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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD '90 DEC 21 A10:01

Administrative Judges:

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

December 21, 1990
(ALAB-942)

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

John Traficonte, Boston, Massachusetts (with whom Alan R. Fierce, Leslie B. Greer, Matthew T. Brock, and Pamela Talbot, Boston, Massachusetts, were on the brief), for the intervenor James M. Shannon, Attorney General of Massachusetts.

Paul McEachern, Portsmouth, New Hampshire (with whom Diane Curran, Washington, D.C., was on the joint brief), for the intervenors Town of Hampton and New England Coalition on Nuclear Pollution, respectively.

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

R. Scott Hill-Whilton, Newburyport, Massachusetts, for the intervenor Town of Newbury.

Barbara J. Saint Andre, Boston, Massachusetts, for the intervenors Town of Salisbury and Town of Amesbury.

Judith H. Mizner, Newburyport, Massachusetts, for the intervenor Town of West Newbury.

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

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Mitzi A. Young (with whom Edwin J. Reis, Richard G. Bachmann, Elaine I. Chan, Sherwin E. Turk, and Lisa B. Clark were on the brief) for the Nuclear Regulatory Commission staff.

DECISION

In this opinion, we consider challenges to the Licensing Board's rejection at the threshold of certain contentions advanced by intervenors Massachusetts Attorney General (MassAG); Seacoast Anti-Pollution League (SAPL); New England Coalition on Nuclear Pollution (NECNP); the Town of Hampton, New Hampshire (TOH); and the Massachusetts Towns of Amesbury (TOA), Salisbury (TOS), Newbury (TON), and West Newbury (TOWN) in this operating license proceeding involving the Seabrook nuclear power facility on the New Hampshire seacoast. These contentions concern either (1) the portion of the proceeding addressed to the Seabrook Plan for Massachusetts Communities (SPMC), the emergency response plan for the Massachusetts segment of the plume exposure pathway emergency planning zone (EPZ);[1] or (2) the results of the June 1988 full participation exercise of both the SPMC and the New Hampshire Radiological Response Plan (NHRERP), the emergency response plan for that State's segment of the EPZ.[2]

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[1] The SPMC was devised and is to be implemented by the applicants, Public Service Company of New Hampshire, et al., in lieu of a government-sponsored plan.

[2] See 10 C.F.R. Part 50, App. E, § IV.F.

In two prior decisions, and for the reasons set forth therein, we undertook for separate consideration and disposition the threshold rejection of certain other

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I.

In his brief on appeal, the MassAG asserts that the rejection of several of his contentions was based on an erroneous common ground; namely, that the issues sought to be raised by those contentions had been previously litigated during the hearings held on the adequacy of the NHRERP.[3] According to the MassAG, the Licensing Board was not empowered to foreclose the litigation of issues under the SPMC "simply because similar issues had been litigated under the NHRERP."[4] This is said to be so because "the SPMC is a separate emergency plan with a separate response organization, separate and distinct procedures and separate resources."[5]

As will be seen in our discussion individually of each of the contentions the MassAG identifies as having been rejected because of this claimed "generic error," we cannot accept the MassAG's thesis as it is broadly stated. To be sure, the two emergency plans are separate and there are

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[2](...continued)
contentions addressed to either the SPMC or the June 1988 exercise. See ALAB-937, 32 NRC 135 (1990), petition for review pending; ALAB-941, 32 NRC ___ (Nov. 21, 1990), petitions for review pending.

[3] See Brief of the Massachusetts Attorney General in Support of his Appeal of LBP-89-32 (Jan. 24, 1990) at 25 [hereinafter MassAG Brief]. Those hearings will be referred to in this opinion as the "NHRERP phase" (as distinguished from the "SPMC phase") of the proceeding.

[4] Ibid.

[5] Ibid.

many distinctions between them. And, to the extent that those distinctions are material to the disposition of a particular issue, it is beyond dispute that the litigation of the issue in the context of the NHRERP cannot serve to prevent the issue from being explored anew within the framework of the SPMC. Our recent discussion in ALAB-937 illustrates that point. We there singled out for separate examination the Licensing Board's refusal to consider, on the ground that a similar issue had been litigated in the NHRERP phase, the assertion in Basis R of MassAG Contention No. 47 that there was no reasonable assurance that school teachers would fulfill their assigned role under the SPMC.[6] Determining, inter alia, that there were significant differences between the roles that the teachers were given under the two plans and that those differences might make teacher role abandonment more likely in the case of Massachusetts teachers,[7] we reversed the threshold rejection of Basis R of Contention No. 47 and remanded the issue to the Licensing Board for consideration of that basis on the merits.[8]

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[6] This contention was among those listed in the MassAG's appellate brief as having been improvidently rejected because of the asserted "generic error." See ibid.

[7] See 32 NRC at 140, 146-47.

[8] In the event that it concluded that reasonable assurance of a response by a sufficient number of teachers was lacking, the Board was then to decide whether the applicants had made adequate alternative arrangements. See id. at 152.

In short, we agree with the MassAG that he could not properly be precluded by the Licensing Board in the SPMC phase from introducing evidence on "issues that pertained uniquely to the SPMC."[9] It scarcely follows, however, that the Board was required to allow him (or any other intervenor) to relitigate in the SPMC phase an issue adequately explored in the NHRERP phase in circumstances where the issue does not take on a different complexion insofar as the terms and implementation of the SPMC is concerned. The MassAG offers no good reason why he should be accorded the proverbial "second bite at the apple" and we can think of none. Assuredly, contrary to the MassAG's apparent belief, the mere fact that the two emergency response plans for this single facility are separate and distinct provides insufficient cause for countenancing any such result.

With these thoughts in mind, we turn to the contentions (other than MassAG Contention No. 47 disposed of in ALAB-937) that are said to have been rejected as a consequence of the asserted "generic error." In doing so, we take account of specific claims made by the MassAG with regard to the contention under examination.[10]

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[9] MassAG Brief at 26 (emphasis supplied). The single example of such preclusion cited in the brief relates to the teacher role abandonment issue. Id. at 26-27.

[10] With the exception of Contention No. 18, Basis E, each of the contentions in question received individual, in addition to generic, attention in the MassAG Brief.

A. In his Contention EX-18, the MassAG maintains that the June 1988 exercise disclosed "fundamental flaws" in both the SPMC and the NHRERP in that neither the applicants' ORO (the offsite response organization responsible for the execution of the SPMC) nor the State of New Hampshire (responsible for carrying out the NHRERP) demonstrated the adequacy of its "procedures, facilities, equipment and personnel for the registration, radiological monitoring, and decontamination of evacuees." In support of this broad claim, Basis B of the contention asserted, inter alia, that,

> in the event of the kind of radioactive release that occurred during the Exercise, resulting in a clock-wise sweeping plume that hit virtually every town in the EPZ, many more persons would have been reporting to the reception centers for monitoring than ORO and the State of New Hampshire had the staff and equipment to monitor within a 12-hour period, even assuming each team could monitor at a continuous rate of 55 evacuees per hour.[11]

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[11] In November 1980, the NRC and the Federal Emergency Management Agency jointly issued NUREG-0654/FEMA-REP-1 (Rev. 1), "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" [hereinafter NUREG-0654]. Included within the guidance contained in this document is the provision in Criterion II.J.12 for radiological monitoring of EPZ evacuees:

> Each organization shall describe the means for registering and monitoring of evacuees at relocation centers in host areas. The personnel and equipment available should be capable of monitoring within about a 12 hour period all residents and transients in the plume exposure EPZ arriving at

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Treating this assertion as challenging the "overall capacity of reception centers, including facilities, personnel, equipment and everything, to monitor the expected population," the Licensing Board ruled from the bench on January 18, 1989, that it was barred by principles of res judicata.[12] This ruling was confirmed in the November 1989 initial decision on the SPMC.[13] In addition to the MassAG, SAPL attacks this ruling as well. We agree with the applicants and the staff that, in the circumstances at hand, the Board below reached the right result on the matter.

1. The res judicata ruling below stemmed from a determination in the Licensing Board's decision addressed to the NHRERP, issued a year earlier.[14] That determination related to SAPL contentions challenging the adequacy of the reception centers provided in the NHRERP for evacuees from the New Hampshire portion of the Seabrook EPZ in the event

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[11](...continued)
relocation centers.

This guidance was reinforced in the September 1988 supplement to NUREG-0654 concerning utility-prepared offsite emergency response plans such as the SPMC. It is now stated that the personnel and equipmert available shall be capable of monitoring within about a 12-hour period all residents and transients in the plume exposure pathway EPZ arriving at relocation centers. NUREG-0654 (Rev. 1, Supp. 1) at 20.

[12] Tr. 15,332-33.

[13] See LBP-89-32, 30 NRC 375, 562 (1989) (erroneously referring to the ruling as having been contained in an unpublished January 26, 1989 order).

[14] See LBP-88-32, 28 NRC 667, 714-15 (1988).

of a radiological emergency.[15] Rejecting the claim in those contentions that the centers lacked sufficient monitoring capacity, the Board relied virtually exclusively upon an internal Federal Emergency Management Agency (FEMA) memorandum offered into evidence by the applicants in response to that claim. The memorandum was dated December 24, 1985, and signed by Richard W. Krimm, Assistant Associate Director for Natural and Technological Hazards in FEMA's Office of State and Local Programs and Support. Directed to certain regional FEMA officials, it stated at the outset that its purpose was to provide "interpretative guidance" with respect to Criterion II.J.12, the provision in NUREG-0654 specifying that the personnel and equipment available at reception centers "should be capable of monitoring within about a 12 hour period all residents and transients in the plume exposure EPZ arriving at relocation centers."[16] After a brief discussion of the matter, the memorandum concluded that state and local radiological emergency preparedness plans should include trained personnel and equipment at relocation centers for the monitoring of a minimum of twenty percent of the population within the EPZ.

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[15] Those contentions, SAPL revised Contention No. 7 and Contention No. 33, were admitted to the proceeding in the Licensing Board's Memorandum and Order (May 18, 1987) at 33-35, 44-45 (unpublished).

[16] See supra note 11.

At the time of the res judicata ruling in January 1989, the propriety of the Licensing Board's reliance on the Krimm memorandum was before us on SAPL's appeal from the partial initial decision the prior month in the NHRERP phase of the proceeding.[17] That appeal rested on the claim that the Licensing Board's reliance was foreclosed by our conclusion in ALAB-905, rendered at the end of November 1988 in the Shoreham operating license proceeding, that the analysis in the Krimm memorandum was flawed in several respects.[18] A principal perceived flaw was the tacit assumption in the memorandum that a twenty percent planning basis will suffice in the formulation of monitoring arrangements for all facilities. In this connection, we noted in ALAB-905 our belief "that, among other things, the demographic and meteorological characteristics of a particular EPZ might have considerable influence upon the percentage of the persons within the EPZ that would, in the event of an accident, seek monitoring either on instruction or on their own initiative."[19]

In ALAB-924, issued a year ago with regard to the NHRERP phase of this proceeding, we addressed the SAPL

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[17] See LBP-88-32, 28 NRC at 714-15.

