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April 7, 1988

UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	
Public Service Company of New Hampshire, et al.	Docket Nos. 50-443 OL-1 50-444 OL-1
(Seabrook Station, Units 1 & 2)	ONSITE EMERGENCY PLANNING & TECHNICAL ISSUES

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S BRIEF
IN SUPPORT OF APPEAL OF MEMORANDUM AND ORDER
RENEWING AUTHORIZATION TO OPERATE AT LOW POWER

Introduction

On February 17, 1988, the onsite Atomic Safety and Licensing Board ("the Licensing Board") issued a Memorandum and Order which renewed its previous authorization for operation of the Seabrook nuclear power plant at low power levels. ASLBP No. 88-55[illegible]-01-OLR. Intervenor New England Coalition on Nuclear Pollution ("NECNP") presents the following arguments in appeal of that decision.[1]

I. BACKGROUND

On March 25, 1987, the Licensing Board issued a Partial Initial Decision ("PID") which authorizes Public Service Co. of New

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1 We note that the Appeal Board has ruled that authorization to operate at low power cannot be given effect pending the outcome of litigation on remanded contentions concerning the siren systems for Seabrook. ALAB-883, 27 NRC at ___ (February [illegible], 1988), slip op. at 24.

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Hampshire ("Applicants") to operate the Seabrook nuclear power plant at power levels up to and including 5% of rated power.[2] NECNP appealed that decision on the merits, arguing, inter alia, that the Licensing Board had wrongly denied a number of contentions and had erred in ruling that Applicants satisfied the Commission's environmental qualification requirements. NECNP also contended that low power authorization was improper prior to the resolution of all contentions concerning Applicants' ability to satisfy the mandatory licensing requirements, including those for offsite emergency planning.

On October 1, 1987, the Atomic Safety and Licensing Appeal Board (the "Appeal Board") issued ALAB-875, reversing and remanding in part the March 25, 1987 Licensing Board decision authorizing a low power license for Seabrook. The Appeal Board ordered, inter alia, that the Licensing Board admit two of NECNP's contention concerning protection against steam generator tube ruptures (NECNP Contention I.V.) and potential degrading of the plant's heat removal capability due to build-up of biological organisms (NECNP Contention IV), and begin the litigation process for these improperly rejected contentions.[3] Litigation of those conten-

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2 Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-87-10, 25 NRC 177 (1987). Hereinafter, all administrative decisions in the Seabrook proceeding will be cited only by number and date. The agency's citation system denotes decisions of the Licensing Board Panel as "LBP" decisions, Appeal Board decisions as "ALAB," and Commission decisions as "CLI."

tions is now underway.

In ALAB-875, the Appeal Board also ordered the Licensing Board either to find as-yet unidentified support in the record for its ruling that a class of electrical cabling is qualified to survive accident environments (NECNP Contention I.B.2), or to reopen the record on that issue.[4] The Licensing Board's first explanatory memorandum was rejected by the Appeal Board; the parties are now responding to a second memorandum from the Licensing Board.

By order of November 27, 1987, the Licensing Board directed the parties to brief the issue of whether authorization to operate the Seabrook reactor at low power should be renewed. NECNP opposed the renewal of low power operation while its three remanded contentions remained unresolved, based on the legal argument that the Atomic Energy Act requires the completion of hearings on all safety issues before reactor operation at <u>any</u> power level may be authorized. The Licensing Board refused to consider NECNP's legal argument and instead authorized low power operation on the ground that the safety issues raised in NECNP's remanded contentions IV (biofouling) and I.V. (steam generator tube degradation) "would not adversely impact upon the public

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3 ALAB-875, slip op. at 13-20.

4 ALAB-875, slip. op. at 14, 20, 35-39.

health and safety if Seabrook, Unit 1, were to be authorized to operate only up to 5% of rated power." Slip op. at 9.[5] The Board did not address the significance of remanded contention I.B.2 (environmental qualification), or its relevance to low power operation.

