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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' RESPONSE TO "MASS AG'S MOTION TO REOPEN THE RECORD"

Under date of February 1, 1990, the Attorney General of The Commonwealth of Massachusetts ("Mass AG") filed with this Board a document styled "Mass AG's Motion to Reopen the Record" [hereinafter "Feb 1 Motion"]. Mass AG's Feb. 1 Motion seeks to have this Board reopen the record as to the adequacy of Applicants' Vehicular Alert and Notification System ("VANS"),[1] with respect to what Mass AG characterizes

[1] This facet of the case is presently before this Board on appeal of LBP-89-17.

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as "[t]he SPMC's primary means of notifying the public in an emergency (the EBS)" having become "unavailable."[2]

At the outset, this Board should note that Mass AG has included with his Feb. 1 Motion at least one affidavit which Mass AG knows the purported affiant has repudiated in its most material respects. Turning to the Motion itself, it should be denied for multiple distinct and independently sufficient reasons: (1) Mass AG is estopped, by his own stipulations, from raising most of the factual arguments which appear to underpin the Feb. 1 Motion; (2) the motion lacks any regulatory basis; (3) the Feb. 1 Motion is not accompanied by the requisite affidavits; (4) the motion is untimely, and fails to raise "an exceptionally grave issue;" (5) no significant safety issue is raised; (6) no different result would have been likely; (7) to the extent that the late-filed contention criteria of 10 C.F.R. § 2.734(d) and 2.714(a)(1) are applicable, then the Feb. 1 Motion fails to meet this test as well; and (8) the Feb. 1 Motion is barred by the doctrine of res judicata.

BACKGROUND

On August 12, 1987, Applicants arranged with WLYT/WHAV, a pair of Haverhill, Massachusetts sister radio stations which broadcast on AM (WHAV) and FM (WLYT), to broadcast EBS messages to the Massachusetts portion of the Seabrook Station

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[2] Feb. 1 Motion at 4.

emergency planning zone ("EPZ") in the event of a radiological emergency.[3] WHAV/WLYT is designated as a "Primary" EBS station in the Massachusetts Emergency Broadcast System Operational Plan.[4]

On April 30, 1988, the Seabrook Station Public Alert and Notification System FEMA-REP-10 Design Report ("REP-10 Report") was published and served upon the parties (including Mass AG). That report made clear that Applicants relied on a pair of sister radio stations to broadcast EBS messages. Because the names of the sister stations were inadvertently redacted from the REP-10 Report, Applicants in June 1988 served on the parties (including Mass AG) a letter replacing the redacted pages with copies that did identify these two stations.[5]

In June 1988, FEMA conducted a graded exercise of the Seabrook Plan for Massachusetts Communities ("SPMC"), including this EBS link to WHAV/WLYT. In its September 1, 1988 Final Exercise Report, which report was served on all the parties (including Mass AG), FEMA discussed Applicants'

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[3] See Affidavit of George R. Gram (Nov. 14, 1989) [hereinafter "Gram Aff."] at ¶ 5, which is included in Exhibit 4 to the Feb. 1 Motion.

[4] See Operational Plan at 1-6, which is included in Exhibit 2 to the Feb. 1 Motion.

[5] See Attachment A to Affidavit of Anthony M. Callendrello (Nov. 14, 1989) [hereinafter "Callendrello Aff."], which is included in Exhibit 4 to the Feb. 1 Motion.

exercise of the planned EBS link, noted the use of a single set of sister stations, and even specifically identified WLYT.[6] Likewise, FEMA's Review and Evaluation of the Seabrook Plan for Massachusetts Communities, served on all the parties (including Mass AG) in December 1988, specifically commented upon and found adequate Applicants' reliance on the single pair of sister stations.[7] Mass AG himself also solicited from Applicants, in the November 16, 1988 deposition of Gregory Howard, the existence and identity of the single pair of sister stations relied upon by Applicants.[8] Moreover, the SPMC itself repeatedly refers to activation of "the lead EBS radio station,"[9] which pair of sister stations the public will be instructed to tune to by "an extensive public information program."[10]

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[6] See Attachment D to Callendrello Aff.

[7] See Attachment C to Callendrello Aff.

[8] See MAG Ex. 126 at p. 129.

[9] See SPMC 3.2-16, 3.2-17, and Table 3.2-1 at 4, which are included in Exhibit 1 to the Feb. 1 Motion.

