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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	
(Seabrook Station, Units 1 and 2)	)	April 27, 1990

MASSACHUSETTS ATTORNEY GENERAL'S MOTION TO AMEND BRIEF IN SUPPORT OF HIS APPEAL OF LBP-89-32, LBP-89-33 AND RELATED RULINGS

The Massachusetts Attorney General ("Mass AG") hereby moves to amend his brief filed on January 24, 1990 with this Board on his appeal of LBP-89-32 to include pages 17-71 of Intervenors' December 1 Supplemental Motion and Memorandum in Support of November 13 Motion to Revoke and Vacate the November 9 License Authorization ("Supplemental Motion") filed with the Commission and attached here as Exhibit 1. In support of this motion, the Mass AG states as follows:

1. As set out in detail during oral argument (Tr. at 9-33) on April 18, 1990, the Mass AG believes that certain appellate arguments set out in his Supplemental Motion were not addressed by the Commission in the adjudicatory portions of CLI-90-03 (at 10-15). As a result, the Intervenors' claims that the Licensing Board's decision in LBP-89-33 contravened ALAB-924

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notwithstanding the Commission's interpretation of 50.47(c)(1) have not been addressed by this agency.[1/] In the Supplemental Motion, the Intervenors analyzed in detail each of the four remanded issues and the manner in which the Licensing Board disobeyed the mandate of ALAB-924. The Commission's determination that 50.47(c) permits licensing notwithstanding open and unresolved issues relevant to licensing as long as such issues are not safety significant and do not preclude the reasonable assurance finding does not address the Intervenors' specific arguments that as to the four remanded issues the Licensing Board's determination to issue a license contravened the holdings of this Board in ALAB-924.[2/]

2. This motion is timely for the following reasons:

a. Intervenors did not brief these matters in their January 24 briefs because the Commission had taken jurisdiction over Intervenors' appellate claims that the Licensing Board had violated ALAB-924. The Mass AG, however, on February 6 did

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1/ The Mass AG, to repeat, believes that the Court of Appeals has jurisdiction over these issues. The NRC, however, asserts that the Court has jurisdiction only over the immediate effectiveness decision, ("IED"), which is at 15-65 of CLI-90-03. By this motion, the Mass AG seeks to protect his right to further appellate review in the event the Court adopts the agency's jurisdictional perspective.

2/ The Commission in the IED (CLI-90-03 at 15-44) expressly contradicts the findings of this Board in ALAB-924 but the IED is non-adjudicatory and nonbinding. 10 CFR 2.764(g). Again, the NRC is asserting to the Court of Appeals that only the IED is presently reviewable.

file an emergency motion with this Board seeking clarification as to this very issue.

b. Between January 24 and March 1, the Mass AG did not move to amend his brief because he had no possibility of knowing how or in what way the Commission would dispose of his mandamus motions. He also was asserting that the Court had jurisdiction as a consequence of his December 4, 1989 Petition for Review.

c. After CLI-90-03 issued on March 1, 1990, the Mass AG did not move to amend because he believed that there was certainly now "final agency action" and therefore court jurisdiction. Indeed, the NRC asserted in its March 12 Opposition to Dispositive Motion and Motion for Expeditious Consideration filed with the Court of Appeals at 1-2:

> At the outset, we are duty bound to point out that petitioners' various motions do not amount to a petition for review attacking the NRC final decision approving the Seabrook license. That decision is the Commision's "immediate effectiveness" ruling . . . .

Moreover, from March 7 until the present the NRC has filed no motion to dismiss Docket No. 90-1132 on the grounds that there is no final agency action. Based on the clear provisions of 5 USC §704 (second and third sentences the Mass AG believed (and believes) that the issues presented in the Supplemental Motion are now before the Court.

d. Between April 11 and April 18, 1990, the Mass AG was seeking to stay further agency appellate process on these very grounds. When this Board denied the stay requests asserting its continued appellate jurisdiction over these

matters, the Mass AG presented these arguments orally and then at argument moved to amend his brief to protect his appellate rights. Tr. of Oral Argument at 177.

e. The Mass AG files this motion on April 27, 1990. The delay from April 18 is due to the following factors: 1) delay in receipt of the transcript of the oral argument until April 20, 1990. Review of this transcript was deemed necessary to the preparation of this motion. The Mass AG prepared and filed on April 24 an Application for Stay with the Chief Justice of the United States and prepared and filed on April 27 a Motion Seeking Clarification of Present Appellate Jurisdiction with the Court of Appeals.

For all of the reasons set forth above, this Board should permit the Mass AG to amend his January 24 Brief to include the arguments already briefed to the Commission in the Supplemental Motion. The Intervenors have taken every rational step in light of the circumstances to obtain review of these matters.

Respectfully submitted,

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DATED: April 27, 1990

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EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission:

Kenneth M. Carr, Chairman
Thomas M. Roberts, Commissioner
Kenneth C. Rogers, Commissioner
James R. Curtiss, Commissioner

In the Matter of	Docket Nos. 50-443-OL 50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	(Emergency Planning Issues)
(Seabrook Station, Units 1 and 2)	December 1, 1989

INTERVENORS' SUPPLEMENTAL MOTION AND MEMORANDUM IN SUPPORT OF NOVEMBER 13 MOTION TO REVOKE AND VACATE THE NOVEMBER 9 LICENSE AUTHORIZATION

COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
ATTORNEY GENERAL

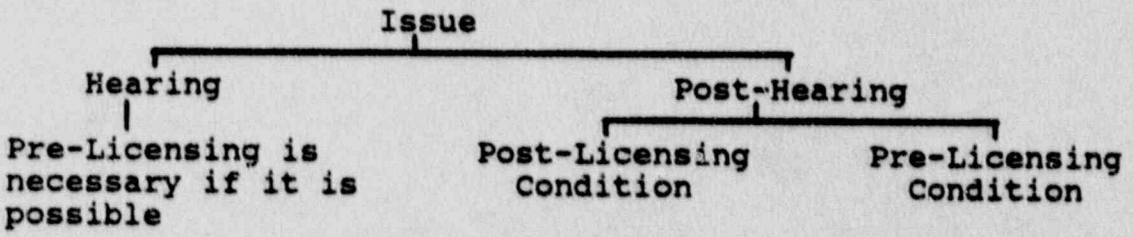
John Traficonte
Assistant Attorney General
Chief, Nuclear Safety Unit
Department of the Attorney General
One Ashburton Place
Boston, MA 02108

Dated: December 1, 1989

have their statutory rights to a hearing on all issues material to licensing acknowledged and respected.[8/]

III. REMANDED ISSUES

The discussion that follows is made more accessible by an initial review of NRC procedural law with regard to when and under what circumstances an issue can be resolved <u>after</u> or <u>outside of</u> the hearing process ("post-hearing" resolution), usually by delegation from a licensing or Appeal Board to the Staff. After an issue has been determined to be resolvable post-hearing, the next issue a Board confronts is whether such resolution is to be completed pre- or post-licensing. Graphically, the law looks as follows:



Issues are presented for further resolution, at least for purposes of this discussion, at the conclusion of a hearing upon licensing board review and decision, or on remand from

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[8/] Recall that Intervenors have sought unsuccessfully to litigate: 1) the low power testing events which led to a constructive suspension of the low power license, a $50,000 fine and the extraordinary requirement of additional operator proficiency tests to be administered by the Staff; 2) the truncated scope of the September onsite exercise which this Commission considered material and from which it denied Applicants an exemption; and 3) the October 20, 1989 loss of an EBS-capacity to support the utility's plan, which is <u>prima facie</u> of safety significance. Since the Board has uniformly denied Intervenors' hearing rights on all these matters (either expressly or <u>de facto</u>) it is unclear what additional aid the Board seeks from the Commission other than an expression of approval.

appeal of such a decision. Issues on remand often, but not always, are presented after license authorization and after license issuance. Here, of course, the remanded issues were presented before licensing authorization.

The standards for determining whether an issue requires a hearing are shaped by both substantive and procedural factors. As the Appeal Board stated in Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n. 57 (1983):

> There are, to be sure, both substantive and procedural limits as to how much of the emergency evaluation, or how many open items, may be deferred until after the close of the hearing. Substantively, the evidence must be sufficient for the Board to conclude that the state of emergency preparedness "provides reasonable assurance . . . . "

The Board continued, quoting the Licensing Board at 15 NRC at 1216:

> Certain matters may be "left for the Staff to resolve following the hearings." . . . These matters typically are of a minor nature and/or are such that on-the-record procedures, including cross-examination, would be unlikely to affect the result. Procedurally, the limits are established by Section 189 of the [AEA] . . . which entitles interested persons to an adjudicatory hearing on the issusance of a[n] . . . operating licenses. This means that an intervenor must have the opportunity to litigate the substantive question whether there is "reasonable assurance . . . ."

Id. (emphasis supplied). Accord Consolidate Edison Company of New York, Inc., (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-952 (1974) (general proposition is that post-hearing resolution disfavored except for "minor procedural deficiencies").

Thus, if an issue is presented on remand before licensing and: 1) it is not a "minor" matter, 2) its resolution is in some fashion entwined with the "reasonable assurance" finding[9/] and 3) a hearing may well affect the decision-making process then NRC law requires that it be resolved by a hearing. Needless to say, that hearing is to take place before licensing under the AEA. Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 773-774 (1983) (affirming Licensing Board's withholding of license pending further hearings on emergency planning because "intervenors must be afforded an opportunity to test the revised plans in an adjudicatory hearing"); Louisiana Power and Light Company, (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-1108 (1983) (affirming post-hearing verification on the grounds that the evidentiary record supported the predictive findings needed);[10/] Commonwealth Edison Company, (Byron Nuclear Power

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9/ For example, if that finding could not be made on the present record with regard to that issue, as the Appeal Board expressly found regarding sheltering. ALAB-924 at 68.n.194. See also Supplement at 4 n.3.

