UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Ivan W. Smith, Chairperson
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	)	Docket Nos. 50-443-444-OL (Off-site EP)
	)	February 19, 1988

ATTORNEY GENERAL JAMES M. SHANNON'S MEMORANDUM IN OPPOSITION TO ENTRY OF A PERMANENT PROTECTIVE ORDER REGARDING PORTIONS OF THE SEABROOK PLAN FOR MASSACHUSETTS COMMUNITIES ("SPMC") AND IN SUPPORT OF HIS MOTION TO COMPEL DISCLOSURE OF ALL SPMC COMPONENTS

Attorney General James M. Shannon hereby submits this memorandum in opposition to entry of a permanent protective order regarding certain redacted portions of the Seabrook Plan for Massachusetts Communities ("SPMC") and in support of his Motion, filed herewith, to lift the temporary protective order and compel disclosure of all portions of the SPMC not yet disclosed. The Attorney General asserts that there is no legal basis or demonstrated need for any form of protective order pertaining to this information. The temporary protective order which has been imposed by the Board should be lifted. To the extent that all components of the SPMC have not already been disclosed, this Board should compel disclosure.

BACKGROUND

Last September, when the Applicants filed their compensatory utility emergency plan for the Massachusetts portion of the EPZ and served it upon all the current parties to this proceeding, substantial information was deleted. The deleted information included, inter alia, (1) [from Appendix C] the names, addresses, contact persons, and compensation agreements for companies, providers and individuals who have entered into letters of agreement; (2) [from Appendix M] the identification of host facilities for schools, day care centers, nursery schools, nursing homes, homes for the mentally retarded, and hospitals; an inventory of road crew companies; names, addresses, and telephone numbers of bus, ambulance, snow removal, and wheelchair van companies; the names, addresses, contacts, and phone numbers of congregate care centers, host school facilities and host special facilities; a listing of the reception hospitals indicating for each the "total beds/average capacity"; and (3) [from Appendix H] the names and phone numbers of hundreds of members of the New Hampshire Yankee Offsite Response Organization.

In a letter dated September 18, 1987, accompanying submission of the SPMC, George S. Thomas, Vice President for Nuclear Production at New Hampshire Yankee, stated that "[t]hese redactions have been made to assure that there will not be any unwarranted invasions of personal privacy of individuals and organizations needed to implement the Plan and certain members of the general public." (Thomas letter, at 4.)

Subsequently, on November 25, 1987, the Commission stated that "[w]hile [it could] well understand why the Applicants might wish to withhold individuals' names and phone numbers given the emotionally charged atmosphere that surrounds this particular plant, that concern must eventually give way to the needs of staff and FEMA to review the emergency plans." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-13 at 6. Thus the Commission made it "a condition of low power operation" that the Applicants "provide to the staff and FEMA any of the deleted information that the staff and FEMA deem necessary for detailed full power review of the emergency plan." Id.

In addition, the Commission expressed its concern that the information not be withheld from the other parties:

> Also prior to low power applicants should clearly state for the record their willingness to provide the detailed information to the other parties to the proceeding, if necessary under appropriate protective orders from the Licensing Board. The Commission is confident that the Licensing Board can fashion appropriate orders and procedures to allow full litigation of the contested issues without unnecessarily violating personal privacy.

Id., at 6-7.

Thereafter, by letter dated December 23, 1987, Mr. V. Nerses for the NRC staff requested that the Applicants provide certain redacted information necessary to support review of the SPMC by FEMA and the NRC staff. None of the redacted information from Appendix H (members of the offsite response organization) was requested, however. In a letter dated December 30, 1987, from Mr. T.C. Feigenbaum, New