[10] See SPMC 3.2-15, included in Exhibit 1 to the Feb. 1 Motion. It may be that Mass AG is trying to make an issue of the fact that the paired WHAV/WLYT are sometimes referred to as one station, e.g., at 3.2-17 (there is only one station in the sense that there is only one management and hence only one entity to contact in an emergency), and sometimes as two, e.g., at 3.2-15 (there are two "local radio stations" in the sense of two different frequencies to which the public may tune). If that is indeed Mass AG's point, then it is more than answered by the fact, as discussed infra at note 16, that Mass AG successfully insisted that literally every single page of every single piece of pre-emergency information distributed to the public identify

In May, 1989, the VANS portion of these licensing proceedings came on for hearing before the Atomic Safety and Licensing Board hearing "onsite" matters (hereinafter the "Bloch Board"). During that hearing, Applicants' reliance on WHAV-WLYT was again discussed.[11] Moreover, in that same examination, Mass AG stipulated that the number of people who would already been listening to EBS stations at the time when the alert sirens sounded was so small as to be insignificant,[12] and Mass AG later filed proposed findings on VANS expressly relying on that stipulation.[13]

Still later, during trial of the SPMC before the Atomic Safety and Licensing Board hearing "offsite" matters (hereinafter the "Smith Board"), Applicants again explained that they rely on only a single pair of EBS stations.[14] Just

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the call letters and frequencies of the sister stations relied upon.

[11] Tr. (5/2/89) at 147-151. During that cross-examination, Assistant Attorney General Jones at one point suggested that WLYT and WCGY were relied on as FM stations, but elsewhere stated that there was only one FM station. Compare Tr. 149 with 148. Applicants' witness said that he had to consult the unredacted version of the REP-10 Report -- i.e. the document served on Mass AG and the other parties in June 1988, specifically identifying WHAV as the sole AM and WLYT as the sole FM Stations -- to be sure. Tr. 148.

[12] Tr. 149-150.

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

[14] Tr. 27893-94.

two days after this testimony, Mass AG entered into another stipulation--through the same Assistant Attorney General who had elicited the testimony on cross-examination--to the effect that all the Pre-Emergency Information issues raised by Mass AG (except as to the means of disseminating information to beach transients) had been resolved.[15] One of the changes which Mass AG demanded and received in return for this stipulation was that literally every page of every piece of pre-emergency information to be distributed in the Massachusetts portion of the Seabrook EPZ would identify the call letters and frequencies of the EBS stations relied upon by Applicants.[16]

At the same time that Applicants obtained, implemented, documented, and repeatedly disclosed this EBS link to WHAV/WLYT, Applicants also undertook to establish a backup to WHAV/WLYT.[17] As one step in this direction, Applicants agreed with Mr. Douglas Rowe of the Massachusetts Emergency Broadcast System and with EBS radio station WCGY to provide certain equipment to WCGY so that it might serve as a backup to WHAV/WLYT.[18] Applicants have already installed some of

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[15] Joint Stipulation Regarding Pre-Emergency Information Issues, ff. Tr. 28285, at 4.

[16] Id. at 2, 3, 4.

[17] Gram Aff. at ¶ 6.

[18] Id. at ¶¶ 6-8.

this equipment, and have at all times been ready and willing to provide the rest.[19] Apparently Mr. Rowe believed that Applicants should provide such equipment to all Merrimac Valley EBS stations, not just WCGY, and when Applicants declined to do so, he sent a letter to Applicants purporting to terminate the agreement between the Massachusetts Emergency Broadcast System and Applicants.[20]

Mr. Rowe sent his letter to Applicants on or about October 13, 1989, with a copy to WCGY.[21] According to Mass AG, Mr. Rowe also contacted Mass AG on October 16.[22] Mass AG then placed two calls to the management of WCGY, after which WCGY on October 20 sent a letter to Applicants, referencing the Rowe letter and copied to Mass AG, purporting to repudiate its separate agreement with Applicants.[23] It is this purported repudiation by WCGY of its role as a possible

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[19] Id. at ¶ 9; Affidavit of Gary J. Catapano (Nov. 13, 1989) at ¶¶ 6-7 and Attachment D, which is included in Exhibit 4 to the Feb. 1 Motion

[20] Affidavit of Douglas J. Rowe Regarding the Voiding of the EBS Letters of Agreement (Oct. 27, 1989) at ¶¶ 3-5, which is included in Exhibit 2 to the Feb. 1 Motion.

[21] Id. at ¶ 5.

[22] 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 (Nov. 9, 1989) [hereinafter "Nov. 9 Motion"] at 7 n.3.

[23] Id.; see also Affidavit of John F. Bassett Regarding the Voiding of the EBS Letters of Agreement (Oct. 27, 1989) at ¶¶ 4-5, which is included in Exhibit 2 to the Feb. 1 Motion.

backup to WHAV/WLYT which forms the basis of Mass AG's present motion.

