

April 23, 1979

NRC PUBLIC DOCUMENT ROOM
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

In the Matter of)	
)	
PUBLIC SERVICE COMPANY OF)	Docket Nos. 50-443
NEW HAMPSHIRE, <u>et al.</u>)	50-444
)	
(Seabrook Station, Units 1)	
and 2))	

NRC STAFF RESPONSE TO REQUEST OF ELIZABETH H. WEINHOLD
TO REQUIRE SEISMIC DESIGN CHANGES

By letter to the Commission dated April 1, 1979, Ms. Elizabeth H. Weinhold requests that the seismic design of the Seabrook facility be upgraded and that construction be halted by the Commission until the requested changes are imposed. In the Staff's view, Ms. Weinhold's request, besides being untimely, does not provide any support for a stay of construction, and should be summarily denied. However, the Staff believes that the Commission should offer Ms. Weinhold an opportunity to file a brief as amicus curiae in the event the Commission decides to grant the petition for review of seismic issues now pending before it at the behest of another intervenor.

The question of the design requirements for the Seabrook seismic category I structures was a contested issue before the Licensing Board. Two separate intervenors, Ms. Weinhold and the New England Coalition on

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Nuclear Pollution (NECNP), disputed the Applicants' and the Staff's proposed safe shutdown earthquake (SSE). In its Initial Decision, the Licensing Board unanimously decided the issue against Ms. Weinhold and NECNP and found that it is acceptable to design the seismic category I structures to withstand an SSE of intensity VIII (modified mercalli) with an associated acceleration of 0.25 g. 3 NRC 857, 868-71, 919-22 (June 29, 1976).

Since the June, 1976 initial decision, until now, Ms. Weinhold has not participated in this proceeding with respect to the seismic design or any other issue. Although NECNP appealed the initial decision on this issue, Ms. Weinhold neither took an appeal nor participated in any way in support of NECNP's appeal. The Appeal Board, by a 2-1 majority, affirmed the SSE determination of the Licensing Board.^{1/} ALAB-422, 6 NRC 33, 54-65, 106, 111-13 (July 26, 1977). Mr. Farrar presented only an outline of his dissenting views on the seismic issue and stated that he would set forth his full reasoning in a supplemental opinion. ALAB-422, supra at 106.

On August 10, 1977, NECNP filed a petition for Commission review of the Appeal Board's decision on several matters, including the seismic issue. Again, Ms. Weinhold filed no requests for review or any other relief in the wake of the Appeal Board decision. The Commission, in an unpublished Order

^{1/} NECNP's position on appeal was that the SSE should be intensity IX with an associated acceleration of 0.75 g, and that, in the alternative, the acceleration associated with the intensity VIII SSE should be 0.40 g, and not 0.25 g as determined by the Licensing Board.

issued on September 15, 1977, (at p. 4), inter alia extended its time to consider whether to review the seismic issue until after it received and analyzed Mr. Farrar's supplemental dissenting opinion. Since that opinion has not been issued, the question of whether to grant NECNP's petition for review of the seismic issue remains before the Commission.^{2/}

As can be seen from the above background, Ms. Weinhold has long abandoned the seismic issue which she litigated before the Licensing Board some three years ago. She was not a party to the appeal before the Appeal Board, and has not been a party to the Commission's consideration of whether to grant review on the seismic issue. Parties cannot step in and out of proceedings at will. Northern States Power Co. (Prairie Island, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975); see also Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-358, 4 NRC 558 (1976).

Under the Commission's Rules of Practice any request for a stay by a party to a proceeding must be made within seven days of the decision appealed from. 10 CFR §2.788(a). A request some three years after the Licensing

^{2/}The Applicants and Staff opposed NECNP's petition for review of the seismic issue, among other issues, in responses dated August 18, 1977 and August 22, 1977, respectively. The Staff continues to believe that under the regulations governing discretionary Commission review, NECNP's request to review the factual issue of the selection of the SSE and associated "g" value should not be granted because the Appeal Board did not resolve the factual issue ". . . in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board." 10 CFR §2.786(b)(4)(ii).

Board decision, and almost two years after the Appeal Board decision is certainly long out of time and may be denied for this reason alone. More importantly, there are no new circumstances which would justify granting Ms. Weinhold any special consideration at this late date. In requesting a stay of construction premised on her new found dissatisfaction with the three-year old decision on the seismic issue by the Licensing Board and the two-year old affirmance of that decision by the Appeal Board, Ms. Weinhold points to no new facts or even any arguments as to why the old facts as determined by both Boards below are in error. Ms. Weinhold's bare reference to the accident at Three Mile Island and the recent shut-down by the NRC Staff of five nuclear power reactors adds nothing to either her equally bare request for a stay of construction or to the substantive seismic issues determined by the Licensing and Appeal Boards with respect to the Seabrook facility.

