

September 28, 1983

SECY-83-397

COMMISSION LEVEL
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ADJUDICATORY ISSUE
(Notation Vote)

For: The Commission

From: James A. Fitzgerald,
Assistant General Counsel

Subject: REVIEW OF ALAB-737 (MATTER OF PUBLIC
SERVICE COMPANY, OF NEW HAMPSHIRE, ET AL)

Purpose: To advise the Commission on a recent
Appeal Board decision for which no
petitions for review have been filed

Facility: Seabrook Station, Units 1 and 2

Review Time
Expires: October 5, 1983

Discussion: In ALAB-737, the Appeal Board denied two
petitions for directed certification of
a Licensing Board order granting
applicants' motion for partial summary
disposition on two contentions dealing
with evacuation time estimates. The
text of contentions is set out in note 3
of ALAB-737, attached. New England
Coalition opposed summary disposition on
the ground that the applicants'
estimates did not reflect the actual
evacuation routes which had yet to be
selected by off-site governments. The

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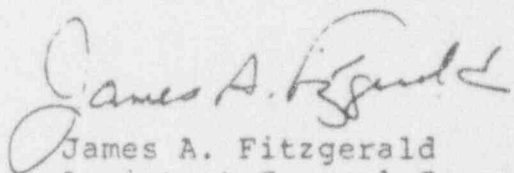
applicant had promised to supply the actual estimates and update its plans when that information became available as a result of the on-going emergency planning process. The Licensing Board found no litigable contention was presented and the Coalition filed its petition. In addition, Massachusetts, which was not involved in the disposition of the motion, also petitioned for interlocutory review of the Licensing Board order. The Appeal Board denied the petitions for directed certification. ALAB-737, 18 NRC _____ (August 26, 1983).

In ALAB-737, the Appeal Board concluded the Licensing Board properly dismissed the contentions and did not "improperly foreclose litigation of contentions directed toward the evacuation estimates or necessarily impinge upon the Coalition's ability to file additional contentions at a later date." Slip op. at 6. The Appeal Board correctly applied the Commission's decision in Catawba and noted the Coalition would be required to pass muster under the five factors in 10 CFR 2.714 for any late contention to be litigated. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC _____, slip op. at 5-6 (June 30, 1983). Because the Licensing Board had noted the applicant's commitment to update the evacuation time estimates when the actual times were available, the Appeal Board was unwilling to entertain the Coalition's argument that litigation of the contentions at a later date would be

either inadequate or foreclosed.
ALAB-737, Slip op. at 9.¹

The Appeal Board rejected Massachusetts' petition because the Attorney General had not participated below. Although a lack of participation is not fatal, the movant bears a heavy burden to explain this recent interest in the matter. The Board concluded the lack of explanation for Massachusetts' new found interest warranted the denial of relief. Slip op. at 13-14.

[We believe


James A. Fitzgerald
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Attachment: ALAB-737

¹The Appeal Board prodded the Licensing Board to reconsider its reliance on the interim version of NUREG-0654 instead of the final version of the document to determine the contents of the evacuation time estimate. ALAB-737, slip op. at 11-12. The Coalition on September 9 asked the Licensing Board for reconsideration on this point.

EX.5

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, October 13, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, October 5, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

- Alan S. Rosenthal, Chairman
- Gary J. Edles
- Howard A. Wilber

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

Diane Curran and William S. Jordan, III, Washington, D.C., for the intervenor, New England Coalition on Nuclear Pollution.

Robert A. Backus, Manchester, New Hampshire, for the intervenor, Seacoast Anti-Pollution League.

Jo Ann Shotwell, Boston, Massachusetts, for Attorney General Francis X. Bellotti, Commonwealth of Massachusetts.

Thomas G. Dignan, Jr., and R. K. Gad III, Boston, Massachusetts, for the applicants, Public Service Company of New Hampshire, et al.

Roy P. Lessy, Jr., and Robert G. Perlis for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

August 26, 1983

(ALAB-737)

Introduction

At hand are two petitions for directed certification in this operating license proceeding now pending before the

Licensing Board.¹ One was filed by the New England Coalition on Nuclear Pollution (Coalition). The other was filed by the Attorney General of the Commonwealth of Massachusetts.² Both petitions seek immediate interlocutory review of the same Licensing Board order, which granted partial summary disposition in the applicants' favor on two Coalition contentions dealing with evacuation time estimates. LBP-83-32A, 17 NRC ____ (June 30, 1983).³ The applicants and the NRC staff oppose the petitions.

