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December 2, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 DEC -4 P12:05

before the

OFFICE OF GENERAL COUNSEL
DOCKETS

ATOMIC SAFETY AND LICENSING BOARD

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

**APPLICANTS' RESPONSE TO "INTERVENORS' MOTION
TO ADD AN ADDITIONAL BASIS TO THE LATE
FILED ATTACHED CONTENTION TO THE MOTION
OF NOVEMBER 9, 1989"**

Under date of November 22, 1989, the Attorney General for The Commonwealth of Massachusetts (MAG), on behalf of himself and two other intervenors, filed a pleading with the labyrinthine title of "Intervenors' Motion to Add an Additional Basis to the Late Filed Attached Contention to the Motion of November 9, 1989" (hereinafter the "Motion"). The thrust of the Motion is that WHAV-AM and WLYT-FM, the EBS radio stations upon whose reliance by Applicants MAG claims to be a newly-discovered fact,¹ have too small a normal

¹ See Intervenors' Motion to Admit a Late-Filed Contention and Reopen the Record on the SPMC Based Upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY (November 9, 1989) [hereinafter "November 9 Motion"].

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listening audience to suffice for EBS notification of the public in a radiological emergency.² In light of the fact that this latest proffered assertion lacks any regulatory basis, is unexcusably late in being filed, fails to raise any safety issue (let alone a significant one), and fails to meet virtually all of the rest of the requirements for reopening the record, the Motion should be denied.³

ARGUMENT

As MAG implicitly concedes in his Motion,⁴ this attempt to reopen the record and litigate the proffered radio coverage issue must meet the requirements of 10 C.F.R. § 2.734. These are:

"(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

"(2) The motion must address a significant safety or environment issue.

"(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially."

² Motion at 2. In point of fact, the SPMC relies on high-powered sirens as the primary means of alerting and notifying the public of a radiological emergency. Plan at 3.2.5. EBS is thereafter employed to instruct the public as to protective action recommendations.

³ Moreover, the plain purpose of the Motion, in at least substantial part, is to attempt to rebut Applicants' response to MAG's November 9 motion. In this respect, the Motion contravenes 10 C.F.R. § 2.730(c).

⁴ See Motion at 3, 10.

10 C.F.R. § 2.734(a)

In addition,

"The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Each of the criteria must be separately addressed, with a specific explanation of why it has been met"

10 C.F.R. § 2.734(b) (emphasis added).

Furthermore, a motion to reopen relating to a new issue must also meet the 10 C.F.R. § 2.714(a)(1) five-factors test. 10 C.F.R. § 2.734(d). Finally, any late-filed contention must also meet the requirements of basis and specificity applicable to all contentions.

As is discussed in detail below, the Motion does not meet the requirements of § 2.734(a), lacks the requisite affidavits, fails the five-factors test, and lacks any regulatory basis. For each of these four independently sufficient reasons, the Motion should be denied.

I. THE PROFFERED CONTENTION LACKS ANY REGULATORY BASIS.

Before turning to the other substantive and procedural deficiencies of the Motion, it should be noted that MAG is asking this Board to reopen the record, authorize further discovery, and then hold more hearings on an issue which has no bearing on Applicants' compliance with the regulations of this agency. As the NRC Staff has recently pointed out in

response to the MAG's related motion to reopen,⁵ ALAB-911 has made clear that Applicants can rely upon the existence of the state-sponsored, FCC-approved EBS system in the Commonwealth and the Seabrook EPZ to meet the notification requirements of 10 C.F.R. § 50.47(b)(5) and 10 C.F.R. Part 50, App. E. IV. D.⁶ As the Staff also pointed out, MAG's own affidavit and documents offered in support of his November 9 EBS contention demonstrate the existence, scope, and efficacy of the EBS system extent in the Seabrook EPZ -- e.g., within 8 minutes of authorization by the Governor or his designee, every EBS station in the Commonwealth could be broadcasting emergency messages.⁷ That Applicants have supplemented the capabilities of the EBS system with an additional direct link to two radio stations thus has no bearing on compliance with

⁵ See NRC Staff Response to Intervenor's Motion to Admit a Late Filed Contention and Reopen the Record on the SPMC Based Upon the Withdrawal of the Massachusetts EBS Network and WCGY, at 3-5, 7-8, 9-10 (November 20, 1989) [hereinafter "Staff Response"]. Given that the Staff's brief was served by Federal Express and thus would have been received by MAG a day prior to the filing of the Motion, MAG's failure to address ALAB-911 in his Motion is noteworthy.

