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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Administrative Judges:

Alan S. Rosenthal, Chairman  
Howard A. Wilber

February 10, 1988

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

MEMORANDUM

1. In ALAB-875, we determined, inter alia, that the Licensing Board had erroneously rejected at the threshold two contentions advanced by the intervenor New England Coalition on Nuclear Pollution in the onsite emergency planning and safety issues of this operating license proceeding involving the Seabrook nuclear facility.<sup>1</sup> Accordingly, we remanded those contentions to the Board with directions to admit them for litigation.<sup>2</sup>

At the time of the issuance of ALAB-875, the low-power Seabrook operation authorized by the Licensing Board in its

<sup>1</sup> 26 NRC \_\_\_\_\_, \_\_\_\_\_ (October 1, 1987) (slip opinion at 13-20). Those contentions concerned, respectively, the inservice inspection of steam generator tubes and the accumulation of aquatic organisms and other foreign matter in cooling systems.

<sup>2</sup> Id. at \_\_\_\_\_ (slip opinion at 48).

March 25 partial initial decision<sup>3</sup> was precluded by virtue of a Commission order.<sup>4</sup> For this reason, we found it unnecessary to explore in ALAB-875 "the extent, if any, to which the remanded issues are relevant to [such] operation."<sup>5</sup> Rather, we left it to the Licensing Board to make that determination if and when the Commission vacated the stay it had imposed without deciding itself whether our remand stood in the way of low-power operation.<sup>6</sup>

In an order entered on November 25, the Commission lifted its stay.<sup>7</sup> The order concluded with a discussion of the then current posture of the proceeding. The Commission noted that ALAB-875 "may have disturbed the legal footing" of the low-power authorization contained in the March 25 initial decision.<sup>8</sup> Accordingly, the Commission informed the Licensing Board that, as directed by us in ALAB-875, it should "expeditiously determine whether considering the

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<sup>3</sup> See LBP-87-10, 25 NRC 177. ALAB-875 was rendered on the appeals of several intervenors from that decision.

<sup>4</sup> See CLI-87-03, 25 NRC 875 (1987). As there appears, the Commission's determination to impose a bar to low-power operation was founded on considerations wholly extraneous to anything considered in ALAB-875.

<sup>5</sup> 26 NRC at \_\_\_ (slip opinion at 48).

<sup>6</sup> Id. at \_\_\_ (slip opinion at 49).

<sup>7</sup> See CLI-87-13, 26 NRC \_\_\_.

<sup>8</sup> Id. at \_\_\_ (slip opinion at 7).

issues that it is hearing on remand, it is appropriate to renew at this time its authorization of low power or whether low power operations must await further decisions."<sup>9</sup> In addition, we were told to consider whether any matter still within our jurisdiction required resolution "before low power."<sup>10</sup> On this score, the Commission referred explicitly to the pendency before us of issues relating to (1) the emergency notification sirens that had been installed and later removed in Newburyport, Massachusetts, and (2) the environmental qualification of certain coaxial cable to be used for data transmission in the Seabrook computer system.<sup>11</sup>

2. Since the entry of the Commission's November 25 order, we have issued decisions addressed to both of the matters before us to which the Commission specifically alluded. On January 8, in ALAB-882, we remanded the issue concerning the environmental qualification of the coaxial cable to the Licensing Board for further consideration.<sup>12</sup> In doing so, we informed the Board that, "[s]hould it prove necessary," it is to decide whether low-power Seabrook

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Id. at \_\_\_ n.6.

<sup>12</sup> 27 NRC \_\_\_.

operation must await the completion of the remand.<sup>13</sup> And just last week, in ALAB-883,<sup>14</sup> we granted motions of the intervenor Attorney General of Massachusetts to reopen the record for the purpose of introducing certain new contentions. Those contentions challenge the applicants' compliance with the Commission's emergency planning regulations on the basis of the removal of installed emergency notification sirens not only in Newburyport but, as well, throughout the remainder of the Massachusetts portion of the Seabrook plume exposure pathway emergency planning zone (EPZ).<sup>15</sup> In remanding the matter to the Licensing Board for further proceedings consistent with our opinion, we directed that the low-power authorization contained in the Board's March 25 partial initial decision not become effective pending the outcome of the remand.<sup>16</sup>

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<sup>13</sup> Id. at \_\_\_ n.14.

<sup>14</sup> 27 NRC \_\_\_ (February 3, 1988).

<sup>15</sup> As noted in ALAB-883, id. at \_\_\_ n.6, offsite public notification of a radiological emergency is treated as within the ambit of onsite emergency planning.

<sup>16</sup> Id. at \_\_\_ (slip opinion at 24). This directive rested upon the Commission's determination several years ago that an adequate public notification system must be in place for the entire EPZ before low-power operation of a nuclear facility may commence. Id. at \_\_\_ (slip opinion at 20-24).

