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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

October 18, 1990
(ALAB-940)

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

John Traficonte, Boston, Massachusetts (Matthew T. Brock, Boston, Massachusetts, was on the brief), for the intervenors, James M. Shannon, Attorney General of Massachusetts, New England Coalition on Nuclear Pollution, and Seacoast Anti-Pollution League.

Thomas G. Dignan, Jr., Boston, Massachusetts (with whom George H. Lewald, Jeffrey P. Trout, Jay Bradford Smith, Geoffrey C. Cook, and William L. Parker, Boston, Massachusetts, were on the brief), for the applicants Public Service Company of New Hampshire, et al.

Richard G. Bachmann for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

While the hotly contested full-power operating license proceeding for the Seabrook facility inched forward, the applicants sought, and eventually received, a low-power testing license for the completed plant pursuant to 10 C.F.R. § 50.57(c). That section permits the grant of such a license upon the successful resolution of all issues relevant to low-power operation, even though other issues

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germane to full-power operation remain to be resolved in the still ongoing licensing proceeding. After receiving a low-power license, the applicants initiated their testing program at the time the full-power proceeding was drawing to a close.[1] At the conclusion of the low-power testing program, the applicants also conducted a natural circulation test that went awry and was not completed under the authority of the low-power license. The events surrounding this incident formed the foundation for several motions filed jointly by the Massachusetts Attorney General, the Seacoast Anti-Pollution League, and the New England Coalition on Nuclear Pollution ("intervenors") to admit into the full-power proceeding late-filed contentions or, alternatively, to reopen the record. The Licensing Board

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[1] The terms "low-power license" and "full-power license" are not used in the Commission's regulations. They are words of art employed in the lexicon of the licensing process to distinguish two types of operating licenses. Although the regulations are not completely consistent in describing a low-power license, it is generally understood to mean an operating license authorizing low-power testing up to five percent of rated power. See 10 C.F.R. §§ 2.764(f)(2)(i),(iii), 50.47(d); id. Part 50, Appendix E, § IV.F.1. But see 10 C.F.R. § 50.57(c) ("an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation"). On the other hand, a full-power license generally authorizes operation up to and including the full thermal power rating of the facility. The latter term is only used in instances when the facility in question has received a separate low-power license. If no low-power license is involved, the term operating license is understood to mean a full-power license.

denied the intervenors' motions,[2] an action the intervenors now appeal. For the reasons that follow, we affirm the result reached by the Licensing Board.

I.

The events that triggered the intervenors' motions are set forth in the Licensing Board's memorandum and need not be repeated fully here.[3] It suffices to note that, while the applicants were conducting the natural circulation test, a steam dump valve failed in the open position causing the pressurizer water level to drop below the seventeen percent level at which the applicable test procedure required a manual trip to shut down the reactor. From the time the pressurizer level fell below this point, the applicants' operators waited seven minutes before tripping the reactor, even though NRC personnel monitoring the test brought the water level of the pressurizer to the operators' attention on at least two occasions. When the applicants' operators finally ordered the manual trip, it was not in response to the pressurizer water level, but rather in response to an approaching pressure trip criterion.

After the incident, the applicants' operating personnel, led by its Vice President-Nuclear Production, participated in a conference telephone call with the NRC's onsite inspectors and the agency's regional office staff.

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[2] LBP-89-28, 30 NRC 271 (1989).

[3] See id. at 284-86.

The applicants then asserted what they now concede was an unwarranted defense of their actions and omissions, claiming their actions were more conservative than otherwise would have resulted from strict adherence to test procedures and that their then-existing policy for following those procedures was adequate. The applicants also proposed to the agency that reactor restart occur in parallel with an evaluation of the event; however, when NRC personnel expressed concern over this proposal, the applicants agreed not to restart the reactor without NRC concurrence. After a second telephone call between the applicants and the agency on the following day, the NRC issued a confirmatory action letter (CAL) to the applicants. This letter confirmed the agency's understanding that, prior to any restart of the reactor, the applicants would conduct a review of the event; institute short-term corrective actions to address che deficiencies identified by the review; identify and schedule needed long-term corrective actions; and obtain the NRC's concurrence before restarting the reactor.[4]

The applicants' review efforts were subsequently documented in a response letter to the staff's CAL. The

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[4] See Confirmatory Action Letter 89-11 from William T. Russell, Regional Administrator, to Edward A. Brown, President and Chief Executive Officer, New Hampshire Yankee Division, Public Service of New Hampshire (June 23, 1989) [hereinafter CAL], appearing as Exhibit 2 to Intervenors' Motion to Admit Contention, or, in the Alternative, to Reopen the Record, and Request for Hearing (July 21, 1989) [hereinafter Intervenors' Motion].

