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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 and 2)	(Offsite Emergency Planning Issues)

APPLICANTS' RESPONSE TO MOTION OF MASSACHUSETTS ATTORNEY GENERAL'S MOTION FOR RECONSIDERATION OF ORDER DENYING LEAVE TO FILE REBUTTAL TESTIMONY OF THOMPSON ET AL.

Under date of July 6, 1988, the Attorney General of The Commonwealth of Massachusetts (Mass AG) has filed a document entitled "Offer of Proof and Motion for Reconsideration." This was accompanied by certain proffered rebuttal testimony.[1] Herein Applicants address this filing insofar as it is a Motion for Reconsideration, and for the reasons set forth below, say that the same should be denied.

ARGUMENT

The Motion is Untimely

In his motion, Mass AG describes the Testimony proffered

[1] Rebuttal Testimony of Dr. Gordon Thompson, Dr. Robert L. Goble, and Dr. Jan Beyea on Behalf of the Attorney General for The Commonwealth of Massachusetts on Sheltering Contentions (hereafter referred to and cited as "Testimony").

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as follows:

> "The testimony . . .is in direct rebuttal to testimony of [FEMA] dated June 10, 1988, and received into the record and cross-examined upon on June 16, 1988. The testimony is also intended to rebut certain cross-examination testimony of Applicants' witnesses on sheltering contentions (Panel No. 6)."[2]

While the Motion does not point out exactly what testimony on cross-examination is referenced in the above quoted language, the Testimony itself does. Specifically the Testimony references Tr. 10426, 10428, 10556, and 10591-92,[3] all of which are references to cross-examination of the Applicants' panel conducted by a Massachusetts Assistant Attorney General. The above quoted description is then followed by a litany of reasons and excuses why such testimony could not have been filed until now, or at least before June 14, 1988.[4]

The first reason given is that even though Mass AG acknowledges that the Applicants' testimony, which he received on April 19, 1988 told him that New Hampshire "intended to amend NHRERP's decision criteria so that its protective action recommendations would now be based primarily on predetermined protective action recommendations made by the utility, which for the beach population would in

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[2]Motion at 1-2.

[3]Testimony at 8.

[4]See Motion at 7.

all cases be a recommendation to evacuate,"[5] this should not be viewed as notice to him of that position because he "did not learn until a few days prior to commencement of the hearings on sheltering contentions that the State of New Hampshire had actually adopted the amendment."[6] What this argument ignores is that the Applicants' Direct testimony received by Mass AG on April 19, 1988 stated flatly that the amendment referred to "is being incorporated into an update of the NHRERP,"[7] and on the panel was, inter alia, the Director of the New Hampshire Office of Emergency Management.

Next we are told that it was not until the cross-examination of the Applicants' panel that it "became clear" to Mass AG that New Hampshire:

> ". . . did not intend to recommend sheltering of the beach population in the event of serious accidents involving ground-deposited radiation."[8]

This excuse rings hollow for a number of reasons. First, in a filing with FEMA served upon all parties on February 11,

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[5]Motion at 2.

[6]Motion at 3. We note in passing that "a few days prior to" the sheltering hearings amounts to sometime late in the week of April 25, 1988. Assuming that the actual date was Friday April 29, 1988, that is still 49 days or seven weeks before June 17, 1988.

[7]App. Dir. No. 6, Post Tr. 10022 at 8.

[8]Motion at 3. It should be noted that New Hampshire has never stated that there is no situation where it would not recommend sheltering. It has only said that in the vast majority of the accident situations, evacuation is the protective action of choice

1988, the State of New Hampshire took the following positions:

> "[S]ince sheltering is a temporary protective action, those that sought public shelter would be faced with assuming some dose while seeking shelter, more while sheltering, and even more during subsequent evacuation. Such considerations dissuade the state from considering movement of large numbers of people to public shelters as a primary protective action for beach transients, given that evacuation is seen as providing dose savings in nearly all accident scenarios."[9]
>
> "This position does not preclude the State from considering and selecting sheltering as a protective action for the beach population. Nevertheless, evacuation is a much more likely protective action decision during the summer months when some beach transients cannot shelter in place, but must leave or move to public shelters."[10]
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> * * *
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> ". . . It is the state's position that evacuation is the protective response that would be used in response to the majority of emergency scenarios at Seabrook, and that the protective action of sheltering may be preferable to evacuation in only a limited number of accident scenarios."[11]

In short, as far back as February, Mass AG knew, or should have known, the intent of New Hampshire. Second, the

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[9] Letter, Strome to Vickers (Feb. 11, 1987) with enclosures and attachments, all of which is reproduced as Appendix 1 to App. Dir. No. 6, Post Tr. 10022 at page 3 of Enclosure 1.