⁶ Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 254-255 (1989).

⁷ See Staff Response at 4-6 and sources cited therein. Inasmuch as the present Motion piggy-backs on MAG's November 9 EBS motion, the Board can and should examine the documentation proffered in support of that earlier Motion to determine whether or not those documents demonstrate any basis for the contention whose admission is sought. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC ___, CCH Nuc. Reg. Rptr. par. 31,105 (July 26, 1989), at CCH page 32,725.

any regulatory requirement. MAG's proffered basis, that these radio stations generally have had only a small listening audience under everyday conditions, is thus likewise irrelevant to any question of regulatory compliance, and accordingly must fail for lack of basis.

II. THE MOTION FAILS TO MEET THE REQUIREMENTS FOR REOPENING THE RECORD.

The Motion is not timely, does not raise a significant safety issue, and does not demonstrate that a different result would have been likely. As to each of these three requirements, moreover, the Motion lacks the requisite affidavit support. Finally, the Motion fails the five-factor test, since factors (i), (iii), and (v) weigh against it.

A. The Motion is Not Timely.

A party seeking to reopen the record is required by 10 C.F.R. § 2.734(b) to provide affidavit support for the assertion that each of the criteria in 10 C.F.R. § 2.734(a) has been met. Despite this unambiguous regulatory requirement, MAG offers no affiant as to his assertion that

this Motion is timely filed.⁸ For that reason alone, the Motion should fail.⁹

Prescinding from this deficiency, the Motion simply is not timely. As Applicants discussed at length in their response to MAG's previous EBS motion,¹⁰ MAG has (or should have) known for quite some time that Applicants relied upon WHAV and WLYT. The FEMA-REP-10 Report of April 30, 1988, and the June 1988 correction to that report made that fact clear.¹¹ So did MAG's November 16, 1988 deposition of Gregory Howard.¹² So did MAG's cross-examination of Anthony Callendrello on June 28, 1989, in which Mr. Callendrello

⁸ The burden of showing timeliness is upon MAG. Given the actions by MAG, and the documents and testimony available to MAG, which are discussed infra, MAG's failure to offer any affidavit on the issue of timeliness is particularly suspicious.

⁹ MAG does not argue that the Motion raises "an exceptionally grave issue" which could excuse untimely filing. Nor could he credibly make such an argument, given the undisputed fact that the state-sponsored, FCC-approved EBS network covering the Seabrook EPZ could have an emergency message on the air within 8 minutes. Massachusetts Emergency Broadcast System Operational Plan at 2 (May 1988), Exhibit 1 to Affidavit of Robert Boulay Regarding the Voiding of the EBS Letters of Agreement (November 9, 1989) [hereinafter "Mass. EBS Plan"].

¹⁰ Applicants' Answer to Intervenors' Motion to Admit a Late-Filed Contention and Reopen the Record Based upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY, at 3-8 (November 15, 1989) [hereinafter "Applicants' Answer"].

¹¹ Id. at 3-4.

¹² Id. at 4.

directed counsel for MAG to "[t]he EBS station that is identified in the SFMC."¹³

Thus MAG could have raised the listening-audience issue proffered in the Motion long before November 9, 1989. And, in fact, he did raise it (albeit not in reference to any admitted contention). On May 2, 1989, Assistant Attorney General Stephen Jonas cross-examined Applicants' witnesses as to what "percentage of the population of the EPZ, how many people would be listening to that station?", and counsel for Applicants stipulated with MAG that "it's unlikely that even a significant percentage of people will actually be listening to the stations that are the EBS stations at the time the balloon goes up."¹⁴ MAG then filed a proposed finding

¹³ Id. at 7 (emphasis added). MAG attempts to claim, Motion at 4 n.2, that confusion arose from Assistant Attorney General Jonas's reference, in his May 2, 1989 cross-examination, to WLYT and WCGY. See id. at 5. Of course, in the same examination the same counsel for MAG asserted that only WLYT was relied upon as an FM station, and the witness being examined stated that he needed to consult the unredacted documents to be sure what the actual stations were.

