JOHN KERRY
MASSACHUSETTS

United States Senate

WASHINGTON, DC 20510

February 28, 1990

The Honorable Kenneth M. Carr
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Chairman:

We are writing to respectfully request that the Commission delay its proceeding on the full power licensing of the Seabrook nuclear power station until all outstanding issues are resolved, including the issues being reviewed by the Nuclear Regulatory Commission Inspector General. We have attached a copy of the letter we recently received from the Inspector General.

The emergency planning requirements and their implementation with respect to the "reasonable assurance" standard are central to our concerns about the safety issues surrounding the licensing of Seabrook. It is critical that the public be assured that the NRC procedures and practices reflect an adequate understanding of the fundamental standard by which it is to judge emergency plans.

The health, safety and welfare of the citizens living near the Seabrook Nuclear Power Plant are our biggest concern in this matter. We hope that you will delay the Commission's deliberations until the Inspector General completes his review.

Sincerely,

Nicholas Mavroules

John F. Kerry

Edward M. Kennedy

Edward J. Markey

3/1...To OCA to Prepare Response for Signature of Chairman
Date due Comm: March 15..Cpys to: RF, Chairman, Cmrs, EDO, OGC....90-0203

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

February 26, 1990

OFFICE OF THE
INSPECTOR GENERAL

The Honorable John F. Kerry
United States Senate

Dear Senator Kerry:

The November 15, 1989, letter to Senator Glenn signed by you an 17 other Members of Congress has been referred to this office b Senator Glenn. That letter included as attachments a November 15, 1989, letter to Nuclear Regulatory Commission (NRC) Chairma Carr from the same 18 Members of Congress, and a November 3, 1989, letter to Chairman Carr from four Members of Congress. O review of those letters identified the following two major concerns:

1. The governing emergency planning standard requiring "reasonable assurance of adequate protective measures" is not understood or effectively implemented within the NRC.

2. In its deliberations regarding issuing a license for the Seabrook Nuclear Power Plant, the NRC has attempted to circumvent the administrative appeal mechanisms in the licensing proceedings.

Senator Glenn's letter to me requested that my office carefully evaluate the matter, conduct a thorough inquiry and report directly to you. Since we received Senator Glenn's letter we have been assessing how we can be responsive to your request while recognizing the legal constraints on our ability to fully review the issues in your letters. This letter explains both what we will be able to review and what we will not be able to review in response to your expressed concerns. On February 22, 1990, a member of my staff discussed the general content of this letter with Sally Ericsson, from Senator Kerry's staff, in response to Ms. Ericsson's inquiry regarding the status of our response to Senator Glenn's letter.

Regarding the first issue identified in your letters to Senator Glenn and Chairman Carr, we will examine the emergency planning requirements as set forth in NRC's regulations and the implementing guidance to determine whether they provide adequate guidance to the NRC staff in making "reasonable assurance" determinations. Upon completion of our review we will provide our report directly to you and the other 17 signatories of the November 15, 1989, letter to Senator Glenn.

Regarding the second issue of NRC's compliance with administrative appeal mechanisms in the Seabrook case, we do not

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believe we can undertake such a review because it involves a quasi-judicial, adjudicatory proceeding which is currently ongoing. This case is being conducted pursuant to the Administrative Procedure Act, 5 USC 551 et seq, as a formal on-the-record proceeding subject to administrative appeal and judicial review in the Federal courts. Hence, there already exists a statutory process for evaluation and review of Seabrook adjudicatory rulings. Indeed, both the Appeal Board and Commission currently have questions pending before them [redacted] shortly after the date of Senator Glenn's letter, the Licensing Board decision at issue was challenged in the United States Court of Appeals for the District of Columbia Circuit. Commonwealth of Massachusetts v U.S. Nuclear Regulatory Commission No. 87-1743 (filed December 5, 1989). There well may be additional litigation of Seabrook issues in the future.

The guidance of the court of appeals in Pillsbury Co. v Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966) suggests caution in investigating quasi-judicial proceedings in response to Congressional requests. The court explained that when an investigation

> . . . focusses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the Agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences. Id. at 964 (citations omitted, emphasis in the original.)

The instant request appears to be within the ambit of the Pillsbury holding. Moreover, I understand from legal counsel that constraints on examining the mental processes of NRC's adjudicatory officials, including the Commissioners and the administrative judges, endure even after the completion of the proceeding. See United States v. Morgan, 313 U.S. 409 (1941).

Accordingly, the Office of the Inspector General inquiry to be carried out in response to Senator Glenn's letter must be restricted to a review of NRC's implementation of the emergency planning requirements. I regret that our review cannot be fully responsive to your request.

Sincerely,

David C Williams

David C. Williams
Inspector General

Identical letters sent to Senators K[illegible]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

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

MEMORANDUM AND ORDER

CLI-90- 03

I. Introduction

In the decision that follows, we decide to allow the Atomic Safety and Licensing Board's authorization of a full power license for the Seabrook Nuclear Power Station Unit 1 to become effective under our regulations during the pendency of further appeals and other administrative proceedings.

The complicated procedural context in which this decision takes place requires some explanation, for we act today both in an adjudicatory and a non-adjudicatory capacity. As is well known, Seabrook is an adjudicatory proceeding, in which contested issues are resolved in court-type proceedings through a hierarchy of administrative tribunals: the Atomic Safety and Licensing Board, the Atomic Safety and Licensing Appeal Board, and ultimately the Commission. Those proceedings have been extensive, having commenced in the 1970's with applications to build

~~Supplement~~ (68 pp)

Seabrook, and are continuing into the 1990's. The Seabrook operating license has been in litigation since 1981. The evidentiary hearings on emergency planning issues alone, which began in 1986, totalled over a hundred days and fill transcript pages numbered in the tens of thousands. Where, as in these proceedings, issues are contested, the Commission acts in a quasi-judicial role and is therefore barred from communicating with the NRC staff (or any other party) relevant to the merits of the proceeding except upon the record of the proceeding, with reasonable prior notice to all parties.

Operating license hearings do not address all issues germane to a facility's readiness to operate, however, only those raised by a party to the proceeding. (The rules also establish standards for the admission of contentions.) To the extent that matters pertinent to the licensing decision are not part of the adjudication, the responsibility f - their resolution lies with the NRC's technical staff. When the NRC staff acts in this capacity, as a regulatory decisionmaker, it is subject to the supervisory authority of the Commission, and the restrictions that attend adjudicatory decisionmaking do not apply.

The NRC's rules provide one extra step in the oversight of licensing decisions, the "immediate effectiveness review." To explain, when an Atomic Safety and Licensing Board authorizes the issuance of a license, that decision, like that of a trial court, need not await the completion of all appeals to become effective. (As with courts, the Commission's adjudicatory procedures allow a party to file a motion for a stay of an adverse decision.) Where the Commission's procedures differ from those of courts is that regardless of whether a stay request is filed, the Commission also conducts an "immediate effectiveness" review under 10

C.F.R. § 2.764, to determine whether the Licensing Board's decision should be allowed to take effect. The "immediate effectiveness" review is largely informal, relying on the existing adjudicatory record and parties' written comments, and it is without prejudice to later adjudicatory resolution of issues still in controversy. As a rule, the effectiveness review examines the reasonableness of the Licensing Board's decision without reaching any formal and final decision that no further review and revision of the decision could ever be required.

Today's decision therefore includes both adjudicatory and non-adjudicatory elements, divided into three sections following this one. In Section II we address, in an adjudicatory context, motions to revoke or vacate the Licensing Board's authorization of an operating license, and we deny those motions. In Section III, we conduct the "immediate effectiveness review" of contested issues described above. We also discuss, in a non-adjudicatory context, certain uncontested issues. We decide in favor of license issuance. Finally, in Section IV, we rule on stay motions, again in an adjudicatory context, and find that the moving parties have not demonstrated their entitlement to a stay.

Today we also respond by separate opinion to an emergency planning question certified to us on October 11, 1989 by the Appeal Board in ALAB-922, 30 NRC 247 (1989); that response, which is in an adjudicatory context, forms an important part of conclusions regarding emergency planning for Seabrook.

In sum, our action today is to allow the Licensing Board's decisions to take effect, and thus to permit the licensing of the Seabrook plant -- with, however, the recognition that administrative appeal processes (in

which later review of the Licensing Board's decision will take place) will continue.

II. Motions to Revoke or Vacate the Licensing Board's Decision

A. Background

1. Procedural Setting

All contested issues in the adjudicatory proceeding on the application for a full power license for Seabrook have now been finally resolved by the Commission, except for issues regarding emergency planning.[1] The offsite emergency planning portion of the proceeding was bifurcated in order to commence hearings on the emergency plan for the New Hampshire portion of the plume exposure pathway emergency planning zone (EPZ), which had earlier been developed by the state of New Hampshire and submitted for Federal Emergency Management Agency (FEMA) review, without waiting for submittal and review of the plan for the Massachusetts portion of the EPZ - the Seabrook Plan for Massachusetts Communities (SPMC). A later hearing was held on the SPMC, which was developed and submitted by the utility in the absence of a willingness of

[1]The active parties to the emergency planning phase of the proceeding are the Applicants, of which Public Service Company of New Hampshire (PSNH) is the lead owner, the NRC staff (Staff), and intervenors: the Attorney General of New Hampshire, the Attorney General of the Commonwealth of Massachusetts (MassAG), the Seacoast Anti-Pollution League (SAPL), the New England Coalition on Nuclear Pollution (NECNP), the Massachusetts towns of Amesbury, Newbury, Salisbury, and the City of Newburyport (CON) and the New Hampshire towns of Hampton (TOH), Hampton Falls, South Hampton, Rye and Kensington. Hereinafter, the term "Intervenors" will be used for convenience to refer to group positions including MassAG, SAPL, NECNP and others opposing the license, even though they do not specifically include all intervening parties.

Massachusetts' state and local governments to provide such a plan.[2] The hearing on the SPMC was also combined with a hearing on contentions submitted as a result of the full participation exercise conducted in June, 1988.

On December 30, 1988, the Licensing Board issued a partial initial decision finding that the New Hampshire Radiological Emergency Response Plan (NHRERP) satisfied NRC regulations and provided reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency (NHRERP decision).[3] LBP-88-32, 28 NRC 667 (1988). Appeals were taken from that decision and were briefed and argued before the Appeal Board while the proceedings on the SPMC and on the June 1988 exercise were ongoing.

In mid-October 1989, in the course of reviewing the NHRERP decision, the Appeal Board certified a question to the Commission reflecting uncertainty on the part of the Appeal Board on the standard to be applied in judging emergency planning matters. ALAB-922, 30 NRC at 259. (As previously noted, the Commission responds to that question today in a separate opinion.) The Appeal Board followed the certification with a decision on November 7, 1989 disposing of certain appeals from the

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[2] In addition, one discrete issue was tried by the so-called "onsite" Board which had considered the adequacy of Applicants' onsite emergency planning as a part of the low-power decision. That issue dealt with the adequacy of the Vehicular Alert Notification System that Applicants provided in light of its inability to rely on local siren systems. The issue was decided in favor of license issuance. LBP 89-17, 29 NRC 519 (1989). The Appeal Board is presently considering Intervenors' appeal of this issue.

[3] The Board retained jurisdiction over an issue relating to evacuation time estimates for later resolution. It resolved this issue in LBP-89-32.

Licensing Board's NHRERP order. ALAB-924, 30 NRC ---(1989). ALAB-924 affirmed the NHRERP decision on all but four of the issues taken up, and on those it reversed and remanded. Two days thereafter the Licensing Board issued a 571-page opinion detailing its findings and rulings on the SPMC and exercise litigation (SPMC decision). LBP 89-32, 30 NRC--- (1989). In sum, the Board found the requisite reasonable assurance was provided by the SPMC and also resolved the exercise contentions in favor of license issuance. In the concluding pages of that order the Board stated:

> 13.8 Upon the issuance of LBP-88-32 and the issuance of this Partial Initial Decision, this Board would have decided all issues remaining in controversy in the Seabrook operating license proceeding. However on November 7, 1989, the Appeal Board remanded to this Board certain issues decided in LBP-88-32 with respect to the NHRERP. [citing ALAB-924].
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> 13.9 The Board has carefully read ALAB-924, evaluated the remanded issues, and studied the Appeal Board's directions to this Board. We conclude that those issues and directions do not preclude the immediate issuance of an operating license for the Seabrook Station.[87]

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[87] The Board will issue a memorandum following the issuance of this Partial Initial Decision explaining why ALAB-924 does not preclude the issuance of an operating license. Our explanations will include for example, the observation that the remanded issues do not involve significant safety or regulatory matters when considered in the context of the record of the NHRERP proceeding; our ultimate conclusions that the NHRERP provides reasonable assurance that adequate protective measures can and will be taken are not changed; the record of the NHRERP proceeding need not be reopened to resolve some inconsistencies and voids found by the Appeal Board, and that any needed implementing actions can be readily and promptly taken. We shall also explain why the pendency of several motions to submit new contentions does not preclude the issuance of the operating license.

LBP-89-32 at 569.

Without delay, Intervenors MassAG, SAPL and NECNP moved the Appeal Board to vacate those portions of the SPMC decision which authorized the

license.[4] On November 14 the Appeal Board said that "consideration of intervenors' motion can and should await the Licensing Board's promised explanation of the reasons why licensing authorization is appropriate, which undoubtedly will include some explanation of the relevance of 10 C.F.R. § 50.47(c)(1)." Appeal Board Order (unpublished), November 14, 1989 at 2. The Appeal Board established a schedule consistent with that view. By order of November 16, 1989 the Commission announced that "[a]lthough the Appeal Board..[had]...set forth a schedule for future filings on intervenors' motion, that motion will be decided by the Commission." Commission Order of November 16, 1989 at 2.[5] In the same order the Commission said that the Commission itself would consider all applications for a stay of effectiveness of LPB-89-32. Id. (We address later in this section Intervenors' challenges to this procedure.) On November 20, 1989 the Licensing Board issued a supplemental decision containing detailed findings in support of its earlier conclusion that the four remanded issues did not prevent authorization of a full power license. LBP-89-33, 30 NRC ___ (1989).

On December 1, 1989, Intervenors filed their 82-page supplemental motion and memorandum in support of their motion to revoke or vacate the license authorization.

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[4]The motion was filed with the Appeal Board on November 9, 1989; appeals of the Licensing Board's findings with respect to the SPMC and exercise have been taken.

[5]By motion dated November 17, 1989, Intervenors sought reconsideration of the Commission's November 16 order. The motion is hereby denied except insofar as the Commission has previously granted portions of it.