[10] Id.

[11] Id. at 5.

Applicants' direct testimony which Mass AG received on April 19, 1988 had appended to it, as Attachment 1, the proposed protective action decision criteria which constitute the amendment discussed earlier. Therein, as pages 31 and 32 thereof, are a "Figure 2" and a "Figure 3" showing the actions to be taken in site area and general emergencies respectively. This shows clearly that the only protective action which will be recommended for the beach will be evacuation. This is of interest, because in the transcript references stated to be the places where the cross-examination of Applicants' panel, supposedly for the first time, revealed the State's intent, one finds that the question was based upon this Figure 3, and the questions reveal that the questioner fully understood exactly what the chart meant before she cross-examined:

> "Q. [By Ms. Sneider] Well according to these two figures is it correct that if the utility is to issue a protective action recommendation as a result of going through the process of these two figures, its protective action recommendation for the beach population of Hampton and Seabrook would always be to evacuate those populations? (Emphasis supplied).
>
> "A. (Callendrello) Yes, . . . "[12]
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> * * *
>
> "Q. And am I correct that according to this chart, if the post LOCA monitor reading is more than 5,000 rem an hour, that the recommendation to evacuate the

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[12] Tr. 10426.

Seabrook and Hampton Beach areas would in fact be an automatic recommendation by the utility? (Emphasis supplied).

"A. (Callendrello) Yes . . . "[13]

In short, the Mass AG was fully aware from his reading of the Applicants' Direct Testimony exactly what the intent was. And in connection with this it should be remembered that the Applicants' direct was required to be filed before the Intervenors' Direct Testimony, thus allowing the Mass AG an opportunity to rebut it in his own direct. In any event, it is clear that the start date on this aspect of the rebuttal was likely as early as February, possibly on April 19, 1988, but certainly not, as claimed, on May 4, 1988 when the cross-examination took place.

The Mass AG's next excuse deals with the proffered testimony insofar as it is rebuttal to the direct testimony of FEMA. Finally acknowledging that he had the FEMA testimony in reality in March,[14] (as opposed to its formal filing date of June 10, 1988), Mass AG still argues that he could not have filed this rebuttal until the end of the hearings. Here the argument is that it was not until deposition of the FEMA witnesses was taken that Mass AG understood what he alleges to be the basis of the FEMA testimony, that he then filed a slightly shorn version of the Sholly testimony, and only after its rejection on May 10,

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[13] Tr. 10429.

[14] Motion at 4.

1988, did he know that he would need the proffered testimony. To recite this litany of woe is to refute it. The depositions of the FEMA witnesses who sponsored the final testimony were completed on April 1, 1988. If Mass AG decided to ride with a slightly altered version of the rejected Sholly piece, he has no one but himself to blame. Even accepting that the knowledge gained as a result of the deposition was necessary to construct the rebuttal now offered, the start date was April Fool's day, not later.

In short, none of the excuses on any of the elements of this testimony wash. It is late, and egregiously so.

The Testimony Does Not Rebut The Position Taken by FEMA

What Mass AG's proffered witnesses have done is suggest that there exist with some scenarios which, if viewed in hindsight or divine foresight would best be handled by sheltering first. The problem is that FEMA's witness Keller freely acknowledges that there may be such cases, Tr. 14231, 14241-43. His choice of selecting evacuation is based upon the fact that, given what the decision maker will know in real time, this is the choice to make every time, even knowing that hindsight may later prove that a shelter first choice might have, in fact, given a better result. Thus, it is apparent that even assuming it is believed it will not rebut the FEMA position.

The Testimony is Inadmissible in Part

In addition to the foregoing problems, the Testimony suffers from the fact that, in large part, it appears to be inadmissible on its face. To begin with, two of the scenarios explored in the testimony involve the construction of major facilities in the form of new roads or massive shelters. It is settled that the Commission's emergency regulations do not require the construction of major new facilities for emergency planning purposes only.[15] Second, the testimony appears to challenge the doctrine that it is population dose savings that are of concern.[16] Finally, the thrust of the Testimony is, in part, to engage in a comparison of sites,[17] a practice specifically rejected by the Commission.[18]

CONCLUSION

The testimony is inexcusably late; it does not rebut what it purports to rebut even if worthy of belief; it is

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[15] Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983).

[16] Testimony at 29.

[17] E.g., Testimony at 23.

[18] E.g., Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Off-Site Emergency Planning, Final Rule, 52 Fed. Reg. 42078, 42085 (Nov. 3, 1987).

clearly inadmissible in part. In short it is a filing made only for the purpose of either causing delay or preserving a record to attempt to convince some appellate tribunal that Mass AG was wronged, to which remedy we respectfully suggest this Board should remit him. The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on July 15, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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