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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
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BRANCH

In the Matter of

CAROLINA POWER AND LIGHT COMPANY AND
NORTH CAROLINA EASTERN MUNICIPAL
POWER AGENCY

(Shearon Harris Nuclear Power Plant,
Units 1 and 2)

Docket Nos. 50-400 OL
50-401 OL

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTIONS FOR SUMMARY
DISPOSITION OF EDDLEMAN CONTENTIONS-144 AND 154

I. INTRODUCTION

On October 8, 1984, the Applicants moved for summary disposition of Mr. Eddleman's Contention 144 ^{1/} and Contention 154. ^{2/} Eddleman - 144 alleges that CP&L's emergency personnel levels do not meet the requirements of NUREG-0737, Rev. 1, Table 2. ^{3/} Contention - 154 as admitted by the Board alleges that plant operators assigned to make dose assessments are not qualified to do so. The Staff supports both of Applicants' Motions on the ground that Applicants have demonstrated that there are no genuine issues of material fact to be heard with respect to either of these contentions. Therefore, Applicants are entitled to a favorable decision on these contentions as a matter of law.

^{1/} Applicants' Motion for Summary Disposition of Eddleman - 144 (October 8, 1984) [hereinafter, Applicants' Motion - 144]

^{2/} Applicants' Motion for Summary Disposition of Eddleman - 154 (October 8, 1984) [hereinafter, Applicants' Motion - 154].

^{3/} NUREG-0737 Rev. 1 is in actuality, NUREG-0737 Supp. 1.

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II. BACKGROUND

The procedural background of Mr. Eddleman's Contentions 144 and 154 is correctly set forth by Applicants in their Motions. Applicants' Motion - 144 at 3; Applicants' Motion - 154 at 2. Discovery between the Applicants and Mr. Eddleman did not reveal any basis which would support Mr. Eddleman's assertions that either personnel levels are inadequate or that plant operators would not be qualified to perform dose assessments.

III. DISCUSSION

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 general allegations in the pleadings, separating the substantial from the insubstantial, depositions, interrogatories or other material of evidentiary value. 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 den., 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, 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 shown 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, 69 FRD 142, 145 (M.D. Alabama 1973). Summary disposition cannot be defeated by the possibility that Mr. Eddleman might think of something new to say at hearing O'Brien v. McDonald's Corp., 48 FRD 370, 374 (N.D. Ill. 1979); nor can the Staff's motion be defeated on the hope that Mr. Eddleman could possibly uncover something at hearing. Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 974 (Minn. 1967). Now, in opposition to the Applicants' motion, is the time for Mr. Eddleman to come forth with material of evidentiary value to contravene the Applicants and Staff'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" Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), supra 632, 635.

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 F.2d 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, supra, 11 NRC at 550. Applicants have met these standards with regard to their motions for summary disposition concerning Eddleman Contentions 144 and 154.

B. There is no Genuine Issue of Material Fact to be Heard with Respect to Eddleman Contention 144

Contention 144 asserts that emergency personnel levels do not meet the requirements of NUREG-0737, Supp. 1, Table 2. The Applicants argue among other things that since plans for construction for Unit 2 of the Harris plant have been canceled, the basis given by Mr. Eddleman for this contention, namely that staffing levels are insufficient to meet the requirements for one damaged and one undamaged unit is moot. Applicants' Motion-144 at 5. The Staff concurs with the Applicants' reasoning and agrees that Mr. Eddleman's concern about emergency staffing for a multi-unit plant is now moot.

As to the adequacy of on-shift staffing and augmentation in the event of an emergency, the Applicants argue that Table 2.2-1 as reformatted in Revision 2 of the onsite plan has substantially the same format as the table in the regulatory guidance, and that Table 2.2-1 satisfies that regulatory guidance. Applicants' Motion-144 at 6-8. Applicants point out several differences between these two tables, and argue that the letter transmitting NUREG-0737, Supp. 1, specifically notes that strict adherence to Table 2 was not required. Id. at 6. Instead of listing augmentation times of exactly 30 and 60 minutes, CP&L

lists a range of times of 30 to 45 minutes and 60 to 75 minutes to allow for variations in time of arrival due to weather conditions. Applicants' Motion-144 at 6. Additionally Applicants substitute specific position titles instead of generic titles suggested in NUREG-0737, Supp. 1. Id. at 6.

