

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:
COMMONWEALTH EDISON COMPANY

(Braidwood Nuclear Power
Station, Units 1 and 2)

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Docket Nos. 50-456

50-857 DEC 24 A10:05

DOCKETED
USNRC

MOTION AND SUPPORTING MEMORANDUM OF
COMMONWEALTH EDISON COMPANY FOR SUMMARY
DISPOSITION ON PLEADINGS AS TO CERTAIN SUBCONTENTIONS

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Pursuant to the provisions of 10 C.F.R. § 2.749, Commonwealth Edison Company ("Applicant" or "CECo") moves the Atomic Safety and Licensing Board ("Licensing Board") for summary disposition of the following portions of Intervenor Bridget Little Rorem et al. Amended Quality Assurance Contentions ("Subcontention"):

3.C	9.D
5.A	10.F
5.B	12.E
5.C	12.F
6.F	12.J
6.G	14.B.1
6.I	14.B.2
9.A (partial)	14.B.3
9.C	14.B.4

As grounds for this Motion, applicant submits that previous filings in this proceeding and the attached statements of facts and affidavits show that there are no genuine issues as to any material fact relevant to any of these Rorem Subcontentions. Applicant is therefore entitled to summary disposition of those contentions as a matter of law.

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ARGUMENT

1. Purpose of Summary Disposition

The summary disposition provisions contained in Section 2.749 of the Commission's rules, 10 C.F.R. § 2.749, are analogous to Rule 56 of the Federal Rules of Civil Procedure. Gulf States Utilities Co., (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246 (1975). The purpose of summary disposition is to ensure that only contested issues involving disputes over material facts are submitted to the Board by way of evidentiary presentations at hearings. The Atomic Safety and Licensing Appeal Board has commented that "the Section 2.749 summary disposition procedures provide, in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues". Houston Lighting and Power Company, (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-590, 11 NRC 542, 550 (1980).

Accordingly, use of the summary disposition provision is encouraged to resolve dubious issues raised in petitions to intervene and for which no genuine issues of material fact exist. See, e.g., Northern States Power Co., (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-73-12, 6 AEC 421, 242 (1973), and Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973). As the Atomic Safety and Licensing Board has emphasized, "[t]he purpose of the summary disposition rule 'is not to cut litigants off from their right of trial if they really have evidence which they will offer at trial, it is to carefully test this out, in advance of trial, by inquiring and

determining whether such evidence exists'". Gulf States Utilities Co., (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 247-48 (1975)

2. Burden of Proof

Section 2.749 of the Commission's rules provides that a movant is entitled to summary disposition as a matter of law as to any matter involved in a proceeding if the filings in the proceeding, depositions, answers to interrogatories, and the statements and affidavits submitted by the parties demonstrate that there is no genuine issue to be heard as to any material fact relevant to the matter. Sections 2.749(a) and 2.749(d). The burden of showing that there is no genuine issue as to any material fact is on the movant. Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant), ALAB-443, 6 WRC 741 (1977). To this end, the rule provides that the movant must attach to his motion "a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard".

Section 2.749(a). The motion may be accompanied by affidavits setting forth facts that would be admissible in evidence and these may be supplemented by depositions and answers to interrogatories. Sections 2.749(a) and 2.749(b).

Any other party to the proceeding may oppose the motion, but the rule is quite explicit as to what is required for a valid opposition. The opposing party must file a statement of material facts as to which he contends there is a genuine issue, and all material facts in the movant's statement will be deemed admitted unless they are controverted in the statement of the opposing party. Section 2.749(a). Moreover, if the motion is properly supported, "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". Section 2.749(b).

A Licensing Board has commented extensively on this requirement:

To defeat summary disposition an opposing party must present facts in the proper form; conclusions of law will not suffice. The opposing party's facts must be material, substantial, not fanciful, or merely suspicious. One cannot avoid summary disposition "on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out the court something indicating the existence of a triable issue of material fact." 6 Moore's Federal Practice 56.15(4). 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., 136 F.2d 715 (2nd Cir. 1943). In Orvis v. Brickman, 95 F.Supp. 605 (D.D.C. 1951), 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

Gulf States Utilities Co., (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975) (footnotes omitted).

3. Cases Granting Summary Disposition

A number of decisions demonstrate that, as the Appeal Board said in Allens Creek, *supra*, summary disposition provides, an efficacious means of avoiding unnecessary and possibly time consuming hearings on

demonstrably insubstantial issues". 11 NRC at 550. In Virginia Electric and Power Co., (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980), the Appeal Board sustained the Licensing Board's grant of summary disposition in the applicant's favor on all contentions and the consequent grant of the application. One contention in the North Anna case asserted that alternatives to the proposed action had been inadequately considered. The applicant and the Staff submitted affidavits tending to show that the intervenors' proffered alternatives were economically unacceptable and were not environmentally preferable to the applicant's proposal. Intervenors submitted an affidavit tending to show that a proper determination of the relative economies of the alternatives required more information. The Appeal Board commented that

the intervenors asserted no facts which might bring into genuine question the applicant's assertion that each of the three proposed alternatives was unacceptable by reason of both cost and timing. Rather, they confined themselves to a general denial of the assertion, coupled with an insistence on the part of their economic consultant that more information was needed. In short, what the intervenors in effect put forth was a disclaimer of their ability to ascertain whether a genuine issue of material fact existed with respect to the feasibility of their alternatives.

