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LBP-89-33

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 NOV 20 P2:36

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	Docket Nos. 50-443-OL 50-444-OL
(Seabrook Station, Units 1 and 2)	(Offsite Emergency Planning) ASLBP No. 82-471-02-OL
	November 20, 1989

MEMORANDUM SUPPLEMENTING LBP-89-32

The Partial Initial Decision on the Seabrook Plan for the Massachusetts Communities (SPMC) and the 1988 FEMA Graded Exercise issued on November 9, 1989. LBP-89-32, 30 NRC ___. There we authorized the Director of Nuclear Reactor Regulation to issue a full power operating license for the Seabrook station notwithstanding the pendency before this Board of the matters remanded on November 7, 1989 by the Appeal Board in ALAB-924 (30 NRC ___) and the pendency of several motions to add new contentions to the proceeding. We noted that we would issue a memorandum following LBP-89-32 explaining why the pendency of those issues does not preclude the immediate issuance of the Seabrook operating

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license. LBP-89-32, slip opinion at 568-69, n.87. The purpose of this memorandum is to provide that explanation.

ALAB-924

General

ALAB-924 remanded to this Board four issues reviewed on appeal from LBP-88-32, the partial initial decision on the NHRERP. 28 NRC 667 (1988).[1] The fact that our November 9, 1989 decision, LBP-89-32, was about to be issued was well established on the public record of this proceeding because this Board had complied with the Commission's directive to report the target date for its issuance. The Commission noted on September 15, 1989 that, "[l]acking the admission of any new contention, the order [partial initial decision] expected on November 30, 1989 would have the potential to authorize issuance of the full power license and conclude this proceeding." CLI-89-19, (29 NRC __), slip opinion at

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[1] A fifth matter was referred to the Licensing Board for further action. We are directed to take appropriate steps to ensure that the commitment made in Applicants' testimony concerning the planning basis for determining transportation needs for the special facilities, Webster in Rye, New Hampshire and Exeter Healthcare Facility in Exeter, New Hampshire are met. The Appeal Board noted a disparity between the commitment to determine transportation needs based upon maximum capacity of each facility, and the actual capacity of the vehicles assigned. ALAB-924, slip opinion, n.72, at 70-71. The Board will require the Applicants to confirm that its commitment has been honored at the time we invite briefing on proceeding with the issues remanded by ALAB-924, unless Applicants have already so confirmed.

2.[2] Despite the Appeal Board's certain knowledge that LBP-89-32 was about to issue, ALAB-924 was silent as to any effect the Appeal Board action would have on the potential in our decision for authorizing issuance of the Seabrook operating license. It is true that ALAB-924 sets out certain specific, as well as general directions, to this Board. But, overall, our reading of ALAB-924 leads us to infer that the remand order included traditional broad discretion in resolving the issues based upon our familiarity with the very large evidentiary record of the proceeding.

Moreover, there is no regulation or, as far as we can determine, any reported decision which would foreclose the issuance of an operating license once the basic findings under 10 CFR 50.47(a)(1) and 50.57(a)(3) have been made despite the pendency of open matters. To the contrary, while it is preferred that issues be resolved in an adjudicative context prior to the issuance of a license, some unresolved matters may be left to post-hearing consideration and, indeed, even delegated to the Staff for implementation. Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947,

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[2]Subsequently this Board informed the parties that the decision would issue as early as three weeks prior to November 30. Tr. 28320. On November 1, the Appeal Board denied Joint Intervenors' motion to direct this Board to withhold its impending initial decision said by Intervenors to be due on November 9 or 10.

951-52 (1974). But see, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-84-2, 19 NRC 36, 210-12 (1984).

This principle is particularly valid in matters of emergency planning where licensing boards traditionally rely upon predictive findings that emergency plans can and will be implemented and upon post-hearing verification of the resolution of open matters. E.g., Philadelphia Electric Co. (Limerick Units 1 and 2), ALAB-836, 23 NRC 479, 494-95, citing Louisiana Power and Light Company (Waterford Station, Unit 3) ALAB-732, 17 NRC 1076, 1103-04 (1983), and Indian Point, CLI-74-23, supra. See also Byron, supra, 19 NRC at 251-52.[3]

A common issue in the foregoing cases was whether a post-hearing delegation of open matters to the Staff was appropriate. Here, of course, the question is whether post-licensing consideration of open matters by an adjudicating board is appropriate. Putting aside questions of passing jurisdiction, which are not present at this juncture, if the requisite findings of reasonable assurance of public safety can be made despite pending open matters, then, a fortiori, the Commission's adjudicating boards can defer resolution of

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[3]We note, however, that the Appeal Board ruled that implementing detail for the sheltering option is a deficiency that must be remedied before the plan can be approved, distinguishing Waterford, supra. ALAB-924, slip opinion, n.194.

some remanded issues for post-licensing consideration under the close scrutiny of the litigating parties.

The important question is not whether this Board can consider just any issue post-licensing, but whether the issues remanded in ALAB-924 are amenable to such treatment. believe that they are. Perhaps lost in the flurry of motions and comments following the issuance of ALAB-924 and LBP-89-32 was the fact that, in ALAB-924, the Appeal Board affirmed this Board's partial initial decision on the NHRERP with respect to every major safety issue decided in ALAB-924. In commenting upon the issuance of the operating license during the pendency of ALAB-924 issues, we promised to explain why the remanded issues were not a bar to licensing, and noted:

> Our explanations will include, for example, the observation that the remanded issues do not involve significant safety or regulatory matters when considered in the context of the record of the NHRERP proceeding; our ultimate conclusions that the NHRERP provides reasonable assurance that adequate protective measures can and will be taken are not changed; the record of the NHRERP proceeding need not be reopened to resolve some inconsistencies and voids found by the Appeal Board, and that any needed implementing actions can be readily and promptly taken. We shall also explain why the pendency of several motions to submit new contentions does not preclude the issuance of the operating license.

LBP-89-32, n.87.

This Board will, of course, promptly seek the advice of the parties on the appropriate resolution of the remanded issues. For now, however, we explain our reasoning

with respect to the particular issues remanded in ALAB-924 based upon the record of the proceeding to date.

