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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission:

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

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL December 10, 1990

INTERVENORS PETITION FOR REVIEW OF ALAB-941

The Decision Below

In ALAB-941,[1/] the Appeal Board ruled on the scope contentions that were filed by the Intervenors, the Massachusetts Attorney General ("Mass AG"), the Seacoast Anti-Pollution League. ("SAPL"), the Town of Hampton ("TOH") and the New England Coalition on Nuclear Pollution ("NECNP"), in connection with the June 1988 exercise. The Appeal Board upheld the Licensing Board's disposition of various scope contentions, although not always on the same grounds as

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1/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2, ALAB-941, ___ NRC ___, November 21, 1990), hereafter cited as ALAB-941 and to the slip opinion.

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relied upon by the Licensing Board. The Appeal Board affirmed the Licensing Board's rejection of the scope portion of SAPL Contention EX-12 on the ground that activation of two of the four Massachusetts reception centers was sufficient to verify the ability to respond in an accident.[2/] The Appeal Board also upheld the Licensing Board's threshold rejection of Basis F of Mass AG Contention EX-2. However, the Appeal Board affirmed the rejection not on the grounds cited by the Licensing Board that American Red Cross ("ARC") non-participation precluded testing of congregate care facilities under the Seabrook Plan for Massachusetts Communities (SPMC), but rather on the ground that there is no need to test the ARC response since that is a role that the ARC has traditionally fulfilled.[3/]

The Appeal Board reversed the Licensing Board's disposition of Bases (a) and (b) of TOH/NECNP Contention EX-1 as those bases pertained to school administrators. The Appeal Board held that the failure to elicit sufficient school participation in the June 1988 exercise should be corrected in a subsequent exercise, but provided no other remedy for the deficiency in that exercise.[4/]

2/ ALAB-941 at 18-19.

3/ Id. at 15-16.

4/ Id. at 24-26.

For the reasons provided below the Appeal Board's affirmance of the Licensing Board's rulings on SAPL Contention EX-12 and Mass AG Contention EX-2 are erroneous. Furthermore, the limited remedy provided by the Board upon its reversal of the Licensing Board's findings on TOH/NECNP Contention EX-12 constitute error. The Intervenors, Mass AG, SAPL, TOH, and NECNP all joined in the briefs filed by other intervening parties with the Appeal Board, and now jointly seek review of the Appeal Board's erroneous rulings in ALAB-941.

Where The Matters Were Raised Below

All matters were raised by the parties in briefs below or by the Appeal Board sua sponte.

Why The Rulings Were Erroneous

I. The Appeal Board's ruling on SAPL Contention EX-12.

The Appeal Board dealt with the scope portions of SAPL Contention EX-12 in a totally cavalier and trivial manner. Had the Appeal Board paid the slightest attention to the Brief filed by SAPL on this issue or glanced at the provisions of the offsite emergency plans as they pertain to reception centers, the Appeal Board would have quickly realized that the contention dealt not with the reception centers under the SPMC but rather with the reception centers under the New Hampshire Radiological Emergency Response Plan (NHRERP). Even a cursory reading of the SPMC and the NHRERP would have revealed to the Appeal Board that there are only two reception centers under the Massachusetts plan and the four reception centers

referenced in Contention EX-12 are under the New Hampshire plan. In the Appeal Board's haste to rubber stamp the ruling of the Licensing Board, the Appeal Board completely ignored both the provisions of the emergency plans and the arguments made by SAPL on the issue.

In upholding the Licensing Board, the Appeal Board ignored the standard set forth in 10 CFR Part 50, App. E. IV.F.1. as to what constitutes a full participation exercise. That standard calls for testing as much of an emergency plan as is reasonably achievable without mandatory public participation. It is unquestionable that the testing of reception centers in Rochester and Manchester, New Hampshire was achievable without public participation. The Appeal Board did not even attempt to controvert the truth of that proposition.

Rather, the Appeal Board attempted to circumvent the plain language of the standard in that regulation by instead relying on language in a footnote to construct its own standard for what constitutes a full participation in an exercise. The Appeal Board referenced language in Footnote 4 of that regulation and held that a Licensing Board can use its own judgment as to what constitutes sufficient numbers of personnel and resources in deciding whether the mandate of full participation has been met.[5/] This ruling ignores the explicit language of the regulation as to what constitutes full participation, and undermines the objective standard in

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5/ Id. at 18.

the regulation by making it into a subjective judgment as to what is "sufficient". In this instance, the Appeal Board held that 50% participation was sufficient to amount to full participation. Under the subjective standard adopted by the Appeal Board there is no reason why in the future a Licensing Board could not conclude that 25% participation, or 10% participation or 5% participation amounted to full participation. The Appeal Board's adoption of this subjective standard completely undermines the plain language of the regulation itself as well as the ostensible purpose of the regulation.

II. The Appeal Board Erred In Rejecting Bases F of Mass AG Contention EX-2.

Although the Appeal Board apparently agreed with the Mass AG's challenge to the Licensing Board's reasons for rejecting Basis F of Mass AG Contention EX-2,[6] the Board still upheld the Licensing Board's exclusion of Basis F. The Appeal Board reasoned that since it can be assumed that the ARC will respond in an emergency, and the role assigned to the ARC under the SPMC is one that it has traditionally fulfilled, there was no need to test the ARC's response.[7] Therefore, the Appeal Board upheld the rejection of the contention challenging the scope of an exercise on the basis of the failure to test the ARC's response at congregate care facilities. The Appeal Board

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6/ ALAB-941 at 14 through 15.

