

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.)

(Seabrook Station, Units 1 & 2))

Docket Nos. 50-443
50-444

APPLICANTS' RESPONSE TO "MOTION OF
ATTORNEY GENERAL FRANCIS X. BELLOTTI
FOR LEAVE TO FILE RESPONSES TO
THE ANSWERS OF THE STAFF AND APPLICANTS
TO HIS MOTION FOR RECONSIDERATION OF
BOARD RULING ON PREPARATION TIME"

Under date of October 3, 1983 the Massachusetts
Attorney General filed what was captioned a
"motion . . . for leave to file response to the answers
of the Staff and Applicants to his motion for
reconsideration of board ruling on 'preparation

time."¹ While so captioned, the document was not such a motion but was, rather, a reply brief. Indeed, the words "move" and "leave" do not appear in the text of the document.

The Applicants set forth their response to this pleading, and the issues subsumed thereby, herein.

1. Notification Times. In its ruling of June 30, 1983, the Board concluded that "as a matter of law that Applicants' evacuation times estimates are not deficient in omitting notification/preparation times" Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-____, 17 NRC ____, ____ (June 30, 1983) (slip opinion at 11).² The

¹Following the rendition by the Appeal Board on August 26, 1983, of ALAB-737, this Board issued an Order on September 9, 1983, directing any party wishing to do so to file motions for reconsideration on the issues of preparation and notification times. MassAG filed such a motion on September 9, 1983, which was limited to the question of preparation times. SAPL filed a motion on September 15 and the Town of Seabrook filed a motion on September 19, both of which sought reconsideration as to both notification and preparation times without distinction between the two. No other party filed a motion (NECNP filed a brief in support of MassAG's motion on September 23, 1983).

²Regarding notification times, the Board's analysis was premised upon a reading of NUREG-0654/FEMA-REP-1 (Rev.0): "[A]n analysis from initiating event to completed response . . . is not required by the

Board accordingly granted summary disposition as to the issue of notification times.

The Appeal Board denied petitions for directed certification of the Board's Order of June 30, 1983. At the foot of its opinion, however, the Appeal Board articulated certain "comment[s]." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC ___, ___ (August 26, 1983) (slip opinion at 10 ff.). Referring to only one portion of the Board's ratio decidendi for granting summary disposition as to notification times (i.e., that based on a Staff report, NUREG-0654), the Appeal Board suggested (i) that Rev. 1 was the relevant standard against which to measure the Applicants' studies (as

regulations or by NUREG-0654, as this Board reads those requirements. As stated in the version of NUREG-0654 that was considered by the Commission during its emergency planning rulemaking, "[t]he requested estimates for time required for evacuations relate primarily to the time to implement an evacuation as opposed to the time required for notification. [Citation] Although this particular passage is not found in NUREG-0654, Rev. 1, the Board can find no indication that the NRC purposely intended to change the requirement. In addition, the Board finds support for not requiring an estimate of notification times in the regulatory prescription of those times. 10 CFR Part 50, App. E, § D.3." LBP-83-___ at ___ (slip opinion at 11).

opposed to Rev. 0), and (ii) that the change in language between revisions was intentional, signifying a Staff view that the Applicants' studies were now to contain a number that included the notification interval. ALAB-737 at ____ (slip opinion at 12-13).

This Board has now invited motions suggesting that it reconsider its earlier ruling. The Applicants have no objection to reconsideration per se, but submit that upon reconsideration that Board's granting of summary disposition should be adhered to. There are three reasons for this: First, the Appeal Board made no mention of the Board's other rationale, namely the words of the regulation itself. Prescinding from the question of whether one looks to Rev. 0 or Rev. 1 of the Staff report for "guidance",³ the regulation of the NRC (which has not been amended in this regard) suggests compellingly that notification times are a

³As the Board observed, Rev. 0 was the version of NUREG-0654 at the time the Applicants' evacuation time studies were first submitted to the parties and is the version to which reference is made, even today, in the regulations.

separate topic.⁴ Second, the fact that the regulations impose guidelines on the time within which notification