applicants' submission included a corrective action plan, an event evaluation report, an operational issues evaluation, and a management effectiveness analysis report.[5] The applicants also filed with the agency a Licensee Event Report on the incident.[6] In response to the incident, the agency dispatched an augmented inspection team to Seabrook and its findings were documented in a lengthy inspection report.[7]

Almost a month after the natural circulation test transient, the intervenors filed their first motion to admit a contention arising from the test incident or, alternatively, to reopen the record.[8] The intervenors repeatedly refer to this contention as a low-power testing contention. The gist of the intervenors' contention was that the natural circulation test incident demonstrated that the applicants' operators and management personnel were neither adequately trained nor qualified. According to the contention, the test incident also showed that the

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[5] See Letter from Edward A. Brown, President and Chief Executive Officer, New Hampshire Yankee, to United States Nuclear Regulatory Commission (July 12, 1989) and Enclosures 1-4, appearing as Attachment A to Applicants' Answer to Intervenors' Motion to Admit Contention (August 7, 1989) [hereinafter Applicants' Answer].

[6] See Attachment D to Applicants' Answer.

[7] See Inspection Report No. 50-443/89-82 (August 17, 1989), appearing as Attachment 5 to NRC Staff Response to Intervenors' Motion to Admit Contention (August 18, 1989).

[8] See Intervenors' Motion.

applicants' managerial and administrative procedures and controls were insufficient for the applicants to operate Seabrook in accordance with the license application, the Commission's regulations, and the Atomic Energy Act.[9] The intervenors' motion was accompanied by the joint affidavit of their experts. In the affidavit, the affiants recited the events surrounding the transient, outlined their view of the applicable regulatory requirements, and opined that the applicants violated certain regulations. The intervenors' experts also concluded that some improvement in the applicants' training program was essential, that the applicants' failure to follow procedures has significant safety implications, and that another recent agency inspection report suggests that the natural circulation test incident might not be an isolated instance but rather part of a pattern of procedural noncompliance.[10]

A month after their first filing, the intervenors filed a second motion seeking leave to submit additional bases for their original contention, bases which they had culled from the staff's recently issued inspection report. The motion also sought to admit two additional so-called low-power testing contentions or, in the alternative, to reopen the

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[9] Id., Exhibit I.

[10] Id., Attachment A.

record.[11] The two further contentions alleged, first, that the applicants' maintenance practices for valves and quality control over such practices were seriously defective, and, second, that the applicants currently did not have adequate staff and procedures to conduct any operational testing.[12] Like their initial contention, the intervenors' second and third contentions were accompanied by the joint affidavit of their experts. The affidavit set forth the affiants' views on the probable safety significance of the applicants' omissions with respect to test training, maintenance, and quality control.[13]

The Licensing Board denied both of the intervenors' motions. With respect to the first, the Board determined, inter alia, that the intervenors' motion must meet the Commission's standards for reopening the record.[14] In applying those standards, it then found that the motion failed to present a significant safety issue and failed to demonstrate that a materially different result would have been likely had the intervenors' proffered evidence been

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[11] Intervenors' Motion for Leave to Add Bases to Low Power Testing Contention Filed on July 21, 1989 and to Admit Further Contentions Arising from Low Power Testing Events or, in the Alternative, to Reopen the Record and Second Request for Hearing (August 28, 1989).

[12] Id., Exhibit 1 at 15, 17-18.

[13] Id., Exhibit 3.

[14] LBP-89-28, 30 NRC at 277-83.

considered initially.[15] With regard to the second motion, the Board found it contained fatal pleading defects.[16] Unlike its detailed treatment of the intervenors' first motion, however, the Board did not closely analyze the substance of the intervenors' second and third proffered contentions, other than to indicate that the second contention failed to raise a significant safety issue as required of a motion to reopen the record.[17]

II.

A. Before us, the intervenors claim that by rejecting their low-power testing contentions the Licensing Board violated their right under section 189 of the Atomic Energy Act[18] to a hearing on all issues material to the issuance of a full-power license. They argue, therefore, that the Board erred in encumbering their statutory hearing right by requiring their contentions to meet the Commission's stringent criteria set forth in 10 C.F.R. § 2.734 for reopening the record. In elaborating upon this proposition,

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[15] Id. at 284-92.

Even though it found the motion did not meet the standards for reopening the record, the Board nevertheless went on to consider the intervenors' first proffered contention under the criteria for late-filed contentions and apparently found those factors weighed against its admission. See id. at 292-93.

[16] Id. at 294.

[17] Id. at 295-97.

