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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL (Offsite Emergency Planning Issues)

APPLICANTS' ANSWER TO INTERVENORS' SECOND MOTION TO ADMIT CONTENTIONS ON THE SEPTEMBER 27, 1989 EMERGENCY PLAN EXERCISE

INTRODUCTION

Under date of October 13, 1989, The Attorney General of The Commonwealth of Massachusetts (MAG), on behalf of himself, Seacoast Anti-Pollution League (SAPL), and the New England Coalition on Nuclear Pollution (NECNP) filed a motion styled "Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Exercise" (the Motion). The purpose of the Motion is to (1) assert additional bases for its original onsite exercise contention (JI-Onsite Ex-1),[1] and (2) proffer an additional contention (JI-Onsite Ex-2).

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1 Applicants have already responded to the original proffer of this contention. Applicants' Response to Intervenors' Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise, passim (Oct. 11, 1989).

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As additional bases for JI-Onsite Ex-1, MAG alleges the following: The Staff Report on the Exercise (hereafter "Staff Report") "indicates" that no PARs based upon dose assessment or other factors were actually prepared or implemented during the exercise. Thus, MAG argues there is no assurance that Applicants have the capability to timely identify adequate and relevant information, formulate appropriate PARs, communicate the PARs offsite, or adjust the PARs based upon changed meteorological conditions. It is also alleged that the Staff Report "indicates" that offsite field monitoring teams only demonstrated sampling procedures, but "[n]o monitoring procedures or activities were tested even by mini scenario. Therefore, there is no assurance that Applicants are capable of adequately implementing procedures for plume tracking or related monitoring activities."

By JI-Onsite Ex-2, MAG seeks to have litigated the issues of whether the failure to exercise the vehicular alert and notification system (VANS)[2] or to demonstrate a shift change means that the scope of the exercise was insufficient. Herein Applicants reply to the Motion.

I. THERE IS NO REGULATORY BASIS FOR THE CONTENTION PROFFERED.

In the portion of Attachment A to the Motion in which he spells out JI-Onsite Ex-2, MAG, as he did in his initial

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2 The short complete answer to this question is that VANS is part of the offsite emergency plan not the onsite emergency plan.

motion to have an onsite exercise contention admitted, continues to rely on a misconstruction of Commission regulations leading to the invalid legal theory that the regulations require that the exercise run on September 27, 1989, comply in scope with the definition of full participation exercise as set forth in 10 CFR 50, App. E § IV.F.1 n.4. That footnote defines the term "full participation" as used in the phrase "full participation exercise." The exercise run on September 27, 1989, however, was not, by definition, a "full participation exercise." It was an exercise run pursuant to the third and fourth sentences of 10 CFR 50, App. E § IV.F.1 which is the exercise to be conducted when, as, and if there has been a full participation exercise run within two years of licensing, but not within one year of licensing. Thus, the regulatory language which forms the underpinning of the contention as pleaded simply has no applicability to the September 1989 onsite exercise. This being the case, the motion is groundless and must be denied.

II. MAG HAS FAILED TO ALLEGE, AS IS REQUIRED, FACTS WHICH, IF BELIEVED, WOULD DEMONSTRATE THAT THE FAILURE TO INCLUDE THE ACTIVITIES WHICH MAG CLAIMS SHOULD HAVE BEEN INCLUDED IN THE EXERCISE RESULTED IN A SITUATION WHERE AN EXTANT "FUNDAMENTAL FLAW" WOULD HAVE AVOIDED DETECTION.

The seminal case with respect to the necessary scope of an emergency exercise is the decision of the Appeal Board in Long Island Lighting Co. (Shoreham Nuclear Power Station,

Unit 1), ALAB-900, 28 NRC 275 (1988). Therein the Appeal Board set the standard by which the scope of an exercise would be judged as: "that the exercise itself must be comprehensive enough to permit a meaningful test and evaluation of the emergency plan to ascertain if that plan is fundamentally flawed."[3] Since that time, the Appeal Board has also held that if the flaw revealed is one which can be readily corrected or can be corrected by supplemental training of personnel, it is not a "fundamental flaw."[4]

We are unenlightened by MAG's filing as to how the failure to engage in any or all of the various activities which MAG claims were improperly not included in the exercise precluded the ascertainment of any "fundamental flaw(s)" in the plan. Moreover, preclusion by reason of exercise scope is not even alleged. In light of the Appeal Board's standard, this is a necessary allegation of basis with respect to a scope contention, and the failure to include such is fatal to the effort.

