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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20545

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

NRC STAFF COMMENTS ON THE
IMMEDIATE EFFECTIVENESS OF LBP-89-32

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December 1, 1989

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.764(f)(2)(ii) and the Commission's Orders of November 16, 21, and 22, 1989, ^{1/} the NRC Staff submits the following comments in connection with the Commission's review of the immediate effectiveness of the Licensing Board's decision in LBP-89-32, 30 NRC ____ (Nov. 9, 1989), which authorized the Director of Nuclear Reactor Regulation to issue a full power license for Seabrook. ^{2/}

Under section 2.764(f)(2), the Commission is to conduct a review in order to determine whether to stay the effectiveness of a board decision

^{1/} Order, November 16, 1989 (unpublished) ("November 16 Order"); Order, November 21, 1989 (unpublished); Order, November 22, 1989 (unpublished). The Commission has stated that in addition to conducting its immediate effectiveness review of LBP-89-32, it would "[I]n the interests of efficiency and effectiveness in resolving matters relating to the Licensing Boards' authorization of the issuance of a full power license," consider applications for a stay of the Licensing Board's license authorization. November 16 Order at 1-2.

^{2/} LBP-89-32, slip op. at 570.

which authorizes operation in excess of 5% power in order to protect the public interest based on a consideration of (1) the gravity of the substantive issue, (2) the likelihood that the issue was resolved incorrectly below, (3) the degree to which correct resolution would be prejudiced by operation pending review, and (4) the public interest. ^{3/} In the Staff's view, the application of these criteria to the instant proceeding leads to the conclusion that the Commission should allow the decision to become effective.

DISCUSSION

The issuance of an operating license for the Seabrook facility has been considered since the publication of the notice of the opportunity for hearing was published on October 19, 1981 (46 Fed. Reg. 51330). Over the past eight years, issues related to the facility have been fully ventilated and carefully evaluated by the several licensing boards convened to rule on the application; these boards have determined that, with respect to the matters in controversy, regulatory requirements have been met and a license may issue. ^{4/}

^{3/} Similarly, the matters to be considered in determining whether to stay a decision pursuant to 10 C.F.R. § 2.788(e) are: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

^{4/} LBP-87-10, 25 NRC 177 (1987), aff'd in part and remanded in part, ALAB-875, 26 NRC 251 (1987); ALAB-891, 27 NRC 341 (1988); LBP-88-31, 28 NRC 652 (1988), aff'd, ALAB-909, 29 NRC 1 (1989); CLI-88-10, 28 NRC 573 (1988), reconsideration den'd, CLI-89-3, 29 NRC 234 (1989); LBP-88-32, 28 NRC 667 (1988); LBP-89-17, 29 NRC 519 (1989); LBP-89-32, 30 NRC ____ (Nov. 9, 1989).

In recent years, the focus of the operating license proceeding has been on whether emergency plans for Seabrook provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Seabrook pursuant to 10 C.F.R. § 50.47(a). The Massachusetts Attorney General, Seacoast Anti-Pollution League, New England Coalition on Nuclear Pollution, and numerous towns ^{5/} ("Intervenors") proffered over 300 contentions; over 100 days of hearings were held to consider approximately 90 admitted contentions on the State of New Hampshire Radiological Emergency Response Plan (NHRERP), the Applicants' offsite emergency plan (Seabrook Plan for Massachusetts Communities (SPMC)), and the June 1988, FEMA graded, full participation exercise. ^{6/} In LBP-88-32, supra at 804, the Licensing Board determined that the NHRERP met the requirements of 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50 Appendix E. With the recent issuance of the LBP-89-32, the Licensing Board resolved all admitted issues on the adequacy of the SPMC and whether the prelicensing, full participation exercise revealed any fundamental flaws in Seabrook emergency plans in the Applicants' favor.

The major issue pending on the adequacy of emergency planning at Seabrook was certified to the Commission by the Appeal Board in ALAB-922, 30 NRC ____ (Oct. 11, 1989), during the Appeal Board's review of LBP-88-32,

^{5/} These include the Town of Hampton, Town of Hampton Falls, Town of South Hampton, Town of Kensington, Town of Amesbury, Town of Newbury, Town of West Newbury, Town of Salisbury, and City of Newburyport. See LBP-88-32, 28 NRC at 669; LBP-89-32, slip op. at 6-7.