2. Positions of the parties

Seeking revocation or vacation of LBP-89-32's authorization of license issuance, Intervenors essentially argue that the Appeal Board's reversal and remand in ALAB-924 divested the Licensing Board of power to authorize a license and that Intervenors have rights to a hearing on the remanded matters before a license can issue. In addition, they argue that the Licensing Board acted illegally in not awaiting the resolution of other pending matters before authorizing a license. Those matters include motions seeking to litigate contentions on the September 27, 1989 onsite exercise (onsite exercise contention) and on the adequacy of the emergency notification system (EBS contention); the Commission's pending response on the question certified in ALAB-922 (certified question), and the Intervenors' request for hearings on any decisions under § 50.47(c). Intervenors also assert that the Licensing Board erred in not conforming its SPMC decision to ALAB-924 in two particulars---need for agreements with teachers and need for individual evacuation time estimates for special facilities-- where Intervenors say they made identical claims of deficiencies in both the hearing on the NHRERP and the hearing on the SPMC and had been successful before the Appeal Board regarding the NHRERP. They also allege that the assumption of jurisdiction by the Commission over Intervenors' motion to vacate was legal error.

The Applicants argue that the Appeal Board's remand did not per se preclude license issuance. They also argue that even were the Appeal Board correct in ordering the remand on each of the four matters, a

license can still properly issue pursuant § 50.47(c)(1). Finally, they argue that the Appeal Board erred in requiring the remands.[6]

The Staff also counters Intervenors' arguments by stating that the Intervenors mischaracterize the remand and the requirements placed on the Licensing Board by the Appeal Board. The Staff maintains that in cases where the Appeal Board has found that further hearings are required, its mandate has been explicit and that the Licensing Board here reasonably and correctly "inferred that the remand order included 'traditional broad discretion' in resolving the issues, including a determination of whether the remanded issues were amenable to post-licensing resolution." Staff Response to Motion to Vacate, dated December 12, 1989 at 10, citing LBP-89-33 at 3-6. They also argue that the state of the record is sufficient to support the Licensing Board's finding of "reasonable assurance" and that § 50.47(c) specifically recognizes that a license may be granted even in the face of some deficiencies so long as they are not significant. Staff further argues that the "fundamental flaw" standard that is applied to contentions on emergency planning exercises is applicable to any decision on emergency planning, "for 'only fundamental flaws are material licensing issues.'" NRC Staff Response to Motion to Vacate, at 18, citing Long Island Lighting Co. (Shoreham Nuclear Power Plant, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

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[6]Applicants have petitioned the Commission for review of ALAB-924, as have Intervenors. The Commission has not yet decided whether to accept review.

B Commission Decision

1. Commission's Authority to Make this Decision

At the outset it is worth emphasizing that the Commission has acted properly and in accord with long-standing practice in electing to consider the instant motion as well as Seabrook stay motions itself, as opposed to delegating such decisional authority to the Appeal Board. The Appeal Board acts only on authority delegated by the Commission; the Commission is responsible for its adjudicatory boards; and by regulation and a long line of case-precedent, the Commission has explicitly retained supervisory power to step in at any stage of a proceeding to decide any matter itself.[7] The Commission's "authority to intervene and provide guidance in a pending proceeding is not limited by the terms of 10 C.F.R. § 2.768(a) [regulation stating the ordinary practice for review]." 5 NRC at 516. The Commission has inherent supervisory authority over adjudicatory proceedings, and "there is every reason why the Commission should be empowered to step into a proceeding..."[8]

The motivation for the Commission to reserve matters to itself can derive from practicality and the need to avoid confusion where matters before the Appeal Board may be so intertwined with matters before the Commission that they should be decided together. Such a circumstance occurred in the low-power license stage of this very proceeding. See CLI-88-9, 28 NRC 567, 601 (1988) (directing that any stay motions should

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[7] See 10 C.F.R. § 2.764 (e)(3)(i) and (f)(2)(i); e.g., Public Service Company of New Hampshire, CLI-77-8, 5 NRC 503, 516 (1977).

[8] United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976), quoted in CLI-77-8, 5 NRC at 516.

be lodged with the Commission itself). A like motivation governed the Commission's action here.

2. The Appropriateness of Relief In the Nature of Mandamus

Intervenors characterize the "immediate mandatory relief" they seek as "essentially a writ of mandamus."[9] Supplemental Motion at 4. As Intervenors note, our rules do not expressly provide for such a mandate. Nonetheless, we would be willing to grant relief of this sort in appropriate circumstances. Borrowing from judicial case-law on mandamus, it is clear that such "drastic" relief is warranted only in unusual circumstances. In Re: Thornburgh, 869 F.2d 1503, 1508 (D.C. Cir. 1989). Moreover, relief in the nature of mandamus is available only where there is a failure to obey a clear direction to perform a nondiscretionary duty and where no other relief is available. Garem v. Heckler, 746 F.2d 844, 852 (D.C. Cir. 1984). The issue before us then is whether, as a result of the decision in ALAB-924 and the pendency of the various other cited matters, the Licensing Board had a clear, nondiscretionary duty to withhold any full power license authorization. For the reasons which follow we find that it did not and deny the relief requested.

a. First of all, nothing in ALAB-924 by its terms precludes a full power authorization pending completion of the remand proceedings. The four matters were reversed and remanded to the Licensing Board for further actions consistent with the opinion, ALAB-924 at 70, but no

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[9]The Commission grants Intervenors' "Motion for Leave to File a Supplemental Brief in Support of their November 13 and December 1, 1989 Motions for Mandatory Relief", dated January 16, 1990. The Commission has considered the brief in reaching this decision.

specific directions were given with regard to the effect of the opinion on a possible future license authorization.

Second, a review of NRC rules and prior NRC decisions does not suggest the existence of any clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending completion of remand proceedings or resolution of all pending matters. In fact, a review of prior precedents indicates past examples of where, as here, permits or licenses were authorized while remand proceedings and motions were still pending.[10] Prior practice suggests that where there is a remand or pending motion the matter of license or permit issuance must be considered on a case by case basis.

Third, and most importantly for this case, the authority of the Board to authorize issuance of a full power license notwithstanding pendency of remands and motions relating to emergency planning issues can be traced to a specific provision of the NRC's emergency planning regulations. Under § 50.47(c) failure to meet offsite emergency planning standards "may result in the Commission declining to issue an operating license" (emphasis added), but does not require this result because an applicant may still show, inter alia, that the deficiencies "are not significant for the plant in question." Accordingly, if a finding can be made that an emergency planning deficiency determined to exist on appeal

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[10] Public Service Company of New Hampshire CLI-77-8, 5 NRC 503, 521 (1977); Consumers Power Co., (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 159-60, 169-70 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, LBP-85-53, 20 NRC 1531 (1984). See also Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986)(per curiam) upholding issuance of a full power license notwithstanding pendancy of motions to reopen.

is not significant, or that an emergency planning issue left unresolved as a result of a pending remand or motion is not significant, then a full power license can still be authorized. In effect, § 50.47(c) creates two classes of litigable emergency planning issues - those "significant" issues which must be addressed fully and resolved favorably by the Licensing Board before full power licensing, and those which are not significant and which can be resolved by the Licensing Board after license issuance.

We therefore reject the fundamental premise of Intervenors' argument that the issues remanded in ALAB-924 must be considered material factors to license issuance and therefore must be resolved completely on their merits before license issuance. We agree that the remanded issues are relevant to the licensing proceeding as a whole, since a positive resolution of them will support a finding of compliance with 10 C.F.R. § 50.47(b) emergency planning standards and therefore support license issuance. But all issues which are relevant to compliance with 10 C.F.R. § 50.47(b) emergency planning standards are not necessarily material to license issuance because, under 10 C.F.R. § 50.47(c), compliance issues may not be significant and therefore need not be resolved prior to license issuance.[11]

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[11]Safety issues, including emergency planning issues, can also be categorized in terms of the Licensing Board's duty to complete the proceedings itself as opposed to referring the matter to the staff for informal resolution. A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license to the Staff for post hearing resolution. Consolidated Edison Co. of N.Y., Inc. (Indian Point Station, Unit 2), CLI--74-23, 7 AEC 947, 951-52 (1974); Public Service Company of Indiana, Inc. (Marble Hill Nuclear

(Footnote Continued)

b. With particular regard for the pendency of the motions to reopen on the onsite exercise and on the EBS contention, we read the Licensing Board's decision in LBP-89-33 as contemplating a full power license authorization so that the Commission could commence its own review of full power licensing under § 2.764, see LBP-89-33 at 38, but also recognizing that its rulings on these motions could require that the full power license authorization be vacated. The Board's decision need not be read, as Intervenors would have it, as holding necessarily that there would be no ruling on the pending motions until after license issuance. In any event, Intervenors' complaints about the possibility of license issuance during the pendency of these motions is now moot since both motions have now been decided by the Licensing Board. Since we respond to the certified question today, Intervenors' concern about license issuance while this matter is pending is moot as well.[12]

In sum, we hold that there was no non-discretionary legal duty on the part of the Board to withhold full power authorization because of the decision in ALAB-924, and that issues raised by Intervenors pertaining to

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(Footnote Continued)
Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984). And, with respect to emergency planning, the Licensing Board may accept predictive findings and post hearing verification of the formulation and implementation of emergency plans. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-95 (1986). Completion of the minor details of emergency plans are a proper subject for post hearing resolution by the NRC staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61-62 (1984).

[12] Intervenors' concerns about the need to conform the Board's SPMC decision to ALAB-924 and request for hearing on § 50.47(c) issues are addressed later in this opinion in sections IIIA.1. and IIIA.3.

the pendency of the two motions to reopen and the certified question are now moot in any event.

In this opinion we are treating the decision in LBP-89-33 as, in effect, a supplemental initial decision, and including it as part of our effectiveness review under § 2.764. In this context we will address, in some detail, the reasonableness of that decision, including the application of 10 C.F.R. § 50.47(c) to each of the four remanded issues.[13]

III. Immediate Effectiveness Review

A. Effectiveness Review of LBP-89-33 (Supplemental Memorandum)

1. LETTERS OF AGREEMENT

Among other things, emergency response plans must ensure that arrangements have been made for "requesting and effectively using assistance resources." 10 C.F.R. § 50.47(b)(3). See also 10 C.F.R.

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[13]On November 15, 1989 Intervenors filed a request for a hearing to the extent a full power license authorization might be based on 10 C.F.R. § 50.47(c)(1). Since we are clearly basing the license authorization on this provision of the Commission's rules, the hearing request must be addressed by us.

There is no doubt that Intervenors have been heard before the Commission on whether the matters reversed and remanded by ALAB-924 are significant and therefore must delay license issuance. These views have been expressed forcefully and at great length in the various written papers filed with us. We find that the written papers before us are adequate for us to address the reasonableness of the Board's conclusions. Further, neither we, nor the Licensing Board, have relied on facts outside the evidentiary record in reaching conclusions about significance; no new evidence was adduced or considered. And Intervenors' hearing request fails to suggest how the existing record may be inadequate and fails to indicate whether, or if so, in what particulars they will offer additional evidence. Given this, we see no

(Footnote Continued)

§ 50.47(b)(1). Associated regulatory guidance provides:

> Each organization shall identify nuclear and other facilities, organizations or individuals which can be relied upon in an emergency to provide assistance. Such assistance shall be identified and supported by appropriate letters of agreement.

NUREG-0654/FEMA-Re P-1 (Rev. 1), "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Nov. 1980) at II.C.4. In Section 2 of LBP-88-32 the Licensing Board considered various challenges to Letters of Agreement (LOAs) obtained by the Applicants pursuant to this regulatory guidance. As a preliminary matter, the Board restated its earlier ruling[14] that Applicants do not need to sign LOAs with, inter alia, schools and school personnel because they are "recipients" of evacuation services and LOAs are required only for "providers" of such services. LBP-88-32 at 673.

In Section 7 of LBP-88-32 the Licensing Board considered the general issue of human behavior in emergencies including contentions asserting that teachers would abandon their normal roles in the face of a radiological emergency. In the course of discussing teacher roles during an emergency, the Board made the following observations:

> 7.9. In general terms, the teachers would have very simple responsibilities in the event of an emergency requiring early dismissal and evacuation. They would be responsible for accounting

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(Footnote Continued)
need for additional evidentiary hearings on § 50.47(c) significance issues. Any unfairness which may have resulted from the Board not having invited comment before making its findings on significance has been removed by the written pleadings, which were filed subsequent to the Board's findings, and our careful consideration of these pleadings.

Accordingly, if construed as requesting an opportunity to be heard, Intervenors November 15, 1989 motion is now moot; construed as a request for additional evidentiary hearings, the request is denied.

[14] Memorandum and Order, May 21, 1986 (unpublished).

for the children under their direct care, taking them to a central place in the school (cafeteria, for example) for accountability, and going with them on school buses to their evacuation destination. E.g., Tr. 4014.

7.10. According to Applicants, teachers are not being called upon to do anything under the plan that they would not normally do in any emergency, or for that matter, on any regular day; they are viewed by the planners as recipients of services rather than as emergency workers or providers of services. Tr. 3356-57; see FEMA Dir., ff. Tr. 4501, at 48. However, we believe that, to the extent that teachers would be expected to accompany pupils in an evacuation rather than leaving in their own transportation, the teachers should be regarded as service providers.

28 NRC at 729-30. The Board did not, however, refer back to its earlier discussion of LOAs nor indicate that LOAs might be needed from teachers.

The Appeal Board approved the Licensing Board's distinction between providers and recipients as being a sensible basis for determining the need for LOAs. ALAB-924 at 8. The distinction, in the view of the Appeal Board, "recognizes that LOAs need not be sought from everyone involved in the emergency response process; rather, they can be limited to those who contribute assistance services." Id. However, the Appeal Board believed, as argued by Intervenors, that the Licensing Board's finding, in the Human Behavior section of its decision, that teachers are "service providers" to the extent they would be expected to accompany pupils in an evacuation was inconsistent with its earlier ruling that teachers were "recipients" rather than "providers" of services. Id. at 9.

The Appeal Board examined the Licensing Board's reasoning in terming teachers "service providers" and found that the Licensing Board had looked to what teachers are normally expected to do; i.e., to the extent that teachers are being asked to do something not within the scope of

their normal duties, they cease to be "recipients" and become "providers". Id. The Appeal Board then addressed the NRC Staff's argument that teachers, in being asked to accompany children on buses, were not being asked "to do anything other than what they normally do -- continue to supervise and assist the children who have been entrusted to their care, which, the evidence showed, is a duty teachers have historically performed in both normal and emergency situations ...." NRC Staff Brief at 7. While the Appeal Board indicated that the Staff's conclusion may be correct, it rejected the evidence supporting that conclusion (which showed that school personnel do not generally abandon their role as student custodians in times of emergency) as not "address[ing] the issue of whether school personnel acting in that role are ordinarily expected to accompany their students in an evacuation ...."[15] ALAB-924 at 10. Thus the Appeal Board remanded this matter for further explanation "with the direction that it resolve the existing inconsistency in its interpretations of the role of school personnel in an evacuation and determine whether any LOAs should be obtained from school personnel." Id. at 11.

