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LBP-89-38

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED DEC 11 1989

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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
	December 11, 1989

MEMORANDUM AND ORDER
(Ruling on Motions Regarding Onsite Exercise)

Introduction

The Intervenors have submitted three motions to admit two contentions (JI-Onsite Ex-1 and JI-Onsite Ex-2) on the September 27, 1989 Seabrook onsite emergency plan exercise.[1]

[1]Intervenors' Motion To Admit Contentions on the September 27, 1989 Emergency Plan Exercise ("First Motion"), September 28, 1989.

Intervenors' Second Motion To Admit Contentions on the September 27, 1989 Emergency Plan Exercise ("Second Motion"), October 13, 1989.

Intervenors' Motion To Amend Intervenors' Motions of September 29 [sic], 1989 and October 13, 1989 To Admit Contentions on the September 27, 1989 Onsite Emergency Plan Exercise ("Third Motion"), October 16, 1989.

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A fourth motion seeks summary disposition on the proffered contentions.[2] The relief sought by the motions is denied in the following order.

Background

A full participation exercise of the Seabrook radiological emergency response plans was conducted during June 1988. The NRC's implementing regulations provide, in pertinent part, that

> If the initial full participation exercise is conducted more than one year before issuance of a low power operating license, an exercise which tests the licensee's offsite plans shall be conducted within one year before issuance of an operating license.

Title 10 C.F.R. Part 50, Appendix E.IV.F.1 n.4.[3]

Applicants applied to be exempted from the within-one-year onsite exercise requirement to avoid what they feared would be an "endless loop of litigation," but the Commission denied the application on September 15, 1989. The Commission, also anticipating the possibility of additional litigation, stated:

> In order to have any contention on an exercise considered in a hearing Commission case law establishes the need to allege a fundamental flaw. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit

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[2]Intervenors' Motion for Summary Disposition on Contentions JI-Onsite Ex-1 and JI-Onsite Ex-2 ("Summary Disposition Motion"), October 18, 1989.

[3]The full text of this provision is set out at 35, infra.

> 1) ALAB-903, 28 NRC 499 (1988). In addition, the criteria for late-filed contentions are applicable to any contentions filed on the onsite exercise, as they are to all contentions filed after the original date by which contentions are due.

CLI-89-19, 30 NRC ___, slip op. n.5.

The exercise was conducted on September 27, 1989. The NRC Staff issued its Inspection Report No. 50-443/89-10, October 2, 1989 (hereinafter "Inspection Report"), concluding that:

> Results: No violations, deviations or unresolved items were identified. 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.

Id., face page.[4]

Subsequently the Massachusetts Attorney General, on behalf of the Joint Intervenors, filed the motions now pending. See n.1, 2.

Our partial initial decision of November 9, 1989 authorized the issuance of a full power operating license for the Seabrook Station. LBP-89-32, 30 NRC ___. On November 20, 1989 we issued a Memorandum Supplementing LBP-89-32 in which we explained why a full power license for Seabrook was authorized despite the pendency before this board of several matters, including the Intervenors' onsite-

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[4]Exhibit 1 to Applicants' Response to Intervenors' Motion To Admit Contentions on the September 27, 1989 Emergency Plan Exercise, October 11, 1989.

exercise motions. There we reported that the motions would be denied. LBP-89-33, 30 NRC ___, slip op. at 37-40.

Discussion

The Contentions

Intervenors' Contention JI-Onsite Ex-1 ("Ex-1") was in the first instance based upon information gained through actual efforts to observe the onsite exercise compared to NRC Staff Inspection Procedures 82301 and 82302. In essence EX-1 charges that, because of four major failures in the exercise design, the onsite exercise was not full scale and did not "test all or even a significant number of the major observable portions of the Seabrook Station RERP ('onsite plan' or 'SSRERP')." This, according to Intervenors, is contrary to the provisions of 10 C.F.R. § 50.47(b)(14) which require periodic exercises "to evaluate major portions of emergency response capabilities . . . ." First Motion, Contention Statement.

The Second Motion is said to be predicated upon the receipt of additional information, in particular, the Inspection Report and the Seabrook Station 1989 Graded Exercise Scenario (hereinafter "Scenario"). It would add new bases to Contention Ex-1. It also seeks to have admitted Contention JI-Onsite Ex-2 ("Ex-2"). It is noteworthy that in the body of the Second Motion, Intervenors describe Contention Ex-2 as one of scope:

> [C]hallenging the adequacy of the on-site exercise as a meaningful test and an evaluation of whether the SSRERP can be implemented so that there is reasonable assurance of adequate protection or, conversely, whether the SSERP is fundamentally flawed [emphasis supplied].

Continuing with the "fundamental flaw" theme, Intervenors cite Long Island Lighting Company (Shoreham Nuclear Power Station Unit 1), ALAB-900, 28 NRC 275, 285-87 (1988) for support. They 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 in original). Id. at 286-87. Second Motion at 7.

However, as we noted in LBP-89-33 (slip op. at 39), Intervenors do not deliver on the promise implicit in their citation to ALAB-900. Contention Ex-2 itself makes no mention of any fundamental flaw revealed by the onsite exercise, which, since it is a "scope" contention, is understandable. But the contention does not even allege that the onsite exercise was insufficiently comprehensive to have revealed fundamental flaws, nor does it point to any non-exercised aspect of the onsite emergency plan which had the capacity to reveal fundamental flaws if that aspect had been exercised. Contention Ex-2 charges that ". . . the willingness, availability, training, equipment, capability or performance of the personnel and entities relied upon to implement the plan was not adequately tested."

While one might speculate that these alleged infirmities in the onsite exercise and its scenario restricted the exercise to the point where it could not have revealed fundamental flaws in the SSRERP, we see no need to draft Intervenors' contentions for them. They are fully informed on the law. But more importantly, there is no need to construe Intervenors' contentions. We read Contention Ex-2 to be drafted deliberately to not allege that fundamental flaws would have been revealed by a fully scoped exercise. Rather the contention specifically alleges that the scope was deficient because the regulations require that the "major observable portions" must be tested within one year of licensing but were not, and that these portions are those set out in 10 C.F.R. § 50.47(b)(1)-(16) as implemented by NUREG 0654, II A-P. In other words, Intervenors allege that the onsite exercise was legally deficient in scope. They acknowledge that the contention presents "a question of law rather than fact . . . ." Second Motion at 6. Indeed, Intervenors provide no factual basis for either contention other than the Exercise Report, the Scenario, and the inspection procedures documents.

In the Third Motion, Intervenors address the "significant safety issue" standard for reopening a closed record, 10 C.F.R. § 2.734(a)(2). Consistent with their earlier legal arguments, Intervenors equate a "significant

safety issue" with a failure to meet regulatory requirements.

In their Motion for Summary Disposition, Intervenors in effect summarize the factual and legal predicates for their contentions in the Statement of Material Facts Not in Dispute. The following is a partially consolidated and simplified summary of the factual and legal predicates pertinent to the Intervenors' Summary Disposition Motion.

1. The scenario package for the September 27, 1989 exercise submitted by the Applicants and approved by the Staff (with minor revision) established the scope, content and extent of play.

2. The scenario, thus the scope, did not require a demonstration by onsite personnel of an actual shift change or a demonstration of continuous 24-hour staffing capability, nor did the NRC evaluate those capabilities.

3. The scope did not require a demonstration of the public notification system for the Massachusetts EPZ nor did the NRC evaluate that capability. Similarly the scope did not require or include a demonstration of the means for alerting and providing prompt instruction to the public within the Massachusetts EPZ including a siren system, even though such a siren system is within the exclusive control of the Applicants and is described within the SSRERP and Appendix E. Nor did the NRC evaluate these capabilities.

