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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 50-444-OL
(Seabrook Station, Units 1 and 2)	(Offsite Emergency Planning Issues)

APPLICANTS' RESPONSE TO MASS AG'S MOTION FOR THE BOARD TO ACCEPT AN EXHIBIT (AMBULANCE LICENSING)

Applicants hereby respond in opposition to the "Motion For The Board To Accept An Exhibit," dated June 30, 1989, of the Attorney General for the Commonwealth of Massachusetts ("Mass AG"). The exhibit consists of four letters from a Deputy General Counsel for the Massachusetts Department of Public Health ("DPH") to certain ambulance companies located outside the Commonwealth. For the reasons discussed below, the Board should deny Mass AG's motion.

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BACKGROUND

On June 29, 1989, Mass AG drew the attention of the Board and the parties to the existence of certain letters, under the date of June 27, 1989, written by Ms. Suzanne L. Mager, a Deputy General Counsel at DPH, to four ambulance companies, each of whose principal place of business lies outside of Massachusetts.[1] In these letters, Ms. Mager advised the ambulance companies that DPH considers them to be subject to injunction and criminal sanctions because they have contracted with the Seabrook Joint Owners to provide ambulance services in the event of a radiological emergency. In particular, the letters allege that Chapter 111C of the Massachusetts General Laws and Section 170.296(B) of Title 105 of the Code of Massachusetts Regulations provide a basis for such legal action against the companies. The letters conclude by warning the ambulance companies that DPH will pursue "enforcement procedures" unless they respond within five days and confirm in writing that they had terminated their contracts with the Seabrook Joint Owners.

Mass AG argued on June 29 that the DPH letters ought to be admitted into evidence as proof that the SPMC makes insufficient provision adequately to protect the public in

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[1] The four companies are MEDEC Ambulance, Inc. of Portland, ME, Rockingham Regional Ambulance, Inc. of Nashua, NH, Derek's Ambulance Service of Manchester, NH, and B & L Ambulance and Rescue of Portland, ME.

the event of a radiological emergency. Tr. 28097-28102. The Board at that time instructed Mass AG to present his argument in the form of a written motion. Mass AG arrived at the final day of hearings, June 30, 1989, with a motion in writing.[2] The Board then determined that, because the subject matter was significant and the Motion was late, it would consider the Motion and Applicants' response on the papers in accordance with Commission rules. Tr. 28195.

ARGUMENT

Mass AG's motion should be denied for five distinct and independently sufficient reasons. First, the proffered exhibit is not relevant to any admitted contention. Second, the DPH letters have no effect under either Massachusetts law or NRC precedent. Third, the letters have no probative value because they constitute only a legal argument and futhermore present an erroneous application of law. Fourth, the Commonwealth is estopped from offering the letters. Finally, the motion is extraordinarily and inexcusably late. These arguments are addressed seriatim below.

1. No Contention Alleges That the Contracts in Question Are Illegal.

The four letters were offered by Mass AG "in connection with Contention No. 55." Tr. 28097; see also Motion at 1.

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[2] The motion is titled "Motion For The Board To Accept An Exhibit" [Hereinafter referred to as "Mass AG's motion" or the "Motion"].

Mass AG claims that the letters are relevant because they are "probative of the ability of the Applicants to provide an adequate number of ambulance to transport the sick, injured and disabled from the Massachusetts EPZ in the event of radiological emergency at Seabrook Station." Motion at 1. Mass AG's theory of relevance is that the DPH's demand that these ambulance companies, which do no business in Massachusetts, nonetheless obey the DPH and repudiate their contracts with the Seabrook Joint Owners "put the use of out-of-state ambulances as a resource in the SPMC in doubt." Motion at 7.

A critical flaw in this theory of relevance is that nowhere in JI Contention 55 or any of its bases is it alleged that any licensing problem existed with regards to out-of-state ambulances.[3] No other admitted contention raises the issue. Moreover, nowhere in Mass AG's interrogatory responses is any assertion of unreliability due to licensing difficulties even suggested. See Answers and Responses of the Massachusetts Attorney General to the Applicants' Interrogatories and Requests For Production Concerning JI Contentions 6 and 27-63 (December 19, 1988) at Interrogatory Response 254; see also id. at Responses 147, 175, 202, 263, 265. As Mass AG has expressly conceded, his interrogatory

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[3] Indeed, in Basis C of JI 55, Mass AG did raise a licensing issue, but only as to ambulettes, thus indicating that that issue was the only licensing question to be litigated.

answers set the outermost possible scope of his contentions. Tr. 18687-88.

The proffered exhibit thus is not relevant to any admitted contention as particularized in any bases. Nor should it be treated as a request for a late-filed contention, since Mass AG has failed to follow the proper procedure for making such a request.[4] See Memorandum and Order (Ruling on Massachusetts Attorney General's Exercise Contentions 8.C.1, 8.C.3, 18, and 21.C) at 12-13 (January 13, 1989) and cases cited therein; see also Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-86-41, 24 NRC 901, 927-28 (1986), modified, ALAB-859, 25 NRC 23, aff'd, ALAB-872, 26 NRC 127 (1987).

Even if Mass AG had properly moved for admission of a late-filed contention, moreover, that motion should have been denied. Looking to the first of the five factors applicable pursuant to 10 C.F.R. § 2.714(a)(1), no good cause could be found for the egregious lateness of Mass AG's request. As Mass AG's own investigators have testified, Mass AG possessed copies of the contracts with the four ambulance companies in question as early as March, 1988, i.e., well prior to the

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[4] The exhibit could only properly be admitted by the Board sua sponte if Mass AG had shown that "a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. §2.760a. No such showing has been made here. Nor could one be, especially in light of the legal infirmities of the proffered letters, see infra Sections 2 and 3, and the fact that Applicants could readily cure any violation -- if a state court did eventually find that one existed -- by having the companies in question obtain Massachusetts licenses.

deadline for filing contentions. Mangan & Paolillo Dir. ff. Tr. 19429 at 5, 6-8, 9-10, 19-20. In the Motion, Mass AG concedes that he "was previously aware of the fact that out-of-state ambulance services were to be used in the SPMC." Motion at 2. He goes on to claim, however, that "the Massachusetts Attorney General was not aware that such companies required Massachusetts ambulance service licenses."[5] Accepting that confession as being true, ignorance of the "law" by the Attorney General can constitute no excuse for a fifteen-month delay in raising this issue.

Having failed to show good cause for his lateness, Mass AG would then be required to "make a compelling showing on the other four factors" of § 2.714(a)(1). Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC ___, slip op. at 21 (June 20, 1989) (emphasis in original). Mass AG could make no such showing. To the contrary, the third (contribution to a sound record) and fifth (delay and/or expansion of issues) would have counted against him. The extreme lateness of Mass AG's motion -- i.e. at the very close of the hearings -- precluded Applicants and/or Staff from offering a cogent factual response to it, thus tending to undermine rather than enhance the soundness of the record. As the Board has noted, it does

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[5] Mass AG does not claim that his client the DPH was similarly ignorant. Given Mass AG's claim of attorney-client privilege with DPH and other Massachusetts agencies, simple fairness demands that he should be chargeable with the knowledge of that client agency.

not favor "sandbagging" tactics used to manipulate the record. Tr. 27212. Similarly, Mass AG clearly would be broadening the issues and, to the extent that admission of the exhibit would logically require waiting upon the initiation and then resolution of the threatened state-court proceedings, would engender substantial delay. The balance of the five factors would therefore weigh substantially against admission of such a late-filed issue.