^{6/} See LBP-88-32, 28 NRC at 669-70; LBP-89-32, slip op. at 3-4, 7. the hearings began in October 1987 and ended on June 30, 1989. Id.; Tr. 28289, 28296.

the decision which found the NHRERP adequate. The question certified in ALAB-922 was whether a determination "that adequate protective measures can and will be taken in the event of a radiological emergency" under 10 C.F.R. § 50.47(a) is to be based on a review to determine if plans comply with the planning standards in 10 C.F.R. § 50.47(b) or whether testimony on dose reductions/consequences of certain planning basis accidents at a particular site might also be introduced in evidence. ^{7/} The Commission, in providing that it would consider all motions to vacate or stay the Licensing Board decision authorizing the issuance of a license, recognized that this certified issue is before the Commission. The certified issue has been fully briefed by the parties ^{8/} and is ready for Commission determination.

Shortly before the Licensing Board issued LBP-89-32, the Appeal Board in ALAB-924, 30 NRC ____ (Nov. 7, 1989), remanded several issues in the

^{7/} ALAB-922, slip op. at 23-24.

^{8/} NRC Staff's Brief on the Dose Reduction Issue as Certified to the Commission in ALAB-922, November 13, 1989; Applicants' Brief With Respect to Issue Certified to the Commission by the Appeal Board on October 11, 1989, November 2, 1989; New England Coalition on Nuclear Pollution's Brief on Certification of ALAB-922 or, in the Alternative, Intervenors' Petition for Review of ALAB-922, October 27, 1989; Brief of Seacoast Anti-Pollution League on Certain Emergency Planning Issues, October 27, 1989; Brief of the Massachusetts Attorney General on the Issues Certified to the Commission by the Appeal Board in ALAB-922 Concerning the Emergency Planning Regulations, October 27, 1989. The Staff (Brief at 2) stated its view that the Commission's reasonable standard does not require admission of testimony on dose projections and dose consequences.

decision on the NHRERP, LBP-88-32, for further consideration. ^{9/} The Licensing Board briefly noted, in its decision authorizing issuance of a full power license, that neither ALAB-924 nor the pendency of several motions to submit new contentions precluded issuance of an operating license ^{10/} and later explained the basis for this conclusion in a supplemental memorandum ^{11/}. That supplemental memorandum is also relevant to the Commission's immediate effectiveness review.

The issues remanded to the Licensing Board in ALAB-924 are largely ministerial in that they relate to minor plan revisions to provide plan

^{9/} Both the Applicants and Intervenors have filed petitions for Commission review of ALAB-924. Applicants' Petition for Review of ALAB-924, November 10, 1989; Intervenors' Petition for Review of ALAB-924, November 21, 1989 ("Intervenors' Petition").

^{10/} LBP-89-32, slip op. at 569 n.87.

^{11/} LBP-89-33, 30 NRC ____ (Nov. 20, 1989). At the time the Licensing Board issued LBP-89-32, there were motions to reopen the record to admit contentions concerning the scope of the September 27, 1989 exercise of the Applicants' onsite plan as well as a motion for summary disposition of these contentions. 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 for Summary Disposition on Contentions JI-Onsite Ex-1 and JI-Onsite Ex-2, October 18, 1989. The Board was not aware of 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, November 9, 1989, when it issued LBP-89-32. LBP-89-33, slip op. at 34 n.20. Subsequently, Intervenors also filed a motion to reopen the record to admit a contention on Seabrook license amendment noticed in the Federal Register on October 26, 1989. Intervenors' Motion to Reopen the Record and Admit Late-Filed Contention Regarding Proposed Amendment of Seabrook Operating License Application, November 17, 1989. This motion is now moot because the amendment application was withdrawn on November 29, 1989. Applicants' Answer to Intervenors' Motion to Reopen the Record and Admit Late-Filed Contention Regarding Proposed Amendment of Seabrook Operating License Amendment, November 29, 1989, Attachment A.

