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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

COMMONWEALTH EDISON COMPANY )

(Braidwood Nuclear Power Station, )  
Units 1 and 2) )

Docket Nos. 50-456  
50-457 /ol

NPC STAFF RESPONSE TO MOTION OF COMMONWEALTH  
EDISON COMPANY FOR SUMMARY DISPOSITION ON  
PLEADINGS OF BOB NEINER FARMS, INC. CONTENTION 1  
AND BRIDGET LITTLE ROREM ET AL. CONTENTION 1(c)

I. Introduction

Applicant Commonwealth Edison Company ("Applicant" or "CECo") filed a motion for summary disposition of Bob Neiner Farms, Inc. Contention 1 ("Neiner Contention 1") and Bridget Little Rorem, et al. Contention 1(c) ("Rorem Contention 1(c)") on June 11, 1985 "Motion of Commonwealth Edison Company for Summary Disposition on Pleadings" ("Applicant's Motion"). The Staff supports Applicant's motion for summary disposition on the grounds that Applicant has demonstrated an absence of any genuine issue of material fact, and that it is entitled to a favorable judgment as a matter of law.

II. Background

Neiner Contention 1 and Rorem Contention 1(c) were admitted by the Atomic Safety and Licensing Board ("Board") during the Special Prehearing Conference held on August 23, 1979 in Joliet, Illinois. Tr. at 10, 25-26.

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Discovery on these contentions was conducted by Intervenors, Neiner Farms and Rorem, the Applicant and the Staff. Based on the results of this discovery, and other filings in this proceeding the Applicant moved for summary disposition of Neiner Contention 1 in its entirety and Subparagraph (c) of Rorem's Contention 1.

### III. Argument

#### A. Standards For Summary Disposition

Summary disposition is appropriate pursuant to the Commission's regulations if, based on a motion, the attached statements of the parties in affidavits, and other filings in the proceeding, it is shown that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 10 C.F.R. § 2.749(d). The Commission's rules governing summary disposition are analogous to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982). Therefore, decisions concerning the interpretation of Rule 56 may be used by the Commission's adjudicatory Boards as guidance in applying the provisions of 10 C.F.R. § 2.749. Id.

A hearing on the questions raised by an intervenor is not inevitable. See Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-654, 14 NRC 632, 635 (1981). The purpose of summary disposition is to avoid hearings, unnecessary testimony and cross-examination in areas where there are not material issues to be tried. The Supreme Court has very clearly stated that there is no right

to a trial except so far as there are issues of fact in dispute to be determined. Ex parte Peterson, 253 U.S. 300, 310 (1920). Under the Federal Rules the motion is designed to pierce the allegations of fact in the pleadings and to obtain summary relief where facts set forth in detail in affidavits, depositions, interrogatories, or other material of evidentiary value show that there are no genuine issues of material fact to be tried. 6 J. Moore, Moore's Federal Practice ¶ 56.04[1] (2d ed. 1976). Mere allegations in the pleadings will not create an issue as against a motion for summary disposition supported by affidavits. 10 C.F.R. § 2.749(b); Fed. R. Civ. P. 56(c).

A party seeking summary disposition has the burden of demonstrating the absence of any genuine issue of material fact. Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977). In determining whether a motion for summary disposition should be granted, the record must be viewed in the light most favorable to the opponent of such a motion. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982).

To draw on federal practice, the Supreme Court has pointed out that Rule 56 of the Federal Rules of Civil Procedure does not permit plaintiffs to get to a trial on the basis of the allegations in the complaints coupled with the hope that something can be developed at trial in the way of evidence to support the allegations. First National Bank of Arizona v. Cities Service Co., 391, U.S. 253, 289-90 (1968), rehearing denied., 393 U.S. 901 (1968). Similarly, a plaintiff may not

defeat a motion for summary judgment on the hope that on cross-examination the defendants will contradict their respective affidavits. To permit trial on such a basis would nullify the purpose of Rule 56 which permits the elimination of unnecessary and costly litigation where no genuine issues of material fact exist. See Orvis v. Brickman, 95 F. Supp. 605, 607 (1951), aff'd 196 F.2d 762 (D.C. Cir. 1952), cited with approval in Gulf States Utilities Co. (River Bend Station, Units 1 and 2), 1 NRC 246, 248 (1975).

To defeat summary disposition an opposing party must present material and substantial facts to show that an issue exists. Conclusions alone will not suffice. River Bend, LBP-75-10, supra at 248; Perry, ALAB-443, supra at 754.

The federal courts have clearly held that a party opposing a motion for summary judgment is not entitled to hold back evidence, if any, until the time of trial. Lipschutz v. Gordon Jewelry Corp., 367 F. Supp. 1086, 1095 (SD Texas 1973); the opponent must come forth with evidentiary facts to show that there is an outstanding unresolved material issue to be tried. Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 63 (9th Cir. 1973), and Franks v. Thompson, 59 F.R.D. 142, 145 (M.D. Alabama 1973). Summary disposition cannot be defeated by the possibility that Neiner Farms or Rorem might think of something new to say at hearing O'Brien v. McDonald's Corp., 48 F.R.D. 370, 374 (N.D. Ill. 1979); nor can the Applicant's motions be defeated on the hope that Neiner Farms or Rorem could possibly uncover something at hearing. Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 974 (Minn. 1967). Now, in opposition to the Applicant's motions, is the time for both Neiner Farms and Rorem to come

forth with material of evidentiary value to contravene the Applicant's affidavits and to show the existence of a material fact to be resolved at an evidentiary hearing.

