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February 22, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 (Offsite Emergency Planning Issues)

On Appeal From A Decision of the Atomic Safety and Licensing Board LBP-89-38 (December 11, 1989)

APPLICANTS' BRIEF

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STATEMENT OF THE CASE

This is an appeal from a decision of the Atomic Safety and Licensing Board (Licensing Board) wherein the Licensing Board denied the admission, and summary disposition, of certain contentions filed after the close of the evidentiary record.[1] The contentions sought to raise issues as to the scope of an

[1] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-38, 30 NRC ___ (Dec. 11, 1989) (hereinafter referred to as "LBP-89-38" and cited to the slip opinion).

onsite emergency plan exercise conducted at Seabrook Nuclear Power Station (Seabrook) on September 27, 1989.

This matter commenced with the filing by The Attorney General of The Commonwealth of Massachusetts, Seacoast Anti-Pollution League, and the New England Coalition on Nuclear Pollution (hereinafter referred to as "Intervenors"), of two motions "to admit contentions." The motions sought the admission into litigation of two contentions as to the scope of the exercise and were filed under the dates of September 28, 1989,[2] and October 13, 1989.[3] On October 16, 1989, Intervenors filed a motion to amend the motions to admit contentions to add thereto allegations purporting to meet the pleading requirements of 10 C.F.R. § 2.734 with respect to each of the earlier motions.[4] Under date of October 18, 1989, the Intervenors filed a Motion for Summary Disposition of all the onsite exercise scope

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[2] Intervenors' Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (Sept. 28, 1989) (alleging Contention JI-Onsite Ex-1 and certain bases therefore - and hereafter cited as "Motion #1").

[3] Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (Oct. 13, 1989) (alleging Contention Onsite Ex-2 and bases therefore and also additional bases for Onsite Ex-1 - hereafter cited as "Motion #2").

[4] Intervenors' Motion to Amend Intervenors' Motions of September 29, 1989 and October 13, 1989 to Admit Contentions on the September 27, 1989 Onsite Emergency Plan Exercise (Oct. 16, 1989) (hereafter cited as "Motion #3").

contentions raised in the motions to admit contentions,[5] accompanied by an extensive supporting memorandum.[6]

The basic thrust of the Intervenors' position, as articulated in the motions and their memorandum was that, as a matter of law, the scope of the exercise was not sufficiently comprehensive. In particular, they claimed six specific shortcomings in the exercise:

1. There was insufficient exercise of the ability of the Applicants' personnel to formulate offsite protective action responses (PARs) which, according to the Intervenors, was due to the fact that the exercise scenario did not escalate to the point of an offsite release and a concomitant general emergency.[7]
2. "[N]o plume monitoring procedures or correlative accident assessment activities were tested even by mini-scenario."[8] This was otherwise articulated as:

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[5]Intervenors' Motion for Summary Disposition on Contentions JI-Onsite Ex-1 and JI-Onsite Ex-2 (Oct. 18, 1989) (hereafter cited as "SD Motion").

[6]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 (Oct. 18, 1989) (hereafter referred to as "Intervenors' Memo" and cited "Int. Mem.").

[7]Int. Mem. at 34; Motion #1, Attach 1 at 3; Motion #2, Attach. A at 1-2.

[8]Int. Mem. at 34.

"The Applicants did not test their capacity to locate a plume, track its course and measure its content."[9]

3. There was no exercise of the Seabrook Fire Department in its capacity as a local support services agency or the Exeter Hospital as an offsite medical treatment facility.[10]

4. There was no testing of the monitoring or decontamination of personnel evacuating the site at the Seabrook Dog Track or a designated warehouse on Rte. 107.[11]

5. There was no demonstration of an actual shift change or demonstration of an ability to staff for continuous (24 hour) operations for a protracted period.[12]

6. There was no exercise of the Vehicular Alert Notification System (VANS) in the Massachusetts portion of the Seabrook EPZ.[13]

It was the position of the Intervenors that the allowance of the summary disposition motion depended only upon the acceptance of their basic legal theory that NRC regulations require that each of the foregoing activities be conducted as part of an exercise held in accordance with the third and fourth sentences

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[9] Id. at 2, n.3.

[10] Int. Mem. at 34; Motion #1, Attach. A at 3.

[11] Int. Mem. at 34-35; Motion #1, Attach. A at 3.

[12] Int. Mem. at 35; Motion #2, Attach. A at 3-4.

[13] Int. Mem. at 35; Motion #2, Attach. A at 4-5.

of 10 C.F.R 50, App. E § IV.F.1. According to the Intervenors, the summary disposition motion (and the motions to admit contentions) "raise[d] (and [were] intended to raise) [a] purely legal question,"[14] and, thus, there was no need for the taking of any evidence in order to reach the moved-for result.

Answers having been filed to each of the above-described motions by both the Staff and the Applicants, the Licensing Board issued the decision at bar which denied each of the substantive motions.

The Licensing Board began by holding that the motions to admit contentions were required to meet the criteria for reopening the record set forth in 10 C.F.R. § 2.734,[15] and held that the failure of the Intervenors to file any affidavits in support of the motions dictated their denial under 10 C.F.R. § 2.734(b).[16] However, "in the interest of a complete record on this important issue," the Board went on to "note that Intervenors are not denied the relief they seek on a mere technicality,"[17] and proceeded thereafter to examine the motions to admit contentions against the other criteria and requirements of 10 C.F.R. § 2.734 and to determine whether the necessary allegations as to the concept of "fundamental flaw" had been

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[14] Int. Mem. at 3.

