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August 24, 1982

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
WISCONSIN ELECTRIC POWER COMPANY)	Docket Nos. 50-266
)	50-301
(Point Beach Nuclear Plant,)	(OL Amendment)
Units 1 and 2))	

LICENSEE'S RESPONSE TO DECADE'S
AMENDMENT TO MOTION
CONCERNING LITIGABLE ISSUES

I. INTRODUCTION

During a conference call with all parties on January 11, 1982, as modified by a subsequent conference call on June 1, 1982 (which was memorialized in a letter from Licensee's counsel to the Board dated June 7, 1982), the Licensing Board established schedules with respect to Decade's Motion Concerning Litigable Issues. The Licensing Board provided Decade the opportunity to file additional interrogatories, within ten days after the filing of the SER, arising from "new information" contained in the SER, Tr. 890, and Decade was

given the opportunity to later amend its Motion on the basis of any such new information in the SER.

Decade's Motion Concerning Litigable Issues was filed on July 21, 1982, and responded to by Licensee and the Staff on August 9 and August 16, 1982, respectively. The SER was served on July 8, 1982. On July 21, 1982, Decade filed interrogatories and requests for documents on the Staff, which were to have arisen from new information in the SER. The Staff responded on August 6, 1982, with additional documentary information provided by Licensee on August 18. Decade filed its amendment to the July 21 Motion Concerning Litigable Issues (Amendment) on August 20, 1982.

Decade's Amendment seeks to add one additional contention, designated 3(f):

Contention 3(f)

The process of sleeving steam generator tubes increases the probability of tube failures generally, and, of even greater significance, it substantially increases the risk of failures in the unconstrained free standing region of the steam generator specifically in, among other things, the following manner:

(f) Sleeves in Corroded Tubes. If the expansion at the upper joint of the sleeve is located where the tube is corroded, the expansion process may weaken the tube such that it will fail during operating or accident conditions and create a leakage pathway.

For the reasons discussed below, Licensee submits that Decade's proposed Contention 3(f) fails to satisfy the requirements for establishing litigable issues in this

proceeding and must therefore be rejected by the Board. Licensee's response below, like its response to the original Motion, will include both a discussion of why the contention does not rise to the level of a litigable issue (Part III), followed by a motion for summary disposition (Parts IV and V).

II. ABSENT SUITABLE ISSUES FOR LITIGATION
THE SCHEDULE HEARING SHOULD BE CANCELLED
AND ISSUANCE OF REQUESTED AMENDMENT AUTHORIZED

As discussed in Licensee's Response To Decade's Motion Concerning Litigable Issues (August 9, 1982), and as further discussed herein, each of Decade's proposed contentions should be rejected or dismissed via summary disposition. In the absence of a cognizable contention, the need for an evidentiary hearing is obviated. Accordingly, the Board should cancel the evidentiary hearing scheduled in this proceeding, and authorize the NRC Staff to issue the requested operating license amendments. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-79-25, 10 N.R.C. 234, 246-47 (1979), aff'd, ALAB-584, 11 N.R.C. 451 (1980); Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 N.R.C. 677, 703-05 (1981), aff'd, ALAB-660, 14 N.R.C. 987 (1981).

III. CONTENTION 3(f) LACKS BASES1/

1/ Decade's opportunity to amend its Motion Concerning Litigable Issues was expressly limited to the reflection of any new information in the SER. See Letter, Counsel for Licensee to Licensing Board (June 7, 1982), at 4. However, Decade's newly proposed Contention 3(f) does not arise from new information in the SER, and should therefore be rejected.

Decade cites as the sole basis for its proposed Contention 3(f) a portion of the Staff's August 6, 1982 response to Decade's Interrogatory 1(b), filed on July 21. That interrogatory reads as follows:

1. With reference to pages 35 and 36 of the Safety Evaluation Report Relating to Full Scale Sleeving ("SER"):

* * *

- b. State the type of joint design in each of the five plants which have had tubes sleeved, the vendor for each of the five sleeving operations, and details of any tests performed on the sleeved tubes in the five plants.