2. The DPH Letters Have No Legal Effect In The Licensing Proceedings Because They Are Neither Authorized Under State Law Nor Sufficient By Themselves To Support A Finding That Transportation Resources Would Be Unavailable.

Even if there were an admitted contention on point, the Board should find the proffered letters irrelevant as a matter of law, since they could have no legal effect under either Massachusetts law or NRC precedent.

(a) The DPH letters have no legal effect under Massachusetts law on the contracts between the Seabrook Joint Owners and the ambulance companies.

The Department of Public Health possesses no statutory authority to issue an order demanding that a party not licensed by DPH "cease and desist" from its commitments under a contract. Massachusetts statute, which gives DPH the ability to "make rules, regulations, and orders, and delegate authority to its divisions, employees and agents, as may be necessary or appropriate to carry out the provisions of this chapter," instead of being unlimited in its grant of authority, requires reference to some other "provisions of this chapter." Mass. Gen. Laws ch. 111C, §2(10), Attachment A

hereto. No other section of ch. 111C provides authority for issuance of a "cease-and-desist order" of the type in question here. Nor do the statutes and regulations give any legal status or significance to any such "order".

The closest analogy to the DPH orders which Mass AG seeks to have admitted into evidence is found in Mass. Gen. Laws ch. 111C §9, Attachment B hereto, the statutory section governing a response by DPH to information that an otherwise licensed ambulance is not in compliance with regulatory requirements. That section provides for the department to order a licensee to correct a deficiency, not for an order to terminate its contractual arrangements. Id. at §9(a). It also states explicitly that, instead of requiring an immediate response, for every correction order issued by DPH, "The period prescribed shall be reasonable and, except in an emergency declared by the commissioner, not less than thirty days from receipt of such order." Id. Since the four companies in question do no business in Massachusetts and are not licensed there, §9 is not applicable to them. Moreover, even if §9 were applicable, DPH failed to provide the requisite "reasonable" correction period of at least 30 days, and in these circumstances the time necessary to correct the alleged "deficiency", i.e., enough time for the making and approval of license applications.

Neither do the two other statutory sections that govern enforcement proceedings give the department authority to

demand that a party immediately withdraw from its contractual obligations. Rather, they allow DPH to request the Attorney General's assistance, and they define prohibited acts that the Attorney General may investigate and prosecute in the courts of the Commonwealth. See id. at §§11, 12, Attachments C and D hereto.

Because the DPH letters to the ambulance companies lack any statutory basis, ignore the 30-day provision for notice, fail to mention appropriate procedures for filing an application for a license, and constitute neither an enforcement proceeding in state court nor a recommendation to prosecute to the Attorney General, they cannot be found by this Board to have any effect on the ambulance companies' availability to perform their roles during a radiological emergency.

(b) NRC precedent makes clear that commencement of an adjudicatory proceeding does not by itself support a finding that resources would be unavailable.

The Atomic Safety and Licensing Appeal Board has recently made clear that the results of unresolved state-court proceedings should not be the subject of speculation in NRC licensing proceedings. In Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515 (1988), the Appeal Board considered the situation of a state-court zoning proceeding against an applicant's use of a facility as a reception center. The Appeal Board noted with approval that, until such a time as the state court entered

its final decision, the licensing board allowed trial only on the issue of the reception center's appropriateness, rather than its availability; "the Board quite properly refused to speculate on the outcome of the zoning dispute." Id. at 519.

Pursuant to ALAB-905, only an actual state-court ruling can constitute probative evidence in a licensing proceeding. The mere pendency of state-court proceedings can have no probative value, since their outcome remains speculative. Given that existing, unresolved proceedings are legally irrelevant in NRC practice, then a fortiori the mere threat that such proceedings might be instituted at some point in the future is doubly speculative. The DPH letters threatening future legal action against the ambulance companies doing business with Seabrook are thus irrelevant as a matter of NRC law.

3. The DPH Letters Have No Probative Value Because They Constitute Only A Legal Argument; Furthermore, That Argument Incorrectly Describes The Ambulance Companies' Role And Wrongly Applies The Law.

Even if there were a contention on point and the proffered evidence were legally admissible, the exhibit offered by Mass AG is not probative of the Applicants' ability to provide an adequate number of ambulances in the event of a radiological emergency. Probative value is the tendency of evidence to establish the proposition that it is offered to prove. McCormick, Evidence §184 (3rd ed. 1984). But the letters written by DPH counsel do not present facts that tend to establish that Applicants can no longer rely on

the ambulance companies to provide ambulances during an emergency.

Instead, the letters offer the peremptory legal conclusion that a Massachusetts ambulance "license is required as the result of the terms of your contract with Seabrook Joint Owners" and threaten to pursue "enforcement procedures" if the ambulance companies do not withdraw from their contracts. Such legal argument, whether presented in an exhibit, as is the case here, or in the form of testimony of a witness who addresses a question of law, should be excluded. See Tr. 22874-78 (May 25, 1989) (Board rejects "raw pure legal analysis"); see also McCormick, Evidence §12 (3rd ed. 1984); Marx & Co., Inc. v. Diner's Club, Inc., 550 F.2d 505, 510 (2d Cir.), cert. den., 434 U.S. 861 (1977).

As Mass AG admits in his own Motion, he "could, in theory, have argued about the law to the Board," but "[s]uch argument would not have provided factual evidence to the Board that the out-of-state ambulance companies would not respond to an emergency at Seabrook." Motion at 6. Having recognized the evidentiary problem with his position, Mass AG endeavors to sidestep it by relying on the legal analysis of another department of the Commonwealth. Having the Department of Public Health proffer its interpretation of

statutes and regulations, however, does not turn legal argument into factual evidence.[6]

Not only is Mass AG's "exhibit" a form of legal argument; as is shown below, the argument itself is thoroughly flawed. The DPH letters should not be admitted because they incorrectly describe the ambulance companies' contractual duties, interpret state regulations in a manner inconsistent with statutory definitions, and propose applying those regulations in a way that would violate constitutional restrictions on state regulation of interstate commerce.

(a) The assertion in the DPH letters that the ambulance companies provide "ambulance service" in Massachusetts is wrong.