3. The Licensing Board apparently found unsettling the instruction in ALAB-883 regarding the withholding of an authorization of low-power operation. For, two days after its receipt of that instruction, it transmitted a certified question to the Commission that, according to the Board, was prompted by the "quandary" occasioned by the instruction.<sup>17</sup> The Commission was told that the Board has "been preparing and could issue within a short time" its conclusion on whether the two issues posed by the contentions remanded in ALAB-875 stood in the way of low-power operation or, alternatively, did not pertain at all to such operation.<sup>18</sup> And, in the Board's view, it was duty-bound to comply with the Commission's directive in its November 25 order that that conclusion be reached "expeditiously."<sup>19</sup> As the Board saw it, however, in deciding in ALAB-883 that the newly admitted public notification issues stood in the way of low-power operation, we had "effectively negated the two alternative determinations which the Commission has delegated to [the Licensing Board] to make."<sup>20</sup>

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<sup>17</sup> Certification of a Question to the Commission Pursuant to § 2.718(i) (February 5, 1988) at 3 (unpublished).

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

Given this perceived dilemma, the Licensing Board called upon the Commission to tell it whether it should "proceed to make the determination as directed [by the Commission's November 25 order]." <sup>21</sup> But that question did not remain on the Commission's docket for long. Exercising his authority to direct to us papers that are improperly filed with the Commission, <sup>22</sup> on the next business day the Secretary transferred the certification to us "for appropriate action." <sup>23</sup>

4. It is readily apparent to us that no warrant exists for the Licensing Board's concern over a possible conflict between, on the one hand, the instructions given in the Commission's November 25 order and, on the other, ALAB-883. There is simply nothing in ALAB-883 that could be taken as affecting the Licensing Board's ability to make the determination called for by the November 25 order. <sup>24</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> See 10 CFR 2.772(h).

<sup>23</sup> Order (February 8, 1988) (unpublished).

<sup>24</sup> It should go without saying that, no less than the Licensing Board, we recognize the paramountcy of the Commission. It is therefore scarcely likely that we would embark upon an unauthorized course that might be reasonably construed as countermanding a Commission directive to a Licensing Board. Moreover, it is worthy of note that, in ALAB-883 in passing upon the question whether resolution of the public notification issue is a precondition to

(Footnote Continued)

As earlier seen, in the November 25 order the Commission asked the Licensing Board to decide whether the two contentions admitted for litigation as the result of ALAB-875 are pertinent to low-power operation. Neither of those contentions is in the sphere of emergency response planning.<sup>25</sup> In sharp contrast, as also seen, the contentions that we held in ALAB-883 must be resolved prior to low-power operation are directed exclusively to the adequacy of a crucial element of the emergency planning effort. There is thus no possible interrelationship between our conclusion in ALAB-883 and any conclusion that the Licensing Board might reach in response to the Commission's November 25 order.

In the circumstances, we can see no good reason why the Licensing Board should not now do what it has told the Commission it is prepared to do "within a short time": issue the determination called for by the November 25 order. To be sure, if it decides that the safety issues remanded in ALAB-875 are not relevant to low-power operation, the Board will not be able to give effect to that conclusion unless and until the ALAB-883 remand on emergency planning issues

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(Footnote Continued)

low-power operation, we were fulfilling an explicit mandate given us by the Commission in the November 25 order. See supra p. 3.

<sup>25</sup> See supra note 1.

culminates in a result favorable to the applicants.<sup>26</sup> But that consideration is hardly dispositive of the certified question. At this juncture, it is of course uncertain when the proceedings on the ALAB-883 remand will be completed. Depending on the timing and nature of the outcome of that remand, however, some advantage to the parties may well accrue from an early knowledge of the Licensing Board's views on whether fulfillment of the ALAB-875 remand is also a precondition to low-power operation. And, to repeat, it appears from the Licensing Board's own declaration that it can now enlighten the parties in this regard without a large additional expenditure of its time or effort.

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The certified question is answered in the affirmative -- i.e., the Licensing Board should proceed to make the determination directed by the Commission in its November 25 order, CLI-87-13.<sup>27</sup>


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<sup>26</sup> Conceivably, that is what the Licensing Board had in mind by its elliptical claim that ALAB-883 "effectively negated" its determination.

<sup>27</sup> Because it is not within the scope of the certified question, we need not here consider whether it would be desirable for the Licensing Board now to pass upon whether the environmental qualification issue remanded in ALAB-882 (see supra pp. 3-4) bears upon low-power operation. We note again, however, that the ALAB-882 direction was to decide that matter "should it prove necessary."



FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board