11 NRC 451 at 455. Furthermore, the Appeal Board found a second ground for granting summary disposition in that intervenors had not established the existence of any genuine issue of fact with respect to the environmental superiority of their alternatives.

In Houston Lighting and Power Co., (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75 (1981), the Appeal Board sustained the Licensing Board's grant of summary disposition in applicant's favor on an intervenor's contention that a proposed alternative to the license application should have been considered. Applicant submitted an affidavit tending to show that the suggested alternative was technologically, economically and legally infeasible as a substitute for its proposal. The intervenor's response, referencing certain studies, "fell far short", in the opinion of the Appeal Board, "of countering the principal points" made in the applicant's motion and affidavit. "Specifically, he offered little beyond naked assertions to buttress his claim" that his proposed alternative was feasible. 13 NRC 75 at 81.

In Florida Power and Light Co., (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677 (1981), the Licensing Board granted summary disposition in the applicant's favor on all contentions and consequently cancelled the evidentiary hearing. One contention asserted that during the activities proposed by the licensee unacceptable radioactive releases were likely to occur. Both the applicant and the intervenor submitted affidavits. Although the intervenor's affidavit controverted some of the applicant's assertions, the Licensing Board, after examining the affidavits, established a list of six material facts as to which it found there were no genuine issues to be heard. Finding these material facts conclusive, the Board summarily disposed of the contention. 13 NRC 677, at 702-03.

Even when some of the moving party's asserted facts are factually controverted, the board will determine whether there are material facts as to which no genuine issue exists sufficient to dispose of the contention. The Appeal Board in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 at 551 (1980), characterized its North Anna decision, supra, as holding that "because, in response to the Applicant's motion for summary disposition, the intervenors had not demonstrated that a genuine issue of fact existed respecting the environmental superiority of any of their suggested alternatives, we held that as a matter of law none of these alternatives had to be further explored at an evidentiary hearing". (Emphasis in original.)

These decisions demonstrate in detail the criteria that should govern a licensing board's consideration of a motion for summary disposition. When such a motion is properly supported, the opposing party may not confine itself to a general denial nor to a disclaimer of its ability to determine whether a genuine issue of material fact exists without further information. In this case, since July, 1985 Applicant and the NRC have answered two sets of voluminous interrogatories, Applicant has provided thousands of documents to the Intervenor for their inspection and copying and over 10 depositions of knowledgeable Staff and Applicant employees have been conducted.

Finally, if the Licensing Board determines that it cannot summarily dispose of a contention, the Board should specify the material facts as to which it finds there is a genuine issue. This sound administrative procedure is suggested by the Licensing Board's practice in Turkey Point, supra, and is in any case implicit in the purpose of summary disposition, which is to narrow the issues requiring an evidentiary hearing. Absent such a specific finding, trial of the contention might require the parties to make an evidentiary presentation regarding many material facts as to which there was no genuine issue. Such unnecessary and time-consuming litigation would defeat the purpose of the summary disposition rule.

4. The scope of the issues in this proceeding

Applicant submits that the Licensing Board's June 21, 1985 Memorandum and Order admitting the amended quality assurance contention (Commonwealth Edison Co. (Braidwood Nuclear Power Station Units 1 and 2) LEP-85-20, 21 NRC 1732 (1985)) limits the scope of genuine issues of fact which must be determined in passing on the motion for summary disposition. The Licensing Board has made that clear by its pronouncement in that Order (21 NRC at p. 1739, n. 3):

We view the actual contention itself to be the preamble at page 16 through the second line of page 17, the last two lines of page 18, and pages 19-47. The limits of the contention are controlled by the specific alleged occurrences of deficiencies set forth in the lettered paragraphs, despite broad language in the preamble and the numbered paragraph which introduces each of the 14 Appendix B criteria groupings of alleged violations.

Intervenors discovery requests have frequently exceeded the boundaries of the matters in controversy in their proceeding. Certain of Applicant's responses have likewise gone beyond the precise scope of a particular subcontention in the interests of providing thorough and complete responses to discovery requests in accordance with 10 CFR 2.740. Such expanded discovery responses cannot properly create genuine issues of fact sufficient to defeat Applicant's Motion.

The memorandum and order admitting the amended quality assurance contention also limited the Intervenor's contention insofar as it alleges patterns of noncompliance. The Board observed that the Intervenor organized the contention into 14 groups of violations, each group alleging violation of one of the criteria of 10 CFR 50, Appendix B. Rejecting an assertion by Intervenor that the contention items represented violations of other Appendix B criteria as well, the memorandum and order states that Intervenor will not be allowed to demonstrate patterns of inadequacies beyond the specific instances set forth under each alleged pattern in the contention as it now stands. 21 NRC 1732 at p. 1742, n. 6.