The exhibit offered by Mass AG suggests that the ambulance companies are obligated under contract to regularly operate in Massachusetts. They are not. The four contracts simply state generally that the Contractor shall "make available all requisitioned vehicles and personnel for the Company's use." See, e.g., Applicants' Exhibit No. 41, MOERP No. 63. The contracts -- which Mass AG has induced DPH to call upon the companies to repudiate -- thus provide for

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[6] Mass AG apparently recognizes the distinction between a position taken by a state agency and an admission by an ambulance company or a court ruling. See Motion at 7. Although Mass AG would surely like to be able to offer either of the latter, he cannot since neither an admission nor a ruling exist. Mass AG only offers the weak excuse that if he had waited to receive a response from the companies or a court ruling, he "might have been criticized for delay."

the companies to make their ambulances available wherever needed, be that in Massachusetts, New Hampshire, or Maine.

More importantly, the contractors only agree to make ambulances available in the event of a radiological emergency (and drills for such emergencies). Id. A radiological emergency is a rare and improbable event. It does not even approach the frequency incorporated in the statutory definition of "ambulance service" as "the business or regular activity" of transporting injured individuals by ambulance. Mass. Gen. Laws. ch. 111C, §1, Attachment E hereto.[7]

Finally, even if there were a radiological emergency and out-of-state ambulance companies sent ambulances into Massachusetts under the SPMC, they would do so only to provide a "backup" to the Commonwealth's own emergency medical transportation resources. The provision of backup service in Massachusetts by out-of-state companies is approved and authorized by Department of Public Health Regulations. Mass. Code of Regs. tit. 105, §170.296(C) (1986), Attachment F hereto.

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[7] Mass AG attempts to compare the present situation to a prior enforcement action against an ambulance company servicing mini-bike races. Motion at 3, 5 and Attachment B thereto. The analogy is simply inapposite. In that proceeding, a New Hampshire company had actually sent its ambulances into Massachusetts to service repeated, regularly-scheduled mini-bike races. Here, on the other hand, the ambulance companies have merely contracted to help, if needed, in the unlikely possibility of a serious radiological emergency at Seabrook Station.

(b) The interpretation of state regulations advocated by the DPH letters is inconsistent with Massachusetts statute.

The DPH letters attempt to apply §170.296(B)(2) of Title 105 of the Code of Massachusetts Regulations, Attachment G hereto, in a way that contravenes the statutory definition of "ambulance service." Section 170.296(B) states that "No ambulance service shall regularly operate in Massachusetts unless the ambulance service is licensed in accordance with the provisions set forth in these regulations." Mass. Code of Regs. tit. 105, §170.296 (1986). Part (2) of §170.296(B) further says that "An out-of-state ambulance service shall be deemed to be regularly operating in Massachusetts if the service has a contractual agreement to provide ambulance service [emphasis added] in Massachusetts."

Mass AG would interpret Part (2) to mean that a contract that might involve any ambulance responding in Massachusetts during a radiological emergency is sufficient to find that an ambulance company is regularly operating in Massachusetts and is subject to its licensing provisions. But a careful reading of the regulation shows that such an interpretation violates the statutory definition of "ambulance service" as a business or regular activity. If the term "ambulance service" in regulation §170.296 (B)(2) did mean that a contractual agreement that called for any ambulance to operate under any condition in Massachusetts could be deemed "regular operation," then it would exceed the statutory definition of "ambulance service" as a "business or regular

activity." Neither the letters written by DPH counsel nor Mass AG's motion establish that the four ambulance companies here regularly operate in Massachusetts or that they have violated the Commonwealth's provisions on licensing.

(c) An attempt by Massachusetts to enforce regulation §170.296(B)(2) as suggested by the DPH letters would be unconstitutional as a violation of the commerce clause.

The DPH letters seek to void contracts between a New Hampshire corporation and four Maine and New Hampshire ambulance companies, which contracts concern the provision of emergency services in connection with a federally-regulated nuclear power plant located in New Hampshire. This putative DPH enforcement action, even if proper under Massachusetts law, would be barred as an impermissible state interference with interstate commerce.

The regulation of interstate commerce usually lies exclusively with the federal, rather than state, authorities, pursuant to the Commerce Clause of the U.S. Constitution. State action that interferes with interstate commerce is allowed only where it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Even then, the local benefit must be balanced against the burden on interstate commerce, and "the extent of the burden that will be tolerated will of course depend on the nature of the local

interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id.

In this case, there seems not to be an evenhanded application of state law, but rather a pointed and contrived attempt to interfere with the licensing of Seabrook Station. Nor does there appear to be any "legitimate local public interest" at stake, since Massachusetts has already expressly stated that it will not regulate vehicles that might be pressed into service as ambulances in the event of a major catastrophe. See Mass. Code of Regs. tit. 105, §170.010 (1988), Attachment H hereto.[8] Moreover, the burden on interstate commerce here clearly outweighs any local interest. These five New Hampshire and Maine entities clearly have a right to conduct emergency activities in Maine, New Hampshire, and Massachusetts without interference by the Mass AG.[9] Moreover, Massachusetts clearly has less intrusive means available to it than a brazen demand that the ambulance companies repudiate their contracts, thus affecting activities in all states, not just Massachusetts. In sum,

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[8] Moreover, to the extent that Massachusetts might still claim to have an interest in the regulation of ambulance services provided in response to a radiological emergency, that interest would be preempted by the federal regulation of all health-and-safety aspects of nuclear power plant operation. Pacific Gas & Elec. Co. v. State Energy Comm'n, 461 U.S. 190 (1983).

[9] To the extent that the operation of Seabrook Station in interstate commerce is interfered with, the strong public interest in promoting rather than retarding that operation must also be weighed in the balance. See Declaration of James D. Watkins, Attachment I hereto, at ¶7.

the Mass AG/DPH interference in these circumstances could not withstand commerce-clause scrutiny.

4. The Commonwealth is Estopped from Offering this Evidence.

Even if the evidence were relevant, admissible, and probative, Mass AG is estopped from offering the exhibit.

(a) Mass AG has already admitted that the DPH letters would have no bearing on a real emergency.

Mass AG's own prior admissions, when read in the light of state law and regulations, estop him from now relying upon these letters to argue that Applicants would not have sufficient ambulance resources to respond to a radiological emergency. Mass AG already has admitted that the Commonwealth would use every available resource, whether public or private, to provide aid in the event of a radiological emergency. App. Reb. No. 21 ff. Tr. 23537 at 28-29 and Attach. G. That admission is buttressed by state regulations which make clear that uncertified vehicles may be used to render emergency medical transportation in the case of a major catastrophe. Mass. Code of Regs. tit. 105, §170.010, Attachment H hereto. Given the power of the Commonwealth's governor to suspend state laws and regulations in the event of a radiological emergency,[10] there unquestionably is no legal or factual impediment to the use of the ambulances in question to respond, if needed, to a

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[10] See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-8, 29 NRC 193, 197 (1989).

Seabrook emergency. For that reason too, therefore, the Board should reject the proffered exhibit.

(b) Mass AG created the "facts" he now seeks to use as a licen[illegible]e impediment.

