2483

LBP-87-3

DOCKETED
USNRC

'87 FEB 10 A10:14

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

SERVED FEB 10 1987

| | |
|---|---|
| In the Matter of | Docket Nos. 50-443-OL-1<br>50-444-OL-1 |
| PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. | (On-Site Emergency Planning and Safety Issues) |
| | (ASLBP No. 82-471-02-OL) |
| (Seabrook Station, Units 1 and 2) | February 6, 1987 |

MEMORANDUM AND ORDER
(Denying Mass.' Motion of January 12, 1987)

MEMORANDUM

On January 12, 1987, the Commonwealth of Massachusetts (Mass.) filed a motion requesting that the Board admit a late-filed contention,[1] reopen the record in the on-site emergency planning phase of this proceeding, and refrain from issuing any decision that might authorize

---

1 The late-filed contention asserts that:

> Applicants have failed to comply with the provisions of 10 C.F.R. §50.47(b)(5) and Part 50, Appendix E, iv, D.1 and 3, because no administrative or physical means have been established to provide early notification and clear instruction to the populace within the plume exposure pathway located within the Town of Merrimac, Massachusetts.



DS02

the issuance of an operating license for operation not in excess of 5% rated power. With respect to the last request, in the alternative, Mass. requests that any decision authorizing the issuance of a low-power license condition the issuance of such a license upon Applicants' compliance with 10 C.F.R. §50.47(b)(5).[2]

On January 12, 1987, Applicants responded and on January 29, the Staff responded.

## DISCUSSION

### I. Re The Request To Admit A Late-Filed Contention

In a motion filed on June 17, 1986, Applicants, in part, had requested that our Partial Initial Decision should authorize operation of Seabrook Unit 1 up to and including 5% of rated power. Mass., including certain intervenors, filed responses in opposition. Our

---

[2] 10 C.F.R. §50.47 provides in pertinent part:

> (b) The onsite and, except as provided in paragraph (d) of this section, offsite emergency response plans for nuclear power reactors must meet the following standards:
>
> * * *
>
> (5) Procedures have been established for notification by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

Memorandum and Order of July 25, 1986, LBP-86-24, 24 NRC 132, granted this part of Applicants' motion to the extent that we stated that our Partial Initial Decision would decide whether or not to issue the operating license for operation up to and including 5% of rated power. The Board closed the record on October 3, 1986,[3] the parties have filed proposed findings of fact and conclusions of law, and the Board is preparing its Partial Initial Decision.

Mass. asserts that Applicants' emergency response plans provide that the Town of Merrimac would be notified of emergencies by means of three alert and notification sirens to be situated in the Town. It alleges that, during the week of January 5, 1987, via an affidavit executed by the Chairman of the Board of Selectmen of the Town of Merrimac, it learned that the sirens are not operational because they have not been hooked up electrically. The affidavit reflects that on May 22, 1986, the Town told its wiring inspector not to issue a wiring permit. The affidavit also reflects that only two of the sirens have been erected but does not state when the affiant first became aware that the third siren had not been installed. However, the affidavit reflects that, on June 2, 1986, the Board of Selectmen revoked its previous action to allow Applicants to install and operate sirens and that such

---

3 During the hearing, the Board received evidence upon on-site issues in controversy which involved the classification scheme and emergency action levels, the safety parameter display system, and the environmental qualification of electrical equipment.

revocation included immediate cessation of all work on siren installations and operation.

In order to determine whether to grant Mass.' motion to admit the late-filed contention, we must consider the five factors set forth in 10 C.F.R. §2.714(a)(1).[4] With respect to the first factor, Mass. urges that it could not have filed earlier because it could not have known or reasonably asserted earlier that Applicants' emergency response plans for notifying the Town of Merrimac would not be implemented. However, as of May 22, 1986, Mass. knew or should have known that the Town had refused to permit the electrical hooking up of the sirens. Moreover, as of June 2, 1986, it knew or should have known that the Town had ordered the immediate cessation of all work on the sirens. We agree with the Applicants that Mass. has not shown good cause for failing to file its contention in a timely manner.

---

[4] The five factors are:

(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 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 issue or delay the proceeding.

With respect to the second and fourth factors, we conclude, and Applicants concede, that there are no means available to Mass. whereby it can assure that its interest will be protected other than by the filing of this contention, and that Mass.' interest will not be represented by existing parties since no other party had proposed such a contention before the Board. However, these two factors are accorded less weight than factors one, three and five. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

With respect to the third factor, we agree with the Applicants that Mass. has failed to demonstrate that it has special expertise on the subjects which it seeks to raise. Mass. states that it can call the Chairman of the Board of Selectmen as a witness, but, after reading his affidavit, at most we conclude that he could testify only as a fact witness. Although it should have done so, Mass. did not identify other prospective witnesses and summarize their proposed expert testimony. Thus, this third factor cannot be weighed in favor of Mass. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-7 (1986).

