UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD



Before the Administrative Judges:
Ivan W. Smith, Chairman
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

| | | |
|---|---|---|
| In the Matter of | ) | Docket Nos. 50-443-OL |
| | ) | 50-444-OL |
| PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. | ) | (Off-Site EP) |
| | ) | |
| (Seabrook Station, Units 1 and 2) | ) | December 2, 1988 |

MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

On November 17, 1988, in a Memorandum and Order (Ruling on Applicants' Motion for Sanctions) the Board issued a three-part order in ruling on a motion filed by the Applicants seeking sanctions against the Massachusetts Attorney General ("Mass AG") for three alleged violations of a protective order issued by the Board on February 17, 1988, and extended on March 23, 1988. The Mass AG hereby moves the Board to reconsider its ruling as to the first part of this three-part order for the reasons set forth herein.

The three parts of the sanction ruling are as follows:

1. To remedy any harm that may have been done on October 7 by revealing the members of the relevant bus companies, the Attorney General may not use any information about the bus companies gathered after October 7 as evidence or for cross-examination in this proceeding. This is a mild remedy, not one bit more than required by the circumstances.

2. To prevent violations, the Attorney General is warned that he faces more severe sanctions in the event that his agents disclose protected information in the future. See Policy Statement [13 NRC 452] at 454.

3. Also to prevent future violations, the Office of the Massachusetts Attorney General shall report to the Board what measures it has taken to prevent disclosures of information protected by the Board's order of March 23, 1988. The report shall be signed by Attorney General Shannon himself.

At the outset, the Mass AG states that it understands and seeks no reconsideration of the last two parts of the Board's order. We do not dispute that Part 2, the warning, is an appropriate sanction for the kind of inadvertent violations which did occur here, given the steps taken to correct the violations and the lack of showing of harm resulting from the disclosures. We also do not dispute that Part 3, which requires the Attorney General to submit a report, is an appropriate sanction. Indeed, that report is enclosed herewith.

However, as to the third part of the Board's order, which is a sanction that seeks to remedy any harm that may have been done by the disclosure on October 7 of names of certain bus companies, the Mass AG moves that the Board reconsider its ruling and withdraw this sanction on the following grounds:

(A) The Board's order appears to be premised, in part, on an incorrect assumption that the Mass AG has adopted an intentional strategy of defeating the spirit of the protective order and disclosing the names of the SPMC's service providers

whenever possible; in fact, the Mass AG's intent is just the opposite and we intend to keep this information secret to the fullest extent of our ability;

(B) Information has come to light in the Applicants' answers to interrogatories which reveal that the potential harm which might have been caused by the Mass AG's breach is much less than originally suggested in the Applicants' Motion for Sanctions; and

(C) The Board may not have fully understood the timeliness and nature of the corrective steps taken to "close the breach" after the second inadvertent disclosure.

A. The Mass AG's policy is not to disclose the names of ORO's members or service providers, regardless of how that information is obtained.

Upon reading the Board's Memorandum and Order of November 17, 1988, the Mass AG is concerned that the Board appears to be uncertain whether the Mass AG shares the Board's goal of doing everything possible to avoid public disclosure of the names of the SPMC's service providers and the other information protected by the Board's order of March 23, 1988. The Attorney General and his staff do indeed share this goal. The Mass AG's express policy is to keep the protected information we have secret to the fullest extent of our ability. While the Mass AG did oppose the entry of the protective order last spring, we have adopted a position that

goes well beyond a narrow and technical obedience to the order. Our policy has been to avoid doing anything that might cause public disclosure of the identities of the SPMC's suppliers of services, the ORO members, or any of the information contained in the papers we received from the Applicants pursuant to the protective order.[1/] This policy applies regardless of the source of the information. Whether the source is the documents released to us under the protective order, other documents subsequently received from the Applicants (interrogatory answers, documents produced, etc.), our own investigations, or third-party sources, our policy is to avoid and prevent any public disclosure of the information if it contains or otherwise suggests the identitites of any SPMC suppliers or ORO members or contains other "protected information."

Because it appears that Mr. Fierce's actions at the FEMA-sponsored public meeting on July 2, 1988, and the language contained in the Mass AG's Answer to Applicants' Motion for Sanctions may have led the Board to contemplate that the Mass AG might harbor a continuing intention to force public disclosure of this information, we offer the following comments in the hope that the Board will recognize that the Mass AG has

---

1/ This policy applies as well to the protective order issued by the onsite Board regarding information about the SPMC's Vehicular Alert and Notification System (VANS).

no such intention.

