UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom

In the Matter of	Docket Nos. 50-443-OL 50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	(On-Site EP)
(Seabrook Station, Units 1 and 2)	October 18, 1989

MEMORANDUM OF THE INTERVENORS IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION OF THE SCOPE CONTENTIONS FILED IN RESPONSE TO THE SEPTEMBER 27, 1989 ONSITE EXERCISE

INTRODUCTION

Pursuant to 10 CFR §2.749, Intervenors file this memorandum of law in support of their motion for summary disposition on their contentions challenging the scope of the September 27 onsite exercise ("September exercise") at Seabrook and asserting that that exercise was too truncated to meet the requirements of 10 CFR Part 50, Appendix E, IV.F. ¶1. Intervenors filed a contention on September 29,[1] 1989 based on information they had gained through their

1/ This pleading is dated September 28 but was filed on September 29, 1989.

efforts to observe the September exercise.[2/] Upon receipt of the scenario documents from the NRC on October 10, 1989 pursuant to an earlier-filed FOIA request, the Intervenors filed on October 13 an additional contention which, like the September 29 filing, also challenged the scope of the September exercise.[3/] As discussed in some detail in Intervenors' October 13

2/ Although the Intervenors had requested observational status, the Applicants refused to accomodate this request. See correspondence attached hereto as Exhibits 1 and 2. Indeed, the Applicants prevented an Assistant Massachusetts Attorney General from observing exercise activities at the Media Center even though that Center was located in a public building which remained open to the public throughout the exercise. See correspondence attached as Exhibit 3.

3/ The October 13 pleading also amended the earlier contention clarifying, by means of the procedural vehicle of amended bases, the nature of the omissions in the scope and design of the exercise as disclosed by the scenario document. For example, direct observation had led the Intervenors to conclude that no field monitoring teams had been dispatched offsite and that therefore the exercise failed to test portions of the onsite plan that are required by 10 CFR 50.47(b)(9) which requires "[a]dequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences . . . ." The scenario document reveals that one team was dispatched offsite but no plume monitoring took place. See Scenario at 3.1-2, 3.1-8. The Applicants did not test their capacity to locate a plume, track its course and measure its content. Neither did they exercise this capacity as it is related to proper offsite protective action decision-making. (The Staff's Inspection Report 50-443/89-10, dated October 2, 1989 but not received by Intervenors until October 11 as Appendix 1 to Applicants' October 11 Response to the Intervenors' September 29 motion, at 8 asserts that field monitoring teams were dispatched and that "sample control and analysis including surveys . . . were effectively demonstrated.") However, as the Scenario makes clear there was no plume to track (4.1-6) in light of the limited development of the accident chosen and no mini-scenario was used to test plume monitoring and tracking capabilities "out of sequence" or outside the logic of the accident scenario. See Scenario at 8.0 "Mini-Scenarios" and 10.4 "Onsite Out of Plant Data" and 10.5 "Offsite Data."

Motion, there appear to be no impediments to summary disposition of these contentions because they raise (and are intended to raise) the purely legal question whether the September exercise, described by the Staff in IR 50-443/89-10 at 2 as a "partial-participation" licensee-only exercise, complies with the regulatory requirements of App. E. IV.F.¶1. As demonstrated below, the "partial-participation" September exercise does not comply with the regulatory requirements and, therefore, no full-power license may issue at this time.

This memorandum is structured as follows:

I. Status of Motion for Summary Disposition and this Memorandum

II. Legal Issues

A. What is the required scope or extent of the pre-licensing one-year onsite exercise required by App. E. IV.F.¶1?

B. What portions of an onsite plan must be tested in order to: 1) "test[] as much of the licensee . . . emergency plan[] as is reasonably achievable without mandatory public participation" F.¶1; and 2) "test[] the major observable portions of the onsite . . . plan[]"? F.¶1, n.4. What type of exercise and, correspondingly what level of mobilization is necessary to verify that "licensee personnel and other resources" have the "capability to respond to the accident scenario."? Id.

C. Did the September exercise sufficiently test the onsite plan to meet the requirements for the pre-licensing one-year onsite exercise?

I. STATUS OF MOTION FOR SUMMARY DISPOSITION AND THIS SUPPORTING MEMORANDUM

A. Intervenors are aware that their onsite exercise contentions have not yet been admitted in this proceeding. Nonetheless, in light of the purely legal nature of the issues raised by these contentions and the need for prompt resolution,[4/] summary disposition is appropriate in these particular circumstances. Summary disposition under NRC procedural law tracks Fed. R. Civ. P. 56. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). Summary judgment pursuant to Rule 56 may be brought by a plaintiff even before the filing of an answer. Intervenors

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4/ Obviously, Intervenors believe that another onsite exercise will be necessary before full-power licensing based on the failure of the Applicants to meet the regulatory requirement. (It goes without saying that another exemption request would be fatuous.) In any event, resolution of Intervenors' contentions in this regard must precede full-power licensing in light of UCS v. NRC. Since the September exercise is litigable by Intervenors and they have chosen to challenge it based on its insufficient scope as expressly provided by NRC law, see ALAB-900, 28 NRC 275, at 286, no full-power license can be authorized until the matters raised by Intervenors with regard to this material licensing issue are addressed. Intervenors have a right to litigate the September exercise before licensing and in these circumstances this translates into a right to have this Board decide whether the September exercise complied with the regulatory requirements. As discussed above, there is no meaningful distinction between deciding this issue as a matter of the admissibility of the contentions or as a matter of summary disposition after they are admitted.

have found no NRC law prohibiting the filing of a motion for summary disposition on a contention before a determination has been made to admit that contention.

B. In the alternative, this memorandum should be considered by the Board in ruling on the admissibility (and then on the merits) of the Intervenors' onsite exercise contentions for several additional reasons.

1. First, this memorandum sets forth the legal analysis that supports the Intervenors' claim that a pre-licensing one-year onsite exercise must be a "full participation" exercise which tests all the major observables of the onsite plan. To this extent, it provides additional legal basis for those contentions. Again, noting this Board's September 26 "Unauthorized Pleadings" Order, the Intervenors believe that legal argument in support of a contention is not properly characterized as "basis" and should not be set forth within the four corners of a contention and bases statement. Nor did Intervenors have to file this memorandum with their September 29 and October 13 motions to admit these late-filed contentions. Legal argument supporting a contention is not relevant to the 5-pronged late-filed standard. (The fact that Intervenors believe that only legal argument is necessary to prevail on these contentions, explains why they have identified fact-witnesses in their September 29 motion (who were only needed until the Scenario became available) and no witnesses in their October 13 Motion (instead incorporating the Scenario.))

