

800

RELATED CORRESPONDENCE

DOCKETED
USNRC
06/18/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 JUN 21 P4:39

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE

In the Matter of)

CAROLINA POWER AND LIGHT COMPANY AND)
NORTH CAROLINA EASTERN MUNICIPAL)
POWER AGENCY)

Docket Nos. 50-400 OL
50-401 OL

(Shearon Harris Nuclear Power Plant,)
Units 1 and 2))

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION
FOR SUMMARY DISPOSITION OF WELLS EDDLEMAN'S CONTENTION 11

I. INTRODUCTION

On May 25, 1984 the Applicants moved for summary disposition^{1/} of Mr. Eddleman's Contention No. 11. That contention alleges that polyethylene will be used as cable insulation at Harris, and that such insulation will be exposed to radiation and become brittle. The conclusion, though not stated in the contention, is that brittle polyethylene cable insulation will cause an unsafe facility condition to exist. The Staff's response in support of the Applicants' Motion follows.

II. BACKGROUND

The procedural background of Mr. Eddleman's Contention No. 11 is correctly set forth on pages 2, 3 and 4 of Applicants' Motion and is not repeated here. Extensive discovery was had among Mr. Eddleman, the Staff and Applicants on this issue. That discovery does not

1/ Applicants' Motion For Summary Disposition of Eddleman Contention 11 (Applicants' Motion) dated May 25, 1984.

8406220145 840618
PDR ADOCK 05000400
G PDR

DESIGNATED ORIGINAL

Certified By YML 2507

reveal any basis which would support either Mr. Eddleman's assertion that polyethylene will be used as cable insulation at the Harris plant, or that Mr. Eddleman's implication that embrittlement of polyethylene could cause an unsafe condition.

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 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 11.

B. The Allegations of the Contention

The contention makes two assertions. First, polyethylene will be used as cable insulation at Harris. The Applicants' Motion states that there will be no polyethylene-insulated electrical cables at Harris. (Motion at 3, Applicants' Statement of Material Facts at 3, fact number 14). The Affidavit of the Staff's reviewer in this area, Armando S. Masciantonio, affirms that polyethylene will not be used as cable insulation. Masciantonio Affidavit at paragraph 4. Staff discovery upon Mr. Eddleman disclosed nothing that contradicts Mr. Masciantonio's statement.^{2/} This is the crux of the matter. Since polyethylene will not be used as cable insulation at Harris there is no material issue of fact in dispute to be the subject of an evidentiary hearing.

Mr. Eddleman next asserts polyethylene becomes embrittled due to radiation and therefore unsafe conditions follow. As mentioned above, polyethylene has not been used at Harris as cable insulation. The Applicants' Motion states that the Harris surveillance and maintenance program will be adequate to detect any cable degradation (Motion at 7, Bucci Affidavit at 20). For the materials which will be used in the plant,

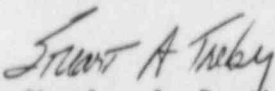
^{2/} NRC Staff Interrogatories To Wells Eddleman, dated March 15, 1984. See Interrogatories 50-67 and especially Interrogatory 65.

the Staff has required, and Applicants have committed to implement surveillance and maintenance procedures which will detect age related degradation and allow for the taking of corrective action before a safety problem develops. Regulatory Guide 1.33, which incorporated ANSI-N18.7-1976/ANS-3.2, contain recommendations for such procedures which would be acceptable to the Staff. Applicants have committed to follow the guidance of this regulatory guide in developing their surveillance and maintenance procedures. Masciantonio Affidavit at ¶¶ 6-8. Nothing in the discovery upon Mr. Eddleman casts a shadow of a doubt upon Mr. Masciantonio's conclusion.

III. CONCLUSION

The Staff does not fully agree with all of the statements made in Applicants' Motion and supporting papers. Our lack of complete agreement does not affect our conclusion that there is no genuine issue of material fact to be heard with regard to Wells Eddleman's Contention 11. Polyethylene is not used as cable insulation at Harris. A well developed and implemented maintenance and surveillance program which will detect unanticipated age related degradation will assure that any increased deterioration of cable insulation due to the expected lower radiation dose rate will be discovered and will not cause an unsafe condition to occur. The Applicants' Motion for Summary Disposition of Wells Eddleman's Contention 11 should be granted.

Respectfully submitted,


for Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of June, 1984