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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Howard A. Wilber

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

BRIEF OF INTERVENORS IN SUPPORT OF THEIR APPEAL OF LBP-89-38

COMMONWEALTH OF MASSACHUSETTS

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INTRODUCTION

The Massachusetts Attorney General ("Mass AG"), the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (the "Intervenors") submit this brief in support of their appeal of LBP-89-38 docketed December 11, 1989.

PROCEDURAL POSTURE OF THIS APPEAL

Intervenors again note that they pursue this further intra-agency appellate review of the Seabrook Licensing Board's actions regarding the full power licensing of Seabrook Station to protect their rights to such further intra-agency appellate review and not in derogation of their rights to have final agency action reviewed in the Court of Appeals for the District of Columbia Circuit at this time.

As this Appeal Board may be aware, Intervenors filed a Petition for Review of the Licensing Board's November 9 license authorization with the Court of Appeals on December 4, 1989. The Commission's December 8 Motion to Dismiss and the Intervenors' January 5 Motion for Expedited Review are currently pending. As grounds for its January 5 motion, the Intervenors argued, inter alia, that the Licensing Board's application of the record reopening standard to the Intervenors' low power contentions (as set forth in Intervenors' December 19, 1989 Brief on Appeal of LBP-89-28 filed with this Board) and to their September exercise contentions (as set out below) supports a judicial presumption of bad faith and that administrative and judicial integrity requires that the Court of Appeals review the Licensing Board's disposition of these issues prior to full power operation in accordance with an effective full power license. In response, the Commission represented to the Court that these issues are presently before the Commission.

Intervenors have only sought further intra-agency review after November 13, 1989 to protect their rights to such review if: 1) the Commission or the Court were to grant Intervenors' various motions for mandatory relief (revoking the November 9 license authorization on the grounds that it is a legal nullity because it unequivocally contravened the mandate of ALAB-924) thereby requiring that Seabrook licensing issues continue before the agency or 2) the Commission or the Court were to grant Intervenors' pending (before the Commission) and future

(before the Court if and when necessary) motions for a stay of the effectiveness of the November 9 license authorization pending the completion of further intra-agency appellate review.[1/] In the event no stay were granted pending the completion of further intra-agency appellate review,[2/] and judicial review of the merits of the November 9 license authorization were to proceed, Intervenors would withdraw,

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1/ A stay pending further intra-agency appellate review is one possible outcome of the Commission's immediate effectiveness review. 10 CFR 2.764(f)(2). Indeed, Intervenors have argued to the Commission that the Licensing Board's application of the record reopening standards to their low power testing and September onsite exercise contentions and the fact that this application prima facie supports a judicial presumption of bad faith is precisely the kind of error that should be reviewed and reversed prior to lifting the immediate effectiveness stay. (Indeed, such a reversal and the concomitant recognition of Intervenors' rights to a hearing on material issues prior to licensing would require further a reversal (or vacation) of the November 9 license authorization, predicated, as it obviously was, on the denial of Intervenors' rights to a hearing on these issues.) Intervenors have also argued to the Commission that the Licensing Board's "bad faith" supports a stay pending further agency review pursuant to 10 CFR 2.788. If the Commission were to deny Intervenors' requests for a stay and otherwise decide pursuant to its immediate effectiveness review that no stay pending administrative review is called for thereby lifting the §2.764 stay and making the license authorization effective, Intervenors would then seek a stay from the Court of Appeals. Such a judicial stay could well remain in place pending the completion of both any further intra-agency appellate process that the Court wishes to permit (as noted, the Commission has argued in opposition to expedition that issues are still before the agency) and Court review of the November 9 action or of any such further agency appellate process (assuming such further agency review does not moot judicial review by resulting in license revocation).

2/ This would not mean that the Court had denied a stay request in toto. The Court may well deny a stay pending further administrative review because it sees no benefit to further agency review on the merits but grant a stay pending judicial review because it finds Intervenors have met the standards for such a stay. In this regard, Intervenors note that they have sought expedited judicial review of the merits with all briefing complete by February 14, 1990.

terminate or otherwise request that intra-agency review be held in abeyance thereby choosing to have the Court of Appeals review the agency's final licensing action notwithstanding the existence of an intra-agency appellate scheme, just as Congress contemplated in the Atomic Energy Act ("AEA"), 42 USC §2239(b).[3/]

PRELIMINARY COMMENT ON LICENSING BOARD'S DISPOSITION OF SEPTEMBER, 1989 EXERCISE ISSUES

Before turning to the procedural facts and arguments that support Intervenors' position on appeal of the Licensing Board's decision of December 11, 1989 (LBP-89-38), Intervenors note the remarkably peculiar status of that decision itself.

1. First, on November 9, 1989 the Licensing Board authorized the issuance of a full power license for Seabrook Station. At that time, Intervenors' September onsite exercise contentions had all been filed and placed before the Board for decision. As discussed below in detail, Intervenors' rights to

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3/ See the Hobbs Act, 28 USC §2342 and the Administrative Procedure Act ("APA"), 5 USC §704. See also Petitioners' [Intervenors'] December 18 Opposition to Respondents' Motion to Dismiss filed in the Court of Appeals, Docket No. 89-1743, at 7-15. For the convenience of this Board, this pleading is attached as Exhibit 1 hereto. The relationship between "finality" and "exhaustion" is described at 1-7.

litigate material licensing issues translated in these circumstances at the very least[4/] into a right to have the Board address Intervenor efforts to secure a "hearing",[5/] even if after addressing them, the Board were to deny admission to all Intervenor contentions. This is so because a Licensing Board can not simply ignore pending requests by intervenors for a pre-licensing hearing if those requests meet all of the formal requirements imposed by the NRC for getting the legal attention of a Licensing Board. Yet such a primitive violation of due process is exactly what the Smith Board accomplished on November 9 when it authorized license issuance with absolutely no discussion at all of these September exercise issues. The only statement concerning these issues in the Board's 571 page magnum opus appears at 569 n.87, last sentence:

> We shall also explain why the pendency of several motions to submit new contentions does not preclude the issuance of the operating license.

4/ If, by some miracle, the Licensing Board were to have admitted Intervenors' contentions then Intervenors' rights to a hearing prior to licensing would have expanded to include disposition of these contentions prior to licensing. Before admission, Intervenors' hearing rights under the AEA at least equal the right to have the admissibility decision made before licensing. The Smith Board denied even this right.

5/ Of course, no evidentiary hearing was required on Intervenors' contentions in their view because they alleged that the September, 1989 exercise was insufficient in scope as a matter of law. Intervenors' "hearing" on such issues would have actually meant a decision on the merits of Intervenors' legal claims of insufficient scope, which Intervenors' sought by means of their October 18 Motion For Summary Disposition. See infra.

2. The promised "explanation" docketed on November 20, 1989 (LBP-89-33), of course, did not provide this explanation but promised yet another "explanation." LBP-89-33 at 40. Moreover, at no time during the display of its apparently limitless capacity[6/] to issue post facto rationalizations for its November 9 licensing action, has the Smith Board even addressed, let alone explained, how it thought it could authorize license issuance before deciding pending motions for a hearing. Had it bothered to focus on this issue, the Board would have found no cases[7/] permitting it simply to ignore or

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6/ On November 20, the Board issued LBP-89-33 its first "explanation". On November 28, the Board issued LBP-89-36 in response to the Applicants' November 22, 1989 Advice to the Licensing Board with Respect to LBP-89-33. (In keeping with the Smith Board's high regard for Intervenors and their rights to be heard, LBP-89-36 issued before Intervenors even received the Applicants' Advice!) On December 11, the Board issued LBP-89-38, dealing with the September exercise. The Board issued LBP-90-1 on January 8, 1990 ringing in the new year with its judicious treatment rationalizing its license authorization notwithstanding Intervenors' EBS contention also pending as of November 9 which the Board could not possibly have even considered at the time because neither the Staff nor Applicants had responded to it or its October 30 virtually identical precursor by November 9. Next, on January 9, 1990, the Board issued LBP-90-2 denying Intervenor's Motion to Reopen Regarding A Proposed License Amendment. Finally, in a procedural ephiphany, the Board issued a Memorandum and Order dated January 11, 1990 soliciting advice from "interested parties" on how it might proceed to finally obey ALAB-924 and "how they propose to participate in the resolution of the remanded issues." January 11 Order at 1.

7/ Of course, in light of the Smith Board's rather expansive view of its own power, finding no cases permitting it to proceed as it did would fall far short of slowing the Board down. The test applied by the Smith Board is whether any case prevented it from acting as it did. See its November 20, 1989 "explanation" (LBP-89-33) at 3 (noting that it found no case foreclosing it from issuing a license notwithstanding that its New Hampshire plan findings had been reversed by the Appeal Board). Interestingly, there is little or no precedent that (footnote continued)

postpone pending motions for a prelicensing hearing on issues at the time it authorizes a license for the obvious reason that by ignoring or postponing disposition of such motions it is necessarily denying these motions de facto.[8/]

3. Even the Board evidenced at least a subliminal awareness of the fact that its November 9 action constituted a de facto denial of Intervenors' exercise contentions. In its rather incoherent discussion of the exercise issues in LBP-89-33 (November 20, 1989) the Board stated at 37-38 (emphasis supplied):

> 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 CFR Part 50, Appendix E. IV F.1. Subject to reasonable procedural requirements, Intervenors may challenge Applicants' compliance with the onsite exercise requirements. [Citations omitted] 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.

7/ (footnote continued) Intervenors have found applicable to the November 9 action regarding: 1) the pendency of the certified question; 2) the contravention of this Board's mandate in ALAB-924 and 3) the failure to even address pending motions. Obviously, if a Board is prepared to act so blatantly outside the law, there is little prior precedent one can find to restrain it.

8/ Cases do exist which affirm the Commission in lifting its immediate effectiveness stay notwithstanding the pendency of motions to reopen the record and grant a hearing. The predicate for Court approval of this procedural sequence, of course, is that the motions for a hearing were filed after final agency action (the license authorization) thereby requiring that the record reopening standard be met. The pendency of these motions do not preclude the Commission from permitting the license authorization to become effective. See discussion and cases cited in Intervenors' December 18 Opposition to Motion to Dismiss at 15-20 (Exhibit 1 hereto).

Logically, the only possible basis for the Board's de facto denial on November 9 of the admissibility of these contentions is the application of the record reopening standard and the de facto (and sub silentio) finding that that standard was not met.[9/] As discussed infra, the application of this standard to material licensing issues prior to final agency action violated Intervenors' hearing rights and supports a presumption of bad faith.

4. Thus, in these circumstances, the Board's bifurcated disposition of these issues (ruling on November 9 and explaining itself on December 11) presents some serious concerns about the status of the December 11 "explanation" and even this Board's jurisdiction:

a. Intervenors believe that the November 9 licensing action is "final agency action" reviewable by the Court of Appeals. What is before the Court is the Board's decision which in relevant part de facto (and sub silentio) denied the September exercise contentions based on the record reopening standard.[10/] The Board had no jurisdiction on December 11 to

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9/ Intervenors discuss below the Board's utterly outrageous (indeed outright funny) determination that the exercise contentions did not meet the late-filed contention standard.

10/ The alternative is that the lower Board simply authorized the license with not even a tacit ruling on these contentions. If applying an impermissible standard supports a presumption of bad faith, applying no standard at all because issues are simply ignored in toto should support a conclusive presumption in this regard.

issue this "explanation" after the Intervenors sought judicial review on December 4, 1989. As such, if understood to be anything more than or other than a statement that the Licensing Board did apply the record reopening standard to these contentions on November 9, the December 11 "explanation" could affect the merits of the legal issues now pending before the Court of Appeals.[11/] This the Licensing Board had (and has) no jurisdiction to do. Thus, this Appeal Board should strike the December 11 decision as beyond the jurisdiction of the lower Board to the extent that it is understood as more than a defense of the Board's application of the record reopening standard.[12/]

11/ As discussed infra, Intervenors are not certain that LBP-89-38 does anything more than or other than attempt (unsuccessfully) to explain how or why it applied the motion to reopen standard, and why such application was permissible. Obviously, if the Board is setting forth an alternative basis for denying the admissibility of these contentions, this alternative was never set forth expressly or impliedly on November 9. Thus, such an alternative basis would be a post facto rationalization in its purest form.

12/ This Board's own authority to strike the December 11 decision is not itself limited by the pendency of the Court of Appeals case, because striking the December 11 decision not only does not interfere with the merits of the case before the Court of Appeals but such action would be taken to prevent an inferior board from potentially interfering with the case now before the Court. See Intervenors' January 19 Motion to Enjoin the Licensing Board filed in response to the Board's January 11 procedural order on the remanded issues, citing cases.

b. In the alternative, this Board should treat the December 11 "explanation" as the post facto rationalization it obviously is in light of the circumstances. No deference on appeal to any determinations by the lower Board is appropriate lest this Board be seen as lending its prestige and authority to the "sentence first, verdict later" procedure adopted by the Smith Board on November 9 ostensibly in the interest of "efficiency." LBP-89-33 (November 20, 1989) at 38.[13/]

c. Finally, this highly peculiar procedural process puts this Board's own jurisdiction in doubt. On January 2, 1990 the Chairman of the Atomic Safety and Licensing Appeal Panel reconstituted the Appeal Board

> for that portion of the emergency planning phase of this operating license proceeding concerned with appeals from the Licensing Board decision (LBP-89-38) regarding the 1989 onsite emergency exercise.

Obviously, Intervenors filed a Notice of Appeal of LBP-89-38 within the requisite time period to protect their rights to have the Smith Board's disposition of their onsite exercise contentions reviewed. Yet, that disposition occurred on

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13/ Under the AEA it would not be lawful for the NRC to structure its licensing procedure as follows: after receipt of a license application, time is provided for the filing of contentions. After all contentions are filed, the Licensing Board then authorizes a license. Finally, in a seemingly endless series of decisions the Board post facto disposes of these contentions, all the while maintaining the illusion (for public consumption) that if a contention were to be admitted then the license authorization may have to be revoked or vacated. Put in this way, even the Smith Board would see something at least peculiar here. (Although it would find no cases foreclosing such an ingenious scheme). Yet, that is precisely what happend here.

November 9, 1989 in LBP-89-32 and not on November 20, 1989 in LBP-89-33 or on December 11 in LBP-89-38.[14/] Intervenors have already filed a notice of appeal of LBP-89-32 (and LBP-89-33)[15/] which appeal is before a different panel of the Appeal Board.

In these circumstances, it is unclear what this Appeal Board panel has jurisdiction over. If it is just the December 11 decision set forth in LBP-89-38 and the Board is believed when it asserts at 4 of that decision that the onsite exercise issues had not been decided before December 11, then Intervenors sought judicial review on December 4 of a November 9 decision that totally ignored pending motions.[16/] In this case, as noted

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14/ On first blush, this assertion might be disputed by the Smith Board. For example at 4 of LBP-89-38, the Board using the subjunctive asserts that on November 20 (in LBP-89-33 at 37-40) it "reported that the motions would be denied." Thus, on December 11, the Board is asserting that on November 9 the motions were not yet ruled on (i.e. denied). Yet, as discussed above, how could the Board, then, simply have ignored these issues? Putting the actions of the Board in the best possible light means that on November 9 it at least tacitly and wrongfully applied the record reopening standard to these issues supporting a presumption of bad faith. If it did not decide these issues at all, its November 9 final agency action is even more arbitrary and capricious (if this is possible).

15/ See Mass AG's November 22 Notice of Appeal of LBP-89-32 noting that review is also sought of LBP-89-33.

16/ Intervenors have represented to the Court of Appeals that the Board on November 9, 1989 de facto ruled on the onsite exercise contentions, tacitly applying the record reopening standard, and thereby acted in bad faith. Intervenors believe that this reconstruction of events flows as a matter of law from the fact that the Board authorized a license and took "final agency action" with these issues before it. Put another way: Intervenors believe that as a matter of law it is not possible for a Licensing Board to authorize a license and take final action with motions for a prelicensing hearing pending without denying them expressly or impliedly. The Board subjectively believes not only that it can do this (although at no time has it supported this assertion with a single case) but that it did do this.

above, this Board has jurisdiction over the lower Board's December 11 decision denying Intervenors' motions and since this decision issued after jurisdiction passed to the Court of Appeals, this Board should simply strike LBP-89-38 as a legal nullity because it interfered with the merits of the case Intervenors had put before the Court.

Alternatively, as Intervenors believe, if the disposition of these onsite exercise contentions occurred on November 9 then the December 11 decision is of no legal significance at all except to the extent that the Board attempts to defend what it obviously did on November 9; i.e. tacitly apply the motion to reopen standard and deny these contentions because they are not safety significant.[17/] Yet, arguably this error is before another panel of this Board.

In these circumstances,[18/] Intervenors proceed on the assumption that this Board has jurisdiction over both LBP-89-38

17/ Very little is clear from a review of 35 to 40 of the Board's November 20 first "explanation" except that it was applying (or was going to apply) the motion to reopen standard to these contentions. LBP-89-33 at 39. As discussed below, such application is indefensible as a matter law and is a clear violation of the holding of the Court of Appeals in San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1316-1317 (D.C. Cir. 1984) ("Mothers for Peace").

18/ Intervenors find this procedural posture to be absurdly complicated, almost to the point of indeterminacy. Yet, these complications flow from the unreasoned, unique and unlawful disposition of Intervenor efforts to secure a hearing by the Smith Board. Intervenors refuse to allow their rights to a fair hearing (including their right to have the agency's November 9 final licensing action judicially reviewed without impermissible post facto adulteration by the Smith Board) to be affected in any way by the Smith Board's apparently innate capacity to complicate and obfuscate everything it touches.

and that part of LBP-89-32 (and LBP-89-33) which tacitly (or expressly yet tentatively in LBP-89-33) denied Intervenor exercise contentions on the September onsite exercise. Intervenors brief these matters here and not in their briefs on LBP-89-32 to be filed on January 24, 1990.

PROCEDURAL BACKGROUND

On May 31, 1989, the Mass AG filed a motion with the Smith Board seeking to have it hold open the Seabrook licensing record pending the then-required prelicensing onsite exercise. In this motion, the Mass AG noted that pursuant to 10 CFR Part 50, Appendix E.IV F.1 another onsite exercise was required prior to the issuance of any full power license after June 27, 1989 (i.e., one year after the last onsite exercise then having been held on June 27, 1988). Mass AG's May 31 Motion to Hold Open the Record at 7. Indeed, the Mass AG attached as Exhibit 6 to that motion a May 5, 1989 NRC Staff letter to Applicants discussing this exercise and noting that it was tentatively scheduled for September 25, 1989. In his May 31 Motion, the Mass AG also requested that the Smith Board assert jurisdiction over this exercise with regard to any possible litigation arising from it, schedule a prehearing conference to discuss it, set a schedule for the filing of contentions,[19/] and

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19/ The Mass AG argued in this Motion at 9-10 that the late-filed contention standard should not be applied. (ALAB-919's ruling on this issue arising out of a contention filed on the June 1988 onsite exercise issued on June 20, 1989.) At 10 n.2 the Mass AG stated:

> If every contention filed after the event is nonetheless late-filed under Catawba, then the Mass AG seeks a schedule so that he can establish "good cause" for the failure to file on time.

permit the Mass AG (and other Intervenors who may be so inclined) the necessary access and observational opportunities to enable the timely formulation and filing of contentions.

Motion at 2.

In its June 21, 1989 Reply to the Responses of the Applicants and Staff, the Mass AG again asserted that the record should be held open pending the September exercise because application of the record reopening standard would violate UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984). Also, the Mass AG again stated that a schedule is needed "in advance so that he will meet this test ["how soon after it was possible to file contentions were contentions filed"] without argument." Mass AG's June 21 Reply at 3 n.3.[20/] Finally, the Mass AG dealt expressly with an argument presented by the NRC Staff in its June 15, 1989 Response to the Mass AG's May 31 Motion at 5-8. This Staff argument was repeated later in response to the contentions actually filed by Intervenors regarding the September exercise and then adopted by the Licensing Board in LBP-89-38 at 15-16. Although the merits of the Staff's arguments are discussed in more detail below, Intervenors note here that in the July 21 Reply, the Mass AG at 10-12 set out carefully how the NRC Staff was intentionally misstating and

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20/ As to the late-filed contention standard, the Mass AG also argued (as he has to the Court of Appeals on appeal of ALAB-918) that the Smith Board should be consistent: it did not apply the late-filed standard to SPMC contentions filed in April, 1988 or to June, 1988 exercise contentions filed in September, 1988 and this standard should not suddenly be applied to increase Intervenor obstacles to a hearing.

mischaracterizing the holding of the Court of Appeals in UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) and San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1316-1317 (D.C. Cir. 1984) regarding the application of the record reopening standard to material licensing issues. Noting that the Staff was obfuscating the distinction between "material issues" and "material evidence" in direct contradiction of the Court of Appeals clear holding in Mothers for Peace at 751 F.2d at 1316, the Mass AG stated:

> The Mass AG believes that such intentional and flagrant omission and miscitation of federal law by the NRC Staff to an adjudicatory body of the NRC should be sanctioned by this Board. At the very least, the intentional obfuscation of the issues and the failure to even address the relevant matters, condemns the Staff's response to deserved irrelevance.

June 21 Reply at 12 n. 10.

On June 20, 1989, ALAB-918 issued and it addressed the Wolfe Board's January, 1989 decision (LBP-89-4, 29 NRC 62 (1989)) regarding Intervenor's onsite exercise contention arising out of the June 8 exercise. That Licensing Board had applied the record reopening standard as well as the late-filed contention standard. In affirming the Licensing Board's application of the late-filed contention standard, the Appeal Board addressed the Intervenors' claims that the application of the record reopening standard violated UCS v. NRC.

> The short answer to the intervenors' claim, however, is that the Licensing Board did not deem the exercise contention to be filed after the record was closed at all. Indeed, the Board specifically assumed the record remained open in finding the exercise contention was late-filed and in applying the five factors of 10 CFR §2.714(a)(1).

> LBP-89-4, 29 NRC at 68. Further, contrary to the Intervenors' apparent belief, the UCS case does not prohibit placing reasonable procedural requirements upon the filing of late-filed contentions. Rather, it holds that a party's statutory hearing rights on a material licensing issue cannot be made to hinge upon the agency's unfettered discretion to reopen the record. See 735 F.2d at 1443-44.

ALAB-918, slip opinion at 13 n. 21.

On June 23, 1989 the Smith Board heard oral argument on the Mass AG's May 31 motion. Tr 27238-27249. Again, at oral argument the Mass AG asserted that the record reopening standard should not be applied to any contentions filed regarding the September exercise and that to ensure Intervenors' rights in this regard, the Board should hold open the record pending that exercise. The Mass AG argued that ALAB-918 did not permit application of the record reopening standard:

> because there are standards in the motion to reopen, Applicants and Staff are going to point to the last sentence on the bottom of page 13 [of the slip opinion of ALAB-918 quoted above] in the footnote [n.21] where the Appeal Board refers to the agency's unfettered discretion to reopen the record, and indicate that UCS only prohibited an unfettered discretion, but otherwise did not prohibit the application of a reopening the record standard when there were, as there is in the NRC's rule, some objective criteria against which the motion is to be judged. . . . Tr. 27239.

The Mass AG then quoted Mothers for Peace at 1312 to the effect that:

> "because the Commission's criteria for reopening a closed record are higher than the criteria for obtaining a hearing under Section 189(a), the mere fact that a party can seek reopening is not a sufficient substitute for the hearing rights guaranteed by Section 189(a)."