[18] See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 522-28 (1988).

[19] Id. at 526.

appeal on the monitoring matter (along with other issues).[20] For the reasons there developed, we came to the conclusion that, unlike the Shoreham intervenors, SAPL had not sufficiently challenged the Krimm memorandum analysis in the course of the litigation of its contentions respecting the monitoring capacity of the New Hampshire reception centers.[21] That being so, we further decided, the Licensing Board had not erred in finding, on the strength of the Krimm memorandum and notwithstanding ALAB-905, that the twenty percent planning basis employed in the NHRERP was both reasonable and adequately supported in the record.[22]

2. As thus seen, in the context of SAPL's challenge to the sufficiency of the monitoring capacity of the reception centers provided in the NHRERP, the Licensing Board had squarely before it the question of the acceptability of the twenty percent planning basis (even if the Krimm memorandum itself had not been directly challenged). In its decision on the plan, the Board explicitly upheld the resort to that basis for NHRERP purposes, and we affirmed that action in ALAB-924.

Thus, we think that, absent some showing (or at the very least a colorable assertion) that conditions within the

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[20] 30 NRC 331, 352-62 (1989), petitions for review pending.

[21] Id. at 355-59.

[22] Id. at 358-60.

Massachusetts portion of the EPZ materially differ from those within the New Hampshire portion, the intervenors must be deemed to be foreclosed from litigating anew the planning basis issue.[23] No matter which particular doctrine of repose might be invoked (whether by analogy or otherwise), in the circumstances there is plainly no reason to permit the intervenors simply to replow old ground. Each intervenor -- not just SAPL -- had the opportunity during the hearings on the NHRERP to establish that, in all of its possible applications, the twenty percent planning basis in the Krimm memorandum is fatally flawed and, therefore, there was an inadequate evidentiary foundation for the Licensing Board's acceptance of that basis for any purpose.[24] Not

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[23] It is clear from the dialogue between MassAG counsel and the Licensing Board at the time of the rejection of Contention EX-18 that the Board correctly construed the contention as seeking to litigate that issue. See Tr. 15,333-37. Moreover, the portion of the MassAG Brief that challenges the threshold rejection of the contention contains a similar acknowledgement that the planning basis issue was at the root of the contention. See MassAG Brief at 43-45. In a subsequent portion of that brief, id. at 74-86, the MassAG attacks the findings of the Licensing Board, LBP-89-32, 30 NRC at 561-82, that the two reception centers provided in the SPMC are capable of monitoring 20% of the Massachusetts EPZ population within approximately 12 hours. We will consider that claim in a subsequent decision devoted to substantive findings of the Board.

[24] It is long-settled that an intervenor in an operating license proceeding is entitled to cross-examine on those portions of a witness's testimony that relate to issues placed into controversy by another party to the proceeding. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). Under recent amendments to the Rules of Practice, however, an intervenor (continued...)

having taken advantage of that opportunity, the MassAG -- no less than SAPL -- cannot now be heard to insist that considerations of fairness dictate that he be given a second chance to demonstrate that the Krimm memorandum, and more particularly its twenty percent standard, should be universally disregarded.

Our task therefore is to decide whether, in support of his Contention EX-18, the MassAG directed the Licensing Board's attention to special factors that might make the twenty percent planning basis inapplicable to the Massachusetts portion of the EPZ (as distinguished from the New Hampshire portion). Given an identification of such factors, there might have been room for a substantial claim that the resolution of the planning basis issue within the framework of the NHRERP would not carry over to the plan for Massachusetts. For, as previously noted, our criticism of the Krimm memorandum in ALAB-905 was founded in part upon the consideration that the demographic and meteorological characteristics of a particular EPZ could have a considerable bearing on the appropriate monitoring planning basis for that EPZ.

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[24](...continued)
may not file proposed findings of fact and conclusions of law on, or appeal the disposition by the Licensing Board of, any issues not placed (or sought to be placed) in controversy by that intervenor. See 10 C.F.R. § 2.762(d)(1)(1990). These amendments apply only in proceedings that, unlike the one at bar, were initiated after September 10, 1989. See 54 Fed. Reg. 33,168, 33,179 (1989).

Contrary to the MassAG's insistence at oral argument,[25] we find nothing in Basis B of Contention EX-18 (or elsewhere in the contention) that might possibly be taken as claiming the existence of material differences between the two segments of the EPZ. Moreover, it seems unlikely that any such differences that might have existed would have come to light only through an exercise of the emergency response plan for the Massachusetts portion of the EPZ. Rather, it is reasonable to suppose that, independent (and well in advance) of the June 1988 exercise, the demographic characteristics of all areas within the EPZ would have been readily ascertainable through resort to available census and other data pertaining to population distribution. It is equally probable that available weather reports would have supplied all of the meteorological information necessary to determine the presence of any significant variations on that front.

In short, the intervenors gave the Licensing Board no warrant for allowing them a fresh opportunity to challenge the adequacy of monitoring capability through an attack upon the FEMA planning estimate embodied in the Krimm memorandum. We thus must endorse the Board's refusal to accord such an

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[25] App. Tr. 46 (Apr. 18, 1990).

opportunity tnrough the vehicle of MassAG's Contention EX-18.[26]

B. We now turn to the other contentions that the MassAG maintains were improvidently rejected at the threshold on the strength of the litigation of the New Hampshire emergency response plan. We consider them seriatim.

1. MassAG Contention No. 29 asserts in substance that, because the residents of the Massachusetts EPZ communities lack confidence in, and are hostile to, the Seabrook owners and the NRC, there will be a "confused, disorderly, and uncontrolled public response" to any endeavor by the applicants' ORO to carry out the SPMC provisions. Our examination of the four bases assigned for the contention has disclosed nothing that might provide a distinction between Massachusetts and New Hampshire EPZ

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[26] In the same section of his brief (at 43), the MassAG assails the Licensing Board's refusal to admit his Contention No. 65. See Memorandum and Order - Part I (July 22, 1988) at 91-92 (unpublished) [hereinafter SPMC Contentions Order - Part I], reconsideration denied, Memorandum and Order (Jan. 4, 1989) at 9 (unpublished). That contention alleged, inter alia, that sufficient "resources including personnel, facilities and equipment have not been secured to adequately respond to a radiological emergency at Seabrook." The MassAG does not state explicitly why he believes that Contention No. 65 should not have been rejected. Nonetheless, the lumping of that rejection with the rejection of Basis B of Contention EX-18 under the heading "20% Monitoring Planning Basis" carries with it the plain implication that, in the MassAG's opinion, Contention No. 65 should have been accepted in the wake of ALAB-905 in Shoreham. For the reasons already assigned with respect to Contention EX-18, there is no substance to that thesis.

residents in this respect. More specifically, none of those bases supplies any cause to believe that the response of the Massachusetts citizenry to information, instructions, or assistance offered in the event of an emergency might differ materially from the response of persons in New Hampshire. This being so, and there appearing to be no dispute that behavioral issues pertaining to public response were in fact considered in the NHRERP phase of the proceeding,[27] we agree with the Licensing Board's determination that Contention No. 29 sought impermissibly to traverse territory already amply covered.[28]

2. MassAG Contention Nos. 30 and 74 are addressed to the same subject: snow removal. In essence, the claim is that the SPMC makes no provision for the removal of snow from the highways and other roads in the communities within the Massachusetts EPZ. Although acknowledging that those communities generally rely on private contractors for snow removal, the basis assigned for Contention No. 30 raises the possibility that the contractors will default in the performance of that service in the event of a radiological emergency.

In rejecting the contentions, the Licensing Board observed that it could see "no basis for assuming that an evacuation would be ordered if unremoved snow makes that

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[27] See LBP-88-32, 28 NRC at 742-47, 749-50.

[28] See SPMC Contentions Order - Part I, at 49-50.

protective action impractical."[29] We agree with that observation. In the event that a snowstorm makes sheltering preferable to evacuation due to resultant road conditions, the sheltering option presumably will be the adopted protective action. On this score, the MassAG does not allege that sheltering would be infeasible or unlikely to be ordered. Indeed, we are unaware of any suggestion in this proceeding that, except in the case of crowded beach areas, there are insufficient resources to shelter the EPZ population. And, needless to say, during the time of year that snowstorms occur, the beaches are essentially deserted.

Contention Nos. 30 and 74 would therefore have an acceptable foundation only if there were an ironclad regulatory requirement that an emergency response plan contain provisions assuring that, in any and all climatic conditions, evacuation is an available protective action. Although the MassAG maintains that the SPMC is deficient in failing to assure that snow removal crews will respond to light and moderate snowstorms,[30] in neither the bases offered for the contentions nor his brief is there an identification of the source of such a requirement. Our own

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[29] Id. at 51, 98.

[30] MassAG Brief at 28-29.

review of the Commission's emergency planning regulations and guidance likewise was unavailing in this regard.[31] Accordingly, Contention Nos. 30 and 74 were properly rejected irrespective of whether they sought to relitigate an issue previously laid to rest in the NHRERP phase.[32]

3. In his Contention No. 34 and the single basis assigned for it, the MassAG alleges a lack of reasonable assurance that sufficient resources are available to furnish gasoline to the "hundreds" of vehicles that are likely to run out of gasoline during a summertime evacuation from crowded beach areas. In addition, he asserts the same

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[31] For its part, NUREG-0654 provides in Criterion II.J.10.k that the emergency response plan include the "[i]dentification of and means for dealing with potential impediments (e.g., seasonal impassability of roads) to use of evacuation routes, and contingency measures." This plainly recognizes that there may be occasions when climatic conditions will render roads impassable. Sheltering is, of course, the generally acknowledged alternative to evacuation and, as such, qualifies as a "contingency measure" in the event there are impediments to the use of evacuation routes.

[32] In a second order, the Licensing Board likewise rejected at the threshold similar contentions of certain of the intervenor Towns: TON No. 1, Basis b (SPMC deficient in failing to come to grips with the seasonal impassability of roads due to snow); TOS No. 21 (SPMC fails to provide adequate measures to protect the public in the event of a snowstorm emergency); and TOWN No. 4 (SPMC leaves snow removal responsibility to local authorities and TOWN does not have adequate resources to clear roadways in a timely fashion to accommodate an evacuation during or after a major snowstorm). See Memorandum and Order - Part II (July 29, 1988) at 31-32, 52, 56 (unpublished) [hereinafter SPMC Contentions Order - Part II]. Our reasons for affirming the rejection of MassAG Contentions Nos. 30 and 74 apply equally to these claims.

absence of such assurance that ride-sharing will be available for use by those stranded without fuel.

