



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
UNION ELECTRIC COMPANY) Docket No. STN 50-483 OL
(Callaway Plant, Unit 1))

APPLICANT'S MEMORANDUM OF LAW
IN SUPPORT OF MOTIONS FOR SUMMARY
DISPOSITION ON EMERGENCY PLANNING ISSUES

I. Introduction

Contemporaneously herewith, Applicant Union Electric Company has filed motions with the Atomic Safety and Licensing Board seeking summary disposition, pursuant to 10 C.F.R. § 2.749, of most of the contentions of intervenor John G. Reed admitted in the Board's Memoranda and Orders of December 7, 1982, and February 25, 1983.^{1/} Only section A of Contention 5

^{1/} On October 1, 1982, Mr. Reed submitted twenty (20) numbered contentions, many of which have several parts. In its rulings, the Board admitted Mr. Reed's contentions as pleaded,

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is not the subject of a motion for summary disposition. These motions are filed in accordance with the schedule established in the Board's Memorandum and Order (Schedule Changes), February 3, 1983.

In order to avoid repetition, Applicant sets forth in this single memorandum of law the general standards by which motions for summary disposition are to be decided. Since all of Mr. Reed's contentions address off-site radiological emergency response planning for the Callaway Plant, the application of those general standards to emergency planning issues is also discussed.

II. Summary Disposition Standards

The admission of a contention for litigation, under the standards of 10 C.F.R. § 2.714, is not an appraisal of the merits of a contention, but merely a determination that it meets the criteria of specificity, asserted basis and relevance. A hearing on an admitted contention, however, is not inevitable. Licensing board's are authorized to decide an admitted contention on its merits in advance of trial on the basis of pleadings filed.

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except that: Contention 11 was reformulated by the Board; Contention 12 and section B of Contention 15 were not admitted.

"Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.749(a). The standard embodied in the regulation is that "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d).

The Commission and its adjudicatory boards have long encouraged the use of this summary disposition process where the proponent of a contention has failed to establish that a genuine issue exists, so that evidentiary hearing time is not unnecessarily devoted to such issues. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 457 (1981); see also Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 550 (1980) ("...the Section 2.749 summary disposition procedures provide in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues . . .").

The standards governing summary disposition motions in an NRC proceeding are quite similar to the standards applied under

Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-554, 10 N.R.C. 15, 20 n.17 (1979). Where, as here, motions for summary disposition are properly supported pursuant to the Commission's Rules of Practice, a party opposing the motions may not rest upon the mere allegations or denials of its answers. Rather, an opposing party must set forth specific facts showing that there is a genuine issue of fact. 10 C.F.R. § 2.749(b). A party cannot avoid summary disposition on the basis of guesses or suspicions, or on the hope that at the hearing Applicant's evidence may be discredited or that "something may turn up." Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 N.R.C. 246, 248 (1975).

The governing regulation permits summary disposition ". . . as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.749(a). Just as summary disposition may be granted as to some but not all contested issues, so may summary disposition be granted as to one or more parts of an intervenor's contention. The format or organizational style employed by the pleader of contentions should not prevent a licensing board from deciding that, as to discrete matters of fact and/or law, there is no genuine issue to be heard with

respect to one or more aspects or parts of a given contention. Thus, where summary disposition may not be appropriate as to the whole of a given contention, a licensing board may and should determine what issues within the contention are not genuinely disputed, and set only disputed issues for trial.

III. Application to Emergency Planning Issues

Application of the standards governing motions for summary disposition to contested issues on off-site radiological emergency response planning for a nuclear power plant invites consideration of the extent of information, and the degree of finality which is attached to the information needed by a licensing board to decide the contentions.

Unlike many other environmental or health and safety matters associated with an operating license application, off-site emergency planning and preparedness reviews need not be completed prior to fuel loading at a nuclear power plant:

. . . [N]o NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and local offsite emergency plans are required prior to issuance of an operating license authorizing only fuel loading and/or low power operations (up to 5% of the rated power).

10 C.F.R. § 50.47(d). The Commission has also specified that the required "[e]mergency preparedness exercises . . . are part of the operational inspection process and are not required for any initial licensing decision." 10 C.F.R. § 50.47(a)(2).

