UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of<br><br>VIRGINIA ELECTRIC AND POWER COMPANY<br><br>(North Anna Power Station, Units 1 and 2) | Docket Nos. 50-338 SP<br>50-339 SP<br><br>(Proposed Amendment to Operating License NPF-4) |

POTOMAC ALLIANCE ANSWER
TO VEPCO'S MOTION FOR SUMMARY DISPOSITION

On May 5, 1979 the Virginia Electric and Power Co. (VEPCO) filed a motion for summary disposition in this proceeding. The Potomac Alliance (the Alliance) hereby moves the Atomic Safety and Licensing Board (the Board) to exercise its authority under 10 CFR §2.749(c) and refuse the application for summary disposition or order a continuance for the purpose of permitting the Alliance additional time in which to respond to the motion. In the alternative, the Alliance requests that the motion be denied. For the reasons stated below, and as supported by the attached affidavit, the Alliance cannot present by affidavit the facts essential to its opposition to VEPCO's motion. Under such circumstances, the Commission's regulations clearly contemplate that the presiding officer will decline to

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consider the motion.

When considering motions for summary disposition under 10 CFR §2.749 licensing boards are to look for guidance to the standards applied by federal courts when considering motions for summary judgment.[1] Under Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which corresponds to 10 CFR §2.749, a party responding to a motion for summary judgment may answer by affidavit that it is unable to respond to the motion with factual affidavits meeting the standards set forth in Fed. R. Civ. P. 56(e).[2] If the respondent's reasons are adequate, the court has broad discretion to deny the motion, order a continuance, or issue other appropriate relief. The federal rule "bids the courts to exercise a spirit of liberality in granting time enough for the parties reasonably to develop the full facts upon the presented."[3] The reasons for the rule are self-evident. Where the key issues in a proceeding turn on facts or information in the sole possession of parties other than the non-moving party, or when the non-moving party has not had a reasonable time in which to gather the necessary facts or

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

2 / Fed. R. Civ. P. 56(f); see also 10 CFR §2.749(b).

3 / Moore's Federal Practice (Rules Pamphlet pt. 1 at 1039 (1975), citing Slagle v. United States, 228 F. 2d 673, (2d. Cir. 1975).

adequately prepare its case, it would work an injustice on that party to require it to mount a full defense of its position on pain of summary dismissal from the proceeding. The party which is in control of the information must not be allowed to use that fact to its advantage.

At this point in the instant proceeding, the situation calls compellingly for the Board to refuse to consider, to postpone its consideration of, or to deny VEPCO's motion. First, interrogatories and requests for the production of documents from the Alliance to VEPCO and the NRC Staff are now pending. Without the fruits of these discovery requests, the Alliance will be simply be unable to submit sworn affidavits relating to many of the facts in dispute. Several of the Alliance's contentions challenge the adequacy of VEPCO's or the Staff's consideration of certain questions; there is no way that such contentions can be resolved until the documents relevant to such past actions are unearthed. The remainder of the Alliance's contentions raise technical issues clearly requiring reponses by the other parties' experts.

Second, the Alliance has contacted qualified experts who are examining the issues in this proceeding, and is actively seeking the assistance of other experts. Until these individuals have had an opportunity to formulate an opinion on the issues, the Alliance will be unable to submit affidavits meeting the requirements of §2.749(b). For the above reasons, the Alliance requests the Board to refuse to consider VEPCO's motion for summary disposition.

In the alternative, the Alliance moves that VEPCO's motion for summary disposition be denied. In federal court proceedings, motions for summary judgment are to be denied unless the movant has clearly met its burden of showing the lack of any triable issue of fact. [4] Moreover, "inferences to be drawn from the underlying facts...must be viewed in the light most favorable to the party opposing the motion." [5] The submissions of the moving party are to be carefully scrutinized. [6] While it would be inappropriate to here dissect the affidavits submitted by VEPCO's experts, those affidavits offer many vague, unsupported, and conclusory assertions. Even without affidavits in opposition by the Alliance, such assertions would be inadequate evidentiary support for a decision by the Board to issue the requested license amendment. Many of these questions require the full exploration that only an evidentiary hearing can provide. [7]

One additional option available to the Board is to grant a continuance with respect to VEPCO's motion until that time at which the Alliance is prepared to respond in conformance with §2.749(b). While this alternative is not favored for the

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4 / Moore's Federal Practice, supra, at 1040.

5 / United States v. Diebold, 369 U.S. 654, 655 (1962).

6 / Moore's Federal Practice, supra, at 1040

7 / Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

reasons set out above, the Alliance is amenable to an order requiring it to report to the Board as to its ability to submit a substantive response to the motion.

The Alliance would additionally point out that the reasons favoring the Board's denial of or refusal to consider the application for summary disposition apply with equal force to VEPCO's request for summary disposition of the contentions raised by Intervenor Citizens Energy Forum, Inc. (CEF).

As a final matter, in order to avoid being held to have admitted the assertions contained within VEPCO's STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE HEARD there is attached to this answer the responsive POTOMAC ALLIANCE STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE TO BE HEARD.

Respectfully submitted,

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Of counsel:

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Dated this 5th day
of June, 1979