

549

06/04/84

RELATED CORRESPONDENCE

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUN -8 A10:22

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
TEXAS UTILITIES ELECTRIC)	Docket Nos. 50-445
COMPANY, <u>et al.</u>)	50-446
(Comanche Peak Steam Electric)	
Station, Units 1 and 2))	

NRC STAFF ANSWER IN SUPPORT OF APPLICANTS'
MOTION FOR SUMMARY DISPOSITION OF
NEAR-WHITE BLAST SURFACE PREPARATION ISSUE

I. Introduction

On May 13, 1984, Applicants Texas Utilities Electric Company, et al. filed their Motion for Summary Disposition of Near-White Blast Surface Preparation Issue ("Motion") pursuant to 10 C.F.R. § 2.749. For the reasons discussed below, the Staff submits that there is no genuine issue of material fact with respect to this issue, and accordingly, the Licensing Board should summarily dispose of this issue as a matter of law.

II. 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

8406110019 840604
PDR ADOCK 05000445
G PDR

DSO

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, ALA3-443, 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 CASE 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 CASE 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 CASE to come forth with material of evidentiary value to contravene the Applicants' affidavit 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 the "near white blast" issue.

- B. Applicants Have Demonstrated the Absence of a Genuine Issue of Material Fact With Regard to the Issue of the Adequacy of Applicants' Procedures for Determining Whether Surfaces had Been Properly Prepared for Coatings By Achieving A "Near White Blast" Condition and Are Entitled to a Favorable Decision on This Issue As A Matter of Law

The issue before the Licensing Board concerns the Applicants' procedures for determining whether surfaces had been properly prepared for

coatings by achieving a "near white blast" condition.^{1/} Specifically, the issue in controversy relates to the procedures in effect during the period from September or October of 1981 until January 26, 1982. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-60, 18 NRC 672, 685-686 (1983); (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-69, 18 NRC 1084, 1089 (1983).

Mr. Robert Hamilton had testified on behalf of intervenor CASE that the Applicants had inadequate procedures for determining whether surfaces had been properly prepared for protective coatings by achieving a "near white blast" condition. LBP-83-60, 18 NRC at 685. The Licensing Board accepted as adequate Applicants' procedure contained in CCP-30, Revision 10, covering the period subsequent to January 26, 1982. Id. at 685-686. In its Memorandum and Order dated October 25, 1983, the Licensing Board indicated that "procedures, which apparently were defective" were in effect for about three months prior to January 26, 1982. LBP-83-69, 18 NRC at 1089.

The present Motion is accompanied by an affidavit executed by Mr. C. Thomas Brandt. Attached to, and referred to in the affidavit are Revision 10 and earlier revisions of the pertinent part of CCP-30, specifically section 4.1.1, "Surface Preparation for Primer." As noted above, the Licensing Board has found that this section, which requires achieving the equivalent of SSPC-SP10-63, "near white blast" cleaning, is an adequate procedure within the context of this issue. Attachments to

^{1/} A separate issue to be considered at a subsequent time is whether Applicants' followup inspection of protective coatings provides adequate assurance concerning the safety of coating. See 18 NRC at 1089.

Mr. Brandt's affidavit, consisting of Revisions to CCP-30 numbers 7, 8 and 9, October 22 and November 4, 1981, respectively, demonstrate that identical language concerning "near white blast" was used in the previous revisions to section 4.1.1. Moreover, Mr. Brandt's affidavit also discusses the relevant inspection procedure, QI-QP-11.4-1, which governs inspection of prepared steel substrate surfaces. Attached to Mr. Brandt's affidavit are copies of the relevant sections of the inspection procedures for the period May, 1981 (Revision 3) through June, 1982 (Revision 8). While these inspection procedures have been revised from time to time, the requirement that an inspector check the blasted substrate surface and adjacent areas and the criteria for determining acceptability of the blasted substrate surface were included in all of the procedures attached to Mr. Brandt's affidavit.

III. Conclusion

Based on the affidavit and attachments thereto submitted with Applicants' Motion, the Licensing Board should grant Applicants' Motion for Summary Disposition of the issue concerning the adequacy of Applicants' procedures for determining whether surfaces had been properly prepared for coatings by achieving a "near white blast" condition.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of June, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'84 JUN -8 A10:22

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

TEXAS UTILITIES ELECTRIC)
COMPANY, et al.)

(Comanche Peak Steam Electric)
Station, Units 1 and 2))

Docket Nos. 50-145
50-446

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER IN SUPPORT OF APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF NEAR-WHITE BLAST SURFACE PREPARATION ISSUE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of June, 1984:

Peter B. Bloch, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Kenneth A. McCollom
Administrative Judge
Dean, Division of Engineering,
Architecture and Technology
Oklahoma State University
Stillwater, OK 74078

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, TN 37830

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mrs. Juanita Ellis
President, CASE
1426 South Polk Street
Dallas, TX 75224

Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection Division
P. O. Box 12548, Capital Station
Austin, TX 78711

Nicholas S. Reynolds, Esq.
William A. Horin, Esq.
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N.W.
Washington, DC 20036

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lanny Alan Sinkin
114 W. 7th, Suite 220
Austin, TX 78701

Mr. Michael D. Spence, President
Texas Utilities Generating Company
Skyway Tower
400 North Olive Street, L.B. 81
Dallas, TX 75201

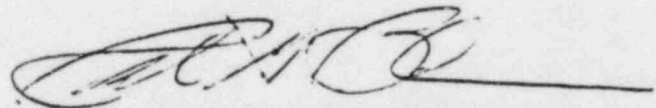
Robert A. Wooldridge
Worsham, Forsythe, Sampels & Wooldridge
2001 Bryan Tower, Suite 2500
Dallas, TX 75201

Mr. James E. Cummins
Resident Inspector/Comanche Peak
Steam Electric Station
c/o U.S. Nuclear Regulatory Commission
P. O. Box 38
Glen Rose, TX 76043

John T. Collins
William L. Brown
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Billie Pirner Garde
Citizens Clinic Director
Government Accountability Project
1901 Que Street, Northwest
Washington, DC 20009

Ellen Ginsberg, Esq.*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Richard G. Bachmann
Counsel for NRC Staff