Letters of Agreement

Statement Of The Issue

NUREG-0654/FEMA-REP-1, which is similar to NRC regulatory guides, provides guidance to the effect that individuals and organizations which can be relied upon to provide assistance in an emergency shall be identified, the assistance identified and supported by appropriate letters of agreement (LOAs). NUREG-0654, II.C.4. See also id. at II.A.3 and II.P.4. The Licensing Board, on May 21, 1986, ruled with respect to proffered contentions that LOAs are not required between the State and communities; that LOAs are required only for providers of services and therefore not for schools (day-care centers, etc.) because, in this case, teachers are "recipients" not "providers" of services. We also ruled, on May 18, 1987, that separate letters of agreement with those such as bus drivers who collectively supply services, are not required. We made similar findings in LBP-88-32. 28 NRC at 673.

The Appeal Board ruled that this Board correctly found in the NHRERP decision that teachers will do their duty as "recipients" of services so long as students remain on the school grounds and that the distinction between "providers" and "recipients" of services (no LOAs required) was a sensible one. ALAB-924, slip opinion at 8-9. But the

Licensing Board had found that when teachers were expected to accompany students on buses, instead of being free to leave by their own transportation, teachers should be regarded as "service providers." LBP-88-32, 28 NRC at 730.

The Appeal Board notes the disparity between our decisional finding that teachers are "providers" when escorting children on buses during an emergency, and our earlier rulings that they are in general "recipients." ALAB-924, slip opinion at 9. The matter is remanded for "further explanation" with the direction that the licensing Board "resolve the existing inconsistency in its interpretations of the role of school personnel in an evacuation and determine whether any LOAs should be obtained from school personnel." Id. at 7, 11. In resolving this issue, we are directed to consider whether school personnel acting in the role of custodians of the students are "ordinarily expected to accompany their students in an evacuation." Id. at 10.

Licensing Board Explanation

We begin with an answer to the Appeal Board's factual inquiry, i.e., whether the teachers are ordinarily expected to accompany their students in an evacuation. The assumption underlying our respective finding was that some of them would accompany the students in an evacuation if needed. LBP-88-32, 28 NRC at 729-30.

School teachers testifying for Intervenors understood that they would be asked to accompany school children.

Tr. 4014. Applicants' panel of experts testified that not all school buses would be accompanied by school personnel, but that school personnel will do what must be done and that sufficient numbers of school personnel would be available to supervise the students on buses. Applicants Direct Testimony No. 7, ff. 5622, at 126-27. Mr. Strome, then New Hampshire's Director of Emergency Management, explained that whether or not teachers accompany school children in an evacuation depends upon whether they volunteer to do so in the discharge of their normal loco parentis responsibilities. He stressed also that, although New Hampshire would hope that the teachers would be willing to participate in caring for school children in an evacuation, their participation is not "key to the process." He noted, as does this Board, that school children regularly get on school buses without hands-on assistance, and that teachers don't travel on the buses every day. Tr. 3388-89. On the other hand it is commonly observed that teachers routinely accompany their students on field trips.

In the very broad experience of Dr. Mileti, a leading expert on human behavior in emergencies, he knows of no emergency in the history of this country where teachers have abandoned their children. LBP-88-32, 28 NRC at 740-41. The Licensing Board concluded that school teachers and school officials, as a group, will not abandon their pupils in the event of a radiological emergency at Seabrook. LBP-88-32,

28 NRC 732, 749. Contrary to the Appeal Board's understanding (ALAB-924, slip opinion, n.24), we did not intend for that conclusion to stop at the school bus steps. If needed, school personnel will stay with their charges until they are safe.

The LOA/school personnel matter is not a significant safety issue. We are convinced that sufficient numbers of school teachers will accompany school buses in those cases where they are needed for a safe evacuation of school children. In arriving at that conclusion, we place more confidence in the inherent dedication and sense of responsibility of school personnel than on non-binding letters of agreement. Moreover, in evacuating with their students, those school teachers are themselves being evacuated and need not choose between personal safety and their duty to their students.

There is, however, a regulatory aspect to the remanded issue on letters of agreement which we are obligated under ALAB-924 to explain. We did indeed refer to teachers as "service providers" to the extent they might be expected to accompany students on the bus. This is the very term used in connection with our findings on letters of agreement. Compare 28 NRC at 673 with id. at 730. The Appeal Board's perception of a disparity has a basis.

Our finding occasioning the remand was under Section 7, Human Factors in Emergencies. 28 NRC at 728, 729-30.

Letters of Agreement, as a regulatory or guidance requirement, were discussed under an entirely different part of the decision -- Section 2, Letters of Agreement. 28 NRC at 673, et seq. The term "service providers" was used, in a literal sense, correctly in both sections. However, the term has a special regulatory meaning under the LOA part of the decision flowing from NUREG-0654, II.C.4.

Our finding that teachers provide a service under Section 7, Human Factors was, in a sense, a gratuitous dotting of the "i" in the interest of accuracy. No party argued, as a human factors consideration, that the likelihood of teachers evacuating with students would be enhanced by LOAs. It was without any thought of the LOA requirements that the Board deemed teachers evacuating with students to be providers of services.

Be that as it may, if in fact, teachers are "service providers" contrary to our earlier rulings that they are not, the regulatory implications must, in obedience to ALAB-924, be addressed. First, nothing in our finding in Section 7, Human Factors, is inconsistent with our finding under Section 2, Letters of Agreement, that LOA's are not required for individuals who collectively supply a labor force or activity. Whatever services teachers may provide when they volunteer to go with their students during an evacuation is done collectively as school system employees.

Second, our finding that the teachers provided a service depended upon the assumption they would forego evacuating in their own vehicles. 28 NRC at 730. We did not explore the matter in detail because we did not then, nor do we now, think it is significant. But obviously some teachers would rely upon school buses for their evacuation -- probably the teachers most likely to volunteer -- and they would in every sense be recipients of that evacuation service.

Third, the school system as a unit is the recipient of evacuation services for the students (and employees needing transportation). Teachers are an integral part of that system. They should not be separated from the school system as a part especially requiring LOAs.

