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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL
PUBLIC SERVICE COMPANY OF	)	50-444 OL
NEW HAMPSHIRE, et al.	)	Off-site Emergency Planning
	)	
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO APPLICANTS' MOTION FOR REFERRAL AND INTERVENORS' CROSS-MOTION IN THE ALTERNATIVE FOR REFERRAL

On August 5, 1988 Applicants moved this Board to refer to the Appeal Board, under 10 C.F.R. § 2.730(f) and 2.785(b)(1), two issues arising from the Licensing Board's Memorandum and Order of July 22, 1988 concerning the admissibility of Massachusetts Attorney General ("Mass AG") Contentions 2, 3, 4, and 6 on the Seabrook Plan for Massachusetts Communities ("SPMC"). Applicants' Motion for Referral ("Motion"). These issues concern rebuttals which are permitted to the presumption created by 10 CFR 50.47(c)(1) that State and local officials will follow the utility's emergency response plan.

The Mass AG and NECNP opposes Applicants' Motion and has cross-moved to refer an additional issue to the Appeal Board if the Licensing Board grants Applicants' request. The issue which intervenors conditionally seek to raise concerns the limitation on the evidence which non-participating governments may offer to rebut a presumption that they would follow the utility plan. Massachusetts Attorney General's and

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NECNP's Opposition to Applicants' Motion for Referral or in the Alternative, Cross Motion for Referral.

For the reasons set forth below, the Staff opposes the Applicants' Motion as well as the intervenors' conditional cross-motion to refer another issue to the Appeal Board.

DISCUSSION

The standards governing motions for directed certification or referral are well-established and permit certification for discretionary interlocutory review by the Appeal Board only when the ruling below either (1) threatens 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) affects the basic structure of the proceeding in a pervasive or unusual manner. See e.g.: Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981) citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station) ALAB-405, 5 NRC 1190, 1192 (1977).

Application of these standards to the Applicants' Motion requires that the motion be denied. Interlocutory review is generally disfavored and only allowed in the most compelling circumstances. See, Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742 18 NRC 380, 383 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983). Applicants here do not suggest that failure of the Licensing Board to refer the two issues will result in any immediate and serious irreparable impact or that these rulings will affect the proceeding in a pervasive or unusual manner. Applicants only maintain that the rulings may be

incorrect and that "the issues not only significantly affect the course of this proceeding but have generic implications." Motion at 4. As often held, the fact that rulings may be incorrect does not provide any basis for interlocutory review. See, Seabrook, 18 NRC at 15; Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14(1982). If error alone could lead to interlocutory review, 10 C.F.R. § 2.730(f) generally prohibiting such review would be rendered meaningless.

Applicants cannot claim that the admission of a contention will significantly affect the course of a proceeding. As often held, the wrongful ruling on the admission of contentions alone does not so affect the course of a proceeding in such a pervasive manner as to lead to interlocutory review. See, Public Service Co.of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987). Nor can it be maintained that generic issues are involved in the admission of off-site emergency planning contentions when such matters are involved only in the Seabrook and Shoreham proceedings. See Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), ALAB-741, 18 NRC 371, 377(1983) (issue arising in at least 3 proceedings did not call for interlocutory review). 1/

1/ Applicants cite Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464-65 (1982), modified in part, CLI-83-19, 17 NRC 1041 (1983), to support their claim that the questions upon which they seek interlocutory review are generic in nature. That case involved the question of whether a Licensing Board might

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The apparent basis of Applicants's Motion is the percieved need for a decision upon "which of the two Licensing Board interpretations of the emergency planning rules it wishes to affirm before the record in this litigation closes." Motion at 2. Interlocutory review will not be granted simply because there is a ccnflict between two Licensing Boards on a particular question. In Public Service Co. of New Hampshire, (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 484-85, (1973), the Appeal Board held that it would not accept an Applicant's request for interlocutory review of rulings on an emergency planning contention in the face of claimed conflicting rulings by Licensing Boards. It there stated:

> Absent some special circumstance making immediate elimination of the decisional conflict imperative, the parties both can and should be left to the pursuit of those normal appellate remedies which become available to them once the initial decision (or some other appealable order) has been rendered.

See also, Virginia Electric Power Co., supra.