Prescinding from the foregoing pleading deficiency, an analysis of MAG's allegations fails, in any event, to reveal the suggested presence of any "fundamental flaw" in the onsite plan which presently remains undetected, but would

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3 ALAB-900, 28 NRC at 286 (emphasis in the original).

4 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 485-86 (1989). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 506 (1988).

have been discovered through execution of the activities MAG suggests should have been undertaken.

The additional PAR activities MAG deems necessary would have uncovered, at best, only training inadequacies. These are not "fundamental flaws". The same can be said for the further activities he claims should have been, but were not, carried out by the offsite monitoring teams. Similarly, the only problems which might have been demonstrated by a shift change also would have been of a personnel training nature. And, insofar as the allegations of not demonstrating staffing sufficiency are concerned, the staffing of a plan is as well demonstrated by personnel rosters and personnel records as by an exercise and need not be demonstrated by such activity. Indeed, the existence of sufficient staff is usually viewed as a planning issue, not an exercise issue. Finally, the allegations as to VANS gain MAG nothing. The regulations require only an exercise of the onsite plan. Mobilization and deployment of VANS are performed in accordance with the offsite plan. App. Ex. 42, App. G & IP 2.16.

III. THE PROPONENTS OF THE MOTION HAVE NOT SATISFIED THE PROVISIONS OF 10 CFR § 2.734 FOR REOPENING THE EVIDENTIARY RECORD.

In the Motion, as originally filed, MAG persisted in his position that there is no need to satisfy the requirements for reopening the record set out in 10 CFR § 2.734 in order to have the contention at issue admitted for litigation. In its recent decision denying the Intervenors' motion to admit

low power testing contentions for litigation,[5] this Board ruled that the Intervenors are required to satisfy the requirements of 10 CFR § 2.734 in order to have any contention arising out of post-hearing tests or exercises admitted.[6] In light of this decision, MAG has now filed a document styled "Intervenors' Motion to Amend Intervenors' Motions of September 29, 1989 and October 13, 1989 to Admit Contentions on the September 27, 1989 Onsite Emergency Plan Exercise" ("Motion to Amend"). This motion attaches as Attachment "A" MAG's attempt to satisfy the requirements of 10 CFR § 2.734. On the assumption that that motion may be allowed, we address the showing attached thereto.

To begin with, MAG's attempt includes no affidavit of any kind. The absence of an affidavit is fatal. The regulation is clear:

> "The motion <u>must be accompanied by one or more affidavits</u> which set forth the factual and/or technical bases for the movant's claim that the <u>criteria of paragraph (a) of this section have been satisfied</u>. . . . Each of the criteria must be separately addressed, with a specific explanation of why it has been met."[7]

There is no leeway here. The Motion <u>must be accompanied</u> by an affidavit. Each criterion <u>must be separately addressed</u>,

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5 <u>Public Service Company of New Hampshire</u> (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC ___ (October 16, 1989).

6 LBP-89-28, Slip Op. at 14.

7 10 CFR § 2.734(b) (emphases supplied).

with a specific explanation of why it has been met. The criteria to be addressed include timeliness and materially different result as well as the existence of a significant safety issue. None of the criteria are addressed by affidavit. This is fatal.

MAG's motion basically turns in the first instance on the legal issue of whether Footnote 4 to 10 CFR 50, App. E § IV.F.1, applies to the exercise of concern. Plainly it does not for reasons stated above. However, assuming arguendo the contrary, the result would not establish the existence of a significant safety issue. Nor would it obviate the need for MAG to explain why these additional activities he desires to have carried out are necessary to assure the discovery of otherwise undiscoverable fundamental flaws which would be a minimum prerequisite to showing a significant safety issue existed. Thus, MAG cannot avoid the need for an affidavit by the argument he makes that the Scenario and Staff Report can serve as a surrogate for the affidavit.[8] Neither of these documents purport to address the reasons why or why not the activities MAG asserts should have been

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[8] That staff or applicant documents might serve to substitute for an affidavit may have been an acceptable practice when motions to reopen were governed by decisional authority. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973). However, the requirement for an affidavit was specifically included in 10 CFR § 2.734(b) and thus wiped out that case law. Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg, 19535, 19537 (May 30, 1986).

