

879

February 27, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

'85 MAR -5 AM 1:15

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 CCNC CONTENTION 2 AND EDDLEMAN CONTENTION 57-C-10

I. INTRODUCTION

On January 14, 1985, Applicants moved for summary disposition of CCNC Contention 2 and Eddleman Contention 57-C-10 pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of CCNC Contention 2" [hereinafter Applicants' Motion, CCNC2]; "Applicants' Motion for Summary Disposition of Eddleman Contention 57-C-10" [hereinafter Applicants' Motion 57-C-10]. Both of these contentions relate to the subject of sheltering as a protective action. Therefore, the Staff's response to both of these contentions is set forth below. The Staff supports both of Applicants' motions on the grounds that there are no genuine issues of material fact to be litigated, and Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

CCNC Contention 2 was admitted in its present form by the Board at the special prehearing conference held on May 1-2, 1984. The Board

8503050548 850227
PDR ADOCK 05000400
PDR

DS87

narrowed the contention as originally filed. Tr. 995-96. As admitted Contention CCNC 2 states:

Sheltering as the recommended response to the release of radiation is not adequate to protect the public health. The typical rural house found around the plant site is not well-insulated and air in it is exchanged several times each hour.

Eddleman Contention 57-C-10 was admitted by the Board in its Order of June 14, 1984. "Further Rulings on Admissibility of Offsite Emergency Planning Contentions Submitted by Intervenor Eddleman" at 17. The precise wording of this contention was the subject of a stipulation among the parties. "Joint Stipulation Codifying Certain Admitted Contentions" at 3 (October 12, 1984). This stipulation was approved by the Board. "Order Approving Joint Stipulation Codifying Certain Admitted Contentions" (December 6, 1984). As stipulated Eddleman Contention 57-C-10 states:

The State Plan (PT I pp 45-46 and 50-53) provides no useful analysis or information on sheltering effectiveness; but without knowledge of sheltering effectiveness, the decision on that option versus evacuation will be illinformed and quite possibly wrong. The plan's discussion of protective actions is mostly a list of them and a little handwaving - it's hopelessly inadequate. The plan, for potential shelters typical of those in the SHNPP plume EPZ, does not comply with Evaluation Criterion J.10.m of NUREG-0654, which calls for inclusion in the plan of "expected local protection afforded in residential units or other shelter for direct and inhalation exposure. ..."

Applicants have set forth the history of discovery conducted on both of these contentions and it need not be repeated here. Applicants Motion CCNC 2 at 2-3; Applicants' Motion 57-C-10 at 3-4.

III. DISCUSSION

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 Intervenors 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' motions be defeated on the hope that Mr. Eddleman and CCNC could possibly uncover something at hearing. Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 974 (Minn. 1967). Now, in opposition to the Applicants' motions, is the time for Mr. Eddleman and CCNC 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 Potom 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 motions for summary disposition concerning CCNC Contention 2 and Eddleman Contention 57-C-10.

B. Applicable Law

Sheltering is considered to be an appropriate protective action by both the Commission and by FEMA. 10 C.F.R. 50.47(b)(10); NUREG-0654 FEMA-REP-1, Rev. 1 "Criteria for Preparation and Evaluation of Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" at Criterion II.J.10.m. [hereinafter NUREG-0654]. The Commission has required the consideration of a range of protective actions in emergency plans. FEMA and the NRC have developed specific guidance for the consideration of sheltering as a protective action in an emergency plan. NUREG-0654 Criterion II.J.10.m. This criterion states:

The organization's plan to implement protective measures for the plume exposure shall include:

m. The bases for the choice of recommended protective actions from the plume exposure pathway during emergency conditions. This shall include expected local protection afforded in residential units or other shelter for direct and inhalation exposure, as well as evacuation time estimates. (footnote omitted)

C. There are no Genuine Issues of Material Fact to be Heard with Regard to CCNC Contention 2.

In moving for summary disposition of this contention, Applicants argue first that there are no special circumstances involving the housing around the Harris facility which would preclude the use of sheltering as a protective action under any conditions. Applicants' Motion, CCNC 2 at 2. They also argue that they have determined the protection factors of

the typical housing in the Harris EPZ, and that this housing could afford shelter in the short term. Id. at 10. Applicants also argue that the state does not intend to use, as the contention seems to imply, sheltering as the preferred protective action. Id. Finally, Applicants assert that the housing around Harris is similar to that surrounding other nuclear plants in North Carolina and the Southeast whose emergency plans include sheltering as a possible protective action. Id.

