

'88 SEP 12 P1:28

September 8, 1988

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.)
)
(Seabrook Station, Units 1 and 2))
)

Docket Nos. 50-443-OL-1
50-444-OL-1
On-site Emergency
Planning and Safety
Issues

APPLICANTS' MOTION FOR SANCTIONS AGAINST
THE MASSACHUSETTS ATTORNEY GENERAL
FOR FAILURE TO COMPLY WITH THE
BOARD'S DISCOVERY ORDER

Applicants hereby move, pursuant to 10 C.F.R. § 2.707,
that the Board dismiss bases A.3, A.5, and A.2 of the Amended
Contention on Notification System of the Attorney General for
the Commonwealth of Massachusetts ("Mass AG"), as a necessary
and proper sanction for the Mass AG's failure to comply with
the Board's Memorandum and Order (Ruling On Applicants'
Revised Motion to Compel), ASLBP No. 88-558-01-OLR (August
19, 1988) [hereinafter the "Order"] requiring Mass AG to
answer certain interrogatories and produce certain documents.

Applicants also move, pursuant to 10 C.F.R. § 2.711(a),
that the Board shorten the time for response to Applicants'

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motion for sanctions. In view of the fact that Applicants must file, in hand, their summary disposition motion on the Amended Contention on Notification System no later than September 15, 1988, Applicants respectfully suggest that the Board hold oral argument of the sanctions motion at 10 a.m., Monday, September 12, or such other time as is convenient for the Board.

DISCUSSION

On August 19, 1988, the Board issued an order requiring Mass AG to produce certain documents and answer certain interrogatories within two weeks. Order, slip op. at 3, 5, 7, and 8. On September 6, 1988, the Mass AG filed "Massachusetts Attorney General's Additional Responses to Interrogatories and Production of Documents" [the "Responses"] and produced photo copies of certain documents and photographs. As discussed below, the Responses were wholly unresponsive to five of Applicants' interrogatories and document requests. As a result, Applicants are severely prejudiced in litigating the three contention bases at which the interrogatories were aimed -- indeed, Applicants are left, just a few days short of the deadline for summary disposition, with no clear information of what they are supposed to litigate. Accordingly, it is appropriate that these three bases be dismissed.

1. Interrogatory 12 -- Basis A.3

The Board ordered Mass AG to respond to the following interrogatory:

12. Please state in detail all the facts underlying the Mass AG's assertion that "the fourteen VANS locations are physically inaccessible to the VANS equipment", define precisely what is meant by "physically inaccessible", and explain exactly how those facts support the assertion.

The quoted language in the interrogatory tracks, word for word, the entire text of Mass AG's Basis A.3.

In a previous answer, Mass AG defined "physically inaccessible" as "the inability of fully loaded VANS trucks and equipment to drive into and set up at the acoustic locations," but declined to state any facts underlying the assertion. In response to the Board's Order compelling an answer, Mass AG states, in full:

Response 12: On August 10, 1988, representatives of the Mass AG's office viewed the acoustic locations and took photographs showing the accessibility, or lack thereof, of each such location. Based on that information, the Mass AG believes that the following locations are inaccessible: VL-02; VL-03, VL-06; VL-07; VL-12; VL-13. Copies of these photos are attached hereto.

Accompanying the Responses were 22 black-and-white photocopies of what the Mass AG apparently purports to be photographs of those six acoustic locations, which are attached hereto as Exhibit A.

Mass AG states his belief that Applicants' VANS trucks cannot drive into and set up at these six locations. Rather than state the facts underlying that belief, as asked and then ordered to do, Mass AG has handed Applicants a fistful of blurred photocopies and invited Applicants to guess what facts, if any, those pictures purportedly portray.

Applicants should not be obligated to engage in such guessing games, especially when a motion for summary disposition is about to be filed. NRC regulations and case law require that intervenors in NRC proceedings must reveal the factual basis for their contentions when asked to do so in discovery. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 339-340(1980) ("A litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis Obviously, interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are not out of order.").

