

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )

PUBLIC SERVICE COMPANY OF )  
NEW HAMPSHIRE, et al. )

(Seabrook Station, Units 1 and 2) )

Docket Nos. 50-443 OL  
50-444 OL

NRC STAFF RESPONSE TO PETITIONS OF NEW ENGLAND COALITION ON NUCLEAR  
POLLUTION AND ATTORNEY GENERAL FRANCIS X. BELLOTTI FOR DIRECTED  
CERTIFICATION OF THE LICENSING BOARD'S DECISION ON APPLICANTS'  
MOTION FOR SUMMARY DISPOSITION OF NECNP CONTENTIONS III.12 AND III.13

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August 11, 1983

DESIGNATED ORIGINAL.

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I. INTRODUCTION

On June 30, 1983, the Licensing Board granted in part and denied in part Applicants' Motion for Summary Disposition of NECNP Contentions III.12 and III.13 challenging Applicants' evacuation time estimates. Petitions for directed certification of the Licensing Board's ruling were filed by the Attorney General of Massachusetts ("Massachusetts") on July 15, 1983 and by the New England Coalition on Nuclear Pollution ("NECNP") on July 21, 1983. The NRC staff herein responds to both petitions and, for the reasons given below, concludes that they should be denied.

II. PROCEDURAL BACKGROUND

NECNP Contentions III.12 and III.13, admitted by the Licensing Board in its Memorandum and Order of November 17, 1982, read as follows:

NECNP III.12

The evacuation time estimates provided by the Applicants in Appendix C of the Radiological Emergency Response Plan are

inaccurate in that they provide unreasonably optimistic estimates of the time required for evacuation. In addition, the estimates provided in the radiological emergency plan are useless to emergency planning because they fail to include bounds of error, to indicate the basis for codes or assumptions used for the time estimates, to indicate whether the model used is static or dynamic, to provide a sensitivity analysis for the estimates or to reveal the underlying assumptions.

NENCP III.13

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

On February 14, 1983, Applicants filed their Motion for Summary Disposition of Contentions III.12 and III.13. The Motion was accompanied by a Statement of Material Facts as to Which There is no Dispute, the Affidavit of James A. MacDonald, and four appendices: Appendix C of the Applicant's Radiological Emergency Response Plan (containing, inter alia, the population and road network data used by the Applicants in their evacuation time estimates, a description of the transportation simulation model used, and the actual time estimates themselves); a validation analysis of Applicant's transportation simulation model; and two NRC NUREG documents (NUREG/CR-2504 and 2903) dealing with evacuation time estimates.

By Orders dated March 16, 1983 and May 11, 1983, the Licensing Board deferred the time for responding to Applicants' Motion until 20 days after issuance of the Staff's SER Supplement addressing, inter alia, on-site emergency planning. The SER Supplement was mailed to the parties on May 11, 1983, and responses to Applicants' Motion were duly filed by

the Staff, NECNP, and the Seacoast Anti-Pollution League ("SAPL").<sup>1/</sup> NECNP (in opposition) and the Staff (in support) submitted affidavits with their responses; SAPL did not. Massachusetts filed no response to Applicants' Motion.<sup>2/</sup>

On June 30, 1983, the Board granted in part and denied in part Applicants' Motion. The Board found (at pp. 6-7) that Applicants had made a sufficient showing for summary disposition (thereby rejecting SAPL's Opposition) and determined (at pp. 8-15) that NECNP's affiant only provided sufficient information in opposition to Applicants' Motion with respect to two areas: an adverse summer weather scenario and simultaneous evacuation of all areas of the EPZ. The Board thereupon dismissed part of Contentions III.12 and III.13 and restated the remainder of the contentions as follows:

NECNP III.12/III.13: Evacuation Time Estimates

The evacuation time estimates provided by Applicants in Appendix C of the Radiological Emergency Plan are deficient in failing to include an estimate of:

1. the times for evacuation during adverse weather conditions developing on a busy summer weekend; and
2. the times for simultaneous evacuation of beach areas lying NE to SSE of the Seabrook site.

Order at 15.

Petitions for directed certification of the Licensing Board's ruling were thereafter filed by Massachusetts and NECNP. On August 5, 1983, SAPL joined in Massachusetts' Petition.

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<sup>1/</sup> SAPL actually filed its response on March 15, 1983, one day before the Board announced that the response date would be deferred.

<sup>2/</sup> The Staff addresses the propriety of Massachusetts petitioning for directed certification after failing to participate below at p. 5, infra.

