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Dated: January 21, 1988

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

before the
ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' RESPONSE TO ATTORNEY GENERAL JAMES M.
SHANNON'S MOTION FOR DIRECTED CERTIFICATION
OF THE NOVEMBER 16 AND 18, 1987 ATOMIC
SAFETY AND LICENSING BOARD RULINGS
CONCERNING THE ADMISSIBILITY OF CERTAIN EVIDENCE

FACTS AND PRIOR PROCEEDINGS

Under date of January 7, 1988, the Attorney General of The Commonwealth of Massachusetts ("Mass. AG") has filed a Motion for Directed Certification of certain rulings of the Atomic Safety and Licensing Board excluding certain testimony proffered in this operating licensing proceeding by Mass. AG ("The Motion"). The rulings challenged excluded "Commonwealth of Massachusetts Testimony of Steven C. Sholly on Technical Basis for the NRC Emergency Planning Rules, Dr. Jan Beyea on Potential Radiation Dosage Consequences of the Accidents That Form the Basis for the NRC Emergency Planning Rules, Dr. Gordon Thompson on Potential

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Radiation Release Sequences, and Dr. Jennifer Leaning on the Health Effects of Those Doses" ("the Testimony").

As is described in summary form therein, Test. at 12-15, the Testimony is in four distinct parts. The first part is a piece sponsored by Witness Sholly, Test. at 15-28, wherein he "describes the technical basis for the current NRC emergency planning rules." Test. at 12. The second part is sponsored by Witness Beyea, Test. at 29-75, who describes his testimony as follows: "In order to determine the extent of protection afforded the summer beach population by current emergency plans, we have modelled the radiation doses to the population that would follow releases of radioactivity from the Seabrook plant." Test. at 13. The third member of the panel, Witness Thompson, gives testimony, Test. at 75-77, which he describes as addressing:

"(1) The potential for an atmospheric release, similar to that designated PWR1 in the Reactor Safety Study, to occur from a steam explosion or high-pressure melt ejection event.

"(2) The range of variation of two parameters which affect plume rise during a 'PWR1-type' release, specifically the location of containment breach and the thermal energy release rate for the plume.

"(3) The potential for 'PWR1-type' releases to contain greater amounts of certain isotopes, such as those of ruthenium, than other categories of releases." Test. at 15.

The final piece by Witness Leaning, Test. 77-107, is described by her as a discussion of "what is known about the acute and long-term health consequences that can be expected to befall human beings exposed to ionizing radiation in the range of dose levels

that might eventuate from a nuclear power plant accident such as described in the testimony of Mr. Sholly, Dr. Beyea and Dr. Thompson. I describe the kinds of injuries that would be received by the population in both the short and long term." Test. at 15. A review of the entire testimony reveals that the foregoing descriptions, by the witnesses themselves, constitute an accurate summary of the testimony. In short, the testimony begins with Mr. Sholly's exposition as to what the contents of various documents are, leading to the conclusions that core melt accidents are within the spectrum of accidents to be considered in emergency planning and that the accidents Dr. Beyea testifies about are within that spectrum; this then is followed by Dr. Beyea's piece which purports to model certain accidents at Seabrook and show that there is a potential for large doses to be received by the public if such events occur at certain times, a piece by Dr. Thompson purporting to show the contents of the source term causing these doses, and finally Dr. Leaning's conclusion that given the circumstances posited by the Beyea and Thompson analyses, a large number of persons would be injured.

After the Testimony was filed, and well prior to its being introduced, the Applicants filed a motion in limine seeking to have the Testimony excluded.¹ On November 16, 1987, the Atomic

¹Applicants' Objection in the Nature of a Motion in Limine to the Admission into Evidence of Commonwealth of Massachusetts Testimony of Steven C. Sholly on Technical Basis for the NRC Emergency Planning Rules, Dr. Jan Beyea on Potential Radiation Dosage Consequences of the Accidents that Form the Basis for the NRC Emergency Planning Rules, Dr. Gordon Thompson on Potential Radiation Release Sequences, and Dr. Jennifer Leaning on the

Safety and Licensing Board granted the motion in limine. Tr. 5594-5609. Over seven weeks later, the motion at bar was filed.