ARGUMENT

II. THE ATOMIC ENERGY ACT PROHIBITS AUTHORIZATION OF LOW POWER OPERATION PRIOR TO COMPLETION OF PUBLIC HEARINGS ON ALL ISSUES MATERIAL TO FULL POWER LICENSING.

As a result of the Appeal Board's remand of NECNP Contentions IV and I.V. alleging that Applicants have not satisfied mandatory onsite safety requirements, NECNP is entitled to a full hearing on these contested safety issues prior to the issuance of a low power license. No low power license may be issued unless and until those contentions are finally resolved in Applicants' favor. Moreover, the record may well be re-opened with respect to NECNP Contention I.B.2, relating to whether Applicants have satisfied GDC 4 with respect to environmental qualification of the RG58 coaxial cable, if the Appeal Board determines that the record as it now exists does not support the Licensing Board's initial findings.[6] Issuance of a low power license prior to the

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5 The Licensing Board did, however, agree with NECNP that Applicants and the NRC Staff had improperly sought to dismiss NECNP's contentions on the merits, and considered only the arguments pertaining to the relevance of NECNP's contentions to low power operation.

6 While the Licensing Board's November 27th order directed briefings only on Contentions IV and I.V, we believe that low

resolution of these contested issues will violate NECNP's right under § 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), to a full operating license hearing before the license is granted.[7]

The Licensing Board has imposed on NECNP the onerous burden of demonstrating that its contentions have some special relevance to low power operation in order to obtain a hearing on its remanded contentions before issuance of a license for low power operation. The Licensing Board is in error. As a matter of law, NECNP need only show that these remanded issues are material to the issuance of an operating license for Seabrook. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir. 1984). That showing has been conclusively established by virtue of the admission of the issues to the licensing

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power authorization must also await resolution of Contention I.B.2.

7 The Appeal Board has previously stated that it will not entertain challenges to 10 CFR §§ 50.47(d) and 50.57(c). ALAB-865, 25 NRC 430, 439. The instant case, however, does not present a regulatory challenge. Section § 50.47(d), which relates only to emergency planning, is not at issue here. Moreover, as demonstrated below in Section III, the arguments presented in this brief are not inconsistent with § 50.57(c). While NECNP challenges a recent Commission interpretation of § 50.57(c) in the Shoreham case which conflicts with the history of the regulation and with past Commission precedent, we believe that the regulation itself is entirely consistent with the hearing requirements of the Atomic Energy Act. Even if the Appeal Board considers itself to be bound by the Commission's Shoreham decision, however, NECNP must raise these arguments at each level of this proceeding in order to preserve its rights of appeal.

proceeding.[8] Accordingly, the Atomic Energy Act requires that NECNP be given a full hearing on these issues prior to the renewal of authorization to operate Seabrook at low power.

A. The legislative history of the expired Temporary Operating License Authorization demonstrates that Congress did not authorize issuance of low power licenses until completion of all hearings relevant to licensing.

NECNP's rights in this proceeding are governed by Section 189(a)(1) of the Atomic Energy Act, which requires that in any proceeding "for the granting, suspending, revoking, or amending of any license or construction permit,"

> The Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a). The hearing must be held before the Commission takes the proposed licensing action. Sholly v. U.S. Nuclear Regulatory Commission, 651 F.2d 780, 789 (D.C. Cir. 1980), vacated on other grounds, 103 S Ct. 1170 (1983); Union of Concerned Scientists v. Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir 1984).

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8 In its Memorandum and Order, the Licensing Board suggests that NECNP is barred from challenging the Board's authority to renew the low power license because NECNP did not request the Commission to reconsider its decision in CLI-87-13, 26 NRC 400 (1987), in which the Commission lifted its stay of low power operation and directed the Licensing Board to determine whether low power operation should be renewed. Slip op. at 11 and n. 8. The Licensing Board is mistaken. It is an axiom of NRC practice that all arguments must be raised to the Licensing Board before they may be appealed to higher tribunals. In any event, no such motion is required under NRC rules of practice.

