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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.

(Seabrook Station, Units 1 and 2)

Docket Nos. 50-443 OL-01
50-444 OL-01
On-site Emergency Planning and Safety Issues

NRC STAFF RESPONSE TO MOTION BY MASSACHUSETTS ATTORNEY GENERAL TO AMEND BASES WITH RESPECT TO SIRENS CONTENTION

INTRODUCTION

On September 8, 1988, the Massachusetts Attorney General (Mass AG) filed a motion (Mass AG Motion) pursuant to 10 C.F.R. §§ 2.730 and 2.714(a)(3) to amend the bases to the Amended Contention of Attorney General James M. Shannon on Notification System for Massachusetts by inserting two new bases which are alleged to be directly related to bases already admitted for hearing. As explained in this response, the Mass AG's Motion does not satisfy the requirements of 10 C.F.R. § 2.714(a)(1). The Mass AG's Motion to admit these late-filed bases should be denied. 1/

BACKGROUND

Mass AG seeks to amend bases 2 and 10 of its contention, which was admitted by the Licensing Board on June 2, 1988, to add the following:

1/ The issue of the necessity of adequate notification to the general public of a radiological emergency as prerequisite to low-power licensing has been rendered moot by the Commission's ruling on September 16, 1988. However, the issue remains alive as regards emergency planning relative to full-power licensing.

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> 10a. Applicants no longer intend to use the sirens in the voice mode for instructing the transient beach 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.
>
> 2a. 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.

As grounds for its Motion, Mass AG avers that the two "bases" are the result of newly discovered facts, and/or of recent changes in the Applicants' notification system plan which he could not have discovered earlier. Mass AG Motion at 2. Further, Mass AG maintains these "bases" are directly related to bases already admitted for hearing and fall clearly within the scope of the admitted contention, such that they are merely further evidence, not even requiring a motion pursuant to 10 C.F.R. § 2.714(a)(3). Mass AG has attached to his motion as exhibits an excerpt from a deposition, and copies of amendments to the Seabrook Plan for Massachusetts Communities.

Basis 10 was originally worded as follows:

> The applicants have not indicated when and under what circumstances the tone alert mode or the message mode will be used.

The language of basis 2 as admitted into litigation was:

> The applicants are legally prohibited under local ordinances from operating their six staging areas and their VANS vehicles at the pre-selected acoustic locations. The specific laws and ordinances can be identified when the Applicants disclose the acoustic locations and staging areas.

ARGUMENT

While Mass AG asserts that his new "bases" merely represent "further evidence" in support of his previously admitted contention, comparison of the respective texts reveals that such is not the case. Rather, the Mass AG is attempting to inject new and untimely issues. As such, this attempted introduction fails to comply with the requirements of 10 C.F.R. § 2.714(a)(1). Although this regulation by its terms speaks to late-filed intervention requests, the "five-factor test" it sets forth has been interpreted to apply with equal force to late-filed contentions, see e.g. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC ___, slip op. at 6-7 (Aug. 23, 1988), and the rationale for applying the criteria of section 2.714(a)(1) -- to give opposing parties notice of the issues they will be required to litigate -- militates in favor of applying the same standards to motions to add late-filed bases which provide new matters to litigate.

Examination of Mass AG basis 10 as now admitted shows it solely concerns the circumstances under which the tone alert mode or the message mode will be used. Proposed basis 10a introduces, in essence, a new contention. It is wholly premised on a supposed need for spoken instructions to the Seabrook beach population in the event of an emergency. No argument is presented to demonstrate a nexus between the original basis 10, which concerns a lack of identification as to when and under what circumstances the tone alert mode or the message mode is to be used, and basis 10a, which is predicated on a necessity for spoken instructions. No regulatory ground creating such necessity is set forth.

Thus, a relationship between existing basis 10 and proffered basis 10a is not shown to exist.

Similarly, proffered basis 2a is not justified by any demonstration of a relationship with the original basis 2. Nothing in the text of the original basis which concerns laws and ordinances allegedly prohibiting applicants from locating VANS vehicles at staging area locations can fairly be construed to encompass the question of the need for the permission of private property owners for use of these subsequently disclosed sites which the Mass AG now seeks to raise. Hence, the Mass AG is again attempting to expand the issues in controversy.

