

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING APPEAL BOARD P5:39

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of)

PUBLIC SERVICE COMPANY)
OF NEW HAMPSHIRE, ET AL.)

(Seabrook Station, Units 1 and 2))

) Docket Nos. 50-443-OL
) 50-444-OL

) August 7, 1990

RESPONSE OF THE INTERVENORS TO THE
APPEAL BOARD MEMORANDA AND ORDERS
OF JUNE 22, 1990 AND JULY 17, 1990

INTRODUCTION

In its Memorandum and Order of June 22, 1990, this Appeal Board correctly noted that as a factual matter there are certain differences in the emergency planning provisions pertaining to school children under the Seabrook Plan for Massachusetts Communities ("SPMC") and the New Hampshire Radiological Emergency Response Plan ("NHRERP"). There are at least four critical distinctions between the SPMC and NHRERP.

First, the SPMC School Host Facility at Holy Cross College in Worcester, Massachusetts is located a substantial distance from the Massachusetts Emergency Planning Zone

("EPZ"). By the Licensees' own estimate it will take approximately an hour and a quarter to an hour and a half to travel from the EPZ to the School Host Facility in Worcester. (Tr.21320). Second, while the NHRERP calls for the evacuation of school children to four separate centers, the SPMC locates all school and day-care children from the Massachusetts EPZ at one facility, Holy Cross. The third distinction is that the NHRERP provides for both the presence of 400 response personnel from the New Hampshire Department of Health and Human Services and the Red Cross to staff the New Hampshire centers while the SPMC relies solely on accompanying teachers to take care of the children at Holy Cross. The fourth difference is that while the four centers in New Hampshire will have adult evacuees present, there will be no adult evacuees at Holy Cross.

In its Order dated July 22, 1988, the Licensing Board rejected the Bases N, Q, R, S.1, and U of MAG Contention 47. The Licensing Board rejected Bases N, Q, R, S. 1 on the ground that those Bases had already been generically litigated in the hearings on the NHRERP and thus, the record on those issues was closed. Order of July 22, 1988 at 71-73. The Licensing Board held that in order to present evidence on those issues, the Massachusetts Attorney General (Mass AG") would have to meet the standards for reopening a closed record. Order of July 22, 1988 at 72. The Licensing Board rejected consideration of the issues pertaining to Massachusetts school children without considering that the provisions for school children under the

SPMC differed substantially for provisions for school children under the NHRERP as noted above. Furthermore, in making its ruling, the Licensing Board overlooked two other factors:

1) had the Mass AG attempted to introduce evidence concerning Massachusetts school children in the New Hampshire proceeding it would have been excluded as irrelevant to the issue of how the NHRERP provided for New Hampshire children; 2) the Mass AG could not have raised issues pertaining to Massachusetts teachers under the SPMC in the NHRERP proceeding because the filing deadline for contentions on the NHRERP preceded the development of the SPMC.

In ALAB-932, 31 NRC ____ (May 31, 1990), this Board upheld the findings of the Licensing Board pertaining to school children under the NHRERP. However, in doing so this Board distinguished between relying upon teachers to oversee the boarding of children onto evacuation buses and relying upon teachers to travel "considerable distances from their school and very likely from their homes and families." Id. at ____ (slip/opinion at 60-61). In ALAB-932, this Board relied on an independent ground as a basis for assurance that school children would be sufficiently provided for while on route during an evacuation. That ground was that "bus drivers will be able to transport the students safely to reception centers, where the students will be cared for and supervised by the personnel already assigned to staff the centers until such time as they are reunited with their parents or guardians." Id.

at ____ (slip opinion at 62-63). The factual distinctions between the SPMC and NHRERP preclude such assurance under the SPMC. Furthermore, as discussed below the existing evidence of record on the matter of the capability of the American Red Cross, or other compensatory measures, does not provide for reasonable assurance that school children will be adequately supervised and provided for at Holy Cross College.

DISCUSSION

The short answer to the first question posed by this Board in its Memorandum and Order of June 22, 1990 is that there is no evidence of record on the capability of the American Red Cross to care for and supervise the children at Holy Cross College. As the Licensees and Staff point out in their responses, the Red Cross will not be called upon to respond to Holy Cross College. Under the SPMC, the Red Cross is called upon to provide staffing and provisions at congregate care centers. However, the SPMC does not look to the Red Cross to respond to the School Host Facility at Holy Cross College.

