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January 30, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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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

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NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION
FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 224

I. INTRODUCTION

On December 31, 1984, Applicants filed a motion for summary disposition of Eddleman Contention 224 pursuant to 10 C.F.R. § 2.749 of the Commission's Regulations. "Applicants' Motion For Summary Disposition Of Eddleman Contention 224" [hereinafter Applicants' Motion]. The Staff supports this motion on the grounds that there are no genuine issues of material fact to be heard, and Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

Eddleman Contention 224 was admitted as a matter in controversy in this proceeding by the Board in its order of June 14, 1984. "Further Rulings on Admissibility of Offsite Emergency Planning Contentions Submitted by Intervenor Eddleman" at 26. The exact wording of this contention was agreed upon by the parties in a stipulation. This stipulation was approved by the Board. "Order Approving Joint Stipulation Codifying Certain Admitted Contentions" (December 6, 1984). Contention 224 states:

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In violation of 10 C.F.R. 50.47(a)(1) and (2) and (b)(10) the HMM study is defective because it does not identify the adverse weather frequency used (NUREG-0654, App. A, IV-A, p. 4-6). Such a defective study is unreliable for guiding emergency response personnel in decision making.

Applicants have set out the history of the discovery concerning this contention, and it need not be repeated here. Applicants' Motion at 2-3.

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 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 allegations of fact in the pleadings and to obtain summary relief where facts set forth in detail in affidavits, depositions, interrogatories, or other material of evidentiary value show that there are no genuine issues of material fact to be tried. 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. § 2.740(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 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 and 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, 59 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 Applicants' 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 which is in accord with Budget Dress Corp. v Joint Board (SD NY 1961) 198 FSupp 4, aff'd (CA2d, 1962) 299 F2d 936, cert den (1962) 371 US 815.

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). Sec. 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 motion for summary disposition concerning Eddleman Contention 224.

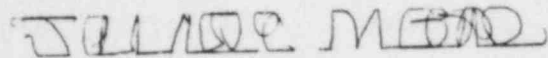
B. No Genuine Issue of Material Fact Remains to be Litigated With Regard to This Contention, and Applicants Are Entitled to a Favorable Decision As a Matter of Law.

Eddleman Contention 224 alleges that the evacuation time estimates performed by HMM Associates are defective because the study does not identify the frequency of the adverse weather condition used in the study. Applicants in their motion, and in the supporting affidavit of Robert Klimm from HMM Associates, state that they will amend the evacuation time estimate study to include a table of the data collected on the occurrence of rainfall and precipitation in the area, and by the inclusion of a verbal summary of that data. Applicants' Motion at 7; Affidavit of Robert Klimm in Support of Applicants' Motion For Summary Disposition of Eddleman Contention 224" at ¶ 8. In light of this commitment to amend the evacuation time estimate study to identify the frequency of the adverse weather scenario, no issue encompassed in this contention remains to be heard. Therefore, Applicants' motion for summary disposition should be granted.

IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Eddleman Contention 224 should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "JANICE MOORE". The signature is written in a cursive style with some loops and flourishes.

Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of January, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 224" in the above-captioned proceeding have been served by the Staff on the following by deposit in the United States mail, first class, or deposit in the Nuclear Regulatory Commission's internal mail system (*), this 30th day of January, 1985.

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