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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LB 9/9/88

DOCKETING
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

- Ivan W. Smith, Chairman
- Gustave A. Linenberger, Jr.
- Dr. Jerry Harbour

REGISTRY
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_____)
 In the Matter of)
)
 PUBLIC SERVICE COMPANY OF)
 NEW HAMPSHIRE, et al.)
)
 (Seabrook Station,)
 Units 1 and 2))
 _____)

Docket Nos. 50-443-OL
 50-444-OL
 (ASLBP No. 82-471-02-OL)
 (Offsite Emergency
 Planning)

September 9, 1988

MEMORANDUM AND ORDER
 (Ruling on Massachusetts Attorney General's
 Offer of Proof and Motion for Reconsideration)

Background

The Board has pending before it the Massachusetts Attorney General's July 6, 1988 Offer of Proof and Motion for Reconsideration responding to the Board's June 16 oral ruling denying the Attorney General's motion of June 14 to file rebuttal testimony.

The Attorney General's June 14 motion, filed two days before the scheduled close of the hearing, sought leave to file testimony, then being prepared, purporting to rebut direct and cross-examination testimony of FEMA and the

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Applicants, respectively, on sheltering contentions. The testimony would have been offered as late as July 1. The Board heard oral arguments on the motion on June 15 where the proposed testimony was described in a very general way. Tr. 13884 - 13890. The following day the Board denied the motion and granted leave to the Attorney General to proffer the testimony when complete in order to preserve his position on appeal. Tr. 13963.

The motion before us submits the now-completed rebuttal, not only as a proffer to preserve the Attorney General's position, but to support his request that we reconsider the June 16 ruling, reopen the record, and receive the testimony -- that of Dr. Gordon Thompson, Dr. Robert L. Goble, and Dr. Jan Beyea. The proffered testimony would rebut testimonies of Applicants and FEMA that evacuation should always be the preferred protective action recommendation for the beach population located in the Seabrook EPZ in the event of a serious accident involving ground-deposited radioactive particulates.

The Attorney General requests the Board to consider his motion timely and offers two reasons for not submitting rebuttal testimony before the end of hearing. First, he could not ascertain the State of New Hampshire's exact position regarding the State's preferred protective action recommendation for the beach population until cross-examination of Applicant's panel which included the

New Hampshire Emergency Planning Director, Mr. Strome. Second, the Attorney General could not ascertain the analytical basis for the FEMA testimony until its witnesses actually testified. Moreover, the Attorney General argues that the proffered testimony is the only testimony "which actually analyzes and compares the potential dose savings to be gained by the beach population from the protective actions of sheltering and evacuation." Motion at 5. He asserts that the public interest deserves no less than its inclusion to keep the record from being misleading.

As stated above, a favorable ruling by the Board on the Attorney General's motion for reconsideration would allow his rebuttal testimony to become part of the record and, of course, would require us to reopen the record for continued litigation on the sheltering contention issue.

Standards for Reconsidering Motions
and Opening Closed Records

As the Licensing Board in Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283 (1982), stated:

When a Board has reached a determination of a motion in the course of an on-the-record hearing, it need not reconsider that determination in response to an untimely motion but it may, in its discretion, decide to reconsider on a showing that it has made an egregious error.

Reopening a record is an extraordinary action. As is well settled, "[t]he proponents of a motion to reopen the

record in a licensing proceeding carry a heavy burden." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-756, 18 NRC 1340, 1344 (1983), citing Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The Attorney General must demonstrate that his motion is timely, that the issues he seeks to litigate are significant, and that a different result would have been reached had the proffered material been considered initially. 10 CFR 2.734. See also, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984), aff'd sub. nom. San Luis Obispo Mothers for Peace V. NRC, 751 F.2d 1287 (D.C. Cir. 1984), aff'd on reh'g en banc, 789 F.2d 26 (1986), cert. denied, 107 S. Ct. 330 (1987).

Discussion

In the matter pending before the Board, we consider the timeliness of both the Attorney General's motion for leave to submit rebuttal testimony filed on June 14, 1988 and his motion for reconsideration filed on July 6, 1988.

