

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA
(UCLA Research Reactor)

Docket No. 50-142 OL
(Proposed Renewal of
Facility License)

DOCKETED
USNRC

'82 SEP -9 P2:14

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DOCKETING & SERVICE
BRANCH

CBG MOTIONS FOR SUMMARY DISPOSITION AS TO CONTENTIONS XIII AND XVII

PREFACE

I. The Motions

Pursuant to 10 CFR 2.749 and the Board's Order of July 26, 1982, the Committee to Bridge the Gap (CBG) respectfully moves the Atomic Safety and Licensing Board for summary disposition as to Contentions XIII (Special Nuclear Materials License) and XVII (Seismic) or, in the alternative, partial summary disposition thereof.

II. The Legal Standard for Summary Disposition

The Commission's Rules of Practice provide for summary disposition of certain issues where it can be demonstrated incontrovertibly 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 CFR 2.749(d).

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). Subsequent ASLB decisions have analogized 10 CFR 2.749 to Rule 56 to the extent that the Federal Rule applied in the cases in question.

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, ; AEC 877, 878 (1974).

The standard for summary disposition is very high. The motion can only be granted where it is quite clear what the truth is and where there are no genuine issues of material fact that remain for hearing.

Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-73-29, 6 AEC 682, 688 (1973). The record will be viewed in the light most favorable to the party opposing the motion. Poller v. CBS, 368 U.S. 464, 473 (1962); 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 with regards summary disposition motions filed under 10 CFR 2.749.

Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 754; Seabrook, LBP-74-36, supra, at 879. Furthermore, 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 CFR 2.732.

Summary disposition, then, is not permitted as a means of determining, without a hearing, the merits of issues where genuine disputes exist as to material facts; it is not a weighing, on the pleadings, where the predominance of the evidence lies in a genuine dispute. It is to be used in only the opposite situation: where no genuine dispute exists as to any material fact, so that no hearing on the matter is necessary. A contention will not be summarily disposed of, one way or another, where the Licensing Board determines that there still exist controverted issues of material fact. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34,

14 NRC 637 (1981).

III. Summary Disposition in this Particular Proceeding

The process of summary disposition, intended as a means of expediting proceedings and resolving matters where no factual dispute exists, has from time to time been misused in some proceedings. Occasionally parties will attempt to use summary disposition procedures to delay a proceeding where they fear its outcome on the merits; or to attempt to overwhelm opposing parties of lesser financial means, or as a form of "shotgunning", i.e., moving for summary disposition on every issue, whether or not genuine issues do exist, in the hopes of a favorable decision on at least some items through the sheer power of statistical probability.

This Licensing Board has indicated it will not tolerate such misuses of the procedures of summary disposition in this proceeding. As Judge Frye stated at the June 29, 1982, Prehearing Conference:

JUDGE FRYE: Since we are on summary disposition in general, let me give you our thoughts, which are very general thoughts with regard to that procedure. We don't look upon it very kindly, frankly. You have got contentions that are fairly detailed in this case. You have had a wealth of discovery that has gone on. And I personally, and I don't think any of us, are privy to all of the information that has been passed back and forth with regard to discovery. I think that if we get into an extended summary disposition procedure we are going to be delaying the hearing three to four months.

I personally, and I think my colleagues agree, would prefer as a general proposition to go to hearing. If we have questions we can ask witnesses. We can't ask affidavits. I think that the whole thing would go much faster, and the result would be on a much sounder basis after an evidentiary hearing.

I think with regard to summary disposition, surely there may be items in here that are amenable to that process that could be handled very quickly. But I would urge you,

when you file motions for summary disposition, that you do so on items that you feel you have got a very strong case for summary disposition. Don't spend a lot of time preparing affidavits. In the same amount of effort you put into preparing your motion for summary disposition you could prepare your case for trial. And we would get to trial just that much faster.

TR 535-6

Later in the same prehearing conference Judge Paris reiterated the point made earlier by Judge Frye:

JUDGE PARIS: I would like to emphasize the point raised by Judge Frye yesterday with regard to the filing of motions for summary disposition. The Board would urge you not to do this in a shotgun, broadside fashion. Our problem with motions for summary disposition is that we are unable to ask questions, and from our experience in dealing with them in the past, frequently, questions will come up. So, unless you feel that you can carry the burden of proof on an issue, let us let it go to trial rather than putting all the parties and the Board through the problem of hashing with the motion for summary disposition.

TR 76405

CBG is quite confident that the Board, when presented with the full evidentiary record at hearing, will find the vast predominance of that evidence to support the positions taken by CBG in this proceeding. The Board by now has some idea of the magnitude of the documentation supporting CBG's concerns and the unique nature of this case. But CBG is also aware that summary disposition is not the proper procedure for obtaining a decision on matters where there are factual disputes. Evidence needs to be weighed through probing of witnesses in the full light of hearing; a decision on the merits needs to be based on the fullest of evidentiary records.

Therefore, mindful both of the legal standard for summary disposition and the Board's clear direction in this regard, CBG has chosen to move for summary on only those matters where, through admissions of the opposing parties, it is apparent that no genuine dispute exists as to the material facts. There may be some residual matters that should remain for hearing as to the two contentions on which summary disposition is requested, but the hearing can be expedited and simplified by removing the need for hearing on those specific matters which are clearly not in dispute. Those particular matters are identified in the detailed motions which follow.

IV. Related Board Requests

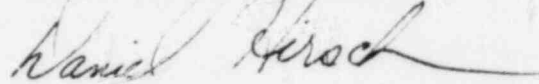
The Board, during the conference call on August 25, 1982, asked parties moving for summary disposition to separate each motion by contention. In complying, CBG requests that this single preface be considered by the Board with regards both of the enclosed motions.

In addition, the Board requested parties in their pleadings to, as Judge Luebke put it, "teach school." Indicating that there is more complicated reactor physics involved with this research reactor case than in the average power reactor case, the Board asked the parties to make an effort to explain, in terms the general public could understand, the technical terms and concepts used in the motions and the contentions. CBG, in these two motions, has made a considerable effort to explain in accessible language the factual background and concepts and terminology central to the

matters being addressed.

The two motions for summary disposition, on Contentions XIII and XVII, follow.

Respectfully submitted,



Daniel Hirsch
President

COMMITTEE TO BRIDGE THE GAP

dated at Ben Lomond, CA
September 7, 1982*

* Because of illness of Mr. Hirsch, CBG requested, and the Board granted (via a phone call from Judge Paris) a two-day extension in which to file these motions. Still down with the flu on the 3rd, Mr. Hirsch attempted to reach Judge Frye, but was informed he was on vacation. CBG left a message requesting leave to file the motions on the next business day.

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DECLARATION OF SERVICE

I hereby declare that copies of the attached: MOTION FOR SUMMARY
DISPOSITION

in the above-captioned proceeding have been served on the following by
deposit in the United States mail, first class, postage prepaid, addressed
as indicated, on this date: September 7, 1982.

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Daniel Hirsch
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