Opposing the admission of Contention No. 34, the applicants and the staff both maintained below that there is no regulatory requirement that arrangements be made to provide fuel for evacuating vehicles. Moreover, the applicants urged that, to the extent it might be addressed to the blockage of evacuation routes by stranded vehicles, the contention sought to raise an issue fully litigated in the NHRERP phase of the proceeding.

The Licensing Board rejected the contention for want of "an adequate basis to support its admission."[33] The sole justification given for this conclusion was that the "MassAG alleges nothing regarding prior litigation of this matter, nor does he even discuss the possibility of mitigating measures that might minimize the impact of stranded vehicles."[34]

We agree with the MassAG's insistence on appeal that, contrary to the Licensing Board's ruling, Contention No. 34 was supported by an adequate basis set forth with sufficient specificity. We further find entirely insubstantial the endeavor of the applicants and the staff to justify the result below by renewing their claim that, in the words of the applicants, emergency plans need not make provision for

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[33] SPMC Contentions Order - Part I, at 55.

[34] Ibid.

"fueling cars [that] run out of gas."[35] Although that may be true, it is also quite beside the point. The issue at hand is not whether the applicants are under an obligation to ensure that gasoline will be at hand for refueling purposes. Rather, as the MassAG observes, Contention No. 34 seeks to put into question whether the SPMC satisfactorily addresses the likelihood that evacuating vehicles will run out of gasoline and the asserted fact that refueling will not be possible, to the end that there is reasonable assurance that stranded evacuees will be accommodated and a successful vehicular evacuation will take place. The failure of either the applicants or the staff even to attempt to explain before us why this is not a litigable question is enough to undergird our belief that no good explanation is possible.

In light of these considerations, we might well be justified in simply reversing the Licensing Board's rejection of Contention No. 34 as supported by neither the reason assigned by the Board nor the defense offered by the applicants and the staff. There is, however, another reason -- hinted at by the Licensing Board but not mentioned by either the applicants or the staff in thei appellate briefs -- why the contention was properly rejected. Certainly the failure of the applicants or the staff to advocate this

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[35] Applicants' Brief (Mar. 5, 1990) at 31.

reason for dismissal of the contention does not stand in the way of our recognition of it.

In its decision in the NHRERP phase of the proceeding, the Board explicitly found, on the strength of the thesis of a "therapeutic community" advanced by applicants' witness Dr. Dennis S. Mileti, that "the public would share rides with other evacuees without transportation."[36] Although Dr. Mileti's focus appears to have been on persons lacking transportation at the inception of the evacuation,[37] his views on ride-sharing would seem to be no less applicable to persons who lose, during the course of the evacuation effort and for whatever reason, transportation that was initially available. Thus, the conclusion is compelled that the assumption necessarily at the root of Contention No. 34 -- that there is not reasonable assurance that ride-sharing will be available to those stranded without fuel -- was at issue in the NHRERP phase and, albeit subsequent to the rejection of that contention, was explicitly found to be unwarranted by the Board below.

In this circumstance, the contention was plainly barred unless the MassAG offered a reasonable explanation why motorists on evacuation routes in Massachusetts would be less inclined to indulge in ride-sharing than their

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[36] LBP-88-32, 28 NRC at 744.

[37] See Applicants' Direct Testimony No. 7 (Evacuation Time Estimate and Human Behavior in Emergencies), fol. Tr. 5622, at 96-98, 105.

counterparts in New Hampshire. No such explanation was forthcoming. This is not surprising. Dr. Mileti's thesis was not area-dependent, and we think it most unlikely that the MassAG would wish to convey the impression that the inhabitants of Massachusetts are less disposed to extend a helping hand to their fellow citizens than are the residents of neighboring New Hampshire.

4. MassAG Contention No. 35 focuses upon the overheating and stalling of vehicles departing crowded beach areas as part of an evacuation on a hot summer day. To the extent that this contention asserts the lack of sufficient tow vehicles to respond adequately to this problem, the Licensing Board combined it with another admitted contention (No. 73).[38] We agree with the Licensing Board that, in its other respects, Contention No. 35 was foreclosed.[39] Once again, the MassAG supplied no good reason to relitigate in the SPMC phase of the proceeding whether, as Dr. Mileti testified and the Board found in the NHRERP phase, ride-sharing will be available to those who do not have (or have been deprived of) their own means of transportation.

5. MassAG Contention No. 48 is concerned with the implementation of adequate protective measures for those persons who either are patients in the two hospitals within the EPZ at the time of the radiological emergency or become

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[38] See SPMC Contentions Order - Part I, at 56.

[39] Ibid.

injured during the course of the emergency. Basis C asserts that, absent pre-emergency planning for hospital personnel specifically, there is no reasonable assurance that sufficient staff will remain or report for duty at the hospital to perform emergency response functions. According to the basis, "[m]any staff members will experience severe role conflict and will leave the hospital."

A similar theme is found in Basis A of MassAG Contention No. 49, which is directed to the measures for the protection of those "institutionalized persons (e.g., patients in medical facilities) who cannot be evacuated." We are told in that basis that, especially in light of the absence in the SPMC of any provision "for informing or instructing hospital staff prior to an emergency of their expected emergency roles," reasonable assurance does not exist that "sufficient hospital staff will be willing to remain behind in an emergency to care for patients, rather than seeing to the safety of their own families who may be evacuating."

The Licensing Board accepted some of the bases for the two contentions, but rejected the role abandonment bases on the ground that they sought to raise anew previously litigated human behavior issues.[40] We concur.

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[40] Specifically, the Board referred in its first July 1988 order to its rejection on that ground of MassAG Contention No. 47, concerned with school teacher role abandonment. See id. at 76-77. As previously noted,

(continued...)

There is no room for doubt that the issue of emergency worker role abandonment was explored at length in the NHRERP phase and resulted in extensive Licensing Board findings.[41] Manifestly, for present purposes (i.e., the role abandonment issue), hospital staff personnel come within the ambit of that discussion.[42] It thus was incumbent upon the MassAG to point to differences between the situations in New Hampshire and Massachusetts medical facilities that might have a material bearing upon the application to the latter of any evidence adduced, and findings made, in connection with role abandonment at the former. No such burden was assumed by

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[40](...continued)
see supra p. 4, in ALAB-937 we reversed the rejection of Contention No. 47 on our determination of, inter alia, significant factual differences between the role assigned to New Hampshire teachers under the NHRERP and that assigned to Massachusetts teachers under the SPMC.

[41] See LBP-88-32, 28 NRC at 735-42. In addition, at an earlier point in that decision, the Licensing Board specifically addressed claims of inadequate staffing of nursing homes to handle emergency evacuations. Id. at 698-99.

[42] This is true whether or not the particular staff member is being called upon in the emergency to fulfill a role foreign to that customarily performed by him or her. The pivotal consideration is whether the emergency plan contemplates (as it does in the case of medical personnel) that the individual will remain on, or report for, duty in the event of the emergency and will have responsibilities for the well-being of individuals exposed to the emergency. If there is that contemplation, the possibility of role abandonment is present irrespective of whether the role at hand is a familiar or an unusual one. At the same time, as we have previously noted in the context of school teachers, abandonment is less likely to occur if the individual will be called upon in the emergency to undertake no more than his or her normal duties. See ALAB-932, 31 NRC 371, 404 (1990).

the MassAG below and his brief to us is equally devoid of any cause to pursue further the matter of role abandonment by hospital personnel. In short, our reversal in ALAB-937 of the Licensing Board's disposition of the teacher role abandonment issue is of no assistance to the MassAG here.

6. In Contention No. 83, the MassAG insists that the SPMC fails to recognize certain "distinct and unique aspects of human behavior during a radiological emergency at Seabrook" that assertedly will "pervade" the response to such an emergency on the part of both the applicants' ORO and the public. Basis C hypothesizes a "severe fast-paced accident" on "a crowded summer beach day." Pointing to a purported acknowledgment by the applicants that the protective measures available to the beach population will not prevent "severe and in some cases immediate health effects," the basis goes on to assert that "a situation in which large numbers of individuals receiving doses of radiation are not able to shelter or evacuate will result in severe, aberrant, and irrational behavior."

The Licensing Board rejected Basis C because "similar" issues were litigated in the New Hampshire phase.[43] On appeal, the MassAG does not dispute that this is so,[44] but

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[43] See SPMC Contentions Order - Part I, at 107-08.

[44] On this score, the applicants refer us to the discussion in LBP-88-32, 28 NRC at 742-49, relating to human behavior in emergencies. In the course of the discussion, the Licensing Board specifically confronted a contention of (continued...)

argues that "[t]he provisions of the SPMC for dealing with the problem posed in the contention basis could not have been litigated in a hearing on the NHRERP."[45] This consideration has no relevance, however, unless there is cause to believe that, in the hypothesized emergency, the conduct of persons on the Massachusetts beaches would differ materially from that of their New Hampshire counterparts. There is an absence of even a hint of such a difference in the MassAG's attack upon the rejection of Basis C and we have no independent reason to think that one might exist.[46]

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[44](...continued)
the MassAG directed to the fact of a large transient beach population. Id. at 745.

[45] MassAG Brief at 35.

[46] In his brief (at 45), the MassAG complains of the Licensing Board's exclusion of portions of Basis A of Contention No. 83, as well as Basis E of Contention No. 77. We are not told, however, why the reasons assigned by the Board for those exclusions are without merit. Accordingly, we need not and do not consider the complaint. See ALAB-937, 32 NRC at 153 n.59 (and case there cited). See also Appeal Board Memorandum and Order (Dec. 15, 1989) at 3-4 (unpublished) (advising appellants that allegations of Licensing Board error not accompanied by an explanation of why the Board was wrong will be dismissed without further consideration).

For the same reason, we need not examine further MassAG Contention No. 18, Basis E, which (although listed among the contentions said to have been erroneously rejected as raising a previously litigated issues) received no individual attention in the MassAG Brief. See supra note 10.

Still further, we have not been presented with any explanation why the Licensing Board's conclusion that aberrant behavior by drivers in the New Hampshire portion of the EPZ would not be a significant factor in an evacuation

(continued...)

7. As summarized by the Licensing Board, MassAG Contention E 13 alleges the inability of the applicants' ORO to control evacuation traffic and access to evacuated and sheltered areas.[47] Bases A, B, and D, as described by the Board, claim that, during the June 1988 exercise, the ORO failed to dispatch and to deploy traffic guides in a timely manner following the beach closings in New Hampshire and Massachusetts (Basis A); issued an Emergency Broadcasting System (EBS) message recommending the evacuation of two towns without having obtained either the authority to implement traffic control measures itself or assurance that state and local authorities would implement ORO's traffic control plan (Basis B); and failed adequately to assess and to respond to a road impediment situation injected into the exercise (Basis D).[48]

The applicants opposed the admission of the contention on the ground that it alleges only minor or readily correctable problems that do not demonstrate a fundamental flaw in the SPMC. In addition, the Licensing Board was told by the applicants that Bases A and B present human behavior

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[46](...continued)
is inapplicable to drivers within the Massachusetts EPZ. See ALAB-932, 31 NRC at 391-98. Accordingly, we find no error in the Board's threshold dismissal of MassAG Contention No. 38 on the subject of aberrant behavior on the part of Massachusetts drivers.