Tr. 27242 (quoting Mothers for Peace).

On June 30, 1989 the Board denied the Mass AG's May 31 Motion, Tr. 28287-28290, and closed the record. The Board stated:

> [E]ven if we were to assume that that onsite exercise is likely to give rise to a right to a hearing and that an issue may come out of it, we find that we do not have the authority to hold open the record for that purpose. . . . Even if the NRC as a whole has the responsibility to address the difference between reopening the record as compared to a late filed contention, or as compared to a 2.206 petition, even if that were the case, that authority has not been granted to licensing boards. . . . And as stated, we found nothing in the cases - Union of Concerned Scientists v. NRC, or Mothers for Peace. (Everyone calls it "Mom's"), the San Luis Obispo case. The Mothers for Peace - that suggests to the contrary.

Tr. 28289.21/

On August 11, 1989 the Applicants filed an Application for an Exemption from the regulations requiring the September 1989 exercise. Noting that the onsite plan (the Seabrook Station Radiological Emergency Response Plan, "SSRERP") had been tested and evaluated in exercises in February 1986, December 1987, and June 1988, the Applicants claimed that:

21/ In short, the Smith Board ruled that it lacked the requisite authority needed to obey the mandate of the Court of Appeals. To jump ahead slightly: none of this prior history of Intervenors' efforts to secure their rights to litigate the September exercise unencumbered by the record reopening standard is even mentioned by the Smith Board in LBP-89-38 (or anywhere else). Instead, as if it were observing and noting facts about the natural world and not a procedural world of its own creation, the Board states in LBP-89-38 at 16:

> 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 CFR §2.734 for dealing with closed records.

Having suppressed the fact that it closed the record on June 30 in the face of Intervenors' repeated arguments based on UCS and Mothers for Peace, the Smith Board on December 11 (or November 9) found no need for "anguish" as it proceeded to expressly violate the direct mandate of the Court of Appeals.

> in each instance the NRC found the emergency response actions were adequate to protect the public health and safety.22/

Applicants' August 11, 1989 Exemption Application (filed with the Commission) at 4. Based on these past exercises, the Applicants sought a temporally unlimited exemption from the one year prelicensing requirement arguing that onsite emergency preparedness (plan + the implementation capability) was adequate to protect the public without it. Further, the Applicants claimed at 8 of their Exemption Application:

> the ASLB's Partial Initial Decision, dated March 25, 1987, found that the onsite emergency plan satisfied all NRC criteria.23/

22/ The Smith Board made much of the purported fact that the onsite plan had been already tested before September 1989. Indeed, the Board actually invented out of whole cloth without any basis whatever the theory that the purpose of the earlier exercises was to "test and validate[] [the] emergency plan" while the later September 1989 exercise was "to assure training and current competency," LBP-89-38 at 22, as if the "plan" is the script of a play which, once it has been tested in New Haven and revised if necessary, just needs a good cast for its New York run. As discussed below in more detail, problems with the SSRERP were revealed in each of its earlier exercises.

23/ As discussed in more detail in the text above, this statement is inaccurate and directly contradicts the claims made by the Applicants to the Appeal Board (in their March 10, 1989 Brief at 17-18) on review of the Wolfe Board's disposition of the Intervenors' onsite exercise contention filed in September 1988 (which appeal led to ALAB-918). The SSRERP qua plan was never litigated before the Wolfe Board and certainly no onsite exercise of the onsite plan was ever litigated by that Board. Notwithstanding this, the Commission in its September 15, 1989 Order denying Applicants' Exemption Application stated that the:

> onsite plan has previously been exercised and adjudicated
> . . . .

CLI-89-19 at 4. The Smith Board then built its speculative chimera involving the differing purposes of so-called earlier (footnote continued)

In fact, the Wolfe Board did not make this finding and certainly never reviewed or considered any of the earlier onsite exercises in authorizing a low power license on March 25, 1987. The only issues before the Wolfe Board concerning the compliance of the onsite plan with the requirements of §50.47 were the adequacy of the plan's emergency classification and action level scheme.[24/] These issues were summarily disposed of in the March 25, 1987 decision, 25 NRC at 183, because the "two contentions are no

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23/ (footnote continued) exercises as compared to so-called later exercises on this same incorrect basis. LBP-89-38 at 22:

> 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.

(emphasis supplied).

24/ The Hampton Beach Area Chamber of Commerce (formerly CCCNH) had submitted an onsite emergency plan contention in 1982 which stated:

> The Applicant has failed to demonstrate adequate onsite protective measures in the event of an emergency in accordance with 10 CFR 50.47(a), (b), 10 CFR 50 App. E, and NUREG-0654.

This contention was dismissed along with its sponsor as a discovery sanction on April 18, 1983. LBP-83-20A, 17 NRC 586, 591-592. The then-plenary Board erroneously stated that:

> All of the HBACC's contentions were adopted from the State of New Hampshire's contentions which are still remaining in the proceeding.

Id. at 591. As the Applicants noted to this Appeal Board in its March 10, 1989 Brief on LBP-89-04 at 19 n.45, the issue of the adequacy of the onsite plan as challenged in HBACC's Contention (CCCNH-5) was

> out of the proceeding . . . . No one has tried to resurrect it since.

longer controverted issues." Moreover, the Applicants had argued strenuously to the Appeal Board and to the Commission[25/] when the Intervenors sought to challenge their performance during the June 1988 onsite exercise before the Wolfe Board that onsite exercises in general (and obviously this would have included all of the earlier exercises predating the lower power authorization of March 1987) are not material to a low power license. The Applicants had argued:

> Issuance of a low power license is not, under NRC regulations dependent upon the onsite portion of the emergency plan for the site being exercised.

Applicants' March 10, 1989 Brief on Appeal of LBP-89-04 at 17 (emphasis in original). Thus, not only was the onsite plan as a matter of fact never litigated before the Wolfe Board but the Applicants had argued to this Board and the Commission in March and May 1989 that onsite preparedness was not even material to the low power authorization issued by that Board in March 1987. Without skipping a beat, of course, Applicants then turned around and argued on August 11, 1989 that the same March 1987 decision evidenced that the onsite plan had been

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25/ The Appeal Board did not address the materiality of onsite exercises to the findings required by 10 CFR 50.47(d) for the issuance of a low power license in ALAB-918 issued on June 20, 1989. The Commission, however, in CLI-89-08 issued May 18, 1989, in a non-merits stay posture, stated:

> In particular, as reflected in questioning by the Appeal Board at oral argument [citing Transcript of Oral Argument before Appeal Board on Review of LBP-89-04 dated April 21, 1989 at 11], there is at least reasonable question whether the exercise is material to a decision on the adequacy of the onsite plan for low power.

CLI-89-08, slip opinion at 14.

adjudicated. This statement then became the basis for the Commission's statement that the "onsite plan has previously been exercised and adjudicated," CLI-89-19 at 4, which then unleashed the Smith Board's speculations concerning the purposes of "early" versus "late" onsite exercises.[26/]

On September 15, 1989 the Commission denied the Applicants' Exemption Application. CLI-89-19. On the next business day, (September 18, 1989) the Mass AG filed by telefax a Renewed Motion for a Schedule for the Filing of Contentions. (This Motion is attached here for convenience as Exhibit 2.) In this Motion, the Mass AG detailed his efforts at obtaining exercise documentation by means of FOIA requests from the Staff and again sought some schedule so that he would know when, after his receipt of necessary and sufficient information, any contentions arising out of the exercise should be filed. The Board never ruled on this September 18 Motion and indeed it appears to have fallen off the edge of the Board's procedural world never even being mentioned by the Board.[27/]

26/ The Wolfe Board stated at 25 NRC at 216 (March 1987) that "the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken." However, in the absence of any admitted contentions challenging the onsite plan or the performance during onsite exercises, these issues never passed jurisdictionally to the Wolfe Board. 10 CFR §50.57(c) (leaving to Director of Nuclear Reactor Regulation all licensing findings not contested before the licensing boards). No adjudicatory record supported the Wolfe Board's boilerplate.

27/ As discussed infra, the Board did find nonetheless that the Intervenors' October 18 Motion for Summary Disposition was impermissibly late.

The exercise took place on September 27, 1989. Intervenors had sought observational opportunities from the Applicants. (See September 18 letter from Traficonte to Dignan attached to Renewed Motion, Exhibit 2 here.) The Applicants refused to cooperate in this regard.[28/] (See September 20 letter from Dignan to Traficonte, Attachment 2 to Intervenors' October 18, 1989 Memorandum in Support of Motion for Summary Disposition ("Memo S.D.") Exhibit 3 here.) As a result, Intervenor observers took up posts in the public domain to observe performance to the extent possible.[29/] Based on these observations, Intervenors concluded immediately after the exercise that the scope of the exercise had been truncated no doubt in order to lower the chances of revealing planning problems and to prevent Intervenors from observing any performance. (The truncated scope meant that many activities that might have been observed from the public domain simply did not take place.)

28/ The Board had denied a request from the Intervenors set forth in the Mass AG's May 31, 1989 Hold Open the Record Motion to assist them in obtaining observational opportunities during low power testing. The Board had denied this request indicating that it has no power to order any discovery before a contention is admitted. The Intervenors, based on this earlier ruling, did not again seek assistance from the Board in obtaining observational status during the September exercise.

29/ One such post was the Media Center located at the Town Hall in Newington, New Hampshire. Although the Town Secretary had assured the Mass AG that the Town Hall would remain open to the public during the exercise (as it did), when Attorney Traficonte tried to observe the exercise from that vantage point, he was thrown out by the Newington police at the direction of the Applicants. See Attachment 3 to Memo S.D. This example of Applicants' exemplary commitment to open and democratic decision-making, of course, goes unmentioned by the Licensing Board.

On September 29 Intervenors filed a contention alleging insufficient scope. After having received the scenario documents from the NRC pursuant to a FOIA request[30/] on October 10, the Intervenors filed on October 13, a second motion to admit an additional contention. After receipt on

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30/ At 3 of LBP-89-38, the Licensing Board takes note of the NRC Staff's Inspection Report No. 50-443/89-10, dated October 2, 1989. As the Board was aware (see October 19 teleconference at Tr. 28308-28309) but of course never mentioned, the Staff had telefaxed this Inspection Report to the Applicants on October 5. The Applicants then had it available to them in preparing their October 11, 1989 Response to Intervenors' first exercise contention. The Staff did not send this Report to Intervenors until after October 19. When confronted with this, Mr. Reis stated (Tr. 28308):

> Although we attempted to get it out as soon as possible, apparently our mail room, which is in the Region, dispatches the section reports, decided to act in the usual course of business which wasn't too prompt and I certainly am embarrassed by the failure to promptly dispatch that and dispatch it in the same way to the Intervenors as to the Applicants.

This, of course, is not an isolated occurrence. The NRC Staff has completely abdicated its role as an independent party in this proceeding, repeatedly filing pleadings containing false, misleading and untrue statements in an effort to mislead the adjudicatory tribunals of the NRC and secure a Seabrook license for the Applicants. For example, on December 12, 1989 the Staff asserted to the Commission that the Smith Board did not apply the record reopening standard to the Intervenors' exercise contentions. NRC Staff's December 12, 1989 Response to Intervenors' Motion to Vacate LBP-89-32 License

Authorization at 45 ("Board did not justify its actions on the basis of a failure to meet the reopening standard in 10 CFR §2.734.") (Reis, Young and Bachman). This is patently false. On December 1, 1989, the Staff asserted to the Commission that the "Appeal Board failed to consider the significance of the planning deficiencies it identified [in the NHRERP]". NRC Staff's December 1, 1989 Comments on the Immediate Effectiveness of LBP-89-32 at 6 n. 12. (Young) Of course, this is false. See ALAB-924 at 68 n. 194 (sheltering plan "deficiency [] must be remedied" for plan to be approved) and 19 n. 47 (suspending, until further proceedings are complete on

October 16 of the Licensing Board's October 12 decision on low power testing contentions in which the Board applied the record reopening standard to Intervenor low power contentions, the Intervenors filed on October 16 a Motion seeking to amend their September 29 and October 13 pleadings, nunc pro tunc, and addressed the motion to reopen standard.

Finally, on October 18, 1989, the Intervenors filed a Motion for Summary Disposition of their onsite exercise contentions, a Statement of Undisputed Facts and a Memorandum in Support. Anticipating timeliness objections, the

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30/ (footnote continued) Special Needs Survey, the Licensing Board's finding that adequate number of vehicles and drivers are available). On October 27, 1989, the Staff asserted to this Appeal Board that the extraordinary further testing of all of Seabrook's operators in December 1989 did not arise out of the June low power events. Staff's October 27 Response to Mass AG's Motion to Expedite Appeal and Appeal Board Order of October 26, 1989 at 3 n. 4 ("[Mass AG's] statement presumes that the December operator's tests and evaluations are being conducted because of the June 22, 1989 events. No support exists in the record for that statement and it is disputed.") (Reis) This is patently false as well. See Intervenors' Brief on Appeal of LBP-89-28 (December 19, 1989) filed with this Board at 9 n. 13 and Exhibits 1 and 2 thereto. The Staff also has not hesitated to misstate the law as well as the facts when needed. In its October 16, 1989 Staff Response to Intervenors' Motion to Admit Contentions on September 27, 1989 Exercise at 15 the Staff asserted that the third of the 5 late-filed contention standards is the "most important factor." (Young) This is also false as the Staff well knows. See ALAB-918 at 21 (slip opinion) ("It is well established that the first factor is the most crucial. . . . ").

In Intervenors' view, the partisan role played by the Staff in this proceeding in combination with: 1) the failure of the Staff lawyers to abide their lawyerly obligations to make only true statements; 2) the Licensing Board's increasing reliance on and wholesale adoption of Staff positions on fact and law; and 3) the Staff' exclusive control over information have made a total shambles of this proceeding and the result has been a clear and direct violation of the public's right to a fair hearing and to due process under the AEA and the Constitution of the United States. Amendments 5 and 14.

Intervenors offered their October 18 memorandum as either support for their motion for summary disposition, as a written reply to the responses of the Staff and Applicants to their exercise contentions or as itself a late-filed supplemental basis to these earlier contentions. (Memo S.D. at 4-10). In this regard, Intervenors set forth why their legal analysis met the late-filed contention standard and the record reopening standard if this legal analysis were to be viewed as an additional supplemental "basis."[31/]

THE BOARD'S LEGAL ERRORS

LBP-89-38 reflects, as it were, a sea battle fought by the Licensing Board against its twin enemies: human reason and the English language. At numerous points during this battle, the decision submerges below the surface and becomes indistinct and indeterminate in form, and incomprehensible in substance. In these circumstances, it is often difficult to pinpoint with precision what the particular errors were which the Board made while it, in general, was applying the record reopening standard in direct violation of federal law. Intervenors' onsite exercise case was based on the following propositions:

31/ Treating a legal analysis as set forth in the Memo S.D. as a necessary component of a contention necessarily to be filed with the original contention statement is absurd and unprecedented. The Intervenors explained at Memo S.D. 5-6 why under the remarkable circumstances of this case, they nonetheless protected their analysis by addressing the late-filed and record reopening standards. True to form, on October 19 (the day after the Memo S.D. was filed) the Staff (Reis) argued precisely what Intervenors had anticipated - that a contention statement must also set out all legal arguments in support. (October 19 teleconference at Tr. 28316 - 28318). Also true to form, the Board adopted this Staff analysis, never even bothering to address Intervenors' timeliness arguments. LBP-89-38 at 31-32. See infra.

1) As a matter of law, the onsite prelicensing exercise had to be of sufficient scope to meet the regulatory requirements;

2) As a matter of law, the regulatory requirements for the one-year prelicensing onsite exercise include a test of all major observable portions of the onsite plan to the extent possible without public participation.

3) As a matter of undisputed and indisputable fact, certain major observable portions of the onsite plan were not tested during the September 27 exercise;

4) As a matter of law, the record reopening standard can not be applied to issues material to licensing before final agency action; and

5) The September 27 exercise was of insufficient scope to meet the regulatory requirements and another exercise would have to be held before full power licensing.

Little of this case actually finds its way onto the scene of battle. As best as Intervenors have been able to decode the Board's decision it is "structured" as follows: at 6-8, the Board discusses the contentions correctly noting that the Intervenors' challenge is to the scope of the exercise under the law set out in ALAB-900, 28 NRC 275, 285-287 (1988). Next, the Board at 8-9, purports to set out the 2 "broad issues" presented by the Intervenors' case. Then, at 10-14, the Board attempts to discuss the "First Broad Issue." Next, at 14- 19, the Board clearly and erroneously holds that the Intervenors' contentions must meet the record reopening standard. This

standard is then applied at 20-31 (setting forth the Board's conclusions as to the safety significance of the issues presented). Then at 31-32, the Board addresses the late-filed contention standard, finding the legal analysis set out in the October 18 Memo S.D. late without good cause without explaining why that analysis "should have been submitted with the earlier motions" (31) or without even addressing Intervenors' reasons for the "delay" in filing the legal analysis until October 18 as set forth at Memo S.D. 4-10. At 33, the Board denied the Intervenors' Motion for Summary Disposition. Finally, at 33-41, the Board's addresses the "Second Broad Issue," discussing and rejecting the legal analysis set out at Memo S.D. at 10-29.

The significant errors liberally sprinkled through the Board's analysis are as follows:

1. At 5, the Board asserts that the contentions do 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.

Apparently, based on some amalgamation of ALAB-903 with ALAB-900, the Board appears to believe that a well-pleaded scope contention in addition to identifying a major observable portion of the emergency plan that was not fully tested must also contain an allegation that <u>if</u> this major observable portion had been tested a "fundamental flaw" either <u>would have or could have been</u> revealed. The Board even detects a sinister motive behind the form of Intervenors' scope 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.

(6) (emphasis in original). First, if this freshly minted requirement concerns an allegation of what would have occurred then such allegations would have been mere speculation and objectionable on those grounds. Second, if the allegation perceived as deliberately omitted is that the testing of a major observable could have revealed a fundamental flaw, then this allegation is not omitted at all. Each contention and basis identified "major observable" portions of the onsite plan which were not tested. Obviously, a portion of a plan is a major observable because the testing of it could reveal a fundamental flaw. If a portion were only "minor" and not tested, even if it had been tested and performance was poor, no "essential element" of the plan (under the first prong of ALAB-903's two pronged test for a fundamental flaw) would be involved. Thus, identifying and establishing portions of the onsite plan as "major observable portions" not tested is the legal and logical equivalent of alleging that had these portions been tested, a fundamental flaw could have been revealed. ALAB-900, 28 NRC 275, 285-287.

Third, ALAB-900 sets out the contours of a scope contention which challenges the compliance of an exercise with the regulatory requirements and the Intervenors' contentions met those contours. Finally, review of the Shoreham Intervenors' admissible scope contentions indicates that the Seabrook Intervenors' scope contentions were every bit as detailed and complete.

2. The Board applied the motion to reopen standard and thereby expressly disobeyed the mandate[32/] of the Court of Appeals in Mothers for Peace and UCS v. NRC. First, the Board found the exercise (and therefore its sufficient scope and adequate completion) material to licensing. (10) Second, it expressly applied the standards set out at 10 CFR §2.734. (16) Not only did the Board fail to even mention Intervenors' repeated efforts to avoid this result, but it applied this standard without any reasoned explanation at all to support its action. The Board hinted that somehow the codification of the motion to reopen standard on May 30, 1986 (after UCS and Mothers for Peace issued) made those cases irrelevant:

> 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.

(16). This statement, of course, is a non-sequitur. In Mothers for Peace, the Court expressly discussed the standards for reopening a closed record and found them impermissibly high when compared to the normal procedural requirements for securing a hearing on material issues under the AEA. These reopening standards were codified with some irrelevant changes

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32/ Mothers for Peace, of course, was issued by the Court of Appeals in another case. Nonetheless, the Court expressly laid down a rule of law applicable to the NRC in all further proceedings. In these circumstances, "mandate" although perhaps not technically correct, captures the nature of the Court's directive and the basis for its statement that further violations of this rule of law would support a presumption of agency bad faith.

after Mothers for Peace at 51 Fed. Reg. 19535. Absolutely nothing about this codification puts the holding of Mothers for Peace and USC into question.[33/] The application of the record reopening standard was legal error and must be reversed.[34/]

33/ Although completely baseless, this concocted notion that somehow the codification in 1986 of the reopen standard was in response to or was somehow a solution to Mothers for Peace and UCS lives on. The Applicants stated in their January 10 Response to the Motion for Expedited Review filed with the Court of Appeals:

> Finally, NRC and its Boards are accused of acting in bad faith vis-a-vis prior decisions of this Court. Acceptance of this line of argument necessitates, inter alia, that this Court accept the notion that NRC deliberately adopted a regulation after a decision of this Court which it knew to be violative of that decision.

Response at 10 (emphasis in original). This statement reflects a rather primitive confusion between the regulation (which alone does not violate anything) and its application (which violates the AEA if applied to issues material to licensing before final agency action.) The Applicants then, in a footnote, try to mislead the Court even further:

> When Mothers for Peace was decided, 10 CFR §2.734 was not on the books. The reopening rule found inappropriate in that case was decision generated and more draconian than 10 CFR §2.734.

Response at 10 n. 25. This assertion is false. See 51 Fed. Reg. 19535, 19536-37 (May 30, 1986) (noting that case law had used phrases for 3rd prong of standard like "would have been reached" and "might have been reached", that Mothers for Peace had discussed "would have been reached" standard, and that "[t]he inquiry should be, and has been, the likelihood that a different result will be reached if the information is considered.") The decision generated standard, therefore, was and is the same as the codified standard which is the same as the standard discussed by Mothers for Peace. The codification was only and just that -- a codification.

34/ Intervenors also assert that for the reasons set out in their October 16 Motion to Supplement, their contentions meet the record reopening standard in any event. The Board, for (footnote continued)

3. The Board, as discussed above, invented a different purpose for "later" onsite exercises as compared with "earlier" ones. (22) This was legal error. The Commission and not the Smith Board (at least in theory) writes the regulations. Moreover, cursory review of earlier inspection reports indicates that every time the SSRERP was fully tested problems were revealed. Attached as Exhibit 4 is 50-443/86-10 which at 5-6 sets forth weaknesses in the plan revealed by the Staff's review of the February 1986 exercise. Exhibit 5 is the one and only Emergency Preparedness Implementation Appraisal ever conducted at Seabrook Station on March 24-28, 1986, (50-444/86-18) which identified 55 open issues regarding the onsite plan (at 28-32). Exhibit 6 is 50-443/87-25 reporting the performance during the December 1987 exercise. Exhibit 7 is the Staff's report on the performance during the June 1988 onsite exercise. There is nothing that as a matter of fact or law supports the proposition that a full exercise was not necessary or required.

34/ (footnote continued) example, ruled that this standard was not met, inter alia, because no factual affidavits were submitted. (19) Again, there were indisputable omissions in the exercise scenario. Intervenors on the basis of these undisputed facts established as a matter of law that the scope of the exercise failed to meet the regulatory requirements. The only affidavits that could possibly have been submitted would have ended up making legal arguments. This was precisely what the Staff and Applicants' submissions did which prompted the Intervenors' objections. See Memo S.D. at 25-26, n. 22. See also LBP-89-38 at 20, 26.

4. The Board erred in finding the Intervenors' October 18 Memorandum to be a late-filed supplement necessarily to have been filed earlier. (31-32, 36 n. 10) Legal argument is not necessary to a contention statement and not necessary to a showing that the late-filed contention has been met. Even if it is, the Board never even addressed the reasons given by Intervenors in Memo S.D. at 6-7 for whatever delay existed between September 27 and October 18.