7/ Id. at 15 through 16.

attempted to buttress its position by stating that "in the absence of any specific information indicating that the organization lacks the ability to discharge its conventional and oft-fulfilled role,"[8/] such a test is unnecessary.

The reasoning of the Appeal Board on this issue contains two flaws. First, under the Appeal Board's logic in any situation where an emergency responder is cast in a role that he/she usually fills, there is no need to test that emergency response role. By following that logic there would be no need to deploy police in an exercise to traffic control positions since that is a role that they normally fill, nor would there be a need to test bus drivers, ambulance drivers, siren system operators, civil defense workers, or myriad other types of responding personnel. Under the logic of the Appeal Board, it could be assumed that all emergency responders who normally have an emergency response role could fulfill their assigned tasks under an emergency plan, and therefore there would be no need to exercise their response capability. Such logic eviscerates the requirement of holding a full participation exercise.

The second flaw in the ruling of the Appeal Board is that the Board appears to put the burden on an intervenor to make a showing that an emergency responder will fail in an exercise to get a scope contention admitted. That logic is not only

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8/ Id. at 16.

untenable but inconsistant with the Appeal Boards own reasoning in ALAB-941 where it stated:

> "Of course, in no circumstance can a lack of appropriate scope in an exercise per se establish a fundamental flaw in the plan that is a subject of the exercise. Rather, the result of an unduly limited exercise, in addition to non-compliance with the Commissions regulations requiring full participation, is an inability to determine whether the plan is, in fact, fundamentally flawed in some essential respect."[9]

Furthermore, in this case it is quite possible that a testing of ARC response capabilities at the SPMC's congregate care facilities would have demonstrated flaws in the plan. The ARC standards for large congregate care centers fix a maximum size of approximately 1,000 persons per congregate care center. Mass Ex. 63, Tr. 18726. Under the SPMC there are five congregate care centers in excess of that maximum limit including one that is twice the maximum number and one that is four times that number. Tr. 18730. Since the ARC is activated on a chapter basis, it is unclear whether the chapters that would be called upon to respond to those unusually congregate care centers would have the personnel and resources to provide an adequate emergency response.

III. The Failure To Test School Participation in the NHRERP Compels Revocation of a License.

Although the Appeal Board held that the potential evacuation of schools is a major element of emergency planning[10] and the June 1988 exercise was so limited in its testing of New Hampshire schools that it is impossible to

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9/ Id. at 30.

10/ Id. at 22.

determine whether adequate protective measures will be taken for school children within the EPZ, the Board did nothing more than order that the deficient school participation be corrected in a subsequent exercise.[11/] Such a remedy is totally inadequate where there is an operating nuclear plant on line. Since there has never been a single demonstration of the capability of the NHRERP to provide adequate protection to school children in the event of an emergency at Seabrook Station, the operating license should be revoked, or at least suspended.

The regulations on this point are clear and uncompromising. Under 10 CFR, Section 50.47 (a)(1), no operating license for a nuclear plant may be issued unless there is a finding that there is reasonable assurance that adequate protective measures can and will be taken in the event of radiological emergency. A key element in evaluating whether an emergency plan can and will be implemented is the testing of that plan in a full participation exercise prior to licensure.[12/] Under the holding of the Appeal Board in ALAB-941, there has never been a sufficient test of the NHRERP's protective measures for school children. Therefore, while there is a paper plan, there is no assurance that protective measures can be implemented for school children.

11/ Id. at 26.

12/ See 10 CFR part 50, App E. IV. F.

In the absence of such assurance, the issuance of the Seabrook license was illegal under the NRC's own regulations. Under such circumstances, the appropriate remedy is to revoke the license until the adequacy of protective measures for sch. children is established.

It is unacceptable to continue to operate the plant under circumstances when there is no assurance that protective measures can be implemented for school children in the event of an emergency. As long as the plant continues to operate, the potential exists for an accident that would pose dire health risks to school children in the New Hampshire EPZ. This situation is compounded by the fact the Appeal Board did not even order that a remedial exercise take place within a given time framework. Instead, the Board only ordered that the deficiencies in the scope of the June 1988 exercise be corrected in a subsequent exercise. The Appeal Board did not even require that the deficiencies be corrected in the next scheduled exercise. To permit the continued operation of the Seabrook Plant under such circumstances flies in the face of the NRC's own regulations and any conscienced concern for the safety of school children.

CONCLUSIONS

The above described errors of the Appeal Board in ALAB-941 merit review of that decision by the Commission. Therefore, the Commission should undertake a review of that decision,

reverse the cited holdings of the Appeal Board and revoke, or at least suspend, the Seabrook operating license until there is a remedial exercise demonstrating that adequate protective measures can and will be implemented for school children.

Respectively submitted

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie Greer, hereby certify that on December 10, 1990, I made service of the within "INTERVENORS' PETITION FOR REVIEW OF ALAB-941" by Federal Express as indicated by [*] and by first class mail to the following parties:

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