[47] See Memorandum and Order (Dec. 15, 1988) at 39 (unpublished) [hereinafter Exercise Contentions Order].

[48] Ibid.

and evacuation time estimate issues already litigated in the proceeding.

The Licensing Board accepted both of these cla·s.[49] It did not, however, illume the footing for its ·lusion that Bases A and B had already been litigated.

On his appeal, the MassAG maintains that the three bases do assert a failure of "an essential element" of the SPMC, "i.e., the ability to control evacuation traffic flow."[50] In addition, he insists that the matters covered by Bases A and B "have most definitely not been litigated previously."[51]

We find it logically impossible to understand how a contention dealing with events during the course of a June 1988 exercise could possibly be deemed to have been litigated in hearings that took place prior to that time. Unfortunately, the Licensing Board made no attempt to unravel that mystery. Nor are the applicants of any assistance in that regard. Although supporting the Licensing Board's rejection of Bases A and B, and although it was their argument that the Board accepted, the applicants' brief is conspicuously silent on the relitigation matter. From that silence, we must assume that, having given the question additional thought, the

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[49] Id. at 40.

[50] MassAG Brief at 39.

[51] Id. at 40.

applicants now have tacitly retreated from what appears to us to have been a wholly insubstantial claim.

The other assigned reason for the rejection of Bases A, B, and D of Contention EX-13 stands, however, on a much sounder footing. In a 1986 decision in the Shoreham proceeding, the Commission restricted hearings on the results of emergency planning exercises to those issues concerned with whether an exercise revealed "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan."[52] In the same proceeding, we had occasion subsequently to determine that "a fundamental flaw in an emergency plan, as revealed in an exercise, has two principal components."[53] With respect to the first -- the exercise "reflects a failure of an essential element of the plan" -- we observed that "[m]inor or isolated problems on the day of the exercise do not constitute fundamental flaws in the emergency plan."[54] Respecting the second component -- the flaw "can be remedied only through a significant revision of the plan" -- we pointed out that, "where the

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[52] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

[53] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988).

[54] Ibid.

problem can be readily corrected, the flaw cannot reasonably be characterized as fundamental."[55]

There is no room for a serious claim that Basis A, Basis B, or Basis D meets both of these standards. To the contrary, we think it manifest that, even if the cited exercise deficiencies might qualify as more than "minor or isolated problems" (a dubious proposition), they are readily correctable. Accordingly, we are satisfied that the Licensing Board did not err in declining to admit Contention EX-13 as supported by those bases.[56]

II.

In addition to the challenges to the Board's rejection of several MassAG contentions on the basis of the prior litigation concerning the New Hampshire plan, the MassAG and other intervenors have appealed the dismissal of various contentions on other grounds. With one exception, we find those assertions of error meritless.

A. In his Contention No. 28, the MassAG alleges that the protective action recommendation (PAR) decision criteria for the SPMC fail to meet the planning standards of 10 C.F.R. § 50.47(b)(10) and NUREG-0654, Criterion II.J.10.m, because they do not account for the purportedly significant number of Massachusetts EPZ residents who live in trailers.

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[55] Id. at 505-06.

[56] Although the contention had other assigned bases, we do not understand the MassAG's appeal to complain of their rejection.

According to the MassAG, this deficiency is important because trailers provide shielding that is notably less than that afforded by a typical house in the Massachusetts EPZ. This, in turn, assertedly mandates that the mobile home population be evacuated or sheltered elsewhere in the event other residents are ordered to shelter. Concluding that it sought to litigate the validity of the existing PARs based upon a resident subset of "unspecified" size, the Licensing Board dismissed the contention as lacking an adequate foundation.[57]

The MassAG now asserts that the Board "impermissibly rejected the contention on evidentiary grounds."[58] Putting aside the fact that this otherwise unexplained assertion of error seemingly runs contrary to our directive that specific reasons must be assigned for intervenor allegations of error,[59] we find that the Board properly dismissed this contention. Even assuming that the regulations and guidance contemplate the need for a particular PAR based upon specific structure sheltering factors -- which is not apparent -- Contention No. 28 lacks the necessary basis and specificity. The contention fails to provide even minimal support for the conclusional allegation that the trailer population is so "significant" that it merits a separate

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[57] SPMC Contentions Order - Part I, at 48.

[58] MassAG Brief at 27.

[59] See supra note 46.

PAR. Moreover, the contention fails to provide any support for the focal assertion that the sheltering factor for a trailer is less than the sheltering factor for a wood frame house without a basement, which is the conservative value utilized in establishing the sheltering PAR for the SPMC.[60] The Board thus properly dismissed this contention.

B. In his Contention No. 36, the MassAG declares that because of a variety of factors, including traffic congestion, frustrated drivers abandoning cars, driver sickness due to radiation effects, and driver disorderliness, the planned vehicular evacuation of the Massachusetts beaches is not feasible, so that the SPMC violates 10 C.F.R. § 50.47 and NUREG-0654. The Licensing Board rejected this contention, finding that previous litigation and logic established that the beach areas "are spontaneously nearly evacuated almost every day" and that the issue the MassAG was seeking to litigate, the propriety

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[60] See SPMC (Procedures) Implementing Procedure [(IP)] 2.5, at 18 n.* (Rev. 0, Amend. 4). The SPMC was admitted as Applicants' Exh. 42.

The cloud source reduction factor of 0.9 assigned to a wood frame house without a basement is a representative value relative to an unprotected outside position, which is considered to have a reduction factor of 1.0. Applicants' Exh. 34, at 34 (Table 10). The conservatism inherent in utilizing this reduction factor for PAR generation is apparent when it is compared with the reduction factors assigned to other types of structures, e.g., masonry house, no basement (0.6); basement of wood frame house (0.6); basement of masonry house (0.4); large office or industrial-type building away from windows or doors (0.2 or less). Ibid.

of the length of the evacuation time estimates (ETEs) for the beach population, was directly raised by other contentions.[61]

Before us, in an apparent attempt to ensure that his contention is not construed as one challenging the length of the ETEs, the MassAG reiterates that this contention was based upon the premise that evacuation "is not feasible at all."[62] This characterization, however, does not aid his cause. In the event of an emergency, there no doubt will be considerable delay in clearing the beach areas in the Massachusetts portion of the EPZ. Nonetheless, the potential for extended delay does not provide an adequate basis for an assertion that an evacuation is incapable of being carried out at all so as to be "infeasible." In dismissing this contention, the Licensing Board properly relegated litigation over the MassAG's various concerns to the issue of whether the ETEs for the SPMC properly reflect the various delay factors posited by the MassAG.

C. With respect to his Contention No. 39, which asserts that, for a variety of reasons, the ETEs for the Massachusetts EPZ are "too unrealistic to form the basis of adequate protective action decision-making," the MassAG protests only the Licensing Board's exclusion of Basis F. In this particular basis, the MassAG contends that the ETEs

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[61] SPMC Contentions Order - Part I, at 59.

[62] MassAG Brief at 32 (emphasis in original).

are too short because they do not take into account the evacuation delays that would occur as a result of evacuation vehicle drivers and passengers becoming ill from radiation sickness caused by radiation releases occurring in a wide range of accident sequences. The Licensing Board rejected the contention on the ground that it lacked foundation for its underpinning that "radiation sickness can reasonably be expected to cause traffic delays, even assuming the wide range of accident sequences alleged in the basis."[63]

Pointing to the Sholly/Beyea/Thompson/Leaning testimony discussed in ALAB-922,[64] before us the MassAG asserts that the Licensing Board "knew full well" that the MassAG had already prepared testimony that described the radiation doses that can be expected and the health consequences that would occur from those doses in the beach areas within the timeframe it would take to evacuate.[65] Putting aside the fact that the MassAG provides us with no confirmation of what the Board allegedly knew in this regard, his assertion does not account for his failure, as the proponent of the contention, to reference this testimony as part of the

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[63] SPMC Contentions Order - Part I, at 62.

[64] See 30 NRC 247, 252-53 (1989). In CLI-90-2, 31 NRC 197, 217 (1990), petition for review pending sub. nom. Massachusetts v. NRC, No. 90-1132 (D.C. Cir. argued Sept. 18, 1990), the Commission declared that this testimony was not admissible for the proffered purpose of examining the radiological dose consequences that might arise under the NHRERP.

[65] MassAG Brief at 33.

supporting basis. It is not the responsibility of the Licensing Board (or this Board) to supply the basis information necessary to sustain a contention.[66] The MassAG having failed to provide some support for his central premise that radiation exposures can be expected within the timeframe established for an evacuation that will produce potentially debilitating effects -- hardly a self-evident proposition -- the Licensing Board properly found that Basis F lacked foundation.

D. In his Contention No. 41, the MassAG insists that the SPMC fails to provide the requisite reasonable assurance that the Massachusetts EPZ beach population will be protected in the event of a radiological emergency. On this score, he asserts that the ETEs are "simply too long" and that the plan fails to provide a sheltering option to protect the population "entrapped" because they are "unable to timely evacuate." The Licensing Board rejected the contention on the ground that it was "another argument that the protective actions must accomplish minimum dose savings."[67] The MassAG now asserts that the Licensing Board committed error because its rationale is based upon the notion that the effectiveness of the plan is irrelevant to

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[66] See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 n.6 (1985).

[67] SPMC Contentions Order - Part I, at 65.

its adequacy.[68] Applicants maintain, with the staff's concurrence, that the contention is simply a restatement of the MassAG's argument, unsuccessfully put forth in support of the admission of his Contention No. 36, that the length of an evacuation from the beaches renders that protective action inadequate.

As we have noted previously, the emergency planning requirement in 10 C.F.R. § 50.47(b)(10) and the guidance in NUREG-0654, Criterion II.J.10.m, indicate only that, in preparing an emergency plan, a "range of protective actions" should be considered and that the bases for the choice of protective actions be set forth in the plan.[69] Contention No. 41 does not assert that these directives have gone unfulfilled. Instead, despite our previous pronouncements that there is no time limitation specified in the regulations within which an evacuation must be completed,[70] this contention focuses on the length of the time it will take to carry out the chosen protective action of evacuation for the beach population and reiterates the assertion that it is "too long." In the absence of more, the Licensing Board was correct in dismissing this contention and, as in the case of MassAG Contention No. 36, essentially incorporating litigation over the timing of the beach

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[68] MassAG Brief at 33.