These provisions in NRC regulations reflect the different roles played by the adjudicatory process and by the Commission and Staff in the process of inspection/license issuance which, in the case of off-site emergency planning, need only occur prior to operation above 5% of rated power. They recognize that at the time of any adjudicatory hearing on contested off-site emergency planning issues, it is not expected that all relevant training, staff, procedures and hardware be in place. Explaining the amendments to its regulations which are quoted above, the Commission stated:

. . . [T]he findings on emergency planning required prior to license issuance are predictive in nature and need not reflect the actual state of preparedness at the time the finding is made.

. . . [P]reparedness connotes the actual state of implementation; is important during the life of the plant, and should be treated as an operational inspection matter.

. . .

. . . The conduct of full-scale exercises early enough in the licensing process to permit the outcome of the exercises to be fully litigated at the hearing is premature. Such exercises are best held at a later time, when the operating and management staff of the plant -- who are central figures in an exercise -- are in place and trained in emergency functions.

47 Fed. Reg. 30232, 30233 (July 13, 1982). See also id. at 30235 (Commissioner Ahearne's Additional Views)(" . . . it is important to hold the exercise close to completion of the plant

since the operating personnel will then be on site and be able to learn from the experience, and the exercise will be more realistic since hardware and procedures will be closer to completion. . .").

Addressing the import of these regulations, and the Federal Emergency Management Agency ("FEMA")/NRC Memorandum of Understanding, on the evidentiary basis upon which the Commission expects licensing decisions on emergency preparedness to be made, the Appeal Board has held that substantively, the evidence must be sufficient for a licensing board to conclude that the state of emergency preparedness (presumably as to the contested matter) "provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency," citing 10 C.F.R. § 50.47(a)(1).2/ "The Commission has stressed that this conclusion may be a predictive one, rather than a reflection of the actual state of emergency preparedness at the time of the board's decision." Southern California Edison Company, et al.

2/ Applicant's motions for summary disposition address the planning standards in 10 C.F.R. § 50.47(b), as well as the implementing evaluation criteria in NUREG-0654, FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants." NUREG-0654 represents NRC/FEMA guidance, not legally binding, on means to satisfy the planning standards in section 50.47(b). Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 N.R.C. 1211, 1460 (1981), aff'd, ALAB-698, 16 N.R.C. ____, slip op. at 13-15 (Oct. 22, 1982).

(San Onofre Nuclear Generating Station, Units 2 and 3),
ALAB-717, 17 N.R.C. _____, slip op. at 66 n.57 (March 4, 1983).
See also Cincinnati Gas & Electric Company, et al. (Wm. H.
Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 N.R.C.
_____, slip op. at 15, 22, 25 (May 2, 1983).

In a recent denial of a rulemaking petition which sought
to inject the adjudicatory process into the later licens-
ing/inspection role of the Commission and Staff, the Commission
affirmed its earlier amendments:

As to all matters of public health and
safety, the licensing boards' findings are
predictive in that they often are based
upon the design of the facility, the
qualifications of the utility's management
and operational staff, inspections,
performance specification, etc. rather than
demonstrated performance. At the time the
licensing board issues its decision
authorizing a full-power license, many
major plant systems have not been fully
tested at or near the full-power operating
levels necessary to show full-system
performance. The full-scale exercise is
analogous to the evaluation of plant
systems at operating power levels during
power ascension testing. Where problems
are discovered, they are addressed before
full commercial operation is achieved. On
the other hand, the applicant's emergency
plan is akin to the design of the facility.
The task of the licensing board confronted
with contested emergency planning and
preparedness issues is to decide whether
the plan meets the Commission's regulations
as set out in 10 CFR 50.47 and Appendix E
to Part 50 and to predict whether it can be
implemented successfully.

48 Fed. Reg. 16691, 16692 (April 19, 1983).

These principles, discussed in the context of the evidentiary record compiled at a hearing, apply as well to a licensing decision made by grant of a motion for summary disposition. Applicant presents this analysis not in anticipation of a dispute over the timing of the full-scale exercise, but in anticipation of argument by intervenor Reed that ignores the necessarily predictive nature of the determinations which will emanate from this adjudicatory proceeding.

