on four Transamerican Delaval diesel generators, two for each of its Perry units. ^{5/}

The contention submitted by Ohio Citizens for Responsible Energy (OCRE) refers to failure of the main crankshaft of a Transamerica Delaval (TDI) diesel generator at the Shoreham Nuclear Plant and discovery of cracks in the crankshafts of the other three TDI diesels at Shoreham, as well as deficiencies in the Perry TDI diesels reported under CEI's QA/QC program. ^{6/}

^{5/} Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-80, 18 NRC I404, 1405 (1983).

^{6/} Id., pp. 1405-06.

The Applicants explain the generic program concerning TDI diesel generators developed by the twelve utilities who are owners of these diesels (the TDI Diesel Generator Owners Group) for design verification and inspection and testing of the diesel components. Motion, pp. 7-8. As further explained by the attached safety evaluation report, ^{7/} the NRC became concerned about the reliability of TDI diesels after repeated failures of these diesels were discovered. To address this concern, the TDI Owners Group in 1984 presented a "Phase I" program for analysis and testing of sixteen common components of TDI diesels to the Staff, who found the program sufficient to demonstrate reliability of those 16 items. SER pp. 2-3. "Phase II" of the program suggested by the Owners Group was to be site specific verification and testing. Id.

CEI has submitted to NRC Staff the results of its design verification, inspection and testing of 171 components of the PNPP diesels for the Phase I and Phase II programs. The Staff has found the CEI verification and test program sufficient to insure the reliability of the diesels at Perry, Unit 1 to provide emergency power to the plant. Affidavit of Drew Persinko (attached), ¶ 6; SER, p. 11. The Staff explains the bases for this conclusion in the safety evaluation report for the PNPP TDI diesels with reference to the evaluation by Pacific Northwest Laboratory. These documents explain the Owners' Group program, the

^{7/} Safety Evaluation Report on Transamerica Delaval, Inc. Diesel Generators, Perry Nuclear Power Plant, Unit 1: Memorandum from C. Berlinger to B. Youndhlood.

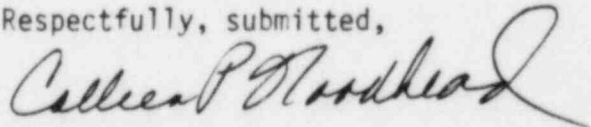
Staff's view of its adequacy, preliminary findings on test results, and CEI commitments for further testing, which together formed the Staff's conclusion. Persinko Affidavit, ¶ 7; SER pp. 11-12.

Because of the comprehensive program of design verification, inspection and testing of the TDI diesels at PNPP, described by the Applicants and Staff, it is clear there is no genuine issue of material fact concerning the adequacy of the test and verification program to assure reliability of the TDI diesels at PNPP. Therefore, the Applicants' motion for summary disposition should be granted.

III. CONCLUSION

For the reasons stated, Issue #16 should be summarily disposed.

Respectfully, submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of February, 1985.