The Atomic Energy Act contains no provision permitting the Commission to authorize the operation of a nuclear power plant at low power levels before full power license hearings are complete and all relevant issues are resolved; nor does it dispense with the prior hearing requirement for any initial operating license decision. Rather, under the Act, all issues that are material to the full power operation of a nuclear power plant must be considered relevant to the issuance of a license for any level of operation.

This interpretation of the Atomic Energy Act is reinforced by the legislative history of the provisions regarding low power operation. On the two prior occasions when Congress perceived a need to permit low power operation before licensing hearings were complete, it gave the Commission only temporary authority to do so.[9] In both instances, Congress was responding to a perceived emergency, and in both instances Congress strictly limited the duration of the NRC's authority to issue a "temporary operating license" or "TOL." The legislative history of these two enactments demonstrates the strength of Congress' intent that in the absence of specific Congressional authorization, the public's statutory right to full hearings on the issuance of operating licenses may not be compromised by the issuance of a low power

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9 See 42 U.S.C. § 2242, which expired December 31, 1983.

license before those hearings have been completed.

(1) 1972 temporary operating license amendment

In 1972, responding to a perceived threat of imminent energy shortages, Congress amended the Atomic Energy Act to permit the NRC to issue temporary operating licenses without the completion of the full adjudicatory hearings required by Section 189a of the Act.[10] According to the Chairman of the Atomic Energy Commission, te legislation was needed in part to allow the NRC to speed reactor testing and thereby "properly anticipate emergency power needs." Statement of James S. Schlesinger before Joint Committee on Atomic Energy, March 16, 1972, at 74.

The new provision required that before the Commission could issue a TOL, it must have received the letter of the Advisory Committee on Reactor Safeguards ("ACRS"), the Staff's Safety Evaluation Report ("SER"), and the environmental impact statement. However, intervenors were entitled to no more than an informal hearing on whether the plant could be operated safely on a temporary basis.

Section 192 did not eliminate the full licensing hearings required by Section 189a, but allowed the NRC to postpone them until after issuance of the low power license. As the House Report explained,

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10 Section 192 of the Atomic Energy Act [42 U.S.C. § 2242], added June 2, 1972, Pub. L. 92-307, 86 Stat. 191.

> Under this new authority, the Commission is authorized to issue a temporary license to operate the reactor under these circumstances even though the full-term license is being contested by interested members of the public. The temporary license would not deprive the public of a full review of the health and safety and environmental matters which may be contested. All substantive requirements of applicable law would have to be satisfied.

House Rept. No. 92-1027, 1972 U.S. Code Cong. and Admin. News 2351 (emphasis added).

In permitting the issuance of TOLs, Congress attempted to avoid or ameliorate "threatened shortages" during the summer of 1972 and the winter of 1972-3. 1972 U.S. Code Cong. and Admin. News at 2352. Congress was also concerned that litigation of environmental impact statements under the NRC's newly promulgated regulations for the implementation of the National Environmental Policy Act ("NEPA") would result in "prolonged" hearings that would delay licensing. Id. at 2355.[11] In particular, the legislation was designed to overcome the court's ruling in Izaak Walton League of America v. Schlesinger, 337 F.2d 287 (D.C.D.C. 1971), in which the District Court enjoined issuance of a low

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11 As the House Report explains, after passage of the National Environmental Policy Act in 1970, the issues open for litigation in licensing hearings "were expanded so that the Commission had to consider all significant environmental matters in its decisionmaking process, which, under the Atomic Energy Act, includes the hearing requirements summarized above." 1972 U.S. Code Cong. and Admin. News at 2355. In response to the U.S. Court of Appeals' 1971 decision in Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), the Commission had "issued regulations which impose a very stringent environmental review" of proposed nuclear reactor licenses. Id.

power license because the Commission had failed to file an environmental impact statement for the plant or to offer a hearing on the adequacy of the EIS. See Statement of James S. Schlesinger before Joint Committee on Atomic Energy, March 16, 1972, at 77-78.