Hampshire Yankee (NHY) submitted to the NRC the information that the NRC Staff had requested. Mr. Feigenbaum, however, requested that the information being provided be withheld from public disclosure pursuant to 10 C.F.R. 2.790. Mr. Nerses, for the NRC staff, granted this request by letter dated February 5, 1988, and stated that, "based on the requirements and criteria of 10 C.F.R. 2.790 and, [sic] on the basis of Mr. Feigenbaum's statements, [the NRC staff had] determined that the submitted information sought to be withheld contains proprietary commercial information." No further explanation for this determination was provided except to note that the versions of the submitted information marked proprietary would be withheld from public disclosure "pursuant to 10 C.F.R. 2.790(b)(5) and Section 103(b) of the Atomic Energy Act of 1954, as amended."[1/]

Subsequently, on February 10, 1988, and on two previous occasions (see Tr. 8398-8425, 8987-9004), the Board and the parties discussed the entry of a temporary protective order to allow the redacted portions of the SPMC to be provided by the Applicants to the parties without further delay. While the counsel present for the Mass AG on February 10 did not object to the entry of a temporary order pending receipt of arguments

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1/ At the same time that the NRC Staff was assessing the Applicants' request to have the NRC withhold this information pursuant to 10 C.F.R. § 2.790, the Staff was considering a FOIA request for this same information. That request, made by the Rockingham County Newspapers in January 1988, has been or soon will be rejected according to statements made by counsel for the NRC staff at the NHRERP hearings on February 10, 1988. At that time the NRC's counsel also indicated that the reason for denying this FOIA request would be "economic impact."

and a decision on the merits regarding the necessity for a permanent protective order, they strongly urged the Board to decide ultimately that no protective order is necessary. The steps agreed to by the parties on February 10 were, first, that counsel for the Applicants would draft a proposed protective order and form of affidavit and, next, that these would be circulated to the other parties for their quick comments. However, the Board pre-empted this process on February 17, 1988, by issuing, with minor revision, the draft temporary protective order. See Memorandum and Order (Revising Schedule and Approving Protective Order) dated February 17, 1988.[2/]

ARGUMENT

I. The Applicants have not made a sufficient showing that disclosure of the entire SPMC without a protective order will necessarily result in any legally cognizable invasion of personal privacy or other specific harm.

A. The legal standards

This is to be sure an unusual situation. The intervenors want certain redacted portions of the SPMC; they want to be able to use it fully to prepare for and litigate the contested issues; and they want the public to have it. While the NRC Staff apparently has some of the information sought, they do not have it all (e.g., the names and phone numbers of

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2/ That same day the Board allowed the ex parte motion of the Attorney General, agreed to by counsel for the Applicants and the NRC Staff, for (1) an extension to February 19, 1988, to file the instant memorandum and (2) a pro rata extension of the previously scheduled dates for the Applicants and the NRC Staff to respond with memoranda on this issue of the redacted information.

hundreds of members of the New Hampshire Yankee Offsite Response Organization contained in Appendix H). This therefore, is not a motion by the intervenors pursuant to 10 C.F.R. 2.744 for production by the NRC of documents withheld from public inspection pursuant to 10 CFR 2.790. Nor is this a formal "discovery" request made pursuant to 10 CFR 2.740 seeking a matter "which is relevant to the subject matter involved in the proceeding . . ." 10 C.F.R. 2.740(b)(1). This is a request for portions of the "subject matter" itself. Clearly the formal discovery stage of the SPMC case will not occur for months, after contentions are filed. Similarly, this is also not a premature formal request for "discovery" of relevant information prior to and for the purpose of framing contentions and their bases. What the intervenors want is simply a copy -- a complete copy -- of the SPMC itself, a document whose contents the Commission has indicated in CLI-87-13 they are to receive. That decision is key here, for it provides the only applicable legal standard -- no specific NRC regulation applies. The key language states as follows:

> Also prior to low power applicants should clearly state for the record their willingness to provide the detailed [deleted] information to the other parties to the proceeding, if necessary under appropriate protective orders from the Licensing Board. The Commission is confident that the Licensing Board can fashion appropriate orders and procedures to allow full litigation of contested issues without unnecessarily violating personal privacy.

