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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 SEP 26 P6:06

BEFORE THE COMMISSION

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443 OL-01 50-444 OL-01 (On-site Emergency Planning and Safety Issues)

NRC STAFF RESPONSE TO JOINT INTERVENORS' APPLICATION FOR STAY OF ORDER AUTHORIZING ISSUANCE OF LOW POWER LICENSE

Gregory Alan Berry
Counsel for NRC Staff

September 26, 1988

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(Seabrook Station, Units 1 and 2)	)	

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INTRODUCTION

On September 6, 1988, the Seacoast Anti-Pollution League (SAPL), Town of Hampton, New England Coalition On Nuclear Pollution (NECNP), and the Massachusetts Attorney General (collectively "Joint Intervenors") filed an application requesting the Commission to "impose a stay of ten days of any future order authorizing the issuance of a low-power license for the Seabrook Station." Joint Intervenors' Application at 1. The Joint Intervenors state that the purpose of this request is to give them the opportunity "to file timely and full" applications for a stay of any future order authorizing the issuance of a low power license for the Seabrook Station. 1/ Id.

1/ Joint Intervenors are incorrect in assuming that no order authorizing the issuance of a low power license has been issued. As explained elsewhere in this response, the issuance of a low power operating license for the Seabrook Station was authorized by the Licensing Board on August 8, 1988. See Memorandum and Order (Re Low Power

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As explained below, Joint Intervenors' application should be considered by the Appeal Board in the first instance. In the event the Commission determines to exercise its inherent authority to entertain Joint Intervenors' application, the Commission should deny the request since additional time to prepare applications for stay is unnecessary. Joint Intervenors currently are in a position to file "timely and full" applications for a stay of low power operations. Moreover, on September 22, 1988, the Commission issued an order which, though not directly related to the pending request, effectively provides the relief sought by Joint Intervenors. Additionally, for the reasons stated herein, there is no merit to any of the arguments which Joint Intervenors intend to raise in support of an application for a "full" stay of low power operations.

BACKGROUND

The Licensing Board initially authorized the Director of NRR to issue a low power operating license for the Seabrook Station on March 25, 1987. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-10, aff'd in part, rev'd and rem'd in part, ALAB-875, 26 NRC 251 (1987). No low power license was issued at that time, however,

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Authorization) (August 8, 1988) (unpublished). The Licensing Board, however, stayed the effectiveness of this order "until such time as the Commission via rulemaking may remove the public notification issue as an obstacle to low power." Id., slip op. at 13. The Licensing Board also conditioned the effectiveness of its order on the Staff's compliance with a request for certain information which might be made by the Commission. Id. To date, however, the Commission has not requested the Staff to provide the information described by the Licensing Board.

because in an unpublished order issued on January 9, 1987, the Commission had stayed the Director from doing so. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-02, 25 NRC 267 (1987); see also id.,CLI-87-03, 25 NRC 875 (1987). Although that stay was lifted by the Commission on November 25, 1987, see Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-13, 26 NRC 400 (1987), there remained four impediments to the issuance of a low power license. These consisted of four contentions which were remanded to the Licensing Board by the Appeal Board for further litigation. See ALAB-875, supra, 26 NRC at 275-76 (NECNP Contentions I.V, relating to preservice inspection of steam generator tubes, and IV, concerning accumulation of aquatic organisms in cooling systems); ALAB-883, 27 NRC 43, 55 (1988) (admitting and remanding to the Licensing Board the Massachusetts Attorney General's late-filed alert notification siren contention for litigation); ALAB-891, 27 NRC 341 (1988) (remanding NECNP Contention I.B.2 concerning environmental qualification of RG-58 coaxial cable).

Under applicable regulations, low power operations may be authorized by a licensing board prior to the resolution of a pending contention if the board determines that the contention involved is not relevant to the safe conduct of low power operations. See e.g. 10 C.F.R. § 50.57(c); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485 (1988). Pursuant to Commission and Appeal Board direction, the Licensing Board proceeded to consider whether remanded NECNP Contentions I.V, IV, and I.B.2 need be resolved before low power operations could be reauthorized and concluded that they need not. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2),

LBP-88-6, 27 NRC 245, aff'd, ALAB-892, 27 NRC 485 (1988) (NECNP Contentions I.V and IV); Memorandum and Order (Re Low Power Authorization) (August 8, 1988) (unpublished) (NECNP Contention I.B.2).