[15] LBP-89-38 at 14-16.

[16] LBP-89-38 at 19 citing Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989).

[17] LBP-89-38 at 19.

pleaded.[18] The Licensing Board concluded this latter inquiry as follows:

> "[T]he Board concludes that the Intervenors' motions do not allege with bases, or at all, that the 1989 onsite exercise revealed fundamental flaws in the respective emergency plan. The contentions do not allege with requisite basis, or at all, that the 1989 exercise was insufficient in its scope to reveal fundamental flaws in the plan. We find that the exercise was sufficient in scope and no fundamental flaw was revealed. Intervenors' motions do not address a significant safety issue."[19]

The Licensing Board then went on to address the issue of whether the motions to admit contentions had met the "five factors" balancing test set out in 10 C.F.R. § 2.714(a) and incorporated by reference into the reopening criteria by 10 C.F.R. § 2.734(d).[20] The Licensing Board concluded that factors two, four and five weighed in favor of the Intervenors, but that factors one and three did not; and that the overall balance of the five factors weighed against admission of the contentions.[21]

From the foregoing, it is apparent that the motions were

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[18]LBP-89-38 at 20-32.

[19]LBP-89-38 at 31.

[20]LBP-89-38 at 31-32.

[21]LBP-89-38 at 32.

denied on the following four distinct, and independently dispositive, grounds:

1. Failure to satisfy the requirements of 10 C.F.R. § 2.734(b) requiring affidavits to accompany a motion to reopen;
2. Failure to satisfy the requirements of 10 C.F.R. § 2.743(a)(2) that a significant safety or environmental issue be addressed;
3. Failure to satisfy the "five factors" balancing test required to be met by 10 C.F.R. § 2.714(a) and 10 C.F.R. § 2.734(d), and;
4. Failure to plead either that the exercise revealed a fundamental flaw in the onsite emergency plan or that the scope of the exercise was insufficient to reveal fundamental flaws in the plan.

Next, the Licensing Board summarily denied the summary disposition motion for the reasons that (a) no contentions had been admitted upon which it could operate, and (b) because had any been admitted, there would have remained, on the basis of the affidavits filed by the Applicants and the Staff, material issues of fact in dispute which would have precluded the grant of the motion.[22]

Lastly, the Board addressed what it characterized as the "second broad issue."[23] This was the issue of whether the

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[22]LBP-89-38 at 33.

[23]LBP-89-38 at 33-41.

Intervenors were correct in interpreting 10 C.F.R. 50 App. E § IV.F.1, as requiring the inclusion in the onsite exercise of the activities detailed in the motions to admit contentions on the theory that such an exercise was a "full participation exercise" as that term is defined in footnote 4 to 10 C.F.R. 50 App. E § IV.F.1. The Licensing Board rejected the construction of the regulation urged by the Intervenors and with it, Intervenors' theory premised upon that construction. Accordingly there is a fifth independent ground upon which Motions 1 and 2 were denied, i.e., that the legal premise upon which they rested was erroneous.

It is in the foregoing posture that this matter comes before this Appeal Board.

ARGUMENT

INTRODUCTION

The Intervenors' Brief in many ways is not a brief at all. Much of it seems to be in the nature of a catharsis which is not directed to the legal issues raised by the appeal.[24] Indeed,

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[24] Int. Br. at 1-12. There are certain comments in this portion of the Intervenors' Brief with respect to jurisdiction. It is suggested that the Licensing Board had no jurisdiction to issue the decision in question on the theory that the filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit precluded the issuance of LPB-89-38. Int. Br. at 8-9. There is no logic to this position. To begin with, the issuance of an "opinion," "memorandum" or "decision" simply is not an exercise of jurisdiction. It is the issuance of orders, decrees and judgemnts which constitute the exercise of jurisdiction. The opinion of a lower tribunal is, in fact and law, wholly unnecessary to the exercise of appellate review (although its absence may foreordain the result if the

writing of such a document is a necessary prerequisite to the exercise of some jurisdictional power, see, e.g., F. R. Civ. P. 65(d)). Thus, in issuing LBP-89-38, the Licensing Board was not exercising jurisdiction if, as Intervenors claim, the denial of their motions actually occurred on November 9, 1989. If, on the other hand, the denial did not take place until the issuance of LBP-89-38 on December 11, 1989, the petition for review which was filed on December 4, 1989, did not take this denial with it, and thus, there was no possibility of a transfer of "jurisdiction" prior to that time. Intervenors also question the jurisdiction of the Appeal Board. To the extent the challenge is based on the concept that different individuals are on the panel considering LBP-89-38 than are on the panel considering appeals taken from the November 9, 1989 decision, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC ___ (Nov. 9, 1989), Int. Br. at 10-13, this argument is frivolous in light of the Commission's regulations. 10 C.F.R. § 2.787(a). See also, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 101 (1977), affirmed generally and as to this point sub nom., New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). If the argument is based on the concept that the filing of the petition for review strips this Appeal Board of authority to act, then the jurisdictional question depends upon whether the petition did or did not encompass the denial of the motions to reopen. If it did, this Appeal Board is without jurisdiction to alter the order denying the motions; if it did not, then the jurisdiction of the Appeal Board to act is clear. Compare Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, vacated on other grounds, CLI-76-17, 4 NRC 451 (1976) with Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-350, 4 NRC 365 (1976). In short, if the Intervenors are correct that the denial took place on November 9, 1989 and that their petition for review encompassed that action of the Licensing Board and placed it squarely before the Court of Appeals, then this Appeal Board is perhaps without power to grant them the relief they seek under agency precedent.

