Filed: June 30, 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.	)	Docket Nos. 50-443 OL 50-444 OL
(Seabrook Station, Units 1 & 2)	)	

APPLICANTS' ANSWER TO "MOTION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI TO DEFER HEARING ON EVACUATION TIME ESTIMATES" AND "MOTION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI FOR EXTENSION OF TIME TO FILE REBUTTAL TESTIMONY ON CONTENTIONS REGARDING APPLICANTS' EVACUATION TIME ESTIMATES"

The Applicants hereby respond to two motions[1] of the Massachusetts Attorney General ("MassAG"), a

[1] "Motion of Attorney General Francis X. Bellotti to Defer Hearing on Evacuation Time Estimates (Contentions NECNP III.12 and III.13)" (hereinafter "Deferral Motion") and "Motion of Attorney General Francis X. Bellotti for Extension of Time to File Rebuttal Testimony on Contentions Regarding Applicants' Evacuation Time Estimates (Contentions NECNP III.12 and .13)" (hereinafter "Enlargement Motion"). Both motions were served on June 28, 1983.

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person admitted to this proceeding as an "interested state," and say that, for the reasons set forth herein, the Deferral Motion should be denied. The Applicants' take no position on the Enlargement Motion.

The Deferral Motion Should be Denied

There are presently two contentions regarding the Applicants' evacuation time estimates that have been admitted in these proceedings. Neither was advanced by MassAG, though MassAG has apparently now decided that it wishes to litigate those contentions full force. Both contentions were admitted on November 17, 1983, some 226 days (or 7½ months) ago. See Memorandum and Order of 11/17/83 at 19. Discovery has closed on these contentions and motions for summary disposition have been filed and answered, though MassAG at no time indicated any interested in opposing those motions. The summary disposition motions have not been ruled upon, and MassAG's Deferral Motion is premised on the apparent assumption that they will be denied. However, even if the summary disposition motions were to be denied, a hearing for all "Phase I" contentions requiring evidentiary hearings has been set. Thus, at what is truly the eleventh hour MassAG moves that the

hearing or these contentions be deferred altogether.[2] This motion should be denied.

In the first place, the motion is distinctly out of time. That consideration of objections to the Applicants' evacuation time estimates would be considered in "Phase I" of the hearings (to the extent not later withdrawn or dismissed summarily) has been established by the Board and accepted by all parties since last November. Schedules have been set and met on this basis. Nothing regarding the scope of the contentions has changed since that time that would make them any less suitable for hearing in the first phase, nor has anything happened since the setting of the schedule that puts a particular premium on "Phase I"

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[2]That is to say, MassAG has made no effort to segregate from among all of the issues that comprise the process of preparing evacuation time estimates those that can plainly be tried fully now and those as to which the present resolutions may possibly be subject to fine tuning in the event of a local-plan sponsored ameliorative action the effect of which has not previously been assessed. To the contrary, MassAG simply requests a wholesale deferral of the entire topic.

time.[3] The reasons given by MassAG for deferring Contentions III.12 and .13 -- which are, essentially, that the contentions should never have been regarded as "Phase I" contentions in the first place -- have been available since November.[4] They were not raised by

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[3]To the contrary, the only changes that have occurred are the withdrawal of a large number of "Phase I" contentions and the dismissal of several more, the unfortunate but necessary deferral of certain contentions that would otherwise have been litigated in the first phase because the necessity of submitting additional documentation, and the onset of signs that the number of contentions for "Phase II" will be very large and time-consuming. As a result, Phase I contains what might be regarded as some "extra" time, while "Phase II" shows signs of becoming congested. This tends to increase the importance of retaining "Phase I" contentions in the first phase and resisting the easy temptation to slip some issue to "Phase II."