10/ For example, the record established the number of each type of vehicle needed and the verification of the submission of LOAs was appropriate for "post-hearing ministerial resolution." Id. at 1105. Cf. ALAB-924 at 19 n. 47 (noting that present record provides no basis for assessing adequacy of number of vehicles) and 68 n. 194 (noting absense of any sheltering details in the plan and distinguishing Waterford). Indeed, Waterford at 1105 n. 46 distinguished Zimmer on precisely the same grounds -- the Zimmer Applicants' proposed communication system was not "incorporated in the emergency plan" and, the record would not support the "reasonable assurance" finding and therefore under Indian Point and its progeny a hearing was required.

Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1175 (1984) (noting link between hearing rights and the relationship between the unresolved issue and a "reasonable assurance" finding); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-496 (1986) (discussing above cited cases and noting that "designation of several more traffic control points" in light of intervenor's dual failure to explain what purpose further hearing would serve and how it had been prejudiced is appropriately resolved post-hearing);[11/] Pacific Gas and Electric Company, (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 832-835 (1984) (noting that emergency planning findings are "predictive" and that "post-hearing" resolution appropriate "as long as the evidence permits the Licensing Board to find "reasonable assurance").[12/]

A. General Infirmities in the Analysis

1. The Board's own analysis of its jurisdiction, powers and scope of discretion on remand

As discussed above, the Smith Board drew certain inferences from the Appeal Board's purported "silence" as to the effect of ALAB-924 on "the potential in our [SPMC] decision for

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11/ The Smith Board's hasty action and its refusal to provide an opportunity to Intervenors to be heard on this issue made it impossible for Intervenors to articulate the grounds for their hearing rights on the remanded issues and their injury if no hearings prior to licensing were held.

12/ The post-hearing licensing condition at issue involved the final publication of an information booklet, the draft of which was in the evidentiary record.

authorizing issuance of the Seabrook operating license." As noted, there is no basis for these inferences in light of the circumstances extant in the time frame from November 1 to November 7, when ALAB-924 issued. But not only does the Board's reasoning have no factual support, the legal conclusions it reaches concerning its powers and discretion after ALAB-924 issued is completely incoherent. The Board asserted:

> Our reading of ALAB-924 leads us to infer that the remand order included traditional broad discretion in resolving the issues based upon our familiarity with the very large evidentiary record of the proceeding.

Supp. at 3. Moving forward from this proposition, the Board framed the issue as follows:

> Here, of course, the question is whether post-licensing consideration of open matters by an adjudicating board is appropriate.

Supp. at 4. In the Board's view, the answer to this question in turn depends on whether

> the requisite findings of reasonable assurance of public safety can be made despite pending open matters ....

Supp. at 4. Because the Board viewed none of the four remanded issues as a significant or "major" (Supp. at 5) safety issue, it did not view ALAB-924 as an impediment to these "requisite findings." Thus, the Board asserts that all remanded issues can be and are resolved after its November 9 licensing action, either in the body of the analysis set forth in the Supplement or at some point in the future "under the close scrutiny of the litigating parties." (Supp. at 5).

A review of the logical and legal support for the Smith Board analysis is instructive. First, Smith notes that:

> There is no regulation or, as far as we can determine, any reported decision which would foreclose the issuance of an operating license once the basic findings under 10 CFR 50.47(a)(1) and 50.57(a)(3) have been made despite the pendency of open matters.

Supp. at 3. Of course, the Board ignores the obvious fact that ALAB-924 reversed and remanded certain NHRERP findings. One necessary inference from this reversal is that to the extent the Board's basic NHRERP finding under 10 CFR 50.47(a)(1) was based on the compliance of that plan with the 50.47(b) standards, then that finding was reversed pending resolution of the remanded issues. Thus, in truth, the proper statement of law should be:

> There is no regulation or, as far as we can determine, any reported decision which would permit the issuance of an operating license once the basic findings under 10 CFR 50.47(a)(1) and 50.57(a)(3) have been reversed and remanded prior to licensing.

Second, the Board discusses the general issue of "post-hearing" resolution of issues, noting that although the adjudicative context is preferred it is not obligatory. The Board states that this principle is "particularly valid" in matters of emergency planning where boards "traditionally rely ... upon post-hearing verification of the resolution of open matters." Supp. at 4. Having identified a category of open issues subject to post-hearing resolution by a board or the Staff, the Board then states:

> Here, of course, the question is whether post-licensing consideration of open matters by an adjudicatory board is appropriate. Putting aside questions of passing

> jurisdiction, which are not present at this juncture, if the requisite findings of reasonable assurance of public safety can be made despite pending open matters, then, a fortiori, the Commission's adjudicating boards can defer resolution of some remanded issues for post-licensing consideration ....

Supp. at 4-5 (emphasis supplied). As noted, because the Smith Board believes that none of the open issues on remand are "major safety issue[s]", it believes post-licensing consideration is appropriate. Not a single case is cited for this latter proposition. The Board appears to believe that post-licensing resolution of contested remanded issues is supported by the Commission case-law which in narrow circumscribed situations permits post-hearing resolution of minor ministerial matters.[13/] Interestingly, even the case law on post-hearing resolution of issues does not draw any distinction between major or significant safety issues and other issues, an obvious unspoken assumption in the Board's analysis. In fact, if the unresolved issue involves the exercise of judgment and discretion, it can only be resolved by means of a hearing, even if it is not a major safety issue. In part, this is because the AEA gives the public a right to a hearing on all issues material to licensing

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13/ Significantly, post-hearing resolution of issues (whether through pre-licensing conditions whose verification is done by the Board or delegated to the Staff, or post-licensing conditions whose verification is normally delegated to the Staff) do not involve "open" issues in the sense in which the four issues reversed and remanded by ALAB-924 were open on November 9 when the Board rendered its decision. The remanded issues were and (as discussed below in detail) still are "open" in the sense that a record must be developed, judgment exercised and real world corrective steps taken before they are resolved.

and some of these issues although not major safety issues are still by definition material.[14/]

2. The three-tiered structure of error

The Board's analysis is so woefully inadequate that it may reflect a conscious effort to obfuscate basic principles of law. Indeed, the errors contained in the "analysis" set forth at 2-6 of the Supplement are actually layered in three tiers. The three-tiers are: 1) the direct impact of ALAB-924's reversal on previous findings material to licensing is ignored; 2) the relationship between the remanded issues and the need for a hearing is never discussed; and 3) the relationship between the remanded issues, real world corrective action, and any licensing action is completely inverted.

a. "Reversal" and its Impact on an Earlier Judgment.

The Board's "analysis" of its powers and discretion, as noted, proceeds from the proposition that the "requisite findings of reasonable assurance of public safety" (Supp. at 4) or the "basic findings under 10 CFR 50.47(a)(1)" (Supp. at 3) are unaffected by ALAB-924. The Board appears to believe that the findings set forth in LBP-88-32 are untouched by ALAB-924 and it asserts as support for this belief the proposition that

> the Appeal Board affirmed this Board's partial initial decision on the NHRERP with respect to every major safety issue decided in ALAB-924.

Supp. at 5. Yet, this matter has nothing to do with what the the Smith Board believes about ALAB-924 or with how the Smith Board in its ipse dixit chooses to characterize the impact of

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14/ If they were not "material" to a licensing decision they would not be "open" or need resolution at all.

ALAB-924. Rather, as an initial proposition, it is necessary to analyze the impact of ALAB-924 in light of basic principles of appellate law. Indeed, as a matter of law, it is quite obvious that ALAB-924 reversed a portion of the very findings necessary and material to any Seabrook licensing.

For example, the lower Board found adequate transportation resources had been identified to evacuate the "special needs" population as required by 50.47(b)(10) and the corresponding sections of NUREG-0654. LPB-88-32, 28 NRC at 699. In turn, the Board's overall "reasonable assurance" finding pursuant to 50.47(a)(1) was based on the plan's compliance with 50.47(b).[15/] The (b)(10) finding was based on an estimate of demand which relied on the 1986 Special Needs Survey. The Appeal Board reversed the lower Board's reliance on this survey as an appropriate estimate of demand. Thus, as a necessary inference of this reversal the Board reversed the lower Board's (b)(10) finding as to the present adequacy of transportation resources. Indeed, the Appeal Board stated:

> Further, in light of our remand of this issue for additional proceedings, it is premature for us to render

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15/ See LBP-88-32, 28 NRC at 804. The Staff and Applicants argued successfully before the lower Board that the (a)(1) finding simply flows from a finding of compliance with the specific (b) standards. See Staff's November 13 Brief on certified question at 5, and passim. See also ALAB-922 at 23. Thus, the requisite finding of (a)(1) was based on the (b) findings. The Board can not now change its tune and adopt an eviscerated version of the Intervenors' view that an (a)(1) finding requires an additional judgment of plan efficacy and risk in light of the circumstances. If (a)(1) does not require such a judgment notwithstanding Intervenor challenges, it will not permit such a judgment as an override to deficiencies in the (b) standards.

> any judgment regarding intervenor SAPL's challenges to the Licensing Board's findings concerning availability of adequate numbers of vehicles and drivers. Once the propriety of this special needs survey's methodology has been aired, it then will be appropriate for the Licensing Board to consider whether the number of vehicles and drivers identified as available to assist in transportation of the "special needs" population is sufficient.

ALAB-924 at 19-20.[16/]

From this one example alone, it is obvious that ALAB-924 reversed the Board's NHRERP decision on matters material to that decision and its basic finding.[17/] Importantly, a reversal on material issues is not the same as a reversal on "major safety" issues,[18/] since under NRC law there are

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16/ The Appeal Board cited ALAB-832, 23 NRC at 154. In that case, the issue of the number of available bus drivers was remanded because the record would not support a finding. On remand, "[a]ll parties will be free to adduce additional evidence on the issue . . . . Upon review of the evidence presented at the reopened hearing, the Licensing Board should reconsider its prior findings . . . ." (emphasis supplied).