In its supplementary memorandum, the Licensing Board explained the context of the apparent inconsistency: in the LOA section of its decision the term "service provider" "has a special regulatory meaning ... flowing from NUREG-0654, II.C.4" (LBP-89-33 at 10) but in the Human Behavior section of its decision it used the term in the context of determining

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[15] While the evidence proferred by the Staff may not be "definitive" (see ALAB-924 at 10) as to this issue, it is not immediately clear to us why it is not sufficiently probative as to resolve this issue.

whether teachers would abandon a particular role -- the role of a custodian in evacuating with the children.[16] See id. at 9-10. "No party argued, as a human factors consideration, that the likelihood of teachers evacuating with students would be enhanced by LOAs. It was without any thought of the LOA requirements that the Board deemed teachers evacuating with students to be providers of services." Id. at 10.

The Board did not view this matter as a significant safety issue because it remained convinced "that sufficient numbers of school teachers will accompany school buses in those cases where they are needed" based on its "confidence in the inherent dedication and sense of responsibility of school personnel." Id. at 9. Thus the remanded issue did not cause the Board to change its "ultimate conclusion that school children can and will be safely evacuated." Id. at 11.

Commission Conclusion

We believe that the Board's decision that this remanded issue does not raise a significant substantive issue regarding emergency planning

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[16]The Licensing Board noted that, contrary to the Appeal Board's understanding (see ALAB-924 at 10, n.24), the Board did not intend to limit its findings with respect to role abandonment to the roles of teachers in accounting for their students and seeing them to the bus. See LBP-89-33 at 8-9. Rather, those findings do not "stop at the school bus steps. If needed, school personnel will stay with their charges until they are safe." Id. at 9. The Board appears to be saying that the distinction it drew between teachers in the role of accounting for students and seeing them to the buses and in the role of riding the buses was meant as a distinction between what all teachers are expected to do and what only some teachers are expected to do (the rest being free to depart in their own vehicles). The distinction was not meant as a conclusion that the latter teachers were transformed into "service providers" within the regulatory meaning of NUREG-0654, II.C.4.

adequacy is a reasonable one.[17] First, it may well be that the Licensing Board has now provided the explanation sought by the Appeal Board. Second, it does not appear that there is any reason why the evacuation of school children will be delayed or will not occur even if no teachers or other school personnel agree to accompany the children on evacuation buses. The Licensing Board noted that Richard Strome, then New Hampshire's Director of Emergency Management, while hoping that teachers would participate, stated that their participation is not "key to the process" and observed that school children usually get on school buses without assistance and that teachers do not regularly travel on the buses. See LBP-89-33 at 8. Finally, while the Appeal Board was unwilling to accept historical testimony showing that teachers do not abandon school children in emergencies in support of what teachers "normally" are expected to do in an evacuation, we think this testimony at least supports the view that even if riding the bus in an emergency is not a normal duty, sufficient school personnel will in fact do this if not doing it would endanger the children.[18]

Because it may well be that the Licensing Board has now provided the clarification sought by the Appeal Board, and because the matter does not

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[17] We address the significance of this issue (and the three other remanded issues as well) both in the context of our "consideration of the gravity of the substantive issue," 10 C.F.R. § 2.764(f)(2)(i), and in the context of 10 C.F.R. § 50.47(c).

[18] See 28 NRC at 740-41.

appear to be significant in any event, we see no need at this point to "conform" anything in the Licensing Board's SPMC decision to ALAB-924.

2. SPECIAL NEEDS SURVEY

Emergency planning includes ensuring that adequate transportation resources and related support services are available to evacuate the transit-dependent population in the EPZ. See 10 C.F.R. § 50.47(b)(8); NUREG-0654, II.J.10.d. This population includes those with "special needs" for transportation services: homebound physically impaired persons and individuals likely to be without transportation. In April 1986, the Licensing Board admitted for hearing two contentions sponsored by SAPL which challenged the adequacy of the means used in the NHRERP for identifying the special needs population.[19] Subsequently the Licensing Board granted Applicants' motion for partial summary disposition with respect to these contentions insofar as they asserted that adequate procedures for identifying persons with special needs do not exist. See Memorandum and Order of November 4, 1986 (unpublished) at 17.

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[19] See Memorandum and Order of April 29, 1986 (unpublished). At the time SAPL submitted its contentions the NHRERP based the number of individuals without their own automobile transportation on an estimate rather than on a survey by which such individuals would identify themselves. No physically impaired persons had been identified, but the NHRERP assumed one special needs vehicle would be needed for each town. See SAPL's Second Supplemental Petition for Leave to Intervene (February 21, 1986); Applicants' Response to Off-Site EP Contentions (March 5, 1986).

Applicants had moved for summary disposition on the basis of the employment of a new method for determining the special needs population: a Special Needs Survey conducted by Applicants during the last two weeks of March 1986.[20] In an affidavit attached to their motion, Richard H. Strome, Director of the New Hampshire Civil Defense Agency (NHCDA), described the new method and expressed his opinion that reasonable assurance exists that special needs individuals can and will be identified through utilization of the survey.[21] See Strome Affidavit at 4.

In response to Applicants' motion, SAPL had argued that the survey was inadequate for the purpose of identifying the special needs population, attaching in support of this claim the Affidavit of Frederick H. Anderson, President of Ideas and Information, Inc. and Director of International Services at International Data Corporation.[22] SAPL

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[20] See Applicants' Motion for Partial Summary Disposition of South Hampton Contention No. 8, NECNP Contention NHLP-4 and SAPL Contentions 18 and 25 (May 20, 1986).

[21] Mr. Strome stated, inter alia, that the survey questionnaire was mailed to EPZ residents based on utility customer lists and was distributed by several social service and local municipal agencies; that the questionnaire requested information on persons within households who might not be able to comprehend English; that Civil Defense officials would verify responses; that the survey would be conducted annually; and that public information announcements had been and would be made periodically by the NHCDA "to inform the public of the distribution of the survey, to encourage responses by persons who may require special assistance, and to provide a means for persons to request survey forms if they may not have received them." Strome Affidavit at 3.

[22] See SAPL's Response to Applicants' Motion for Summary Disposition of SAPL Contentions 5, 7, 14 and 17 and Motion for Partial Summary Disposition of SAPL Contentions 18 and 25 (June 9, 1986). Mr. Anderson stated, inter alia, that the Strome Affidavit and survey instrument gave

(Footnote Continued)

contended on the basis of the Anderson Affidavit that it had raised genuine issues of material fact as to the adequacy of the survey; in particular, that the survey needed to be supplemented using additional identification techniques, that greater motivation to respond needed to be provided, that the survey should be conducted more frequently than annually, that an outreach program to social service agencies needed to be included, and that the design of the questionnaire needed to be improved to eliminate ambiguity. See SAPL's Response at 17-18.

On appeal, SAPL challenged the Licensing Board's grant of summary disposition. The Appeal Board, upon reviewing the filings before the lower board, determined that issues of material fact concerning the adequacy of the survey, which it identified as "issues relating to the methodology utilized to identify the special needs population, survey design, accuracy verification, response motivation, and update procedures," were indeed present. ALAB-824 at 16. Moreover, the Appeal Board rejected the only rationale given by the Licensing Board for its decision; i.e., that the "additional requirements" sought by SAPL "would fall into the category of 'extraordinary measures' not required by the regulations of this Commission." Memorandum and Order, November 4, 1986

(Footnote Continued)
no indication: (1) that special needs individuals who do not receive utility bills, such as those living in apartments or motels, would have been identified; (2) that special needs individuals not resident in the EPZ in March would have been identified; (3) that potential respondents were given sufficient motivation to respond; (4) that the accuracy of information received had been verified; (5) that various design deficiencies had not confused respondents; (6) that those who read only French, Spanish, or other languages or who do not read at all would have responded; (7) that transients in the area would have been reached; and (8) that the single mailing of the questionnaire would have located even a majority of the special needs population.

at 16-17.[23] Thus the Appeal Board concluded that the Licensing Board had erred in granting Applicants' summary disposition motion and, accordingly, "remand[ed] the matter of the sufficiency of the 1986 Special Needs Survey for further consideration by the Licensing Board." ALAB-924 at 19.

Further, the Appeal Board noted that it would be "premature for us to render any judgment regarding intervenor SAPL's challenges to the Licensing Board's findings concerning availability of adequate numbers of vehicles and drivers" until the Licensing Board had again considered this matter upon remand.[24] Id. at 19-20. The Appeal Board also noted:

> We also are unable in this instance to rely upon the Licensing Board's determination that there is an excess of available evacuation vehicles and drivers, see LBP-88-32, 28 NRC at 695, as the foundation for a finding of harmless error. ... On the present

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[23] As the Appeal Board notes, ALAB-924 at 16, the Licensing Board did not address the question of whether genuine issues of material fact were present. Instead, the Licensing Board accepted Applicants' argument that the improvements in the survey desired by SAPL constituted "extraordinary measures" within the meaning of the Commission's decision in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 536 (1983), rev'd in part on other grounds, GUARD v. NRC, 753 F.2d 1144 (D.C.Cir. 1985).

[24] Before the Licensing Board SAPL raised various challenges to Applicants' testimony that the NHRERP provided reasonable assurance as to the availability of sufficient buses and drivers to effectuate a complete evacuation of the New Hampshire EPZ. See 28 NRC at 692-694. In particular, SAPL claimed that at the hearing Applicants had revised downwards the numbers of buses/drivers that were available. See id. at 694. The Board noted that the State had demonstrated that "it is willing to revise its dependence on certain drivers if the State is made aware of their unavailability" and expected "that deficiencies in the driver pool will be provided for through utilization of other resources identified or to be identified by the State." Id. at 693-694. Thus the Board did not believe that any uncertainty created by changes in the pool of buses and drivers assigned to assist in an emergency response undermined its confidence that the NHRERP contained reasonable assurance of sufficient transportation resources. SAPL appealed the Board's resolution of the issue of bus or driver availability. SAPL Brief at 37-39.

> record ... we have no basis for setting a limit on the uncertainty about the size of the 'special needs' population that accrues from the Licensing Board's erroneous summary disposition ruling.

ALAB-924 at 19, n. 47.[25]

In its Supplementary Memorandum the Licensing Board reviewed the remand decision, the original filings with respect to the summary disposition motion, and information subsequently placed in the record and concluded: (1) that the remanded issues do not present significant safety or regulatory considerations requiring pre-license adjudication; (2) that its finding that adequate transportation and support services would be

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[25] At the text of LBP-88-32 cited by the Appeal Board, the Licensing Board considers an Intervenor argument that one particular segment of the special needs population, transients without their own transportation, were not adequately provided with transportation for evacuation. See 28 NRC at 694. Intervenors claimed that the adequacy of transportation provisions for transit-dependent transients could not be made without having an exact estimate of that population and that there was no such exact estimate because the Special Needs Survey did not identify individuals who may be dropped off by bus or who hitchhiked to the beach, unless they were associated with a hotel responding to the survey. Id. The Licensing Board noted Applicants' testimony (1) that, based upon the work of KLD Associates (the preparer of the ETE for Seabrook), few transients would require transportation assistance, and (2) that Applicants "had added nine buses to the beach area to address the uncertainties in the number of individuals in this population and that they had specifically routed buses along the beach area." Id. at 695. The Licensing Board concluded:

> Applicants' allocation of transportation resources in excess of that identified as being needed under its Special Needs Survey also supports a finding that there is reasonable assurance that a small population of transit-dependent transients can be adequately evacuated. ... Based on the number of buses and drivers Applicants identify as being available for evacuation purposes, we also find reasonable assurance that any increase in the estimate of the population of transport-dependent transients can be addressed without major revisions to the plan.

Id. The Licensing Board's findings are based on record evidence that the number of buses available for evacuation of the special needs population is approximately 50% greater than the number of buses required by the survey. See Applicants' Direct Testimony No. 2 (October 21, 1987), ff. Tr. 4228, at 10.

available to evacuate the transport-dependent population was not undermined; and (3) that the survey deficiencies, even if ultimately found to be meritorious, are either of no moment or are amenable to relatively simple and timely correction. LBP-89-33 at 17.

The Licensing Board's conclusions were premised on the view that "the focus of SAPL's identified concerns regarding the adequacy of the 1986 Special Survey is to fine-tune and broaden rather than replace the methodology employed by the NHCDA to identify special needs populations." Id. at 21-22. Thus the Board found that SAPL's concerns regarding ambiguities in the design of the questionnaire, the need for motivational language, the frequency of the survey (once a month rather than annually), the need to continuously survey the transient population and the need for testing of the siren system to assist the hearing impaired in determining their need for special notification[26] simply went beyond the requirements of the Commission's emergency planning regulations and associated regulatory guidance. Id. at 18-20. The Board also noted that SAPL had not "advanced any specific factual bases tending to establish that significant numbers of special needs individuals or their transportation needs were, in fact, understated or unreported." Id. at 18.

The Board did view one issue -- the adequacy of the dissemination methodology employed in conducting the survey -- as having "a reasonable possibility of requiring a pre-license hearing and adjudication." Id. at 20. However, the Board rejected this conclusion because the NHRERP

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[26] See LBP-89-36 (November 28, 1989) which corrects the Board's misimpression, as expressed in LBP-89-33, that this issue was moot.

contains two features in recognition of the fact that any survey will miss a certain number of people: excess transportation resources[27] and a mechanism for special needs individuals who have not been pre-identified to make their needs known to emergency response workers. Id. at 21. The Board did not believe that the number of unidentified special needs individuals could be "so large as to render the existing excess transportation resources under the NHRERP inadequate." Id.

Commission Conclusion

In reviewing this issue, the Commission finds reasonable the Licensing Board's view that SAPL's concerns with the adequacy of the 1986 Special Needs Survey are primarily in the nature of "fine-tuning" an acceptable methodology of ascertaining special needs individuals than a contention that the Applicants or the State must begin this task anew due to methodological deficiencies. While the Appeal Board is correct that survey improvements do not amount to "extraordinary measures" within the

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[27] The Board found that the fact that the survey had been undertaken in March, before the arrival of the summer population, did not present a significant safety or regulatory issue requiring pre-license adjudication because:

> First, any failure to identify summer special needs individuals is of consequence only in the summer, some eight months hence. Second, given the NHRERP's allocation of transportation resources equal to 150 percent of the 1986 identified transit-dependent needs ... and written commitments indicating the overall availability of approximately 170 more buses than the estimated need (LBP-88-32, 28 NRC at 692), the number of summer transit-dependent individuals would have to be significant before our finding that adequate transportation resources will be available can be seriously questioned.