With respect to intra-agency jurisdiction, there can be no doubt of the Licensing Board's jurisdiction in this regard in light of this Board's unpublished order of November 16, 1989. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), Appeal Board Order (unpublished) (Nov. 16, 1989).

As to the issue of deference owed the decision, Int. Br. at 10, the legal reasoning of the Licensing Board is owed such deference as its force commands, no more and no less. The soundness of reasoning in the decision is the same whether it be in this decision or in a law review article.

given the general tone of portions of the Intervenors' Brief, it is a fair candidate for being stricken sua sponte by this Appeal Board on the authority of Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973). In any event, we understand the errors of substance being assigned are those which are described and argued in summary fashion at pages 27-34 of Intervenors' Brief. It is to these assertions of error that we direct the remainder of this brief.

I. THERE WAS NO ERROR IN RULING THAT THE CONTENTIONS HAD TO ALLEGE EITHER THAT THE EXERCISE REVEALED A FUNDAMENTAL FLAW OR THAT THE SCOPE OF THE EXERCISE WAS SO NARROW AS TO PERMIT FUNDAMENTAL FLAWS TO GO UNDETECTED.

The seminal case with respect to the necessary scope of an emergency exercise is the decision in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275 (1988). Therein, the standard by which the scope of an exercise would be judged was stated to be: "that the exercise itself must be comprehensive enough to permit a meaningful test and evaluation of the emergency plan to ascertain if that plan is fundamentally flawed."[25] Since that time, it has also been held that if the flaw revealed is one which can be readily corrected or can be corrected by supplemental training of personnel, it is not a fundamental flaw.[26] Nowhere in any of their moving papers

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[25]ALAB-900, 28 NRC at 286 (emphasis in the original).

[26]Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 485-86 (1989). See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 506 (1988).

did the Intervenors set forth either that a fundamental flaw had been revealed by the exercise or that the scope of the exercise was so narrow as to preclude the ascertainment of any fundamental flaw. Moreover, and more to the point, neither the Applicants and Staff nor the Licensing Board were ever enlightened as to how the specific shortcomings in scope alleged would preclude the ascertainment of some "fundamental flaw." This is a pleading failure which doomed the Intervenors' effort and the Licensing Board correctly so held.

Prescinding from the pleading failure per se, it is clear that the Intervenors could not have made such a factual allegation in any event.[27] The first shortfall alleged was that the exercise did not:

> "1) advance beyond a declaration of site area emergency and, therefore, did not trigger sufficient offsite protective action decision making."[28]

If the exercise had required more protective action decision-making, the only problem that could have resulted would have been that a decision maker might have made a decision as to the action to be taken that turned out to be erroneous in retrospect. Correcting for such an error is a personnel training matter.

The second shortfall alleged was that the exercise did not:

> "2) involve a medical team from a local

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[27]This is not surprising. The onsite plan had been exercised several times previously. Presumably, any "fundamental flaw" would long since have come to light.

[28]Motion #1, Attach. A at 3.

support services agency (the Seabrook Fire Department pursuant to the Seabrook RERP) or an offsite medical treatment facility (Exeter Hospital according to the SSRERP)"[29]

Assuming this had been done, all that could have been revealed would have been weaknesses of personnel in the performance of their duties; again a matter of training. Moreover, when the Commission promulgated the regulation which required full participation exercises to be held within two years of licensing rather than one, it made clear that its concern in requiring the onsite exercise was not in exercising entities such as the Exeter Hospital or the Seabrook Fire Department. The Commission, in stating its justification for the two-year rule stated:

> "Moreover, to mandate an onsite exercise within one year of operation while requiring an offsite exercise within two years is a recognition of the distinct nature of the participants involved in each instance. The State and local emergency planning organizations that are primarily involved in offsite emergency planning are in almost all instances organized and trained to deal with emergency situations long before facility operation. While the offsite emergency test is important to judge the ability of these existing organizations to respond to the particular of a radiological emergency, in light of their ongoing responsibility for all types of emergencies a demonstration of offsite preparedness by such agencies within two years prior to licensing affords reasonable assurance of their capabilities at the time of licensing."[30]

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[29] Id.

[30] Production and Utilization Facilities; Timing Requirements for Full Participation Emergency Preparedness Exercises for Power Reactors Prior to Receipt of an Operating License, 52 Fed. Reg. 16823, 16825 (May 6, 1987).

The Exeter Hospital and the Seabrook Fire Department fall squarely within the class of organizations referenced in the above-quoted language.

The third shortfall alleged was that the exercise did not:

> "3) involve the dispatch of any field monitoring teams and monitoring and assessment activities;"[31]

In fact, this was done, as the Licensing Board found.[32] But again, assuming it had not been done, all that could have been revealed would be personnel errors in carrying out monitoring activities, a matter correctable by training and, thus, not a fundamental flaw.