Mass AG's motion asks the Board to admit into evidence four letters whereby the DPH -- at the instigation of and in active cooperation with the Mass AG[11] -- seeks to force four out-of-state ambulance companies to renounce all involvement in emergency response for Seabrook Station. In effect, Mass AG seeks to have this Board give weight, in its licensing decision, to a threat which he at the very least has engendered against four parties who have contracted with the Seabrook Joint Owners. The precedents established by this Board, by the federal courts reviewing similar state interferences with the nuclear licensing process, and under the general principle of estoppel[12] all urge that Mass AG be denied the benefits of his own inequitable conduct.

As discussed in Sections 2 and 3 supra, the four DPH letters are without statutory basis, violate DPH procedures, misinterpret the relevant statutes and regulations, and

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[11] Mass AG's weak argument that he could not have "compelled" DP to send the letters, Motion at 6, is at best disingenuous. Mass AG admits that one of his attorneys raised the issue with DPH, and that two different divisions of his office were fully involved in the drafting and sending of the letters. Motion at 3-4.

[12] See, e.g. R.H. Stearns Co. v. United States, 291 U.S. 54, 62 (1934) ("A suit may not be built on an omission induced by him who sues."); see also Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) ("No State can be heard to complain about damage inflicted by its own hand.").

contravene the federal constitution.[13] The Mass AG/DPH threat to the ambulance companies thus clearly fits within the category of "improper affirmative act[s]" to obstruct licensing which the federal courts have held to be actionable, and which on at least one occasion they have enjoined. Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 813 F.2d 570, 571 (1987) (per curiam); Long Island Lighting Co. v. County of Suffolk, 604 F.Supp. 759 (E.D.N.Y. 1985).

As this Board noted when it sanctioned Mass AG for disclosing information that could be used to intimidate participants in Applicants' emergency plans, "[i]nterfering with the [contractors'] agreements to respond to an emergency at Seabrook is no different than disabling a safety system at the plant itself." Memorandum and Order (Ruling on Applicants' Motion for Sanctions) at 11 (November 17, 1988). Now Mass AG seeks to use, for his own advantage in these proceedings, attempts to intimidate these ambulance contractors into breaching their agreements to help evacuate the sick and disabled in the event of a major nuclear disaster. The Board stated, when the threat of intimidation

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[13] ALAB-883 is thus distinguishable. In that case, the Appeal Board refused to apply the doctrine of estoppel because it found the Commonwealth's actions, in destroying Applicants' fixed siren system, to be neither "unlawful or untoward". Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 28 NRC 43, 49 (1988). Here, however, the Licensing Board can and should find the Mass AG/DPH threats to be both "untoward" and "unlawful".

was indirect, that it would "try to nullify any unfair litigative advantage." Id. at 10. A fortiori, the Board should respond to this direct harassment by denying Mass AG any evidentiary use of his threats.

5. Mass AG's Motion Is Inexcusably Late.

Finally, putting all other arguments aside, Mass AG's motion simply comes too late in the proceedings to fairly be allowed.

Mass AG had copies of the contracts involving the four ambulance companies since approximately March, 1988. See Mangan & Paolillo Dir. ff. Tr. 19429 at 5, 6-8, 9-10, 19-20. The contracts were admitted into evidence as part of Applicants' Exhibit No. 41 on April 14, 1989. Tr. 19338. To make a motion based upon an alleged deficiency in the contracts on June 30, the last day of the hearings, is a transparent attempt to delay the final resolution of these proceedings. After nearly two years of trial, the time for an end is at hand.

CONCLUSION

For the reasons stated above, the Motion should be denied.

Respectfully submitted,

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for, and is maintained and operated for, the transportation of sick, injured or disabled individuals.

"Ambulance service", means the business or regular activity, whether for profit or not, of transporting sick, injured or disabled individuals by ambulance.

"Board", means the emergency medical care advisory board established under section seven.

"Commissioner", means the commissioner of public health.

"Company", means a corporation, a partnership, a business trust, an association, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing while acting in such capacity.

"Department", means the department of public health.

"Dual purpose vehicle", means a vehicle which is used for ambulance service even though it is also used for other purposes, including police and fire purposes.

"Person", means an individual, a company, or an agency or political subdivision of the commonwealth.

The department may define in regulations any term used in this chapter, provided that such definition is not contrary to a provision of the general laws.

Added by St.1973, c. 948, § 1.

Historical Note

St.1973, c. 948, § 1, adding this chapter, consisting of this section and §§ 2 to 18, was approved Oct. 24, 1973.

Library References

Physicians and Surgeons ⇐1.
C.J.S. Physicians and Surgeons § 3 et seq.

§ 2. Powers and duties of department

For the administration and enforcement of this chapter, the department may:

(1) establish and enforce rules and regulations for the establishment and maintenance of ambulance services and for the maintenance and operation of ambulances, including but not limited to rules and regulations governing ambulance personnel, safety, sanitation, equipment, communications, medical supplies and records;

(2) establish fees for the issuance and renewal of licenses and certificates of inspection;

(3) make such reasonable classifications of ambulances, by type of vehicle and purpose, and ambulance services, by nature and scope of service, as it finds necessary or appropriate in the public interest;

(4) determine the need for and to plan for the distribution of ambulances and ambulance services in the commonwealth;

(5) inspect at any time any ambulance and any facilities and records maintained in connection with any ambulance service, provided that a license has been issued, or an application for a license has been filed, for such ambulance service;

(6) approve courses in emergency medical care for ambulance operators and attendants under such conditions as it may establish with the advice of the board;

(7) develop a cost-sharing program between local, state and federal governments and voluntary private funding for training of ambulance operators and attendants and purchase of ambulances;

(8) coordinate on a regional basis communications centers, ambulance services, hospital emergency services, law enforcement and fire units and emergency operations centers and facilitate hospital transfers of patients;

(9) subject to the provisions of section three, make rules and regulations regarding adequate insurance coverage for licensed ambulance services and for operators and attendants of certified ambulances;

(10) make rules, regulations, and orders, and delegate authority to its divisions, employees and agents, as may be necessary or appropriate to carry out the provisions of this chapter.

The department shall not establish the requirements as specified in clause (1) and shall not establish conditions for approval of courses as specified in clause (6) until the board has been provided a reasonable opportunity to review and make recommendations on such requirements and conditions.

Added by St.1973, c. 948, § 1.

Historical Note

St.1973, c. 948, § 4, provided:

"Paragraph (3) of section twelve of chapter one hundred and eleven C of the General Laws, inserted by section one of this act, shall not take effect until July first, nineteen hundred and seventy-seven, provided, that under the authority conferred under section two of said chapter, the department may require prior to July first, nineteen hundred and seventy-six, that no more than two thirds of the operators and attendants employed by an ambulance service be in compliance with the training requirements of section six of said chapter, and it may require prior to July first, nineteen hundred and seventy-five, that no more than one third of such operators and attendants be in compliance with said training requirements. For purposes of this section, the department may treat classes of operators and attendants separately in the event that it establishes different training requirements for each class."

