UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF	)	50-444 OL-01
NEW HAMPSHIRE, et al.	)	On-site Emergency Planning
	)	and Safety Issues
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO CONTENTION OF ATTORNEY GENERAL JAMES M. SHANNON ON NOTIFICATION SYSTEM FOR MASSACHUSETTS AND MOTION TO ADMIT LATE-FILED CONTENTION AND REOPEN THE RECORD

INTRODUCTION

On January 19, 1988, the NRC Staff received a copy of the "Contention On Notification System For Massachusetts And Motion To Admit Late-Filed Contention And Reopen The Record" ("Motion") filed on January 7, 1988 by the Attorney General for the Commonwealth of Massachusetts ("AG"). In his motion, the AG requests the Appeal Board to reopen the on-site emergency planning phase of this proceeding and admit a late-filed contention which alleges that "Applicants have failed to comply with the provisions of 10 C.F.R. § 50.47(b)(5) and Part 50, Appendix E, § IV(D)(1) and (3), because no means have been established to provide early notification and clear instruction to the populace of the Towns of Amesbury, Merrimac, Newbury, Salisbury and West Newbury, Massachusetts and the Salisbury State Beach Reservation in Salisbury, Massachusetts." AG Motion at 7. The asserted basis for the AG's late-filed contention is that the alert sirens situated in these localities

which Applicants relied upon to comply with section 50.47(b)(5) have or soon will be removed. Id. at 8 and Exhibits 1-3.

BACKGROUND

In prior proceedings before the Licensing Board, no issue has been raised concerning the emergency notification system for the Massachusetts portion of the emergency planning zone; nor was Applicants' compliance with 10 C.F.R. § 50.47(b)(5) with regard to that area challenged in the proceedings below. No low power license has been issued for Seabrook Station, although a fuel loading and precriticality license has been issued. See CLI-87-02, 25 NRC 267, 269 n.4.

On December 30, 1987, Applicants issued a press release which states that Applicants have "offered to give its 32 siren poles in five northeastern Massachusetts towns to each of the respective town governments," and that "the Massachusetts sirens will no longer be part of the plant's licensing efforts. See Attachment to Letter from Edwin J. Reis to Members of the Appeal Board and Licensing Board Panels (January 7, 1988). According to the press release, if the towns involved accept the siren poles, Applicants "will disconnect all equipment used by Seabrook personnel to activate the sirens." Id.; see also AG Motion, Exhibit 4. The towns to whom this offer was made -- West Newbury, Amesbury, Newbury, Merrimac, and Salisbury -- all are located within the Massachusetts portion of the Seabrook emergency planning zone (EPZ). As of this date, none of the towns has accepted Applicants' offer and each has expressed its intention to dismantle and remove the sirens

therein situated. Id., Exhibit 1. In addition, Applicants have not adopted an alternative plan to provide early notification and clear instruction to the affected populaces although they have indicated that they will do so. See e.g., Applicants Motion For A Further Extension Of Time at 2 (January 20, 1988); Attachment to Letter from Edwin J. Reis to Members of the Appeal Board and Licensing Board Panels (January 7, 1988); AG Motion, Exhibit 4 at 1. Thus, at present there now exists no plan for notifying the residents in the Massachusetts portion of the emergency planning zone of an emergency at the Seabrook Station as is required by 10 C.F.R. § 50.47(b)(5).

The instant late-filed contention and motion to reopen the record is substantially similar to the one filed by the AG on November 12, 1987 regarding the removal of the Newburyport, Massachusetts sirens. See Contention Of Attorney General James M. Shannon And Motion To Admit Late-Filed Contention And Reopen The Record (January 7, 1988). In responding to that contention and motion, the Staff recommended that the Appeal Board defer ruling on the AG's motion "until after Applicants submit their alternative plans [for providing early notification and clear instruction to the affected population] and the Intervenors submit their contention, if any, on such plans." NRC Staff Response To Contention Of Attorney General James M. Shannon And Motion To Admit Late-Filed Contention And Reopen The Record at 7-8 (January 14, 1988). This recommendation was made based upon the Staff's view that the removal of the alert sirens would not present a "significant safety issue" or demonstrate the likelihood that a different result would have obtained (which must be the case to warrant a reopening of the record) if

Applicants had other adequate means of notifying the affected populations. Id. at 5-6. Because Applicants had announced that they would develop other means of notifying the public, but had not yet completed their alternative plans, the Staff urged the Appeal Board to defer ruling on the motion to reopen until the plan was submitted and the Staff had made a determination as to whether it complied with 10 C.F.R. § 50.47(b)(5). Id. at 8.

