381

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 MAY 30 P3:58

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER AND LIGHT COMPANY AND	)	
NORTH CAROLINA EASTERN MUNICIPAL	)	Docket Nos. 50-400 OL
POWER AGENCY	)	50-401 OL
	)	
(Shearon Harris Nuclear Power Plant,	)	
Units 1 and 2)	)	

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 67

I. INTRODUCTION

On May 9, 1984, Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency (Applicants) filed a document entitled "Applicants' Motion for Summary Disposition of Eddleman Contention 67" [hereinafter Applicants' Motion]. For the reasons set forth below, the Staff supports Applicants' motion on the grounds that Applicants have demonstrated the absence of any genuine issue of material fact relating to the matters covered by the contention, and Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

Eddleman Contention 67 was admitted by the Board in its "Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference)" 16 NRC 2069, 2102 (1982). Eddleman Contention 67 as admitted states:

> There is no assured disposal site to isolate the low-level radioactive wastes produced by normal operation at Harris from the environment and the

D507

> public until said waste, which includes highly toxic (radiotoxic) and long-lived nuclear wastes such as Sr-90, Cs-137 and Pu-239, has decayed to virtually zero levels of radioactivity and radiotoxicity. The lack of such an assured disposal site, endangers the Health and safety of the public under AEA and this condition having changed since the CP stage and (CP FES) due to the refusal of SC, NV and WA states to continue to accept unlimited amounts of low-level radioactive wastes; and by the enactment by Congress of laws allowing states to form compacts for low-level rad-waste disposal and to exclude wastes such as SHNPP low-level radioactive wastes from states not members of such compacts. Sea disposal is not assured because EPA's proposed rule to allow disposal of low-level radioactive wastes in the oceans has not been enacted, and if enacted may be overturned by legal action or act of Congress.

Discovery on both of these contentions was conducted by Applicants, Intervenor Eddleman and the Staff. The Staff's response and supporting affidavit are filed in support of Applicants' Motion for summary disposition.

In their motion Applicants have addressed matters referenced by Mr. Eddleman in his responses to Applicants' interrogatories and have made the argument that certain of those matters are outside the scope of the contention. In this response the Staff addresses those issues which are clearly within the plain meaning of the contention. On those issues raised by the admitted contention, the Staff supports Applicants' Motion.

III. DISCUSSION

A. Standards For Summary Disposition

Summary disposition is appropriate pursuant to the Commission's regulations if, based on a motion, the attached statements of the parties in affidavits, and other filings in the proceeding, it is shown that

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 10 C.F.R. § 2.749(d). The Commission's rules governing summary disposition are analogous to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982). Therefore, decisions concerning the interpretation of Rule 56 may be used by the Commission's adjudicatory Boards as guidance in applying the provisions of 10 C.F.R. § 2.749. Id.

A hearing on the questions raised by an intervenor is not inevitable. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC 632, 635 (1981). The purpose of summary disposition is to avoid hearings, unnecessary testimony and cross-examination in areas where there are not material issues to be tried. The Supreme Court has very clearly stated that there is no right to a trial except in so far as there are issues of fact in dispute to be determined. Ex parte Peterson, 253 U.S. 300, 310 (1920). Under the Federal Rules, the motion is designed to pierce the general allegations in the pleadings, separating the substantial from the insubstantial, depositions, interrogatories or other material of evidentiary value. 6 J. Moore, Moore's Federal Practice ¶ 56.04[1] (2d ed. 1976). Mere allegations in the pleadings will not create an issue as against a motion for summary disposition supported by affidavits. 10 C.F.R. § 2.749(b); Fed. R. Civ. P. 56(c).

A party seeking summary disposition has the burden of demonstrating the absence of any genuine issue of material fact. Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 and 2),

ALAB-443, 6 NRC 741, 753 (1977). In determining whether a motion for summary disposition should be granted, the record must be viewed in the light most favorable to the opponent of such a motion. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982).

To draw on federal practice, the Supreme Court has pointed out that Rule 56 of the Federal Rules of Civil Procedure does not permit plaintiffs to get to a trial on the basis of the allegations in the complaints coupled with the hope that something can be developed at trial in the way of evidence to support the allegations. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968), rehearing den., 393 U.S. 901 (1968). Similarly, a plaintiff may not defeat a motion for summary judgment on the hope that on cross-examination the defendants will contradict their respective affidavits. To permit trial on such a basis would nullify the purpose of Rule 56 which permits the elimination of unnecessary and costly litigation where no genuine issues of material fact 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 Gulf States Utilities Co. (River Bend Station, Units 1 and 2), 1 NRC 246, 248 (1975).

