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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 50-250 OLA
	)	50-251 OLA
(Turkey Point Units #3 & #4)	)	

INTERVENORS' RESPONSE TO THE FLORIDA POWER & LIGHT COMPANY'S MOTION TO STRIKE

The Florida Power & Light Company's (FPL or Utility Co.) Motion to Strike Intervenors' responses to the original Motion for summary disposition must fail.

In support of their original Motion for Summary Disposition, the Utility Company provided a memorandum of law that purported to describe the agency process for summary disposition, and which described the agency endorsement of that device for avoidance of "unnecessary and time consuming hearings..." In that dissertation, the Utility omitted, however, any reference to the fact that, "the Proponent of the motion for summary disposition has the burden of demonstrating the absence of a genuine issue of material fact." It does not necessarily follow, therefore, that a motion supported by affadavits will automatically prevail over an opposition not supported by affadavits... the Board must scrutinize the motion to determine whether the movant's burden has been met." Carolina Power & Light Co.(Shearon Harris Nuclear Plant), LPB-84-7,

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19 NRC 432, 435, citing Adikes v. SH. Kress & Co. 398 US 144,156-61 (1970) ; and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2) ALAB-443, 6 NRC 741, 752-54 (1977).

The original Motion by the Florida Power & Light Company, relying upon probability assessment of less than 100%, never met this burden of demonstration of the absence of an issue of material fact.

In order to invoke the hearing process, the key consideration is whether there exists an issue of material fact upon which reasonable minds differ within the scope of the Board's responsibilities.

In an original test as to the adequacy of the statement of issues of material fact (or contentions), the Board has ruled in an Order of May 16, 1984, that Intervenors are entitled to a hearing on two issues, original contentions (b) and (d). This was done after after a substantial and initial attack by the Staff and the Utility as to the adequacy of the issues raised by the Intervenors. The ASLB (Board) has acknowledged the existance of at least two issues of material fact by its acceptance of Contentions (b) and (d) as being valid and"raising a concrete issue within the scope of the proceeeding ." Prehearing Conference Order , May 16, 1984, p. 15, also see similar statement at pg. 11 supra. Thus, the Board has already acknowledged that the Intervenors have raised a substantial issue of material fact suitable for disposition at hearing.

Nothing in the affadavits of the Utility experts, or relied upon in the Utility's Statement of Material Facts As to Which There Is No Genuine Issue To Be Heard With Respect to Intervenors' Contention (either (b) or (d)), disputes or dispells the existance of a significant issue of material fact.

For example, in addressing Contention (d), the Utility merely uses language to the effect that in their opinion and that of the Staff, "these requirements can be met through the use of heat transfer correlations based upon experimental data in safety analyses

in establsihing technical specifications which assure with a 95% confidence that there is a 95% probability that fuel design limits including... DNB, will not be exceeded." Licensee's Statement of Material Facts ...Intervenors Contention (d) , pg. 2.

Intervenors and their experts,Dr. Gordon Edwards and Robert B. Pollard, disagree. Ninety five percent probability does not equate with one hundred percent certainty. Reasonable minds may differ. The Intervenors have,by affadavit and to meet their minimal responsibility under the Summary Rule, provided the testimony of Dr. Gordon D. J. Edwards to the effect that there exists at least two issues of material fact that must be allowed to be litigated at hearing.

The Utility's third effort, which now includes an attack upon the qualifications of Dr. Edwards and Ms. Lorion, is an inequitable, premature, and impermissable effort at voir dire which is a proper element of the hearing process, not the prehearing process being conducted here. To even entertain, let alone grant, motions to strike at this stage would be to unfairly give a party (here the Utility Company) two bites at the apple of voir dire in a betrayal of the Commission's regulatory responsibilities and unfairly discredit witnesses who have had no fair opportunity to defend their professional qualifications.

Nothing in the Commission's Rules of Practice, or specifically under Rule 10 C.F.R. 2.749 (a) allows a party (here FPL) to reply to an answer opposing a motion for summary disposition. Therefore, it is the position of Intervenors that the Motion to Strike is inappropriate and premature.

Intervenors motion that it be stricken. If the Board allows the Motion, in the alternative, the Intervenors motion that the FPL Motion to Strike be denied as premature, since voir dire is incomplete.

Indeed, no Commission Rule ever allows Motions to Strike testimony prior to completion of voir dire and completion of the testimony.

The Commission's Rules of Practice are based upon the Federal Rules of Civil Procedure. F.R.C.P. 12 (f) relates to the matters to be stricken from proceeedings. Although technically not pleadings, Courts have permitted affadavits to be challenged by motions to strike because there is no other Federal Rule mechanism to contest their sufficiency. Sunshine Kitchens, Inc. v. Alanthus Corp., 66 F.R.D. 15, 17, (S.D. Fla. 1975). Of course, if portions of the affadavits are inadmissable, the whole affadavit need not be stricken, but only those portions which are deficient, Perma Research and Development Co. v. Singer Co, 410 F 2d 572, 578-79; See J. Moore, J. Wicker, Moores Federal Practice 56.22 at 56-1330-31, (2d Ed. 1976).

