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October 3, 1988

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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.	)	Docket Nos. 50-443-OL-1 50-444-OL-1
(Seabrook Station, Units 1 and 2)	)	(Onsite Emergency Planning and Safety Issues)

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

INTRODUCTION

Under date of September 21, 1988, the Attorney General of The Commonwealth of Massachusetts (Mass AG) has filed a document entitled: Request to File Reply of Massachusetts Attorney General to "Applicants' Answer to Motion to Amend Bases Filed by Massachusetts Attorney General with Respect to Siren Contentions" (The Request). The purpose of the filing is apparently to make further arguments in support of a "Motion to Amend Bases" filed by Mass AG on September 8, 1988, and answered by the Applicants on September 12, 1988,

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and the Staff on September 22, 1988. It is stated that The Request is filed because:

> "The reply is necessary because since the Applicants' Answer the Commission has adopted an amendment to 10 C.F.R. § 50.47(d) which bears directly on the Applicants' arguments."[1]

The above-quoted justification is a ruse in large part. In fact, the recent amendment of the regulation referenced has, at best, minimal tangential relevance to the arguments made in The Request.[2] In fact, The Request is an attempt to make the arguments which Mass AG should have made in the September 8, 1988, filing for the first time.[3] For the reasons set forth below, this tactic should not be rewarded, and, in any event, the necessary showing has not been made.

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[1] Request at 1.

[2] See infra n. 5 and accompanying text.

[3] Mass AG's somewhat unstructured approach to this entire proceeding is further illustrated by the fact that the transcript attached to The Request and which allegedly forms a partial basis for it is under this Board's protective order and an agreement prohibiting its disclosure. When this was called to Mass AG's attention, the Applicants were advised that this was simple inadvertence, a representation we accept. As a result we are filing no motion for sanctions. However, as set forth in the argument herein, this casual approach of "file what you feel like whenever you feel like it" should not be condoned by granting The Request.

ARGUMENT

I. The Request Makes no Case for the Exercise of this Board's Discretion to Grant The Request

Under the Commission's Rules of Practice, there is no right of reply to the answer to a motion.[4] A motion for leave to file a reply is, of course, addressed to the sound discretion of the Board. No case has been made for the exercise of that discretion here. As will appear below, every argument that has substantive relevancy to the matter at bar could, and should, have been made in the original filing except one. That one is an erroneously premised argument, see infra § II., to the effect that an admission of the new issues will cause no delay because the "siren issues are [now] full-power rather than low-power issues. . . ."[5] As pointed out below, however, whether it delays full-power or low-power operation, admission of Mass AG's new issues will certainly cause delay.

The adjudicatory boards of the NRC have a long-standing history of granting relief from the Rules of Practice when

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[4] 10 CFR § 2.730(c).

[5] The other place where reference is made to the rule change is in a section where Mass AG complains of the Applicants' refusal to agree to ignore an outstanding Board scheduling order and put off the filing of Summary Disposition Motions with respect to the siren issues.

the party in error is a lay person unfamiliar with legal matters.[6] However, in this case the initial pleading was filed by the Office of the Attorney General of a State; an office from which at least seven attorneys have appeared of record in this proceeding. There simply is no excuse for not making the arguments made in The Request in the initial filing. Thus The Request for leave to file should be denied.

II. Even if the Board Elects to Receive and Consider the Arguments made in The Request, the Arguments Made therein Should Be Rejected on the Merits.

The arguments made in The Request address three of the "five factors" to be considered under 10 CFR § 2.714(a)(1) in deciding whether to admit a late-filed contention. The following rejoinder is offered as to each of the arguments made:

1. *Timeliness*

It is argued that basis 10a could not have been filed until after Amendment No. 6 to the SPMC was served.[7] However, as was pointed out in Applicants' original answer, Mass AG should have realized from a review of an answer to

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[6] Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-479, 7 NRC 470, 471 (1978) (layman's reply to answer to motion filed without leave accepted, examined, and addressed by Appeal Board).

[7] Request at 2.

his interrogatory on this point filed July 5, 1988, that the voice mode was not being used at all.[8] And, in any event, as also pointed out in Applicants' original answer,[9] Mass AG admits it was made clear to him on July 28, 1988, in a deposition.[10] As to the arguments that Basis 2a could not have been brought until after the Desmarais Deposition plus time for a title search on the locations: This ignores the fact that the exact locations were offered to the Mass AG, and refused by him, as early as June 28, 1988, and were actually reviewed by him on July 20, 1988.[11] The timeliness argument is without merit.

2. *Development of Record*

The Commission has stated:

> "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

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[8] Applicants' Answer to Motion to Amend Bases Filed by Mass AG with Respect to Sirens Contention 3 at n.5.

[9] Id. at 3.

[10] Motion to Amend Bases (Sept. 8, 1988), Exh. A at 143.

[11] Applicants' Answer, supra n. 8 at 4.

prospective witnesses, and summarize their proposed testimony'."[12]

In the filing at bar no witness is named; the summaries are too brief. The necessary showing is lacking.

3. *Delay of Proceeding*

The first argument made is that the new bases "arise directly from existing bases and are well within the scope of the siren contention."[13] We have already addressed that argument in our initial answer.[14] The second argument is that there will be no delay because the siren issue is now a full-power issue, not a low-power issue. This may be so, but that does not vitiate the fact that it will broaden the issues and delay the proceeding. All new issues have that effect.

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[12] 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).

[13] Request at 4.

[14] Applicants' Answer, supra n. 8 at 3. One wonders why the filing at issue was even made if the issues were so clearly part of the contention already admitted.

CONCLUSION

For all of the reasons set forth in the Applicants' original answer and those set forth herein, The Request should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on October 3, 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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