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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF SECRETARY
DOCKETING & SERVICE
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD BRANCH

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3070-ML
)
(Claiborne Enrichment Center))

LOUISIANA ENERGY SERVICES' MOTION
FOR SUMMARY DISPOSITION OF
THE SAFETY AREAS OF CONTENTION I

I. INTRODUCTION AND SUMMARY

Louisiana Energy Services, L.P. ("Applicant") herein moves, pursuant to 10 C.F.R. § 2.749, for summary disposition of the matters in Citizens Against Nuclear Trash ("Intervenor") Contention I which relate to areas in which Applicant's Safety Analysis Report ("SAR") is alleged to be deficient.^{1/} As will be

1/ Applicant is aware that the Licensing Board's schedule in its May 7, 1992, Memorandum and Order (Memorializing Prehearing Conference) called for summary disposition motions sixty days prior to issuance of the SER. However, Intervenor, consistent with the Licensing Board's February 22, 1992, Memorandum and Order, delayed serving answers to relevant interrogatories until after that date. Also, Intervenor's answers to Interrogatories for Contention I indicated that Intervenor continued evaluating the issue. Therefore, Applicant has waited to file this Motion until after the discovery period closed and Intervenor's opportunity to provide further information has ended. In this light, and consistent with the Commission's policy that such "[m]otions may be filed at any time" (10 C.F.R. § 2.749), Applicant seeks leave to file this Motion for Summary Disposition.

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discussed below, the Atomic Safety and Licensing Board categorized these alleged deficiencies as Areas 8-11 of Contention I. (Areas 1-7 of Contention I, which relate to the Applicant's Environmental Report, are not the subject of this Summary Disposition Motion. Applicant wishes to confine this Motion to matters in issue in the upcoming safety hearing and will address environmental matters at another time.)

Intervenor based Areas 8-11 of Contention I on an NRC staff request for additional information ("RAI"). Applicant has responded to the RAI, regarding Areas 8-11, to the NRC staff's satisfaction, and the incomplete information cited by Intervenor and the NRC staff has been added to the Applicant's SAR. Therefore, the information regarding safety matters cited by Intervenor in the basis for Contention I, and as allowed by the Licensing Board as Areas 8-11, has been provided.

As grounds for this motion, Applicant asserts that the attached affidavit of Peter G. LeRoy demonstrates that there remains no genuine issue of material fact to be heard with respect to Areas 8-11 of Intervenor's Contention I. Accordingly, Applicant is entitled to a decision in its favor as a matter of law.

II. BACKGROUND

Intervenor's Contention I is that "the license application for the CEC is incomplete in many major respects."^{2/} Intervenor's basis for Contention I relies entirely on a March 21, 1991, NRC Staff request for additional information wherein the Staff stated that Applicant's license application "appears to contain incomplete or inadequate information that limits our ability to conduct detailed reviews of the topics." Regarding the specific matters alleged by Intervenor to be incomplete in the application, Intervenor quotes directly from the NRC Staff's specific requests for information. Intervenor provides no matters on which the application is incomplete other than matters cited by the NRC Staff in its March 21 letter.

Contention I, with its specific bases, was clarified and admitted by the Atomic Safety and Licensing Board ("Licensing Board") in its Memorandum and Order (Ruling on Contentions): "There appears to be no question that the application is deficient in at least some of the areas listed in CANT's contention." Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 348 (1991). For the purpose of discovery and litigation in this proceeding, the Licensing Board limited the contention "to eleven (11) specific areas listed in CANT's contention as follows:"

^{2/} "Citizens Against Nuclear Trash's Contentions on the Construction Permit/Operating License Application for the Claiborne Enrichment Center," October 3, 1991, at 33.

In the Environmental Report:

1. environmental impacts of site preparation and construction;
2. monitoring data to support source term determination for gaseous effluents;
3. evaluation of means of reducing liquid effluent concentrations;
4. assessment of radiological impacts of plant operation;
5. environmental effects of accidents;
6. baseline data for pre-operational effluent and environmental [monitoring] program; and
7. program to maintain releases as low as reasonably achievable (ALARA);

In the Safety Analysis Report:

8. finalization of design features for earthquakes[,] tornadoes, and missiles;
9. quality assurance program for Class I equipment;
10. program for surveillance and maintenance of cylinders containing tails [in] interim storage; and
11. management and control program.

Id. at 348-349.

The Licensing Board rejected as premature a twelfth area in Intervenor's Contention I related to criticality safety analyses. Items 8-11 above are the Areas 8-11 of Contention I which are the subject of this Motion for Summary Disposition.