The next shortfall alleged was that the exercise did not:

> "4) involve any onsite personnel monitoring and decontamination at the offsite locations planned for that purpose (the Seabrook Dog Track and the 'Warehouse' on Route 107)."[33]

Again, all that could have been revealed would have been personnel errors in carrying out the monitoring and decontamination activities, a matter overcome by training and, thus, not a fundamental flaw.

In the second motion to admit contentions, the Intervenors alleged as part of their second contention a shortcoming in scope by virtue of the fact that the exercise did not include an

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[31] Id.

[32] LBP-89-38 at 25.

[33] Id.

exercise of the vehicular alert and notification system (VANS).[34] A short complete answer to this allegation is that VANS simply is not a part of "the licensee's onsite emergency plans" as that phrase is used in 10 C.F.R. 50, App. E § IV.F.1. This is clear from the statement of reasons issued with the change in the regulations that excluded the prompt notification system from the review of emergency plans to be conducted prior to allowance of low power testing.

> "This practice of reviewing an offsite element of licensee emergency plans that has no onsite application is being discontinued . . . ." (Emphasis added.)[35]

Also as part of their second contention, Intervenors alleged a shortcoming in scope by virtue of the fact that there was no demonstration of a shift change or ability to staff for continuous operations for a protracted period.[36] The only problems which might have been demonstrated by a shift change also would have been of a personnel training nature. And, insofar as the allegations of not demonstrating staffing sufficiency are concerned, the staffing of a plan is as well demonstrated by personnel rosters and personnel records as by an exercise and need not be demonstrated by such activity. Indeed,

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[34] Motion #2 , Attach. A at 4-5.

[35] Emergency Planning and Preparedness Requirements for Nuclear Plant Fuel Loading and Low Power Testing, 53 Fed. Reg. 36955 (Sept. 23, 1988). See also 10 C.F.R. 50 App. E § IV.D.3; NUREG-0654, Supp. 1 § II.E.4 (party responsible for activation of prompt notification system is offsite organization).

[36] Motion #2, Attach. A at 3-4.

the existence of sufficient staff is usually viewed as a planning issue, not an exercise issue.

II. THE LICENSING BOARD DID NOT ERR IN APPLYING THE REOPENING STANDARDS OF 10 C.F.R. § 2.734.

The second assignment of error contained in the Intervenors' Brief is that the Licensing Board erred in closing the evidentiary record when it did, and even assuming such closing was proper, the Board erred in applying the reopening criteria of 10 C.F.R. § 2.734 to their motions.[37] We address these points immediately below.

A. The Licensing Board Did Not Err in Denying the Motion to Hold Open the Record.

Intervenors make passing reference in their brief to the fact that they made "repeated efforts to avoid [the] result" of having the record reopening criteria applied to their motions.[38] Presumably, this is a reference to their motion to hold the record open and the denial thereof by the Board.[39] The Licensing Board denied the motion on the basis that it had no power to hold open a record in order to vest itself with stand-by jurisdiction over subsequent events to see whether a litigable contention might surface.[40]

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[37] Int. Br. at 29-30.

[38] Int. Br. at 29.

[39] See Int. Br. at 13-17.

[40] Tr. 28289.

The Intervenors' Brief acknowledges, in a footnote, that the denial of Intervenors' motion was on jurisdictional grounds.[41] Despite this recognition, nowhere in the Intervenors' Brief is the issue of the Licensing Board's jurisdiction to grant the relief sought by the motion to hold open addressed. The law is that a Licensing Board's jurisdiction extends only to the admitted contentions before it[42] or matters which it raises sua sponte.[43] In addition, the Commission has made clear that its adjudicatory boards are not empowered to create special procedures to enable themselves, or parties before them, to search out possible contentions for litigation.[44] A fortiori, they are not empowered to hold proceedings open on the surmise that something might arise in the future worthy of litigation.

B. The Record Having Closed, it Was Proper to Apply the 10 C.F.R. § 2.734 Standards.

Intervenors argue that the decisions in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied,

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[41] Int. Br. at 17 n.21.

[42] 10 C.F.R § 2.104(c); 10 C.F.R § 2.760a; Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Union Electric Company (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 190 (1976).

[43] 10 C.F.R § 2.760a.

[44] Louisiana Power and Light Co. (Waterford Steam Electric Station, Units 1 and 2), CLI-86-1, 23 NRC 1, 6-7 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Station, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 (1986).

469 U.S. 1132 (1985) and San Luis Obisbo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984) dictate that the Commission's reopening regulation, 10 C.F.R. § 2.734, may not be applied to the contentions at issue herein. Mothers for Peace and UCS were both decided in 1984. At that time, the law was that after an evidentiary record closed, the only way a plant's license could be attacked was by a petition under 10 C.F.R. § 2.206 if final agency action had been taken, or by a motion to reopen if the proceeding was still in the agency. This latter procedure had been recognized in NRC adjudicatory case law, but was not, at that time, provided for in the Rules of Practice. This case law was, in most respects, the same as the present 10 C.F.R § 2.734. However, as of that time, the NRC case law on reopening had, in actuality, recognized two disparate "different results" standards for reopening. In some decisions, the standard had been articulated as requiring a showing that a different result "would" have been reached if the proffered evidence had been originally considered;[45] in others, the articulated standard was "might" have been reached.[46]

