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UNITED STATES OF AMERICA  
before the  
NUCLEAR REGULATORY COMMISSION

'88 SEP 20 P4:01

In the Matter of  
PUBLIC SERVICE COMPANY  
OF NEW HAMPSHIRE, ET AL.  
(Seabrook Station, Units 1  
and 2)

Docket Nos. 50-443-OL-1  
50-444-OL-1  
(Onsite Emergency  
Planning and Safety  
Issues)

APPLICANTS' ANSWER TO JOINT INTERVENORS'  
APPLICATION FOR STAY OF ORDER AUTHORIZING  
ISSUANCE OF LOW-POWER LICENSE

INTRODUCTION

Under date of September 6, 1988, the Attorney General of the Commonwealth of Massachusetts has filed a document entitled: *Joint Intervenors' Application for Stay of Order Authorizing Issuance of Low Power License*. The length of stay requested is 10 days after the issuance of any future order authorizing low-power operation. It is stated that:

"The purpose of such a stay would be to give the Mass AG and other intervenors the opportunity to file timely and full stay applications pursuant to 10 C.F.R. § 2.788 and Fed. R. App. P. 18."<sup>1</sup>

For the reasons stated below, the motion should be denied.

<sup>1</sup>Application at 1.

DS03

## ARGUMENT

### I. The Legal Standard to be Applied

The Application seeks a stay pending judicial review.

Under Commission precedent:

"The standards the Commission applies to stay motions are the same as those set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)."<sup>2</sup>

Further the Commission described the standards as follows:

"They are: has the petitioner made a strong showing that it is likely to prevail on the merits of its claim; whether absent a stay it will be irreparably injured; whether the granting of a stay will harm other participants; and where lies the public interest."<sup>3</sup>

These standards are essentially the same standards as are to be applied in cases of stays pending appeal within the agency itself.<sup>4</sup> As seen below, these standards have hardly been met.

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<sup>2</sup>*Westinghouse Electric Corp. (Exports to the Philippines)*, CLI-80-14, 11 NRC 631, 662 (1980).

<sup>3</sup>*Id.*

<sup>4</sup>10 CFR §2.788.

II. The Standards for a Stay Have not  
Been Met

A. *Likelihood of Prevailing on the  
Merits*

Mass AG has identified four arguments that he wishes to make to the Court of Appeals for reversal of any order allowing low power testing.<sup>5</sup> The first argument is:

"the recent proposed rule change on public notification systems, see 53 Fed. Reg. 16435 (May 9, 1988), if adopted as a final rule is arbitrary, capricious and not in accordance with law;"

For all of the reasons set forth in the Commission's decision with respect to the sirens rulemaking, this argument is totally without merit.<sup>6</sup> The second ground alleged is:

"the Commission's denial, if that occurs, of the Mass AG and other intervenors' petitions for waiver of the financial qualifications rule would be arbitrary, capricious and not in accordance with law;"

As of this writing, no such decision has been made. More importantly, a decision to adhere to a regulation which has already survived judicial scrutiny can hardly qualify as

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<sup>5</sup>Application at 2.

<sup>6</sup>To the extent that the instant filing can be viewed as a motion to stay the effectiveness of a rule pending judicial challenge, the same standards apply to such an application as apply to an adjudicatory matter. *Fire Protection for Operating Nuclear Power Plants* (10 CFR § 50.48), CLI-81-11, 13 NRC 778, 784 (1981); *Uranium Mill Licensing Requirements* 910 CFR Parts 30, 40, 70 and 150), CLI-81-9, 13 NRC 460, 463 (1981); *Environmental Radiation Protection Standards for Nuclear Power Operations* (40 CFR 190), CLI-81-4, 13 NRC 298, 301 (1981).

arbitrary and capricious. Indeed, it is questionable whether the decision of an agency not to suspend a rule can even be judicially reviewed.<sup>7</sup> The third alleged ground is:

"the issuance of a low power license prior to hearings on all emergency planning and safety issues violates the Atomic Energy Act, 42 U.S.C. § 2201 et seq.,"

This argument has been previously rejected by the Commission.<sup>8</sup> The final ground is that:

"a separate or supplemental environmental impact statement under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., is required for a low-power license in this case."

This argument has been rejected by both this Commission and the Courts.<sup>9</sup> In short there has been no strong showing of a likelihood of success on the merits. The most that has been shown is that there are possible grounds for appeal and that is not enough.<sup>10</sup>

#### B. Irreparable Harm

"The most significant factor in deciding whether to

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<sup>7</sup>Massachusetts Public Interest Research Group, Inc. v. NRC, \_\_\_ F.2d \_\_\_, No. 87-1865, (1st Cir. July 15, 1988).

<sup>8</sup>Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 and n.6 (1984)

<sup>9</sup>CLI-85-12, supra, n.7 at 1589; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 24 NRC 1323, at 1326 (1984); Cuomo v. NRC, 772 F.2d 972, 974-75 (D.C. Cir. 1985).

<sup>10</sup>Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

grant a stay request is 'whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted.'<sup>11</sup> The Application makes no attempt to address this factor. Thus it is impossible to state with certainty what arguments are contemplated. However, in a careful opinion, the Appeal Board has once considered a series of arguments with respect to this factor made by the Mass AG and rejected them all, pointing out that all except one had previously been rejected by the Commission in the *Shoreham* proceeding, and holding that the remaining one was basically economic and therefore in no sense irreparable.<sup>12</sup> In addition, the usual litany recited with respect to this area has also been rejected by the Courts.<sup>13</sup>

### C. *Harm to Others*

Issuance of any stay will further delay low power testing of Seabrook Station. This Commission has long recognised the very real benefit of early low power testing as being a benefit which must be considered in ruling upon low power license stay applications.<sup>14</sup>

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<sup>11</sup>*Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-84-17, 20 NRC 801, 804 (1984), quoting *Westinghouse Electric Corp. (Exports to the Philippines)*, CLI-80-14, 11 NRC 631, 662 (1980).

<sup>12</sup>*Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-865, 25 NRC 430, 436-38 (1987).

<sup>13</sup>*Cuomo v. NRC*, 772 F.2d 972, 976-77 (1985).

<sup>14</sup>*Long Island Lighting Company (Shoreham Nuclear Power Station)*, 21 NRC 1587, 1590 (1985).

*D. Where Lies the Public Interest?*

The Application does not address this factor either. If the argument is that irradiation of the plant is against the public interest because a full power license may not issue, this argument has been considered and found by both this Commission and the Courts not to tip the public interest factor.<sup>15</sup>

**III. If the Theory is That a Stay Should be Granted Simply to Allow Preparation of a Proper Stay Motion, the Application Still Should be Denied in the Circumstances of this Case.**

Although not actually recognised in the rules of practice, there is undoubtedly power inherent in the Commission to grant some time to a party to seek a stay from the courts in an orderly fashion. This should not be done here. The issues to be resolved prior to the authorization of low power testing are well known. There has been more than ample time for the Mass AG to prepare the substance of a stay motion for filing with the Court of Appeals. To grant more time is not in any legitimate interest.

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<sup>15</sup>See Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1590 (1985); Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985).

*CONCLUSION*

The Application should be denied.

Respectfully submitted,



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