⁴The structure of Appendix E plainly refutes any notion that the evacuation time estimates called for should include estimates of the additional activities for which MassAG now contends. The ultimate sentence of the introductory paragraph of § IV provides that: "The nuclear power reactor operating license applicant shall also provide an analysis of the time required to evacuate . . . for various sectors and distances within the plume exposure pathway EPZ for transient and permanent populations." (Emphasis added.) Later in the same section it dictates the time within which the operator should complete notification of the public officials (§ IV.D.3) and then it provides for flexible notification of the public, at the discretion of the public officials: "The design objective of the prompt public notification shall be to have the capability to essentially complete the initial notification public within the plume exposure pathway EPZ within about 15 minutes. The use of this notification capability will range from immediate notification of the public (within 15 minutes of the time that State and local officials are notified that a situation exists requiring urgent action) to the more likely events where there is substantial time available for the State and local governmental officials to make a judgment whether or not to activate the public notification system. Where there is a decision to activate the notification system, the State and local official will determine whether to activate the entire system simultaneously or in a graduated or staged manner. The responsibility for activating such a public notification system shall remain with the appropriate government authorities." Id.

We submit that it is plain both that the Appendix contemplates that evacuation and notification are

is to be feasibly accomplishable, is contrary to the concept that notification time is to be estimated: there is no purpose in calling for the estimate of something the quantification of which is supplied by the regulations themselves. Finally, if it is thought the time estimates themselves are required to include this quantum of time, then it is sufficient to add it to the times estimated for the various scenarios. In any event, there is and has been suggested no disputed issue of fact on which litigation is necessary, and the granting of summary disposition is still appropriate.

2. Preparation Times. With respect to preparation times, the Applicants have no objection to reconsideration of the ruling at issue (i.e., whether or not to grant the motion for summary disposition). Moreover, on this issue we believe that the Board's alternative rationale for dismissing as to notification times does not extend to the question of preparation

distinct topics of concern, and that it would be impossible for anyone to estimate the time within which notification would be completed without a specification of the manner in which, in some hypothetical situation, the governmental officials had determined to exercise the discretion that the Appendix reposes in them exclusively.

times. Therefore, the Applicants do not oppose the reconsideration of the preparation times aspect of the June 30, 1983 Order.

This does not, however, mean that the question of preparation times is now a fit subject for litigation, for it is the Applicants' judgment that summary disposition on the issue of preparation times is still appropriate and the decision in this regard should be reaffirmed, albeit on a different ground from that first articulated (one that the Board did not have to reach previously). As the Board pointed out in its Order, the question of preparation times was not included within the scope of the contention (i.e., NECNP III.12 and .13) as admitted. See LBP-83-____ (slip opinion at 8). Moreover, preparation times was not identified by NECNP in its answers to interrogatories on this question, which were filed prior to the submission of the motion for summary disposition.⁵ Finally, the only assertion made in the

⁵In response to the Applicants' interrogatories relating to Contentions NECNP III.12 and .13, NECNP stated that "The deficiencies in Applicants' evacuation time estimates are listed in Contention III.12"

affidavit offered in opposition to the motion for summary disposition was the asserted total omission from the Applicants' evacuation time studies of any

and "NECNP has not yet had any experts evaluate Contention III.12 [or Contention III.13]. We will supplement our answers to these interrogatories when the expertise becomes available to us." ("NECNP Response to Applicants' Interrogatories and Request for the Production of Documents" (filed January 21, 1983) at 20-21.) NECNP never supplemented its answers to interrogatories. The asserted omission of any consideration of preparation times is singularly missing from the contentions. Since the scope of the contention is of necessity limited to the issues set forth in discovery (see 10 CFR § 2.749(d)), the issue of the asserted omission of any consideration of preparation times was foreclosed from and after the filing of these answers, long before the motion for summary disposition was even filed.

The omission of any complaint about preparation times from the contention and from NECNP's answers to interrogatories worked another distinctly unfair and inappropriate consequence. The Applicants' submitted at detailed affidavit in support of their motion for summary disposition. Affidavit of James MacDonald on NECNP III.12 and .13 (filed February 14, 1983). This affidavit addressed the complaints contained in the contentions (which did not include preparation times). Had that complaint been revealed in the contentions, or more particularly in the answers to interrogatories, Mr. MacDonald might also have addressed in detail what the Board learned later in the hearings, namely that the question of preparation times for evacuees at Seabrook becomes, as a practical matter owing to the capacities of the roadway network, wholly subsumed in the vehicle loading rates and roadway capacities. See Tr. 1038-39, 1044-59.

consideration of preparation times.⁶ Since this assertion was, in fact, inaccurate,⁷ summary disposition was properly granted even if one reached the issue.