[18] 42 U.S.C. § 2239.

the intervenors first offer various arguments as to why low-power testing is material to the grant of a full-power license. They then argue that two decisions, Union of Concerned Scientists v. NRC[19] and San Luis Obispo Mothers For Peace v. NRC,[20] establish their right to a hearing on all issues material to the grant of a full-power license without their contentions having to meet the Commission's standards for reopening the record.[21]

The staff counters by focusing upon the "hearing rights" premise of the intervenors' argument. It asserts that neither of the cited decisions bestows such an unfettered right to a hearing upon the intervenors and, therefore, the Licensing Board correctly applied the Commission's reopening standards to the intervenors' contentions.[22] The applicants, on the other hand, disagree with the "materiality" premise of the intervenors' argument as well as their "hearing rights" claim.[23]

Initially, we note that the intervenors have attempted to structure their argument before us to parallel the UCS

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[19] 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) [hereinafter UCS].

[20] 751 F.2d 1287 (D.C. Cir. 1984). See infra note 44.

[21] Intervenors' Brief on Appeal of LBP-89-28 (Dec. 19, 1989) at 10-23 [hereinafter Intervenors' Brief].

[22] NRC Staff's Brief in Opposition to Intervenors' Appeal of LBP-89-28 (Jan. 30, 1990) at 4-14.

[23] Applicants' Brief (Jan. 19, 1990) at 17-30.

decision. That case involved the mandatory test of a facility's offsite plan for responding to a radiological emergency -- a matter incidental to the safe physical operation of a commercial nuclear reactor. In UCS, the court held that, because the NRC's regulations made the correction of emergency planning deficiencies identified during the exercise a requirement of the Commission's ultimate licensing decision, issues concerning the exercise were "material" to the grant of a license and, therefore, the agency could not eliminate such issues from the statutorily required licensing hearing.[24] In an effort to reach the same outcome on materiality as that reached in UCS, the intervenors' seek to equate low-power testing of the Seabrook reactor with emergency planning exercises even though these two regulatory concepts are totally distinct.

Further, in an attempt to give their argument an even tighter fit in the UCS mold, the intervenors also resort to a bit of legerdemain. They label their contentions "low-power testing contentions" and then argue that low-power testing is material to full-power licensure, so they are entitled to a hearing on such material issues (i.e., their low-power testing contentions) without having to satisfy the Commission's standards for reopening the record. But the intervenors' label for their contentions is misleading. The issues raised by the contentions are not

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[24] 735 F.2d at 1441-42.

unique to low-power testing. Rather, the questions presented raise more generic matters concerning plant readiness for full-power operation, not issues inherent to low-power testing. This being so, the intervenors' so-called low-power testing contentions are no different from any other contention that focuses upon whether it is appropriate to license a facility for actual operation.[25] Nevertheless, even if we ignore the intervenors' sleight of hand and accept their argument as presented, it still fails.

To establish their materiality premise, the intervenors initially maintain that low-power testing performance is per se material to the issuance of a full-power license where, as here, the applicants conduct such testing under a separate low-power license granted pursuant to 10 C.F.R. § 50.57(c) while the full-power operating license proceeding is still ongoing. In these circumstances, the intervenors claim that the applicants must successfully complete the testing as a precondition for meeting the minimum regulatory requirement for a full-power license, i.e., that there is

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[25] For example, the intervenors' first late-filed contention alleges that the applicants' operators and management personnel are not adequately trained or qualified to operate the plant. Yet that is essentially the same issue another intervenor, the State of New Hampshire, filed as contention NH-13 at the start of the operating license proceeding. The Licensing Board admitted that contention (see LBP-82-76, 16 NRC 1029, 1042 (1982)) and then granted the applicants' motion for summary disposition on it. See Memorandum and Order (Memorializing Prehearing Conference, and Ruling on Motion for Summary Disposition) (May 11, 1983) at 14-18 (unpublished).

reasonable assurance the plant will be operated without endangering the public health and safety and in accordance with the Commission's regulations. In the next breath, however, the intervenors argue that, even if a separate low-power license is not issued, low-power testing performance is also a material component of full-power licensing when it is conducted under the authority of a full-power license prior to full-power operation. In either situation, the intervenors assert that low-power testing is per se material to full-power licensing and, therefore, they are entitled to a hearing pursuant to section 189a of the Atomic Energy Act on their low-power testing contentions.

Because it might seem a bit incongruous to issue a full-power operating license for a facility that has yet to complete successfully a low-power testing program, the intervenors' materiality argument has a certain surface appeal. But closer examination of this argument in the context of the Atomic Energy Act and the Commission's regulations shows it to be fatally flawed. This flaw is most easily highlighted by first examining that portion of the intervenors' argument positing that low-power testing performance is per se material to the grant of a full-power license even when such testing is conducted pursuant to a full-power license (rather than a separate low-power license) but before full-power operation has been achieved.

