

7070

September 12, 1988  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION '88 SEP 14 P3:53

before the  
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRATTLE

|                                 |   |                         |
|---------------------------------|---|-------------------------|
| In the Matter of                | ) |                         |
|                                 | ) |                         |
| PUBLIC SERVICE COMPANY          | ) | Docket Nos. 50-443-OL-1 |
| OF NEW HAMPSHIRE, <u>ET AL.</u> | ) | 50-444-OL-1             |
|                                 | ) |                         |
| (Seabrook Station, Units 1      | ) | (Onsite Emergency       |
| and 2)                          | ) | Planning and Safety     |
|                                 | ) | Issues)                 |
|                                 | ) |                         |

APPLICANTS' ANSWER TO MOTION TO  
AMEND BASIS FILED BY MASS AG  
WITH RESPECT TO SIRENS CONTENTION

Under date of September 8, 1988, on almost the eve of the date for sending out motions for summary disposition in the "sirens" portion of the proceeding, the Attorney General of the Commonwealth of Massachusetts (Mass AG) filed a document entitled Motion to Amend Basis (The Motion). The thrust of The Motion is to seek the admission into litigation of two new contentions with respect to the early notification system for Seabrook Station. For the reasons set forth below, the motion should be denied.

- I. THE MOTION MUST BE TREATED AS ONE SEEKING THE ADMISSION OF A LATE-FILED CONTENTION.

The Motion is careful to refer to what is being sought as the admission of new "Bases" rather than contentions. This approach is taken in order, apparently, to avoid having to address the "five factors" test for admission of late-filed

8809160079 880912  
PDR ADOCK 05000443  
G PDR

DS03

contentions set out in 10 CFR § 2.714(a)(1), all of which clearly are not addressed in the motion. This piece of legerdemain should be rejected.

The first of the new "bases" reads as follows:

"Applicants no longer intend to use the sirens in the voice mode for instructing the transient population in an emergency and there are no other means in place that provide reasonable assurance that the beach population in Massachusetts will be adequately instructed in the event of an emergency at Seabrook Station"<sup>1</sup>

The second reads as follows:

"The Applicants are prohibited from use of the acoustics locations which have been selected because no permission for use of these locations has been obtained from the property owners."<sup>2</sup>

The language and phrasing of the above quoted assertions are in the nature of contentions, not bases. Furthermore, the Appeal Board has recently made clear that the scope of what is included within an already admitted contention is to be derived from the contention and bases as stated when the contention is admitted.<sup>3</sup> If the issue is not within the scope of the contention and bases admitted, any attempt to raise it must satisfy the "five factors" test of 10 CFR § 2.714(a)(1).

Mass AG makes no attempt to argue that the previously

---

<sup>1</sup>Motion at 1.

<sup>2</sup>Motion at 2.

<sup>3</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, \_\_NRC \_\_, Slip Op. at 7-8 n.11 (Aug. 23, 1988).

admitted sirens contention and bases encompassed the second of its newly raised issues. As to the first, he argues that the original basis 10 encompassed such an issue, that basis being:

"10. the Applicants have not indicated when and under what circumstances the tone alert mode or the message mode will be used."

Linguistically it is a far reach to say that the above-quoted assertion was to be read as encompassing the issue of whether there would be a way adequately to "instruct" the beach population. There is nothing in the contention and bases, as already admitted, which in any way raises an issue as to how any particular population will be "instructed." This being the case, the issue now sought to be raised is simply not within the scope of the contention and bases as admitted.<sup>4</sup> Thus the "five factors" test set forth in 10 CFR § 2.714(a)(1) must be satisfied. As seen below, in this case, they are not.

## II. THE "FIVE FACTORS" TEST IS NOT MET

### A. Good Cause, if any, for failure to file on time.

The Motion does address this factor. With respect to the first new contention, it is admitted that Mass AG was fully aware that the voice mode was not to be used as of July 28, 1988.<sup>5</sup> We are given no explanation as to why the Mass AG waited over one

---

<sup>4</sup>ALAB-899, supra, n.4.

<sup>5</sup>Motion at 3, and Exh. A thereto. Indeed as early as July 5, 1988, Mass AG had been informed in answer to an interrogatory that the voice mode was not required for use under the Massachusetts Utility Plan (SPMC). Applicants' Response to "Massachusetts Attorney General's First Set of Interrogatories to Applicants Regarding Siren Contentions" at 11 (July 5, 1988).

month until almost the eve of the summary disposition deadline to file the Motion. As to the second contention: The Board is cryptically told that Mass AG "only learned during the course of discovery the addresses of the preselected acoustic locations where the sirens are to be operated."<sup>6</sup> Conveniently not mentioned is the fact that as early as June 28, 1988, Mass AG was offered the information under a protective agreement,<sup>7</sup> but refused to take it because of a desire to avoid having to keep the information confidential, and, in any event, the information was made available as of July 15, 1988 and actually reviewed for the first time at the site on July 20, 1988.<sup>8</sup> Again no excuse is given for waiting until almost the eve of the Summary Disposition deadline for filing. In these circumstances, the first factor should weigh against allowing the motion.

B. The availability of other means whereby the petitioner's interest will be protected.

The Motion does not address this or any of the remaining factors. The Applicants would concede that this (and the fourth factor) favor the Mass AG, as is usually the case. However, "[t]his factor, like the closely related fourth factor (the extent to which other parties will represent petitioners'

---

<sup>6</sup>Motion at 3-4.

<sup>7</sup>See Applicants' Motion to Compel Answers to Interrogatories Propounded to the Attorney General for The Commonwealth of Massachusetts at 17 (July 20, 1988).