4. The scope of the exercise did not require a demonstration of the VANS system for the Massachusetts EPZ, nor did the NRC evaluate the VANS system, which has never been field tested.

5. The exercise did not advance beyond a declaration of Site Area Emergency. The scope did not include a simulated major release of radioactivity.

6. The scope did not require a demonstration by Applicants' onsite personnel to formulate or communicate PARs to offsite officials, or to adjust them upon changed conditions.

7. The scope did not require participation by a medical team from a local support services agency (in this case the Seabrook Fire Department) or by an offsite medical treatment facility (Exeter Hospital).

8. The scope did not require a demonstration of field monitoring or plume tracking.

9. The scope did not require a demonstration by offsite personnel of monitoring and decontamination of onsite personnel at the offsite locations designated for that purpose.

Broad Issues Presented

The pleadings present two broad legal and factual issues: First, assuming, contrary to our finding below, that the onsite exercise did not comply with NRC regulatory

requirements, whether the exercise contentions, in addition to alleging that deficiency, need to comply with more restrictive Commission case law governing the substantive content of contentions and relevant procedural rules. In particular, do the Intervenors' contentions need to allege a fundamental flaw in the SSRERP revealed by the onsite exercise or allege that the exercise was insufficiently comprehensive in scope to have revealed any such fundamental flaw? Finally as a part of the first broad issue, we must consider whether Intervenors, having met the contention pleading requirements (fundamental flaw or insufficient scope), need also to meet the requirements of a motion to reopen this closed record in accordance with the provisions of 10 C.F.R. § 2.734, or whether they need satisfy only the standards for entertaining nontimely contentions in accordance with 10 C.F.R. § 2.714(a)(1)(i)-(v).

The second broad issue is whether the NRC regulations require an onsite exercise broader in scope than that required by the scenario and carried out on September 27, 1989. A sub-issue is whether this Board may grant any motion for litigation of the onsite exercise based upon allegations limited to issues of law and regulatory non-compliance, given the Commissions' directive in CLI-89-19 announcing the case law applicable to this very exercise.

First Broad Issue

It is not disputed that an exercise which "tests the licensee's onsite emergency plans" within one year before the issuance of a full power license is, by the very terms of the regulation, 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. Such issues may not be eliminated from a hearing as a matter of the unfettered discretion of the NRC. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446-49 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) (hereinafter "UCS"). However, the Court in UCS accepted the Commission's argument that a pre-licensing exercise is only relevant to a licensing decision to the extent that it indicates a fundamental flaw in the emergency plans and is not relevant as to minor ad hoc problems occurring on the day of the exercise. There the Court, having announced its agreement with that substantive relevancy test, went on to discuss various procedural standards the Commission might employ to "shorten the period between the exercise and the date of the license," concluding that the "only central requirement is that there be an opportunity to dispute issues raised by the exercise under the relevant decisionmaking criteria." 735 F.2d at 1448-49.

The Commission subsequently formally instituted the "fundamental flaw" standard. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986). Also in the Shoreham proceeding the Appeal Board explained how a fundamental flaw should be measured. In now familiar language we are told ". . . a fundamental flaw in an emergency plan, as revealed in an exercise, has two principal components. First, it reflects a failure of an essential element of the plan, and, second, it can be remedied only through a significant revision of the plan [emphasis in original]." Whether the failure pertains to an essential element of the plan should be determined by reference to the sixteen elements of 10 C.F.R. § 50.47(b). ALAB-903, 28 NRC 499, 505.

In the onsite phase of this proceeding the Appeal Board stated also that where problems revealed by an exercise "are readily corrected by providing supplemental training . . . such training does not involve any revision, much less a significant one, of the emergency plan." ALAB-918, 29 NRC 473, 486 (1989). The lesson of ALAB-918 has special relevance to the case at bar in that Applicants argue[5] that the most that can be said about Intervenors' allegations is

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[5]Applicants' Answer to Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise, October 20, 1989, at 5.

that more training may be needed -- a point we address below.

As we have already noted above, ALAB-900 in the Shoreham proceeding noted the implicit requirement of CLI-86-11 that an exercise must be comprehensive enough to "ascertain if that plan is fundamentally flawed [emphasis in original, footnote omitted]."

Although the Commission case law on the substantive relevance of problems revealed by an exercise (fundamental flaw) is extensive and seemingly explicit, there are areas where our course has not been well charted. In ALAB-900, for example, the Appeal Board having explained about fundamental flaws, went on to rule that:

> Assuming that the general subject of such requirements is not otherwise expressly foreclosed from challenge, an intervenor (through the appropriate procedural vehicle) can always raise issues concerning compliance with regulatory requirements.

Id., 28 NRC at 286.

Moreover those intervenors "cannot be denied the opportunity to challenge [the utility's] compliance with any of the Commission's regulations concerning emergency exercise" in that the assessment of the exercise is (as is the case here) material to a licensing decision. 28 NRC at 286-87, citing UCS, 735 F.2d at 1442, 1445-46. Falling into the cracks then, is the distinct situation presented by the instant motions where a fundamental flaw is not alleged, nor

is it alleged that a properly scoped exercise would or could have revealed a fundamental flaw.

This is a case of first impression. It is very likely that, if an aspect of the emergency plan is required by Commission regulations, particularly the sixteen planning elements of 10 C.F.R. § 50.47(b)(1)-(16), it is by regulation a matter concerning an "essential element" of the plan as defined in ALAB-903, supra. Thus the first element of a fundamental flaw would be established. However, even if one or more of the regulatory planning elements are not fully satisfied, the omission does not become a fundamental flaw unless the second element is present, that is the failure can be remedied only through a significant revision of the emergency plan. ALAB-903, supra, 28 NRC at 505.

Moreover, we find nothing in either ALAB-900 or ALAB-903 to suggest that a contention alleging that planning elements one through sixteen of 10 C.F.R. § 50.47(b) must be exercised will meet the substantive relevance test of an emergency planning contention. Nor will it satisfy the requirement that contentions be specific. 10 C.F.R. § 2.714(b). We therefore limit our consideration to those aspects of the motions alleging specific voids in the exercise scenario and execution.

Standards for Entertaining The Motions

We also have before us the question of whether the standards for reopening a closed record under 10 C.F.R. § 2.734[6] should obtain, as urged by Applicants and the

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[6]Sec. 7.234 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

Staff, or whether the Commission's order in CLI-89-19, supra, permits a test under the nontimely contention standard of 10 C.F.R. § 2.714(a)(1). As noted above, in CLI-89-19 the Commission simply stated that the "fundamental flaw" standard and the criteria for nontimely contentions must be met before any contention can be considered. Id., slip op. n.5. Since the nontimely contention test must be addressed in both sections, CLI-89-19 does not foreclose consideration under Section 2.734.

In this Board's Memorandum and Order ruling on the low power testing contentions (LBP-89-28, 30 NRC ___, October 12, 1989), we ruled that the standards under 10 C.F.R. § 2.734 for reopening a closed record applied there. But our reasoning there took into account the fact that low power testing was not material to the issuance of a full power license. Slip op. at 13-17, 25. Here of course, the onsite exercise is material to a licensing decision and we must reckon with UCS v. NRC, supra. As we note above, the UCS court did not limit the Commission's procedural discretion in satisfying the requirement that there be an opportunity to dispute issues raised by the exercise. The

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(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.714(a)(1)(i) through (v).

Court eschewed only a test of "unfettered discretion." 735 F.2d at 1448-49. See also ALAB-918, 29 NRC 473, n.21. In promulgating Section 2.734, the Commission explained that it was distinguishing that rule from Section 2.206 where the NRC could refuse to entertain any motion to reopen. 51 Fed. Reg. 19535-538, May 30, 1986, Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings.