Finally, as we have found, and profoundly believe, teachers as a group will not abandon students needing their care. They will accept evacuation services in the exercise of the altruistic and voluntary care of their charges. To the extent that school buses permit the teachers to see their children safely to reception centers, they are the recipients of services, albeit on behalf of their charges.

Accordingly, we do not believe that the remanded issue regarding teachers and LOAs has either safety or regulatory significance. That issue does not change our ultimate conclusion that school children can and will be safely evacuated and that the NHRERP provides reasonable assurance

that protective actions can and will be taken in the event of a radiological emergency at Seabrook.

1986 Special Needs Survey

Statement of the Issue

Taken together, NUREG-0654/FEMA-REP-1, Criteria J.10.d and J.10.g provide that emergency plans should specify the means to relocate, notify, support and assist, among other categories of potential evacuees, special needs individuals (i.e., transit-dependent and homebound disabled or bedridden persons). The first step in assuring that an emergency plan is capable of meeting the needs of this group is the reasonably complete identification of the number and particularized assistance requirements of the special needs population that resides within an EPZ.

In May 1986, the Applicants moved for partial summary disposition of all contentions to the extent they "assert[ed] that there do not exist adequate procedures for identifying persons with special needs."[4] In support of their motion, the Applicants offered the affidavit of the Director of the New Hampshire Civil Defense Agency (NHCDA) detailing the design, dissemination methodology, public awareness campaign and results of a March 1986 survey (to be repeated annually) undertaken by the NHCDA to identify the

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[4]Applicants' Motion for Partial Summary Disposition of South Hampton Contention No. 8, NECNP Contention NHLP-4 and SAPL Contentions 18 and 25 (May 20, 1986) (hereinafter referred to as "Applicants' Motion") at 1-2.

number and particularized transportation needs of special needs individuals.[5]

As explained by Mr. Strome, the NHCDA developed and mailed in March 1986 a pre-addressed, postage paid survey instrument to 33,812 New Hampshire households based on then-current customer lists provided by the Public Service Company of New Hampshire and the Exeter-Hampton Electric Company. In addition, the survey was made available through several local service and municipal agencies. Strome at ¶ 2. Finally, recognizing that the use of utility customer lists would not necessarily ensure that every household in the New Hampshire portion of the Seabrook EPZ would receive a survey instrument, public announcements were made by the NHCDA noting the distribution of the survey instruments, encouraging responses, and providing a means for persons to request a survey instrument if they had not received one. Id. at ¶ 6.

The survey sought information regarding the number of residents of each household who would need transportation (and if so, whether transportation by ambulance was necessary), and/or who was hearing- or sight-impaired, wheelchair disabled, bedridden, non-English speaking (and if so, what language), or would otherwise need special help

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[5]Applicants' Motion, Affidavit of Richard H. Strome (Contention South Hampton-8, NECNP Contention NHLP-4, and Contentions SAPL-18 and -25) (hereinafter referred to as "Strome at ¶ __").

because of other health conditions.[6] Strome at ¶ 2 and Attachment A. The survey also asked respondents to provide special directions to their respective residences.

With SAPL taking the lead, Intervenors opposed the Applicants' motion on the grounds that "genuine issues as to the adequacy of the dissemination of the survey, its design and the frequency with which it is to be conducted" necessitated further litigation.[7] In support of its opposition, SAPL appended an affidavit by Frederick Anderson, Jr. asserting that the 1986 Special Needs survey was deficient in its dissemination methodology because (1)

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[6]As of May 16, 1986, the initial survey resulted in the identification of 1974 persons who might require transportation, 333 persons who might require special notification, 51 persons who might require transportation by ambulances, 546 persons who might require special assistance due to a physical disability, and 9 persons who might require special notification in languages other than English. Strome at ¶ 3. By July 11, 1986, after additional responses and consultations with private and governmental organizations who routinely deal with handicapped individuals or provide home health care, approximately 2340 transit-dependent individuals and 9 ambulance-dependent individuals had been identified. App. Dir. No. 2, ff. Tr. 4228, at 9-10. However, the survey is conducted annually, and the transportation needs of special needs individuals are updated on a continuous basis as survey responses and other information become available. Thus, the specific number used in the NHRERP as a transportation resource planning basis with respect to special needs individuals fluctuates over time. See Strome at ¶ 5; Tr. 4285.

[7]SAPL's Response to Applicants' Motion for Summary Disposition of SAPL Contentions 5, 7, 14 and 17 and Motion for Partial Summary Disposition of SAPL Contentions 18 and 25 (June 9, 1986) (hereinafter referred to as "SAPL Response at __") at 16. See also NECNP Opposition to Applicants' Motion for Summary Disposition (June 9, 1986) at 23-25.

the State had used utility customer lists and thus did not reach EPZ residents who were not personally responsible for utility bills, (2) the survey was mailed in March and thus did not reach those seasonal residents who would qualify as special needs individuals, and (3) the survey was conducted using a single mailing, an approach that is unlikely to locate even a majority of special needs individuals.[8] In terms of the survey instrument itself, Anderson asserted that its design was deficient because it (1) did not sufficiently motivate individuals to respond by indicating the consequences of such a failure (no personal evacuation), (2) employed ambiguous questions that could lead to overlapping, speculative or inaccurate responses, and (3) was only in English and thus was not adequate for households where no adult resident spoke English. Anderson at ¶¶ 6 and 8-12.

In November 1986, the Licensing Board granted partial summary disposition, concluding that the 1986 Special Needs survey conducted by the State of New Hampshire (and scheduled to be repeated annually) was adequate as a matter of law for the emergency planning purposes, and further concluded that any additional enhancements or refinements of the survey methodology employed by the State or the possible

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[8]SAPL Response, Affidavit of Frederick H. Anderson, Jr. (June 6, 1986) (hereinafter referred to as "Anderson at ¶ __") at ¶¶ 4, 5, 13 and 14.

use of alternative survey methods were "extraordinary measures" not required under the Commission's emergency planning regulations.[9] In ALAB-924, 30 NRC ___ (November 7, 1989), the Appeal Board held that SAPL had raised material factual issues regarding the adequacy of the 1986 Special Needs survey whose litigation was not properly precluded under the Commission's San Onofre "extraordinary measures" principle. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 536 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985). It therefore remanded the matter of the sufficiency of the Special Needs Survey for further consideration.[10]

Licensing Board Explanation

We have carefully considered the factors that lead the Appeal Board to reverse the grant of partial summary disposition, the pleadings of the parties in support and in opposition to Applicants' Motion, and the information subsequently developed and reflected in the record of the New Hampshire portion of this proceeding. For the reasons

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[9]Memorandum and Order of November 4, 1986, at 14-17 (unpublished).