III. DIRECTED CERTIFICATION OF NEITHER PETITION IS WARRANTED

A. Standard for Directed Certification

Under the provisions of 10 C.F.R. § 2.718(i) and § 2.785(b), Atomic Safety and Licensing Appeal Boards "have the power to direct the certification of legal issues raised in proceedings still pending before licensing boards." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). Because Commission policy does not favor appellate examination of interlocutory rulings, exceptional circumstances must first be demonstrated before an Appeal Board will exercise its discretionary powers to direct certification of an issue under 10 C.F.R. § 2.718(i). Id. at 483. In accordance with the decision in Public Service Company of Indiana (Marble Hill Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 92 (1977), Appeal Boards will undertake discretionary interlocutory review "only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner." "In sum, a licensing board may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a 'final' licensing board decision." Cleveland Electric Illuminating Company (Perry Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).

Thus, directed certification is disfavored by Appeal Boards, and a petitioner seeking this extraordinary appellate review must satisfy one of the two prongs of the standard set forth in Marble Hill, supra.

B. Massachusetts' Petition

Massachusetts seeks directed certification on the basis of both prongs of the Marble Hill standard. Petition at 18-19. Before addressing the merits of its petition, a word is in order about the propriety of Massachusetts' petition. That party is participating in this proceeding under the provisions of 10 C.F.R. § 2.715(c). Although that regulation permits an interested state to file appellate papers, it is settled law that to preserve its appellate rights on an issue, an interested state must participate in the proceeding below on that issue. Pacific Gas and Electric Company (Diablo Canyon Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448 (1980). As mentioned previously, Massachusetts did not respond to Applicants' Motion for Summary Disposition of NECNP Contentions III.12 and III.13. Under the circumstances, Massachusetts should not now be permitted to seek interlocutory relief from this Appeal Board and its petition should be denied.

Even if its petition were properly before the Board, neither prong of the Marble Hill standard is properly invoked by Massachusetts. As noted previously (at p. 4, supra), the first prong applies where the ruling below "threaten[s] the party adversely affected by its with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal." Given the fact that Massachusetts elected to take no position before the Licensing Board, it is hard to see how that party's interests could have suffered such "immediate and serious

irreparable impact" to warrant the extraordinary granting of interlocutory review. Moreover, there is no attempt to show (other than a bare claim of financial hardship) that a later appeal could not correct any of the deficiencies Massachusetts asserts can be found in the Licensing Board's ruling. Indeed, the contrary would appear to be true: even if the Licensing Board were eventually found to have erred in dismissing any part of NENCP's contention, there is no reason any resurrected portion of the contention could not be litigated at that time. As for the claim that financial resources might be wasted if interlocutory review is not undertaken, the short answer is that the mere preservation of resources does not warrant the grant of interlocutory review.

The second prong of Marble Hill is whether the ruling objected to "affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Massachusetts asserts that the Board has grossly erred in its view of the law governing summary disposition by shifting the burden of proof onto the intervenor (Petition at 11) and by resolving factual disputes between experts prior to hearing (Petition at 12-18). As we discuss below, the Licensing Board was guilty of neither error. Even if it were, however, Massachusetts has still not shown why the errors it alleges would pervade all aspects of the proceeding such that directed certification would be warranted.

### C. NECNP's Petition

NECNP's petition is grounded on the second prong of Marble Hill. (Petition at 10). The gist of NECNP's argument is that the Licensing Board has again taken a commitment to comply as evidence of actual compliance, a practice NECNP asserts has occurred before and is likely to occur again.

Moreover, NENCP asserts that the Board's ruling places an unfair burden on Intervenor because of the Commission's Catawba decision.<sup>3/</sup>

In point of fact, the Licensing Board in this proceeding has never accepted a commitment to comply with a requirement as evidence of actual compliance. Rather, the Board held that as to the lack of evacuation time estimates based on actual evacuation routes (which have not yet been selected), NECNP's contention "simply presents no litigable issue, nor can any adverse legal conclusion be drawn from the present incompleteness of the estimates." Board Order at 15. Like the Licensing Board ruling that was the focus of an earlier petition by NECNP for interlocutory review (see ALAB-734, 18 NRC \_\_\_\_, July 19, 1983), the Staff believes the ruling complained of here was not meant to put the issue (of evacuation time estimates based on actual routes) to rest, but is to be read as dismissing the issue now without prejudice to a resubmittal of that part of the contention after actual routes are chosen and estimates based on those routes are produced.