5. Finally, the Board's discussion of the central legal issue here -- What is the proper interpretation of 10 CFR Part 50 App. E IV. F. 1? -- is woefully inadequate and wrong as a matter of law. (34-41) Before this Board Intervenors rely on the legal analysis they set out in Memo. S.D. at 10-29 for the proposition that the prelicensing onsite exercise had to test all major observables of the onsite plan. They rely on Memo S.D. at 29-36 for the proposition that the September exercise did not test all these major observables just as alleged in their contentions. The Board's legal interpretation is wrong for the following reasons:

a) First, at 35-36 the Board after having set out the relevant regulatory language states:

> 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.

(emphasis supplied). In light of the analysis of the regulatory language set out by Intervenors in Memo S.D. at

10-15, the Board's construction is nothing more than an ipse dixit without rational analysis supporting it. Indeed, the Board expressly presumes that the onsite exercise is "limited" in scope when this is the very focus of the inquiry. Rational legal analysis does not begin with a presumption that the Intervenors' proffered interpretation is wrong.

b) Even more telling, the Board expressly acknowledges that there is ambiguity in Appendix E. IV. F. 1. After reciting its own crabbed version of Intervenors' interpretation the Board states:

> 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.

(38) (emphasis in original).[35/] Recall that the Smith Board is purportedly trying to make a reasoned and fair determination of this legal question after it has already authorized a license and acknowledged that if Intervenors' legal arguments were to prevail it would have to revoke that license! Obviously, if Intervenors' interpretation is "reasonably plausible" and the language is ambiguous, rational minds would then turn to the administrative history of that language in order to interpret it. Intervenors set out in detail this history at Memo S.D. 15-25. This history established beyond peradventure that not only were the Intervenors' views "reasonably plausible" but

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35/ At 40-41 the Board also states that the relevant language has "acknowledged ambiguities."

that they were legally correct as the best interpretation of the ambiguous language in light of that history and the regulatory purposes of emergency plan exercises.

Instead of even confronting Intervenors' argument from the administrative history, the Board instead: 1) again restated its own construction (38-39); 2) asserted that the Commission's silence on the issue is significant even though no one had ever raised the issue before (39-40); and 3) again relied on its concocted notion that "later" exercises test the cast and not the play (40). Finally, the Board dismissed the Intervenors' rational appeal to the administrative history of the relevant regulation:

> 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.

(40) (emphasis supplied). Within 4 lines of text from the phrase underscored in this passage, the Board reiterated that the dispositive language of the regulation is ambiguous. "Oh, what a topsy-turvy world this can be!" The intellectual and linguistic confusion here should be reversed in the strongest possible terms.

CONCLUSION

For all of the reasons set forth above, this Appeal Board should dispense with oral argument, reverse the lower Board's November 9 denial of Intervenors' right to a hearing on the Intervenors' September onsite exercise contentions, find that the September exercise, from which the Commission expressly

refused to grant the Applicants an exemption, was insufficient in scope as a matter of law, and revoke and vacate the license authorization. In the alternative, in the event, such a reversal comes only after the license authorization has been made effective, full power operation should be suspended pending the adequate completion of a full onsite exercise.

Respectfully submitted,

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Dated: January 22, 1990

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA, Respondents.	No. 89-1743 December 18, 1989

PETITIONERS' OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS

Petitioners Commonwealth of Massachusetts ("Mass AG"), the New England Coalition on Nuclear Pollution and the Seacoast Anti-Pollution League oppose the Respondents' December 8, 1989 Motion to Dismiss their Petition for Review of the November 9 Order authorizing the issuance of a Seabrook full power operating license.1/

I. DECISIONAL FINALITY AND JURISDICTIONAL EXHAUSTION: THE FRAMEWORK FOR ANALYSIS OF THE NOVEMBER 9 ORDER.

The Commission and the Intervenor identify two somewhat overlapping reasons why the November 9 Order is not "final": 1) further actions must be taken by the Commission before the Seabrook full power license is actually, literally granted; and 2) further agency appellate process must be completed before

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1/ Petitioners' Petition for Review was filed on December 4, 1989. The November licensing action was dated November 9 but docketed by the Licensing Board with the NRC on November 13, 1989. On December 11, 1989, Public Service Company of New Hampshire (Seabrook's bankrupt Lead Owner) moved to intervene in this case and filed a separate Motion to Dismiss the December 4 Petition. Petitioners address Intervenor's motion in this opposition as well.

any licensing "decision" is final. In doctrinal terms, Respondents argue that the license authorization is not "decisionally final" because it is not yet effective and that the existence of an intra-agency appellate scheme without more constitutes a bar to review based on "jurisdictional exhaustion." American Dairy of Evansville, Inc. v. Bergland, 627 F.2d 1252, 1259-1261, 1267-1273 (distinguishing "mandatory exhaustion" from "decisional finality") ("Bergland").[2/] Respondents and the Intervenor are wrong on both counts and their motions to dismiss should be denied.[3/]

2/ There is a distinction between exhaustion and finality. FTC v. Standard Oil, 449 U.S. 232, 243 (1980) (noting confusion between these two separate requirements); Gulf Oil Corp. v. DOE, 663 F.2d 296, 307-08, n.71 (D.C. Cir. 1981) (distinguishing doctrines but noting overlap). In those cases where the decisional finality of an action is not immediately apparent, courts often engage in an inquiry into its practical and legal effects. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967) (ripeness test includes a hardship-to-parties component as well as a more narrow finality component). However, when an action otherwise has the indicia of decisional finality, a search for immediate real-world effects is not a relevant inquiry. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 70-71 (1970) (noting anachronistic ring to argument that an order having no immediate practical effect is therefore not decisionally final).

3/ Petitioners will file within a matter of days a Petition for Mandatory Relief seeking an order from this Court to the NRC instructing it to give legal effect to a November 7, 1989 NRC Appeal Board decision in the Seabrook case. This November 7 decision on appeal of an earlier Licensing Board decision reversed and remanded that decision for further proceedings. Notwithstanding this clear mandate, the subordinate Licensing Board within 48 hours proceeded to authorize license issuance, an action necessarily predicated in part on its earlier decision presently reversed and remanded. Petitioners immediately sought license revocation and enforcement of the November 7 decision from the Appeal Board. Before any action on the merits of this request was taken, the Commission on November 16, sua sponte took jurisdiction of this request away from the Appeal Board, initiated its immediate effectiveness review of the Seabrook licensing proceeding pursuant to 10 C.F.R. §2.764 (in accordance with which the effectiveness of

Footnote 3 continued ...

A. The November 9 Order and Decisional Finality.

The NRC and the Intervenor have confused in a very thoroughgoing way the differences between an order's "finality for purposes of appellate review" and an "order's amenability to immediate execution or enforcement," i.e., its effectiveness. National Treasury Employees Union v. FLRA, 712 F.2d 669, 670 (D.C. Cir. 1983) ("NTEU"). A union sought to bargain with an employer over a contract provision that would have stayed execution of adverse personnel actions pending review by the Merit Systems Protection Board ("MSPB"). The Federal Labor Relations Authority ("FLRA") ruled that such a provision was nonnegotiable reasoning that: 1) the MSPB only entertained appeals from "final agency actions"; 2) an agency action becomes final under MSPB regulations on its "effective date"; and 3) an action has no "effective date" when it is stayed and therefore such a stay provision would actually end the appellate process and "permanently bar or forever suspend adverse action." Id. at 670.4/

Footnote 3 continued
the November 9 Order is temporarily stayed) and indicated that the Petitioners' Motion for Mandatory Relief would be considered by the Commission as a request for a stay. These events establish that there exist no discretionary exhaustion defects in this case. The Clerk of this Court has indicated that such a Petition for Mandatory Relief will be separately docketed in accordance with Court rules and procedures and Petitioners will therefore immediately move to consolidate that Petition with this case.

4/ NTEU is proof positive if it is needed that "finality" has clouded otherwise bright minds. FLRA essentially took the position that the moment an appeal was filed and a stay issued the appeal could no longer lie. It confused the "finality" of the order giving rise to the appeal and the need for the stay with the effectiveness of the order which the stay suspended. NTEU makes very clear not only that "effectiveness" is not the hallmark of "finality" but also that a stay of effectiveness does not in any fashion affect the finality of an order.

In reversing the FLRA, this Court articulated quite clearly that decisional finality for purposes of appealability is not a function of the immediate effectiveness of an order but whether it is a dispositive action "in the sense that it is firm and complete." Id. at 673. This Court stated:

> final agency action occurs when the agency has made an unalterable decision and only implementation of that decision remains. . . . No change in the legal consequences ultimately flowing from [the] decision will occur unless the decision is reversed or modified on appeal.

Id. at 674 (emphasis supplied). The Court concluded noting the

> commonly-accepted meanings of nonfinal (interlocutory) action, final action not yet executed, and final action that has been executed.

Id. at 677. See American Federation of Government Employees v. FLRA, 777 F.2d 751, 755 (D.C. Cir. 1985) (identifying decisional finality with "judgments that constitute full resolutions on the merits").

Thus, the immediate effectiveness of an order is not relevant to its "finality" for purposes of appeal. The relevant consideration is: is the decision a firm one establishing legal consequences which will flow (when it is executed) unless the decision is reversed on the merits on appeal.[5/]

5/ Indeed, this is the analytical core of finality for purposes of appealability. An order is "final" if it fixes legal rights or occasions legal consequences that will remain firm unless reversed or modified on appeal. Since nothing more can affect the resolution of the issues on the merits except an appeal, the order is amenable to appeal. This is why review upon "finality" does not adversely affect the decision-making process: that process is complete but for that review. Port of Boston, 400 U.S. supra at 71 (the test of decisional finality is 1) disruption of decision-making and 2) legal consequences fixed).

Of course, the decision must be both "firm and complete" because a resolution of only a portion of the issues presented might appear firm but be subject to modification upon the issuance of the decision on the remaining issues. Thus, to be "firm" a decision must be complete.

It is immediately obvious that the November 9 Order is "firm and complete" on all issues the Licensing Board believes it needed to resolve prior to authorizing the issuance of a license. The best evidence of this is the Order itself which recites the Board's findings and authorizes the license to issue.[6/] Moreover, the NRC has treated the November 9 Order as "firm and complete" by beginning its "immediate effectiveness review" which by regulation begins only upon the decision by a Licensing Board to authorize a license. 10 C.F.R. §2.764. Thus, absent a reversal or modification on appeal the Licensing Board's decision will "ultimately" lead to the issuance of a full power operating license. Such legal consequences are the very hallmark of "final agency action."

Both the NRC and the Intervenor appear to believe that there is some significance for this court in the distinction

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6/ The Licensing Board is empowered by statute and Commission regulation to issue license authorizations. 42 U.S.C., §2241(a) (boards may "make such intermediate or final decisions as the Commission may authorize with respect to the granting . . . of any license or authorization"); 10 C.F.R. §§2.721, 2.718, 2.760, 2.764, 2.788. As discussed infra, these "final agency actions" are stayed pending a non-merits review conducted by the Commission for roughly 30 days.

between a license authorization (which is the full limit of an adjudicatory board's power over licensing) and the actual grant of a license by the Commission. NRC Motion at 1, 3; Intervenor Motion at 6 n.9, 8 n.11. Apparently, the NRC believes it can treat a decisionally final order by a Licensing Board authorizing a license as non-final for purposes of appellate review on the grounds that the later non-adjudicatory action of granting a license must be taken before the license authorization is "effective." Of couse, as noted, the "effectiveness" of the final agency action is irrelevant to its decisional finality. Moreover, "finality" attaches to the legal components of the decision at issue, not the entire complex of bureaucratic events that make up a licensing action.[7/] Finally, under the Administrative Procedure Act ("APA").[8/] an "order"[9/] means "the whole or a part of a

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7/ It is similarly wrongheaded for the NRC to assert that decisional finality is affected by the fact that before the license authorization is "effective" the technical staff must resolve all uncontested safety issues. While no doubt reassuring, those actions are not even part of the decision at issue (since the issues involved were uncontested) and cannot effect its finality. NRC Motion at 1. Such actions will never be before this Court on review as they are extra-adjudicatory.

8/ The APA is applicable to agency action under the Atomic Energy Act ("AEA"). 42 U.S.C. §2231.

9/ The AEA makes a "final order" subject to judicial review in the manner prescribed in 28 U.S.C. §2341. It also makes that "final order" subject to the provisions of the APA, 5 U.S.C. 701, et seq. 42 U.S.C. §2239(b).

final disposition." 5 U.S.C. §551(6). Thus, if the NRC's position requires any further analytic response at all, it is sufficient to note that the "final agency action" for which review is sought here is the legal part of the licensing order which reached decisional finality on November 9, 1989, no matter when the non-legal parts are completed and the license physically, as it were, is issued.

B. The Relevance of the Agency's Appellate Scheme: Jurisdictional Exhaustion.

Both the NRC and the Intervenor appear to believe that the existence of an agency's appellate scheme without more makes a decisionally final Licensing Board licensing action non-final for purposes of judicial review.[10/] NRC Motion 2-5; Applicants' Motion 6-8. Not only is this a false belief but it directly and completely contradicts the Congressional scheme established for the judicial review of NRC licensing actions. Indeed, Congress intended the exact opposite result.

First, this Court, under the Hobbs Act, 28 U.S.C. §2342, has exclusive jurisdiction over "final orders . . . made reviewable" by 42 U.S.C. §2239. The AEA in turn states:

10/ Both parties also argue that the fact that Petitioners have acted in accordance with that scheme somehow affects the jurisdiction of this Court. Although such actions certainly are relevant to discretionary exhaustion considerations, they are irrelevant to jurisdictional exhaustion concerns. In any event, every effort after November 13, 1989 by the Mass AG to protect his intra-agency appellate rights was accompanied by an express statement concerning his right to seek judicial review. As noted, discretionary exhaustion is discussed at length in Petitioners' Petition for Mandatory Relief.

> Any final order entered in any proceeding of the kind specified in subsection (a) of this section [including proceedings for the granting of any operating license] shall be subject to judicial review in the manner prescribed [in the Hobbs Act] and to the provisions of section [701 et seq.] of the [APA].11/

42 U.S.C. §2239(b). The provisions of the APA identified by Congress to which any decisionally final order of the NRC is subject include 5 U.S.C. §704 which states:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The syntax of this sentence is rather painful but its meaning can be made clear. First, it is obvious that the overall intent of this sentence12/ is in general to make irrelevant for purposes of judicial reviewability the existence of an agency's appellate scheme. Section 704 begins with the phrase "Agency action made reviewable by statute. . . ."

11/ This subsection has been misread by some courts. A "final order" in a licensing proceeding is subject to judicial review under the Hobbs Act and, as a distinct proposition, is subject to the provisions of §§701-706 of the APA. The subsection does not say a final order is subject to judicial review under the Hobbs Act and the APA. The language clearly distinguishes between a final order's subjection to judicial review in the manner set forth in the Hobbs Act and that order's subjection to the provisions of the APA. Since the Hobbs Act grants exclusive jurisdiction to the Court of Appeals it is obvious that although §§701-706 of the APA control what a "final order" is, whatever it is can only be reviewed in a Court of Appeals. But see Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1020 (3rd Cir. 1974) and cases cited therein.

12/ §704 of the APA is entitled "Actions Reviewable". It begins "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

The AEA makes "final orders" reviewable in this Court. An order "otherwise final"[13/] "is final for the purposes of this section whether or not there has been presented or determined an application . . . for an appeal to superior agency authority." There are two separate exceptions to this general rule of §704. Neither exception applies to the scheme set up by Congress in the AEA or by the NRC in its regulations.

The first exception is set out in the opening phrase of the third sentence of §704: "Except as otherwise expressly required by statute. . . ." Clearly, Congress intended to allow itself the statutory option of requiring intra-agency appellate exhaustion[14/] and indeed such statutory exhaustion

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13/ An order that is on its own terms in light of the agency's regulations decisionally final is "otherwise final."

14/ This is done by simply precluding judicial review until a certain decisional stage is reached within the agency even if a doctrinal analysis would have identified an earlier stage as decisionally final. If the statutory scheme defines that stage as also the first point at which the agency's decision has any possibility of real world effect (by either staying its effect upon an appeal or as in the Agricultural Marketing Agreement Act, simply forgiving all statutory fines for an appellant's violations arising during the pendency of his good faith appeal, 7 U.S.C. §608c(14)) then this postponement of review is benign. Still, it is an obvious exception to the general rule announced in §704 which makes the agency's first "firm and complete" resolution on the merits judicially reviewable. If the agency's action is both final and effective and not reviewable, the scheme is not benign. See V.N.A. of Greater Tift County, Inc. v. Heckler, 711 F.2d 1020, 1022-1025 (11th Cir. 1983) (jurisdictional exhaustion under the Medicare Act, 42 U.S.C. §1395ii, which incorporates 42 U.S.C. §405(h) of the Social Security Act, prevents review notwithstanding immediate suspension of payments flowing from agency action which agency's appellate body is not empowered to stay); Bergland at 1267 n.36 (citing cases).

requirements are the basis for the courts' recognition of jurisdictional exhaustion. Bergland at 1267 citing City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). However, this exception is not reflected in a statute that states simply that review can be had only of "final agency action."[15/] This is so for several reasons. First, interpreted in this way, this exception would swallow the general rule that follows. Section 704 defines agency action otherwise final as final and therefore reviewable notwithstanding the agency's appellate scheme. If the simple Congressional limitation of review to "final agency action" were enough to make that agency's appellate scheme relevant to the analysis of reviewability, then Congress' intent that that scheme is not relevant unless expressly required by statute would be frustrated. Indeed, every agency scheme would be subsumed under the first exception and the general rule of §704 would be a null set. Second, the words "otherwise expressly required" clearly indicate that a mere statutory provision for judicial review of final agency action does not trigger the

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15/ Even when Congress omits the word "final" and makes "agency action" reviewable, the courts interpret the intent to be in accordance with the basic principles of appellate procedure which limit review to "final" actions. See e.g., Air California v. United States Department of Transportation, 654 F.2d 616, 620 (9th Cir. 1981) (noting courts' restriction of review of FAA pursuant to 49 U.S.C. §1486(a) to "final" agency action); Public Utility Commission of Oregon v. Bonneville Power Administration, 767 F.2d 622, 629 (9th Cir. 1985) (citing cases and authorities). But see Gulf Oil Corp, 663 F.2d supra at 310-311 (refusing to read such a restriction into 42 U.S.C. §7193(c)).

first exception.[16/]

In this case, it is obvious that the AEA does not "otherwise expressly require" that any agency appellate process be exhausted before judicial review can be obtained of an otherwise decisionally "final order" entered in an NRC licensing proceeding. Not only does the AEA establish no appellate agency structure at all but it contemplates that a reviewable licensing order could issue from the Commission (42 U.S.C. §2239) or from the Licensing Board. 42 U.S.C. §2241. Indeed, §2241 expressly excepts the Commission from the requirements of 5 U.S.C. §557, thereby permitting the Commission to delegate, as it has, final decision-making authority on licensing to the Licensing Board. Obviously, Congress intended that upon the issuance of an "otherwise final" licensing order, as has occurred in the Seabrook case, that order would be subject to judicial review in accordance with §704. That section in turn makes jurisdictionally irrelevant any appellate structure the Commission may in its discretion establish.[17/]

16/ Jurisdictional exhaustion statutes usually set up an agency's appellate scheme and then either define "final agency action" as a point along that intra-agency appellate process or restrict judicial review to the outcome of a designated decisional stage. The result is the same whether the method is by definition or by express preclusion.

17/ Establishing an agency appellate structure is not the same as retaining decision-making authority under 5 U.S.C. §557. The NRC pursuant to 42 U.S.C. §2241 has delegated the authority to issue decisionally final orders to the Licensing Board. The agency's appellate structure does not change that fact one bit. Therefore, §704 controls the relevance of that appellate structure for purposes of this Court's jurisdiction.

The second exception is equally irrelevant here. Agency action is final and judicially reviewable notwithstanding the existence of the agency's appellate scheme

> unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative....

The first prong of this exception -- "requires by rule" -- is syntactically indeterminate but in context means that the agency requires that the litigant avail himself of the agency's appellate scheme if that litigant ever intends to seek judicial review.[18/] The second prong ensures that the action during the pendency of the intra-agency appeal is inoperative.[19/] Congress by means of this second exception is permitting an agency to create a jurisdictional exhaustion requirement similar to one it might create pursuant to the first exception but with the important difference that if an agency chooses to postpone judicial review the price is that the action is inoperative in the interim.

18/ Thus, the agency requires an intra-agency appeal before it would permit the litigant to seek judicial review. Of course, agencies cannot control litigants. But the APA is, inter alia, a waiver of sovereign immunity. Assiniboine and Sioux Tribes v. Board of Oil & Gas, 792 F.2d 782, 792-93 (9th Cir. 1986); 5 U.S.C. §702. Thus, Congress in §704 is permitting agencies to adopt rules that condition the waiver of sovereign immunity in §702. If a litigant does not avail himself of the agency's appellate scheme then the agency is not amenable to suit at all even if the action is otherwise "final" and reviewable.

19/ Again, note the difference between an agency-created appellate scheme in which the authority to take decisionally final actions is delegated and then reviewed and an agency whose "initial" decisions are not "firm and complete" but "tentative, provisional, or contingent, subject to recall, revision, or reconsideration by the issuing agency." NTEU, 712 F.2d supra at 671. Recall that the second exception, like the first, requires as its predicate an "otherwise final" agency action.

Again, it takes little analysis to see that the NRC has not adopted by regulation an appellate scheme in accordance with the second exception. No regulation requires either expressly or by implication that a litigant confronted with a decisionally final order must file an appeal with the agency if he ever wants to challenge the order under the Hobbs Act.[20] Equally important, the filing of an agency appeal does not make the final action inoperative pending appellate review. Although the Commission by regulation automatically stays the immediate effectiveness of a licensing action, this stay is contemplated to be of short duration (30 days), has no relationship whatever to any appellate process then ongoing[21] and is expressly defined as a non-merits look at the agency action.[22]

20/ Again, the issue here is jurisdictional exhaustion. No doubt in the normal administrative agency case discretionary requirements would lead a litigant to turn first to the agency for relief. Here, where it is clear that a nuclear power plant can be granted a license and begin full power operation notwithstanding an ongoing intra-agency appellate process, a court should view discretionary exhaustion in a different light. Of course, the specific circumstances and events in the Seabrook proceeding in the last several months as set out in Petitioners' Petition for Mandatory Relief establish beyond peradventure that no discretionary exhaustion requirements should be imposed by this Court.

21/ Indeed, this 30-day stay pending a decision to stay is imposed even if no litigant files any notice of appeal. 10 C.F.R. §2.764.

22/ No comment made in the course of the opinion or statement reflecting that ["immediate effectiveness" or better a "stay"] determination is to be given any weight by the [Licensing Board] or Appeal Board in its consideration of either a stay motion pursuant to §2.788(e) or an appeal on the merits pursuant to §§2.762 and 2.785, or in anysubsequent formal adjudication. The Commission's effectiveness determination is entirely without prejudice to such consideration in subsequent proceedings.