¹ We recently denied two earlier petitions in ALAB-731, 17 NRC ____ (June 20, 1983) and ALAB-734, 18 NRC ____ (July 19, 1983).

² The Seacoast Anti-Pollution League (SAPL), an intervenor in the proceeding, has filed a pleading joining the Attorney General's petition for directed certification.

³ The contentions read as follows:

III.12

The evacuation time estimates provided by the Applicants in Appendix C of the Radiological Emergency Response Plan are inaccurate in that they provide unreasonably optimistic estimates of the time required for evacuation. In addition, the estimates provided in the radiological emergency plan are useless to

Under the provisions of 10 CFR § 2.718(i) and § 2.785(b), appeal boards have the power to direct the certification of legal issues raised in proceedings still pending before licensing boards. Exceptional circumstances must be demonstrated, however, before we will exercise that authority. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).

(footnote continued)

emergency planning because they fail to include bounds of error, to indicate the basis for codes or assumptions used for the time estimates, to indicate whether the model used is static or dynamic, to provide a sensitivity analysis for the estimates or to reveal the underlying assumptions.

III.13

The preliminary evacuation time estimates submitted by the Applicants assume favorable weather conditions and thus fail to account for the worst case situation of adverse weather conditions developing on a busy summer weekend afternoon. Nor do they take into account evacuee directional bias, evacuation shadow, or reasonably expected vehicle mix. As a result, the estimates are unduly optimistic and useless to future planning.

As we indicated in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), we undertake discretionary, interlocutory review

only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner.

Because we find that they meet neither of the Marble Hill criteria, we deny both petitions.

Discussion

1. The applicants moved the Licensing Board for summary disposition of the Coalition's contentions dealing with evacuation time estimates. The Coalition opposed the motion, claiming, in part, that the estimates were inaccurate because they were not based on the actual evacuation routes to be incorporated in the final emergency plans. Such routes are to be chosen in due course by the local governmental bodies. The Licensing Board recognized that the plans were incomplete in that respect. Nevertheless, it granted summary disposition, holding that the Coalition's assertion "simply presents no litigable issue, nor can any adverse legal conclusion be drawn from the present incompleteness of the estimates." See LBP-83-32A, supra, 17 NRC at ____ (slip opinion at 14-15).

The staff argues that the Board dismissed this portion of the Coalition's contention without prejudice to resubmittal once the actual routes are designated. In the staff's view, the Board properly found that there was no litigable issue before it at this time. NRC Staff Response to Petitions for Directed Certification (August 11, 1983) at 14. The Coalition contends, however, that there can be no certainty that its grievance regarding evacuation times can be redressed in a timely fashion. It claims that there is no assurance that it will ever have an opportunity to litigate the adequacy or completeness of the evacuation estimates because the applicants' ability to submit revised estimates depends entirely on the completion of the offsite emergency plans by the local governments. The Coalition asserts that, at a minimum, it will be required to satisfy the heightened threshold imposed by the Commission's recent Catawba decision if it attempts to file new contentions to litigate the merits of any revised evacuation estimates.⁴

⁴ The Commission's regulations direct that contentions be filed in advance of a prehearing conference. 10 CFR § 2.714(b). On occasion, an intervenor will tender a contention at a later date. In the Catawba case, we held that

as a matter of law [such] a contention cannot be rejected as untimely if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity
(Footnote Continued)

We conclude that the Licensing Board's decision does not improperly foreclose litigation of contentions directed toward the evacuation estimates or necessarily impinge upon the Coalition's ability to file additional contentions at a later date.

