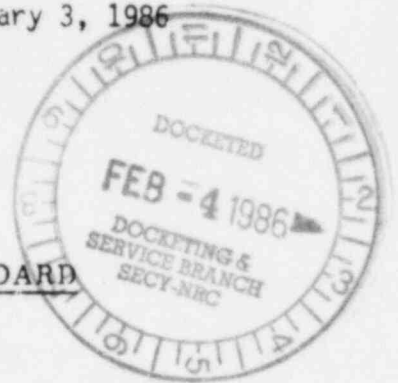


February 3, 1986



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF/FEMA RESPONSE TO APPLICANTS'
MOTIONS FOR SUMMARY DISPOSITION OF
EDDLEMAN CONTENTIONS EPX-2 AND EPX-8

I. INTRODUCTION

On January 13, 1986, Applicants Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency (Applicants) moved for summary disposition of Eddleman Contentions EPX-2 and EPX-8 pursuant to 10 C.F.R. § 2.749 of the Commission's regulations. "Applicants' Motion for Summary Disposition of Eddleman Contention EPX-2" [hereinafter Applicants' Motion EPX-2]; "Applicants' Motion for Summary Disposition of Eddleman Contention EPX-8 (Emergency Broadcast System)" [hereinafter Applicants' Motion EXP-8]. The NRC Staff/FEMA support these motions on the grounds that Applicants have demonstrated that there are no genuine issues of material fact to be litigated with respect to these contentions, and that Applicants are entitled to a favorable decision as a matter of law.

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II. BACKGROUND

On May 17-18, 1985, a full participation exercise was held at the Harris facility. After the issuance of evaluations by the State of North Carolina and FEMA, Mr. Eddleman filed 12 contentions concerning this exercise. "Contentions Based on Emergency Planning Exercise" (September 30, 1985). Ten of these contentions were rejected by the Licensing Board. See Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-29, 22 NRC ____, slip op. at 14-24 (December 11, 1985). Eddleman Contentions EPX-2 and EPX-8 were admitted by the Licensing Board in an oral ruling on November 4, 1985. Tr. 9972-76. See also, LBP-85-49, supra, slip op at 17.

Applicants served one round of discovery on Mr. Eddleman to which he responded. ^{1/} Mr. Eddleman served one set of Interrogatories on the Applicants and the NRC Staff and FEMA. ^{2/} The Applicants and FEMA

^{1/} "Applicants' Emergency Planning Interrogatories and Request for Production of Documents to Intervenor Wells Eddleman (Third Set)" (November 25, 1985); "Wells Eddleman's Response to Applicants' (EPX) Emergency Planning Interrogatories and Request for Production of Documents (Third Set)" (December 23, 1985).

^{2/} "Wells Eddleman's General Interrogatories to Applicants Carolina Power & Light et al. (EPX Set)" (November 26, 1985); "Wells Eddleman's Interrogatories to NRC Staff and FEMA (Eighth Set)" (November 26, 1985).

have each responded to Mr. Eddleman's interrogatories. ^{3/} Neither the Staff nor FEMA filed discovery on these contentions. All responses to discovery have now been filed. ^{4/}

Applicants filed their Motions for Summary Disposition of Eddleman Contentions EPX-2 and EPX-8 in accordance with the schedule adopted by the Licensing Board. Tr. 10,206. The motions are accompanied by Affidavits of State and local officials charged with responsibility for overseeing emergency preparedness in the Harris EPZ. These motions and the accompanying affidavits demonstrate that there are no genuine issues of material fact to be litigated and that Applicants are entitled to a favorable decision on these contentions as a matter of law.

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

^{3/} "Applicants' Response to Wells Eddleman's General Interrogatories to Applicants Carolina Power & Light et al. (EPX Set)" and "Applicants' Response To Wells Eddleman's Request For Production of Documents (EPX Contentions)" (December 20, 1985); "FEMA Staff Response to Interrogatories Propounded by Intervenor Wells Eddleman (8th Set)" (January 16, 1986).

^{4/} A discovery dispute between FEMA and Mr. Eddleman is expected to be the subject of a conference of the Board and parties on February 5, 1986.

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 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 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 FSupp 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 motions for summary disposition concerning EPX-2 and EPX-8.

B. There are No Genuine Issues of Material Fact to be Heard with Respect To Eddleman Contention EPX-2, and Applicants are Entitled to a Favorable Decision on this Contention as a Matter of Law

The Commission's regulations require that provisions exist for prompt communication among principal response organizations and to the public. 10 C.F.R. § 50.7(b)(6). Contention EPX-2 alleges a number of deficiencies in various communications systems were observed during the emergency planning exercise. This contention states:

Communications deficiencies revealed in the exercise could have severe bad effects in a real emergency, including lack of effective communications and radiation monitoring results, lack of contact with field and ground units, etc. Specifically: the emergency inter-system mutual aid frequency was so overloaded the state's communications evaluator stated it was "proved there could be absolutely no communication with ground units on this frequency due to constant misuse." Other examples: the highway Patrol evaluator found "communication inadequacies; equipment ... is not yet capable of adequately handling the impact of so many units responding to an emergency of this type"; Harnett County had "insufficient telephones"; "[e]xtra radio traffic overloaded personnel on duty" in Chatham County; "excessive delays" in Emergency Medical services office received messages from SERT (State Emergency Response Team); communications from the mobile radiation lab had to be relayed to base station at times, which "always introduces the possibility of delayed and/or incorrect information" according to the State Radiation Protection Evaluator.