Sensitive to the interests of the public in licensing hearings, Congress stressed that the temporary licensing provision should be used by the Commission only where there was an "urgent need" for the energy. Id. at 2356. More important, the legislation contained an expiration date that gave the NRC less than a year and a half to implement the TOL provision. Thus, Congress gave the NRC only so much authority to issue TOLS as it deemed was necessary to cope with a perceived short-term energy crisis. Clearly, Congress intended that under ordinary circumstances and in the absence of special legislation, the public was entitled to full adjudicatory hearings before the issuance of an operating license.

(2) 1982 temporary operating license amendment

After the 1972 temporary operating license legislation expired, nine years passed before Congress again perceived the need to grant utilities relief from the Atomic Energy Act's strict prior hearing requirements. In January of 1983, in response to licensing delays caused by the Three Mile Island

accident, Congress again enacted a special, limited-term temporary operating license provision. This new version of § 192 allowed the Nuclear Regulatory Commission to issue temporary licenses for fuel loading and operation at up to 5% of rated power, with special provision for incremental increases in power levels.[12]

According to the Senate Report, the legislation was designed to alleviate the licensing delays that had been caused by the imposition of additional safety requirements following the Three Mile Island accident:

> Largely as a result of this situation, it became apparent in late 1980 that some delays would be experienced between the time when construction of these plants would be sufficiently complete to allow fuel loading and the start of operation, and the time when all requirements for the issuance of an operating license, <u>including the hearing requirements</u>, of the Atomic Energy Act, would be met.

Sen. Rep. No. 97-113, 1982 U.S. Code Cong. and Admin. News at 3593 (emphasis added).

As summarized in debates on the bill,

> The temporary operating license provision confers upon the NRC a much-needed authority arising out of the Post-TMI licensing delays, authorizing the NRC to issue operating licenses to applicants prior to the completion of that certain public hearing required under the Atomic Energy Act, if all other statutory requirements are met.

128 Cong.Rec. 15314 (December 16, 1982) (remarks of Rep. Simp-

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12 42 U.S.C. § 2242, Pub.L. 97-415, 96 Stat. 2072 (January 4, 1983).

son).

Like the original version of § 192, the 1982 amendment established as prerequisites for a TOL the filing of the ACRS letter, the Staff's Safety Evaluation Report, and a final environmental impact statement. In addition, the 1982 law required that no TOL could issue before the submission of a State, local, or utility emergency preparedness plan.

Were either of these two temporary operating license provisions in place today, they might conceivably give the Licensing Board the authority to issue an operating license permitting low power operation before completion of licensing hearings. However, both provisions have long since expired. The legislative history of the TOL bills demonstrates unequivocally that Congress considered pre-hearing licensing such as the low power authorization sought here to constitute a short-term emergency stopgap measure. In the absence of such specific authorization from Congress, the Commission may not issue an operating license authorizing any level of operation at the Seabrook nuclear power plant until it completes hearings on all issues that are material to full power operation.

B. "Sholly Amendment" Legislative History

It is by now generally recognized that the issuance of a license authorizing low power operation would have the irreversible effect of causing the contamination of the Seabrook plant, and posing some risk to the public health and safety. Long Island

Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587 (1985). For this reason, the legislative history of the "Sholly Amendment" reinforces the view that Congress did not intend to authorize the initial operation of a nuclear power plant at any power level, with its accompanying irreversible changes and raised risk to the public health and safety, until the NRC completes hearings on all issues that are material to the full power licensing of the plant.[13] The "Sholly Amendment" amended Section 189(a) to permit the Commission to waive the prior hearing requirement for operating license amendments that pose "no significant hazards consideration." Significantly, Congress did not, at that time, include operating licenses within the ambit of that authority. Rather, only for license amendments which, despite their "irreversible consequences," pose "no significant hazards consideration" to the public, has Congress made an exception.