Applicant served Intervenor with interrogatories related to Areas 8-11 which asked (1) whether Intervenor was willing to withdraw any aspect of Contention I in light of information submitted to the NRC staff by Applicant, and (2) if not, to

indicate what required information was considered to be missing and the basis for that position.^{3/} Intervenor responded that (1) it was not willing to withdraw any aspect of Contention I, and (2) that it was continuing to evaluate these aspects of Contention I while awaiting the NRC staff's evaluation.^{4/} Intervenor's answers provided no substantive information regarding any remaining omissions from the Applicant's documents.

Intervenor, in a supplemental response to Interrogatory I-10 (Area 10),^{5/} was unwilling to withdraw this area of Contention I in light of Applicant's submittals to the NRC staff, and took exception with the program that had been submitted, but did not indicate that required information was missing.

II. ARGUMENT

A. Applicant's License Application Changes Have Resolved Areas 8-11 of Contention I

Intervenor's concern is that Applicant's license application is incomplete in Areas 8-11. This concern was stated in what the Licensing Board found to be an admissible contention which met the

3/ "Applicant's Interrogatories to Citizens Against Nuclear Trash Regarding Citizens Against Nuclear Trash's Contentions B, I, J, K, L, M and Q," August 11, 1992.

4/ "Answers to Applicant's Interrogatories to Citizens Against Nuclear Trash Regarding Citizens Against Nuclear Trash's Contentions B, I, J, K, L, M and Q," December 2, 1992.

5/ "Supplemental Answers to Applicant's Interrogatories to Citizens Against Nuclear Trash Regarding Citizens Against Nuclear Trash's Contentions B, I, and J," February 11, 1994. (Intervenor's answer labeled "I-11" is in fact an answer to "I-10.")

requirements of 10 C.F.R. § 2.714(b)(2)(iii). In the case where "the petitioner believes that the application fails to contain information on a relevant matter as required by law," section 2.714(b)(2)(iii) requires Intervenor to (1) identify each failure, and (2) the supporting reasons for that belief. Intervenor provided this information in Contention I and its Basis. As is discussed below, Applicant has corrected each identified failure within the framework of Intervenor's supporting reasons for its belief.

Intervenor identified each failure by reference exclusively to the NRC Staff's March 21 RAI (and the Licensing Board limited the contention to eleven specific areas). Intervenor's stated reason for its belief (that required information was missing) was the fact that the NRC Staff had stated that the license application was deficient when it asked for the information in its March 21 RAI.

To ensure the full scope of Contention I had been identified, Applicant asked, in its August 11 Interrogatories, whether Intervenor believed any other information had been omitted from the license application in Areas 8-11. Intervenor cited no additional missing information, nor did Intervenor cite any relevant authority as a requirement for the allegedly missing information. Intervenor noted that it "is also waiting for the NRC Staff's evaluation."

In its Supplemental Answers on February 11, 1994, to Applicant's August 11, 1992, Interrogatories, Intervenor noted

that in Area 10 (answer to Interrogatory I-10, mis-labeled as an answer to Interrogatory I-11): (1) "July 31, 1992 changes to Chapter 11 of the SAR did not materially add to CANT's knowledge" of planned cylinder maintenance and surveillance, (2) two cylinders at the Portsmouth facility had holes, (3) the only way to prevent all corrosion is to store the cylinders indoors with monitoring, and (4) the only way for LES to satisfy 10 C.F.R. § 50.40(a) is to implement a monitoring and surveillance program for the tails cylinders. February 11 Answers at 14-15.

This assertion conflicts with the NRC staff's conclusion in the SER, section 7.3.2, that the management of solid radiological waste (which includes analysis of Applicant's program for inspecting and maintaining cylinders) is acceptable. Therefore, Applicant views Intervenor's assertion as a disagreement with the adequacy of the program described, not a disagreement as to whether the required information had been provided. Thus, Intervenor's assertion is in the nature of a new contention. Applicant notes that the apparent basis for this assertion is the discovery of leaking cylinders at a Department of Energy facility. However, Intervenor has made no effort to relate the causes of the leaking DOE cylinders to any alleged deficiencies in Applicant's program. Regardless, this is another matter entirely from the subject of Areas 8-11 of Contention I, which relates to whether required information had been submitted.