17/ Indeed, it is difficult to imagine why the Appeal Board would have bothered to reverse and remand if the issues were amenable to post-hearing (or in the Board's transmogrification post-licensing) resolution and therefore had no necessary relationship to the requisite findings under 50.47(a)(1) and any licensing action. One presumes the Appeal Board reversed because things were not right and remanded because the Board would have to make a judgment in the context of the remand at some point in the future as to whether they now are right. Why bother if such issues are not material to a licensing action?

18/ Lack of adequate transportation resources for the "special needs" population is indeed a significant safety issue. The point here is that whether the remanded issues are major safety issues or not is irrelevant to the proper analysis of the impact of ALAB-924 on LBP-88-32 and the powers and discretion of the Board on November 9.

issues material to licensing that are not major safety issues.19/ The Board appears to believe that so long as it was not reversed on major safety issues it is free to ignore the reversal on otherwise material issues and issue a license. The Board's analysis evidences not even a passing familiarity with the law of appellate reversal and remand, and appears to be based on a remarkable confusion between reversal and remand after a license issues and reversal and remand before a license issues.

1. Reversal and Remand after Judgment

Assume a rational world with a single decision by a Board that authorizes a license. A stay is sought and denied. The license issues. On appeal on the merits a portion of that decision is reversed and remanded by the Appeal Board (or the Commission). The question for the superior (or if it is silent then the inferior) board is: Does the reversal and remand require a license suspension or revocation pending the remand? Even assuming that the remanded issues require a hearing to be resolved properly, a license suspension or revocation is not required as a matter of law. Instead, an equitable standard is applied and the absence of any safety significance in the remanded issues is weighed and considered in deciding whether to suspend the license pending the decision on the merits of the remand.

19/ Indeed, on one reading of ALAB-922, the Appeal Board has interpreted all of emergency planning as something less than a major safety issue, in contradiction to the intent of Congress and the Commission in 1980. See Mass AG's October 27 Brief on Certified Question at 5-10 discussing emergency planning as "second tier."

2. Reversal and remand before judgment

The situation the Smith Board found itself in on November 9 is very different. At least two decisions were necessary preconditions to any licensing action. The first decision was reversed before the second decision was rendered. Thus, the legal requirements for a license were not met, as a matter of law, once the reversal occurred.[20/] The Board improperly and without any analysis of the differences between pre-licensing and post-licensing reversal and remand, simply applied an equitable standard to the licensing issue in its Supplement. But although some limited equity may be appropriate in the post-licensing remand context because the legal requirements had at one time been met, it plays no role whatever in the pre-licensing situation, because the Board has no jurisdiction to alter the legal requirements for a license. See Seabrook, ALAB-349, 4 NRC 235, 270 (1976) (noting difference between "presumptively valid authorization" and one based on now

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20/ Again, the correct analysis has nothing to do with the safety significance of the reversed and remanded issues. These issues obviously involve material matters concerning legal requirements of licensing. (If they did not, they would not ever have been litigated!) Thus, the Board's entire analysis in the Supplement is a non-sequitur: even if it is assumed, incorrectly, that there is no major safety significance to any of the remanded issues, the Appeal Board must have reversed LBP-88-32 on issues at least material to licensing. Therefore, certain legal requirements for a license are not presently met and were not met at the time of the licensing action on November 9.

invalid law or regulation). The Board's equitable analysis, based on the purported lack of safety significance to any of the remanded issues, simply changes the legal requirements for a license and indeed is indistinguishable from an "exemption" the standards for which the Board did not even address. Indeed, analytically, the Board's actions on November 9, 1989 are just as absurd as the actions of a Board that in 1986 or 1987 or at any time simply determined that a license could issue immediately notwithstanding open issues that are material to licensing so long as these issues are not of major safety significance.[21/]

Thus, the first tier of error deeply obscured by the Board's analysis in the Supplement is that the Board did not have jurisdiction on November 9 to alter the legal requirements for a license and issue one. The Board ignores completely the undisputed fact that ALAB-924 reversed LBP-88-32 on issues material to licensing. Impermissibly, sliding from law to equity, the Board frames the issue as one involving the safety significance of the remanded issues. Prior to license authorization this procedure is indistinguishable from a

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21/ Such a procedure, of course, is familiar to the Commission. It applies to license amendments and involves a "no significant hazards" determination. See 10 CFR 50.91. Of course, it does not apply to initial licensing actions and indeed it required amendment by Congress of the Atomic Energy Act to be permissible for the Commission to act in such fashion at all.

straight forward modification of the legal requirements of a license.[22/]

b. The remanded issues and the need for a hearing.

The second level of error on which the Supplement rests is its complete failure to focus on the rather simple question whether any of the remanded issues require a hearing. As noted, the irrelevant question that the Board posed and incorrectly answered was: Are the remanded issues safety significant? Finding that they are not, the Board believed it was free to issue a license without any concern whether the issues require a hearing prior to resolution.[23/] However, even if none of the remanded issues are safety significant if they require a hearing prior to resolution, Intervenors were entitled to that hearing under the AEA prior to the licensing action. Thus, ALAB-924 works at two levels: 1) it reversed findings on material issues and these issues had to be

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22/ It goes without saying that the Board had no jurisdiction to simply reutter its NHRERP judgment on the remanded issues. Thus, because these issues are obviously material to licensing under 50.47(a)(1) and (b), and the Board had no jurisdiction to alter the legal requirements for licensing (i.e., somehow eliminate the materiality of these issues), the Board had no jurisdiction at all to issue the license on November 9, 1989 and it is void as a matter of law.

23/ As noted, the Board based its decision to consider all remanded issues post-licensing on the case-law that permits post-hearing resolution of certain issues. The illogic here has two separate layers: 1) even if something can be resolved post-hearing it may still have to be a prelicensing condition and 2) something is resolvable post-hearing only if a hearing is not necessary. Remarkably, the Board moved from post-hearing law to post-licensing treatment without ever asking whether any of the remanded issues required a hearing. Obviously, if the remanded issues could not be resolved post-hearing, the case law dealing with such issues is of absolutely no support for the even more dramatic step of resolving them post-licensing!

addressed by the Board on remand prior to licensing (by hearing only if necessary); and 2) it remanded issues at least some of which by necessity required a hearing, and such hearings must be provided under the AEA prior to licensing.

It takes little analysis to see that at least two of the four remanded issues require a "hearing", at least in the sense that Intervenors be given an opportunity to be heard.[24/] Not only is this the result, under the very case law cited by the Smith Board concerning the limits of "post-hearing" resolution, but the Appeal Board's remand expressly directed the Board to conduct such further proceedings. See ALAB-924 at 68-69 (sheltering provisions). Again, as an example, the Appeal Board reversed an earlier summary disposition decision of the lower Board holding that genuine issues of material fact were presented that merited a hearing. The Supplement literally tortures this issue beyond recognition because the Board is determined to reutter its judgment right now (retroactive, of course, to November 9 which we are supposed to believe was the point at which the Board had actually carefully read ALAB-924 and realized that it was not an impediment to licensing) that transportation resources are adequate.[25/] Indeed, although at some level it seems beyond belief, it appears that the Board has again

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24/ The Smith Board's remarkable discussion of each of these issues is analyzed in detail below. It is clear from this analysis that hearings must be held on all four remanded issues, contrary to the Board's crabbed and unsupportable reading of the record and ALAB-924.

25/ See infra where it is made clear that the Board directly and openly disobeys the decision of the Appeal Board on this matter.

granted summary disposition on this issue without so much as one scrap of additional information. Certainly, one can read and reread the Supplement at 12-22 (particularly at 20-22) without finding an answer to the simple question whether the hearing that the Appeal Board found necessary is indeed going to take place.[26/] Of course, if Intervenors are entitled to a hearing, that entitlement includes a right to have that hearing pre-licensing if no license has issued. As discussed in detail below, the Board openly and knowingly acted in bad faith in denying any possibility of a pre-licensing hearing on the remand issues (as well as other pending issues the Board simply ignored.)

Even the Smith Board may have acknowledged that the sheltering remand requires a hearing. At 31 of the Supplement, the Board stated:

> It is likely that this issue cannot be resolved on the existing record.

Further, the Board noted that: "We read the direction to permit a challenge ...." Certainly, these words at least intimate that a "hearing" is indeed required prior to resolution. Of course, in keeping with the general intellectual level of the Supplement, the word "hearing" is not mentioned at 31-33. Thus, the obvious contradiction between a

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26/ At 20, the Board states that

> the only special needs issue remanded by the Appeal Board that has the reasonable possibility of requiring a pre-licensing hearing and adjudication is that involving the dissemination methodology employed by the NHCDA in conducting the 1986 Special Needs Survey.

remand before licensing that requires a hearing before the issue can be resolved and an immediate licensing action in open violation of Intervenors' hearing rights under the AEA is masked in the "explanation." In fact, as discussed below, at yet another level the discussion of the resolution of the sheltering issue is remarkable. Not only does its resolution require a hearing but the Appeal Board expressly held that plan approval requires this resolution. Thus, even without the Intervenors' AEA rights to a hearing before licensing on material issues, the Appeal Board obviously understood that resolution of this issue would take place before the plan would be approved and any license issued, if that issuance was based on that approval. ALAB-924 at 68 n. 194.

