

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

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| In the Matter of |) | |
| |) | |
| PORTLAND GENERAL ELECTRIC COMPANY, |) | Docket No. 50-344 |
| <u>et al.</u> |) | (Control Building |
| |) | Proceeding) |
| (Trojan Nuclear Plant) |) | |
| <hr/> |) | |

LICENSEE'S MOTION DATED FEBRUARY 7, 1980
FOR SUMMARY DISPOSITION OF SPECIFIED CONTENTIONS

Portland General Electric Company (Licensee or PGE) moves the Atomic Safety and Licensing Board (Board), pursuant to 10 CFR §2.749, to grant summary disposition in Licensee's favor with respect to Coalition for Safe Power's (CFSP) Contentions Nos. 3, 17, 20, and 22.*/

Licensee submits that as to each of the foregoing contentions there is no genuine issue as to any material fact and that Licensee is entitled to a decision as a matter of law. In accordance with 10 CFR §2.749 there are appended to this Motion with respect to each such contention a statement of the material facts as to which there is no genuine issue to be heard and a brief discussion thereof, together with supporting affidavits.

In the view of the Licensee, the instant proceeding involves particularly suitable circumstances under which the Board should give serious consideration to the granting of a motion for summary disposition.

*/ On July 27, 1979 the Board issued an Order which consolidated CFSP and Consolidated Intervenor (CI). In light of that Order, these two intervenors will herein be referred to as Joint Intervenor. On October 17, 1979 the Board issued an Order which dismissed all of CI's contentions in the proceeding and ruled that the Joint Intervenor would be bound by CFSP's responses to discovery requests filed by Licensee and NRC Staff.

One of the basic purposes of the totality of the Commission's rules with respect to contentions, e.g., requiring that contentions be stated with specificity and bases (§2.714(a)), providing for discovery (§§2.740-2.744), and allowing for summary disposition (§2.749), is to ensure that only contested issues which involve disputes over material facts are allowed to be adjudicated at an evidentiary hearing. See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

This was clearly recognized by the Board at the prehearing conference of March 29, 1979. Contentions were admitted which barely satisfied the requirements of §2.714, with the clear understanding on the part of the Board and the parties that proper discovery was necessary to shape the contentions into issues suitable for litigation. (Tr. 3062-65) The Board took great pains to instruct Joint Intervenors how to frame full and meaningful responses to discovery requests, and specifically warned that if they did not adequately respond to discovery requests, the Board, on proper motion, would impose sanctions.*/ (Tr. 3123-35) Since contentions were being admitted liberally, pending refinement through the discovery process, the Board explicitly pointed out that summary disposition would be an available mechanism to be considered prior to hearing. (E.g., Tr. 3019, 3037)

A motion for summary disposition is the appropriate mechanism to resolve whether a questionable contention is suitable for litigation. The mere fact that a contention may be marginally acceptable for purposes of §2.714 does not mean

*/In fact, as noted (note p. 1, supra) the Board has dismissed the contentions of Consolidated Intervenors for failure to comply with discovery requests and default on a Board order compelling responses to such discovery requests.

that it cannot be tested under §2.749 to determine whether it gives rise to a "genuine issue [which must] be heard." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241 (1973); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 43, 425 n. 4 (1973); see, e.g., Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244-45 (1973). The purpose of summary disposition is not to prevent a litigant from a right of trial if in fact he has an issue worthy of adjudication (e.g., hard evidence to be offered at trial). Summary disposition is designed to test, in advance of trial, whether such evidence in fact exists. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975).

The provisions for summary disposition in §2.749 are analogous to those in Rule 56 of the Federal Rules of Civil Procedures. Consequently, in dealing with a motion under §2.749, Licensing Boards apply rules and standards similar to those applied by courts in ruling on motions for summary judgment under Rule 56. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). Thus, summary disposition on the pleadings may be granted where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no genuine issue of fact remains for trial. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-75-9, 1 NRC 242, 244 (1975); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, and 3), LBP-73-29, 6 AEC 682, 688 (1973).

It is the duty of the movant under §2.749 to demonstrate the absence of any genuine issue of material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2) ALAB-443, 6 NRC 741, 753-54 (1977); Pacific Gas & Electric

Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 NRC 159, 163 (1977).

A party who opposes a motion for summary disposition need not show that he will prevail on the issue at trial; he need show only that there exists a genuine issue for trial. River Bend at 246. However, a substantive factual showing must be made that a genuine issue exists which is worthy of adjudication. As one Board has stated:

To defeat summary disposition an opposing party must present facts in the proper form; conclusions of law will not suffice. The opposing party's facts must be material, substantial, not fanciful or merely suspicious. River Bend at 248 (emphasis added; footnotes omitted).

