

Licensee motion for summary disposition of the contentions and its motion to strike the affidavits supporting Intervenors' Response in opposition to summary disposition. Motion at 1-2. Licensee argues that clarification or reconsideration of the February 8, 1985 Order is necessary because (1) neither 10 C.F.R. § 2.749(d) nor the Commission's guidance to licensing boards expressly provide for nor contemplate receipt of oral testimony in conjunction with summary disposition and (2) cases regarding the analogous provision, Rule 56 of the Federal Rules of Civil Procedure, indicate that oral testimony on motions for summary judgment, while within a judge's discretionary power, is to be used sparingly, in a manner which prevents unfair surprise to other litigants, and solely to determine whether a genuine issue of material fact exists. Motion at 3-6.

Summary disposition may not be granted unless the Board determines on the basis of all the pleadings before it, that there is no genuine issue as to any material fact. 10 C.F.R. § 2.749(d). Because the burden is on the movant to demonstrate the absence of any genuine issue of material fact, where the proponent of the motion fails to establish such absence the motion must fail irrespective of the quality of any response. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977). Thus, a proper course for this Board, if it has determined that summary disposition cannot be granted on the basis of Licensee's filings and the other papers filed in this proceeding, is either to call for the submission of additional documents or written materials on the summary disposition motion, Perry, 6 NRC at 752, or to deny the motions, in whole or in part, and schedule any surviving issues for hearing.

A. Authority for Oral Testimony on Summary Disposition

The Staff agrees with Licensee that there apparently is no express NRC authority, either in 10 C.F.R. § 2.749 or agency case law, for the receipt of oral testimony on motions for summary disposition. See Motion at 3-4, 7. The Licensing Board does have the power to request additional information where it believes the existing record is insufficient to allow summary disposition. For example, the Appeal Board has held that it is not improper for a licensing board to request submission of additional documents which it knows would support summary disposition and to consider such documents in reaching a decision on a summary disposition motion. Perry, 6 NRC at 752. ^{1/} The regulations and agency case law are silent, however, on the use of oral testimony for summary disposition. ^{2/}

^{1/} The Appeal Board stated that a licensing board's role "as an arbiter of important safety and environmental questions 'does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it. . .'" Perry, 6 NRC at 752, quoting Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

^{2/} 10 C.F.R. § 2.749 generally speaks in terms of written materials (filings in the proceeding, depositions, answers to interrogatories, admissions on file, statements of the parties, and affidavits, 10 C.F.R. § 2.749(d)) as forming the basis for summary disposition. The regulation does not, by its terms, prohibit oral testimony, however. In different contexts, oral testimony has been relied upon for resolving other types of motions. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1343 (1983) (Appeal Board heard testimony and permitted cross examination of parties' affiants on motion to reopen the record where Board had questions on nature and significance of "new evidence" claimed to warrant reopening).

The decisions of the federal courts provide guidance as to whether the Board may receive oral testimony on summary disposition. ^{3/} Court decisions indicate that oral testimony may be received on motions for summary disposition, but the testimony should be used only to assist in the determination of whether genuine issues of material fact exist and should not result in unfair surprise to other litigants. Hayden v. First National Bank of Mt. Pleasant, Texas, 595 F.2d 994, 997 (5th Cir. 1979). See 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶¶ 56.11[1.6], 56.11[8] (2d ed. 1983); Chan Wing Cheung v. Hamilton, 298 F.2d 459, 460 (1st Cir. 1962). It is advisable that courts "avoid a lengthy trial for the purpose of actually establishing an actual trial is necessary." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.11[1.6].

B. The Board's Order

In light of the fact that the Board did not indicate in its Order the full scope of its inquiry or the opportunity for cross-examination, response or rebuttal, and mindful of the caution expressed by federal courts to avoid unfairness to opposing parties, the Board should clarify its Order. The Board's Order provides that Licensee's experts should be prepared to respond "in a didactic manner . . . to questions and issues

^{3/} Generally in ruling on a motion for summary disposition under 10 C.F.R. § 2.749, licensing boards should apply the rules and standards established by courts for granting or denying a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

raised in the various filings" and includes as examples of question areas:

1. The calculations used to determine critical heat flux (CHF) and peak cladding temperature (PCT) for Low-parasitic (LOPAR) fuel, Optimized Fuel Assemblies (OFA) and mixed LOPAR/OFA fuel.
2. The hydraulic and thermal effect of spacer grids (as related to calculations of CHF and PCT values).
3. The procedure and calculations used in arriving at the 10°F increase in PCT identified in items 5 and 8 of the Parvin affidavit.
4. The uncertainties listed in Joette Lorion's affidavit at pages 4, 5 and 8 and item 9(d) of Dr. Edward's affidavit at pages 6-7.

Order at 2 (footnote omitted). Because the information the Board requests in items 1 and 2 above is of general applicability to core reconfigurations, the Staff does not believe that an instructional presentation by one party's experts on such items would be improper. ^{4/} If there is an oral presentation by Licensee experts, however, the Board should give the parties an opportunity to cross-examine Licensee's experts.

