

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Docket Nos. STN 50-528
STN 50-529
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Affidavit demonstrate the absence of any genuine issues of material fact requiring adjudication and that the dismissal of Contention 6B is warranted as a matter of law.

Section II of this pleading discusses generally the law applicable to motions for summary disposition. Section III sets forth the Staff's reasons for concluding that there is no genuine issue of material fact raised by Contention 6B.

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. Because the Commission's summary disposition rule is analogous to Rule 56 of the Federal Rules of Civil Procedure (summary judgment), the Federal court decisions interpreting Rule 56 may be relied on for an understanding of the operation of the summary disposition rule.^{3/} In Adickes v. Kress & Co., a 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".^{3/} To meet this

^{2/} Alabama Power Company (Joseph M. Farley, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

^{3/} See also, Cleveland Electric Illuminating Co. (Perry, Units 1 and 2), ALAB-433, 6 NRC 741, 752-54 (1977).

burden, the movant must eliminate any real doubt as to the existence of any genuine issue of material fact.^{4/} 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). A material fact is one which may affect the outcome of the litigation.^{5/} The opposing party need not show that it would prevail on the issues but only that there are genuine material issues to be tried.^{6/} A party opposing the motion, however, may not rely on mere allegations, but instead must demonstrate by affidavit or otherwise that a genuine issue exists as to a material fact.^{7/} Furthermore, the record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion.^{8/} Finally, the proponent of a motion for

^{4/} Poller v. Columbia Broadcasting Co., 368 U.S. 464, 468 (1962);
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

^{5/} Mutual Fund Investors, Inc. v. Putnam Mgt. Co., 533 F.2d 620, 624 (9th Cir. 1977).

^{6/} American Manufacturers Mut. Inc. Co. v. American Broadcasting - Paramount Theaters, Inc., 388 F.2d 272, 280 (2d Cir. 1976).

^{7/} 10 C.F.R. § 2.749(b); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980).

^{8/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877 (1974).

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 controverting the conclusions reached in documents submitted in support of the motion.^{9/}

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. 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

9/ Cleveland Electric Illuminating Co., (Perry, Units 1 and 2), ALAB-443, 7 AEC 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. Reidel 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).

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 3), ALAB-654, 14 NRC 632 (1981). 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

A. Legal Requirements for Consideration of Unresolved Safety Issues

ATWS is an unresolved generic safety issue. The Appeal Board had outlined requirements for Staff review of unresolved generic safety issues. Compliance with these requirements allows an Applicant to commence construction or operation of a facility pending final resolution of the issue by the Commission. The Appeal Board in Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774-75 (1977), explained that the primary consideration regarding unresolved generic safety issues is whether the Staff review thereof is adequate. The Safety Evaluation Report (SER) is the principal Staff review document and each SER should contain a summary description of resolved generic safety issues that affect the facility. Specifically, the discussion should describe (1) the investigation program and its projected completion

date, (2) what, if any, interim measures have been taken, and (3) alternatives if the program fails to resolve the problem. See also Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978). The Staff's review of the ATWS issue has been completed in accordance with the criteria referenced in the above decisions. See SER, Appendix C and § 15.3.9.

Legal Precedent Regarding ATWS

Because it is an unresolved safety issue, ATWS has not often been litigated. However, there is precedent for disposing of ATWS based in part upon fulfillment of the Staff's interim requirements. The Appeal Board in Northern States Power Company (Monticello, Unit 1), ALAB-611, 12 NRC 301, 304 (1980), upheld the Licensing Board's substantive findings therein that the facility could continue to operate safely even though ATWS was an unresolved safety issue. The Appeal Board was satisfied with the Staff's affidavit which recounted the conclusions of pertinent Staff reports, recommendations for remedial measures, and the projected completion schedule for resolution of the issues. 10 NRC at 307. The Appeal Board quoted approvingly from the portion of the staff affidavit that outlined interim measures for Monticello and the conclusion that the facility can operate without "undue risk to the health and safety of the public" while the matter was under Commission review. Id. at 307-308. The propriety of the Licensing Board's conclusion about the ability of the plant to operate safely was further bolstered by the Applicants' affidavit which stated it had implemented the Staff approved design changes and almost all the recommended emergency operating procedures and

operator training outlined in the Staff's interim requirements. Id. at 308.

