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UNITED STATES OF AMERICA

Before The

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF	Docket Nos. 50-443-OL-1 50-444-OL-1
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.,	(On-Site Emergency Planning and Safety Issues)
(SEABROOK STATION, UNITS 1 and 2),	

ANSWER OF ATTORNEY GENERAL
JAMES M. SHANNON TO APPLICANTS'
PETITION FOR REVIEW OF ALAB-883

On February 3, 1988, the Atomic Safety and Licensing Appeal Board ("Appeal Board") issued a Memorandum and Order granting two motions of the Attorney General of Massachusetts ("Mass AG") to reopen the record in the on-site emergency planning and safety issues phase of the Seabrook operating license proceeding. The Appeal Board found that by virtue of the removal and dismantling of all of the emergency notification sirens in the Massachusetts portion of the EPZ, the Applicants no longer satisfied the 10 C.F.R. §50.47(b)(5) requirement that means exists to provide early notification and clear instruction to the populace within the EPZ. ALAB-883. The Appeal Board remanded the matter to the Licensing Board for further proceedings and ruled that a low-power license could not issue until the remand was complete.

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On February 18, 1988, the Applicants petitioned the Commission for review of ALAB-883. They argue that Massachusetts should be denied a hearing on the siren issue before low-power operation. The Applicants claim that the Appeal Board should have estopped the state from obtaining a hearing and should have allowed low-power operation pending the outcome of any remand.

Their estoppel argument is misguided, ignores the relevant facts and misapprehends the applicable law. Moreover, the Commission has already decided that early notification issues must be treated and resolved in the on-site emergency planning and safety issues phase of the operating license proceeding. Therefore, the Petition for Review should be denied.

1. The Appeal Board Acted Correctly By Rejecting The Estoppel Argument.

The Applicants first presented their estoppel argument to the Appeal Board on January 25, 1988. Applicants' Answer To "Contention Of Attorney General James M. Shannon On Notification System For Massachusetts And Motion To Admit Late-Filed Contention And Reopen The Record at 5-9. They argued that Massachusetts should be denied a hearing on the siren issue because:

> What the Commonwealth, its agencies, and political subdivisions have done to Seabrook is indistinguishable from the action of a private individual who gains access to a nuclear plant and deliberately renders a safety system inoperative. Id. at 6.

The inaccuracies of that statement were pointed out and, as a result, the Applicants have evolved their estoppel argument into the following: "[t]he Commonwealth and its political subdivisions could legally have assured continued validity of the siren system in any number of ways . . . ." Petition for Review at 5.

The argument is insubstantial and does not raise "an important question of policy," see 10 C.F.R. 2.786(b)(4)(i), for several reasons. First, the argument is a transparent attempt to shift the Applicants' established burden in these proceedings to the Commonwealth. The Applicants bear the burden of demonstrating that they are entitled to an operating license. E.g., Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-315, 3 NRC 101 (1976). To meet that burden, they must persuade the Commission that they have met emergency planning standards. E.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 690 (1986); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-697, 16 NRC 1265, 1271 (1982).

More particularly, the NRC and FEMA have explicitly imposed on the Applicants the burden of demonstrating an adequate early notification system. Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, NUREG-0654, FEMA-REP-1, Rev. 1 at 45 (November, 1980) and its draft analogue for utility

plans, Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants (Criteria for Utility Off-site Planning and Preparedness Draft Report for Interim Use and Comment), NUREG-0654, FEMA-REP-1, Rev. 1, Supp. 1 at 11 (November, 1982) state that "[i]t shall be the licensee's responsibility to demonstrate that such means exist, regardless of who implements this requirement." The former document emphasizes that "NRC and FEMA also recognize that the responsibility for demonstrating that such a system is in place rests with the facility licensee." NUREG-0654, FEMA-REP-1, Rev. 1 at 3-1. The Applicants have not met their burden because their system cannot withstand legal scrutiny. They should not be permitted to shift that burden by claiming that Massachusetts, in some unidentified manner, should excuse the system's legal deficiencies.

Second and as the Appeal Board found, see ALAB-883 at 11, the "factual ingredients" of an estoppel claim are absent. The sirens were removed (except for a single siren on the Salisbury Beach State Reservation) by six Massachusetts communities pursuant to votes of their Boards of Selectmen. The Commonwealth did not take those actions; municipalities, independent of the Commonwealth, did. As pointed out in the Supplemental Memorandum of the Mass AG,[1/] the Commonwealth

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1/ Supplemental Memorandum Of Attorney General James M. Shannon In Support Of Motion To Admit Late-Filed Contention And Reopen The Record (January 28, 1988).

and its municipalities are separate, largely independent entities under Massachusetts state law. The Applicants' attempt to equate the actions of the state with those of its political subdivisions is factually and legally wrong.

Third, the actions of the towns were justified, if not required. The United States Court of Appeals for the First Circuit found that the permits authorizing the erection and operation of the sirens had likely been issued ultra vires. Public Service Co. of New Hampshire v. Town of West Newbury, No. 87-1395 (1st Cir. December 16, 1987). A private party cannot base an estoppel on a government's invalid extension of a privilege to that private party. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61-63 (1987).

Finally, the Applicants sent letters to the Massachusetts towns representing that "[w]e will not be including the Massachusetts siren system in any documentation to the Nuclear Regulatory Commission by the Federal Emergency Management Agency involving the licensing of Seabrook Station." ALAB-883 at 8. In abandoning their siren system, the Applicants themselves apparently have recognized the legality of the actions taken by the Massachusetts towns.

2. The Commission Has Already Decided To Resolve Public Notification Issues In Low-Power Proceedings.

Effective July 13, 1982, the Commission amended its emergency planning regulations to allow the issuance of zero

and low-power licenses without NRC or FEMA findings on the adequacy of off-site emergency response plans. The Commission stated that its "review of the licensees' on-site response mechanism would necessarily include aspects of some off-site elements." 47 Fed. Reg. 30232 (July 13, 1982). Among the elements specifically mentioned by the Commission was public notification under 10 C.F.R. §50.47(b)(5). Id. An issue raised by public comments on the proposed rule was that public knowledge of a lack of off-site protection could cause chaos in the event of an incident during low-power testing. The Commission responded that prior to issuing a low-power license it would review elements of the off-site emergency plan including the public notification system required by 10 C.F.R. §50.47(b)(5). Id. at 30234. The conclusion is inescapable that the Commission has already determined that certain off-site elements of emergency response plans, like the public notification system, must be litigated and resolved prior to the issuance of any operating license, including a low-power license. Public confidence in the adequacy of protective measures available during low-power testing would be severly undermined if that testing were permitted to proceed before the public notification system was installed and found adequate in the licensing proceedings.

CONCLUSION

For all the foregoing reasons, the Petition for Review should be denied.

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DATED: March 3, 1988

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CERTIFICATE OF SERVICE

I, Stephen A. Jonas, Assistant Attorney General, hereby certify that on March 3, 1988, I made service of the within Answer Of Attorney General James M. Shannon To Applicants' Petition For Review Of ALAB-883, by mailing copies thereof, postage prepaid, by first class mail to, or by Federal Express to those individuals as indicated by *:

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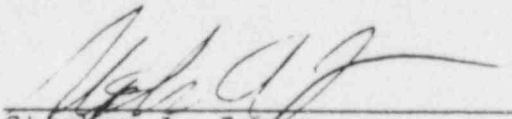

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