Notwithstanding this, this Board may view the legal analysis set forth here as necessary basis to the earlier-filed contentions. If so, as the Board indicated in its September 26 Order, this pleading itself should again separately address the late-filed standards or it will be striken. Intervenors therefore state that if this pleading is viewed as an amended basis to the earlier filed onsite contentions it meets the late-filed standards for such an amended basis as follows:

1) This legal analysis of the failure of the September exercise to comply with the regulatory requirements of App. E. IV. F.¶1 could not have been done (and would not have been even imagined) before the scope of that exercise became clear. This analysis is filed 14 business days after the exercise, 12 business days after the September 29 filing and 3 business days after the October 13 filing. This is a reasonable time in light of the fact that further alleged significant omissions, in addition to those pleaded in the September 29 filing, provide the factual basis for this legal analysis and the motion for summary disposition. Moreover, the legal analysis and regulatory history is complex and has taken time. Finally, the Staff's own characterization of this exercise as a licensee-only "partial-participation" exercise was not available until October 12, 1989. Notwithstanding the Staff and Applicants' representations that the third factor is the "most important" (Staff Response at 15; see also Applicants' Response at 8) good cause for late-filing is the

most crucial. As the Appeal Board stated in ALAB-918 at 21 (slip opinion):

> It is well established that the first factor is the most crucial and, when the proponent of a contention fails to demonstrate good cause for not filing the contention in a more timely fashion, the movant must make a compelling showing on the other four factors.

(citation omitted).

2) and 4) Intervenors adopt their statements on these two standards as set forth in their September 29 Motion at 5 and 7 respectively.

3) This legal analysis establishes that the onsite exercise contentions are meritorious and that the September exercise does not comply with the regulatory requirements. This analysis thereby indicates in what fashion Intervenors will contribute to the development of a sound record by setting forth the precise issues raised. Intervenors again assert, however, that no witnesses are necessary to resolve these contentions and that therefore no obligation exists to identify witnesses or summarize their testimony.

5) This legal analysis, if viewed as an amended basis, does not further broaden the issues raised by the earlier contentions. To this extent, Intervenors rely on their statements as to this standard as set forth at 7 of their September 29 Motion and at 8-9 of their October 13 Motion. In fact, this legal analysis, set forth as it is in a memorandum of law supporting a motion for summary disposition, is designed to shorten whatever delay is necessary as a consequence of

Applicants' decision to conduct a "partial-participation" licensee-only onsite exercise, by having the issue of the alleged insufficient scope of that exercise addressed immediately.

To the extent the motion to reopen standard[5/] is applied to this memorandum (viewed as an amended basis) that standard is met as well:

1) Intervenors adopt the timeliness response set forth above with regard to the first prong of the late-filed contention standard.

2) Intervenors incorporate by reference their statement regarding the safety significance of an incomplete onsite exercise set forth on pages 3-7 of their October 16, 1989 Motion to Amend September 29 and October 13 motions.[6/]

5/ The Board in its October 12 low power decision (LBP-89-28) (received by the Mass AG on October 16, 1989) applied the record reopening standard to Intervenors low power contentions distinguishing UCS v. NRC (slip opinion at 14-15). To the extent the Board recognizes a difference between the "materiality" of low power testing as compared to the "materiality" of the September exercise, it may not view LBP-89-28 as dispositive of this question for these onsite exercise contentions. Intervenors on October 16, 1989 in response to LBP-89-28 have sought to amend their September 29 and October 13 motions to address the motion to reopen standard. Intervenors continue to assert that UCS v. NRC and Mothers for Peace and ALAB-918 are controlling law on this issue.

6/ Intervenors note that "incorporation by reference" was recently criticized by this Board (LBP-89-28 at 47 calling it an "unskilled approach to legal pleading"). In these circumstances the Intervenors nevertheless do so for the following reasons: 1) Intervenors do not believe that this memorandum is an "amended basis" and therefore do not believe that they need to address these standards at all. They do so only because this Board's "Unauthorized Pleadings" order

(footnote continued)

3) Intervenors also incorporate by reference their discussion of the third factor at 7 of their October 16 motion to amend earlier onsite contention filings. Intervenors state further that if this Board finds that the record reopening standards have not been met (and as a consequence do not reach the merits of Intervenors' scope challenge) because there is no safety significance to a pre-licensing exercise even if it is too truncated to meet the regulatory requirements, then the Applicants have obtained an exemption from the App.E. IV. F.¶1 requirement de facto even though the Commission in CLI-89-19 denied them such an exemption de jure.

2. Second, the Applicants, in their October 11, 1989 Response at 8-16, claim that the September 29 contention (and one would expect similar arguments to be made by Applicants in response to the October 13 filing) fails for lack of basis.7/

(footnote continued)

indicates that the Board may view this memorandum in that light and it required that all pleadings meet the NRC's requirements in "form and substance"; 2) Intervenors do not simply reproduce the actual text of pages 3-7 of their October 16, 1989 motion dealing with the significant safety issue because this Board has also indicated that restating arguments is not permitted. (LBP-89-28 at 45 noting that Second Motion seeking admission of low power contentions dated August 28, 1989 "is devoted to restating and glossing arguments in the first [July 21] motion, although the Attorney General is fully aware that the practice is not authorized by the rules.") Thus, Intervenors understand that in order to fully protect their rights in this case, they must set out a response to both the late-filed contention and record reopening standards, but not repeat arguments made earlier as to those standards and also not incorporate by reference such arguments into their present pleading. Unsure how to proceed in these circumstances, Intervenors have chosen to explain in this footnote the factors that have produced the particular form of this pleading.

7/ On October 17, 1989, the Mass AG received the Staff's

(footnote continued)

The Applicants assert that App. E. IV. F.¶1 does not require a "full participation" licensee-only onsite exercise that tests all major observable portions of the onsite plan. This memorandum is also appropriate for consideration by this Board as a reply by Intervenors to the response of the Applicants to these contentions. Intervenors have a right to some form of reply to responses to contentions.[8/]

II. LEGAL ISSUES

A. What is the necessary scope and extent of the one-year prelicensing onsite exercise required by App. E. IV. F. ¶1? Turning to the regulatory language, we find the following:

> 1. A full participation exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted for each site at which a power reactor is located for which the first operating license for that site is issued after July 13, 1982. This exercise shall be conducted within two years before the issuance of the first operating license for full power (one authorizing operation above 5% of rated power) of the first reactor and shall include participation by each State and local government within the plume exposure pathway EPZ and each State within the ingestion exposure pathway EPZ. If the full participation exercise is conducted more than one year prior to issuance of an operating licensee for full power, an exercise which tests the licensee's onsite

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(footnote continued)

Response to Intervenors' September 29 Motion. Having originally intended to file this memorandum on behalf of Intervenors on October 17, the Mass AG has deferred that filing one day to consider and reply to the Staff's Response. At pages 2-6 of its Response, the Staff also argues that this contention fails for lack of basis. Thus, this pleading is also Intervenors' reply to the Staff's Response.

8/ Intervenors note the difference between having no right to reply to an answer to a motion as compared with a right to reply to a response to a contention.

emergency plans shall be conducted within one year before issuance of an operating license for full power. This exercise need not have State or local government participation.

4/ "Full participation" when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately assess and respond to an accident at a commercial nuclear power plant. "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

The correct analysis of this language is as follows:

1. The phrase "full participation" is used here in two different although related ways. The first four words -- "a full participation exercise" -- begins (but only begins) to define the initial offsite exercise required within two years of the first full-power operating license at a site. At first glance, the phrase that follows the first four words -- "which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation" -- seems to define the nature of such a "full participation" exercise. But immediately it becomes clear that there are two variables at play in ¶1: 1) exercises are being defined by the scope, level or extent of the participation of the participants (the "how" of participation in an exercise); and 2) exercises are being defined by what entity or entities

must participate (the "who" of such participation). Standing alone the first sentence of ¶1 does not completely define the requirements for this initial offsite exercise because it defines the "how" -- "... as much of the licensee, State and local emergency plans as is reasonably achievable without public participation" -- but does not define the who.

