UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DAIRYLAND POWER COOPERATIVE	)	Docket No. 50-409
	)	(FTOL Proceeding)
(La Crosse Boiling Water Reactor)	)	

NRC STAFF MOTION FOR SUMMARY DISPOSITION

Full Term License Proceeding:
Environmental Issues

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June 6, 1980

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I. THE MOTION

Pursuant to 10 C.F.R. §2.749 of the Commission's Rules of Practice, the NRC Staff moves the Atomic Safety and Licensing Board for summary disposition of all contentions admitted to this proceeding. In support of its motion, the Staff will show by affidavit and discussion that no material issue of fact exists to require litigation of any contention and that summary disposition should be granted as a matter of law.

II. INTRODUCTION

Notice of opportunity for hearing indicating that the Commission was considering the application submitted by Dairyland Power Cooperative (DPC) for conversion of the provisional operating license[1/] for the La Crosse Boiling Water Reactor (LACBWR) to a full term license, was published on April 10, 1978. In response to the notice, the Coulee Region Energy Coalition (CREC) petitioned to intervene and was admitted as a party to the proceeding. In August of 1978 a prehearing

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1/ A provisional operating license was issued for LACBWR in 1967 by AEC as a demonstration plant. The plant has been operating since 1969.

conference was held in La Crosse, Wisconsin to consider contentions submitted by CREC. During the conference it was agreed by the Board and parties that a hearing to consider environmental issues raised in regard to the license conversion would be held separately and prior to a hearing to consider safety issues, since the safety evaluation for LACBWR resulting from the Systematic Evaluation Program (SEP)[2/] was not expected to issue in the near future. By Board Order of November 30, 1979, six CREC contentions concerning environmental matters were admitted for litigation, and a discovery schedule was established. The NRC Staff filed discovery requests on December 14, and, having received no response in the time allowed, filed a subsequent motion to compel answers on March 13, 1980.[3/] The motion was granted by the Board's Order of April 4, 1980, a period of nearly four months from the date of the interrogatories.

On April 25, 1980 CREC filed a partial response to the Staff interrogatories.[4/] The response was not filed under oath or affirmation as required by 10 C.F.R. §2.740b(b). Only fifteen of the twenty-six interrogatories were answered, and four answers were unresponsive.[5/] Thus, no response at all was provided for

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2/ The SEP was initiated by the Staff in 1976 as a project to review the oldest operating nuclear plants in light of the most recent safety standards developed by the Commission. Safety evaluations for all the plants in the SEP were previously issued by the Staff at the time of issuance of the original license for each plant.

3/ The discovery schedule established by the Board's Order of November 30, 1979 was extremely liberal, allowing approximately forty-five days for filing responses to first round interrogatories.

4/ See "Intervenors' Response to Staff Interrogatories," served April 25, 1980.

5/ See CREC responses 5, 6, 13, and 14.

eleven interrogatories in contravention of the Board's Order. Those responses which are provided consist of the personal opinion of the two members of CREC who wrote the responses and no reference was made to possession of any evidence whatsoever with which the Intervenor could support any contention in an adjudicatory hearing.

III. 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 C.F.R. §2.749(d).

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. 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); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973).

The Commission's rule authorizing summary disposition is analagous to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974); Gulf States

Utilities Co. (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 878 (1974), 6 Moore's Federal Practice, p. 56-21 (2d ed. 1976); Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977).

In Federal practice, Rule 56 authorizes summary judgment only where it is quite clear what the truth is and where no genuine issues remain for trial. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). And the record will be viewed in the light most favorable to the party opposing the motion. Poller v. CBS, supra, at 473; Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963). The Commission follows these same standards in considering summary disposition motions. Perry, ALAB-443, supra at 754; Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 879 (1974). And the burden of proof lies upon the movant for summary disposition who must demonstrate the absence of any genuine issue of material fact. Adickes v. Kress and Co., 398 U.S. 144, 157 (1970); Perry, ALAB-443, supra, at 753; 10 C.F.R. §2.732.