These decisions, however, have not empowered the Director of NRR actually to issue a low power license for the Seabrook Station because in remanding the Attorney General's late-filed contention, see ALAB-883 supra, the Appeal Board held that 10 C.F.R. § 50.47(b)(5) precludes the issuance of a low power license so long as any contention relating to the adequacy of an applicants' alert notification system, such as the one filed by the Attorney General, remains unresolved. 27 NRC at 53-55. Applicants' petition is pending before the Commission for review of ALAB-883. The Commission has stated that it would consider this petititon after it completed its action on the "public notification" 2/ rulemaking. See May 4, 1988 Commission Order at 1-2.

Because of the pending rulemaking proceeding, the License Board stayed the effectiveness of its August 8, 1988 Order "until such time as the Commission via rulemaking may remove the public notification issue as an obstacle to low power." August 8, 1988 Order at 13. Shortly thereafter, Joint Intervenors filed the instant motion which essentially requests the Commission to stay the August 8, 1988 order for ten additional days after it becomes effective on October 24, 1988.

On September 20, 1988, the "public notification issue" was essentially removed as an obstacle to the issuance of a low power license.

2/ See "Emergency Planning And Preparedness Requirements for Nuclear Power Plant Fuel Loading And Low Power Testing," 53 Fed. Reg. ____ (September 20, 1988).

On that date, the Commission amended 10 C.F.R. § 50.47(d) to make clear that the issuance of a fuel loading or low power license is not dependent upon an applicant having in place the means to provide "prompt public notification in the event of an accident." 53 Fed. Reg. at ___. This amendment to the regulation is effective on October 24, 1988. It is likely that the Commission soon will act on Applicants' petition for review of ALAB-883 in a matter consistent with the new rule which will obviate the condition imposed by the Licensing Board in its authorization order of August 8, 1988.

On September 22, 1988, the Commission issued a further stay of the Seabrook low power license. The Commission stated "that before low power may be authorized, [A]pplicants must provide reasonable assurance that adequate funds will be available so that safe decommissioning will be reasonably assured in the event that low power operation has occurred and a full power license is not granted for Seabrook Unit 1." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-07, 28 NRC ___, slip op. at 2 (September 22, 1988). Applicants were requested by the Commission "to provide the basis on which a finding of the necessary reasonable assurance" might be made on or before October 22, 1988. Id. After such a filing other parties will have 10 days to file a motion to reopen the record and admit a late-filed contention challenging the adequacy of Applicants' plan for funding the decommissioning of the facility. Id. at 3. Parties opposing any such motion were afforded ten days after that time to file their responses. Id.

DISCUSSION

A. Jurisdiction Over Joint Intervenors' Application Lies With The Appeal Board

As explained above, the August 8, 1988 Order authorizes the issuance of a low power license, subject to the fulfillment of one condition: that the Commission adopt the proposed rule on alert notification systems. See August 8, 1988 Order at 13. That condition was satisfied on September 20, 1988, when the Commission adopted the rule in final form. See Fed. Reg. ____. It is this order which Joint Intervenors must seek to have stayed. 3/ As explained below, Joint Intervenors, however, have submitted their stay application to the wrong forum.

On August 23, 1988, intervenor NECNP filed a notice of appeal of the August 8, 1988 Order with the Appeal Board. Jurisdiction to entertain an application for stay of the order thereupon passed to the Appeal Board. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), 16 NRC 1324, 1326-27 (1982). That appeal has not been acted upon. Thus, Joint Intervenors' temporary stay application therefore should have been filed before the Appeal Board.

While it is of course true that the Commission has the authority under 10 C.F.R. § 2.718(i) to direct the certification to it of any

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3/ The temporary stay imposed by the Commission in its September 22, 1988 Order does not alter this fact. That order only stays the issuance of the low power license authorized by the August 8, 1988 Order until Applicants provide the Commission with a basis upon which it can conclude that there is reasonable assurance funds will be available to decommission the Seabrook Station after low power operation in the event a full power license is not issued to Applicants. See CLI-87-07, 28 NRC ___ (September 22, 1988). Once

(FOOTNOTE CONTINUED ON NEXT PAGE)

question pending before an inferior tribunal, Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), ALAB-901, 28 NRC ___, slip op. at 7, n.4 (September 20, 1988), no sound reason has been advanced by Joint Intervenors -- and none readily is apparent -- why the Commission should divest the Appeal Board of its jurisdiction over the instant request. Since the Appeal Board, not the Commission, is the appropriate forum for considereing Joint Intervenors' request, the Commission should dismiss Joint Intervenors' application.

