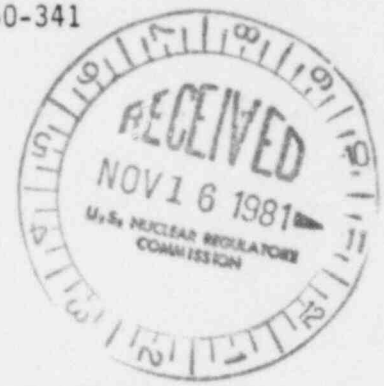
11/16/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DETROIT EDISON COMPANY	)	Docket No. 50-341
	)	
(Enrico Fermi Atomic Power Plant, Unit 2)	)	



NRC STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION 5

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 Contention 5 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 Contention 5 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 by Detroit Edison Company (DECo) for an operating license for the Enrico Fermi Atomic Power Plant, Unit 2, (Fermi-2) was published in the Federal Register on September 11, 1978. In response to that notice, the Citizens for Employment and Energy (CEE) submitted a petition to intervene in the proceeding and was admitted as a party January 2, 1979. On March 21, 1979 several contentions submitted by CEE were admitted by the Board for litigation. Discovery began on

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March 21, 1979 and concluded in March, 1980, except for a brief discovery period after the recent issuance of Staff safety and environmental reports during which time no discovery requests were filed. Responses by CEE to Applicant's interrogatories to the Intervenor produced no information indicating that CEE could provide any evidence which would raise a material issue of fact requiring a hearing for Contention 5 but that the contention rests merely on the insupportable opinion of the Intervenor. Therefore, the Staff believes it appropriate that Contention 5 be dismissed because no issue of fact underlies this contention.

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).

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. The Appeal Board has stated that 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 to demonstrate the existence of a genuine issue of material fact ...." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 2), ALAB-654, 14 NRC ____ (Sept. 11, 1981) (slip op., at 4).

The Commission's rule authorizing summary disposition is analogous 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 affidavit and discussion concerning the contention are viewed most favorably in support of the contention, that it is clear that no genuine issue of material fact exists to warrant litigation of the contention, and that summary disposition should be granted on the basis of the pleadings.

B. THE CONTENTION

Contention 5 states:

> The design of the radiation monitoring system is insufficient and incomplete as specified below to adequately monitor radiation releases (a) to demonstrate, during normal operation, conformance with Part 20 and Appendix I to 10 CFR Part 50 and (b) to implement the offsite protective actions following accidents set forth in the Applicant's emergency plan. The deficiencies of the radiation monitoring system are:
>
> (a) There is no continuous monitoring system on the lake (for air and water) that can be read remotely; and
>
> (b) There is no continuous monitoring system at the site boundary that can be read remotely.

The contention essentially limits the issue raised to the allegation that remote-reading monitors are necessary to provide compliance with 10 C.F.R. Part 20 and Part 50, Appendix I regulations concerning radiological monitoring, and that, since DECo has not installed such monitors, the radiological monitoring system does not comply with the Commission's regulations. Such is not the case.

Section 20.201(b) of 10 CFR requires each licensee to make surveys as necessary to comply with Part 20 regulations; and § 20.106(c)(6) requires a description of environmental monitoring equipment and procedures to determine concentrations of radionuclides in unrestricted areas.

Section IV.B. of Appendix I of Part 50 states:

> B. The licensee shall establish an appropriate surveillance and monitoring program to:
>
> 1. Provide data on quantities of radioactive material released in liquid and gaseous effluents to assure that the provisions of paragraph A 1/ of this section are met;
>
> 2. Provide data on measurable levels of radiation and radioactive materials in the environment to evaluate the relationship between quantities of radioactive material released in effluents and resultant radiation doses to individuals from principal pathways of exposure; and
>
> 3. Identify changes in the use of unrestricted areas (e.g. for agricultural purposes) to permit modifications in monitoring programs for evaluating doses to individuals from principal pathways of exposure.

Clearly, neither of these regulations specifies a remotely-read monitoring system.

