

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

10/7/81

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
UNION ELECTRIC COMPANY ) Docket No. 50-483 OL  
(Callaway Plant, Unit 1 )

NRC STAFF MOTION FOR SUMMARY DISPOSITION  
OF JOINT INTERVENORS' CONTENTION I-D

I. INTRODUCTION

In the Special Prehearing Conference Order of April 21, 1981, the Licensing Board admitted Joint Intervenors' Contention I-D which alleged under the heading of Failure of the Quality Assurance Program:

D. Concrete Cover

There exist many areas where concrete coverage of reinforcing bars in concrete walls and floors at the Callaway Plant does not adhere to requirements. Bechtel Power Corporation's interpretation of the cover requirements was that minimum cover requirements could be reduced by one-third, but the NRC stated in a meeting between NRC, UE, Bechtel, and Danish inter-national personnel on January 23, 1978, that no reduction of the two-inch cover minimum is acceptable. However, the NRC indicated that it would be acceptable "if the cover requirements were fully met in the area of the sixth lift, utilizing the fifth lift as a transition area." (See, NRC Report No. 50-483/77-11, pp. 10-11).

Some examples of nonadherence to concrete cover requirements are as follows:

1. At 340 degrees azimuth, vertical reinforcement bars and supporting bars for the horizontal tendon sheathing in the 3rd lift of the reactor containment wall had concrete cover "less than that specified by NRC requirements, but within the concrete cover requirements as interpreted by licenses and contractors." (See, NRC Report No. 50-483/77-11, pp. 4 and 9-11).

2. NRC inspectors observed the preplacement preparation of the fourth lift of the exterior wall of

the Reactor Containment Building, finding 14 unacceptable items, in half of which concrete cover was less than the 2 inch minimum required or more than the 9.6 inch maximum required. These items include instances where the concrete cover is as small as 5/8 of an inch (at azimuth 210 degrees) and as great as 12 inches (at azimuth 200 degrees). Some items were corrected, and the rest were within the range judged to be acceptable below the sixth lift because of the one-third placement tolerance. (See, NRC Report No. 50-483/78-01, pp. 9-11).

The NRC Staff asserts that Contention I-D presents no genuine issue of material fact and that the Staff is entitled to a decision in its favor 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 I-D raises no genuine issue of material fact. Attached to this motion is the Affidavit of Eugene J. Gallagher 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 C.F.R. § 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.<sup>1/</sup> Thus, in Adickes v.

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<sup>1/</sup> Alabama Power Company (Joseph M. Farley, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

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."<sup>2/</sup> To meet this burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact.<sup>3/</sup> To further this goal, the summary disposition rule provides that all material facts, set out in the statement mandatorily accompanying summary disposition motions, will be deemed to be admitted unless controverted by the opposing party. 10 C.F.R. § 2.749(a).

Any other party may serve an answer supporting or opposing the motion for summary disposition. 10 C.F.R. § 2.749(a). Attached to a motion opposing summary disposition must be a separate, short, and concise statement of the material fact as to which it is contended that there exists a genuine issue to be heard. 10 C.F.R. § 2.749(a). A material fact is one which may affect the outcome of the litigation.<sup>4/</sup> The opposing party need not show that it would prevail on the issues, but only that there are genuine material issues to be tried.<sup>5/</sup> Furthermore, the record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion.<sup>6/</sup>

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<sup>2/</sup> See also Cleveland Electric Illuminating Co. (Perry, Units 1 and 2), ALAB-433, 6 NRC 741, 752-54 (1977).

<sup>3/</sup> Poller v. Columbia Broadcasting Co., 368 U.S. 464, 468 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

<sup>4/</sup> Mutual Fund Investors, Inc. v. Putnam Mgt. Co., 533 F.2d 620, 624 (9th Cir. 1977).

<sup>5/</sup> American Manufacturers Mut. Ins. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1976).

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

Finally, the proponent of a motion for summary 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 contradicting the conclusions reached in documents submitted in support of the motion.<sup>7/</sup>

In a recent Statement of Policy, the Commission emphasized the availability of summary disposition in appropriate cases, as a means of expediting the hearing process. In Statement of Policy on Conduct of Licensing Proceedings, 46 Fed. Reg. 28533 (May 27, 1981), the Commission stated as follows:

In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

46 Fed. Reg. at 28535. As was stated previously by the Appeal Board, the summary disposition rule provides "an efficacious means of avoiding unnecessary and possibly time consuming hearings on demonstrably insubstantial issues." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542, 550 (1980). As the Appeal Board noted recently, a hearing on each issue raised "is not inevitable," but "wholly depends upon the ability of the intervenors

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<sup>7/</sup> 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).