This Board admitted Basis A.3 to litigation, over the objections of Applicants and Staff that it was too vague to put Applicants on notice as to what specific alleged deficiency was to be litigated, on the assumption that "the Staff and Applicants may seek further information via discovery procedures." Memorandum and Order (Ruling on

Admissibility of Mass. Amended Contention and Bases (June 2, 1988), slip op. at 5. Mass AG, however, has thwarted every attempt by Applicants to obtain such further information.

Mass AG's Responses leave Applicants without a clue as to what facts about these six locations allegedly make them physically inaccessible to Applicants' vehicles. With no idea what they are supposed to be defending against, Applicants obviously are prejudiced in filing their summary disposition motion due on September 15. Under these circumstances, in light of the contumacy of Mass AG, the clear prejudice to Applicants, and the detriment to the evidentiary record caused by Mass AG's refusal to disclose his facts, the appropriate sanction is dismissal of the contention which Mass AG's conduct has rendered unlitigable. Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75 (1986).

2. Interrogatories 18 and 20(e) -- Basis A.5

The Board ordered Mass AG to respond to the following interrogatories:

18. Please state in detail all the facts, analyses and estimates underlying the Mass AG's assertion that "the time needed for driver alert, dispatch, route transit, setup and activation in accordance with NRC regulations will exceed 15 minutes for many of the VANS vehicles in optimum weather conditions", and explain exactly how those facts support the assertion.

20. Please state in detail how long the Mass AG contends it will require to perform each of the following functions, for (1) optimum weather conditions and (2) poor weather, heavy traffic, or nighttime conditions, and state in detail all the facts underlying each answer and how these facts support the answers: . . . (e) VANS vehicle proceeds to acoustic location.

The quoted language in Interrogatory 18, which is followed up upon in Interrogatory 20(e), tracks, word for word, the operative language in Mass AG's Basis A.5.

In response to the Board's Order compelling answers to these interrogatories, Mass AG states, in full:

Response 18: In an earlier response, the Mass AG estimated that performance of various functions inherent in completion of VANS siren notification (*i.e.*, dispatch, set-up, activation) would entail a total of nine (9) minutes. See Mass AG Response to First Set of Interrogatories, No. 20. Thus, actual transit time can be no greater than six (6) minutes in order for the VANS system to work within the prescribed fifteen (15) minute time frame.

Based on transit times supplied by the Applicants and based on transit times recorded by representatives of the Mass AG's office during a preliminary investigation, the following VANS transit routes take longer than 6 minutes: VL-01,; VL-03; VL-07; VL-08; VL-09; VL-10; VL-11; VL-12; VL;13 [sic]; VL-16S.

Whereas the aforementioned routes were timed both by the Applicants and the Mass AG during light to moderate traffic and at times when beaches were not frequented, the transit time involved when beaches are populated and/or during heavier traffic flow and/or during adverse weather would result in significantly longer transit times. In those cases, the aforementioned routes would be ever further out of the prescribed time frame and other routes which may have previously taken less than

six (6) minutes would similarly [sic] fall out of the required range.

(Emphasis added).

Response 20(e): See Response to Interrogatory 18.

In these Responses, Mass AG reveals, for the first time, that his agents have conducted field tests of the route times to Applicants' acoustic locations. It is the facts about these tests -- when and how they were conducted, and what specific transit times were observed for each location -- that presumably constitute the factual basis for Mass AG's contention. It is these facts which Applicants asked for, and which the Board ordered Mass AG to reveal.¹ Yet, it is these facts which Mass AG refuses, without explanation or justification, to reveal.

Instead, Mass AG simply states his belief, based upon those undisclosed facts, that at least 10 of Applicants' acoustic locations are too far from the VANS staging areas. That belief, however, is of no probative value, and is of no interest to Applicants. What Applicants asked for, what the Board ordered Mass AG to reveal, and what Applicants need in order to litigate this basis, are the facts underlying that belief.

¹ Indeed, to the extent that those tests were documented, Interrogatory 1 required Mass AG to identify and produce the documentation as well.

As matters now stand, Applicants must file for summary disposition without knowing what facts Mass AG may introduce in response. Moreover, since Mass AG will presumably then reveal only such selected parts of the test data as arguably help him to counter Applicants' summary disposition motion, the rest of the facts assembled by Mass AG -- which may support Applicants' case, as to some or all of the acoustic locations -- would remain forever hidden. Applicants clearly are prejudiced by this attempt on the part of Mass AG to manipulate the evidentiary record on this contention basis and to conceal key probative evidence.