[10]The Appeal Board went on to note that once the Licensing Board determined the adequacy of the Special Needs survey, it would be appropriate for the Board to re-visit the ultimate question of whether reasonable assurances exist that adequate transportation resources will be available to assist special needs individuals.

set out below, we conclude that the remanded issues regarding the 1986 survey do not present significant safety or regulatory considerations requiring pre-license adjudication, and do not undermine our ultimate finding in LBP-88-32, 28 NRC at 699, that "adequate transportation and support services will be available to evacuate the transport-dependent population of the EPZ . . . ." Moreover, we find that the survey deficiencies identified by SAPL, even if ultimately found to be meritorious, are either of no moment or are amenable to relatively simple and timely correction. Because of this and consistent with the Commission's intent underlying its emergency planning rule, we believe reasonable assurances exist at this juncture that "there are no barriers to emergency planning implementation or to a satisfactory state of emergency preparedness that cannot feasibly be removed." 46 Fed. Reg. 61134, 61135 (December 15, 1981).

We start by focusing on the specific material issues identified by SAPL which, in its view, warranted further, pre-license litigation. As we read the material issues SAPL sought to litigate under SAPL-18 and SAPL-25, the principal thesis of those contentions is that the dissemination methodology of the 1986 Special Needs Survey (repeated annually) is flawed and that the results obtained through that survey cannot be relied upon to adequately identify the number and particularized transportation needs of transit-

dependent individuals that might reside within the EPZ at the time of a radiological emergency. SAPL Response at 17-18. The contentions further assert that the design of the survey instrument itself "could have been improved to eliminate ambiguity." Id. at 18. We further note that neither SAPL nor its expert advanced any specific factual bases tending to establish that significant numbers of special needs individuals or their transportation needs were, in fact, understated or unreported. Rather, SAPL's statement of material facts is replete with phrases such as "may not," "may well have," "could have been," "may have meant," and "would probably not."

With respect to the questions regarding the design of the survey instrument itself, we note that neither SAPL's statement of material issues nor the Affidavit of its supporting expert assert that the survey was deficient or inadequate because of design flaws. Rather, as noted above, the issue that SAPL sought to litigate was that the instrument "could have been improved to eliminate ambiguity." Even if we accept SAPL's proposition as true (Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-75-10, 1 NRC 246, 248 (1975)), it would not materially weaken the Applicants' position that the design of the survey instrument was adequate for the purposes of pre-emergency planning under NUREG-0654. In addition, SAPL's concerns regarding the absence of sufficiently

motivational language on the face of the survey itself (emphasis of the dire consequences of a failure to respond),[11] the frequency of the survey (once a month rather than annually), and the need to continuously survey "the thousands of transients in the area" to identify special needs individuals within their ranks simply invites us to impose identification requirements beyond those we believe are reasonably contemplated by NUREG-0654 and the Commission's emergency planning rule.

Moreover, we do not find that the timing of the 1986 NHCDA survey presents a significant safety or regulatory issue that must be resolved prior to the issuance of a license. First, any failure to identify summer special needs individuals is of consequence only in the summer, some eight months hence. Second, given the NHRERP's allocation of transportation resources equal to 150 percent of the 1986 identified transit-dependent needs (App. Dir. No. 2, ff.

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[11] Moreover, even if it were ultimately determined that NUREG-0654 required the NHCDA to specially craft its survey instrument to go beyond the acquisition of information and create a motivation among EPZ residents to respond to the mail survey, we believe that the mechanism for conducting such a public information campaign already exists under the NHRERP. The plan already calls for the annual distribution of public information calendars (NHRERP, Vol. 1, § 2.3.2) and public information flyers (id. at § 2.3.4). These informational packets (some of which are in languages other than English) already include a section on the provisions for special assistance to handicapped/mobility-impaired individuals. To the extent necessary, these packets can easily be expanded to include any additional information subsequently determined necessary to assure the reasonable identification of special needs populations.

Tr. 4228, at 10) and written commitments indicating the overall availability of approximately 170 more buses than the estimated need (LBP-88-32, 28 NRC at 692), the number of summer transit-dependent individuals would have to be significant before our finding that adequate transportation resources will be available can be seriously questioned.

Similarly, in support of the opposition to Applicants' Motion, Mr. Anderson asserted that because the offsite siren system had not yet been audibly tested, the survey required the hearing-impaired to speculate as to their need for special assistance. Anderson at ¶ 10. SAPL's concern has been mooted. The New Hampshire siren notification system has been tested. App. Ex. 43F, at 157-158. As a result, respondents to surveys subsequent to this test need not speculate on this point, and appropriate compensatory measures have been taken.

Thus, the only special-needs issue remanded by the Appeal Board that has the reasonable possibility of requiring a pre-license hearing and adjudication is that involving the dissemination methodology employed by the NHCDA in conducting the 1986 Special Needs Survey. The NHCDA's methodology used a three-prong approach relying on EPZ-utility customer mailing lists, a public information program providing, inter alia, a mechanism for EPZ residents to obtain a copy of the survey, and the availability of survey instruments through several local service

organizations and municipal agencies. In evaluating the safety significance of this alleged deficiency in the 1986 survey, we note that no survey can guarantee the identification of every transit-dependent or special transport individual within an EPZ who will require assistance in the event of some future emergency.[12] Because of this, a common and acceptable approach is to have available both excess transportation resources and a mechanism for special needs individuals who have not been pre-identified to make their needs known to emergency response workers. Both these approaches are part of the NHRERP. See, e.g., App. Dir. No. 2, ff. Tr. 4228, at 9-10, 12-15 and 25; NHRERP, Vol. 1, §§ 2.6.11a - 2.6.11b. Moreover, while SAPL has clearly raised the possibility that some special needs individuals might not be accounted for due to the particular dissemination methodology employed by the NHCDA, we believe that the number, whatever it might be, is not so large as to render the existing excess transportation resources under the NHRERP inadequate.