[69] See ALAB-924, 30 NRC at 367 n.164.

[70] See ALAB-932, 31 NRC at 408 & n.16 .

evacuation within that concerning the validity of the ETE calculations.

E. MassAG Contention No. 56 alleges that "[t]he SPMC does not establish or describe coherent decision criteria to be used by emergency decision-makers in formulating an appropriate [PAR] and otherwise fails to provide guidelines for the choice of protective actions consistent with federal policy." Of the six separate bases initially proffered in support of this contention, the Licensing Board rejected only Basis A. In that basis, the MassAG asserts that the SPMC's provision for utilizing certain predetermined PARs, which are based in significant part upon containment-monitored radiation levels, is inadequate. As grounds for dismissing Basis A, the Licensing Board declared that, as the licensing board with jurisdiction over "offsite" emergency planning matters, it lacked the authority to rule on the assertedly "onsite" issue raised in this particular basis.

Before us, the MassAG maintains that the error in this ruling is clear from ALAB-916.[71] In that decision, rendered in response to a properly filed directed certification motion, we held that the Licensing Board incorrectly rejected a previously admitted portion of a contention (MassAG EX-19, Basis D) concerning the validity of the computer model utilized to generate the PARs for the June

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[71] 29 NRC 434 (1989).

1988 full participation exercise on the ground that it lacked jurisdiction over the issue. In response to the MassAG's allegation of error here, applicants maintain that Basis A of Contention No. 56 was an improper attack upon the emergency action levels (EALs) established in the onsite plan, which previously had been reviewed and sanctioned by the "onsite" Licensing Board.[72] The staff, however, takes a somewhat different tack, arguing that the MassAG's current reliance upon ALAB-916 makes his assignment of error "untimely," in that he took no steps when ALAB-916 was issued to resubmit his rejected contention to the offsite Board for admission.[73]

As ALAB-916 made clear, in creating separate licensing boards to consider the various issues that may be presented within a single licensing proceeding, the authority of each board to act (at least in the absence of any Commission directive to the contrary) is governed by the "jurisdiction" allocated to that board by the Chief Administrative Judge of the Licensing Board Panel, usually by way of a board constitution notice.[74] ALAB-916 also made apparent that,

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[72] Applicants' Brief at 38 & n.112 (citing LBP-87-10, 25 NRC 177, 190-94 (1987)).

[73] NRC Staff Brief In Response to Intervenor Appeals from LBP-89-32 and LBP-89-17 (Mar. 21, 1990) at 68 [hereinafter NRC Staff Brief].

[74] See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 307-08 & n.6, review declined, CLI-88-11, 28 NRC 603 (1988).

under the apportionment for this operating license proceeding, the "offsite" Board that rejected MassAG Contention No. 56, Basis A, is the board with "general" jurisdiction over the proceeding, with the separate "onsite" Board having within its precinct only those matters relating to "safety and onsite emergency planning issues." Given this division of labor, as was the case with the contention under review in ALAB-916, the "offsite" Board here "correctly focused on the question of the scope of its jurisdiction vis a vis that of the so-called 'onsite' Board."[75] Unfortunately, as was also the case with ALAB-916, "it came up with the wrong answer."[76]

In considering the admissibility of Contention No. 56, the Board declared that the proper focus was on the distinction, albeit "narrow, and perhaps somewhat arbitrary," between EALs and PARs.[77] Observing that

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[75] ALAB-916, 29 NRC at 437.

[76] Ibid.

[77] SPMC Contentions Order - Part I, at 82. An EAL defines the level of an emergency situation based upon plant conditions and other relevant factors. 10 C.F.R. Part 50, App. E, § IV.C, establishes four classes of EALs (in ascending order of significance): Notification of Unusual Event, Alert, Site Area Emergency, and General Emergency. See also NUREG-0654, at 1-3. The Notification and Alert classifications are intended to provide early and prompt notification of minor events that could lead to more serious consequences, while the Site Area and General Emergency classifications are intended to reflect conditions in which significant releases are likely or are occurring and could, in the latter instance, include core degradation with the potential for loss of containment. Ibid. Responsibility

(continued...)

together EALs and PARs "span the [onsite/offsite] interface," the Board nonetheless found that EALs "are immediately next to the onsite/offsite interface on the onsite side" and thus are "onsite" matters, while PARs "are immediately next to the interface on the offsite side" and so are "offsite" matters.[78] According to the Board, the regulatory assignment of primary responsibility for EAL classification to licensee personnel, along with the fact that classification is based in substantial measure upon plant conditions and factors affecting plant conditions, established the "onsite" nature of EALs. On the other hand, PARs would be considered "offsite" matters because regulations and NUREG-0654 guidance place the responsibility for choosing and implementing PARs upon state and local

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[77](...continued)
for establishing the EALs for a facility, including designation of the initiating conditions for each level based upon plant conditions, rests with the licensee. Id. Criterion II.D.1; see 10 C.F.R. § 50.47(b)(4). In contrast to the EAL, a PAR is a recommendation for protective action that should be taken in response to the emergency situation. The licensee is also responsible for having a mechanism in place, based on among other things) the EALs for the facility, that provides a basis for making recommendations to appropriate state, local, or offsite response organization officials (in instances when state and local governments are not participating in emergency planning) on protective actions that might be taken to avoid projected doses. NUREG-0654, Criterion II.J.7. Offsite response authorities, however, bear the responsibility for assessing any licensee-recommended PAR and determining whether, taking into account local conditions existing at the time of the emergency, it is appropriate and should be implemented in the plume EPZ. See id. Criteria II.D.4, II.J.9., II.J.10.m.

[78] SPMC Contentions Order - Part I, at 82.

government response officials and, in an instance such as this when there is no governmental participation, upon the licensee's offsite response organization.

With this dichotomy established, the Board found that, although portions of Basis A made reference to the offsite significance of the predetermined PARs and therefore seemed to be an offsite matter, the core of the allegation nonetheless was the supposed improper utilization of within-containment monitoring levels for the predetermined PARs. According to the Board, "[s]ince effluent parameters are a part of the plant status consideration within the dominion of the plant licensee in setting EALs [(emergency action levels)], . . . Basis A, at least, is fundamentally an onsite matter."[79] The Board thus refused to consider this basis further because it was not within its jurisdiction.

We agree with the Board's general analysis distinguishing between issues involving EALs or PARs as onsite or offsite matters, respectively. We do not agree, however, with its conclusion that the MassAG's particular challenge to the sufficiency of the predetermined PARs set forth in the SPMC is an onsite matter. The Board found determinative the fact that the effluent parameter information that is incorporated into the predetermined PARs is the same type of onsite information used by the licensee in setting EALs, an onsite matter. Yet, as a review of the

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[79] Id. at 84.

SPMC demonstrates, this type of information plays a role generally in establishing all PARs, predetermined or otherwise.[80] It thus renders poor service as a mark for plotting the line of jurisdictional demarcation if, as the Licensing Board correctly concluded, PARs are an offsite matter.

Instead, in line with the Board's general holding concerning the status of EALs and PARs as onsite or offsite matters, we find that ascertaining the nature of the issue raised by Basis A to Contention No. 56 requires an inquiry into who is utilizing the information and why. For the EAL process, the primary responsibility for utilizing the onsite information rests with onsite personnel for the purpose of alerting onsite and offsite response personnel about an emergency situation at the facility.[81] In contrast, for the PARs at issue here, the SPMC makes it clear that the primary responsibility for employing the effluent information rests squarely with offsite response personnel, i.e., the applicants' offsite response organization, who (in consultation with Commonwealth officials) are to use it to reach a judgment about what the Board itself recognized is an offsite matter -- establishing an appropriate PAR for the

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[80] See SPMC (Procedures) IP 2.2, at 3, 15-17 (Rev. 0, Amends. 4 & 5); id. IP 2.5, at 16 (Rev. 0, Amend. 4).

[81] See LBP-87-10, 25 NRC at 192-93.

offsite population.[82] We thus conclude that Contention No. 56, Basis A, raised an offsite issue and that the offsite Board had the authority to consider it along with the other bases provided in support of the contention.

This finding necessarily brings us to the additional issue posited by the staff: whether, in light of our ruling in ALAB-916, the MassAG's failure to seek reconsideration from the Licensing Board of the dismissal of Contention No. 56, Basis A, precludes him from raising the matter on appeal.[83] We share the staff's concern about the MassAG's seeming lack of genuine interest in the vigorous pursuit of Basis A when he had the opportunity to do so.[84]

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[82] See Staff (Procedures) IP 2.5, at 5-11 (Rev. 0, Amends. 1-3).

[83] As the sole support for its assertion that the MassAG's attempt to invoke ALAB-916 should be rejected as untimely, the staff cites our decision in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 449 (1980). In that case, we held that an "interested state" under 10 C.F.R. § 2.715(c) cannot participate as a matter of right on appeal to allege errors in a Licensing Board determination regarding seismic issues when it had not been involved in the litigation of those matters before the Licensing Board. Because the MassAG clearly was a full participant below concerning the predetermined PAR issue, that decision has no application in this instance.

[84] Indeed, the MassAG had at least two other opportunities to seek admission of Basis A of his Contention No. 56, even before ALAB-916 was issued. At the time of the offsite Licensing Board's initial ruling, he could have explicitly requested the presiding onsite Licensing Board to admit this portion of the contention, or he could have sought our interlocutory review of the Licensing Board's dismissal ruling via directed certification (as he later successfully did for the contention considered in ALAB-

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Nonetheless, as the staff implicitly concedes, the Commission's Rules of Practice place no affirmative obligation on the MassAG to have requested the Licensing Board to reconsider its ruling some ten months later when we handed down ALAB-916.[85] In the absence of such an obligation, he was entitled to await a final order and raise the matter by way of direct appeal, as he has, in fact, done.[86]

Accordingly, we reverse the Licensing Board's determination that it lacked jurisdiction over the issue

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[84](...continued)
916). The staff does not rely upon these considerations to support its "timeliness" argument, however, and the applicants -- addressing only the merits of the Licensing Board's onsite/offsite ruling -- do not claim that there is any "timeliness" bar to the MassAG's argument on appeal.

[85] The Rules of Practice also impose no explicit obligation on the offsite Licensing Board to have referred the contention to the onsite Licensing Board, although such action is certainly within the scope of any board's "duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order." 10 C.F.R. § 2.718. Further, as we have previously concluded with regard to the use of multiple licensing boards in a single proceeding, this discretionary case management tool cannot be used to the detriment of a party's rights. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 430, review declined, CLI-88-11, 28 NRC 603 (1988). Hence, the offsite Board's failure to refer the contention to its onsite brethren seemingly reflects its tacit concurrence in the MassAG's decision to "rest on his oars" until the time for a direct appeal.

