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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. 50-400.0L  
50-401.0L

NRC STAFF/FEMA RESPONSE IN SUPPORT OF APPLICANTS' MOTION  
FOR SUMMARY DISPOSITION OF CONTENTION EPJ-4(c)

I. INTRODUCTION

On January 14, 1985, Applicants Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency moved for summary disposition of Contention EPJ-4(c) pursuant to 10 C.F.R. §2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of EPJ-4(c)." [hereinafter Applicants' Motion]. The Staff supports Applicants' motion on the ground that there is no genuine issue of material fact to be heard, and the Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

EPJ-4(c) states as follows:

Section E4d of State Procedures (p. 47) is deficient because --  
In normal operation, each bus makes two runs each day. Thus, two round trips to the shelter sites would be required. (This factor was not considered in traffic control plans or evacuation time estimates). Students who do not normally ride buses will be an extra burden, requiring even more round trips.

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The Licensing Board admitted this contention, which was derived from contentions proposed by Intervenors Wells Eddleman and Dr. Richard Wilson, <sup>1/</sup> in the Board's "Memorandum and Order (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, 429-421 (1984).

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

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<sup>1/</sup> See, "Wells Eddleman's Contentions on The Emergency Plan (2d Set)" (April 12, 1984) and "Contentions of Richard Wilson Concerning North Carolina Emergency Response Plan" (April 13, 1984).

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' 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 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 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 Contention EPJ-4(c).

#### B. Applicable Law

The Commission's regulations in 10 C.F.R. §50.47(b)(10) require that the offsite emergency response plans for nuclear power reactors must meet certain standards, including, that "[a] range of protective actions have been developed for the plume exposure EPZ for the general public." 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]. Criterion J.

10.g. of NUREG-0654 calls for the plan to implement protective measures for the plume EPZ, including means of relocation.

The Licensing Board in Catawba considered the adequacy of planning in North Carolina for the evacuation of schools. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 NRC 933, 995-996 (1984). Intervenor there alleged numerous difficulties with the evacuation of schools. Plans for the evacuation of schools, along with an analysis of the adequacy of such planning, were presented in the Applicants' testimony. The Board noted that the State of North Carolina plans an early evacuation of children from schools and has adequate buses available to move the students without utilizing multiple bus pickups by bringing buses in from outside the EPZ. Id., 20 NRC at 995.

C. There are No Genuine Issues of Material Fact To Be Litigated With Respect to Contention EPJ-4(c)

It is the Applicants' position that the underlying premise of EPJ-4(c) is invalid (i.e., that "multiple round trips to the shelter sites would be required"). Applicants' Motion, at 5. State and local emergency planning authorities, in cooperation with appropriate school officials, have made a detailed assessment of both the need for and the availability of resources for the evacuation of the ten schools in the EPZ. Id. Their plans would accomplish school evacuation in a single trip, using existing, readily available transportation resources. "Affidavit of Jesse T. Pugh, III on EPJ-4c" [hereinafter Pugh Affidavit], at ¶ 2. <sup>2/</sup> Applicants describe the number of buses available to the various schools

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<sup>2/</sup> Mr. Pugh's affidavit states his position as "Director of the Division of Emergency Management of the North Carolina Department of Crime Control and Public Safety." Pugh Affidavit, at ¶ 1. Staff counsel understands that he no longer occupies that position.

within the EPZ. Applicants' Motion, at 5-7. They also point out that the figures used to assess the need for resources for school evacuation reflect several conservatisms which may reduce the number of buses needed. Id., at 6. Applicants conclude that Intervenors cannot distinguish this case from the body of NRC case law approving similar plans for the evacuation of schools. <sup>3/</sup> Id., at 7.

It is the Staff's position that the provisions in the State plan providing for a "means of relocation" comply with NUREG-0654. "Affidavit of Thomas I. Hawkins In Support of Applicants' Motion for Summary Disposition of Contention EPJ-4(c)," at ¶2. FEMA has no reason to doubt the conclusion of Mr. Pugh that the evacuation of schools within the Harris EPZ would be accomplished in a single bus trip to the school evacuation shelters. Id.

#### IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Contention EPJ-4(c) should be granted.

Respectfully submitted,

*Marjorie Ulman Rothschild*

Marjorie Ulman Rothschild  
Counsel for the NRC Staff

Dated at Bethesda, Maryland  
this 26th day of February, 1985

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<sup>3/</sup> See, e.g., Catawba, supra; Kansas Gas & Electric Company (Wolf Creek Generating Station Unit 1), LBP-84-26, 20 NRC 53, 98-99 (1984); Consumers Power Company (Big Rock Point Plant), LBP-83-44, 18 NRC 201, 205-206 (1983).