The Appeal Board was not persuaded that this approach should be taken at this time. In an order issued January 20, 1988, the Appeal Board stated:

> [I]t appears to us that that consideration [that Applicants' will submit alternative public notification plans] is entirely irrelevant to the question whether the Attorney General's motion satisfies the established criteria for the reopening of a closed evidentiary record and the admission of new contentions.

January 20, 1988 Order at 1 (unpublished). The Appeal Board indicated that this was a tentative position by affording the Staff and Applicants the opportunity to explain why "the filing of substitute notification plans for Massachusetts may be relevant to the disposition of [the AG's] motion." Id. at 2.

As explained below, the AG's motion must be judged by the existing state of the record not on the basis of some hypothetical facts which may come into being in the future. 1/ Currently, there is no alternative public notification plan, and there is no basis upon which to issue any low power operating license. The AG's motion to reopen does not

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1/ No contention had been admitted dealing with the adequacy of the notification system in Massachusetts.

present a "significant safety issue" -- the most important of the criteria which must be satisfied to reopen a closed evidentiary record -- because the Staff has not determined, pursuant to 10 C.F.R. § 50.57(a), that the facility will operate in accordance with the Commision's rules and regulations including 10 C.F.R. § 50.47(b)(5), which relates to notification of the public in the Massachusetts portion of the Seabrook emergency planning zone. Further, under 10 C.F.R. § 2.734(a), the AC must show that a "materially different result would be likely" in order to prevail on his motion. As will be explained, the AC has not made this showing. Accordingly, the AC's motion should be denied.

DISCUSSION

A. Legal Standards

In NRC proceedings, motions to reopen a record are governed by 10 C.F.R. § 2.734. Paragraph (a) of this regulation provides:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
>
> (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 proffered evidence been considered initially.

The "most important of these criteria is whether the motion raises a significant safety or environmental issue." Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264

(1986). In addition, a motion to reopen which relates to a late-filed contention must also meet the standards governing late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1). See 10 C.F.R. § 2.734(d). Reopening a closed record is, as the Commission has noted, an "extraordinary action" and thus requires the movant to bear a "heavy burden." See 51 Fed. Reg. 19535, 19538 (May 30, 1986); accord Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978). The reason a motion to reopen is not to be granted lightly is because of the public interest in ensuring that "once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process." 51 Fed. Reg. at 19539.

In passing upon a motion to reopen a board is to consider the moving papers and any opposing filings. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Filings in opposition, of course, may be accompanied by "affidavits or other evidence." 10 C.F.R. § 2.730(c) (emphasis added). If the affidavits or other evidence filed in opposition to the motion to reopen indicate that no significant safety issue is presented or that a different result would not have obtained if the movant's evidence had been considered initially, the motion to reopen must be denied. Vermont Yankee, supra, 6 AEC at 523. In such a case:

> The 'record' (in the broad sense) will necessarily have been supplanted by the introduction of affidavits, letters or other materials accompanying the motion and the responses thereto. The 'hearing record,' however, has not been reopened. Typically, in this situation, the result will be designated a denial of the 'motion to reopen the record,' even though that description of the action taken does not precisely reflect what transpired. For clarity, the order denying the motion should

> state that the record has been supplemented and that the denial of the motion is based on the absence of a triable issue.

Id. at 523-24; see e.g., Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133-34 (1986) (motion to reopen denied based on Staff analysis prepared after close of evidentiary record); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 25 NRC ___ (November 20, 1987) (denial of motion to reopen record upheld on basis of additional tests performed after close of evidentiary record).

2. The AG's Motion Does Not Present A Significant Safety Issue

While the AG's motion to reopen the record is timely the AG's motion does not present a "significant safety issue" nor would a different result be obtained if the evidence were considered in an adjudicatory proceeding. Underlying the AG's motion and late-filed contention is the assumption that the absence of a public notification system places the affected population at risk in the event of an accidental radioactive release at the Seabrook Station. As Mr. Congel demonstrates, there is no danger that this scenario will come to pass. See Affidavit of Frank J. Congel, passim (January 28, 1988.)