In any event, we need not anguish over whether UCS permits the application of the rule governing motions to reopen a closed record. The record of this proceeding is closed, and we must obey the clear provisions of 10 C.F.R. § 2.734 for dealing with closed records. Moreover, the Commission reference to the "fundamental flaw" test is a reference to the substantive relevance of an exercise contention, which must apply whether or not Section 2.734 controls.

Therefore, we find that the provisions of Section 2.734 should be applied to Intervenors' motions. We also note that, within the context of the allegations, that finding does not force the ultimate disposition of the motions. The issues presented by the motions are not amenable to precise mathematical measurement of their significance. Were we to find that the contentions, with specificity and bases, alleged fundamental flaws in the onsite exercise, or that the exercise was insufficiently comprehensive in scope to have revealed such flaws, we might well also find, by the

same reasoning, that Intervenors' motions address a significant safety issue (Section 2.734(a)(2)), and that, given the fact that the onsite exercise is material to a licensing decision, "a materially different result . . . would have been likely . . ." had the contention been proffered initially (Section 2.734(a)(3)).

There are, however, important differences between a motion to reopen the record under Section 2.734, and a motion to admit a late filed contention under Section 2.714(a)(1). A motion to reopen must be accompanied by affidavits (Section 2.734(b)) which must be tantamount to evidence and in excess of the basis and specificity requirements of Section 2.714(b). Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989).

Notwithstanding Intervenors' disavowal of a factual basis for the motions, they do, in fact, provide factual reasons why they believe the onsite exercise was legally inadequate in scope. We summarized those reasons above.

Furthermore, Intervenors argue that legally and factually they meet the standards for reopening. Third Motion, Attachment A. In addressing the safety significance of the onsite motions, Intervenors argue that the issue is safety significant as a matter of law by NRC regulation. Factually they point to the Commission's Order denying Applicants' motion for an exemption, CLI-89-19, supra. The

flaw in Intervenors' factual argument is that it confuses the significant safety reasons underlying the Commission's insistence upon an onsite exercise within one year of licensing -- reasons not before us or now in dispute -- with the safety significance of the results of that exercise. Third Motion, Attachment A, at 4-6.

Also, under their safety-significance discussion, Intervenors maintain that the Commission has expressly recognized Intervenors' right to litigate exercise results. Attachment A, at 4, citing 52 Fed. Reg. at 16827 (May 6, 1987). The obvious answer to this argument is that their right to litigate the results of the onsite exercise is subject to the appropriate procedural rule. E.g., CLI-89-19, supra, slip op. n.5; ALAB-918, supra, 29 NRC 473 at n.21.

Resting on their quasi-factual/legal arguments, Intervenors assert that affidavits (Section 2.734(b)) are not required because the factual bases for their claims are set out in the Inspection Report and the Scenario. Third Motion, Attachment A, at 7-8. But we have already invited the Intervenors' attention (LBP-89-28, slip op. at 26) to another decision in this proceeding where the Appeal Board explained:

> [T]he Commission expects its adjudicatory boards to enforce section 2.734 requirement rigorously -- i.e.,

> to reject out-of-hand reopening motions that do not meet those requirements within their four corners . . . .

ALAB-915, 29 NRC 427, 432 (1989).

The provisions of Section 2.734(b) leave no place to hide; "[t]he motion must be accompanied by one or more affidavits . . . ." Intervenors' motions, to the extent that they rest on a factual foundation should be rejected out-of-hand precisely as the Appeal Board in ALAB-915 directed. We rule that the motions would fail for that reason alone. But in the interest of a complete record on this important issue, we note that Intervenors are not denied the relief they seek on a mere technicality. Both the Applicants and the NRC Staff responded to the motions with affidavits of competent individuals with knowledge of the facts and who are experts in the respective disciplines.[7]

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[7]NRC Response to Intervenors' Motion To Admit Contentions on September 27, 1989 Exercise, October 16, 1989, attaching affidavits of Falk Kantor and Edwin F. Fox, Jr.

NRC Staff Response to Intervenors' Second Motion To Admit Contentions on the September 27, 1989 Emergency Plan Exercise, October 27, 1989, with Kantor Affidavit (Kantor 2) and Fox Affidavit (Fox 2) attached.

Applicants' Answer to Intervenors' Motion for Summary Disposition on Contentions JI-Onsite Ex-1, and JI-Onsite Ex-2, October 25, 1989, attaching Affidavits of Anthony M. Callendrello ("A") and S. Joseph Ellis ("B").

Significance of Issues Addressed

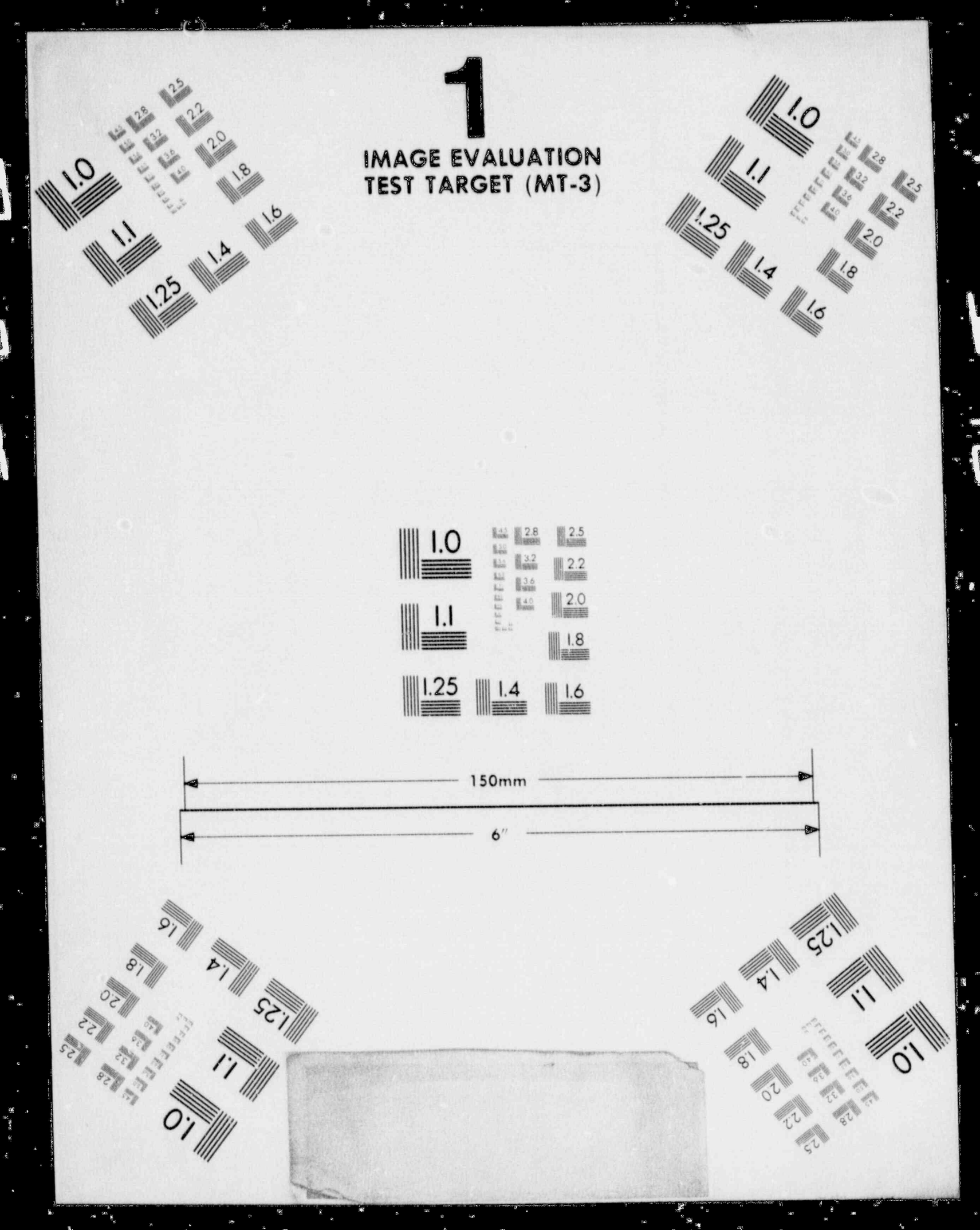
As we discuss in greater detail below, Part 50, Appendix E.IV.F.1 does not specify the requirements for "an exercise which tests the licensee's onsite emergency plans . . . ." Consequently the views of the Staff experts charged with determining the purposes and the results of the exercise are very instructive.