Because testing a commercial nuclear reactor at any power level necessarily involves operating the plant or, in the words of section 101 of the Atomic Energy Act, entails the "use" of a "utilization" facility, low-power testing can be conducted only after the Commission grants an applicant a license to operate the plant.[26] Low-power testing thus involves operating an already licensed reactor. Further, under section 189a of the Atomic Energy Act and as pertinent here, an intervenor's hearing rights attach only to a proceeding for the "granting" of an initial operating license.[27] The statute affords no intervenor hearing rights relative to activities occurring as a consequence of facility operation undertaken pursuant to such a license. Once the full-power license has been granted, those licensee and agency actions that relate to facility operation conducted pursuant to that license, including low-power testing, involve compliance with the license under which the operations are performed.[28] Thus, while it might be said to

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[26] 42 U.S.C. § 2131. That section provides in pertinent part that "[i]t shall be unlawful . . . for any person within the United States to . . . use . . . any utilization . . . facility except under and in accordance with a license issued by the Commission. . . ."

[27] 42 U.S.C. § 2239a. That section provides in relevant part that "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding. . . ."

[28] See 10 C.F.R. §§ 2.200-.206; id., Part 2, Appendix C.

be material to the operation of the facility, low-power testing performed under the authority of a full-power license has absolutely nothing to do with, and therefore cannot be material to, the granting of a full-power license.

This point is further illustrated by examining the power-ascension testing that is performed after low-power testing in the initial startup of a facility. Low-power testing is conducted up to five percent of rated power. Power-ascension testing, on the other hand, is performed above this level up to and including the power level permitted by the operating license, normally 100% or full power. As in the case of low-power testing, power-ascension testing involves the "use" of the facility, so it can only be conducted under the authority of an operating license -- generally a full-power license. Again, like low-power testing, power-ascension testing is a necessary step in the initial operational life of every plant. Indeed, both test programs involve some operational tests that must be conducted every time the reactor is restarted after being refueled. By its very nature, power-ascension testing is conducted incrementally and entails a number of operating hold points, typically at twenty-five percent, fifty percent, and seventy-five percent of rated power.[29] Any agency action with respect to the actual performance of such

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[29] See NRC Regulatory Guide 1.68 (Rev. 2), "Initial Test Programs for Water-Cooled Nuclear Power Plants" (Aug. 1978) at 1.68-15 to -18.

tests also is a matter of license compliance, not initial licensure, and no intervenor hearing rights accompany a licensee's performance of such tests. Hence, as with low-power testing, power-ascension testing plainly is material to the ultimate full-power operation of the facility because such tests have to be performed before full-power operation can be achieved. But all operation in reaching full-power as well as full-power operation itself is regulatively distinct from, and hence immaterial to, the initial licensure of the plant that must precede any operation of the facility.

This basic regulatory scheme does not change just because low-power testing is conducted under the authority of a separate low-power license granted pursuant to 10 C.F.R. § 50.57(c) while the full-power operating license adjudicatory proceeding is still ongoing. Whether low-power testing has been completed is not germane to the question whether the full-power license should be granted to the applicant. In such circumstances, a low-power license is required because low-power testing still involves the operation or "use" of the facility within the meaning of section 101 of the Atomic Energy Act. Further, in order to comply with the hearing rights provision of section 189a of the Act, the low-power license can be granted only after all issues in the contested adjudicatory proceeding relevant to low-power testing authorization have been heard and decided

by the Licensing Board.[30] The successful performance of the low-power tests authorized under that license, however, remains immaterial to the determination whether a full-power operating license should be granted for the facility.

Contrary to the intervenors' claim, nothing in the agency's regulations dictates that low-power testing need be completed successfully as a precondition to the grant of a full-power license in order to meet the minimum regulatory requirements for a full-power license. Similarly, there is no regulatory bar to the issuance of a full-power license while low-power testing is still under way pursuant to an earlier granted testing license. Indeed, an applicant that receives a low-power license under section 50.57(c) is under no regulatory obligation to use it and the applicant remains free to defer low-power testing until a full-power license is issued. And, as in the case of all plant operations, any agency action with respect to the performance of low-power testing in such circumstances is a matter of compliance with the low-power license.