[86] So too, the MassAG was not obliged by the Rules of Practice to seek either directed certification -- a discretionary form of review in any event -- or to refile his contention with the onsite Licensing Board. See supra note 84.

raised by MassAG Contention No. 56, Basis A, and remand the matter for further proceedings. This, of course, raises the question whether the full-power operating license for Seabrook may be allowed to continue in effect pending the outcome of the remand. In comparing the MassAG's allegations concerning the deficiencies in the predetermined PARs with the SPMC provisions concerning PAR generation, it appears to us that the principal factors he asserts should be part of the decisionmaking process as it relates to utilization of a predetermined PAR are, in fact, included as part of the overall process that is undertaken before any PAR is finally adopted.[87] We are, therefore, unable to conclude that there are significant deficiencies in the SPMC relative to PAR generation for which adequate compensating measures do not exist and thus do not have grounds for the extreme measure of license suspension.[88] Nonetheless, as we indicated previously in a similar circumstance,[89] should the MassAG wish to challenge this determination in a motion before the Licensing Board seeking a suspension, the Board

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[87] See SPMC (Procedures) IP 2.5, at 5-10. In this regard, the MassAG's central premise -- that the SPMC process for evaluating the use of the predetermined PAR does not take into account a variety of relevant factors -- may well be mistaken and thus an appropriate subject for a motion for summary disposition.

[88] See 10 C.F.R. § 50.47(c)(1).

[89] See ALAB-937, 32 NRC at 152.

is to act upon the motion, following the receipt of responses, with all possible expedition.

F. In his Contention EX-12, Bases A, B, and D, the MassAG asserts that the June 1988 full participation exercise demonstrated that the applicants' emergency warning system failed to comply with the regulatory provisions concerning early notification and clear instruction of the general public found in 10 C.F.R. § 50.47(b)(5) and Part 50, App. E, § IV.D.3, as well as the guidance in NUREG-0654, App. 3, and the applicable exercise objective. In Basis A, the MassAG refers to three instances of what he contends are noncompliance with Exercise Objective 12, which contemplates a demonstration of the ability to alert the public and to begin the dissemination of an instructional message through the emergency broadcast system (EBS) within fifteen minutes of a decision by state officials to begin notification. He alleges that in these instances, eighteen, thirty, and fifteen minutes, respectively, elapsed between the time the person portraying a Massachusetts government representative made a general determination to begin siren sounding and EBS instructional messages and the time the siren sounding and the broadcast of EBS messages were actually initiated. He further contends that the delay was due in large part to discussions concerning EBS message content that took place between the person portraying a Commonwealth representative and applicants' emergency response officials, after the

determination to issue a general alert was made but before authorization to begin the siren sounding and EBS processes was given. Basis B maintains that applicants' notification efforts in the exercise did not comply with the dictate of 10 C.F.R. Part 50, App. E, § IV.D.3, that "initial notification" must be essentially completed "within about 15 minutes" because in each instance the time to broadcast the initial EBS message, lasting between three and five minutes, would have to be added to the existing times in order to complete "initial notification." The MassAG claims that this would add significantly to the exercise times, clearly placing them beyond the applicable regulatory limit for initial notification. Finally, in Basis D the MassAG states that the exercise demonstrated that the total length of time from the declaration of an emergency condition to the completion of initial public notification is overly lengthy in that too many "physical and administrative steps" exist in the applicants' alert and notification system to provide timely completion of public notification.

The Licensing Board rejected Bases A and B on the ground the MassAG had substantially and improperly lengthened the time periods involved in all three incidents through an interpretation of the applicable regulations and guidance in a manner that failed to recognize a notification decision is not complete, so as to start the fifteen-minute period running, "until the important aspects of the

notification have also been decided."[90] The Board also found those bases failed to meet the pleading requirement that any purported exercise deficiencies must be alleged to demonstrate a "fundamental flaw" in the SPMC. Finally, the Board declared that Basis D was insufficient because its essential components, Bases A and B, were without substance and because Basis D did not delineate, nor was the Board aware of, any standard setting forth how quickly the relevant notification decision must be made after the declaration of an emergency condition.

The Licensing Board was correct in rejecting Basis A as footed on an unreasonably narrow interpretation of when the alerting/notification "decision" has been made so as to start the clock for assessing the timeliness of the alerting/notification process. The close operational correlation between the siren alerting system and the EBS notification system is clear.[91] As a consequence, for the purpose of determining the timeliness of the alerting and notification process, a decision to initiate the systems cannot reasonably be said to be finalized until there has been not only a determination that these systems should be activated but also a decision about what EBS messages should be broadcast. The time periods posited by the MassAG in support of Basis A are fatally flawed because they do not

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[90] Exercise Contentions Order at 37.

[91] See ALAB-935, 32 NRC 57, 61-62 (1990).

reflect the proper starting point for any assessment of timely system activation. With respect to Basis B, as our recent determination in ALAB-935 makes clear, in considering compliance with the requirement in Part 50, App. E, § IV.D.3, that initial notification be completed "within about fifteen minutes," the amount of time needed to complete the EBS message is essentially irrelevant,[92] thereby negating the MassAG's argument that exercise compliance was impossible because of the message completion period. Finally, the Licensing Board was correct in its assessment that, in contrast to the time constraints delineated in 10 C.F.R. Part 50, App. E, § IV.D.3, within which state officials must be notified of the declaration of an emergency by a licensee and the time within which initial notification must be completed, there is no regulatory requirement establishing a specific time frame for a decision to begin notification following the declaration of a particular emergency classification. Basis D thus lacks a foundation as well.[93]

G. As part of the basis its Contention No. 3, intervenor SAPL seeks to challenge the adequacy of the

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[92] Id. at 68-69.

[93] In appealing the dismissal of this contention, the MassAG also asserts that the application of the fundamental flaw standard "in the manner applied here" sets an impermissibly high threshold for the admission of the contention. MassAG Brief at 38. We reject that argument, however, as lacking both sufficient explanation and merit.

decontamination showers in the trailers provided for radiation monitoring of Massachusetts EPZ evacuees. Pointing to the NUREG-0654 guidance that there "shall" be the capacity to provide monitoring for evacuees "within about a 12-hour period,"[94] SAPL asserts that the same standard should be applicable for completing any decontamination of evacuees who might need such protection. Noting that compliance with the twelve-hour guidance requires that the trailers have ten or more monitoring stations, each processing evacuees at a rate of slightly more than one per minute, SAPL claims that the provision of only two showers in each trailer for decontamination would leave the applicants unable to meet the same twelve-hour guideline. This is so, SAPL contends, because applicants' planning basis provides for ten minutes per decontamination shower. In a bench ruling supplementing its June 1988 order rejecting this portion of the basis for the contention, the Board barred further litigation on the ground that, in contrast to the standards for monitoring capacity, there is no regulatory requirement or guidance that specifies a period for the completion of evacuee decontamination.[95]

Before us, SAPL asserts that the Commission's guidance on monitoring logically compels the conclusion that the

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[94] NUREG-0654 (Rev. 1, Supp. 1) Criterion II.J.12; see supra note 11.

[95] Tr. 15,644-46, 15,649-52.

standard for carrying out decontamination activities should be completed within the same time period and that SPMC planning clearly is deficient because it cannot meet that guideline. This line of argument implicitly acknowledges that, as the Licensing Board recognized, there is no guideline or regulatory requirement relating to decontamination activities that parallels the NUREG-0654 "twelve hour" timing guideline for monitoring EPZ evacuees.[96] The thesis necessarily rests, therefore, on the unspoken premise that a substantial portion of those individuals who will be monitored also will require decontamination at the monitoring station. SAPL having failed to provide any support for the premise, this portion

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[96] As the staff points out, in its earlier determination relating to the NHRERP the Licensing Board rejected this same argument concerning applicability of the twelve-hour monitoring guideline to decontamination activities. LBP-88-32, 28 NRC at 722. SAPL did not appeal that determination as part of its challenge to the Board's partial initial decision on the NHRERP nor has it made any attempt to demonstrate that the situation in Massachusetts would be any different than that in New Hampshire with regard to this ruling.

Further with respect to SAPL's argument that a time limit applies to decontamination activities for members of the public who are EPZ evacuees, we note that, in contrast to its clear provisions for monitoring and decontamination for onsite personnel and offsite emergency workers, NUREG-0654 fails to make any mention of the need for decontamination for evacuees. Compare NUREG-0654 Criteria II.J.3 -.4, II.K.7 (monitoring and decontamination for onsite personnel) and id. (Rev. 1, Supp. 1) Criterion II.K.3, .5 (dosimeter distribution and decontamination for emergency workers) with id. Criterion II.J.12 (monitoring of evacuees).

of the basis of SAPL's contention is without substance and was properly dismissed.[97]

H. In their Contention EX-2, intervenors TOH and NECNP contend that the June 1988 exercise demonstrated that there is no reasonable assurance that school children will be protected in the event of a radiological emergency at Seabrook. As bases for this contention, they set forth allegations regarding inaccurate and confusing instructions to the public concerning the care of school children, bus drivers unable to complete their evacuation route assignments without assistance, slow or late protective action decisions regarding school children, and failure by the State of New Hampshire to follow through on protective actions for school children. Initially, the Licensing Board admitted the contention, finding that the allegations in basis paragraph seven concerning a "profusion of ordered protective actions" were adequate to show a "pattern" of repeated or related failures associated with an essential

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[97] Before us, SAPL also argues that, even if there is no regulatory standard governing the timing for decontamination activities, the adequacy of decontamination facilities should be considered as relevant to the general issue of whether the planned facilities provide "reasonable assurance" under 10 C.F.R. § 50.47(a)(1). Putting aside the question of whether this general standard provides any basis for inquiry in the absence of a specific regulatory direction arising from section 50.47(b) and the implementation guidance in NUREG-0654, see CLI-90-2, 31 NRC at 213, 217; ALAB-932, 31 NRC at 424, as the Licensing Board recognized in its supplemental bench ruling, this clearly was not the basis upon which SAPL sought to have its contention litigated. See Tr. 15,658.

element of the plan, thereby satisfying the threshold showing required by ALAB-903 for admission of a contention alleging that exercise deficiencies reflect a "fundamental flaw" in the emergency plan.[98] Subsequently, however, applicants filed a motion to dismiss the contention, asserting that the intervenors' prefiled testimony on the contention failed to establish the requisite pattern. The Licensing Board thereafter dismissed the contention.[99] Before us, intervenors challenge this action, asserting that the testimony in question, which allegedly would have proved that New Hampshire response officials failed to provide follow-up PARs for students in five of seventeen towns previously ordered to shelter,[100] established a "gross breach of public safety" so pervasive in its negative implications for protective action decisionmakers that it manifests a fundamental flaw in the plan.[101]

Even if we accept as true the claims set forth in the prefiled testimony with regard to the failure of New

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[98] Exercise Contentions Order at 68-69 (citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499 (1988)).