The Staff submitted the affidavits of Falk Kantor, Section Chief, Emergency Preparedness Branch, Office of Nuclear Reactor Regulation. He is well qualified to explain the purposes of the onsite exercise and to evaluate its results. Professional Qualifications attached to Affidavit.

Mr. Kantor stated that the requirement to test the major observable portions of the onsite and offsite plans refers to the full-participation exercise conducted within two years of full power licensing and not to the exercise of the onsite emergency plan within one year before issuance of a full-power license. From the full context of Mr. Kantor's affidavit, we infer that he is referring here to the manner in which the Staff administers the regulation, not his legal conclusion on the issues before us.

Mr. Kantor also explained that:

> [T]he purpose of the one year exercise requirement is to assure that adequate emergency response capability exists at the time of licensing. The Seabrook Station Emergency Response Organization (ERO), which implements the SSRERP, the onsite emergency plan, was established in 1985. In addition to extensive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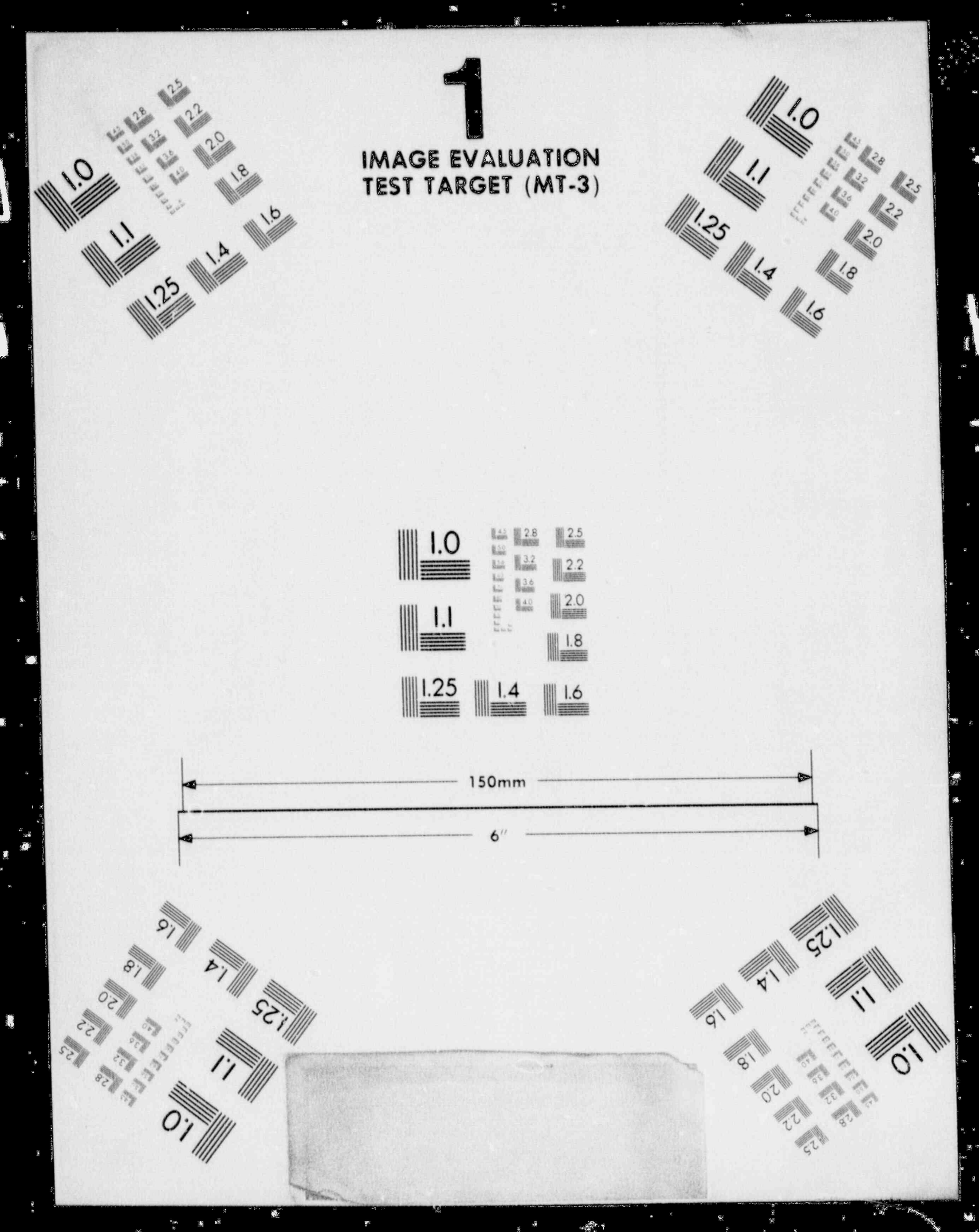
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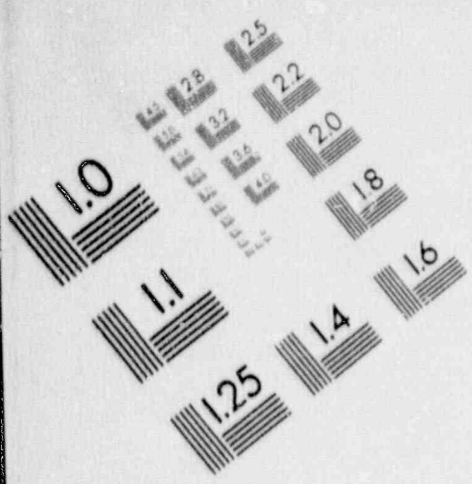