That the first sentence of ¶1 defines the "how" and not the "who" of a "full-participation" exercise is also clear from the fact that footnote 4 reinforces the definition of "full participation" as to scope and extent (the "how") and says nothing about the "who". Footnote 4 defines "full participation" generically ("when used in conjunction with emergency preparedness exercises") and indicates that it requires "appropriate" personnel from the licensee, State and local governments to take part. Footnote 4 also expressly develops the scope or "how" aspects of "full-participation": it requires testing "major observable portions" and a certain level of mobilization. But footnote 4 does not delineate the participants in such a "full-participation" exercise. In other words, the following phrase in footnote 4

> "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans. . . ."

means that whatever entities are fully participating must test all major observable portions of their plans but it does not mean that all entities must participate for an exercise to be a

"full participation" exercise.[9/]

The reason why the first sentence of ¶1 and footnote 4 define the "how" and not the "who" of an exercise is based on the overall structure of paragraphs 1, 2, and 3 of subpart F. In ¶3 it is expressly stated that a "full participation" exercise is required at certain times even though not all States or all local governments with relevant emergency plans must be actively participating.[10/]

In fact, ¶3 requires all plume EPZ states plus any ingestion pathway states to participate in one big exercise only every seven years after licensing. ¶3(c). (This kind of exercise is actually called a "joint exercise" in ¶3: "State and local governments that have fully participated in a joint exercise. . . . ").

Thus, a post-licensing biennial exercise of the New Hampshire plan in which the licensee "fully participates", the

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9/ In short, footnote 4 further defines only the "how" and not the "who" of an exercise. This is the reason it begins with the phrase "'Full participation' when used in conjunction with emergency preparedness exercises. . . ."

10/ To see this, imagine the following configuration: A multi-site State and a local government in that state that is a single-site local government. Assume that the State has three sites and all three exercise in the same month in 1990. The State must "fully participate" in only one of these three exercises. In 1992, when all three sites have their next biennial offsite exercise, the State must "fully participate" again. Assume that in 1990 the State "fully participated" at Site 1, and in 1992 at Site 2. This means that at Site 3 in both 1990 and 1992 there was a "full participation" exercise (as defined in footnote 4) which tested all major observable portions of the licensee and local government's plans but did not fully test the State's plan for this site. Thus, "full-participation" defines the "how" and not the "who".

New Hampshire local governments "fully participate," the New Hampshire State government "partially participates," and Massachusetts and Maine do not participate at all is still in compliance with ¶3.

Thus, it is obvious that "full participation" as defined in the first sentence of ¶1 and in footnote 4 delineates the "how" and not the "who" of an exercise and that, as a consequence, a "full-participation exercise" should not be understood as requiring any particular kind or specific number of participants. Thus, it now becomes clear that a licensee-only onsite exercise must still be a "full-participation" exercise in the sense that it would test as much of the licensee onsite plan as is reasonably achievable without mandatory public participation, test the major observable portions of that plan and otherwise meet the requirements of footnote 4.

Returning to the remaining portions of ¶1, it is now clear what the purpose of the second sentence of ¶1 is. The second sentence identifies "who" the participants must be in the exercise required within 2 years of licensing. This exercise:

> shall include participation by each state and local government within the plume [EPZ] and each state within the ingestion [EPZ].

Thus, the second sentence of ¶1 requires within 2 years of licensing a joint exercise in which all relevant entities fully participate, just as ¶3(c) requires such a big joint exercise post-licensing every 7 years. But such a joint exercise is not the same as a "full participation" exercise which is also

required by ¶1 and ¶3 under different circumstances and with different frequencies and which only requires, pursuant to footnote 4, that whoever is obligated to participate, participate in a particular way. As the Shoreham Licensing Board noted: "Thus, it appears that the definition of "full participation" found in footnote 4 applies to both initial and biennial exercises. . . ." Shoreham, 26 NRC 479, 485 (December 7, 1987).

Now the last 2 sentences of ¶1 are also clear because they too define the "who" and not the "how" of the prelicensing exercise requirements. The onsite exercise required within 1 year must still be a "full-participation" exercise even though the only necessary participant is the licensee. The "how" of the pre-licensing exercise requirements - the 2 year offsite and the 1 year onsite - is set forth and described in the first sentence of ¶1 and footnote 4. The "who" is set forth for the offsite exercise in the second sentence and for the onsite exercise in the third and fourth sentences.

2. Further support for this interpretation of ¶1 is found in the developmental history of the pre-licensing and post-licensing exercise requirements.

The 1980 Scheme

> Each licensee shall exercise at least annually the emergency plan for each site at which it has one or more power reactors licensed for operation. Both full-scale and small-scale exercises shall be conducted and shall include participation by appropriate State and local government agencies as follows:

> 1. A full-scale exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted:
>
> > a) For each site at which one or more power reactors are located and licensed for operation, at least once every five years and at a frequency which will enable each State and local government within the plume exposure pathway EPZ to participate in at least one full-scale exercise per year and which will enable each state within the ingestion pathway to participate in at least one full-scale exercise every three years.
> >
> > b) For each site at which a power reactor is located for which the first operating license for that site is issued after the effective date of this amendment, within one year before the issuance of the operating license for full power, which will enable each State and local government within the plume exposure EPZ and each state within the ingestion pathway EPZ to participate.

45 Fed. Reg 55402 at 55413 (August 19, 1980).

As review of this scheme makes clear, the Commission required in 1980 (just as today) a pre-licensing joint offsite exercise (¶1.b.) and post-licensing exercises. Both were annual requirements and, as the structure of the regulation indicates, the "how" was set out separately from the "who": the "how" was defined as

> a full scale exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation . . . .

The "who" varied (again as today) depending on whether the exercise was a pre-licensing or post-licensing requirement. Section a) makes clear that an annual exercise in which at least the licensee fully participated was required

post-licensing.[11/] Section (b) required a big joint exercise with every participant (including the licensee) fully participating within one-year of licensing.

In sum, then, the 1980 scheme required the licensee to annually exercise its onsite plan to the full extent possible without public participation both pre- and post-licensing. Obviously, for the Applicants and Staff to prevail in any defense of a one year pre-licensing "partial participation" licensee-only exercise (like the September exercise) the Commission must have intended to relax this requirement on the licensee's annual exercise when it modified the post-licensing frequency of the exercise of State and local government plans (in 1984) and the timing requirement of the pre-licensing exercise of these governmental plans (in 1987). In fact, the Commission reaffirmed in these rule makings that the licensee was to continue to fully participate or fully test its onsite plan each year.

11/ To see why §1a of the 1980 rule permitted the post-licensing annual exercise requirement to be met with a full scale licensee-only exercise, posit a multi-site State and a multi-site local government. Although each licensee had to conduct a "full-scale" exercise annually, the state and local government had to participate at any given site only once every five years. So long as both the State and the local government participated in and at other sites' full-scale exercises each year, they did not have to participate in any particular licensee's annual full-scale exercise. In their absence the licensee still had to "test[] as much of the licensee . . . plan[] as is reasonably achievable without mandatory public participation," precisely the requirement that continues to exist today for licensee-only annual exercises.