10 C.F.R. §2.764(g).

Thus, the stay now in effect has no internal relationship to any merits decision since the Commission's immediate effectiveness decision which brings the present stay to an end is not a merits decision. Moreover, the present stay has no relationship to any intra-agency appeal.[23/]

Thus, not only is the November 9 Order "decisionally final" notwithstanding its lack of immediate effectiveness but 5 U.S.C. §704 makes clear that Congress intended that there be no jurisdictional exhaustion bar to review now of this "final

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23/ Of course, the Commission could decide in its §2.764 "stay" decision to stay the effectiveness of the action pending further agency merits review. But, of course, this is not what the second exception requires. The possibility that an action will be made inoperative pending agency appeal is not enough to trigger jurisdictional exhaustion under §704. The mere possibility that a stay will issue exists in many agency schemes. If this were enough to postpone judicial review of "otherwise final" agency actions, the second exception would swallow the rule and the Congressional intent in §704 would be frustrated. Also, as a practical matter, if a stay is not granted, then the second exception is not met and the agency action at issue is reviewable under §704. Yet, the Hobbs Act's 60-day time limit is jurisdictional. Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988). Thus if the mere possibility of a stay pending agency review requires an appellant to wait, then the right to review may be lost. Finally, the "pendency of an application for a stay before an agency ... does not affect the finality of the order at issue." Commonwealth of Massachusetts v. NRC, No. 89-1306, September 22, 1989 Order (D.C. Cir. 1989). Since the mere possibility of a stay does not affect "decisional finality", it would be paradoxical for it to affect jurisdictional exhaustion under §704. Congress clearly intended that if the agency wanted to postpone judicial review it would not only have to require agency appeal but make it clear and provide by regulation that the filing of such appeal would make (not might make) the action inoperative pending that appeal. Agencies that have adopted schemes in harmony with this exception have done precisely this. The NRC meets neither prong of this second exception.

order" based on the existence of an intra-agency appellate scheme.[24/]

II. THE NRC IS SEEKING TO EVADE REVIEW.

Congress intended that the November 9 Order be judicially reviewable at this point on the merits notwithstanding the existence of an intra-agency appellate scheme. The Respondents position on the appropriate timing of judicial review of licensing actions as well as their notion of what actions are reviewable is a strategy designed to evade the review intended by Congress.[25/] Indeed, it is a strategy that to date has

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24/ The fact that the November 9 Order is presently stayed pending a decision on a stay is purportedly relevant to Respondents' motions in two different ways: 1) Respondents appear to believe that the "stay" which makes the Order presently ineffective affects decisional finality and therefore there is no jurisdictional predicate -- a "final agency action" -- at this time. This is a simple error based on a confusion between decisional finality and effectiveness. NTEU. 2) Respondents also appear to believe that the stay reflects an ongoing agency appellate process which as a matter of jurisdictional exhaustion precludes this Court's review. This is a complex error based on a failure to consider 5 U.S.C. §704 and a lack of attention to the nature of the present stay. As noted, the present stay has no relationship whatsoever to any ongoing intra-agency appellate review on the merits. In short, the present stay is irrelevant to decisional finality and jurisdictional exhaustion and has no impact on this Court's present jurisdiction.

25/ Respondents are attempting to achieve precisely the same results as those administrative schemes which by statute or by agency regulation preclude or postpone judicial review. Yet, the AEA indicates that Congress intended to have a final order authorizing a license judicially reviewed (no matter what label is affixed to that order by the agency and no matter what additional agency appellate process might be available). Further, if the NRC wants to postpone that review for its own reasons, Congress required that the final action be meanwhile inoperative.

achieved astonishing success as a review of the case law makes clear.[26/] The NRC holds back from judicial review the "merits" of its licensing action until the agency appellate process is complete, an event the timing of which has nothing to do with the granting of a license. Respondents' Motion at 6 n.4. It holds out for review at the time of licensing only its immediate effectiveness stay decision pursuant to 10 C.F.R. §2.764, a decision which has nothing to do with the merits of the licensing action. Id. at 3-4. The NRC then convincingly argues that its stay decision is simply discretionary and that absent a court imposed stay, no merits review is yet timely, even though the licensing action (which was decisionally final when made) is now both final and effective.[27/] This

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26/ Petitioners have found no case in which appellants have sought judicial review of a Licensing Board's license authorization decision. Aggrieved agency litigants have sought review at literally every stage of agency decision-making connected to nuclear plant licensing except the one that no doubt was intended by Congress in 42 U.S.C. §2239 and 5 U.S.C. §704 with the results discussed in the text above. This failure is due to the lack of attention to §704 and the Commission's own insistence that it is insulated from review at the point at which it decides to license a nuclear plant.

27/ This position is convincing precisely because of the non-merits discretionary nature of the §2.764 decision, establishing again that the earlier Licensing Board licensing action is decisionally final. See Oystershell Alliance v. NRC, 800 F.2d 1201, 1206-1207 (D.C. Cir. 1986) (rejecting a challenge to the Commission's non-merits stay decision in an appeal of that decision based on its discretionary nature). In Oystershell no appeal was taken of the Licensing Board's decisionally final licensing action, which was only made effective by the challenged stay decision.

legerdemain is performed with the rather simple device of labelling the "firm and complete" Licensing Board decision as "non-final" upon agency appeal. 10 C.F.R. §2.760(a).[28/]

The Intervenor in its motion makes this attempted evasion of meaningful review transparent:

> [U]nder appropriate circumstances, a license may in fact issue prior to "final agency action" on the license application; in such a case, the interlocutorially-issued license is analogous to a preliminary injunction issued by a District Court (except that, unlike the case of preliminary injunctions, Congress has not provided for interlocutory review).[29/]

28/ The confusion at work here is transparent: when the Licensing Board's action is decisionally final for purposes of agency appeal (based on doctrinal considerations identical to those developed by the courts) and an appeal is sought the action is then simply relabelled "non-final" even though its effectiveness is in no way affected by the appeal and even though the agency thereby is not withdrawing the authority to make final decisions (subject only to modification on agency appeal) from the Licensing Board. 10 C.F.R. §§2.721, 2.718 and 2.760(a). The effect of this semantic game is that the agency has created two decisional "tracks": the actual licensing track where a Board issues a "final order" under 42 U.S.C. §2239 and it then becomes effective as a result of a non-merits stay decision and the soi-disant "full merits" track whose relationship to the agency's licensing actions (which Congress wanted the courts to be able to review) is completely severed. Although the agency is free to proceed in this fashion, its labels do not affect "finality" before this court. See, e.g., Abramowitz v. EPA, 832 F.2d 1071, 1075 (9th Cir. 1987) ("mere fact that the agency did not label its action "final" does not preclude review", and citing cases).

29/ This analysis is quite astonishing. Congress expressly provided for review of final licensing orders. By the transparent artifice of labelling such a final order "non-final" the license becomes "interlocutorially-issued." Since no one can find a statutory provision in the AEA for the review of such "affirmative injunctions," review even of the Commission's immediate effectiveness decision is apparently foreclosed. Of course, no one can find any authority whatever enabling the Commission to issue a license, and by labelling its action non-final evade the clear review provisions of 42 U.S.C. §2239.

Intervenor's December 11 Motion at 8 n.11 (emphasis supplied). The agency is obviously trying to frustrate the will of Congress. County of Rockland v. NRC, 709 F.2d 766, 775 (2nd Cir. 1983) (noting that every Commission order must be evaluated in accordance with the standards of decisional finality set out in Port of Boston, "[o]therwise, the Commission potentially could insulate itself from appellate review simply by labelling a decision as 'interim' . . .").

The impact on litigants and courts of the NRC's tortured and contradictory treatment of agency "finality" and judicial review is well-illustrated in a series of Sixth Circuit cases arising from the NRC's full power licensing of the Perry Nuclear Power Plant in Ohio. In May 1985 the Licensing Board closed the record on all contested issues in the licensing proceeding. In September 1985, it issued its "firm and complete" licensing order authorizing that a full power license issue.[30/] After a January 1986 earthquake, agency intervenors moved to reopen the record before the Appeal Board which had jurisdiction over the Licensing Board's decision as a result of intra-agency appeals. After the Appeal Board decided to hold an exploratory hearing on this reopen motion, the Commission in April 1986 took sua sponte review of this decision and reversed it, denying the motions to reopen. At this point, judicial review was sought of this Commission

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30/ No petition for judicial review was filed within 60 days of this final order. The effectiveness of this order was automatically stayed pursuant to 10 C.F.R. §2.764 until November 1986.

decision. Ohio Citizens for Responsible Energy, Inc. v. NRC, 803 F.2d 258, 259-260 (6th Cir. 1986). The Court held that the decision upon which review was sought was not a "final order" because it did not grant or deny a license, and it dismissed the petition.[31/] After the November 1986 immediate effectiveness decision, another petition for review was filed in the same court. Appellants again sought and this time obtained review of the April 1986 Commission decision denying the motions to reopen. Astonishingly, the Court upheld that decision as an exercise of Commission discretion which discretion was appropriate on the grounds that the motions were submitted after final agency action.[32/] State of Ohio v. NRC, 814 F.2d 258, 263 (6th Cir. 1987).

31/ The Court cited Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 180 (D.C. Cir. 1982), Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1978) and Oystershell. Of course, the Commission's April 1986 decision came after and not before the final agency action required by the Hobbs Act which the Court expressly recognized when it affirmed the application by the Commission of the motion to reopen standard to the motion regarding the earthquake. The Court quoted Oystershell's own quotation from Mobil Oil Corp. v. ICC, 685 F.2d 624 (D.C. Cir. 1982), approving a reopen standard after an "agency has taken final action." The fact that the April petition was filed therefore after the point at which the Commission considered "final agency action" to have been taken (the Licensing Board's decision in September 1985) had no impact on the Court's analysis of the "finality" of the April 1986 Commission decision being challenged. Instead, the Court, completely confused, stated that review of the April 1986 action would lie upon review of the "final licensing decision." Ohio Citizens, supra at 261.

32/ In short, when initially challenged the April 1986 decision was seen as not yet "final" and when it became "final" and subject to review after November 1986 it was affirmed on the grounds that the April 1986 decision was properly discretionary because "final agency action" had already taken place in September 1985. This absurd result was based on the failure to petition from the "decisionally final" order of

Footnote 32 continues...

CONCLUSION

For all of the reasons set forth above, this Court should deny the Respondents' Motion to Dismiss.

Respectfully submitted,

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Footnote 32 continued...
September 1985, an order identical in form to the November 9 order at issue here. Moreover, it is obvious that the agency's application of the reopen standard to new evidence or issues after the Licensing Board has issued its decision authorizing a license establishes that the Commission understands very well that under its regulations the license authorization is "final agency action." As such, Congress intended that it and not some elusive future stay decision be subject to this Court's review.

EXHIBIT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

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

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

RENEWED MOTION OF THE MASSACHUSETTS ATTORNEY GENERAL FOR A SCHEDULE FOR THE FILING OF CONTENTIONS ARISING OUT OF THE SEPTEMBER, 1989 ONSITE EXERCISE

The Massachusetts Attorney General ("Mass AG") hereby renews his request for a filing deadline for contentions arising out of the September 27, 1989 onsite exercise ("September exercise"). In support of this renewed request the Mass AG states:

1. The Commission has indicated in CLI-89-19 (dated September 15, 1989) that the September exercise is litigable by Intervenors assuming that the exercise provides a basis for alleging a fundamental flaw in the onsite plan. CLI-89-19, slip opinion at 4 and n. 5. Because any contentions filed will be subject to the late-filed contention standard,[1/] id., the Mass AG seeks a filing deadline so that he can establish "good

1/ The Mass AG is presently seeking review of ALAB-918 (which became final agency action on August 18, 1989) as part of his appeal of the NRC's low-power decision pending before the Court of Appeals for the District of Columbia.

cause" for his failure to file on time. (As CLI-89-19 indicates "on time" in the Seabrook proceeding now means filed in the spring of 1982.) See Mass AG's May 31, 1989 Motion to Hold Open the Record at 9-10.

2. The Commission has ordered the Staff to issue its exercise "report" no later than October 16, 1989 ("October Report"). The Mass AG seeks 45 days[2/] from the date of his receipt of that report as the deadline for the filing of all contentions for which that report supplies both necessary and alone or in combination with other information sufficient information to prepare a contention, assuming that such necessary and sufficient information was not fully available beforehand.

3. The Mass AG also seeks (as a part of this filing schedule) 45 days from the date of his receipt of any other information (not available either before or in the Staff October Report) which is necessary and alone or in combination with other information sufficient for the preparation of an onsite exercise contention, as the deadline for the filing of such contention. In this regard, the Mass AG states that he is today seeking agreement from the Applicants to permit

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2/ This Board's August 19, 1988 Order setting a deadline for filing offsite exercise contentions was used as a model here. First, as the Applicants argued at that time, an expedited schedule was appropriate and was issued by this Board. Second, a FEMA draft exercise report was made available to Intervenors on or about August 2, 1988 and the final FEMA report was issued on or about September 2, 1988. In light of these facts, this Board set September 21, 1988 as the filing deadline. In addition, the Mass AG has factored in the additional time necessary to prepare a summary of expert testimony as required by the late-filed contention standards, which standards were not applied in September, 1988.

Intervenor observers at all relevant locations during the September exercise. See attached letter. In addition, the Mass AG is seeking full access to all onsite exercise-related documents immediately after the exercise.[3/] For example, the scenario documents for an onsite exercise like the September exercise are not normally produced as part of the Staff's onsite exercise report. Absent production of such documents by the Applicants after the exercise or by the Staff as part of its exercise report, the Mass AG and Intervenors will not obtain such documentation until the NRC responds to its FOIA requests (including those now pending). Certain contentions -- scope contentions being the obvious example -- cannot be formulated in the absence of such scenario documents. Thus, the Mass AG seeks 45 days from the date of his receipt of other information not provided in the Staff's report for the filing of contentions based on that other information.[4/]

4. The Mass AG requests that this Motion be handled in an expedited fashion with Applicants' and Staff responses filed on September 22, 1989. This is necessary because in the event observational status is permitted during the September 27

3/ The Mass AG has sought and will continue to seek all such documents from the NRC Staff through FOIA requests.

4/ The Mass AG does not hazard a guess as to the Applicants' and Staff's response to "informal" discovery on the onsite exercise. The point here is simply to have the Board set a filing deadline triggered by Intervenor receipt of information whenever that occurs (sooner if Intervenors' have observational access and are provided documents in a timely manner or later if the Mass AG has to obtain these documents by means of his FOIA requests).

exercise and/or documents are provided afterward, and the information gleaned therefrom is necessary and sufficient to permit the filing of an onsite exercise contention, the Intervenors will soon need the Board's guidance as to the timeliness standards it intends to apply to September onsite exercise contentions.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
ATTORNEY GENERAL

John Traficonte
Chief, Nuclear Safety Unit
Department of the Attorney General
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(617) 727-2200

DATED: September 18, 1989

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

JAMES M. SHANNON
ATTORNEY GENERAL

September 18, 1989

BY FAX

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

RE: Observational Status During September Exercise

Dear Tom:

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

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

Thank you for your cooperation.

Best,

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

JT/tm

cc: Service List

EXHIBIT 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

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

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

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

INTRODUCTION

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

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

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

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

3/ The October 13 pleading also amended the earlier contention clarifying, by means of the procedural vehicle of amended bases, the nature of the omissions in the scope and design of the exercise as disclosed by the scenario document. For example, direct observation had led the Intervenors to conclude that no field monitoring teams had been dispatched offsite and that therefore the exercise failed to test portions of the onsite plan that are required by 10 CFR 50.47(b)(9) which requires "[a]dequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences. . . ." The scenario document reveals that one team was dispatched offsite but no plume monitoring took place. See Scenario at 3.1-2, 3.1-8. The Applicants did not test their capacity to locate a plume, track its course and measure its content. Neither did they exercise this capacity as it is related to proper offsite protective action decision-making. (The Staff's Inspection Report 50-443/89-10, dated October 2, 1989 but not received by Intervenors until October 12 as Appendix 1 to Applicants' October 11 Response to the Intervenors' September 29 motion, at 8 asserts that field monitoring teams were dispatched and that "sample control and analysis including surveys . . . were effectively demonstrated.") However, as the Scenario makes clear there was no plume to track (4.1-6) in light of the limited development of the accident chosen and no mini-scenario was used to test plume monitoring and tracking capabilities "out of sequence" or outside the logic of the accident scenario. See Scenario at 8.0 "Mini-Scenarios" and 10.4 "Onsite Out of Plant Data" and 10.5 "Offsite Data."

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

This memorandum is structured as follows:

I. Status of Motion for Summary Disposition and this Memorandum

II. Legal Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

(citation omitted).

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

(footnote continued)

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

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

(footnote continued)

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

II. LEGAL ISSUES

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

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

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(footnote continued)

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

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

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

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

The correct analysis of this language is as follows:

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

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

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

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

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

"full participation" exercise.[9/]

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

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

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

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

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

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

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

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

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

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

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

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

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

The 1980 Scheme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

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

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

(footnote continued)

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

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

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

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

Id. at 16825.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

b. There is no regulatory basis at all for exercising a licensee's onsite plan at a given site over a period of years instead of fully testing all the major observable portions of that plan during each annual exercise. See Inspection Procedure 82301 attached as Exhibit 2 to the Intervenors September 29 Motion at 2-3. All major observable portions of an onsite plan (and as much as is reasonably achievable without public participation) must be exercised annually alone or together with some combination of offsite plans. The NRC Staff has simply adopted this cyclical pattern from FEMA without determining whether "partial participation" be the licensee is permitted under the regulations. See ALAB-900 at 290.

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

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

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

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

(emphasis supplied)

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

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

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

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

(emphasis supplied).

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

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

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

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

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

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

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

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

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

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

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

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

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

In its 1982 rulemaking concerning the standards for issuance

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

> The proposed rule change in 46 FR 61132 provided that in orderto grant a low-power license, only a finding as to the adequacy of onsite emergency planning and preparedness is required; . . . While the proposed rule would eliminate the need to have any NRC or FEMA review, findings, or determinations on the adequacy of offsite agencies' emergency planning and preparedness, the NRC review of the licensees' onsite response mechanism would necessarily include aspects of some offsite elements: Communications, notification, assistance agreements with local law enforcement, fire protection, and medical organizations, and the like. Some examples, but not an exclusive list, where review of an applicant's emergency plan would involve aspects of some offsite elements may be found in pertinent portions of 10 CFR 50.47(b)(3), (5), (6), (9), and (12). . . . Prior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the applicants' emergency plan:
>
> (b) Section 50.47(b)(5). Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

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

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

Subsequently, in remanding for further proceedings prior to

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

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

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

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

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

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

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

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

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

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

4) no testing of the personnel monitoring and

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

5) no demonstration of an actual shift change or the capability to provide staffing for continuous (24 hour) operations for a protracted period or for second shift staffing; §50;47(b)(1); NUREG-0654 II.A.4; and

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

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

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

CONCLUSION

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

COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
ATTORNEY GENERAL

John Traficonte
Chief, Nuclear Safety Unit
Matthew Brock
Assistant Attorney General
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Boston, MA 02108-1698
(617) 727-2200

DATED: October 18, 1989

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

JAMES M. SHANNON
ATTORNEY GENERAL

September 18, 1989

BY FAX

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

RE: Observational Status During September Exercise

Dear Tom:

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

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

Thank you for your cooperation.

Best,

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

JT/tm

cc: Service List

ATTACHMENT 1

ROPES & GRAY
ONE INTERNATIONAL PLACE
BOSTON, MASSACHUSETTS 02110-2624
617 951-7000
TELECOPIER 617 951-7050

[illegible]
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401 [illegible]
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WASHINGTON, D.C. 20004
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TELECOPIER 202 [illegible]

September 20, 1989

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

Re: Observational Status During September Exercise

Dear John:

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

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

Very truly yours,

Thomas G. Dignan, Jr.
Counsel for the Applicants

cc: Service List

TGD/tgd:ONEXOBSR SB

ATTACHMENT 2

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

September 27, 1989

BY FAX

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

Dear Mr. Dignan:

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

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

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

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

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

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

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

Yours,

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

JT/jc

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

APPENDIX 1

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

A. PROGRAM APPLICABILITY

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

B. DEFINITIONS

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

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

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

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

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

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

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

C. LEVEL OF INSPECTION EFFORT FOR EXERCISE OBSERVATION

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

D. RECOMMENDED SIZE OF INSPECTION TEAMS

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

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

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

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

4. Remedial Exercise

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

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

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

END

EXHIBIT 4

U.S. NUCLEAR REGULATORY COMMISSION
REGION I

Report No. 50-443/86-10

Docket No. 50-443

License No. CPPR-135 Priority -- Category B-1

Licensee: Public Service of New Hampshire

P.O. Box 330

Manchester, New Hampshire

Facility Name: Seabrook Unit 1

Inspection At: Seabrook, New Hampshire

Inspection Conducted: February 24-28, 1986

Inspectors: _____ 4/1/86
W. Lazarus, Senior EP Specialist date

W. Thomas, EP Specialist
C. Amato, EP Especialist
C. Gordon, EP Specialist
J. Hawxhurst, EP Specialist
G. Bryan, COMEX Corporation
G. Wehmann, Battelle

Approved by: _____ for _____ 4/1/86
T. Harpster, Chief, date
Emergency Preparedness Section

Inspection Summary: Inspection on February 24-28, 1986 (Report Number 50-443/86-10)

Areas Inspected: Routine announced emergency preparedness inspection to observe the licensee's first full scale emergency exercise performed on February 25, 1986.

Results: No violations were identified. The licensee's emergency response actions demonstrated during this exercise were adequate to provide appropriate protective measures for the health and safety of the public.

DETAILS

1. Persons Contacted

*A. Callendrello, Emergency Preparedness Supervisor
*P. Casey, Senior Emergency Planner
*W. DiProfio, Assistant Station Manager
*S. Ellis, Security Department Supervisor
*J. MacDonald, Radiological Assessment Manager
*D. Moody, Station Manager
W. Otto, Emergency Planner
*J. Quinn, Director of Emergency Planning
*G. Thomas, Vice President - Nuclear Production
*L. Walsh, Operations Manager

The inspectors also interviewed several licensed operators, health physicists, administrative and training personnel.

*Denotes those present at the exit interview.

2. Emergency Exercise

The Seabrook Station full scale emergency preparedness exercise was conducted on February 26, 1986.

A. Pre-Exercise Activities

Prior to the emergency exercise, NRC Region I representatives had telephone discussions and met with licensee representatives to review the scope and content of the exercise scenario. As a result of these discussions, revisions were made to the scenario and supporting data sheets.

The NRC observers and licensee observers and controllers attended a scenario briefing on February 25, 1986. The emergency response actions expected during the various phases of the scenario were discussed.

The scenario included the following events:

- An explosion in the chlorination building due to defective instrumentation and a pump electrical fault which ignited an undetected hydrogen accumulation.
- A fire in the "B" containment building spray pump area when the pump was started for testing following maintenance. The fire damage rendered the pump inoperable.
- A double-ended shear of cold leg "B".

- In conjunction with the cold leg break the containment Building Spray Valve CBS-VII failed to open and Safety Injection Pump A failed to operate.
- Electrical Emergency Buss E6 failed.
- Station conditions degraded to the point where in-core thermocouples indicated greater than 700°F with Reactor Vessel Level Indication System less then 40%.
- Station radiological conditions indicated significant core damage due to the LOCA.
- Reactor vessel level was restored, however, in-containment pressures and radiation levels increased drastically.
- The "A" SI Pump was restored and cold leg recirculation initiated.
- The closed indication for several containment on-line purge valves was lost and an off-site release began.

The above events caused activation of the licensee's emergency facilities and also permitted state and local governments to exercise their Emergency Plans.