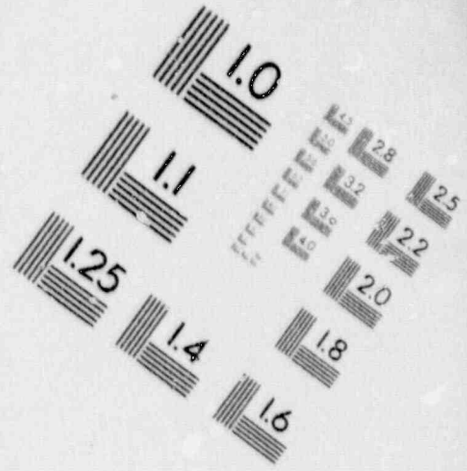

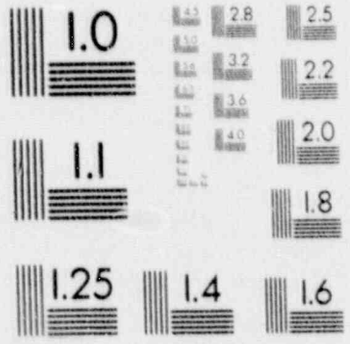

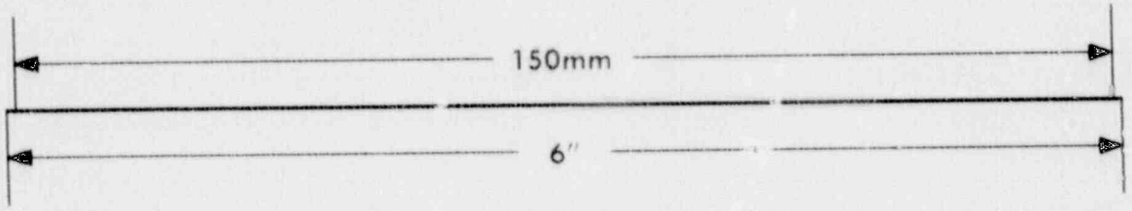

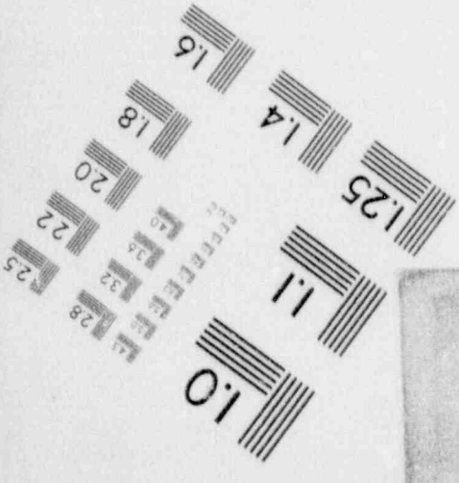

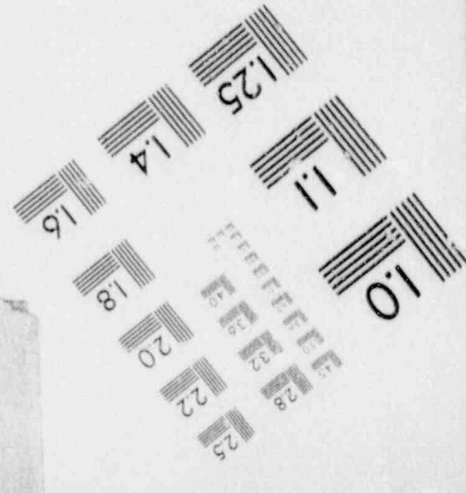

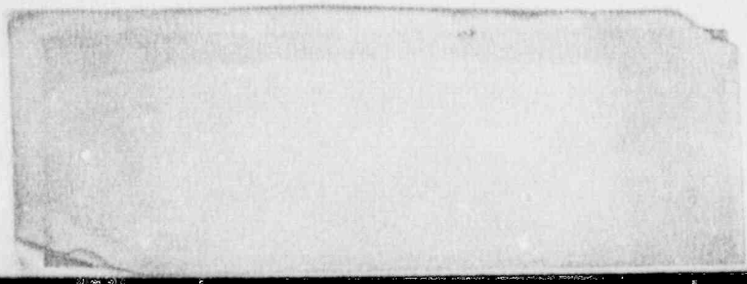

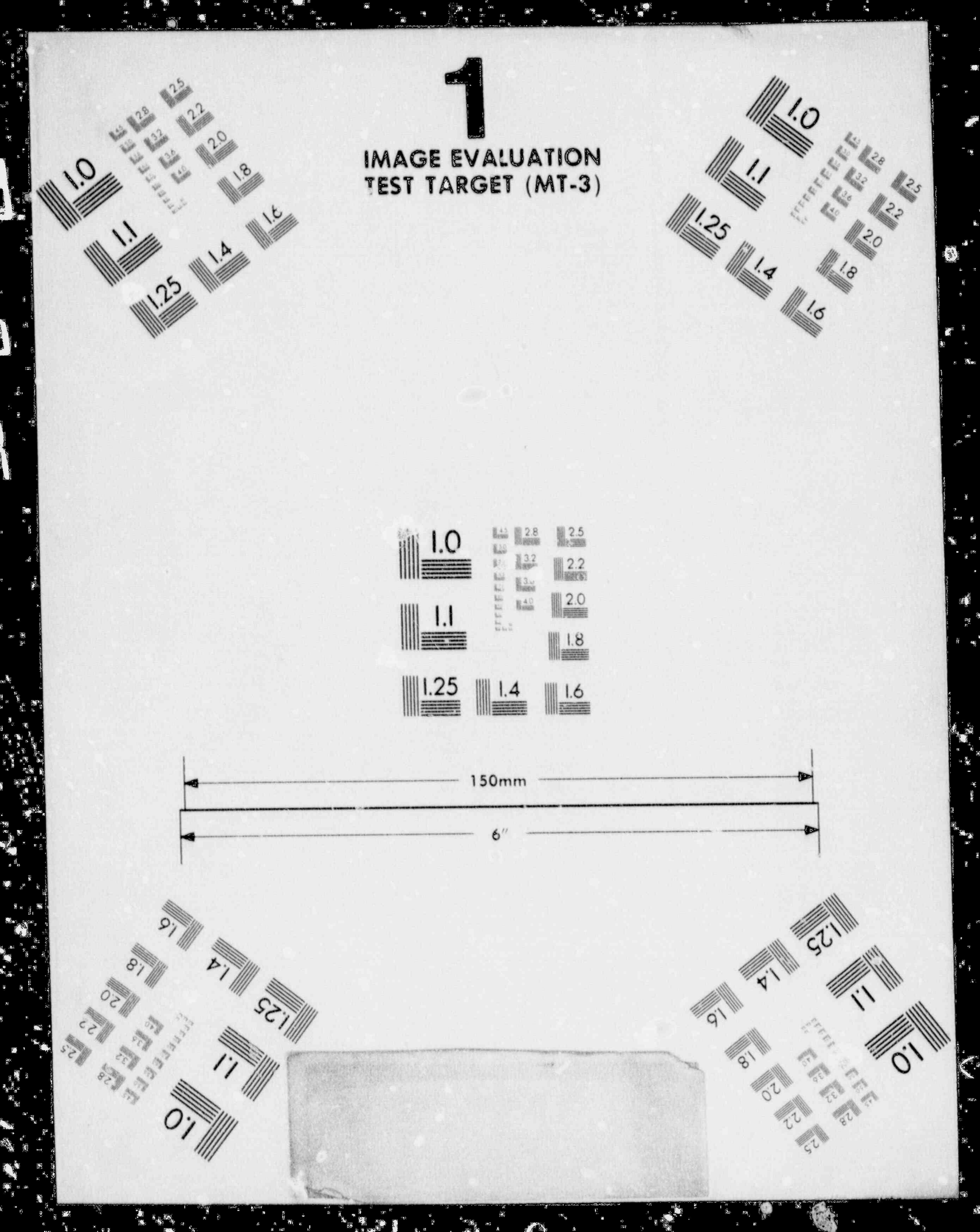
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> training and drills, the ERO has participated in three emergency preparedness exercises in addition to the September 27, 1989 exercise. A joint exercise of the onsite plan and the New Hampshire Radiological Emergency Response Plan (NHRERP) was held in February 1986. An exercise of the onsite plan was held in December 1987. A full-participation exercise involving the onsite plan, the NHRERP, the Seabrook Plan for Massachusetts Communities, and the State of Maine Ingestion Pathway Plan was held on June 28 and 29, 1988. Each of these exercises involved the testing of the onsite emergency plan which was observed and evaluated by the NRC. These exercises included the activation of the control room, the technical support center, the operational support center, the emergency operations facility, and the media center. All major elements of the onsite plan were demonstrated during these exercises. In addition to the exercise of record, the NRC takes into account the performance demonstrated in previous drills and exercises as well as the adequacy of an applicant's training, procedures, facilities, and equipment in evaluating the adequacy of an applicant's emergency response capability.

Affidavit at 3.