As noted above, Mass AG contacted WCGY and became involved in Mr. Rowe's dispute with Applicants even before the October 20, 1989 letter from WCGY to Applicants. During that same period, Mass AG apparently also wrote an "expert's" affidavit claiming that the purported withdrawal of WCGY prevented Applicants from implementing their planned EBS notification, which affidavit Mass AG then presented to Royce N. Sawyer, the Communications Officer for the Massachusetts Civil Defense Agency ("MCDA").[24] On October 30, 1989, Mass AG filed the first "Intervenors' Motion to Admit Late Filed Contention and Reopen the Record on the SPMC Based Upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY" [hereinafter "Oct. 30 Motion"]. In this Oct. 30 Motion, Mass AG identified Royce Sawyer as Intervenors' witness on the issues raised, and described him as "a witness who possesses special expertise on the topic of the EBS in Massachusetts."[25]

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[24] Statement of Royce N. Sawyer (Nov. 17, 1989, affirmed under oath Feb. 13, 1990) [hereinafter "Sawyer Statement"], attached hereto as Exhibit A. Counsel for the Applicants have been aware of the existence of the memoranda which form the substance of the Sawyer Statement since shortly after the time of their making. However, because of their nature and content, Applicants were unwilling to disclose them until their substance was verified and sworn to, which is now the case.

[25] Oct. 30 Motion at 9.

Also in this Oct. 30 Motion, Mass AG represented that the affidavit he had written for Royce Sawyer, a copy of which the Mass AG included with and relied upon for the motion, had received "authorization and approval."[26] In fact, however, according to Mr. Sawyer he did not authorize, and clearly had not approved, the affidavit.[27]

On November 3, 1989, Mr. Sawyer returned to work from sick leave and, according to him, was confronted by Mass AG's demand that he immediately sign the affidavit.[28] In response to his protest that someone else should be the affiant, Mass AG apparently stated that Sawyer was "the most knowledgeable person in the Civil Defense Agency on the Massachusetts EBS."[29] In response to Mr. Sawyer's protest that parts of the affidavit were beyond his knowledge and parts were wrong, two minor changes were made, but, according to Mr. Sawyer, Mass AG refused to make other changes he requested.[30] In particular, Mass AG refused to delete paragraph 4, in which Mass AG had Sawyer stating an expert opinion that, without WCGY, "there does not exist any provision for insuring that notification is made to the public in the Massachusetts

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[26] Id. at 12.

[27] Sawyer Statement.

[28] Id.

[29] Id.

[30] Id.

emergency planning zone for Seabrook Station within the 15 minutes required by NUREG 0654, FEMA-REP-1, Revision 1, Appendix 3."[31] It is this paragraph, and this particular statement, which formed the linchpin of the Oct. 30 Motion, and of all the subsequent EBS motions filed by Mass AG.

Royce Sawyer states that he "was pressured into signing of the affidavit without legal advice and to meet a deadline imposed by the Attorney General's Office", on November 3.[32] Between November 4 and November 7, however, Sawyer finally had an opportunity to study the affidavit in detail, and to document its errors and omissions.[33] In particular, he states that he pointed to the fact that the MCDA has a direct link to WROR, the lead state EBS station, and that "Massachusetts Civil Defense, if notified by New Hampshire Yankee of an incident affecting public safety, could activate the Emergency Broadcast System from this agency's headquarters."[34] According to the documents filed by Mass AG himself, by using that direct link MCDA could have an EBS

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[31] See id., and attachments thereto: "I am also concerned with the wording in paragraph 4 that states 'there does not exist any provision for insuring that notification is made to the public in the Massachusetts emergency planning zone for Seabrook Station within the 15 minutes required by NUREG 0654, FEMA-REP-1, Revision Appendix 3'" (Nov. 6 memo); and "paragraph 4 should be eliminated in its entirety" (Nov. 7 memo).

[32] Id. at Nov. 6 memo.

[33] Sawyer Statement.

[34] Id., quoted at Nov. 6 memo.

message out on every EBS station in the Commonwealth, including WCGY and all other stations in or near the Seabrook EPZ, within eight minutes.[35]

Mr. Sawyer states that when he confronted Mass AG on November 7 with a list of changes necessary to make the affidavit Sawyer's actual testimony, Mass AG again "would not consider the changes."[36] Instead, another signatory was substituted for Sawyer, and Sawyer "was informed by telephone on November 7, 1989, by Mr. John Traficonte of the AG's office, that [Sawyer's affidavit] would not be submitted."[37]

The next day, November 8, 1989, Mass AG notified the Licensing Board and the parties that he was withdrawing the Oct. 30 Motion.[38] That written notification, however, contained no indication that the affiant had repudiated the key portions of the affidavit upon which the October 30 Motion relied.[39] The day following that, Mass AG filed a new "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" (Nov. 9, 1989)

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[35] See Operational Plan, supra note 4, at 2.

