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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '85 FEB 28 A11:14

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER AND LIGHT COMPANY AND	)	
NORTH CAROLINA EASTERN MUNICIPAL	)	Docket Nos. 50-400 OL
POWER AGENCY	)	50-401 OL
	)	
(Shearon Harris Nuclear Power Plant,	)	
Units 1 and 2)	)	

NRC STAFF/FEMA RESPONSE IN SUPPORT OF APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF EDDLEMAN CONTENTION 30

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 30 pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of Eddleman 30" [hereafter Applicants' Motion]. The Staff support 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 30) concerning radioprotective drugs. The Licensing Board admitted that part of Contention 30 which alleged that the state and county plans should include the quantities of potassium iodide (KI)

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stored for use in an emergency. See "Further Rulings on Admissibility of Offsite Emergency Planning Contentions Submitted by Intervenor Eddleman", June 14, 1984, at pp. 19-22. However in that Order, the Board did not adopt any specific wording for that contention. The Applicants, Intervenors, and the Staff later entered into a stipulation to memorialize their agreement on the precise wording of certain contentions admitted by the Board, including Contention 30. As stipulated by the parties and approved by the Board, 1/ Contention 30 reads as follows:

> The plan's provisions (Part 1 pp. 49-50) for Potassium Iodide do not comply with the requirements of NUREG-0654 II.J.10.e (pg. 63) that the plans must include "quantities" for persons whose "evacuation may be infeasible or very difficult" who are in the plume EPZ.

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

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1/ In "Order Approving Joint Stipulation Codifying Certain Admitted Contentions," December 6, 1984, the Board granted the parties' October 12, 1984 joint motion seeking approval of the "Joint Stipulation Codifying Certain Admitted Contentions."

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 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 Cooper-ative (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, 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 Eddleman Contention 30.

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 demonstrate that "[a] range of protective actions have been developed for the plume exposure EPZ for emergency workers and the general public." Criterion II.J.10.e 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] provides guidance for meeting the standard in 10 C.F.R. §50.47(b)(10). Specifically, Section II.J.10.e. of NUREG-0654 states:

> J.10. The organization's plans to implement protective measures for the plume exposure pathway shall include:
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> e. Provisions for the use of radioprotective drugs particularly for emergency workers and institutionalized persons within the plume exposure EPZ whose immediate evacuation may be infeasible or very difficult, including quantities, storage and means of distribution.

C. There Are No Genuine Issues of Material Fact To Be Litigated With Respect to Eddleman Contention 30

According to Applicants, the sole issue raised by Eddleman Contention 30 is whether a specific quantity of potassium iodide for emergency workers and for institutionalized persons must be set forth in the plan itself, or whether the plan's provision for determining the required quantities of potassium iodide is sufficient. Applicants' Motion, at 5. Applicants argue that as interpreted by FEMA, NUREG-0654 does not require that the emergency response plan ("ERP") identify a

specific quantity of potassium iodide to be stored in the vicinity of a nuclear power plant. Id., at 6-7. According to Applicants, the North Carolina State Plan provides reasonable assurance that potassium iodide will be available for emergency workers and institutionalized persons wholly apart from whether specific quantities of potassium iodide are listed in the plan. Id., at 6. Lastly, Applicants urge that even if the Board concludes that criterion II.J.10.e. requires specification of the quantities of potassium iodide in ERP's, it should not order such specification here. Id., at 12.

It is the Staff's position that NUREG-0654 does not require that specific quantities of potassium iodide be listed in the plan but that provisions for the use, quantitites and distribution be included in the plan. "Affidavit of Thomas I. Hawkins In Support of Applicants' Motion for Summary Disposition of Eddleman Contention 30," at ¶ 2 [hereafter Hawkins Affidavit]. The ERP contains such provisions at pp. 48-49. Specifically, Part 1 of the ERP states that the Department of Health Services (DHS) will establish a "program to insure that a sufficient number of potassium iodide units are conveniently and strategically located in the vicinity of the Shearon Harris Plant." Id. As Mr. Hawkins notes, succeeding paragraphs of the plan discuss the distribution of potassium iodide. Id.