CLI-87-13 at 6-7 (emphasis supplied).

The legal standard imposed on the parties and the Board is, therefore, whether any protective order is "necessary" to

protect personal privacy. If the Board determines that a protective order is "necessary," then the protective order must be narrowly drawn so as "to allow full litigation of contested issues." Id. Such order should prohibit only those disclosures of private personal matters which are not necessary to a full litigation of the contested issues.[3/]

Thus, the legal standard to be applied here is not a balancing test which requires the Board, in shaping a protective order, to weigh the privacy interests at stake with the needs of the parties to conduct a full litigation. Cf. C.F.R. 2.790 (b)(5) [Commission to determine, inter alia, "whether the right of the public to be fully apprised . . . outweighs the demonstrated concern for protection" (emphasis supplied)].

3/ The Mass. AG also believes that, by virtue of his constitutional office, he has a responsibility in this case (as in many others) to continue to speak out on the many issues of concerned to the public in the Commonwealth. Details of the Massachusetts Plan will be of great interest and concern to the citizens of Massachusetts, both within and without the EPZ, so long as the licensing process continues. In this circumstance, strict scrutiny of any extension of the present temporary protective order would be required by the First Amendment, even if only private parties were affected, to determine

> whether the "practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment feedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." [Citations omitted]

Seattle Times v. Rhinehart, 104 S.Ct. 2199, 2207, 467 U.S. 20 (1984)(Protective order issued in litigation between private parties pursuant to rules of discovery does not offend the First Amendment where entered on a showing of good cause [respondent's associational rights of privacy and religious expression], is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources in addition to discovery.

B. There has been no sufficient showing of the necessity for any protective order.

Apart from the oral statements of Applicants' counsel on various occasions at the hearings, the only formal presentations by the Applicant of the necessity for a protective order are contained in (1) the letter from NHY's George Thomas dated September 18, 1987, accompanying the Applicants' submission of the SPMC, and (2) the letter and affidavit from NHY's T.C. Feigenbaum, dated December 30, 1987.[4/]

The statements in the Thomas letter do not support a showing of necessity. Only one sentence in the letter is relevant, and it states: "These redactions have been made to assure that there will not be any unwarranted invasion of personal privacy of individuals and organizations needed to implement the plan and certain members of the general public." Thomas letter, at 4. No details or justification regarding this purported "unwarranted invasion of personal privacy" are provided.

The Affidavit of T.C. Feigenbaum is marginally more informative, but the assertions made are all frankly speculative. For example, it states:

> [S]uch disclosure could potentially subject [the individuals and entities involved in carrying out the SPMC] to unnecessary contacts and interruption of their private lives by members of the public at large . . . and create real potential for undermining

4/ If Applicants, in order to further justify the necessity of a protective order, submit any additional information or affidavits with their response to this memorandum, the Attorney General requests an opportunity to file a reply brief responding to any new information.

> efficient implementation of the Plan during routine exercises of the Plan or in the unlikely event or [sic] a real emergency at Seabrook Station; . . .

Feigenbaum affidavit, at 2. Again, no specific reasons are given as to why this "potential" is other than speculation. Further on, after repeating the formula for a request for 2.790 protection, Mr. Feigenbaum alludes back, apparently, to the above-quoted statement: "As indicated above, premature disclosure of the information could undermine the viability of the plan and the commitment of those entities and individuals to its successful implementation." Id., at 3 (emphasis supplied).

Conclusory speculation of this sort has been found by NRC licensing boards to be insufficient to support requests for protective orders in other similar contexts. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979) (insufficient factual foundation presented to justify a protective order to prevent public revelation of the identity of members of a potential intervenor organization, an anti-nuclear group, which had alleged that disclosure would occasion an invasion of the members privacy and subject them to harassment of various types at the hands of utilities and government agencies).