In July 1983, the Commission proposed a rule change the intent of which was to modify the post-licensing frequency of the exercise of State and local government plans from each year to a biennial schedule. 48 Fed. Reg. 33307 (July 21, 1983).[12/]

In discussing these changes to post-licensing exercise frequency, the Commission noted that:

> [t]he proposed rule would not relax in any manner the onsite exercise that each licensee is required to conduct which includes exercising control room, technical support center and emergency operating facility functions. A partial or full-participation exercise[13/]

12/ As noted, the 1980 scheme did not require an annual post-licensing exercise of the state and local government plans for each site but only that each state and local government in a plume EPZ fully participate at some site each year. Similarly, the proposed biennial requirement did not require state and local government participation and the exercise of governmental plans at each site every two years but only at some site every two years. See 48 Fed. Reg. 33307, at 33309 (charts setting forth effects of new rule on frequency and scope of governmental participation in exercises at each site depending on number of sites in state).

13/ Under the 1983 proposed scheme every two years at every site the local governments would "fully participate" in the licensee's annual exercise. (Footnote 4 was added at this time to further define the "how" of an entity's participation.) A State could partially participate at any give site every two years so long as it was fully participating at some site every two years and at every site within seven years. See proposed language of ¶¶1, 2, and 3 at 48 Fed. Reg. at 33310. Thus, the post-licensing biennial exercise at any given site in a multi-site State could involve: 1) partial participation of the State; 2) full participation of the local government; and 3) full participation of the licensee. Nothwithstanding that such an exercise included the full participation of the local governments and the licensee, the Commission called it a "partial-participation" exercise, no doubt defining it by the level of involvement of the State (although not the other participants).

> would satisfy the licensee's annual requirement for an onsite exercise as full licensee participation is required for either type of exercise.

48 Fed. Reg. at 33308 (emphasis supplied). The Commission made these statements at the same time it defined in the proposed rule (and in the final rule, see 49 Fed. Reg. 27733 at 27736 (July 6, 1984)) "full participation" as follows:

> "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

48 Fed. Reg. at 33310.[14/] The Commission could not have more clearly stated that although it was modifying the frequency of the post-licensing exercise of State and local government offsite plans, the licensee's emergency plan still was to be exercised annually and that this annual exercise had to continue to involve "full-participation" by "licensee personnel and other resources."[15/]

14/ This definition is identical to the current form of footnote 4.

15/ "Other resources" that have to be mobilized to verify their capability in a licensee-only annual full-participation exercise include the non-licensee personnel under contract to supply emergency services pursuant to an onsite plan. At Seabrook, this would include medical support, rescue teams and the outside support hospital. See §8.8 of the SSRERP identifying the other emergency response organizations (non-government since the State and local governments do not have to participate pursuant to the fourth sentence of ¶1) and Appendix D of the SSRERP containing some (but not all) of the Letters of Agreement with these various resources. The Intervenors' onsite contentions challenge the scope of the September exercise, in part, based on the failure to mobilize and verify the capability of these resources.

Thus, before the post-licensing annual exercise requirement was modified in 1984, the licensee at a given site had to fully test its emergency plan each year even when the State did not test its plan for that site. When the frequency of the exercise of the State and local government plans was changed to two years (noting again that State participation at any given site need not be "full" even every two years), the Commission clearly stated that the licensee had to continue to fully test its emergency plan each year and that in the biennial year since the licensee would be fully participating in the ("partial or full") exercise of the offsite governments' plans, this annual requirement would be met by the licensee in those biennial years by this participation. Obviously, then, in the off-year[16/] licensee-only post-licensing annual exercise (which after 1984 occurs at every site) the Commission continued (and continues) to require a full-participation licensee-only exercise. As the Commission stated in its Statement of Considerations in support of the final 1984 rule:

> The proposed rule did not relax in any manner the annual requirement for onsite exercises that each licensee is required to conduct. . . .

49 Fed. Reg. 27733 (July 6, 1984)(emphasis supplied).

16/ "Off-year" referring to those years when the State and local governments do not exercise at any level of participation their plans for a given site. Obviously, in that year, a multi-site State and a multi-site local government would probably be exercising their plans at some site (either "fully" or "partially").

Three years later in May, 1987, the Commission modified the timing requirement for the full participation exercise prior to full-power licensing in which all relevant governmental entities had to fully test their plans. The 1980 regulation, as amended, required this big joint exercise within one year of licensing. (A similar joint exercise, as noted, was required post-licensing every five years pursuant to the 1980 amendment.) The 1987 rule change relaxed this timing requirement to two years. See 52 Fed. Reg. 16823 (May 6, 1987). As discussed above with regard to the 1980 scheme, this one-year joint exercise prior to licensing had required the "full participation" of all entities involved, including the licensee. Thus, when the Commission relaxed the timing requirement for this "joint exercise" from one year to two years while at the same time continuing to require a licensee-only exercise within one-year of full-power licensing, it is obvious that that licensee-only one-year prelicensing exercise (like its post-licensing annual exercise equivalent) was to be a "full-participation" exercise[17/]

17/ Again, as defined in the first sentence of ¶1 and footnote 4, the words "full-participation" control the "how" and not the "who" of an emergency plan exercise. This is also clear from the fact that footnote 5 defines "partial participation" obviously in terms of "how" and not "who". Either a multi-site State or a multi-site local government or both could "partially participate" depending on the circumstances. Thus, the language in footnote 5 that partial participation "means appropriate offsite authorities" clearly and with good reason omits any reference to partial licensee participation. There is simply no such regulatory thing as a "partial participation" licensee-only exercise that could meet the requirements for emergency plan exercises set out in ¶¶1, 2, and 3 of App. E. IV. F. "Full participation" "means appropriate offsite local

(footnote continued)

just as it had always been unless the Commission expressly relaxed the scope of that one year prelicensing exercise.

Not only did the Commission not relax the required scope of the one-year prelicensing licensee-only exercise in the 1987 rulemaking, but it again affirmed that that exercise was to be understood as requiring the same level of licensee involvement as the licensee's annual post-licensing requirement. And that annual obligation, as just noted, was expressly characterized by the Commission as requiring "full licensee participation." 48 Fed. Reg. at 33308. The Commission in its Statement of Consideration in support of the final 1987 rule quoted its earlier statement in support of the proposed rule as follows:

> Moreover, in accord with the Commission's regulations for sites with operating licenses, applicants will still have to conduct annual exercises, i.e., if the full participation exercise is held more than one year before issuance of the operating license, then the applicant must conduct an exercise of its emergency plan before license issuance.

52 Fed. Reg. 16823 (May 6, 1987) at 16826 quoting 51 Fed. Reg. 43369 (December 2, 1986) (emphasis supplied). Moreover, acknowledging that the 1980 prelicensing scheme had required an exercise in which all entities (including the licensee) had "fully participated" within one-year of licensing, the Commission stated:

(footnote continued)

and State authorities [appropriate in light of the regulatory basis for the exercise (¶1 or ¶3)] and licensee personnel." Footnote 4. Thus, licensee-only fully-participation exercises are just as "normal" as the "full-participation" exercises which fully test various combinations of governmental plans as well as the licensee's plan.

