

Date: May 7, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

SOUTH CAROLINA ELECTRIC AND
GAS COMPANY, et al.

(Virgil C. Summer Nuclear
Station, Unit 1)

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Docket No. 50-395-OL

APPLICANTS' MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT
OF THEIR MOTION FOR SUMMARY DECISION
ON INTERVENOR BRETT A. BURSEY'S
CONTENTION A3 REGARDING ATWS

Background and Summary

Intervenor Brett A. Bursey's Contention A3 states as follows:

"Contention A3 The Applicant has not met the requirements of the NRC Staff to assure that the probability of occurrence of an ATWS event is acceptably small." (Order admitting contentions, April 24, 1978).

Despite a series of Board orders dating back to 1978, Intervenor Bursey has told us almost nothing regarding his ATWS contention. In response to the Board's December 30, 1980 Order requiring Mr. Bursey to provide a comprehensive summary of his proposed evidence, including exhibits, regarding his admitted contentions, Mr. Bursey filed (three weeks late) only the following statement with regard to ATWS:

"Testimony about the ATWS question is being prepared by the intervenor Brett A. Bursey."
(Bursey's letter to Licensing Board dated February 23, 1981)

Then, at the April 7th prehearing conference session, Mr. Bursey handed out a number of documents, one of which, he explained, contained some limited discussion by a Dr. Kaku of the ATWS question. Mr. Bursey referred us to pages 8 and 11 of that document. Item 12 on page 11 merely lists ATWS as one of a class of unresolved safety problems. Item a) on page 8 of the document said to be prepared by Dr. Kaku contains only the following with regard to ATWS:

"a) power excursion initiated by ATWS. Though the 3% enrichment level in a commercial reactor is too low to initiate a Bethe-Tait [sic] excursion like in breeder reactors, failure-to-SCRAM accidents in power plants can cause localized melting, generation of large quantities of steam, and perhaps enough pressure in the vessel to blow the headpiece off."

It will be seen that the only issue sought to be raised by the contention is that Applicants have not met NRC Staff requirements for ATWS. That this is incorrect may be seen by reference to §15.3.5 of the NRC Staff Safety Evaluation Report.

The allegations attributed to Dr. Kaku simply address the consequences of ATWS events. While we would not agree with the statement of consequences,^{1/} it is unnecessary for purposes of summary disposition of the contention to reach the question of consequences. That is, even assuming that the consequences of some

^{1/} Which reflect an apparent misunderstanding and misapplication of ATWS consequences for other designs. Power excursions have been generally associated with Boiling Water Reactor analyses (caused by void collapse during an over-pressurization transient). Severe pressures such as might lift the vessel head, stretching head bolts, have been suggested as a pressure-relieving phenomenon with regard to another PWR design, but not the Westinghouse design.

undetected, unmitigated ATWS event could be severe under some assumptions, the issue posed by the contention goes to the risk of ATWS events, which has been shown to be acceptably low and to meet current NRC licensing criteria for ATWS. (See the SER §15.3.5 and the enclosed affidavits.)

Finally, in Mr. Bursey's April 7, 1981 document also handed out at the prehearing session on that date, entitled "Summary of Contentions", he states with reference to Contention A3:

"The ATWS concern is an issue of generic consideration that has been in a rule-making proceeding for years. It is the Intervenor's position that the V.C. Summer plant should be required to operate under any forthcoming NRC regulations for ATWS concerns and not allowed to circumvent these important safety considerations due to a date of filing for construction."

It may be that what Mr. Bursey is driving at here is beyond the scope of his contention and seeks to challenge the absence of a requirement for SCE&G to make the ATWS modifications identified by NRC Staff for possible future application through rule-making (discussed in Mr. Steitler's affidavit) applicable to Summer prior to operation. If so, no basis at all is revealed for this argument, certainly none that would warrant the conclusion that he has made the prima facie showing of special circumstances required by 10 C.F.R. 2.758 for certification of the question of the imposition of requirements in excess of those which satisfy NRC regulations.

On the other hand, Mr. Bursey may simply be anticipating that plants of the vintage of V.C. Summer will be "grandfathered". There is no such suggestion of grandfathering as to ATWS mitigation features for this unit that we are aware of. If additional

requirements are duly imposed after rulemaking action, they are anticipated to create the legal obligation to make certain modifications, which Applicants will be obliged to make as required.