In UCS, which dealt only with the question of whether a material issue could be excluded from a hearing, the scope of which would otherwise encompass it, the only discussion of any of

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[45]E.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

[46]E.g., Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant), ALAB-598, 11 NRC 876, 879 (1980).

these principles was a discussion of 10 C.F.R § 2.206.[47] This section of the Rules of Practice leaves the decision as to whether to commence a proceeding of any kind thereunder to the discretion of the Staff, reviewable only by the sua sponte action of the Commission itself and only for an abuse of that discretion.[48] Doubtless, it was this history that led the Appeal Board to observe previously in this proceeding:

> "[T]he 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."[49]

In Mothers for Peace, which was a case where a statutorily mandated opportunity for a hearing had been denied, the principle discussed was the "would" standard.[50] Of course, neither case discussed 10 C.F.R § 2.734, because it was not yet part of the regulations. In 1986, the Commission promulgated 10 C.F.R § 2.734. This was done with the full knowledge and understanding of both UCS and Mothers for Peace as is clear from the Statement of Considerations which accompanied the promulgation wherein Mothers for Peace was fully discussed along with the articulation

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[47]UCS, 735 F.2d at 1444.

[48]10 C.F.R § 2.206(c); Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

[49]Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481 n.21 (1989).

[50]Mothers for Peace, 751 F.2d at 1316.

of the two different standards in NRC case law.[51] The Commission having adopted the regulation after the issuance of the decisions relied upon as grounds for holding it invalid, this Appeal Board, as a result, would be and, indeed, is, without power to adopt the Intervenors' argument because it is a challenge to the regulations.[52] Moreover, since what is involved here is the question of whether an issue would be litigated in a hearing (i.e., the UCS-type situation) rather than the denial of a statutorily mandated hearing as in Mothers for Peace, the Mothers for Peace holding relied upon by Intervenors is inapplicable. Indeed, Mothers for Peace appears to uphold application of even the draconian "would" reopening standard where, as here, the question is only whether an issue should be litigated in a closed proceeding.[53]

Intervenors argue in their brief that 10 C.F.R. § 2.734 was simply a codification of the rule found objectionable in Mothers for Peace.[54] They base this on the language of the Commission Statement which accompanied the promulgation of 10 C.F.R. § 2.734 wherein the Commission made reference to the fact that a reading of all their prior cases indicated that the real inquiry had been whether a different result would have been "likely." This, say

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[51] Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19535, 19536-37 (May 30, 1986).

[52] 10 C.F.R. § 2.758.

[53] 751 F.2d at 1317-21.

[54] Int. Br. at 30, n.33.

the Intervenors means that 10 C.F.R. § 2.734 is merely a codification of prior practice in effect at the time of Mothers for Peace and therefore does not address the problem created by that case. It is clear that the Commission did feel it was codifying what was the prior actual, if unarticulated, practice. However, it was not that practice that the Court in Mothers for Peace objected to in that setting. It was the perceived, and much more draconian, "would have been reached" standard that was discussed in Mothers for Peace and found wanting.

C. The Criteria and Standards of 10 C.F.R. § 2.734 Were Properly Applied by the Licensing Board.

In a footnote, referencing a prior pleading,[55] Intervenors claim that even if the reopening criteria are properly to be applied to their motions, the Licensing Board erred in finding that their submissions did not pass muster under the regulation.[56]

To begin with, the Intervenors' filings contained no affidavit of any kind. As the Licensing Board ruled,[57] the absence of an affidavit is fatal. The regulation is clear:

> "The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. . . . Each of

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[55]The prior pleading was Motion #3. See n.4, supra, and accompanying text.

[56]Int. Br. n.34 at 30-31.

[57]LBP-89-38 at 19.

> the criteria must be separately addressed, with a specific explanation of why it has been met."[58]

There is no leeway here. The Motion must be accompanied by an affidavit. Each criterion must be separately addressed, with a specific explanation of why it has been met. The criteria to be addressed include "timeliness" and "materially different result" as well as the existence of a significant safety issue. None of the criteria were addressed by affidavit.

As discussed below, the vitality of Intervenors' motions turns, in the first instance, on the legal issue of whether Footnote 4 to 10 C.F.R. 50, App. E § IV.F.1, applies to the exercise of concern. Plainly it does not for reasons stated infra. However, assuming arguendo the contrary, a ruling that the regulation does apply would not, by itself, establish the existence of a significant safety issue. Nor would it obviate the need for the Intervenors to explain why the additional activities they claim should have been included in the exercise are necessary to assure the discovery of otherwise undiscoverable fundamental flaws. Such a showing would be a minimum prerequisite to showing a significant safety issue existed. Thus, the Intervenors could not avoid the need for an affidavit by an argument to the effect that the Scenario and Staff Report can serve as a surrogate for the affidavit.[59] Neither of these

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[58]10 C.F.R § 2.734(b) (emphases supplied).