[36] Sawyer Statement.

[37] Id.

[38] See Withdrawal of Motion (Nov. 8, 1989), attached hereto as Exhibit B.

[39] Id.

[hereinafter "Nov. 9 Motion"].[40] This filing, too, did not disclose that Sawyer had repudiated the affidavit previous attributed to him by Mass AG. To the contrary, Mass AG included that affidavit with the Nov. 9 Motion, despite the fact that, according to Sawyer, on November 7 he had promised Sawyer that the affidavit would not be submitted.[41]

On November 22, 1989, Mass AG filed his third EBS-related motion, this one styled as "Intervenors' Motion to Add an Additional Basis to the Late Filed Attached Contention to the Motion of November 9, 1989" (Nov. 22, 1989) [hereinafter "Nov. 22 Motion"].[42] In this filing too Mass AG failed to disclose that his affiant Sawyer had repudiated the key factual allegations underlying the Motion.[43]

On December 1, 1989, Mass AG filed two pleadings with the Commission in which he raised, on his own initiative, the issue of the various pending EBS-related motions.[44] Here

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[40] See Exhibit 2 to Feb. 1 Motion.

[41] See Exhibit H to Nov. 9 Motion, Exhibit 2 to the Feb. 1 Motion.

[42] See Exhibit 3 to Feb. 1 Motion.

[43] Id.

[44] See Intervenors' Supplemental Motion and Memorandum in Support of November 13 Motion to Revoke and Vacate the November 9 License Authorization (Dec. 1, 1989) at 76-80 [hereinafter "Supplemental Motion"], pages 76-80 of which are attached hereto as Exhibit C; Massachusetts Attorney General's Comments on the Immediate Effectiveness Issue (Dec. 1, 1989) at 7-8, attached hereto as Exhibit D.

once again, Mass AG failed to disclose that his affiant Sawyer had stated, orally and in writing, that the affidavit filed in his name was materially untrue.[45] To the contrary, Mass AG represented to the Commission that he had called the Licensing Board's law clerk of November 8, 1989, and "explained why and under what circumstances the October 30 motion was being withdrawn."[46] Mass AG further represented to the Commission, in an affidavit from Assistant Attorney General John Traficonte, that that explanation was "that Sawyer had simply 'gotten cold feet' about getting involved in the Seabrook case'".[47]

The Licensing Board on January 8, 1990, issued a memorandum and order denying both the Nov. 9 Motion and the Nov. 22 Motion.[48] The Licensing Board found that both motions were untimely;[49] that, for "multiple reasons", including the Board's agreement with the Appeal Board's

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[45] Id.

[46] Supplemental Motion at 77.

[47] Affidavit of John Traficonte (Dec. 1, 1989) at ¶ 4, which was included as Exhibit 1 to the Supplemental Motion and is attached hereto as Exhibit E. It is noteworthy that, in describing the explanation, Mass AG does not quote or characterize his own agent's words, but instead relates the response from the Board's law clerk, and characterizes that response as "accurate".

[48] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC __ (1990) [hereinafter "LBP-90-1" and cited to slip op.].

[49] Id. at 5-14.

analysis in ALAB-911, neither motion raised a significant safety issue;[50] that a materially different result would not likely have occurred;[51] and that the motions failed the first, third, an fifth prongs of the five-factor test for late-filed contentions.[52] Mass AG noticed his appeal of this decision on January 17, 1990.[53]

Finally, on January 24, 1990, Mass AG filed with this Appeal Board his brief on appeal from LBP-89-32 and LBP-89-17.[54] In the brief itself, Mass AG raised yet again the EBS issues contained in his Oct. 30 Motion, Nov. 9 Motion, and Nov. 22 Motion.[55] Moreover, attached to the brief, as part of Exhibit 1 thereto, Mass AG included the October 30 version of the Sawyer affidavit. Nowhere, however, did Mass AG disclose that Royce Sawyer had repudiated that affidavit.

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[50] Id. at 15-29.

[51] Id. at 29-31.

[52] Id. at 31-36.

[53] Notice of Appeal (Jan. 17, 1990).

[54] Brief of the Massachusetts Attorney General in Support of his Appeal of LBP-89-32 (Jan. 24, 1990).

[55] Id. at 89-90.