The second ground asserted by NECNP is the burden the Board's ruling in light of the Commission's Catawba decision will place on that party if it attempts to submit a contention dealing with evacuation time estimates based on actual routes at a later date. It must be noted that the Licensing Board's ruling was issued on the same day as the Commission's Catawba decision and did not therefore consider the Commission's decision. If NECNP considers the Licensing Board's ruling to be inconsistent with

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<sup>3/</sup> Duke Power Company (Catawba Station, Units 1 and 2), CLI-83-19, 17 NRC \_\_\_\_ (June 30, 1983).

Catawba, it should have requested reconsideration from that Board. Even if the Licensing Board's ruling were inconsistent with Catawba, it would be improper and unfair to assume that that Board would misapply Commission precedent in the future. This ruling can not be said to affect the proceeding in a pervasive manner; if NECNP submits a contention at a later date and if that contention meets the "good cause" standard of Catawba and if that contention is nonetheless denied because of the other factors listed in 10 C.F.R. § 2.714(c)(1), there is no reason why a subsequent appeal could not adequately protect NECNP's interest.

IV. THE LICENSING BOARD PROPERLY DISMISSED PORTIONS OF NECNP CONTENTIONS III.12 AND III.13

A. Applicants' Motion Was Sufficient to Warrant Summary Disposition of NECNP Contentions III.12 and III.13

In its petition (at 6-12), Massachusetts essentially advances the argument that Applicants' Motion for Summary Disposition was insufficient as a matter of law to warrant the dismissal of portions of NECNP's contentions. The gist of the argument appears to be that since NECNP (in its interrogatory responses) and Massachusetts (in a pleading putting forth a similar contention dealing with evacuation time estimates)<sup>4/</sup> alleged

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<sup>4/</sup> Massachusetts and NECNP both raised similar evacuation time estimate contentions before the Licensing Board. In its Order of September 13, 1982 (at 82, 86-90), the Board rejected these contentions as premature. NECNP sought reconsideration of this ruling; upon reconsideration, the Board admitted, inter alia, NECNP III.12 and III.13. Memorandum and Order of November 17, 1982 at 15-19. Massachusetts did not seek reconsideration of the Board's September 13 Order. Inasmuch as Massachusetts has filed direct testimony on NECNP III.12 and III.13 and has sought interlocutory review of the Licensing Board's partial summary disposition of those contentions, however, it does not appear that Massachusetts has been harmed by the dismissal of its own evacuation estimates contention.

certain deficiencies in the time estimates, Applicants were required to address each such asserted deficiency in their Motion. Not surprisingly, Massachusetts offers no legal support for this proposition. The Licensing Board found that Applicants' Motion, together with its supporting papers, was sufficient such that, absent an opposing response, summary disposition would be appropriate. Order at 7. Applicants in their Motion and supporting papers explained how they devised their estimates and why they found the estimates to be sufficiently accurate. The Staff, in its Response in Support of Applicants' Motion, agreed that the Applicants' estimates were adequate in the absence of actual evacuation routes.<sup>5/</sup> Given these circumstances, it became incumbent upon those who opposed the Applicant's Motion for Summary Disposition to indicate with some specificity why those estimates were inadequate. To the extent that inadequacies were not specified, summary disposition was appropriate. See 10 C.F.R. § 2.749(b); Virginia Electric & Power Company (North Anna Station, Units 1 & 2), ALAB-584, 11 NRC 451, 453 (1980).

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<sup>5/</sup> The Staff noted that evacuation estimates serve two purposes: they pinpoint situations that require special attention from planners and they provide decisionmakers with a tool with which to make decisions on the appropriate protective action for a given circumstance. The Staff determined that the estimates were adequate for the first purpose. In the absence of the completion of local emergency planning, the Staff could not determine whether Applicants' estimates would in fact serve their second purpose. The Staff did indicate however that the Applicants' estimates would serve as a useful tool for managers in the event of an emergency if the traffic control and routing assumptions used by the Applicants were used by local planners as well. NRC Staff Response to Applicants' Seventh and Twenty-first Motions for Summary Disposition at 5-6.