§ 8. Incapacitated persons; assistance to facility or protective custody

Notes of Decisions

1. In general

Detention of defendant, who officer had ample reason to conclude was intoxicated and was about to attempt to drive away in his automobile, and seizure of gun discovered on defendant during pat-down search was not unreasonable because officers failed to inform defendant of his rights as person taken into protective custody due to intoxication, particularly of his right to have breathalyzer test administered; right to be informed of right to breathalyzer arises at police station, and by time defendant arrived at station, he was under arrest for carrying firearm without license, making this section irrelevant. Com. v. Tomeo (1987) 507 N.E.2d 725, 400 Mass. 23.

Police officer, who had ample reason to conclude defendant was intoxicated and was about to attempt to drive away in his automobile, was entitled to seek to take defendant into protective custody. Com. v. Tomeo (1987) 507 N.E.2d 725, 400 Mass. 23.

CHAPTER 111C. EMERGENCY MEDICAL CARE

WESTLAW Electronic Research

WESTLAW supplements Massachusetts Laws Annotated and is useful for additional research. Enter a citation in Insta-Cite for display of any parallel citations and case history. Enter a constitution, statute or rule citation in a case law database for cases of interest.

Example query for Insta-Cite: IC 258 N.E.2d 22

Example query for Massachusetts Constitution:
M.G.L.A. Const. Constitution /s 1 First /5 80 XXX

Example query for statute: M.G.L.A. G.L. /5 231 +5 85Q

Also, see the WESTLAW Electronic Research Guide following the Preface.

Code of Massachusetts Regulations

Public welfare, transportation services, definitions, see 106 CMR 407.402.

§ 2. Powers and duties of department

For the administration and enforcement of this chapter, the department may:

(1) establish and enforce rules and regulations for the establishment and maintenance of ambulance services and for the maintenance and operation of ambulances, including but not limited to rules and regulations governing emergency medical technicians, including ambulance operators and attendants, safety, sanitation, equipment, communications, medical supplies and records;

[See main volume for text of clauses (2) to (5)]

(6) approve courses in emergency medical care for emergency medical technicians, including ambulance operators and attendants, under such conditions as it may establish with the advice of the board.

[See main volume for text of clauses (7) to (10)]

The department shall not establish the requirements as specified in clause (1) and shall not establish conditions for approval of courses as specified in clause (6) until the board has been provided a reasonable opportunity to review and make recommendations on such requirements and conditions.

Amended by St.1983, c. 419, §§ 1, 2.

Code of Massachusetts Regulations

Ambulance and ambulance services, see 105 CMR 170.001 et seq.

§ 8. Ambulance service; complaint procedures; investigation; notification of complainant

The department shall establish and implement procedures for the making, transmission, and investigation of complaints concerning the maintenance of any ambulance service. The department shall prepare, and make available upon request, a description of such procedures, and it shall, as the public interest may require, investigate every complaint received, except to the extent that the act or practice complained of does not constitute a violation of this chapter or any regulation under this chapter. Upon investigation the department shall notify the complainant, if known, of its action in the matter. If it finds that an investigation is not required, it shall notify the complainant, if known, of its finding and the reasons therefor.

Added by St.1973, c. 948, § 1.

§ 9. Ambulance deficiencies

(*a*) Whenever the department finds upon inspection, or through information in its possession, that an ambulance is not in compliance with a requirement established under this chapter, the department may order the licensee to correct such deficiency. Every such correction order shall include a statement of the deficiencies found, the period prescribed within which the deficiency must be corrected, and the provisions of law relied upon. The period prescribed shall be reasonable and, except in an emergency declared by the commissioner, not less than thirty days from receipt of such order. Within seven days of receipt, the affected licensee may file a written request with the department for administrative reconsideration of the order or any portion thereof. Failure of the department to grant, deny, or otherwise act upon a written request within seven days of filing shall be deemed a denial of such request.

(*b*) The department may assess a licensee ordered to correct deficiencies fifty dollars per deficiency for each day the deficiency continues to exist beyond the date prescribed for correction. Before making an assessment, the department shall give the affected licensee notice of the matters alleged and the provisions of law relied upon and shall accord such licensee an opportunity for a hearing upon timely written request. If after hearing, or waiver thereof, the department determines that cause exists, it shall make an appropriate assessment. The affected licensee shall pay such assessment except to the extent that, upon judicial review, the reviewing court may reverse the final decision of the department.

(c) An assessment made under this section shall be due and payable to the commonwealth on the thirtieth day after notification to the affected licensee. The attorney general shall recover any assessment due and payable in an action of contract, or any other appropriate action, suit or proceeding, brought in the name of the commonwealth in the superior court. Upon the motion of the attorney general, such court may consolidate for hearing and decision a judicial review proceeding and an assessment collection proceeding if the proceedings result from the same administrative action.

Added by St.1973, c. 948, § 1.

Code of Massachusetts Regulations

Ambulance, inspection, deficiencies,
Generally, see 105 CMR 170.800.
Assessments, notice and hearing, see 105 CMR 170.820.

§ 10. Revocation, refusal to renew or suspension of certificate of inspection or license for violations

The department may, after hearing or waiver thereof, revoke or refuse to renew a certificate of inspection or license for failure to perform such requirements as set forth in such certificate or license, for violation of any applicable requirement prescribed under this chapter, for violation of a correction order, or for engaging in, or for aiding, abetting, causing, or permitting, any act prohibited under this chapter. The commissioner may, without hearing, suspend a certificate of inspection or license if he finds that the licensee concerned is operating or maintaining the ambulance subject to such certificate, or is maintaining the ambulance service subject to such license, in a manner which endangers the public health or safety; provided, however, that in every case of suspension the licensee shall be promptly afforded an opportunity for a hearing under this section. If after any hearing hereunder concerning a license, the department determines that cause exists, instead of revoking or refusing to renew such license, the department may issue an order modifying the license if it finds that the public interest would be better served by such action. No certificate of inspection under a licensee shall continue in force after the department has revoked or refused to renew such license.

Added by St.1973, c. 948, § 1.

Code of Massachusetts Regulations

Ambulances,
Certificates of inspection, revocation, see 105 CMR 170.830.
Licenses, suspension, revocation or refusal to renew, see 105 CMR 170.670.

Library References

Automobiles ⇐106.
C.J.S. Motor Vehicles §§ 96, 127 et seq.

§ 11. Enforcement proceedings; jurisdiction; injunctive relief

The attorney general, at the request of the department, shall, or any ten taxpayers of the commonwealth, may bring a bill in equity in the superior or supreme judicial court to enforce compliance with this chapter or any rule, regulation, or order made under this chapter, whenever it shall appear that any person has engaged in, or is about to engage in an act or practice in violation of this chapter or any rule, regulation, or order made under this chapter, or whenever it shall appear that any person has aided, abetted, caused, or permitted, is aiding, abetting, causing, or permitting, or is about to aid, abet, cause, or permit any such act or practice. Upon a bill brought hereunder, the superior court or supreme judicial court, as the case may be, shall have jurisdiction to grant temporary relief and, upon hearing, a permanent injunction, which shall be mandatory in form, if appropriate; provided, however, that, where a bill is brought by ten taxpayers of the commonwealth, no permanent injunction shall be issued until the department has been permitted to intervene as a party, if it so desires, or to submit an amicus brief to the court. Any ten taxpayers filing a bill in equity hereunder shall serve a copy thereof upon the department on the same day as such filing.