to demonstrate the existence of a genuine issue of material fact...." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC \_\_\_\_ (Sept. 11, 1981) (slip. op., at 4). A party cannot avoid summary disposition "'on the mere hope that at trial he will be able to discredit movant's evidence,'" nor may a party "'go to trial on the vague supposition that something may turn up.'" Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975), quoting 6 Moore's Federal Practice § 56.15[3] and [4]

### III. ARGUMENT

Contention I-D asserts that there are many areas at the plant where concrete coverage of reinforcing bars in concrete walls and floors does not adhere to requirements. The contention specifically identifies the third and fourth lifts of the reactor containment wall as areas where concrete cover requirements were not met. For the reasons set forth below, the Staff concludes that Contention I-D fails to raise any genuine issue of material fact. The Staff further concludes the attached Affidavit of Eugene J. Gallagher 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.

ASME Code requirements for placement of concrete cover of reinforcement steel specify a minimum cover of two inches and a maximum cover of one-fifth the thickness of the concrete section. (ASME Sections CC-3533.1 and CC-3534 of Appendix C to BC-TOP-5A). There is no dispute that these cover requirements were not met in certain areas below the sixth lift of

the containment wall. At the time of the placements of the first three lifts, Applicant and its contractors interpreted ASME Section III, Division 2, Concrete Reactor Vessels and Containments, as allowing a one-third reduction of coverage requirements. This matter was brought to the Staff's attention, and a meeting was held between members of the Staff and Applicant's representatives. Following this meeting, the Staff was in frequent correspondence with the Applicant on this matter. It was the Staff's position that the ASME code allowed no reduction of the cover, and that the Applicant could use the fifth lift as a transition stage but would have to meet both the minimum and the maximum requirements by the sixth lift. The Staff did, however, indicate that exceptions to the maximum requirement, where necessary, could be sought. (Attachment 3, Report 78-01, Enclosure 1, p. 8). The applicant accepted the Staff view and was in compliance with the two inch minimum at all places above the fifth lift. Two exceptions were sought to the maximum requirement and, after appropriate Staff review, were granted. (Gallagher Affidavit at 3; Attachments 7 and 8). The Staff stresses that Applicant's failure to adhere to the ASME cover requirements below the sixth lift was not the result of sloppy workmanship or quality assurance, but was due to their interpretation of the relevant section of the ASME code.

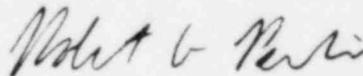
Intervenors do not allege that the use of a one-third reduction below the sixth lift presents a safety problem. The minimum cover is designed to protect steel reinforcement bars from exposure. The maximum cover is designed to prevent cracking under loading conditions. In the Staff's view, the cover in place below the sixth lift will adequately perform its intended function and will not adversely affect the

structural integrity of the reactor building over the life of the plant (Gallagher Affidavit at 4). Moreover, the Staff does not believe the existing concrete cover below the sixth lift requires any corrective action. (Gallagher Affidavit at 4).

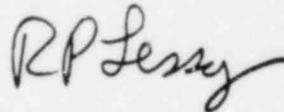
IV. CONCLUSION

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 reduction of concrete cover requirements below the sixth lift of the containment building. Thus, the Staff concludes that Summary Disposition of Contention I-D should be granted in its favor as a matter of law in accordance with 10 C.F.R. § 2.749.

Respectfully submitted,



Robert G. Perlis  
Counsel for NRC Staff



Roy P. Lessy  
Deputy Assistant Chief  
Hearing Counsel

Dated at Bethesda, Maryland  
this 7th day of October, 1981.

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

1. At the time of the concrete placements of the first three lifts of the reactor containment wall, Applicant and its contractors interpreted the applicable ASME code as allowing for a one-third reduction in placement tolerance for concrete cover of reinforced steel.

2. Before concrete for the fourth lift was poured, members of the NRC Staff met with representatives of the Applicant to discuss Applicant's interpretation of the cover requirements.

3. As a result of this meeting and the correspondence which followed, Applicant agreed to be in compliance with the two inch cover minimum by the sixth lift, using the fifth lift as a transition stage.

4. Applicant also agreed to comply with maximum cover requirements, except that a provision was made allowing Applicant to request exceptions to the maximum where necessary.

5. Concrete pours after the sixth lift adhered to the two-inch minimum requirement in all places.

6. Two exceptions to the maximum requirement were granted by the NRC based on a case-by-case evaluation.

7. The application of the one-third reduction in cover requirements, where used, does not jeopardize the safe operation of the plant.

8. Because the instances of reduction of concrete coverage resulted from Applicant's interpretation of the applicable ASME code, and not from any construction defects, this does not demonstrate a cognizable issue with respect to the Quality Assurance Program.