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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 IN SUPPORT OF APPLICANTS' MOTION
FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 213-a

I. INTRODUCTION

On January 14, 1985 Applicants Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency moved for summary disposition of Eddleman Contention 213-a pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of Eddleman 213-a" [hereinafter "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

In "Wells Eddleman's Contentions on the Emergency Plan (2nd set)" April 12, 1984, Mr. Eddleman proposed a number of contentions (including Contention 213-a) concerning emergency planning. The Licensing Board admitted Contention 213-a in the following form:

Either each off-site ERP should contain an appendix which conforms to evaluation criterion II.P.7 of NUREG-0654 or it should be demonstrated that such an appendix is

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unnecessary because its functions are performed in some other way by the present form of the plans.

See "Final Set of Rulings on Admissibility of Offsite Emergency Planning Contentions, Rulings on Petition For Waiver of Need-For-Power Rule, And Notice of Upcoming Telephone Conference Call", LBP-84-29B, 20 NRC 389, 408-409 (1984). The Applicants, Intervenors, and the Staff later entered into a stipulation to memorialize their agreement on this wording of Contention 213-a. ^{1/}

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

^{1/} The Licensing Board granted the parties' October 12, 1984 Joint Motion seeking approval of their "Joint Stipulation Codifying Certain Admitted Contentions." See "Order Approving Joint Stipulation Codifying Certain Admitted Contentions," December 6, 1984.

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 insofar 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 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 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, 633. 'ch 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 BPT 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 213-a.

B. Applicable Law

The Commission's regulations in 10 C.F.R. § 50.47(b)(16) require that the offsite emergency response plans for nuclear power reactors

demonstrate that "responsibilities for plan development and review and for distribution of emergency plans are established, and planners are properly trained." Criterion II.P.7 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" [hereinafter NUREG-0654], provides guidance for meeting the standard in 10 C.F.R. § 50.47(b)(16). Specifically, Criterion II.P.7. of NUREG-0654 states:

Each plan shall contain as an appendix listing, by title, procedures required to implement the plan. The listing shall include the section(s) of the plan to be implemented by each procedure.

C. There Are No Genuine Issues Of Material Fact To Be Litigated With Respect to Eddleman Contention 213-a

Applicants, citing the Board's Order, supra, at 408, admitting Contention 213-a, assert that neither the adequacy of any procedure to implement the Plan nor the adequacy of the Plan itself in the absence of any specific procedure is placed in issue by Eddleman Contention 213-a. Rather, according to the Applicants, the issues raised by Eddleman Contention 213-a are solely limited to whether the Plan contains an appendix in accordance with Criterion II.P.7 and, if not, whether the purposes of II.P.7 are satisfied in some other way by the present form of the Plan. Applicants' Motion, at 6.

Applicants argue that as it is currently constituted, the Shearon Harris Emergency Response Plan ("ERP") contains appendices satisfying the requirements of Criterion II.P.7. Id. Applicants note that the plan

for the State and each county does contain an appendix (labelled here as an attachment) listing procedures and other plans that are used in implementing the Shearon Harris ERP. Applicants argue that this is the precise listing called for by the first sentence of II.P.7. Id., at 7. According to Applicants, the State and counties are presently developing additional standard operating procedures ("SOPs") to aid in the implementation of the ERP for the Shearon Harris facility. Id., at 8.

Applicants also assert that the second requirement of Criterion II.P.7, (that the listing identify the section(s) of the plan being implemented by each procedure) is also satisfied. Id., at 9. According to Applicants, while the attachments do not list the section(s) being implemented, the title of each supporting SOP or plan listed does indicate the section(s) of the ERP that each supporting procedure or plan implements. Id., at 9-10. Finally, Applicants note that when the State amends Attachment 2 for the respective Parts of the Plan to add the new procedures currently under development, it will, at the same time, amend the Attachments to include more explicitly the section(s) of the Plan that each procedure, both those presently listed and those being added, are intended to implement. Id., at 10.

The Emergency Response Plan as presently written, in the opinion of FEMA staff and the RAC, is in conformance with NUREG-0654, Criterion II.P.7. At the conclusion of each of the Plan's five parts, there is an "Attachment" which includes by title, a listing of the Standard Operating Procedures

to be used in Plan implementation. The title itself indicates the section of the Plan to be implemented by the procedures. "Affidavit of Thomas I. Hawkins In Support of Applicants' Motion for Summary Disposition of Eddleman Contention 213-a," [hereinafter "Hawkins Affidavit"] at ¶ 2.

The State and involved local governments are, at this time, drafting additional SOPs which will be utilized during the scheduled May 1985 exercise and incorporated into the Plan attachments after the exercise and before the ASLB Hearings in June 1985. Hawkins Affidavit at ¶ 2.

IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Eddleman Contention 213-a should be granted.

Respectfully submitted,

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Counsel for NRC Staff

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