B. Activities Observed

During the conduct of the licensee's exercise, NRC team members made detailed observations of the activation and augumentation of the emergency organization; activation of emergency response facilities; and actions of emergency response personnel during the operation of the emergency response facilities. The following activities were observed:

- Detection, classification, and assessment of the scenario events;
- Direction and coordination of emergency response;
- Notification of licensee personnel and offsite agencies of pertinent information;
- Assessment and projection of radiological (dose) data;
- Recommendation of protective actions;
- Provisions for in-plant radiation protection;
- Performance of offsite, onsite, and in-plant radiological surveys;
- Maintenance of site security and access control;
- Performance of technical support;
- Performance of repair and corrective actions;
- Communications/information flow, and record keeping; and
- Management of Recovery Operations.

The NRC team noted that the applicant's activation and augmentation of the emergency organization; activation of the emergency response facilities; and [illegible] and use of the facilities were generally consistent with their emergency response plan and implementing procedures. The team also noted the following positive aspects of the licensee emergency response that were indicative of their ability to cope with abnormal plant conditions:

- The control room operators demonstrated excellent knowledge of the plant emergency operating procedures.
- The development of plant actions by control room personnel to effectively mitigate the consequences of the accident were excellent.
- Shortly after the initial offsite release an excellent briefing of the Control Room staff was provided by the TSC Emergency Operations Manager.
- The TSC contained an excellent document library, which was well used as a resource throughout the exercise.
- The activation of the TSC was timely and plant condition briefings by the Site Emergency Director (SED) were frequent.
- The activation of the OSC was timely and frequent briefings were held to update personnel on plant conditions.
- Good control over the OSC in-plant teams and good communirations with the teams were demonstrated throughout the exercise.
- The OSC team members demonstrated a generally good knowledge of sound health physics practices.
- The Incident Field Office location in the EOF functioned very well during the exercise.
- Good coordination between the dose assessment specialist and the field monitoring team coordinator was demonstrated.
- Offsite field monitoring teams were well briefed prior to dispatch from the EOF and were frequently updated on changing plant conditions.
- Offsite sampling coordinates were quickly located, and sampling results were promptly reported back to the Offsite Team Communicator.

- Offsite teams demonstrated a thorough knowledge of the use of offsite monitoring team equipment and procedures.

Although the ability to analyze plant conditions, and make appropriate, timely, protective action recommendations for the public were found to be acceptable, the following items were identified which could have degraded overall response during emergencies and require evaluation for possible corrective action:

- The classification of the chlorination building explosion as a Notification of Unusual Event was incorrect. (This appears to be partly due to a deficiency in EPIP ER-1.1 in that the station initiating condition is misleading). A second independent verification of correct classification should be considered to avoid errors in classification. (50-443/86-10-01)

- EPIP ER-1.4 directs evacuation to the the Seabrook Greyhound Track if the wind is from the east. This is in error as the dog track is due west of the plant (50-443/86-10-02).

- There was no security representation in the TSC. The Maintenance Coordinator assumed this function, but he is not security trained. It may be more appropriate to station the Security Coordinator in the TSC rather than in the EOF (50-423/86-10-03).

- There was no dose assessment/dose projection capability demonstrated in the TSC (neither prior to EOF activation, nor as a backup to EOF after activation). Instead the TSC relied on YAEC to perform dose projections based on core damage. This resulted in a one hour delay (because of a computer malfunction) before this information was available to the SED. (No actual release was taking place at this time) The capability to perform preliminary dose projections exists by procedure and is required by ER-3.1 (50-443/86-10-04).

- Priorities of TSC activities were occasionally inappropriate. The General Emergency classification was made by the Emergency Operations Manager without verification by the Site Emergency Director (SED) (50-443/86-10-05).

- The TSC was somewhat slow in analyzing the indications of a DBA LOCA (50-443/86-10-06).

- The SED was not informed of the failure of the Containment Building Spray (CBS) discharge cross-connect valve until 30 minutes after the failure was identified. TSC personnel were not briefed on the failure until an additional ten minutes had passed (50-443/86-10-07).

- The general plant status board in the TSC at times lagged actual plant conditions by 30 minutes (50-443/86-10-08).

- Form ER-3.2B (Rev. 2) from OSC Operations procedure EPIP ER-3.2 had been issued, but the procedure in the OSC had not been revised to reflect the change (50-443/86-10-09).

- Extremity TLDs were not considered for the containment atmosphere sample team although they were involved in handling a 40R/hr (contact) source. Revised form ER-3.2B (Rev. 2) does not have provisions for the Radiological Controls Coordinator to specify the use of extremity TLDs (ER-3.2 and ER-6.2 contain these provisions) (50-443/86-10-10).

- The method of tracking personnel exposures by team members when RWPs are not used is not clearly specified (50-443/86-10-12).

- EBS messages are not monitored for accuracy. The EBS message issued at 1105 was contrary to protective action recommendations agreed to by NH Yankee and NH CD. (Message announced that the beaches at Seabrook, Hampton and Hampton Falls would be evacuated and that those three towns would be sheltered. It should have announced evacuation of the towns of Seabrook, Hampton, and Hampton Falls, with sheltering downwind out to five miles). (50-443/86-10-13).

- Tracking of feedback on actual offsite protective actions taken was not indicated on the EOF status board (50-443/86-10-14).

- On occasion, delays occurred in EOF discussions/decision making while searching messages for the most recent values of critical plant parameters (containment pressure, containment radiation levels, plant vent stack release rates, etc.) Trending such information on a status board would improve response times (50-443/86-10-15).

- The Response Manager interfaced with several different levels in the various organizations in the EOF. He should consider a single point of contact with each organization and delegate other contacts to the Technical Coordinator (50-443/86-10-16).

- There is no PA speaker in the dose assessment area of the EOF. Several important announcements were not heard as a result. (50-443/86-10-17).

- Critical information was not recapitulated on a frequent enough basis during press briefings in the media center (50-443/86-10-18).

3. Exit Meeting

The inspectors attended the applicant's critique on February 27, 1986 following the critique, the NRC team leader summarized the observations made during the exercise as detailed in this report (See detail 1 for attendees).

At no time during the inspection was any written material provided to the licensee by the inspectors.

EXHIBIT 5

U.S. NUCLEAR REGULATORY COMMISSION
REGION I

Report No. 50-444/86-18

Docket No. 50-443

License No. CPPR-125 Priority Category B-1

Licensee: Public Service of New Hampshire
P. O. Box 330
Manchester, New Hampshire 03105

Facility Name: Seabrook Unit 1

Inspection At: Seabrook, New Hampshire

Inspection Conducted: March 24-28, 1986

Inspectors: W. Lazarus, Senior EP Specialist — 5/15/86 date

W. Thomas, EP Specialist
C. Amato, EP Specialist
C. Gordon, EP Specialist
J. Hawxhurst, EP Specialist
G. Bryan, COMEX Corporation
G. Wehmann, Battelle PNL

Approved by: W. Lazarus, Acting Chief, Emergency Preparedness Section — 5/15/86 date

Inspection Summary: Inspection on March 24-28, 1986 (Report No. 86-18)

Areas Inspected: Emergency Preparedness Implementation Appraisal to evaluate the adequacy and effectiveness of the emergency preparedness program for Seabrook Unit 1, including organization, administration, procedures, training and facilities and equipment.

Results: No violations were identified. Several program areas were identified which are incomplete or require corrective action, these are listed as open items, and will need to be addressed by the licensee and reinspected in a subsequent inspection. Paragraph 6 of this report provides a summary listing of these items along with the determination of whether the item is required to be corrected prior to issuance of the low power license or the full power license.

DETAILS

1. Persons Contacted

A. Callendrello, Emergency Preparedness Supervisor
P. Casey, Senior Emergency Planner
*W. DiProfio, Assistant Station Manager
S. Ellis, Security Department Supervisor
*J. MacDonald, Radiological Assessment Manager
*D. Moody, Station Manager
W. Otto, Emergency Planner
*J. Quinn, Director of Emergency Planning
*G. Thomas, Vice President - Nuclear Production
*L. Walsh, Operations Manager

The inspector also interviewed several licensed operators, health physics, administrative and training personnel.

*Denotes those present at the exit interview.

2. Scope of Appraisal

The purpose of this appraisal was to determine the readiness of the Seabrook Station to implement the Emergency Plan in preparation for licensing. The principal criteria for this appraisal are contained in NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Emergency Response Plans and Preparedness in Support of Nuclear Power Plants", 10 CFR 50.47, and 10 CFR 50 Appendix E. The appraisal addressed administration, emergency organization, emergency training and retraining, emergency facilities and equipment, procedures, coordination with offsite groups, and drills, exercises and walk-throughs.

3. Summary of Results

The appraisal was completed during this inspection. Several emergency preparedness program areas under review remain incomplete or require corrective action. This report documents the followup of the areas for which review was completed during the previous inspection (IR 85-32) as well as those areas covered by this inspection. Items which were listed as open items in the previous inspection report are addressed at the beginning of each section with the disposition of the item identified. Those items which need to be addressed for resolution as a result of this inspection are listed as "open items" in each detail section, and are summarized in detail 6, at the end of this report.

4. Details

A. Administration of the Emergency Plan

(1) Assignment of Responsibilities and Authority
Previous Inspection Findings

(Closed) IFI (50-443/85-32-01): Develop job specifications for the Emergency Preparedness Supervisor and the second Senior Emergency Planner.

The inspector reviewed the approved job specifications for both positions and found them to be acceptable. In addition the qualificatipns of the individual who had been hired as of the second Senior Emergency Planner were reviewed. It was determined that the education and experience requirements of ANSI N 18.7 were met.

(2) Coordination of EP Functions

(Open) IFI (50-443/85-32-02): Define and document the interaction between the corporate EP staff and the station staff.

Action on this item has not been completed. The licensee is planning several changes to strengthen the EP staff organization in the near future. Action in this area will be evaluated during a subsequent inspection.

Except as noted in (2) above, this area was found to be acceptable.

B. Station Emergency Organization

(1) Onsite Organization

Previous inspection findings

(Closed) IFI (50-443/85-32-03): Develop a comprehensive organization chart which describes overall command, control, and information flow for emergency response facilities and each major element of the augmented organization.

The licensee has developed a series of organization charts which describe the overall command, control, and information flow for the emergency response facilities and each major element of the augmented organization. This was determined to be acceptable in lieu of a single integrated organization chart.

(Open) IFI(50-443/85-32-04): Assign the responsibility to perform initial dose assessment on shift and revise Appendix A of the Emergency Plan accordingly.

The responsibility to perform initial dose assessment is assigned to the shift superintendent or a trained alternate in Section 10.1.1 of the Emergency Plan. Appendix A of the Emergency Plan, which defines each ERO position, does not include initial dose assessment as a duty of the Shift Superintendent or Short Term Emergency Director. This will be incorporated in Amendment 58 to the FSAR. Action in this regard will be verified in a subsequent inspection.

(2) Augmentation of Onsite Emergency Organization

Previous Inspection Findings

(Closed) IFI (50-443/85-32-05): Identify authorities and responsibilities of the Response Manager that may not be delegated. This item was closed with the publication of FSAR Amendment 57 which adequately identified the authorities and responsibilities of the Response Manager.

(Open) IFI (50-443/85-32-06): Provide additional qualified alternates in the line of succession for supervisory elements of the augmented emergency organization. (In order to provide for 24 hr./day staffing). The licensee has committed that at least 3 people will be trained and qualified for each of the key positions prior to issuance of a full power license.

(Open) IFI (50-443/85-32-07): Complete all arrangements with local service groups to ensure offsite support will be available when needed. At the time of the appraisal all of the training identified in the emergency plan for members of the Offsite Emergency Support groups had not been completed. Also a letter of agreement for backup ambulance services with the Seabrook Fire Department needs to be completed.

C. Control Room Operator Walk-throughs

Previous Inspection Findings

The previous inspection findings in this area requiring followup were jointly identified as item (50-443/85-32-13). For ease of tracking, a suffix consistent with the original subparagraph of each item is being added to this number.

During the previous inspection, three of the six operating crews were evaluated during during walk through examination. A fourth crew was observed during a utility conducted training drill. The following findings were made:

D

(Open) IFI (50-443/85-32-14a) Paragraph 3.2 (et al) of EPIP ER-2.2, is not consistent with 10 CFR 50.72, in that it fails to require notification of the NRC immediately after state and local notification and within one hour.

This item had not yet been addressed by the licensee and will be reviewed in a subsequent inspection.

(Closed) IFI (50-443/85-32-14b): Paragraph 5.3 of EPIP ER 2.2 lists one or more incorrect alternate NRC phone numbers (e.g. (301) 952-0550 listed vis. (301) 951-0550). The inspector reviewed the latest revision to ER 2.2 and verified that the NRC phone numbers have been corrected.

(Open) IFI (50-443/85-32-14c) Form ER-2.2A, "Initial Notification Fact Sheet," is the form used to accomplish initial state notification (also via the state, local agency notification). This form does not contain information necessary regarding whether a release is taking place (NUREG 0654 II.E3).

This item had not yet been addressed by the licensee and will be reviewed in a subsequent inspection.

(Open) IFI (50-443/85-32-14d): None of the crews was able to accomplish the dose assessment problem postulated. That function is assigned to the STA (SS). They had not yet been trained on dose assessment. Equipment (HP-41CV calculators with the associated dose assessment program) to be used by control room personnel for dose projection was not available. (NUREG-0654 II.0 and II.1).

The inspector verified that the HP41CV calculators had been issued and that crews had been trained in their use, however, it was determined that the HP41CV program is only designed for dose calculation at the site boundary.

Further, the information derived is only used for accident classification purposes, not for making protective action recommendations. This does not meet the requirements of 10 CFR 50.47(b)(9) to be able to assess and monitor actual or potential offsite consequences of a radiological emergency, which could not be done under the present arrangements, prior to arrival of emergency response augmentation personnel. The licensee is evaluating this item for corrective actions. This will be reviewed in a subsequent inspection.

(Closed) IFI (50-443/85-32-14e) Errors in EPIP ER-1.1 regarding emergency action levels. A review of EPIP ER-1 (Rev. 01), "Classification" indicated that a fire which is contained and controlled and potentially affects safety systems would be classified as an Alert;

and, an uncontrolled uncontained fire affecting safety systems would be classified as a Site Area Emergency. This is contrary to the guidance of NUREG 0654, App. 1, which states that, any fire potentially affecting safety systems is an ALERT; and a fire compromising the functions of safety systems is a Site Area Emergency. The inspector reviewed EPIP ER-1.1 (Rev. 2) which corrected this discrepancy.

(Closed) IFI (50-443/85-32-14f): Errors in classification of accident conditions. Walk-through examinations were conducted with two crews during this inspection, following increased training in this area. The training in this area resulted in a noticeable improvement in performance in this area. This area was found to be acceptable.

(Closed) IFI (50-443/85-32-14g): Shift crews were unable to identify source material for evacuation time estimates (ETE). After further evaluation it was determined that knowledge of source material for ETE studies would not normally be expected of control room crews. This item is closed.

(Open) IFI (50-443/85-32-14h): Shift crews were unable to properly evaluate the static condition of 20,000 R/hr containment dome monitor reading (with the containment intact). Specifically they were unsure of whether a release would be in progress and whether EPA protective action guidelines would be exceeded at the site boundary.

This item was not specifically readdressed during this inspection, but will be reviewed during a subsequent evaluation of operator training in this area.

(Open) IFI (50-443/85-32-14i): Shift crews were unaware of the capabilities of the post accident sampling system (PASS). Training of the operators in this area has not yet been conducted due to the fact that the PASS installation has not been completed. This will be reviewed in a subsequent inspection.

D. Emergency Plan Training and Retraining

(1) Previous Inspection Findings

During inspection 85-32 several open items were identified relative to the implementation of the Emergency Plan Training/ Retraining program. These items along with their status as determined during this inspection are noted below.

(Closed) IFI (50-443/85-32-15a) Complete and implement the Emergency Plan Training Manual.

Emergency preparedness training has been transferred to the General and Specialty Training Department. Emergency Preparedness Training requirements are an integral part of the General and Speciality Training Program Manual approved by SORC on March 2, 1986. Following review of the Manual, the inspectors concluded that it meets the requirements for establishment of an acceptable Emergency Preparedness training program. Training, continuing training, and requalification requirements are specified. Attendance, exemption, and documentation policies are stated. In structor training is required. Courses are listed and described. This manual does not apply to Security Emergency Preparedness Training or Emergency Preparedness Training for operators licensed per 10 CFR 55. That training is described under the separate training programs for Security and licensed operators respectively. The inspector had no further questions in this area.

(Open) IFI (50-443/85-32-15b): Specify the initial qualification criteria for selection of personnel to the positions in the Emergency Response Organization.

Criteria for assignment to Emergency Response Organization (ERO) positions are based on operational assignments and qualifications. A listing of the association of operational assignment to ERO position was reviewed by the inspectors; such a listing is not now included in Appendix A, Amendment 55, to the FSAR "Seabrook Radiological Emergency Plan." The inspectors were advised that these criteria would be included in Amendment 58 to the FSAR now in preparation. This item remains open until the amendment is submitted and reviewed.

(Closed) IFI (50-443/85-32-15c): Lesson modules required by ER 8.2 have not all been prepared and implemented.

The inspector verified that all thirteen training modules required for training of onsite personnel have been reviewed and approved.

(Open) IFI (50-443/85-32-15d) EP training instructors do not meet the requirements of ANSI/ANS-3.1.

The inspectors reviewed the SORC approved General and Speciality Training Program Manual dated March 27, 1986 and concluded that the emergency preparedness instructor qualifications listed (Section 5.1, page 2-5) are incomplete. There are no provisions for education requirements (A, AS, BS etc. in an appropriate discipline); practical experience in reactor operations and/or health physics. Seven reading assignments are listed plus a

requirement to observe a full participation exercise. The reading requirements are appropriate, but should be extended to discussion and examination to verify knowledge level. Specifics of what should be gained by exercise observation should be detailed. Play by instructors in the roles based on the training modules they teach should be considered.

(Closed) IFI (50-443/85-32-15e): Revise Emergency Support Group training modules to stress the expected role of each specialty group. Following further review, it was determined that the emphasis of the present training modules is appropriate.

(Closed) IFI (50-443/85-32-15f): Assure that methods for training personnel in changes to procedures and equipment are similar to methods used for the basic qualification program.

The inspector verified that this concern is adequately addressed by the descriptions in Section 1.3.2 and 1.3.7 of the approved General and Specialty Training Program Manual.

(Closed) IFI (50-443/85-32-15g): Assure an adequate number of qualified individuals are available for key Emergency Response Organization positions to provide for 24 hour coverage following implementation of the Emergency Plan.

This item is closed administratively as it is a duplicate of the concern being tracked under item number (50-443/85-32-06).

(2) Current Inspection Findings

a. During a review of Section 1.0 of Chapter 5 to draft Amendment 58 to the FSAR, and in-force Amendment 55, it was identified that responsibilities for each ERO position are listed but there is no indication regarding which responsibilities may not be delegated. This listing should be revised to indicate responsibilities which may not be delegated for all assignees (50-433/86-18-01).

b. The Security Officers Lesson Plan which addresses protective actions does not address the use of KI as a protective action. This should be added, and additional and appropriate material included in this Lesson Plan as to the purpose, use and effects of KI, as well as the identity, by title, of the persons who may approve Security Officer use of KI (50-433/86-18-02).

c. Radiological training has been provided to the hospital staff by a member of the Health Physics Department staff, however continuing training in this area has not been defined. NHY should address periodic retraining in this area to insure continuity of this function (50-443/86-18-03).

d. Section 4.2.64 of the General and Specialty Training Program Manual lists Course S65, "Mitigating the Consequence of Core Damage." Two levels of management are targeted for this training which pertains to EP. Since managers will, in general, fill key ERO positions, this course should be added to Figure 18.2, Rev. 03 as required training for the Response Manager, EOF Coordinator (auditor basis only), Short Term Emergency Director, Site Emergency Director, Emergency Operations Manager (50-443/86-18-04).

E. Offsite Dose Assessment Walk-throughs

The inspectors requested that all personnel trained in refined dose assessment (METPAC) participate in a table-top discussion to determine the effectiveness of EP training.

The refined dose assessment calculations according to the Seabrook Plan are performed in the EOF. The group responsible to the Site Emergency Director Response Manager for offsite dose assessment consists of five people excluding the offsite/onsite survey teams. The EOF Coordinator, who assesses the offsite radiological consequences and determines protective action recommendations (PARs). The Dose Assessment Specialist determines offsite doses and supports the EOF Coordinator. The Offsite Monitoring Coordinator coordinates the activities of offsite monitoring and sampling teams and provides field radiological data to the EOF Coordinator. The METPAC operator is responsible for accessing and running the refined dispersion model. The METPAC operator and the sample analysis personnel, although an integral part of the assessment capability, as demonstrated in the February 24, 1986 exercise and walk-throughs, are not described in the Seabrook Plan (50-443/86-18-05).

The same table top exercise scenario was used for each of the two teams. The following observations were made.

- Procedure ER-1.4 does not provide for (or permit) any protective action recommendations (PAR) unless a General Emergency has been declared. Both crews felt that conditions warranted a precautionary PAR, however were reluctant to make a recommendation because they were in a Site Area Emergency. This has apparently been reinforced by training. The licensee recognizes the advantage of being able to make a PAR prior to a General Emergency and is evaluating possible changes to their procedures and training (50-423/86-18-06).

- The initial dose model assumption is for no iodine in the release, in spite of the fact that Technical Specifications allow operation with up to 10 uCi/cc dose equivalent iodine. The licensee is evaluating a change to the model (50-443/86-18-07).

  Any changes made in these areas will be evaluated in a subsequent inspection.

F. Facilities and Equipment

(1) Emergency Operations Facility

a. Previous Inspection Findings

(Closed) IFI (50-443/85-32-16): Completely describe EOF equipment in Appendix E.3 to the Emergency Plan or procedure ER-3.3. EOF equipment is fully described in Appendix F of the Emergency Plan and procedure ER-8.1.

(Closed) IFI (50-443/85-32-17): Complete the installation of EOF equipment. An inspection of the EOF, and observations made during the February 26, 1986 exercise confirmed that the necessary equipment is installed and operational.

b. (Closed) IFI (50-443/85-32-08): Assure that all dedicated emergency equipment (specified in procedure ER-8.1) located at the EOF is maintained in operable condition. During the appraisal an inspection was conducted of the dedicated emergency equipment located in the EOF. All equipment was determined to be operable. A program has been instituted to perform inventories and checks to assure continued operability.

(2) Media Center (Emergency News Center)

a. Previous Inspection Findings

(Open) IFI (50-443/85-32-18): Complete the details of the facility, equipment and organization for the Media Center. The details for the Media Center facility and equipment are complete and contained in ER-8.1. The Media Center policy and procedures are still in draft.

b. Except as noted above this area is acceptable.

(3) Meteorological Instrumentation

a. Previous Inspection Findings

(Open) (50-443/85-32-19): Finalize the meteorological monitoring system design, consistent with the FSAR commitments and revise the program description in Section 6.2.3.1 of the Emergency Plan and Section 2.3.3 of the FSAR.

The licensee stated that the FSAR will be revised to reflect the full meteorological monitoring program by June 1, 1986. A two step approach will provide for an interim data acquisition system prior to full availability of the plant process computer for total data handling.

(Open) (50-433/85-32-20): Provide for backup meteorological measurements representative of conditions in the vicinity of the site and provide for backup power to the instrument building.

