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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)

Docket Nos. 50-400-01  
50-401-01

NRC STAFF/FEMA RESPONSE IN SUPPORT OF  
APPLICANTS' MOTION FOR SUMMARY  
DISPOSITION OF EMERGENCY PLANNING JOINT CONTENTION 5

I. INTRODUCTION

On January 14, 1985, Applicants Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency moved for summary disposition of Emergency Planning Joint Contention 5 ("EPJ-5") pursuant to 10 C.F.R. § 2.749. "Applicants' Motion for Summary Disposition of EPJ-5" [hereafter Applicants' Motion]. The Staff supports Applicants' Motion on the ground that there is no genuine issue of material fact to be heard, and Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

Contention EPJ-5 is derived from Contentions 235 and 236(A) as proposed in "Wells Eddleman's Contentions on the Emergency Plan (2d Set)" (April 12, 1984) and from Wilson Contention 7 as proposed in "Contentions of Richard Wilson Concerning North Carolina Emergency Response Plan"

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(April 13, 1984). The Licensing Board consolidated these contentions as Contention EPJ-5, which states as follows:

Section E 4b of State Procedures (p. 47) is deficient because there is no listing or mechanism of identifying homebound non-ambulatory people. Most ambulances and rescue squad vehicles are not adequately equipped to meet State standards for transporting hospitalized patients. A sufficient number of vehicles equipped adequately to transport the non-ambulatory from hospitals and homes will not be available.

See "Final Set of Rulings on Admissibility of Offsite Emergency Planning Contentions, Ruling on Petition for Waiver of Need-for-Power Rule and Notice of Upcoming Telephone Conference Call," LBP-84-29B, 20 NRC 389, 395 (1984).

In this ruling, the Board designated Richard Wilson as "lead intervenor" on this contention. Id.

Applicants have set forth the history of discovery regarding 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. § 2.749(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, 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 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 the 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 has noted 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 F. Supp. 4, aff'd (CA2d, 1962) 299 F.2d 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 Contention EPJ-5.

#### B. Applicable Law

The Commission's regulations in 10 C.F.R. § 50.47(b) require that the offsite emergency response plans for nuclear power reactors must meet certain standards, including, that

(1) Primary responsibilities for emergency response by the nuclear facility licensee and by

State and local organizations within the Emergency Planning Zone have been assigned, the emergency responsibilities of the various supporting organizations have been established, and each principal response organization has staff to respond and to augment its initial response on a continuous basis.

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(8) Adequate emergency facilities and equipment to support the emergency response are provided and maintained.

10 C.F.R. § 50.47(b)(1) and (8).

Criterion J.10.d. of 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" [hereafter NUREG-0654], calls for the plan to include "means for protecting those persons whose mobility may be impaired due to such factors as institutional or other confinement." The guidance in NUREG-0654, Criterion G.1.d. provides that information on the special needs of the handicapped be included in information to the public regarding how they will be notified and what their actions should be in an emergency. An Appeal Board decision in San Onofre has suggested that the regulations and guidance be implemented by identifying in advance non-ambulatory persons in the plume exposure pathway in need of transportation. Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 373-74 (1983). According to the Appeal Board, "...the objective should be to assemble and keep current as reasonably complete a list as possible of housebound people within the plume EPZ who would require transportation assistance in an evacuation." Id., at 374. The Appeal Board required that in addition to the mailing of an information packet to all people within the EPZ

with a request that those in need of special assistance return an enclosed post card, the Applicants also work with city officials and private service groups to continue to identify housebound people who would need transportation assistance in the event a nuclear accident at San Onofre occasioned the need for evacuation. Id.

In Zimmer, the Licensing Board approved the use of a postcard survey to identify disabled individuals requiring transportation, provided there was clear responsibility for periodically surveying and maintaining lists of these individuals. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1572-73 (1982), aff'd, ALAB-727, 17 NRC 760 (1983). Also see Consumers Power Company (Big Rock Point Plant), LBP-83-44, 18 NRC 201, 205 (1983).

C. There are No Genuine Issues of Material Fact To Be Litigated With Respect to EPJ-5

As Applicants note, Contention EPJ-5 contains the following three allegations: first, that section E 4b of the North Carolina Emergency Response Plan In Support of the Shearon Harris Nuclear Power Plant ("ERP" or "the off-site emergency plan") is "deficient because there is no listing or mechanism of identifying homebound non-ambulatory people;" second, that "ambulances and rescue squad vehicles are not equipped to meet state standards for transporting hospitalized patients;" and third, that "there is not a sufficient number of adequately equipped ambulances and rescue squad vehicles to transport non-ambulatory persons." Applicants discuss each allegation separately. Applicants assert that none of



these allegations has any factual basis and that their Motion for Summary Disposition of EPJ-5 should be granted in its entirety. Applicants' Motion, at 5.