[99] See Tr. 25,189-222.

[100] The prefiled testimony in question, which was provided by Town of Kensington Emergency Management Director Sandra F. Mitchell, was marked for identification as MassAG Exh. 115 but was, of course, not admitted into evidence because of the Board's dismissal of the contention.

[101] [TOH] and [NECNP] Brief on Appeal of LBP-89-32 (Jan. 24, 1990) at 28.

Hampshire response officials to provide a follow-up protective action for the sheltered school children,[102] under the standards set forth in ALAB-903 that testimony is inadequate to establish the existence of a fundamental flaw in that state's emergency plan. Whether through this testimony or otherwise, intervenors have failed to make any proffer suggesting why this apparent misstep "can be remedied only through a significant revision of the plan," the second element required to show a fundamental flaw. Relatively minor, additional training emphasizing careful attention to follow-up protective actions, not a significant redesign of the plan, is the appropriate course of action to correct a deficiency like that identified in the prefiled testimony. The prefiled testimony provided in support of Contention EX-2 thus having failed to establish any grounds for a finding that the exercise demonstrated a fundamental flaw in the emergency plan, intervenors' assertion that the

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[102] Although the applicants referred to their motion as one to "dismiss" the contention, it is apparent that given the proceeding's procedural posture at the time the motion was filed, it should more properly have been submitted and treated as motion for summary disposition, with the prefiled testimony serving as a statement of material facts not in dispute. See Motion to Dismiss Contention TOH/NECNP EX-2 (June 8, 1 39) at 1-2. This labeling flaw aside, for the reasons set forth infra, the applicants were entitled to summary disposition in their favor on the merits of the contention.

Licensing Board erred in precluding further litigation on their contention is without justification.[103]

I. TOA Contention No. 4 and TOS Contention Nos. 6 and 10 speak to the issue of the adequacy of the SPMC insofar as concerns traffic control at key intersections along the evacuation routes. Each contention was rejected at the threshold in whole or in part on the ground that it lacked the requisite specificity.[104] More particularly, as the Licensing Board saw it, the sponsors of the contentions were obliged to identify the "critical" intersections that

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[103] Intervenors' reliance on this purported deficiency also appears to run afoul of the declaration in ALAB-903 that "a particular person's failure to follow the requirements of the emergency plan itself" will not be considered a fundamental flaw unless the person is shown to perform a critical role and there is no backup structure that would mitigate the effects of the individual's failure. ALAB-903, 28 NRC at 505-06. In this instance the prefiled testimony, although not addressing whether the individuals involved performed a critical role, does indicate that a backup structure existed. Ms. Mitchell states in her testimony that, when personnel in the incident field office who recognized there might be a problem with the school children made a telephone check with the State emergency operations center (EOC), EOC personnel indicated that arrangements for the children had been made (although they could not provide details about what the arrangements were). See MassAG Exh. 115, at 5.

[104] At the time of the submission of the contentions, 10 C.F.R. § 2.714(b) (1988) mandated that the bases for a contention be "set forth with reasonable specificity." The current Rule of Practice does not contain that language but imposes a higher standard: "[e]ach contention must consist of a specific statement of the issue of law or fact to be raised . . . with . . . [a] brief explanation of the bases of the contention . . . [and a] concise statement of the alleged facts . . . which support the contention . . . ." 10 C.F.R. § 2.714(b)(2)(1990). See 54 Fed. Reg. 33,168 (1989).

assertedly required greater traffic control resources than is contemplated by the SPMC.[105]

The TOS/TOA attack upon the disposition of the three contentions focuses essentially upon the imposition of that obligation, which assertedly saddled those intervenors with an unduly large burden in the presentation of traffic control issues. TOS/TOA would have it that, even in the absence of an identification of particular intersections, the contentions "contained sufficient specificity for the other parties to know generally what was to be litigated" and that "further details" could be obtained "via discovery."[106]

We think otherwise. Presumably, the two towns are fully aware of the identity of every intersection within their borders that might be a part of an evacuation route. And, assuredly, at the time the contentions were filed, the towns must also have had in mind which of those

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[105] See SPMC Contentions Order - Part II, at 9-16, 43-44, 46-47.

[106] Brief of [TOS] and [TOA] on Appeal of [LBP-89-32] (Jan. 24, 1990) at 7-9, 16 [hereinafter TOS/TOA Brief]. Although TOS subsequently amended its Contention Nos. 6 and 10 to assert bases, see [TOS] Amended Contentions with Respect to Applicants' Plan for Massachusetts Communities (June 17, 1988) at 4-5, 6-7 [hereinafter TOS Amended Contentions], we do not understand it to claim that the amendments cured the deficiency that the Licensing Board found in those contentions as originally submitted. Indeed, had TOS deemed the amended contentions to identify sufficiently the intersections it had in mind, there would have been no necessity for it to confine itself before us to the extreme position that no such identification was required.

intersections might require traffic control resources in addition to those (if any) now provided for in the SPMC. (Indeed, if this knowledge was not within the towns' grasp, one might well inquire into whether the contentions had any real foundation.) Thus, it scarcely can be seriously suggested that the Licensing Board's specificity ruling under attack placed an onerous burden upon them.

Nor can we accept the TOS/TOA insistence that, notwithstanding the lack of specification respecting the particular intersections that assertedly should receive additional traffic control resources, the applicants and the staff were on adequate notice as to "what was to be litigated."[107] The fact is that, without such specification, those parties had very little information of substance regarding the claim against which they were being called upon to defend. In this connection, the staff correctly observes that discovery is not an appropriate vehicle for determining the particulars of which traffic sites may impede a planned evacuation. We have determined previously that "[s]ection 2.714 [does not permit] the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or

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[107] TOS/TOA Brief at 16. As we have noted, one of the purposes of the specificity requirement is to put the other "parties on notice of what issues they will have to defend or oppose." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 230 (1986).

staff."[108] By the same token, an intervenor should not be allowed to transfer the burden of fleshing out a vague contention through discovery by the applicants and staff.[109]

J. TOS Contention No. 3 alleges that the SPMC is deficient in that it fails to establish that applicants' ORO will be "sufficiently equipped and replenished" to provide necessary emergency services within the Town of Salisbury over a protracted period. No separate statement of basis was filed in support of this contention. The Licensing Board rejected it, citing "vagueness and lack of basis."[110] Intervenor TOS now challenges this ruling, asserting that the contention did provide notice of what was to be litigated with reasonable specificity and that the issue presented by the contention -- i.e., the adequacy of the SPMC's provisions for one shift of applicant-supplied, evacuation-related personnel, with additional personnel

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[108] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982) (emphasis supplied), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983); see Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192 (1973), aff'd sub nom. Business and Professional People for the Public Interest v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

[109] Given the foregoing conclusions, the Licensing Board was justified in limiting the scope of the hearing on the matter at hand to the intersections that had previously been specifically identified. Those conclusions also render it unnecessary to consider any other, independent reason the Licensing Board might have assigned for the rejection of TOS Contention No. 10.

[110] SPMC Contentions Order - Part II, at 42.

equal to twenty percent of the one shift total to be held in reserve -- was appropriate for litigation in this proceeding.

TOS's protests notwithstanding, this contention clearly lacked the necessary basis and specificity. It is nothing more than a general statement declaring that applicants cannot provide the necessary response resources, without reference to any specific information indicating why this is so. Nor do we find persuasive the TOS argument that in discovery the parties would have revealed the specific bases for the contention.[111] Certainly, as applicable here, 10 C.F.R. § 2.714 does not require that all material factual information supporting a contention be disclosed in providing a basis for the contention.[112] Nonetheless, in putting forth a contention a party must make a showing sufficient to demonstrate to the Licensing Board "that there has been sufficient foundation assigned for it to warrant further exploration."[113] Because TOS failed to provide even

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[111] See supra pp. 56-57.

[112] See supra note 104.

[113] Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (footnote omitted), rev'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974).

a minimal supporting basis for its Contention No. 3, the Board acted correctly in dismissing the contention.[114]

K. TOS also appeals the Licensing Board's dismissal of its Contention No. 7 for lack of basis and specificity. That contention alleges, again without any separate statement of basis, that the SPMC fails to compensate for the negative effect upon evacuation traffic flow of emergency personnel who park their vehicles at the transfer points and other traffic sensitive points in the Town of Salisbury.

In dismissing the contention, the Licensing Board declared its agreement with the staff's position that "such parking by emergency personnel is not likely to be done in a manner that will impede evacuation, nor does the contention include a basis for believing otherwise."[115] Intervenor TOS characterizes this determination as an improper "finding of fact," made without litigating the contention, that parked

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[114] Moreover, TOS's attempt now to provide such a basis by reference to the SPMC's provisions relating to evacuation personnel is unavailing. As applicants and the staff point out, other intervenor contentions -- JI-11 and JI-12 (initially submitted as MassAG Contention Nos. 77 and 78) -- squarely raised the issue of the capability for continuous staffing of the applicants' response organization. See Applicants' Brief at 39; NRC Staff Brief at 77. These contentions subsequently were litigated and decided by the Licensing Board in a merits determination, see LBP-89-32, 30 NRC at 472-73, from which none of the parties has appealed. Accordingly, the rejection of TOS Contention No. 3, even if erroneous, constitutes harmless error.

[115] SPMC Contentions Order - Part II, at 45.

cars would not impede traffic.[116] We do not agree. As the Licensing Board correctly pointed out, intervenor TOS failed to provide any statement of basis in support of the central premise of the contention, i.e., that emergency workers will, for whatever reason, park their cars in a manner that could impede traffic. As a consequence of intervenor's failure to supply some support for this proposition, which is by no means self-evident, the Licensing Board properly dismissed the contention.[117]

L. With its Contention No. 9, intervenor TON sought to contest the adequacy of both the protective action option of sheltering as it is utilized under the SPMC and the criteria in the SPMC governing whether that option would be invoked. As the basis for this contention, TON alleged that the

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[116] TOS/TOA Brief at 6.

[117] As with other of its contentions, prior to the Board's dismissal ruling, TOS sought to amend this contention to provide a supporting basis. See TOS Amended Contentions at 5. Again, however, it makes no claim that the amendment cured the deficiency found in its contention as originally submitted. See supra note 106. In any event, as applicants note, their testimony submitted in response to intervenor testimony challenging the sufficiency of emergency worker parking in the Town of West Newbury states that the procedures provided to traffic control point/access control point traffic guides contain the instruction to park their vehicles out of the way of the traffic flow. Applicants' Brief at 40-41; see Applicants' Rebuttal Testimony No. 9 (Traffic Management and Evacuation of Special Populations), fol. Tr. 17,333, at 28. The testimony further declares that there is no reason traffic guides will need their cars nearby because they will be given portable radios. Applicants' Rebuttal Testimony No. 9, at 28. Thus, as with TOS Contention No. 3, see supra note 114, any error in dismissing this contention was harmless.

standards under which the option would be invoked were too vague; that there had been no evaluation of the sheltering capacity within the Town of Newbury or on the nearby beach area of Plum Island; and that there had been no consideration of whether owners of public buildings would allow their buildings to be used by others as shelters or that potential shelters would afford a sufficient level of protection.