[4]MassAG makes an argument, Deferral Motion at 2 n.1, to the effect that it, too, filed contentions going to the Applicants' evacuation time estimates, contentions which (according to MassAG) the Board "ruled were premature due to the absence of off-site emergency plans." Id. We suggest that history has been rewritten. None of MassAG's original four contentions (which are set forth in full in the Board's Memorandum and Order of 9/13/83 at 87-88) addressed evacuation time estimates explicitly, and certainly the FSAR and the evacuation time estimates contained therein were not the basis of any ruling grounded on "documents that are not in existence." See id. at 89. If the Board was induced by the generality at MassAG's contentions to overlook the basis for a possible contention that was then litigable, the duty was MassAG's to bring the matter to the Board's attention

MassAG then, nor were they raised at the time the Board scheduled proceedings for the hearing on motions for summary disposition on these contentions -- which MassAG did not even oppose -- nor were they raised during any of the discussions between the Board and parties regarding scheduling.[5] The attempt to inject

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and seek reconsideration -- as other parties did. Certainly MassAG was not entitled to assume that litigation of the FSAR-contained evacuation time estimates would be deferred until Phase II after the Board -- on reconsideration -- admitted the very contentions now in question as Phase I issues. To the contrary, MassAG's failure to make any motion at least after the November 17, 1982 Memorandum and Order is not credibly consistent with anything but an abandonment by MassAG of any separate contention on its part relating to the Applicants' evacuation time estimates contained in the FSAR.

[5]It is difficult not to wonder whether MassAG was suddenly inspired to join the fray on contentions III.12 and .13 at the last minute, or whether it has been lying in wait to file this motion for some time. Either way avails it not at all. If sudden interest is the source, MassAG must take the procedural posture as the other parties have left it; if an excess of cleverness is at the root, it need not be said that such a tactic would warrant the strongest criticism.

It is appropriate to observe that the scheduling of the hearings on presently admitted contentions was a topic explicitly addressed in the most recent pre-hearing conference. See Tr. 880-A through 899 (4/8/83). Though counsel for MassAG was present at the conference and participated in the discussion (id. at 894), she did not then raise this issue (though others did, id. at 889). On May 23, 1983, the Board issued

potential delay at this late stage is simply out of time and should be rejected on that ground alone.

Second, allowance of the motion would be inconsistent with the Commission's "Statement of Policy on Conduct of Licensing Proceedings," 13 NRC 452 (1981). On the one hand, allowance of the motion means certain delay, since that which would otherwise be litigated now is deferred until later. This situation becomes all the more acute here, given the relatively "open road" at present and the potential for greater congestion later on -- this means that not only will the litigation be deferred, but also that, all other things equal, it will take longer if it occurs in the second phase. All that MassAG offers on the other hand is the potential for some duplication which, even if taken at face value, cannot produce as much delay in the overall conclusion of the litigation. This is so because under no circumstances would everything

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its Order (Re: Hearing Schedule), wherein the suggestion for deferring litigation of the evacuation time estimate contentions was rejected. No objections to that Order were filed (either by MassAG or any other party) and the time for doing so has long since elapsed. 10 CFR § 2.752(c).

relevant to the evacuation time estimates have to be litigated over again because under no circumstances would everything relevant to the evacuation time estimates depend on the state and local plans the present absence of which is ultimately the sole basis of the motion.[6] Thus, there is no reason why such components of evacuation time estimates as population size, population growth, population distribution, geographic features, condition of existing roadways, intersections and other features, meteorological features, and analytic methodologies cannot be fully

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[6]At one point MassAG also refers to the fact that the New Hampshire state plan incorporates the Applicants' time estimates by reference and then suggests that this phenomenon also implies the potential for duplication. If what MassAG is suggesting -- though it has not said so explicitly -- is that the incorporation by reference entitles it or any other party to relitigate the validity of the entirety of the incorporated estimates, then surely MassAG is wrong. Whatever findings this Board makes on the Applicants' evacuation time estimates will apply equally to the incorporated estimates. If the validity of the Applicants' estimates is established by this Board (either on summary disposition or after the first phase of hearings), certainly MassAG will not be in a position to relitigate the very same issues simply because a planner later relies on (and incorporates) those estimates.

litigated now. All that MassAG suggests may change are such things a local-government imposed traffic controls, highway improvements, and increased resources; the effects of these can be litigated later, if necessary, and the effects of these all share the characteristic that they will tend to lower the resulting evacuation time estimates.

