

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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 No. 50-400-0L

FEMA STAFF RESPONSE TO APPLICANTS' MOTION  
FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 57-C-3

I. INTRODUCTION

On November 2, 1984, the Applicants moved for summary disposition on Mr. Eddleman's Contention 57-C-3, (hereinafter Applicant's Motion) pursuant to 10 CFR § 2.749 of the Commission's regulations. FEMA staff supports in part Applicant's Motion for summary disposition except as noted herein on the grounds that they have demonstrated an absence of a genuine issue of material fact, and that they are entitled to a favorable judgment as a matter of law.

II. BACKGROUND

Contention 57-C-3 was admitted by the Board as a matter in controversy in this proceeding by the Board's Memorandum and Order (Further Rulings on Admissibility of Offsite Emergency Planning Contentions Submitted by Intervenor Eddleman) on June 14, 1984. Eddleman 57-C-3 alleges:

The plan does not have provisions for notification at night, e.g. in the hours between 1 a.m. and 6 a.m. when most people living near the plant would normally be asleep. Nor does the plan assure that they would be timely awakened to take sheltering action, as e.g. on a summer night when many might have windows open or air conditioners on. The plan should

provide automatic phone-dialing equipment to transmit an emergency message to all households in the EPZ for Harris, asking people to alert their phoneless neighbors.

Discovery on this contention was conducted by Mr. Eddleman (see Interrogatories to NRC staff and FEMA [Fourth Set dated June 29, 1984 and Fifth Set dated August 9, 1984]). The deadline for filing discovery was August 9, 1984. FEMA staff response to the Fourth and Fifth Set of Interrogatories was filed on August 14, 1984 and September 7, 1984 respectively.

### III. ARGUMENT

#### 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 equivalent to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7AEC 210, 217 (1974); Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512,519 (1982). 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. Mere allegations in the pleadings will not create an issue against a motion for summary disposition supported by affidavits. 10 C.F.R. § 2.749 (b); Fed R. Civ. P. 56 (e).

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 rRC 512,519 (1982). 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 complaint 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 denied 393 U.S. 901 (1968). To defeat summary disposition an opposing party must present material substantial facts to show that an issue exists. Conclusions alone will not suffice. Gulf States Utilities Co. (River Bend Station, Units 1 and 2) 1 NRC 246,248 (1975).

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 (S.D. Texas 1973); the opponent must come forth with evidentiary facts to demonstrate that there is an outstanding unresolved material issue to be tried. Stansifer v. Chrysler Motors Corp. 487 F. 2d 59, 63 (9th Cir. 1973); Franks v. Thompson 59 FRD 142, 145 (M.D. ALA. 1973). Nor can summary disposition be defeated by the possibility that Mr. Eddleman might

think of something new to say at the hearing. O'Brien v. McDonald's Corp., 59 FRD 370,374 (N.D. Ill. 1979). It is incumbent on Mr. Eddleman to come forward at this time with material of evidentiary value to contravene the Applicants and FEMA staff's affidavits and to show the existence of a material fact to be resolved at an evidentiary hearing.

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 and 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 motion for summary disposition concerning Eddleman Contention 57C-3.

B. There is no Genuine Issue of Material Fact (except as noted) to be Heard with Respect to Eddleman Contention 57-C-3.

FEMA's Planning Standards and Evaluation Criteria for Notification Methods and Procedures in plume exposure pathway is found at NUREG-0654/FEMA REP-1 II.E.6. which provides:

Each organization shall establish administrative and physical means, and the time required for notifying and providing prompt instructions to the public within the plume exposure pathway Emergency Planning Zone. (See Appendix 3). It shall be the licensee's responsibility to demonstrate that such means exists, regardless of who implements this requirement. It shall be the responsibility of the State and local governments to activate such a system.

Appendix 3 of NUREG-0654/FEMA REP-1 provides in pertinent part:

The design objective for the (notification) system shall be to meet the acceptance criteria of Section B of this Appendix. This design objective does not however constitute a guarantee that early notification can be provided for everyone with 100% assurance or that the system when tested under actual field conditions will meet the design objective in all cases. (emphasis added).

The plans shall include:

...A capability for 24 hour per day alerting and notification;

A. Concept of Operations.

...The primary means for alerting the public to an impending notification by public authorities may be any combination of fixed, mobile or electronic tone generators which will convey the alerting signal with sufficient timeliness and intensity to permit completion of notification by broadcast media in a timely manner.

B. Criteria for Acceptance

2. The minimum acceptable design objectives for coverage by the system are:

a) Capability for providing both an alert signal and an informational or instructional message to the population on an area wide basis throughout the 10 mile EPZ within 15 minutes.

b) The initial notification system will assure direct coverage of essentially 100% of the population within 5 miles of the site.

c) Special arrangements will be made to assure 100% coverage within 45 minutes of the population who may not have received the initial notification within the entire plume exposure EPZ.

C. Physical Implementation

3. Sirens

Whenever proposed as part of a system, subject to later testing by statistical sampling, the design concept and expected performance must be documented as part of plans submitted by licensees, States and local governments....(emphasis added).

As an acceptable criteria at most locations 10db above average daytime ambient background should be a target level for the design of an adequate siren system....Sirens on vehicles may be used to supplement fixed alert systems outside the inner five mile radius of the plume exposure EPZ. (emphasis added).