implementation details for sheltering, refinement of evacuation time estimates for, and numbers of, transport dependent populations, or possible execution of letter of agreements. Such issues do not pose significant safety or regulatory matters which would prevent a finding of reasonable assurance for full power operation. See LBP-89-33, slip op. at 5, 9-12, 16-17, 28-29, 31, 32. ^{12/}

For example, the Licensing Board explained in its Memorandum Supplementing LBP-89-32 ^{13/} that the remanded issues did not undermine its conclusion that a finding of reasonable assurance can be made for Seabrook and the license issued. LBP-89-33, slip op. at 4-6, 40-41. The Board found that (1) sufficient numbers of school teachers will accompany school buses where need for a safe evacuation, (2) adequate transportation and support services will be available to evacuate the transport dependent population, (3) evacuation time estimates for advanced life support (ALS) patients were adequate and any needed revisions in plan evacuation

^{12/} In ALAB-924, the Appeal Board failed to consider the significance of the planning deficiencies it identified -- whether the matters were necessary to establish reasonable assurance, i.e., whether any of the deficiencies rose to the level of "fundamental flaw." Fundamental flaws are exercise "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986). They reflect "a failure of an essential element of a plan, and . . . can be remedied only through significant revision of the plan." Shoreham, ALAB-903, 28 NRC 499, 505 (1988). While this principle was developed in order to determine the significance of deficiencies revealed by an exercise, the basic premise underlying this principle is applicable to an assessment of the adequacy of a plan. That is, there should be a determination that the alleged plan deficiency relates to an essential element of a plan which can only be remedied by a significant revision of a plan as opposed to minor modifications.

^{13/} LBP-89-33, 30 NRC ___ (Nov. 20, 1989).

instructions for ALS patients would be minor, and (4) implementation details for the unlikely evacuation of the greater beach population could await a post-licensing determination since peak beach season is a number of months away and there are an adequate number of shelters available. In addition, the Board concluded that Intervenor's pleadings on the onsite exercise did not reveal a fundamental flaw and it would issue a decision denying the onsite exercise motions, id. at 39-40, ^{14/} and that nothing in the papers concerning the Emergency Broadcast System (EBS) contention raised matters sufficiently grave so as to justify any delay in license issuance, id. at 40-41. ^{15/}

^{14/} The Board indicated it would issue a decision denying the motions on the onsite exercise. LBP-89-33, slip op. at 40.

^{15/} Aside from the matters remanded in ALAB-924, Intervenor's immediate effectiveness comments related to that decision may only raise those matters identified in Intervenor's petition for review. See 10 C.F.R. § 2.786(b). The three matters raised in the petition do not require a stay of immediate effectiveness of LBP-89-32. See Intervenor's Petition at 2-10. First, the alleged need for second shift staffing at decontamination and reception centers is based largely on conjecture. See Intervenor's Petition at 2-5. More importantly, it does not involve a violation of the regulation and, as the Appeal Board concluded, "there is no realistic basis for NECNP's related concern that the reception centers will cease operations prematurely," ALAB-924, slip op. at 46-47 n.125. Second, the issue concerning the adequacy of sheltering for beach populations generally involves matters already before the Commission in its review of the question certified in ALAB-922. See Intervenor's Petition at 5-9. The only other matter raised concerning sheltering concerns the exclusion of certain evidence as being untimely. Id. at 8-9. Both the Licensing Board and Appeal Board determined that the evidence was correctly excluded, ALAB-924, slip op. at 69 n.196, and Intervenor has failed to make the requisite showing for Commission review. See 10 C.F.R. § 2.786(a)(4). Third, the Appeal Board accepted the FEMA monitoring planning basis as acceptable for monitoring under the NHRERP because it concluded that Intervenor had not directly challenged the validity of these conclusions at hearing.