That low-power testing is not a prerequisite to the grant of a full-power operating license is amply demonstrated by a review of the regulatory history of 10 C.F.R. § 50.57(c). When the NRC's predecessor, the Atomic Energy Commission (AEC), amended its rules to add section 50.57(c), its expressed purpose was to shorten,

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[30] See 10 C.F.R. § 50.57(c).

without adversely affecting the public health and safety, the time it takes to get a licensed plant to full-power operation by allowing for the early performance of low-power testing while the contested full-power operating license proceeding was still ongoing.[31] The Statement of Consideration accompanying the rule amendment indicates that the AEC specifically rejected proposals that would have made completion of low-power testing a precondition of full-power licensure. Such proposals would have mandated that "every applicant be required to have completed 6 months of low-power testing prior to issuance of the final operating license . . . ."[32] This history convincingly demonstrates that, in adopting the separate low-power license provisions, the AEC did not make the performance of low-power testing "material" to the grant of a full-power license. Nor did it alter the established regulatory scheme in which low-power testing performance is material only to plant operation. Accordingly, the intervenors' argument that low-power testing is per se material to full-power licensure is simply wrong.

Equally fallacious is intervenors' second argument that, in this instance, the staff has made low-power testing performance material to full-power licensing. Intervenors

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[31] See 35 Fed. Reg. 16,687, 16,687 (1970); 36 Fed. Reg. 8861, 8862 (1971).

[32] 36 Fed. Reg. at 8862.

assert that this occurred as a consequence of the staff's enforcement action requiring the applicants to demonstrate to the staff's satisfaction adequate corrective actions before restarting the facility. Although the intervenors describe the staff's action in issuing a confirmatory action letter to the applicants as a "suspension" of the low-power license, they concede that for purposes of their argument the label placed upon the action is irrelevant.[3]

Like their first argument, this one also confuses plant licensure with plant operation and erroneously attempts to make the two distinct regulatory concepts synonymous. Here, the staff's issuance of a CAL immediately after the natural circulation test incident was an enforcement action directly

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[3] Intervenors' Brief at 12 n.17. In any event, the intervenors are incorrect in describing the staff's enforcement action as a license suspension. The NRC's formal enforcement sanctions include notices of violations, civil penalties, and various orders such as license revocation or suspension orders. See 10 C.F.R. Part 2, Appendix C, § II. Each of these formal enforcement sanctions requires prescribed notice and hearing procedures. See id., §§ 2.201-.205. In this instance, none of these formal regulatory requirements was followed, so the staff's action could not be a suspension within the meaning of the regulations.

In contrast to formal enforcement actions, the agency also employs less formal administrative mechanisms, such as the confirmatory action letter issued by the staff here, to supplement its enforcement program. See id., Part 2, Appendix C, § V.H. Specifically, confirmatory action letters are "letters confirming a licensee's or a vendor's agreement to take certain actions to remove significant concerns about health and safety, safeguards, or the environment." Id., § V.H.(3).

linked to the applicants' low-power license -- the only operating authority extant at the time of the staff s license compliance action. The staff's action was taken to ensure that the applicants complied with all agency regulations and the terms and conditions of the low-power license before they could restart the facility under that license authority. As previously explained, pursuant to the Commission's regulatory scheme the staff's enforcement action was independent of, and immaterial to, any subsequent Commission licensing determination that the applicants met all regulatory requirements for a full-power license. Thus, contrary to the intervenors' assertion, the staff's enforcement action -- in this case or in general -- did not make the performance of low-power testing material to the issuance of a full-power license.

The intervenors' third argument is pure sophistry. Initially, they state that the Commission previously represented to the Court of Appeals in the UCS case that preoperational testing must be completed successfully prior to the issuance of an operating license. The intervenors then claim that, "[b]y necessary inference," the Commission has recognized the importance of successfully completing the entire initial test program (i.e., preoperational testing and low-power testing).[34] Next, they declare that emergency exercises and the initial test program should be treated

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[34] Intervenors' Brief at 13.

similarly and, therefore, because the court in UCS ruled that emergency exercises are material to licensing and subject to the hearing rights provisions of the Atomic Energy Act, so too are the results of low-power testing.

Although it is true that preoperational testing generally must be completed successfully prior to the issuance of a full-power operating license as the intervenors represent, the other conclusions they attempt to stack upon that truism simply do not follow. As its name connotes, preoperational testing is conducted as part of the construction process for the plant pursuant to 10 C.F.R. § 50.56 before an operating license for the facility is issued.[35] Such testing does not involve the "use" of the facility within the meaning of section 101 of the Atomic Energy Act and hence does not require an operating license. Contrary to the intervenors' claim, the Commission has not recognized, "by necessary inference" or otherwise, that preoperational testing and low-power testing -- testing that the intervenors incorrectly lump together under the label of

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[35] In pertinent part, 10 C.F.R. § 50.56 provides that

> [u]pon completion of the construction . . . of a facility, in compliance with the terms and conditions of the construction permit and subject to any necessary testing of the facility for health or safety purposes, the Commission will, in the absence of good cause shown to the contrary issue a license of the class for which the construction permit was issued . . . .

an initial test program -- must be completed successfully before the grant of an operating license. As already explained, the scheme of the Commission's regulations does not make the performance of low-power testing material to the grant of a full-power operating license and neither the regulations nor Commission practice join preoperational testing with low-power testing for the purpose of determining whether the applicants should be granted an operating license. Accordingly, the intervenors' argument fails.