FEMA-43, Standard Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants attached hereto as Exhibit 1, provides that:

the reviewer must recognize that the licensee could employ a number of means to alert the public. The means of alert is at the option of the licensee. A fully effective alert and notification system may include a combination of means. These could include but are not limited to fixed sirens; mobile siren vehicles; tone alert radios; aircraft; automatic telephone dialers/switching equipment; modulated power lines; and police, fire and rescue vehicles or personnel. Regardless of the combination of alert methods implemented, the licensee is expected to provide a design report of the selected system demonstrating its adequacy. The reviewer must, in turn, assess the acceptability of this design report prior to exercises or tests conducted to satisfy the alert and notification aspects of 44 CFR 350.9(a). (emphasis added).

FEMA-43 further provides at E.6.2. Sirens:

...The NUREG-0654/FEMA REP-1 criteria, as quoted earlier are satisfied when the design report shows that, for those geographical areas to be covered by the fixed sirens either (a) the expected siren sound level generally exceeds 70 dBC where the population density exceeds 2,000 persons per square mile and 60 dBC in other inhabited areas, or (b) the expected siren sound level generally exceeds the average measured daytime ambient sound levels by 10dB ... (emphasis added).

NUREG-0654/FEMA REP-1 provides at Appendix 3, C 3:

c. The differential above daytime ambient is meant to provide a distinguishable signal inside of average residential construction where average conditions....

The affidavit of FEMA's staff reviewer, Thomas I. Hawkins, simply and succinctly addresses Mr. Eddleman's contention that the plan does not have provisions for notification at night between 1 a.m. and 6 a.m. FEMA's guidance, NUREG-0654/FEMA REP-1 (and FEMA-43) does not require special provisions for nighttime notification. Mr. Bassiouni's affidavit points out that daytime ambient sound levels are utilized for the siren system because the ambient noise level during the daytime is substantially higher than the level at nighttime. Furthermore, Appendix 3C3.c of NUREG-0654/FEMA REP-1 as indicated above states that the differential above the daytime ambient noise level is meant to provide a distinguishable signal inside of average residential construction under average conditions. The affidavit of Mr. Mileti on behalf of the applicants indicates that in the event of an emergency at Shearon Harris, the populace in seeking to confirm the emergency would lead people to contact others who might not as yet learned of the emergency, paragraph 5.

With regard to that part of Eddleman Contention 57-C-3 that asserts that "the plan should provide automatic phone dialing equipment to transmit an emergency message to all households in the EPZ for Harris asking people to alert their phoneless neighbors", absent a showing by Mr. Eddleman that the siren system does not meet NUREG-0654/FEMA REP-1, FEMA-43 requirements, there is no requirement to provide an additional warning notification system to supplement the fixed siren system. FEMA 43 clearly establishes that the means of alert is at the option of the licensee. While "an effective system may include more than one of the alerting means," there is no redundant alert notification system requirement. See Bassiouni affidavit paragraph 5 and FEMA-43. In addition to the fixed siren system, a system utilizing police, fire, or rescue vehicle personnel, that will provide vehicles with flashing lights, sirens and/or public address system "will be immediately dispatched upon the activation of the fixed sirens and/or public address systems to provide additional public warning by driving predesignated routes within the EPZ" during daytime and nighttime (1 a.m. to 6 a.m.) conditions. (See Pugh affidavit paragraph 2,3). The utilization of automatic phone dialing equipment to alert EPZ residents is clearly an optional method of alert notification (see FEMA-43 E.6.2.4, E.6.2.4.4),

The affidavit of FEMA's staff reviewer, Thomas I. Hawkins, establishes that NUREG-0654 does not require automatic phone-dialing equipment to transmit an emergency message. Mr. Hawkins further indicates that the FEMA/RAC review of the Harris plan revealed no plan deficiencies related to public notification.



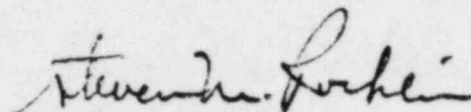
While the applicants have gone forward with evidence in the form of an affidavit from Mr. Bassiouni that demonstrates that NUREG-9654/FEMA REP-1, FEMA-43 criteria for fixed sirens have been met, the design report has not been filed with FEMA, as of this date and thus has not been reviewed by FEMA for technical sufficiency. (See affidavit of FEMA Region IV Emergency Management Program Specialist H. Doug Hoell). It is incumbent upon the licensee to provide the design report of the selected system to demonstrate its adequacy. (See E.6.1 FEMA-43). FEMA-43 E.6.2.1 provides that notification criteria are satisfied when the design report shows that for those geographical areas to be covered by fixed sirens, decibel levels based upon population density or upon the average daytime ambient sound level are as set forth in FEMA-43 E.6.2.1 (emphasis added).

The applicants have failed to demonstrate that there is no genuine issue of material fact to be heard with regard to that part of 57-C-3 concerning the adequacy of the fixed siren system to warn residents of the EPZ.

#### IV. CONCLUSION

FEMA staff agrees with the arguments made in the Applicants' Motion 57-C-3 and supporting papers concerning nighttime notification and automatic phone dialing equipment. FEMA staff believes that there remains an issue of material fact to be heard with regard to that part of Contention 57-C-3 which pertains to the adequacy of the fixed siren system to warn the populace within the EPZ. The Applicants' Motion for summary disposition on Mr. Eddleman's Contention 57-C-3 should be granted in part and denied in part.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steven M. Rochlis".

Steven M. Rochlis  
Regional Counsel  
Federal Emergency Management Agency

Dated at Atlanta, Georgia  
this 6th day of December, 1984.