Since some or all of the evidence hidden by Mass AG may in reality be favorable to Applicants, a sanction order that merely barred Mass AG from introducing it would only exacerbate, rather than cure, the injury done to Applicants' due process rights. Accordingly, the only sanction adequate to protect Applicants' rights and the integrity of the evidentiary record is to strike the basis to which Mass AG's concealed evidence would go. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-17, 11 NRC 893 (1980).

3. Interrogatories 6 and 7 -- Basis A.2

The Board ordered Mass AG to respond to the following two interrogatories and production requests, while at the

same time limiting the evidentiary use that Applicants might make of the Mass AG's responses and production:²

6. Has any representative of or person employed by the Department of the Attorney General of the Commonwealth been in contact with any selectman, civil defense director or other official of Amesbury, Merrimack, Newbury, West Newbury, Newburyport, Salisbury or Haverhill concerning any actual or proposed siren warning system for Seabrook Station? If so, please:

(a) Identify each selectman, civil defense director or other official who was contacted and the official, representative or employee who contacted them.

(b) Describe in detail the date, time, manner, place, and substance of the communication.

(c) Identify and produce every document that reflects, refers to, or relates in any way to any such contact.

7. Has any other official, representative, or employee of the government of the Commonwealth of Massachusetts been in contact with any selectman, civil defense director or other official of Amesbury, Merrimack, Newbury, West Newbury, Newburyport, Salisbury or Haverhill concerning any actual or proposed siren warning system for Seabrook Station? If so, please:

(a) Identify each selectman, civil defense director or other official who was contacted and the official, representative or employee who contacted them.

(b) Describe in detail the date, time, manner, place, and substance of the communication.

(c) Identify and produce every document that reflects, refers to, or relates in any way to any such contact.

² Order, slip op. at 4-5.

As the Board noted, these interrogatories and document requests are directly relevant to Mass AG's Basis A.2, which contends that Applicants' VANS system violates local ordinances.

Mass AG responses to these interrogatories and requests, in their entirety, are:

Response 6: The Mass AG has already produced a town ordinance (pertinent to the town of Amesbury) and a communication related thereto. Other than this, the Mass AG knows of no other such ordinance. In addition, the Mass AG knows of no communication with a town official which would contain probative evidence bearing on the interpretation of any ordinance.

Response 7: The Mass AG knows of no communication with a town official which would contain probative evidence bearing on the interpretation of any ordinance.

Mass AG does not deny that his office and/or other state officials have communicated with local officials about Applicants' siren warning system. Indeed, the single document Mass AG has previously produced reveals that there have been other such communications. Yet Mass AG refuses to describe those communications and produce their documentation, as asked by Applicants and ordered by the Board.

Instead, Mass AG arrogates to himself the prerogative to decide what is probative evidence on the evidentiary limit the Board placed on Applicants' use of the communications. Based on that usurpation, Mass AG has arbitrarily withheld all evidence concerning such communications.

It is not Mass AG's place to decide what evidence is probative.³ Rather, that is for the Board to decide, after Applicants have examined all the communications and have introduced those which Applicants think are relevant. In order for Applicants to do their job, and for the Board to do its job, Mass AG must do as he was ordered, and turn over the communications.

Mass AG apparently contends that one section of the Amesbury Zoning by-law prohibits operation of Applicants' VANS sirens. The key question underlying Mass AG's Basis A.2, therefore, is the meaning and validity of that by-law. As the Board has acknowledged, the communications which Applicants seek may help to reveal how that by-law would be interpreted and applied, and whether its enforcement against Applicants would be valid. Yet, Mass AG refuses to reveal those communications, taking it upon himself to decide all questions of relevance and probative value.

