

785

February 27, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

'85 FEB 28 A11:21

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'
MOTION FOR SUMMARY DISPOSITION
OF CONTENTION EPJ-4(d)

I. INTRODUCTION

On January 14, 1985 the Applicants moved for summary disposition of contention EPJ-4(d) pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of EPJ-4(d) [hereinafter Applicants' Motion]. The NRC Staff and FEMA support Applicants' motion on the grounds that there is no genuine issue of material fact now in dispute, and that the Applicants are entitled to a favorable decision as a matter of law.

II. BACKGROUND

Contention EPJ-4(d) was admitted as a contention in this proceeding in the Licensing Board's August 3, 1984 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, 420-421. That contention reads as follows:

8503010212 850227
PDR ADOCK 05000400
G PDR

DS07

Contention EPJ-4(d)

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

Most parents would demand to pick up their children at school. The chaos at every school in the area would require all local law enforcement officers and several county officers to contain. This factor is not mentioned in the plan.

Discovery was had upon that contention. The details of the discovery is set forth on page 3 of the Applicants' Motion. Neither the NRC Staff or 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, 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 shown 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 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 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 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-4(d).

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

In their motion Applicants argue first that the information in the public information brochure, and the information which will be contained in the EBS messages broadcast in the event of an evacuation would assure that few parents would attempt to pick up their children at schools located within the EPZ. Applicants' Motion at 6-7. Applicants also argue that even if parents did go to the schools to pick up their

children in the event of an emergency, school evacuation would not be seriously impeded. Id. at 8.

The FEMA Staff has reviewed the Applicants' Motion upon the subject contention and, in general, do not disagree with their assertions. FEMA guidance does not require that the Emergency Response Plan (ERP) contain provisions treating the possibility of parents demanding to pick up their children at school. ^{1/} Neither do the FEMA or NRC regulations so require. As Mr. Pugh explains in his affidavit attached to Applicants' motion, the emergency broadcast system messages would inform parents that their children are being transported to shelters outside the EPZ and that parents could pick up their school children at those predesignated points. "Affidavit of Jesse T. Pugh, III on EPJ-4(d)" at ¶ 4 [hereinafter Pugh Affidavit]. Also, page 5 of the booklet "Safety Information" which will be widely distributed in the EPZ, instruct parents to pick up their children at the evacuation shelters outside the EPZ. This booklet was sent to the Board and parties on July 9, 1984 and page 5 is attached hereto. FEMA believes that it is difficult to conceive of parents going to a location where they have been told that their children are not present. Hawkins Affidavit at ¶ 2. Rather, it would seem that parents would follow EBS and Safety Information instructions and go to the locations where the students are located or to which they are being transported. Id. FEMA Staff and the Regional Advisory Committee (RAC)

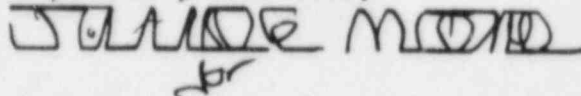
^{1/} See attached Affidavit of Thomas I. Hawkins

have found no inadequacies in the ERP regarding issues raised in
Intervenors' contention EPJ-4(d). Id.

IV. CONCLUSION

Based on the foregoing discussion, Mr. Hawkins' affidavit, and
the booklet "Safety Information", the NRC/FEMA Staff concludes that the
Applicants' Motion for Summary Disposition should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "CHARLES A. BARTH". The signature is written in a cursive, somewhat stylized font.

Charles A. Barth
Counsel for NRC Staff

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

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert P. Gruber
Executive Director
Public Staff - NCUC
P.O. Box 991
Raleigh, NC 27602

Wells Eddleman
718-A Iredell Street
Durham, NC 27701

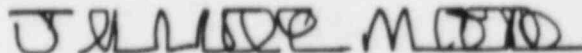
Richard E. Jones, Esq.
Associate General Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, NC 27602

Bradley W. Jones, Esq.
Regional Counsel, USNRC, Region II
101 Marietta St., N.W. Suite 2900
Atlanta, GA 30323

George Trowbridge, Esq.
Thomas A. Baxter, Esq.
John H. O'Neill, Jr., Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, DC 20036

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Harry Foreman, Alternate
Administrative Judge
P.O. Box 395 Mayo
University of Minnesota
Minneapolis, MN 55455



Janice E. Moore
Counsel for NRC Staff