Id. at 19-20.

meaning of the Commission's San Onofre, supra, decision, it is also true that for the most part the improvements desired by SAPL appear not to be required under the Commission's regulations and guidance. Particularly in view of the fact that SAPL, in resisting Applicants' summary disposition motion, did not present any evidence tending to show that any particular special needs individuals were missed (as opposed to expert opinion suggesting that some may have been missed), we believe that the Licensing Board was reasonable in concluding that this remanded issue did not raise a significant substantive issue regarding emergency planning adequacy.[28]

However, one aspect of this issue deserves further comment. No survey can guarantee the identification of every transit-dependent individual. In recognition of this, the Licensing Board noted that a common and acceptable approach is to have available both excess transportation resources and a mechanism for special needs individuals who have not been pre-identified to make their needs known to emergency response workers. The Licensing Board observed that the emergency plan included both of these measures. LBP-89-33 at 21. On the basis of our effectiveness review, we agree with the Licensing Board that while some special needs individuals might not be pre-identified, that number should not be so large as to render the existing excess transportation resources inadequate. With particular regard for hitchhikers among the peak summer

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[28] While the non-moving party, in resisting a summary judgment motion, need not present all the evidence it would introduce at a hearing, it is obliged to support its opposition to summary judgment with evidence that is "significantly probative". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

beach population, and beachgoers who are dropped off at the beach by family members or others, we rely on the testimony by Applicants' witness which is to the effect that the number of such people is not significant.[29] See Tr. 4252-53 (Oct. 21, 1987). On the basis of this review, we therefore disagree with the Appeal Board that no limit can be set on the uncertainty about the size of the special needs population. We believe that the uncertainty is not likely so large as to require more transportation resources than the plan already provides.

3. ADVANCED LIFE SUPPORT PATIENTS

The Commission's regulations require the preparation of "an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway [emergency planning zone] for transient and permanent populations." 10 C.F.R. Part 50, Appendix E, § IV; see also 10 C.F.R. § 50.47(b)(10), NUREG-0654, Appendix 4. As the Licensing Board explained:

> The primary purpose for having evacuation time estimates is to assist responsible governmental officials in making informed decisions regarding what protective actions are appropriate in a given radiological emergency in order to maximize dose savings. To make these decisions the government officials must have available to them evacuation time estimates that are realistic appraisals of the minimum period in which, in light of existing local conditions, evacuation could reasonably be accomplished. The nearer to [the] plant the area that might have to be evacuated, the greater the importance of accurate time estimates. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 770, 771 (1983).

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[29] We also note that the survey is to be updated annually, and the next update should be done in the summertime. Thus, the problem highlighted by Intervenors' contention that the prior survey was done in March and therefore missed those who would be present only in the summertime can be easily and expeditiously cured.

28 NRC at 777.

The Commission has emphasized that an adequate emergency plan is not required to achieve a preset minimum dose savings or a minimum evacuation time for the EPZ in the event of a serious accident. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986).

In LBP-88-32, the Licensing Board approved (subject to conditions not relevant here) the evacuation time estimates (ETEs) prepared for the Seabrook emergency planning zone (EPZ). 28 NRC at 803. In approving these ETEs, the Board rejected the testimony of Intervenor witness Maureen Barrows that the NHRERP had incorrectly estimated the time needed to move a wheel chair nursing home resident from room to evacuation vehicle[30] on the following basis:

> ... Intervenors' assumptions concerning evacuation times for each nursing home patient fail to adequately reflect the evacuation time assumptions of the NHRERP. The plan assumes that patients are at the loading point when transportation arrives (NHRERP, Vol. 6, at 11-[21]), not in their beds awaiting pickup as Intervenors argue.

28 NRC at 699. Although the Licensing Board addressed Ms. Barrows' testimony, it apparently ignored the testimony of Intervenor witness Joan Pilot who voiced a similar concern with respect to advanced life support (ALS) patients. She testified that it would take from 28-60 minutes to move an ALS patient from hospital bed to a stretcher in the same room and that, except for paperwork, it is not possible to begin preparation of an

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[30] Ms. Barrows testified that a time trial for moving a wheel chair nursing home resident from her bed to the place where the evacuation bus would be waiting showed a total time of 5 minutes, 17 seconds as opposed to the estimated time of 15 seconds per resident specified in the NHRERP at Vol. 6, p. 11-21. See Direct Testimony of Commissioner Maureen Barrows, ff. Tr. 4405, at 2-3.

ALS patient for evacuation until the ambulance arrives. See Rebuttal Testimony of Joan Pilot, fol. Tr. 7670, at 1-2; Tr. 7674-76.

The Appeal Board found that appropriate planning implementation had been undertaken with respect to specification of the number and type of transport vehicles assigned to evacuate particular special medical facilities. ALAB-924 at 23. However, the Appeal Board agreed with Intervenors' concern, based on the testimony of Ms. Pilot, see supra, that the preparation time for the evacuation of ALS patients had not been taken into account in the ETEs applicable to this group. Id. at 24-27. The Appeal Board noted that the Licensing Board's reason for rejecting the Barrows' testimony with respect to nursing home wheel chair residents -- that the NHRERP assumes them to be at the loading point, not in their beds, when evacuation vehicles arrive -- is "inconsistent with the direction given in the individual emergency plans for New Hampshire EPZ towns that patients/residents of special facilities will be assembled as (not before) the evacuation vehicles arrive." Id. at 26 (emphasis in original). The Appeal Board was concerned about a possible underestimate of ETEs for ALS patients stemming from a failure to consider the necessary preparation time due to

> the proximity of several special facilities to the Seabrook plant, as well as the fact that sheltering in large buildings such as these institutions may offer greater protection than that assigned to residential properties, thus making sheltering a more

acceptable alternative to evacuation if the evacuation times increase appreciably....

Id. at 25 (footnotes omitted).[31] Thus the Board remanded this issue for resolution by the Licensing Board.[32]

In its supplemental memorandum, the Licensing Board explained that the "loading time" in the ETE for the ambulatory and wheel chair nursing home residents is not the same as the ETE for non-ambulatory persons such as ALS patients. LBP-89-33 at 25, 28. Only the ETE for the former is based on the notion that the evacuees will be waiting at the loading point for the transit vehicles to arrive. For ALS patients the loading time in the NHRERP is 40.2 minutes which, in the Board's view, "does not deviate in any significant way from an average of the time Ms. Pilot stated it takes to prepare ALS patients for transportation (28 + 60 minutes/2 = 44 minutes)." Id. at 25. Thus the Board found that "[a]n

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[31]Both the Appeal Board and the Licensing Board appear to have assumed that ALS patients reside at nursing homes. However, Applicants' witness Michael C. Sinclair testified during cross-examination that Applicants had worked with hospital and nursing home personnel in developing their emergency plans as well as the transportation requirements needed to implement those plans and that none of the nursing homes in the EPZ have ALS patients who require ambulance transport. See Tr. 4294-95. Thus the record indicates that all ALS patients reside at Exeter and Portsmouth Hospitals which are located, respectively, seven and eleven miles away from the reactor. NHRERP, Vol. 1 at Table 2.6-3.

[32]The Appeal Board also noted:

> "[c]orrection of the preparation time omission ... also will ensure that special facility planning conforms to the guidance of NUREG-0654 that evacuation time '[e]stimates for special facilities shall be made with consideration for the means of mobilization of equipment and manpower to aid in evacuation' and that '[e]ach special facility shall be treated on an individual basis.' NUREG-0654, App. 4 at 4-9 to 4-10.

ALAB-924 at 27, n. 71.

increase of four minutes in the ETE would not affect the choice of a protective action recommendation for the ALS patient population as a whole." Id.[33]

The Licensing Board also found that the adequacy of the ETE for the ALS population for protective action decisionmaking was further demonstrated by what it perceived to be "an extra margin of time within which ALS patients can be readied for evacuation." Id. at 27. This "extra margin of time" is provided by the fact that emergency coordinators contact special facilities at the Alert Classification Level

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[33]The Board's explanation does not appear to be based on a close reading of the NHRERP. Evacuation time estimates for transit operations are found at Volume 6, Section 11 of the NHRERP. Section 11 contains ETEs for two different categories of the population at special facilities such as nursing homes and hospitals: the ambulatory and the non-ambulatory. With respect to ambulatory individuals the NHRERP states:

> Studies have shown that passengers can board a bus at headways of 2-4 seconds .... Thus, if we double these headways to account for elderly or disabled passengers, and allow additional time to walk to the bus, then we estimate that a bus can be fully loaded in about 10 minutes (15 second mean headway for 40 passengers).

NHRERP, Vol. 6 at 11-21. With respect to non-ambulatory persons the NHRERP gives an estimate of "0.67 hours" as the time for loading passengers but nowhere explains how this estimate is derived or what activities are encompassed within it. NHRERP, Vol. 6 at 11-26. Thus the Licensing Board's assumption that this "loading passenger" time includes the "preparation time" of concern to Ms. Pilot is not clearly supported.

Moreover, the Licensing Board also may be in error in grouping the wheel chair residents that were the subject of the Barrows testimony, see LBP-89-33 at 28, with the "ambulatory" group. The NHRERP explicitly places individuals confined to wheel chairs with the non-ambulatory group. NHRERP, Vol. 6 at 11-22. Further, as noted by the Appeal Board, see ALAB-924 at 26, n. 69, the directions given in individual emergency plans for nursing homes and hospitals do contain language indicating that patients/residents will be assembled as, and not before, evacuation vehicles arrive. Thus, while there does not appear to be any reason why ambulatory individuals could not be pre-assembled, these plans, as presently written, are inconsistent with the NHRERP's provisions for ambulatory individuals.

to verify their transportation needs, a contact which "effectively provides the staffs of the special facilities with advance notice that an evacuation is being considered." Id.[34] We note, however, that the Board does not cite any medical testimony in support of the notion that preparation of an ALS patient would be medically appropriate at the Alert Level.[35]

For the above reasons, the Board does not find any "safety significant problem outstanding with regard to the transit preparation time for ALS patients." Id. at 28. Moreover, in the view of the Board, "any confusion over the distinction between preparing special-needs persons in anticipation of arriving transportation, and assembling them can be readily resolved." Id. at 29.

Commission Conclusion

On the basis of our effectiveness review, we agree that the issue identified by the Appeal Board -- whether the ETEs for non-ambulatory individuals found in the NHRERP take into account the amount of time it

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[34] At the Alert Level emergency response workers contact special facilities to confirm their needs and notify ambulance operators of potential need in the event that an evacuation is ordered.

[35] In fact this "extra margin of time" rationale ignores, without explanation, Ms. Pilot's testimony that ALS patients cannot be prepared until the ambulances arrive. The Board further confuses this issue by later suggesting that the NHRERP can be improved "by requiring an amendment to the plan (or town plans) to provide for instructions to the staff of special facilities to prepare ALS patients for transportation at the order to evacuate" (emphasis added). LBP-89-33 at 29. It is unclear what the "extra margin of time" is if preparation does not begin until the order to evacuate has issued. More fundamentally, the Commission is concerned that preparation of ALS patients for evacuation not begin until it is medically safe to do so.

would take to prepare ALS patients for evacuation -- remains unresolved. It is simply not clear that the 40 minute "loading passenger" time found in the NHRERP[36] includes this preparation time as the Licensing Board asserts. Nor do we necessarily agree, in the absence of any confirmatory medical testimony, that there is any so-called "extra margin of time".

Nevertheless, we still view as reasonable the Board's bottom line conclusion that this remanded issue does not raise a significant substantive issue regarding emergency plan adequacy. The record indicates that ALS patients are found at only two locations: Exeter and Portsmouth Hospitals. Thus it should not be difficult to resolve whether the 40 minute period may indeed include adequate time for preparing an ALS patient for transport, taking the patient to the loading point and loading the patient into the ambulance. If these tasks take longer than 40 minutes, then there will be some "shortfall" in the evacuation time estimate for these patients. We have no reason to believe, however, that this "shortfall" would be significant enough to cause a decisionmaker to recommend sheltering rather than evacuation for either of these facilities.[37]

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[36] See NHRERP, Vol. 6 at 11-26.

[37] While Intervenors argue that these facilities may not have sufficient staff to prepare ALS patients simultaneously, thus further lengthening necessary preparation time, see Intervenors' Supplemental Motion at 49, n. 34, the NRC Staff points out that "at no time during the lengthy litigation of this issue have Intervenors contended that medical facility staffing would be inadequate". NRC Staff Response to Intervenors' Motion to Vacate at 31 (emphasis in original).

We note, as Applicants point out, that even should a significantly enlarged ETE make sheltering a preferable protective action response to

(Footnote Continued)

Again, on a related ETE issue, the Intervenors have argued the need to conform the Board's SPMC decision to what Intervenors interpret as a holding in ALAB-924 that the Commission's emergency planning rules require that emergency plans include ETE's for each special facility. We do not elevate the Appeal Board's observation about regulatory guidance in NUREG-0654 regarding the calculation of ETEs in a footnote in its opinion to a holding that NRC regulations require that emergency plans include individualized ETEs for special facilities even where only ETE's for the general population are to be used in making protective action decisions. We find reasonable the Licensing Board's extensive discussion of this issue in the SPMC decision at pp. 85-90.

4. IMPLEMENTING DETAILS FOR SHELTERING THE BEACH POPULATION

Intervenors argued before the Licensing Board that the NHRERP did not contain adequate provisions for sheltering persons at beach areas near the Seabrook Station. The Board explained that the Commission's emergency planning regulations do not require that sheltering be designated as a protective action at each site but rather that a range of protective actions be developed and incorporated into the emergency

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(Footnote Continued)
evacuation in a given circumstance, this is precisely the action the ALS patients would be taking pending their evacuation. See Applicants' Response at 29. Thus the real issue is whether a greatly increased ETE for ALS patients might make it preferable for this group to remain sheltered even if evacuation of the general population is called for. In the extraordinarily unlikely event that such a decision needs to be made prior to the Licensing Board's resolution of this issue, we believe that the exceedingly small size of this group would make an "ad hoc" ETE estimate feasible and appropriate.

plan.[38] See 28 NRC at 770. Similarly, pertinent regulatory guidance "requires an evaluation of the expected local protection afforded by sheltering, but does not set standards for that protection or require it" (emphasis in original). Id. See NUREG-0654, II.J.10.m. Thus the issue before the Board was whether the State of New Hampshire had given adequate consideration to sheltering as a possible protective action. See 28 NRC at 771.