As to Mr. Fierce's actions at the July 2 meeting in Portsmouth, we do not wish to re-argue the facts. But we do wish to note that it was the receipt of a copy of the Applicants' letter to FEMA protesting Mr. Fierce's questions that day which triggered the Mass AG's discussions that resulted in the above-described policy. While we of course have sought to defend Mr. Fierce's actions in response to the motion for sanctions, pursuant to our current policy the Mass AG staff would not today seek in a public setting to ask any questions which, if answered, would elicit the identities of ORO members or service providers.[2/]

B. <u>New information has revealed that the potential for harm flowing from the October 7 disclosure is less than originally suggested.</u>

On November 2, 1988, the day after the Mass AG filed his response to the Applicants' Motion for Sanctions, the Attorney General's office received the Applicants' Response to the Mass AG's Second Set of Interrogatories on the SPMC. Interrogatory 13 had asked for a list of the names of the companies "currently being relied upon by the ORO to supply buses and/or vans in the event of a radiological emergency at Seabrook Station." Applicants' answer to this interrogatory lists the

---

2/ This should not be read to suggest that prior to the receipt of Applicants' letter to FEMA the Mass AG's policy was to force public disclosure of this information by others. Such was not the case. Prior to July the Mass AG simply had no policy with respect to the order other than to obey it on its own terms.

names of eleven (11) bus companies. When one compares this list of eleven (11) with the list of sixteen (16) bus companies that were contained in the original "protected information" supplied to the intervenors last spring (pages from the original SPMC prior to any of its six subsequent amendments), one finds that six of the original sixteen have been dropped and one new company has been added. Furthermore, when one compares this list of eleven currently participating bus companies with the list of eight (8) bus company names which were inadvertently disclosed on October 7, one finds that only three companies appear on both lists.

These facts are significant for the following reasons. Last spring, after receiving the names of the sixteen (16) bus companies along with the other "protected information," the Mass AG's investigators contacted the managers of each of the sixteen companies and questioned them about their participation in the event of a radiological emergency at Seabrook Station. We wanted to learn, first, whether they had agreed to participate at all and, second, if they were participating, under what conditions, limits, or constraints were they doing so. We learned that four companies did not intend to participate at all and that with respect to at least four other companies, the buses the SPMC indicated they would supply would be provided only "if available," i.e., not otherwise in use at the time, and that for these companies there was no reasonable assurance that all listed buses would ever be available to the ORO when needed.

As a result of these investigative contacts, the Mass AG subsequently drafted a number of SPMC contentions which used this information about the bus companies as a basis, and these contentions were admitted.

On August 31, 1988, the Applicants served the Mass AG with the Applicants' First Set of Interrogatories. Interrogatory 6 sought inter alia, "all the facts underlying each assertion" in each of the contentions. In MAG 47(F), a school-related contention which was consolidated into JI 45, the Mass AG had alleged: "At least eight of the 16 companies have either confirmed that they will not participate or that they will offer only the buses, vans and drivers that might be available, if any, at the time of an emergency." Thus, on October 7, 1988, in a supplemental response to Interrogatory 6, the Mass AG provided the names of the four (4) bus companies which it had learned will not participate and the names of the four (4) companies which had not provided reasonable assurance of the ready availability of the number of buses listed for them in the SPMC. This of course, was the public disclosure at issue here.

The Applicants' answers to the Mass AG's interrogatories now reveal, however, that five (5) of the eight (8) companies listed by the Mass AG in this interrogatory answer are no longer being relied upon by the ORO. The plans originally listed sixteen (16) bus companies. Of these only ten (10) remain and one new one has been added. Thus, six (6) of the

original sixteen (16) have dropped out. Importantly, there is no suggestion by the Applicants in their motion for sanctions that these companies withdrew after October 7, 1988.[3/] What appears almost certainly to have happened is that these five (5) companies, as the Mass AG had learned, were not solidly committed to responding to a radiological emergency at Seabrook and dropped out on their own prior to October 7, 1988.