The Commission's regulations mandate that no operating license be issued unless a finding is made that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. 10 CFR § 50.47(a)(1). Evacuation is one of the measures routinely considered. It may turn out, as the Coalition suggests, that there can be no basis for a finding that the Seabrook area can be evacuated within the times predicted by

(Footnote Continued)

(if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982). On its review of that determination, the Commission agreed that this "three-part test constitutes a reasonable and useful test of the good cause factor as applied to late-filed contentions based solely on information contained in institutionally unavailable licensing-related documents." CLI-83-19, 17 NRC, ___ (June 30, 1983) (slip opinion at 9). But it went on to hold that a belated contention is nonetheless amenable to rejection on the strength of a balancing of all five of the late intervention factors set forth in 10 CFR § 2.714(a). Id. at ___ (slip opinion at 5-6). Only one of those factors relates to good cause for the late filing; one of the others is "[t]he extent to which the petitioner's participation will broaden the issues or delay the proceeding."

the applicants in the absence of information on the actual routes chosen. See NECNP Petition for Directed Certification (July 21, 1983) at 7. It may also be that the selection of the actual routes will necessitate a material alteration in the estimates. Those issues, however, are not amenable to resolution now, and thus do not warrant our involvement in the proceeding at this stage. We can review in due course any decision the Licensing Board may eventually reach regarding the actual routes chosen or, in the event the routes are not known before the Board issues its initial decision on the merits, the adequacy or completeness of the existing evacuation time estimates. For the present, we hold only that the Licensing Board did not abuse its discretion in disposing of matters currently before it, proceeding to hearing, and leaving ultimate resolution of the question of the adequacy of the existing evacuation time estimates for future disposition.⁵

It is true that, applying the Commission's Catawba decision, the Licensing Board might reject a new contention

⁵ For similar reasons, we do not agree with the Coalition that the effect of the Licensing Board's decision is to accept the applicants' commitment to comply with Commission regulations as a substitute for a demonstration of compliance. In the final analysis, before the plant may be licensed, the applicants must demonstrate that there is reasonable assurance that the public will be adequately protected in the event of an emergency.

on the basis of its balancing of all of the Section 2.714(a) lateness factors,⁶ even though the Coalition had no earlier opportunity to formulate sufficiently specific contentions relating to the final evacuation plans. But that consideration does not have any bearing upon whether the Licensing Board correctly disposed of the Coalition's current contentions summarily on prematurity grounds.⁷

Moreover, we are unprepared to assume for present purposes that there is a high probability that the Licensing Board would reject as untimely a further contention put forth by the Coalition once actual evacuation routes have been selected and announced. In adopting its Catawba rationale, the Commission expressly relied on the traditional willingness of licensing boards to apply the lateness criteria generously to admit late-filed safety contentions on a showing of good cause.⁸ And the Licensing Board appears to understand its responsibilities in this

⁶ See fn. 5, supra.

⁷ We note, in passing, that we also need not rule here upon the Coalition's claim that, had it moved for such relief, it would itself have been entitled to summary disposition on those contentions because the failure to include information on the actual evacuation routes in the time estimates already supplied rendered those estimates incomplete as a matter of law. NECNP Petition, supra note 6, at 9. That claim was not presented to the Licensing Board and thus cannot be pressed before us.

⁸ CLI-83-19, supra, 17 NRC at ____ (slip opinion at 8).

regard. In passing on the petitions to intervene and admission of contentions, for example, the Board explicitly declared its willingness to accept new emergency planning contentions "when the additional plans and reports are issued, provided contentions are filed shortly after issuance of the plans or reports." See LBP-82-76, 16 NRC 1029, 1078 (1982). And later, in acting on the motion for summary disposition, the Board noted that the applicants had committed themselves to revise their estimates once the evacuation routes have been chosen. Although the Board's rulings were made before issuance of the Commission's Catawba opinion, the Coalition has given us no cause to believe that the Board will not properly evaluate whether the exclusion of the actual evacuation routes from the estimates renders them incomplete or inadequate, or that it will foreclose litigation of properly submitted new contentions.⁹

⁹ The applicants state that the selection of the evacuation routes will have the sole effect of refining the evacuation time estimates to reflect savings that may accrue as a result of local traffic control measures. They assert, therefore, that the Board has already concluded that only the initial time estimates constitute licensing items subject to litigation. See Applicants' Answer to Petitions for Directed Certification (August 8, 1983) at 27 n.19. As noted above, we interpret the Board's order simply to have dismissed the Coalition's contention as premature. Nothing in that order suggests that the Board deems contentions directed to the effect of the selection of routes on the
(Footnote Continued)

We have reviewed the other allegations of error raised (explicitly or by adoption) by the Coalition and SAPL. In our judgment, none justifies our interlocutory appellate intercession in the face of the long standing articulated Commission policy generally disfavoring such review. See 10 CFR § 2.730(f). One matter does warrant comment, however.

