UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:
Alan S. Rosenthal, Chairman
Howard A. Wilber

IN THE MATTER OF	Docket Nos. 50-443-OL-1 50-443-OL-1
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE	
(SEABROOK STATION, UNITS 1 and 2)	(On-Site Emergency Planning and Safety Issues)

January 28, 1988

SUPPLEMENTAL MEMORANDUM OF ATTORNEY GENERAL JAMES M. SHANNON IN SUPPORT OF MOTION TO ADMIT LATE-FILED CONTENTION AND REOPEN THE RECORD

I. INTRODUCTION

On November 13, 1988, Massachusetts Attorney General James M. Shannon ("Attorney General") filed a contention and motion to admit the contention and to reopen the record addressing the City of Newburyport's dismantling and removal of emergency notification sirens. On January 7, 1988, the Attorney General filed similar papers with respect to the dismantling and removal of all the remaining emergency notification sirens within the Massachusetts portion of the EPZ. The Applicants

then represented to the towns within the EPZ and subsequently acknowledged to this Board that they would no longer rely on pole-mounted sirens to satisfy their burden of demonstrating that means exist to provide early notification and clear instruction to the Massachusetts population within the EPZ. Notwithstanding that they have not revealed an alternative system, the Applicants ask this Board not to reopen the record and base that request on a misstatement of the facts underlying the removal of the sirens and a misapprehension about the law of estoppel and the criteria for reopening the record in NRC proceedings.

II. ARGUMENT

A. The Actions At Issue Were Taken By The Selectmen Of The Various Communities[1] In Response To A Federal Court Order.

On December 16, 1987, the United States Court of Appeals for the First Circuit ruled that PSNH was unlikely to prevail on the merits of its lawsuit against the Town of West Newbury, Massachusetts, challenging the town's attempt to remove the sirens located in it. Public Service Co. of New Hampshire v. Town of West Newbury, ____ F.2d ____ (No. 87-1395) (1st Cir. December 16, 1987). In 1984, PSNH had applied for and received

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1/ The January 7, 1988 Contention of the Attorney General also raises the removal of the Applicants' siren from the Salisbury Beach State Reservation. The removal resulted from the nonrenewal of New Hampshire Yankee's Special Use Permit by the Massachusetts Department of Environmental Management. See Exhibits 2 and 3 to January 7, 1988 Contention.

permits from the Town's Board of Selectmen to install the poles. In March, 1987, the Selectmen determined that they had granted the permit without statutory authority and ordered PSNH to remove the poles. Id. slip. op. at 2. When PSNH refused, the Board held a public hearing, at which PSNH presented its arguments, and reviewed the utility's post-hearing submission. The Board then reaffirmed its earlier order. Id. slip. op. at 2.

After examining the purported statutory authority for the permits, M.G.L. c. 166, §§21, 22 (governing construction of transmission lines and associated facilities) and other potential statutory authority, M.G.L. c. 40, §3 (governing towns' holding, leasing and conveying of property), the First Circuit concluded that the Selectmen probably had issued the permits without the requisite authority. Id. slip. op. at 7-11. Therefore, the Court affirmed the District Court's denial of a preliminary injunction against removal of the sirens sought by PSNH. Id. slip. op. at 12.

The First Circuit's decision was followed by votes of the Boards of Selectmen of West Newbury and the other Massachusetts communities (which had issued the permits under the same, apparent authority) to instruct PSNH to remove the sirens within their respective towns. See letters attached as Exhibit 1 to January 7, 1988 Contention. The opposition of these communities to the licensing of Seabrook Station is well understood. However, the towns determined, and the First

Circuit agreed, that they probably had no authority to permit the installation of the sirens in the first place. That determination was made by the towns, not by the Commonwealth, its agencies, or the Attorney General.

The Applicants' characterization of the towns' actions as part of a systematic plot orchestrated by the Commonwealth and its agencies to destroy the early notification system reveals a misunderstanding of applicable law as well as of relevant fact. Generally, the Home Rule Amendment to the Massachusetts Constitution grants cities and towns broad municipal powers, largely independent of the state government. Mass. Const. amend. art. 89, art. 2, §1 ("It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government and to grant and confirm to the people of every city and town the right of self-government in local matters . . ."). See Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 358 (1973) ("Municipalities are now [after the 1966 enactment of the Home Rule Amendment] free to exercise any power and functions excepting those denied to them by their own charters or reserved to the State by §7, which the Legislature has the power to confer on them . . ."). Those powers include full legislative authority, subject to control by the state legislature.2/ Bloom v. Worcester, 363 Mass. 136, 150, n.9

2/ The Applicants have made no claim that the Massachusetts legislature is part of any "conspiracy" to destroy the early notification system.