There is no reason why this interrogatory, or any other interrogatory related to sleeving experience in other plants, could not have been filed at any time during the preceeding year, and certainly on February 10, 1982 when the bulk of Decade's interrogatories were to have been filed. Tr. 890; Memorandum and Order (Concerning an Extension of Time) (February 5, 1982). Decade has long been aware that sleeving has taken place at other plants (particularly at San Onofre 1, the object of Decade's cited basis), and could well have pro-pounded these interrogatories far earlier in the proceeding. There is no new information at pages 35 and 36 of the SER which justified the late filing of Decade's Interrogatory 1(b).

Decade is once again conveniently ignoring both the letter and the spirit of the Board's orders, a particularly egregious course of action in view of the extraordinary latitude granted Decade in this proceeding for conduct of discovery and framing of contentions. A Licensing Board order should not be taken lightly, and Decade should not be allowed to benefit from its by now well established pattern of flaunting Board directives.

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As discussed in Licensee's August 9, 1982 Response to Decade's Motion Concerning Litigable Issues, at 21-23, 10 C.F.R. § 2.714(b) of the Commission's Rules of Practice requires that Decade provide "the bases for each contention set forth with reasonable specificity." Licensee is not required to litigate, and assume the burden of proof for, issues which are frivolously raised with no rational bases to justify litigation of the issues.

Decade's proposed Contention 3(f) is just such an issue. It alleges that, if the upper joint were expanded where the tube is corroded, the expansion process may weaken the tube and create a failure. Decade's cited basis provides no justification for the allegations. Decade's basis is simply a statement by the Staff that, at San Onofre 1, some expansions took place where IGA (inter-granular attack) was present.

(Continued)

The contention should therefore be excluded.

Nor, did Decade provide the Board and the other parties to the proceeding with the required advance notification of the subject matter of its proposed Contention 3(f). During the June 1, 1982 conference call, Judge Bloch ordered that Decade's Motion Concerning Litigable Issues (which was subject to further amendment based on new information in the SER) was to identify any possible issues for litigation raised by new information in the SER. See Letter, Counsel for Licensee to Licensing Board (June 7, 1982), at 3. Decade's Motion (at 13-14) provided no hint of any new issue even remotely related to its newly proposed Contention 3(f). Accordingly, Licensee urges the Board to enforce its directives, which Decade apparently feels free to ignore at will, and exclude Contention 3(f).

Decade states no basis for alleging that expansion of upper joints at Point Beach will take place where the tubes are corroded; Decade states no basis for alleging that such an expansion would weaken the tube; Decade states no basis for alleging that such unsubstantiated weakness would cause the tube to "fail;" and, finally, Decade states no basis for alleging that such a failure would create a leakage pathway which would be unacceptable from a safety point of view.

Decade's Contention 3(f) is created out of sheer speculation, and must be rejected for failure to provide bases as required by section 2.714(b).

IV. LICENSEE'S MOTION FOR SUMMARY
OF DECADE CONTENTION 3(F)

A. INTRODUCTION

Licensee hereby moves the Licensing Board, pursuant to section 2.749 of the Commission's Rule of Practice, 10 C.F.R. § 2.749, for summary disposition in Licensee's favor of Decade's Contention 3(f).

As shown below, there is no genuine issue to be heard as to any fact material to Contention 3(f), and Licensee is entitled to a decision in its favor on the contention. The "Statement of W. D. Fletcher" and "Affidavit of W. D. Fletcher" filed with Licensee's August 9, 1982 Response to Decade's Motion Concerning Litigable Issues demonstrates the complete absence of any factual basis for Decade's contention, and

Decade has not come forward with any evidence to support its allegations. Accordingly, the contention is ripe for summary disposition.

This motion is based upon "Licensee's Statement of Material Facts As To Which There Is No Genuine Issue To be Heard With Respect To Decade Contention 3(f) (Part V hereof), upon the above-referenced "Statement of W. D. Fletcher" and "Affidavit of W. D. Fletcher," and upon all the pleadings and other papers previously filed in this proceeding.