Thus, instead of the irrelevant discussion concerning safety significance, the Board should have analyzed whether any of the remanded issues required a hearing. Because they obviously do, the Board's November 9 licensing action, even

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(footnote continued)

It is unclear from a reading of 20-22 whether the Board intended to grant summary disposition anew in direct violation of ALAB-924 or simply rule as to the absence of safety significance. If the latter, then Intervenors may get their hearing but obviously not pre-licensing. No doubt inadvertently, the Board in the quoted portion above correctly noted that the Appeal Board's remand may have required a "pre-license hearing". (emphasis supplied). Obviously, on November 9 the Smith Board made sure that even if ALAB-924 did require that, it could no longer comply. Indeed, we are supposed to believe that within 48 hours of November 7 the Smith Board had already determined that nothing in ALAB-924 was an impediment to licensing, even though on November 20, the Board still has not answered the question clearly. Obviously, if the Board obeys ALAB-924 and permits a hearing, that hearing certainly should have been pre-licensing. Again, the non-legal, non-judicial character of the November 9 action is clear.

assuming it had the jurisdiction to either reutter its NHRERP or alter the legal requirements for a license, was in direct and knowing violation of the AEA.

c. The relationship between the remanded issues and any licensing action

Finally, the Board completely inverts the relationship between post-hearing resolution of issues and licensing action. To grasp this third layer of illogic and error in the Supplement it is necessary to map out the possible actions available to a Board at the time of licensing. At the time of a licensing action, a Board can identify issues that:

1) can be closed after decision (under its oversight or by the Staff) but before licensing; i.e., prelicensing conditions; and

2) can be closed after decision and after licensing by the Staff; i.e., post licensing conditions.

Both of these patterns are available for matters that are appropriate for post-hearing resolution. At the time of a licensing action, however, a Board is not free to identify issues that:

1) are not now resolvable without hearing and simply postpone that hearing until after a license issues; or

2) require real world changes yet attach no conditions (pre- or-post-licensing) on the license requiring those changes; or

3) require real world changes that in turn will give rise to a hearing yet neither attach any conditions at all on the license concerning these changes nor provide for that hearing prior to licensing.

Yet, since ALAB-924 issued before the Smith Board rendered a license authorization and the disposition of the four remanded issues is, therefore, controlled by ALAB-924, it is appropriate to analyze the November 9 action as if the Board itself had just issued LBP-88-32 modified by ALAB-924. Seen in this light, it is obvious that the failure by the Board to attach <u>any conditions</u> pre- or-post licensing on its licensing action is simply a refusal to obey ALAB-924 and a further indication that the November 9 action was not a judicial act at all.

B. Board's Analysis of Specific Issues

In turning to the Board's detailed analysis of the remanded issues, Intervenors, then, will focus on the two relevant considerations in weighing the validity (and the motives) of the November 9 licensing action: did resolution of the remanded issues require a hearing? If not, what type of Licensing Board action was required at the very minimum if the Smith Board was obedient to ALAB-924's directives and concerned about public safety?

1. Letters of Agreement for New Hampshire Teachers

The Appeal Board noted a contradiction in LPB-88-32 between school teachers as "providers" and "recipients" of emergency services. It instructed the Licensing Board to provide further explanation: if it is the case that school teachers would ordinarily be expected to accompany their students in off-site evacuation situations, then although in some sense "providers", the teachers could still be appropriately characterized as "recipients" of services for whom no agreements were necessary. As the Appeal Board noted:

> LOAs need not be sought from everyone involved in the emergency response process.

ALAB-924 at 8. The Appeal Board further noted, however, that it appears the empirical question of what New Hampshire teachers are ordinarily expected to do (which controls the legal requirement for LOAs under Criterion II.C.4. of NUREG-0654) can not be answered on the present record: "the present record fails to disclose any definitive evidence addressing whether school personnel usually would (or would not) be expected to accompany their students in emergency evacuation situations." ALAB-924 at 10. If teachers are not expected to do this, then LOAs should be obtained.

This issue is purportedly completely resolved by the "analysis" set forth in the Supplement. Thus, the Board has taken the view that: 1) no further evidentiary record needs to be developed, and 2) no LOAs with any teachers are necessary.

Thus, no hearing was required and no pre- or post-licensing conditions were necessary or called for. Indeed, the Supplement is the Board's resolution of this remanded issue.[27/]

Unfortunately, the Board's analysis of this issue is woefully inadequate. The Board states at 7:

> We begin with an answer to the Appeal Board's factual inquiry, i.e., whether the teachers are ordinarily expected to accompany their students in an evacuation.

But, one can read and reread pages 7-12 and not find an answer to this simple question, the very question the Appeal Board believes had to be answered but could not be answered on the existing record. First, immediately after stating the question the Board states what its "assumption" had been in LBP-88-32. Then, the Board offers some scatter-shot: 1) it repeats Applicants' witnesses ipse dixit that school personnel "will do what must be done" (8); 2) it notes that these personnel are not "key"; and 3) it repeats its behavioral "analysis" regarding role abandonment (already noted by the Appeal Board as irrelevant to the remanded issue in ALAB-924 at 10). The Board also noted:

27/ In keeping with the format of the Supplement, the Board addresses the irrelevant question as to the "safety or regulatory [sic] significance" of this issue at 11. However, careful reading of 7-12 indicates that the issue has indeed been resolved no matter what its safety significance is. Intervenors are totally baffled by the unexplained although repeated reference to "regulatory significance" (Supp. at 11, 19 ("regulatory issue")). Obviously, the Board can not decide which regulations count and which do not.

> Mr. Strome, then New Hampshire's Director of Emergency Management, explained that whether or not teachers accompany school children in an evacuation depends upon whether they volunteer to do so . . . .

Finally, the Board stated:

> Be that as it may, if in fact, teachers are "service providers" contrary to our earlier rulings that they are not, the regulatory implications must, in obedience to ALAB-924, be addressed.

It is addressed in remarkably incoherent fashion: first, noting that LOAs are not required for individuals who collectively supply a labor force or activity, the Board asserts that if viewed as "providers" (because they accompany students offsite) the teachers are such providers "collectively as school system employees." (10) But if, as the Board notes, such services depend on certain teachers volunteering then not only is it obvious that they are not "ordinarily expected" to do this,[28/] but such volunteering is an individual matter having nothing to do with their membership in a collective labor force. Indeed, it is outright irrational to assert that:

> whatever services teachers may provide when they volunteer . . . is done collectively . . . .

Id. (emphasis supplied).

28/ Although obvious, it no doubt needs to be stated that in the sense used by the Appeal Board "ordinarily expecting" someone to do something is the opposite of hoping they volunteer to do it. (Supp. at 8 noting that "New Hampshire would hope that the teachers would be willing to participate" (emphasis supplied)).

Second, the Board simply reverses its determination in LBP-88-32 that the teachers are "providers" of services. Because the "volunteers" would be relying on school buses they would be "in every sense" recipients and not providers. (11) Not only is the Board no longer free to simply change its rulings on remand under the doctrine of law of the case, but this is pure legerdemain: they have to first "volunteer" to do something not ordinarily expected of them and only then do they become "recipients." But these "volunteers" are first "providers" and only then "recipients" in the limited sense used by the Board. Indeed, as further support for reversing its earlier determination, the Board now simply defines the "school system" as the unit that is the recipient. Teachers are just a part of that unit and "should not be separated from the school system as a part especially requiring LOAs." Id. Well, of course, they are required to be if what they are called upon to do is not ordinarily expected of them and they could avoid doing it (by simply evacuating on their own or seeing to their own families). Again, the simple question posed by the Appeal Board just can not find an answer.

Finally, the Board simply reasserts its irrelevant behavioral assumptions (in this iteration, dressed up as "profound[] belie[f]s") and in a remarkable linguistic amalgamation states:

> To the extent that school buses permit the teachers to see their children safely to reception centers, they are the recipients of services, albeit on behalf of their charges.

(11) (emphasis supplied).

Had the Smith Board acted in a judicial capacity on November 9 or November 20 it would have obeyed ALAB-924, determined that teachers are not ordinarily expected to perform these services (or sought further evidentiary submissions on this point), and then deferred any licensing action pending the submission of LOAs. Obviously, such submissions in light of the well-known, well-organized and vocal opposition to emergency planning among EPZ teachers would likely have led to challenge and further hearings. Knowing this and knowing that this would engender delay, the Smith Board simply acted and later defended its actions with illogic, irrationality and cant.

2. The 1986 Special Needs Survey

The Appeal Board reviewed SAPL's claim of error regarding a November 4, 1986 summary disposition decision resolving the challenge to the adequacy of the procedures used to identify the "special needs" population in New Hampshire. ALAB-924 at 15. Based on review of the materials presented to the Licensing Board on the motion, the Appeal Board found genuine issues of material fact which prevented summary disposition. It remanded the issue "for further consideration" by the Licensing Board. The Appeal Board then stated:

> Further, in light of our remand of this issue for additional proceedings, it is 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. Once the propriety of this special needs survey's methodology has been aired, it then will be appropriate for the Licensing Board to consider whether the number of vehicles and drivers identified as available to assist in transportation of the "special needs" population is sufficient.

ALAB-924 at 19-20. Thus, this remanded issue prevented any immediate licensing action for two different reasons: 1) the hearing that was denied would now have to be provided and under the AEA this has to be a pre-licensing hearing; and 2) the reversal of the basis for the demand estimate for transportation resources effectively reversed the lower Board's finding as to the adequacy of transportation resources and this issue (regardless of AEA hearing rights) <u>at the very least</u> would require pre-licensing resolution, because of its significance.

In reaching its judgment on this issue, the Appeal Board expressly rejected a harmless error analysis based on Intervenors' purported opportunity to contest the 1986 Survey's adequacy or on the Board's findings that an excess of transportation resources were available. The Appeal Board stated:

> 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, <u>see</u> LBP-88-32, 28 NRC at 695, as the foundation for a finding of harmless error. In many instances, intervenor assertions establish an upper limit against which the adequacy of planning can be judged . . . . <u>On the present record, however, 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</u>.

ALAB-924 at 19 n.47 (emphasis supplied).

