

9/10/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
PENNSYLVANIA POWER AND LIGHT CO.)
AND)
ALLEGHENY ELECTRIC COOPERATIVE, INC.)
(Susquehanna Steam Electric Station,)
Units 1 and 2)

Docket Nos. 50-387
50-388



NRC STAFF MOTION FOR SUMMARY
DISPOSITION OF CONTENTION 14

I. INTRODUCTION

On March 6, 1979, the Licensing Board admitted Contention 14 which alleges:

The facility's cost-benefit balance as set forth by the Applicants overstates the benefits of the facility since it utilizes overoptimistic capacity factors. The facility will not be capable of producing the amount of electricity predicted by the Applicants, so that its benefits will be less than predicted and the cost-benefit balance adversely affected.

The NRC Staff asserts that there is no genuine issue to be heard regarding the statement of material facts accompanying this motion and that the Staff is entitled to a summary decision in its favor, dismissing Contention 14 as a matter of law.

Section II of this pleading will discuss generally the law applicable to motions for summary disposition. Section III will set forth the Staff's reasons for concluding that Contention 14 raises no

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genuine issue of material fact. Attached to this motion is the Affidavit of Raghaw Prasad and the Statement of Material Facts as to Which There Is No Genuine Issue to be Heard.

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. As 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/} Thus, in Adickes v. 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

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

^{2/} See also Cleveland Electric Illuminating Co. (Perry, 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).

rule provides that all material facts, set out in the statement which must accompany 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/} Once a motion for summary disposition has been made and supported by affidavit, a party opposing the motion may not rely on mere allegations, but instead must demonstrate by affidavit or otherwise that a genuine issue exists as to a material fact. 10 CFR 2.749(b); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). 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 viewed in the light most favorable to the party opposing the motion.^{6/} Finally, the proponent of a motion for summary

^{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).

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

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

Contention 14 asserts, in essence, that Applicants' cost-benefit balance overstates the benefits to be derived from the Susquehanna facility because Applicants used overoptimistic capacity factors. For the reasons set forth below, the Staff concludes that this contention fails to raise any genuine issue of material fact. The Staff further concludes that the attached Affidavit of Raghaw Prasad and the attached Statement of Material Facts as to Which There Is No Genuine Issue to be Heard, when read together with this motion, show that the Staff is entitled to a decision in its favor as a matter of law.

The projected capacity and the cost-benefit analysis referenced in this contention are set forth in Applicants' Environmental Report, Operating License Stage, May 1978 (ER-OL). (Affidavit of Raghaw Prasad at 2). At page 1.1-4 of that document, Applicants assumed station

^{7/} Cleveland Electric Illuminating Co., (Perry, 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).

operation at a 70% capacity factor. (Prasad at 2). Additionally, they projected two major benefits to flow from operation of the Susquehanna facility: (1) the amount of electricity produced and (2) the cost savings resulting from the generation of electricity from Susquehanna rather than the generation of electricity from Applicants' other generating units or the acquisition of electricity from a power pool. (Prasad at 3). Thus, Applicants projected that 11.6 billion Kwh of electricity per year over the life of the plants will be produced by Units 1 and 2, assuming that the units operate at a 70% capacity factor and they estimated an operational saving of approximately \$40 million per year per unit. (Prasad at 3).

The average capacity factor of a 1100 MW boiling water reactor is estimated at 65%. In any event, Applicants also estimated that the amount of electricity which would be produced and the operational saving which would result would be 5.0 billion Kwh and \$34 million per year per unit respectively, if the plants operated at a 60% capacity factor. (Prasad at 3-4). Studies performed for and by the NRC have indicated that the historical capacity factors of all nuclear units in the United States is between 61.8% and 65%. (Prasad at 2). At either a 70% or 60% capacity factor, the benefits from operation of the facility outweigh the environmental costs. (Prasad at 4). Because this lower capacity factor does not significantly reduce the savings and the amount of electricity produced, the overall cost/benefit balance still supports operation of the facility. (Prasad at 4-5).

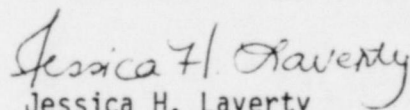
Table 7.1 of the Final Environmental Statement, NUREG-0564 (June 1981) (FES) estimates greater savings from operation of the Susquehanna facility than those estimated by Applicants in the ER-OL because the cost of acquiring replacement electricity has increased in response to

the rise in the price of fuel oil. (Prasad at 5). This cost has increased again since calculation of the estimates in Table 7.1. (Prasad at 5). The projection reflected in Table 7.1 used 1978 fuel prices (Prasad at 5). These prices increased in 1979 due to events in the Middle East. (Prasad at 5). The savings from operation of the Susquehanna facility, using more recent fuel prices, are projected to be \$112 million/year/unit, assuming a capacity factor of 60%. This savings is approximately 320% higher than what was reported by Applicants in the ER-OL. (Prasad at 5). Thus, even if the Staff assumes a capacity factor of 60% rather than the 70% predicted in the ER-OL, the benefits of operation outweigh the environmental costs of operation. (Prasad at 4 and 5).

IV. CONCLUSION

Based on the foregoing, the NRC Staff believes it is clearly demonstrated that there is no genuine issue as to any material fact regarding the alleged overestimation of capacity factors in the Applicants' ER-OL and their alleged effect on the present cost/benefit balance. Thus, the Staff concludes that summary disposition of Contention 14 should be granted in its favor as a matter of law in accordance with 10 CFR § 2.749.

Respectfully submitted,


Jessica H. Laverty
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of September, 1981

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STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO
GENUINE ISSUE TO BE HEARD

1. The Applicants have assumed a 70% capacity factor and have projected that 11.6 billion Kwh of electricity per year over the life of the plants will be produced by Susquehanna Units 1 and 2.

2. At this capacity factor, the Applicants estimated an operational saving of approximately \$40 million per year per unit resulting from the generation of electricity from Susquehanna rather than the generation of electricity from Applicants' other generating units or the acquisition of electricity from a power pool.

3. Studies performed by and for the NRC have indicated that the historical capacity factors of all nuclear reactors in the United States is 61.8%. From these studies, it appears that the Applicants' 70% capacity factor projection may be on the high side.

4. Nonetheless, the Applicants also estimated that the amount of electricity which would be produced and the operational saving which would result would be 5.0 billion Kwh and \$34 million per year per unit, respectively, even if the plant operated at a 60% capacity factor.

5. At either capacity, the benefits from operation of the facility exceed the environmental cost. Because the lower capacity factor does not significantly reduce the savings and amount of electricity produced, the overall cost/benefit balance still supports the operation of the facility.

6. The Staff, in its FES (NUREG-0564) estimates greater savings from the operation of the Susquehanna facility than those estimated by the Applicants because the cost of acquiring replacement electricity has increased in response to the rise in the price of fuel oil. In fact, the cost of fuel oil has increased again since the estimates in the FES.

7. The savings from operation of the Susquehanna facility, using more recent fuel prices, are projected to be \$112 million per year per unit, assuming a capacity factor of 60%. This savings is approximately 320% higher than that reported by the Applicants' ER-0L.

8. Thus, even if the Staff assumes a capacity factor of 60%, the benefits of operation outweigh the environmental costs of operation.