The Commission's regulations permit responses both in support of and in opposition to motions for summary disposition. 10 C.F.R. § 2.749(a). Such responses may be filed with or without supporting affidavits. Id. However, if the motion is properly supported, the opponent of such a motion may not rest simply on allegations or denials of the contents of the motion. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980). In addition, any facts not controverted by the opponent of a motion are deemed to be admitted. 10 C.F.R. § 2.749(b). The Appeal Board noted recently that a hearing on each issue raised "is not inevitable," but "wholly depends upon the ability of the intervenors to demonstrate the existence of a genuine issue of material fact . . . ." Peach Bottom, ALAB 654, supra at 632, 635 which is in accord with Budget Dress Corp. v. Joint Board 198 F. Supp. 4, (SD NY 1961) aff'd, 299 F.2d (2d Cir. 1961), 936 cert. denied 371 U.S. 815 (1962)

Both the Appeal Board and the Commission have encouraged the use of the Commission's summary disposition procedure. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). See, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 241 (1973), aff'd sub nom BPI v. Atomic Energy Commission, 502 F2d 424 (D.C. Cir. 1974); Houston Lighting and 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 and 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).

The Commission has stated that:

" . . . Boards should encourage the parties to invoke the summary disposition procedures on the issues of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues."

CLI-81-8, supra, 13 NRC 452, 457. The Commission's summary disposition procedures "provide . . . an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." Allens Creek, ALAB 590, supra, 11 NRC at 550. Applicant has met these standards with regard to its motions for summary disposition concerning Neiner Contention 1 and Rorem Contention 1(c).

B. Applicant Has Demonstrated the Absence of a Genuine Issue of Material Fact Concerning Neiner Contention 1 and Rorem Contention 1(c) and Applicant is Entitled to a Favorable Judgment as a Matter of Law

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1. Neiner Contention 1

Neiner Contention 1 alleges that:

The 765 kV transmission lines that will be used to transport the electrical output from Braidwood create an unacceptable, hazardous and dangerous condition to persons living or working in the vicinity of these lines. In support of its contention Neiner Farms cites testimony by Commonwealth Edison before the Illinois Commerce Commission in 1978 that 60% of the transmission rights-of-way included rights-of-way for 345 kV and 765 kV transmission lines.



Applicant argues that there is no genuine issue of material fact with regard to this contention for several reasons. First, Applicant asserts that it does not now plan nor has ever planned to construct a 765 kV line to transmit power from Braidwood, Units 1 and 2. Applicant's Motion, Neiner Contention 1 at 4. The only relationship between a future 765 kV line and the Braidwood site rests on "the original plan for the site [which] anticipated an ultimate development of four units" and that "prudent long-range planning dictated that the right-of-way emanating from the station be adequate to accommodate a future 765 kV line" in addition to the 345 kV lines required for Braidwood, Units 1 and 2. Id. at 5. Applicant states that it does not foresee "additional units being installed at the Braidwood site for at least 25 years" and thus it has no plans for construction of a 765 kV line to transmit power from such units for at least 25 years. Id. at 6.

Applicant further argues that the 765 kV line does not fall within the scope of NRC's jurisdiction under the National Environmental Policy Act ("NEPA"). Applicant's Motion, Neiner Contention 1 at 10. Although reference to the future 765 kV line was included initially in the Environmental Report ("ER") submitted in connection with its application for an Operating License for Braidwood, Units 1 and 2, Applicant amended its ER to indicate that any future plans for a 765 kV line are not associated with Braidwood, Units 1 and 2. Id. at 6.

To determine that a future 765 kV transmission line is within the scope of the Commission's jurisdiction under NEPA a sufficient nexus must be found between the operation of Braidwood, Units 1 and 2 and the 765 kV transmission lines. The Appeal Board in Detroit Edison Company

(Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974) asserted its authority over transmission lines, but only to the extent that the lines are directly attributable to the proposed nuclear facility. In Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), LBP-75-70, 2 NRC 879, 891 (1975), aff'd, ALAB-325, 3 NRC 404 (1976) the Licensing Board declined to consider the environmental effects of the construction of a transmission line which was "likely in the near future," but for which the time of construction and the route and terminus of the line was "highly uncertain." Id. The Board's decision was not influenced by the fact that much of the right-of-way had already been acquired. The Board asserted its belief that its decision on environmental matters should not be influenced by the business judgments of the Applicant. Id.

The Staff agrees with the Applicant's argument that the acquisition of the right-of-way does not in itself provide the requisite nexus between plans for a 765 kV transmission line and the operation of Braidwood, Units 1 and 2 (Applicant's Motion at 11).