Finally, the Deferral Motion should be denied because its fundamental premise -- i.e., that litigation of the evacuation time estimates cannot be done until the state and local plans have been completely finalized -- is faulty. On the primary level, the basic parameters of evacuation time estimates include geography, population, roadway networks, and land usage factors. All of these presently exist and all can be litigated now. Broadening our view one step, it must be remembered that something as fluent as evacuation time estimates are not and never will be resoluable to several decimal places of precision -- nor are they intended to be. For the purpose of providing guidance to emergency action decisionmakers, fine precision is as unnecessary as it is impossible. In the unlikely event that a

decision to evacuate or not ever has to be made, it simply will not be relevant to know whether the "right" time for evacuating a given sector is 4 hours and 20 minutes or 5 hours and 40 minutes. Finally, viewing the matter from the perspective of the purpose of evacuation time estimates in the NRC process, MassAG has gotten the cart before the horse. One of the purposes of the estimates is to identify those traffic control and similar measures that might significantly shorten estimated evacuated times, so that a judgment can be made by the local planners as to whether the benefit of any given measure is with the cost and thence as to whether the particular measure ought to be included in the local plans. The local plans not only need not, but it is possible that in some cases they cannot, be totally "finalized" until after the evacuation time estimates have been completed.[7] And since the prospective value of any given traffic control measure will be assessed and

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[7]Of course, nothing in 10 CFR § 50.47 or App. E requires that plans be "final" at all. Cincinnati Gas & Electric Company (Wm.H. Zimmer Nuclear Power Station, Unit No. 1), ALAB 727, ___ NRC ___, Slip. Op. at 15 (5/2/83).

quantified in the hypothetical in any event, the fact of its present inclusion or not in a given piece of paper is irrelevant to the impact of the measure (if any) in the base-line estimates.[8]

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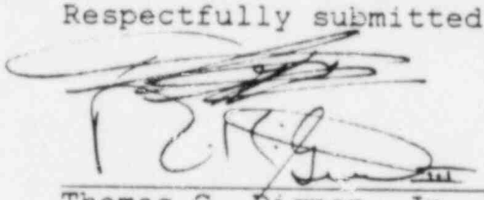
[8]MassAG leans heavily on an argument that the NRC Staff agrees with its assessment. Deferral Motion at 2-3. We submit that MassAG has flatly misconstrued the Staff filings (including the Sears Affidavit) and that MassAG has gotten the Staff's point exactly backwards. Sears points out, first, what we have said above, namely that "during the process of making the estimates, any situations requiring special attention during the planning process can be identified." Sears Affidavit, ¶ 9. (Mr. Sears then goes on to opine that the Applicants' evacuation time estimates meet any requirement on this score.) Mr. Sears does not say that the estimates will be useful for the decisionmaking function "only" if the subsequently-adopted local plans exactly track the traffic control assumptions of the Applicants' estimates. Compare Deferral Motion at 3. Obviously, if the local plans do that, then the bottom-line values of the estimates will be directly applicable. Just as obviously, if the evacuation time estimates -- or the Board's findings as a result of the litigation -- quantify the impact (if any) of any different control measures (either the deletion of one assumed in the Applicants' estimates or the addition of one not assumed therein) those estimates (as supplemented by those findings) will equally serve the decision-making function. (It is worth observing that, to date, no party to this litigation has specified any additional traffic control measures that should be added to or deleted from those assumed in the Applicants' estimates.) Finally, proof positive that the Sears Affidavit is being misused by MassAG lies in the fact that Mr. Sears and the NRC Staff support the allowance of the pending motions for summary disposition on contentions III.12 and .13.

The Enlargement Motion is Not Opposed

Though no adequate showing has been made,[9] the Applicants' nevertheless interpose no objection to the allowance of the Enlargement Motion (in the event that it is not mooted by allowance of the pending motions for summary disposition).

Respectfully submitted,



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[9]At a minimum, the Enlargement Motion ought to have identified the witness in question, described the nature of the conflicting engagement and how and when it came about sufficiently to enable the Board to make a judgment, stated when it was that MassAG first learned of the conflict, and at least attempted a demonstration that no lack of diligence caused the last-minute motion. As it is framed, the Enlargment Motion contains none of these essential elements of decision and, therefore, it forces the Board to a "take it or leave it" proposition on what is essentially an ipse dixit.

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on June 30, 1985, I made service of the within "APPLICANTS' ANSWER TO 'MOTION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI TO DEFER HEARING ON EVACUATION TIME ESTIMATES' AND 'MOTION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI FOR EXTENSION OF TIME TO FILE REBUTTAL TESTIMONY ON CONTENTIONS REGARDING APPLICANTS' EVACUATION TIME ESTIMATES'" by mailing copies thereof, postage prepaid, to:

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