B. Building upon their first premise that low-power testing is material to the grant of a full-power license, the intervenors next argue that they have a right to a hearing pursuant to section 189a of the Atomic Energy Act on all issues material to the grant of a full-power license without having to meet the Commission's standards for reopening the record. As previously seen, the intervenors' first premise is erroneous. Hence, the remainder of their argument founded upon that faulty premise cannot stand. Nevertheless, for the sake of completeness, we will address it.

The intervenors assert that UCS and Mothers for Peace establish their right to a hearing on their so-called low-power contentions without having to meet the Commission's standards for reopening the record set forth in 10 C.F.R. § 2.734. In particular, they point to a portion

of the decision in Mothers for Peace, which in turn partially relies upon UCS, stating, inter alia, that "we cannot conclude that the opportunity to seek reopening was an adequate substitute for the hearing guaranteed petitioners as a matter of right under section 189(a)."[36] Contrary to the intervenors' assertion, however, neither of these cases precludes the application of the Commission's reopening standards in the circumstances presented. Moreover, the quoted language from Mothers for Peace upon which the intervenors so heavily rely was used by the court in a completely different context that makes it inapposite here.

In the cited portion of Mothers for Peace, the court faced the question whether the Commission violated section 189a by refusing to give the petitioners a hearing on each of the applicants' two requests for an extension of its low-power license for the Diablo Canyon facility. In defense of its refusals to grant the hearing requests, the Commission argued that the section 189a hearing provision did not apply to the extension of the term of a low-power operating license. Alternatively, it argued that, if section 189a did apply, the petitioners had been accorded a sufficient hearing because of their attempts to reopen the record in the then ongoing full-power operating license

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[36] 751 F.2d at 1316 (emphasis in the original).

proceeding where petitioners had sought to raise the same issues.[37]

The court found that the extension of the term of a low-power license was a license amendment within the meaning of section 189a. Because a license amendment is one of the eight categories of agency action specifically enumerated in that section, the court held that the petitioners were entitled to a hearing on the applicants' extension requests and that, therefore, the Commission erred in denying the petitioners' hearing requests.[38] Next, the court rejected the Commission's argument that the petitioners had received a sufficient hearing by being referred to the ongoing full-power operating license proceeding for the facility where they could attempt to reopen the record on the same construction quality assurance issues that the petitioners sought to raise in their hearing requests on the low-power license extension amendments. It was in this context that the court employed the language quoted by the intervenors, indicating that the opportunity to seek reopening in a second ongoing proceeding was not an adequate substitute for a guaranteed right to a hearing on an independent license extension amendment, even if the issues sought to be raised were the same.[39]

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[37] Id. at 1311.

[38] Id. at 1312-14.

[39] Id. at 1316.

The situation addressed by the court in Mothers for Peace was considerably different from the circumstances presented here. If they are to litigate their contentions at all, they must do so in the context of the existing operating license proceeding held pursuant to section 189a, in which their concerns would constitute additional late-filed contentions in the proceeding where the record already has closed. As we read it, Mothers for Peace does not preclude the agency from insisting that the intervenors comply with its reopening standards in this circumstance. The court's decision does not indicate, as the intervenors apparently would have it, that a fresh and unencumbered right to be heard exists each time arguably new information seemingly related to the licensing process arises. Indeed, to read the case that broadly would make it virtually impossible to conclude the hearing process. We find no such result mandated by Mothers for Peace.

Nor do we read UCS to guarantee the intervenors a hearing on their late-filed contentions even if they do not meet the Commission's standards for reopening a closed record. As noted previously, in UCS the court had under review a Commission rule providing that in operating license proceedings licensing boards need not consider the results of emergency preparedness exercises before authorizing a full-power operating license for a nuclear power plant.[40]

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[40] 735 F.2d at 1438.