The licensee stated that a meteorologist familiar with the site will be available, during all emergencies. The duties and responsibilities will be further delineated in the Yankee Mutual Assistance Plan. This individual will have access to all local National Weather Service data and knowledge of the parameters needed by the radiological emergency response staff. This also will be addressed by the June 7, 1986 revision. The licensee is still evaluating methods to provide backup power to the meteorological instrumentation.

(Open) (50-443/85-32-21): Provide a method of severe weather notification to the control room.

A policy document is currently being drafted which will specify the load dispatcher as providing severe weather notification to the control room.

(Open) (50-443/85-32-22): Implement T.S. 6.9.2 surveillance requirements for the meteorological monitoring program. Operators will perform the daily operability checks on the meteorological monitoring system when the Technical Specification are required to be followed, at licensing. The inspectors will verify that appropriate surveillance procedures are written.

(Open) (50-443/85-32-23): Modify calibration procedure IX1654.410, Rev. 2, for delta-temperature instrumentation to properly reflect accuracy requirements and use more specific terminology. The licensee indicated action has not been completed on this item.

(Open) (50-443/85-32-24) Provide the basic data required for atmospheric dispersion calculations (15 minute averages), which includes a time history (analog or digital printout) of wind direction and speed at each level and temperature difference with height in the control room and EOF.

The inspector held discussions with licensee personnel and found that the data acquisition system currently in place will be modified on an interim basis to provide the necessary meteorological data to onsite personnel. Future plans will include use of the plant process computer to provide the basic parameters to the Control Room, TSC and EOF. The licensee will provide a full description of the program and implement the interim system prior to fuel load.

b. Except as noted above this area is acceptable.

(4) Non-Radiation Process Monitors

The station non-radiation process monitoring system indications provided from various plant sensors include reactor coolant system pressure and temperature, secondary side steam pressure, status and function of various plant equipment components, and fire and combustible detectors.

The inspector verified that the process monitoring system component installation and testing had been completed prior to hot functional testing. The entire system is operational and adequate for operations under emergency conditions.

(5) Area and Process Radiation Monitors

The area and process radiation monitoring system (Radiation Data Management System (RDMS) is a microprocessor based acquisition and display system with readouts locally, in the Control Room, and in the Operations Support Center (OSC). The various parameters measured include general area radiation, process radioactivity levels, airborne contamination levels, and effluent radioactivity levels. The system provides plant operators with warnings of accident conditions, and the capability of continual accident assessment.
The RDMS installation is complete. Turnover from construction and acceptance testing is in progress. Calibration of instrumentation and final acceptance and operational testing is projected to be complete by June 15, 1986.

As a result of this inspection it was determined that this item will remain open pending review of final acceptance, calibration and operational testing data concerning the RDMS (50-443/86-18-08).

(6) Respiratory Protection

Previous Inspection Findings

(Open) IFI (50-443/85-32-09): Implement the respiratory protection program and assure that adequate supplies of respiratory protection equipment are maintained at the onsite assembly areas for emergency workers. The respiratory protection program has not been fully implemented. All required respiratory protection equipment is in place in the emergency response facilities, except for the equipment to refill air bottles onsite. SCBA training, respirator use training, and medical certification is expected to be completed by May 31, 1986.

The TSC and OSC both contained air purifying respirators and canisters as well as SCBAs reserved for emergency use only. Both the TSC and OSC contained an adequate supply of full face respirators and SCBAs for use during emergencies. An adequate number of spare bottles was present for use. Additional bottles would be available onsite from the air compressor-cascade refill facility, which is being installed onsite. The air compressor-cascade equipment has been received onsite, however, installation is not expected to be completed prior to June 1, 1986. The compressor building will be located within the protected area near the construction building and should be useable under accident conditions.

As a result of this inspection it was determined that in order to assure an adequate respiratory protection program the respirator bottle refill facility should be completed and the necessary training and medical certification be completed for those who will be called upon to use respiratory equipment. This area will be reviewed in a subsequent inspection.

(7) Communications Equipment

The inspector reviewed Section 70 of the NHY Emergency Plan, Rev. 55 on Communications, held discussions with licensee personnel and visited the emergency response facilities.
The emergency communication system was reviewed against the commitments made in the Emergency Plan.

The inspectors witnessed testing of the communication system during the December 21, 1985 emergency drill and February 24, 1986 full-scale emergency exercise. The system as described in the emergency plan is functional except for the ENS. A dedicated telephone line is in use in place of the ENS. This is acceptable until the ENS is installed. The licensee has identified several problem areas. The internal public address system speakers in some areas are inaudible.

This was due in most cases to persons tampering with the speaker or internal volume control adjustment. A system has been established to track and correct problems in this area.

The licensee has a surveillance procedure, ER-8.1, which requires periodic inspection of communications systems and equipment. Procedures ER-8.1 and ER-8.5 establish responsibilities for performance of the surveillance.

During the exercise on February 26, 1986, the Nuclear alert system (orange phone) was used, providing direct interfaces with the Massachusetts and New Hampshire State Police.

At the time of the inspection, the installation of the sirens which comprise a portion of the Public Emergency Alerting System, had not been completed. This area will be reviewed in a subsequent inspection (50-443/86-18-33).

Except as noted above, this area was found to be acceptable.

(8) Medical Treatment Facilities

Previous Inspection Findings

(Open) IFI (50-443/85-32-10): Complete and equip the first aid treatment facility to allow treatment of contaminated/injured personnel. The first aid treatment facility equipment has been ordered but has not yet been received. This will be reviewed in a subsequent inspection.

(Closed) IFI (50-443/85-32-11): Assign a full time nurse onsite as described in the Emergency Plan. A full time nurse joined the Seabrook Station at the beginning of the calendar year.

(Open) IFI (50-443/85-32-12) (50-443/85-32-13): Ensure that arrangements for transportation of onsite contaminated/injured personnel are permanently available and clearly described in plans/procedures, including equipment and supplies for contamination control This item remains open pending training for the offsite ambulance personnel and negotiation of a letter of agreement with the Seabrook Fire Department which will be providing this service.

The inspectors toured the First Aid and nurse's station located next to the health physics control point. Progress has been made, however it was determined that not all of the first aid equipment and supplies identified on page 10-9 of the Emergency Plan has been received. In addition, the procedure for decontamination of contaminated/injured personnel (ER4.4) is

being revised. A full-time nurse has been appointed and is available during daytime working hours. When completed and fully equipped, the medical treatment facility will be adequate to treat radioactively contaminated and injured personnel.

In addition to completing the installation of equipment noted in a.. above, the following items were identified and will be reviewed in a subsequent inspection.

- Complete the revision to ER-4.4 "Onsite Medical Emergency" (50-443/86-18-9).

- Complete and implement the Exeter Hospital Radiological Procedure Manual for treating contaminated injured patients. (50-443/86-18-10)

A medical emergency drill will be observed in a subsequent inspection, to assess the capabilities in this area.

(9) Operations Support Center

The OSC is located on the first floor of the Administration and Service Building. The OSC is included in the station emergency communications network. The OSC does not have any special radiation shielding or air filtration systems. If conditions warrant, the OSC staff would relocate to the TSC. The OSC facility is established as described in EP-6.0, Section 6.1.2 and as shown in Figure 6.6. Dedicated emergency equipment is maintained at the OSC. This equipment is identified and serviced in accordance with EP-8.1. Activation and operation of the OSC is documented in EP-3.2, Revision 2.

Based on the above, this area is acceptable.

(10) Emergency Kits and Survey Instrumentation

Emergency kits and emergency survey instrumentation are maintained at the following locations: TSC, OSC, Rte. 107 Warehouse, EOF and the Exeter Hospital. The emergency equipment maintained at each of these locations is identified in Procedure ER-8.1. This procedure provides for routine inventory checks of all emergency equipment. When appropriate, operational and calibration checks are routinely performed. All such checks are documented. Equipment to be used by re-entry teams has the capability for the detection and measurement of both beta and gamma radiation. The emergency kits contained sufficient instruments/supplies to adequately support re-entry teams. In-plant capability for detecting airborne iodine in the presence of noble gases is provided. Instrumentation capable of distinguishing beta/gamma is available.

Based on the above, this area is acceptable.

(11) Protective Clothing

Stores of protective clothing reserved for emergency use are maintained at the TSC, OSC, Rte. 107 Warehouse, EOF and the Exeter Hospital. This equipment is periodically inventoried and is accessible under emergency conditions.

Based on the above, this area is acceptable.

(12) Reserve Supplies

The licensee maintains an onsite inventory of emergency supplies and equipment in addition to that dedicated specifically for emergencies. In addition, the licensee has the ability to obtain additional supplies from offsite through the Yankee Mutual Assistance Plan. Equipment available through this plan includes:

a) Mobile Laboratory Emergency Analysis Equipment and Van Service
b) Mobile TLD Van Service
c) Mobile Body Burden Van Service, and
d) Field environmental radiation surveillance equipment (and personnel).

The licensee maintains a minimum stock level to insure an adequate reserve of normal supplies to handle emergency situations.

Based on the above, this area is acceptable.

(13) Transportation

The licensee has identified eight (8) vehicles for use in the event of an emergency. Four of these vehicles have fixed mobile 100 watt VHF mobile radios tuned to the Health Physics frequency. The other four vehicles can be equipped with conversion kits that boost the transmitting power of portable radios from 5 to 100 watts. Security procedures provide for the delivery of three of the vehicles to the EOF for use by the field radiological monitoring teams. Ambulance and fire vehicles are provided by the Seabrook Fire Department. It appears that the size and type of vehicles reserved by the licensee for emergency use is adequate.

Based on the above, this area is acceptable.

(14) Control Room

The inspector reviewed the Seabrook Radiological Emergency Plan (REP), applicable EPIPs, selected portions of the Seabrook FSAR, and compared the facility to requirements and guidance from 10 CFR 50, NR-0654, NR-0696, NR-0737 Sup. 1, and RG-1.97. The inspector also observed the control room as an emergency response facility (ERF) during the February 26, 1986 observed exercise.

Based on this review, it was determined that the control room met the guidance concerning equipment, decisional aids, and habitability.

(15) Technical Support Center

The inspector toured the facility and observed it in operation during a utility sponsored exercise in December 1985 and again, during the February 26, 1986 observed exercise, to verify that the guidance NUREGs 0696 and 0654 was met and that operation was in accordance with the appropriate EPIP's.

Based on this review it was determined that the TSC is within the Control Room habitability envelope and is thus served by the same filtered ventilation system. The guidance of the NUREGs has been met, except in the case of the NUREG-0654 II H 5, equipment installation (e.g. seismic, rad, etc.) which is not yet complete. This item will be reviewed in a subsequent inspection (50-443/86-18-11).

(16) Post Accident Sampling System

At the time of this inspection the installation of the Post Accident Sampling System (PASS) had not been completed. This area will be reviewed in a subsequent inspection (50-443/86-18-34).

G. Emergency Response Procedures

(1) Personnel Monitoring and Decontamination

During the appraisal the procedures for personnel monitoring and decontamination were reviewed and discussed with the health physics supervisor. Applicable procedures were contained in HDO958.02, "Radiation and Contamination Survey Techniques", and HDO958.03, "Personnel Decontamination Techniques". ER-4.6, "Offsite Monitoring and Decontamination", contained instructions for assembly and dispatch of monitoring and decontamination teams. These procedures provided for monitoring all personnel exiting from restricted areas and at the offsite assembly/reassembly areas.

These procedures provided for recording the names of individuals surveyed, extent of contamination found, radiation detection instrumentation used, survey methods, and results of any decontamination efforts employed. Contamination levels that require decontamination actions were specified for various levels and types of radioisotopes. Action levels requiring further assessment by the health physics staff and the followup actions required were delegated to the Radiological Controls Coordinator. Copies of monitoring and decontamination procedures were available at the onsite decontamination facility, at the Route 107 warehouse, and at the EOF.

It was determined from the review that adequate procedures existed to facilitate personnel monitoring and decontamination under emergency conditions.

(2) Evacuation of Owner Controlled Areas

The inspector reviewed EPIP ER-4.1, Personnel Evacuation, to determine compliance with NUREG-0654 requirements.

ER-4.1 Section 4.0 contains prerequisites for evacuation of the site, specific areas of the plant, or individual buildings. Evacuation routes from the station are clearly spelled out both in the Emergency Plan and in ER-4.1. The locations of assembly areas and the criteria for use are as described in the Emergency Plan. Provisions for concise oral announcements over the facility public address system, and for dispatch of security patrols to the construction building, production warehouse, education center, and the training center are contained in ER-4.1. This procedure provides for the assurance that all station personnel are notified and that the accountability and contamination monitoring are implemented by the Security Supervisor and Radiological Controls Coordinator respectively.

As a result of this inspection it was determined that the applicant's procedure for personnel evacuation of owner controlled areas acceptable to control operations under emergency conditions.

(3) Personnel Accountability

The inspector reviewed EPIP ER-4.2, "Personnel Accountability", for adequacy in assuring that all onsite personnel are accounted for in an accurate and timely manner.

The procedure specifies that the Security Supervisor implements the accountability process and reports accountability results to the Short Term Emergency Director (Shift Supervisor) or Technical Services Coordinator. The procedure establishes a thirty minute goal for completion of accountability and contains provisions for continuous accountability of all persons onsite after initial accountability has been completed.

The accountability system relies on the use of a security computer with a manual backup utilizing Form ER-4.2A, Accountability Listing. The security computer is installed and operational, however, the card readers are not functional. The total security program is scheduled to be implemented by May 15, 1986, at which time the card readers will be operational. The security computer will print out missing personnel by plant sector. A search would be initiated by the Short Term Emergency Director or Technical Services Coordinator utilizing Procedure ER-4.5, Search and Rescue. ER-4.5 is not referenced or referred to in ER-4.2.

As a result of this inspection it was determined that this area will remain open pending the implementation of the plant security program and demonstration of the ability to complete accountability. The plant accountability procedure ER-4.2 should also reference ER-4.5, Search and Rescue. This item will be reviewed in a subsequent inspection (50-443/86-18-12).

(4) Off-site Radiological Surveys

Procedure ER-5.2, "Site Perimeter and Off-site Monitoring and Environmental Sampling", identifies the methods and equipment to be used to perform emergency off-site radiological surveys. The Off-site Monitoring Coordinator, stationed at the EOF, is responsible for coordination of the emergency off-site monitoring and environmental sampling program. Emergency supplies collected by off-site sampling teams are to be analyzed by either the Yankee Nuclear Services Division Environmental Laboratory or the Seabrook Mobile Environmental Laboratory. A walk-through with one of the three field monitoring teams was conducted during a full-scale emergency preparedness drill held on December 12, 1985. Dedicated vehicles equipped with 100 watt mobile radios and monitoring kits are available to field three monitoring teams. The procedure does not provide the field teams with instructions for communication with the EOF in the event of loss of the mobile radio capability.

Based on the above the following items need to be addressed in this area:

- Provide procedures for a back-up means of communications in the event of radio failure (50-443/86-18-13).

- Include specific instructions to the Off-site Monitoring Coordinator regarding the use of respiratory equipment and the administration of KI by the field monitoring teams for protection from airborne hazards (50-443/86-18-14).

Except as noted above, this area is acceptable.

(5) On-site (Out-of-Plant) Radiological Surveys

The inspector reviewed procedures ER-4.3, Rev. 02, "Radiation Protection During Emergency Conditions", and ER-5.2, Rev. 04, "Site Perimeter and Off-site Monitoring and Environmental Sampling". The inspector identified that there was no emergency procedure describing the method and equipment to be used to perform onsite (out-of-plant) radiological surveys. The applicant acknowledged the lack of this procedure and agreed to draft appropriate procedures for these surveys (50-443/86-18-15).

(6) Radiation Protection During Emergencies

Procedure ER-4.3, Rev. 02, "Radiation Protection During Emergencies" specifies the on-site radiation protection practices to be implemented following activation of the Radiological Emergency Plan. Specifically, the procedure addresses the following areas:

a) OSC Activities
b) Protective Area Radiation Surveillance and Control
c) In-plant Surveillance and Control
d) MPC-hour Accountability
e) Dose Assessment and Exposure Tracking.

The Radiological Controls Coordinator is assigned the responsibility for ensuring station emergency exposure control measures.

Based on the above, this area is acceptable.

(7) Repair and Corrective Actions

Procedure ER-7.1, "Emergency Repair and Corrective Action", Rev. 01, provides instructions for emergency repair and corrective actions. The responsibilities of the Technical Service Coordinator, the Maintenance Coordinator and the OSC Coordinator are defined. The procedure describes the concept of the operations for repair or corrective action activities. The Radiological Controls Coordinator is required to provide health physics support to team members. This support includes;

a) expected doses,
b) Required protective equipment including KI,
c) Dosimetry required,
d) Authorized dose,
e) Respiratory hazards, and,
f) Radiological controls.

Based on the above, this area is acceptable.

(8) Recovery

Procedures ER-8.7, "Recovery Organization" and ER-7.3, "Re-entry and Recovery", were reviewed. Organizational authority for declaring that a recovery phase is to be entered is included in the procedure. Radiological conditions as well as plant operating conditions are evaluated before terminating an emergency and entry into a recovery mode. Procedure ER-8.7 requires the agreement of the authorities of Massachusetts and New Hampshire, federal authorities, and the Response Manager before an emergency condition can be terminated.

based on the above, this area is acceptable.

(9) Inventory, Operational Check, and Calibration of Emergency Equipment

Procedure ER-8.1, "Emergency Equipment and Facility Inventory and Preparedness Check", provides a specific inventory listing of all equipment reserved for use during emergencies. The specific location of the equipment is provided. An emergency equipment inventory and operational check is performed when any of the following occur:

- the emergency equipment has been used;
- at scheduled quarterly intervals; or
- if a seal on an emergency kit or locker has been broken.

The scheduled quarterly inspection includes an inventory check, and when appropriate, operational checks are performed. The results of each inventory are documented and the results reported to the Radiological Assessment Manager. Health physics equipment calibration and maintenance scheduled in accordance with HD-0963.02 regulate the frequency of inspection of dedicated radiological equipment/supplies. The Radiological Assessment Manager is responsible for ensuring the inspection, inventory, and operational checking of emergency equipment and facilities.

Based on the above, this area is acceptable.

(10) Emergency Kits and Emergency Survey Instrumentation

A walk through was conducted of the Control Room, TSC, OSC, Rte. 107 warehouse and EOF for the purpose of verifying that the dedicated emergency facility/equipment identified in the following procedures was in the assigned location.

EP-6.0, "Emergency Facilities"

EP Appendix F, "Emergency Equipment Checklist"
ER-8.1, "Emergency Equipment and Facility Equipment Inventory and Preparedness Check",

The final walk through was conducted on March 25-26, 1986. An inventory, and when appropriate, a functional check was made of all essential equipment at each of the above emergency response facilities. No discrepancies were identified.

Based on the above, this area is acceptable.

(11) Public Information

The inspector reviewed section 11.3 of the NMY Emergency Plan, Rev. 57, on Public Information, also draft brochures, calendars, telephone book inserts and posters.

The Public Information (PI) program was evaluated against the requirements in 10 CFR 50 Appendix E. Specific areas were reviewed to verify the following:

- provisions were described for yearly dissemination to the public with the EPZ;
- that the materials contain basic emergency planning information and general information as to the nature and effects of radiation;
- measures are taken to provide information to the transient population;
- materials and information provided to the public are coordinated with State and local government agencies, and;
- that the information provided also contains evacuation routes, sheltering directions and actions to be taken when alerted.

Based on this review it was determined that the public information section in the Emergency plan describes the bases for the program. NMY has stated that they will provide, annually, emergency planning materials to each resident, school, hospital and nursing home within the EPZ. The inspector noted the draft materials for residence (brochures and calendars) provide the general information on the nature and effects of radiation. Also, in the draft material are the Emergency Radio Broadcast stations, information on how to shelter, and how the residents will be notified. However, evacuation routes have not been finalized.

The inspector reviewed several mailing lists covering the resident population in the EPZ. The licensee stated these lists will be updated prior to the mailings. Also, local commercial establishments (within the EPZ) with fifty or more employees, schools and nursing homes will be provided tone alert radios. In addition, the licensee has made arrangements with the NH Civil Defense director and local towns to provide posters (some bilingual French/English) for the persons on the beaches within the EPZ.

Other methods the licensee plans to use for the initial distribution of emergency planning information are newspaper and radio advertising. This is planned to be done concurrently with the mailing of brochures. Telephone directory advertising will be included in the 1986 Portsmouth white pages and the 1987 Newburyport and Haverhill white pages.

At present this information has not been distributed to residents in the EPZ. It is understood that the final details will have to be developed to reflect information in the NH and MA plans, however the licensee indicated that an interim pamphlet will be distributed prior to fuel load, to provide basic information as to what to do if sirens are activated, where to receive additional information, etc. (50-443/86-18-16). The final brochures will be distributed prior to receiving a full power license (50-443/86-18-17). The information contained in these brochures will also receive evaluation by FEMA as part of the off site plant reviews.

(12) Drills and Exercises

The inspector reviewed procedure ER-8.3, "Emergency Preparedness Drills and Exercises", Rev. 1, which defines the program for the conduct and evaluation of emergency drills and exercises to verify that drills and exercises are properly planned and coordinated to meet the training requirements of 10 CFR 50 Appendix E. In addition a schedule of drills was reviewed to verify that the various emergency response areas would be adequately exercised.

The overall coordination of the drill and exercise program is the responsibility of the Radiological Assessment Manager. The Training Manager coordinates scheduling of the exercises with the Radiological Assessment Manager, and ensures that they are conducted as scheduled.

A tracking system has been developed to track drill/exercise deficiencies and to ensure that appropriate corrective action is taken.

This area was determined to be acceptable.

(13) Audits

The inspector reviewed Chapter 18 of the QA Manual which defines the Operational QA audit requirements. One of the requirements is to prepare an annual audit schedule which includes (among others) the activities of section 6.5.2 of the Technical Specifications. A review of the draft Technical Specifications indicates that the appropriate reference is section 6.4.2, not 6.5.2. It was also determined Emergency Preparedness was not included in the list of activities. The licensee indicated awareness of the error in the Technical Specification reference in the QA Manual, and that Emergency Preparedness had not yet been added to the list of activities in section 6.4.2, as an area requiring audit. Steps are being taken to correct both of these items. This item will be reviewed in a subsequent inspection (50-443/86-18-18).

(14) Review, Revision, and Distribution of the Emergency Plan

The inspector reviewed the Document Control Center organization and functional responsibilities section of the Nuclear Production Department Records Manual, compared it with NUREG-0654 elements P.4, P.5, and P.10, and toured the Document Control Center facilities.

The inspector determined that Emergency Plan Implementing Procedure telephone numbers are reviewed quarterly. The responsibility for review is assigned to the Sr. Emergency Planner. Changes to the Plan and Implementing Procedures are required to be approved by the Station Operations Review Committee (S.O.R.C.). The Plan and Procedures were current and distribution was in accordance with the approved distribution list. The names, titles, and telephone numbers of selected procedures were verified to be correct.

As a result of this inspection it was determined that the applicant's procedures for review, revision, and distribution of the Emergency Plan and Implementing procedures are acceptable.

