

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

VIRGINIA ELECTRIC AND POWER COMPANY)

(North Anna Power)
Station, Units 1 and 2))

) Docket Nos. 50-338 SP

) 50-339 SP

) (Proposed Amendmend to

) Operating License NPF-4

POTOMAC ALLIANCE SUPPLEMENTAL 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) filed its answer to the above motion on June 5, 1979. An order by the Atomic Safety and Licensing Board (the Board) was issued on June 18, 1979, in which it invited the Alliance to submit additional comments on that part of VEPCO's Motion for Summary Disposition which the Board had not yet addressed.

The Alliance therefore moves once again the Atomic Safety and Licensing Board to exercise its authority under 10 C.F.R. §2.749(c) and refuse the application for summary disposition. While VEPCO's responses to the discovery requests of the Alliance and Citizen's Energy Forum (the Intervenors) have been received only within the past few days, the NRC Staff has notified the parties and the Board that it will not be able to submit its responses until several after the date of this filing. The

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Alliance has therefore been severely handicapped in attempting to amass the facts necessary to develop its case, with the result that it cannot present by affidavit the facts essential to its opposition to VEPCO's motion. Under such circumstances it is appropriate for the Board to refuse to consider the motion or to deny it. See 10 CFR §2.749(c).

The Alliance again asks the Board to apply the standards applied by the federal courts when considering motions for summary judgment filed pursuant to Fed. R. Civ. P. 56. Rule 56 encourages the courts to be liberal in their application of the rules governing time limitations for the purpose of permitting the parties to fully develop the factual bases of their arguments. Moore's Federal Practice (Rules Pamphlet, Part 1 at 1039 (1975), citing Slagle v. United States, 228 F.2d 673 (2d Cir. 1975). In situations such as that in the case at hand, where the party opposing the motion (the Alliance) must rely upon the facts presented by the proponents (VEPCO and the Staff), the opponent must be given a reasonable opportunity to gain access to proof. 6 Part 2, Moore's Federal Practice §56-566 citing Ward v. U.S., 471 F.2d 667 (CA 3d, 1973), "(where the facts of alleged operational negligence of aircraft are solely in the possession of the defendants, entry of summary judgment for defendant without first granting plaintiff's request for a continuance is reversible error)". Additionally, the court in Littlejohn v. Shell Oil Co., 456 F.2d 225 (C.A. 5th, 1972) reversed summary judgment for the defendant on grounds, inter alia, that the plaintiff had not had an adequate opportunity for discovery.

Rule 56(f) of the Fed.R.Civ.P. directs the court to refuse an application for summary judgment when the opponent of the motion cannot present by affidavit facts essential to justify its oppositions due to the inability to locate a witness or to secure an affidavit thus far. 6 Part 2, Moore's Federal Practice §56-1436. "Indeed, where the proof is peculiarly within the knowledge or control of the moving party, this may in itself warrant denial of his motion for summary judgment." 6 Part 2, Moore's Federal Practice §56-567 citing Penn Galvanizing Co. v. Lukens Steel Co., 59 FRD 74 (E.D.Pa. 1973), quoting Treatise. The factor of access to proof is particularly important in determining whether the party opposing summary judgment has, pursuant to Rule 56(f) stated sufficient reasons why (s)he is then unable to present by affidavit facts essential to justify her/his opposition. 6 Part 2, Moore's Federal Practice §56-575.

The Alliance has contacted and established a working relationship with several potential expert witnesses. Included among these are Dr. Mohsin Siddique, a research associate at Howard University with a doctoral degree in chemical engineering and Dr. David Schwartzman, Chairperson of the Department of Geology and Geography at Howard University with a doctoral degree in geology from Brown University. These individuals, however, are unable to submit affidavits meeting the requirements of 10 CFR §2.749(b) without having had an opportunity to scrutinize the responses to the Intervenors' discovery requests.

In sum, the Intervenors have had no meaningful access to the facts on which the relevant issues will turn, and as a result have been unable to date to fully prepare their case or groom their experts sufficiently to respond substantively to the Applicant's motion for summary disposition. If the Board were to grant said motion it would not only be unwarranted, but contrary to established adjudicatory procedures and notions of due process. The Intervenors urge the Board, to the extent that there remain contentions before it, to deny or refuse to consider VEPCO's motion for summary disposition.

Respectfully submitted,

Of counsel:

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James B. Dougherty

Counsel for the
Intervenors

Dated this 25th day
of June, 1979

CERTIFICATE OF SERVICE

I hereby certify that copies of the POTOMAC ALLIANCE SUPPLEMENTAL ANSWER TO VEPCO'S MOTION FOR SUMMARY DISPOSITION were served this 25th day of June, 1979, by United States Mail, First Class, to the following:

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