In this instance, the Licensing Board has specifically found that its July 22, 1988 ruling is not in conflict with the Shoreham Board as Applicant claims. See, Memorandum and Order at 22, n.2; Tr.14345-14346. In the Memorandum and Order the Board specifically distinguished the facts and procedural setting of the Shoreham decision. At the time of the Shoreham decision the LILCO plan had generally been found to be adequate but for State and local government participation. Thus, the Shoreham Board could safely presume that the "best efforts" response by local or

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> conditionally admit a contention, and affected all NRC adjudicatory proceedings. Here the issue is limited to a question involving off-site planning issues which are only involved in two proceedings.

State governments would either follow the LILCO plan or some other plan. In this proceeding since the adequacy of the SPMC has not been determined the same presumption would be premature. 2/

In a pre-hearing conference following the Memorandum and Order admitting contentions, the Board elaborated on the basis for its belief that the ruling in Shoreham and in the instant case are not in conflict.

> [O]ur rulings on the contentions addressed the Long Island Lighting case. . . in the context of that memorandum and order [the Shoreham Board was] under no obligation to explain where they were in the proceeding. . . they assumed that the parties knew where they were. They were not, as we are, upstream from a couple of hundred contentions, and. . . a Board totally unfamiliar with a plan. They had been at the end of an adjudication of a plan which had been found . . . .to meet at least that Board's standards of adequacy, and they saw no other factual believable response other than

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2/ The presumption created by the recent amendment to 10 C.F.R. § 50.47(c)(1) forcloses a claim that lack of legal authority, standing alone, is a bar to licensing. See 52 Fed.Reg. 42082-85; CLI-86-13, 24 NRC 22, 25, 29-31 (1986) (Commission assumes utility does not have authority to implement material parts of emergency plan, but remands proceeding to see if State and local governments' "best efforts" in implementing the plan in an actual emergency would be adequate.) In the event a utility cannot lawfully implement its plan under State law (as alleged in Mass AG Contention 6), 10 C.F.R. § 50.47(c)(1) creates an irrebuttable presumption that State and local governments would use their best efforts to implement the plan in the event of an emergency and that such a response would be based upon the utility's plan, unless some other "best effort" response of State or local government is proffered. In its discussion accompanying the issuance of the final rule, the Commission stated "The presiding Licensing Board should not hesitate to reject any claim that state and local officials will refuse to act. . ." 52 Fed Reg. 42085. This Board has made it clear that in order to prevail with any claim that a particular reponse is better than the utility plan, the nature of that allegedly superior response must be established. July 20, 1980 Memorandum and Order at 20. This ruling is entirely consistent with the Shoreham Board's ruling that the intervenors must come forward and present a "positive case" on the actions they would take in an emergency or possibly suffer an adverse ruling. 27 NRC at 370.

> "follow the plan or another plan," and it was a factual context.
>
> If that is not the case, if we have misunderstood what that Board was talking about, then we disagree with them. I don't think that we in fact do disagree with them because they just did not have the same situation [as that] before us, and they did not address at all the "for example" aspect in the context of looking at the regulation and framing threshold windows for contentions yet to be evaluated and analyzed. (quotations added)

The predicate of the conflict between Licensing Boards upon which Applicants found their claim, namely, that there is a significant question meriting appellate guidance, is missing. Thus, no basis exists to delay this proceeding to obtain that guidance. See, Virginia Electric Power Co., 18 NRC at 374-75, explaining Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-1, 13 NRC 452, 456-57 (1981).

In addition to the Motion's failure to meet the standards for directed certification or referral, the Motion is premature. The Licensing Board has placed the burden on Intervenors to proffer their rebuttal to the permissive presumption that Intervenors would follow the utility plan by showing the "best effort" they would make to protect their citizens in the event of an emergency. Memorandum and Order at 20. The Board should be afforded an opportunity to apply its interpretation of the new emergency planning rules in the context of the evidence adduced in the hearing. See, Seabrook, 1 NRC at 485. 3/

3/ For similar reasons the intervenors' cross-motion should be denied. Their cross-motion does not address the standard for certification. Further, as they recognize the Licensing Board's determinations are not in conflict with the Shoreham board's ruling. See Cross-Motion at 2. The rulings of this Board and the Shoreham Board on the issue

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CONCLUSION

For the reasons set forth above the Staff opposes the Applicants' Motion and Intervenors' Cross-Motion. No cause is shown to refer a question to the Appeal Board.

Respectfully submitted,

Elaine I. Chan
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of August, 1988

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they conditionally seek to have certified (the need for governments to go forward and show the response they would make in an emergency) are similar. See n.2 above.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANTS' MOTION FOR REFERRAL" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 22nd day of August 1988.

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