This, of course, leaves three (3) remaining bus companies the names of which were disclosed inadvertently on October 7 and which the Applicants contend (in their interrogatory answers) are still participating. As to one of these, however, the Mass AG's disclosure on October 7 lists it as one of the four companies which is not going to be participating. Such a disclosure -- that company "X" is not participating -- is highly unlikely ever to result in that company being subject to harassment. While the demonstrators we have observed may be "emotionally volatile" as the Board has described (Memorandum and Order at 8), they do not appear to be so irrational as to harass companies which the Mass AG has indicated are not cooperating with New Hampshire Yankee or the ORO.

The upshot is that of the eight bus company names released briefly by the Mass AG, potential harm to the Applicants and to

---

3/ If any of the five (5) identified companies had withdrawn after that date, Applicants would surely have mentioned it in their motion rather than have simply admitted, as they did on page 9 of that motion, that "Applicants, to be sure, cannot now point to what, if any, specific effect this public disclosure may have on bus company participation."

the integrity of the NRC adjudicatory process realistically exists as to only two (2) bus companies. A check of their Letters of Agreement in the "protected information" indicates that together these two companies are being relied upon to supply only 45 buses out of a total of 366 which the SPMC, Amendment 6 now indicates are needed. See Resource and Needs Summary, SPMC, Appendix M at M-16 and M-17.[4/]

What is equally revealing about this brief recount of the events leading up to the Applicants' motion for sanctions is that at the time they brought this motion they must have known that the realistic potential for harm from the Mass AG's inadvertent disclosure of eight (8) bus company names ran only to two of the eight companies. Yet the Applicants fail to mention this critical information in their motion. Rather than accurately describing the limited nature of the potential for harm, they exaggerate it. See Applicants' Motion for Sanctions at 6 ("With this violation, Mass AG, by an authorized person, has rendered the Board's Order a nullity in respect of the matter disclosed. The direct result of Mass AG's flouting the Order of this Board is an impairment of the Applicants' ability to defend against contentions and bases alleging bus company insufficiency.") and at 9 ("Should any bus company decide to withdraw, given Mass AG's disclosure of the protected

---

4/ The Mass AG still contends that these companies will supply not 45 buses, but only that number of buses, if any, which will be available at the time.

information, it will be impossible to determine definitively whether that withdrawal resulted in whole or in part from harassment and intimidation.")

The fact is that should there be a withdrawal by any of the nine (9) currently participating bus companies which are not one of the two (2) which were put at some risk by the October 7 disclosure, it obviously will be very easy to determine definitively that the withdrawal did not result from that disclosure. Similarly, even if there is a withdrawal by one of the two companies which was named, it will not be impossible to determine (at least by the "preponderance" standard if not "definitively") whether that withdrawal resulted in whole or part from harassment. Presumably, the owner or manager can be asked whether the company was subject to any harassment or intimidation and, if so, whether that had any bearing on the decision to withdraw.

As the Applicants' answers to interrogatories now reveal, six (6) of the original sixteen (16) bus companies have dropped out. Clearly, the commitment of those six (6) companies, despite having signed LOAs, was extremely tenuous. This raises serious questions regarding the remaining bus companies, the strength of their "commitment" to respond to a real emergency, and the nature and timing of that response. Having now received the list of the eleven (11) currently participating

bus companies from the Applicants, the Mass AG intends to gather information once again from all participating bus companies to examine these questions. It would be unfair if, as a result of the Mass AG's inadvertence and the Applicants' exageration of the impact, the full litigation of these important issues is limited at the hearings such that any otherwise relevent information now gathered which shows that any of the 11 bus companies are not participating, or cannot respond with the number of buses indicated, will not be admitted into evidence.

But it is more than unfair. As the Board has acknowledged, "the unwillingness of the bus companies to actually respond in a radiological emergency is a serious safety matter." Memorandum and Order at 11. It simply would not be prudent or in the public interest for licensing decisionmakers to refuse to consider relevant evidence about bus company non-participation or, where companies are facially participating, the limits or constraints they have placed on that participation. The most relevant evidence about the commitments of bus companies is that which is most current, not that which the Mass AG gathered last March. It is clearly a serious matter of public safety for the Board to know what the current commitment is of all the currently participating bus companies, those three (3) named in the October 7 filing as

well as the remaining eight (8). Current data about the three (3) which were named are especially important, because each had informed us last March that it was either not participating or, because it would send only the buses then available, could not be counted on to supply the full number of buses it was willing to provide. Current data about the eight (8) others also needs to be gathered and presented in light of the concerns raised by the high drop-out rate over the course of the past year.