As discussed below and in the attached affidavit of Peter LeRoy, the information needed to correct deficiencies in the

license application in Areas 8-11 has been provided to the NRC Staff, and the NRC Staff has indicated to Applicant that the license application is complete. This is supported by NUREG-1491, "Safety Evaluation Report for the Claiborne Enrichment Center, Homer, Louisiana," January 1994, in which the NRC staff states that it "has reviewed the applicant's SAR, Proposed License Conditions, and supporting documentation, including responses to NRC requests for additional information, and concludes that the applicant's descriptions, specifications, and analyses provide an adequate basis for safety review of facility operations." SER at xxv. The SER provides similar conclusions in each area of evaluation.

In summary, Areas 8-11 of Intervenor's Contention I are based on Applicant's SAR being deficient in the areas stated by the NRC staff in the March 21 RAI. All deficiencies noted in the March 21 RAI (as well as all other NRC staff RAIs in Areas 8-11) have been resolved to the NRC staff's satisfaction. Thus, Applicant has addressed each specific deficiency stated by Intervenor and has addressed the basis for Intervenor's belief, which was the NRC staff's opinion of adequacy. Thus, the license application in Areas 8-11 no longer fails to contain information on a relevant matter as required by law, and as a result, no genuine issue exists as to any material fact.

B. Applicant is Entitled to Summary Disposition

Under 10 C.F.R. § 2.749(d), summary disposition is appropriate if the filings, depositions, answers to interrogatories, and admissions in a proceeding, together with the statements of the parties and affidavits, show that no genuine issue exists as to any material fact and that the moving party is entitled to a decision as a matter of law. This standard is met in the present case. The affidavit attached hereto provides the relevant facts known to Applicant with respect to Areas 8-11 of Contention I. The record contains no contrary facts.

The Commission encourages licensing boards "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." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981); see also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-1 (1980); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd, CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

Given the information in the attached affidavit, the NRC staff SER, and the complete lack of any substantive information related to this issue in Intervenor's Answers to Interrogatories, it is clear that an evidentiary hearing on Areas 8-11 will serve no purpose to identify whether required information has been

submitted. The Commission's policy favoring summary disposition should be applied.

Section 2.749 requires, for a contention to survive summary disposition, a genuine issue of material fact, i.e., a fact that may affect the outcome of a litigation. Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).⁶ "To be genuine . . . the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue." Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983). Further, to be a genuine issue, evidence must be presented. See Southern Distributing Company, Inc. v. Southdown, Inc., 574 F.2d 824, 826 (5th Cir. 1978) (in affirming a summary judgment against the defendant, the court noted that "[a] pretended issue, one that no substantial evidence can be offered to maintain, is not genuine'" (quoting Firemen's Mutual Ins. Co. v. Aponaug Mfg. Co., 149 F.2d 359, 362 (5th Cir. 1945))). Thus, to overcome a motion for summary disposition, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FRCP Rule 56(e)

6/ The Commission's summary disposition rule is a judicial counterpart of Rule 56 of the Federal Rules of Civil Procedure (FRCP). Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). Thus, Section 2.749 can be construed in light of case law pertinent to FRCP Rule 56.

(emphasis added).^{2/} The record in the present proceeding contains no facts presented by Intervenor to support a proposition that any information required by law to be included in the license application, in Areas 8-11, has not been provided. Summary disposition of these four questions is, therefore, appropriate.

Even if there is a formally-stated issue such as Intervenor has made in response to Interrogatory I-10 (labeled as the answer to I-11) in this proceeding, "[t]here may be no genuine issue Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment." Dewey v. Clark, 180 F.2d 766, 772 (D.C. Cir. 1950) (rejecting a rigid rule where an assertion and a denial always preclude the granting of summary judgment). "[A] party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968).^{3/} The moving party need only demonstrate the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). This may be done by pointing out an absence of evidence in the opposing party's case. Celotex Corp. v. Catrett, 477 U.S.

2/ Similarly, the adverse party may not rest "on averments of his pleadings which on their face present an issue," but do not produce any evidentiary matter. Commentary on the 1963 Amendment to FRCP Rule 63, Subdivision (e).

3/ A party cannot overcome a summary disposition motion "on the basis of allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations" Cities Service, 391 U.S. at 290.

317, 325 (1986). The moving party need not prove the opposing party's allegations false. "There is no sound reason why conclusory allegations should suffice to require a trial when there is no evidence to support them even if the movant lacks contrary evidence." Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986).