included would be necessary to uncover otherwise undetectable fundamental flaws or why a materially different result would obtain from a reopening. Indeed, the Inspection Report, inasmuch as it endorses the scope of the exercise, refutes, rather than supports, MAG's position. The lack of an affidavit is plainly and simply fatal to this motion.[9]

Furthermore, there has been no sufficient showing, by affidavit or otherwise, that any significant safety issue is involved. The basic showing made in the Motion[10] is that, under MAG's legal theory, the regulations require the various additional matters he wanted done, to be done. Even assuming _arguendo_ that his legal theory were correct, and therefore there has been a failure to meet a regulation, this is not, in and of itself, enough to demonstrate that there is a significant safety issue. Rather, by affidavit, there must be a showing that the necessary factual result of particular alleged noncompliance will be to create a meaningful threat to the public health and safety.[11]

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9 _Long Island Lighting Co._ (Shoreham Nuclear Power Station), CLI-89-1, 29 NRC 89, 93-94 (1989); _Public Service Company of New Hampshire_ (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431 (1989).

10 _Motion to Amend_, Attach. A at 3-6.

11 As recently as October 19, 1989, the Commission has commented on the phrase "significant safety problem" which, it would seem, must be shown to be likely in order that there exist a "significant safety issue," as follows:

> "The Commission used the terminology 'significant safety problem' to

Nor has there been the necessary showing that "a materially different result would be or would have been likely."[12] MAG states that under his legal theory, if correct, Applicants would be barred from receiving a license.[13] This is hardly the case. The most he would have established at that point is a regulatory basis for his contention. And even if he satisfies this Board that he somehow has met the "significant safety issue" criterion, the most that he could possibly accomplish is some further delay while a remedial drill was run before full power operation under the license was authorized. That a given result will be delayed is not the same thing as it being materially different.

In short, the showing made falls far short of that required by 10 CFR § 2.734, both procedurally and substantively.

> note that it intended to require something more than a theoretical--or conceivable--issue, but insisted on there being a real matter that required resolution."

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC ___ (Oct. 19, 1989), Slip Op. at 18. It is submitted that no lower standard should be applied here.

12 10 CFR § 2.734(a)(3) (emphasis added).

13 Motion to Amend at 7.

IV. THE BALANCING OF THE "FIVE FACTORS" DOES NOT FAVOR ADMISSION OF THE PROPOSED CONTENTION FOR LITIGATION.

The Motion fails in its showing with respect to the "Five Factors."[14] Assuming that there exists good cause for the late filing on the theory that the contention could not have been filed before the documents attached thereto were received, and conceding that, as is almost always the case, the less weighty[15] second (protection of the movant's interests) and fourth (extent to which that interest is represented by existing parties) factors favor the Movants, the fact is that analysis of the third (assistance in development of a sound record) and fifth (delay) factors reveals a balance which tips decidedly against allowance of the Motion.

Commission "case law establishes both the importance of the third factor in the evaluation of late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. [Citation omitted.] The Appeal Board has said: 'When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and

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14 Motion at 2-8; see 10 CFR §§ 2.734(d), 2.714(a)(1).

15 Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

summarize their proposed testimony'."[16] MAG, in his showing, proffers no witness. He does so on the theory that his contention presents only a question of law and no witnesses are necessary. As noted above, the viability of MAG's proffered contention does turn in the first instance upon the resolution of a legal question, as to which we believe his views are erroneous. However, even if he were correct that the regulations required the exercise to include the events he desires, he still will need a witness to establish that the failure to include those events within the scope of the exercise would result in a situation where a "fundamental flaw" (i.e. a flaw (1) in the plan (not in its execution), (2) which is not correctable by further training of personnel, and (3) not otherwise readily correctable)[17] would remain undetected. These are not pure legal questions; and to prevail on them MAG will need expert witness testimony. The Motion flunks completely on the third factor.

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16 Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing with approval, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) (emphasis added). Accord, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 483-84 (1989).

17 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 485-86 (1989). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 506 (1988).

MAG concedes that the fifth factor favors the Applicants.[18] Thus the two most important factors weigh against admission of the contention and it should be rejected.[19]

V. THE MOTION FAILS TO COMPLY WITH 10 C.F.R. § 2.714(b)(2) AS AMENDED.

The Motion fails to address the requirements recently added to 10 C.F.R. § 2.714(b) for:

> "(i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with

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18 Motion at 8.