Added by St.1973, c. 948, § 1.

Cross References

Injunctions, see Mass.R.Civ.P. Rule 65.
Supreme judicial and superior courts, equity jurisdiction, see c. 214, § 1.

Library References

Injunction ⇐89(5).
C.J.S. Injunctions §§ 133 to 135.

§ 12. Prohibited acts; penalty; investigation and prosecution of offenses by attorney general

No person shall:

(1) establish or maintain an ambulance service without a valid license or in violation of the terms of a valid license;

(2) operate, maintain, or otherwise use any aircraft, boat, motor vehicle, or other means of transportation as an ambulance without a valid certificate of inspection;

(3) operate an ambulance or to serve as an attendant thereon in violation of section six;

Library References

Automobiles ⇐106.
C.J.S. Motor Vehicles §§ 96, 127 et seq.

§ 11. Enforcement proceedings; jurisdiction; injunctive relief

The attorney general, at the request of the department, shall, or any ten taxpayers of the commonwealth, may bring a bill in equity in the superior or supreme judicial court to enforce compliance with this chapter or any rule, regulation, or order made under this chapter, whenever it shall appear that any person has engaged in, or is about to engage in an act or practice in violation of this chapter or any rule, regulation, or order made under this chapter, or whenever it shall appear that any person has aided, abetted, caused, or permitted, is aiding, abetting, causing, or permitting, or is about to aid, abet, cause, or permit any such act or practice. Upon a bill brought hereunder, the superior court or supreme judicial court, as the case may be, shall have jurisdiction to grant temporary relief and, upon hearing, a permanent injunction, which shall be mandatory in form, if appropriate; provided, however, that, where a bill is brought by ten taxpayers of the commonwealth, no permanent injunction shall be issued until the department has been permitted to intervene as a party, if it so desires, or to submit an amicus brief to the court. Any ten taxpayers filing a bill in equity hereunder shall serve a copy thereof upon the department on the same day as such filing.

Added by St.1973, c. 948, § 1.

Cross References

Injunctions, see Mass.R.Civ.P. Rule 65.
Supreme judicial and superior courts, equity jurisdiction, see c. 214, § 1.

Library References

Injunction ⇐89(5).
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§ 12. Prohibited acts; penalty; investigation and prosecution of offenses by attorney general

No person shall:

(1) establish or maintain an ambulance service without a valid license or in violation of the terms of a valid license;

(2) operate, maintain, or otherwise use any aircraft, boat, motor vehicle, or other means of transportation as an ambulance without a valid certificate of inspection;

(3) operate an ambulance or to serve as an attendant thereon in violation of section six;

(4) obstruct, bar, or otherwise interfere with an inspection undertaken under authority of this chapter;

(5) knowingly to make an omission of a material fact or a false statement in any application or other document filed with the department; or

(6) violate or fail to observe any requirement of this chapter, or of any rule, regulation, or order under this chapter, which requirement the department has made subject to this section by regulation.

Whoever engages in, aids, abets, causes, or permits any act prohibited under this section shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars for each offense. A separate and distinct offense shall be deemed to have been committed on each day during which any prohibited act continues after written notice by the department to the offender. The commissioner shall report each suspected offense to the attorney general for investigation and, if appropriate, prosecution in the courts of the commonwealth.

Added by St.1973, c. 948, § 1.

Historical Note

St.1973, c. 948, § 4, provided:

"Paragraph (3) of section twelve of chapter one hundred and eleven C of the General Laws, inserted by section one of this act, shall not take effect until July first, nineteen hundred and seventy-seven, provided, that under the authority conferred under section two of said chapter, the department may require prior to July first, nineteen hundred and seventy-six, that no more than two thirds of the operators and attendants employed by an ambulance service be in compliance with the training requirements of section six of said chapter, and it may require prior to July first, nineteen hundred and seventy-five, that no more than one third of such operators and attendants be in compliance with said training requirements. For purposes of this section, the department may treat classes of operators and attendants separately in the event that it establishes different training requirements for each class."

Code of Massachusetts Regulations

Ambulances and ambulance services, violations of regulations, criminal sanctions, see 105 CMR 170.890.

§ 13. Liability of doctors, nurses, hospitals, ambulance operators and attendants

No physician duly registered under the provisions of sections two, two A, or nine of chapter one hundred and twelve, and no nurse duly registered under the provisions of section seventy-four or section seventy-six of said chapter, and no hospital shall be liable in a suit for damages as a result of acts or omissions related to advice, consultation or orders given in good faith to ambulance operators and attendants who are qualified under section six, and are acting on behalf of an ambulance service duly licensed under section three, by radio, telephone or other remote means of communication under emergency conditions and prior to

CHAPTER 111C

EMERGENCY MEDICAL CARE

Sec.
1. Definitions.
2. Powers and duties of department.
3. Licensing of ambulance services.
4. Inspection of ambulances.
5. Ambulance license modification or transfer.
6. Ambulance operators and attendants.
7. Advisory board.
8. Ambulance service; complaint procedures; investigation; notification of complainant.
9. Ambulance deficiencies.
10. Revocation, refusal to renew or suspension of certificate or inspection or license for violations.
11. Enforcement proceedings; jurisdiction; injunctive relief.
12. Prohibited acts; penalty; investigation and prosecution of offenses by attorney general.
13. Liability of doctors, nurses, hospitals, ambulance operators and attendants.
14. Liability of emergency medical technicians, police officers or fire fighters.

The section headings for Massachusetts General Laws Annotated have been editorially supplied.

Chapter 111C of the General Laws was added by St.1973, c. 948, § 1.

Code of Massachusetts Regulations

Ambulances and ambulance services, see 105 CMR 170.001 et seq.

Cross References

Cities and towns, contracts for ambulance service authorized, see c. 40, § 4.
Emergency medical technicians, leave without loss of pay while incapacitated, see c. 41, § 111M.
Medical care and assistance, see c. 118E, § 1 et seq.

Library References

Automobiles ⇐58 et seq.
C.J.S. Motor Vehicles §§ 10, 79 et seq.

§ 1. Definitions

For the purpose of this chapter the following definitions shall apply unless the context or subject matter requires a different interpretation:—

"Ambulance", means any aircraft, boat, motor vehicle, or any other means of transportation, including a dual purpose vehicle, however named, whether privately or publicly owned, which is intended to be used

for, and is maintained and operated for, the transportation of sick, injured or disabled individuals.

"Ambulance service", means the business or regular activity, whether for profit or not, of transporting sick, injured or disabled individuals by ambulance.

"Board", means the emergency medical care advisory board established under section seven.

"Commissioner", means the commissioner of public health.

"Company", means a corporation, a partnership, a business trust, an association, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing while acting in such capacity.

"Department", means the department of public health.

"Dual purpose vehicle", means a vehicle which is used for ambulance service even though it is also used for other purposes, including police and fire purposes.