Finally, as to the fifth factor, we agree with the Applicants that the admission of the late-filed contention would broaden the issues and delay the proceeding which is sub judice. Indeed, Mass. "acknowledges that the admission of this contention at this very late date after the record has been closed in this [on-site] portion of these licensing

proceedings will necessarily broaden and cause delay in the proceedings." Mass., however, states that "the factual issues raised by this contention could easily be decided by affidavit and therefore the entire issue could be briefed and resolved within a matter of just a couple of weeks."[5] We are not persuaded by Mass.' conclusional statement concerning the short turn around time for the resolution of this matter. Mass. does not tell us whether discovery by any of the parties will be needed nor does it set forth a schedule for the filing of briefs and replies which all parties have agreed could be met. The Commission has directed Licensing Boards to see to it that the process moves along at an expeditious pace, consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, CLI-8-8, 13 NRC 452, 453 (1981). We must comply with that direction.

---

5 In passing, we note that the Applicants and the Staff leap even farther than Mass. proposes. The Applicants urge that, should the Board admit the contention, the Board should grant summary disposition of the contention in light of the attached affidavit of its radiological assessment manger. The Staff did not deem it necessary to brief whether Mass. had satisfied the standards for late-filed contentions -- rather, in light of the attached affidavit of its senior resident engineer, the Staff urged that it was clear that the contention's factual premise was fundamentally in error and thus that the contention must be rejected. Applicants and the Staff assert that, as established in the affidavits, (1) the two sirens erected in the Town have been equipped with batteries and have operated and will operate under a procedure whereby fresh batteries are put in the sirens every two weeks, and that (2) the third siren is not necessary because a study by Applicants' consultant confirms that the two battery-operated sirens can produce noise levels of at least 10 decibels above normal which meets the requirements of NUREG-0654. Pursuant to

(Footnote Continued)

It is well established in our case law that the first factor is a crucial element in the analysis of whether a late-filed contention should be admitted. If the proponent of a contention fails to satisfy this element of the test, it must make a "compelling" showing with respect to the other four factors. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986); Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983); Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). Mass. did not make the "compelling" showing on factors three and five that was required to overcome its failure to demonstrate good cause, under the first factor, for its failure to file on time.

II. Re The Request To Reopen The Record

A motion to reopen a closed evidentiary record is governed by 10 C.F.R. §2.734.[6] 51 Fed. Reg. 19535, 19539 (1986). It is obvious from

---

(Footnote Continued)
§2.714(a)(1), we may only determine whether or not to admit the late-filed contention.

6 Section 2.734 provides in pertinent part:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
>
> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely
>
> (Footnote Continued)

our discussion above that Mass.' motion to reopen, which relates to a contention not previously in controversy, does not satisfy the requirements for nontimely contentions in §2.714(a)(1)(i-v). Further, while in our discretion we could consider an exceptionally grave issue even though the motion to reopen was untimely, with respect to this narrow exception in §2.734(a)(1), the Commission, in its Analysis of Public comment, stated that "It must be understood that the Commission anticipates that this exception will be granted rarely and only in truly extraordinary circumstances." The circumstances here do not qualify as being "truly extraordinary" since it was the Town of Merrimac itself that caused them by being obdurate and obstructive in refusing to allow the installation of the third siren and in not permitting the electrical hookup of the sirens. Thus, the first criterion for reopening a record has not been met.

---

(Footnote Continued)
presented.

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

* * *

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in §2.714(a)(1)(i-v).

We also conclude that the second and third criteria have not been satisfied. While footnote 5, supra, indicates that we would not either admit the late-filed contention and summarily dispose of it or simply reject it as being fundamentally in error, after reviewing the Staff's and the Applicants' affidavits for the purpose of determining whether the motion to reopen should be granted, we have decided that a significant safety issue is not involved and that a materially different result would not be or would not have been likely had the newly proffered evidence been considered initially. The Staff's affidavit, confirming that which is stated in Applicants' affidavit, satisfies us that the Staff finds Applicants' schedule acceptable in requiring the replacement of batteries in and the testing of the two sirens every two weeks. The Staff's affidavit also satisfies us that the noise levels of the two sirens meet regulatory requirements and that the adequacy of the siren coverage will be routinely examined as part of the emergency exercise held before full power licensing.

III. Re The Request That The Board Refrain From Issuing A Low Power License

In light of our rulings under Parts I and II, above, we deny the request that we refrain from issuing a decision that might authorize the issuance of an operating license for operation not in excess of 5% of rated power, and we deny the alternative request that any decision authorizing the issuance of a low-power license condition the issuance of such a license upon Applicants' compliance with §50.47(b)(5).

ORDER

For the foregoing reasons, the Mass. motion of January 12, 1987 is denied.

It is so ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe

Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Jerry Harbour

Jerry Harbour
ADMINISTRATIVE JUDGE

Emmeth A. Luebke

Emmeth A. Luebke
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 6th day of February, 1987.