The following colloquy between Rep. Markey and Rep. Ottinger clearly indicates that the NRC is not permitted, absent specific Congressional authorization, to take any licensing action carrying "irreversible consequences" without granting a prior hearing on those actions.

> MR. MARKEY: I note that with respect to section 12 of the bill, the so-called Sholly provision, the statement of managers emphasized that, in determining whether a proposed

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13 42 U.S.C. § 2239(a), Pub. L. 97-415 § 12(a), 96 Stat. 2073 (January 4, 1983).

> amendment to a facility operating license involves no significant hazards consideration, the Commission should be sensitive to those license amendments that involve irreversible consequences. As chairman of the subcommittee that originated the Sholly provision in this House, do you understand that statement to mean that the Commission should be especially careful in evaluating, for possible hazards consideration, amendments that involve irreversible consequences?
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> MR. OTTINGER: Yes, that is exactly what I understand our intent to have been. Once a license amendment with irreversible consequences has received the Commission's approval and has gone into effect, as a practical matter it will be impossible to correct any errors that may have entered into the Commission's decision. Therefore, we believed that the Commission has an obligation, when assessing the health and safety considerations of amendments having irreversible consequences, to insure that only those amendments that very clearly raise no significant hazards issues will be allowed to take effect before the required hearings can be held.

128 Cong. Rec. 8823 (December 2, 1982).

In sum, the Sholly Amendment contains no provision that would exempt operating licenses from prior hearings based on something analogous to a "no significant hazards consideration" finding. Therefore, no matter how insignificant the Commission may view the consequences of low power operation in the context of the overall benefits of full power operation, the Atomic Energy Act forbids the issuance of a low power license until the Commission has made the findings and reached the conclusions required for issuance of an operating license for the Seabrook plant.

III. THERE IS NO AUTHORITY IN THE COMMISSION'S REGULATIONS FOR ISSUANCE OF A LOW POWER LICENSE PRIOR TO FINDINGS ON ALL ISSUES RELEVANT TO FULL POWER OPERATION.

The Licensing Board incorrectly interprets 10 C.F.R. §

50.57(c) to allow it to issue a low power license before resolution of contested onsite safety issues if the Board determines that these contested issues are not "relevant" to low power licensure. This construction of § 50.57(c) is inconsistent with both the plain language and regulatory history of § 50.57(c), as well as prior NRC decisions.[14] Rather, both the regulatory history of § 50.57(c) and past licensing decisions reinforce the conclusion that the Commission has no authority to grant the equivalent of ad hoc, case-by-case "exemptions" from mandatory licensing requirements in the context of low power authorization, outside of the normative process of petitioning for regulatory waivers.

Commission regulation 10 C.F.R. § 50.57(c) provides that, in cases of motions for low power authorization,

> Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent his contentions are relevant to the activity to be authorized.

It is this underscored language that is relied on, out of context, as ostensible authority for the Licensing Board to pick and choose among mandatory licensing requirements and to require Applicants to satisfy only those requirements that are, in the absolute discretion of the Board, "relevant" to low power licensure. However, this was plainly not the intention of this

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14 As discussed above, this construction of § 50.57(c) is also at odds with § 189 of the Atomic Energy Act.

regulatory language. Rather, the real purpose of this provision is made plain by the next sentence of the regulation, which provides that

> Prior to taking any action on such motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section.

10 C.F.R. § 50.57(c) (emphasis added).

This language clearly indicates that the purpose of § 50.57(c) was simply to relieve the Licensing Board of the obligation to make positive findings on uncontested issues prior to low power operation, by delegating this function to the Director of Nuclear Reactor Regulation (NRR). Nothing in the regulation vitiates the Licensing Board's obligation to make findings on all operating license issues "as to which there is a controversy" prior to issuance of a low power license. In other words, this regulation was clearly intended to be protective of the parties' rights to a prior hearing on contested issues, not to abrogate them altogether.