Although the preferred protective action for the seasonal beach population is almost always early beach closure or evacuation, the State of New Hampshire is prepared to consider sheltering as a possible recommended action in a very limited number of circumstances:

> A. When sheltering can be predicted to be the most effective option for achieving maximum dose reduction;
>
> B. When there are physical impediments to evacuation such as fog, snow, hazardous road and bridge conditions, and highway construction; and
>
> C. When transients without transportation need sheltering pending evacuation.

28 NRC at 758-59.[39]

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[38] 10 C.F.R. § 50.47(b)(10) provides:

> (b) The onsite and ... offsite emergency response plans for nuclear power plant reactors must meet the following standards:
>
> (10) A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

[39] Implementing detail for use of the sheltering option in the third circumstance -- the need for shelter by the approximately 2% of the beach

(Footnote Continued)

In examining the State's consideration of sheltering in these circumstances, the Board found that the likelihood that sheltering would afford the maximum dose reduction was very low because a determination to shelter for this reason would require the coincidental occurrence of the following circumstances: (1) no earlier action such as precautionary beach closing has been taken; (2) a peak or close-to-peak beach population exists thereby causing evacuation times to be significantly longer than the duration of the predicted release; and (3) the release is predicted to be one of short duration, without particulates, and projected to arrive at the beach in a short time. 28 NRC at 759, 775. Further, the Board credited the testimony of Joseph K. Keller, the FEMA representative, who indicated that the uncertainties involved in predicting the start and duration of a release as well as the meteorological conditions which would bring a release to the beach area in a certain amount of time are considerable and that, in any event, the

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(Footnote Continued)
population without transportation when an evacuation is ordered -- is not at issue. See ALAB-924 at 59. The plan which we are discussing today, and on which we are allowing the finding of adequacy to become immediately effective, is the plan as described by the Licensing Board in its NHRERP decision, 28 NRC at 769-772, and as reviewed by the Appeal Board in ALAB-924. Amendments of this plan since the close of the record before the Licensing Board have not been considered. If changes to the plan are intended, or if the parties believe that the Licensing Board, Appeal Board, or Commission misconstrued the intent of the plan, then appropriate motions should be filed. In light of the foregoing, the Commission denies Intervenors Motion to Supplement Application for a Stay of LBP-89-32, dated February 14, 1990.

dose reduction to be expected from shelters available to the beach population is minimal.[40] See 28 NRC at 765-768.

Since the NHRERP contemplates recommending sheltering in the limited circumstances noted above, the Board considered the shelter available in the area and concluded that enough sheltering exists for the peak or near-peak beach population. See 28 NRC at 770-772, 775. The Board based its finding upon a shelter survey prepared by Stone & Webster for Applicants and provided by them to the State for use as a resource

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[40] Mr. Keller testified that while he could construct scenarios where after the fact it would appear that sheltering would have been a more appropriate response than evacuation, in a real event "[y]ou have very little confidence that you can predict with any reliability what the next step is going to be. So the prudent thing to do is ... to move the people in a 360-degree arc, a radius, within two or two and a half, three miles." Tr. 14242. The following interchange then ensued:

> Q. Well, let me ask you this, if you can't move the people prior to the start of the release because there isn't enough warning, might you then be better because you don't know where the plume is going to travel to put them in shelters, and wait and then evacuate them in order to avoid this ground shine component to the greatest extent possible?
>
> A. If the State of New Hampshire had come in with a recommendation or an assertion ... that the shelters ... had a shelter factor of .5 or .4, all right. My own personal opinion is, you might have looked at it a little harder.
>
> The State came in [and] said, the average shelter factor in this -- of the buildings out here, is about .9 -- a 10 percent reduction. That's not enough -- I mean, when you have uncertainties in source terms and you have uncertainties in weather conditions, you have uncertainties in the nuclide mix that's likely to be there, this 10 percent reduction is so -- is down in the dirt in the error band, it's trivial.

Tr. 14243.

document as well as site visits to the beach area by the Board.[41] 28 NRC at 771. The Board did not, however, require that implementing provisions for the sheltering option be included in the NHRERP. The Board explained:

> After reviewing the testimony on the reasons why sheltering is a very low-probability option, particularly Mr. Keller's explanation of the many conditions that must line up before sheltering can be predicted to save doses, the Board is concerned that forcing implementation into the NHRERP would be a mistake. The greatest risk is that the decisionmaker might implement the sheltering option using preset implementing detail without understanding that the potential benefits are not very great and can readily be outweighed by the uncertainties.

28 NRC at 769. The Board was content to leave any differences on this point to FEMA and the State of New Hampshire to resolve.[42] The Board concluded that "the absence of implementing detail for sheltering in the NHRERP is not so material as to foreclose a finding by the Board that the NHRERP provides reasonable assurance that adequate protective measures will be taken in the event of a radiological emergency at Seabrook." Id.

In ALAB-824, the Appeal Board affirmed the Licensing Board's conclusion that the NHRERP appropriately limited sheltering as a

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[41] The Board noted that the shelter survey indicates that some three times as much potential shelter space as is necessary is available and that even if Intervenors' objections to some of this shelter as unsuitable are fully credited only about 20% of the existing shelter potential would be eliminated. 28 NRC at 771-772. The Board rejected Intervenors' contentions that the owners of beach establishments would close their doors to the transient beach population, finding instead that this population would be regarded as "fellow victims". See 28 NRC at 772. The State found that the survey "identified a large number of shelters that may serve as a pool from which public shelter choices will be made" but declined to incorporate the study into the NHRERP or rely on the study as a planning basis. See Applicants' Direct Testimony No. 6 at 22 and Appendix 1 at 9.

[42] The Board was unable to determine what FEMA's view was as to the necessity of additional planning for the sheltering option. See 28 NRC at 769.

protective action option to very limited circumstances. ALAB-924 at 57-58. However, the Appeal Board believed, contrary to the Licensing Board, that implementing measures needed to be added to the NHRERP given that sheltering the beach population remained a possible option. See ALAB-924 at 58-69. The Appeal Board held that its finding in the Shoreham proceeding[43] that the probability of implementation of an option was irrelevant in determining whether emergency planning obligations had been satisfied meant that the low probability that sheltering would ever be recommended did not excuse the lack of implementing detail. The Appeal Board rejected as well the Licensing Board's perception that the addition of implementing detail might cause a decisionmaker to lose sight of the considerable limitations of sheltering even in circumstances where it might be viewed as an option. Rather, in the view of the Appeal Board, the lack of implementing detail essentially left decisionmakers to "speculate [as to] what will be the practical impact of a decision [to shelter]" and, in fact, enhanced "the risk that sheltering will not be utilized in the appropriate, albeit limited, instances contemplated by the plan." ALAB-924 at 64.

The Appeal Board acknowledged that not all implementing details needed to be in place for a plan to be approved but found that here "the absence of any concerted attempt to incorporate implementing details for protective action options arrived at as a result of the planning process is a deficiency that must be remedied." ALAB-924 at 68, n.194. The Appeal Board rejected the NRC Staff's contention that the existence of

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[43] See ALAB-832, 23 NRC 135, 154-57 (1986), aff'd CLI-87-12, 26 NRC 383, 398-99 (1987).

the Stone and Webster Survey, inter alia, made planning here "less ad hoc" than the planning at issue in ALAB-832.[44] Rather, said the Appeal Board, "[t]he planning efforts concerning sheltering already undertaken remain ad hoc until planning officials take appropriate implementing act'ons [which] [i]n this case ... would include designating in the NHRERP which shelters on the survey list are suitable and available for use...." ALAB-924 at 68. Thus the Appeal Board remanded this matter "for appropriate corrective action" by the Licensing Board. Id.

Upon remand, the Licensing Board considered again its earlier determination that the lack of implementing detail in the NHRERP was not so material an issue as to preclude a reasonable assurance finding under 10 C.F.R. § 50.47(a)(1). The Board recognized that further development of the record would likely be necessary to resolve this issue. LBP-89-33 at 31. However, the Board did not believe that the Appeal Board's remand meant that a reasonable assurance finding was now precluded because "the very low probability of selecting the sheltering option for the beach population and the fact that the beach population does not reach large numbers until July, provides adequate safety pending the resolution of the remanded sheltering issue." Id. at 33. The Board further observed that "[i]mplementing measures may not be difficult to effect," noting that "sheltering available for the outdoors transient beach population is concentrated in a relatively compact and well defined area." Id. at 32.

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[44] The Staff pointed out to the Appeal Board that, "... for the sheltering option under the NHRERP, the means of public notification exist; the mechanisms for a protective action determination are in place; and the size of the beach population and the quantity, quality, and location of the shelter are known." ALAB-924 at 62-63.

Commission Conclusion

On the basis of our effectiveness review, we agree with the Appeal Board that so long as sheltering remains a potential, albeit unlikely, emergency response option for the beach population, the NHRERP should contain directions as to how this choice is to be practicably carried out. Such directions should include identification of the location of sufficient available shelter together with the means to notify the beach population as to where this shelter is located. Given the existence of the Stone & Webster Survey, we do not believe incorporation of implementing detail into the NHRERP to be especially difficult or time-consuming.[45]

However, we also find reasonable the Licensing Board's decision that this remanded issue does not raise a significant substantive issue regarding emergency planning adequacy. The record shows clearly that evacuation rather than sheltering is the principal protective action for the beach population, and that the average shelter factor is so small that the public protection afforded from sheltering is very small. FEMA characterized the dose reduction from sheltering as "trivial" and "down in the dirt in the error band", supra p.39, n.40. We note in this regard that the emergency plan for the Massachusetts beaches, which the

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[45] In this connection, we note that the Licensing Board has interpreted the remanded issue to mean that specific sheltering (as compared to maps showing sheltering areas) be identified for the general beach population. See LBP-89-33 at 31-32. We understand the Appeal Board's direction to designate in the NHRERP "which shelters on the survey list are suitable and available for use," ALAB-924 at 68, as meaning that there should be a sufficient quantity of available shelter space rather than that there must necessarily be agreements with particular establishment owners to provide space to beachgoers.

Licensing Board found to be adequate, does not even include sheltering as an option. Given these considerations, we believe that the absence of implementing detail for the sheltering option is not significant.

B. Remaining Unreviewed Contested Matters

1. Licensing Board Decision LBP-89-32 Deciding Contentions on the Emergency Plan for Massachusetts and the Full Participation Exercise

The final significant segment of Seabrook operating license litigation entertained issues on the adequacy of the Seabrook Plan for Massachusetts Communities (SPMC) and the full participation exercise of that plan along with the exercise for the NHRERP and Applicant's plan for onsite response capability as well as the State of Maine's ingestion pathway plan. See 10 C.F.R Part 50, Appendix E ¶ IV(1). The Licensing Board order in LBP-89-32, resolved the issues that were admitted for litigation[46] and decided that the SPMC is adequate and implementable.

The Board ruled that the June, 1988 exercise was adequate in scope and revealed no fundamental flaw in any of the plans exercised. The Board specifically found that the SPMC meets the Commission's emergency planning regulations. See 10 C.F.R. § 50.47(a) and Appendix E to 10 C.F.R. Part 50. Thus the Board found, subject to certain commitments, conditions and the like for which the Director of NRR is charged with

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[46] One hundred twenty-three contentions were admitted for litigation. As later consolidated, there were 63 contentions admitted with respect to the SPMC and 21 with respect to the plan exercise. LBP-89-32 at 3.

verifying conformance, that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Seabrook station.[47]

In the same opinion the Board also resolved the one remaining ETE-related (Evacuation Time Estimate) issue over which it retained jurisdiction from the New Hampshire phase of the proceedings. Slip op. at 36. In a separate opinion, LBP-89-17, 29 NRC 519 (1989), another Seabrook Licensing Board had earlier decided in June 1989, that Applicants' Vehicular Alert Notification System (VANS) provided adequate means to alert people who are within the Massachusetts portion of the emergency planning zone of an emergency situation.

LBP-89-32 is on appeal before the Appeal Board on issues related to both the SPMC and the 1988 exercise[48]. The Appeal Board is considering Intervenors' Appeal of LBP-89-17 (VANS decision) along with LBP-89-32 because the VANS decision was simply one step on the way to LBP-89-32's conclusive finding of adequacy of emergency planning for the Massachusetts portion of the EPZ. As the only unreviewed partial initial decisions resolving admitted contentions relevant to the issuance of a

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[47] FEMA had reviewed the SPMC and judged the exercise and on both testified in the proceeding that they met the NRC regulations and standards. In other words, both the SPMC and the exercise provided reasonable assurance that adequate protection would be provided in the event of a radiological emergency. FEMA's conclusions are presumed to be correct unless rebutted. 10 C.F.R. § 50.47.

[48] This is apart from objection taken to the Licensing Board's treatment in that order of the impact of the Appeal Board's remand in ALAB-924 on the authorization of issuance of a license.

full power license, these decisions are a central focus of our immediate effectiveness review.[49]

In considering the conclusions of LBP-89-32, the Commission has paid particular attention to issues raised by Intervenors in their immediate effectiveness review comments.[50] The Commission has neither been shown nor found sua sponte that it need withhold effectiveness of operation of Seabrook pending administrative review. Our review has, however, turned up several matters on which we believe we can provide some helpful comment or for which, as a matter of policy, we require some further commitment or action by the Applicants or Staff. In some instances the Commission does so not because it is clearly essential to safety, but because additional enhancements to the adequate emergency preparations that have already been made appear desirable on the basis of our effectiveness review. We discuss these matters below.

(i) Evacuation Time Estimate (ETE) Issues

In LBP-89-32, the Board made the finding that the number of ETEs generated, and the regions and scenarios for which they were generated,

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[49] As noted elsewhere, LBP-88-32 has been substantially reviewed by the Appeal Board. Petitions for review of the Appeal Board's decision, ALAB-924, are pending. LBP-89-33, the Licensing Board's explanation of its authorization of a license following ALAB-924, was considered in the preceding section as a supplemental partial initial decision.

[50] MassAG's immediate effectiveness comments on the Licensing Board decision on the SPMC and exercise alone included 34 separately asterisked discussions of error spread over 33 pages. The total lack of references to the record which might aid our understanding of their belief that the Licensing Board erred in the referenced portions of the decision was not helpful. Nonetheless because of the importance of this matter we have had our adjudicatory staff do as much of the tracking of sources as possible. The parties are on notice that they may not further rely on the Commission to do their work for them and cannot be heard to complain of any incompleteness in the Commission's response.

are sufficient and correctly limited in number so as to be usable by a decisionmaker fairly quickly and not to be overly cumbersome. LBP-89-32 at 47. However, Intervenors complain that the Board permitted a regional approach to producing ETEs and assert that separate ETEs should be created for Massachusetts decisionmakers. LBP-89-32 also states that the Massachusetts Attorney General argued for segregated ETEs for the Massachusetts and New Hampshire portions of the EPZ. Id. at 44.