With respect to the first allegation, Applicants state that Rev. 1 to the ERP 1/ has been revised to provide more information on how non-ambulatory persons will be identified and transported. Applicants' Motion, at 6. According to Applicants, the efforts to identify homebound non-ambulatory persons in the Emergency Planning Zone (EPZ) equal or exceed those approved in other NRC adjudicatory proceedings. Id., at 7.

Specifically, these individuals are being identified through the "special needs response card" included in the Harris "Safety Information" brochure. In addition, information will be provided by rescue squads, fire departments, social service agencies and health care providers in the four county area. The Division of Emergency Management intends to consult these organizations annually to supplement information received from the special needs response card. Applicant Carolina Power and Light Company's listing of customers on life support systems will also be used. See "Affidavit of Jesse T. Pugh, III, In Support of Applicants' Motion For Summary Disposition of EPJ-5" [hereinafter "Pugh Affidavit"], at ¶¶ 3-4. Applicants also describe how the mechanisms to identify homebound non-ambulatory persons in the EPZ will be kept current, and where the lists of homebound non-ambulatory persons will be located and utilized during an evacuation. Id., at ¶¶ 3-9.

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1/ This revision was issued in September 1984, subsequent to the admission of EPJ-5.

Concerning the second allegation, Applicants state that Mr. Pugh has confirmed that all of the rescue vehicles that would be used for transporting non-ambulatory persons during an evacuation have received a permit from the North Carolina Department of Human Resources. Applicants' Motion, at 8. Applicants, citing Mr. Pugh's affidavit, as well as the North Carolina General Statutes, standards set forth by the North Carolina Medical Care Commission, and the North Carolina Administrative Code, argue that vehicles available for use meet the comprehensive standards established by the State for obtaining an ambulance permit and have Advanced Life Saving Capability. Id., at 8-9. Thus, according to Applicants, there is no basis for the allegation that the ambulance and rescue squad vehicles do not meet State Standards for the transportation of hospitalized patients. Id., at 9.

Finally, Applicants assert that there will be a sufficient number of ambulances to transport non-ambulatory persons. Based on Mr. Pugh's affidavit, Applicants state that estimates of the number of homebound non-ambulatory persons who need to be evacuated by ambulance in each of the four counties within the plume EPZ have been made based upon discussions between State and local emergency planners and representatives of local health care and social services agencies. Applicants' Motion, at 9. Applicants also note that based upon discussions with hospital, nursing home and rest home administrators, an estimate of the number of persons in those facilities who would require evacuation by ambulance has also been made. Id.

It is FEMA's position that, in accordance with criterion J.10.d. of NUREG-0654, supra, plans to implement protective measures for the plume

exposure pathway include "means for protecting those persons whose mobility may be impaired due to such factors as institutional or other confinement." "Affidavit of Thomas I. Hawkins In Support of Applicants' Motion for Summary Disposition of Contention EPJ-5" [hereafter Hawkins Affidavit] at ¶ 2.

Specifically, Section IV.E.4.b. of the ERP states that the mobility-impaired will be identified through the use of the special needs response card contained in the brochure mailed annually and the CP&L listing of system customers on life support equipment and that the mobility impaired will be "provided specialized transportation as required." Hawkins Affidavit, at ¶ 2. In addition, in accordance with NUREG-0654, supra, criterion G.1.d., the Harris Public Information brochure (which is to contain information to the public regarding how they will be notified and what their actions should be in an emergency) will contain information on the special needs of the handicapped. Id.

FEMA guidance does not require investigation into the number of vehicles equipped adequately to transport the nonambulatory from hospitals and homes. However, FEMA staff has reviewed the information in the "Affidavit of Jesse T. Pugh, III In Support of Applicants' Motion For Summary Disposition of EPJ-5," and based on the information there provided, it appears that all rescue vehicles that will be used for transporting nonambulatory persons are adequately equipped and that there will be a sufficient number of ambulances to transport such persons. Hawkins Affidavit, at ¶ 2.

FEMA staff and the RAC have found no deficiencies in the ERP for Harris concerning the subject matter of Contention EPJ-5. Id.

IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Contention EPJ-5 should be granted.

Respectfully submitted,

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