B. The Temporary Stay Sought By Joint Intervenors To Prepare "Full" Applications For Stay Of The Board's August 8, 1988 Order Is Not Needed

Joint Intervenors state that they intend to make the following arguments in support of their stay applications: (a) that the Commission's proposed rule change on public notification systems, if adopted, is arbitrary, capricious, and contrary to law; (b) that should the Commission deny the petitions for waiver of the Commission's financial qualifications rules filed by the Attorney General and the other intervenors, such denial is arbitrary, capricious, and contrary to law; (c) the issuance of a low power license for the Seabrook Station prior to the resolution of all issues material to full power operation violates the Atomic Energy Act and is arbitrary and capricious; and (d) that a separate or supplemental environmental impact statement (EIS) must be prepared before a low power license can issue. Id.

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that assurance is provided, the Director of NRR will be free to issue the low power license for the facility unless the August 8, 1988 Order is stayed or reversed.

Joint Intervenors do not attempt to explain, however, why they are unable to prepare those arguments now. There is no issue they seek to raise which they have not known of for months and they could have long ago prepared these legal arguments. In this connection, it should be emphasized that the last two of these arguments -- that a separate EIS must be prepared prior to low power license and that the Commission lacks the legal authority to authorize the issuance of a low power license prior to the resolution of all issues affecting off-site emergency planning -- already have been fully briefed before the Commission. 4/ Thus, there can be no merit to any suggestion that additional time is needed to research and brief these issues.

Joint Intervenors also should be prepared to present at this time the reasons why they believe that any action taken by the Commission to adopt the proposed rule change on public notification systems or to deny the Massachusetts Attorney General's waiver petition regarding the financial qualification rule would be invalid. With respect to the first point, it should be pointed out that more than four months have elapsed since the Commission first published the reasons supporting the proposed rule change on public notification systems. See 53 Fed. Reg. 16435 (May 9, 1988). Joint Intervenors have had ample time to formulate their challenges to the adoption of the proposed rule. Indeed, Joint Intervenors filed comments with the Commission in which they had the opportunity to argue against

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4/ See e.g. Attorney General James M. Shannon's Application For A Stay Of Licensing Board Order Authorizing Issuance Of Operating License To Conduct Low Power Operations at 3-5, 6-8 (May 13, 1987); NECNP Motion For A Stay Of Low Power Operation Pending Full Power Decision Or Appellate Review at 3-7 (May 14, 1987).

adoption of the rule change on the identical ground raised here: that it would be arbitrary capricious and contrary to law. The substantial amount of time requested by Joint Intervenors is not needed and should not be granted to present this argument again.

Similarly, regarding whether denial of the Attorney General's petition to waive the financial qualification rule would be arbitrary, capricious, and contrary to law as Joint Intervenors claim, no more time is needed to present this argument. Joint Intervenors have already presented their views to the Commission on why it must grant the waiver petition. See e.g. Response Of Massachusetts Attorney General James M. Shannon To Commission Order Of July 14, 1988 (August 2, 1988); Intervenors Reply To The Responses Of The NRC Staff And Applicants To The Commission's Order Of July 14, 1988 (August 2, 1988). In short, the ten days requested by Joint Intervenors simply is not needed to to prepare applications for a stay of low power operations. The request should be denied.

Finally, in view of the further stay of low power operation imposed by the Commission's September 22, 1988 Order, the relief sought by Joint Intervenors' has been substantially provided. As noted earlier, on September 22, 1988, the Commission issued a further stay of the Seabrook low power license stating, "that before low power may be authorized, [A]pplicants must provide reasonable assurance that adequate funds will be available so that safe decommissioning will be reasonably assured in the event that low power operation has occurred and a full power license is not granted for Seabrook Unit 1." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-07, 28 NRC ___, slip op. at 2 (September 22, 1988). Applicants were afforded 30 days "to provide the

basis on which a finding of the necessary reasonable assurance" might be made. Id. After such a filing other parties have 10 days to file a motion to reopen the record and admit a late-filed contention challenging the adequacy of Applicants' plan for funding the decommissioning of the facility. Id. at 3. Parties opposing any such motion have ten days after that time to file their responses. Id. In these circumstances, it is unlikely that a low power operating license will issue within the next 50 days. This amount of time is more than sufficient to enable Joint Interverors to prepare "full" applications for stay of low power operations should they elect to do so.

C. A Stay Of The August 8, 1988 Order Is Not Warranted

As noted above, Joint Intervenors state that they intend to advance four reasons why low power operations should be stayed pendente lite. The determination whether to grant or deny an application for a stay depends upon a consideration of the four factors set forth in 10 C.F.R. § 2.788(e). The Staff will briefly explain why none of the arguments Joint Intervenors intend to raise are likely to succeed on the merits and why a consideration of the other three criterion set forth in 10 C.F.R. § 2.788(e) would not militate in favor of granting a stay of the low power operations.