In their motion Applicants argue that each of the deficiencies set forth in the contention were minor in nature and that steps are being taken to correct them. In light of this, Applicants argue that there are no genuine issues to be heard. FEMA agrees that Applicants' Motion should be granted.

The only communications deficiency which FEMA evaluators observed during the exercise concerned the telephone system in Harnett County. Affidavit of Thomas I. Hawkins in Support of NRC Staff/FEMA response to Applicants' Motions for Summary Disposition of Eddleman Contentions EPX-2 And EPX-8 at ¶ 3. FEMA determined that this deficiency was not of sufficient magnitude to seriously affect the capability of Harnett County to respond and protect the health and safety of the public in the event of an actual emergency at Harris. Id.

The Director of the North Carolina Division of Emergency Management informed FEMA that the total communications needs of Harnett County were being evaluated, and that the installation of telephone circuits and equipment would meet those needs. This, in addition to the establishment of the Harnett County EOC in the County office building will, FEMA has concluded, resolve the communications deficiency noted during the exercise. Hawkins Affidavit at ¶ 3. Given the nature of this particular deficiency and its correction, FEMA agrees with Applicants that there are no genuine issues of material fact to be heard with respect to the adequacy of telephones for Harnett County. Since FEMA did not observe any other communications deficiencies, it has no basis to believe that there are any genuine issues of material fact to be litigated with respect to the remainder of this contention. Therefore,

Applicants' Motion for Summary Disposition of Eddleman Contention EPX-2 should be granted.

- C. There are no Genuine Issue of Material Fact to be Heard with Respect to Eddleman Contention EPX-8, and Applicants are entitled to a Favorable Decision on This Contention as a Matter of Law

Contention EPX-8 as admitted states:

Emergency Broadcast System use was incomplete and ineffectively managed (FEMA 2.3.1(2), page 13; see p.12 discussion). Inadequacies include procedures for activation and use of the EBS (before the State assumes control); inadequate coverage of the emergency area and emergency response area, incomplete messages and instructions to the public. (Ref FEMA report received 8/30/85 Board Notification 85-078) numerous problems with FBS activation mentioned on pp. 17-18 of the same report also need to be identified and rectified. All these problems must be resolved to ensure timely and effective notice to the public about nuclear/radiation emergencies so that the public can be protected in such emergencies.

This contention refers to several problems encountered by Wake County and by the State in the activation and use of the EBS system. Applicants argue in their motion that in light of the minor nature of these deficiencies and the corrective actions which are being taken to correct them, there are no genuine issues of material fact to be heard with respect to this contention, and Applicants are entitled to a favorable decision on it as a matter of law. Applicants' Motion, EPX-8 at 15, 19. FEMA agrees.

The Commission's regulations require that the contents of initial and followup messages to response organizations and the public be established, and that means be established to provide clear instructions to the

populace within the EPZ. 10 C.F.R. § 50.47(b)(5). As a design objective the prompt public notification system should be capable of providing notification and instructions to the public within about 15 minutes. 10 C.F.R. Appendix E, § IV.D.3. During the exercise which took place at Harris on May 17-18, 1985, FEMA identified certain deficiencies in the activation of the EBS system. These deficiencies included problems with the conferencing capability early in the exercise in Wake County, and problems with the simulation of preparation of initial and followup messages. Among these deficiencies FEMA mentioned that complete coverage of the emergency area was not realized. Hawkins Affidavit at ¶ 5. This deficiency referred to the failure to simulate the use of the EBS system on a continuous basis throughout the exercise. Id. FEMA concluded that none of the inadequacies identified in the exercise concerning the EBS system were of sufficient magnitude to seriously affect the capability of the emergency response organizations to protect the health and safety of the public in the event of an emergency. Id.

FEMA recommended certain actions to resolve the identified inadequacies concerning the EBS system. These recommendations included the installation of a dedicated telephone network, improvement of EBS procedures and additional training. Hawkins Affidavit at ¶ 5. Applicants described the corrective action to be taken in a letter from Joseph Meyers, Director of the State of North Carolina's Division of Emergency Management, and in the Affidavit of Alvin H. Joyner. FEMA considers the proposed corrective actions to be adequate to resolve the identified problems with the EBS. Hawkins Affidavit at ¶ 5. Therefore, the Staff and FEMA agree that there are no genuine issues of material fact to be

heard regarding this contention, and that Applicants' Motion for Summary Disposition of Eddleman Contention EPX-8 should be granted.

IV. CONCLUSION

For the reasons set forth above, the NRC Staff/FEMA conclude that Applicants' Motions for Summary Disposition of Eddleman Contentions EPX-2 and EPX-8 should be granted.

Respectfully submitted

Janice E. Moore
Janice E. Moore *By CES*
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of February, 1986