ARGUMENT

Mass AG's Feb. 1 Motion is barred, at least in substantial part, by two stipulations previously entered into by Mass AG, which stipulations completely undermine two of the factual assertions Mass AG is now trying to make. Moreover, in light of this Board's analysis in ALAB-911, this Feb. 1 Motion has no regulatory basis. The motion also fails all of the requirements for reopening: it lacks the requisite affidavits; it is untimely; it does not raise a significant safety issue; and if it had been raised earlier, no different outcome would have resulted. Further, the Feb. 1 Motion has the unusual distinction of failing to carry any of the five factors for late-filed contentions. Finally, Mass AG's Feb. 1 Motion is barred by res judicata, since the Smith Board has already ruled that these same allegations do not warrant reopening the record. Applicants address each of these points below.

I. MASS AG IS ESTOPPED FROM BRINGING AT LEAST PARTS OF THIS MOTION.

Mass AG claims that the putative withdrawal of WCGY as a backup to Applicants' EBS link with WHAV/WLYT raises three issues: (i) "there is no hardware in place to assure activation of the EBS within fifteen minutes";[56] (2) "the amount of time that it will take to find a radio station

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[56] Feb. 1 Motion at 9.

carrying an SPMC emergency message";[57] and (3) "how many people will actually hear messages transmitted solely on WHAV/WLYT".[58] Putting to one side any argument as to the truth and/or the significance of Mass AG's assertions, Mass AG is estopped from raising at least the second and third issues, because he has stipulated to facts which render both issues moot.

Mass AG's theory under issue number two appears to be that it would take a radio listener longer to tune his or her radio to the right station if only WHAV and WLYT are relied upon.[59] This theory overlooks the fact that it is the Public Information Material ("PIM") distributed in the EPZ which tells listeners which stations to turn to.[60] The PIM includes, by stipulation with (indeed, at the insistence of) the Mass AG, the call letters and frequencies of WHAV and WLYT on literally every single page.[61] Mass AG's implicit argument to this Board, that radio listeners will be randomly searching the airwaves for an EBS message, thus collapses in the face of Mass AG's stipulation that the PIM should contain

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[57] Id. at 10.

[58] Id. at 11.

[59] Id. at 10.

[60] See, e.g., SPMC 3.2-15, which is included in Exhibit 1 to the Feb. 1 Motion.

[61] See supra at note 16.

this frequency information, and his stipulation that with this and other changes his allegations as to the adequacy of Applicants' PIM are satisfied.[62]

Mass AG's third issue, as to the number of people listening to WHAV/WLYT, likewise disappears in the face of this stipulation. Here Mass AG's theory is that few people listen to WHAV and WLYT normally, so few will hear it in an emergency.[63] The flaw in that theory is that the PIM, not normal listening patterns, determines who would tune to WHAV and WLYT in an emergency, and Mass AG has stipulated that the PIM -- with WHAV, WLYT, and their frequencies blazoned on every page, poster, and flyer -- met his contentions.

Moreover, this third issue is mooted by yet another stipulation entered into by Mass AG. During the VANS hearings before the Bloch Board, Applicants and Mass AG stipulated 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."[64] If Mass AG believed, when he entered into this stipulation, that "the EBS stations" included WCGY as well as WHAV/WLYT, then the stipulation means that even with WCGY participating listenership at the moment the warning sirens

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[62] See supra at notes 15-16.

[63] Feb. 1 Motion at 11.

[64] Tr. 149-150 (May 2, 1989).

sounded will be "insignificant", and this third issue disappears as also being insignificant. If, on the other hand, Mass AG were now to claim that the stipulations were intended only to apply to WHAV and WLYT,[65] then he would be conceding that he knew even in May 1989, while the record was still open, that Applicants relied only on WHAV/WLYT, and his present motion would fail as unexcusably late. In either case, this listenership issue simply cannot survive in the face of Mass AG's stipulation.

II. THE MOTION LACKS ANY REGULATORY BASIS.

Before turning to the further substantive and procedural deficiencies of the Feb. 1 Motion, it should be noted that Mass AG is asking this Board to reopen the record on an allegation which has no bearing on Applicants' compliance with the regulations of this agency. As has been pointed out three times already,[66] this Appeal Board's ruling in ALAB-

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[65] Such a position would be inconsistent with Mass AG's various protestations of timeliness. See, e.g., Nov. 22 Motion at 4.

[66] See LBP-90-1 at 17-21; Applicants' Response to "Intervenors' Motion to Add an Additional Basis to the Late Filed Attached Contention to the Motion of November 9, 1989", at 3-5 (Dec. 2, 1989) [hereinafter "Dec. 2 Response"], which is included as Exhibit 5 to the Feb. 1 Motion; see also NRC Staff Response to Intervenors' 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 (Nov. 20, 1989) [hereinafter "Staff Responses"].