> An exercise which tests the licensee's onsite emergency plan, but which need not include State or local government participation is still required to be held within one year. . . .

52 Fed. Reg. 16823 (emphasis supplied). Thus, whatever one-year prelicensing requirement had existed for exercising the licensee's plan was unchanged by the 1987 rule. And as discussed, the 1980 scheme required full-participation by the licensee (fully testing its plan) within one year of licensing. As the Commission stated in 1987,

> Licensees are not being granted any additional 'freedom' by this rule.

Id. at 16825.

Indeed, had the Commission intended in 1984 or 1987 to modify the scope of its annual licensee exercise requirement which had clearly required since 1980 a full-scale[18/] exercise of at least the licensee's emergency plan at each site it would have provided expressly for licensee "partial-participation" as it did after 1984 for governmental entities. The absence of such language anywhere in ¶¶1, 2, and 3 indicate that at least annually every licensee at every site must fully test and exercise its emergency plan.[19/]

18/ As noted, in 1980 "full-scale" (defining the "how" of an exercise) meant an exercise which "tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation." 45 Fed. Reg. 55402 at 55413 (August 19, 1980).

19/ "Partial-participation" by a licensee during a licensee-only exercise obviously is not prohibited. Such an abbreviated exercise (more akin to a drill) simply does not satisfy NRC regulatory requirements. The September exercise was such an abbreviated exercise.

3. It is clear that in 1980 the Commission required full-scale licensee emergency plan exercises at least annually, pre- and post-licensing. Although the frequency at which State and local government plans were to be exercised was changed for exercises conducted post-licensing (1984) and the timing of the joint exercise of all such governmental plans before licensing was relaxed (1987), the Commission made it clear that it was not relaxing in any manner the nature of the annual licensee exercise requirement to fully test as much of the licensee's plan as is reasonably achievable without public participation. If the Commission had intended to permit a licensee-only "partial participation" exercise to satisfy either the one year pre-licensing onsite requirement of ¶1 or the annual requirement of ¶2, it would have said so.[20/]

The regulatory history should be considered in interpreting ¶1 because that paragraph does not directly state the necessary scope and extent of the licensee-only onsite exercise required by the third sentence. (Neither do the regulations directly state the necessary scope and extent of the annual exercise required by ¶2. See Staff's October 16, 1989 Response to Intervenors' September 29 Motion at 2-3.) The Appeal Board has stated with regard to interpreting App. E. IV. F. ¶1:

20/ Significantly, the annual licensee exercise is set out for the first time in a different paragraph (¶2) as a result of the 1984 rulemaking. 49 Fed. Reg. 27733 at 27736. It was also in that rulemaking that the Commission first defined "partial participation" which, as noted, does not run to the licensee. Finally, it was in the 1983 proposed rule that the Commission stated that the licensee's annual requirement is met by full licensee participation. 48 Fed. Reg. 33307 at 33308.

> Because the Commission's requirements for emergency exercises have been amended several times since 1980, however, the [Shoreham Licensing] Board also considered the parties' arguments based on the administrative history of the regulation at issue. . . . As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. . . . Further, the entirety of the provision must be given effect. . . . Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.

ALAB 900, 28 NRC 275, 287-288 (omitting citations).[21/]

4. In reply to the Staff's arguments set forth in their October 16, 1989 Response the Intervenors state briefly:

a. The Staff is simply misinterpreting the necessary scope and extent of the licensee's annual exercise requirement both pre- and post-licensing.[22/]

21/ The Appeal Board at 289 also noted ambiguity in footnote 4 (calling the "principal ambiguity" the issue of what the major observable portions of plans are, an issue it then decided as a matter of law, see infra) and at 295 n. 20 the Appeal Board stated:

> We are inclined to think that careless drafting accounts for this change. . . . There is also other evidence of a lack of precision in the drafting of the rule. For instance, section IV. F. 1 pertains only to pre-license exercises, yet it refers to the licensee's (rather than the applicant's) emergency plans.

Although Intervenors do not see an ambiguity in the rule as to the proper scope of the licensee's annual exercise (no partial participation by a licensee or an applicant is expressly provided for) it is quite clear that the administrative history provides important "background information" that clarifies the Commission's "lack of precision."

22/ Intervenors object to the Staff's affidavits because they (footnote continued)

There is no regulatory basis at all for a licensee-only "partial participation" exercise understood as an exercise in which the licensee tests something less than the major observable portions of its plan. To the extent that the September exercise is characterized by the Staff as a "partial-participation" exercise because the State of New Hampshire participated in a limited way (see IR 50-443/89-10 at 2 attached as Appendix 1 to Applicants' October 11 Response and Kantor Affidavit, ¶5 n. 1.), the Staff is ignoring the definition of partial participation set forth in footnote 5:

> appropriate offsite authorities shall actively take part in the exercise sufficient to test direction and control functions, i.e., (a) protective action decision making related to emergency action levels, and (b) communication capabilities among affected State and local authorities and the licensee.

Obviously, the September exercise was not a partial-participation exercise in the sense that the State of New Hampshire "partially-participated" as per the regulations.

(footnote continued)

set out legal arguments and interpretation of the regulatory requirements which need not, and indeed can not, be sworn to. To the extent that Staff affiants are describing NRC Staff custom and past practice, this is irrelevant to the legal questions raised here. As the Appeal Board noted in ALAB-900 at 298-299:

> custom is not dispositive, particularly when the regulations clearly require otherwise. . . . The fact that the NRC Staff advised FEMA to focus on plume EPZ activities is, as the Licensing Board described it, unfortunate, but is also of little aid to LILCO. As the applicant for an operating license, LILCO is ultimately responsible for analyzing the Commission's regulations and determining its obligations thereunder.

b. There is no regulatory basis at all for exercising a licensee's onsite plan at a given site over a period of years instead of fully testing all the major observable portions of that plan during each annual exercise. See Inspection Procedure 82302 attached as Exhibit 2 to the Intervenors September 29 Motion at 2-3. All major observable portions of an onsite plan (and as much as is reasonably achievable without public participation) must be exercised annually alone or together with some combination of offsite plans. The NRC Staff has simply adopted this cyclical pattern from FEMA without determining whether "partial participation" be the licensee is permitted under the regulations. See ALAB-900 at 290.

c. Although Inspection Procedure 82301 which was attached as Exhibit 1 to the Intervenors September 29 Motion was revised, the revised IP 82301, attached as Exhibit 2 to the Applicants October 11 Response, was not issued until after the Scenario was received by the NRC and approved. More significantly, the new IP 82301 makes reference at 3 (¶82301-03/03.01) to an Appendix I also issued on August 21. 1989. Neither the Staff nor the Applicants make any reference to this Appendix, which is attached hereto as Exhibit 4. This Appendix actually provides definitions of the various types of emergency preparedness exercises and the "conditions under which each is held." Exhibit 4 at AI-1. After defining the "full-participation," the "first-full-participation" and the

"partial-participation" exercises, Appendix I defines the "Licensee-only Exercise" as follows:

> This exercise is conducted onsite to fulfill the licensee's annual exercise requirement during a year when neither a full-participation nor a partial-participation exercise is held. It normally involves full participation from the licensee with little or no participation by state and local governments.