This Board's confusion on this point that was apparent in its Order of June 22, 1990 and led to the supplemental Order of July 17, 1990 has been addressed by the Licensees and Staff in their responses dated July 19, 1990 and July 25, 1990 respectively. The confusion appears attributable to there being two letters of agreement with Holy Cross College, one dated February 1, 1988 ("The Congregate Care, LOA") and one dated November 30, 1988 ("The School Host Facility LOA").

Under the version of the SPMC that was litigated and introduced into evidence below Massachusetts school children were originally to go to Shriner's Auditorium, the Special Population Facility. The Licensees later changed the designation of Holy Cross College from that of a Congregate Care Center to being the School Host Facility. Apparently, when the Licensees' contracting personnel marked up the Congregate Care LOA to make Holy Cross into the School Host Facility, references to the Red Cross were not edited out.

While it is understandable that this Board might have been confused by that editorial error, the Licensees and Staff are correct in the representations made in their filings that at the time of the hearings on the SPMC, the Mass AG understood that the Red Cross was not to be called upon to staff or provide for children at the School Host Facility. (Tr. 21322-21323, 21328-21330) In Mass AG's Proposed Findings 8.1.66A through 8.1.66E the adequacy of that arrangement was questioned. The short answer to this Board's first question is that there is no evidence of record that anyone other than teachers or other school staff will be looked to under the SPMC to care for school and day-care children. There is no evidence of record on the capability of the American Red Cross to provide such care.

In response to the second question posed by this Board in its Memorandum dated June 22, 1990, the Licensees and Staff suggest that the concerns raised by this Board in ALAB-932

should be set aside for the following reasons: (1) it does not make any difference that teachers will be called upon to go considerably further under the SPMC than under the NHRERP; (2) the record and the hearings on the NHRERP support the notion that teachers can be relied upon to continue to care for children; (3) the "realism" doctrine allows for the presumption that teachers can be relied upon to care for children at Holy Cross; and (4) additionally, the Staff apparently relies upon a FEMA review of Holy Cross as the School Host Facility that took place after the close of the record on the SPMC. None of these rationalizations for ignoring the concerns of ALAB-932 withstand scrutiny.

The Licensees and Staff suggest that this Board can ignore the fact that Holy Cross College is an hour and a half from the EPZ on the ground that the Mass AG did not submit any evidence that the longer distance of Holy Cross from the EPZ (in contrast to congregate care centers in New Hampshire) would have any impact on the response of teachers in an emergency. This argument totally ignores the fact that under the July 22, 1988 Order of the Licensing Board the Mass AG was completely precluded from introducing any evidence on teacher behavior. The Licensees go so far as to suggest that the intervenors could have filed a late filed contention when Holy Cross was named as the School Host Facility after November 1988. It is patently absurd to argue that the Licensing Board would have entertained such a contention under the higher late-filed

contention standard when it had previously rejected all such issues in its July 22, 1988 Order. Any evidence that the Mass AG could have introduced on the issue of whether teachers would accompany and stay with children at Holy Cross would have been encompassed under Basis R of MAG 47. Basis R states:

"There is no reasonable assurance that sufficient teachers, or other school staff, will volunteer on an ad hoc basis to accompany and supervise the students on evacuation buses, at the Reception Center, and at the Host Special Facility. ORO Bus Drivers, Route Guides, and other ORO staffers are inadequate substitutes. Many of the students themselves will simply not get on a strange bus driven by a stranger unless a familiar and trusted person rides along with them." (Emphasis added.)

By rejecting the above quoted Basis, the Licensing Board precluded the Mass AG from submitting any evidence on the issue at hand.

Nor is the record that was introduced in the New Hampshire proceeding adequate to deal with the issue. The Licensees and the Staff rely upon the testimony of Mr. Moyer, a New Hampshire teacher, and Dr. Miletì in the New Hampshire hearings. Neither piece of testimony is compelling as to the adequacy of the SPMC provisions pertaining to the School Host Facility. Both witnesses were at best directing their remarks to the willingness of teachers to stay for the relatively short amount of time that it would take to load school children onto busses and perhaps, to accompany them to the four congregate care centers in New Hampshire. Neither Dr. Miletì nor Mr. Moyer were addressing their remarks to the likelihood of teachers staying on as the care providers for children at a host