"Person", means an individual, a company, or an agency or political subdivision of the commonwealth.

The department may define in regulations any term used in this chapter, provided that such definition is not contrary to a provision of the general laws.

Added by St.1973, c. 948, § 1.

Historical Note

St.1973, c. 948, § 1, adding this chapter, consisting of this section and §§ 2 to 18, was approved Oct. 24, 1973.

Library References

Physicians and Surgeons ⇐1.
C.J.S. Physicians and Surgeons § 3 et seq.

§ 2. Powers and duties of department

For the administration and enforcement of this chapter, the department may:

(1) establish and enforce rules and regulations for the establishment and maintenance of ambulance services and for the maintenance and operation of ambulances, including but not limited to rules and regulations governing ambulance personnel, safety, sanitation, equipment, communications, medical supplies and records;

(2) establish fees for the issuance and renewal of licenses and certificates of inspection;

170.292: Supplies

An adequate amount of medical supplies and linen for stocking vehicles shall be stored wherever vehicles are garaged.

EXCEPTION: An ambulance service may obtain all medical supplies and linen from a hospital provided that a written agreement for such an arrangement exists between the ambulance service and the hospital.

170.295: Non-Discrimination

No person shall discriminate on the grounds of race, color, religion, national origin, age or sex in any aspect of the provision of ambulance service or in employment practices.

170.296: Out-of-State Ambulance Services

(A) Ambulance services located in and licensed in another state are not required to be licensed in accordance with these regulations if they are transporting patients from locations outside of Massachusetts to locations within Massachusetts.

(B) No ambulance service shall regularly operate in Massachusetts unless the ambulance service is licensed in accordance with the provisions set forth in these regulations. An out-of-state ambulance service shall be deemed to be regularly operating in Massachusetts if:

(1) the service advertises in Massachusetts, or otherwise solicits business in Massachusetts;

(2) the service has a contractual agreement to provide ambulance service in Massachusetts; or

(3) the service transports persons from locations within Massachusetts on a routine or frequent basis.

(C) Out-of-state ambulance services which provide only back-up service to Massachusetts ambulance services are exempt from the requirements of 105 CMR 170.296(B). However, such a service must be in compliance with all applicable licensing laws and regulations in the state in which the backup ambulance service is based.

(D) If an out-of-state ambulance service regularly operates in Massachusetts, within the meaning of (B) above, that service shall either maintain a place of business within Massachusetts or make acceptable provisions for Department inspection of the service's vehicles and records. Such service shall meet all requirements imposed by M.G.L. c. 111C and these regulations, unless such requirements have been properly waived by the Department.

170.297: Waiver

An applicant for a license, or a licensee under 105 CMR 170.500, may apply to the Department for a waiver, for a given period of time, of those requirements with which the service is unable to comply. Such waiver may be renewed.

(A) The applicant for a license, or a licensee under 105 CMR 170.500, when applying for a waiver, shall submit the following in writing:

(1) Evidence of a prior good faith effort to comply with each requirement for which a waiver is requested;

(2) A statement documenting why the service cannot comply with each requirement for which a waiver is requested, including any financial or other significant hardship resulting from efforts to comply;

(3) A statement documenting why non-compliance with each requirement will not cause the service to be unable to render adequate care;

(4) Reasons why compliance with each requirement is not possible for a given period of time; and

(5) A plan for compliance with each requirement within the period requested on the waiver application, unless the application is for a permanent waiver in accordance with subsection (B).

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(2) A statement documenting why the service cannot comply with each requirement for which a waiver is requested, including any financial or other significant hardship resulting from efforts to comply;

(3) A statement documenting why non-compliance with each requirement will not cause the service to be unable to render adequate care;

(4) Reasons why compliance with each requirement is not possible for a given period of time; and

(5) A plan for compliance with each requirement within the period requested on the waiver application, unless the application is for a permanent waiver in accordance with subsection (B).

170.002: Authority

This chapter is adopted under the authority of M.G.L. c. 111C and M.G.L. c. 30A, s. 2.

170.003: Citation

This chapter shall be known and may be cited as "Regulations Governing Ambulance Services and Coordinating Emergency Medical Care", 105 CMR 170.000. The short form of citation shall be "The Massachusetts Emergency Medical Service Regulations," 105 CMR 170.000.

170.010: Scope

This chapter governs emergency medical services systems, ambulance services, ambulances, equipment, training and personnel.

(A) Uncertified vehicles may be used to render emergency medical transportation in the case of a major catastrophe when the number of certified ambulances capable of emergency dispatch in the locality of the catastrophe is insufficient to render the required emergency medical transportation services.

(B) Nothing in this chapter is intended to preclude the public from choosing any mode of transportation to get to a hospital or other established site of medical care.

DEFINITIONS

170.020: Meaning of Terms

The definitions set forth in 105 CMR 170.020 through 170.061 shall apply for the purpose of this chapter, unless the context or subject matter clearly requires a different interpretation.

170.021: Advanced Life Support

Advanced Life Support (ALS) means the pre-hospital use of medical techniques and skills by qualified personnel who are specially trained and shall include such functions as advanced airway and circulatory maintenance and the management of cardiac disorders.

170.022: Ambulance

Ambulance means any aircraft, boat, motor vehicle, or any other means of transportation, including a dual purpose vehicle, however named, whether privately or publicly owned, which is intended to be used for, and is maintained and operated for, the transportation of sick, injured or disabled patients.

170.023: Ambulance Attendant

Ambulance attendant means an Emergency Medical Technician trained and certified in accordance with these regulations who provides emergency medical care to sick or injured persons prior to and during transport by an ambulance. The term ambulance attendant includes the EMT who operates the ambulance.

170.029: Ambulance Service

Ambulance service means the business or regular activity, whether for profit or not, of transporting sick, injured or disabled individuals by ambulance.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al.,	)	
Petitioners,	)	
v.	)	Nos. 89-1306
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	88-1821
	)	88-1819
	)	88-1817
Respondents.	)	

DECLARATION OF JAMES D. WATKINS

I, James D. Watkins, hereby declare under the provisions of 28 U.S.C. 1746 as follows:

1. I am the Secretary of Energy and, as such, head of the United States Department of Energy.

2. The Department of Energy was established to "promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs." 42 U.S.C. 7112. In establishing the Department, Congress found that "a strong national energy program is needed to meet present and future energy needs of the Nation consistent with overall national economic, environmental and social goals" (42 U.S.C. 7111(B)), and it charged the Department with, among other things, responsibility for coordinating, formulating and implementing "national energy policy * * * to deal with the short-, mid- and long-term energy problems of the Nation" (42 U.S.C. 7112(3)); "promot[ing] the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest

reasonable cost" (42 U.S.C. 7112(9)); and "assur[ing] incorporation of national environmental protection goals in the formulation and implementation of energy programs" (42 U.S.C. 7112(13)).

3. This Declaration is provided to inform the Court of the public interest, which the just described mandate of the Department of Energy makes of special concern to me, in not staying the low power testing of the Seabrook nuclear power plant recently authorized by the Nuclear Regulatory Commission (NRC). The specific facts and figures set forth in this Declaration have been assembled by Departmental staff in the regular course of their duties.