The Licensing Board's "explanation" of this issue is astonishing even viewed against the standard set by the Supplement. As discussed above, the need to provide the hearing that was denied is never directly acknowledged by the Board. (Certainly, the Intervenors' right to that hearing before licensing was denied de facto on November 9.) Moreover, the issue of the adequacy of transportation resources for the "special needs" population in light of ALAB-924, is simply finessed by the Board by again granting summary disposition to the Applicants and relying on the transportation excuse rejected by the Appeal Board. There is no clearer example of an inferior board directly and openly contradicting the law of the case as announced by a superior tribunal.[29/] The reason, of course, for the Board's actions is that if it acknowledged the reversal of its finding concerning transportation resources then it could not claim, as it does in the Supplement at 2-6, that ALAB-924 has no impact on the "requisite findings of reasonable assurance of public safety." (4)

The Board begins its "explanation" by expressly reuttering its judgment concerning transportation resources (17). It then asserts that the survey deficiencies identified by SAPL "even if ultimately found to be meritorious, are either of no moment

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29/ A lower board does not have jurisdiction to reutter its judgment in direct contradiction and derogation of its superior board. Such an act is ultra vires and void ab initio.

or are amenable to relatively simple and timely correction.".[30/] Id. If the deficiencies are of "no moment" then apparently they are not material even though the Appeal Board has so held. But, if the survey can be fixed quickly and simply, then this should be done, the results tested in the adversary process "under the close scrutiny of the litigating parties" (5) and then the adequacy of transportation resources assessed anew by the Board just as the Appeal Board ordered it to do.

The Board, however, reasons that since the deficiencies can be corrected, neither those corrections nor a hearing on a reassessment of the results is necessary prior to licensing. For this proposition, the Board cites a statement from a December 15, 1981 Commission rulemaking and claims that reasonable assurance findings can be made at that point at which "there are no barriers to emergency planning implementation or to a satisfactory state of emergency

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30/ Throughout its discussion of this issue, the Board acts as if there is an evidentiary record on the adequacy of the survey. Of course, there is none because of the earlier erroneous summary disposition. Indeed, the Board appears to believe it is free to limit Intervenors' attack on the survey (which Intervenors never had an opportunity to mount) to the points raised in SAPL's pleadings in opposition to summary disposition. Of course, a party is obligated in opposing summary disposition only to establish a genuine issue of material fact. 10 CFR 2.749(d). It is under no obligation to present its full evidentiary case. Even cursory review of the Board's discussion of this remanded issue at 16-22 indicates that its entire "analysis" is based on this rather basic and fundamental error.

preparedness that cannot feasibly be removed." Supp. at 17 citing 46 Fed. Reg. 61134, 61135 (December 15, 1981).[31/] In fact, this statement is indistinguishable from the standard that applies to the review of emergency plans at the construction permit phase of a proceeding. See §50.34(a)(10), App. E.II. See also 14 NRC 279, 285 (1981) Director's Decision Denying Petition for Revocation of Seabrook Construction Permit (noting that current "information does not indicate that it is infeasible to develop an emergency plan, including an evacuation plan, for the area surrounding the Seabrook site.") Indeed, if this were the legal standard for licensing then the 1981 decision by the Director stated sufficient grounds to grant a full operating license for Seabrook!

31/ Needless to say, the Commission's statement is taken out of context. First, it is clear that the Board simply lifted this citation from the Waterford decision where it appears at 17 NRC 1076, 1104. Second, as the Waterford context makes clear this statement references the "predictive" nature of the "reasonable assurance" finding. It does not, standing alone, indicate what type of issues are amenable to post-hearing or, as here, post-licensing resolution. See cases cited at outset of this section. Third, the statement is taken from a proposed rulemaking which excluded hearings on emergency exercises. The rule (47 Fed. Reg. 30232 (July 13, 1982)) was reversed by the Court of Appeals. UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984). Indeed, the Waterford citation predated the Court's reversal of this rulemaking. As is clear when the portion cited by the Smith Board is put in context, this Commission statement was connected to its efforts at removing emergency exercises from litigation, an impermissible goal. 46 Fed. Reg. 61134, 61135. See also 50 Fed. Reg. 19323 (May 8, 1985) (Commission obeys UCS, maintains "predictive" nature of finding but repeats no language even remotely similar to quoted citation).

Turning its attention to the specific issues raised in SAPL's opposition to summary disposition, the Board advances a series of illogical and indeed false propositions that support its view that ALAB-924's reversal is not of any significance:

a) The Board asserts at 18 that SAPL advanced no "factual bases tending to establish that significant numbers...were, in fact, understated or unreported." Again, as noted, the Smith Board ignores the obvious fact that SAPL was denied a hearing and had no obligation to present its evidentiary case in opposition to summary disposition. Moreover, this assertion cannot be squared with the undisputed fact that SAPL indeed challenged the survey. Even the Board acknowledged that SAPL's "principal thesis" is that the "results obtained through that survey cannot be relied upon to adequately identify the number and particularized transportation needs" of the special-needs population. (17) (emphasis added).

b) Next the Board asserts at 18 that SAPL did not claim that the survey was "inadequate because of design flaws" (emphasis in original). Apparently, the Board now reads SAPL's challenge as merely a claim that the survey could be improved. Thus, although the Appeal Board reversed the Board's November 1986 summary disposition holding that "there were issues of material fact relating to the survey" in dispute (ALAB-924 at 16), the Smith Board in November 1989 (indeed within 48 hours of that reversal) again grants de facto summary disposition on these issues:

> Even if we accept SAPL's proposition as true...it would not materially weaken the Applicants' position that the design of the survey instrument was adequate... .

Supp. at 18.

c) Next, the Board asserts at 19 that any defects in the survey need not be resolved prior to licensing (or even as post-licensing conditions). This is so because part of the SAPL opposition to summary disposition concerned the summer special needs population which will not be present until summer 1990 and because there is a resources excess of 150% in the NHRERP. Again, obviously, Intervenors never presented an evidentiary case in which they might have challenged in detail the non-summer special needs count. However, the SAPL materials did challenge the methodology of the survey for all EPZ special needs populations, not just the summer population. Moreover, the Board simply adopts the harmless error analysis expressly rejected by the Appeal Board as noted above when it asserts that excess resources are now sufficient:

> We believe that the number, whatever it might be, is not so large as to render the existing excess transportation resources under the NHRERP inadequate.

Supp. at 21. This finding directly contradicts ALAB-924 at 19 n.47 set out above.

d) Finally, the Board asserts that no survey can guarantee identification of every special needs person. In support of this irrelevant truism, the Board states:

> Indeed, during the Massachusetts portion of this proceeding, the only witness offered by any intervenor on the issue of identifying and calculating the transportation needs of the homebound disabled testified that not all pre-identified homebound disabled would in fact use the transportation resources allocated to them.

Supp. at 21 n.12. (emphasis supplied). This reference to the litigation of similar issues on the SPMC is nothing short of astonishing when put into context. First, the Mass AG's contention on the SPMC directly challenged the adequacy of the mail survey used by the utility.[32/] Second, the Board (at Tr 19887-88), excluded Mass AG's testimony of one of the foremost survey experts in the country (that February 21 testimony is attached hereto as Exhibit 2), holding that the contention did not adequately put the parties on notice as to this issue and that the Mass AG's December 1988 answers to interrogatories did not adequately identify survey "methodology" as part of the issues presented by the contention.[33/] Third, the Board

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32/ The 1986 New Hampshire survey and the 1988 SPMC survey are similar in design and methodology. Obviously, SAPL Contentions 18 and 25 were sufficient to put at issue the adequacy of the survey's methodology in the New Hampshire proceeding. The language of the Mass AG's contention was even more direct in expressly challenging this methodology. See July 5, 1989 "Contentions Memo." at 59, JI 48 "The plan proposes to conduct periodic special needs surveys by mail. Plan 3.7. This method is unreliable for a number of reasons."

33/ It made this ruling notwithstanding its earlier holding that the filing of testimony prior to hearing is a form of discovery putting parties on notice as to the issues presented. See Tr 16444. The Mass AG's December 19, 1988 Answers to Applicants' Interrogatories Concerning JI Contentions 6 and 27-63 stated at 86: "Experts in the area of surveys and data gathering have uniformly proclaimed surveys by mail as being among the most unreliable methods of gathering information." The Mass AG's expert, Dr. Dillman, was not retained until February, 1989.

acknowledged in its decision on the SPMC, LBP-89-32 at ¶ 8.21 (287), that the SPMC survey was indeed flawed and had left out entire portions of the special needs population. Yet, it was sure that timely correction would be forthcoming. In light of its handling of this issue in the SPMC litigation, it is misleading for the Board to characterize the Mass AG's witness as "the only witness offered by any intervenor" during the Massachusetts portion of the proceeding on the issue of identifying and calculating the transportation needs of the special-needs population. Indeed, this is an outright falsehood.

In sum, then, the Board's disposition of this remanded issue is completely and totally in error. The Board denied Intervenors their pre-licensing hearing again, reuttered its judgment on transportation resource adequacy in derogation of ALAB-924, granted summary disposition within forty-eight hours of the Appeal Board's reversal of its earlier identical action, mischaracterized in form and substance the nature of SAPL's challenge to the 1986 Survey, and adopted a harmless error analysis based on purported planning excess expressly rejected by the Appeal Board. There is virtually not a single accurate statement of fact or law at 16 to 22 of the Supplement. The only conclusion possible upon review of these matters is that the Board is not acting in good faith.

3. ALS and ETEs for special populations

Upon review of the arrangements in the NHRERP for the evacuation of special facilities, the Appeal Board noted that the ETEs for special facilities may have been underestimated

because of a failure to include in the ETE the time it takes to move an advanced life support ("ALS") patient from a bed to a stretcher adjacent to the bed ("preparation time"). This process cannot be begun before the arrival of the evacuation vehicle and it may add an additional 28 to 60 minutes per patient to the total ETE for the facility.[34/] ALAB-924 at 25. Not only did Intervenors' witness Pilot testify that this preparation could not be begun before the evacuation vehicle arrived, but contrary to the statement of the Licensing Board in LBP-88-32 at 28 NRC at 699, the NHRERP also states that patients are assembled as and not before the evacuation vehicles arrive. ALAB-924 at 26 n.69. The Appeal Board, noting that increased evacuation times for special facilities close-in to the reactor effect the relative efficacy of sheltering as compared to evacuation, remanded the matter to the Board for resolution. The Board also stated:

> Correction of the preparation time omission suggested by the Licensing Board's statement 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.