facility. By the Licensees' own calculation, teachers might well be called upon to remain at Holy Cross for in the range of thirteen and a half hours. That thirteen and a half hours is in addition to the amount of time that the teachers would be sitting on the bus prior to reaching the boundry of the EPZ. (Tr. 21319-21323.) It is certainly reasonable to postulate that Massachusetts teachers, upon hearing that they would be required to remain with students to the reception centers and then further across the state to Holy Cross College, would be reluctant to get on an evacuation bus. Accompanying school children under the SPMC would effectively cut off a teacher for an extended period from contact with his or her family. The testimony on the response of teachers under the NHRERP simply does not address the issue of whether teachers could be counted on to remain at the SPMC's School Host Facility because that was not an issue under the NHRERP.

Both the Licensees and Staff also point to the "realism" doctrine as assurance that teachers will remain at Holy Cross to care for students. That reliance is misplaced for two reasons. First, it assumes that teachers who are employed by towns and school districts will recognize themselves as employees of the state and respond to a directive of the Governor. Even if one assumes that the opinion expressed in Attachment B to the Calendrello Affidavit is correct, there is no evidence that the teachers in the Massachusetts EPZ are

aware of that opinion or would act in accordance with it.^{1/} Secondly, even if one could count upon the "realism" doctrine for assurance that public school teachers would accompany and stay with school children, the "realism" doctrine has no applicability to the private school children and thousands of day-care children who would also be transported and held at Holy Cross College. The "realism" doctrine is only applicable to public entities. It is inapplicable to the dozens of private day-care facilities in the Massachusetts EPZ.

The NRC Staff also references a review by Richard Donovan of FEMA of Holy Cross College and the SPMC Support Plan Holy Cross Host Facility Activation and Operation Plan ("SP HFFS 1") as support for the view that the concerns of ALAB-932 can be ignored. It is clear from the record below that any review that Richard Donovan did of Holy Cross as a Host School Facility took place after the close of the record on the SPMC. When FEMA did its original review of Holy Cross it was as a Congregate Care Center. FEMA's finding of adequacy as to Holy Cross as a Congregate Care Center was the only finding of record in the hearings on the SPMC.

When FEMA did its original review of Holy Cross, there was no plan or agreement to use Holy Cross as the School Host Facility. (Tr. 21342, 21345.) The School Host Facility LOA

^{1/} Neither the Calendrello affidavit nor its attachments were part of the record below.

designating Holy Cross College as the School Host Facility was not signed until November of 1988, long after FEMA did its review of the SPMC's congregate care centers and the Special Population Facility at Shriners Auditorium. Furthermore, the plans that the NRC Staff refer to at page 5 - 6 of its July 13, 1990 memorandum reference SPMC Appendix M Revision 1.A. The version of SPMC Appendix M that was litigated in the proceedings below was Revision 0. It is at best unclear from the Staff's Memorandum of July 13, 1990, and the Donovan affidavit attached thereto, when Donovan did his review of Holy Cross as the School Host Facility or when the supplemental plans were adopted or incorporated. The effective date of Revision 0 of the SP HFFS 1 is 12/26/89 or roughly six months after the close of the record on the SPMC. Certainly, there is no indication that the SP HFFS 1 or the review referenced in the Donovan affidavit were encompassed by the record below or considered by the Licensing Board.

CONCLUSION

Thus, since there does not appear to be any evidence of record to establish that there is reasonable assurance that there are adequate provisions for the care of school children at Holy Cross, this Board should remand the matter to the Licensing Board. This issue cannot be properly disregarded under this Board's rationale in ALAB-932. Nor is it reasonable to direct the Licensees to simply supplement personnel at Holy Cross. It is clear from the affidavit of Anthony Calendrello

attached to the Licensees' July 11, 1990 response that they would simply amend the SPMC to designate route guides to stay on at Holy Cross College to care for children. That response to the staffing problem at Holy Cross College is totally inadequate because of the second shift staffing problems for route guides under the SPMC previously noted in Mass AG's appeal to this Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Traficante, hereby certify that on August 7, 1990, I made service of the enclosed RESPONSE OF THE INTERVENORS TO THE APPEAL BOARD MEMORANDA AND ORDERS OF JUNE 22, 1990 AND JULY 17, 1990 by telefax as indicated by (*) and by first class mail to:

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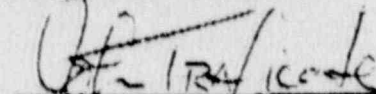
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