1. Likelihood of success on the merits

None of the four arguments which Joint Intervenors state they intend to raise in support of a stay pendente lite of the August 8, 1988 Order is likely to succeed on the merits. The argument that "the issuance of a low power license prior to hearings on all emergency planning issues violates the Atomic Energy Act," Joint Intervenors' Application at 2, previously

has been considered and rejected by the Commission and the Appeal Board. Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), CLI-84-21, 20 NRC 1437, 1440 and n.6 (1984); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987); as has Joint Intervenors' claim that "a separate or supplemental environmental impact statement . . . is required for a low power license in this case." Shoreham, supra, CLI-85-12, 21 NRC 1587, 1589 (1985); Id., CLI-84-9, 19 NRC 1323, 1326 (1984); Seabrook, supra, 25 NRC at 439; accord Cronin v. NRC, 772 F.2d 972, 974-76 (D.C. Cir. 1985). Thus, these arguments have no likelihood of success on the merits.

Similarly, Joint Intervenors are not likely to succeed on the merits of their claim that the Commission's adoption of the final rule relating to alert notification systems is arbitrary and capricious and not in accordance with law. In the preamble issued in connection with the adoption of the final rule, the Commission considered and rejected this argument. See 53 Fed. Reg. at _____. Joint Intervenors have pointed to no new reason why the Commission should abandon a position adopted less than a week ago.

Finally, should the Commission deny the Massachusetts Attorney General's pending petition for waiver of the Commission's financial qualification rules, an argument that such denial is arbitrary and capricious or not in accordance with law is not likely to succeed. As the

Staff has explained in previous filings [5/], a petition for waiver must be denied where the petitioner fails to make out a prima facie case that application of the rule or regulation in question will not achieve the purpose for which it was adopted. See 10 C.F.R. § 2.758(b). For the reasons previously stated [6/], the Massachusetts Attorney General's waiver petition failed to meet this requirement. It would be hardly arbitrary and capricious for the Commission -- or any administrative agency -- to adhere to its own procedural regulations.

In sum, there is little, if any, likelihood that any of the arguments which Joint Intervenors' intend to raise in support of a stay low power operations will succeed on the merits.

2. Irreparable harm, harm to others, the public interest

"[T]he most significant factor in deciding whether to grant a stay request is whether irreparable injury will result in the absence of a stay." Seabrook, supra, ALAB-865, 25 NRC at 436; accord Three Mile Island, supra, CLI-84-17, 20 NRC 801, 804 (1984). A federal circuit court, the Commission, and Appeal Board already have considered whether the issuance of a low power license pendente lite will result in irreparable harm and each has concluded that it would not. See e.g.,

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5/ See e.g., NRC Staff Response To Commission Order of July 14, 1988 (July 22, 1988); NRC Staff Response To Intervenors' Motion For Leave To File Additional Reply to Commission Order of July 14, 1988 (September 14, 1988).

6/ See n.5.

Cuomo v. NRC, supra, 772 F.2d 972; Shoreham, supra, CLI-85-12, 21 NRC at 1590; Seabrook, supra, ALAB-865, 25 NRC at 436-437.

The third factor -- harm to other parties -- would weigh heavily in Applicants' favor. As the Commission has noted, the primary benefit of prompt low power testing is "the early discovery and correction of unforeseen but possible problems which may prevent or delay full power operation at an enormous expense to the [utility] and/or its customers." Shoreham, supra, CLI-85-12, 21 NRC at 1590.

The fourth and final factor to be considered in deciding whether to grant a stay request -- where the public interest lies -- similarly would favor Applicants. See Id. ("the inherent benefits of early low power testing outweighs the uncertainty that a full power license may be denied"); accord Seabrook, supra, ALAB-865, 25 NRC at 439.

CONCLUSION

Because jurisdiction over Joint Intervenors' request for a ten day stay of the Licensing Board's August 8, 1988 Order lies with the Appeal Board, the Commission should dismiss the request or refer it to the Appeal Board. Should the Commission elect to exercise its authority and entertain Joint Intervenors' request, the request should be denied because the additional time sought is not needed. Moreover, for the reasons set

forth herein, a consideration of the stay criteria set forth in 10 C.F.R. § 2.788(e) reveals that a stay of the low power operations would not be warranted.

Respectfully submitted,

Gregory Alan Berry
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Dated at Rockville, Maryland
this 26th day of September 1988

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT INTERVENORS' APPLICATION FOR STAY OF ORDER AUTHORIZING ISSUANCE OF LOW POWER LICENSE" 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 26th day of September 1988.

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