[59]That staff or applicant documents might serve to substitute for an affidavit may have been an acceptable practice when motions to reopen were governed by decisional authority.

documents purported to address the reasons why or why not the activities Intervenors assert should have been included would be necessary to uncover otherwise undetectable fundamental flaws or why a materially different result would have obtained from a reopening. Indeed, the Inspection Report, inasmuch as it endorsed the scope of the exercise, refuted, rather than supported, the Intervenors' position. The lack of an affidavit was plainly and simply fatal to this motion.[60]

Furthermore, there was no sufficient showing, by affidavit or otherwise, that any significant safety issue was involved. The basic showing made by the Intervenors[61] was that, under their legal theory, the regulations require the various additional matters they wanted done, to be done. Even assuming arguendo that the legal theory were correct, and therefore, there has been a failure to meet a regulation, this is not, in and of itself, enough to demonstrate the existence of a significant safety issue. Rather, by affidavit, there must be a showing that the necessary factual result of particular alleged noncompliance will

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See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973). However, the requirement for an affidavit was specifically included in 10 C.F.R § 2.734(b) and thus overuled that case law. Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg, 19535, 19537 (May 30, 1986).

[60]Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-89-1, 29 NRC 89, 93-94 (1989); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989).

[61]Motion #3, Attach. A at 3-6.

be to create a meaningful threat to the public health and safety.[62]

Nor was there the necessary showing that "a materially different result would be or would have been likely."[63] Intervenors asserted before the Licensing Board that under their legal theory, if correct, Applicants would be barred from receiving a license.[64] This is hardly the case. The most that would have been established at that point is the existence of a regulatory basis for the contention. And even if Intervenors prevailed on the "significant safety issue" criterion, the most that they could possibly accomplish is some further delay while a remedial drill was run before full power operation was authorized. That a given result will be delayed is not the equivalent of it being materially different.

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[62]Recently, the Commission has commented on the phrase "significant safety problem" which, it would seem, must be shown to be likely in order that there exist a "significant safety issue," as follows:

> "The Commission used the terminology 'significant safety problem' to note that it intended to require something more than a theoretical--or conceivable--issue, but insisted on there being a real matter that required resolution."

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC ___ (Oct. 19, 1989), Slip Op. at 18. It is submitted that no lower standard should be applied here.

[63]10 C.F.R § 2.734(a)(3)(emphasis added). The Licensing Board did not address this criterion.

[64]Motion #3 at 7.

In short, the showing made fell far short of that required by 10 C.F.R § 2.734, both procedurally and substantively.

III. THE LICENSING BOARD DID NOT ERR INSOFAR AS IT VIEWED AN ONSITE EXERCISE HELD AFTER THE INITIAL ONE AND AFTER THE FULL PARTICIPATION GRADED EXERCISE AS PRIMARILY FOR THE PURPOSE OF ASCERTAINING THE STATE OF TRAINING.

The Intervenors' next assignment of error is that the Board erred in its view that onsite emergency plan exercises, which, like the one here involved, take place subsequent to other such exercises and a full participation graded exercise of on and off site plans, are primarily for the purpose of ascertaining the state of training.[65]

The Licensing Board was absolutely correct. In the Statement of Reasons and Basis which accompanied the promulgation of the two-year exercise rule,[66] the Commission, in response to a utility comment urging elimination of the one-year rule for onsite exercises, described the justification for continuing the one-year rule with respect to such exercises as follows:

> "The importance of annual onsite emergency planning exercises by the licensee's operational staff has already been recognized in the Commission's regulations, which now require that after a facility is licensed to operate there must be an annual onsite exercise. This annual emergency response function drill ensures that the licensee's new personnel are adequately and promptly trained and that existing licensee personnel maintain their emergency response capability. The existing requirement of a pre-operational

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[65] Int. Br. at 31.

[66] 52 Fed. Reg. 16823 et seq. (May 6, 1987).

> onsite exercise within one year prior to full-power license issuance is consistent with this philosophy as well as the Commission's general desire to have pre-operational emergency planning exercises as close as practicable to the time of licensing."[67]

What the language quoted with emphasis reveals is an understanding by the Commission that the exercise contemplated by the third sentence of 10 C.F.R. 50, App. E § IV.F.1 was an exercise that would serve the purpose of uncovering personnel deficiencies in the nature of lack of training or slippage of skills rather than "fundamental flaws" in the plan itself. This makes sense because any "fundamental flaws" in the plan itself would have been revealed in the "full participation" exercise already held for that facility more than one year prior to licensing and also prior to the conduct of the onsite exercise. Indeed, as the Commission itself further observed in promulgating the present version of 10 C.F.R. 50, App. E § IV.F.1:

> "To the extent that an offsite pre-licensing exercise is intended to reveal whether an emergency plan has fundamental flaws, that purpose can be achieved at least as well by an exercise held within two years of licensing as within one year."[68]

Undoubtedly, it is this concept that the Commission had in mind in its decision denying the Applicants an exemption from the one year onsite exercise rule when it referred to the onsite plan for Seabrook as having "previously been exercised and adjudicated"

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[67] 52 Fed. Reg. at 16824-25 (emphases added).

[68] 52 Fed. Reg. at 16824.

and then went on to state that "any contention" would need to allege a fundamental flaw.[69] In short, the "any contention" language of the Commission would dictate that the Intervenors at least plead the fundamental flaw that the improper scope would fail to reveal, which, as shown above, they never did.

IV. THE RULING THAT THE INTERVENORS' CONTENTIONS WOULD NOT PASS MUSTER UNDER THE "LATE-FILED" CRITERIA OF 10 C.F.R. § 2.714(a)(1) WAS CORRECT.