FEMA agrees with Applicants that sheltering is one protective action to be considered in accordance with federal guidance. "Affidavit of Thomas I. Hawkins in Support of Applicants' Motion for Summary Disposition of Contention CCNC-2" at ¶ 2. There is no indication, however, as the contention seems to imply, that sheltering is the recommended action in the North Carolina Emergency Plan. Id. The Plan does not reflect any such emphasis on sheltering, and the State through Mr. Pugh has expressed the view that evacuation, where feasible, is the preferred protective action. Affidavit of Jesse T. Pugh III In Support of Applicants' Motions For Summary Disposition of CCNC Contention 2 and Eddleman Contention 57-C-10 at ¶ 4. Intervenor CCNC in discovery has not established any basis for the assertion in the contention that sheltering is the recommended action.

In addition, FEMA believes that the Applicants in performing their survey of the housing in the Harris EPZ and determining the protection factors afforded by such housing, have used a standard reference in EPA 520. This document is cited in NUREG-0654 as an acceptable reference for the determination of protection afforded by shelters. Hawkins Affidavit at ¶ 2. FEMA has no reason to believe that the information

derived from that document would be inapplicable to the structures in the Harris EPZ. Hawkins Affidavit at ¶ 2. FEMA and the RAC have concluded that this emergency plan satisfies NUREG-0654 Criterion II.J.10.m. Id. Finally, FEMA guidelines do not require the exclusion of sheltering as protective action because residences are not well insulated or provide less protection than other types of residences. Id. Therefore, there are no genuine issues of material fact to be heard with regard to CCNC Contention 2, and the Applicants are entitled to a favorable decision as a matter of law.

D. There is No Genuine Issue of Material Fact to be Heard with Respect to Eddleman Contention 57-C-10, and Applicants are Entitled to a Favorable Decision on This Contention as a Matter of Law

Contention 57-C-10 alleges that the emergency plan does not contain a discussion of the protection afforded by local residences as required by Criterion J.10.m. of NUREG-0654. Applicants argue that they have performed a survey of the housing in the area of Harris, and have determined protection factors of a typical residence for both direct and inhalation radiation exposure. Applicants' Motion 57-C-10, at 6. Mr. Pugh, on behalf of the Division of Emergency Management, has committed to amend the plan to include the information resulting from the survey and to include the protection factors for a typical residence in the area. "Affidavit of Jessie T. Pugh III In Support of Applicants'

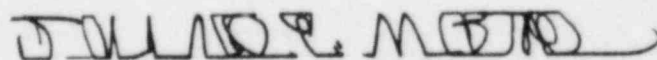
Motions For Summary Disposition of CCNC Contention 2 and Eddleman Contention 57-C-10" at ¶ 3; ^{1/} Applicants' Motion at 7.

FEMA and the Regional Advisory Committee (RAC) have determined that the plan as it exists meets Criterion J.10.m. FEMA does not require the inclusion of specific protection factors for local structures in the emergency plan. "Affidavit of Thomas I. Hawkins In Support of Applicants' Motion For Summary Disposition of Eddleman Contention 57-C-10" at ¶ 2. In this case, however, Applicants have received a commitment from the State that the plan will be amended to include the information which is the subject of this contention. Therefore, there is no genuine issue of material fact to be heard.

IV. CONCLUSION

For the reasons set forth above, Applicants' motions for summary disposition of CCNC Contention 2 and Eddleman Contention 57-C-10 should be granted.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

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

^{1/} In his affidavit Mr. Pugh is identified as the Director of the Division of Emergency Management. It is the Staff's understanding that he no longer holds this position. There is no indication, however, that the commitment set forth in this affidavit on the part of the Division of Emergency Management would not be implemented.