It is in the foregoing posture that this matter comes before this Appeal Board.

ARGUMENT

A. The Motion Fails to State a Case for Directed Certification

The standard to be utilized when deciding whether to grant or deny a request for directed certification is well known. Such relief will be granted "almost without exception" only when the ruling challenged has:

" . . . 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."²

It is also well settled that, absent exceptional circumstances, directed certification is not granted to review rulings as to the admissibility of evidence.³

Mass. AG does not even argue that the motion at bar quali-

Health Effects of Those Doses (Oct. 1, 1987).

²Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

³Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-353, 4 NRC 381 (1976); Power Authority of the State of New York (Greene County Nuclear Power Plant), ALAB-439, 6 NRC 640 (1977).

fies under the first of the two above-quoted tests. See Mass. AG Brief at 3. Mass. AG does argue that the "basic structure" test is met. Stripped of rhetoric, the argument that Mass. AG makes comes down to the assertion that the evidence was important Mass. AG's case. But this is true of any evidentiary ruling. Nobody offers unimportant evidence.

To give his position some gloss, Mass. AG points out that there is a second phase of hearings contemplated in this proceeding dealing with the Massachusetts portion of the Seabrook EPZ. This is used to make the ruling seem more nearly one that affects the basic structure of the proceeding. Presumably what is being conjured up is the concept that if error has been committed, there will have to be a redo of two evidentiary phases. The fact remains that, in the event the challenged ruling should be reversed on subsequent appeal, the only thing that will be required is to go back to the Licensing Board, place the testimony in evidence, cross-examine it, and possibly have a little rebuttal. All of this would require a maximum of one or two weeks. The testimony is not of a nature that it will be any different as it applies to the Massachusetts side of the border than as it applies to the New Hampshire side

B. The Ruling was Correct on the Merits

Even though, for the reasons set forth above, the Applicants believe that the question presented is not a worthy candidate for directed certification, prior precedent requires us to address

the merits of the Motion.⁴

As Mass. AG states, Mass. AG Brief at 20, the desire of the Mass. AG is to have an objective standard in terms of "dose received" to judge the Seabrook emergency plans. However, the law is clearly to the contrary. In 1986, the Commission stated:

"Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a minimum evacuation time for the plume exposure pathway emergency planning zone in the event of a serious accident. Rather, they attempt to achieve reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986). (Emphasis added)

Some nine months later the Commission reiterated this position:

"The existing emergency planning [regulation] does not require that plans achieve any preestablished minimum dose savings in the event of an accident. For example, approved emergency plans with full State and local governmental cooperation have highly variable evacuation time estimates ranging from several hours to over ten hours and the projected dose savings for such plans would vary widely. Thus the regulation is inherently variable in effect and there are no bright-line, mandatory minimum projected dose savings or evacuation time limits which could be viewed as performance standards for emergency plans in the existing regulation. Moreover, the dose savings achieved by implementation of an emergency plan under adverse conditions, e.g., during or following heavy snow, could be substantially less than under perfect conditions. This variability

⁴Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 374 n.3 (1983); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 n.4 (1983).

is consistent with a concept or approach to emergency planning and preparedness that is flexible rather than rigid." Licensing of Nuclear Power Plants Where State and/or Local Governments Decline To Cooperate in Offsite Emergency Planning (Proposed Rule), 52 Fed. Reg. 6980, 6982 (March 6, 1987).

