

August 1, 1983

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

NRC STAFF RESPONSE OPPOSING ADMISSION OF "CONTENTION
OF ATTORNEY GENERAL FRANCIS X. BELLOTTI RELATIVE TO
APPLICANTS' EVACUATION TIME ESTIMATES FOR BEACH AREAS"

I. INTRODUCTION

On July 15, 1983, the Attorney General of the Commonwealth of Massachusetts (hereinafter, "MassAG") proposed admission of a contention challenging the adequacy of the Applicants' evacuation time estimates.^{1/} As discussed below, the NRC staff opposes the admission of this late-filed contention.

II. DISCUSSION

A. Rules Governing Admission of Late-Filed Contentions

As an "interested state," the Commonwealth of Massachusetts must observe the procedural requirements applicable to other participants. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). In order to obtain admission of a

^{1/} The Commonwealth has made its proffer of this contention conditional on the Board's interpretation of its June 30, 1983 Memorandum and Order as precluding testimony on the adequacy of the assumptions and methodology underlying the Applicants' evacuation time estimates (beyond the two areas stated in the restated contention). The Staff believes that this is the only reasonable interpretation of the Board's Order.

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late-filed contention, 10 C.F.R. § 2.714(a)(3) requires the MassAG to convince this Board that late admission is warranted by a balancing of the following factors listed in 10 C.F.R. § 2.714(a)(1):

- (i) Good cause, if any, for failure to file on time;
- (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; and
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Failure to show good cause for late filing increases a petitioner's burden as to the other factors. See e.g.: Virginia Electric and Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975); Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389 (1976); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 615 (1977); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977).

As will be shown in Part II.B, infra, the balancing of these factors weighs heavily against the admission of this contention.

B. Balancing the § 2.714(a)(1) Factors

The contention proffered by the MassAG asserts that:

"The Applicants' evacuation time estimates for 360° evacuations within two and five miles of the site are inadequate and lack utility for emergency planning and management because they are based on erroneous assumptions and faulty methodology. The estimates suffer from the following specific deficiencies:

- (1) The demand forecast from transient population is understated by a margin so wide as to render the estimates unreliable;
- (2) The characteristics of the road network in the beach area makes movement singularly vulnerable to the consequences of accidents and breakdowns, yet no analysis of the time effects of such incidents has been made;
- (3) The estimates fail to reflect the travel impedance in the beach area resulting from non-evacuating traffic, such as persons returning to homes within the EPZ, milling about, or passing through the area;
- (4) There is inadequate analysis of the time demands for evacuating the transit-dependent population, including beach visitors; and
- (5) There is no analysis of the effect of adverse weather on beach evacuation.

In addition, the wide variances in the evacuation time estimates for these areas developed by the Applicants and by others demonstrate that the predictive ability of the Applicants' simulations is too poor for them to be relied upon as a planning or management aid."

"Contention of Attorney General Francis X. Bellotti Relative to Applicants' Evacuation Time Estimates For Beach Areas," at p. 4 (hereinafter, "Contention at p. ___"). So stated, the proposed contention challenges the assumptions and methodology underlying Applicants' evacuation time estimates.^{2/}

In its only effort to address any of the § 2.714(a)(1) factors, the MassAG argues that "there is good cause for admission of this contention at this time" because the testimony supporting it would have been "clearly admissible testimony under previously accepted contentions" prior to the

^{2/} To the extent that the last paragraph of the contention is not challenging the assumptions and methodology underlying the Applicants' estimates, it is nonsensical, since the fact that others' estimates differ from those of Applicants' does not in and of itself lead to the conclusion that the Applicants' estimates are inaccurate.

Board's Memorandum and Order of June 30, 1983.^{3/} Contention at p. 5. The contentions under which the testimony supporting this proposed contention would have been "clearly admissible" are, of course, NECNP III.12 and III.13, which were the objects of the Applicants' summary disposition motion partially granted by the Board in its Memorandum and Order of June 30, 1982. Those contentions were restated by the Board as follows:

NECNP III.12/III.13: Evacuation Time Estimates

The evacuation time estimates provided by Applicants in Appendix C of the Radiological Emergency Plan are deficient in failing to include an estimate of:

1. the times for evacuation during adverse weather conditions developing on a busy summer weekend; and
2. the times for simultaneous evacuation of beach areas lying NE to SSE of the Seabrook site.

Order at p. 15. The Board ruled that "[a]ll other issues and averments, including NECNP's professed skepticism as to the accuracy of Applicants' demographics and efficacy of their model . . . are dismissed." Thus, the reason that Massachusetts' testimony challenging Applicants' assumptions and methodology is not clearly admissible subsequent to the Board's June 30 Order is because that Order summarily disposed of those portions of NECNP III.12 and III.13 which challenged the Applicants' assumptions and methodology, except as to the simultaneous evacuation and adverse summer weather scenarios.

