UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION '83 NOV -1 P2:59

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL October 31, 1983

JOINT INTERVENOR RESPONSE TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF CONTENTION II (HEALTH EFFECTS)

INTRODUCTION

On October 3, 1983 Applicants filed with the Board a "Motion for Summary Disposition of Joint Intervenors' Contention II and Wells Eddleman's Contention 37B." On October 12, 1983, Applicants filed a "Corrected Copy" of the same motion. Following is Joint Intervenors' response Memorandum of Law. While the Applicants continue to group Joint Intervenor Contention II and Eddleman Contention 37B together, there has been no such agreement made. Nevertheless, Joint Intervenors submit that the following principles of law apply equally to the motion as it affects Mr. Eddleman.

MEMORANDUM OF LAW

In reviewing Applicants' Motion, we must start with the premise that 10 C.F.R. 2.749 does not specifically refer to the Federal Rules of Civil Procedure, but that the procedure outlined therein is similar to that employed by the Federal court system. "Motions for summary disposition under Section 2.749

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are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and Federal court decisions interpreting that rule may be relied upon in NRC proceedings." Texas Utilities Generating Co., et al., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 N.R.C. 593, 595 (1982). In Federal court, as here, "summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967). Joint Intervenors respectfully submit that to grant summary disposition to Applicants based on the papers they have filed to date would be improper in light of these principles.

Applicants apparently believe that the burden lies with Joint Intervenors to "present credible evidence contesting the validity of the Staff's assessment of health effects" in order to survive their motion. Corrected Motion at 10. This statement of the law is clearly incorrect. By admitting Joint Intervenor Contention II, the Board has recognized that, the position the Staff has taken in the past few years notwithstanding, there is some issue of fact here [as indeed they must under Black Fox, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 N.R.C. 264 (1980)]. Regardless of the placement of the ultimate burden of proof on the issue, when Applicants move for summary disposition they assume an additional burden. To carry their motion they must first, before Joint Intervenors respond, submit papers which establish the absence of any genuine issue of material fact. It is not enough by any means for the moving party to simply present evidence that is legally sufficient to support a judgment in its favor. National Industries Inc. v. Republic National Life Insurance Co., 677 F.2d 1258 (9th Cir. 1982). Until Applicants have done this, Joint Intervenors have no burden whatsoever.

Moore summarizes well:

> The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which under applicable principles of substantive law, entitle him to judgment as a matter of law.
>
> The courts hold the movant to a strict stand-

> ard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. 6 Moore's Federal Practice §56.15(3) at 56-463 ff.

When the non-moving party does submit papers in opposition, then "the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden." Id. at 56-469 ff.

An important issue in ruling on summary disposition motions is the issue of credibility. Ordinarily, where there is a real issue of credibility on the papers a motion for summary judgment must be denied, Id. at 56-475. See Cram v. Sun Insurance Office Ltd., 375 F.2d 670 (4th Cir. 1967) (denying summary judgment where credibility of witness remained a factual issue). Without going into great detail (see accompanying papers) Joint Intervenors note that much of Applicants' motion relies on the opinion of Dr. Fabrikant. While no doubt Dr. Fabrikant's credentials are impressive, and a jury could well be persuaded by his arguments to rule in Applicants' favor, Joint Intervenors would respectfully point out to the Board that Dr. Morgan, on whom Joint Intervenors rely, also has impressive credentials and somewhat different opinions on the issue. In an ordinary trial under the Federal Rules of Civil Procedure, the credibility of each expert's opinion would be a matter for the jury to determine, not for the judge to decide as a matter of law. Joint Intervenors will not undertake to dredge up every charge of collusion between the nuclear industry, the N.R.C. staff, and the radiological health establishment; instead they ask the Board (1) to take judicial notice of the fact that such charges have been made, see for example Report of the President's Commission on the Accident at Three Mile Island 51 (1979) and (2) to consider the necessary implications of such cooperation in the issue before it.

Joint Intervenors would analogize in this context to similar complex issues in anti-trust litigation. In Poller v. Columbia Broadcating Co., 368 U.S. 468, 82 S.Ct. 486, 7 L.Ed.2d

458 (1962), the United States Supreme Court held that summary judgment should be used sparingly in complex anti-trust litigation where among other things proof is largely in the hands of one side and motive played a leading role. Although Applicants have no monopoly on scientific information, the industry of which they are part and the supporting government institutions do exercise substantial control over the availability of proof in a case like this. Were the Board ruling in a vacuum, it might ignore the circumstances of the case and rule strictly on the papers. But Poller requires more: the slate, as Applicants correctly state, is not clean, and the Board is required to consider the posture of the case, the access of the various parties to proof, and the motives of the various parties involved. Who has billions at stake? Who has a large organizational interest in issuing licenses? Who will be "blackballed" or have research funding cut off if he/she testifies the wrong way?

Finally, Applicants state in their memorandum of law that the BEIR estimates "can be relied on conclusively." Corrected Motion at 10. This is an interesting statement, which cannot be found in Black Fox--apparently it was inferred therefrom by Applicants--what Black Fox does say, and with which Joint Intervenors do not disagree, is that the BEIR results may be considered along with other evidence in ruling on motions for summary disposition. This is nothing more than allowed by the liberal rules of evidence and relevancy under the Federal Rules of Evidence §§401-3. That somehow BEIR is conclusive of the issue of long term or low level effects of radiation is, in light of the absence of significant human experimental data, laughable at best. The continued criticism of Drs. Morgan and Gofman indicates that there is in fact a controversy over the issues treated in BEIR, and the absence of human data makes a conclusive statement about health effects impossible. Applicants' assertion that there are no known human genetic effects is true only in that no such effects have been shown in a rigorously conducted experiment with results that will pass strict standards of scientific proof. Those scientists who have attempted to do so, if

their data have been contradictory to the establishment, have often been unable to continue their work--that Sternglass' data are not as scientifically authoritative as they might be is due in large part to this factor. Joint Intervenors ask the Board to keep this part of the "unclean slate" in mind in ruling on Applicants' motion.

The facts Applicants allege are dealt with in a separate filing by Joint Intervenors, submitted by Wells Eddleman on October 28, 1983.

Respectfully submitted,

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October 29, 1983

CERTIFICATE OF SERVICE

I, Daniel F. Read, hereby certify that I have deposited in the United States Mail in the repositories for same, first-class postage prepaid, copies of "Joint Intervenor Resposne to Applicants' Motion for Summary Disposition on Contention II (Helath Effects)," addressed as below, except to those parties marked with an asterisk, for whom service was accomplished by hand delivery. This 29th day of October, 1983.

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