Intervenors complain in summary fashion[70] of the Licensing Board's holding that the "five factors" test weighed against admission of the contentions proffered.[71] To begin with, in order to prevail on this point:

> "[T]he intervenors have a heavy burden on appeal. It is insufficient for them to show merely that the Board below might legitimately have determined that the five lateness factors weighed in favor of admitting the contention[s]; rather, they must demonstrate that a reasonable mind could reach no other result."[72]

The one paragraph, eight line, effort made in Intervenors' Brief[73] falls far short of making the required showing. Indeed, we submit that the Licensing Board, if it erred at all on this

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[69] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-19, 30 NRC ___ Slip Op. at 4 & n.5 (Sept. 15, 1989).

[70] Int. Br. at 32.

[71] LBP-89-38 at 31-32.

[72] ALAB-918, supra, 29 NRC at 482 (footnote omitted. See also, cases there cited.

[73] Int. Br. at 32.

matter erred in holding that the fifth factor did not weigh against the Intervenors.[74] Had these contentions been admitted it would have "broadened the scope of the proceeding" even if the Licensing Board was able, as it suggested to control the delay problem. The delay and "broaden" concepts in the fifth factor are set out in the regulation in the disjunctive.[75] The ruling should have been that the fifth as well as the first and third weighed against the Intervenors.

V. THE LICENSING BOARD DID NOT ERR IN REJECTING THE THEORY THAT THE EXERCISE HAD TO BE A "FULL PARTICIPATION" EXERCISE AS THAT TERM IS DEFINED IN THE REGULATIONS.

Introduction

Intervenors' last claim of error is the Licensing Board's rejection of their theory as to the proper construction of 10 C.F.R. 50 App. E § IV.F.1. It is the Intervenors' theory that 10 C.F.R. 50, App. E, § IV.F.1 and Footnote 4 thereto and other regulations of the Commission should be read as requiring, as a matter of law, that the activities enumerated in their submissions to the Licensing Board must be included in the prelicensing onsite exercise called for in the third and fourth sentences of 10 C.F.R. 50, App. E § IV.F.1. The fundamental premise to the entire legal argument is that Footnote 4's language which calls for "testing the major observable portions

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[74]LBP-89-38 at 32.

[75]10 C.F.R. § 2.714(a)(1)(v).

of the onsite and offsite emergency plans" applies to the exercise conducted by the Applicants on September 27, 1989. We address this point below.

A. The Language of 10 C.F.R. 50, App. E § IV.F.1 Does Not Admit of the Construction Intervenors Would Give It.

The rule with respect to the construction of Commission regulations is:

> "As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. [Citations omitted.] Further the entirety of the provision must be given effect. [Citation omitted.] Although the 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. [Citations omitted.]"[76]

The key to the entire legal theory underlying the motions at bar is that the requirement for testing "the major observable portions" found in Footnote 4 to 10 C.F.R 50, App. E § IV.F.1 be applied to the exercise of September 27, 1989. Such a construction of the regulation is at odds with the language of the regulation itself. To begin with, 10 C.F.R 50, App. E § IV.F.1 begins by describing a "full participation exercise" in the first sentence. It then goes on to state in the second sentence that "[t]his exercise" shall be conducted within two years of the plant receiving a license to operate at greater than

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[76]ALAB-900, supra, 28 NRC at 288.

5% of power. In the third sentence it states that if "the full participation exercise" is held more than one year prior to the issuance of a license to operate at above 5% power, "an exercise which tests the licensee's onsite emergency plans" (emphasis added) shall be conducted within one year of the issuance of such a license, and in the fourth sentence we are told that "[t]his exercise" need not have State or local governmental participation.

When one parses through the regulation as above at least two things become patently clear. First, whatever the "an exercise" is that is referred to in the third and fourth sentences, it is not the same thing as the "full participation exercise" referred to in the first and second sentences. Second, the words "full participation" are not used in conjunction with the "an exercise" referred to in the third and fourth sentences. This being the case, Footnote 4 has no part in defining the "an exercise" of the third sentence because, by its terms, that footnote only purports to deal with situations where the term "full participation" is used in a regulation "in conjunction with emergency preparedness exercises" (emphasis supplied). Thus, if, as Intervenors tried to do, one wishes to engraft the "major observable portions" criterion on the "an exercise" in the third sentence, in the words of the apocryphal Maine farmer "you can't get there from here."

The view that Intervenors have misread the regulation is reinforced by the language in the second sentence of Footnote 4

which contains the "major observable portions" language. The reference to "mobilization" is set forth in the conjunctive with the testing requirement, and the listing of personnel: "State, local and licensee," is also set out in the conjunctive. The reading that Intervenors gave the regulation, see infra, would require that the listing of personnel be in the disjunctive. Finally, we note that the Commission, in its recent decision denying the Applicants' request for an exemption, used language which further strengthens the view that Intervenors' interpretation is in error.[77] In describing the regulation under discussion, the Commission stated:

> "Pursuant to the Commission's regulation, from which the Applicants seek relief in their instant petition, if more than a year has passed since a full participation exercise, an exercise of the Applicants' onsite plan must be held within one year before license issuance."[78]

By use of the indefinite article in the above-quoted language in referring to the phrase "full participation exercise," the Commission makes clear that whatever the "an exercise" referenced in the third sentence of 10 C.F.R 50, App. E § IV.F.1 is, it is not a "full participation" exercise and, thus, not subject to the criteria enunciated in Footnote 4 to 10 C.F.R 50, App. E § IV.F.1.

