

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY	)	Docket No. 50-466
	)	
(Allens Creek Nuclear Generating	)	
Station, Unit 1)	)	

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION

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 an order granting summary disposition of the consolidated contention (Cumings 9, Griffith 1, Johnston 1 and Lemmer 5) which was reworded by the Board and admitted pursuant to its Order dated September 26, 1980. In accordance with that Order, discovery was to be completed by no later than October 27, 1980.<sup>1/</sup> In support of its motion, the Staff will demonstrate by affidavit and discussion that no material issue of fact exists which would require litigation of this contention and that summary disposition should be granted as a matter of law.

<sup>1/</sup> Although Staff did not conduct discovery on this issue, Applicant served its first set of interrogatories on October 22, 1980. The consolidated intervenors did not file any responses to these interrogatories and, consequently, Applicant filed a motion to compel on November 10, 1980.

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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 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); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980); 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), Cleveland Electric Illuminating Co. et al.

(Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977).  
6 Moore's Federal Practice, p. 56-21 (2d ed. 1976).

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. 626, 627 (1944); Poller v. Columbia Broadcasting Systems, 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, 89 (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 exists. 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. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). 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 affidavit and discussion concerning this contention is viewed in a light most favorable to the Intervenor, it is nevertheless clear that no genuine issue of material fact exists to warrant litigation, and that summary disposition should be granted on the basis of the pleadings.

B. THE CONTENTION

The admitted consolidated contention reads as follows:

The health effects\* of low level radiation emitted during normal operation of the plant, even though meeting, the "as low as is reasonably achievable" standards of Appendix I, if included in the NEPA balancing of costs and benefits, would alter this balance to the extent that costs would outweigh benefits.

\*Health effects include impacts upon humans, animals, and plants.

The attached affidavit of Reginald L. Gotchy Concerning the NEPA Impacts of Low Level Radiation indicates that based on current health effects models, the consideration of Appendix I health risks in the NEPA cost-benefit balance results in such a de minimus impact that it would not alter the balance. The affidavit indicates that the NRC health effects models are based on the best scientific evidence available and Dr. Gotchy concludes that the potential health risks derived from these models and associated with LWRs operating in accordance with Appendix I design objectives, are insignificant relative to naturally occurring events.

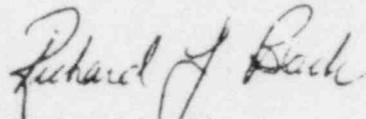
The NRC Staff submits that the undisputed facts set forth in the Gotchy affidavit refute the underlying basis for this contention and, accordingly, no genuine issue of fact remains to be heard.

III.

CONCLUSION

For the reasons set forth above, the Staff believes that the affidavit submitted with this motion, and the absence of any other facts in support of the contention, demonstrate that there is no serious dispute with respect to this issue and that no genuine issue of material fact remains to be litigated. Accordingly, we submit that this contention should be summarily dismissed as a matter of law.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard L. Black".

Richard L. Black  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 26th day of November, 1980