B. The Licensing Board Properly Disposed of the Points Raised by NECNP in its Opposition to Applicants' Motion

In its Opposition to Applicants' Motion, NECNP raised seven specific challenges to Applicants' evacuation time estimates. The Licensing Board considered these challenges, denied summary disposition as to two of them (adverse summer weather and simultaneous evacuation) and granted summary disposition as to the remainder. Order at 9-15. Massachusetts claims that in the instances where summary disposition was granted, the Board improperly resolved factual disputes between experts. Petition at 13-18. NECNP in its petition attacks only one instance where summary disposition was granted: the asserted deficiency of the time estimates because they do not reflect actual evacuation routes. NECNP claims that the Board's decision on this issue was inconsistent with the Commission's Catawba decision and improperly accepted a commitment to comply with a requirement as evidence of actual compliance. Petition at 2-9. The Board's rulings on the five issues where summary disposition was granted will be discussed seriatim below.

1. Evacuation Shadow

Applicants asserted in their Motion that the phenomenon of evacuation shadow would not affect their time estimates because "while the concentrated evacuation traffic management considerations are for the EPZ in general and the beach areas in particular, the transportation corridors serving the overall area would be available for any additional 'evacuation shadow' evacuee use. Such transportation corridors are not taxed to capacity in the evacuation estimate analysis performed by the Applicants." Affidavit

of James A. MacDonald on NECNP §§ II.12 and III.13 at 2. In its Opposition, NENCP's affiant (Phillip B. Herr) pointed to data at Three Mile Island and Shoreham indicating that a voluntary evacuee population may in fact exist. Herr Affidavit, ¶ 10. He also criticized the Applicants for not performing a survey of local "attitudes towards evacuation" and not performing an analysis of the effect of voluntary evacuees on evacuation times.

The Board properly found Mr. Herr's position on this issue to be fatally speculative. Contrary to the arguments made in Massachusetts' Petition (at 16), the Board did not weigh the credibility of the experts, nor did it shift the burden of proof to NECNP. In his affidavit, Mr. Herr asserted nothing about either the populations ringing the 10-mile EPZ at Seabrook (from which, presumably, the voluntary evacuees would spring) or the transportation corridors outside the EPZ. He did not point to a single location where evacuation shadow might produce a bottleneck that would delay the evacuees from inside the EPZ. For all practical purposes, Mr. Herr indicated only that some residents living more than 10 miles from the Shoreham site might leave their homes in the event of an accident at that site on Long Island. This being the case, Mr. MacDonald's statement that the transportation corridors in New England would not be taxed to capacity was left unchallenged, and summary disposition of the issue was proper.

## 2. Notification/Preparation Times

NECNP asserted in its Opposition to Applicants' Motion that the Applicants' estimates were deficient because of failure to include notification/preparation times. The Board examined the Commission's Regulations and various emergency planning documents and ruled that, as a matter of

law, notification times need not be included in the Applicants' estimates. Order at 10-12. Massachusetts in its Petition argues that the Board should have taken expert testimony on this issue. Petition at 18. Why expert testimony might be needed to resolve a question of law is not explained. Nor does Massachusetts provide any challenge to the Board's legal reasoning on this issue. Its challenge to the Board's ruling on this issue is patently frivolous and should be dismissed.

### 3. Vehicles Per Household

In his affidavit, Mr. Herr attempted to raise a question of the number of vehicles that would be used per household in the event of an evacuation. Herr Affidavit, ¶ 7. All Mr. Herr states on this issue is that the assumption of one vehicle per household results in a low estimate according to NUREG/CR-1745.<sup>6/</sup> The Board found this assessment vague and speculative, as well as somewhat incorrect in its factual premise. Order at 13.<sup>7/</sup> Again, Mr. Herr simply did not provide the Board with sufficient information to raise a genuine question of material fact for litigation. If Mr. Herr had any knowledge relative to the Seabrook area on this issue, he did not share his knowledge with the Board. While NECNP did not have the burden of proof on this issue, once Applicants met their burden of proof in the

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<sup>6/</sup> In fact, Mr. Herr's reference to NUREG/CR-1745 is somewhat misleading. That document describes two possible methods of transforming person-trips into vehicle-trips. One method is to assume every vehicle will be used; another is to assume one vehicle per household would be used. The latter method will yield a lower number of automobiles, but at no point does NUREG/CR-1745 criticize that method or recommend that it not be used. See NUREG/CR-1745, p. 10.

<sup>7/</sup> In fact, as the Board noted, Applicants assumed 10% more vehicles than the number of households would be used per household in the event of an evacuation. Order at 13, n. 10.

submission of their Motion for Summary Disposition, NECNP was required to show that a factual dispute did exist. The Board correctly found that NECNP failed to make such a showing.

