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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of)
)
PUBLIC SERVICE COMPANY OF)
NEW HAMPSHIRE, et al.)
)
(Seabrook Station, Units 1 and 2))

Docket Nos. 50-443 OL-1
50-444 OL-1
Off-site Emergency Planning

NRC STAFF RESPONSE TO INTERVENORS'
PETITION FOR REVIEW OF ALAB-941

Elaine I. Chan
Counsel for NRC Staff

December 24, 1990

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NRC STAFF RESPONSE TO INTERVENORS'
PETITION FOR REVIEW OF ALAB-941

INTRODUCTION

On December 10, 1990, the Massachusetts Attorney General, the Seacoast Anti-Pollution League, the Town of Hampton and the New England Coalition on Nuclear Pollution, ("Intervenors") filed a petition for review, pursuant to 10 C.F.R. § 2.786 of certain portions of ALAB-941.¹ In ALAB-941, the Appeal Board affirmed the Licensing Board's decision rejecting a portion of SAPL Contention EX-12, concerning whether activation of two out of four reception centers was a sufficient test of part of an emergency plan, and the Licensing Board's denial of admission of MassAG Contention EX-2 Basis F, concerning the adequacy of the emergency plan exercise in testing the participation of the American Red Cross ("ARC"). ALAB-941 at 15-16, 17-19. The Appeal Board also reversed the

¹*Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-941, 32 NRC ____ (November 21, 1990), hereafter cited as ALAB-941. Citations to that opinion are to the relevant pages of the slip opinion. See Intervenors' Petition for Review of ALAB-941, dated December 10, 1990 ("Petition").

Licensing Board on an issue concerning the participation of schools in the emergency planning exercise, finding that the exercise was deficient in scope because too few school administrators in the New Hampshire portion of the Seabrook EPZ participated in the exercise. *Id.* at 26. The Appeal Board indicated that any failures in the exercise could be remedied in a subsequent exercise, such as the one scheduled for December 1990. *Id.* at 2, 26. The NRC Staff submits the following response in opposition to the Petition.

DISCUSSION

Pursuant to 10 C.F.R. § 2.786(b)(1), a party may file a petition for review of an Appeal Board decision on the grounds that the decision or action is erroneous with respect to an important question of fact, law or policy. The petition must contain (1) a concise summary of the decision or action of which review is sought, (2) a statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Appeal Board, and if they were not, explain why the matters could not have been raised, (3) a concise statement as to why in the petitioner's view the decision or action is erroneous, and (4) a concise statement of why Commission review should be exercised. 10 C.F.R. § 2.786(b)(2).

1. The Appeal Board Correctly Applied 10 C.F.R. Part 50, App. E, IV.F.1 In Its Ruling on SAPL Contention EX-12, that a Sufficient Number of Reception Centers Were Exercised to Verify the Capacity To Respond.

Intervenors challenge the Appeal Board's affirmance of the Licensing Board's threshold dismissal of SAPL Contention EX-12, alleging that the Appeal Board improperly relied on the definition of a "full participation exercise" set out

in footnote 4 to 10 C.F.R. Part 50, App. E IV.F.1, in concluding that a test of two of four reception centers in New Hampshire was a sufficient exercise of that portion of the emergency plan.² That regulation provides:

1. A full participation^{4/} exercise which tests as much of the licensee, State and local emergency plans as is reasonably achievable without mandatory public participation . . .

^{4/}"Full participation" when used in conjunction with emergency preparedness exercises for a particular site means appropriate offsite local and State authorities and licensee personnel physically and actively take part in testing their integrated capability to adequately assess and respond to an accident at a commercial nuclear power plant. "Full participation" includes testing the major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.

