

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-454-OL
	)	50-455-OL
	)	
(Byron Station, Units 1	)	
and 2)	)	

MOTION OF COMMONWEALTH EDISON COMPANY  
FOR SUMMARY DISPOSITION ON PLEADINGS

Pursuant to the provisions of 10 CFR § 2.749, Commonwealth Edison Company, ("Applicant") moves the Atomic Safety and Licensing Board ("Board") for a decision in Applicant's favor on Contentions 1, 2, 2A, 3, 4, 6, 7, 8 and 9(a), (b), (d) and (e) of Intervenors, DeKalb Area Alliance For Responsible Energy ("DAARE") and Sinnissippi Alliance For The Environment ("SAFE"). As grounds for this Motion, Applicant submits that previous filings in this proceeding, answers to discovery requests and the attached statements of facts, affidavits and extracts from depositions show that there are no genuine issues as to any material fact relevant to any of the Contentions designated above. Applicant is therefore entitled to a decision on each Contention as a matter of law.

*D505*

ARGUMENT

The summary disposition provisions contained in Section 2.749 of the Commission's rules of practice are analogous to Rule 56 of the Federal Rules of Civil Procedure. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246 (1975). The purpose of summary disposition is to insure that only contested issues involving genuine disputes over material facts are submitted to the Board by way of evidentiary presentations at hearings. The Atomic Safety and Licensing Appeal Board has commented that "the Section 2.749 summary disposition procedures provide, in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues". Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-590, 11 NRC 542, 550 (1980).

Accordingly, use of the summary disposition provision is encouraged to resolve dubious issues raised in petitions to intervene and for which no genuine issues of material fact exist. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241, 242 (1973), and Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973). As the Atomic Safety and Licensing Board has emphasized, "[t]he purpose of the summary disposition rule

'is not to cut litigants off from their right of trial if they really have evidence which they will offer at trial, it is to carefully test this out, in advance of trial, by inquiring and determining whether such evidence exists'". Gulf States Utilities Co., (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 247-48 (1975).

The burden of showing that there is no genuine issue as to any material fact is on the movant. Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant), ALAB-443, 6 NRC 741 (1977). To this end, the rule provides that the movant must attach to his motion "a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard". 10 CFR § 2.749(a). The motion may be accompanied by affidavits setting forth facts that would be admissible in evidence and these may be supplemented by depositions and answers to interrogatories. 10 CFR §§ 2.749(a) and 2.749(b).

Any other party to the proceeding may oppose the motion, but the rule is quite explicit as to what is required for a valid opposition. The opposing party must file a statement of material facts as to which he contends there is a genuine issue, and all material facts in the movant's statement will be deemed admitted unless they are controverted in the statement of the opposing party. 10 CFR §2.749(a). Moreover, if the motion is properly supported, "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". 10 CFR § 2.749(b).

A Licensing Board has commented extensively on this requirement:

To defeat summary disposition an opposing party must present facts in the proper form; conclusions of law will not suffice. The opposing party's facts must be material, substantial, not fanciful, or merely suspicious.

One cannot avoid summary disposition "on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out the court something indicating the existence of a triable issue of material fact." 6 Moore's Federal Practice 56.15(4). One cannot "go to trial on the vague supposition that something may turn up." 6 Moore's Federal Practice 56.15(3). See Radio City Music Hall v. U.S., 136 F.2d 715 (2nd Cir. 1943). In Orvis v. Brickman, 95 F. Supp. 605 (D.D.C. 1951), the Court, in granting the defendant's motion for summary judgment under the Federal Rules, said:

All the plaintiff has in this case is the hope that on cross-examination...the defendants...will contradict their respective affidavits. This is purely speculative, and to permit trial on such basis would nullify the purpose of Rule 56....

Gulf States Utilities Co., (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975) (footnotes omitted).

Two recent cases illustrate two important aspects of the use of summary disposition to dispose of contentions which do not raise genuine issues of material fact. First, the mere filing of an argumentative affidavit raising no

factual issues will not suffice to defeat a summary disposition motion. Second, even if the opposing affidavits raise disputes as to some factual assertions, the Board must determine whether the undisputed facts supported by movant's affidavits are nonetheless dispositive of the issue.