¹⁴ Id. at 4, 6. It is interesting that, although Applicants reproduced this entire exchange in their November 15 brief, MAG attaches to his Motion only a snippet of the exchange, specifically omitting the above-quoted stipulation. This omission by MAG is important, because the stipulation binds MAG as well as Applicants to the position that "it's unlikely that even a significant percentage of people" would be listening to the stations relied upon by Applicants. If MAG did indeed believe, at the time he agreed to this stipulation, that Applicants relied on WCGY as well as WLYT and WHAV, then MAG was agreeing that even the inclusion of WCGY did not give access to a significant listening public. Thus the loss of WCGY has no significance, and the present Motion must fail by virtue of MAG's prior stipulation. If, on the other hand, MAG believed that he

relying upon that cross-examination: "(limited number of EBS stations; Applicants stipulate that it is unlikely that significant number of people will be tuned into the EBS station when 'the balloon goes up.')." ¹⁵ Furthermore, on June 28, 1989 Assistant Attorney General Pamela Talbot cross-examined Applicants' witness as to listening public and Arbitron ratings:

"Q. Well, isn't it a fact that EBS is only carried on local Essex County stations?

"A. (Callendrello) The EBS station that is identified in the SPMC is located in Essex County. However, I wouldn't call it a local Essex County station, it's a 50,000 watt FM station. Mr. Catapano can address the range. But I know it has got a substantial range. I've picked it up probably 40 or 50 miles away, although he can talk about what the licensed range of that would be.

"Q. If he wants to, fine.

"A. (Catapano) It is an area that extends well beyond the emergency planning zone.

"Q. Isn't it a fact though that the news releases are carried by big Boston radio stations that have the largest listening public?

"A. (Callendrello) I don't know what the Arbitron ratings are for the various stations"

Tr. 27893-94.

was stipulating only to the audience of WLYT and WHAV, then he knew in May that WCGY was not relied upon. In either case, the Motion simply cannot stand in the face of the stipulation entered into by MAG on May 2, 1989.

¹⁵ Massachusetts Attorney General's Proposed Findings and Rulings of Law with Respect to Siren Issues, at 29 (June 12, 1989).

In light of the documents and testimony available to MAG, and particularly in light of the litigatory uses made by MAG of that information in May and June of 1989, it strains credulity past the breaking point for MAG to contend that he could not have offered this Motion until November 22.¹⁶

B. No Significant Safety Issue Exists.

The contention proffered by the Motion, which seeks to litigate the "proportion of the population in the EPZ [that] listen[s] to [WHAV and WLYT],"¹⁷ does not raise any safety issue, let alone a significant one. Any best efforts response to a Seabrook emergency would include activation by the Governor of the Massachusetts EBS network, which would have emergency messages on the air-waves within 8 minutes.¹⁸ WHAV and WLYT may be on the air even sooner, thanks to Applicants' direct link to them, but in either case there is no question but that the 15-minute notification requirement can and would be met. That being so, no safety issue exists.

¹⁶ Indeed, even if one accepts MAG's assertion that he could not have known of the issue until October 16 (see November 9 Motion at 7 n.3), MAG has not shown good cause for the over five week delay in filing the Motion. cf. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70, aff'd, ALAB-918, 29 NRC 473 (1989).

¹⁷ Motion at Attachment A.

¹⁸ Mass. EBS Plan at 2. There can be no doubt that the Governor would authorize activation of the EBS system. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-8, 29 NRC 193 (1989).

