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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	Docket Nos. 50-445 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating License)

APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF NEAR-WHITE BLAST SURFACE PREPARATION ISSUE

Pursuant to 10 C.F.R. § 2.749, Texas Utilities Electric Company, et al. ("Applicants") submit this Motion for Summary Disposition of Near-White Blast Surface Preparation Issue. There is no genuine issue as to any material fact as to this issue, and Applicants are entitled to a decision in their favor as a matter of law.

I. BACKGROUND

Robert Hamilton testified that at some point in September or October of 1981, Applicants revised the procedures respecting the near-white blast criterion for steel substrate preparation (CASE Ex. 653 at 15, 18). In response to Mr. Hamilton's testimony, Applicants submitted an affidavit with copies of relevant construction procedures showing that steel substrate surface

preparation requires cleaning to a near-white blast condition. Applicants also submitted the inspection procedure which requires that steel surfaces be prepared to near-white blast condition.

The Board's September 23, 1983 Memorandum and Order (pp. 20-21) accepted Applicants' proof as dispositive of Mr. Hamilton's allegation, but only for the period after January 26, 1982, the effective date of the construction procedure submitted by the Applicants. The Board's October 25, 1983 Memorandum and Order (p. 8) clarified the Board's finding on this issue to hold that the inquiry into the near-white blast issue would be limited to the three-month period between the time that Mr. Hamilton alleged the procedures were changed, and the date of Revision 10 to CCP-30. Thus, although the Board was satisfied that Applicants' procedures adequately addressed Mr. Hamilton's allegation on this issue for all other periods, it perceived a three or four-month gap (September or October, 1981 through late January, 1982) during which, in Mr. Hamilton's words, there were "no standards" regarding near-white blast.

II. THE BOARD SHOULD GRANT APPLICANTS' MOTION FOR SUMMARY DISPOSITION ON THIS ISSUE

The Board's apparent understanding that Applicants revised procedures respecting near white blast in the fall of 1981, and again in January 1982, is based on Mr. Hamilton's testimony. Mr. Hamilton, however, is simply incorrect.

Attached is the affidavit of C. Thomas Brandt, who identifies relevant excerpts from Comanche Peak Construction Procedure CCP-30, "Coating Steel Substrates Inside Reactor Building and Radiation Areas," Section 4.1.1, which governs the preparation of steel substrate surfaces. Attached to Mr. Brandt's affidavit are copies of Section 4.1.1 of the procedure for Revisions 7 (effective May, 1981) through 10 (effective January, 1982). In each case, Section 4.1.1 is identical with respect to the near-white blast surface preparation requirement. Specifically, each edition of this procedure provides: "The surface shall then be cleaned by blast, hand or power tool operations to achieve an equivalent of SSPC-SP10-63, 'near white' blast cleaning". As Mr. Brandt states (affidavit p. 2), this near-white blast requirement was incorporated in the original procedure in 1977 and is included in the procedure now.

Mr. Brandt's affidavit also discusses the relevant inspection procedure, QI-QP-11.4-1, "Inspection of Steel Substrate Surface Preparation and Primer Applications," which governs inspection of prepared steel substrate surfaces. Attached to Mr. Brandt's affidavit are copies of the relevant sections of the inspection procedures for the period May, 1981 (Revision 3) through June, 1982 (Revision 8). As Mr. Brandt states (affidavit, p. 3), this inspection procedure, which

requires a determination of near-white blast condition, appeared in the quality instructions in 1977, and has remained in the instructions ever since.

Robert Hamilton's contention that the procedures governing near white blast surface preparation were changed in the fall of 1981 is incorrect. The pertinent procedures have been in place since 1977, and have remained unchanged to this day.

III. LEGAL STANDARDS GOVERNING SUMMARY DISPOSITION

Pursuant to 10 C.F.R. § 2.749(d), upon an appropriate motion for summary disposition "[t]he 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 has stated that Section 2.749 "has been revised to track more closely the Federal Rules of Civil Procedure."[1] Cases decided under the Federal Rules may thus provide guidance to licensing boards applying Section 2.749.[2]

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1 37 Fed. Reg. 15135 (1972). See also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 (1982); Cleveland Electric Illuminating Co. (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); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982).