<sup>8</sup>See Memorandum and Order (Ruling on Applicants' Revised Motion to Compel), (August 19, 1988), at 6.

interest) is accorded less weight, under established Commission precedent, than factors one, three, and five."<sup>9</sup>

- C. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

"Our case law establishes both the importance of this third factor in the evaluation of late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. [citation] The Appeal Board has said: 'When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony'."<sup>10</sup> This the Mass AG has not even attempted to do. The third factor must weigh heavily against him.

- D. The extent to which the petitioner's interest will be represented by existing parties.

As indicated above in § B., had the Mass AG addressed this factor, it would likely have favored him as is usually the case.

---

<sup>9</sup>Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986), citing with approval, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

<sup>10</sup>Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing with approval, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

- E. The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The injection of new issues will always delay the proceeding. Indeed, the entire area of sirens is susceptible of summary disposition, which is immediately in order as this is written. There can be no doubt that allowance of this motion will result in delay. In any event, Mass AG has simply forsworn addressing this factor.

### III. CONCLUSION

The motion fails to satisfy the procedural prerequisites for filing a late-filed contention as it is required to do. Even if this failure to address the necessary factors is overlooked, an analysis of the "five factors" reveals a balance heavily weighted against the Mass AG. Factors one, three, and five, the important ones, all weigh against him. The Motion should be denied.

Respectfully submitted,



Thomas C. Dignan, Jr.  
Kathryn A. Selleck  
Jeffrey P. Trout  
Jay Bradford Smith  
Ropes & Gray  
225 Franklin Street  
Boston, MA 02110  
(617) 423-6100

Counsel for Applicants

CERTIFICATE OF SERVICE

DOCKETED  
USNRC

SEP 14 P3:53

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on September 12, 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.

DOCKETING & SERVICE  
BRANCH

Administrative Judge Sheldon J. Wolfe, Esq., Chairman, Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Robert Carrigg, Chairman  
Board of Selectmen  
Town Office  
Atlantic Avenue  
North Hampton, NH 03862

Administrative Judge Emmeth A. Luebke  
4515 Willard Avenue  
Chevy Chase, MD 20815

Diane Curran, Esquire  
Andrea C. Ferster, Esquire  
Harmon & Weiss  
Suite 430  
2001 S Street, N.W.  
Washington, DC 20009

Dr. Jerry Harbour  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Stephen E. Merrill  
Attorney General  
George Dana Bisbee  
Assistant Attorney General  
Office of the Attorney General  
25 Capitol Street  
Concord, NH 03301-6397

Adjudicatory File  
Atomic Safety and Licensing Board Panel Docket (2 copies)  
U.S. Nuclear Regulatory Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Sherwin E. Turk, Esquire  
Office of General Counsel  
U.S. Nuclear Regulatory Commission  
One White Flint North, 15th Fl.  
11555 Rockville Pike  
Rockville, MD 20852

\*Atomic Safety and Licensing Appeal Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Robert A. Backus, Esquire  
Backus, Meyer & Solomon  
116 Lowell Street  
P.O. Box 516  
Manchester, NH 03105

Philip Ahrens, Esquire  
Assistant Attorney General  
Department of the Attorney  
General  
Augusta, ME 04333

Paul McEachern, Esquire  
Matthew T. Brock, Esquire  
Shaines & McEachern  
25 Maplewood Avenue  
P.O. Box 360  
Portsmouth, NH 03801

Mrs. Sandra Gavutis  
Chairman, Board of Selectmen  
RFD 1 - Box 1154  
Route 107  
Kensington, NH 03827

\*Senator Gordon J. Humphrey  
U.S. Senate  
Washington, DC 20510  
(Attn: Tom Burack)

\*Senator Gordon J. Humphrey  
One Eagle Square, Suite 507  
Concord, NH 03301  
(Attn: Herb Boynton)

Mr. Thomas F. Powers, III  
Town Manager  
Town of Exeter  
10 Front Street  
Exeter, NH 03833

H. Joseph Flynn, Esquire  
Office of General Counsel  
Federal Emergency Management  
Agency  
500 C Street, S.W.  
Washington, DC 20472

Gary W. Holmes, Esquire  
Holmes & Ells  
47 Winnacunnet Road  
Hampton, NH 03841

Mr. J. P. Nadeau  
Selectmen's Office  
10 Central Road  
Rye, NH 03870

Carol S. Sneider, Esquire  
Assistant Attorney General  
Department of the Attorney General  
One Ashburton Place, 19th Floor  
Boston, MA 02108

Mr. Calvin A. Canney  
City Manager  
City Hall  
126 Daniel Street  
Portsmouth, NH 03801

R. Scott Mill-Whilton, Esquire  
Lagoulis, Clark, Hill-Whilton &  
McQuire  
79 State Street  
Newburyport, MA 01950

Mr. Peter J. Matthews  
Mayor  
City Hall  
Newburyport, MA 01950

Mr. William S. Lord  
Board of Selectmen  
Town Hall - Friend Street  
Amesbury, MA 01913


Charles P. Graham, Esquire  
Murphy and Graham  
33 Low Street  
Newburyport, MA 01950

Richard A. Hampe, Esquire  
Hampe and McNicholas  
35 Pleasant Street  
Concord, NH 03301



Mr. Richard R. Donovan  
Federal Emergency Management  
Agency  
Federal Regional Center  
130 228th Street, S.W.  
Bothell, WA 98021-9796

Judith H. Mizner, Esquire  
79 State Street  
Second Floor  
Newburyport, MA 01950



Thomas G. Dignan, Jr.

(\*-Ordinary U.S. First Class Mail.)