The Attorney General's assertion that he was unable to ascertain the position of the State of New Hampshire regarding the State's preferred protective response prior to the close of the hearing is not supported by the record. FEMA's filing, served upon all the parties on February 11,

1988, gave a clear indication that New Hampshire State officials intended to adopt evacuation as the preferred protective response in most instances of radiological emergency. App. Dir. No. 6, ff. Tr. 10022 at page 7 of Enclosure 1. While New Hampshire did not state it would adopt evacuation of the beach population in all instances, its position, at the time, was sufficiently clear to offer guidance to the Attorney General in his efforts to shape the basic outline of his rebuttal testimony.

We also reject the Attorney General's claim that he was unable to ascertain the State's exact position until a few days prior to the commencement of the hearing, or in the alternative, until the cross-examination of Applicant's witnesses on May 4. The Attorney General admits in his own motion that Applicant's Direct Testimony, filed on April 19, stated that New Hampshire "intended to amend the NHRERP's decision criteria so that its protective action recommendations would now be based primarily on . . . recommendations made by the utility, which for the beach population would in all cases be a recommendation to evacuate." Motion at 2. Furthermore, during cross-examination of Applicant's panel on May 4, counsel for the Attorney General made specific references to the Applicant's filing of April 19 which indicated that the State had adopted evacuation as the protective action recommendation

for the beach population in every event of radiological emergency. Tr. 10426 and 10429.

The Attorney General also claims that it was impossible to complete testimony to rebut FEMA's position on sheltering until after the close of the hearing. While he admits having FEMA's pre-filed testimony in March 1988, he argues that he could not ascertain the analytical basis for FEMA's testimony until its witnesses were deposed on April 1. Yet, on May 10, over five weeks later, the Attorney General offered only a slightly amended version of Sholly-Beyea-Thompson-Leaning testimony ruled inadmissible by this Board in November 1987. Tr. 5608. We again ruled the rebuttal testimony inadmissible on the same grounds as before. Tr. 11134.

It was not until one month later, on June 14, that the Attorney General filed for leave to prepare the new rebuttal testimony. While we recognize some confusion surrounding the actual analytical basis for the FEMA's testimony at the time, one of the reasons the Attorney General cites for his delay, we resolved that confusion by striking from FEMA's testimony any reference to generic dose consequence analyses on June 15. We then went on to rule the Attorney General's motion as untimely and lacking sufficient value to justify continued litigation of the sheltering contention. Tr. 13963. We decline to modify that ruling now. We find

that he had ample time to raise his sheltering contention arguments during the hearing process.

We have also considered the timeliness of the motion for reconsideration itself. As a starting point, we refer to the Attorney General's offer of June 15 to submit the rebuttal testimony by June 24 if he were granted leave. Motion at 6. As it became clearer to the Board during arguments over this motion, taking into consideration holidays and prior commitments of all the parties, that any extension would unreasonably delay the hearing process, the Attorney General even offered, if the Board so ordered, to file the testimony by June 17. Motion at 7. On the basis of the Attorney General's own estimate of the time needed to prepare the rebuttal testimony, we question the timeliness of the Motion for Reconsideration submitted three weeks after the close of the hearings.

As stated above, NRC practice views the reopening of the record as an extraordinary action. In light of this standard, and with our review of the sequence of events and arguments the Attorney raises in support of his motion, we find the motion for reconsideration to be untimely.

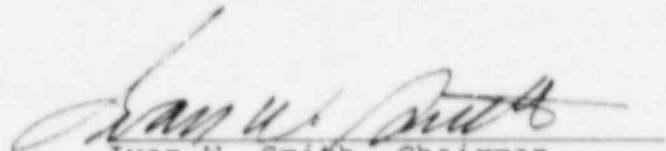
The Attorney General does not raise the argument of an egregious error in the Board's June 16 ruling to deny him leave to file rebuttal testimony, and this Board does not infer an error on its own. The Attorney General's motion shows only that his disagreement is with the Applicant and

not with the Board. Furthermore, we do not accept the Attorney General's assertion that the public interest requires the record to include the rebuttal testimony. While our reading of the offered testimony shows some of its points to be relevant to the issue, others are inadmissible and repetitious. Regardless, the Attorney General's offered testimony does not warrant a decision to continue litigation of the sheltering contention.

ORDER

The Massachusetts Attorney General's Motion for Reconsideration is denied. The Offer of Proof is denoted as Massachusetts Attorney General's Exhibit 56 and placed in the rejected exhibit file.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

A handwritten signature in cursive script, appearing to read "Ivan W. Smith", is written over a horizontal line.

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
September 9, 1988