34/ Assuming staffing was sufficient to permit each ALS patient to be shifted from bed to stretcher simultaneously and that all ambulances for these patients arrived at a special facility at the same time, the total additional time would be between 28 and 60 minutes for any one facility. If either of these assumptions could not be made (as seems obvious) the increase in the ETE for a particular facility would be a function of the staffing available, the number of patients and the arrival times of the ambulances. Obviously, these increases could be substantial.

ALAB-924 at 27 n.71.[35/]

First, it is clear that this issue is of sufficient importance to have required resolution prior to licensing, perhaps in a post-hearing but still pre-licensing posture. As discussed below, however, the Licensing Board's total confusion on this issue and the Applicants' repeated efforts to underestimate Seabrook evacuation times requires that these issues get resolved (pre-licensing and) by means of the adversary process. Thus, again, the Board's November 9 action denied Intervenors' hearing rights on material issues and failed to close or resolve open issues prior to licensing in any fashion. As should now be anticipated, the Board's November 20 explanation confuses, misstates and obfuscates these issues.

The Board begins its "analysis" by setting forth the total generic ETE used in the NHRERP for special facilities: 3.30 hours composed of

Mobilization time:	.33 hours
Inbound Travel: 90/50 + .50	2.30
Loading Passengers	.67
	3.30 hours

35/ The NHRERP provides no particularized ETEs for the special facilities on the grounds that no special facility ETE is longer than the overall ETE for the EPZ. Obviously, if the NHRERP has underestimated the special facility ETEs by a substantial amount that varies from facility to facility for the reasons set forth in the preceding footnote, then the NHRERP has not complied with governing regulations. Indeed, in reality, the plan may call for an evacuation of a facility whose dose minimizing action would be sheltering.

Supp. at 25 citing NHRERP, vol. 6 at 11-26. Next, the Board compares this estimate of loading time (.67 hours = 40.2 minutes) with the average preparation time estimated by Ms. Pilot (28 + 60 minutes/2 = 44 minutes), and finds that the Pilot estimate and the assumptions in the NHRERP do not "deviate in any significant way" and that an "increase of four minutes in the ETE would not affect the choice" of a PAR for the ALS patient population as a whole.(25) In this fashion, the Smith Board puts the Appeal Board's concern "in context". (25)

It is difficult to be certain how to interpret what the Smith Board does in this passage. It is so obviously wrongheaded to compare the preparation time which Pilot estimated at 44 minutes on average per patient with the loading time per facility that the Board must have realized it was comparing apples and oranges. The whole point of Pilot's testimony and the Appeal Board's remand in this regard was that before an ALS patient could be loaded at a facility preparation time was necessary and this preparation could not begin until the evacuation vehicle arrived. Thus, Pilot's 44 minutes per patient would have to be added to the NHRERP's estimate of 40.2 minutes of loading time per facility as long as the preparation could not begin until the evacuation vehicles arrived. The Intervenors in light of the circumstances here (a Board retroactively defending its own careless and hasty action) infer that the Smith Board is purposefully and intentionally

confusing the issue in the hope that the press of time, and the level of detail will prevent comprehension and review of its action.[36/]

The next maneuver made by the Board to avoid the issue has two parts: 1) the Board outlines notification and mobilization procedures for EMS vehicles and the special facilities and finds a margin of extra time there in which to perform Pilot's preparatory tasks; and 2) the Board asserts that the NHRERP can be amended post-licensing under the oversight of the Staff to:

> provide instructions to the staff of special facilities to prepare ALS patients for transportation at the order to evacuate.

(29).[37/]

Turning first to the mobilization procedures for the EMS vehicles, the Board accurately states that these vehicles would be notified and possibly mobilized at an Alert (26). If mobilized at Alert (obviously before an order to evacuate would issue) they travel from their point of origin to the State Transportation Staging Areas (TSAs). (26) Later when the order

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36/ The alternative is similarly bleak: after years of litigating ETE issues and a "careful" reading of ALAB-924 the Board simply fails to grasp even the rough edges of the remanded issue.

37/ It is unclear why any amendment would be necessary if upon the Board's present review of the issue "any inconsistency [as noted at ALAB-924 at 26] between our former ruling and the current issue evaporates." (28). This statement appears to be based on a belief that the whole issue turns on a miscitation in LBP-88-32. Of course, the miscitation is irrelevant to the issue and as noted by the Smith Board was corrected by the Appeal Board. (28). The relevant citations are to the Pilot testimony and to those portions of the NHRERP which clearly state that special facility patients will be assembled as and not before the evacuation vehicles arrive. ALAB-924 at 26 n.69.

to evacuate is given these vehicles travel from the State TSAs to the Local TSAs in the communities and from there to the individual facilities. As set out above, this 2-staged transit process for these vehicles is reflected in the NHRERP at vol. 6 at 11-26 in two separate estimates of "inbound travel time": 1) 90 miles at 50 mph = 1.8 hours (travel time from point of origin to State TSA) and 2) .50 hours which equals the time on average for traveling from the State TSA to the local TSA to the special facility. (See Vol 6, 11-19 to 11-20). Thus, because the staffs of the facilities are told when the order to evacuate is given and because, assuming the vehicles have already arrived at the State TSA, it is estimated that the vehicles will travel from there to the individual facilities in about 30 minutes, the Board believes that this 30 minutes

> provides an extra margin of time within which ALS patients can be readied for evacuation -- a margin of time beyond that assumed as loading time for those patients.

(27). Thus, because the Board believes this extra time exists, the remanded issue is resolved by simply requiring an amendment instructing the staff of the special facilities to begin preparation upon the order to evacuate.

On closer review, such a solution would be an egregious error and reflects again the Board's incomprehension of the remanded issue. First, assuming the planners knew that all necessary vehicles would arrive at each facility 30 minutes after the staffs were told to begin the preparation of their patients, the point made by Ms. Pilot and noted by the Appeal

Board was that each patient would require 28 to 60 minutes to complete the preparation prior to loading. Since there are no individual ETEs for each special facility reflecting "the means of mobilization of equipment and manpower to aid in evacuation" (ALAB-924 at 27 n. 71 citing NUREG 0654) there is no basis for assuming that within that 30 minutes even 1 patient will be ready to begin the loading process when the EMS vehicles arrive. Ms. Pilot estimated the process to take 28-60 minutes per patient and without knowing "on an individual basis" how many patients can be prepared simultaneously the impact of this additional process on the ETE for any one facility could be very great.[38/]

But more fundamentally, the Board misconceives the ETE scheme it cites, and indeed no extra 30 minutes is available at all! If the emergency is slower-paced and permits a two-staged mobilization of the EMS vehicles, then it is clear that at the point at which a decision comparing evacuation to sheltering for the special facilities is made, the appropriate ETE has nothing to do with the one cited by the Board and set out above, i.e. 3.30 hours. That estimate includes a 2.5 hour mobilization and travel time which would already have taken place before the protective action decision would have to be

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38/ For example, assume five ALS patients at a facility each of which takes 45 minutes to prepare and available staffing permits preparation of only 1 patient at a time. The total preparation time for this facility would be 3 hours 45 minutes and even if this process began 30 minutes early (the purported extra time the Board believes it has found) the total additional evacuation time would be over 3 hours, a significant amount and one having an impact on any determination whether this facility should evacuate or shelter.

made. In this situation, the much lower transit time for the EMS vehicles (.50 hours to travel from State TSA to Local TSA to facilities) would greatly reduce the special facility ETEs and indeed counterbalance (in whole or in part) the omission of any preparation time in the ETE calculation.[39/] Thus, the extra margin of time is available only when it is not needed. Assuming instead the very type of emergency for which the ETE calculation set out at Vol. 6, 11-26 was designed (in which the EMS vehicle upon the order to evacuate must first mobilize and then travel to the State TSA, the Local TSA and finally the facility) it is quite obvious that it would be an unmitigated disaster to amend the NHRERP and instruct the staff to begin the preparation time upon the order to evacuate when the evacuation vehicles will arrive over a very long and uncertain period of time up to 2.63 hours after that same order. It is obviously this simple point that led the planners to quite reasonably instruct the staff to begin preparations as and not before the evacuation vehicles arrive. Thus, in precisely those emergency situations in which the omission of any preparation time will most affect the special facility ETEs (because the mobilization time for the vehicles will be longest) there is absolutely no extra time before vehicle arrival to begin preparation, and indeed the uncertain and

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39/ The NHRERP is contradictory on this point. At Vol. 6, 11-21 "loading time" for special facilities is defined to include the travel time from the local TSA to the facility. But at 11-26 the inbound travel time calculation includes .50 hours which as is clear from 11-20 includes trips both from State TSA to Local TSA and from Local TSA to facility. The analysis above assumes the "loading itme" estimate reflects only activiities at the facility and no travel time from Local TSA to the facility.

varied arrival times of the evacuation vehicles demand that preparations be begun only upon arrival and not at the order to evacuate.

Thus, this remanded issue requires additional planning to determine the total preparation time per facility and then to calculate for each facility an appropriate ETE to determine if and when certain facilities should be sheltered when others should be evacuated. These plan changes are sufficiently complex and involve no small amount of judgment and, therefore, resolution of this remanded issue, too, requires further adversary proceedings. Again, the Board's actions on November 9 and November 20 neither resolve the issues in any rational fashion nor permit Intervenors' the hearing to which they are statutorily entitled.

