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February 6, 1985

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 )

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Docket Nos. 50-400 OL  
50-401 OL

NRC STAFF RESPONSE IN SUPPORT OF APPLICANTS' MOTION  
FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 215(1)

I. INTRODUCTION

On January 7, 1985, Applicants Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency moved for summary disposition of Eddleman Contention 215(1) pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of Eddleman Contention 215(1)" [hereinafter Applicants' Motion]. The Staff supports Applicants' 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

Contention 215 was originally admitted by the Board in its order of June 14, 1984. "Further Rulings on Admissibility of Offsite Emergency Planning Contentions Submitted by Intervenor Wells Eddleman" at 24. Contention 215(1) in its present form was admitted by the Board in its

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order of October 4, 1984. "Rulings on Specification of Eddleman Offsite Emergency Planning Contention 215 and On the Admissibility of Eddleman Contentions on the Public Information Brochure". The contention states:

In violation of 10 CFR 50.47(b)(10) CP&L's evacuation time study does not conform to NUREG-0654 Appendix 4 and will not provide accurate and useful guidelines for the choice of protective actions during an emergency because the study contains numerous so-called "conservatisms" including those referring to recreational populations and vehicle capacity factors (see e.g. sections 3-3 and 3-6) which may force evacuation time estimates upwards and provide inaccurate estimates for decisionmakers during an emergency, in the opinion of expert Paul Holmbeck. Potential hazards of such "conservatisms" are discussed in the 1974 Byron partial initial decision under emergency planning.

1. The assumption of evacuation from home. For certain times of day, this assumption is unrealistic for many persons who will not be at home, but be at work, school, shopping, doctor's office, etc. This could also result in double counting of evacuees for persons who both live and work within the EPZ (6/14/84 Order at 31).

Applicants have set forth the history of discovery regarding this contention, and it need not be repeated here. Applicants' Motion at 2-4.

### 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. § 2.749(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 and substantial facts to show that an issue exists. Conclusions alone will not suffice. River Bend, LRP-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). 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 motion for summary disposition concerning Eddleman Contention 215(1).

#### B. Applicable Law

10 C.F.R. Part 50, Appendix E, Section IV of the Commission's regulations requires the performance of analyses of evacuation times by Applicants. Appendix 4 to NUREG-0654/FEMA-REP-1, Rev. 1 (November

1980) "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" [hereinafter NUREG-0654] provides criteria for the contents of those analyses. According to Appendix 4, the analysis is required to set forth the assumptions used. The assumptions used in the evacuation time estimate study performed for Applicants by HMM Associates are contained in Section 2.2 of the study.

C. There are No Genuine Issues of Material Fact to be Litigated With Respect to Eddleman Contention 215(1)

Applicants argue that the assumption that people will evacuate from home is not a conservatism which will result in unrealistic evacuation time estimates. Applicants' Motion at 7-8. They also argue that the double counting in the evacuation time estimates is intentional, and done to more realistically simulate the vehicular activity in the area in the event of an emergency. Applicants' Motion at 10-11.

The Staff's contractor, Dr. Thomas Urbanik, II has reviewed Applicants' evacuation time estimate study, and found it to be consistent with Appendix 4 to NUREG-0654. It is the Staff's position that the assumption that people will evacuate from home is a supportable assumption which does not affect the ability to use the evacuation time estimates by emergency planners. Affidavit of Thomas Urbanik, II on Eddleman Contention 215(1) [hereinafter Urbanik Affidavit] at ¶ 4. The Staff agrees with Applicants that the assumption of evacuation of people from their homes is an assumption supported by the literature. Urbanik Affidavit at ¶ 4.