At this time Applicant is seeking summary disposition for only one entire subpart of the amended quality assurance contention, subpart 5. Assuming that Applicant prevails on each of the three individual subcontention items comprising subpart 5, we submit that those issues would be wholly outside the scope of any future litigation reviewing portion of the amended quality assurance contention. Applicant has shown

that individually, each of the deficiencies identified in the contention items has been corrected adequately and raises no legitimate doubt about quality at Braidwood. Moreover, the basis for subcontention item 5A is a comment in the NRC CAT inspection report which concludes that the activity inspected is generally adequate. The inspection report does not propose any enforcement action with respect to that activity. Applicant has also shown that there is no common root cause underlying Subcontention item 5A, 5B and 5C that might suggest more pervasive problems.

Subcontention 5 asserts that Applicant has violated Criterion III, "Design Control," of 10 CFR Part 50, Appendix B, by failing to establish appropriate measures to assure that the regulatory requirements and design bases are correctly translated into specification, drawings, procedures and instructions, and by failing to require that measures are established for the identification and control of design interfaces. Applicant has established that contention item 5B does not involve deficient design control at all. Moreover, Applicant has established that contention items 5A and 5C share no common root cause and neither is indicative of more widespread deficiencies. Rather, both contention items involved isolated and trivial examples of deficiencies under Criterion III..

Finally, contention items 5A, 5B and 5C cannot logically be aggregated with other contention items in Intervenor's QA contention because they are unrelated to them. Unlike the remainder of Intervenor's QA contention, subcontention 5 puts in issue Applicant's design quality

assurance rather than construction quality assurance. "[Design quality assurance issues [are] separate and distinct from construction quality assurance issues." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1611-1613 (1984) (emphasis in original). There is no direct connection between design quality assurance and construction quality assurance issues. Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1109-10 (1983). Contention Items 5A, 5B and 5C should therefore be disposed of summarily with no subsequent opportunity for Intervenor to use them to demonstrate patterns of inadequacies.

There are portions of other subparts of the contention as to which Applicant now seeks summary disposition. Applicant recognizes that even should it prevail on such items considered together, it still bears a burden of proof to demonstrate that each of the subcontention items, do not represent a pattern of quality assurance deficiencies as alleged in the contention. In this regard, the Licensing Board observed that it is only the cumulative effect of uncorrected quality assurance deficiencies which can form the basis for a conclusion that "the Braidwood QA program was not functioning effectively during the plant's construction", 21 NRC at p. 1744. As the detailed discussion of each subcontention item establishes, in every instance in which Applicant conceded that a violation of NRC regulatory requirements took place, corrective action acceptable to the NRC Staff has also occurred. As further motions for summary disposition are filed or as the evidentiary hearings are conducted, it will become apparent that there are no uncorrected quality assurance deficiencies set forth in the contention. Moreover, the

assurance deficiencies set forth in the contention. Moreover, the entirety of Applicant's case will show that virtually all of the quality assurance contention is an aggregation of unrelated matters, bereft of any meaningful pattern.

CONCLUSION

To aid the Board in its consideration of this Motion, Applicant is submitting the following documents in connection with each contention on which summary disposition is sought.

1. A statement of the contention and of material facts as to which there is no genuine issue to be heard and a brief discussion of particular reasons why summary disposition is appropriate on that individual subcontention.
2. Affidavits or depositions in support of each statement.

The filings in this proceeding together with the attached statements and affidavits demonstrate that there is no genuine issue as to any material fact and that Applicant is entitled to summary disposition as a matter of law of the Subcontentions referred to herein. Therefore, pursuant to 10 CFR § 2.749, the Licensing Board should grant Applicant's Motion for Summary Disposition. In the alternative, if the Board determines that it is unable to summarily dispose of a given

contention, Applicant respectfully requests that the Board enter a finding specifying the material fact or facts as to which there exist genuine issues requiring hearing.

Respectfully submitted,

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Dated: December 26, 1985

December 20, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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'85 DEC 24 A10:05

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of:)	
COMMONWEALTH EDISON COMPANY)	
)	
(Braidwood Station, Units 1 and 2)	Docket Nos. 50-456
)	50-457

CERTIFICATE OF SERVICE

I, Michael I. Miller, one of the attorneys for Commonwealth Edison Company, certify that Applicant's Motion for Summary Disposition dated December 20, 1985 on Rorem's Quality Assurance Contention with supporting memorandum and affidavits have been served in the above captioned matter on those persons listed on the attached Service List by United States Mail, postage prepaid, this 20th day of December, except where service has been made as otherwise noted.

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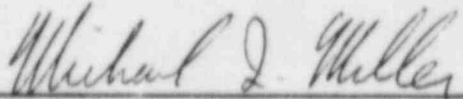
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