Exhibit 4 at AI-1-2.[23/]

(emphasis supplied)

5. Finally, in order to preserve such arguments for appeal (if necessary), Intervenors assert that sound regulatory policy supports a "full-participation" pre-licensing licensee-only onsite exercise within one year of licensing in order to provide a basis for the necessary "reasonable assurance" finding. Intervenors incorporate arguments set out by the Staff and themselves in opposition to the Applicants' August 11, 1989 Request for an exemption. As noted in LBP-89-28 (slip opinion at 20):

> As with any test program, it is expected that, in spite of adequate construction and pre-operational testing and extensive training of personnel, occasional problems may be identified and personnel errors may occur. This is part of the testing process. This seems very reasonable to the Board. Indeed any testing program that

---

23/ The Staff's IPs are thus directly contradictory. IP 82301 and Appendix I define the licensee-only annual exercise as requiring "full-participation" which tests, inter alia the major observable portions of the onsite plan as required by footnote 4. Contrariwise, IP 82302 permits certain major observable portions to be cycled at a given site over a five-year period. In addition, NRC Information Notice No. 87-54, attached to the Falk Kantor Affidavit, clearly states at 1 that "suggestions contained in this information notice do not constitute NRC requirements. . . ."

fails to reveal any problems or personnel error would be highly suspect as an undemanding test.

(emphasis supplied).

B. What portions of an onsite plan must be tested in a "full-participation" onsite exercise?

Applicants were required to test all "major observable portions" of the onsite emergency response plan in the September Exercise. Appendix E IV. F.¶1, first sentence and footnote 4. The regulation, however, does not further define the "major observable portions" of the onsite plan.

The Appeal Board however, has provided guidance on this issue in ALAB-900, which identified the "major observable portions" of emergency response plans that must be tested pursuant to Appendix E. IV. F.1. The Appeal Board noted that "FEMA Objectives can provide an appropriate measure for determining whether an exercise meets the regulations' major observable portions of the plans' criterion for full participation." ALAB 900 at 291. (Emphasis Supplied). A review of the content and reach of the FEMA Objectives therefore is appropriate.

FEMA itself identifies NUREG 0654 FEMA-REP-1, Rev. 1 (NUREG 0654) as the basis for its Exercise Objectives. See FEMA Exercise Report for Seabrook Station, Applicants' Exhibit 43f, at 253 (New Hampshire); at 261 (Massachusetts), Appendix B at B-3 (corrective actions). Indeed, in the FEMA Report, each exercise objective is expressly identified with, and designed to test, a designated planning standard identified in NUREG

0654.[24/] NUREG 0654, in turn, adopts verbatim the language of the Commission's planning standards in 50.47(b) (1)-(16). NUREG 0654 II. A.-P. Manifestly, therefore, the FEMA objectives that represent "the major observable portions" of an emergency plan, in substance, restate the Commission's planning standards of 10 CFR 50.47 (b)(1)-(16).

Consistent with this view, the Appeal Board in ALAB-900 recognized that the Commission's 50.47(b) standards, as reflected in the FEMA objectives, define the "major observable portions" of emergency plans that must be exercised. For example, the Appeal Board noted that "public alert and notification is unquestionably a major element of emergency planning," ALAB-900 at 294, and cited to both the FEMA Objective 13, and 10 CFR §50.47 b)(5), and (6) for support. Id.

Again the Appeal Board observed that "the potential evacuation of schools . . . is a major element of offsite emergency planning", ALAB-900 at 297, citing both to the FEMA Objective and 10 CFR §50.47(b)(10). It is apparent that the Appeal Board, by expressly embracing FEMA Objectives as the basis to measure the appropriate scope of an exercise, ALAB-900 at 291, also understood this as identifying the major observable portions of emergency plans with the standards

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24/ For example, as set out in the FEMA Report, Exercise Objective No. 1 (Emergency Classification Levels) is expressly referenced to Planning Standard D of NUREG 0654, citing evaluation criteria D.3 and D.4 appearing thereunder. See App. Ex. 43F at 253.

identified in 10 CFR §50.47(b)(1)-(16).

ALAB-900 therefore established that the "major observable portions" of an emergency plan are, at bottom, the Commission's 50.47(b) standards, as further explicated by NUREG-0654. By regulation the (b) standards, for purposes of full-power licensing, are equally applicable to both onsite and offsite emergency plans.

> (b) The onsite and, except as provided in paragraph (d) of this section [low power] offsite emergency response plans for nuclear power reactors must meet the following standards . . . 10 CFR 50.47(b)

In these circumstances, it is clear that the (b) standards therefore represent the "major observable portions" of both the onsite and offsite plans which must be tested under pre-licensing exercise requirements. 10 CFR Part 50 Appendix E IV. F. ¶1. Indeed, given the need for coordinated response between onsite and offsite response organizations, and the applicability of the (b) standards to both, the logic of ALAB 900 should equally control in defining the "major observable portions" of the onsite plan that must be exercised.

As further support for JI-Onsite Ex-2, which asserts, inter alia, that the scope of the onsite exercise was inadequate for failure to test the public notification system, Intervenors cite to Commission rulemakings that specifically discuss the place of public notification requirements, 10 CFR 50.47(b)(5), in the regulatory scheme for emergency planning.

In its 1982 rulemaking concerning the standards for issuance

of a low-power operating license, the Commission stated:

> The proposed rule change in 45 FR 61132 provided that in orderto grant a low-power license, only a finding as to the adequacy of onsite emergency planning and preparedness is required; . . . While the proposed rule would eliminate the need to have any NRC or FEMA review, findings, or determinations on the adequacy of offsite agencies' emergency planning and preparedness, the NRC review of the licensees' onsite response mechanism would necessarily include aspects of some offsite elements: Communications, notification, assistance agreements with local law enforcement, fire protection, and medical organizations, and the like. Some examples, but not an exclusive list, where review of an applicant's emergency plan would involve aspects of some offsite elements may be found in pertinent portions of 10 CFR 50.47(b)(3), (5), (6), (9), and (12). . . . Prior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the applicants' emergency plan:
>
> (b) Section 50.47(b)(5). Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

47 Fed. Reg. 30232, 30234 (July 13, 1982).

Manifestly, therefore, the Commission determined that the public notification requirement for emergency planning is part of Applicants' onsite emergency plan, i.e., an "offsite element[] of the Applicants' emergency plan." Id. at 30234. Equally clearly, the public notification requirement is mandated by one of the Commission's (b) standards, 50.47(b)(5).

Subsequently, in remanding for further proceedings prior to

low-power operation based upon an inadequate public notification system, the Appeal Board expressly quoted the Commission's comments in the rulemaking that, pursuant to 50.47(b)(5), "(p)rior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the Applicant's emergency plan." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 53 (1988).

The Commission subsequently modified the requirement for an approved public notification system prior to low-power operations. 53 Fed. Reg. 36955 (September 23, 1988).

