7262

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

'88 OCT 12 P5:29

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Emmeth A. Luebke
Jerry Harbour

SERVED OCT 13 1988

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) (ASLBP No. 88-558-01-OLR) October 12, 1988

MEMORANDUM AND ORDER
(Granting Mass. Request To File A Reply;
Denying Mass. Motion To Amend)

Memorandum

I. Background

In the Memorandum and Order of June 2, 1988 (unpublished), the Board admitted as an issue in controversy an amended contention and certain bases or the notification system for Massachusetts which had been submitted by the Attorney General for Massachusetts (Mass.).[1] The admitted amended contention reads as follows:

---

1 The Board also directed that discovery should be completed by August 1, 1988 and that any motions for summary disposition should be filed by September 15. The latter date was extended to September 19 (see Applicants' letter of September 15 memorializing the conference call on September 12). On September 17, Applicants filed their motion for summary disposition, and the Staff and Mass. will file their responses pursuant to § 2.749(a).

DS02

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.

Certain bases were also admitted, among which were the following:

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 accustic locations. The specific laws and ordinances can be identified when the Applicants disclose the acoustic locations and staging areas.

On September 8, 1988, Mass. filed a motion to amend bases. It requested that the following two bases be admitted in that they are directly related to bases already admitted for hearing:

Basis 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.

Basis 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.

The Applicants' answer of September 12 opposed the granting of the Mass. motion. On September 21, Mass. filed a request to reply together with a reply to the Applicants' opposing answer. On September 22, the Staff filed a response opposing the granting of the Mass. motion, and on

September 29 filed a response opposing the Mass. request to file reply. On October 3, Applicants filed an answer opposing the request to reply.[2]

II. Discussion

In its motion of September 8, Mass. asserted that the two amended bases resulted from newly discovered facts and/or recent changes in Applicants' notification system plan which could not have been discovered earlier. In addition, Mass. stated that only as a matter of caution was it filing the motion to amend since bases 10a and 2a were directly related to admitted bases 10 and 2 and fell clearly within the scope of the admitted contention. However, we agree with the Applicants' and the Staff's arguments that Mass. has attempted to inject two new contentions because the two proposed amended bases raise issues neither posed by nor directly related to the original admitted bases. Since the reach of a contention necessarily hinges upon its terms coupled with its stated bases and since a fair reading of the contention and of bases 10 and 2 compels us to conclude that the contention was not intended to embrace the two issues newly posed in the amended bases, Mass. should have filed a motion for leave to file out-of-time the two

---

2 We grant Mass.' request to reply despite the fact that its citation to and discussion of the five factors in 10 C.F.R. § 2.714(a)(1) should have been presented in its motion of September 8. On numerous prior occasions we have cautioned the parties that they must file exhaustive briefs. Hereafter, where it is clear that, as in the instant case, the movant could and should have presented fully all arguments in the original motion, we will deny any request by the movant to file a reply brief. Our patience is at an end.

new contentions, cited and fully addressed the five factors in 10 C.F.R. § 2.714(a)(1) that govern the disposition of late-filed contentions.[3] We deny the motion to amend bases but proceed to discuss the five factors to determine whether, as contentions, the two late-filed contentions should be admitted.[4]

In its motion of September 8, although not citing the first factor in § 2.714(a)(1), and in its reply of September 21, Mass. stated that, during the taking of a deposition of one of Applicants' witnesses on July 28, 1988, it learned for the first time that Applicants had no plans to use sirens in the beach area in the voice mode. Mass. also asserted that it was not until after August 2, when Applicants amended the Seabrook Plan for Massachusetts Communities and thereby confirmed the deletion of the voice mode, that Mass. had factual grounds for submitting the proposed amended basis 10a. Second, Mass. asserted that

---

3 Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC __ (August 23, 1988).

4 (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.

it was not until after August 19, 1988, when the off-site Licensing Board rejected Mass. contentions concerning inadequate provisions for instructing the population via the voice mode because this was an on-site issue, that it had grounds for filing proposed amended basis 10a before this on-site Board. In both the motion and the reply Mass. asserted that it had no grounds for proposing amended basis 2a until after it found out during discovery the addresses of acoustic locations where the sirens were to be located, and until after it discovered, through title searches, that several of the acoustic locations appeared to be on private property. Mass. added that it appeared that the owners of these properties had not consented to the use of their properties for siren operation. However, with respect to Contention 10a, since Mass. acknowledges that it learned on July 28, 1988 that the Applicants had no plans to use sirens in the voice mode, we find that it should have filed a motion for leave to submit out-of-time this new contention in a timely manner instead of waiting until September 8 to do so. Further, we find that it is not an acceptable excuse that, rather than timely filing a motion for leave with this Board, Mass. took the risk that the contention would be admitted by the off-site Board. With respect to Contention 2a, Mass. does not deny that on July 20, 1988 it reviewed discovery documents which set forth the addresses of the preselected acoustic locations where the sirens would be operated. Thus, thereafter Mass. should have filed a motion for leave to submit out-of-time this new contention in a timely manner, and we find that it did not. We conclude that Mass. has failed to show good cause for failure to file a