Whatever interpretation is to be assigned the very sketchy information we are provided, it is clear that there is no genuine issue of material fact relevant to this plant regarding the substance of Contention A3 on satisfaction of current NRC licensing requirements for ATWS.

Discussion

Contention A3 is contradicted by the NRC Staff's Safety Evaluation Report (NUREG 0717), in Section 15.3.5 of which the Staff discusses ATWS^{3/} and concludes:

"We conclude that the actions taken to reduce the risk from anticipated transients without scram events are adequate to support interim operation of the facility to 100 percent of rated power."

The enclosed affidavits establish that there is no genuine issue of fact to be heard regarding the satisfaction of NRC requirements to assure that the risk of an undetected, unmitigated ATWS event is acceptably small.

The matter of full power operation pending ultimate resolution of additional ATWS modifications through rulemaking was

^{3/} See also Supplement No. 1 to NUREG-0717, Appendix C, especially pages C-6 and C-9.

addressed by the Appeal Board in Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301 (1980). In that decision, the Appeal Board upheld substantive determinations on the ATWS issue by the licensing board in that case.

The Appeal Board in Monticello reviewed the history of the ATWS issue and the status (as of 1980) of the proposal for establishment of further requirements through rulemaking. The Appeal Board characterized the position of the NRC Staff as follows:

"[The Staff] believes it prudent to improve safety margins even further to protect the public. The Staff has not determined that there is a present risk to public safety from an ATWS event; rather, its position is that no unacceptable risk currently exists."^{4/}

The Appeal Board then went on to consider the evidence of record in that case on the proposition whether the facility there in question could continue to operate safely pending an ATWS rulemaking. The Appeal Board quoted extensively from the evidence below and emphasized the procedures and training measures being taken to implement the NRC Staff's recommendations.^{5/}

^{4/} 12 NRC 301 at 306, citing NUREG-0460 Vol. 3, pp. 1-8, 42-44 and Vol. 4 at pp. 3-6, 63-65.

^{5/} 12 NRC 301 at 306-308.

The Appeal Board then upheld the licensing board's conclusion that the facility in that proceeding, given design features, ATWS procedures and training, could continue to operate safely pending the generic ATWS rulemaking (12 NRC at 309).

Although the facility in Monticello is a BWR, the decisional theory of the licensing board and the Appeal Board there is equally applicable here. As is shown by the attached affidavits, and the referenced NRC documentation: the NRC Staff has recognized that PWR's of Westinghouse design have inherent ATWS mitigation capability; the Applicants have proposed, and the NRC Staff has accepted, procedures and training designed to assure detection and appropriate mitigating action with respect to ATWS events; existing NRC requirements are met; and identified possible future requirements can and will be met as required.

Legal Considerations

Summary disposition is an entirely appropriate means of dealing with Contention A3 in this proceeding. Summary disposition (or summary judgment) is recognized by the Commission and the Federal courts as an appropriate device to pierce general allegations and to separate substantial issues from insubstantial ones.

Pursuant to 10 C.F.R. §2.749(d), upon an appropriate motion for summary disposition, "the presiding officer shall render the decision sought" where it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law". To provide more definitive guidance in rendering such judgments, the Commission stated that Section 2.749 "has been revised to track more closely the Federal Rules of Civil Procedure". See 37 Fed. Reg. 15135

(1972).^{6/} The basis of this section is Rule 56 of the Federal Rules of Civil Procedure and the Model Summary Disposition Rule drafted by the Administrative Conference of the United States for use by administrative agencies. See Gellhorn & Robinson, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, 628 (1971).

To defeat summary disposition, an opposing party must present facts in the proper form; conclusions of law will not suffice. Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, 202 F. Supp. 486 (W.D. Pa. 1962), aff'd. 309 F.2d 186 (3rd Cir., 1962), cert. denied, 376 U.S. 916 (1963). The opposing party's facts must be material^{7/} and of a substantial nature,^{8/} not fanciful, or merely suspicious.^{9/}

6/ See also, Alabama Power Company (Joseph M. Farley Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 878 (1974); Gulf States Utilities Co. (River Bend Station, Units 1 and 2) LBP-75-10, 1 NRC I 246, 247 (1975).

7/ Egyes v. Magyar Nemzeti Bank, 165 F.2d 539 (2nd Cir., 1948).