The affidavit of the Staff's reviewer in this area, Gerald E. Simonds, demonstrates that the Staff agrees with the Applicants as to the correspondence of Applicants' revised Table 2.2-1 with Table 2 of NUREG-0737, Supp. 1, and Table B-1 of NUREG-0654. Affidavit of Gerald E. Simonds In Support of NRC Staff's Response To Applicants' Motion For Summary Disposition of Eddleman Contentions 144 and 154 at ¶ 4, [hereinafter Simonds Affidavit]. The Staff also agrees with Applicants that there is a typographical error in Table 2 of NUREG-0737, Supplement 1, and that Table B-1 contains the correct specification of personnel to be available in the area of electrical maintainance/instrument and control. Simonds Affidavit at ¶ 4. Item by item comparison of Table 2.2-1 with Table B-1 shows that, at least in one area, Applicants have designated more personnel than the minimum required. Id. For example, Applicants Emergency Plan designates two people for Emergency Direction and Control whereas both Tables 2 and B-1 require only one. Id. The Staff also agrees with Applicants that the Staffing levels set forth in Table 2 are goals, not strict requirements. Id. Reasonable exceptions to the goals for the number of additional staff personnel and the response times for the arrival of such personnel are considered by the Staff. Id. The Staff concludes that the staffing goals of Table B-1 of NUREG-0654, and

therefore Table 2 of NUREG-0737, Supplement 1, have been fully met by the Applicants. Id. Since the Applicants' emergency plan for on-shift staffing meets or exceeds all the personnel and augmentation requirements set forth in NUREG-0654, Table B-1, there is no issue of material fact with respect to Contention - 144 to be the subject of an evidentiary hearing.

C. Contention - 154 does not Raise Any Genuine Issue of Material Fact to be the Subject of an Evidentiary Hearing

Contention - 154 asserts that personnel assigned to make dose assessments are unqualified to make the detailed judgements that may be required by the procedures for dose estimating. Applicants first argue that Annex B of the emergency plan does not contain the procedures for making dose projections. Applicants' Motion-154 at 6-7. The Staff agrees with this argument. As Staff affiant Simonds states, the Annex forms the technical basis and justification for the dose projection procedures, but is not used in making actual dose projections. Simonds Affidavit at ¶ 6. The actual dose projection procedures are contained in Plant Emergency Procedures (PEP 341, 342 and 343). Id.

Applicants also argue that control room personnel responsible for accident assessment will be trained to carry out their duties assigned under the emergency plan. Applicants' Motion-154 at 8-9. Applicants also assert that personnel will be subject to periodic retraining as well as practice drills in order to demonstrate their ability to perform their assigned emergency functions. Applicants' Motion-154 at 9.

The NRC Staff concurs with the Applicants summary of training, retraining and periodic practice drills of control room personnel. The

Affidavit of the NRC Staff reviewer in this matter, Gerald E. Simonds states that the Applicants' emergency plan (EP) assigns the initial responsibility to control room personnel to: (1) determine when an Emergency Action Level (EAL) has been met or exceeded, (2) declare an emergency, (3) recommend protective actions to the offsite governmental authorities, and (4) make dose projections. Simonds Affidavit at ¶ 6. He further states that the emergency plan commits to providing training of control room personnel and other individuals who may be called on to assist in an emergency. Id.

The provisions for initial training and annual retraining are contained in the emergency plan Section 5.2.1 and Plant Emergency Procedure PEP-403. Simonds Affidavit at ¶ 6. Training is also provided in emergency classifications and EALs, dose projection procedures and protective action recommendation for the public. Id. Section 5.2.1 of the plan states that the specific emergency response task training is described in the lesson plans and study guides prepared for each emergency position. Id.

The Applicants' plan provides for periodic drills and exercises. Procedures set forth the objectives to be achieved by those periodic drills and exercises. These objectives are: to test the adequacy of emergency preparedness at SHNPP, to ensure that emergency personnel are familiar with assignments and proficient in performing their duties; to demonstrate proficiency in recognizing, assessing, and classifying the emergency condition; to employ corrective measures; and to demonstrate the adequacy of protective measures considered and used to protect personnel, both onsite and offsite. Simonds Affidavit at ¶ 7. Plant Procedures provide that any weaknesses in the emergency plan and in training

that are identified through critiques of drills and exercises will be documented and corrected by the organizations and individuals who have responsibility for the areas identified. Id.

Since there is reasonable assurance that Control Room personnel assigned the responsibility for dose projections are, or will be, suitably proficient to perform their functions, and that the dose assessments will be properly made, there is no issue of material fact with respect to Contention 154 to be the subject of an evidentiary hearing. Simonds Affidavit at ¶ 9.

III. CONCLUSION

The Staff agrees with the arguments made in the Applicants' Motions 144 and 154 and Supporting papers. The Staff concludes that there is no genuine issue of material fact to be heard with regard to Wells Eddleman's Contentions 144 and 154. The onshift staffing levels and augmentation proposed by the Applicants meet or exceed those required by NUREG-0654, Table B-1. Personnel assigned the responsibility of performing dose assessments are qualified to perform their functions. The Applicants' Motions for Summary Disposition of Wells Eddleman's Contentions 144 and 154 should be granted.

Respectfully submitted,

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Response in Support of Applicant's Motions