In Virginia Electric and Power Co., (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980), the Appeal Board sustained the Licensing Board's grant of summary disposition in the applicant's favor on all of the intervenors' contentions and the Licensing Board's consequent grant of the license amendment in a spent fuel pool expansion proceeding. One contention asserted that alternatives to the spent fuel pool expansion had been inadequately considered. The applicant and the staff submitted affidavits tending to show that the intervenors' preferred alternatives were economically unacceptable and were not environmentally preferable to the applicant's proposal. Intervenors submitted an affidavit arguing that a proper determination of the relative economies of the alternatives required more information. The Appeal Board commented:

As is seen from the foregoing, the intervenors asserted no facts which might bring into genuine question the Applicant's assertion that each of the three proposed alternatives was unacceptable by reason of both cost and timing. Rather, they confined themselves to a general denial of the

assertion, coupled with an insistence on the part of their economic consultant that more information was needed. In short, what the intervenors in effect put forth was a disclaimer of their ability to ascertain whether a genuine issue of material fact existed with respect to the feasibility of their alternatives.

11 NRC at 455. Furthermore, the Appeal Board found a second ground for granting summary disposition in that intervenors had not established the existence of any genuine issue of fact with respect to the environmental superiority of their alternatives.

In Florida Power and Light Co., (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677 (1981), aff'd ALAB-660, 14 NRC 987 (1981), the Licensing Board granted summary disposition in the applicant's favor on all contentions raised by the intervenor and consequently cancelled the evidentiary hearing. One contention asserted that, during the proposed repair of the steam generators at Turkey Point, radioactive releases in violation of 10 CFR Part 20 were likely to occur as a result of a hurricane or tornado. The applicant and the staff submitted affidavits and the intervenor submitted an opposing affidavit. Although the intervenor's affidavit controverted some of the applicant's assertions, the Licensing Board, after examining the affidavits, established a list of six material facts as to which it found there were no genuine issues to be heard. Finding these material facts conclusive, the Board summarily disposed of the contention.

13 NRC at 702-03.

If the Licensing Board determines that it cannot summarily dispose of an entire contention, the Board should specify the material facts as to which it finds there is a genuine issue. This sound administrative procedure is suggested by the Licensing Board's practice in Turkey Point, supra, and is in any case implicit in the purpose of summary disposition, which is to narrow the issues requiring an evidentiary hearing. Absent such a specific finding, trial of the contention might require the parties to make an evidentiary presentation regarding many material facts as to which there was no genuine issue. Such unnecessary and time-consuming litigation would defeat the purpose of the summary disposition rule.

#### CONCLUSION

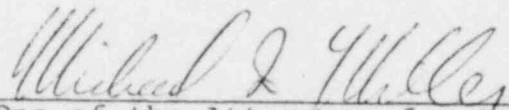
To aid the Board in its consideration of this Motion, Applicant is submitting the following documents in connection with each contention on which summary disposition is sought.

1. A statement of the contention and of material facts as to which there is no genuine issue to be heard and a brief discussion of particular reasons why summary disposition is appropriate on that individual contention.
2. Affidavits and exhibits in support of each statement.

The filings in this proceeding, answers to interrogatories, together with the attached statements, affidavits, exhibits and extracts from depositions, demonstrate that there is no genuine issue as to any material fact and that Applicant is entitled to a decision as a matter of law on the Contentions referred to herein. Therefore, pursuant to 10 CFR § 2.749, the Board should grant Applicant's Motion for Summary Disposition. In the alternative, if the Board determines that it is unable to summarily dispose of a given contention, Applicant respectfully requests that the Board enter a finding specifying the material fact or facts as to which there exist genuine issues requiring hearing.

Dated: June 7, 1982.

Respectfully submitted,



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DAARE/SAFE CONTENTION 1

CONTENTION 1

Intervenors contend that the record of noncompliance with Nuclear Regulatory Commission regulations by the Applicant in its other nuclear stations demonstrates its inability, unwillingness, or lack of technical qualifications to operate the Byron station within NRC regulations and to protect the public health and safety as required under 10 C.F.R. 50.57(a)(1) (2) (3) (4) and (6), and that therefore the Applicant should not be granted an operating license unless it demonstrates that improvements in management, operations, and procedures will ensure its willingness, ability and technical qualifications to operate within NRC rules; that these improvements will be enforced; and that the Applicant is financially capable of supporting these improvements.

As bases for this contention, intervenors cite the following facts and other facts relevant to the contention which may become apparent through the procedures authorized by 10 C.F.R. 2.740-2.744.