Our regulation at 10 C.F.R. § 50.47(b)(10) requires, in part, that "guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place." Criterion II.J.10.1 of NUREG 0654 indicates that an organization's plans to implement protective measures for the plume exposure pathway EPZ shall include "...time estimates for evacuation of various sectors and distances based on a dynamic analysis (time-motion study under various conditions) for that EPZ." Criterion II.J.10.1 also references Appendix 4 of NUREG 0654 as the location for more detailed guidance on performing such an ETE study. Appendix 4, in turn, includes the following criteria for determining sub-areas within the EPZ for which ETEs are required. The sub-areas must encompass the entire plume exposure pathway EPZ, as ETEs are required for the situation of the simultaneous evacuation of the entire EPZ. The sub-areas to be considered are also to be radial distances of about 2, 5, and 10 miles from the nuclear plant, with the areas within these circles to be divided into four, 90 degree sectors. The boundaries of these sub-areas should be based on demography, topography, land characteristics, access routes, and local jurisdictions, and should not divide densely populated areas to the extent practical.

The guidance in Appendix 4 of NUREG 0654 neither requires nor suggests that the sub-areas' boundaries must take into account the borders of contiguous States. Therefore, the Board's conclusion that there is no regulatory requirement for segregated ETEs for Massachusetts and New Hampshire appears to be correct. Moreover, as a practical matter, we agree in this effectiveness review with the Board's position in LBP-89-32, that the regional approach of the ETEs is acceptable, given the reality that traffic flow cannot be segregated temporally according to political boundaries and because there is no suggestion that evacuees from New Hampshire portions of the EPZ would be prohibited from entering the Commonwealth.

Furthermore, the guidance of NUREG 0654 states that, when making ETEs for outer sectors, it is to be assumed that the inner, adjacent sectors are being evacuated simultaneously. In LBP-89-32, the Board concluded that the Applicants' regional approach in presenting ETEs was acceptable given that the New Hampshire coastal areas are closer to the Seabrook Station than are the Massachusetts communities and will be generating sizeable traffic flows before or as soon as an order to evacuate is issued in Massachusetts. Indeed, one might conclude from the NUREG 0654 guidance and the aforementioned conclusion by the Board, that the Massachusetts ETEs would be unacceptable under the regulatory guidance, if they did not take into account permitted traffic flow from New Hampshire portions of the EPZ that were nearer to the Seabrook Station.

In LBP-89-32, the Board indicates that the NRC Staff witness concluded that the Applicants' ETE study satisfied the guidance of Appendix 4 of NUREG 0654 and all applicable regulatory requirements with

one exception, which was categorized as essentially an editorial task. This exception was that the ETE study should be published. LBP-89-32 states that the Applicants committed to publish the ETE study. The Board required that the published study be submitted to the NRC staff for verification within 60 days of the date of service of LBP-89-32. LBP-89-32 at 115-16. The Board's instruction to publish the study and to submit it to the Staff, so that verification of the publication commitment can take place, was appropriate, as there is no regulatory requirement to incorporate the entire study in an emergency plan.

The Commission finds the Board's decision on this issue reasonable since the guidance contemplates that for ETE purposes the EPZ would be divided in a series of concentric radials, with the areas within the circles into quadrants, taking into account various geographic and demographic features. As a practical matter, where more than one state is involved, decisionmaking is coordinated and may be expected to be so here particularly since the utility plan for the SPMC contemplates a cooperative effort.

Nonetheless, should the Commonwealth of Massachusetts decide to participate in planning and wish separate ETEs in order to prepare a state-sponsored emergency plan or for its own use in arriving at protective action decisions, the Commission sees no reason why ETE's cannot be promptly developed and considered for that use.

(ii) Notification of Special Facilities in an Emergency

The Commission believes that the Board reasonably decided Intervenors' concerns with regard to communication with schools or special needs persons. The Commission notes only that the Applicants, among other things, committed to supplying tone alert radios to

Massachusetts EPZ schools as another means to assure timely notification of the school population in the event of an emergency. No time for fulfillment of the commitment is provided.[51] The Commission believes that this additional protection for school children should be accomplished promptly and without unnecessary delay. However, we do not believe that the matter is significant such that it must be accomplished prior to issuance of the full power license.

(iii) The Sheltering Option for the Beach Population in Massachusetts

Our separate opinion today deciding the certified question is relevant to Intervenors' arguments with regard to an alleged inadequacy in the range of options for the beach population. That opinion confirms that the adequacy of any emergency plan is not to be judged with specific reference to some minimum level of dose savings. A plan is to be judged under the Commission planning standards, which resulted from a comprehensive public rulemaking which included consideration of the ways to assure effective emergency responses to radiological incidents. The Board's finding that the SPMC contains a range of possible protective options for people in the Massachusetts portion of the EPZ[52], even though not every option is necessarily available everywhere appears reasonable.

(iv) Congregate Care Facilities

LBP-89-32 describes the SPMC's provisions for Congregate Care Centers for school children and for mobility-impaired persons who do not require hospital care. The Holy Cross College in Worcester will serve as

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[51] See id. at 243.

[52] Id. at 221.

a Host School Center for all the Massachusetts EPZ's public, private, daycare, and nursery school children. The primary Host Ambulatory Special Needs Center would be located at the Shriners' Auditorium in Wilmington, while a backup Congregate Care Center for excess members of the ambulatory special needs population would be located at a large facility known as the Westborough facility.[53]

Section 10 CFR § 50.47(b)(8) requires that "adequate emergency facilities and equipment to support the emergency response are provided and maintained." 10 CFR 50.47(b)(10) states, in part, "that a range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public." Criterion II.H.4 of Supplement 1 to NUREG 0654 states as guidance for meeting the regulatory criteria that "each offsite response organization shall provide for timely staffing of the facilities and centers described in the offsite plan." Criterion II.J.10.d of Supplement 1 states that "the offsite organization's plans to implement protective measures for the plume exposure pathway shall include the means of protecting those persons whose mobility may be impaired due to such factors as institutional or other confinement. These means shall include notification, support, and assistance in implementing protective measures where appropriate."

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[53] It is alternatively spelled "Westboro" in LBP-89-32, passim, and in other documents.

a. Adequacy of the Westborough Facility

The Board found that the Shriners' Auditorium can accommodate roughly half of the Massachusetts special needs population who are not school children.[54] The Westborough facility is to be available as a backup to accommodate the over 1000 special needs persons who cannot fit into the Shriners' Auditorium in the event that the protective action chosen requires that the entire special needs population be accommodated. The Board noted that FEMA evaluated the Westborough facility for the general population who would evacuate the EPZ, but not as a facility suitable for the needs of mobility-impaired evacuees. Id. at n.52.

LBP-89-32 indicates that, with the exception of the Westborough facility as a Congregate Care Center for mobility-impaired persons, FEMA found all of the Congregate Care Centers in the SPMC to be adequate. Since the Westborough facility is described in LBP-89-32 as a backup Congregate Care Center for excess numbers of mobility-impaired evacuees, the Commission believes that evaluation of its adequacy for this purpose would be beneficial. Accordingly, the Director of the Office of Nuclear Reactor Regulation, in consultation with FEMA as appropriate, should evaluate the Westborough facility's adequacy as a Congregate Care Center for mobility-impaired persons. However, we do not believe that the matter is significant such that it must be accomplished prior to issuance of a full power license.

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[54] LBP-89-32 at 338.

(b) School officials' roles during Evacuation and early stages of Congregate Care

LBP-89-32 finds that the Host School Center at Holy Cross College would accommodate the Massachusetts EPZ's school children if they are evacuated from their schools. The Board further states its understanding that the SPMC incorporates an "evacuation in place" concept[55] whereby it is assumed that teachers, day care workers, and nursery school personnel will continue in their "service provider roles" while accompanying their charges through an evacuation process and into the early stages of congregate care. Furthermore, facility administrators and supervisors are assumed by the SPMC to continue to exercise their pre-emergency authority, including calling for additional staff and assigning persons under their pre-emergency authority in a manner that best serves the needs of their group of evacuees. In LBP-89-32, the Board rejected the MassAG's argument, similar to that advanced with respect to the NHRERP, that there is no "reasonable assurance" that Commonwealth school officials will continue in their pre-emergency roles in the event of an actual radiological emergency. As we indicated earlier in this opinion, we consider it reasonable to conclude that school children can be evacuated without teachers on the buses.

Relatedly, in LBP-89-32 the Board states that the Applicants will make SPMC orientation training available, during some unspecified time period, to Massachusetts school officials regarding the roles that the SPMC expects them to fulfill in a radiological emergency. The Director of the Office of Nuclear Reactor Regulation should ensure that the

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[55] Id. at 314.

Applicants offer this orientation training to all appropriate Massachusetts EPZ school officials and that the training be made available so that it could be completed by the end of the 1989-1990 school session.

3. The Motions to Reopen

In three separate opinions, one issued before and two after LBP 89-32 and 89-33, the Licensing Board rejected three categories of contentions: LBP 89-28 (ruling on low power testing contention), October 12, 1989; LBP 89-38 (ruling on motions regarding onsite exercise) December 11, 1989, and LBP-90-1 (Ruling on Intervenors' Motions to Admit a Late Filed Contention and Reopen the Record Based Upon the Withdrawal of the Massachusetts E.B.S. Network and WCGY) January 8, 1990. We discuss them briefly in turn.

The low-power testing contentions

The Licensing Board declined to reopen the hearing to admit the low power contentions in which Intervenors wished to explore anew operator qualifications based on operator misjudgment during low-power testing. Key to its decision was the determination that low-power testing is not material to the grant of a full power license and therefore is not automatically subject to litigation as Intervenors maintain. The Licensing Board is clearly correct in that full power licenses may issue without a previous issuance of a low power license which would be otherwise needed to permit such testing. Indeed, were each phase of pre-full power-operational readiness testing to open the door to relitigating the licensing issues it is doubtful that any plant would

avail itself of the benefits of an early low-power testing license. Perhaps more importantly, the record shows that Intervenors' contentions are based on staff reports and that this is a matter to which staff has paid considerable attention.[56] The Board specifically noted that it had before it an "ample factual record" (LBP-89-28 at 41) from the affidavits provided by the parties to make a determination on whether the issues were safety significant and explained why they were not. The Commission believes that the Board's conclusions are reasonable.

The September 18, 1989 Onsite Exercise Contentions

An exercise of Applicants' onsite plan was held on September 18, 1989.[57] Intervenors thereafter contended that the scope of the onsite exercise was insufficient to fully test the onsite plan. The Board rejected the contentions based in part on Intervenors failure to meet reopening standards but also, and more importantly, because of a failure to plead how the alleged insufficient scope resulted in a situation where a fundamental flaw in the emergency plan could avoid detection. Significantly, the Board also found that the regulations which Intervenors claimed set the standard for the scope of the exercise were applicable to the full participation exercise but not to the exercise solely of the Applicants' onsite plan. LBP-89-38 at 41. We do not here summarize the Board's 41-page opinion, but express our view that the

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[56] A civil penalty has been assessed against the Applicants.

[57] The exercise followed the Commission's denial of the Applicants' request for an exemption from conducting a test of the onsite plan within a year of issuance of a full power license. CLI-89-19, 30 NRC 171 (1989).

Board's treatment of this matter appears reasonable. Applicants' onsite plan had been tested on several occasions before this one and no fundamental flaw was shown. Given the prior review and exercises of the onsite plan, it strikes us as unlikely that a fundamental flaw would have arisen, although it is possible that there might be a lapse in readiness. To avoid such readiness lapses is the principal goal in requiring an annual exercise. We also note that the scope of the exercise does not appear to be inconsistent with the scope of onsite exercises at other plants.

The EBS Contentions

In its decision, LBP 90-1, the Licensing Board rejected contentions related to broadcast notification included in Intervenors' motions served on November 3 or 9[58] and November 22. The motions were filed late in the process - at the most a few days before the SPMC decision - and raise the issue whether a motion of this sort can be so late that its consideration is simply precluded. We do not address this issue here; we will consider, separate from the Seabrook proceeding, the desirability of additional guidance regarding such late filed motions. In any event, our effectiveness review here suggests that in the circumstances the Board's application of the reopening standards to these motions was reasonable.

[58] We need not here address the confusion that apparently resulted from MassAG's withdrawal and resubmittal of his motion to admit the EBS contention.

C. Uncontested Issues, Verification of Conditions and Plant Readiness

1. Uncontested Issues and Verification of Conditions

As with any full power license, a full power license for Seabrook will necessarily contain numerous technical conditions which reflect the Staff's prelicensing technical review of issues relevant to full power operation.

As a result of the litigation of contested issues numerous conditions were placed on license issuance. The Director of Nuclear Reactor Regulation shall ensure that the license includes all of the necessary conditions and that those that are prelicensing conditions have been met. The requirements of this effectiveness order shall not be conditions in the license, as they represent requirements subject to change in the adjudicatory process. Nonetheless, interim compliance is necessary as stated and shall be confirmed by the Staff.

2. Plant Readiness

On January 18, 1990 the Commission met in public session to receive briefings from the Applicants and the Staff on the readiness of the Seabrook plant to receive a full power license. Both reported that the plant was ready except for certain specified exceptions, and the Commission also requested some additional information. The Commission has on January 23, February 9, February 26, February 28, and March 1, 1990 received notice from the Staff that those exceptions have been or are being resolved on the anticipated schedule, and that the plant is ready to begin ascension to full power operation. In particular, the Staff completed detailed reviews of late-filed allegations including approximately 255 separate

allegations prepared by the Quality Technology Corporation for the Employees Legal Project as well as 13 allegations of a private citizen who taped Seabrook control room radio transmissions between January 1989 and the end of January, 1990. Based on these reviews, the NRC Staff concluded that none of the allegations represents concerns that are material to the issuance of a full-power license. Moreover, the review determined that the majority of the concerns were restatements of allegations previously submitted and resolved.

In light of the foregoing considerations, the Commission's effectiveness review fully supports allowing the Licensing Board's authorization of issuance of a full power license to become effective.