The Staff believes that the double counting engaged in by Applicants is consistent with the guidance of Appendix 4. The double counting was intentional regarding school children, employees of large employers,

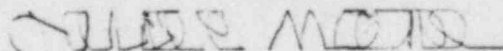
and tourists. These populations must be treated separately in order to be consistent with Appendix 4. As far as the double counting of the school population is concerned, such double counting would have little effect on the evacuation time estimates. Urbanik Affidavit at ¶ 4. The evacuation of school children in buses would change the number of passengers in vehicles evacuating from home, but would not change the number of vehicles using evacuation routes. Urbanik Affidavit at ¶ 5. There is no data to eliminate the other sources of double counting which arise from the treatment of particular segments of the population separately. Urbanik Affidavit at ¶ 5.

Since the assumption of evacuation from home is a reasonable assumption, and the approach taken by Applicants in treating certain segments of the population separately is consistent with Appendix 4 of NUREG-0654, the evacuation time estimates are reasonable and would be useful to decisionmakers in the event of an emergency. Therefore, there is no genuine issue of material fact to be heard, and Applicants are entitled to a favorable decision as a matter of law.

#### IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Eddleman Contention 215(1) should be granted.

Respectfully submitted,



Janice E. Moore  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 6th day of February, 1985



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

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

(Shearon Harris Nuclear Power Plant,  
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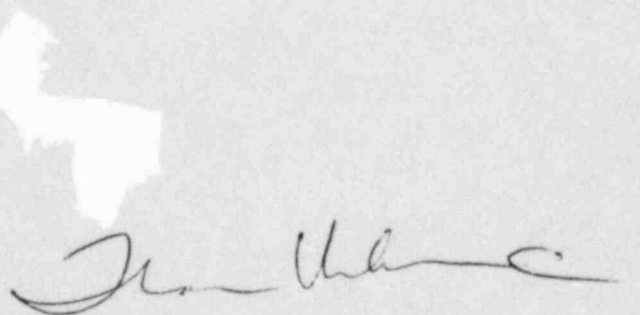
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Docket No. 50-400 OL  
50-401 OL

AFFIDAVIT OF THOMAS URBANIK II

I, Thomas Urbanik II, hereby affirm as follows, subject to the penalty of perjury, that the answers are true and correct to my best knowledge and belief.

1. I am an Associate Research Engineer associated with the Texas Transportation Institute of the Texas A&M University System, College Station, Texas.
2. I hereby certify the statements concerning Eddleman 215 (1) are true to the best of my knowledge.



\_\_\_\_\_  
Thomas Urbanik II

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF THOMAS URBANIK, II  
CONCERNING EDDLEMAN CONTENTION 215(1)

1. I am Thomas Urbanik, II, Associate Research Engineer and Program Manager, Texas Transportation Institute, Texas A&M University System, College Station, Texas 77843-3135.
2. I am a subcontractor to Battelle Pacific Northwest Laboratories which is responsible under contract to the Nuclear Regulatory Commission for reviewing evacuation time estimates studies. A statement of my professional qualification is attached.
3. I have reviewed the Applicants' Motion for Summary Disposition of Eddleman Contention 215(1). Eddleman 215(1) states:

In violation of 10 CFR 50.47(b)(10) CP&L's evacuation time study does not conform to NUREG-0654 Appendix 4 and will not provide accurate and useful guidelines for the choice of protective actions during an emergency because the study contains numerous so-called "conservatisms" including those referring to recreational populations and vehicle capacity factors (see e.g. sections 3-3 and 3-6) which may force evacuation time estimates upwards and provide inaccurate estimates for decisionmakers during an emergency, in the opinion of expert Paul Holmbeck. Potential hazards of such "conservatisms" are discussed in the 1974 Byron partial initial decision under emergency planning.

1. The assumption of evacuation from home. For certain times of day, this assumption is unrealistic for many persons who will not be at home, but be at work, school, shopping, doctor's office, etc. This could also result in double counting of evacuees for persons who both live and work within the EPZ (6/14/84 Order at 31).