Nowhere in its 1988 rulemaking, however, did the Commission disturb its conclusion from the 1982 rulemaking that public notification remains a primary component of onsite emergency planning.

> The Nuclear Regulatory Commission is amending its regulations to establish more clearly what emergency planning and preparedness requirements are needed for fuel loading and low-power testing of nuclear power plants. . . . the rule will also change the prior practice, never included in the prior rule itself, of reviewing plans for prompt public notification in the event of an accident. This practice of reviewing an offsite element of licensee emergency plans that has no onsite application is being discontinued as not necessary for public safety. The rule does not change the emergency planning requirements that must be satisfied before full power operation can be authorized. No new requirements are being imposed by the rule beyond those that have been previously required by rule and by prior NRC practice. The rule makes clear that no offsite elements of the applicant's emergency plan, other than those set forth in this revised rule need be considered in connection with low-power licensing. 53 Fed Reg 36955 (September 23, 1988).

Since the public notification system represents an aspect of Applicants' onsite emergency plan, and is a "major observable portion" of the plan since mandated by the "b standards" under §50.47(b)(5), Applicants were required, yet failed, to test that system during the September 27, 1989 onsite exercise.

C. Did the applicants fail to test certain major observable portions of the onsite emergency plan during the September Exercise?

Intervenors' contentions JI-Onsite Ex-1 and JI-Onsite Ex-2 specifically identify those "major observable portions" of the onsite plan, as defined by the planning standards in §50.47(b)(1)-(16), that Applicants failed to test during the September 27, 1989 Exercise. In summary, these are:

1) insufficient protective action decisionmaking; §50.47(b)(10); NUREG-0654 II.J;

2) no plume monitoring procedures or correlative accident assessment activities were tested even by mini-scenario; §50.47(b)(9); NUREG-0654 II.I;

3) no involvement by a medical team from a local support services agency (the Seabrook Fire Department pursuant to the Seabrook RERP) or an offsite medical treatment facility (Exeter Hospital according to the SSRERP); §50.47(b)(12), (14), (15); NUREG-0654 N.2.c; L.1, L.4, O.4.h;

4) no testing of the personnel monitoring and

decontamination capacities at the offsite locations planned for that purpose (the Seabrook Dog Track and the "Warehouse" on Route 107); §50.47(b)(10); NUREG-0654 J.3, J.6;

5) no demonstration of an actual shift change or the capability to provide staffing for continuous (24 hour) operations for a protracted period or for second shift staffing; §50.47(b)(1); NUREG-0654 II.A.4; and

6) no demonstration of the capability for early notification and clear instruction to the populace within the plume exposure EPZ. §50.47(b)(5); NUREG-0654 II.E. The Exercise did not test the public notification system, in violation of 10 CFR Part 50, Appendix E IV.F, or require Applicants to demonstrate in an exercise that administrative and physical means have been established for alerting and providing prompt instruction to the public within the EPZ, in violation of 10 CFR Part 50 Appendix E. IV.D.3.

The contentions thereby specifically identify those "major observable portions" of the onsite plan, defined by the (b) standards that were required to be tested in the onsite exercise.

As further support for summary disposition, Intervenors have annexed to their motion Intervenors' Statement of Material Facts Not in Dispute ("Statement"). This Statement is grounded in the Scenario document, and the NRC Exercise Inspection Report, which provide the primary factual basis for Intervenors' motion.

CONCLUSION

Intervenors assert that there is no genuine issue of material fact in dispute as to the scope of the onsite Exercise. As a matter of law, and as requested through their motion, Intervenors are entitled to summary disposition on JI-Onsite Ex-1 and JI-Onsite Ex-2 since the Exercise failed to test the identified major observable portions of Applicants' onsite emergency plan, did not test as much of that plan as is reasonably achievable without public participation and was not in compliance with the regulatory requirements of 10 CFR 50.45(b)(14) and App. E. IV F. and F. ¶1.

COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
ATTORNEY GENERAL

John Traficonte
Chief, Nuclear Safety Unit
Matthew Brock
Assistant Attorney General
Nuclear Safety Unit
Department of the Attorney General
One Ashburton Place
Boston, MA 02108-1698
(617) 727-2200

DATED: October 18, 1989

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
JOHN W. McCORMACK STATE OFFICE BUILDING
ONE ASHBURTON PLACE, BOSTON 02108-1698

JAMES M. SHANNON
ATTORNEY GENERAL

September 18, 1989

BY FAX

Thomas Dignan, Esq.
Ropes & Gray
One International Place
Boston, MA 02110

RE: Observational Status During September Exercise

Dear Tom:

On behalf of the Mass AG and other Intervenors, I would like to request observational status for Intervenor observers at all relevant facilities at which Applicant personnel's performance will be evaluated by the NRC Staff, including the Technical Support Center (TSC), the Operational Support Center (OSC), the Emergency Operations Facility (EOF), and the Media Center. Obviously, I am prepared to discuss any reasonable constraints and conditions on such access at your earliest convenience.

In addition, I would like the Applicants to provide me, at the earliest possible time after the conclusion of the onsite exercise, all relevant documents generated before and during the exercise, including the scenario, the exercise objectives and all other material of a kind similar to that pertaining to the June, 1988 onsite exercise which was included in the 7-volume scenario document you made available to us at Seabrook Station sometime after the June, 1988 exercise. In addition, I request access to player-and-controller-generated materials as well.

Thank you for your cooperation.

Best,

John Traficonte
Chief, Nuclear Safety Unit
Public Protection Bureau
(617) 727-2200

JT/tm

cc: Service List

ATTACHMENT 1

ROPES & GRAY
ONE INTERNATIONAL PLACE
BOSTON, MASSACHUSETTS 02110-2624
617 951-7000
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1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
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TELECOPIER 202 626-3961

September 20, 1989

John Traficonte, Esq.
Chief, Nuclear Safety Unit
Public Protection Bureau
Office of The Attorney General
One Ashburton PLace
Boston, MA 02108-1698

Re: Observational Status During September Exercise

Dear John:

This will reply to yours of September 18, 1989 regarding the above referenced subject. As you are undoubtedly aware, under NRC Rules of Practice there is no right to discovery of any nature in order to assist in the formulation of future contentions and no discovery may be had in the absence of admitted contentions. This means that the only way your office and the other intervenors will be permitted the observation and documents you requested in your letter is through the voluntary cooperation of my clients.

In the past, such cooperation has been forthcoming. However, inasmuch as The Attorney General of The Commonwealth has made it clear that his desire with reference to the upcoming exercise is not to assist in the design of a plan which will best protect the health and safety of the citizens of The Commonwealth, but rather is simply to further his announced goal of delaying operation of the Seabrook Plant, I see nothing to be gained on the part of my clients or the public interest in acceding to your requests.

Very truly yours,

Thomas G. Dignan, Jr.
Counsel for the Applicants

cc: Service List

TGD/tgd: ONEXOBSR.SB

ATTACHMENT 2

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
JOHN W. McCORMACK STATE OFFICE BUILDING
ONE ASHBURTON PLACE BOSTON 02108-1698

WILLIAM SHANNON

September 27, 1989

BY FAX

Thomas G. Dignan, Jr., Esq.
Ropes & Gray
One International Place
Boston, MA 02110

Dear Mr. Dignan:

I must express my extreme displeasure with actions taken by your clients at the Newington Town Hall on the morning of September 27, 1989. The facts are these:

1. As you are aware, on September 18, 1989 on behalf of the Massachusetts Attorney General and other intervenors, I requested access to various locations for purposes of observing the on-site emergency plan exercise held on September 27, 1989. On September 20, you responded stating that your clients would not cooperate with intervenor efforts to observe the exercise.