The Three Mile Island accident has no relationship to selection of the proper SSE. The recently ordered shutdown of five nuclear power reactors was for the purpose of reanalyzing whether the piping systems were in fact constructed to the earthquake stresses to which they were supposed to be designed, in light of apparent errors in the computer code used to guide the designers. This is not at all related to the seismic

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issue in Seabrook--the proper choice of the SSE and associated "g" value from which to calculate the resultant stresses on plant systems.^{3/}

Even if Ms. Weinhold had been a party to an appeal, and even if she had timely filed the instant request for stay pending appeal years ago, the request still presents no basis upon which it could be granted. Such a stay in the circumstances of this proceeding would be governed by the four factors listed in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), for consideration by Federal courts before the issuance of preliminary injunctions (now codified in the Commission's Rules of Practice in the context of stays pending appeal by 10 CFR §2.788(e)).^{4/} In the absence of any attempt by Ms. Weinhold to address these factors to support a stay of construction pending Commission consideration of whether to grant review on the seismic issue, her request should be summarily denied.

^{3/} Although not related to the seismic issue litigated in Seabrook, it should be noted that the NRC Staff in IE Bulletin 79-09 dated April 14, 1979, requested all licensed facilities (including Seabrook), to verify that resultant earthquake stresses postulated for piping systems were not calculated in a manner similar to the erroneous calculations performed for the five reactors which have been shut down. The responses from all facilities will be evaluated by the NRC Staff.

^{4/} These factors are:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties, and
- (4) Where the public interest lies.

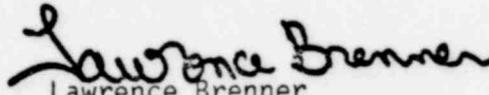
In addition to the fatal absence of any attempt to address these factors, Ms. Weinhold's failure to even appeal the decisions below on the seismic issue, let alone timely request a stay pending such an appeal, points strongly to the implication that Ms. Weinhold herself did not perceive any need for a stay to avoid any irreparable injury to her. It is the "established rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury." Permian Area Rate Cases, 390 U.S. 747, 773 (1968); Public Service Co. of Indiana (Marble Hill, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977); Toledo Edison Co. (Davis-Besse, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 626 (1977). This established rule is certainly applicable here where there has not been any showing by Ms. Weinhold on any of the four factors, let alone the particularly strong (perhaps even overwhelming) showing required on the remaining factors to justify a stay where there is no irreparable injury to the movant absent the stay. Florida Power & Light Co. (St. Lucie, Unit 2), ALAB-404, 5 NRC 1185 (1977). Cf. Marble Hill, supra at 632.

For the reasons stated, Ms. Weinhold's filing is clearly insufficient to justify any relief at her independent behest. However, the Commission does have before it the question of whether to grant NECNP's petition for review of virtually the same seismic matters

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which Ms. Weinhold has listed in her letter.^{5/} In recognition of this, and the fact that Ms. Weinhold was previously an active party to the litigation of the seismic issue before the Licensing Board, the Staff believes the Commission should grant Ms. Weinhold the opportunity to file a brief as amicus curiae pursuant to 10 CFR §2.715(d) in the event the Commission in the future decides to grant NECNP's request for review of the seismic issue in this proceeding.

Respectfully submitted,


Lawrence Brenner
Counsel for NKC Staff

Dated at Bethesda, Maryland,
this 23rd day of April, 1979.

^{5/} One matter which Ms. Weinhold lists is not still subject to possible Commission review--Ms. Weinhold's apparent belief that the cooling tunnels are a seismic category I structure and should therefore be designed to withstand the SSE. This is incorrect. In the event that the "once-through" cooling tunnels are totally blocked (e.g., by an earthquake), the seismic category I mechanical draft cooling tower system will be the "ultimate heat sink" relied upon to supply sufficient cooling water. Initial Decision, supra at 3 NRC 877-78.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST OF ELIZABETH H. WEINHOLD TO REQUIRE SEISMIC DESIGN CHANGES" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk by deposit in the Nuclear Regulatory Commission internal mail system, this 23rd day of April, 1979:

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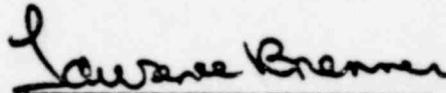
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