Intervenor has had access to information in Applicant's submittals to the NRC staff, and the NRC staff's responses. Further, Intervenor has had an opportunity in the answers to Applicant's Interrogatories to indicate whether it considered any information to be missing. Except for the new allegation provided in Intervenor's answer to Interrogatory I-10, (i.e., disagreeing with the plan provided^{2/}) Intervenor stated only that it was continuing to evaluate Contention I and that it was waiting for the NRC staff's evaluation. Intervenor's December 2, 1992, Answers at 15-20. Intervenor has offered no information to supplement that which it provided in Contention I. Thus, the deficiencies alleged in Contention I, as clarified by the Licensing Board as Areas 8-11 stand as the only deficiencies in those Areas.

Consistent with Commission policy stated in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), an intervenor:

2/ As noted, CANT's comment in its answer to Interrogatory I-10 should have been presented as a new contention. CANT's failure to do so, particularly when we are almost at the eve of trial, renders it impermissible under the balancing test of 10 C.F.R. § 2.714(a)(1) for late filed contentions.

has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention. . . .

Accordingly, since Intervenor is not permitted to flesh out its contention through discovery, provided the information is available in the public documents (see id.), no purpose is served by waiting for the Staff's evaluation. The alleged deficiencies for Areas 8-11 are, therefore, defined by Contention I as clarified by the Licensing Board on December 19, 1991.

Intervenor has offered no facts to indicate that, in light of Applicant's numerous submissions and revisions to the SAR for the specific purpose of resolving the very issues cited by Intervenor in Areas 8-11 of Contention I (i.e., the NRC staff's concerns), and in light of the NRC staff acceptance of the SAR in its SER, deficiencies of information still exist in the SAR. Rather, Intervenor maintains its position that deficiencies exist (as evidenced by its answers to Interrogatories on Contention I) without a basis in fact or law. Therefore, no genuine dispute of material fact or law exists, and Applicant is entitled to a decision in its favor on Areas 8-11 as a matter of law.

By its answers to Applicant's Interrogatories, Intervenor either has not analyzed Applicant's information submittals and changes or it has no further concern over deficient information. This should be sufficient ground for a decision in Applicant's favor. "The purpose of summary judgment would be defeated if a party who has obtained by discovery and from affidavits[,]

information which he should seek to amplify or test by further discovery, merely rests on a statement of ignorance of the facts." Robin Construction Company v. United States, 345 F.2d 610, 613 (3rd Cir. 1965). Intervenor has withheld its agreement that Applicant's information and changes are sufficient to address matters required by law, for no reason apparent in the proceeding to date.^{10/} To justify a hearing on the merits, "[i]t is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts." Id. at 614. Yet, this appears to be precisely what Intervenor is doing. It is not enough.

In sum, under NRC regulations, to earn a hearing on this matter Intervenor must present material facts sufficient to indicate the existence of a genuine issue. Merely withholding a decision or an opinion in hope of discovering facts in the future is not enough. Without material facts to indicate that Applicant's information is deficient in Areas 8-11, summary disposition is appropriate.

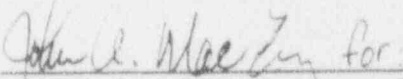
III. CONCLUSION

The attached affidavit addresses Areas 8-11 identified by the Licensing Board as the bases for admitting the safety aspects of Contention I. These affidavits, as well as the NRC staff's SER,

^{10/} However, we do not mean to say that Intervenor cannot take issue with the information by way of late-filed contentions.

demonstrate that Applicant has resolved the deficiencies in Areas 8-11 to the NRC staff's satisfaction. Even though Intervenor has had an opportunity to do so, it has not raised a genuine issue of material fact to refute this conclusion. Applicant's information and changes relevant to Areas 8-11 have been provided to Intervenor at the same time as they were provided to the NRC staff. However, Intervenor has not presented any material facts, i.e., facts that may affect the outcome of this litigation, to indicate that the license application remains deficient in these Areas. Thus, Applicant is entitled to a decision as a matter of law.

LOUISIANA ENERGY SERVICES, L.P.



J. Michael McGarvey, III

WINSTON & STRAWN,
ATTORNEYS FOR LOUISIANA ENERGY
SERVICES, L.P.

Dated at Washington, D.C.,
this 13th day of April, 1994

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

1. Applicant's license application submittals are complete, as required by law, in the following areas:
 - a. finalization of design features for earthquakes[,]
tornadoes, and missiles;
 - b. quality assurance program for Class I equipment;
 - c. program for surveillance and maintenance of
cylinders containing tails [in] interim storage; and
 - d. management and control program.