2. Upon receipt of your letter, an attorney in this office contacted the Newington Town Hall inquire whether the Town Hall remained open to the public during its use as a "Media Center" for emergency plan exercises. We stated that we wanted to observe exercise activities on September 27, 1989. We were told by the Town Secretary that the Town Hall does indeed remain open to the public and that there was no reason we could not observe the activities.

3. On the morning of September 27, I arrived at the Town Hall with an associate who was prepared to videotape appropriate portions of the exercise events. I was told initially by consultants to New Hampshire Yankee and then by the Emergency News Director (after he arrived) that I would not be permitted anywhere in the building. A police officer from the Newington Police Department escorted me to the exit. In my efforts to assert my right to enter the Town Hall and remain there, I contacted by phone the Town Counsel for Newington, Attorney Peter Loughlin. During discussions between myself, the police officer, the Yankee consultant and a Yankee spokesperson (Rob Williams), your clients asserted that they had a written agreement with

the Town of Newington that permitted them to bar me from the premises during the exercise. (Town Counsel was not aware of such an agreement.) Indeed, at one point a Yankee security guard communicated to the police officer that you had been contacted and that "Mr. Dignan said keep the Massachusetts Attorney General out."

4. During this entire period - from approximately 9:15 until 9:50 a.m. (and for the entire day) - the Town Hall remained open to the public and no effort was made to prevent other members of the public from entering the building. Obviously, if the Town Hall remained open to the public, the public had a right to enter and (if so inclined) observe the exercise, as long as such observational activities did not interfere with the conduct of the exercise.

Restricting my access to this public facility was inappropriate and discriminatory and I object to these actions in the strongest terms.

Yours,

John Traficonte

John Traficonte
Chief, Nuclear Safety Unit
(617) 727-2200

JT/jc

cc: Newington Town Counsel
Newington Board of Selectmen
Newington Chief of Police
Seabrook Service List

APPENDIX 1

LEVEL OF INSPECTION EFFORT AND SIZE OF INSPECTION TEAMS FOR EMERGENCY PREPAREDNESS EXERCISE OBSERVATION R

A. PROGRAM APPLICABILITY

This guidance applies to programs specified in Manual Chapters 2513, 2514, 2515, and 2525.

B. DEFINITIONS

The following are descriptions of each type of emergency preparedness (EP) exercise and the conditions under which each is held:

Full-Participation Exercise. This exercise is conducted onsite and offsite to test as much of the licensee, state, and local emergency plans as reasonably achievable without mandatory public participation. It is normally conducted biennially at all sites where one or more operating reactor units are located.

The First Full-Participation Exercise. This is the first exercise conducted at a reactor site and involves full-participation by the licensee and participation by each state and local government within the 10-mile plume exposure pathway emergency planning zone (EPZ) and each state within the 50-mile ingestion exposure pathway EPZ. This exercise is normally required to be held within 1 year before the first full-power operating license is issued and before operation above 5% of rated power of the first reactor at that site. However, because of a 1984 court decision permitting litigation of exercise findings at a license hearing, many applicants request an initial exercise earlier than required to permit timely completion of a hearing prior to licensing. Another exercise may be required in order to fulfill the 1-year provision.

Partial-Participation Exercise. This exercise involves full-participation by the licensee, but state and local participation may be partial because of involvement with more than one reactor site within their jurisdiction. Normally, local participation is full and state participation is partial. As a minimum, this exercise tests implementation of the licensee's onsite emergency plans, coordination and communication between the licensee and offsite authorities, and protective action decision-making. It is normally conducted biennially.

Licensee-Only Exercise. This exercise is conducted onsite to fulfill the licensee's annual exercise requirement during a year when neither a full-participation nor a partial-participation exercise

is held. It normally involves full participation from the licensee with little or no participation by state and local governments.

Remedial Exercise. This exercise is generally held at the request of FEMA to demonstrate the correction of specific deficiencies identified during the exercise in offsite emergency planning and normally does not directly involve the licensee. However, there may be instances when poor licensee performance during the annual exercise would require a remedial exercise.

C. LEVEL OF INSPECTION EFFORT FOR EXERCISE OBSERVATION

With the exception of the first full-participation exercise at single unit sites, the level of inspection effort and corresponding team size for exercise observation should be based on past licensee performance, recent EP inspection findings and SALP ratings, and regional assessment of the current status of the licensee's emergency preparedness program. For example, favorable SALP ratings coupled with consistently good performance in areas of observation may result in decreased inspection effort in those areas. Conversely, if licensee performance in the EP area appears to be declining or if specific aspects of exercise performance are repeatedly substandard, intensification of inspection effort is warranted. It is expected that more total time will be expended for some facilities than others.

D. RECOMMENDED SIZE OF INSPECTION TEAMS

The region will determine the team size, establish the team and provide the team leader for all exercise inspections. Where specific resource allocations for a particular phase of nuclear power plant operation are included in an inspection procedure, they should be followed.

1. The First Full-Participation Exercise. Up to 7 or 8 team members are normally sufficient to observe the first full-participation exercise. The team generally consists of the team leader, one or more regional inspectors, one Headquarters EP licensing representative, several contractors and may include one or more resident inspectors.

2. Full- and Partial-Participation Exercises. Inspection teams for these types of exercises normally consist of the regional team leader, one resident inspector and one contractor. In addition, one Headquarters observer is generally provided for one half of the exercises conducted.

3. Licensee-Only Exercises. Up to 3 team members are normally sufficient to observe a licensee-only exercise. Resident inspectors should be included in the inspection team.

4. Remedial Exercise

   a. Regional inspectors do not normally observe remedial exercises requested by FEMA for the correction of offsite

deficiencies identified during the exercise. However, depending upon inspection priorities, onsite activities may be observed by the resident inspector(s) when the licensee elects to participate in a remedial exercise requested by FEMA.

b. When a remedial exercise is required by the NRC, team size will depend on the number and nature of the problems identified during the previous exercise. Depending on the nature of the problems identified and inspection priorities, some onsite drills may be limited to observation by the resident inspectors.

END

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	
(Seabrook Station, Units 1 and 2)	)	October 18, 1989

CERTIFICATE OF SERVICE

I, Matthew T. Brock, hereby certify that on October 18, 1989, I made service of the within INTERVENORS' MOTION FOR SUMMARY DISPOSITION ON CONTENTIONS JI-ONSITE EX-1 AND JI-ONSITE EX-2 AND MEMORANDUM OF THE INTERVENORS IN SUPPORT OF THEIR MOTION FOR SUMMARY DISPOSITION OF THE SCOPE CONTENTIONS FILED IN RESPONSE TO THE SEPTEMBER 27, 1989 ONSITE EXERCISE by Federal Express as indicated with (*) and by first class mail to:

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DATED: October 18, 1989