On June 10, 1985, Applicant submitted Amendment 7 to the Braidwood Station Environmental Report -- Operating License Stage to the Staff <sup>1/</sup> which removed reference to the future 765 kV line from the ER-OL.

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<sup>1/</sup> Letter from David H. Smith, Nuclear Licensing Administration, Commonwealth Edison Co. to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, USNRC dated June 10, 1985 Amendment 7 to Braidwood Station Environmental Report--Operating License Stage enclosed. The letter and enclosed amendment were served on the Licensing Board by letter from Peter Thornton, Counsel for Commonwealth Edison on June 11, 1985.



Affidavit of Janice Stevens in Support of Staff Response to Motion of Commonwealth Edison Company for Summary Disposition of Neiner Contention 1, Paragraph 6. The Staff considers that 765 kV transmission lines are removed from the pending application for an operating license for Braidwood, Units 1 and 2. Id., Paragraph 5. The review of the environmental impact of the lines is not required since they are no longer related to the proposed federal action of licensing the operation of Braidwood Units 1 and 2. Id., Paragraphs 5, 6.

There is no dispute that the details of future uses of portions of rights-of-way originally designated for 765 kV were removed from the Applicant's ER-OL by Amendment 7. Since these rights-of-way are no longer part of the operating license application, consideration of the environmental impacts of 765 kV transmission lines is beyond the scope of the Commission's jurisdiction under NEPA. Therefore, there are no genuine issues of material fact remaining with regard to this contention, and Applicants are entitled to judgement in their favor as a matter of law.

2. Rorem Contention 1(c)

Rorem Contention 1 Subparagraph (c) contends that the Emergency Plan for Braidwood Station should include a plan for medical treatment of operating personnel who might be exposed to radiation in an accident, including transportation to medical facilities equipped to treat radiation casualties.

The requirements for providing such medical services are set forth in the Commission's emergency planning regulations. 10 C.F.R. § 50.47(b)(2) requires that "arrangements are made for medical services for contaminated

injured individuals." 10 C.F.R. Part 50, Appendix E, Paragraph IV.E requires that "adequate provisions shall be made and described for emergency facilities and equipment, including: . . . (5) arrangements for the services of physicians and other medical personnel qualified to handle radiation emergencies onsite; (6) arrangements for transportation of contaminated injured individuals from the site to specifically identified treatment facilities outside the site boundary.

Intervenor, Rorem, et al. testified that she is concerned about adequate transportation arrangements for injured personnel as well as the capacity of medical facilities to accommodate the number of individuals who might require medical attention. Deposition of Bridget Little Rorem, May 21, 1985. Tr. 50-58.

NUREG-0654/FEMA-REP-1, Revision 1 entitled "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" provides guidance criteria for the Staff in Section II, Paragraph L in the evaluation of plans made for providing care to onsite personnel requiring medical treatment following exposure to radiation. Applicant is responsible for "[arranging] for local and backup hospital and medical services having the capability for evaluation of radiation exposure and uptake, including assurance that persons providing these services are adequately prepared to handle contaminated individuals" as well as "onsite first aid capability", and "[arrangements] for transporting victims of radiological accidents to medical support facilities." NUREG-0654, Reg. 1, Section II, Paragraph L.

Thomas J. Ploski, Emergency Preparedness Analyst, Emergency Preparedness Section, Emergency Preparedness and Radiological Protection Branch,

NRC Region III has independently reviewed the emergency plan for the Braidwood Station which includes the Generating Stations Emergency Plan (GSEP), common to all Commonwealth Edison Company's nuclear generating stations and the Braidwood Annex to this generic GSEP. Affidavit of Thomas J. Ploski in Support of Staff Response to Motion of Commonwealth Edison Company for Summary Disposition of Rorem Contention 1(c), Paragraph 4. Mr. Ploski has evaluated the GSEP and Braidwood Annex based on the requirements set forth in 10 C.F.R. § 50.47(b)(12) and 10 C.F.R. Part 50, Appendix E, Paragraph IV.E and the guidance provided in NUREG-0654, Rev. 1, Section II, Paragraph L and set forth how the Applicant's plan addresses these requirements and guidance. Id., Paragraphs 9-14. He concludes that portions of the Applicant's emergency plan regarding the provision of medical treatment to operating personnel who might be injured in the event of an accident, including transportation to medical facilities equipped to treat radiation casualties, has been reviewed by the Staff in light of the requirements set forth in 10 C.F.R. § 50.57(b)(12) and 10 C.F.R. Part 50, Appendix E, Paragraph IV.E and the guidance set forth in NUREG-0654, Revision 1, Section II, Paragraph L and found to be in compliance with said requirements and guidance. Id., Paragraph 15.

Therefore, there are no genuine issues of material fact remaining with regard to this contention and Applicant is entitled to judgment in its favor as a matter of law.

IV. Conclusion

For the reasons set forth above, Commonwealth Edison's Motion for Summary Disposition on Neiner Contention 1 and Rorem Contention 1(c) should be granted.

Respectfully submitted,

*Elaine I. Chan*

Elaine I. Chan  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 11th day of July, 1985