(Footnote continued on next page)

The Staff also agrees that ALAB-924 poses no matters of such gravity as to warrant delaying the effectiveness of the license. Any modifications to the plan would be minor and such plan enhancements arising out of ALAB-924 remand issues could be left to the Staff or FEMA to verify. E.g., Louisiana Power & Light (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1600 (1985); Limerick, ALAB-836, 23 NRC 479, 495 (1986). ^{16/}

In addition, the various motions to reopen do not raise safety significant issues which would affect the outcome in the proceeding. As the Licensing Board concluded in LBP-89-24, 30 NRC ____ (Oct. 12, 1989), the natural circulation test contention did not demonstrate any significant issue that would have been likely to have produced a different result in the licensing of Seabrook and thus no cause to reopen the hearing was shown. Slip op. at 41-44, 51-55. Nor were the prerequisites for new contentions satisfied in regard to this matter. Slip. op. at 44-45. Similarly, none of the last minute attempts to reopen the

(Footnote continued from previous page)

ALAB-924, slip op. at 39-40. Thus, the FEMA finding on the adequacy of this plan provision was not rebutted. Id. at 40-43; see 10 C.F.R. § 50.47(a)(2). The Appeal further examined in depth the capacity to meet the FEMA guidance (id. at 44-46) and the petition provides no basis to challenge the accuracy of that conclusion.

^{16/} See also Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); accord, Marble Hill, 7 NRC 313, 318 (1978); Perry, ALAB-298, 2 NRC 730, 736-37 (1975); WPPSS, (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973).

record, based on contentions alleging that the scope of the September 1989 onsite exercise was not adequate, raised a significant issue that would likely change the result of this proceeding. As the Licensing Board concluded, the proffered contentions failed to allege that the exercise was not comprehensive enough to reveal fundamental flaws in the onsite plan. ^{17/} Thus, the attempt to reopen the record on the exercise did not meet the test for reopening the record or for the submission of new contentions.

Similarly, the last minute attempt to reopen the record to admit an EBS contention, as the Staff has previously shown, does not raise a significant safety issue that could affect license issuance because even the affidavits submitted by Intervenors recognize that the EBS system for Seabrook could be activated by contacting State officials or the lead EBS station in Massachusetts. ^{18/}

In sum, the matters have been correctly decided below and there is no matter of sufficient gravity to warrant delaying the issuance of the license.

^{17/} LBP-89-33, slip op. at 39-40. See NRC Staff Response to Intervenors' Motion to Admit Contention on September 27, 1989 Exercise, October 16, 1989, at 9-11, 13-14; NRC Staff Response to Intervenors' Second Motion to Admit Contentions on September 27, 1989 Exercise, October 27, 1989, at 9-12.

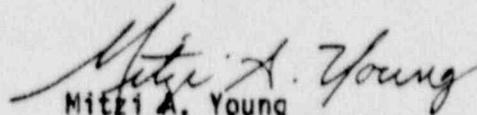
^{18/} NRC Staff Response to Intervenors' Motion to Admit a Late-Filed Contention and Reopened the Record on the SPMC Based Upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY, November 20, 1989, at 3-10. Such action would be consistent with the best efforts presumption under the realism rule. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986) (realism doctrine); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 251-55 (1989) (EBS can be activated by licensee contacting the state system directly).

CONCLUSION

Should the Commission resolve the question certified in ALAB-922 consistent with the Staff Brief on the dose reduction issue (see note 8, supra), there are:

- no matters so grave as to warrant delay of the immediate effectiveness of the Board's decision authorizing issuance of a full power license;
- no substantive issues for which there is a significant likelihood that they have been resolved incorrectly below;
- no issues whose correct resolution would be prejudiced by operation pending review; and
- no other public interest factors that would warrant staying the effectiveness of LBP-89-32.

Respectfully submitted,


Mitzi A. Young
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Dated at Rockville, Maryland
this 1st day of December, 1989

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF COMMENTS ON THE IMMEDIATE EFFECTIVENESS OF LBP-89-32" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks, by express mail this 1st day of December 1989:

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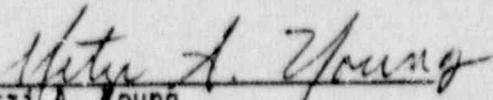
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