(15) First Aid/Rescue

The inspectors reviewed procedure ER-4.4 "Onsite Medical Emergency" in the Emergency Response Program Manual, and determined that it covers action to be taken in the event treatment of contaminated/injured individuals is necessary. The procedure includes provisions for receiving, recovering, transporting, and handling persons who may become radioactively contaminated onsite and provides for radiological controls offsite. However, discussions with NH Yankee health physics personnel indicated that procedure ER-4.4 was being revised in its entirety (50-443/86-18-09). It was also identified that the

Radiological Procedure Manual for Exeter Hospital (where contaminated/injured personnel are treated) was incomplete (50-443/86-18-10). Facilities, equipment, supplies, and other arrangements necessary for the applicant to implement this procedure were also incomplete at the time of this inspection. (See para. F.8)

Except as noted above, this area is acceptable.

(16) Emergency, Alarm, & Abnormal Procedures

The inspector reviewed chapter 5 of the Emergency Plan, the Seabrook site specific version of the Westinghouse Owners Group (WOG) Emergency Response Guidelines, and selected emergency alarms, and abnormal operating procedures to evaluate conformity to requirements & guidance provided by 10 CFR 50, NUREG-0737 Supp. 1, & Regulatory Guide 1.33.

Based on this review it was determined that, although none of these procedures has been formally promulgated, most of the required procedures exists in a refined draft stage which are in conformance with the referenced guidelines and requirements. Formal promulgation of the procedures is expected in the near future, and action in this regard will be reviewed in a subsequent inspection (86-443/86-18-19).

Operators have been trained in these draft procedures, however a final training effort for all operators after the procedures are formally promulgated will be necessary. This area will be reviewed in a subsequent inspection (50-443/86-18-20).

(17) Implementing Procedures

The inspector reviewed Seabrook EPIPs ER-1.2 through 1.5, the procedures for Notification of Unusual Event through General Emergency, and compared them with guidance from NUREG-0654. Based on this review it was identified that:

a. Initial notification forms and some of the followup notification forms incorrectly allow the EOF Coordinator to sign, authorizing notification. This authority cannot be delegated to the EOF coordinator. (NUREG-0654 II B 4) (50-443/86-18-21).

b. The followup notification forms found in ERs 1.2 through 1.5 et al do not:

- indicate type of release (airborne, waterborne) (NUREG-0654 II E 4 D),

- Project integrated dose at the site boundary (NUREG-0654 II E 4 H),

- Project dose rate and integrated dose at 10 miles (NUREG-0654 II E 4 I), (50-443/86-18-22).

c. Revise ER-1.3 fig. 1 paragraph 13 to add the on shift HP tech as an alternate advisor to be consistent with ER-4.1 paragraph 5.3.3 (50-443/86-18-26).

d. Procedure ER-I.4 contains the following errors:

The instructions to the SED concerning selection of evacuation alternatives as a function of wind direction appear to be in error. At present, for winds from 080 through 180, the dog track is the designated site. It is located generally downwind for winds from that sector (50-443/86-18-24).

The caution after step 4 of figure 1 prohibits Protective Action Recommendations (PAR) during initial notification of declaration of a Site Area Emergency (SAE). There is no PAR block on the standard followup information sheet. In combination, these items infer a prohibition against PARs at SAE. (This inference was confirmed during the EOF walkthroughs when the staff expressed the belief that they were prohibited from making a PAR if at SAE) (See paragraph F.)

e. Steps 18-20 of form 2.2B (contained in ERs-1.5 and 2.2) require use of the HP-41 calculator to project dose at the site boundary, 2 miles, and 5 miles. This requirements cannot be met with the present HP-41 system and software. (See paragraph D.1, item 85-32-14d).

f. Item E of the Emergency Plan pgs. A-1 and A-2 should be identified as a non-delegable function (50-443/86-18-26).

g. The listing of primary and alternate staffing in Appendix A of the Plan differs from that of procedure 2.1 (e.g. SEDs) (50-443/86-18-27).

(18) Assessment Actions

The inspector reviewed applicable Seabrook emergency preparedness procedures, and Section 5 of the Emergency Plan. The inspector verified that assessment actions were consistent with the guidance of NUREG-0654 except as noted below:

- The operating shift has no dose projection capability (See paragraph D.1.)

- Procedural problems with the notification process are identified elsewhere (See paragraph G.17).

(19) Classification Scheme Review:

Outside the scope of the EP Appraisal, but within the month prior to this inspection, the inspector completed two technical reviews of the Seabrook Emergency Plan EALs and procedure ER-1.1 under NRC Headquarters sponsorship and met twice with the utility on that subject. It was identified that several differences existed between the classification scheme shown in the Emergency Plan and that of procedure ER-1.1 (draft Rev. 4). The licensee has proposed satisfactory corrective action concerning these differences, by issuance of Revision 4 to ER-1.1 and Amendments 56 and 57 to the FSAR. This item will be closed following review of these changes (50-443/86-18-28).

(20) Security During Emergencies

The inspector reviewed this area during a utility drill in December 1985 and again during the exercise of February 26, 1986, and made the following observations:

- The protected area perimeter control system (fencing, E fields, badging, etc.) has not yet been established (50-443/86-18-29).

- Station personnel have not completed full scope General Employee Training nor has the EP training program been finalized and completed in this area. Security training is a component of both (50-443/86-18-30).

(21) Coordination with Offsite Groups

The auditors reviewed Appendix E of the Emergency Plan (Letters of Agreement with offsite agencies support personnel) and met with representatives from six support groups to determine to what extent the program for coordinating emergency planning and response activities with each group has been developed and implemented by the applicant. Discussions were held with key response personnel from the towns of Exeter, NH, Kingston, NH, Brentwood, NH, Seabrook, NH, West Newburg, Mass, Exeter Hospital, and Seabrook Greyhound tack. All representatives expressed a clear understanding of their agency's role and responsibility in response to Seabrook emergencies. The inspectors found that arrangements for technical and administrative support at each facility were consistent with the language specified in letters of agreement with the exception the Seabrook Fire Department. Agreements or contracts between the applicant and each offsite group were either current or in the process of being updated with the exception of Exeter Hospital. Efforts made by the applicant to coordinate notifications and communications, emergency response training, and routine exchange of information are acceptable. Classroom

training of State and local groups in New Hampshire and Massachusetts remains incomplete. New Hampshire representatives had the opportunity to participate in the full-scale emergency exercise held on February 26, 1986. In Massachusetts, no practical training (drills or walkthroughs) has been provided to response personnel. (See section 3). Controlled copies of the Seabrook Emergency Plan and Procedures are maintained in local libraries for reference by local officials. Copies were not maintained at Exeter Hospital. Local town managers were familiar with the applicant's procedures as they affect State and local response regarding notifications, communications, and information flow from the site to them. Managers also indicated that recommendations for protective measures which were agreed on by State and utility officials would be implemented at the local level without delay immediately following communication of all critical information.

The individuals interviewed by the inspectors were identified as top level emergency response personnel of their respective organizations, i.e., Civil Defense Directors, Selectmen, hospital president, police chief, and fire chief. It was determined that the representatives are generally content with the applicant's effort for coordinating emergency preparedness issues, and Civil Defense (Emergency Operations Center) directors stated that the language contained in letters of agreement would be honored.

Except as noted below, this area of the licensee's program is acceptable.

- The licensee should ensure that all letters of agreement are current, reviewed, and contain mutually acceptable language to all parties involved in each agreement (50-443-86-18-31).

- Complete the orientation and offsite training program for New Hampshire and Massachusetts State and local officials (training effectiveness will be evaluated by FEMA). (50-443/86-18-32).

5. Summary Listing of Open Items

The following is a composite list of items from the appraisal conducted in December, 1985 (IR 85-32), and this inspection, which had not been satisfactorily resolved at the conclusion of this inspection. Except for those items indicated by (*) all will be corrected prior to fuel load. Asterisked items will be corrected prior to issuance of a full-power license.

(85-32-02): Define and document the interaction between the corporate EP staff and the station staff.

(85-32-04): Assign the responsibility to perform initial dose assessment on shift and revise Appendix A of the Emergency Plan accordingly.

*(85-32-06): Provide additional qualified alternates for key ERO positions to assure the ability to staff the augmented organization on a 24 hour basis.

(85-32-07): Complete arrangements with offsite survey groups to ensure availability of offsite support during emergencies.

(85-32-09): Complete implementation of the respiratory protection program (training and air bottle refill capability).

(85-32-10): Complete installation of equipment in the First-Aid Facility.

(85-32-12/13): Ensure that arrangement for transportation of onsite contaminated/injured personnel are made and described in plans and procedures.

(85-32-14a): Paragraph 3.2 (et al) of EPIP ER-2.2 is not consistent with the requirements of 10 CFR 50.72, in that it does not require notification of the NRC immediately after the state(s) and within one hour.

(85-32-14c): Form ER 2.2A, "Initial Notification Fact Sheet", does not contain provisions for recording or reporting whether a release is in progress (NUREG-0654 II.E.3).

(85-32-14d): No on-shift dose assessment capability is provided.

(85-32-14n): Shift operating crews were not aware of containment design leak rate specifications.

(85-32-14i): Shift operating crews were not aware of the capabilities of the Post Accident Sampling System (PASS).

(85-32-15b): Qualification criteria for assignment to positions in the Emergency Response Organization were not specified.

(85-32-15d): EP training instructors do not meet the experience requirements of ANSI/ANS-3.1.

(85-32-18): Complete procedures which describe the equipment and organization of the Media Center.

(85-32-19): Finalize the meteorological system design consistent with FSAR commitments, and revise description in the Emergency Plan.

(85-32-20): Provide for backup meteorological measurements representative of conditions in the vicinity of the site.

(85-32-21): Provide a method for notification of impending severe weather to the Control Room.

(85-32-22): Implement surveillance program procedures for meteorological equipment (to be done concurrent with issuance of operating license).

(85-32-23): Modify calibration procedure IX-1654.410 to reflect minimum required accuracy of delta-T instrumentation of 0.1 degrees centigrade.

(85-32-24): Provide for maintaining a historic record of basic data required for atmospheric dispersion calculations.

(86-18-01): Emergency Plan, Chapter 5, Section 1, does not specify which responsibilities of ERO staff members may not be delegated.

(86-18-02): The Security Officers' Lesson Plan does not include discussion of the use of KI as a possible protective action.

(86-18-03): Periodic radiological retraining of the hospital staff has not been developed or scheduled.

(86-18-04): Mitigation of core damage training is not required for the Response Manager, EOF Coordinator, Short Term Emergency Director, Site Emergency Director, or the Emergency Operations Manager.

(86-18-05): METPAC Operator and sample analysis personnel are not described in the Emergency Plan as augmentation personnel.

(86-18-06): Procedure ER-1.4 does not provide for (or allow) any protective action recommendations (PAR) to be made unless a General Emergency has been declared.

(86-18-07): The initial dose assessment model assumes no iodine in the release.

(86-18-08): Complete operational testing and turnover of the Radiation Data Monitoring System.

(86-18-09): Complete the revision to ER-4.4, "Onsite Medical Emergency".

(86-18-10): Complete and implement the Exeter Hospital Radiological Procedure Manual.

(86-18-11): Installation of instrumentation in the TSC is not complete (NUREG-0654 II.H.5).

(86-18-12): Implement the station security program and demonstrate the ability to perform accountability of onsite personnel during an emergency.

(86-18-13): Provide backup means of communication with off-site radiological teams in event of loss of radio communications.

(86-18-14): Include specific instructions to Off-site Monitoring Coordinator regarding use of respiratory equipment and KI in procedures.

(86-18-15): Draft appropriate procedures for the performance of onsite (out-of-plant) radiological surveys.

(86-18-16): Distribute interim public information brochures, providing basic information concerning what action to take on siren activation, where to receive additional information, etc.

*(86-18-17): Distribute final detailed public information brochures describing all necessary emergency planning information for the public, including evacuation routes.

(86-18-18): Revise T.S. 6.4.2 and implement the QA audit program for emergency preparedness.

(86-18-19): Promulgate final version of emergency, alarm, and abnormal procedures.

(86-18-20): Train operators in the final versions of emergency, abnormal, and alarm procedures.

(86-18-21): Revise procedures ER-1.2-1.5 to reflect that the authority to authorize notification cannot be delegated to the EOF Coordinator.

(86-18-22): The Followup Notification Forms in procedures ER-1.2 through ER-1.5 do not include information regarding type of release, projected integrated dose at the site boundary, and projected dose rate or integrated dose at ten miles.

(86-18-23): ER-1.3, Figure 1, does not identify the on-shift HP technician as an alternate Advisor, to be consistent with ER-4.1.

(86-18-24): Procedure ER-1.4 contains an error concerning the selection of evacuation alternatives as a function of wind direction...has evacuation to the dog track when wind is blowing toward the track.

(86-18-25): HP 41 calculator cannot be used to calculate the doses at 2, 5, and 10 miles required by procedures ER-1.5 and 2.2.

(86-18-26): Item E of Emergency Plan pgs. A-1 and A-2 should be identified as a non-delegable function.

(86-18-27): The listing of primary and alternate staffing in Appendix A of the Plan is not consistent with ER-2.1 (e.g. SED).

(86-18-28): Revise ER-1.1 and FSAR to be consistent with EALs of NUREG-0654.

1

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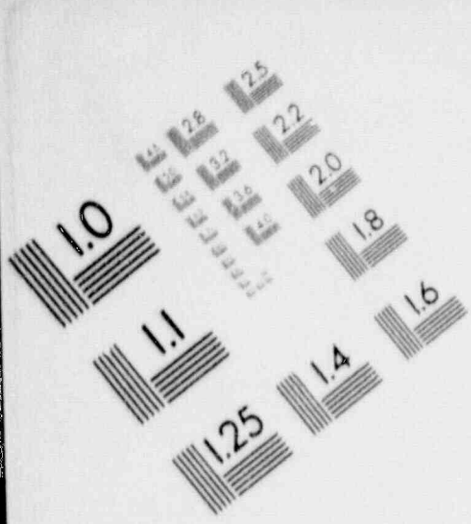

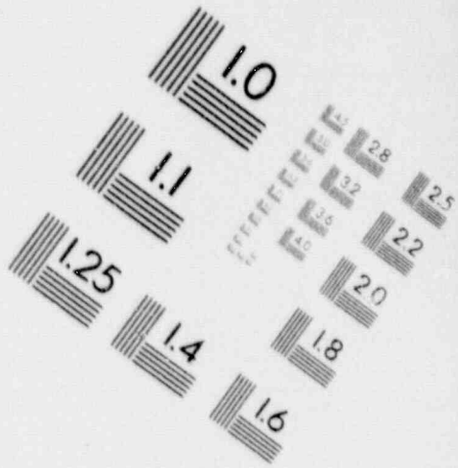

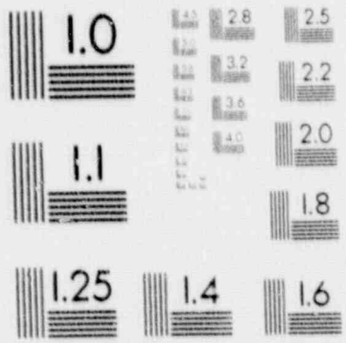

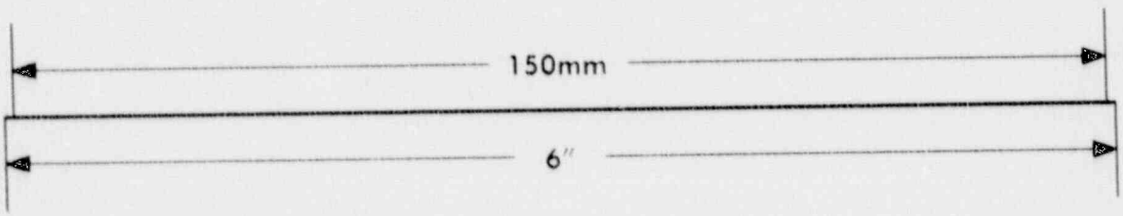

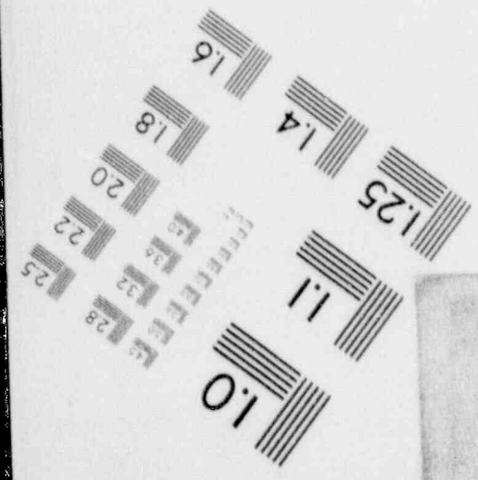

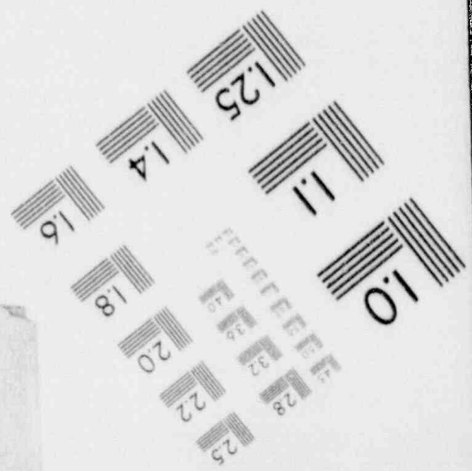

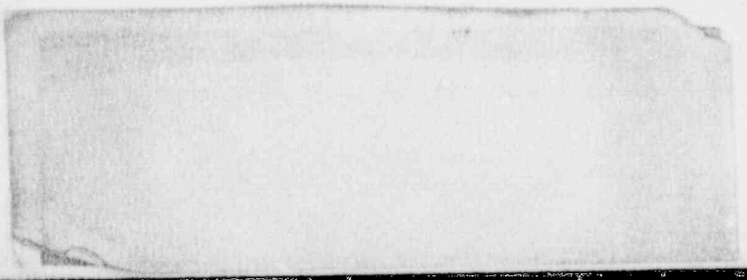

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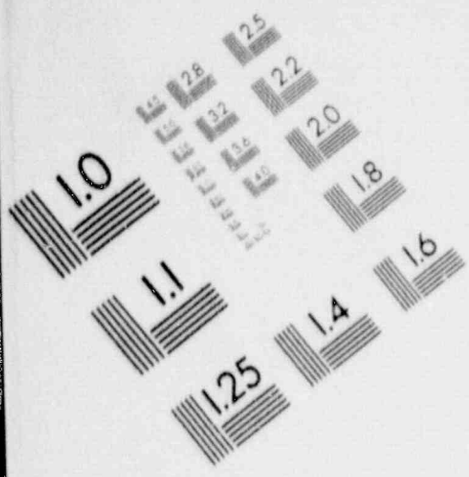

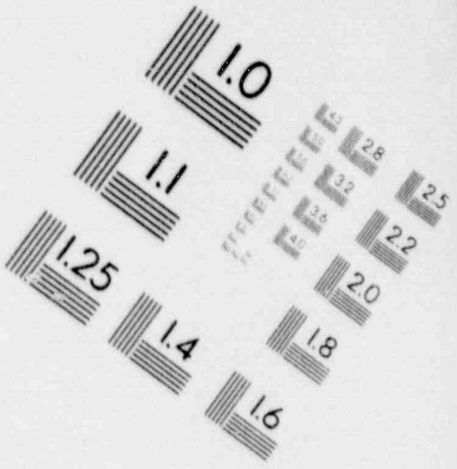

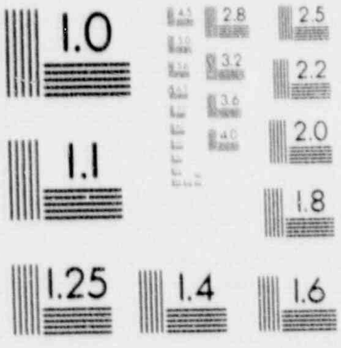

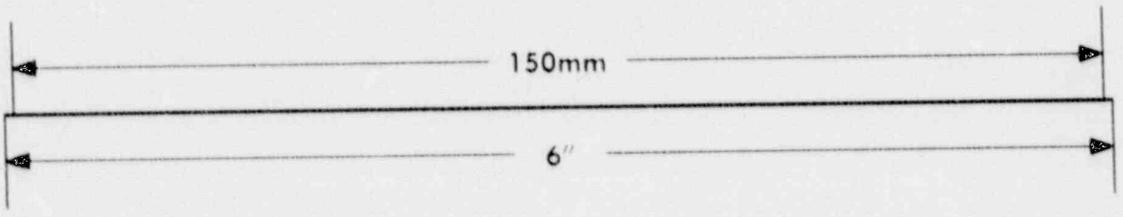

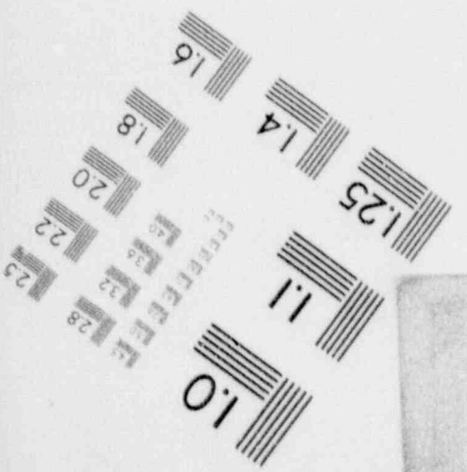

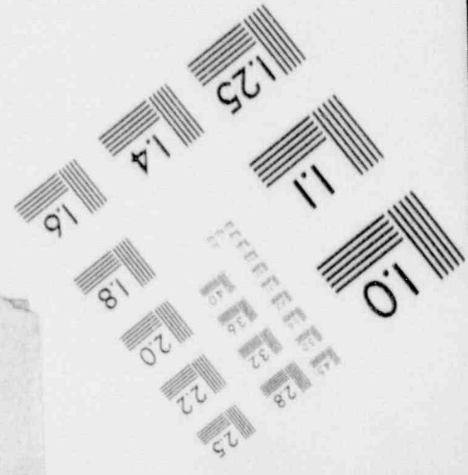

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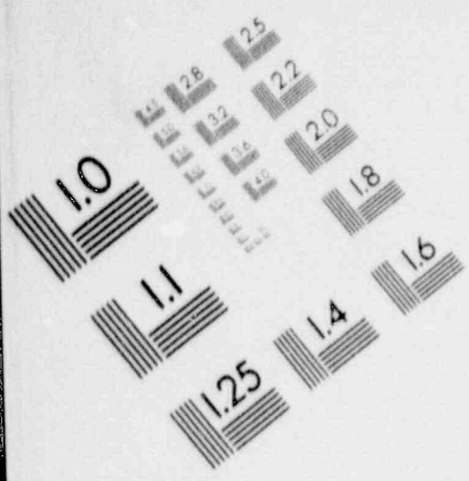

