

February 14, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
ILLINOIS POWER COMPANY, et al.) Docket No. 50-461 OL
(Clinton Power Station, Unit 1))

NRC STAFF SUPPORT OF APPLICANTS' MOTION FOR
SUMMARY DISPOSITION OF PRAIRIE ALLIANCE CONTENTION VI

I. INTRODUCTION

On January 17, 1983, Applicants moved for summary disposition of Prairie Alliance Contention VI, pursuant to 10 C.F.R. § 2.749.

The NRC staff supports this motion on the ground that the papers filed in this proceeding, including the attached affidavit of Harvey Abelson, demonstrate that there is no genuine issue of material fact, and that Applicants and the Staff are entitled to a decision in their favor as a matter of law.

II. DISCUSSION

A. The Standards for Summary Disposition

The Commission's Rules of Practice provide that summary disposition of any matter involved in an operating license proceeding shall be granted

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if the moving papers, together with the other papers filed in the proceeding, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. 10 C.F.R. § 2.749(d). The use of summary disposition has been encouraged by the Commission and the Appeal Board to avoid unnecessary hearings on contentions for which an intervenor has failed to establish the existence of a genuine issue of material fact. E.g., Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981) and Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-551 (1980). A material fact is one that may affect the outcome of the litigation. Mutual Fund Investors Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).

When a motion for summary disposition is made and supported by affidavit, a party opposing the motion may not rest upon the mere allegations or denials of his answer but must set forth specific facts admissible in evidence that show the existence of a genuine issue of material fact. 10 C.F.R. § 2.749(b); Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75, 78 (1981). All material facts set forth in the statement of material facts required to be served by the moving party will be deemed to be admitted unless controverted by the statement of material facts required to be served by the opposing party. 10 C.F.R. § 2.749(a). Any answers supporting or opposing a motion for summary disposition must be served within twenty (20) days after service

of the motion. Id. If no answer properly showing the existence of a genuine issue of material fact is filed, the decision sought by the moving party, if properly supported, shall be rendered. 10 C.F.R. § 2.749(b).

B. Prairie Alliance Contention VI

On November 10, 1982, the Atomic Safety and Licensing Board admitted Prairie Alliance Proposed Supplemental Contention 4, as Contention VI. Memorandum and Order, Clinton Power Station, Unit 1, November 10, 1982, p. 26. Contention VI states:

General Electric recently announced that it will withdraw from the nuclear hardware market. The effects of this withdrawal have not been considered by the Applicant nor the Staff. This withdrawal is especially germane in light of Applicant's lack of experience in operating nuclear plants and its future needs relative to plant servicing and design modifications mandated by present and future Commission regulations and orders.

Id., at p. A-7.

In support of its motion for summary disposition ("Motion"), Applicants have filed an affidavit of Mr. W. H. Bruggeman, Vice President and General Manager of the Nuclear Energy Business Operations of the General Electric Company, dated December 13, 1982. In his affidavit, Mr. Bruggeman states: that "General Electric Company has no expectations of abandoning the nuclear business" and "will continue to furnish support and expertise to Illinois Power Company" (paragraph 3); that his company is diligently fulfilling its obligations under its nuclear steam supply contract with Illinois Power (paragraph 4); and that "General Electric Company services will be available in the future to Illinois Power Company to make hardware and other design modifications which may be

required by present or future rules or regulations of the Nuclear Regulatory Commission" (paragraph 6). The NRC staff is not independently aware of any information contrary to that contained in the Bruggeman affidavit. See attached Affidavit of Harvey Abelson.

The Prairie Alliance in its "Answer in Opposition to Applicants' Motion for Summary Disposition" ("Answer"), claims that "there remain disputed issues of fact which are neither resolved nor addressed by the motion." Answer at 1. These appear to be: "whether the Applicants or staff have fully considered the effects of GE's decision to stop supplying major nuclear hardware;" "whether GE will remain in a capacity sufficient to supply major components throughout the lifetime of the Clinton Power Station;" "whether major reactor components used in lieu of GE components can guarantee an acceptable level of safety;" and "the precise terms of GE's service and maintenance obligations. . . ." Answer, p. 2.

