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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 OCT -4 P5:25

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & COMPLIANCE  
BRANCH

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 MASSACHUSETTS ATTORNEY GENERAL'S  
REQUEST TO FILE REPLY TO "APPLICANTS' ANSWER TO  
MOTION TO AMEND BASIS FILED BY MASSACHUSETTS  
ATTORNEY GENERAL WITH RESPECT TO SIREN CONTENTIONS"

INTRODUCTION

On September 21, 1988, the Massachusetts Attorney General (Mass AG) filed a request (Mass AG Request) pursuant to 10 C.F.R. § 2.730(c) for Board permission to file a reply to Applicants' Answer To Motion To Amend Basis Filed By Mass AG With Respect To Sirens Contention (Applicants' Answer). Applicants' Answer was in response to Mass AG's September 8, 1988, Motion To Amend Bases (Mass AG Motion to Amend) regarding the Amended Contention of Attorney General James M. Shannon on Notification System for Massachusetts. The Mass AG Motion to Amend sought to add two new "bases", alleged to be directly related to bases already admitted for hearing. The NRC Staff has already registered its disagreement with Mass AG's attempt to introduce these new "bases" into this proceeding. See NRC Staff Response To Motion By Massachusetts Attorney General To Amend Bases With Respect To Sirens Contention, September 22, 1988 (NRC Staff Response). As the rationale for his request, the Mass AG refers to a Commission rule change on September 16, 1988, which rendered moot the

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issue of the necessity of adequate notification to the general public of a radiological emergency as prerequisite to low-power licensing. As explained in this response to Mass AG's present request, he is essentially reiterating arguments made in his Motion to Amend, while belatedly attempting to address the criteria for late-filed contentions imposed by 10 C.F.R. § 2.714(a). For reasons discussed below, his request should be denied.

#### BACKGROUND

In his Motion to Amend, Mass AG sought addition of these amended "bases":

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.

These "bases" were said to be related to, and merely further evidence of, the following previously-admitted bases:

Basis 10. The applicants have not indicated when and under what circumstances the tone alert mode or the message mode will be used.

Basis 2. 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.

The NRC Staff has already submitted its reasons for rejecting Mass AG's arguments in support of his Motion to Amend. See NRC Staff Response at 3-7. In his new request, Mass AG cites the following language of the contention under which bases 10 and 2 were admitted into this proceeding as further justification that proposed amended bases "10a" and "2a" are within the scope of the contention:

Applicants have failed to comply with the provisions of 10 C.F.R. § 50.47(b)(5) and Part 50, Appendix E, IV, D(3). The means they claim to have established to provide early notification and clear instruction to the populace of the Towns of Amesbury, Merrimac, Newbury, Newburyport, Salisbury and West Newbury, Massachusetts and Salisbury State Beach Reservation in Salisbury, Massachusetts are inadequate.

Further, Mass AG adduces new arguments in a belated attempt to demonstrate that proposed "bases" 10a and 2a comply with two of the requirements governing the admission of late-filed contentions, namely "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record" and "[T]he extent to which the petitioner's participation will broaden the issues or delay the proceeding." See 10 C.F.R. § 2.714(a)(1)(iii) and (v).

#### ARGUMENT

The only new element in Mass AG's request designed to demonstrate that he is not really trying to add new issues to this proceeding is the contention quoted supra. This new factor utterly fails to meet the substance of arguments made in either Applicants' Answer or the NRC Staff Response that "bases" 10a and 2a are actually untimely new contentions which could and should have been made long before the eve of the filing date for summary disposition motions, and which now should be subject to

the five-factor balancing test set forth in 10 C.F.R. § 2.714(a)(1). It appears that Mass AG now recognizes the failure, in his Motion to Amend, to establish a logical connection between proposed amended "bases" 10a and 2a and admitted bases 10 and 2, and is maintaining that other parties to this litigation were somehow put on notice by the broad generality of the contention of the future need to litigate issues raised by the new "bases". Were such an argument to be validated, the vagueness of highly general contentions could be exploited to append an endless array of new "bases", no matter how tenuously related to previously admitted bases. This flouts the intent of the specificity requirement of 10 C.F.R. § 2.714(a)(2) that parties be put on notice of issues to be litigated, and fails to show any logical nexus between proposed new "bases" 10a and 2a and the admitted bases.

Belatedly acknowledging the need to comply with the "five factors" test of 10 C.F.R. § 2.714(a)(1), Mass AG maintains his Motion to Amend was timely. See Mass AG Request at 2-3. What he evidently means by this is that he had good cause for his late-filed contentions. However, he nowhere refers to the "good cause" requirement, or plausibly justifies delaying his attempt to add 10a and 2a until the imminence of the summary disposition filing deadline.

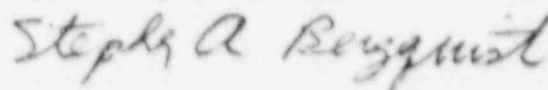
A person who files an untimely contention must affirmatively address the five lateness factors stated in 10 C.F.R. § 2.714(a)(1) in his petition, regardless of whether any other parties in the proceeding raise the tardiness issue. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465 (1985). Thus, the burden of proof is on Mass AG to show justification for admission of late-filed contentions. Id. at 466. A late petitioner like Mass AG who failed to address the lateness

factors in his Motion to Amend is not entitled to a second opportunity to make a substantial showing on those factors, although a Board in its discretion may give a late petitioner such an opportunity. Id. at 468. However, the Board should not do so in this case. Mass AG does not even attempt to explain why there is good cause to entertain his belated attempt to satisfy the five-factor test. Nor could he succeed in making such a showing, because there is nothing in the instant response that could not have been presented initially.

Although the Licensing Board might, as a matter of discretion, accord Mass AG a second opportunity to make a "substantial showing" on the lateness factors, it is not obliged to do so. In short, Mass AG "ignored . . . the terms of 10 C.F.R. § 2.714(a)(1) and his own past practice in Seabrook -- at his peril." Id.

In his Request, Mass AG argues that addition of "bases" 10a and 2a will assist in developing a sound record and will not unduly broaden the issues or delay the proceedings. He is wrong on both counts, but that is irrelevant for purposes of assaying the legal merits of his present pleading. He ignored the five lateness factors in his motion of September 8, 1988, which attempted to add two new contentions in the guise of previously admitted bases. Mass AG's belated, improvisational attempt to make a showing on the lateness factors comes too late. The Board should deny his Request.

Respectfully submitted,



Stephen A. Bergquist  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 29th day of September 1988

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NUCLEAR REGULATORY COMMISSION

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} and Safety Issues

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MASSACHUSETTS ATTORNEY GENERAL'S REQUEST TO FILE REPLY TO 'APPLICANTS' ANSWER TO MOTION TO AMEND BASIS FILED BY MASSACHUSETTS ATTORNEY GENERAL WITH RESPECT TO SIREN CONTENTIONS" 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 29th day of September 1988.

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