- a. Fines totalling \$105,500.00 have been levied upon the Applicant during the years 1974 through 1978 due to the Applicant's noncompliance with the regulations of the Commission. In imposing some of these fines, Commission officials cited the Applicant for "continuing management inadequacies" and "a history of rad-waste management problems" and stated that operating errors in the Applicant's Dresden plant caused "serious concern about the Company's [Applicant's] regulatory performance in all of their nuclear plants."
- b. An NRC Board Notification, released February 1977, reports survey and case study findings of plants nationwide, and notes continuing management and operating problems with Applicant's stations, especially Zion, which plant was also selected as the poor performer case for in-depth case analysis. In 1974, all three stations operated by Applicant were rated "C", the lowest rating given by the NRC.

- c. Noncompliance with NRC regulations in 1977 and 1978 in the Dresden facility, including findings that both backup generators were inoperative, that there was a valve error in part of a backup system for shutting down the reactor and errors in testing for maintenance, led NRC to increase their inspection frequency to weekly inspections in the Dresden plant, and in Applicant's other two plants as well in December of 1977.
- d. The nature of the noncompliance by the Applicant with the regulations of the Commission ranges from "licensee event reports" to "violations" with "violations" constituting the most serious charge the Commission can cite as to the operator of a nuclear generating plant.
- e. The Applicant has reported to the Commission "abnormal occurrences" at the nuclear generating plants wholly or predominantly owned by the Applicant at a rate which is proportionally in excess of the rate of "abnormal occurrences" reported by owners of other nuclear generating plants as to those plants in the rest of the United States.
- f. Former guards at the Cordova nuclear generating plant, owned predominantly by the Applicant, have stated that they were told, by employees of the Cordova nuclear generating plant, not to report certain security violations on forms intended to be reviewed by inspectors for the Commission. Applicant, despite lack of full ownership, is solely responsible for the Cordova plant's operation. A federal grand jury, convened in January, 1978, to investigate the propriety of initiating criminal charges based in part upon the aforesaid, did on information, criminally indict Applicant and certain of its employees on or about March 26, 1980. It is reported that Applicant is charged therein with nine (9) counts of Federal criminal law violations, including fraud and conspiracy to evade NRC security regulations at the Cordova plant through Applicant's concealment of material facts from NRC and its maintaining of false records.
- g. Applicant's record of laxity in the packaging and hauling of low level wastes caused it to be banned from South Carolina's low level waste disposal site, and in Washington, all importation of low level waste was banned after an incident of waste leakage in transport by Applicant.

- h. The history at all of Applicant's plants (whether now operating) of its failure (and that of its architect-engineers and contractors) to observe on a continuing and adequate basis the applicable quality control and quality assurance criteria and plans adopted pursuant thereto.
- i. The difficult financial position of Applicant, in that its credit ratings have been lowered, it is experiencing difficulty in raising money from traditional sources, and the Illinois Commerce Commission is presently re-evaluating Applicant's entire construction program (including Byron) to determine if funds by way of rates will be allowed.
- j. Applicant does not have (nor is it likely it will have) research programs in place and resolved at the time of contemplated operation which it represented it would do (at or about time of issuance of construction permits) in connection with completion of the problems extant raised herein both by the Regulatory Staff and the Advisory Committee in Reactor Safeguards.

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

1. Commonwealth Edison Company has been operating nuclear power stations for more than twenty years. (Stiede Affidavit, p. 3.)
2. Edison's top corporate management is committed to the safe operation of its nuclear stations, including the Byron Station. (Reed Affidavit, p. 3.)
3. Edison is considered a leader in the nuclear industry; it contributes money and expert advice to safety-related research and has been instrumental in the recent creation of two industry-wide review groups (Nuclear Safety Analysis Center and the Institute for Nuclear Power Operations) which enhance nuclear safety. (Reed Affidavit, p. 3-4; Stiede Affidavit, p. 3-4.)

4. Edison employs people for its nuclear operations who are technically qualified for their job function and are dedicated to safety. (Reed Affidavit, p. 5.)
5. When incidents of non-compliance with NRC requirements have occurred, Edison has taken prompt corrective action, has evaluated the root cause of the incident and, where necessary or appropriate, has made generic changes to procedures. (Reed Affidavit, p. 6; Stiede Affidavit, p. 3.)
6. Edison has created unique corporate-level departments to utilize experience from each of its operating stations to improve operation at all stations. (Stiede Affidavit, p. 6-8; p. 9-10.)
7. In 1979, Edison engaged a group of distinguished scientists and business leaders from the Chicago area to evaluate the effectiveness of its nuclear operations, and has improved its corporate control of nuclear operations based on recommendations made by the panel. (Stiede Affidavit, p. 5.)
8. Edison instituted significant improvements to organization of its operating stations management structure based on recommendations of an independent management consulting firm retained in 1978. These improvements are incorporated at Byron. (Stiede Affidavit, p. 6; Querio Affidavit, p. 5.)

