

September 1, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
CAROLINA POWER & LIGHT COMPANY ) Docket Nos. 50-400 OL  
AND NORTH CAROLINA EASTERN ) 50-401 OL  
MUNICIPAL POWER AGENCY )  
 )  
(Shearon Harris Nuclear Power )  
Plant, Units 1 and 2) )

APPLICANTS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTIONS FOR SUMMARY  
DISPOSITION ON INTERVENOR WELLS EDDLEMAN  
CONTENTIONS 64(f), 75, 80 AND 83/84

I. Introduction

Contemporaneously herewith, Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency filed four motions with the Atomic Safety and Licensing Board seeking summary disposition, pursuant to 10 C.F.R. § 2.749, of Contentions 64(f), 75, 80 and 83/84, which were advanced by Intervenor Wells Eddleman.<sup>1/</sup> In order to avoid repetition, Applicants set forth in this single memorandum of law the general

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<sup>1/</sup> The motions on Contentions 64(f) and 80 accompany this memorandum. Applicants' motions with respect to Contentions 75 and 83/84 are being filed under separate cover.

standards by which motions for summary disposition are to be decided.

## II. Timeliness

The motions for summary disposition of Eddleman Contentions 75, 80 and 83/84 are filed pursuant to the Board's Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference) at 6 (March 10, 1983), which established September 1, 1983 as the last day for filing motions for summary disposition with respect to these environmental contentions. Consequently, the motions clearly are timely filed. Further, the motions are ripe for decision by the Board, notwithstanding the fact that motions to compel discovery of Applicants have been filed by Mr. Eddleman and are pending before the Board.<sup>2/</sup> Discovery has been open on these contentions since September 22, 1982, when the Board admitted them for adjudication. Mr. Eddleman was advised on January 6, 1983 that Applicants would seek summary disposition of these contentions, so that failure to pursue discovery was at his own risk. See letter to the Board from Applicants' counsel, January 14, 1983, with attached meeting minutes.

While Applicants could have filed their motion on Contention 64(f), a safety contention, at a later time, discovery on

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<sup>2/</sup> No outstanding discovery requests otherwise are pending with respect to these contentions.

that contention likewise has been available for almost one year and, for the reasons stated in the motion, it is ripe for decision by the Board.

Therefore, the existence of discovery disputes on these contentions is entirely a situation created by Mr. Eddleman, and from which he should not be allowed to profit by forestalling the Board's consideration of timely motions for summary disposition.<sup>3/</sup>

### III. Governing Legal Standard

The admission of a contention for adjudication, under the standards of 10 C.F.R. § 2.714, is not an appraisal of the merits of a contention, but merely a determination that it meets the criteria of specificity, asserted basis and relevance. A hearing on an admitted contention, however, is not inevitable. Licensing boards are authorized to decide an admitted contention on its merits in advance of trial on the basis of pleadings filed.

"Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.749(a). The standard embodied in the regulation is that "[t]he presiding officer shall render the decision sought if the filings in the

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<sup>3/</sup> In addition, we note that only a handful of interrogatories are at issue.

proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show 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." 10 C.F.R. § 2.749(d).

The Commission and its adjudicatory boards have long encouraged the use of this summary disposition process where the proponent of a contention has failed to establish that a genuine issue exists, so that evidentiary hearing time is not unnecessarily devoted to such issues. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 457 (1981); see also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 550 (1980) (" . . . 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 . . .").

The standards governing summary disposition motions in an NRC proceeding are quite similar to the standards applied under Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-554, 10 N.R.C. 15, 20 n.17 (1979). Where, as here, motions for summary disposition are properly supported pursuant to the

Commission's Rules of Practice, a party opposing the motions may not rest upon the mere allegations or denials of its answers. Rather, an opposing party must set forth specific facts showing that there is a genuine issue of fact. 10 C.F.R. § 2.749(b). A party cannot avoid summary disposition on the basis of guesses or suspicions, or on the hope that at the hearing Applicants' evidence may be discredited or that "something may turn up." Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 N.R.C. 246, 248 (1975).

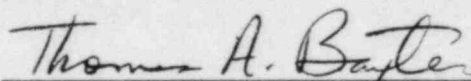
The governing regulation permits summary disposition ". . . as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.749(a). Just as summary disposition may be granted as to some but not all contested issues, so may summary disposition be granted as to one or more parts of an intervenor's contention. The format or organizational style employed by the pleader of contentions should not prevent a licensing board from deciding that, as to discrete matters of fact and/or law, there is no genuine issue to be heard with respect to one or more aspects or parts of a given contention. Thus, where summary disposition may not be appropriate as to the whole of a given contention, a licensing board may and should determine what issues within the contention are not genuinely disputed, and set only disputed issues for trial.

Applicants submit that the four motions filed contemporaneously are all meritorious and should be granted as a matter of law in their entirety. Each motion demonstrates that there



is no genuine issue of material fact to be heard. If, however, the Board were to be of the view that Mr. Eddleman has demonstrated that one or more genuine issues exist as to a given contention, the Board should exercise its authority to narrow the issues for trial by disposing of those portions of contentions regarding which no genuine issue exists.

Respectfully submitted,



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Dated: September 1, 1983

September 1, 1983

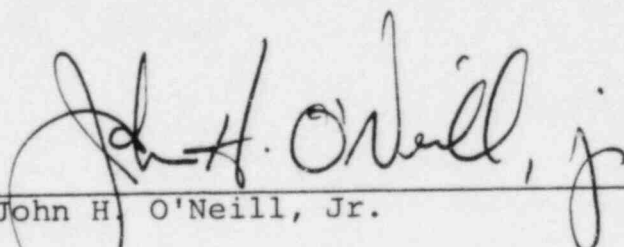
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CERTIFICATE OF SERVICE

I hereby certify that copies of the documents listed on the attached "Document List" were served this 1st day of September, 1983 by deposit in the United States mail, first class, postage prepaid, to the parties on the attached Service List.

  
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John H. O'Neill, Jr.

Dated: September 1, 1983

DOCUMENT LIST

1. Applicants' Memorandum of Law in Support of Motions for Summary Disposition on Intervenor Wells Eddleman Contentions 64(f), 75, 80 and 83/84
2. Applicants' Motion for Summary Disposition of Intervenor Wells Eddleman's Contention 64(f) (Spent Fuel Shipping Cask Pressure Relief Valve)
3. Applicants' Statement of Material Facts As To Which There Is No Genuine Issue To Be Heard on Intervenor Wells Eddleman's Contention 64(f) (Spent Fuel Shipping Cask Pressure Relief Valve)
4. Affidavit of Louis H. Martin in Support of Summary Disposition of Intervenor Wells Eddleman's Contention 64(f)
5. Applicants' Motion for Summary Disposition of Intervenor Wells Eddleman's Contention 80 (Atmospheric Dispersion Model)
6. Applicants' Statement of Material Facts as to Which There is No Genuine Issue to Be Heard on Eddleman Contention 80
7. Affidavit of Wayne Lei in Support of Applicants' Motion for Summary Disposition of Intervenor Wells Eddleman's Contention 80
8. Affidavit of Brian McFeaters in Support of Applicants' Motion for Summary Disposition of Intervenor Wells Eddleman's Contention 80



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