At the hearings, Applicants' counsel has stated the concerns in similar general terms:

> "I just want [] a protective order so that I can protect these people from possible harassment who have agreed to cooperate." (Tr. 840, emphasis supplied)

> "You know, there's no kidding what this is all about, your Honor. You have, as you always do, delicately put it. [T]here is a thread of indication that agreements that we have with people come apart, and we want to protect those names as long as we can."
> (Tr. 8419, emphasis supplied)

> "What I'm worried about is when . . . I make it public some crowd, unnamed but sometimes thought of as having the same symbol as a shellfish we all know well, might just go down and raise hell on the front steps of somebody's place. * * * I'm concerned about elements of the public, in the Commonwealth of Massachusetts, who I think will put, exert, tremendous pressure and are answerable to no one like this Board, for doing so."
> (Tr. 9001, emphasis supplied)

In conclusion, there has simply been a wholly insufficient factual showing that a protective order is necessary in this circumstance. The mere disclosure of the names and addresses of the companies and individuals who will be relied upon for support and services violates no privacy rights whatsoever. In any event, only individuals, not commercial entities, have "privacy" rights. As to the names and addressed of individuals, especially but not limited to those who have duties and responsibilities to the public, there is no protectable privacy interest whatsoever under Massachusetts law. See Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812 (1978); Pottle v. School Committee of Braintree, 395 Mass. 861,866 (1985).

At the federal level, in FOIA cases in which it is alleged that harassment will occur if an individual's identity is disclosed, the courts require a specific factual showing of the likelihood of this harassment and make an exception to this

requirement only in those cases involving the identities of a narrow range of law enforcement personnell for whom disclosure creates obvious discernable difficulties. See, e.g., Ingle v. Dept. of Justice, 698 F.2d 259, 269(6th Cir. 1983)(FBI agents); Miller v. Bell, 661 F.2d 623, 629-630(7th Cir. 1981), Cert. denied, 456 U.S. 960, 102 S.Ct. 2035(1982)(FBI agents); New England Apple Council v. Donovan, 725 F.2d(1st Cir. 1984)(investigators of labor racketeering for the office of Inspector General of the Department of Labor); Nix v. United States, 572 F.2d 988(4th Cir. 1978)(FBI agents and Assistant U.S. Attorneys). In Nix, the court warned that even for highly sensitive law enforcement personnel, protection of their identities in response to a FOIA request could not always be guaranteed: "The court recognizes that, in a matter arousing greater public interest, non-disclosure of these official's identity might be overborne by the legitimate interests of the public. See Deering Milliken, 548 F.2d at 1136-37." Nix, at 1006.

Here, by contrast, with respect to the dispute over the adequacy of emergency plans for Massachusetts, there is undisputably a matter of substantial public interest about the identities of individuals who lack the obvious and discernable need for secrecy possessed by federal law enforcement officials. The Governor of the Commonwealth of Massachusetts has stated that no set of emergency plans can afford adequate protection to the citizens of Massachusetts within the EPZ. Now, in response, New Hampshire Yankee has asserted it can adequately respond during an emergency with an undisclosed

group of private individuals whose qualifications and training are unknown. Substantial public scepticism abounds about the efficacy of the utlity plan, some of it generated by the very fact that the identities of the responders, host facilities, etc., has been withheld. The public has both an interest and a right to know who these responders will be in order to judge for itself how adequate the response will be.

Even though the Mass. AG asserts that a balancing test is not to be applied in deciding whether to keep or lift a protective order, if such a test were applied the balance would surely tip in favor of public disclosure here. The evidence advanced to support secrecy is highly speculative and generalized; in contrast, the public interest in disclosure is strong and weighty.

II. By refusing to permit public disclosure of critical components of this utility plan, the Board is failing to allow "full litigation" of the plan in violation of the Commission's order, Section 189(a)(1) of the Atomic Energy Act, and the principles of due process.

A. Potential new intervenors cannot fully assess how they might be affected and are thereby unable to draft any number of contentions, and to allege a wide range of harms, needed to petition to intervene.