Even if the state-sponsored, FCC-approved EBS network were somehow wished out of existence by MAG, moreover, the Motion would still fail to raise a significant safety issue with the required affidavit support. What the normal listenership of WHAV and WLYT may be -- the subject of paragraphs 1-4 of the Kelsey Affidavit relied upon by MAG -- is immaterial. The only possible safety issue would be (again, assuming the non-existence of the rest of the EBS network) how many persons would hear the messages on WHAV and WLYT during the emergency, with the sirens sounding, with reference to Applicants' pre-emergency information (which on literally every page instructs the public to tune to those two stations)¹⁹, and with televised and radio news releases instructing them to tune to the two EBS stations. Even a quick review of the curriculum vitae provided for attorney Kelsey reveals that he is in no way qualified as an expert in the emergency and human behavior fields central to that issue.²⁰

¹⁹ Joint Stipulation Regarding Pre-Emergency Information Issues, ff. Tr. 28285, at 2, 3, 4. Having successfully insisted that Applicants make these changes to the pre-emergency information, MAG should now be estopped, by his own stipulation, from claiming that the pre-emergency information would have no effect. E.g., Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 58 n.2 (1984), aff'd, ALAB-798, 21 NRC 357 (1985).

²⁰ Moreover, putting aside the fact that attorney Kelsey has no qualifications to render the opinions contained in paragraph 5 of the affidavit written for him by MAG (see Motion at 6), those opinions are hedged and speculative -- e.g., "it is

C. There Has Been No Showing That a Different Result Would Be Likely.

ALAB-911 makes clear beyond peradventure that a different result -- i.e., denial of a license -- could not result, even if all of MAG's unsupported assertions were true, and even if together they met the substantive and procedural requirements for admission. Moreover, MAG again offers no affidavit support for his assertions as to this requirement of 10 C.F.R. § 2.734(a).

D. The Five-Factor Test Weighs Against Admission of the New "Basis".

As MAG concedes,²¹ the Motion must meet the five-factor test of 10 C.F.R. § 2.714(a)(1). As discussed in Section II.A above, there is no good cause for the extreme lateness in filing the Motion; hence the first factor weighs against admission. Moreover, having "fail[ed] to demonstrate good cause for not filing the contention in a more timely fashion,

conceivable" -- and do not indicate that Kelsey was even aware of the existence of the pre-emergency information prepared by stipulation with MAG, or of the news releases.

Nor is MAG's argument saved by his citation out of context to, and mischaracterization of, the testimony of Dr. Miletic. Motion at 14. MAG again carefully failed to cite to Dr. Miletic's testimony which was on point, to the effect that Applicants' plan was designed to encourage persons to tune to those EBS stations, through use of news releases and other means. Tr. 27894-96.

²¹ Motion at 3. Although MAG has at least twice before raised questions concerning EBS radio listening audiences, see pages 7-8 supra, he has not done so in the context of a then-admitted contention, and thus the requirements of 10 C.F.R. § 2.734(d) and § 2.714(a)(1) apply.

[MAG] must make a compelling showing on the other four factors."²² This MAG has not done.

As usual it must be conceded that the second and fourth factors favor the Movants, but these are the less weighty factors.²³ With respect to the third factor: 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 petition 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 summarize their proposed testimony'."²⁴ On a cursory look, the Motion might be viewed as having complied with the requirements of

²² Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 484 (1989) (emphasis in original); see also Virginia Electric & Power Co. (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975).

²³ 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).

²⁴ 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). Accord, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 483-84 (1989).

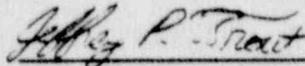
the third criterion; but, on close inspection, it has not. The sole affiant offered by MAG has no expertise in the areas of human behavior and radio listenership during emergencies, the issues on which the Motion seeks a hearing. Thus the Motion provides no demonstration that MAG would assist in the development of a sound record.

As to the fifth factor, there can be no doubt that granting the Motion would produce substantial delay in the final conclusion of these proceedings. Hence, factors one, three, and five weigh against admission of the new "basis",²⁵ and the Motion should fall on those grounds as well.

CONCLUSION

For each of the reasons stated above, the Motion should be denied.

Respectfully submitted,



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²⁵ Moreover, even if the Motion were timely filed, MAG's failure to carry the third and fifth factors should, in this case, be fatal. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 59, aff'd, ALAP-915, 29 NRC 427 (1989).

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CERTIFICATE OF SERVICE

I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on December 2, 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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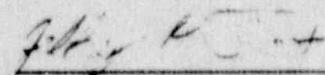
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