The Licensing Board initially dismissed the entire contention, declaring that the "matters identified in the basis are in part conclusional and in part have been covered in prior litigation."[118] Thereafter, in response to arguments by TON requesting clarification of its ruling,[119] the Board admitted for litigation that portion of the basis alleging that the SPMC criteria for determining whether sheltering or evacuation should be utilized were too ambiguous.[120] Although acknowledging that the portion of the basis alleging noncooperation of building owners was properly dismissed,[121] TON now asserts that the Board

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[118] SPMC Contentions Order - Part II, at 37.

[119] Tr. 14,604-11.

[120] Memorandum and Order (Aug. 19, 1988) at 7 (unpublished).

[121] [TON]'s Brief on Appeal of the Partial Initial Decision of the [SPMC] LBP-89-32 (Jan. 24, 1990) at 6 [hereinafter TON Brief]. It is apparent that TON is correct in this regard, given that the issue of cooperation by the private owners of buildings that could be used as shelters

(continued...)

improperly dismissed those portions of the contention's basis alleging that there had been insufficient evaluations of sheltering capacity (particularly with regard to the transient population that utilizes the beach areas on Plum Island near the Town of Newbury) and of the level of protection afforded by potential shelter structures.

The exact nature of the sheltering option, particularly as it affects the transient populations that use the New Hampshire and Massachusetts ocean beaches, has been the subject of some uncertainty in this proceeding, so much so that we had occasion recently in ALAB-939 to attempt to provide some explanation of our understanding of this protective action alternative and how it is to be carried out.[122] As we described it there, if a directive is given to "shelter-in-place," which is the general label that has been given to the sheltering option utilized under both the NHRERP and the SPMC,[123] those at home, at work, or in school

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[121](...continued)
previously was litigated in the New Hampshire portion of this proceeding, LBP-88-32, 28 NRC at 759, 772, and TON made no attempt to show that building owners in Massachusetts would act any differently from those in New Hampshire. See supra pp. 3-5. Moreover, despite TON's suggestion to the contrary, see TON Brief at 6 n.4, its lack of participation in the New Hampshire portion of this proceeding in no way relieved it of the responsibility to make such a showing in challenging the utility plan for the Massachusetts Plume EPZ.

[122] 32 NRC 165, 168 (1990).

[123] See App. Tr. 75-76.

are to remain where they are.[124] Transients located indoors or in private homes are to follow the same course of action, while transients without "access" to an indoor location are to evacuate from the EPZ as quickly as possible, either by using their own vehicle or in buses to be provided for those without a vehicle.[125] For the transient beach population that has transportation, a "shelter-in-place" directive would answer the obvious question of who has "access" to an indoor location by advising everyone who is not already inside a building to return to his or her car and evacuate.[126]

As we indicated in ALAB-939, with this formulation of the sheltering option for the nontransportation dependent beach population, implementing detail becomes largely unnecessary. It is not a situation in which a large transient population is being directed by emergency response officials to seek shelter in a discrete location (e.g., a beachfront area) with a finite number of buildings that can provide protection. Accordingly, there is no need to determine the available shelter capacity for that population when the only instruction is to remain indoors if you are already there and to evacuate by car if you are not. Thus, TON's assertion that a shelter capacity survey is necessary

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[124] ALAB-939, 32 NRC at 167-68.

[125] Ibid.

[126] See id. at 172-73.

for implementing the SPMC shelter-in-place option is misdirected.

With respect to that portion of the basis for TON Contention No. 9 that questions the level of protection afforded by the shelter structures that might be available, as we have indicated previously in assessing the Board's dismissal of MassAG Contention No. 28 concerning sheltering for trailer residents, the sheltering PAR for the SPMC is based upon the conservative sheltering factor for a wood frame house without a basement.[127] As with the MassAG's Contention No. 28, TON has failed to provide any support for its central premise that buildings that potentially could be used as shelters are, to any significant degree, of a type that would not yield this minimal sheltering factor.[128] Accordingly, this portion of the basis for TON Contention No. 9 also lacks an adequate foundation.[129]

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[127] See supra note 60 and accompanying text.

[128] While testimony from New Hampshire planning officials concerning the NHRERP's sheltering provisions suggested that some exploration of the level of protection afforded by potential shelters in the New Hampshire beach areas might be necessary, see ALAB-939, 32 NRC at 173-74, TON has made no showing indicating that similar concerns are applicable in Massachusetts.

[129] TON devotes several pages of its brief to the "revisionist" argument that hearing testimony concerning the adequacy of the SPMC's traffic management plan relative to access to Plum Island establishes a basis for the admission of Contention No. 9. TON Brief at 7-10. This, however, is of no moment with respect to the issue before us, i.e., whether TON at the initial pleading stage supplied sufficient information as a supporting basis for the admission of the contention.

For the foregoing reasons, the Licensing Board's disposition in unpublished orders dated July 22, July 28, August 19, and December 15, 1988, (and related bench rulings) of MassAG Contention Nos. 28, 29, 30, 34, 35, 36, 38, 39 (Basis F), 41, 48 (Basis C), 49 (Basis A), 65, 74, 83 (Basis C), EX-12 (Bases A, B, and D), EX-13 (Bases A, B, and D), and EX-18 (Basis B); SAPL Contention No. 3; TOH/NECNP Contention No. EX-2; TOA Contention No. 4; TOS Contention Nos. 3, 6, 7, 10, and 21; TON Contention Nos. 1 (Basis b) and 9; and TOWN Contention No. 4 is affirmed.[130] Further, the Licensing Board's disposition of MassAG Contention No. 56 (Basis A) in its July 22, 1988 order is reversed. Finally, insofar as it relates to his Contention Nos. 18 (Basis E), 77 (Basis E), and 83 (Basis A1 and 3), the MassAG's appeal is dismissed for the want of adequate briefing.

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[130] Before us, intervenor MassAG also characterizes a Licensing Board ruling concerning the admission of an exhibit relating to the PAR procedures for the Seabrook onsite emergency plan as an incorrect determination that MassAG Contention EX-19, Basis A, lacked specificity sufficient to allow the litigation of onsite plan decision criteria. MassAG Brief at 36-37. We will address this matter as part of our consideration of that portion of his appeal challenging the Board's merits determinations relative to the PARs. Also, we will address intervenor appeals from the Licensing Board's threshold disposition of MassAG Contention Nos. 1-6, and TOWN Contention Nos. 1 and 2 as part of our consideration of the MassAG's appeal relative to the Board's application of the "best efforts" presumption of 10 C.F.R. § 50.47(c)(1).

It is so ORDERED.

FOR THE APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing AB DECISION (ALAB-942) - 12/21 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.

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas S. Moore, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Howard A. Wilber
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Alan S. Rosenthal
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Law Judge
Ivan W. Smith, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert R. Pierce, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Kenneth A. McCollom
1107 West Knapp Street
Stillwater, OK 74075

Edwin J. Reis, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mitzi A. Young
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
Harmon, Curran & Tousley
2001 S Street, N.W., Suite 430
Washington, DC 20009

Thomas G. Dignan, Jr., Esq.
Ropes & Gray
One International Place
Boston, MA 02110

Robert A. Backus, Esq.
Backus, Meyer & Solomon
116 Lowell Street
Manchester, NH 03106

Paul McEachern, Esq.
Shaines & McEachern
25 Maplewood Avenue, P.O. Box 360
Portsmouth, NH 03801

Gary W. Holmes, Esq.
Holmes & Ells
47 Winnacunnet Road
Hampton, NH 03842

Judith H. Mizner, Esq.
Counsel for West Newbury
79 State Street
Newburyport, MA 01950

Suzanne P. Egan
City Solicitor
Lagoulis, Hill-Wilton and Rotondi
79 State Street
Newburyport, MA 01950

Barbara J. Saint Andre, Esq.
Counsel for Amesbury, Newburyport
& Salisbury
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

Jane Doughty, Director
Seacoast Anti-Pollution League
5 Market Street
Portsmouth, NH 03801

Ashod N. Amirian, Esq.
145 South Main Street, P.O. Box 38
Bradford, MA 01830

George Iverson, Director
N. H. Office of Emergency Management
State House Office Park South
107 Pleasant Street
Concord, NH 03301

George W. Watson, Esq.
Federal Emergency Management Agency
500 C Street, S.W.
Washington, DC 20472

Jack Dolan
Federal Emergency Management Agency
442 J.W. McCormack (POCH)
Boston, MA 02109

George D. Bisbee, Esq.
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301

Paul A. Fritzsche, Esq.
Office of the Public Advocate
State House Station 112
Augusta, ME 04333

Suzanne Breiseth
Board of Selectmen
Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

Leslie Greer, Esq.
Nuclear Safety Unit
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Peter J. Brann, Esq.
Assistant Attorney General
Office of the Attorney General
State House Station, #6
Augusta, ME 04333

Allen Lampert
Civil Defense Director
Town of Brentwood
20 Franklin Street
Exeter, NH 03833

William Armstrong
Civil Defense Director
Town of Exeter
10 Front Street
Exeter, NH 03833

Anne Goodman, Chairman
Board of Selectmen
13-15 Newmarket Road
Durham, NH 03824

Michael Santosuosso, Chairman
Board of Selectmen
South Hampton, NH 03827

R. Scott Hill-Whilton, Esq.
Lagoulis, Hill-Whilton & Rotondi
79 State Street
Newburyport,, MA 01950

Stanley W. Knowles, Chairman
Board of Selectmen
P.O. Box 710
North Hampton, NH 03862

Norman C. Katner
Superintendent of Schools
School Administrative Unit No. 21
Alumni Drive
Hampton, NH 03842

Sandra F. Mitchell
Civil Defense Director
Town of Kensington
Box 10, RR1
East Kingston, NH 03827

Beverly Hollingworth
209 Winnacunnet Road
Hampton, NH 03842

The Honorable
Gordon J. Humphrey
ATTN: Janet Coit
United States Senate
Washington, DC 20510

Docket No.(s)50-443/444-OL
AB DECISION (ALAB-942) - 12/21

The Honorable
Nicholas Marvoules
ATTN: Michael Greenstein
70 Washington Street
Salem, MA 01970

Michael C. Sinclair
Gravestone Emergency Management
Associates
13 Summer Street
Hillsboro, NH 03244

Dated at Rockville, Md. this
21 day of December 1990

Kris Cater
Office of the Secretary of the Commission