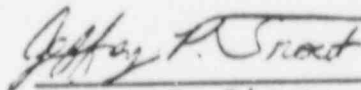
³ Having previously argued that he should be treated like the NRC staff rather than like any other intervenor, Mass AG now apparently insists that he be accorded powers equal or superior to the Board itself. See Massachusetts Attorney General's Response to Applicants' Revised Motion to Compel at 5 (August 15, 1988) (Mass AG, "like the NRC", should not be required to answer interrogatories under oath). For the record, Mass AG is wrong about the facts as well as about his role in these proceedings -- the NRC Staff does answer interrogatories under oath. See, e.g., NRC Staff response to NECNP First Set of Interrogatories and Request for the Production of Documents to NRC Staff on NECNP Contention I.B.2. (July 20, 1988).

Here again, the evidence concealed by Mass AG may very well be favorable to Applicants.⁴ Therefore, a sanction order barring the evidence would again only exacerbate the injury to Applicants. Having refused to produce the evidence which may be relevant, as Applicants asked and the Board ordered, Mass AG can only remedy his wrong by giving up the contention basis to which it would go.

CONCLUSION

For the reasons stated above, the Board should dismiss Bases A.3, A.5, and A.2 of Mass AG's Amended Contention on Notification System.

By their attorneys,

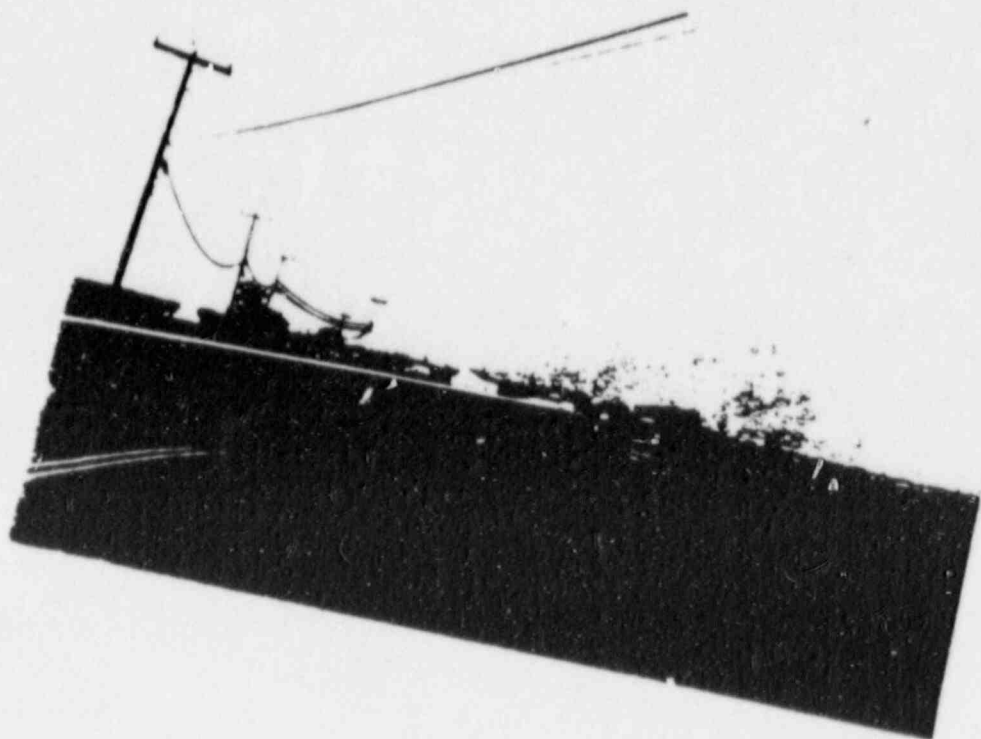


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⁴ Indeed, since Mass AG does not regard it as probative, presumably he does not plan to use it at all, and its exclusion can only hurt Applicants.