The instant motions filed by Applicant rely upon, reference and quote from the Missouri Nuclear Accident Plan - Callaway, the Callaway County/Fulton Radiological Emergency Response Plan, the Osage County Radiological Emergency Response Plan, the Gasconade County Radiological Emergency Response Plan, the Montgomery County Radiological Emergency Response Plan, and the (Union Electric Company) Callaway Plant Radiological Emergency Response Plan. Copies of these plans have been provided to the Board, intervenor Reed, the Missouri Public Service Commission and the NRC Staff,^{3/} and the off-site plans have been submitted to the Federal Emergency Management Agency by the State of Missouri for review and approval.^{4/}

^{3/} Representatives of local government participating in this proceeding under 10 C.F.R. § 2.715(c) are expected to have access to the plans through other means in connection with their government positions.

^{4/} In response to comments generated during a FEMA technical review of an earlier version of the off-site plans, the previous single four-county plan and four individual county proce-

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Consequently, they have the endorsement of the State, and each of the local plans is accompanied by a letter from the judges of the county court[/mayor] requesting formal review and approval of their plan.^{5/} These endorsements also reflect agreement on the boundary of the plume exposure pathway Emergency Planning Zone.

While some of Mr. Reed's contentions focus uniquely upon Montgomery County, Applicant's motions show that the EPZ population in that county is approximately 500 in an EPZ area of roughly 56 square miles. Gasconade and Osage Counties have an EPZ population of about 200 and 860, respectively, in EPZ areas of approximately 2 and 72 square miles, respectively. Callaway County, on the other hand, has an EPZ population of approximately 15,300, of which 11,000 are in the City of Fulton, on the outer edge of the EPZ. Because of its greater population, Callaway County and Fulton receive the greatest

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dures documents have been combined into four separate county plans, with a general increase in the level of planning detail provided. The four local plans were prepared in close coordination with the State and among the four counties and the City of Fulton. In substance, the four local plans are virtually identical.

^{5/} In addition, by execution of funding agreements with Union Electric Company, each of the local governments involved as response organizations within the plume exposure EPZ (i.e., the City of Fulton and Callaway, Osage, Gasconade and Montgomery Counties) agreed to develop, maintain and upon adoption implement a local radiological response plan which meets NRC and FEMA requirements.

attention in Applicant's motions, as they should. This EPZ population size and distribution also illustrate, however, the relative ease of implementing off-site protective actions for the Callaway Plant. See Attachment 1 hereto (EPZ map).

Applicant's motions also rely upon 28 affidavits from qualified personnel involved in the emergency planning process, including State personnel from the State Emergency Management Agency and the Bureau of Radiological Health, county emergency management directors and elected administrative court judges, consultants with national experience in nuclear emergency planning, and employees of Union Electric Company -- reflecting the broad-based technical and institutional support for these plans.

IV. Conclusion

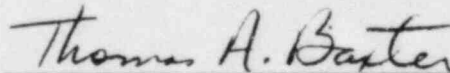
In the case of contested off-site emergency planning issues, there is special reason to give the summary disposition process the diligent effort required to examine the parties' voluminous pleadings and sort out those matters as to which there is no genuine issue to be heard. The wasteful hearing time which would be spent on truly baseless allegations would harm not only the public interest and the parties to the proceeding, but the numerous non-party State and local agency personnel (and perhaps representatives of private response organizations) whose participation would be required. The Reed

contentions are specific and lend themselves, at this stage of the planning process, to decision on the pleadings.

While Applicant's motions are all meritorious and should be granted in their entirety, the Board's authority to dispose of portions of contentions, and thereby narrow the issues for trial, should be exercised where another party is viewed to have shown that one or more genuine issues exist as to a given contention.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