To defeat summary disposition an opposing party must present material, substantial facts to show that an issue exists. Conclusions alone will not suffice. River Bend, LBP-75-10, supra at 248; Perry, ALAB-443, supra at 754.

The federal courts have clearly held that a party opposing a motion for summary judgment is not entitled to hold back evidence, if any, until the time of trial. Lipschutz v. Gordon Jewelry Corp., 367 F. Supp. 1086, 1095 (SD Texas 1973); the opponent must come forth with evidentiary facts to show that there is an outstanding unresolved material issue to be tried. Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 63 (9th Cir. 1973); and Franks v. Thompson, 59 FRD 142, 145 (M.D. Alabama 1973). Summary disposition cannot be defeated by the possibility that Mr. Eddleman might think of something new to say at hearing O'Brien v. McDonald's Corp., 48 FRD 370, 374 (N.D. Ill. 1979); nor can the Applicants' motion be defeated on the hope that Mr. Eddleman could possibly uncover something at hearing. Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 974 (Minn. 1967). Now, in opposition to the Applicants' motion, is the time for Mr. Eddleman to come forth with material of evidentiary value to contravene the Applicants and Staff's affidavits and to show the existence of a material fact to be resolved at an evidentiary hearing.

The Commission's regulations permit responses both in support of and in opposition to motions for summary disposition. 10 C.F.R. § 2.749(a). Such responses may be filed with or without supporting affidavits. Id. However, if the motion is properly supported, the opponent of such a motion may not rest simply on allegations or denials of the contents of the motion. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). In addition, any facts not controverted by the opponent of a motion are deemed to be admitted. 10 C.F.R. § 2.749(b). The Appeal Board noted recently that a hearing on each issue raised "is not inevitable," but "wholly depends

upon the ability of the intervenors to demonstrate the existence of a genuine issue of material fact . . . ." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), supra 632, 635.

Both the Appeal Board and the Commission have encouraged the use of the Commission's summary disposition procedure. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). See, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241 (1973), aff'd sub nom BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550-51 (1980); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-25 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973). The Commission has stated that:

> ". . . Boards should encourage the parties to invoke the summary disposition procedures on the issues of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues."

CLI-81-8, supra, 13 NRC 452, 457. The Commission's summary disposition procedures "provide . . . an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." Allens Creek, supra, 11 NRC at 550. Applicants have met these standards with regard to their motion for summary disposition concerning Eddleman Contention 67.

B. Applicants Have Demonstrated the Absence of a Genuine Issue of Material Fact With Regard to Contention 67 and are Entitled to a Favorable Decision on This Contention as a Matter of Law

In preparing to respond to the Applicants' motion, Frank Young and Charles Willis, who are the Staff's technical experts in this area,

reviewed Contention 67 and all of its supporting documentation: The response of Messrs. Young and Willis is set forth in their Affidavit in Support of Summary Disposition of Contention 67 which is attached to, and a part of, this Staff Response.

In Contention 67, Mr. Eddleman generally contends that there is no assured disposal site to isolate the low-level radioactive wastes produced by normal operation of Harris. The legal issue this contention presents under the Atomic Energy Act is whether the Commission has reasonable assurance that the wastes can be safely handled and stored as they are generated, and safely disposed of when, from a public health and safety standpoint, that is likely to become necessary. Florida Power & Light Company (Turkey Point Nuclear Generating Station, Unit Nos. 3 and 4), ALAB-660, 14 NRC 987, at 1011.

Turkey Point concerned Appeal Board consideration of appeals of two licensing board orders which, inter alia, granted summary disposition of certain contentions opposing Florida Power & Light Company's proposal to repair the steam generators at Turkey Point. The Appeal Board held that the Licensing Board properly granted summary disposition of intervenor's claim that extended onsite storage of low level waste generated by the repairs was unacceptable. The facts before the Licensing Board established that even absent additional allocations of space at Barnwell or permits to ship to other low-level waste disposal sites, the Turkey Point steam generator wastes would be disposed of within approximately six years of the repairs and would be safely stored onsite during that time. The Appeal Board found:

> the undisputed facts before the Licensing Board sufficient to conclude that the low level wastes generated by the steam generator repairs would be safely stored and disposed of when necessary.

Id. at 1011-1012.

In its "Memorandum and Order (Addressing Motion for Reconsideration and Clarification of the Board's Prehearing Conference Order)" (Order), dated January 11, 1983, the Board properly limited the scope of Contention 67 to whether there is "some reasonable assurance that low-level waste can be disposed of off-site or stored on-site." Order, at 5.