The Appeal Board, in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 292-293, 297 (1988), concluded that "the adequacy of the scope of a pre-license emergency exercise must be judged against the NRC's regulatory requirements." *Id.* "Particularly pertinent among those requirements insofar as emergency exercises are concerned is 10 C.F.R. Part 50, Appendix E, IV.F.1, the entirety of which (*including footnote 4*) must be

²Although Intervenors also allege that "The Appeal Board dealt with the scope portions of SAPL Contention EX-12 in totally cavalier and trivial manner" (Petition at 3-4), by placing the location of the relocation centers which were the subject of the contention in Massachusetts rather than New Hampshire, the Intervenors fail to cite the Appeal Board's November 27, 1990 "Correction Memorandum" which corrected this oversight.

given effect." *Id.* at 292 [*emphasis added*]. The Appeal Board added that "a pre-license exercise includes the mobilization of state, local, and licensee personnel 'in sufficient numbers' to verify their 'integrated capability' to assess and to respond to the particular accident scenario being tested." *Id.* at 293.

As both the Appeal Board and the Licensing Board determined, a sufficient number of relocation centers were exercised "to verify the integrated capacity to respond" by exercising two of the four reception centers and one out of two small reception centers in New Hampshire. *See* ALAB-941 at 18-19. No allegation is even made that this was not "sufficient . . . to verify the capability to respond to the accident scenario," and there is no cause for the Commission to review this ruling.

2. The Appeal Board Properly Affirmed the Licensing Board's Rejection of the MassAG Contention EX-2 Basis F, Concerning Participation of the ARC in the Emergency Planning Exercise

The Appeal Board correctly concluded, on the basis of *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-5, 25 NRC 884, 887-88 (1987), *reconsideration denied*, CLI-88-3 28 NRC 1 (1988), that a contention concerning the participation of the ARC in the emergency planning exercise was properly rejected.

The Licensing Board had recognized that the ARC had not entered into a Letter of Agreement with Applicants, and due to the Commonwealth of Massachusetts' decision not to participate in emergency plans for Seabrook, "there was no governmental planning process in which the ARC could participate." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-30 NRC 375, 584 at ¶ 9.136 (1989). The Licensing Board noted that a

Memorandum of Understanding between the Massachusetts Chapter of the ARC and the Commonwealth regarding Seabrook planning prevented the local chapter of the ARC from participating. *Id.* at ¶ 9.137. Although the Appeal Board differed with some of the reasoning of the Licensing Board (ALAB-941 at 14), both the Licensing and Appeal Boards found (and the Intervenors do not take issue with the assumption) that the ARC will respond to a radiological emergency. Memorandum and Order (December 13, 1988) (*unpublished*) ("Exercise Contentions Order") at 20. *Seabrook*, LBP-89-32, 30 NRC at 585 ¶ 9.140 (1989); ALAB-941 at 14-15.

In light of the Commission's recognition in *Shoreham*, CLI-87-5, 25 NRC at 887-88, that "the ARC's charter and policy require it to assist in emergency response whether or not there is an agreement. . .", it can be assumed that the ARC will respond to an emergency. As the Appeal Board stated:

In light of the Commission's recognition that it can be assumed that the ARC will answer a request for emergency assistance, in an instance such as this, in which the response role assigned to the ARC in an emergency plan conforms to one it traditionally has fulfilled, we see little use, in terms of identifying fundamental flaws in the emergency plan, in admitting a contention challenging the *scope* of an exercise founded solely upon the ARC's declination to participate in an exercise. This is especially so in the absence of any specific information indicating that the organization lacks the ability to discharge its conventional and oft-fulfilled role.

ALAB-941 at 15-16.³ No cause is given to review this ruling which follows Commission precedent.

3. The Appeal Board Did Not Err In Its Review of TOH/NECNP Contention EX-1 Bases (a) and (b), by Failing To Vacate or Suspend the Seabrook License Upon Concluding That The Exercise Did Not Properly Test The Emergency Response of School Administrators.

Intervenors maintain that the Appeal Board erred in not suspending or revoking the Seabrook License because of the alleged insufficient participation of school administrators in the June 1988 exercise, rather than just providing that this alleged flaw in the scope of the exercise be corrected in a subsequent exercise. Petition at 8-9. Intervenors present no cogent argument to support their position that the license should have been revoked or suspended. As the Appeal Board stated,

". . . in no circumstance can a lack of appropriate *scope in an exercise per se* establish a *fundamental flaw in the plan* that is the subject of that exercise. Rather, the result of an unduly limited exercise, . . . is an inability to determine whether the plan is, in fact, fundamentally flawed in some essential respect.

