

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Michael F. Kennedy
Randall J. Charbeneau

In the Matter of

DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

ASLBP No. 09-880-05-COL-BD01

March 1, 2011

ORDER

(Granting Motion for Summary Disposition of Contention 5)

On February 3, 2011, the Detroit Edison Company (“Applicant”) submitted a Motion for Summary Disposition of Contention 5 (“Motion”), which relates to site-specific hydrogeological parameters and radiological transport modeling.¹ NRC Staff timely filed their answer in support of Applicant’s Motion on February 23, 2011.² Intervenor’s similarly consented to Applicant’s Motion, stating that after reviewing the Motion they “concluded that it is not feasible to oppose said Motion, and hereby formally indicate their consent for the Board to grant the [Motion].”³

Contention 5, as admitted by the Board in LBP-09-16, consists of two parts.⁴ The first part consists of a “contention of omission” alleging that on-site measurements of parameters required under 10 C.F.R. § 100.20(c)(3), including distribution coefficients, retardation factors,

¹ Applicant’s Motion for Summary Disposition of Contention 5 (Feb. 3, 2011) at 1.

² NRC Staff Answer to Applicant’s Motion for Summary Disposition of Contention 5 (Feb. 23, 2011) at 1.

³ Intervenor’s Consent to Summary Disposition of Contention 5 (Feb. 23, 2011) at 1 [hereinafter Intervenor’s Answer].

⁴ LBP-09-16, 70 NRC 227, 272 (2009).

and porosity, had been omitted from Applicant's Combined Operating License Application.⁵ The second part relates to exceedance of effluent concentration limits in the analysis of radionuclide transport in groundwater as documented in FSAR § 2.4.13 (Revision 1).⁶

In NRC adjudicatory proceedings such as this, the standard for summary disposition motions is discussed in 10 C.F.R. § 2.710, which states that summary disposition motions should be granted if "the filings in the proceeding . . . together with the statements of the parties and the affidavits . . . 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."⁷

The moving party bears the initial burden of showing the basis for its motion and thereby demonstrating the absence of a genuine issue of material fact.⁸ If an opposing party fails to counter each adequately supported material fact, then the moving party's facts will be deemed admitted.⁹ Where, as here,¹⁰ the non-moving party declines to oppose a motion for summary disposition, the moving party is not necessarily entitled to a favorable judgment. Rather, the moving party "has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required."¹¹

⁵ Id.

⁶ Id.

⁷ 10 C.F.R. § 2.710(d)(2). Summary disposition motions are the functional equivalent of summary judgment motions. See Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

⁸ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

⁹ Advanced Med. Sys., Inc., 38 NRC at 102-03.

¹⁰ Intervenors' Answer at 1.

¹¹ Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 754 (1977) (internal quotation marks omitted); accord Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970) ("[w]here the evidentiary matter in support of the motion does not establish

All of the parties involved agree that Applicant's Motion for Summary Disposition of Contention 5 should be granted.¹² In doing so, they concede that no genuine issue of material fact remains and that Applicant is entitled to judgment as a matter of law.

Based on the consensus of the parties, along with the Board's independent review of the parties' filings concerning Contention 5, the Board agrees with the parties' assessment and finds that Contention 5 no longer presents a genuine dispute of material fact and that Applicant is entitled to judgment as a matter of law. Thus, Applicant's Motion for Summary Disposition of Contention 5 is hereby granted.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹³

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 1, 2011

the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented").

¹² See supra notes 1–3 and accompanying text.

¹³ Copies of this order were sent on this date by the agency's E-Filing system to the counsel/representatives for (1) Applicant Detroit Edison Company; (2) Intervenors Beyond Nuclear et al.; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DETROIT EDISON COMPANY) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))
)
(Combined License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING MOTION FOR SUMMARY DISPOSITION OF CONTENTION 5) have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Matters, Assistant General Counsel
E-mail:
matersb@dteenergy.com

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: Ronald.Spritzer@nrc.gov

Michael F. Kennedy
Administrative Judge
E-mail: Michael.Kennedy@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Kirsten Stoddard, Law Clerk
E-mail: kirsten.stoddard@nrc.gov

Docket No. 52-033-COL
LB ORDER (GRANTING MOTION FOR SUMMARY DISPOSITION OF CONTENTION 5)

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
David Repka, Esq.
Rachel Miras-Wilson, Esq.
Tyson R. Smith, Esq.
Emily J. Duncan, Esq.
Carlos L. Sisco, Senior Paralegal

E-mail:

drepka@winston.com
trsmith@winston.com
rwilson@winston.com
EJduncan@winston.com
CSisco@winston.com

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Marian Zobler, Esq.
Marcia Carpentier, Esq.
Sara Kirkwood, Esq.
Robert M. Weisman, Esq.
Anthony Wilson, Esq.
Andrea Silvia, Esq.
Joseph Gilman, Paralegal
Karin Francis, Paralegal
Email:
marian.zobler@nrc.gov
marcia.carpentier@nrc.gov
sara.kirkwood@nrc.gov
rmw@nrc.gov
anthony.wilson@nrc.gov
andrea.silvia@nrc.gov
joseph.gilman@nrc.gov
karin.francis@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
Counsel for Progress Energy
Robert Haemer, Esq.
Maria Webb
E-mail: robert.haemer@pillsburylaw.com
E-mail: maria.webb@pillsburylaw.com

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
E-mail: paul@beyondnuclear.org

Beyond Nuclear, Citizens for Alternatives to
Chemical Contamination, Citizens
Environmental, Alliance of Southwestern
Ontario, Don't Waste Michigan, Sierra Club
et al.
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
E-mail: tjlodge50@yahoo.com

[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of March 2011