As noted by the Appeal Board in a recent decision, where the scope of a contention is at issue, there is no good reason not to read the contention together with its bases to get a sense of what issue the party seeks to raise. ALAB-899, slip op. at 7-8, n.11. Since both of Mass AG's "basis 10a" and "basis 2a" raise issues not posed by admitted bases 10 and 2, they must both constitute proper bases for a contention, and must also meet the burden for admission established by the five factors set forth in 10 C.F.R. § 2.714(a)(1):

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

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

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

With respect to these criteria, Mass AG asserts no "good cause" (factor (i)) for its belated attempt to introduce its amended "bases" into litigation. As noted above, no regulatory requirement for a "voice" mode of communication to the Seabrook beach population is cited in support of proffered "basis 10a," and no such requirement exists. Further, as noted on page 3 of Applicants' Answer To Motion To Amend Basis Filed By Mass AG With Respect To Sirens Contention (September 12, 1988) (Applicants' Answer), Mass AG was furnished with data upon which basis 10a is predicated at least by July 5, 1988, nearly two months ago.

With respect to proposed "basis 2a," no reason or argument is presented to justify Mass AG's tardy attempt to introduce the issue of the necessity of property owners' permission for siting of acoustics locations. The Mass AG acknowledges the matter in this new basis was made available to the Mass AG as of July 19, 1988, well before the date of his motion. Applicants' answer at 4. More importantly, the issue could also have been raised at the time Mass AG's initial contentions in this proceeding were filed, or long before July 1988. Further, no relationship is substantiated between "basis 2a" and basis 2 as admitted into litigation, such that the latter may fairly be considered to have put opposing parties on notice as to the future need to litigate the former.

In sum, Mass AG has shown no reasons why his late motion should be entertained. He has given no good reasons for sitting on the sidelines for this long time. He has given no good reasons why he should be permitted to introduce two new issues at this late date. Therefore, he has failed to show any good cause for his late filing, and this factor should preponderate against the granting of his motion to amend his bases

in these proceedings. Accordingly, the first factor -- good cause for delay -- weighs heavily against the Mass AG with respect to both "basis 10a" and "basis 2a."

Absent a showing of good cause for late filing, an intervention petitioner must make a "compelling showing" on the other four factors stated in 10 C.F.R. § 2.714(a). Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982), citing South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 894 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1982). Factor (ii) concerns whether there is another forum for a party to have its interests represented. Factor (iv) concerns whether there is another party to represent petitioner's interests. 10 C.F.R. § 2.714(a). These factors are generally given less weight than the others. See, Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245; citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). While the Staff believes that these two factors weigh in favor of Mass AG, in the circumstances of this case, despite his failure to address them, they do not create a "compelling showing" justifying admission of "basis 10a" and "basis 2a" into this proceeding.

The third factor set forth in 10 C.F.R. § 2.714(a)(1) concerns the ability of Mass AG to contribute to development of a sound record. As the Commission has previously noted, "[O]ur 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." See, CLI-86-8, supra, 23 NRC at 246. The Appeal Board has stated "[W]hen 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." Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). Mass AG presents no argument whatsoever to substantiate compliance with this criterion in regard to either "basis 10a" or "basis 2a." Accordingly, it must be weighed against him.

Finally, factor (v) requires inquiry concerning whether the Mass AG's new contention would broaden the issue or delay the proceeding. Without referring to this factor, he avers, in conclusory fashion, that "admission of these two bases will not broaden the scope of the hearing in any material way." Mass AG Motion at 4. To the contrary, admitting either "basis 10a" or "basis 2a" into litigation would inevitably entail both the adverse consequences required to be considered under factor (v). Thus factor (v) further depresses the scales against admission of the new "bases."

Balancing the factors in 10 C.F.R. § 2.714(a)(1) requires that "bases" 10a and 2a be denied admission into litigation.

CONCLUSION

In summary, Mass AG's Motion represents an untimely attempt to inject two new issues on the eve of the filing date for summary disposition motions. A balancing of the five factors set forth in 10 C.F.R.

§ 2.714(a)(1), in light of precedent and sound policy, militates against admitting these late-filed issues. Mass AG's motion, therefore, should be denied.

Respectfully submitted,

Stephen A. Bergquist

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Dated at Rockville, Maryland
this 22nd day of September, 1988

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION BY MASSACHUSETTS ATTORNEY GENERAL TO AMEND BASES WITH RESPECT TO SIRENS CONTENTION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system or, as indicated this 22nd day of September 1988.

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