In our view, the focus of SAPL's identified concerns regarding the adequacy of the 1986 Special Survey is to

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[12]Indeed, during the Massachusetts portion of this proceeding, the only witness offered by any intervenor on the issue of identifying and calculating the transportation needs of the homebound disabled testified that not all pre-identified homebound disabled would in fact use the transportation resources allocated to them. LBP-89-32, at Finding 8.48.

fine-tune and broaden rather than replace the methodology employed by the NHCDA to identify special needs populations. This being the case, while the number of pre-identified special needs individuals might increase, we do not believe the remanded survey issues undermine our finding of reasonable assurances in LBP-88-32 that the NHRERP has both the procedures and transportation resources to satisfy the needs of special needs populations in the event of a radiological emergency at the Seabrook Station.

Advanced Life Support Patients

Statement of the Issue

The Appeal Board remands an issue (SAPL's) concerning the time it would take to prepare special facility advanced life support (ALS) patients for transit and to load them into emergency vehicles and the effect this preparation time may have upon evacuation time estimates (ETEs).[13]

The Appeal Board takes notice of the testimony of Intervenors' witness Joan Pilot, who stated "without apparent contradiction" that it would take from "28 minutes

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[13]The Appeal Board's concern is framed in the context of the accuracy of the ETE for the development of protective action recommendations for ALS patients. Given the fact that several special facilities are located within close proximity to the Seabrook station and the fact that these facilities may offer greater sheltering protection than available to the general public, thus making sheltering a more acceptable alternative to evacuation if the evacuation times increase appreciably, the question of how much the ETE for these patients will be increased by preparation time becomes "a matter of concern." Slip opinion at 24-25.

to an hour" to move an ALS patient from a bed to a stretcher adjacent to the bed and that none of this activity can be accomplished before arrival of the evacuation vehicle.[14]

Earlier in this proceeding, we dismissed SAPL's challenge to the evacuation times for special facilities when we found that the NHRERP "assumes that patients are at the loading point when transportation arrives (NHRERP, Vol. 6, at 11-12 [sic]), not in their beds awaiting pickup as Intervenors argue." LBP-88-32, 28 NRC at 699. The Appeal Board recognizes that if this were the case for ALS patients, the NHRERP's planning assumptions would encompass the amount of time Ms. Pilot asserted it would take to prepare special facility ALS patients before taking them to the transportation loading point. However, the Appeal Board found our ruling to be:

> inconsistent with the direction given in the individual emergency plans for New Hampshire EPZ towns that patients/residents of special facilities will be assembled as (not before) the evacuation vehicles arrive. [Citations omitted]. If, as these plans suggest, assembly begins only when the evacuation vehicles arrive, then the preparation time factor highlighted by Ms. Pilot seemingly has not been considered as part of the present planning basis for ETEs. [Footnote omitted].

Slip opinion at 26.

The Appeal Board states that it is unable to conclude that the issue of preparation time "has received appropriate

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[14]Slip opinion at 25, citing Rebuttal Testimony of Joan Pilot, ff. Tr. 7670, at 1-2; Tr. 7674-76.

consideration as a factor in deriving accurate ETEs for this class of the special facility population." Id. at 27. Accordingly, the Appeal Board remands the matter to the Board "to resolve this deficiency." Id.

Licensing Board Explanation

Section 11 of the NHRERP[15] details the analyses applied and the results obtained, which provide evacuation time estimates for transit vehicles responding to the needs of the transit-dependent population within the Seabrook EPZ. In the plan's ETE analysis, ETEs were developed for three categories of transit-dependent persons: 1) residents and tourists with no cars available; 2) individuals at "special facilities" including schools, health-support facilities, and child-care centers; and 3) those individuals who have "special medical needs." NHRERP, Section 11, at 11-18. It is the ETE for this last category of special populations which encompasses the transportation of non-ambulatory ALS patients -- those having "special medical needs." This category of individuals, due to special medical requirements, is evacuated by emergency medical service (EMS) vehicles -- ambulettes and ambulances. Id. at 11-22.

Because EMS vehicles are generally available on an emergency basis and it is therefore reasonable to expect that drivers are immediately at hand, the NHRERP ETE for

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[15]Applicants' Exhibit 5, NHRERP Volume 6, Section 11, Evacuation Time Estimates (ETE) For Transit Operations.

special medical needs individuals assumes that the mobilization time for EMS vehicles can be completed within 20 minutes. Id. Also, since many EMS vehicles have to travel long distances to the EPZ (some as far as 90 miles), more time is required for those vehicles to reach EPZ special facilities. In its calculation of travel time for EMS vehicles, the NHRERP ETE for special medical needs individuals assumes an in-bound travel speed of 50 mph. Id. at 11-26. Thus the NHRERP shows the total elapsed time, at worst, from notification to the arrival of an EMS vehicle at its destination within the EPZ, in the following ETE calculation:

Mobilization Time:	0.33 hours
Inbound Travel: 90/50 + 0.50	2.30
Loading Passengers	0.67
	3.30 hours

Id.

In the context of the Appeal Board's concern, we note that the NHRERP's ETE calculation for the transit of special medical needs individuals has allowed 0.67 hours (40.2 minutes) for the loading of ALS patients. This estimation of loading time does not deviate in any significant way from an average of the time Ms. Pilot stated it takes to prepare ALS patients for transportation (28 + 60 minutes/2 = 44 minutes). An increase of four minutes in the ETE would not affect the choice of a protective action recommendation for the ALS patient population as a whole. However, this

finding in itself does not completely address the Appeal Board's concern, nor does it end our analysis of the issue.