9. There has been a continuous reduction over the last five years in the number of deficiencies identified by NRC inspectors during their inspections at Commonwealth Edison Company's operating stations. (Shewski Affidavit, p. 9.)
10. The Quality Assurance program to be employed at Byron during Station Operation meets each of the eighteen criteria of Appendix B to 10 CFR Part 50. (Shewski Affidavit, p. 6-7.)
11. Although Edison's Quality Assurance Program has been reviewed repeatedly by Region III of the NRC, the NRC Headquarters Staff, American Society of Mechanical Engineers survey teams and the Illinois Office of State Fire Marshall, Division of Boiler and Pressure Vessel Safety, no significant deficiencies in the program or its implementation have been identified during the reviews. (Shewski Affidavit, p. 7-8.)
12. The Byron Station will be staffed for operation in accordance with Revision 1 of NRC Regulatory Guide 1.8. (Querio Affidavit, p. 12.)
13. A jury found Edison and its employees not guilty of the charges referred to in Contention 1(f). (Stiede Affidavit, p. 19-21.)
14. The Byron Station will have improved rad-waste processing equipment, procedures and administrative controls over those which existed at other stations at the time of the individual incidents referred to in Contention

1(g). (Querio Affidavit, p. 14-17; Stiede Affidavit, p. 21-23.)

15. Edison has appropriately completed all research programs identified as required for plant design or operation in the Preliminary Safety Analysis Report. (Stiede Affidavit, p. 24.)
16. Edison is willing, able and technically qualified to operate the Byron Station safely and within NRC requirements so as to protect the public health and safety. (Affidavits of Reed, Stiede, Shewski and Querio, passim.)

#### DISCUSSION

In Contention 1, DAARE and SAFE have alleged that certain incidents of non-compliance with NRC regulatory requirements by the Applicant, Commonwealth Edison Company, in a period essentially between 1974 and 1979 demonstrate that Applicant is unable, unwilling or lacking in the necessary technical qualifications to operate the Byron Station safely and within NRC requirements. These incidents, reflected in Inspection Reports prepared by the NRC following its inspections, are matters of public record and the underlying facts are not in dispute. DAARE and SAFE argue that unless Applicant demonstrates that improvements in management, operations and procedures will insure the willingness, ability and technical qualifications of Applicant

to operate within NRC rules, it should not be granted an operating license for the Byron Station. In response to discovery initiated by Applicant, DAARE/SAFE has stated that it does not intend to sponsor a witness to testify on this Contention.

In response to this Contention, Applicant offers the attached affidavits of Cordell Reed, its Corporate Vice-President of Nuclear Operations, Wayne L. Stiede, its Assistant Vice-President in charge of Station Nuclear Engineering, Nuclear Licensing and Nuclear Fuel Services, Walter J. Shewski, its Corporate Manager of Quality Assurance, and Robert E. Querio, Station Superintendent for the Byron Station. These affidavits demonstrate that the specific incidents cited by DAARE/SAFE in Contention 1 do not individually or collectively demonstrate the inability, unwillingness or lack of technical qualifications of Applicant to operate the Byron Station safely. These affidavits further demonstrate that Commonwealth Edison Company has the experience, willingness, corporate organization, station organization, trained personnel and procedures to assure that the Byron Station will be operated in a manner consistent with NRC requirements and consistent with the health and safety of the public. Moreover, these affidavits demonstrate that since the occurrence of the incidents referred to in Contention 1, Commonwealth Edison Company has restructured its management at the corporate level to place

all nuclear operations under a single Corporate Vice-President and has restructured the management of its nuclear stations based on recommendations of Booze, Allen & Hamilton, Inc., a management consulting firm. Edison has also revised its procedures when appropriate in response to specific incidents of non-compliance. The cited incidents are not part of a pattern. They are merely isolated problems at individual stations and as such they are not applicable to the operation of the Byron Station. The undisputed facts listed above and reflected in the attached affidavits demonstrate that Applicant is entitled as a matter of law to a favorable decision on Contention 1.