IV. The Stay Motions

The Commission's effectiveness review under § 2.764 is designed to enable the Commission itself to examine preliminarily the matters decided by the Licensing Board in order to determine whether the decision can become effective and thus authorize issuance of a full power license. While parties were invited by our rules to file effectiveness comments, the principal avenue for relief for parties seeking to preclude license issuance pending appeals is to seek a stay under § 2.788. Stays are a part of the formal adjudicatory proceeding, and the criteria for consideration of a stay under § 2.788 of the Commission's regulations are the same as those which the courts apply in granting or denying a stay

pending appeal.[59] See e.g., Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C.Cir. 1958).

Intervenors MassAG, SAPL, NECNP and the Town of Hampton filed their stay request on December 1, 1989.[60] The Applicants and the NRC staff thereafter, on December 8 and 17 respectively, filed their responses in opposition to the grant of the stay.

A. The Irreparable Injury Factor

Of the four stay factors, it is well established that "the most crucial [factor] is whether irreparable injury will be incurred by the movant absent a stay." Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). For that reason we turn first to Intervenors' claims of harm to them. The claims appear to boil down to three categories of harm: 1) an alleged due process harm, focusing on a claim that they are harmed by being forced to seek a stay of license issuance even after a victory before the Appeal Board; (2) an alleged cost and resource harm (3) an alleged harm from increased risks during operations by allegedly untrained operators.

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[59] Section 2.788 establishes the following factors to be considered in reviewing a request for a stay:
(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
(2) whether the party will be irreparably injured unless a stay is granted;
(3) whether the granting of a stay would harm other parties; and
(4) where the public interest lies.

[60] New England Coalition on Nuclear Pollution filed a separate stay request on the same day. The Commission has considered it as well, along with stay requests included with a party's immediate effectiveness comments.

1. Administrative Due Process

Intervenors claim that there has not been administrative regularity in the conduct of this proceeding. Intervenors particularly do not like and vigorously object to the Commission's procedures permitting licensing boards to evaluate whether a remand need block authorization of a license, requiring all contentions after the original stage to be subject to certain "timeliness" requirements, and allowing the Commission to step into a proceeding at any stage to offer guidance to the parties.

The procedures to which Intervenors object are neither unprecedented nor aberrations; they have been in force for years and have been applied to numerous nuclear power plant licensing proceedings before this one.[61] Their application to this proceeding is not a deprivation of due process.

2. Financial and Resource Harm

Intervenors claim that they will be harmed from the irretrievable commitment of resources associated with operation pending appeal and the alleged inability of the Applicants to meet the expenses of decommissioning in the event that they operate at full power and the license is later vacated upon final order of the Commission (or a court) after review.

There is no support for Intervenors' claim that the commitment of resources will cause a bias in favor of continuing the license in

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[61] See discussion supra at sections II.B.1 and 2 and citations there provided.

subsequent Commission decisionmaking.[62] To the contrary, as the Intervenors themselves have recognized, the Commission has stated repeatedly and categorically that it will not consider the commitment of resources to a completed plant or other economic factors in its decisionmaking on compliance with emergency planning safety regulations. See e.g., SAPL v. NRC, 690 F.2d 1025 (D.C. Cir. 1985).

Intervenors' further assertion that Applicants' financial condition will leave them unable to meet decommissioning expenses in the event a license is ultimately vacated totally lacks substance. They claim that the Applicants would have no more than $43 million available at the end of the first year from the state funding source for decommissioning and could have nothing from NRC funding. Intervenors are mistaken. The Applicants' surety bond for $72,126,456.00, required by the Commission for issuance of a low-power license, is effective until "the earlier of (i) a final non-appealable regulatory or judicial determination that the Seabrook Project has been granted a license...other than as contemplated by the issuance of the license for low power testing...or (ii) a final non-appealable regulatory or judicial determination that no further Pre-Operational Decommissioning is required." Surety Bond between Applicants and The Aetna Casualty and Surety Company as Surety, dated March 20, 1989. Thus this bond is available during the pendency of appeals which could lead to vacation of the license. And, lest there be

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[62] Intervenors citation to NEPA cases for the proposition that the commitment of resources will prevent meaningful review is unavailing. The decisionmaking process under NEPA includes consideration of commitments of resources and economic factors, while the decisionmaking process for compliance with NRC emergency planning regulations does not.

any doubts on this score, we merely require that the bond, or a similar one, be available pending appeals. Adding the available state funds to the $72.1 million available from the surety, it is evident that Applicants here would have available over $115 million in the event that premature decommissioning were required. This large sum is close to what, under the Commission's decommissioning rules, would be required for decommissioning of a plant which had been in operation for a long period of time. We find that fund sufficient to offset any claim of irreparable injury from lack of decommissioning funds.[63] In fact Applicants here have done far more to meet decommissioning expenses than our rules literally require.

3. Increased Risk of Nuclear Accident by Alleged Lack of Competence of Seabrook Operators

It is well settled that speculation about occurrence of a nuclear accident does not constitute the kind of irreparable injury that would warrant a stay of full power operations. E.g., Cleveland Electric Illuminating Co. et. al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985) citing New York v. NRC, 550 F.2d 745, 750-757 (2d Cir. 1977) and Virginia Sunshine Alliance v. Hendrie, 477 F. Supp. 68, 70 (D.D.C. 1979). In an apparent effort to distinguish this settled principle, Intervenors argue that a June 22, 1989 event

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63. Intervenors use a figure of $242 million developed by the Applicants' in another context,as the "total decommissioning cost assumption." Intervenors' Stay Motion at 9. The Commission does not recognize that sum. We assume that it includes decommissioning costs other than those necessary to avoid radiological harm which are not cognizable here.

during low-power testing, when Seabrook plant personnel erred in not tripping the reactor at the point first called for by the low-power testing procedure, indicates inadequate training, operating procedures and performance, and that this in turn increases the risk of an accident. We find this argument unpersuasive. The error during low-power testing was significant, and led to enforcement and corrective actions. But the Board, after an exhaustive examination of the incident, based on affidavits from the parties and the extensive NRC Staff investigations of the event, found that reactor plant safety was never in question, that with this one exception plant staff performed well, that there was no evidence of willful noncompliance with NRC requirements or withholding of information from NRC, and that the event reflected only an isolated instance of a failure to adhere strictly to applicable procedures and did not represent a pervasive breakdown or fundamental flaw in Applicants' testing or training programs. LBP-89-28 at pp 20-22, 28-43. We find the Board's careful discussion and evaluation of the safety significance of this event entirely reasonable and, based upon this and on Staff's and Applicants' own follow-on corrective actions, fail to see how the event evidences any increased risk of accident at Seabrook. In fact we think that Intervenors' own affiants demonstrated that the Commission is holding the public safety in high regard.[64]

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[64]The affiants noted that the NRC staff planned to evaluate the proficiency of all Seabrook shift crews under simulated accident conditions in mid-December 1989. Joint affidavit of Gregory C. Minor and Steven C. Sholly at 6.

B. The Remaining Factors

Given the lack of any showing of irreparable harm to Intervenors, a strong showing would need to be made on the remaining stay factors in order for any stay to be granted. Our discussion of the litigated issues in our immediate effectiveness section is fully applicable here. That discussion indicates that Intervenors have certainly not made a strong showing that they are likely to prevail on the merits of further appeals. We offer no comment at this point on how a stay could harm Applicants' interests or affect the reliability of electrical power in the New England area - matters which, if considered, could not bolster Intervenors' case in any event. However, we do believe strongly that a stay at this point would be contrary to the public interest which underlies the mandate to us in 5 U.S.C. § 558 to complete license application proceedings within a reasonable time with due regard for the rights of the parties.

Conclusion

For the reasons explained above, the Director of NRR may issue the license authorized by the Licensing Board in LBP-89-32 on a schedule consistent with the following provisions for a housekeeping stay. Given the controversy which has surrounded the Seabrook plant since these proceedings commenced, we fully expect that judicial review of this decision will be sought. As a courtesy to the parties, to permit the filing of judicial stay motions, the effective date of this decision will

be March 8, 1990. If motions for a stay are filed by plant opponents with the U.S. Court of Appeals within this period, then the decision's effective date will be one week after the relevant motions are filed.

It is so ORDERED.

For the Commission[66]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of March, 1990

[66]Commissioners Curtiss and Remick abstained from consideration of this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.
(Seabrook Station, Units 1 and 2)

Docket No.(s) 50-443/444-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-90-03) DTD 3/1 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-443/444-OL
COMM M&D (CLI-90-03) DTD 3/1

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Forrest J. Remick

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

MEMORANDUM AND ORDER

CLI-90- 02

I. Introduction

In ALAB-922, 30 NRC 247, issued on October 11, 1989, the Appeal Board certified a question to the Commission for resolution, pursuant to 10 CFR § 2.785(d), under which the Appeal Board may "certify to the Commission for its determination major or novel questions of policy, law or procedure." The question certified was the following:

> "Whether the MassAG's [Massachusetts Attorney General's] testimony, which seeks to address the dose reductions/dose consequences that will arise under the NHRERP [New Hampshire Radiological Emergency Response Plan], is admissible as relevant to a determination of whether, in accordance with the Commission's Shoreham guidance, the NHRERP will achieve 'reasonable and feasible' dose reduction under the circumstances so as to provide 'reasonable assurance that

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adequate protective measures can and will be taken' in accordance with 10 C.F.R. § 50.47(a)."

30 NRC at 259.

For the reasons which follow, we have determined that the testimony proffered by the Massachusetts Attorney General was admissible neither for the purpose mentioned by the Appeal Board nor for any other. To explain the basis of our decision requires us to set forth in some detail the context in which the admissibility of the proffered testimony was considered by the two Boards.

II. Proceedings before the Licensing Board

The Massachusetts Attorney General, in a contention first offered in 1983 and resubmitted in 1986, charged that the New Hampshire plan did not, as required by 10 CFR § 50.47(a), provide "reasonable assurance that adequate protective measures can and will be taken" in an emergency, because on a summer weekend, with the nearby beaches densely populated by transients, evacuation would fail to protect persons on the beach under many plausible meterological conditions, and inadequate provisions had been made for sheltering these persons. The applicants objected to this contention on the grounds, first, that the NRC's emergency planning regulations were not intended to guarantee absolute protection or a given level of protection, and second, that to litigate the contention would in effect be to relitigate the decision to site the plant at Seabrook. The staff opposed the contention to the extent it could be interpreted as seeking to litigate the dose consequences of any specific accident or as asserting that emergency planning must achieve a particular level of dose protection to the public, but would have allowed its admission to the

the MassAG, called for a range of protective measures, but here, the plan did not provide for sheltering. The MassAG urged that while the Board was not required to make specific dose savings findings, or to calculate the number of people who would be injured in an accident, it was nevertheless required to accept evidence on those issues in order to determine the adequacy of the protective measures provided by the emergency plan.

Applicants objected to the offer of proof, arguing that it was an effort to reintroduce the contention rejected earlier, and that the evidence was irrelevant, since it purported to show dose savings and consequences in absolute terms, whereas the regulation only required a showing that the emergency plan "is designed to achieve reasonable and feasible dose savings given the circumstances of the site in question." The staff agreed with the applicant.

In a bench ruling on November 17, 1987, the Licensing Board determined that the proposed testimony was outside the scope of the Commission's emergency planning requirements, as outlined in three Commission pronouncements on emergency planning. TR 5594. First, the Licensing Board said, the 1983 San Onofre decision (Southern California Edison, San Onofre Nuclear Generating Station, Units 2 and 3, CLI-83-10, 17 NRC 528, 533), had emphasized that with regard to emergency planning,

> The emphasis is on prudent risk reduction measures. The regulation does not require dedication of resources to handle every possible accident that can be imagined. The concept of the regulation is that there should be core planning, with sufficient planning flexibility to develop a reasonable ad hoc response to those very serious low-probability accidents which could affect the general public.

B. Proceedings before the Appeal Board

The issue of the exclusion of the proffered testimony came before the Appeal Board on its review of the Licensing Board's December 31, 1988 Partial Initial Decision on the New Hamphsire emergency plan. In ALAB-922, issued on October 11, 1989, the Appeal Board provided a different analysis of the issue from that of the Licensing Board. It declared that the focal point of the dispute was where the emergency planning regulations, with their requirement of "reasonable assurance," fit into the two-tiered regulatory scheme of the Atomic Energy Act. The Appeal Board explained that the Commission's safety regulations are either standards necessary to provide first-tier "adequate protection" (as authorized by Section 182(a) of the Atomic Energy Act) or are second-tier "extra-adequate protection" (measures over and above what is needed for adequate protection) as authorized by Sections 161(b) and (i) of the Atomic Energy Act. The distinction between the two was recognized, said the Appeal Board, in UCS v. NRC (UCS I), 824 F.2d 108 (D.C. Cir. 1987).

The intervenors, said the Appeal Board, claimed that 10 CFR § 50.47 was a first-tier "adequate protection" standard, and that the Commission could not determine whether "adequate protection" was provided without evaluating the degree to which the emergency plan still left the public at risk. This argument, said the Appeal Board, was "promptly dispelled" by an examination of the 1980 rulemaking that promulgated 10 CFR § 50.47. In that rulemaking, the Commission cited as its authority Sections 161(b), (i), and (o) of the Atomic Energy Act. In the Appeal Board's words, "it is hard to imagine a more compelling indication that ... emergency planning requirements are intended to be second-tier, AEA section 161

1987 rule, in which the determination of "specific dose reductions" was ruled out. The latter approach, the Appeal Board said, suggested that "given the 'extra-adequate protection' status of emergency planning requirements," review of emergency plans should concentrate not on a subjective judgment of whether the protection afforded to the public is "adequate," but rather on conformance with the requirements of the regulation and the pertinent NRC/FEMA criteria. Accordingly, the Appeal Board certified to the Commission the question of whether the MassAG's testimony was admissible as relevant to a determination of whether the New Hampshire plan would achieve "reasonable and feasible dose reduction under the circumstances" so as to provide "reasonable assurance that adequate protective measures can and will be taken." 30 NRC at 259.

On October 20, 1989, the Massachusetts Attorney General asked the Appeal Board to reconsider its decision that emergency planning regulations represented a "second-tier" or "extra-adequate" level of protection under Section 161 of the Atomic Energy Act rather than "first-tier" protection under AEA Section 182. The petition urged that the transcript of the 1980 Commission meeting at which the language of the emergency planning rule was crafted was evidence that the Appeal Board erred on this central point. The Massachusetts Attorney General argued that the citation to Section 161 in the 1980 rulemaking was without significance, and it noted that the Commission's fire protection rule -- by the NRC's own account a first-tier "adequate protection" standard -- had been issued under Section 161. The petition also noted that the two-tier theory had not been articulated until years after the 1980 rulemaking on emergency planning. Massachusetts offered a different

was crucial to a correct understanding of the Commission's intent, the Commissioners directed that the transcript be included in the rulemaking record.