Transportation arrangements for the evacuation of non-ambulatory persons are coordinated between the State of New Hampshire and each New Hampshire town within the EPZ. At the Alert Classification Level, the Transportation Coordinator (or equivalent personnel) of the local emergency response organization, or State IFO Local Liaison at the Incident Field Office confirms the community's institutional and special transportation requirements through verification of actual need by contacting each special facility. App. Dir. No. 2, ff. Tr. 4228, at 16-17, 24. The NHRERP also provides for the notification and possible mobilization of Emergency Medical Service vehicles at the Alert level. Id. at 19. If an evacuation is recommended, the number of vehicles previously determined to be required are dispatched from the State Transportation Staging Areas (TSAs) to the Local TSAs in the affected communities. From the Local TSAs, vehicles are assigned to assist the transportation-dependent population; i.e., ambulances are dispatched to medical care facilities providing for ALS patients. Id. at 21.

The foregoing NHRERP provisions demonstrate that special facilities (where ALS patients reside) are contacted by emergency coordinators at the Alert Classification Level prior to an order to evacuate. This initial verification

effectively provides the staffs of the special facilities with advance notice that an evacuation is being considered. Ambulances, while mobilized at the Alert Level, are not dispatched from the State TSA to the Local TSA and then to the special facilities until an order to evacuate has been given. The fact that the staffs of the special facilities are given advanced warning of a pending emergency evacuation, and the fact that ambulances are not dispatched from the State TSAs to the special facilities until an order to evacuate has issued, provides an extra margin of time within which ALS patients can be readied for evacuation -- a margin of time beyond that assumed as loading time for those patients in the NHRERP ETE for that population. This extra margin of time is an added measure of conservatism to the Applicants' ETE for the ALS population and further tends to support the ETE's adequacy for protective action decision-making.

We finally address the Appeal Board's concern that Finding 4.40 in LBP-88-32, 28 NRC at 699 ("the plan assumes that patients are at the loading point when transportation arrives, not in their beds awaiting pickup as Intervenors argue") is inconsistent with the directions given in individual emergency plans for New Hampshire towns ("as evacuation vehicles arrive, assemble residents . . ."). We take note of a mis-citation in our Finding 4.40 which may have mistakenly led the Appeal Board down a path it did not

intend to take in its analysis of this issue. Our cite to "NHRERP, Vol. 6, at 11-12" is clearly erroneous, as that cited page (which contains a table of Estimated Transit Requirements) clearly fails to support the Board's finding (Finding 4.40) relating to the loading of nursing home patients at special facilities. The Appeal Board recognized this mistake and correctly changed the citation to "NHRERP, Vol. 6, at 11-[21]" in its slip opinion. Slip opinion at 26. In the context of that citation (which shows that 10 minutes has been allocated by the plan for the loading of ambulatory and wheelchair nursing home residents), we can see why the Appeal Board was concerned about the time it would take to prepare ALS patients for transit. However, our review of this issue has now demonstrated that citation and its emphasis on "assembly" does not pertain to special facility advanced life support patients. As we have cited above, ALS patients are provided for in NHRERP, Vol. 6, at 11-22, 11-26, and 11-27. Within the context of these portions of the NHRERP, which provide an analysis of the ETE for ALS patients and the means to develop protective action decisions regarding that population, any inconsistency between our former ruling and the current issue evaporates.

Our analysis of the issue leads us to the conclusion that there is no safety significant problem outstanding with regard to the transit preparation time for ALS patients at special facilities which warrants a delay in the issuance of

a full power license for Seabrook Station. Some improvement could be made in the NHRERP by requiring an amendment to the plan (or town plans) to provide for instructions to the staff of special facilities to prepare ALS patients for transportation at the order to evacuate. Moreover, any confusion over the distinction between preparing special-needs persons in anticipation of arriving transportation, and assembling them can be readily resolved. This type of improvement does not require any significant revision to the NHRERP and it can be readily accomplished by the Applicants and the State and verified by the NRC Staff during the post licensing period.

Implementation of The Sheltering Option

Statement of the Issue

In the NHRERP decision, with respect to sheltering the beach population, the Licensing Board concluded that sheltering would be the protective action of choice under a very limited number of conditions and that therefore the State of New Hampshire is appropriately prepared to recommend sheltering only rarely. LBP-88-32, 28 NRC 775. The Appeal Board affirmed our sheltering conclusions. ALAB-924, slip opinion at 58. However, the Licensing Board had also approved what we then perceived to be New Hampshire's ad hoc approach to the implementation of the sheltering option. We ruled that implementing detail was unnecessary except for about two percent of the transient beach

population without transportation. This conclusion was based, in part, on the low probability that sheltering would be recommended for the beach population, in part upon the concern that such detail might mislead a decisionmaker, and in part because the matter could be left in the hands of FEMA and the New Hampshire authorities. Id. at 769-70.

The Appeal Board remanded, finding that so long as sheltering for the beach population is a protective option, notwithstanding the low probability of its selection, implementing measures are required. All of our reasons for not requiring implementing detail were rejected. The Appeal Board explained that emergency planning regulations and guidance support preplanning rather than an ad hoc response. ALAB-924, at 62-68.

The Appeal Board noted the special implementing measures for those at the beach with no transportation where specific sheltering locations are to be identified together with appropriate EBS messages directing the transit-dependent to go to the public shelters to await assistance in the event evacuation is ordered. Further, the Appeal Board ruled that there is no basis for distinguishing between those who will be provided shelter under condition (3) (transit dependent) and those for whom sheltering is to be a protective action option under conditions (1) and (2) (general transient beach population). Id. at 50, 67.

Finally the Appeal Board directs that the NHRERP not be approved until the deficiency is remedied, and when the potential shelters have been identified, it will be appropriate for the Licencing Board and the Appeal Board to address the adequacy of that shelter.[16] Id., slip opinion, at 69 n.194.

Licensing Board Explanation.