The Coalition argued below that the evacuation estimates should include a computation for notification and preparation time. The applicants indicated that estimates for notification, evacuation of special facilities and persons with special needs, and for confirmation that an evacuation has been completed, "will be developed in detail as the arrangements for Seabrook Station are established. . . ." ¹⁰ The Licensing Board determined that,

(Footnote Continued)
 evacuation time estimates to be automatically outside the scope of litigable issues. Indeed, specific routes and road conditions have been the subject of litigation in some cases. See, e.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1422 (1982), aff'd, ALAB-730, 17 NRC ____ (June 2, 1983). Whether the existing evacuation plan is sufficient to demonstrate reasonable assurance that adequate protective measures can and will be taken in the event of an emergency, if the actual routes have not been selected, must be left for the Licensing Board's determination in the first instance.

¹⁰ See Attachment A to the affidavit of James A. McDonald, accompanying the Applicants' Twenty-First Motion for Summary Disposition (Contention NECNP III.12 and .13) (February 14, 1983), Preliminary Evacuation Clear Time
 (Footnote Continued)

as a matter of law, the applicants' evacuation time estimates were not deficient in omitting notification and preparation times. This matter would not merit comment at this stage had the Licensing Board simply deferred ultimate consideration until the applicants' later submission. But the Board's decision relies in part on NUREG-0654/FEMA REP-1 (Rev. 0), "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (January 1980). That document explicitly states that "[t]he requested estimates for time required for evacuations relate primarily to the time to implement an evacuation as opposed to the time required for notification." Id. at 4-1. The Board recognized that the current version of NUREG-0654, i.e., Rev. 1, omits that explanatory phrase, but could find "no indication that the NRC purposely intended to change the requirement." LBP-83-32A, supra, 17 NRC ____ (slip opinion at 11). In short, the Board may well have discouraged the formulation and submission of estimates that include notification and preparation times.

We believe the Board may wish to reconsider its conclusion in this regard. In Section 13.3 of the Seabrook

(Footnote Continued)
Estimates for Areas Near Seabrook Station (August 4, 1980)
at 11.

Safety Evaluation Report (SER), Supplement No. 1 (April 1983) at 13-15, the staff utilizes NUREG-0654, Rev. 1, as the criterion against which to measure the applicants' emergency plan. It is plain that the Board also recognized that Rev. 1 is the relevant regulatory document. While there is no clear specification in the text of Rev. 1 regarding the makeup of the overall evacuation time estimate, we believe the omission of the explanatory phrase included in the earlier version was quite intentional. In this connection, there are statements in the greatly expanded Appendix 4 of Rev. 1 that establish that evacuation time is made up of several components, and that both notification and preparation times are now to be included among those components. See Appendix 4, Table 2; Section IV.B; and Figure 2. They are, in fact, included among the components listed in NUREG/CR-2504, "CLEAR (Calculates Logical Evacuation And Response): A Generic Transportation Network Model for the Calculation of Evacuation Time Estimates" (March 1982). In our judgment, the change from Rev. 0 to Rev. 1 was deliberate, and NUREG-0654, Rev. 1, now contemplates that the makeup of the estimated evacuation

time include time estimates for notification and preparation.¹¹

2. Turning to the Attorney General's petition, the record discloses that he did not oppose the applicants' request for summary disposition below. Such lack of interest certainly undermines the justification for his request that we step into the proceeding at this interlocutory stage. While a lack of participation below may not absolutely foreclose grant of a request for directed certification in all circumstances, it does increase the movant's already heavy burden of demonstrating that our intercession is necessary. The Attorney General offers no explanation for his sudden manifestation of interest and, apart from his argument that the Board has ruled incorrectly, claims only in the most conclusory manner that the Licensing Board's decision will result in unusual litigation expense and delay and impede the development of a


¹¹ The applicants argue that, in any event, the Coalition errs in suggesting that mobilization and preparation times were ignored in its estimates. See Applicants' Answer to Petitions for Directed Certification, (August 8, 1983) at 31. n.22. A review of the underlying referenced document (see note 10, supra), however, reveals that preparation and notification, although not, strictly speaking, "ignored," were plainly and intentionally excluded from the calculation at this time.

sound record for decision. Such general assertions are insufficient to warrant directed certification.¹²

The petitions for directed certification are denied.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

¹² An argument that future litigation may be required does not satisfy the test for directed certification. See Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310 (1981).