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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 & LIGHT COMPANY)	
and NORTH CAROLINA EASTERN)	Docket No. 50-400 OL
MUNICIPAL POWER AGENCY)	
)	
(Shearon Harris Nuclear Power)	
Plant))	

APPLICANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTIONS FOR
SUMMARY DISPOSITION OF EMERGENCY PLANNING CONTENTIONS

I. INTRODUCTION

Contemporaneously herewith, Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency have filed two motions with the Atomic Safety and Licensing Board seeking summary disposition, pursuant to 10 C.F.R. § 2.749, of emergency planning contentions Eddleman-144 and Eddleman-154.^{1/} In order to avoid repetition, Applicants set forth in this single memorandum of law

^{1/} These two motions address onsite emergency planning issues. However, Applicants will file motions on offsite planning contentions in the future. Therefore, this Memorandum is applicable to both onsite and offsite planning issues.

the general standards by which such motions for summary disposition are to be decided.

II. GOVERNING LEGAL STANDARD

The admission of a contention for adjudication, under the standards of 10 C.F.R. § 2.714, is not an appraisal of the merits of the 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 boards are authorized to decide an admitted contention on its merits in advance of trial on the basis of pleadings filed.

"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 for litigation. 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

Applicants' 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 entirety of a given contention, a licensing board may and should determine which issues within the contention are not genuinely disputed, and set only disputed issues for trial.

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 scrutinize the parties' 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 be contrary to not only the interests of public at

large and of the parties to the proceeding, but also the numerous non-party State and local agency personnel (and perhaps representatives of private response organizations) whose participation would be required.

The regulatory scheme for emergency planning was outlined by the Appeal Board in Cincinnati Gas & Electric Co. (Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 N.R.C. 760, 764 (1983). Under the Commission's regulations, no operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be taken in the event of a radiological emergency. 10 C.F.R. § 50.47(a)(1). Emergency response plans must meet the 16 standards set forth in 10 C.F.R. § 50.47(b).^{2/}

The focus of a hearing should be on whether the emergency plans themselves meet the "broadly drafted standards" of 10 C.F.R. § 50.47(b). The details of plan implementation are not properly subject to scrutiny in the hearing process. Licensing hearings are not to be "bogged down

^{2/} In addition to the criteria of 10 C.F.R. § 50.47(b), Appendix E of 10 C.F.R. Part 50 sets forth in greater detail the information which must be included in emergency plans. Guidance as to how these regulatory standards can be satisfied is provided by NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Rev. 1, November 1980).

with litigation about such details." Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1106-07 (1983). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 N.R.C. _____ (September 18, 1984), slip op. at 7.

The Commission's regulations do not require that extraordinary emergency planning measures be taken. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 N.R.C. 528 (1983). As another licensing board recently observed:

The planning standards of 10 C.F.R. § 50.47(b) and NUREG-0654 provide a reasonable planning basis rather than absolute planning requirements. This Board does not have to find that all individuals are covered by the plans under all circumstances.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 N.R.C. _____ (September 18, 1984), slip op. at 7 (emphasis supplied). The Catawba Board quoted the Commission in San Onofre:

It was never the intent of the regulation to require directly or indirectly that state and local governments adopt extraordinary measures * * * just to deal with nuclear plant accidents. The emphasis is on prudent risk reduction measures. The regulation does not require dedication of resources to

handle every possible accident that can be imagined. The concept of the regulation is that there should be core planning with sufficient planning flexibility to develop a reasonable ad hoc response to those very serious low probability accidents which could affect the general public.

17 N.R.C. at 533. Thus, like the Catawba Board, the basic test to be applied by this Board is whether the emergency plans "take the necessary 'prudent' risk reduction measures." LBP-84-37, slip op. at 7.

III. CONCLUSION

The motions filed contemporaneously are meritorious and should be granted, as a matter of law, in their entirety. Each motion demonstrates that there is no genuine issue of material fact to be heard. If, however, the Board were to be of the view that an intervenor has demonstrated that one or more genuine issues exist as to a given contention, the Board should exercise its authority to narrow the issues for trial by

disposing of those portions of contentions as to which no genuine issue exists.

Respectfully submitted,

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