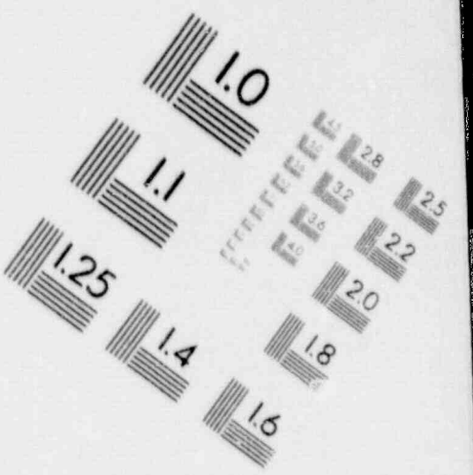

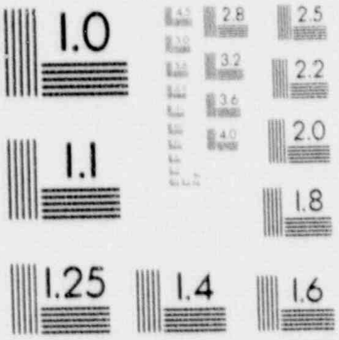

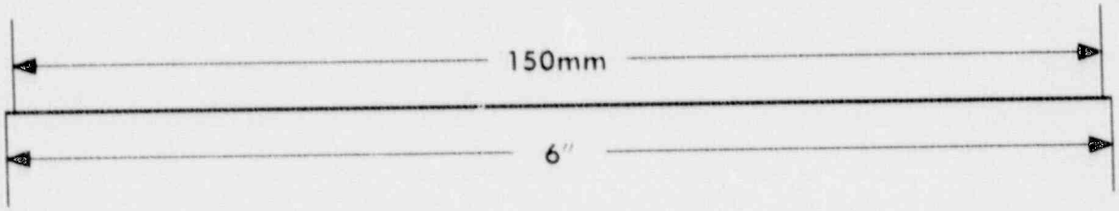

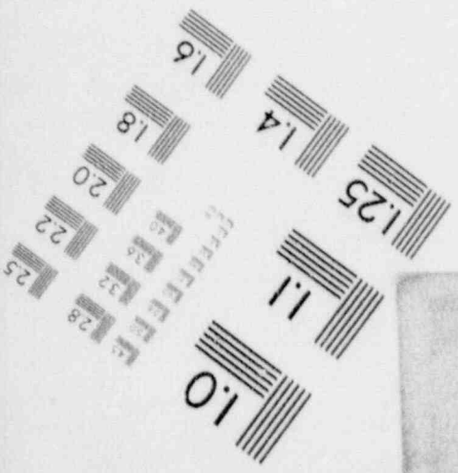

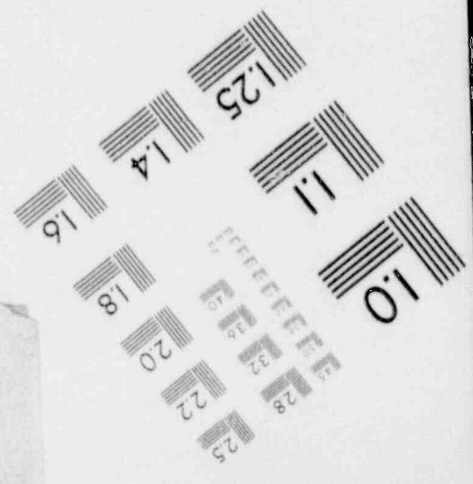

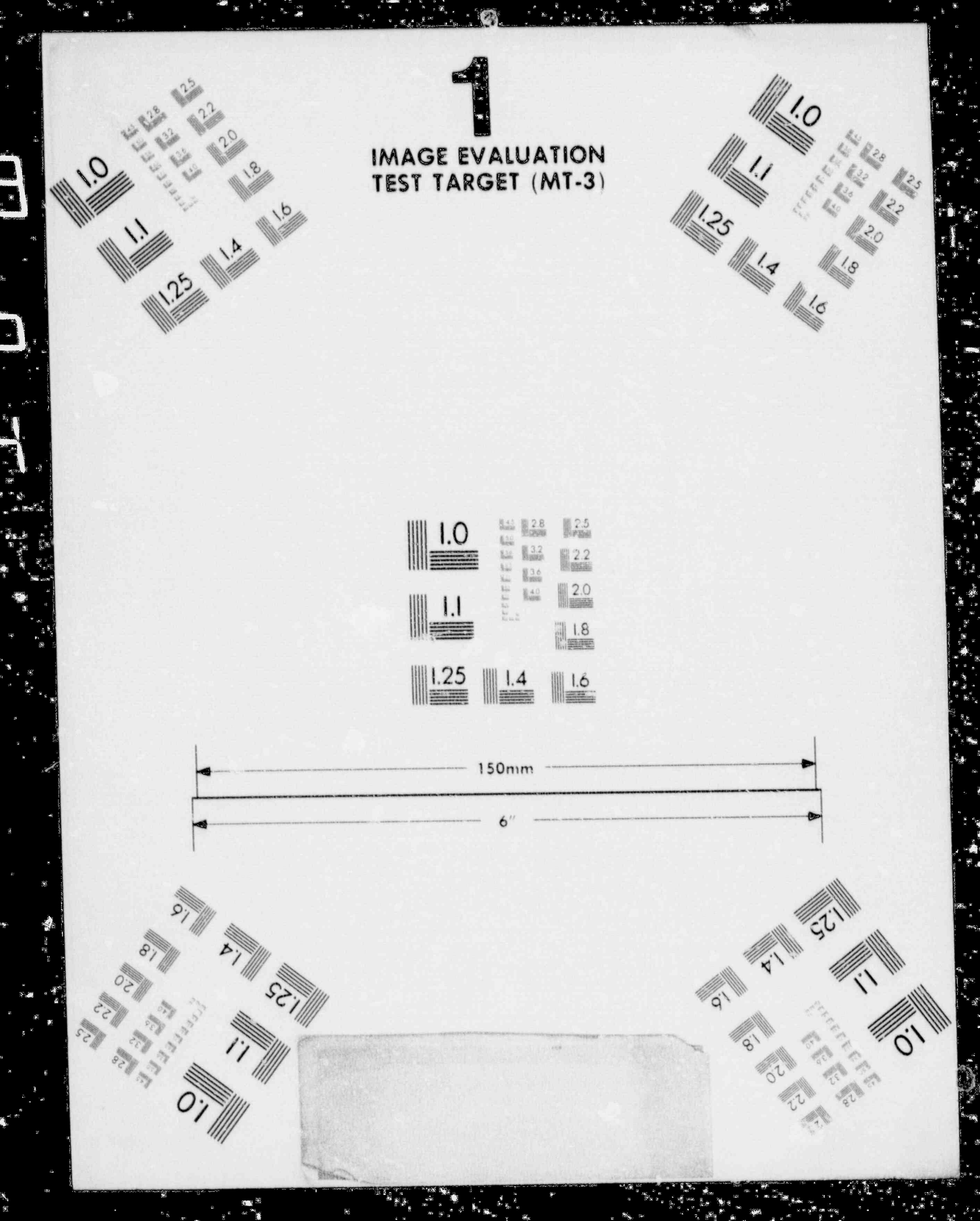
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1.6
1.8
2.0
2.2
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2.8
3.2
3.6
4.0
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6"

(86-18-29): Implement site Security Plan.

(86-18-30): Complete security training for station personnel.

(86-18-31): Verify that all letters-of-agreement are current.

(86-18-32): Complete the orientation and off-site training program for New Hampshire and Massachusetts state and local officials.

(86-18-33): Complete installation and testing of PEAS sirens.

*(86-18-34): Complete installation of the Post Accident Sampling System

6. Exit Interview

At the conclusion of the inspection on March 28, 1986, the inspector met with representatives of the licensee (see detail 1 for attendees) to discuss the findings of this inspection as detailed in this report.

At no time during this inspection was any written material provided to the licensee.

EXHIBIT 6

U.S. NUCLEAR REGULATORY COMMISSION
REGION I

Report No. 50-443/87-25

Docket No. 50-443

License No. CPPR-135 · Priority_____ Category C

Licensee: Public Service Company of New Hampshire
P. O. Box 330
Manchester, New Hampshire 03105

Facility Name: Seabrook Nuclear Power Station

Inspection At: Seabrook, New Hampshire

Inspection Conducted: December 15-17, 1987

Inspectors: _____ 12/21/87
C. Conklin, Team Leader, EPS, EP&RPB, DRSS — date

C. Amato, EP Specialist, EPS, EP&RPB, DRSS
D. Perrotti, NRR

Approved By: _____ 12/22/87
W. J. Lazarus, Chief, EPS, EP&RPB, DRSS — date

Inspection Summary: Inspection on December 15-17, 1987 (Report No. 50-443/87-25)

Areas Inspected: Routine announced emergency preparedness inspection and observation of the licensee's annual emergency exercise performed on December 15, 1987. The inspection was performed by a team of three NRC Region I personnel.

Results: No violations were identified. Emergency response actions were adequate to provide protective measures for the health and safety of the public.

DETAILS

1.0 Persons Contacted

The following licensee representatives attended the exit meeting held on December 17, 1987.

G. Thomas, Vice President, Nuclear Production
D. Moody, Station Manager
P. Casey, Senior Emergency Planner
J. MacDonald, Radiological Assessment Manager
S. Perkins, Emergency Preparedness Trainer
E. Brown, President and Chief Executive Officer
W. Hall, Manager of Regulatory Services
P. Stroup, Director of Emergency Implementation and Response
G. Kline, Manager of Technical Services
F. Straccia, Supervisor of Emergency Preparedness Training

The team observed and interviewed several licensee emergency response personnel, controllers and observers as they performed their assigned functions during the exercise.

2.0 Emergency Exercise

The Seabrook Nuclear Power Station partial participation exercise was conducted on December 16, 1987 from 8:00 AM to 3:30 PM. There was limited participation by New Hampshire Civil Defense Personnel in the Emergency Operations Facility.

2.1 Pre-exercise Activities

Prior to the emergency exercise, NRC Region I representatives held meetings and had telephone discussions with licensee representatives to discuss objectives, scope and content of the exercise scenario. As a result, changes were made in order to clarify certain objectives, revise certain portions of the scenario and ensure that the scenario provided the opportunity for the licensee to demonstrate those areas previously identified by NRC as in need of corrective action.

NRC observers attended a licensee briefing on December 15, 1987, and participated in the discussion of emergency response actions expected during the various phases of the scenario. The licensee stated that controllers would intercede in exercise activities to prevent scenario deviation or disruption of normal plant operations.

The exercise scenario included the following events:

- A loss of Radiation Monitoring System Instrumentation;

- High radiation levels in the PAB;
- An ejected control rod accident, with subsequent LOCA and fuel damage;
- Declaration of Unusual Event, Alert, Site Area Emergency and General Emergency Classifications;
- Calculation of offsite dose consequences; and
- Recommendation of protective actions to state officials.

2.2 Activities Observed

During the conduct of the licensee's exercise, three NRC team members made detailed observations of the activation and augmentation of the emergency organization, activation of emergency response facilities, and actions of emergency response personnel during the operation of the emergency response facilities. The following activities were observed:

1. Detection, classification and assessment of scenario events;
2. Direction and coordination of the emergency response;
3. Augmentation of the emergency organization and response facility activation;
4. Notification of licensee personnel and offsite agencies of pertinent plant status information;
5. Communications/information flow, and record keeping;
6. Assessment and projection of offsite radiological dose and consideration of protective actions;
7. Provisions for inplant radiation protection;
8. Performance of offsite and inplant radiological surveys;
9. Maintenance of site security and access control;
10. Performance of technical support, repair and corrective actions;
11. Assembly, accountability and evacuation of personnel; and
12. Preparation and dissemination of information at the Emergency News Center.

3.0 Exercise Observations

The NRC team noted that the licensee's activation and augmentation of the emergency organization, activation of the emergency response facilities, and use of the facilities were generally consistent with their emergency response plan and implementing procedures.

3.1 Exercise Strengths

The team also noted the following actions that provided strong positive indication of their ability to cope with abnormal plant conditions:

- Positive command and control of all emergency response facilities (ERF's) was demonstrated by the respective managers;
- Classifications made by the Technical Support Center (TSC) staff were prompt and correct, and subsequent notifications were timely;
- Dose Projections were performed often and utilized plant conditions as well as field conditions. Subsequent Protective Action Recommendations (PAR's) were timely and conservative;
- Staff augmentation was prompt and each ERF was setup and activated in a timely manner;
- Staff members in each ERF demonstrated a thorough knowledge of the plant and coordinated effectively with their respective counterparts; and
- Staff members in each ERF demonstrated very good use of procedures and record keeping.

3.1 Exercise Weaknesses

The NRC team identified the following areas where weaknesses were observed which could have degraded the response and should be evaluated by the licensee for corrective action. This item is tracked as an Inspector Followup Item (IFI).

- 50-443/87-25-01: The Shift Superintendent (SS) in the Simulator Control Room did not classify the loss of both trains of the Radiation Monitoring System as an Unusual Event until prompted by the Lead Controller. Although the SS was strongly involved in troubleshooting the problem, he did not refer to the Emergency Action Levels, nor did utilized procedures refer him to the EAL's.
- 50-443/87-25-02: Dose assessment personnel in the EOF did not provide an estimate of radioiodines in the containment atmosphere. They were unable to provide this estimate because there was not a Post Accident Containment Air Sample available. While the HP-41

computer model has default values built in for the noble gas to iodine ratio, the METPAC system, which is the primary system, does not. The licensee needs to upgrade their present methodology to ensure they have the ability to estimate the impact of releases or potential releases with regard to the radioiodine component for releases which occur prior to obtaining and analyzing a containment sample.

4.0 Licensee Actions on Previously Identified Items

The following items were identified during previous inspections (Inspection Report No. 50-443/86-10). Based upon observations made by the NRC team during the exercise the following open items were acceptably demonstrated and are closed:

(CLOSED) 50-443/86-10-04: There was no dose assessment/dose projection capability demonstrated in the TSC;

(CLOSED) 50-443/86-10-05: Priorities of TSC activities were occasionally inappropriate;

(CLOSED) 50-443/86-10-06: The TSC was somewhat slow in analyzing the indications of a DBA LOCA;

(CLOSED) 50-443/86-10-07: The SED was not informed of the failure of the Containment Building Spray discharge cross-connect valve until 30 minutes after the failure was identified;

(CLOSED) 50-443/86-10-08: The general plant status board in the TSC at times lagged actual plant conditions by 30 minutes;

(CLOSED) 50-443/86-10-13: EBS messages are not monitored for accuracy;

(CLOSED) 50-443/86-10-14: Tracking of feedback on actual offsite protective actions taken was not indicated on the EOF status board;

(CLOSED) 50-443/86-10-16: The Response Manager interfaced with several different levels in the various organizations in the EOF; and

(CLOSED) 50-443/86-10-18: Critical information was not recapitulated on a frequent enough basis during press briefings in the media center.

5.0 Licensee Critique

The NRC team attended the licensee's post-exercise critique on December 17, 1987, during which the key licensee controllers discussed observations of the exercise. The licensee indicated these observations would be evaluated and appropriate corrective actions taken.

6.0 Exit Meeting and NRC Critique

The NRC team met with the licensee representatives listed in Section 1 of this report at the end of the inspection. The team leader summarized the observations made during the exercise.

The licensee was informed that previously identified items were adequately addressed and no violations were observed. Although there were areas identified for corrective action, the NRC team determined that within the scope and limitations of the scenario, the licensee's performance demonstrated that they could implement their Emergency Plan and Emergency Plan Implementing Procedures in a manner which would adequately provide protective measures for the health and safety of the public.

Licensee management acknowledged the findings and indicated that appropriate action would be taken regarding the identified open items.

At no time during this inspection did the inspectors provide any written information to the licensee.

EXHIBIT 7

U.S. NUCLEAR REGULATORY COMMISSION
REGION I

Report No. 50-443/88-09

Docket No. 50-443

License No. CPPR-135 Priority _____ Category C

Licensee: Public Service Company of New Hampshire
P. O. Box 330
Manchester, New Hampshire 03105

Facility Name: Seabrook Nuclear Power Station

Inspection At: Seabrook, New Hampshire

Inspection Conducted: June 27-29, 1988

Inspectors: _____ 7/6/1988
E. Wox, Senior Emergency Preparedness Specialist, DRSS date

C. Amato, EPS
C. Gordon, EPS
S. Peleschat, EPS
D. Ruscitto, RI, Seabrook
D. Perrotti, NRR
J. Jamison, PNL

Approved By: _____ 7/6/88
G. J. Lazarus, Chief, EPB, FRSSB, DRSS date

Inspection Summary: Inspection on June 27-29, 1988 (Report No. 50-443/88-09)

Areas Inspected: Routine, announced emergency preparedness inspection and observation of the licensee's annual full-participation emergency exercise performed on June 28-29, 1988. The inspection was performed by a team of seven NRC Region I, headquarters and contractor personnel.

Results: No violations were identified. Emergency response actions were adequate to provide protective measures for the health and safety of the public.

DETAILS

1.0 Persons Contacted

The following licensee representatives attended the exit meeting held on June 29, 1988.

E. Brown, President and Chief Executive Officer
D. Bovino, Exercise Coordinator
P. Casey, Senior Emergency Planner
T. Feigenbaum, Vice President Engineering/Quality
G. Gram, Executive Director, Emergency Preparedness and Community Affairs
T. Harpster, Director, Emergency Preparedness Licensing
D. Moody, Station Manager
P. Stroup, Director, Emergency Implementation and Response
G. Thomas, Vice President, Nuclear Production
J. MacDonald, Radiological Assessment Manager

The team observed and interviewed several licensee emergency response personnel, controllers and observers as they performed their assigned functions during the exercise.

2.0 Emergency Exercise

The Seabrook Nuclear Power Station full-participation exercise was conducted on June 28, 1988 from 9:00 AM to 7:00 PM. The State of New Hampshire, 11 local towns and the State of Maine participated. The Commonwealth of Massachusetts and 6 local towns in New Hampshire did not participate. The State of New Hampshire compensated for the local non-participants. The New Hampshire Yankee Offsite Response Organization (NHY ORO) compensated for the Commonwealth non-participants. The licensee, New Hampshire, Maine and NHY ORO conducted field monitoring activities, an ingestion pathway exercise and recovery and reentry activities on June 29, 1988. The Federal Emergency Management Agency (FEMA) observed all off-site activities.

2.1 Pre-exercise Activities

Prior to the emergency exercise, NRC Region I and FEMA representatives held meetings and had telephone discussions with licensee representatives to discuss objectives, scope and content of the exercise scenario. As a result, minor changes were made in order to clarify certain objectives, revise certain portions of the scenario and ensure that the scenario provided the opportunity for the licensee to demonstrate the stated objectives as well as those areas previously identified by NRC and FEMA as in need of corrective action.

NRC observers attended a licensee briefing on June 27, 1988, and participated in the discussion of emergency response actions expected during the various phases of the scenario. The licensee stated that controllers would intercede in exercise activities to prevent scenario deviation or disruption of normal plant operations.

The exercise scenario included the following events:

- Fuel damaged by loose parts;
- Damage to a turbine driven emergency feedwater pump;
- Large break Loss of Coolant Accident (LOCA) due to a total weld failure;
- Venting of the containment into the containment enclosure building with a subsequent elevated, filtered release to the atmosphere;
- Declaration of Alert, Site Area Emergency and General Emergency Classifications;
- Calculation of offsite dose consequences; and
- Recommendation of protective actions to off-site officials.

2.2 Activities Observed

During the conduct of the licensee's exercise, seven NRC team members made detailed observations of the activation and augmentation of the emergency organization, activation of emergency response facilities, and actions of emergency response personnel during the operation of the emergency response facilities. The following activities were observed:

1. Detection, classification, and assessment of scenario events;
2. Direction and coordination of the emergency response;
3. Augmentation of the emergency organization and response facility activation;
4. Notification of licensee personnel and offsite agencies of pertinent plant status information;
5. Communications/information flow, and record keeping;

6. Assessment and projection of offsite radiological dose and consideration of protective actions;

7. Provisions for inplant radiation protection;

8. Performance of offsite and inplant radiological surveys;

9. Maintenance of site security and access control;

10. Performance of technical support, repair and corrective actions;

11. Assembly, accountability and evacuation of personnel;

12. Preparation of information for dissemination at the Emergency News Center; and

13. Management of recovery and reentry operations.

3.0 Exercise Observations

3.1 Exercise Strengths

The NRC team noted that the licensee's activation and augmentation of the emergency organization, activation of the emergency response facilities, and use of the facilities were generally consistent with their emergency response plan and implementing procedures. The team also noted the following actions that provided strong positive indication of their ability to cope with abnormal plant conditions:

1. Very good command and control of all emergency response facilities (ERF's) was demonstrated;

2. Plant conditions were quickly recognized and classified;

3. Shift turnover was accomplished smoothly and with no apparent loss of control of the situation;

4. The ERF's were activated in a timely manner; and

5. Protective Action Recommendations (PAR's) were prompt and conservative. Evacuation time estimates were effectively utilized in determining the PAR's.

3.1 Exercise Weaknesses

The NRC identified the following exercise weaknesses which needs to be evaluated and corrected by the licensee. The licensee conducted an adequate self critique of the exercise that also identified these areas.

1. The Technical Support Center (TSC) and Emergency Operations Facility (EOF) staff displayed questionable engineering judgement and/or did not recognize or address technical concerns (50-443/88-09-01). For example:

   - Neither the EOF or TSC staff questioned a release of greater than 7000 curies per second with only clad damage and no core uncovery;

   - Efforts continued to restore the Emergency Feedwater Pump after a large break LOCA;

   - A questionable fix for the Containment Building Spray system;

   - A lack of effort to locate and isolate the release path; and

   - No effort was noted to blowdown Steam Generators to lessen the heat load in containment.

2. The TSC and Operational Support Center (OSC) have multiple entrances and exits that are not controlled. As a result, contamination controls were ineffective at times as personnel entered without frisking and it couldn't be determined if continuous accountability was, or could be, maintained (50-443/88-09-02).

3. No apparent consideration was given to the departing first shift to account for possible dose when leaving the plant during the release, as they were not given dosimetry (50-443/88-09-03).

4. The response to some questions in the Media Center were not adequate such as: the NRC's role in an emergency; and why a reactor trip wasn't performed earlier (50-443/88-09-04).

4.0 Licensee Actions on Previously Identified Items

The following items were identified during a previous inspection (Inspection Report No. 50-443/87-25). Based upon observations made by the NRC team during the exercise the following opens item were acceptably demonstrated and are closed:

(CLOSED) 87-25-01 IFI: The simulator Shift Supervisor did not use classification procedures and failed to recognize the loss of both Radiation Monitoring Systems trains as an Unusual Event.

(CLOSED) 87-25-02 IFI: Lack of a Post Accident Containment air sample prevented dose assessment personnel from estimating the containment atmosphere iodine concentration.

5.0 Licensee Critique

The NRC team attended the licensee's post-exercise critique on June 29, 1988, during which the key licensee controllers discussed observations of the exercise. The licensee indicated these observations would be evaluated and appropriate corrective actions taken.

6.0 Exit Meeting and NRC Critique

The NRC team met with the licensee representatives listed in Section 1 of this report at the end of the inspection. The team leader summarized the observations made during the exercise.

The licensee was informed that previously identified items were adequately addressed and no violations were observed. Although there were areas identified for corrective action, the NRC team determined that within the scope and limitations of the scenario, the licensee's performance demonstrated that they could implement their Emergency Plan and Emergency Plan Implementing Procedures in a manner which would adequately provide protective measures for the health and safety of the public.

Licensee management acknowledged the findings and indicated that appropriate action would be taken regarding the identified open items.

At no time during this inspection did the inspectors provide any written information to the licensee.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Howard A. Wilber

In the Matter of	Docket Nos. 50-443-OL 50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	
(Seabrook Station, Units 1 and 2)	January 22, 1990

CERTIFICATE OF SERVICE

I, John Traficonte, hereby certify that on January 22, 1990, I made service of the enclosed BRIEF OF INTERVENORS IN SUPPORT OF THEIR APPEAL OF LBP-89-38 by Federal Express as indicated (*) and by first class mail to:

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