4. A Sheltering Plan for the Beach Population

The Appeal Board reversed the Licensing Board's judgment regarding the present adequacy of the planning done to assure the implementability of the protective measures described in the NHRERP. Specifically, the Appeal Board found that so long as sheltering for the beach population is identified as the appropriate protective action in certain circumstances, the Commission's emergency planning regulations require preplanning and not ad hoc response. ALAB-924 at 63. The Appeal Board noted that a sheltering plan for the beach population would include a designation of what shelters are "suitable and available for use" (id. at 68) and a means of effectively

communicating the need for and the location of these shelters to the beach populations. Id. at 67. The issue was remanded for

> appropriate corrective action by the Licensing Board. When the potential shelters have been identified pursuant to our remand, it then will be appropriate for the Licensing Board (and for us) to address any intervenor concerns relative to the adequacy of that shelter.

Id. at 68-69. As discussed at length above, the Appeal Board also found that the absence of a sheltering plan prevented the NHRERP from being approved in its present posture.40/ Id. at 68 n. 194.

The Licensing Board's "analysis" of this remanded issue is brief.41/ Supp. at 31-33. The Board acknowledges the

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40/ Of course, the Appeal Board reversed the Licensing Board's approval of the NHRERP in each of the particulars surrounding the remanded issues. In each case, had the existing level of planning and implementing detail been sufficient notwithstanding the issues remanded, the Appeal Board would not have reversed but simply directed the lower Board to establish certain (post-hearing) pre- and/or post-licensing conditions to ensure that the details presently lacking are put in place in a timely fashion. (The Appeal Board, for example, itself directed a revision of the NHRERP regarding nonhost community fire department personnel. ALAB-924 at 70.) Thus, what the Appeal Board said expressly about sheltering detail (that the NHRERP is not approvable without it) it indicated by necessary inference about the need to determine whether LOAs for teachers are required, the need to litigate the 1986 Survey and establish a record basis for approving the level of transportation resource planning, and the need to determine whether the NHRERP recommends the correct protective actions for the special facilities in the EPZ.

41/ Half of its discussion is based on the Board's misinterpretion of the Appeal Board's references to the sheltering implementing procedures for transients without transportation that are in the NHRERP. The Smith Board asserts, that it is "directed to assure that the same implementation action" (32) is taken for the general beach population as for the transit-dependent transients. It then proceeds to an irrelevant discussion of the differences between these groups. Of course, the Appeal Board never said "treat transit-dependent transients the same as transients with (footnote continued)

likelihood "that this issue cannot be resolved on the existing record." (31) Thus, the Board expressly acknowledges that the remanded issue is not of the type amenable to post-hearing resolution under NRC law. Nonetheless, is totally ignores the relationship between an issue requiring a hearing that is identified and presented before licensing and that licensing action. As a result, it denied Intervenors' AEA rights to a hearing prior to licensing on all issues material to that licensing.42/ Equally remarkable was the Board's complete failure (on November 9 and November 20) to attach any post-licensing conditions on the license related to this unresolved issue. Instead the Board's "analysis" was as follows:

(footnote continued)

transportation." (32). Instead, the Appeal Board simply found that the same level (not kind) of planning and implementing detail is required for both groups. ALAB-924 at 67. The Appeal Board obviously understood that "sheltering" for beach transients without transportation which is in the plan is part of the evacuation procedure and that no present planning has been done for sheltering (as opposed to evacuating) the beaches. Thus, nothing the Smith Board says in this regard even begins to "question the reasoning" (33) of ALAB-924 since that reasoning remains elusive for it.

42/ It is beyond argument that the remanded issue is material. The Smith Board noted that the "Appeal Board ruled that implementing detail for the sheltering option is a deficiency that must be remedied before the plan can be approved." Supp. at 4 n. 3. Also, it hardly seems credible that the NRC could interpret the AEA to mean that Intervenors get a hearing on emergency planning before licensing but then if they successfully challenge the plan in a material way at this hearing, a license may then issue and further hearings be held after licensing. A successful challenge on a material issue requiring a hearing before resolution as a matter of law prevents the NRC from lawfully issuing a license.

> As a safety matter, that same low probability would permit post-licensing consideration. The New Hampshire beach population does not peak until July.43/ Implementing measures may not be difficult to effect. (31) . . . The Board concludes that 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. (33)

It is obvious, as discussed at length above, that the Licensing Board is simply applying a "no significant hazards" analysis to this remanded issue and postponing the required hearing until after the licensing action. This it simply can not do. Moreover, even its stated rationale for its irrelevant safety judgment is obviously flawed. First, as noted above, the Board confuses evacuation with sheltering concerns when it refers to peak beach populations in July. Obviously, any transients on the beach at all at any time need a sheltering plan if sheltering is the appropriate response.

Second, the Board's assertion that because the circumstances under which sheltering would be the appropriate

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43/ Apparently, the significant although not peak populations that visit the beaches year round can simply be disregarded in toto for the purposes of the Board's "analysis." Obviously, the Board here is confusing beach ETE issues whose focus is "peak" beach population for purposes of establishing an upper limit on an ETE with beach sheltering issues whose focus is on any transient beach population requiring shelter. Indeed, there is no record support even for the assertion that in the middle of January there are no transients on the beaches who would need to shelter in the appropriate circumstances. As a Hampton police detective testified without contradiction "On a 40-degree day in January, that [Hampton] beach is jammed with people." Tr. 3708-09. In fact, in light of the number of summer time use only structures that would be closed up or boarded up in the winter, an ad hoc sheltering response for the no doubt comparatively small wintertime transient beach population might be just as unworkable.

protective action are limited there is no safety significance to this deficiency is also confused.[44/] The Board simply asserts that there is a "low probability of selecting the sheltering option for the beach population." (33) But the basis for this statement has to do with the Board's understanding that at the time of an emergency uncertainties as to key decision criteria will tend to favor evacuation as the protective action of choice.[45/] LBP-88-32, 28 NRC 775. Assuming the Board is correct and further that no assumptions are made about what kind of accident will occur, then there is in general a low probability of selecting sheltering as compared to evacuation. However, this is not the same as asserting that the particular kind of accidents for which sheltering is appropriate are of low probability compared to all other accidents in the planning basis.[46/] This is an empirical question which the Board does not even address.

44/ Intervenors have already pointed out that the Appeal Board expressly held that this deficiency precludes plan approval and the "reasonable assurance" finding prior to resolution. Obviously, the Smith Board does not see any safety significance in the fact that existing planning does not permit that finding. In this regard, as discussed below, the Smith Board's licensing action directly raises the issue of the nature of emergency planning as a first or second tier regulation.

45/ This discussion assumes the Board's analysis is correct. Intervenors challenged it vociferously in Mass AG's Appeal Brief at 56-71 and again in Intervenors Petition for Review of ALAB-924 filed November 22, 1989.

46/ All accidents are low probability events. This truism would not support a judgment that a planning deficiency is not safety significant. The Smith Board is obviously asserting (without any basis) that the accidents for which sheltering is appropriate are more improbable than all other accidents when it made its safety judgment.

It is possible that the very accidents for which sheltering would be appropriate are more probable than all other accidents in the planning spectrum. See ALAB-924 at 50-51, 52 (quoting Intervenors' witness Goble that puff releases are "less severe"). Although this may appear paradoxical, upon reflection it is clear that there is a difference between the lower Board's approval of the NHRERP's use of sheltering in very limited circumstances based on the need to plan for a range of accidents only a small percentage of which would require sheltering, and any determination that this small percentage of accidents are less probable than all the other accidents for which evacuation would be appropriate. The Board is simply wrong in basing its safety assessment on the purported low probability of these kind of accidents. Indeed, to the extent they are less serious design-basis accidents they are more probable than the others in the planning basis. The Board has confused the probability of a specific accident occurring with the probability that evacuation would be preferred over sheltering assuming planning is necessary for an entire range of accidents. Indeed, if sheltering was appropriate at this site for only one accident sequence and evacuation appropriate for all other accidents it would obviously be correct to limit sheltering to that one accident. Yet, if that accident were more probable than all other accidents (as is likely if it "less serious" and within the

design basis) having a sheltering plan would be more not less safety significant than adequate provisions for an evacuation. Thus, there is absolutely no basis for the Board's judgment that the absence of beach sheltering provisions are of no safety significance either because beach populations do not peak until July (which is irrelevant) or because accidents requiring sheltering are "low probability" accidents (which is unsupported in the record and probably false).[47/]

C. The Relevance of 50.47(c)(1)

In its November 14 Order in response to Intervenors' November 13 Motion to Revoke, the Appeal Board intimated that the Smith Board's licensing action on November 9 may have had some undisclosed relationship to 10 CFR 50.47(c)(1). The Smith Board obviously saw no relationship.[48/] Instead, it chose to

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47/ Intervenors are at a loss to grasp the relevance to any rational judgment of safety significance that the "[i]mplementing measures may not be difficult to effect." (31) An emergency core cooling system, or a containment structure "may not be difficult to effect" either but this fact has no bearing in assessing the safety significance of these measures. No doubt, the Smith Board intended this statement only as further support for its irrelevant point that beach populations will not peak until July. Providing a sheltering plan by July does little good for beach transients in need of such a plan before July.

48/ In its November 9 decision, the Board made no reference to 50.47(c)(1) in its brief comments on the impact of ALAB-924 on the vitality of its NHRERP findings. Even though the Appeal Board pointed it in that direction on November 14, the Smith Board's November 20 "explanation" makes no reference at all to 50.47(c)(1). That should be the end of it since no findings have been made pursuant to 50.47(c)(1) on the record. Intervenors, however, at this juncture take no chances, and in the text above indicate in detail why 50.47(c)(1) provides no solace for those who would license Seabrook in the present state of these proceedings.

base its action, as analyzed above, on the clear denial of Intervenors' hearing rights, the illegitimate reutterance of its findings and judgments reversed in ALAB-924 and the illicit substitution of its own personal view of the equities for law. In what follows, Intervenors explain why in the circumstances of this case, 50.47(c)(1) would also not support the Board's actions.