Although the Licensing Board, the Applicants, and the Staff have each argued that ALAB-911 is potentially dispositive of Mass AG's EBS allegations, Mass AG does not mention ALAB-911 in his

911 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.[67] And has also been pointed out three times already,[68] 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. That Applicants have gone beyond the capabilities of the EBS system and added a direct link to two sister EBS radio stations thus has no bearing on compliance with any regulatory requirement, and accordingly Mass AG's Feb. 1 motion must fail for lack of a basis.

Feb. 1 Motion. As this Board recently observed, "[w]hen a party totally fails to come to grips with pivotal and manifestly nonfrivolous arguments advanced by an adversary, a permissible inference arises that that party recognizes the force of the arguments." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-917, 29 NRC 465, 471 (1989).

[67] Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 254-55 (1989).

[68] See LBP-90-1 at 21; Dec. 2 Response at 4; Staff Response at 4-6, 7-8.

III. THE REQUIREMENTS FOR REOPENING A CLOSED RECORD HAVE NOT BEEN MET.

As MAG implicitly concedes in his Feb. 1 Motion, this latest attempt to reopen the record and litigate the proferred EBS issues must meet each 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 environmental issue.
>
> "(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proferred evidence been considered initially."[69]

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 sectio[illegible] 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 . . . ."[70]

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.[71]

As is discussed in detail below, the Feb. 1 Motion does not meet any of the requirements of § 2.734(a), lacks the

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[69] 10 C.F.R. § 2.734(a).

[70] Id. § 2.734(b) (emphasis added).

[71] Id. § 2.734(d).

requisite affidavits, and fails the five-factors test. For each of these independently sufficient reasons, the motions should therefore be denied.

A. Lack of Affidavit Support

Mass AG submitted no new affidavits with his Feb. 1 Motion. At best, Mass AG seems to be relying upon the Sawyer,[72] Boulay, and Kelsey affidavits which were included with the Nov. 9 Motion and the Nov. 22 Motion, Exhibits 2 and 3 to the present motion. Even those affidavits, however, fail to satisfy the requirements of §2.734(b).

As is noted above, 10 CFR §2.734(b) requires that a motion to reopen be accompanied by affidavits. There is no leeway here.[73] Each criterion of §2.734(a) must be separately addressed, 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. The affidavits included in the exhibits to the Feb. 1 Motion do not suffice as to any of those three criteria.

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[72] As to the Sawyer affidavit, see infra Section V.

[73] As this Board recently stated, "the Commission expects its adjudicatory boards to enforce the section 2.734 requirements rigorously -- i.e., to reject out-of-hand reopening motions that do not meet those requirements within their four corners." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989); see also Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989).

None of Mass AG's affiants offer any explanation as to why the present Motion was not filed until Feb. 1. Nor do they even attempt to address the "different result" criterion. As for safety significance, nothing in Mass AG's affidavits provides any support for the two key assumptions underpinning Mass AG's motion: that the Massachusetts EBS system is somehow inadequate,[74] and that normal radio listenership patterns will determine who tunes to the designated EBS stations after the sirens have sounded in a radiological emergency.[75] This across-the-board lack of affidavit support is fatal, in and of itself, to Mass AG's motion.

B. Untimeliness

Mass AG has known, or should have known, since June 1988 that Applicants rely upon WHAV/WLYT for EBS notification.[76] Since that time, Mass AG has repeatedly been apprised of that fact.[77] Accordingly, there simply can be no excuse for Mass AG's untimely raising of these EBS issues in November 1989, let alone in February 1990.

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[74] See Feb. 1 Motion at 9-10.

[75] See id. at 10-11. Nothing in the affidavit or professional qualifications of Mass AG's affiant Kelsey suggests that he is qualified to testify as to emergency radio listenership, as opposed to normal Auditron patterns.

[76] See supra at note 5.

[77] See supra at notes 6-14.

Moreover, the explanation that Mass AG himself gives for the delay does not bear scrutiny. Mass AG argues that his delay until February 1 was excusable for two reasons: (1) if he brought this motion while the Nov. 9 Motion and Nov. 22 Motions were pending before the Smith Board, it would have been vulnerable to a charge of "invit[ing] the possibility of inconsistent finding on the issues";[78] and (2) Mass AG believed he would prevail before the Smith Board, thus making the present motion unnecessary.[79] The first proffered reason makes no sense, since Mass AG is now asking this Board to make the same "inconsistent findings" that he eschewed to seek earlier. And the second explanation does not address the question of why, if Mass AG was waiting to learn the Smith Board's ruling on the earlier EBS motion, Mass AG then delayed another 23 days before filing this motion.[80]

In a single conclusory sentence, Mass AG argues that the issues he raises are "sufficiently grave" as to warrant this Board to excuse his untimeliness. Apparently this represents an attempt to invoke the second clause of 10 C.F.R. §2.734(a)(1), to the effect that "an exceptionally

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[78] Feb. 1 Motion at 7.