(1973) (quoting from 1966 Senate Doc. No. 846 at 18). Moreover, Chapter 166 of the Massachusetts General Laws, under which PSNH initially received its siren permits, sets forth a two-tiered procedure, which preserves the distinction between municipal activity on the one hand and state activity on the other, for obtaining permission to construct transmission lines. Under section 22, the company first petitions the Board of Selectmen of the town where the construction is proposed to take place. If the petition is denied, the company may petition the Commonwealth's Department of Public Utilities for the approval the municipality refused or neglected to give. The independence of the towns from the various state executive officials the Applicants point to is, therefore, well-established as a matter of Massachusetts law.

B. The Commonwealth Should Not Be Precluded For Seeking A Reopening Of The Record.

The Applicants' "estoppel" or "waiver" argument, candidly acknowledged by them to be a "novel one in NRC jurisprudence," should be rejected.

First, the activities of the towns were not the activities of the Commonwealth. In any event, they were fully consistent with, and perhaps even mandated by state law.3/

Second, it is clear from Heckler v. Community Health

3/ For these reasons, the Applicants' far-fetched analogy of the towns' decisions to the action of a trespasser and vandal in a nuclear power plant (Applicants' Answer at 6) merits no serious response.

Services of Crawford County, Inc., 467 U.S. 51, 61-63 (1987), that a private party cannot base an estoppel on a government's invalid extension of a privilege to that private party. See id. at 60 ("it is well settled that the Government may not be estopped on the same terms as any other litigant."); Holahan v. Medford, 394 Mass. 186, 191 (1985) ("In general, we are 'reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law intended to protect the public interest'."); Camache v. Mayor of North Adams, 17 Mass. App. 291, 294 (1983) ("Generally, the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute.").

Third, the Applicants' argument that there should be no evidentiary hearing, since to do so would "reward" the Commonwealth for its claimed misdeeds, only obscures the Applicants' own failure to meet NRC and FEMA regulations and guidelines. It is the Applicants' responsibility, not the intervenors' responsibility, to establish an early notification system that can withstand legal scrutiny. They have not done so.

C. The Criteria For Reopening Are Met.

The Applicants conclude that in order for a determination to be made on the reopening criteria this Board should delay its ruling on the motion to reopen until a new warning system has been proposed. Applicants' Answer at 11. They reach that

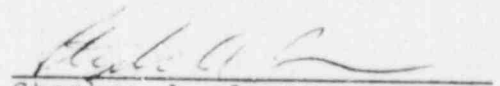
conclusion by arguing that the Licensing Board could not have reached a different result had this evidence been proffered because no appropriate contentions were before it. But, of course, no contentions were filed with the Licensing Board on the issue because the sirens had not been removed at that time. The only sensible way to apply the materially different result criterion here is to assume that the Licensing Board would have had jurisdiction to hear the evidence by virtue of the filing of appropriate contentions. The Applicants' reading would create the anomaly that new evidence so extensive and potentially serious as to require new contentions would be a weaker candidate for reopening than new evidence that relates only to an existing contention.

The Applicants' argument is merely another plea for more time to create a new notification system and to postpone indefinitely a necessary reopening of the record. Once again, the Applicants attempt to turn NRC procedure on its head. Their failure to provide any information on this critical safety system is not a reason to keep a now deficient record closed. Rather, it is an entirely sufficient reason to reopen

the record and postpone low-power operation until the issue is fully resolved.[4/]

JAMES M. SHANNON
ATTORNEY GENERAL

COMMONWEALTH OF MASSACHUSETTS



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DATED: January 28, 1988

4/ The Applicants have ignored the Attorney General's request at page 3 of his January 7, 1988 Contention "that this Board issue an order" that a low-power license not issue unless and until the Applicants have demonstrated compliance with section 50.47(b)(5). Applicants' Answer at 2. Contrary to the Applicants' claim, such an order would not be premature once the record is reopened. This Board has already found that the off-site notification system is "within the ambit of on-site emergency planning." ALAB-879 at n.4.

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	)	

January 28, 1988

CERTIFICATE OF SERVICE

I, Stephen A. Jonas, hereby certify that on January 28, 1988 I made service of the within document by mailing copies thereof, postage prepaid, by first class mail, or as indicated by an asterisk, hand delivered, or as indicated by double asterisk by Federal Express mail, or as indicated by a triple asterisk by telecopier, to:

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