19 Intervenors cite no support whatsoever for their extraordinary argument that, if they prevail as to the first factor, "the other factors must be considered much more lightly since they impose a burden on the intervenors. . . ." Motion at 3. This failure to cite any authority is hardly surprising, since, in essence, intervenors are asking the Board to amend 10 CFR § 2.714(a)(1) and wipe out factors (ii) - (v). Even more to the point, this Board has already stated that failure to carry factors (iii) and (v) -- the factors which the intervenors flunk here -- can be sufficient to preclude a late filed contention. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 59, aff'd, ALAB-915, 29 NRC 427 (1989) ("even were we to assume that factors (i), (ii), and (iv) weigh in favor of the Petitioner, factors (iii) and (v) do not and, in this situation, would be controlling").

> the applicant on a material issue of law or fact. This showing _must_ include references to the specific portions of the application (including applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for _each_ dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of _each_ failure _and_ the supporting reasons for the petitioner's belief."[20]

MAG attempts to justify his failure to comply with 10 C.F.R. § 2.714(b) on the basis of the language in the Statement of Basis which accompanied the promulgation of the amendments to the Rules of Practice to the effect that the rules concerning contentions would not apply to contentions filed in proceedings commenced prior to the effective date of the amendments.[21] Prescinding from the thorny issue of whether a regulation can be made effective, but denied general applicability, by a statement in the Statement of Basis as opposed to language in an actual regulation, MAG cannot take advantage of this statement. He is estopped from doing so because of his assertion to the Commission just a few weeks earlier, in arguing that possible litigative delay did not warrant exempting Applicants from being required to hold this Exercise, that the new requirements of 10 C.F.R. § 2.714(b) _would_ apply to any contentions filed concerning the Exercise.[22] Having argued to his advantage to the Commission

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20 54 Fed. Reg. 33180 (August 11, 1989) (emphasis added).

21 _Motion_ at 9; 54 Fed. Reg. at 33179.

22 _Response of Mass. AG to Applicants' Application for an Exemption from the Requirement of 10 C.F.R. Part 50, Appendix E, Section IV.F.1_ at 18 (August 21, 1989).

that these "recent rule changes restricting the admissibility of contentions," id., do apply to contentions concerning this Exercise, MAG is estopped from now arguing to this Board that the rules do not apply.[23] And, having admitted that the requirements apply, MAG's failure even to address them is grounds for the denial of his motion out of hand.[24]

The argument set forth immediately above was first articulated in the Applicants' response to the first motion filed by MAG for the admission of exercise contentions.[25] In the Motion MAG seeks to respond to this estoppel argument with three short points.[26] The first is a non sequitur; the second is irrelevant because the estoppel arises from MAG's act, not from any response the Commission might have made to it. The third point is that NECNP and SAPL should not be

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[23] Illinois ex rel. Gordon v. Campbell, 329 U.S. 362, 369 (1946); Wilcox Dev. Co. v. First Interstate Bank of Oregon, 590 F.Supp. 445, 452-53 (D. Or. 1984), rev'd on other grounds, 815 F.2d 522 (1987); but see Note, The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings, 59 HARV. L. REV. 1132, 1136 (1946).

[24] See Memorandum and Order (Ruling on Massachusetts Attorney General's Exercise Contentions 8.C.1, 8.C.3, 18, and 21.C) at 12-13 (January 13, 1989), and cases cited therein; see also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-86-41, 24 NRC 901, 927-28 (1986), modified, ALAB-859, 25 NRC 23, aff'd, ALAB-872, 26 NRC 127 (1987).

[25] Applicants' Response to Intervenors' Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (Oct. 11, 1989) at 16-18.

[26] Motion at 10.

estopped in any event because it was only MAG who made the estopping argument. The rub is that both NECNP[27] and SAPL[28] joined in MAG's response to the exemption request, and thus estoppel runs against them to the same degree and for the same reasons.

CONCLUSION

The motion should be denied, and the proffered contention excluded.

Respectfully submitted,

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27 New England Coalition on Nuclear Pollution's Opposition to Applicants' Request for an Exemption from the Requirement to Exercise the Onsite Emergency Plan Within a Year Prior to the Issuance of Operating License or, in the Alternative, Request for Hearing on Applicants' Application (Aug. 21, 1989) at 1 n.1.

28 SAPL's Response and Objection to Applicants' Application for an Exemption From the Requirement of 10 CFR, Part 50, Appendix E, Section IV.F.1 (Aug. 21, 1989) at 3.

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on October 20, 1989, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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