B. Conformance to Staff Interim Requirements

Ms. Hourihan asserts in her contention that the Applicant has not incorporated measures to mitigate the consequences of ATWS events. To the contrary, the SER attached affidavit of Mr. Hodges and the affidavit of Mr. Hartley for the Joint Applicants demonstrate that (1) interim requirements have been developed by the Staff and imposed on the Joint Applicants in this proceeding, and (2) the Joint Applicants have committed to submit for Staff approval the specific procedures for their facility at least 60 days prior to fuel load.

ATWS has been the subject of numerous Staff reports including the "Technical Report on Anticipated Transients Without Scram for Water-Cooled Power Reactors" (WASH-1270, dated September 1973 and Volumes 1 through 4 of "Anticipated Transients Without Scram for Light Water Reactors" (NUREG-0460), dated April 1978 (Volumes 1 and 2), December 1978 and March 1980 respectively. In Volume 3 of NUREG-0460, the Staff reaffirmed its earlier position that the "likelihood of severe consequences arising from an ATWS event is acceptably small and presently there is no undue risk to the public from ATWS. Volume 3 NUREG-0460, at 42-43. This conclusion is based on engineering judgment that considers: (a) the estimated arrival rate of anticipated transients with potentially severe consequences in the event of scram failure; (b) the favorable

operating experience with current scram systems; and (c) the limited number of operating reactors. Id. at 43. Nonetheless, to prevent the potential for severe ATWS events from increasing in the future, the Staff Report concluded that corrective measures were needed. Id. Volume 4 of NUREG-0460 contains the Staff's final recommendations regarding necessary design changes for ATWS mitigation and ATWS prevention.

As stated above, the Staff's interim requirements pending final Commission resolution of this issue, to which the Joint Applicants are committed, include (1) development of emergency operating procedures to recognize and handle an ATWS event and (2) the training of operators to take such actions to respond to an ATWS event. SER § 15.3.9. In that regard, the Commission's regulations generally require all applicants to train operators in the use of all procedures for normal and abnormal operations, including procedures to recognize and handle ATWS events. To become licensed operators, candidates must pass a written exam and operating test. 10 C.F.R. § 55.11. In order to have their licenses reviewed, licensed operators must show their continued competence every two years by reexamination or by satisfactory completion of an approved requalification program. 10 C.F.R. § 55.32, § 55.33. While training is an ongoing process and need not be fully completed until the issuance of the operating license, the Staff has concluded that the Applicants have met, at this stage of the review, the applicable requirements for a training program and there is reasonable assurance that qualified individuals will be available for safe operation of the facility. SER § 13.2.

Further, the Commission has now published a proposed rule which would finally resolve the permanent requirements for coping with ATWS

events. 46 Fed. Reg. 57521 (November 24, 1981). In publishing that proposal, the Commission specifically echoed the Staff's judgment expressed in the SER and as affirmed by Mr. Hodges in the attached affidavit:

The Commission believes that the likelihood of severe consequences arising from an ATWS event during the two to four year period required to implement a rule is acceptably small. This judgment is based on (a) the favorable experience with the operating reactors, (b) the limited number of operating nuclear power reactors, (c) the inherent capability of some of the operating PWRs to partially or fully mitigate the consequences of ATWS events, (d) the partial capability of the recirculation pump trip feature to mitigate ATWS events that has been implemented on all BWRs of high power level,^{10/} and (3) the interim steps taken to develop procedures and train operators to further reduce the risk from some ATWS events. On the basis of these considerations, the Commission believes that there is reasonable assurance of safety for continued operation until implementation of a rule is complete.^{11/}

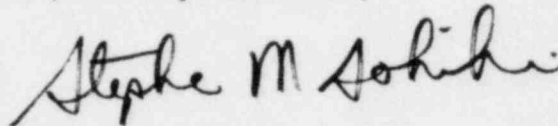
¹⁰ This basis for the Commission's judgment is, of course, not applicable to PWRs such as Palo Verde.

^{11/} 46 Fed. Reg. at 57522.

IV. CONCLUSION

In view of the fact that, contrary to the allegation set forth in Ms. Hourihan's Contention 6B, the Joint Applicants will incorporate measures required by the Staff to mitigate an ATWS event,^{12/} there is no genuine issue of material fact to be litigated, and the contention should be dismissed as a matter of law.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stephen M. Sohinki".

Stephen M. Sohinki
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 9th day of February, 1982.

^{12/} SER § 15.3.9, Hodges Affidavit ¶s 8, 10, Hartley Affidavit ¶s 11-12.