The program of DHS will include a running inventory of quantities of potassium iodide on-hand and on-order and where those quantities are located. Hawkins Affidavit, at ¶ 2. Since the quantities fluctuate, it would be misleading and cumbersome, because of necessary updating, to include those figures in the North Carolina Emergency Response Plan.

Id. FEMA and the Regional Assistance Committee have determined that in this regard, the ERP provisions fully comply with NUREG-0654.

The Staff agrees with the Applicants that FEMA's interpretation of Criterion II.J.10.e. is not plainly erroneous. 2/ In fact, FEMA's interpretation of this criterion appears to be consistent with the interpretation of this criterion elsewhere. There appears to be precedent for interpreting this criterion as not requiring that the plan itself specify the quantities of potassium iodide. See Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), DD 84-11, 19 NRC 1108, 1123-1124 (1984). That decision denied a petition filed pursuant to 10 C.F.R. § 2.206 by Monroe County, Michigan and others regarding the County's expertise and resources to carry out its responsibilities under the emergency plan for the Enrico Fermi Atomic Power Plant. One of the concerns raised in the petition related to whether potassium iodide supplies could be made available in a timely and effective manner for EPZ residents and emergency workers. 3/

2/ According to Applicants, since criterion II.J.10.e. is a criterion established by FEMA, FEMA's interpretation of this criterion is entitled to substantial weight. The Applicants note that the courts have repeatedly indicated that an agency's interpretation of its own regulations should be upheld unless "plainly erroneous." Applicants cite the following cases in support of this proposition: United States v. Larionoff, 431 U.S. 864, 872 (1977) and Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Applicants recognize that criterion II.J.10.e. does not carry the weight of a regulation, but they assert that the same rule would apply with even greater force to regulatory guidance such as NUREG-0654. Applicants' Motion, at 7-8.

3/ The County's petition stated that supplies of KI are to be warehoused at a central location under the control of the Michigan Department of Public Health (DPH) and would be distributed only after a radiological emergency was under way. Fermi, at 1123.

The distribution of potassium iodide is not the precise issue raised here. Nevertheless, the discussion of the issue raised in Fermi suggests that neither the Michigan Emergency Preparedness Plan (dated September 1983) nor the revised Monroe County Emergency Plan (draft dated December 1983) specified the quantity of potassium iodide. The discussion in Fermi quotes the provisions in both plans concerning the distribution of potassium iodide as follows:

> The Michigan Emergency Preparedness Plan dated September 1983 states that '[l]ocal health departments that have a nuclear power plant in their service area have a supply (of KI) for distribution to local emergency workers and others.' (Department of Public Health, Annex S, at S9.) The plan further states that, '[l]ocal health officers and medical directors are responsible to develop and implement plans for the storage, distribution and record keeping of potassium iodide to emergency workers and the general public based upon guidance from the department (of Public Health).' The revised Monroe County emergency plan, draft dated December 1983, states (at J-1-7) that '[t]he Monroe County Department of Health maintains a quantity of potassium iodide at a secure location within the County for emergency workers. The MDPH (Michigan Department of Public Health) also has additional supplies and contacts from which additional radioprotective drugs can be obtained for distribution to the general public. The Director of the Monroe County Health Department will coordinate distribution.' Fermi, at 1123-24. 4/

These quotes from the provisions of both emergency plans suggest that the plans do not specify the quantity of potassium iodide available. Thus,

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4/ The Staff determined that:

> Based upon a preliminary review of the information in the revised State and County emergency plans, the NRC staff finds that the State and County plans are compatible regarding the storage of a supply of KI in the local area, and that this issue has been satisfactorily resolved. This information will be confirmed by FEMA as part of its review of the revised emergency plan for Monroe County. Fermi, at 1124.

Fermi is precedent for interpreting Criterion II.J.10.e. of NUREG-0654, as FEMA does here (i.e., that the quantity of potassium iodide need not be specified in the plan).

IV. CONCLUSION

For the reasons set forth above, Applicants' Motion for Summary Disposition of Eddleman Contention 30 should be granted.

Respectfully submitted,

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Marjorie Ulman Rothschild
Counsel for NRC Staff

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