In response to this contention, Applicants make essentially two arguments. First, Applicants point out that because of the progress in the formation of the Southeast Compact, its submission to Congress for consent, and the activities of the Southeast Compact Commission, there is now reasonable assurance that the Harris facility will be able to ship low-level waste to the Southeast Compact disposal facility. Applicants' Motion, at 7. Second, Applicants assert that the availability of several alternative methods for disposal or interim storage of low-level radioactive wastes provides further assurance, if any is needed, that the Harris plant will operate without risk to public health and safety. (Id.). The Staff addresses each of these arguments below. The Staff submits that the Applicants have met the standard enunciated in Turkey Point.

1. Off-Site Waste Disposal

The legislatures of eight southeastern states, including North Carolina and South Carolina, have adopted the Southeast Interstate Low-Level Radioactive Waste Management Compact. Young at 2.

As provided by the Low-Level Radioactive Waste Policy Act of 1980, the Compact has been introduced to Congress for its consent. S. 1749, 98th Cong., 1st Sess. (1983); H.R. 3777, 98th Cong. 1st Sess. (1983). All cognizant Congressional committees have held hearings on the Compact. Representatives of the Compact Commission established by the Compact have testified at these hearings and responded to questions posed by members of the cognizant Congressional committees. (Id., at 2-3).

The Compact provides in Article 3(A) that any low-level waste generator in a party state has the right to have all its waste disposed of at the Compact disposal facilities. (Id., at 3).

Article 2(10) of the Compact provides that the currently licensed and operating low-level waste disposal facility in Barnwell, South Carolina will serve as the Compact's initial disposal facility. Disposal capacity in the Barnwell facility is currently available through 1992. Carolina Power & Light Company ships low-level wastes from its operating nuclear power plants to Barnwell. (Id., at 3).

Article 4(E)(6) of the Compact provides that a second host state for a disposal facility will be identified within three years and be in operation by 1991, one year before the scheduled closing of Barnwell. The Compact Commission is moving toward implementation of this provision. (Id., at 3).

The Shearon Harris Nuclear Power Plant, as a generator within a party state, would be entitled to ship its low-level waste to the disposal facility designated by the Compact. (Id.).

Therefore, upon consent to the Compact by Congress, there is reasonable assurance that there will continue to be an off-site facility for the disposal of the low-level waste from the Shearon Harris Nuclear Power Plant. (Id., at 3).

The North Carolina Waste Management Act of 1981 establishes a system for the evaluation and assessment of low-level radioactive waste. (Id., at 3).

2. On-Site Storage Capacity

In Statement 11 of the Applicants' Statement of Material Facts, the Applicant claims dedicated space for seven months output of low-level radioactive wastes (LLRW). The Staff notes that the LLRW generation rate postulated in the affidavit of George H. Warriner (page 5) is substantially lower than the rate postulated in the FSAR (Table 11.4.2-1, Amendment 5). The Staff has independently calculated the annual LLRW generation rate for Harris operation and concluded that the rate calculated by Warriner is correct, Therefore, the claim of capacity for storage of seven months LLRW production is realistic. Thus, the Staff supports the Applicants' claim of substantial dedicated onsite storage capacity. (Willis, at 4-5).

In Statement 12, the Applicant claims that space for another seven months' LLRW production is readily available. The Staff has confirmed that space is allocated in the Waste Processing Building for the storage of empty drums and that if such drums are removed from the

building, this space can be used for the storage of LLRW. Thus, the Staff agrees with the Applicants' statement that there is additional readily available storage space. (Id., at 5).

In Statement 13, the Applicant states that the additional space is available in the Waste Processing Building because the building was designed for four units, whereas only one unit is now being built. The Staff confirms this statement. (Id.).

In Statement 14, the Applicant claims that, in total, 4.3 years accumulation of LLRW could be stored in the Waste Processing Building. The Staff has determined that additional space is available and that the amount of space available appears consistent with the 4.3 years capacity. Thus, the Staff generally supports the claim that LLRW from several years operation could be stored in the Waste Processing Building. (Id.).

In Statement 15, the Applicant claims that the Waste Processing Building satisfies all regulatory requirements for onsite storage of LLRW. The Staff confirms that the Waste Processing Building meets the regulatory requirements for storage of LLRW (see SER Section 11.4). These requirements are specified in Regulatory Guide 1.143, "Design Guidance for Radioactive Waste Management Systems, Structures, and Components Installed In Light-Water Cooled Nuclear Power Plants." (Id., at 6).

In summary, the Staff agrees that the Shearon Harris Nuclear Power Plant has adequate provisions for onsite storage of low-level radioactive wastes. (Id.).

IV. CONCLUSION

For the reasons set forth above, Applicants' motion for summary disposition of Contention 67 should be granted in its entirety.

Respectfully submitted,

Marjorie U. Rothschild

Marjorie U. Rothschild
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of May, 1984