These bald statements without affidavit or other proof show no issue of fact to defeat the motion for summary disposition.^{1/} The

1/ The only support offered for Prairie Alliance's opposition to the Motion is a copy of a publication called Electrical Week, which states, in part:

. . . GE chairman and chief executive officer John Welch said, "Our planning does not anticipate any new nuclear plant orders." He said GE would work off its backlogs and remain in the nuclear fuel and nuclear plant servicing businesses where it expects to turn a profit.

This quote itself would seem to indicate that, contrary to Prairie Alliance's assertions, GE does intend to remain in the nuclear plant servicing business, although they expect no orders for additional plants.

sworn affidavit of GE's Vice-President W.H. Brugeman establishes G.E.'s intention to continue to provide plant servicing and to assist Applicant in making future design modifications as required by the NRC. The Prairie Alliance's conjectures, as set forth in Part I of its Answer, concerning the extent to which GE intends to engage in all facets of the nuclear business, create no issue of fact. 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 & 2), LBP-75-10, 1 NRC 246, 248 (1975), quoting 6 Moore's Federal Practice § 56.15[3] and [4]. See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 389-90 (1968) (Federal Rules of Civil Procedure do not permit plaintiffs to get to a jury on the basis of allegations in complaint coupled with the hope that evidence can be developed at trial to support the allegations). To permit trial on such a basis would nullify the salutary purpose of summary disposition, which permits the elimination of unnecessary and costly litigation where no genuine issues exist. See Orvis v. Brickman, 95 F.Supp. 605, 607 (1951), aff'd, 196 F.2d 762 (D.C. Cir. 1952), cited with approval in River Bend, supra, 1 NRC at 248.

Thus Prairie Alliance has failed to make the showing of a genuine issue of material fact, by affidavit or otherwise, as required by 10 C.F.R. § 2.749(b). It has failed to address those statements made by Applicants in their Motion and supported by the affidavit of GE Vice President Brugeman which squarely refute Prairie Alliance's expressed concerns. It has chosen instead to rely on the "mere allegations and

"denials," rather than a showing of sufficient facts to sustain an opposition to a motion for summary disposition under the Commission's Rules of Procedure. 10 C.F.R. § 2.749(b); North Anna, supra; Allens Creek, supra.

The second part of Prairie Alliance's Answer argues that the Motion should be dismissed "because all of the facts and documents relevant to the contention remain in the possession of the Applicants and have not been made available to Prairie Alliance." This appears to be an attempt to invoke 10 C.F.R. § 2.749(c), which provides that if it should appear "from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition," [emphasis supplied] this may be grounds for refusing the motion for summary disposition. Prairie Alliance has failed, however, to submit in its Answer the affidavits required by the express terms of § 2.749(c), and thus cannot rest its opposition on these grounds.

Inasmuch as Mr. Bruggeman's affidavit addresses and refutes the assertions of Contention VI that General Electric is withdrawing from the nuclear hardware market and that Illinois Power Company will not have access to the necessary expertise in plant servicing and design modifications, inasmuch as the Staff is not independently aware of any information contrary to that presented in the Bruggeman affidavit, and inasmuch as Prairie Alliance has failed in its Answer to set forth specific facts contradicting the material facts established by Applicants in their Motion, there is no genuine issue as to any facts material to the assertions contained in Contention VI. There is thus no basis for further consideration of Prairie Alliance Contention VI, and Applicants

and the Staff are entitled to a decision as a matter of law. 10 C.F.R.
§ 2.749(d).

III. CONCLUSION

For the reasons stated above, the Applicants' motion for summary
disposition of Prairie Alliance Contention VI should be granted.

Respectfully submitted,

William F. Patterson, Jr.

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of February, 1983