As shown by the attached affidavit of Dr. Wayne Meinke, the radiological monitoring system installed at the Fermi-2 site and surrounding area is sufficient to determine radiation levels offsite and to comply with the Commission's regulations in Parts 20 and 50. As pointed out by Dr. Meinke at ¶ 6, the first stage of radiological monitoring takes place at the plant itself, so that the offsite monitors function as a verification of the plant monitors' recordings. (The plant monitoring system is described in Section 11.3 of the Safety Evaluation Report). Further, as explained by Dr. Meinke, pp. 3-6, the monitoring stations provided by the Applicant offsite are considerable and comprehensive, including monitors and sampling stations at Lake Erie and

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1/ Paragraph A speaks to exposure limits.

the site boundary. Additionally, as pointed out by Dr. Meinke, the benefit of remote reading monitors is not a demonstrated fact. (Meinke at p. 5, ¶ 12).

The Final Environmental Statement (FES), Section 5.2.5 describes the preoperational radiological environmental monitoring requirements and Tables 5.1 and 5.1a list the types and number of monitoring and/or sampling stations. These are extensive and comply with the Commission's requirements (Meinke at ¶ 13). Section 5.3.4 of the FES explains the similarity of the pre- and post- operational radiological monitoring programs. Section 22, II.B.3 of the SER describes the post-accident monitoring capability requirements of NUREG-0737, II.B.3 which must be fulfilled by the Applicant prior to issuance of the full power license. Additionally, the emergency plan requirement in 10 C.F.R. § 50.47 references NUREG-0654 which requires, in Section 2.I.9, that licensees provide offsite teams of employees to assess by direct and immediate measuring equipment all radiological releases from the plant in case of accident.

Intervenor's responses of July 6 and August 2, 1979 to Applicant's interrogatory number 5 simply state that "CEE contends that the lack of provision for continuous monitoring that can be read remotely does not conform with the general criteria" (in 10 C.F.R. Parts 20 and 50 regarding radiation monitoring) and, also, "We feel that the lack of a continuous monitoring system on the lake and at the site boundary does not meet the requirements of these two (Part 20 and 50, Appendix I) regulations." No attempt is made to demonstrate by citing any part of these regulations that remotely read monitors are required, nor to

explain how the many monitoring and sampling stations and systems in plant and offsite are insufficient to give adequate information about normal and accidental plant emissions, nor to delineate the benefit of remotely read monitors beyond the monitoring systems in effect at Fermi-2. Consequently, it appears that the contention consists only of a speculative opinion of the Intervenor and could not be supported with credible evidence at hearing.

Based upon the above demonstration that remotely read monitors are not required by the radiological environmental monitoring regulations in 10 C.F.R. Part 20 and Part 50, Appendix I, and the attestation of the Staff affiant, Dr. Meinke, whose responsibility it is to review Applicant's radiological environmental monitoring systems for compliance with the Commission's regulations, that the Applicant's system is comprehensive and adequate to comply with the Commission's regulations; and that remotely read monitors are of uncertain, if any, benefit, and that the Applicant's post-accident monitoring capability will be adequate to allow implementation of appropriate protective actions, the Staff submits that no issue of material fact exists concerning this contention and that the Staff's motion for summary disposition should be granted as a matter of law.

Respectfully submitted,

Colleen P. Woodhead

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of November, 1981

STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

1. The inplant monitoring system at Fermi-2 will provide the most significant information about normal and accident radiological releases.

2. The radiological environmental monitoring system around the Fermi-2 is a means of verifying the inplant monitoring.

3. Sufficient continuous offsite monitoring is provided by Detroit Edison Company at the site boundary and Lake Erie to verify the inplant monitoring of normal and accidental releases.

4. The offsite monitoring system at Fermi-2 is comprehensive and sufficient to provide information necessary to assure that normal effluents do not exceed Commission limits specified in 10 C.F.R. Parts 20 and 50, Appendix I and to supplement other inplant and offsite monitoring of accidental releases.

5. The radiological environmental (offsite) monitoring system at the Fermi-2 plant complies with the Commission's regulations in 10 C.F.R. Parts 20 and 50, Appendix I.

6. During accident conditions, additional direct monitors offsite will provide additional information about possible releases on which to base protective actions.

7. Sufficient accident monitoring capability is available at Fermi-2 to provide information necessary to determine appropriate protective actions.

8. Remotely-read radiological monitors would provide no substantial benefit beyond the offsite monitoring system at Fermi-2.