However, where no evidence exists to support a claim asserted, it is appropriate to promptly dispose of a case without a formal hearing. 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. Prairie Island, CLI-73-12, supra at 242. This obligation of intervenors is reflected in 10 C.F.R. §2.749(b) which states therein:

> When 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.

As the Supreme Court has pointed out, Rule 56 does not permit plaintiffs to get to a jury on the basis of the allegations in the complaints coupled with the hope that something can be developed at trial in the way of evidence to support the allegations. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-290 (1968). Additionally, as stated by another court, a plaintiff is not allowed to defeat a motion for summary disposition on the hope that on cross-examination the defendants will contradict their respective affidavits. This is purely speculative and to permit trial would nullify the purpose of Rule 56 which provides summary judgment as a means of putting an end to useless and expensive litigation where no genuine issues exist. Orvis v. Brickman, 95 F. Supp. 605, 607 (1951) aff'd 196 F.2d 762 (D.C. Cir. 1952).

To defeat summary disposition an opposing party must present material, substantial facts to show that an issue exists. Conclusions alone will not suffice. River Bend, LBP-75-10, supra at 248. Perry, ALAB-443, supra, at 754. Further, if the statement of material facts required by 10 C.F.R. §2.749(a) is unopposed, the uncontroverted facts are deemed to be admitted. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit No. 1), LBP-77-45, 6 NRC 159, 163 (1977).

The Staff believes that even when the following affidavits and discussions concerning each contention are viewed most favorably in support of the contentions, that it is clear that no genuine issue of material fact exists to warrant litigation of any contention, and that summary disposition should be granted on the basis of the pleadings.

B. THE CONTENTIONS

CONTENTIONS 2A AND 2B

2A. CREC contends that the excessive off-gas emissions from LACBWR are inimical to public health and safety, and fail to comply with the restrictions set forth in 10 C.F.R. Part 50, Appendix I.

2B. CREC contends that the excessive off-gas levels at LACBWR are inimical to the health and safety of plant employees, and fail to comply with the restrictions set forth in 10 C.F.R. Part 20.

This two part contention rests on the assertion that the off-gas emissions from LACBWR are "excessive" and violate the Commission's regulations, but as shown by the Final Environmental Statement,[6/] the off-gas emissions from the plant are well within the limits of both Appendix I of 10 C.F.R. Part 50 and 10 C.F.R. Part 20 and thus cannot be termed "excessive." See FES §3.6.3; §5.5.2 and §5.5.3.

Inquiries posed by Staff interrogatories 2-6 elicited only unresponsive answers from the Intervenor. CREC response number 5 answers a question

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6/ Final Environmental Statement related to operation of La Crosse Boiling Water Reactor, NUREG-0191, April, 1980.

with a question, while response number 6 makes vague reference to a discussion of occupational doses presented at a previous hearing which concerned need-for-power, and is unintelligible to Staff. Thus, no explanation or basis for the allegation of "excessive" off-gas emissions has been provided in support of or to clarify this contention, and apparently the Intervenor possesses no evidence to present at hearing on this assertion.

Dr. Branagan's attached affidavit at pp. 2-3 sets out the radiological release limits of 10 C.F.R. §50, Appendix I and clearly shows that the off-gas emissions from LACBWR are limited to below the levels required, since the noble gases released are less than 75% of the design objectives of Appendix I and the radioiodine and particulate releases are less than one-fifth of the Appendix I objective.

Dr. Nehemias, by his attached affidavit, on page 2 explains the requirements of 10 C.F.R. §20.101 (radiation dose limits) and §20.103 (airborne radioactive material exposure limits) and shows that the occupational exposure record at LACBWR for eleven years has been in compliance with Part 20, except for one incident. Further, Dr. Nehemias explains (p. 3) that since the off-gas emissions from LACBWR result in minimal doses on site, and the plant employees are not exposed to these emissions for significant times, that the emissions could not result in overexposures.