A party cannot be permitted to "go to trial on the vague supposition that something may turn up." River Bend at 248, citing 6 Moore's Federal Practice §56.15[3]. "One cannot avoid summary disposition 'on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact.'" River Bend at 248, citing 6 Moore's Federal Practice §56.15[4]. If all an opponent has is the hope that, on cross-examination, affidavits will contradict their respective affidavits this is mere speculation; and to permit trial on such basis would nullify the purpose of the summary disposition rule. See River Bend at 248, citing Orvis v. Brickman, 95 F. Supp. 605 (D.D.C. 1951).

In the argument and documentation attached hereto with respect to each contention for which summary disposition is sought, Licensee has fully met its burden of demonstrating the absence of any genuine issue of material fact. Not only has the Licensee provided in the affidavits an affirmative presentation with respect to the subject matter of each contention,

but it has painstakingly reviewed CFSP's remarks on such contentions at the prehearing conference of March 29, 1979 and CFSP's responses (limited as they might be) to interrogatories of the Licensee and NRC Staff and responded to any potentially relevant matters raised therein. In Licensee's view, the totality of information submitted by CFSP to date (including CFSP's failure to update previous responses to interrogatories, as would have been required if CFSP possessed new information) clearly indicates that the facts recited in the affidavits attached hereto are undisputed. In order to avoid the granting of the instant motion for summary disposition Joint Intervenor will need to present facts in the proper form,*/ which must be "material, substantial, not fanciful, or merely suspicious." This is a task which Joint Intervenor have not begun to meet to date.

In selecting the contentions for which summary disposition is sought, Licensee has not neglected the Board's indications at the prehearing conference that there are certain matters central to the basic safety issues in this proceeding that the Board itself would be interested in hearing and as to which, therefore, it would not be inclined to grant summary disposition regardless of the paucity of the Joint Intervenor's prospective case. Licensee has particularly reviewed the factual questions raised by the Board at the prehearing conference (Tr. 3165-79) as an indication of the types of matters the Board may prefer to have addressed at the hearing.

On the basis of that review, the contentions for which summary disposition is being sought have been carefully selected so as to avoid basic safety issues that the Board might prefer to have addressed at the hearing and to include only issues of limited scope that can be fully and appropriately dealt with in

*/What is required from Joint Intervenor is not mere allegations or denials, but sworn statements.

affidavits. One of the selected contentions (CFSP's No. 22 relating to the effect of the steel plate on displacement) generally deals with matters that were explored thoroughly at the hearing on interim operation and where similar analyses were performed with respect to the modified Complex. In the absence of any significant factual controversies raised by Joint Intervenors, there would appear to be little need to have Licensee's witnesses testify as to how the same general principles were applied with respect to the modified Complex. Other contentions (CFSP's No. 3, relating to Plant Staff review of work plans; and CFSP's No. 20, relating to drilling in walls) deal with matters of such limited scope -- and so peripheral to the main safety questions involved in this proceeding -- that they are particularly suitable to exhaustive treatment in affidavits. In the absence of any significant controverted facts, there appears to be little need to obtain oral testimony on these subjects either to further inform the Board or the public or to expand upon the record established by the affidavits. Finally, although one contention (CFSP's No. 17, relating to the hampering of operators in responding to an emergency) may appear to relate more closely to a safety issue, the affidavits make clear that the issue is essentially non-existent. Thus, again in the absence of significant controverted facts, a hearing on such contention would not appear to be warranted.

Conclusion

For the foregoing reasons, and in light of the supporting arguments and documentation attached hereto, Licensee respectfully requests that the Board grant summary disposition in Licensee's favor as a matter of law with respect to each of the contentions identified above.

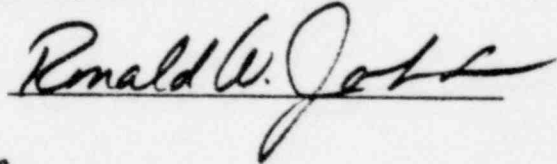
If, notwithstanding Licensee's presentation, the Board determines not to grant summary disposition with respect to one or more of the foregoing contentions, Licensee respectfully requests that, as to each such contention, the Board make such findings of facts as it deems appropriate and that the Board identify the remaining factual matters that it determines are still in controversy. Such action by the Board would be very helpful in refining the issues for hearing, minimizing unnecessary factual presentations and cross-examination and expediting the proceeding.

Respectfully submitted,

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By



Dated at *Portland, Oregon*
this *7th* day of *February* 1980