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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  
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 Nos. 50-400 OL  
50-401 OL

NRC STAFF/FEMA RESPONSE TO APPLICANTS'  
MOTIONS FOR SUMMARY DISPOSITION  
OF CONTENTIONS EPJ-3, EPJ-4(a), AND EPJ-4(b)

I. INTRODUCTION

On January 11, 1985 the Applicants moved for summary disposition of contentions EPJ-3, EPJ-4(a), and EPJ-4(b) pursuant to 10 CFR §2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of EPJ-3" [hereinafter Applicants' Motion EPJ-3]; "Applicants' Motion for Summary Disposition of EPJ-4(a)" [hereinafter Applicants' Motion EPJ-4(a)]; "Applicants' Motion for Summary Disposition of EPH-4(b)" [hereinafter Applicants' Motion EPJ-4(b)]. The FEMA Staff supports Applicants' motions on the grounds that there are no genuine issues of material fact now in dispute, and that the Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

Contentions EPJ-3, EPJ-4(a) and EPJ-4(b) were admitted as contentions in this proceeding in the Licensing Board's August 3, 1984 Order. Final Set of Rulings on Admissibility of Offsite Emergency Planning Contentions, Ruling

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on Petition For Waiver of Need-For-Power Rule, and Notice of Upcoming Telephone Conference Call", LBP-84-29B, 20 NRC 389, 420-421. Those contentions read as follows:

Contention EPJ-3

The number of volunteer workers--such as members of volunteer police, rescue, and fire departments -- who would respond to an alert is extremely questionable; plans should be based on a response rate of no greater than 50% in organizations in which no attention has been given to composition which would avoid conflict between organizational and family responsibilities.

Similarly, present planning assumes that teachers will leave their cars and families in the area and supervise students on the bus and in the shelters. This is an unreasonable and unrealistic demand on teachers.

Contention EPJ-4(a)

Section E4d of State Procedures (p. 47) is deficient because --

Fifty percent of school bus drivers are high school juniors and seniors (as young as 16½ years). They should not be expected to perform as emergency personnel without explicit and specific authorization from their parents. Even with such authorization they should not be trusted to perform in emergency situations.

Contention EPJ-4(b)

Section E4d of State Procedures (p. 47) is deficient because --

Adult bus drivers have minimal education and are paid very low wages. They cannot be trusted to put their jobs above family obligations or to perform adequately in emergency situations.

Discovery was had upon these contentions. The details of the discovery are set forth in each of Applicants' Motions. Applicants' Motion EPJ-3 at 3-4; Applicants' Motion at EPJ-4(a) at 3; Applicants' Motion at EPJ-4(b) at 2-3. Neither the NRC Staff nor the FEMA Staff conducted discovery.

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, LBP-75-10, supra at 248; Perry, ALAP-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 show 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 the Intervenor 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 Intervenor 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 the Intervenor 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 motions for summary disposition concerning Contentions EPJ-3, EPJ-4(a) and EPJ-4(b).

B. There Is No Genuine Issue of Material Fact To Be Resolved By An Evidentiary Hearing Upon The Subject Contentions.

The FEMA Staff has reviewed the Applicants' Motions upon the subject contentions and, in general, does not disagree with their assertions. We do view the issues purported to be raised by the contentions in a less complex and more direct manner than that put forth in the Applicants' filings. Reduced to their basic element, contentions EPJ-3, EPJ-4(a), and EPJ-4(b) all purport to raise as issues the fact that workers in an emergency will not perform their assigned tasks. The contentions include volunteer workers such as police (EPJ-3) rescue units (EPJ-3) and school bus drivers (EPJ-4(a) and 4(b)).

It is the position of the FEMA Staff, based upon their experience with disasters, <sup>1/</sup> that workers who have a role in emergency situations will show up and perform their assigned tasks. Although stated at greater length, this is the substance of the affidavits of Dr. Dennis S. Mileti which are attached to the Applicants' motions.

The relevant regulations of FEMA, 44 CFR Part 350, and the NRC, 10 CFR § 50.47 and Appendix E, and the guidance of NUREG 0654/FEMA-Rep-1 do not

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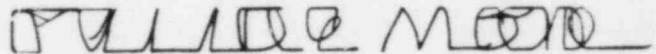
<sup>1/</sup> See page 3 of Affidavit of Thomas I. Hawkins attached hereto.

impose requirements as to age, education level, compensation, or numbers of workers who are assigned functions in an emergency situation. We do not find that contentions EPJ-3, EPJ-4(a) and 4(b) identify any violations of FEMA-NRC regulations or deficiencies in NUREG 0654 guidance.

IV. CONCLUSION

Based on the foregoing discussion, and Mr. Hawkins' affidavit, the Applicants' Motions for Summary Disposition should be granted.

Respectfully submitted,



<sup>for</sup>  
Charles A. Barth  
Counsel for NRC Staff

Dated in Bethesda, Maryland  
this 27th day of February, 1985