The agency rule also required that such exercises be held within one year prior to the grant of a full-power license; hence, the results of the exercise necessarily could become known only when the licensing hearings were nearly over or already concluded. The court found that, in spite of the new rule, the Commission nevertheless considered the results of the offsite emergency preparedness exercise material to its decision whether to grant a full-power license for the facility.[41] In these circumstances, the court held that the Commission acted beyond its statutory authority in categorically excluding from operating license hearings required by section 189a of the Atomic Energy Act a class of issues that the Commission itself considered material to licensure.[42]

Contrary to the intervenors' apparent belief, UCS does not stand for the broad proposition that the Commission must allow any and all information arguably relevant to licensing, whenever raised, to be the subject of a hearing. Rather, UCS teaches that the agency cannot generically exclude from operating license hearings issues that its own regulations make material to the licensing decision. But we find nothing in the case to preclude the Commission from applying its reopening rules to the instant situation when the issues sought to be raised are of a type that could have

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[41] Id. at 1441.

[42] Id. at 1438, 1441-42.

been raised when the proceeding commenced. As previously noted, the intervenors' late-filed contentions do not raise issues unique to low-power testing, even though they label them low-power testing contentions.[43] Rather, the issues the intervenors seek to raise each involve ordinary operational questions of the sort that the intervenors could have raised at the beginning of the proceeding.[44] Accordingly, we find UCS inapposite here.[45]

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[43] See supra pp. 10-11.

[44] Even assuming we have read UCS too narrowly, the intervenors' argument still fails. Upon rehearing en banc of a portion of Mothers for Peace not relied upon by the intervenors, the court stated that UCS "holds only that the Commission cannot exclude from a section 189(a) hearing issues that its rules of [sic] regulations require it to consider in its licensing decisions." San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 30 (D.C. Cir. 1986), cert. denied, 479 U.S. 923 (1986). The Commission's regulations do not require it to consider the results of low-power testing in determining whether to grant a full-power license. Hence, the intervenors' argument lacks merit for this additional reason even if we further assume that the intervenors' so-called low-power contentions deal with issues inherent to such low-power testing.

[45] The intervenors also argue that the Licensing Board erred in denying its May 31, 1989, motion to hold open the record pending low-power testing. Intervenors' Brief at 23-26. The intervenors' motion was filed before the applicants conducted low-power testing and before the June 22, 1989, natural circulation test incident. In an oral ruling on June 30, 1989, at the conclusion of the evidentiary hearings and several weeks before the intervenors filed their first motion to reopen the record, the Licensing Board denied the intervenors' motion. It concluded, inter alia, that the Board had come to the natural ending of the hearings and, therefore, it was closing the record. Tr. 28,287-89. Before us, the intervenors repeat their earlier argument that because low-power testing performance is material to the grant of a full-power license and they have a right to a hearing on all

(continued...)

III.

Finally, the intervenors assert that, if we reject their other arguments and approve the application of the Commission's standards to reopen the record to their contentions, they meet those standards. They claim, therefore, that the Licensing Board erred in denying their motions.[46] As the Licensing Board found, however, the intervenors' low-power testing contentions do not meet the Commission's standards for reopening the record set forth in 10 C.F.R. § 2.734.[47]

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[45](...continued)
such material issues, the Licensing Board violated their hearing rights by closing the record before resolving any issues arising out of low-power testing. For the reasons we have already set forth in rejecting intervenors' earlier argument, their argument also fails in this context. Thus, the Licensing Board did not abuse its discretion in closing the evidentiary record on June 30.

[46] Intervenors' Brief at 26-40.

[47] In arguing that their so-called low-power testing contentions meet the Commission's reopening standards, the intervenors have not explicitly admitted that their contentions raise issues that are not inherent to actual low-power testing. As we have previously explained, the intervenors have mischaracterized their contentions because they actually raise more generic matters relating to plant readiness for full-power operation. In considering the intervenors' last argument, we assume that the intervenors would have us ignore their label and view their contentions in this broader framework given our rejection of the notion that low-power testing performance is material to the grant of a full-power license. Without this assumption, we would be faced with the incongruity of applying the Commission's reopening standards to the intervenors' so-called low-power testing contentions when we already have determined that the performance of low-power testing (and hence the resolution of their contentions) is not material to the grant of a full-power license.

That section provides, in pertinent part, that a motion to reopen the record must satisfy each of the following criteria:

> (1) The motion must be timely . . . .
>
> (2) The motion must address a significant safety or environmental issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.[48]

With regard to the application of this standard, we have stated that

> to justify the granting of a motion to reopen the moving papers must be strong enough, in the light of an opposing filings, to avoid summary disposition. Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding.[49]

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[48] 10 C.F.R. § 2.734(a).

[49] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (footnote omitted).

In their brief, the applicants suggest that ALAB-138 is no longer sound authority because it was decided 13 years before the Commission enacted 10 C.F.R. § 2.734. Applicants' Brief at 31. As the applicants should be aware, however, the Commission's adoption of section 2.734 was a codification of NRC case law. See 51 Fed. Reg. 19,535,

(continued...)