The regulatory history of § 50.57(c) reinforces this reading. The language relied on by Applicants was adopted in 1972, when § 50.57 was amended to adopt procedures designed to expedite and make more efficient administrative decisionmaking.[15] There

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15 See Notice of Proposed Rulemaking, "Restructuring of Facility

is absolutely no suggestion that the amendments were intended to effect a change so drastic as to permit the issuance of an operating license without resolving all safety issues. The statement of consideration accompanying the notice of final rulemaking make clear that "the amendments do not involve drastic changes in the administrative process or novel procedures."[16] Rather, § 50.57(c) does no more than establish a policy for low power licenses of having the Licensing Board decide contested issues, and permitting the Director of NRR to make findings as to uncontested issues.

And in fact, between 1972 and 1984, this rule was not construed as permitting a Licensing Board to determine summarily that contested safety issues are "not relevant" to low power operation. Rather, past licensing decisions authorize low power operation only after resolution of contested onsite safety issues that were the subject of admitted contentions. For example, in Texas Utilities Electric Co. (Commanche Peak Steam Electric Station, Units 1 and 2), LBP-84-30A, 20 NRC 443, 444 (1984), the Licensing Board denied low power authorization due to the pendency of a broad quality assurance contention, on the grounds

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License Application Review and Hearing Processes," 37 Fed. Reg. 15124, Col. 3 (May 9, 1972).

16 37 Fed. Reg. 15127, 15128, Col. 1 (July 28, 1972).

that 10 C.F.R. § 50.57(c) "requires us to make the findings listed in § 50.57(a) with respect to the contested activity sought to be licensed." (emphasis in original).[17]

The licensing decisions permitting low power operation prior to the resolution of new, late-filed allegations, do not contradict our view that Commission has no authority to authorize low power operations prior to the resolution of admitted, unresolved onsite safety contentions. As was recognized by the D.C. Circuit in San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1312 (D.C. Cir. 1984), "the Commission's criteria for reopening a closed record are higher than the criteria for obtaining a hearing under section 189(a)." The Licensing Board does not possess such comparable discretion where the record remains open and there are outstanding, unresolved safety issues in controversy. Here, the Appeal Board's remand firmly establishes that NECNP has already made the requisite showing that

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17 In Commonwealth Edison Co (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-31, 24 NRC 451 (1986), the Licensing Board issued a license authorizing fuel loading and precriticality testing prior to the resolution of contested safety contentions, but expressly noted that a different standard would be applicable to a request for low power operating licenses than to "a mere request for fuel loading and precriticality testing." Id., at 457 n.2. While we do not believe that the distinction between precriticality and low power operation is a valid one, this case plainly indicates that onsite safety issues must be resolved prior to authorizing operations involving irradiation of the reactor core.

resolution of the remanded contentions is necessary to the safe operation of the plant at any level of power, and no additional showing is required.[18]

The novel interpretation that § 50.57(c) authorizes discretionary Licensing Board determinations as to the "relevance" of particular safety requirements to low power operation can be traced to Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437 (1984) (hereafter "Shoreham II"), in which LILCO sought a low power license under § 50.57(c). In an earlier decision, the Commission held that as a condition of even low power operation, the Applicant must satisfy the mandatory General Design Criterion requiring reliable emergency power supplies, unless it satisfied the requirements for an exemption under 10 C.F.R. § 50.12(a), demonstrating, inter alia, that operation without compliance with the rule would be "as safe