The testimony that may be elicited in response to items 3 and 4, however, involves matters that are directly at issue in the proceeding

^{4/} In a prior NRC proceeding, a licensing board interrupted an operating license hearing to hear a basic and generic presentation, which was accorded no evidentiary weight, on seismology and geology to aid the board's understanding of those complex subjects. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), Transcript, June 24, 1981, Tr. 1153-1250.

and may result in prejudice to other parties if the Board hears testimony from Licensee experts alone without permitting responses or rebuttal from the other parties. ^{5/} Consequently, the Board should provide an opportunity for cross-examination by all parties and permit each party's affiants to address these items, either at the prehearing conference or by affidavit.

The Licensee recommends that the Board propound in writing the questions for the experts, in order to eliminate the potential for surprise and to limit the Board's inquiry to whether there are genuine issues of material fact, and allow cross-examination by all parties. Motion at 7-8. Alternatively, Licensee suggests that its experts respond to specific Board questions in writing by means of sworn affidavits with the opportunity provided to Intervenor and Staff to respond to the same questions and to Licensee's affiants. Id. at 8.

The procedures proposed by Licensee are only objectionable to the extent that they may unnecessarily protract a decision on the motions for summary disposition or deprive the Board of an opportunity to pursue fully questions to determine whether there is a genuine issue of material fact. Noting these concerns and the parties' need to know the full scope of the Board questions regarding the summary disposition motions, the Staff suggests that, if the Board is of the opinion that a brief prehearing conference may avoid unnecessary hearings on the contentions

^{5/} It would also be contrary to 10 C.F.R. § 2.749(a) which explicitly permits answers or responses from parties opposing summary disposition.

later, the Board outline any areas of concern apart from those listed in its Order, either in an order or in a conference call, and indicate the respective rights of the parties as to cross-examination, response or rebuttal testimony. ^{6/}

In sum, while NRC regulations and caselaw are silent on the Board's power to entertain oral testimony on summary disposition motions, there appears to be no prohibition against the Board's calling for and considering such testimony. Federal court caselaw on analogous summary judgment provisions of the Federal Rules of Civil Procedure makes clear, however, that oral testimony on motions for summary judgment should be used only to determine whether genuine issues of material fact exist and should not result in surprise to other parties. Since the Board's Order directing the presentation of testimony by Licensee did not necessarily account for such limitations, the Board should reconsider or clarify its Order by (1) clearly outlining any areas as to which the Board has questions so that the parties will not be surprised, (2) affording the

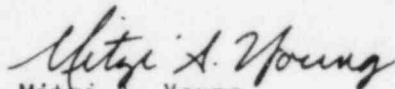
^{6/} Intervenors state they have no objection to the didactic presentation at the prehearing conference provided the Board's inquiry is limited to determining whether there is a genuine issue of material fact and the parties are provided an opportunity to cross-examine Licensee's experts. Intervenors' Response to Licensee's Motion for Reconsideration or Clarification of Order, dated February 25, 1985, at 1-2. Intervenors urge, however, that they should have a subsequent opportunity to rebut any presentation by Licensee's experts which Intervenors deem "inaccurate, prejudiced, misleading or improper." *Id.* at 3. While the Staff expects the Board's inquiry to be limited to obtaining explanations or clarifications of statements in affidavits already on record in this proceeding, the Staff is of the view that, once the Licensee is given an additional opportunity to meet its burden on the motion through oral testimony, an opportunity for additional responses by other parties is required by Section 2.749(a).

opportunity to cross-examine Licensee's experts, or any other party's experts, and (3) affording all other parties the opportunity for subsequent written response or rebuttal.

III. CONCLUSION

For the reasons discussed above, the Staff supports Licensee's Motion and believes the Board should either deny summary disposition, in whole or in part, or clarify its Order to indicate the scope of its further inquiry and the respective rights of the parties as to cross-examination, and subsequent response or rebuttal.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of March, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
FLORIDA POWER AND LIGHT COMPANY)
(Turkey Point Plant,)
Units 3 and 4))

Docket Nos. 50-250 OLA
50-251 OLA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LICENSEE'S MOTION FOR RECONSIDERATION OR CLARIFICATION OF ORDER" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 6th day of March, 1985:

*Dr. Robert M. Lazo, Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Norman A. Coll, Esq.
Steel, Hector & Davis
4000 Southeast Financial Center
Miami, FL 33131-2398

*Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

*Dr. Richard F. Cole
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

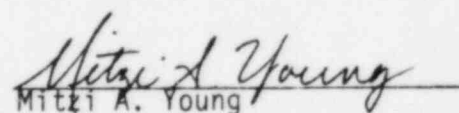
*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Harold F. Reis, Esq.
Newman & Holtzinger, P.C.
1615 L St., NW
Washington, DC 20036

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

Martin H. Hodder, Esq.
1131 N. E. 86th Street
Miami, FL 33138

Joette Lorion
7269 SW 54th Avenue
Miami, FL 33143


Mitzi A. Young
Counsel for NRC Staff