He explained further that:

> This annual emergency preparedness exercise ensures that the licensee's new personnel are adequately and promptly trained and that existing licensee personnel maintain their emergency response capability. The existing requirement of a pre-operational onsite exercise within one year prior to full-power license issuance is consistent with this philosophy. The guidance regarding the conduct of the onsite exercise is given in Inspection Procedure (IP) 82301 [revised August 21, 1989 to reflect the flexibility regarding the development of scenarios] which is used by the NRC staff to evaluate the exercise. This guidance states that licensee performance in the control room, the technical support center, the operational support center, and the emergency operations facility should be observed and evaluated. In addition, the NRC regional inspectors may adjust the extent of observation in each area, as needed, to concentrate on areas where past license performance was considered marginal or in need of observation.

Id. at 4.

Mr. Kantor's discussion of the importance of ensuring that new personnel are trained and that existing personnel maintain capability underscores a very important aspect of the Intervenors' motions. True, the regulation states that the within-one-year exercise is to test the licensee's onsite emergency plans. But as Mr. Kantor noted, the onsite plans have been tested several times. No fundamental flaw in those plans has been revealed. In CLI-89-19 the Commission itself noted that the onsite plan has previously been exercised and adjudicated. Slip op. at 4. When the Commission amended its rules to relax the frequency of a full participation exercise (i.e., with State and local government participation) to two years it held fast to the within-one-year onsite exercise requirement. This was because such exercises are best held closer to operation (as Mr. Kantor also explained) to ensure "that licensee's new personnel are adequately and promptly trained and that existing licensee personnel maintain their emergency response capability." 52 Fed. Reg. 16822, 16825 (May 6, 1987) Final Rule, Emergency Planning and Preparedness.

Thus it is apparent that a major purpose, the principal purpose, of the within-one-year onsite exercise is to assure training and current competency, not to test an already tested and validated emergency plan. It is not surprising that Intervenors are provided only a very narrow opportunity to mount a litigation based upon fundamental flaws of that

plan revealed by the onsite exercise -- especially since the teaching of ALAB-918 is that any training problems revealed by the exercise are readily correctable and would not involve any revision to the emergency plan. 29 NRC at 486.

But, however narrow Intervenors' opportunity to reopen the record may be, the opportunity does exist as the Commission noted in CLI-89-19, so we continue with a discussion of the merits of their motion with respect to the scope of the onsite exercise and the plan.

The exercise of the onsite plan within one year of licensing is considered by the NRC Staff to be akin to the annual exercise of the onsite plan specified in Section IV.F.2 of Appendix E to 10 C.F.R. Part 50. The Staff recognizes that the regulations do not set forth specific requirements for the scope of an onsite exercise. However, as Mr. Kantor stated, the Staff has formulated guidance in NRC Inspection Manual, IP 82302, for delineating the scope of an exercise. Each exercise is evaluated in accordance with the guidance in IP 82301, dated August 21, 1989. Kantor Affidavit at 5. The evaluation criteria of NUREG-0654/FEMA-REP-1 supporting the planning standard are reflected in IPs 82301 and 82302. The NRC Staff reviewed the objectives and scenario for the 1989 onsite exercise. The Staff utilized the guidance of IP 82302 in performing this evaluation, the same guidance used to evaluate other onsite emergency plan exercises. IP 82302 provides the

major onsite elements that should be exercised each year. Mr. Kantor stated that:

> The NRC review of the objectives and scenario for the 1989 Seabrook onsite exercise indicated that the exercise was in conformance with the guidance of IP 82302 and all of the major onsite elements would be exercised.

Kantor Affidavit at 5.

Mr. Kantor then addresses specific examples alleged by Intervenors to demonstrate that the exercise was too narrow in scope. First he comments on the fact that the September 27, 1989 onsite exercise did not advance beyond a declaration of site area emergency (SAE) which was alleged by Intervenors to be an exercise failure. NRC guidance to licensees and applicants on the conduct of "off-year exercises" of onsite emergency plans (i.e., exercises other than the full-participation biennial exercises) specifies that the onsite exercises are not required to proceed to a General Emergency condition. (See NRC Information Notice No. 87-54, attached to Mr. Kantor's affidavit.) As noted in the guidance, the flexibility within the requirements contained in the emergency planning rules allows for the development of realistic scenarios which can improve emergency response capability. Kantor Affidavit at 11-12.

Aside from the Staff's expert judgment that a site area emergency is a realistic scenario for the off-year onsite exercise, the Board believes that there is a patent flaw in the logic of Intervenors' allegation that the scenario must

include a major release of radioactivity. We would expect that at least sometimes a demonstration of adequate training and current competency to execute the onsite plan would not begin with a General Emergency and a major release. The capability to avoid such a situation should also be demonstrated. See also Fox affidavit at 3-4.

Mr. Kantor addressed Intervenors' objections that the exercise did not involve a medical team from local support services, did not involve the dispatch of any field monitoring teams, and did not involve any monitoring and decontamination centers for onsite personnel. Mr. Kantor reported that field monitoring teams were in fact a part of the exercise scenario. See Inspection Report No. 50-443/89-10. See also Ellis Affidavit, paragraphs 17-20. It seems that Intervenors are simply mistaken on this point.

Mr. Kantor stated further that the exercise of medical support teams and the monitoring and decontamination of onsite personnel are elements of the plan that need not be performed in conjunction with each onsite exercise. Medical support services have been satisfactorily demonstrated in previous exercises and drills. (See Findings and Determinations for the Seabrook Nuclear Power Station, FEMA, dated December 1988, at 39.) Monitoring and decontamination of onsite personnel are activities which are routinely performed as part of plant operation activities. The demonstration of this activity as part of an exercise is an

element which can be tested over a 5-year period. Kantor Affidavit at 5-6.

Finally Mr. Kantor offers the expert opinion, unchallenged by any evidence, that the September 27, 1989 exercise of the Seabrook onsite plan was of sufficient scope to test the adequacy of the Applicants' emergency response capability. Id. at 6. Mr. Kantor's additional conclusion that the exercise was in conformance with 10 C.F.R. § 50.47 (b)(14) and 10 C.F.R. Part 50, Appendix E, Section IV.F.1 (id.) is valid to the extent that he is an NRC official who must see to the implementation of those regulations. But we do not accept it as a substitute for the legal conclusion at which we must arrive on the record before us. For the same reasons we note but do not adopt his conclusion that Intervenors' motion does not raise a significant safety issue. Id. at 7.

The Staff also submitted the affidavit of Edwin F. Fox, Jr., who was the Team Leader of the NRC Inspection Team during the observation and evaluation of the September 27, 1989 "partial participation exercise" at Seabrook. Mr. Fox's affidavit is largely a corroboration of Mr. Kantor's affidavit. He explains in greater detail why it is not necessary for the exercise scenario to reach the General Emergency classification so long as the major portions of the response plan can be tested. These major portions are specified in NRC Inspection Manual, Inspection

Procedure 82302 ("IP 82302") as Accident Detection and Assessment; Emergency Classification; Notification of Onsite and Offsite Emergency Responders; Communications; Radiological Exposure Control; Protective Action Recommendations; Staff Augmentation; and Shift Staffing. These items are evaluated during each annual exercise. The other portions of the plan are considered to be of lesser significance and are observed and evaluated over a five-year period. Fox Affidavit at 4.

Mr. Fox also addressed Intervenors' assertion that the scope of the exercise was insufficiently comprehensive in that it did not require a demonstration of Applicants' personnel to formulate or communicate PARs to offsite officials. E.g., Motion for Summary Disposition, Statement of Material Facts, at 3. Mr. Fox noted that the Inspection Report (at 6), states that "Discussions were held regarding the potential need for protective actions and at what point they would become necessary if conditions worsened." Mr. Fox notes also that:

> I also observed the Recovery Manager discuss with the designated representatives of the State of New Hampshire and the New Hampshire Emergency Response Organization (State of Massachusetts) on several occasions the need for protective actions. These discussions included those that had already been taken or recommended by the States and those that the utility would be recommending if conditions degraded at the plant. The scenario events were sufficient to trigger meaningful offsite protective action decision making.