[79] Id. at 7-8.

[80] See id. at 8. Given that the Feb 1 Motion is scarcely more than a repackaging of Mass AG's prior EBS motions, and also given that Mass AG addressed these same issues in his January 24 appellate brief, it is inexplicable that Mass AG offers no explanation whatsoever for this delay.

grave issue may be considered in the discretion of the presiding officer even if untimely presented."[81] Obviously, for §2.734(a)(1) to have any efficacy, an "exceptionally grave issue" must be something more serious than a "significant safety" issue as required by §2.734(a)(2). As is discussed infra, Mass AG's motion does not raise a significant safety issue. But even assuming arguendo that a significant safety issue were shown to exist, Mass AG has not even argued, let alone proven, that that issue meets the additional and higher test of being "exceptionally grave".

C. Absence of a Significant Safety Issue

The Feb. 1 Motion 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.[82] 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.

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[81] 10 C.F.R. §2.734(a)(1) (emphasis added).

[82] Operational Plan, supra note 4, 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).

D. No Difference in Result

ALAB-911 makes clear beyond peradventure that a different result -- i.e., denial of a license -- could not have resulted, even if all of Mass AG unsupported assertions were true and had been raised initially. At most, Applicants might have been require to complete the establishment of their back-up link to WCGY, something which Applicants have always been ready and willing to do anyway.[83]

E. All Five Factors Weigh Against the Motion

The allegations contained within the Feb. 1 Motion, and in the contentions attached to Mass AG's Nov. 9 Motion and Nov. 22 Motion, do not fall within the scope of any contention that was before the Bloch Board in LBP-89-17. Despite that fact, Mass AG's Feb. 1 Motion does not even address the requirements for late-filed contentions. Prescinding from that pleading failure (which in and of itself should be fatal to the motion[84]), Mass AG fails to carry any of the five factors considered under 10 C.F.R. §2.714(a)(1).

The five factors to be weighed are:

"(i) Good cause, if any, for failure to file on time.

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[83] See supra at note 19.

[84] See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980).

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."[85]

As to the first factor, Mass AG has not shown good cause for not bringing this motion before February 1, 1990, as is discussed in Section III.B. supra. Accordingly, Mass AG must make a "compelling" showing on the other four factors.[86] Instead, he fails to even carry any of them.

The second factor weighs against Mass AG because he has "other means" to protect his "interest" in these issues -- specifically, his currently pending appeal of LBP-90-1. Likewise the fourth factor weighs against him, since SAPL and NECNP are parties to that same appeal. Nor can there be any question that the fifth factor, delay, also weighs heavily against the Feb. 1 Motion.

With respect to the third factor: Commission "case law establishes both the importance of the third factor in the

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[85] 10 C.F.R. §2.714(a)(1).

[86] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 484 (1989); see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), and cases cited therein.

evaluation of late-file 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'."[87]

Mass AG does not identify his witnesses or state their testimony. Assuming, however, that Mass AG would call the affiants from his Nov. 9 Motion and Nov. 22 Motion, there still is no reason to believe he would contribute to the development of a sound record. Affiant Sawyer has repudiated the position espoused by Mass AG.[88] Affiant Boulay's assertions, carefully hedged as they are, do nothing to call into question the fact that MCDA has the capability to broadcast EBS messages within eight minutes.[89] Affiant Kelsey has no demonstrated qualifications to testify as to

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[87] 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).

[88] Sawyer Statement.

[89] See Operational Plan, supra note 4, at 2.

EBS matter or as to emergency radio listenership. Thus this factor too weighs against Mass AG's motion.

IV. THE MOTION SHOULD BE REJECTED AS *RES JUDICATA*.

Mass AG's assertion, that the purported termination of Applicants' arrangement with WCGY for backup EBS notification warrants reopening the record in the proceedings, is presently before this Appeal Board in two procedurally distinct postures. First, as discussed above, Mass AG has noticed an appeal to this Board from the Smith Board's decision rejecting his Nov. 9 and Nov. 22 EBS motions.[90] Indeed, Mass AG notes that his brief on that appeal is to be filed by February 16, 1990.[91] In this posture, the issues are before this Board in its role as an appellate tribunal, and the question for the Board to decide is whether the Smith Board committed reversible error in LBP-90-1.