ALAB-941, at 30 [*emphasis in the original*]. A fundamental flaw, as defined by the Appeal Board, is a "failure of an essential element of the plan, . . . [which] can be remedied only through a significant revision of the plan." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499,

³It is noted that MassAG Contention EX-2 did not raise any issue in regard to the maximum size of congregate care centers, and to the extent Intervenors wish to raise such an issue now (*see* Intervenors' Petition at 7), they are foreclosed from doing so by not raising or briefing the issue in appeals below. *See* 10 C.F.R. § 2.786(b)(4)(iii). Further, testimony showed that ARC congregate care centers could contain well over 1,000 people provided they were administratively divided into smaller units for managerial purposes. Tr. 18735, 19148, 19156.

505 (1988). The Appeal Board went on to note that the Commission, in determining if shutdown of an operating reactor is appropriate, will consider action taken to correct deficiencies disclosed in biennial emergency exercises. *Id.* at 506, n.8; cf. 10 C.F.R. § 50.54(s)(2)(ii). Hence, the remedy proposed by the Appeal Board, that of including a larger number of school administrators in a subsequent exercise, is in keeping with the regulations and of itself does not mandate revocation or suspension of a license.

The Appeal Board did not suspend or revoke the license, but concluded that "in line with the Commission's guidance concerning the correction of exercise scope deficiencies [in *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-88-11, 28 NRC 604 (1988)], the failure to elicit sufficient school participation in the June 1988 exercise should be corrected in a subsequent exercise." ALAB-941 at 26, citing n.22 at 11. In CLI-88-11, the Commission offered guidance, occasioned by the decision in *Shoreham*, ALAB-900, *supra*, as to the course of action to be followed if a problem is found with the scope of a pre-licensing emergency planning exercise: "To the extent an exercise was not of adequate scope, the applicant need not conduct an entirely new full-scale exercise." CLI-88-11 at 603-604. "The applicant may conduct a remedial exercise sufficient in scope to address the deficiency in the original scope of the exercise." *Id.*

In considering deficiencies found in the emergency plans for an operating plant, the court in *Rockland County v. NRC*, 709 F.2d 766, 776-77 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983), determined that the NRC had discretion to allow a plant to continue to operate while deficiencies in emergency plans were corrected, and did not have to take action to shut the plant down. In *Commonwealth of*

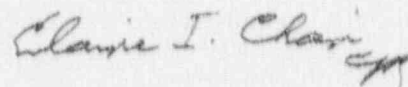
Massachusetts v. NRC, 878 F.2d 1516, 1524-25 (1st Cir. 1989), the court similarly concluded that a finding of emergency planning deficiencies does not require that the license of the affected facility be suspended. See also *State of Ohio ex rel. Celebrezze v. NRC*, 868 F.2d 810, 818 (6th Cir. 1989). Similarly here, there is no showing of any abuse of discretion in ordering that any fault in the scope of the emergency planning exercise be corrected in a subsequent exercise, rather than in requiring a revocation or suspension of the license.

Intervenors show no cause for the Commission to review the Appeal Board's conclusion that, in keeping with Commission precedent, errors in the scope of the exercise should be corrected by a subsequent exercise and do not warrant a revocation or suspension of the license.

CONCLUSION

For the above stated reasons, the Intervenors' Petition to Review ALAB-941 should be denied.

Respectfully submitted,



Elaine I. Chan
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of December, 1990

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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF ALAB-941" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, and as indicated by double asterisks, by express mail, this 24th day of December 1990:

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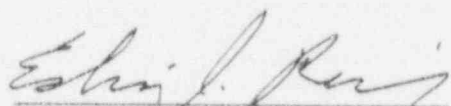
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