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[77]CLI-89-19, supra.

[78]CLI-89-19, supra, Slip Op. at 2 (emphasis added).

B. Intervenors' Argument From Regulatory Interpretation and History is Flawed.

Introduction

As we understand the argument made by the Intervenors below, it was as follows: They began with an analysis of the regulatory language itself.[79] Basically, they claimed that the phrase "full participation" should be viewed as having been used in two ways. One is defining the "how" of an exercise and the other as defining the "who." Intervenors asserted that what this all means is that while the exercise which took place on September 27, 1989, did not require the participation of State and Local Governments because it was not a "full participation" exercise, it still required the "full participation" of the licensee in the sense that licensee personnel were required to test all "major observable portions" of the plan being exercised. Next, the Intervenors went on to say that their reading of the regulation was further supported by the regulatory history of the exercise requirements of 10 C.F.R 50, App. E.[80] In summary, this is an argument that, as of 1980, there was only one prelicensing exercise required called a "full scale" exercise which Intervenors claim required what they view as full participation by everyone who was required to play, and that, since then the Commission has stated that various changes in the regulation

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[79] Int. Mem. at 11-15.

[80] Int. Mem. at 15-23.

governing exercise requirements have not served to lessen the duties or burdens of licensees with respect to such exercises. Therefore, they assert, the licensee must engage in "full participation" in its onsite exercise referenced in the third sentence of 10 C.F.R. 50, App. E § IV.F.1.

Having made their two parallel arguments for the concept that the exercise of September 27, 1989, was required to meet the "major observable portions" criterion, and after attempting to justify their appeal to administrative history,[81] addressing certain Staff arguments made in a prior pleading,[82] and making a public policy argument,[83] Intervenors went on to argue that under the holding in ALAB-900, the necessary "major observable portions" to be exercised are defined as a matter of law in the regulations and include the activities which Intervenors argued should have been carried out, but were not.[84]

We address each of the facets of this argument below.

1. *The Regulatory Interpretation Argument is Flawed.*

As already pointed out, Intervenors' argument simply ignores the fact that the words "full participation" nowhere appear "in conjunction with" the term "an exercise" in the third sentence which is what was being run on September 27, 1989. It has

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[81] Int. Mem. at 24-25.

[82] Int. Mem. at 25-28.

[83] Int. Mem. at 28-29.

[84] Int. Mem. at 29-35.

further been pointed out earlier, that Intervenors' argument, insofar as it interprets the sentence containing the "major observable portions" language in Footnote 4 to 10 C.F.R. 50, App. E § IV.F.1[85] simply ignores the "mobilization" language and the use of the conjunctive, as opposed to the disjunctive, throughout the sentence. Finally, Intervenors also ignore the fact that the second sentence of Footnote 4, which contains their key "major observable portions" language wholly refutes the concept that "major observable portions" constitutes a definition of what must be included in the scenario as Intervenors would have it. This is so because the "major observable portions" of the plan which that sentence requires to be tested and the personnel which the sentence requires to be mobilized, are only those which are necessary to "verify the capability to respond to the accident scenario." In short, the sentence of the footnote contemplates that the scenario will be set independently of any requirement contained in that sentence. The actual language of the regulation simply cannot be twisted to the meaning Intervenors would give it.

2. *The Argument From History Also Ignores Certain Salient Facts.*

As the Licensing Board pointed out,[86] when Intervenors quoted the regulation in their memorandum below,[87] they neglected

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[85] Int. Mem. at 12-13.

[86] LBP-89-38 at 34-35.

[87] Int. Mem. at 10-11.

to insert the Footnote 4 call into the quoted language from 10 C.F.R. 50, App. E § IV.F.1. This may have been a Freudian slip given its location directly after the first use of the term "full participation" which itself negates the idea that the word was used in two ways as Intervenors would have us believe. But what is interesting is to observe the placement of the call of the precursor to Footnote 4 the first time it was proposed for inclusion in the regulations. This occurred with the publication of the proposed rule which eventually, after alteration, became the final rule adopted effective August 6, 1984.[88] That proposed rule was published on July 21, 1983,[89] and it proposed the following ¶ 2.b. to be included in 10 C.F.R 50, App. E § IV.F:

> "2. Each licensee at each site shall:
>
> "a. Annually exercise its emergency plan.[5]
>
> "b. Except as provided in paragraph three below, include in its annual exercise:
>
> "(i) Annual full participation[6] by local government agencies.
>
> "(ii) Annual full or partial participation[7] by States within the plume exposure EPZs."[90]

The call to what was the footnote which became Footnote 4 to the present 10 C.F.R. 50, App. E § IV.F.1 was "6" in the above-quoted proposed regulation. Given its setting, it is clear that from

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[88]See Emergency Planning and Preparedness 49 Fed. Reg. 27733 (July 6, 1984).

[89]Emergency PLanning and Preparedness for Production and Utilization Facilities; Frequency and Participation of Exercises, 48 Fed. Reg. 33307 (July 21, 1983).

[90]48 Fed. Reg. at 33310.

the beginning "full participation" was a term designed to designate the "who," not the "how," to utilize Intervenors' own terms.

CONCLUSION

The decision of the Licensing Board should be affirmed.

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