Fox Affidavit at 4-5.

Moreover as Mr. Fox states in his second affidavit, since the scenario did not call for an offsite release, no PARs were required.[8] Fox 2, at 3-4. In addition, Section 50.47(b)(10) does not, contrary to Intervenors' suggestion, require that PARs be prepared or implemented during an onsite exercise. The plan need only contain a range of protective actions. Id. In any event, consistent with the guidance in IP 82301, dose assessment capability was promptly established in the EOF.

Mr. Fox also challenges Intervenors' dependence upon NRC's Inspection and Enforcement Manual ("IE Inspection Procedure 82301") with its attachment, NRC's Exercise Evaluation Criteria for Onsite Exercises, dated July 1, 1983, which states: "Sections 1, 2, and 3 [of the Evaluation Criteria] (control room, technical support center, and emergency operating facility) must be evaluated annually and the entire program must be evaluated in the initial exercise prior to escalation of power beyond 5%." (Emphasis added by Mr. Fox). He explained that the July 1, 1983 version of IP 82301 was superseded by the August 21, 1989 version utilized as guidance for the September 1989 Seabrook Exercise. The section quoted above is not in the current version of IP 82301.

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[8]Applicants' expert, Mr. Ellis, states that the capacity to formulate and communicate PARs to offsite officials was demonstrated. Ellis Affidavit at paragraph 10.

The NRC Staff submitted a second set of affidavits of Messrs. Kantor and Fox directed to Intervenors' Second Motion and Contention Ex-2. Kantor 2 and Fox 2.

Mr. Kantor counters the Intervenors' allegation that shift-change capability must be demonstrated during the onsite exercise (but was not) with the observation that Applicants' capability to perform a shift change was demonstrated in the June 1988 full participation exercise and that given the large number of persons qualified to staff the emergency response organization there is no need to demonstrate shift-change capability during each onsite exercise. Kantor 2, at 3. See also Fox 2, at 7-8 (capability for 24-hour staffing). In addition the affidavit of Mr. Ellis, presented by the Applicants, notes that the capability to provide 24-hour emergency response was included as an objective of the exercise, but that no specific objective regarding actual replacement of personnel was included. Ellis Affidavit at paragraphs 4-9.

Intervenors claim that the scope of the onsite exercise should have included, but did not include, a demonstration of the capability of early notification of the public; that the public notification system (sirens) was not tested; nor was the capability to mobilize and deploy the VANS system demonstrated. Statement of Material Facts at 2. Mr. Kantor addresses this allegation, with the simple, adequate, and unrefuted explanation that those activities require the

involvement of an offsite organization, and "hence, is not appropriate for an exercise of the onsite plan." Kantor 2, at 4.

We have also considered the Affidavit of Mr. Anthony M. Callendrello, Emergency Planning Licensing Manager for New Hampshire Yankee. Although we concentrate on the evidence provided by the Staff's experts because of their official regulatory responsibilities, Mr. Callendrello's statements are entitled to substantial weight. He has established his credibility with this Board by testifying many times over the entire spectrum of emergency planning issues. He concludes that flaws alleged by Intervenors regarding the scope of the onsite exercise did not result in any major portion of the plan not being tested nor would any fundamental flaws result. His affidavit, in conjunction with that of his colleague, Mr. Ellis, provides a well-reasoned basis for that conclusion. Callendrello Affidavit, passim.

Conclusions on Significance

Accordingly, the Board concludes that the Intervenors' motions do not allege with bases, or at all, that the 1989 onsite exercise revealed fundamental flaws in the respective emergency plan. The contentions do not allege with the requisite bases, or at all, that the 1989 exercise was insufficient in its scope to reveal fundamental flaws in the

plan. We find that the exercise was sufficient in scope and no fundamental flaw was revealed. Intervenors' motions do not address a significant safety issue. They have defaulted in their burden to establish by affidavit or otherwise that their motion addresses a significant safety issue. The Affidavits of Messrs. Kantor, Fox, Callendrello, and Ellis are credible, relevant, and sufficient. They establish by a preponderance of the evidence that the 1989 exercise was sufficiently comprehensive in scope, and that no fundamental flaws in the plan were revealed by that exercise.

Five Factors

Having found that the contentions do not meet the threshold substantive relevance standards required for exercise contentions, and having found that the motions do not present a significant safety issue, our disposition of the motions will not turn on the five factors to be considered in entertaining non-timely contentions. Nevertheless we note our agreement with the NRC Staff that the arguments supporting Intervenors' legal theory underlying the contentions, submitted with the Motion for Summary Disposition, could and should have been submitted with the earlier motions seeking admission of the

contentions.[9] Since these legal arguments are essential, albeit unavailing, to Intervenors' position, the motions seeking the admission of the contentions are late without good cause for the failure to file on time.

Intervenors' failure to discuss the technical significance of the contentions bodes ill for any prospect that their participation might reasonably be expected to assist in developing a sound record.

However the other three factors do not weigh against Intervenors. While we might fear that the Attorney General's announced intention to delay the proceeding would have that effect, it would be the responsibility of the Board to prevent that from happening solely as a license-blocking strategy. Where, as here, the opportunity to litigate is assured in matters material to a licensing decision, the potential for a necessary and proximate delay in the proceeding to afford that opportunity may not be a factor in denying the opportunity. But since the Intervenors have not established the right to litigate their contentions, that factor is of no moment. Clearly there are no other means whereby Intervenors may protect their interests, nor will other parties do so. On balance, the five factors weigh against admitting the contentions.

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[9]NRC Staff Response to Intervenors' Motion for Summary Disposition of Proffered Contentions JI-Onsite Ex-1 and JI-Onsite Ex-2, November 8, 1987, at 4-5.

Motion for Summary Disposition

The Summary Disposition rule, 10 C.F.R. § 2.749, permits disposition of matters involved in the proceeding. In a literal sense, Intervenors are correct in their claim that, in the words of the regulation, "there is no genuine issue to be heard." But this is because the Intervenors have failed to have any such issue accepted. Therefore the Motion for Summary Disposition should be denied for that reason alone. Even if such an issue had been accepted by the Board, the affidavits of Messrs. Callendrello and Ellis, submitted with Applicants' Response to the Motion for Summary Disposition establish material facts as to which there would be a genuine issue. The Motion for Summary disposition is denied on both scores.

Second Broad Issue

The second broad issue presented by the Motions is whether the NRC Regulations require, at a minimum, an onsite exercise broader in scope than that conducted on September 27, 1989.[10] As we understand Intervenors'

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[10]There is considerable doubt whether the Board should entertain the Intervenors' purely legal bases for their contentions. First, as we concluded in the preceding section, the essential legal bases for the contentions were submitted late without good cause and should be rejected on that account alone. Moreover, it appears that the Commission did not contemplate a purely legal approach to onsite exercise litigation when it announced the substantive "fundamental flaw" standard for such contentions at this

argument, the Commission's "fundamental flaw" standard is applicable only to the results of an exercise which itself satisfies minimum exercise scope standards as set out in Section IV.F.1. Absent such an exercise, which they argue is always a material issue subject to pre-license litigation, there is no compliance with Section IV.F.1 regardless of whether the results of the inadequate exercise that was conducted did or could reveal fundamental flaws. We find that Intervenors have come before us empty-handed.