Dr. Branagan's estimate of annual doses from LACBWR noble gas releases (5.6 mrad-gamma; 3.8 mrad-beta; 3.7 mrem total body and 7.4 mrem to skin) shows compliance with Appendix I limits of 10 mrad, 20 mrad, 5 mrem and 15 mrem for the respective types of doses, while the highest radioiodine and particulate dose estimate of 2.2 mrem to the thyroid compares quite favorably to the Appendix I limit of 15 mrem to any organ. These estimated doses are not of the significance to support a description of "excessive." Dr. Nehemias points out, in addition, that the dose measured at the monitor nearest the stack is 20 mrem per quarter in order to demonstrate that off-gas emissions are not "excessive" or likely to cause overexposures of plant personnel in violation of 10 C.F.R. Part 20.

It is clear from the affidavits of Dr. Branagan and Dr. Nehemias; the analysis provided in Chapters 3 and 5 of the Final Environmental Statement; and the failure of the Intervenor to provide any evidentiary basis by response to interrogatories concerning these contentions, that there is no issue of material fact which could be litigated. Therefore, the Staff submits that Contentions 2A and 2B should be dismissed as a matter of law.

CONTENTION 8

CREC contends that LACBWR's ra ogical environmental monitoring program is inadequate in terms of

a) the methodology of the testing

b) the size and distribution of the sample, and

c) the frequency of the sampling, in light of the off-gas levels, the geography of the area to the east of the plant, and the fact that the area is primarily a dairy region.

The attached affidavit of Dr. Branagan demonstrates clearly that the radiological environmental monitoring program for LACBWR is wholly adequate in terms of the testing methods, and the sample sizes, distribution and frequency. No response to any Staff interrogatory asking for bases for the allegations in this contention was provided by the Intervenor.

The sample size consists of thirty-one locations distributed in an area encompassing eight miles north of the plant to five miles south (Enclosure 3), while the frequency of sampling varies from once a week for radioiodine and particulates at seven locations encircling the plant (Table 1 and Enclosure 3) to annually, depending on the type of sample in question (i.e., food products are tested at time of harvest: Table 1). Milk samples are collected every 15 days when animals are at pasture (Table 1). The method of testing samples is described in Table 1, and includes I-131 analysis; gamma isotopic analysis; tritium analysis; and gross beta analysis. (Affidavit of Dr. Branagan).

On page 4 of Dr. Branagan's affidavit, the guidelines of the Branch Technical Position[7/] (BTP 4.8, Rev. 1) on radiological environmental monitoring are compared to the monitoring program for LACBWR provided in Table 1 (pp. 7-10). This comparison shows clearly that the LACBWR monitoring program complies with the Branch Position. Further, Dr. Branagan includes the Branch Technical Position to demonstrate that the guidelines therein are comprehensive and entirely adequate to provide assurance of minimal environmental impacts. Enclosure 3 to Dr. Branagan's affidavit shows that the monitoring sample locations surrounding LACBWR are extensive. In addition to compliance with BTP 4.8 Rev. 1 directives

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7/ Regulatory Guide 4.8, Environmental Technical Specifications for Nuclear Power Plants, issued for comment in December, 1975, is being revised. The Radiological Assessment Branch issued a Branch Position on the radiological portion of the environmental monitoring program in March, 1978, and Revision 1 to this position issued November, 1979.

concerning methodology of testing, sample size, distribution and frequency, Dr. Branagan points out on page 5 that DPC participates in an Interlaboratory Comparison Program to assure accurate sample measurements.

Based on the clear demonstration that the environmental monitoring program for LACBWR complies with all guidelines of the Branch Technical Position for acceptable programs, and the showing that the BTP entails an adequate program, the Staff submits that there is no genuine issue of material fact regarding this contention and that the Board should dismiss it as a matter of law.

CONTENTION 9

> CREC contends that the exposure of the population to the combined and synergistic health effects of the airborne effluents released by LACBWR and the Genoa 3 coal plant is inimical to public health and safety.