According to the intervenors, the Appeal Board, in relying on the citation to Sections 161(b), (i), and (o) -- an issue which the Appeal Board itself raised, none of the parties having done so -- ignored the 1980 Authorization Act in which Congress directed the NRC to develop emergency planning regulations. Although the Commission's final rule in 1980 included a statement that the rule was consistent with the Authorization Act, that Act did not appear in the list of authorities. Thus the list is incomplete on its face. Furthermore, the Commission has named Section 161 as the sole basis of such safety-based rules as the fire protection rule, cited by the Commission in an appellate brief as an example of a first-tier "adequate protection" backfit. In reality, the citations to Sections 161(b), (i), and (o) simply designate regulations to which criminal penalties under 42 U.S.C. 2273 are intended to apply. Any doubt is eliminated when it is recognized that in the 1980 version of 10 CFR, the General Design Criteria of 10 CFR Part 50, Appendix A, were not described as based on Section 182.

Intervenors claim that the Appeal Board's quotation from the Commission's 1986 Shoreham decision was misplaced. Although some of the quoted language might suggest that emergency planning was not designed to achieve or maintain a regulatory minimum of protection, the 1980 rulemaking was unambiguous on that point, and it is controlling. Indeed, in 1983 the Commission, in response to a Congressional question, made clear that it saw emergency planning as a matter of adequate protection,

that utilities have spent on emergency planning since 1980 if those requirements were not viewed as necessary for adequate protection. The Appeal Board did not deal with the 1980 Authorization Act, in which Congress made clear that emergency planning was designed to prevent "public endangerment," i.e., first tier. In statements to the Congress, Commissioners made clear that they shared Congress' view that emergency planning regulations were in place to assure "adequate protection."

Once it is recognized, say the intervenors, that emergency planning is a first tier safety standard, then there are three different approaches under which the Massachusetts Attorney General's proffered testimony is admissible: (1) to contribute to a case-by-case evaluation of whether the risk posed by operation of Seabrook is acceptable; (2) for a determination of whether a "range of protective measures," as required by the planning standards of Section 50.47(b), have been provided; and (3) to judge whether the plan achieves "reasonable and feasible dose reductions under the circumstances," to quote the Commission's 1986 Shoreham decision. The phrase "under the circumstances" should be understood to refer simply to the case-by-case nature of the inquiry, not to suggest that a "best efforts" showing is all that is needed. The Commission's November 1987 final emergency planning rule rejected a "best efforts" approach.

Finally, intervenors argue, there is no "exclusionary rule" in NRC proceedings that would bar testimony on dose consequences. The evidence on dose reductions and dose consequences that the Massachusetts Attorney General has sought to introduce is plainly relevant to the adequacy of the emergency plan. The only way that such obviously relevant evidence could be excluded is the existence of some policy barring its admission. Such

amendments to the Commission's emergency planning rules lay to rest any suggestion that the profferred testimony could be admissible. The proposed rule emphasized that the emergency planning rules were flexible, not aimed at achieving preestablished minimum dose savings. The final rule made the same point, declaring that findings as to precise dose reductions "are never a requirement in the evaluation of emergency plans," and that emergency plans were to be evaluated individually, "without reference to the specific dose reductions which might be accomplished under the plan...." The foregoing demonstrates that the evidence proffered by the intervenors was irrelevant, since all that must be shown to satisfy the NRC's requirements is that the emergency plan is "designed to achieve reasonable and feasible dose savings given the circumstances of the site in question." Once that is shown, it is irrelevant "whether these dose savings will be high or low in absolute terms at a particular site in the circumstances of a given accident or class of accidents."

The Appeal Board was correct, applicants argue, in finding that the NRC's emergency planning rules, having been promulgated under Section 161 of the Atomic Energy Act, constitute "second tier" protection under the two-tier formula described in UCS I. Citations of authority are required by the Administrative Procedure Act, and are not merely some afterthought to which the agency may or may not give consideration. The 1980 Commission transcript on which intervenors rely is at best inconclusive. It does not remove the ambiguity as to the meaning of "adequate protective measures" in the regulation, but it does make clear that the emergency planning rules were not intended as a "site blocking" regulation. Moreover, the 1987 emergency planning rules commented on the

level of public safety protection," such as 10 CFR § 100.11, which establishes the exclusion area and low population zone in terms of doses to individuals. This language clearly shows emergency planning regulations to be second tier.

Finally, say the applicants, the discussion in the Commission's 1987 proposed rulemaking makes clear that any ambiguity was to be resolved in favor of calling emergency planning rules second tier. The final rule made the further point that the 120-day clock in the 1980 rule showed the second tier status of emergency planning requirements.

3. NRC Staff

According to the NRC staff, the Commission's regulations -- the plain wording of Section 50.47(a)(1), the pertinent administrative history, and prior Commission interpretations -- all demonstrate that the Licensing Board was correct in excluding the proferred testimony. The regulation calls for determinations by FEMA on the adequacy and implementability of offsite plans, in accordance with planning standards of Section 50.47(b). The regulation does not provide for a dose reduction/dose consequences analysis, but rather for a review of the plans against the standards to see if they are adequate and implementable. The Statement of Considerations of the 1980 rule did not indicate that there was to be any examination of radiological doses and consequences. The Commission there recognized that FEMA was best suited to assess offsite emergency preparedness. The NRC final rule restated, and cited, the guidance of NUREG-0654/FEMA-REP-1, which states that the planning basis for the standards was a spectrum of accidents, independent of specific accident

Section 182, the Commission's regulations do not call for dose calculations, but rather for conformity with standards set out in the regulations. In this regard they are like many of the Commission's most basic safety regulations, such as emergency core cooling standards and quality assurance requirements. If the intervenors wished to challenge the adequacy of the rule, they could have petitioned for a rule change, and they could have asked for a waiver of the rule in this case. Instead, they are attempting to engraft onto the rule requirements over and above those established by the Commission.

To answer the certified question directly, the NRC staff maintains, the phrase "reasonable and feasible dose reductions under the circumstances" in Shoreham envisioned testimony not on dose projections and dose consequences, but on reasonable and feasible methods of dose reduction for a particular site under the circumstances existing there. The Licensing Board received such testimony and concluded, as had FEMA, that the New Hampshire emergency plan provided "for a range of protective actions."

> On the other hand, the Commission rejected an option in the rulemaking that could have led to automatic plant shutdown if adequate plans were not filed because of commenters' concerns about "unnecessarily harsh economic and social consequences to State and local governments, utilities, and the public." Operating plants were given very substantial grace periods....These provisions are not consistent with the concept that emergency planning and preparedness are as important to safety as such engineered safeguards as reactor containments or emergency core cooling systems. ... Rather, these provisions reflect a different concept -- that adequate emergency planning and preparedness are needed and important, but that they represent an additional level of public protection that comes into play only after all of the other safety requirements for plant design, quality construction, and careful, disciplined operation have been considered, and that therefore some regulatory flexibility is warranted and the costs associated with alternative approaches may be taken into account.

The Commission's notice asked for comment on which of the two approaches should be followed:

> a relatively inflexible one, that will require adequate planning and preparedness with little or no concern for fairness or cost; or a more flexible one that focuses on what kind of accident mitigation (dose reduction to the public in the event of an accident) can be reasonably and feasibly accomplished, considering all of the circumstances. If sound safety regulation requires the former, then no rule change is warranted. If the latter, then a change would be in order....

In other words, the Commission's March 1987 proposed rule recognized explicitly that to move from an "adequate protection" standard to a "second tier" or backfit standard, a rule change would be needed.

The Commission's November 1987 final rule, 52 Fed. Reg. 42078, disavowed any intent to move from the former to the latter approach. The Commission began its answer to the question, "Is emergency planning as

> planning does not automatically raise a "substantial health or safety issue" with regard to plant operation. By contrast, a major safety deficiency relating to emergency conditions -- for example, the availability of the emergency core cooling system -- would warrant immediate shutdown.
>
> In sum, despite language indicating that emergency planning was "essential," the Commission in 1980 created a regulatory structure in which emergency planning was treated somewhat differently, in terms of the corrective actions to be taken when deficiencies are identified, from the engineered safety features ("hardware") that would be relied on in an emergency.

The foregoing discussion from the 1987 final rule helps to clarify the real nature of the issue in dispute. The relevant consideration is not whether emergency planning as a general matter is a part of "adequate protection" or of "extra-adequate protection." The Commission's rulemakings of 1980 and 1987 establish that it is the former. (We do not share the Appeal Board's view of the significance of the citation to Section 161 in the 1980 rulemaking.) To frame the issue in terms of a simple choice between "adequate" and "extra-adequate" protection is to lose sight of the reality that when the Commission enumerates the many individual safety issues which must be resolved in order to find "adequate protection," it is not thereby declaring that all those component issues are of equal safety significance, or that the same standards for demonstrating compliance are applicable to all.

For illustration, one need only consider the gamut of issues presented in 10 CFR 50.34(b), dealing with the Final Safety Analysis Report. These include: a description of the reactor coolant system, instrumentation and control systems, electrical systems, containment system, and other engineered safety features (50.34(b)(2)(i)); the

sense to acknowledge that emergency plans, like lifeboats, are a backstop, a second or third line of defense that comes into play only in the extremely rare circumstance that engineered design features and human capacity to take corrective action have both failed to avert a serious mishap.) For our purposes today, the real issue is a much more straightforward question: what is the nature of the inquiry that the Commission, in recognition of the fact that emergency planning involves predicting the ability to respond to the unpredictable, has put in place for determining whether "adequacy," i.e., compliance with the Commission's emergency planning regulations, has been established?

2. How Adequacy is Determined

The Commission's emergency planning requirements are not obscure. In the text of the regulations, in rulemakings on the subject of emergency planning, and in adjudicatory decisions interpreting those regulations, the Commission has made clear that judgments on the adequacy of emergency planning are to be based on conformity with the 16 planning standards set forth in 10 CFR § 50.47(b).[1] For offsite planning, the regulations

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[1] 10 CFR § 50.47(b) provides:

> The onsite and, except as provided in paragraph (d) of this section, off-site emergency response plans for nuclear power reactors must meet the following standards:
>
> (1) Primary responsibilities for emergency response by the nuclear facility licensee and by State and local organizations within the Emergency Planning Zones have been assigned, the emergency responsibilities of the various supporting organizations have been specifically established, and each principal response organization

(Footnote Continued)

implemented." 10 CFR § 50.47(a)(2). This FEMA finding "will primarily be based on a review of the plans." Id. The same regulation also provides that "[i]n any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability." 10 CFR § 50.47(c), which states that the Commission may decline to issue an operating license in case of "[f]ailure to meet the applicable standards set forth in paragraph (b) of this section," reinforces the point that adequacy is to be judged by conformity with the planning standards. Nothing in the regulation contains any suggestion that calculations of dose consequences are intended to play a role in the evaluation of a plan's adequacy.

(Footnote Continued)

(10) A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

(11) Means for controlling radiological exposures, in an emergency, are established for emergency workers. The means for controlling radiological exposures shall include exposure guidelines consistent with EPA Emergency Worker and Lifesaving Activity Protective Action Guides.

(12) Arrangements are made for medical services for contaminated injured individuals.

(13) General plans for recovery and reentry are developed.

(14) Periodic exercises are (will be) conducted to evaluate major portions of emergency response capabilities, periodic drills are (will be) conducted to develop and maintain key skills, and deficiencies identified as a result of exercises or drills are (will be) corrected.

(15) Radiological emergency response training is provided to those who may be called on to assist in an emergency.

(16) Responsibilities for plan development and review and for distribution of emergency plans are established, and planners are properly trained.

for it is by applying the generic guidance of the regulation's 16 standards to the review of individual emergency plans -- not by attempting to predict the effects of particular hypothetical accidents occurring under particular hypothetical conditions of weather, time of year, and time of day -- that the NRC satisfies itself that the goal of achieving dose reductions is met.

The Commission interpreted and explained its emergency planning requirements in the 1983 San Onofre decision, where it said:

> Since a range of accidents with widely differing consequences can be postulated, the regulation does not depend on the assumption that a particular type of accident may or will occur. In fact, no specific accident sequences should be specified because each accident could have different consequences both in nature and degree. Although the emergency planning basis is independent of specific accident sequences, a number of accident descriptions were considered in development of the Commission's regulations, including the core melt accident release categories of the Reactor Safety Study (WASH-1400). (Footnote omitted.)

Southern California Edison Co., (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983).

The Commission further explained:

> It was never the intent of the regulation to require directly or indirectly that state and local governments adopt extraordinary measures, such as construction of additional hospitals or recruitment of substantial additional medical personnel, just to deal with nuclear plant accidents. The emphasis is on prudent risk reduction measures. The regulation does not require dedication of resources to handle every possible accident that can be imagined. The concept of the regulation is that there should be core planning with sufficient planning flexibility

24 NRC 22, 30, 32.

Recognizing that the language just quoted lent itself to the interpretation that findings on dose reductions are a part of the emergency planning inquiry, the Commission soon provided a clarification. In the final emergency planning rule, 52 Federal Register 42078 (November 3, 1987), the Commission stated:

> The Commission currently believes that the planning standards of 10 CFR 50.47(b), which are used to evaluate a state or local plan, also provide an appropriate framework to evaluate a utility plan. Therefore ... a utility plan ... will be evaluated for adequacy against the same standards used to evaluate a state or local plan.
> ...
> The approach reflected in this rule amplifies and clarifies the guidance provided in the Commission's decision in Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). ... That decision ... included language which could be interpreted as envisioning that the NRC must estimate the radiological dose reductions which a utility plan would achieve, compare them with the radiological dose reductions which would be achieved if there were a state or local plan with full state and local participation in emergency planning, and permit licensing only if the dose reductions are "generally comparable." Such an interpretation would be contrary to NRC practice, under which emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished, and without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan. (Emphasis added.)

52 Federal Register 42078, 42084-85.

find that there was no purpose for which the proffered testimony was admissible.

In concluding, we wish to make clear that this opinion does not decide whether emergency planning at Seabrook is adequate, nor whether that facility should receive a license to operate at full power. Rather, it provides, in accordance with our procedures for directed certification, guidance as to how, under the Commission's rules, determinations on the adequacy of emergency planning are to be made.

It is so ORDERED.

For the Commission[2]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of March, 1990.

[2]Commissioners Curtiss and Remick abstained from consideration of this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.
(Seabrook Station, Units 1 and 2)

Docket No.(s) 50-443/444-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-90-02) - 3/1 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
1 day of March 1990

Helen Boyd
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*Copies sent by Federal Express in addition
to mailed copies.