4. The assumption that family members return home is a reasonable assumption based on my review of the literature concerning human behavior in disasters (see for example Ronald W. Perry, "The Implications of Natural Hazard Evacuation Warning Studies for Crisis Relocation Planning", Federal Emergency Management Agency, February 1980, p. 48-49). Individuals will try to unite as families unless knowledge exists that individual family members are safe. The use of the assumption of evacuation from home is not, therefore, a conservatism which would result in unrealistic evacuation time estimates.

5. Some double counting does exist such as those who are counted at school and are also counted at home. However, this double counting has little effect on the evacuation time estimate, since the number of vehicles evacuating is unaffected. This is to say, the number of persons in each family's car is less when school children are being evacuated by bus, but the number of cars is unchanged.

Some double counting does exist. However, the numbers involved are believed to be small. No data exists to eliminate the double counting. The two instances of double counting at Shearon Harris are tourists and those working at major employers. The guidance of NUREG-0654 requires separate counting of tourists and large employers because it is likely that the majority reside outside the EPZ. The approach used is, therefore, consistent with the guidance.

February 1984

## BIOGRAPHICAL DATA

### URBANIK II, THOMAS

Program Manager, Texas Transportation Institute  
Lecturer, Civil Engineering Department, Texas A&M University

### Education

Ph.D., Civil Engineering, Texas A&M University, 1982.  
M.S., Civil Engineering, Purdue University, 1971.  
B.S., Civil Engineering, Syracuse University, 1969.  
B.S., Forest Engineering, State University of New York, 1968.

### Experience

Program Manager, Texas Transportation Institute, Texas A&M University System, 1983-Present.  
Assistant Research Engineer, Texas Transportation Institute, Texas A&M University System, 1977-1983.  
Lecturer, Civil Engineering, Texas A&M University, 1982-Present.  
Traffic Engineer, City of Ann Arbor, Ann Arbor, Michigan, 1972-1976.  
Transportation Planning Engineer, City of Ann Arbor, Ann Arbor, Michigan, 1971-1972.  
Research Assistant, Joint Highway Research Project, Purdue University, 1970-1971.

### Professional Licenses

Registered Professional Engineer, Texas and Michigan

### Memberships

American Society of Civil Engineers  
Institute of Transportation Engineers  
Sigma Xi  
Chi Epsilon

## SIGNIFICANT REPORTS AND PUBLICATIONS

### *Traffic Engineering*

Speed/Volume Relationships on Texas Highways, State Department of Highways and Public Transportation, Research Report 327-2F, Austin, Texas, October 1983.  
Priority Treatment of Buses at Traffic Signals. Transportation Engineering, November 1977.  
Priority Treatment of High-Occupancy Vehicles on Arterial Streets. State Department of Highways and Public Transportation, Report 205-5, 1977.  
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*Public Transportation*

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- Intercity Bus Riders in Texas, Transportation Research Record 887, 1982.
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*Elderly and Handicapped Transportation*

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- Cost-Effectiveness of Accessible Fixed-Route Buses in Texas. Technical Report 1061-1F, 1979.
- Transportation of the Elderly and Handicapped in Texas: A Case Study. State Department of Highways and Public Transportation, Technical Report 1056-2F, 1979.

Total Accessibility Versus Equivalent Mobility of the Handicapped. Institute of Transportation Engineers, Compendium of Technical Papers, 49th Annual Meeting, 1979.

Survey of Vehicles and Equipment for Elderly and Handicapped Transportation. State Department of Highways and Public Transportation, Technical Report 1056-1, 1978.

Corpus Christi Elderly and Handicapped Transportation Study. City of Corpus Christi, Texas, 1978.

*Expert Witness*

Presented expert testimony before the Atomic Safety and Licensing Board, U.S. Nuclear Regulatory Commission, concerning evacuation times at several nuclear power plant sites including Three-Mile Island, Diablo Canyon, Indian Point, Seabrook and Shoreham.

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Docket Nos. 50-400-OL  
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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 215(1)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 6th day of February, 1985:

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Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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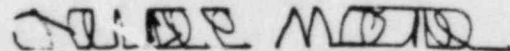
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