"Full litigation" of the SPMC is not possible unless all those groups and individuals who are affected by the plan have a meaningful opportunity to scrutinize its essential elements, to assess whether the plan is adequate, and to seek to intervene or otherwise be heard, either to raise inadequacies not raised by other intervenors or to assist in the development of a sound record in ways the current parties cannot. The

Mass. AG believes that throughout the Massachusetts portion of the EPZ there are dozens if not hundreds of persons who have concerns about who the responders are for them. Day care centers will want to know what their host facilities are and what specific bus arrangements have been made for them. Group homes for the retarded have similar concerns. There are hospitals, social service organizations of all sorts, community groups, neighborhood associations, local governments, service provider organizations, medical associations, schools, large and small private companies -- all of whom want to know what the plans provide for them specifically.

The Massachusetts Attorney General is not capable of knowing how the plans will affect all of these persons or of fully representing each of their interests. "Full litigation" of these plans is possible only in the sunshine that permits all these affected individuals and groups to have a full opportunity to participate as parties or to be heard through cooperation with existing parties.

With a protective order like that now in place, further intervention will be severely curtailed. Denying these potential intervenors access to the full set of plans available to the current parties violates (1) the Commission's directive that the Licensing Board "allow full litigation" of this case (2) Section 189(a)(1) of the Atomic Energy Act, and (3) the due process and equal protection clauses. There is no sound basis for a protective order which offers full hearing rights and opportunities only to the current parties.

B. The current Intervenors are being denied the full opportunity to gather all evidence otherwise obtainable from third parties about deficiencies in the plans.

Pursuant to the temporary protective order, the current intervenors will receive the "protected information" but can disclose it to only (1) their non-lawyer representatives (if "approved" by the Board) or (2) their technical experts and advisors. This imposes a tremendous hardship on the ability of the Intervenors to gather the information necessary to litigate the SPMC fully. While asking Intervenors' experts and advisors to review and comment on the SPMC is important to case preparation, it is equally important to be able to speak freely with third parties of all sorts about the SPMC responders, contractors, and host facilities in order to gather information and evidence regarding the probable adequacy of the services and the performance to be expected.

For example, if any Intervenor wants to know whether the host facility for a particular group home for the mentally retarded will be able to meet the needs of all who are relocated there, it cannot speak either to present or former staffers about use of the host facility during an emergency at Seabrook.

There are hundreds of potential third party sources of information about the "protected" portions of the SPMC who the present protective order prohibits the Intervenors from contacting. Not only is this a violation of due process, it is also wholly at odds with the public interest view that the NRC and the Intervenors ought to share -- that emergency plans are

best scrutinized carefully by the people (whether "experts" or not) with the most specific knowledge or information. If the Intervenors cannot now turn to these "non-experts" and ask them what they know about aspects of the "protected" portion of the plan, then they cannot fully litigate the case.

CONCLUSION

For the reasons set forth above, the Board should lift the temporary protective order and compel the intervenors to produce all redacted aspects of the SPMC which have not already been produced.

Respectfully submitted,

Allan R. Fierce
Assistant Attorney General
Nuclear Safety Unit

Dated: February 19, 1988

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL

CERTIFICATE OF SERVICE

I, Allan R. Fierce, hereby certify that on February 19, 1988, I made service of the within Motion of Attorney General James M. Shannon to Lift Temporary Protective Order and to Compel Disclosure of all Those Portions of the Seabrook Plan for Massachusetts Communities Which Have Yet to be Disclosed to the Intervenors and Attorney General James M. Shannon's Memorandum in Opposition to Entry of a Permanent Protective Order Regarding Portions of the Seabrook Plan for Massachusetts Communities (SPMC) and in Support of his Motion to Compel Disclosure of all SPMC Components, by mailing copies thereof, postage prepaid, by first class mail to, or by Federal Express to those individuals as indicated by *:

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