In the Commission's Statement of Policy on the Conduct of Licensing Proceeding, CLI-81-3, 13 NRC 452, 454 (1981), the Commission stated its policy on sanctions as follows:

> In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

We ask the Board to reconsider its sanction in light of how this new information, brought to light by the Applicants' answers to interrogatories, may change the balance it gives to some of these other factors noted in the Statement of Policy, especially in reducing "potential for harm."

We note as to two of these other factors that Part 3 of the

sanction will potentially impede the Board's full evaluation of important safety concerns and is imposed for an incident which does not appear to be a pattern or practice.[5/]

C. The steps taken to "close the breach" after the October 7 disclosure were as responsible as those taken to close the September 21 breach.

In its Memorandum and Order of November 17, 1988, at 7, the Board, in discussing the September 21 disclosure in an onsite Board filing of certain VANS location owners, noted that the Mass AG promptly sought to retrieve all copies of the protected information and that this action was "a wholly responsible and appropriate response." However, in assessing the October 7, 1988, disclosure of certain bus company names in answers to interrogatories served on the Mass AG by the Applicants, the Board stated: "Again the Attorney General took action to correct the error, but we don't know whether that action was prompt enough or thorough enough. It took until October 19 to close the breach. Answer at 7."

It appears that the mere citation to certain documents on the top of page 7 of the Mass AG's answer may have led the Board to conclude that the breach was not closed promptly. As the attached affidavits of Pamela Talbot and Ellen Keough

---

5/ Ms. Talbot's October breach appears to be separate and unrelated to that which stemmed from Mr. Jonas' filing in September.

indicate, the interrogatory answers were mailed on Friday, October 7, 1988. This was the beginning of a three-day holiday weekend (Columbus Day). On the next business day, Tuesday, October 11, the Mass AG learned of the inauvertent disclosure and began to take steps to close the breach.

A decision was promptly made to send a notice, along with a stamped return envelope, to the entire Service List. Because the process of drafting, typing, copying, addressing, stuffing, and mailing the notice to the full Service List was likely not going to be completed before the end of that day or the beginning of the next, Ms. Keough was assigned the task of immediately calling as many of those on the Service List as she could reach. As her affidavit indicates, many of those on the Service List were contacted. The following day, October 12, Ms. Talbot sent a notice (attached to her Affidavit) to the Service List seeking the return of the page on which the disclosures were listed. To facilitate returns, she enclosed a stamped return envelope with her notice. Two days later, on October 14, 1988, Ms. Talbot called Mr. Julian in the NRC's public documents room to verify that he would be entering the corrected page into the public documents computer and not the original page. He assured her that it would be. The October 19 date mentioned by the Board (Memorandum and Order at 7) was of no significance in closing the breach; on that date

Ms. Talbot merely sent a letter to Mr. Julian thanking him for his assistance.

Thus, when fully examined, the steps taken by the Mass AG to close this breach are difficult to fault. The Mass AG acted as promptly and as responsibly as it could.

## CONCLUSION

For all the reasons stated above, the Mass AG respectfully requests that the Board reconsider its decision to preclude the Mass AG from using any information "about the bus companies" gathered after October 7. If the Board's purpose is to preclude any such further disclosures, parts 2 and 3 of the Board's order have accomplished that goal. If, as the Board states (at 9), its purpose is to "remedy any harm that may have been done on October 7" by revealing bus company names, we fail to see how this sanction achieves that goal since no harm has occurred by all accounts. If either of the two bus companies which was put in some risk of harm is ever harassed, proof of that harassment can be received and sanctions imposed, if necessary, at that time.

In the event that the Board elects to maintain this sanction in place, we move the Board to clarify its meaning. We assume, but are not certain, that the reference to the "relevant bus companies" means that the order only applies to the two bus companies named which were put at risk, not all

other participating bus companies. We also assume, but are not certain, that we can still present the information we do have about these two companies which was gathered prior to October 7 and can cross examine witnesses presented who testify about these two companies.

Respetfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

By: Allan R. Fierce

Stephen A. Jonas
Deputy Attorney General
Allan R. Fierce
Pamela Talbot
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

DATED: December 2, 1988