It is likely that this issue cannot be resolved on the existing record. We understand and are obedient to the ruling that the very low probability of a sheltering protective action may not be the basis for not requiring implementing detail. However, as a safety matter, that same low probability would permit post-licensing consideration. The New Hampshire beach population does not peak until July. Implementing measures may not be difficult to effect. New Hampshire relies upon a "shelter-in-place" concept, i.e., everyone, transients and residents alike, who are indoors, remain indoors. LBP-88-32, 28 NRC 758. It is true that no other radiological emergency response plan requires that

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[16]We do not understand the mandate to assess the "adequacy of the shelter" to suggest that a preset maximum level of dose savings must be afforded by sheltering at the New Hampshire beaches. See id. n.164, citing ALAB-922. Rather, we read the direction to permit a challenge to whether there has been an identification of an adequate amount of suitable sheltering out of the sufficient available supply. Since the Appeal Board declined to affirm or reverse the Licensing Board's finding that there was more than twice the needed shelter for the peak beach population, we are not free of doubt on this point. ALAB-924, n.196.

specific sheltering (as compared to maps showing sheltering areas) be identified for the general population, thus there is no experience for guidance. But on the other hand, sheltering available for the outdoors transient beach population is concentrated in a relatively compact and well defined area.

Although we are directed to assure that the same implementation action be taken for the general transient beach population as for the transit-dependent transient beach population, there are fundamental differences between the needs of the two groups. The transit-dependent group needs pre-identified "sheltering" only in the case that evacuation is ordered. They must go to pre-identified public sheltering to catch the evacuation bus. Applicants' Direct Testimony No. 6, ff. Tr. 10022, at 21. When sheltering is the chosen protective action, transit-dependent transients will not differ from the general transient group. Their sheltering needs will be exactly the same.[17] Therefore the Appeal Board mandate to treat transit-dependent transients the same as transients with transportation will be complied with by the protective action scheme for sheltering now in place. We are required, nonetheless, to identify potential shelters for transients

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[17] In the rare sheltering case -- gaseous release of predictably short duration arriving before evacuation can be effected -- evacuation is not called for.

with transportation. ALAB-924, slip opinion at 68-69. We make this point not to question the reasoning behind the remand of this issue, which is not our role in this proceeding, but to explain that, in carrying out that remand, greater flexibility is possible when identifying sheltering for the general transient beach population than with sheltering which needs to be along evacuation bus routes.

Finally, the Board had left to FEMA and New Hampshire the task of resolving differences over implementing detail. Id. at 769. In drafting LBP-88-32, the Board overlooked the fact that FEMA and the State of New Hampshire had already resolved FEMA's concern about implementing detail.[18] It is unlikely that the FEMA/State agreement will satisfy the Appeal Board's requirements on that issue, however.

The Board concludes that the very low probability of selecting the sheltering option for the beach population and the fact that the beach population does not reach large numbers until July, provides adequate safety pending the resolution of the remanded sheltering issue.

PENDING MOTIONS

Several motions to admit contentions in two categories were pending before this Board on November 9, 1989, the date LBP-89-32 issued. The first category of motions pertain to

[18]Letter Huntington, Assistant Attorney General of New Hampshire, to Chairman Smith of Licensing Board, October 13, 1988.

the June 27, 1989 onsite emergency plan exercise.[19] The second category, consisting of a single motion as of this date, relates to the alleged withdrawal of the Massachusetts Emergency Broadcast System (EBS) from participation in the SPMC.[20]

In proceeding as we did we considered the following factors:

First, LBP-89-32 was ripe for issuance in the normal course. The pleadings on the onsite exercise contentions had just been completed,[21] but the Board's opinion on the

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[19]Intervenors' Motion to Admit Contentions on The September 27, 1989 Emergency Plan Exercise, September 28, 1989; Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise, October 13, 1989; Intervenors' Motion to Amend Intervenors' Motions [of September 29 and October 13, 1989], October 16, 1989; and Intervenors' Motion for Summary Disposition on Contentions JI-Onsite EX-1 and JI-Onsite EX-2, October 18, 1989.

[20]Intervenors' Motion to Admit a Late Filed Contention and Reopen the Record on the SPMC Based Upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY. This motion dated November 9, 1989, and served by first class mail that date was received by the Board after LBP-89-32 was rendered (November 9), and served (November 13). An apparently identical earlier motion with the same title was dated October 30, 1989. The October 30 motion was withdrawn by a faxed "Withdrawal of Motion" dated November 8, 1989. Thus, it is not literally true that the E.B.S. motion was pending before this Board when LBP-89-32 issued. However, since no appeal had been taken from LBP-89-32 when the second E.B.S motion finally arrived, this Board continued to have jurisdiction over it. The fact remains that the Board did not know about the November 9 E.B.S. Motion when it rendered the partial initial decision, LBP-89-32.

[21]The last pleading, dated November 8, 1989 was the NRC Staff Response to Intervenor's Motion for Summary Disposition of proffered Contentions JI-Onsite EX-1 and JI-Onsite EX-2, November 8, 1989.

intricate legal arguments was not yet drafted. After many years of a full and fair adjudication on all matters in controversy Applicants had prevailed on all issues. We believed that they were entitled to an immediate judgment to that effect -- providing that the legitimate rights of the intervening parties could be protected.

Second, there is no NRC regulation requiring that an initial decision be delayed because of speculation that future issues might require further hearings. In this context, the Board reports that it did not rush the initial decision to completion at the expense of the Intervenors' four motions on the September 1989 onsite exercise. To the contrary, the Board took strong measures to encourage the parties to move promptly on the onsite exercise contentions. Tr. 28297-28321 (telephone conference, October 19, 1989). In fact, the initial decision was somewhat delayed while the Board examined the onsite exercise motions for serious safety implications.

While we now understand the safety and regulatory implications of the onsite exercise motions, there is a very intricate set of legal arguments which should be discussed before a complete and reviewable decision on the motions can be rendered. This will take time not previously anticipated by this Board or by the Commission in its Order of September

15, 1989 (CLI-89-19) denying Applicants' Motion for an exemption from the one-year onsite exercise rule.[22]

To have delayed an otherwise ready initial decision pending the resolution of the onsite exercise motions would, as noted, be unfair to Applicants. But that unfairness might be a reasonable price given the eight years of this litigation, were it not for the fact that delay spawns delay. The Attorney General of Massachusetts is carrying out his announced strategy of filing contentions at every opportunity. He announced in advance of the respective events that he would submit contentions on low power testing and again on the onsite exercise. True to his word those occasions produced pleadings as well measured in terms of pounds as in numbers. See, e.g., LBP-89-28, October 12, 1989, Memorandum and Order [denying motions for low power contentions], n.1. The on/off/on sequence of the E.B.S. motions portends even more motions for renewed litigation.