EXHIBIT A

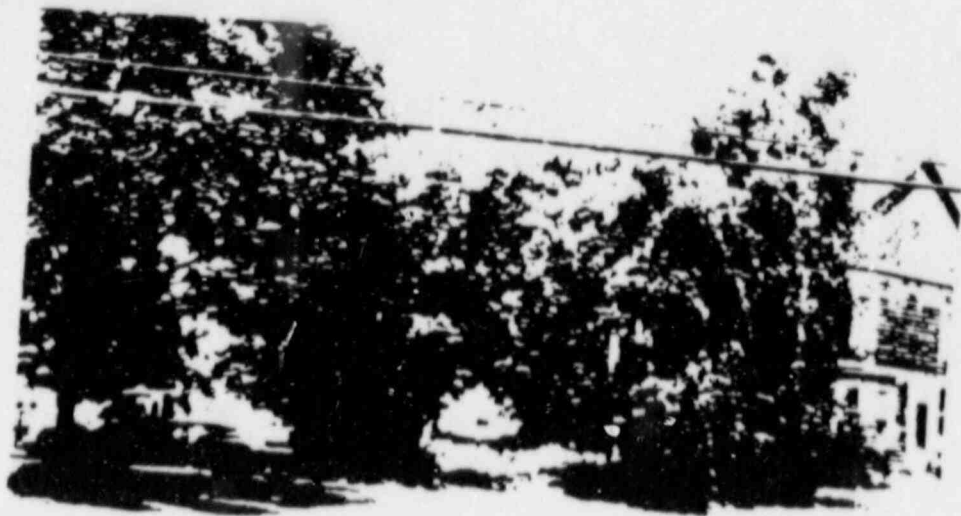


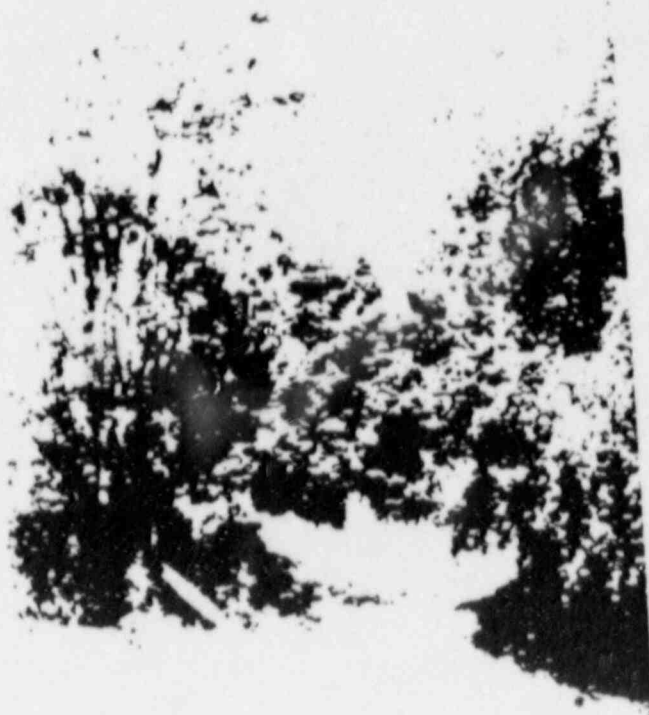


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VL-16









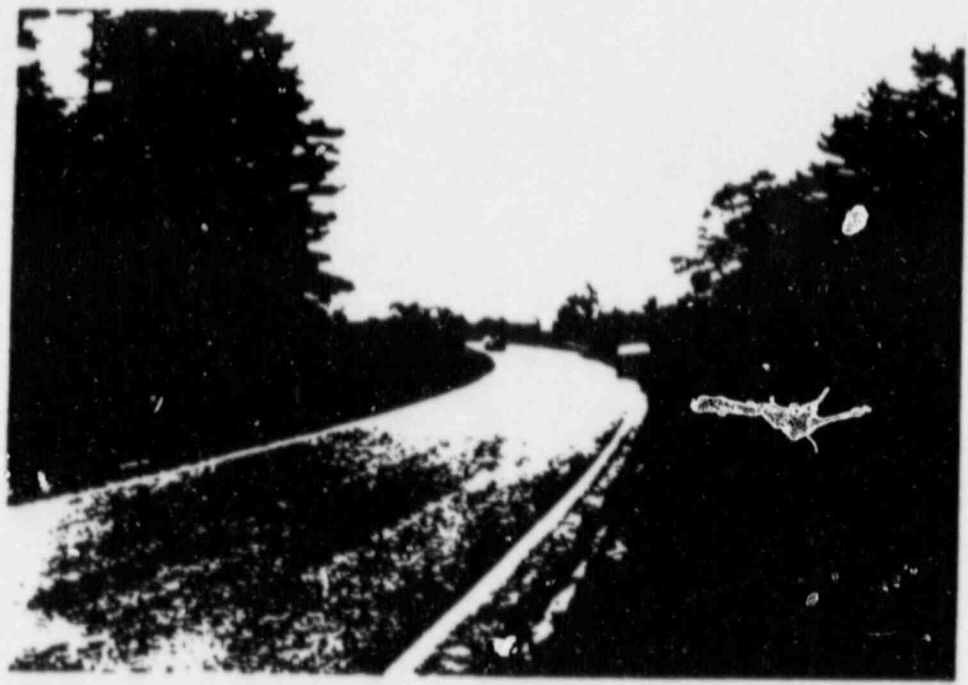
10-7



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VL-17



6-1-11



6-1-2

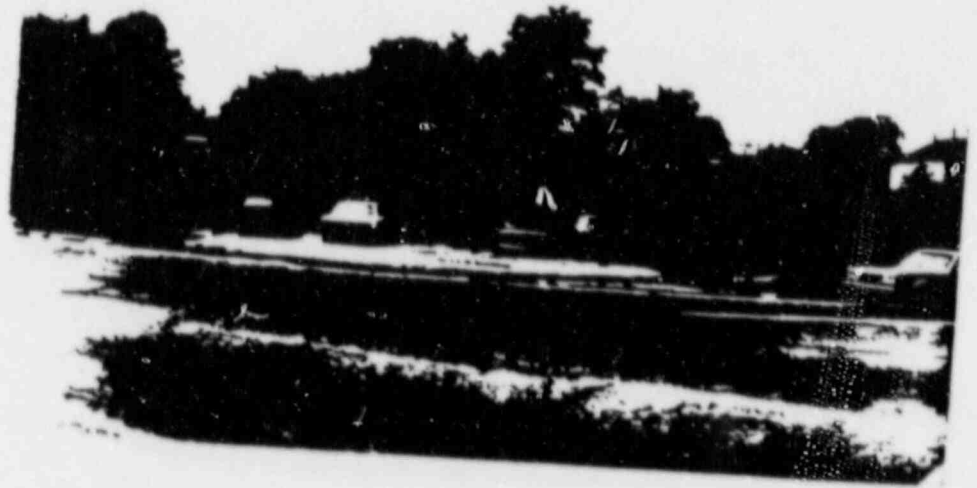




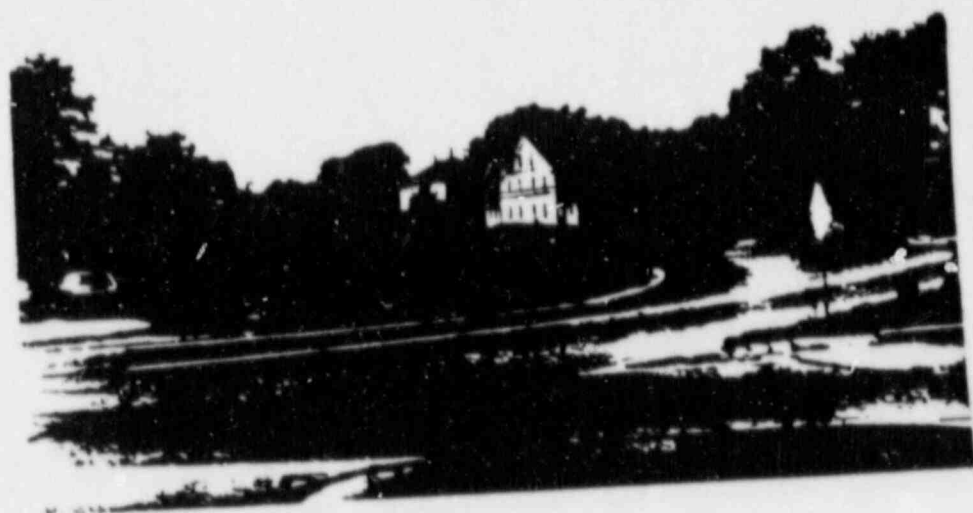
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CERTIFICATE OF SERVICE

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I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on September 8, 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) the individuals listed below.

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