In an attempt to meet the reopening standards, the intervenors do not claim that the natural circulation test incident itself presented any threat to the public health and safety or that reactor safety was ever in question. Rather, the gist of the intervenors' first contention is that the incident demonstrates that the applicants' operators and management personnel are not adequately trained or qualified, and that they lack adequate management and administrative controls to operate Seabrook as required by the Commission's quality assurance regulations, 10 C.F.R. Part 50, Appendix B. In their affidavit in support of this contention, the intervenors' experts recite the events surrounding the incident and opine that these events reveal a number of procedural noncompliances with the quality assurance regulations. The intervenors' experts also allege, based upon an unrelated staff inspection report

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[49](...continued)
19,535 (1986). In the Statement of Consideration accompanying the rule, the Commission explicitly stated that "[t]he present rule is not, except where noted, intended to wipe out NRC case law concerning motions to reopen." Id. at 19,537. Neither section 2.734 nor its history notes any change to the gloss provided by the above-quoted portion of ALAB-138. Indeed, in its Statement of Consideration (id. at 19,536), the Commission itself referenced the same general discussion on motions to reopen from ALAB-138 that includes the quoted language -- a most unlikely action if the Commission were disavowing the case. Additionally, the applicants' further suggestion that this portion of ALAB-138 only set a floor or a minimum standard for a reopening motion so that a licensing board is free to decide outcome-determinative, disputed facts on the basis of contested affidavits ignores both the plain language of the decision and its context.

listing four minor instances of a possible lack of attention to detail by the applicants,[50] that the circulation test incident may not be an isolated event. They then conclude that the test incident represents a pervasive pattern of procedural noncompliance and thereby raises a significant safety issue.

In like fashion, the intervenors' second contention alleges that the events surrounding the test incident demonstrate that the applicants' maintenance practices for valves violate the NRC's quality assurance regulations. In their affidavit in support of this contention, the intervenors' experts assert that the post-event inspection of the plant's steam dump valves revealed some deficiencies in seven of the twelve valves. The affiants then opine that this fact may indicate a pervasive deficiency in the applicants' testing, verification, and maintenance of all valves throughout the plant, which, in turn, raises a significant safety issue. Similarly, the intervenors' third contention alleges that the events surrounding the test incident establish that the applicants' training and procedures for conducting start-up testing violate the agency's quality assurance regulations. As support for this

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[50] The intervenors' affiants referenced NRC Inspection Report 50-443/89-3 but, as the Licensing Board noted (LBP-89-28, 30 NRC at 296), that inspection report was not an exhibit to the intervenors' reopening motions. Further, that inspection report is not otherwise part of the adjudicatory record in this proceeding.

claim, the intervenors' experts again detail many of these events and claim they demonstrate a breakdown in the applicants' quality assurance program for testing.

None of these contentions, however, raises a significant safety issue -- the most important of the three criteria for reopening the record.[51] At bottom, all three of these contentions are nothing more than quality assurance contentions alleging violations of the Commission's quality assurance regulations; the first, an alleged pattern of procedural noncompliances in training and administrative controls; the second, an asserted pattern of deficiencies in the testing and maintenance of valves; and, the third, a purported pattern of deficiencies in test training. In analogous circumstances, we have stated that

> for new evidence to raise a "significant safety issue" for purposes of reopening the record, it must establish either that uncorrected . . . errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely.[52]

The intervenors have not attempted to demonstrate that safe operation of the plant was threatened by the natural circulation test incident or that the staff's CAL and the

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[51] Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986).

[52] Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983). See also Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).

applicants' response to it have left any uncorrected deficiencies. Rather, they have focused on the second prong of this test by attempting to show that failures in the applicants' training, maintenance, and start-up quality assurance programs are so pervasive as to raise legitimate doubt that the plant can be operated safely. Even if we accept the intervenors' underlying factual representations as true, however, their motions simply do not raise an authentic doubt that the plant can be operated safely. In the final analysis, the intervenors and their experts have attempted to turn a single incident of personnel error into a wholesale and widespread breakdown of the applicants' quality assurance programs. Without a great deal more, the intervenors have failed, as a matter of law, to raise a legitimate doubt that the plant can be operated safely. Hence, they have failed to raise a significant safety issue and we need not explore whether they meet the other criteria for reopening the record. The Licensing Board was correct, therefore, in denying the intervenors' motions to reopen the record.

For the foregoing reasons, the result reached by the Licensing Board in LBP-89-28 is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins

Barbara A. Tompkins
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL-1

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing AB M&O (ALAB-940) DTD 10/16/90 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
18 day of October 1990

Office of the Secretary of the Commission