Each of Intervenors affiants here comported with the requirements of Federal Rule of Civil Procedure 56 (e). Each of Intervenors' affiants asserts he/she is competent to testify and that his/her statements are based upon personal knowledge. In the Lorion affadavit, there is the addition of hearsay testimony that meets the hearsay exception as defined in Duke Power Company (Catawba Nuclear Stations Units 1 and 2) ALAB-355, 4NRC 397, 411-412, (1976). "Relavant material and reliable evidence which is not unduly repetitious will be admitted." 10 C.F.R. 2.743 (c).

Dr. Gordon Edwards, with an educational background in chemistry, mathematics, and physics, is emminently qualified. Dr. Edwards , a Canadian subject, has been employed by the Ontario Royal Commission for the purpose of assistance as an expert in cross examination of government nuclear experts. His qualifications for the purpose here are unassailable, and if the Board were to question his qualifications one iota before affording him opportunity to defend on voir dire, it would be inequitable and erroneous.

Conversely, Joette Lorion has not represented herself to be an expert witness in the nuclear field, but has indicated that she is possessed of "broad general knowledge" of the problems at Turkey Point and interpreted for the Board the nature of the issue of material fact she raised due to the nonavailability of the actual experts she had consulted.

Since Ms. Lorion has not insisted that she is an"expert" in the nuclear technology field, a finding by this Board that she is unqualified would be inappropriate and superfluously redundant. She is a party and has raised an issue of material fact suitable for rsolution at a hearing, and she has met her responsibility to raise an issue of material fact while the Utility has failed to overcome its burden of adequately refuting the issues she has raised. Credible witnesses need not be experts as the ASLB has previously found.

> Each expert witness in this proceeding has either submitted a statement of qualifications and experience or training, or undergone a voir dire examination, and though several witnesses have not been expert witnesses, we feel the information they gave relates to important elements of their experience and training and puts them in the same class as expert witnesses. Public Service Co. of New Hampshire (Seabrook Nuclear Power Station Units 1 and 2) LBP-76-4, 123.

None of the expert witness cases relied upon by FPL is in point. See FPL Motion to Strike, pgs. 3 and 4, referencing Philadelphia Electric Company and Pacific Gas and Electric Company. Each of the cases cited by the Utility Company that disqualified or limited a prospective expert witness in an NRC proceeding arose from an actual hearing before the Atomic Safety and Licensing Board after voir dire and proper examination of testimony. None of those cases addresses the pre-hearing process where summary disposition is sought. Presumably, in the absence of voir dire, prospective witnesses are given some benefit of the doubt.

The Utility has contended that Sections 7-10 of the Edwards Affadavit "constitute and attack on the substance of the Commission's Regulations." FPL Motion to Strike, p.10-11. This is untrue. What Dr. Edwards is saying is that the computer models and correlations utilized by the Staff and Utility are not in conformance with the Commission's own criteria.

Dr Edwards says, that no computer code is completely accurate.

The results are always approximate and one should leave an adeqaute margin of safety because the closer one gets to the safety margin, the greater one's chances are of exceeding it. Dr. Edwards argues that the FPL proposed margin is unsatisfactory because running the fuel hotter increases the amount of iodine available for release.

Dr. Edwards belives that the proposed amendments will erode safety margins and that it is not prudent to grant these amendments for an interim fuel cycle phase when no decent computer model exists for the fuel core design in question and proper mathematical tools for predicting the degree of safety have not been used.

Dr. Edwards is not attacking the Commission's Rules. He is merely inserting a cautionary note that computer models are only an approximation and, thus, there is room a difference of opinion on the degree of conservatism where safety is concerned. Dr. Edwards is merely asking if it is prudent to allow safety margins to be reduced without a proper computer model designed for the specific fuel core in use at Turkey Point that meets the NRC 10 C.F.R. 50.46 requirements.

To comply with 10 C.F.R. 2.749 (a) and specifically to dispell all doubt , Intervenors contend the following:

1. Contention (b). The BART A-1 Computer Code used to analyze loss of coolant accidents for Turkey Point, does not meet the emergency core cooling criteria, specifically 10 C.F.R. 50.46 and 10 C.F.R. Part 50 Appendix K, because the ECCS analysis was not performed with a computer code designed for the mixed fuel core, and,thus, erosion of safety margins could result in a maximum fuel element temperature greater than 220 degrees F.

2. Contention (d). The reduction DNBR from 1.3 to 1.17 will result in an increased potential for cladding perforation and release of fission products, especially iodine, to the environment. Thus, the margin of safety will be significantly reduced for

the Turkey Point Units, and the requirements of 10 C.F.R. 50.46 and 10 C.F.R. Part 50 Appendix A will not be met due to the fact that the amendment was based on mathematical correlations and computer codes not designed for the mixed fuel core currently in use.

For all the foregoing reasons, the Florida Power and Light Company's Motion to Strike must fail.

Respectfully Submitted,

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