motion for leave to submit out-of-time these two new contentions for periods of between forty-two to fifty days after becoming aware of the relevant information. We weigh this factor against Mass. Absent good cause for late filing, a compelling showing must be made on the other four factors.[5]

The Applicants and the Staff concede factors (ii) and (iv) weigh in favor of Mass. and we agree. However, these two factors are accorded less weight than the three other factors.[6]

With respect to factor (iii), 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.[7] At page 4 of its reply, Mass. states that, with regard to Contention 2a, it will present evidence in the form of title documents and testimony of Applicants' employees to establish that Applicants neither own nor have they sought permission to use certain acoustic locations upon which to operate the vehicular mounted sirens. It also states that with regard to Contention 10a it will offer the testimony of a behavioral/human response expert that the voice mode is absolutely necessary for instructing the transient beach

---

5 Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

6 Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986).

7 Id. at 246.

population in an emergency. While it sets out the precise issues planned to be covered and summarized proposed testimony, Mass. should have but did not identify by name the witnesses it would call to testify in order that the Board could arrive at an informed judgment regarding their likely contribution.[8] It should also have identified the specific title documents it intends to offer into evidence in order to assure the Board that there indeed is real evidence. Perhaps, in light of the Protective Order of July 27, 1988, Mass. was hesitant about specifically identifying Applicants' employees it intended to call as witnesses and about identifying specific title documents -- however, condition 8 of the Protective Order provided that all papers filed that contained any protected information should be segregated and served in specially designated envelopes on the Board and counsel for active parties only. This was not done. We weigh this factor against Mass.

With respect to factor (v), Mass. argues that, since bases 2a and 10a arise directly from existing bases and are well within the scope of the siren contention, the granting of the motion to amend bases will not unduly broaden the issues. However, we denied, supra, the motion to amend bases, and thus to admit the two late-filed contentions obviously would broaden the issues. We need not go farther in light of the disjunctive wording in factor (v). In any event, we reject the second

---

8 South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 893-894 (1981).

argument advanced by Mass. -- viz that since, in amending 10 C.F.R. § 50.47,[9] the Commission made the siren issue a full-power rather than a low-power issue, the full-power proceeding will not be delayed because the Seabrook Plan for Massachusetts Communities pending before the off-site Board is still in the discovery stages. However, pursuant to the Commission's Order of October 7, 1988, CLI-88-08, in a Notice of Clarification dated October 12, 1988, the Acting Chief Administrative Judge of the Atomic Safety and Licensing Board Panel has ordered that this on-site Board has jurisdiction over and shall consider and decide this now full-power issue -- i.e., Amended Contention on Notification System for Massachusetts (and certain bases) admitted in this Board's Memorandum and Order of June 2, 1988 (unpublished). Thus, this on-site Board, rather than the off-site Board, has been authorized to consider and decide the amended contention of Mass. and certain bases which were admitted on June 2. We are a separate, independent Board and must proceed expeditiously to resolve this full-power issue now pending before us pursuant to § 2.749 procedures, regardless of the status of the proceedings before the off-site Board. The admission of the two late-filed contentions would delay our proceeding. We weigh this factor against Mass.

Overall, Mass. failed to demonstrate that it prevailed on the five factor test. Much less did it make the compelling showing on factors

---

9 53 Fed. Reg. 36955 (September 23, 1988).

two through five that was required to overcome its failure to demonstrate good cause, under the first factor, for its failure to file on time.

Order

1. The Mass. request of September 21, 1988 to file a reply is granted.

2. The Mass. Motion to Amend Bases of September 8, 1988 is denied.

3. Even if the Mass. Motion to Amend Bases of September 8, 1988 is considered as a motion for leave to file out-of-time two new contentions, it is denied.

Judge Luebke was unavailable and did not assist in preparation of this issuance.

THE ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 12th day of October, 1988