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January 28, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket No. 50-440 OL 50-441 OL
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

NRC STAFF MOTION FOR
SUMMARY DISPOSITION OF ISSUE #8

I. THE MOTION

Pursuant to 10 CFR § 2.749 of the Commission's Rules of Practice, the NRC Staff moves the Atomic Safety and Licensing Board (the Board) for summary disposition of Issue #8 admitted to this proceeding. In support of its motion the Staff will show by the attached affidavit of John Stefano and reference to the Safety Evaluation Report for the Perry plant that no genuine issue of material fact exists to require litigation of this issue.

II. DISCUSSION

A. Legal Standards for Summary Disposition

The Commission's Rules of Practice provide for summary disposition of certain issues on the pleadings where the filings in the proceeding show that there is no genuine issue as to any material fact and that the movant is entitled to a decision as a matter of law. 10 CFR § 2.749(d).

Use of summary disposition has been encouraged by the Commission and the Appeal Board to resolve contentions where the intervenor has failed

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to establish that a genuine issue exists. 1/ The Commission's rule authorizing summary disposition is analogous to Rule 56 of the Federal Rules of Civil Procedure 2/ which authorizes summary judgment only where it is quite clear what the truth is and where no genuine issue remains for trial 3/ when the record is viewed in the light most favorable to the party opposing the motion. 4/ The Commission follows these same standards in considering summary disposition motions. 5/ Consequently, the burden of proof lies upon the movant for summary disposition who must

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1/ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1&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 (1980); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 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). See also, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).

2/ Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-54 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974).

3/ Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962); Sartor v. Arkansas Natural Gas Corp. 321 U.S. 620, 627 (1944).

4/ Poller v. CBS, supra, at 473; Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F.2d 896, 899 (7th Cir. 1966); United Mine Workers of America, Dist. 22 v. Roncco, 314 F.2d 186, 188 (10th Cir. 1963).

5/ Perry, ALAB-443, supra at 754; Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-36, 7 AEC 877, 879 (1974).

demonstrate the absence of any genuine issue of material fact. 6/ A material fact is one that may affect the outcome of the litigation. 7/

However, where no evidence exists to support a claim asserted, it is appropriate to promptly dispose of a case without a formal hearing. The Commission has made clear that intervenors must show that a genuine issue exists prior to hearing, and if none is shown to exist, the Board may summarily dispose of the contentions on the basis of the pleadings. 8/ This obligation of intervenors is reflected in 10 CFR § 2.749(b) which states that:

> [w]hen a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered.

To defeat summary disposition, an opposing party must present material, substantial facts to show that an issue exists. Conclusions alone will not suffice. 9/ If a contention is to remain litigable, there must be presented to the Board a sufficient factual basis to require reasonable minds to inquire further. 10/ Moreover, if the statement of

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6/ Adickes v. Kress and Co. 398 U.S. 144, 157 (1970); Perry, ALAB-443, supra, at 753; 10 CFR § 2.732.

7/ Mutual Fund Investors Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).

8/ Prairie Island, CLI-73-12, supra at 242.

9/ Perry, ALAB-443, supra, at 754; River Bend, LBP-75-10, supra at 248.

10/ Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 340 (1980).

material facts required by 10 CFR § 2.749(a) is unopposed, the uncontroverted facts are deemed to be admitted. 11/

The Staff submits that even when the attached affidavit and statement of material facts about which there is no genuine issue are viewed most favorably in support of the contention, it is clear that no genuine issue of material fact exists to warrant litigation of the contention, and summary disposition should be granted on the basis of the pleadings.

B. The Contention

Issue #8 states:

> Applicant has not demonstrated that the manual operation of two recombiners in each of the Perry units is adequate to assure that large amounts of hydrogen can be safely accommodated without a rupture of the containment and a release of substantial quantities of radioactivity into the environment.

However, there is no issue raised by the assertion that the recombiners to be installed at the Perry plant will not accommodate significant hydrogen generation. The recombiners are not designed for such purpose. The 1982 Safety Evaluation Report for the Perry Plant (NUREG-0887) states that recombiners are provided to accommodate the small amount of hydrogen calculated for design basis accidents (SER pp. 6-14 to 6-15). The recombiners are not intended to, and will not, accommodate the much larger amounts of hydrogen that might be generated by a degraded core accident. Instead, the Applicants have selected a distributed igniter system to accommodate the large amount of hydrogen which could be generated during a degraded core accident. SER pp. 6-15 to 6-16.

11/ Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 NRC 159, 163 (1977).

As indicated by the attached affidavit of John Stefano and letter from CEI Vice President, M. Edelman, the Applicants have submitted a plan for development of a hydrogen control system to accommodate large amounts of hydrogen and are members of the Hydrogen Control Owners Group which is conducting tests of the igniter system of hydrogen control. 12/

Thus, it is, indeed, true that the two recombiners in each Perry Unit have not been demonstrated to be adequate to safely accommodate large amounts of hydrogen. A different hydrogen control system, not challenged by Issue 8, is intended for that purpose. Issue 8, therefore, raises no genuine issue of material fact warranting litigation.

III. CONCLUSION

For the reasons stated, the Board should grant the Staff's motion for summary disposition of Issue #8.

Respectfully submitted,

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of January, 1985.

12/ These tests are being conducted in accordance with a new hydrogen control rule recently approved for issuance by the Commission. (Memorandum, Chilk to Dircks, January 22, 1985.)