As recently as Nov. 25, 1987, the Commission again spoke to this subject in promulgating its rule as to "Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline to Participate in Off-Site Emergency Planning," 52 Fed. Reg. 42078 (Nov. 3, 1987):

"The Commission, in its 1986 LILCO decision, stressed the need for flexibility in the evaluation of emergency plans. In that decision, the Commission observed that it 'might look favorably' on a utility plan 'if there was reasonable assurance that it was capable of achieving dose reductions in the event of an accident that are generally comparable to what might be accomplished with government cooperation.' 24 NRC 22, 30. We do not read that decision as requiring a finding of the precise dose reductions that would be accomplished either by the utility's plan or by a hypothetical plan that had full state and local participation: such findings are never a requirement in the evaluation of emergency plans. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan." 52 Fed. Reg. at 42084 (Emphasis supplied.)

* * *

"That decision also included language which could be interpreted as envisioning that the

NRC must estimate the radiological dose reductions which a utility plan would achieve, compare them with the radiological dose reductions which would be achieved if there were a state or local plan with full state and local participation in emergency planning, and permit licensing only if the dose reductions are 'generally comparable.' Such an interpretation would be contrary to NRC practice, under which emergency plans are evaluated for adequacy without reference to numerical dose reductions which might be accomplished, and without comparing them to other emergency plans, real or hypothetical. The final rule makes clear that every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to the capabilities of any other plan. It further makes clear that a finding of adequacy for any plan is to be considered generally comparable to a finding of adequacy for any other plan." Id. at 42084-85 (Emphasis supplied.)

There is nothing new in this concept. Over four years ago, the Commission observed, "The Commission presumes as does FEMA that offsite individuals in the EPZ may, as a result of a nuclear plant accident, either become externally contaminated with radioactive materials or become exposed to dangerous levels of radiation, or both." Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 534-35 (1983).

The teaching from all of the foregoing is that evidence such as the Testimony here at issue is irrelevant in an NRC proceeding on Emergency Planning. The standard which must be met by an Emergency Plan is that it is designed to achieve reasonable and feasible dose savings given the circumstances of the site in

question. Whether these dose savings will be high or low in absolute terms at a particular site in the circumstances of a given accident or class of accidents is irrelevant.

The Mass. AG, by making the argument that Seabrook's site could not be approved today, Mass. AG Brief at 28-32 seeks to characterize the position of the Applicants as seeking an exemption from the regulations for plants which received their construction permits before 1980. Nothing could be further from the truth. Whatever may be the political likelihood of Seabrook's site being approved today, the regulatory result under applicable regulations, 10 CFR 100, should be the same.

Finally, the Mass. AG argues that prior case law handed down before the 1980 amendment to the emergency planning rules indicates that evidence such as that proffered by Mass. AG was received in cases where emergency planning within the LPZ under the old rule was involved. See cases cited by Mass. AG at Mass. AG Brief 26-27. A review of these cases⁵ will reveal that what was being considered were doses from design basis accidents, sometimes referred to as the maximum hypothetical accident under 10 CFR 100, which are accidents of far less severity than the largest within the "spectrum" which must be planned for under the new rule, and of far less severity than the accidents discussed

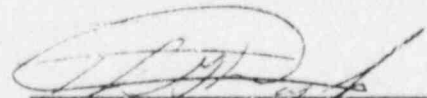
⁵Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), LBP-77-3, 5 NRC 301, 370 (1977); Northern States Power Company (Tyrone Energy Park, Unit 1), LBP-77-30, 5 NRC 1197, 1223 - 24 (1977); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), LBP-78-17, 7 NRC 826, 853 (1978); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 15 - 16 (1978).

in the Testimony. All that these cases stand for is the well-known rule under the Regulations as they existed prior to 1980 that dose calculations from design basis accidents were used to set the LPZ and it was against these same dose calculations that the issue of whether there was a reasonable probability that "appropriate protective measures" could be taken for LPZ residents was resolved. 10 CFR §100.3(b). There is no issue or contention in this proceeding as to whether the requirements of 10 CFR §100.3(b) are met.

CONCLUSION

The Motion should be denied.

Respectfully submitted,



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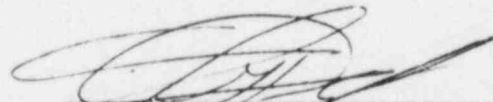
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