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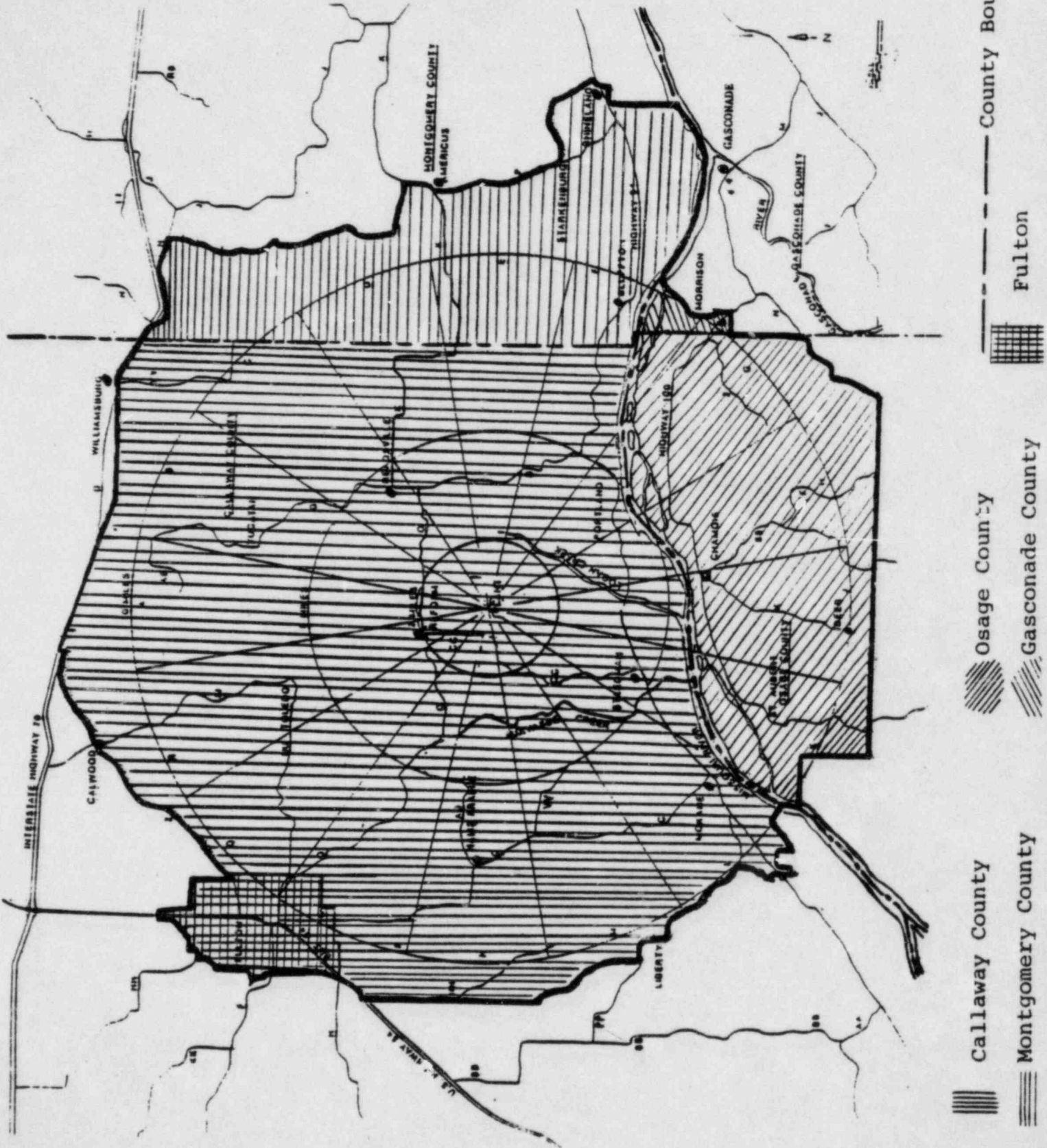
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May 20, 1983

EMERGENCY PLANNING ZONE (EPZ) BOUNDARY MAP



May 20, 1983

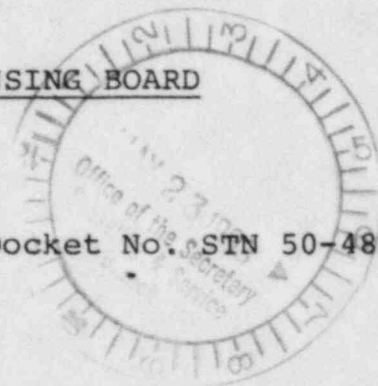
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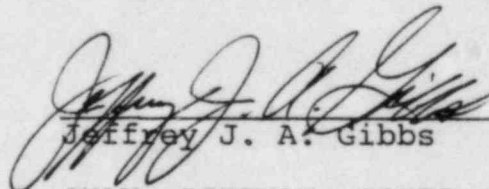
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NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of applicant Union Electric Company in proceedings related to the above-captioned matter.

Respectfully submitted,



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