B. ARGUMENT

The standards governing summary disposition motions in an NRC proceeding are now well established and are quite similar to the standards applied under Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974); See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-554, 10 N.R.C. 15, 20 n.17 (1979). Where, as here, a properly supported motion for summary disposition is made, the party opposing the motion may not simply rely upon the bare allegations of its contentions. Rather, it must come forward with substantial facts in the form of admissible evidence establishing that a genuine issue of fact remains to be heard. 10 C.F.R. § 2.749(b); Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2); ALAB-584, 11 N.R.C. 451, 453 (1980).

A party cannot avoid summary disposition on the basis of guesses or suspicions or on the hope that at the hearing the Licensee's evidence may be discredited or that "something may turn up." Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 N.R.C. 246, 248 (1975). If the party opposing the motion fails to make the proper showing, summary disposition must be granted. 10 C.F.R. § 2.749(b). As the Appeal Board has emphasized, "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 & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 550 (1980). Similarly, the Commission itself has recently issued its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, instructing Licensing Boards to "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. 28,535 (May 27, 1981).

Applying the foregoing standards to this case, it is clear that Licensee's motion for summary disposition of Decade's Contention 3(f) should be granted.

Contention 3(f) alleges that if the upper joint were expanded where the tube is corroded, the tube may be weakened. As stated in the sworn Statement of Fletcher, however, the

tubes will be inspected by eddy current techniques prior to sleeving, and joints will not be placed where degradation is indicated to exist. Moreover, even if the worst type of failure were to take place at the expanded joint, the Statement of Fletcher demonstrates that the resulting leakage would not be of significant safety significance because of the presence of the sleeve. Under these circumstances, as more particularly set forth in Part V below, there is no genuine issue to be heard as to any material fact related to Contention 3(f), and the contention should not be the subject of a hearing.

C. CONCLUSION

For all of the reasons stated above, Licensee submits that its motion for summary disposition should be granted, and that Decade's Contention 3(f) should be dismissed.

V. LICENSEE'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE HEARD WITH RESPECT TO DECADE'S CONTENTION 3(F)

Pursuant to 10 C.F.R. § 2.749(a), and in support of "Licensee's Motion for Summary Disposition of Decade's Contention 3(f)," Licensee states that there is no genuine issue to be heard with respect to the following material facts:

1. The region of the tube where the upper joint is located has virtually been free of corrosion degradation in the past at Point Beach. Statement of Fletcher, ¶ 28.

2. The tubes will be inspected by eddy current techniques prior to sleeving. A joint will not be placed where degradation is indicated to exist. Statement of Fletcher, ¶ 28.

3. Even if, for the sake of argument, it is assumed that a joint will be expanded where the tube is corroded, that the expansion process at that point will weaken the tube, and that the weakening of the tube will cause the worst conceivable failure during operating or accident conditions, i.e., a complete severance of the tube at the joint, the resulting leakage would be minimal and would not be a significant safety concern. The leakage, approximately 5% of the rate which would be expected from the unobstructed leak path of a double-ended break, would be detected by normal radiation monitoring systems and would allow for an orderly planned shutdown if technical specifications were exceeded. Statement of Fletcher, ¶¶ 8, 9, 10, 11, 29.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: August 24, 1982

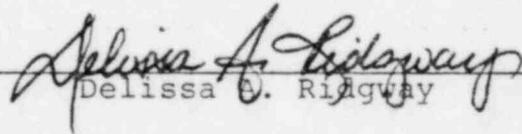
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Licensee's Response to Decade's Amendment To Motion Concerning Litigable Issues" were served, by deposit in the U.S. Mail, first class, postage prepaid, to all those on the attached Service List, except that those marked with an asterisk were served by hand delivery and those marked with a double asterisk were served by deposit with Federal Express, this 24th day of August, 1982.


Delissa E. Rigway

Dated: August 24, 1982

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