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18 Signficantly, even those decisions permitting low power authorization prior to resolution of late-filed contentions or §2.206 petitions in no way indicate that "safety" means something different depending on the level of power to be authorized. See Diablo Canyon, DD-84-20, 20 NRC 776, 780 (1984) (a low power license may not be issued prior to the resolution of a petition filed under 10 C.F.R. § 2.206 if the allegations raise significant new information concerning "safety-related" activities or equipment); Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), DD-87-6, 25 NRC 387, 388 (1987) (if issues in petition filed under 10 C.F.R. § 2.206 "do not present significant safety concerns, the Nuclear Regulatory Commission may issue the low-power or full-power operating license.") It would be illogical to have a lower standard for issuance of a low power license where, as is the case here, the record has already been reopened for the litigation of substantive safety issues.

as" operation in compliance with the rule.[19] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984) (hereafter "Shoreham I"). In a revealing SECY paper responding to this decision, the Commission staff recognized that a Licensing Board could not "distinguish more carefully among safety requirements for fuel loading and other operational phases,... without extensive changes to the regulations."[20] Instead, the Staff suggested that the Commission would have greater flexibility if it relaxed the "as safe as" standard it had set for granting exemptions. The Staff relied on the following reasoning to justify this less restrictive exemption standard:

> Some regulations, including some GDC, may properly be considered inapplicable to fuel loading and low power testing if such a conclusion is fairly compelled by simple logic and common sense. However, a regulation cannot be considered inapplicable merely because, as applied to fuel loading or low-power testing, it is logical but arguably excessive.

SECY-84-290A, at 26 (emphasis added).

The first part of the above-quoted language was then seized out-of-context by the Licensing Board as authority for simply disregarding on a case-by-case basis mandatory safety requirements which do not appear to the ASLB to be necessary for opera-

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19 10 C.F.R. § 50.12(a) also requires, inter alia, a showing of exigent circumstances justifying an exemption.

20 SECY-84-290A, at 2.

tion at less than full power. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LPB-84-35A, 20 NRC 920, 924 (1984). In so holding, the Licensing Board cited no authority (other than the inapposite SECY paper) and essentially ignored the express language in the SECY paper stating that the "flexibility" perceived by the Licensing Board was not possible under the current language of § 50.57(c), as well as the overall thrust of the SECY paper that the sole way to avoid a safety requirement was to apply for an exemption under § 50.12. Despite the total lack of regulatory or case authority for this novel reading of §50.57(c), the Commission approved the Licensing Board's decision. Shoreham II, 20 NRC at 1439-1440. Again, no authority other than "simple logic and common sense" was cited.

Interestingly, had the Commission intended to interpret § 50.57(c), which has been in existence since 1972, in this novel manner, it would presumably have found it unnecessary, ten years later, to promulgate § 50.47(d) to provide a specific, generic exemption from the regulatory requirements governing offsite emergency planning for low power license applications. As was noted in Pacific Gas and Electric Co (Diablo Canyon, Units 1 and 2), 17 NRC 777, 789 (1983), "This amendment [§ 50.47(d)] makes clear that for fuel loading and low power testing it is the applicant's onsite emergency plan and preparedness that is crucial ..." More importantly, the promulgation of an express exemption from emergency planning regulations for purposes of low

power operation demonstrates that, in 1982, the Commission felt that it had no existing authority -- under § 50.57(c) or elsewhere -- to give Licensing Boards the uncontrolled discretion to grant what amount to regulatory exemptions on such an ad hoc, basis, or to place the burden upon those opposing a license to establish the applicability to low power of any and all rules.

Finally, any reading of § 50.57(c) which gives licensing boards uncontrolled discretion to grant the practical equivalent of regulatory exemptions would stand the Commission's licensing scheme on end. NRC regulations establish a presumption that licensing regulations are mandatory for all nuclear power plants and may not be relitigated or challenged in an operating license case, except via the formal process for obtaining regulatory exemptions. 10 C.F.R. § 2.758(a). To permit Applicants to bypass mandatory safety requirements outside the formal exemption process would establish a presumption that no regulation is relevant to low power operation unless an intervenor shows that compliance is necessary. Accordingly, 10 C.F.R. § 50.57(c) cannot be construed as granting the licensing board the authority, on an ad hoc, case-by case basis, to waive mandatory safety requirements.