The Feb. 1 Motion, on the other hand, comes before this Board in a very different posture, and raises a very different question. Mass AG in his motion asks this Board to act, not as a appellate tribunal, but as the successor in initial jurisdiction to the Bloch Board. The question that the motion seeks to raise is not the correctness of the Smith

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[90] See supra at note 53. Mass. AG has also already raised the issue in his appeal from LBP-89-17, which he briefed to this Board on January 24, 1990. See supra at notes 54-55. Thus the issue may be before the Appeal Board in three different postures.

[91] Feb. 1 Motion at 4.

Board's rulings in LBP-90-1, but rather whether, on the merits as an initial matter, Mass AG's allegations warrant reopening the record.

In order to address the merits of Mass AG's claim for reopening, this Board would be forced to decide, as a tribunal of initial rather than appellate jurisdiction, the same issues as were decided by the Smith Board, on the same facts as were presented to the Smith Board, and between the same parties[92] as were before the Smith Board. Just to state those circumstances -- the same issues, the same facts, and the same parties -- indicates why the doctrine of res judicata should lead this Board to give no further consideration to the Feb. 1 Motion. Mass AG himself seems aware of this fact: he argues that he did not bring this motion to this Board sooner because Applicants would have pointed out "that to have two separate panels (one licensing board and one appeal board) considering the same issues invited the possibility of inconsistent findings on the issues."[93] Exactly right -- Mass AG is asking this Board to reach a different result than did the Smith Board, on the same facts, not as a matter of law on appeal but as an exercise of primary jurisdiction.

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[92] The only difference in parties is that NECNP and SAPL did not sign onto the Feb. 1 Motion, but were before the Smith Board in LBP-90-1.

[93] Feb. 1 Motion at 7.

The tribunals of the Nuclear Regulatory Commission apply essentially the same doctrine of res judicata as do the courts of the Unites States,[94] and for essentially the same reasons: judicial economy, avoidance of piecemeal litigation, certainty in the legal findings of tribunal, and final resolution of disputes.[95] In this case, these policies are reinforced by the fact that this Board has been called upon to exercise appellate review of LBP-90-1, and such review would almost certainly be compromised if this Board were to make findings in its exercise of initial jurisdiction that were inconsistent with LBP-90-1. The effect of the Feb. 1 Motion, in sum, would be to short-circuit the normal agency appellate process and deny Applicants their procedural and

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[94] Of course, this Board has held that, even when the requirements of res judicata are met, "the doctrine must be 'applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case.'" Carolina Power & Light Co., (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 (1986) (emphasis added). Mass AG has made no such showing of special circumstances here.

[95] E.g., Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 439 (1989) ("[I]t was not necessary for the Attorney General to file the identical contention a second time before another Licensing Board merely because the subject of the contention had both full power and low power ramifications by reason of the Commission's regulations. Any other conclusion would occasion the dual litigation of the same issue with possibly inconsistent results.") (emphasis added; citation omitted).

substantive rights arising from LBP-90-1. This Board should not countenance such a subterfuge.

V. THE BOARD SHOULD GIVE NO WEIGHT TO THE REPUDIATED SAWYER AFFIDAVIT.

Mass AG has included the Sawyer affidavit in his Feb. 1 Motion to this Board, without disclosing that that affidavit has been repudiated.[96] Given that there can now be no dispute that Royce Sawyer repudiated, as untrue in its key assertions, this affidavit as long ago as November 7, 1989, this Board should give no weight to the affidavit in its consideration of the merits of Mass AG's factual claims.

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[96] This filing represents the fourth time that Mass AG has filed that affidavit without Sawyer's consent. It also represents the third time that Mass AG has filed it after Sawyer listed in writing the material factual errors in the affidavit, and after Mass AG promised Sawyer that it would not be submitted. Moreover, in none of the eight pleadings which Mass AG has filed on these EBS issues has Mass AG ever disclosed that Sawyer repudiated the affidavit -- not in Mass AG's three briefs to the Licensing Board, not in his two briefs and accompanying lawyer's affidavit to the Commission, and not in his two briefs to this Board. Nor has Mass AG ever corrected his October 30 representation that the original affidavit had received "authorization and approval" prior to filing, or his Nov. 8 representation to the Licensing Board's law clerk that Sawyer "had simply 'gotten cold feet' about getting involved in the Seabrook case."

CONCLUSION

For each of the above-stated reasons, Mass AG's Feb. 1 Motion should be denied.

Respectfully submitted,

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