The basis provided by the Intervenors to support this contention was a reference to an article which the Staff has been unable to locate and for which the Intervenor has refused to provide information. See: letter from Mark Burmaster to Kevin Gallen, Esq. (September 18, 1978) and CREC response to Staff Interrogatories dated April 25, 1980. As shown by the affidavit of Dr. Gotchy, as well as the Intervenor response to Staff interrogatory number thirteen, the concept of synergistic health effects is merely a speculation since no evidence exists to support any conclusion on the hypothesis.

The National Environmental Policy Act of 1969, 42 U.S.C. §4332 (1970) is subject to a rule of reason and need not include all theoretically possible environmental effects arising out of an action. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978) citing Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1011-12 (1973); Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 358 (1974); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Unit No. 2), ALAB-254, 8 AEC 1184, 1191-92 (1975); N.R.D.C. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); EDF v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972).

Intervenor response number 13 to a Staff interrogatory inquiring about evidence to support this contention states:

> It is our opinion that very little research has been done on coal-nuclear synergisms and their effects and the burden of proof lies with the promoters and owners of the nuclear machines.

This response seems to admit to the speculative nature of this contention and concedes the lack of evidence available with which one could reach a conclusion. Furthermore, Dr. Gotchy states that in his opinion the radiological and toxic impacts from a mixture of the coal and nuclear plumes would be additive and not synergistic. (Gotchy Affidavit, p. 4).

Therefore, since the Intervenor admits to the hypothetical nature of this contention, and since, in Dr. Gotchy's opinion, there is no scientific basis to support the contention, there is no issue of material fact which can be litigated concerning the contention and it should be dismissed.

CONTENTION 19

CREC contends that the economic cost-benefit balance does not favor issuance of a full-term operating license due to LACBWR's small size, relative obsolescence and retrofitting requirements; its low operating efficiency as evidenced by low megawatt hours of cumulative output, low unit capacity factor, and substantial downtime; the costs of spent fuel storage; the rising costs of fuel and maintenance; and the eventual costs of decommissioning.

The inherent fallacy of this contention is illustrated by the long line of Commission decisions which state that solely economic considerations are not authorized by the Atomic Energy Act or the National Environmental Policy Act (NEPA). Since the essential concept of this contention is a question only of the expense of the power production by LACBWR, the contention is outside the jurisdiction of the Commission under either of the two statutes named above. The purpose of NEPA is to assure that federal agencies consider the environmental impacts of proposed actions and possible alternatives to the action. See e.g. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 527-528 (1977), Cf. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 778 (1978). If no environmentally preferable alternatives are suggested or apparent, neither the Atomic Energy Act nor NEPA requires consideration of less expensive methods of energy production. In sum, the Commission has not been given the responsibility for assessing whether a proposed nuclear plant is the most financially advantageous way for a utility to provide needed power. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 163 (1978); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-244, 8 AEC 857, 862 (1974); Illinois Power Co. (Clinton Power Station.

Units 1 & 2), ALAB-340, 4 NRC 27, 48 (1976); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92, 102-03 (1977).

Once need for the plant is established, for which no environmentally preferable means of power production exists, and it is shown that all cost-beneficial environmentally protective equipment has been employed, the final cost-benefit balance will nearly always favor the plant. Midland ALAB-458, at 169.

The concerns of low operating efficiency, the small capacity of the plant, costs of spent fuel storage, fuel and maintenance, all relate to the economics of the plant and not to environmental concerns which is the object of NEPA. As to decommissioning costs, these obviously will be incurred regardless of whether or not a full term license is issued.

Thus it is clear that even without addressing the various reasons that the Intervenors assert as adverse economic factors, the contention is invalid as a matter of law, and should be dismissed because it is outside the jurisdiction of the Commission.

