

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
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In the Matter of)
CAROLINA POWER AND LIGHT COMPANY AND)
NORTH CAROLINA EASTERN MUNICIPAL)
POWER AGENCY)
(Shearon Harris Nuclear Power Plant,)
Units 1 and 2)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket Nos. 50-400 OL
50-401 OL

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS'
MOTION FOR SUMMARY DISPOSITION OF
WELLS EDDLEMAN'S CONTENTION 45 (WATER HAMMER)

I. Introduction

On May 25, 1984 the Applicants moved for summary disposition^{1/} of Mr. Eddleman's contention number 45 which relates to water hammer.

The Staff's response in support of the Applicants' motion follows.

II. Background

The procedural background of Mr. Eddleman's contention number 45 is correctly set forth on pages 2, 3 and 4 of Applicants' motion and will not be repeated here.

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

^{1/} Applicants' Motion For Summary Disposition of Eddleman Contention 45 (Water Hammer) dated May 25, 1984.

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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 Mr. Eddleman 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 shown 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 Staff's 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 45.

B. The Motion

As set forth in Applicants' motion, extensive discovery was had among the concerned parties. The text of the contention asserts that the Applicants' design cannot comply with NRC requirements. On March 15, 1984

the Staff served Interrogatories upon Mr. Eddleman.^{2/} Interrogatory 68 on page 5 asked Mr. Eddleman to set forth with particularity in what ways the Harris facility will not conform to NRC requirements for obviating water hammer, which, in substance, is a reiteration of Mr. Eddleman's allegations. We asked him to specify his allegations. In our original response^{3/} to Mr. Eddleman's proffered contentions we argued that they were not admissible as they were too vague and lacked identifying any specific issue in the Harris Facility that could be litigated. Now, some two years later Mr. Eddleman has yet to identify any failure of the Applicants to conform to NRC requirements in the area of water hammer. Mr. Eddleman's response to this inquiry was an objection that the Interrogatory was vague. Mr. Eddleman's failure to identify any non-conformance to NRC requirements leaves the present posture with a general contention with no specific issues identified which could be resolved at an evidentiary hearing.

Technical members of the NRC Staff reviewed the Applicants' motion and supporting papers and concluded that design and implementation, as verified by pre-operational and startup testing, would mitigate possible water hammer problems.^{4/} Serkiz at 4 and 5, Marinos at 2 (ECCS), Wagner at 3 and 4 (feedwater). There is not now an identified issue of fact in dispute which could be resolved in an evidentiary hearing.

2/ NRC Staff Interrogatories To Wells Eddleman, dated March 15, 1984.

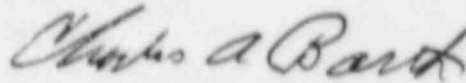
3/ NRC Staff Response to Supplemental Statements of Contentions By Petitioners To Intervene, dated June 22, 1982.

4/ Affidavits of Aleck W. Serkiz, Evangelos C. Marinos and Norman H. Wagner in Support of NRC Staff Response to Applicants' Motion For Summary Disposition of Wells Eddleman Contention 45 (Water Hammer) hereinafter "Serkiz", "Marinos" and "Wagner."

IV. Conclusion

The Staff concludes, based upon the Affidavits of Messers. Serkiz, Marinos and Wagner that the Applicants have complied with the NRC program to mitigate water hammer and that the pre-operational and startup testing will verify the acceptability of the program. Based upon the foregoing, the Applicants' motion for summary disposition of Eddleman Contention 45 should be granted.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of July, 1984