8/ Reidler and Bookmeyer v. Universal Ins. Co. 134 F.2d. 838, 831 (2nd Cir., 1943).

9/ Griffin v. Griffin, 327 U.S. 220, 236 (1946). Banco de Espana v. Federal Reserve Bank, 28 F. Supp. 958, 973 (S.D.N.Y. 1939) aff'd, 144 F.2d 433 (2nd Cir., 1940).

One cannot avoid summary disposition

on the mere hope that at trial he will be able to discredit movant's evidence; he must, [in response], be able to point out to the court something indicating the existence of a triable issue of material fact. 6 Moore's Federal Practice 56.15(4). [Emphasis added.]

One cannot "go to trial on the vague supposition that something may turn up". 6 Moore's Federal Practice 56.15(3). See Radio City Music Hall v. U.S., 135 F.2d 715 (2nd Cir., 1943). See also Orvis v. Brickman, 95 F. Supp. 605 (D.D.C. 1951), wherein the Court in granting the defendant's motion for summary judgment under the Federal rules said:

"All the plaintiff has in this case is the hope that on cross-examination . . . the defendants . . . will contradict their respective affidavits. This is purely speculative, and to permit trial on such basis would nullify the purpose of Rule 56, which provides summary judgment as a means of putting an end to useless and expensive litigation and permitting expeditious disposal of cases in which there is no genuine issue as to any material facts."

It is imperative to the orderly administrative process that supporting evidence be presented at this stage of litigation or that the Licensing Board rule favorably on such motions. To permit otherwise would be to countenance unwarranted delay and fishing expedition tactics. As the Licensing Board said in its "initial Decision" in Wisconsin Electric Power Company, Wisconsin-Michigan Power Company (Point Beach Nuclear Plant, Unit 2, Docket No. 50-301, December 18, 1972), a

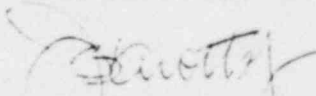
"public hearing is not an opportunity for the commencement of a de novo review of an

application for a license which would permit the intervenors to ultimately determine whether or not, in fact, there are matters they wish to controvert and which would automatically delay the proceedings for a considerable length of time." (Emphasis added.)

CONCLUSION

For the foregoing reasons, Applicants' motion for summary decision as to Intervenor Brett A. Bursey's contention A3 regarding ATWS should be granted.

Respectfully submitted,



Joseph B. Knotts, Jr.
Counsel for Applicants

Date: May 7, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

SOUTH CAROLINA ELECTRIC & GAS COMPANY and)	Docket No. 50-395 OL
)	
SOUTH CAROLINA PUBLIC SERVICE AUTHORITY)	
)	
(Virgil C. Summer Nuclear Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion for Summary Decision of Intervenor Brett A. Bursey's Contention A3 Regarding ATWS", "Applicants' Statement of Material Facts not Genuinely in Issue", "Affidavit of Robert W. Steitler on Anticipated Transients Without Scram", "Affidavit of O.S. Bradham on Anticipated Transients Without Scram" and "Applicants' Memorandum of Points and Authorities in Support of Their Motion for Summary Decision on Intervenor Brett A. Bursey's Contention A3 Regarding ATWS" in the above captioned matter, were served upon the following persons by deposit in the United States mail, first class postage prepaid, or by overnight messenger service with next day delivery guaranteed, as indicated by an asterisk, this 7th day of May, 1981:

*Herbert Grossman, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman, Atomic Safety and
Licensing Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Dr. Frank F. Hooper
School of Natural Resources
University of Michigan
Ann Arbor, Michigan 48109

Chairman Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*Mr. Gustave A. Linenberger
Member, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

George Fischer, Esq.
Vice President and Group
Executive - Legal Affairs
South Carolina Electric &
Gas Company
Post Office Box 764
Columbia, South Carolina
29202

Mr. Chase R. Stephens
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*John C. Ruoff
Post Office Box 96
Jenkinsville, S.C. 29065

*Richard P. Wilson, Esq.
Assistant Attorney General
South Carolina Attorney General's
Office
P.O. Box 11549
Columbia, South Carolina 29211

*Mr. Brett Allen Bursey
Route 1, Box 93-C
Little Mountain, S.C. 29076

*Steven C. Goldberg, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Joseph B. Knotts, Jr.