4. I have been advised that the ongoing NRC proceedings involving Seabrook could result in issuance of a license for full power operation by as early as September 30, 1989. The issue here concerns possible delay in the use of such a full power license. Even though actual low power testing may take only a few weeks to perform, this testing is designed to permit early discovery and correction of any unanticipated problems that might delay full power operation.

5. Seabrook's generating capacity is about 1186 MW. Over $5 billion has been spent building this plant, which is now completed and awaiting final NRC authorization to enter into full power operation. As the following facts demonstrate, New England urgently needs the power that Seabrook is ready to provide, and there are no satisfactory near-term alternative sources of

supply:

(a) To maintain reliable electric service, most utilities subscribe to a reliability standard which requires a reserve margin, or an excess of generating capacity over peak demand, of 15 to 20 percent. Although the reserve margin in New England is currently at about 24 percent, the actual operating margin has on occasion fallen as low as 3 percent due to equipment failures and/or exacerbated peak demands (which, in New England, occur in both summer and winter). Moreover, in 1987 and again in 1988, the demand for electricity in New England grew at about 5 percent a year. This sustained and relatively rapid demand growth reflects both a robust regional economy and several very hot summers and was approximately double the rate of projected growth for the region. If Seabrook does not become operational, and if demand grows only at a modest 2.5 percent rate, regional reserve margins could fall below 20 percent later this year. As reserve margins fall below 20 percent, the system becomes more vulnerable to contingencies. During the past year, in fact, New England suffered repeated "brownouts" and rolling "blackouts," and similar emergency procedures will probably again become necessary as soon as this summer.

An unreliable electricity supply system can inhibit regional economic growth and diminish the quality of life of our citizens. For New England, the danger of falling below the point where adequate electric service can be assured is both real and immediate. Within a year of coming on-line, Seabrook could

provide enough power to add an additional 6 percent to New England's electric reserve margin.

(b) There are no satisfactory alternative sources of supply to Seabrook that could meet New England's near-term energy needs: (i) Although the region's existing oil-fired steam plants could conceivably be used more intensively, this would increase the region's and the Nation's dependence on imported oil and regional reserve margins still would be insufficient to deal with extreme weather or equipment failures. (ii) There has been no significant construction of coal-fired plants in New England for the last two decades and, even if strong environmental opposition to such plants could be overcome, it would take 5 to 8 years to build new coal-fired capacity. (iii) New England presently has very limited gas pipeline capacity and, although there are plans to expand gas pipeline capacity, new lines and gas-fired combined cycle units could not be available until the mid 1990s. Gas-fired combustion turbines could be built more quickly, but they would be more expensive to operate and the uncertainties related to completion of the proposed natural gas pipeline projects make this alternative uncertain as well. (iv) Relying on imported power, either from Canada or from other regions of the United States, also will not provide energy reliability and adequacy. The future development and availability of Canadian electricity is uncertain at best and, in the time it would take to build new transmission lines, strong demand growth in other regions of the United States is expected to deplete any power surpluses those

regions currently have. (v) Finally, while there have been aggressive conservation programs carried out by utilities in New England, experience has shown that these conservation efforts cannot keep up with the rapid economic growth in the region and with consequent electric demand.

5. Energy security, economic and environmental considerations also weigh strongly against any delay in Seabrook coming on-line:

(a) Nearly half of the installed generating capacity in New England is now designed to run on oil, and that region is heavily and uniquely dependent on imported oil. Furthermore, the Nation as a whole is becoming increasingly dependent on insecure sources of imported oil to meet its energy needs. By a conservative estimate, Seabrook will generate about 6.8 billion kilowatt-hours each year, which would displace demand for roughly 11 million barrels of oil a year. At the recent crude oil price of approximately $20 per barrel, running Seabrook could reduce our trade deficit by some $220 million a year, and simultaneously enhance the Nation's energy security.

(b) Since the costs of building Seabrook already have been incurred, the relative economics of alternative sources of supply depend on a comparison between the costs of operating Seabrook and the costs of developing and operating alternative facilities. Such a comparison makes it clear that there is no economically sound alternative to Seabrook, which currently stands ready to produce power at a levelized cost of operation of about 2.7

cents/kilowatt-hour: (i) The levelized costs of an equivalent increment in oil-fired capacity would be about 8.1 cents/kilowatt-hour for new combined cycle generation (which would take about 5 years to develop) and about 11.1 cents/kilowatt-hour for new combustion turbine generation (which would take 2-4 years to develop). (ii) The levelized costs of an equivalent increment in new coal-fired capacity (which would take about 5-8 years to develop) would be about 5.6 cents/kilowatt-hour. (iii) The levelized costs of an equivalent increment in new gas-fired capacity would be about 5.2 cents/kilowatt-hour for combined-cycle units (which would take about 5 years to develop) and about 6.5 cents/kilowatt-hour for combustion turbines (which would take about 2-3 years to develop). (iv) Current contracts suggest that it would cost about 4.2 to 4.9 cents/kilowatt-hour to import additional electricity from Canada, if such electricity is available at all.

(c) Although there are environmental issues related to operating Seabrook, the alternatives to operating Seabrook also raise environmental issues. Of particular concern are the "Acid Rain" and "Greenhouse" effects of fossil-fired plants, which emit sulfur dioxide, nitrogen oxides and carbon dioxide. These are especially serious concerns in New England, whose electric utilities in 1987 emitted an estimated 390,000 tons per year in sulfur dioxide and 130,000 tons per year in nitrogen oxides -- which are precursors to "Acid Rain" -- and an estimated 49 million tons per year in carbon dioxide -- which is one of the

gases that some scientists believe is a major contributor to possible atmospheric warming. Replacing Seabrook with equivalent coal-fired capacity could add up to an additional 20,000 tons per year in both sulfur dioxide and nitrogen oxides emissions, and an additional 6 million tons in carbon dioxide emissions. Similarly, replacing Seabrook with equivalent oil-fired capacity could produce 5,000 tons of additional yearly sulfur dioxide emissions, 8,000 tons of additional yearly nitrogen oxides emissions, and 4 million tons of additional yearly carbon dioxide emissions. And although the emissions problems from gas-fired plants are slightly less dramatic, even they could result in additional yearly emissions of 6,000 tons of nitrogen oxides and 3 million tons of carbon dioxide.

7. Considerations of energy reliability, energy security, economics and environment thus all indicate a pressing need for Seabrook. Any unnecessary delay in bringing this plant on-line would be, quite simply, bad energy policy and flatly inconsistent with the public interest.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 1989

James D. Watkins
Admiral, U.S. Navy (Retired)

CERTIFICATE OF SERVICE

I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on July 10, 1989, 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 State mail, first class postage paid, addressed to):

Administrative Judge Ivan W. Smith
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Adjudicatory File
Atomic Safety and Licensing Board Panel Docket (2 copies)
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Administrative Judge Richard F. Cole
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