2 Perry, ALAB-443, supra, 6 NRC at 754; La Crosse, LBP-82-58, supra, 16 NRC at 519.

In accordance with the Federal Rules, to defeat a motion for summary disposition an opposing party must present facts in the proper form; conclusions of law will not suffice.[3] The facts of the opposing party must be material,[4] and must be of a substantial nature,[5] not fanciful, or merely suspicious.[6] One cannot avoid summary disposition "on the mere hope that at trial he will be able to discredit movant's evidence; he must . . . be able to point out to the court something indicating the existence of a triable issue of material fact."[7] As the Supreme Court explained, one cannot go to trial "on the basis of the allegation in [the] complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations".[8] One court, in granting the defendant's motion for summary judgment under the Federal Rules, said:

> All that plaintiff has in this case is the hope that on cross-examination . . . the defendants . . . will contradict their

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3 United States v. Various Slot Machines on Guam, 658 F.2d 697 (9th Cir. 1981); Citizens Environmental Council v. Volpe, 484 F.2d 870, 873 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

4 British Airways Board v. Boeing Co., 585 F.2d 946, 951-52 (9th Cir. 1978); Mutual Fund Investors, Inc. v. Putnam Mgmt. Co., 553 F.2d 620, 624 (9th Cir. 1977) (a material fact is one that may affect the outcome of the litigation).

5 Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824, 826 (5th Cir. 1978).

6 Robin Construction Co. v. United States, 345 F2d 610, 614 (3d Cir. 1965).

7 6 Moore's Federal Practice ¶56.15[4] at p. 56-525 (1982) (emphasis added).

8 First National Bank v. Cities Service Co., 391 U.S. 253, 290 (1968).

> 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 to any material facts.[9]

"The Commission and the Appeal Board have encouraged the use of summary disposition to resolve contentions where an intervenor has failed to establish that a genuine issue exists."[10] Thus, fundamental precepts of the administrative process mandate that at this stage of litigation the intervenor be required to respond to this motion by presenting material and disputed facts in affidavit form that support its position. When doing so, intervenor should not be permitted to submit, for example, an affidavit prepared by one of its officers or members reciting facts about which it has no first-hand knowledge or which are based on "common knowledge." Rather, intervenor should be required to support its position with affidavits prepared by qualified individuals familiar with the issues in this proceeding. If intervenor fails to do so, the Board should rule

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9 Orvis v. Brinkman, 95 F. Supp. 605, (D.D.C.), aff'd, 196 F.2d 762 (D.C. Cir. 1952); see also Curl v. Int'l Business Machines Corp., 517 F.2d 212, 214 (5th Cir. 1975).

10 La Crosse, LBP-82-58, supra, 16 NRC at 519, citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-73-12, 6 AEC 241, 242 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Houston Lighting & 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 & 2),ALAB-130, 6 AEC 423, 424-25 (1973).

favorably on Applicant's motion. To permit otherwise would be to countenance unnecessary litigation and unwarranted delay. In this regard, see 10 C.F.R. § 2.749(b), which states:

> When 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.

Further, the Appeal Board has emphasized that admission of a contention does not "carry with it any implication that . . . the contention [is] meritorious."[11] Thus, even though a contention might be admitted to a proceeding it does not perforce follow that the contention must be taken up at an evidentiary hearing.[12] In this regard the Commission's summary disposition procedures set forth in 10 C.F.R. § 2.749 "provide in reality as well as theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues."[13]

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11 Allens Creek, ALAB-590, supra, 11 NRC at 549 (1980).

12 See Washington Public Power Supply System (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 at n. 5 (1982); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 76 (1981).

13 Allens Creek, ALAB-590, supra, 11 NRC at 550.

IV. CONCLUSION

The Board should grant Applicants' motion for summary disposition on this issue.

Respectfully submitted,

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