The adequacy of the alert notification system in Massachusetts was not an issue in controversy in this proceeding below. Where a contention has not been admitted for litigation, the Staff must find under 10 C.F.R. § 50.57(a) that a facility will operate "in conformity. . . with the rules and regulations of the Commission" and that "activities [authorized by the license] will be conducted in compliance with the regulations." As the Appeal Board has observed, "at the operating license stage, the Staff generally has the final word on all safety matters not placed in

controversy by the parties" through an admitted contention. Southern California Edison Company (San Onofre Nuclear Generating Stations, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982); accord South Carolina Electric and Gas Company (Virgil E. Summer Nuclear Station, Unit), ALAB-642, 13 NRC 881, 895-96 (1981), aff'd sub nom., Fairfield United Action v. Nuclear Regulatory Commission, 678 F.2d 261 (D.C. Cir. 1982) ("As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations").

In the Statement of Consideration issued in conjunction with the adoption of 10 C.F.R. § 50.47(d), the regulation which allows a nuclear facility to operate at 5% of rated power before the adequacy of an applicant's offsite emergency preparedness program has been finally determined, the Commission stated that:

> Prior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the applicant's emergency plan:
>
> (a) * * *
>
> (b) Section 50.47(b)(5). Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

See also Congel Affidavit at ¶¶ 6-8; NRC Staff Response to Appeal Board Order of July 30, 1987 Regarding Merrimac Sirens at 4, n.3 (October 6, 1987); NRC Staff Supplemental Response to Appeal Board Order of

September 17, 1987 Regarding East Kingston Sirens at 3, n.3 (October 6, 1987).

Thus, a license to operate at any power level will not be issued for the Seabrook Station before Applicants' satisfy the requirements of 10 C.F.R. § 50.47(b)(5) by demonstrating that "means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established." See Congel Affidavit at ¶¶ 6-8. In the absence of a license to operate at any level of rated power, no fission products will be generated at the Seabrook Station and thus there is no danger that the public health and safety is threatened by the fact that Applicant currently lacks a Staff-approved plan for notifying the residents of the Massachusetts portion of the emergency planning zone of an emergency at the Seabrook Station. Id. at ¶ 8. In view of this consideration, the Appeal Board should rule that the AC's motion to reopen does not present a safety issue of sufficient significance to warrant a reopening of the hearing record.

3. A Different Result Would Not Be Likely If The Newly Proffered Evidence And Late-Filed Contention Had Been Considered Initially

The AC's motion does not demonstrate that a different result would have been likely had the newly proffered evidence been considered initially as required by 10 C.F.R. § 2.734(a)(3). See Motion at 6-7. Nor could the AC make this showing. This is because the showing that the AC must make in this regard is that had the newly proffered evidence (i.e., lack of sirens for the Massachusetts portion of the EPZ) been considered initially, a low power license would not have been issued. The fact is, however, that a low power license has not been authorized or

issued. Nor, as Mr. Congel states, nor will a license to operate at any level of rated power be issued to Applicants since there currently is no notification plan for the Massachusetts portion of the EPZ. Congel Affidavit at ¶ 8. Reopening the record at this time to consider the AG's late-filed contention will not change this result. To reopen the record on the speculation that the applicant will propose, the Staff will approve, and the AG will object to some set of alternative notification procedures would not be a proper use of the Commission's adjudicatory process.

In Vermont Yankee Nuclear Power Corporation, supra, the Appeal Board noted that "to justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." 6 AEC at 523. It further stated:

> Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding.

Id. (emphasis added) (footnotes omitted). The filing of the Applicants alternative public notification plan, would provide additional information upon which the Appeal Board could determine whether a materially different would be likely. Were that plan to demonstrate that Applicants have established means to notify the populace of the Massachusetts portion of the EPZ, this would be an additional and independent reason for the Appeal Board to conclude that the removal of the Massachusetts sirens -- the basis for the AG's motion to reopen and late-filed contention -- has "no effect upon the outcome of the licensing proceeding," Vermont

Yankee, supra, 6 AEC at 523 and that the AG's motion therefore should be denied. 2/

CONCLUSION

For the reasons stated in this response, the Appeal Board should deny the Massachusetts Attorney General's motion to reopen the record to admit his late-filed contention.

Respectfully submitted,

Gregory Alan Berry
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of January 1988

2/ The Staff has not here addressed in detail the requirements for late filed contentions set forth in 10 C.F.R. § 2.714(a). The Massachusetts Attorney General has shown that his filing is timely and that he can assist in developing a record. On the other hand there is no question that the raising of these issues will broaden the issues and delay the proceeding. Further, the Commonwealth's AG has failed to address whether the Commonwealth can protect its interests in the timely notification of its citizens by itself installing or giving permission for the installation of the sirens, which its municipalities apparently may not authorize.