As Dr. Nash explains in the attached affidavit, even consideration on a purely economic basis of continued operation of LACBWR taking into account all the costs listed in the contention weighs in favor of the issuance of the full term license, as shown in Table 8.1-1 (p. 8-3) in the Final Environmental Statement. There, it is demonstrated that there is an economic benefit to continued operation of LACBWR even at 40% capacity, compared to the costs of any other alternatives,

since an additional expense of two million dollars would be incurred if replacement power were purchased. A savings of more than ten million dollars is realized by operation of LACBWR at 50% power. In this case of an operating plant, where no environmental impacts beyond those already incurred are proposed by issuance of a full term license, the benefit of continuing power production weighs heavily in favor of the plant's operation when compared to the minimal environmental cost of the routine releases from the plant (FES Chapter 3).

For the reasons above cited, the Staff submits that there is neither legal nor factual basis to support litigation of this contention and that it should be dismissed by the Board.

CONTENTION 22

> CREC contends that DPC has not sufficiently promoted energy conservation programs to decrease electrical demand, such as flat rate structure, higher peak usage rates, and elimination of electrical usage promotion, which would eliminate the need for LACBWR, as the least cost-effective unit in the DPC system.

The following affidavit of Dr. Feld on pages 2-3, shows that the energy conservation measures listed in this contention, i.e., flat rate structure, higher peak usage rates, and elimination of electrical usage promotion, are already in use by Dairyland Power Cooperative, with the additional (involuntary) economic incentive of recent inflationary prices, but that even with these conservation forces in effect, that the need for LACBWR has not been eliminated. Thus it is clear that the allegation made in Contention 22 is groundless and

not only unsupported, but contradicted by the facts. As the Commission has stated, the NEPA evaluation of alternatives is subject to a rule of reason and may well justify exclusion or but limited treatment of a suggested alternative. Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 540 (1977). Need-for-power issues are judged by the Commission according to the reasonableness of the forecast and consideration of the issue includes additional or replacement capacity. USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 77 (1976); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978). In the case of the allegation made in Contention 22, investigation into the facts of the matter shows clearly that the contention has no basis in fact. The response by CREC to Staff interrogatory 25 admits to the fact that the most effective means of energy conservation is high price; that high prices already exist; and that conservation is already in effect. As shown by Dr. Feld's explanation (p. 2) of the flat rate structure in use by DPC, small and large users of electricity incur comparable unit costs. Although the CREC response to interrogatory 26 from the Staff alleges that DPC advertisements and rate structure discriminate against small users of electricity, the basis given for this allegation in the response is that "The monthly REC newsletter chastises conservationists and environmentalists while promoting the 'live better electrically' motto." This basis is insufficient to give credence to the allegation.

Dr. Feld explains that two-thirds of the DPC cooperatives have initiated off-peak rates (p. 3); that DPC eliminated promotional advertising in 1971 and is

presently directing advertising at conservation (p. 3); that DPC cooperatives can participate in a load control system designed to control electric water and space heat (p. 3); and that in spite of these specific conservation efforts, growth of demand on the DPC system will occur (p. 4).

As pointed out by Dr. Feld on pages 3 and 4 of his affidavit, the econometric forecasting model used to ascertain projected power needs in the DPC service area incorporates price-induced conservation and is itself conservative, since it does not account for the higher rural demand growth, but that nevertheless, the model forecasts a need for the power from LACBWR.

The Staff submits that the affidavit of Dr. Feld and the Intervenor's response to interrogatories show that no issue of fact exists to support Contention 22 and that it should be summarily dismissed.

IV. CONCLUSION

For the reasons set out above concerning each contention, the Staff believes that the pleadings and discovery documents filed in this proceeding as well as the affidavits submitted show that there is no genuine issue of material fact supporting any of the contentions submitted by the Intervenor CREC. Consequently, the Staff believes that the burden of proof has been met and that the Board should grant summary disposition of Contentions 2A, 2B, 8, 9,

19, and 22 and, accordingly, terminate the proceeding for consideration of environmental issues.

Respectfully submitted,

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of June, 1980