IV. APPLICANTS MUST SATISFY COMMISSION REGULATIONS WITH RESPECT TO REMANDED CONTENTIONS, OR SATISFY THE STANDARD FOR AN EXEMPTION, PRIOR TO RENEWAL OF LOW POWER AUTHORIZATION

Applicants carry the burden of proving that they satisfy all Commission regulations before they can receive a license for the operation of the Seabrook nuclear power plant. 10 CFR §§ 50.57(a), 2.732. As discussed above, except for certain offsite emergency planning requirements exempted under § 50.47(d), no regulatory exceptions are made for licenses permitting low power operation. Hence, before receiving any license to operate the Seabrook plant, Applicants obtain a favorable resolution of NECNP's three remanded contentions.

The only alternative means available to Applicants that would enable them to bypass litigation of these outstanding contentons prior to receiving a license to operate at low power authorization is to petition for a regulatory waiver of the General Design Criteria and regulations that are the subject of NECNP's contentions, pursuant to 10 C.F.R. § 2.758(b).[21] Any other standard would violate the presumption of the validity and

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21 Regulatory exemptions may be granted only where the applicant can demonstrate special circumstances with respect to the subject matter of the proceeding such that application of the regulation would not serve the purposes for which it was adopted, or upon a showing of "exceptional circumstances." 10 C.F.R. §§ 2.758(b) and 50.12. Under both exemption standards, "the burden is on ... the petitioner for a waiver." Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410, 443 n.16 (1985), aff'd, ALAB-837, 23 NRC 525 (1986)

general applicability of all regulations that is embodied in 10 C.F.R. § 2.758, and unlawfully shift the burden of proof away from the party seeking a waiver of a regulatory requirement, placing it instead on parties who seek to ensure compliance with valid regulations.

Indeed, this is the standard that has been applied by the Commission in past proceedings. For example, in Shoreham I, the Commission held that LILCO must satisfy the mandatory General Design Criterion requiring reliable emergency power supplies (GDC 17) prior to issuance of a low power license, or demonstrate that it satisfies the standards for an exemption under 10 C.F.R. § 50.12. On remand, the Licensing Board stated "[a]n exemption to GDC 17 may be authorized for low power operation where applicant has shown that operation would be as safe as it would be if it were in full compliance, and that exigent circumstances favor the grant of the exemption." LBP-84-45, 20 NRC 1343, 1345 (1984).

In sum, the presence of unresolved, admitted contentions concerning mandatory, onsite safety requirements, is sufficient by itself to establish that these contentions are relevant to the license under consideration, and the issuance of a license to operate at any level of power is barred until these outstanding issues are resolved. Insofar as NECNP's rights are concerned, it is entitled to be in the same posture as if its contentions had

not been erroneously rejected. Had NECNP's contentions been properly admitted, there would have been no question that the issues needed to be fully heard and resolved in the Applicants' favor in an initial decision. Accordingly, the only alternative to the litigation and resolution of these contentions is for Applicants to petition for a waiver of the General Design Criteria at issue. However, Applicants have not petitioned for a waiver of any of these GDC. Until Applicants do so, and satisfy the formidable burden placed on one seeking a regulatory waiver, no low power license can be granted.

V. CONCLUSION

For the reasons discussed above, Licensing Board violated the provisions of the Atomic Energy Act and NRC regulations when it renewed Applicants' authorization to operate the Seabrook plant at up to 5% of rated power. Therefore, the Licensing Board's decision should be reversed.

Respectfully submitted,

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April 7, 1988

CERTIFICATE OF SERVICE

I certify that on April 7, 1988, copies of this pleading were served by first-class mail on the parties to the attached service list.

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