In reaching this conclusion, we begin, as do Intervenors in mounting their legal challenge, with the language of 10 C.F.R. Part 50, Appendix E, Section IV.F.1. See ALAB-900, supra, 28 NRC at 287. However, unlike Intervenors, we believe it is important to clearly indicate

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stage of the proceeding. See CLI-89-19, slip op. at 4 n.5. However, absent some clear Commission guidance to the contrary, this Board clearly has jurisdiction to consider any meritorious challenge, legal or factual, to the adequacy of the 1989 onsite exercise. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 791-92 (1985).

Despite our conclusion that the Intervenors have failed to satisfy the provisions of 10 C.F.R. § 2.734(a)(2) (motions to reopen record), we elect to consider the merits of Intervenors' underlying construction of 10 C.F.R. Part 50, Appendix E, Section IV.F.1. The Commission did not specifically address the question of whether a "fundamental flaw" must be alleged at this juncture before pre-license litigation of exercise contentions is proper. Because of this, we hesitate to reject Intervenors' legal argument without any evaluation of the merits of their construction of the regulatory requirement at issue. More importantly, we believe that this proceeding is better served if we address all the bases advanced by Intervenors in support of their contentions.

the actual structure of Section IV.F.1, including the relationship of footnote 4 to the specific words and phrases of this controlling guidance:

> A full participation[4] 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. If the full participation exercise is conducted more than one year prior to issuance of an operating license for full power, an exercise which tests the licensee's onsite 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.
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> [4]"Full participation" when used in conjunction with emergency preparedness exercise for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capabilities 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.

On its face, Section IV.F.1 appears to set out a straightforward and logical structure for the nature and timing of required pre-license exercises. As we read the first sentence and its accompanying footnote, a "full

participation" exercise of the onsite and offsite emergency plans must be conducted before a full power license is issued. Pursuant to the second sentence, that "full participation exercise" must occur within two years prior to any licensing authorizing operation above 5 percent and must include both plume and ingestion exposure state and local governments. Where the integrated onsite and offsite exercise occurs more than one year prior to a full power license, the third sentence requires that an exercise of the licensee's onsite emergency plan must be conducted within one year before the full power license. The fourth sentence provides that State and local governments need not participate in this supplemental test of the onsite emergency plan. From this, the fundamental purpose of Section IV.F.1 is to ensure that a "full participation" integrated exercise of the onsite and offsite emergency plans involving the licensee and all relevant governments must take place no more than two years before a full power license notwithstanding the timing of any subsequent supplemental (and presumably, limited) exercise of the licensee's onsite plan.

Intervenors suggest that a construction of Section IV.F.1, such as ours above, is in error. Based on a segmented analysis of each sentence or portion of a sentence, Intervenors assert that the true meaning and exact requirements of Section IV.F.1 flow, not from the face of

the paragraph, but rather lurk within its interstices. Under the Intervenors' approach, the phrase "full participation" as used in the first sentence of the paragraph and in its accompanying footnote define the Commission's generic requirements regarding the necessary "scope, level or extent of the participation of the participants (the 'how' of participation in an exercise)" of any exercise.[11] Memorandum[12] at 11. Intervenors go on to construe that the second, third and fourth sentences of the paragraph as addressing "what entity or entities must participate (the 'who' of such participation)" in a particular type of exercise. Id. at 11-12.

From this, Intervenors argue that while Section IV.F.1 permits the "who" to change depending upon the type of exercise being conducted (i.e., pre-license or post-license and annual or biennial), it is clear to them that the paragraph requires the "how" to remain the same for each participant regardless of the type of exercise undertaken. Thus, according to Intervenors, a licensee-only onsite exercise (whether the pre-license one-year exercise or a

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[11]While Intervenors characterize this asserted aspect of Section IV.F.1. as the "how" of participation, they in fact deal with "what" aspects of the onsite emergency plan must be exercised no more than one year prior to the issuance of a full power license.

[12]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 ("Memorandum"), October 18, 1989.

post-license annual 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." Memorandum at 14. It is a credit to the rhetorical talents of Intervenors' counsel that they advance a possible (but not the only) interpretation of Appendix E, Section IV.F.1 which, on first blush, appears reasonably plausible yet is, upon analysis, devoid of merit.

The illogic of Intervenors' proffered construction of Section IV.F.1 is demonstrated by applying it to the particular provision of the paragraph applicable to the specific facts now before this Board. The third sentence of the paragraph provides that:

> If the full participation exercise is conducted more than one year prior to issuance of an operating license for full power, an exercise which tests the licensee's onsite emergency plans shall be conducted within one year before issuance of an operating license.

Notwithstanding the fact that the sentence appears to make a clear distinction between "the full participation exercise" in its first clause, and "an exercise which tests the licensee's onsite emergency plans" in its second clause,

Intervenors invite us to simply modify every reference to an "exercise" with the phrase "full participation."[13]

Thus, if Intervenors' reading were to be correct, this sentence must be read to mean (as distinguished from what it appears on its face to state) that in the absence of a "full participation" exercise of both onsite and offsite emergency plans testing the major observable portions of the plan within one year prior to the issuance of a full power license, the applicant must conduct a full participation exercise of its onsite emergency plan testing the major observable portions of the plan within one year prior to the issuance of a full power license. In essence, Intervenors argue that Section IV.F.1 requires a "full participation" integrated exercise of either the onsite/offsite emergency plans or the onsite emergency plan within one year prior to a full power license.

To adopt Intervenors' approach would require that we assume the Commission was incapable of drafting even a marginally clear regulatory requirement. We are further required to assume that the Commission has chosen to remain

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[13]In addition to this requested act of semantic magic, Intervenors ask us to ignore the fact that the second sentence of footnote 4 refers to "the major observable portions of the onsite and offsite emergency plans." If Intervenors' construction is correct, one would have assumed that the Commission would have used the conjunctive "or" or "and/or" to indicate that the requirement of a full participation exercise applied to exercises involving just the onsite emergency plan.

silent as to the true meaning of Section IV.F.1 in the face of numerous opportunities to address the NRC Staff's, applicants' and licensees' long-standing and, according to Intervenors, incorrect application of the paragraph. We find neither assumption reasonable.

Moreover, both the Applicants and the Staff advance a compelling argument that the purpose of the supplemental, one-year pre-license onsite exercise was substantially identical to that of the annual, post-license onsite exercise: to ensure that emergency response personnel retain sufficient knowledge and expertise to actuate an emergency already determined through a reasonably current "full participation" exercise to be adequate and without fundamental flaws. See Applicants' Answer at 14-17 and NRC Staff Response at 8-13. To the extent Intervenors cite and characterize isolated snippets of administrative history to support their strained reading of Section IV.F.1, we are bound to reject their construction in favor of the clear import of the language of the section. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982).

While Section IV.F.1 may not represent the zenith of draftsmanship,[14] we find that Intervenors' construction of the paragraph, which exacerbates its acknowledged

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[14] See ALAB-900, 28 NRC at 295 n.20.

ambiguities, is mandated neither by the clear language of Section IV.F.1, nor by the administrative history underlying that regulatory requirement. We conclude that the one-year, pre-license onsite exercise need not encompass all "major observable portions" of the onsite emergency plan "as is reasonably achievable without mandatory public participation."

ORDER

For the reasons set out herein, Intervenors' motions to admit contentions regarding the September 27, 1989 Seabrook onsite exercise are denied. Intervenors' motion for summary disposition is also denied.

ATOMIC SAFETY AND LICENSING BOARD

Richard F. Cole
ADMINISTRATIVE JUDGE

Kenneth A. McCollom
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

December 11, 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 LB M&O (RULING ON MOTIONS...) 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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Docket No.(s)50-443/444-OL
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Dated at Rockville, Md. this
11 day of December 1989

Patty Henderson
Office of the Secretary of the Commission

*Received by Overnight Express Delivery.