From the foregoing discussion it is clear that the late-filed contention now proffered for the first time by the MassAG is a vehicle by which it seeks to litigate issues that have been summarily disposed of by this Board. As

^{3/} Memorandum and Order (Seabrook Station, Units 1 and 2), June 30, 1983 (hereinafter, "Order").

such, it is in essence a motion for reconsideration of the Board's June 30 Order. If the MassAG wished to protect its interest in offering testimony under NECNP III.12 and III.13 as originally admitted, the way to do so under the Commission's rules was to argue in opposition to summary disposition. The MassAG, however, did not oppose Applicants' motion for summary disposition of NECNP III.12 and III.13, and consequently cannot offer as good cause for late filing the fact that the Board's ruling on Applicants' motion has narrowed the scope of the contention so as to render inadmissible certain testimony that it now wishes to offer. In ruling that an interested state is not entitled to appeal the decision by a Licensing Board on an issue as to which the state did not participate, the Atomic Safety and Licensing Appeal Board has stated that "[a]n administrative hearing would be a meaningless charade if those with ample opportunity to participate were allowed to stand idly by and then, nevertheless, demand a replay when they do not like the result." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448 (1980). Exactly analogous is the instant situation, in which the MassAG, having had ample opportunity to protect its interest by opposing summary disposition of contentions in which it now claims interest, chose nevertheless to stand idly by while this Board considered the arguments for and against summary disposition of NECNP III.12 and III.13. The Board granted partial summary disposition, whereupon the MassAG now seeks, by means of a contention filed on the virtual eve of the hearing, to reintroduce and relitigate the issues previously ruled upon by the Board.

As discussed above, the MassAG, having chosen to take no part in the deliberations leading to the Board's Order, has not shown good cause

for its late filing of a contention which in essence seeks reconsideration of that Order. Nor has the MassAG made any effort whatsoever to shoulder its burden as to the other four factors required to be considered under § 2.714(a)(3), even though that burden is made heavier, under North Anna, et al., supra, by its failure to show good cause for late filing. Although the MassAG's failure to address the remaining factors is fatal to its argument in the absence of a showing of good cause, the Staff has chosen nonetheless to brief the Board on these factors.

Two of the remaining factors are: (ii) the availability of other means whereby the petitioner's interest will be protected; and (iv) the extent to which the petitioner's interest will be represented by existing parties. Although it may be true that there are no other means by which the MassAG's interest in litigating the issues that are the subject of this contention will be protected, and that no other existing parties will be able to represent that interest, such a conclusion does not end the analysis. If the admission of this late-filed contention is, indeed, the only way in which the MassAG's interest in litigating the issues therein can be protected, such is the inevitable predicament into which the MassAG has placed itself by sleeping on its right to oppose summary disposition of NECNP III.12 and III.13. To argue, however, that this self-imposed predicament is a reason for the Board to admit this contention would be absurd. Further, the MassAG's present expression of interest in litigating these issues is contradicted by its previous failure to take part in the deliberations resulting in their dismissal; in this case, the MassAG's inaction speaks more convincingly than its words.

Factor (iii) of § 2.714(a)(1) is the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. The Staff cannot know on what basis the MassAG would have relied had it chosen to press this factor as one favoring admission of its contention. If, however, that basis had been expertise, the MassAG would have been required to present a bill of particulars delineating its relevant expertise under Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759, 764 (1978).

As to the fifth and final factor -- the extent to which the petitioner's participation will broaden the issues or delay the proceeding -- scarcely could it be maintained that the admission of this contention will not significantly broaden the issues in this proceeding.

It is clear from the foregoing discussion that a balancing of the factors to be considered in deciding whether to admit a late-filed contention requires rejection of the contention proffered by the MassAG.

III. CONCLUSION

For the reasons discussed above, the NRC staff opposes the admission of the proposed "Contention of Attorney General Francis X. Bellotti Relative to Applicants' Evacuation Time Estimates for Beach Areas."

Respectfully submitted,

William F. Patterson, Jr.

William F. Patterson, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of August, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE OPPOSING ADMISSION OF 'CONTENTION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI RELATIVE TO APPLICANTS' EVACUATION TIME ESTIMATES FOR BEACH AREAS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 1st day of August, 1983:

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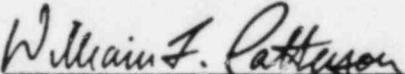
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