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[22]In CLI-89-19 the Commission, noting that the Licensing Board set November 30, 1989, as the target date for its decision on all remaining issues stated, "[l]acking the admission of any new contention, the [licensing board decision] expected on November 30, 1989 would have the potential to authorize issuance of the full power license and conclude this proceeding [emphasis supplied]." Slip opinion at 2. It is possible that the Commission used the term "admission" in the precise sense that the mere pendency of motions for renewed adjudication would not bar a decision authorizing a full power license. However, there is no reason to believe that the Commission was focusing upon the between-the-cracks situation at bar where motions for renewed adjudication come in faster than they can be decided.

The Attorney General's large staff of assistants with their fecund word processors can produce motions for renewed litigation faster than the Board and parties can deal with them. The specter of the deplored "endless loop of litigation' [3] becomes more threatening as the two-year anniversary of the 1988 FEMA Graded Exercise approaches.

If the capacity to file motions to admit late-filed contentions is permitted to afford Intervenors the unilateral power to delay the issuance of the full power license, there is no hope for the Seabrook Station despite Applicants' fairly won victory.[24] The Board believes that this problem calls for prompt Commission policy guidance, and pursuant to 10 C.F.R. § 2.764(f)(1)(ii), it is the Board's responsibility to so inform the Commission.

The pendency of the motions on the onsite exercise presents a different kind of problem. Such exercises are material to the issuance of an operating license in the circumstances of this proceeding. 10 C.F.R. Part 50, Appendix E.IV.F.1. Subject to reasonable procedural requirements, Intervenors may challenge Applicants'

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[23] Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 570 (1988).

[24] Yet another motion seeking additional litigation was presented to the Licensing Board during the preparation of this Memorandum: Intervenors' Motion to reopen the Record and Admit Late-filed Contention Regarding Proposed Amendment of Seabrook Operating License Application, November 17, 1989.

compliance with the onsite exercise requirements. CLI-89-19, 29 NRC ___, slip opinion, n.5; Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446-49 (D.C. Cir. 1984); ALAB-918, 29 NRC 473 (1989). Therefore, if Intervenors' respective motions are admitted, our Initial Decision authorizing the issuance of a full power license may need to be revisited and perhaps vacated. Nevertheless we believe the Commission may find it efficient to proceed with its Section 2.764 review in view of several circumstances.

An onsite exercise was conducted at Seabrook on September 27, 1989 and Inspection Report 50-443/89-10 documents the Staff's inspection of the exercise. No violations, deviations or unresolved items were identified.

The Commission in CLI-89-19 (slip opinion at n.5) ruled that any contention on the exercise must allege a fundamental flaw, citing Long Island Lighting Company (Shoreham Nuclear Power Station Unit 1), ALAB-903, 18 NRC 499 (1988). However the Intervenors' contentions do not allege that the exercise revealed fundamental flaws in the emergency plan. Instead they allege that the scope of the exercise was inadequate, relying upon Long Island Lighting Company (Shoreham Nuclear Power Station Unit 1), ALAB-900, 28 NRC 275, 285-87 (1988) for support. The Intervenors accurately cite ALAB-900 for the proposition that "the exercise must be comprehensive enough to permit a meaningful test and evaluation of the emergency plan to ascertain if

that plan is fundamentally flawed" (emphasis supplied). Id. at 286-87. Intervenors' Second Motion at 7.

However, Intervenors do not deliver on the promise implicit in their citation to ALAB-900. Nowhere do the motions or the respective contentions allege that the onsite exercise was insufficiently comprehensive to have revealed fundamental flaws, nor do they point to any non-exercised aspect of the onsite emergency plan which, in their view, had the capacity to reveal fundamental flaws if that aspect had been exercised.

Assuming for present purposes that the standards for reopening a closed evidentiary record (10 C.F.R. § 2.734) apply in this case -- and we believe that they do -- it is significant that the only expert witness affidavits before the Board are those of two NRC Staff officials and two New Hampshire Yankee emergency planning officials to the effect that the scope of the onsite exercise was sufficient to test the major elements of the Seabrook onsite emergency response plan.[25] Similarly, the inspection report of the onsite exercise concluded that:

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[25] E.g., Affidavit of Edward J. Fox at 7 (attached to NRC Staff Response to Intervenors' Motion to Admit Contentions of September 27, 1989 Exercise, October 16, 1989).

> The licensee's response actions for this exercise demonstrated the ability to implement the emergency plan in a manner which would provide adequate protective measures for the health and safety of the public.

In contrast, Intervenors generally depend upon NRC regulations and Staff guidance documents for their position that the onsite exercise was inadequate in scope. While the large stack of pleadings on this issue leave much work for the Board, we have read the factual record of the matter and do not believe that a factual case has been made out by Intervenors. Indeed their motion for summary disposition puts the matter before us as an issue of law on undisputed facts.[26] The Board can report now that it does not agree with the Intervenors' legal arguments.[27] A decision denying the motions on the onsite exercise will issue as a matter of the Board's highest priority.

As to the motion respecting the Emergency Broadcasting System, the fact that it was submitted, withdrawn, and resubmitted, and that the matter is not yet fully briefed indicates that its potential effect of the outcome of the proceeding is too speculative to have warranted deferring or

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[26] See also Second Motion at 6.

[27] Moreover, in evaluating the effect of the legal arguments, the Board will have to discuss whether CLI-89-19 has foreclosed contentions based upon interpretations of regulations and Staff guidance, given the Commission's direction that any contention on an exercise must allege a fundamental flaw. Slip opinion at n.5

recalling our decision authorizing a full power operating license. We have nevertheless examined those papers and find nothing sufficiently grave to justify any delay.

ATOMIC SAFETY AND LICENSING BOARD

Richard F. Cole
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Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

November 20, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMO SUPPLEMENTING LBF-89-32 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
20 day of November 1989

Patty Henderson
Office of the Secretary of the Commission

*Received by Overnight Express Delivery.