3. The Need for Additional Hearings. MassAG⁸ argues first that any time there is a reversal of a decision granting summary disposition, there must be a

⁶"The Preliminary Evacuation Time Study . . . fails, inter alia, to account for notification/preparation/mobilization times" Affidavit of Philip B. Herr (filed May 27, 1983) at 2, ¶ 4. See also the "Statement of Material Facts as to Which There is Dispute" filed by NECNP in opposition to the motion for summary disposition at the same time, which omits any mention of the issue altogether.

⁷See, e.g., FSAR-SSREP, App. C at 11 ("These times are from the start of the evacuation to the point when evacuation of the last automobile has been completed. Additional time for notification, evacuation of special facilities and persons with special needs, and for confirmation that an evacuation has been completed is not included in the estimates provided.") (emphasis in the original).

It bears repetition that, beyond pointing out the erroneously perceived omission, Professor Herr did not assert that the times estimated by the Applicants were understated; as the Board learned later, Professor Herr did no estimates himself and was therefore unable to say what the "right" numbers were. He assumed that the numbers were too low by the omission of preparation times only because he perceived that preparation times had been omitted from consideration.

⁸It should be pointed out that MassAG did not oppose the motions for summary disposition on the

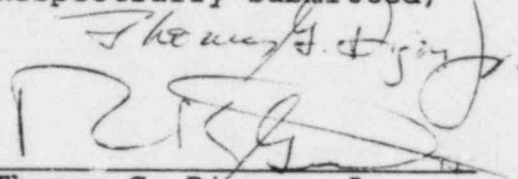
hearing. Massachusetts cites no authority for this proposition. The taking of further evidence is required only if the Board feels it is necessary for some reason. Here there is no reason. No one was cut off from cross-examining on the issue of preparation times and indeed extensive cross-examination was conducted including why preparation time was fully accounted for in the estimates of the "worst case" Seabrook scenarios. E.g., Tr. 1038-39, 1044-59. In addition, Massachusetts argues that certain testimony of Professor Herr as to preparation time was excluded. This problem, if it be a problem, is easily obviated by the Board now letting it in for such weight as the Board may give it, provided the Board is satisfied that the witness' qualifications, which include no reference to expertise in computer modelling of evacuations,

evacuation time estimate contentions. Presumably, therefore, MassAG was content with the scope of the contention framed by NECNP, which did not include the question of preparation times at all, and with the scope of the objection lodged by NECNP, which, as noted above, was limited to an affidavit that advanced only the manifestly erroneous perception that preparation times had not been considered at all and a statement of material facts that omitted the point entirely.

permit admission of his criticism of the Applicants' use of loading rates. Herr Rebuttal, Post Tr. 1196 at 3. The Herr testimony is fully rebutted by the testimony of Mr. Merlino which appears at Tr. 1038-39, 1049-59.⁹

No case has been made for holding a further evidentiary hearing.

Respectfully submitted;



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Dated: October 12, 1983

⁹For the purpose of avoiding the need for more hearings (but only in that event), the Applicants are prepared to waive their right to cross-examine Professor Herr on those portions of his testimony.

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on October 12, 1983, I made service of the within Applicants' Response to "Motion of Attorney General Francis X. Bellotti for Leave to File Responses to the Answers of the Staff and Applicants to His Motion for Reconsideration of Board Ruling on Preparation Time" by mailing copies thereof, postage prepaid, to:

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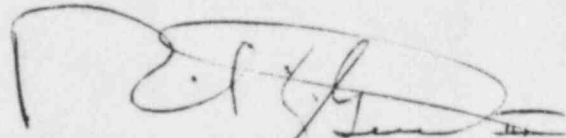
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A handwritten signature in dark ink, appearing to read 'Robert K. Gad III', written over a horizontal line.

Robert K. Gad III