1. Possible Relevance of 50.47(c)(1)

The Appeal Board's reference to 50.47(c)(1) may have been based on its understanding that if the Smith Board were obedient to ALAB-924, it would acknowledge that its determination that the NHRERP was in compliance with the planning standards of 50.47(b), in part, had been reversed. Thus, the Appeal Board may have reasoned that the only conceivable way the Smith Board could nonetheless have authorized license issuance was pursuant to 50.47(c)(1) which establishes a different legal basis on which licensing could occur. Without relying on (c)(1), in other words, the Smith Board by necessity must simply be contravening ALAB-924 and the law of the case.

2. Proper Interpretation of 50.47(c)(1)

In the present circumstances of this case, however, (c)(1) provides no alternative basis for licensing. That section has a fairly obvious application: if "deficiencies" (defined as failures to meet the (b) standards) exist in an emergency plan then licensing is nonetheless appropriate if the deficiencies are not significant for the plant in question, or there are

adequate interim compensatory actions that have been or will be taken promptly or there are other compelling reasons to permit plant operation. Nonetheless, it is quite obvious that before licensing under (c)(1) is possible the present state of planning must permit the (a)(1) "reasonable assurance" finding to be made. First, (a)(1) states clearly that "no operating license . . . will be issued unless a ["reasonable assurance"] finding is made." Nothing in (c)(1) removes this overarching prelicensing requirement. Instead, (c)(1) only relaxes the stringency of 50.47(b) which states that offsite plans "must meet the following standards." Second, when the Commission amended (c)(1) to establish criteria for evaluating utility plans it expressly incorporated the (a)(1) standard into (c)(1). See (c)(1)(iii) (identifying public endangerment standard with (a)(1)'s "reasonable assurance" standard). Obviously, there is no basis for the position that <u>utility plans</u> evaluated pursuant to (c)(1) have to meet the (a)(1) standards but <u>governmental plans</u> do not.

This persistence of the need for the (a)(1) finding in the (c)(1) posture is confirmed by express Commission statements in this regard. The Commission has noted that some "deficiencies"

> call[] into question whether reasonable assurance may be found that public health and safety will be adequately protected in a radiological emergency. However, some deficiencies may be found that only reflect the actual state of preparedness which may be easily remedied; these types of deficiencies should not delay licensing action. See 10 CFR 50.47(c).

3. "Reasonable Assurance" in Light of ALAB-924

At the outset, the Smith Board's "significant safety" standard (imported perhaps from 10 CFR § 2.734) must be rejected in addressing this issue. As noted, the Smith Board did not mention (c)(1). Moreover, any "deficiency"[50/] in a (b) standard is "safety significant" by definition. Further, to the extent an (a)(1) finding requires at least that a plan be in compliance with the (b) standards, a "deficiency" with regard to those standards precludes the "reasonable assurance" finding.[51/] The "safety significance" of each of the (b) standards is obvious from the fact that the Commission required compliance with each of these standards before a "reasonable assurance" finding could be made, and, in turn, made the "reasonable assurance" finding a precondition to licensing. Thus, as a necessary consequence of the regulations themselves, a Licensing Board facing "deficiencies" in an emergency plan (such "deficiencies" being at present the law of the case on remand) is not free to assess the "safety significance" of

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50/ Of course, there has to be a "deficiency" in the plan as measured against the (b) standards for (c)(1) to be relevant. A minor omission or detail that is amenable to post-hearing resolution (either as a pre- or post licensing condition) is not a "deficiency" under 50.47(c)(1). As discussed at length above, ALAB-924 expressly characterized the remanded issues in light of the existing record as requiring further proceedings, and either by implication or expressly (in the case of sheltering) characterized these issues as significant enough to prevent plan approval at this time.

51/ Intervenors have asserted in their briefs on the certified question that the (a)(1) finding requires a rule of reason judgment, which begins with compliance with the (b) standards but does not end there.

those deficiencies to any "reasonable assurance" finding pursuant to (a)(1). Such a course is tantamount to a challenge to the regulations.

Nonetheless, (c)(1) obviously permits the (a)(1) finding notwithstanding these deficiencies. Thus, what is permitted under (c)(1) is an assessment whether at this particular plant the deficiencies (which are generically at least safety significant and prevent the (a)(1) finding) are nonetheless not significant. The Board's "explanation" offers nothing to indicate that it has found that the "deficiencies" in the NHRERP are not significant for the Seabrook plant. It appears simply to have ruled in general that the "deficiencies" are not safety significant.

4. Issues are "significant" and there are not compensatory measures

The Board's failure in this regard is rooted in the facts themselves. The remanded issues are significant for this plant. First, it is unclear why the Appeal Board would have reversed and remanded insignificant issues. Indeed, to the extent the Appeal Board rejected arguments that the "deficiencies" in question were not important at this site and, therefore, did not prevent a "reasonable assurance" finding, any ruling on this issue pursuant to (c)(1) is controlled by the law of the case. ALAB-924 at 19 n. 47 (expressly rejecting transportation resource excess as basis for "harmless error" or lack of significance of issue because no record basis supports finding of "excess"); 68 n. 194 (expressly noting that

in "absence of any concerted attempt to incorporate implementing details" "deficiency must be remedied" for plan approval).[52/]

Second, nothing about this plant makes these deficiencies in the (b) standards insignificant and there are no compensatory measures at all in place. As detailed above, the issues involve: 1) availability and agreement of teachers to accompany students in an evacuation; 2) absence of any finding that transportation resources for special needs population are adequate; 3) accuracy of the ETEs for the special-facilities, including those close-in to the reactor; and 4) the absence of an implementable protective measure for the beach population. In an evacuation at Seabrook, as at any other plant, deficiencies 1) - 3) are significant to public safety, and there are no compensatory measures in existence.[53/] In an

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52/ In fact, it is quite obvious that to issue a Seabrook license in the present posture of this proceeding is nothing less than to grant an exemption pursuant to 10 CFR 50.12(a)) from the "reasonable assurance" finding required before licensing by 50.47. See Limerick, 21 NRC supra at 1610-1613. There simply is no way on the present record in light of existing law that the "reasonable assurance" finding can be made. Of course, SAPL v. NRC, supra, makes any exemption for Seabrook from the emergency planning regulations legally impossible.

53/ This is hardly surprising since ALAB-924 identified the deficiencies on November 7 and a license was authorized on November 9 without conditions.

emergency at Seabrook in which sheltering was appropriate for the beach population, it would obviously be significant if a sheltering plan did not exist.[54/] Again, there is no compensatory measure in existence in this regard.

Third, it is not a little ironic to find the Licensing Board proceeding as if that "reasonable assurance" is a judgment-call it is able to make independently of compliance with the (b) standards based on some assessment of the present level of public safety afforded by the plan. Of course, just such a risk-based assessment was rejected by the Smith Board when it rejected the Sholly/Beyea testimony.[55/] Fourth, any finding that the deficiencies in the (b) standards are not significant for the plant in question or are otherwise adequately compensated for effectively puts an end to any further proceedings on the remanded issues because resolution

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54/ Intervenors, above, disposed of the Smith Board's confused notions involving "peak" beach periods of the year and the asserted low probability of the accidents requiring sheltering. As to this last point, the Appeal Board already rejected the notion that the unlikelihood of using sheltering at the site eliminates any "deficiency." ALAB-924 at 65. How something would be a "deficiency" in a plan for a site even though it is unlikely to be utilized, and yet not be "significant for that plant" based on this unlikelihood, Intervenors leave to others to explain.

55/ Of course, the Smith Board has turned the issue on its head: Intervenors asserted that the (a)(1) reasonable assurance finding required a judgment of risk and public safety over and above compliance with the (b) standards. The Smith Board made a judgment "under and below" such compliance.

of these issues would no longer be "material" to licensing. The remanded issues are "material" (and indeed were remanded) because the Appeal Board held they were significant to the issue of emergency planning adequacy at Seabrook, could not be resolved on the present record and prevented "plan approval", i.e. the reasonable assurance finding. There is no record support for simply closing out these issues at this point and yet that is what a 50.47(c)(1) finding would entail.

5. 50.47(c)(1) and Intervenors' hearing rights.

50.47(c)(1) can not be used to circumvent Intervenors' hearing rights under the AEA. Therefore, if the remanded issues require further hearing, that hearing must be held prior to licensing. Moreover, Intervenors have never been heard on the issue of whether the "deficiencies" in the NHRERP are significant for the plant in question or whether there are adequate interim compensatory measures. Certainly, the Applicants have never so demonstrated as required by 50.47(c)(1). See Intervenors' November 15, 1989 Request for Hearing Regarding Any Determination That a Seabrook Full Power License May be Authorized Based on 50.47(c)(1). Finally, 50.47(a)(2) requires that an NRC finding of "reasonable assurance" be based on FEMA's findings and determination. FEMA has never opined on whether the deficiencies identified in ALAB-924 are significant for the plant in question or whether there exist adequate interim compensatory measures.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL April 27, 1990

CERTIFICATE OF SERVICE

I, John Traficonte, hereby certify that on April 27, 1990, I made service of the enclosed MASS AG'S MOTION TO AMEND BRIEF IN SUPPORT OF HIS APPEAL OF LBP-89-32, LBP-89-33 AND RELATED RULINGS via Federal Express as indicated by (*), by hand as indicated by (**), and by first class mail to:

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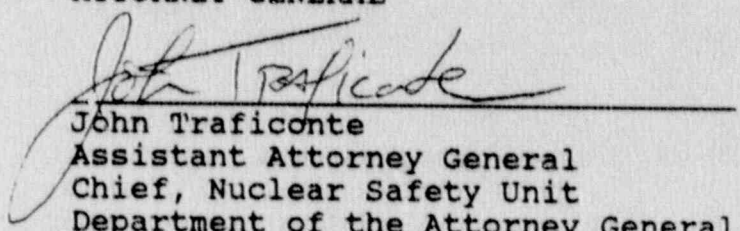

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