4. Population Growth

Mr. Herr in his affidavit asserted a deficiency in Applicants' estimates for not considering population growth in the Seabrook vicinity over the life of the plant. Herr Affidavit, ¶ 9. To support this proposition, Mr. Herr cited the following provision of NUREG-0654, Rev. 1 (at App. 4, 4-2):

The number of permanent residents shall be estimated using the U.S. Census data or other reliable data, adjusted as necessary, for growth.

The Board found that, as a matter of law, this provision applies only to the adjustment of data that is not current and accurate at the time the estimates are made, and does not impose a requirement that Applicants "project" their estimates into the future based on guesses of future population shifts. Instead, the Board held that Applicants are required to update their estimates in the future as the population in the Seabrook area changes. Order at 13-14. Mr. Herr in his affidavit did not contend, nor does Massachusetts in its Petition, that Applicants did not make appropriate adjustments to accurately reflect the current population around the site. The sole question left is whether, as a matter of law, an Applicant must speculate in its estimates as to future population developments or whether those estimates must instead be updated in the future when those developments take place. There is no factual dispute here; only a question of law remains. Massachusetts apparently believes speculative estimates of future population must be included in the evacuation estimates, but it provides no support whatsoever for this position. See Petition at 17-18.

Massachusetts has not properly challenged the Licensing Board's legal ruling on this issue.

5. Evacuation Routes

Finally, there is the matter raised by NECNP as to the propriety of the Licensing Board's dismissal of that part of NECNP's contention dealing with the failure of Applicants' estimates to utilize actual evacuation routes, a failure concededly caused by the current absence of chosen evacuation routes (to be designated at some time in the future by State and local emergency planners). The Board found that Applicants have committed to revise their estimates to correspond to the actual routes when such routes are designated. Order at 14-15. The Board further found no litigable issue before it and dismissed this portion of the contention.

As was explained earlier (see p. 7, supra), the Staff believes the Licensing Board dismissed this portion of the contention without prejudice to its resubmittal once routes are designated. Thus, the Board did not accept Applicants' commitment as evidence of compliance; it simply found that, at this time, there was no litigable issue before it.

As mentioned earlier, the Board below did not have the Commission's Catawba decision before it when it reached its decision.<sup>8/</sup> NECNP claims

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<sup>8/</sup> As the Commission concluded in Catawba (at pp. 13-14):

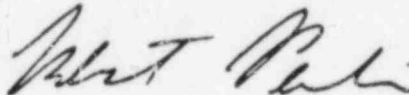
[I]ntervenors are expected to raise issues as early as possible. To the extent that this leads to contentions that are superseded by the subsequent issuance of licensing-related documents, those changes can be dealt with by either modifying or disposing of the superseded contentions.

that that decision mandates reversal of the Board's ruling. Petition at 6-9. Under the circumstances, it would have been appropriate for NECNP to seek reconsideration from the Licensing Board. However, even if NECNP's contention were reinstated, it should be noted that such a contention would be satisfied once routes are designated and Applicants perform a computer run utilizing the new routes. In that connection, it is also worth noting that the computer model and input data (other than the routes themselves) would not be open to challenge in that the methodology and assumptions to be used have already been found appropriate except as they relate to adverse summer weather and simultaneous evacuation. The sole issue raised by NECNP in this portion of the contention is the failure to apply the methodology and assumptions (already found to be appropriate except as noted above) to the actual evacuation routes to be used in the event of an emergency. Thus even if NECNP is correct and the Commission's Catawba decision does dictate a different result, the minimal effect a different result would have on this contention (let alone the proceeding as a whole) does not warrant the grant of directed certification.

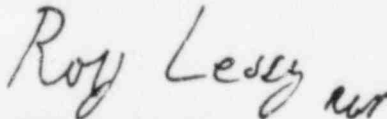
V. CONCLUSION

For the reasons stated above, the Staff submits that neither Massachusetts nor NECNP has shown that directed certification of the Licensing Board's ruling of June 30, 1983 is warranted.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 11th day of August, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONS OF NEW ENGLAND COALITION ON NUCLEAR POLLUTION AND ATTORNEY GENERAL FRANCIS X. BELLOTTI FOR DIRECTED CERTIFICATION OF THE LICENSING BOARD'S DECISION ON APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF NECNP CONTENTIONS III.12 AND III.13" 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 11th day of August, 1983:

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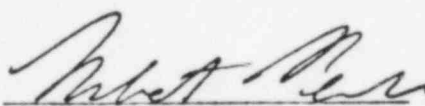
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