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UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

Public Service Company of)
New Hampshire, et al.)

(Seabrook Station, Units 1 & 2))

Docket No. 50-443 OL-1/444-OC 1

ONSITE EMERGENCY
PLANNING & TECHNICAL
ISSUES

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S
PETITION FOR REVIEW OF ALAB-892

Pursuant to 10 C.F.R. § 2.786(b), the New England Coalition On Nuclear Pollution (NECNP) hereby requests that the Commission review the Atomic Safety and Licensing Appeal Board's Decision dated May 24, 1988 (ALAB-892), affirming the Atomic Safety and Licensing Board's February 17, 1988, MEMORANDUM AND ORDER renewing low power authorization for Seabrook Station.¹

I. Summary of Decision of Which Review is Sought.

In ALAB-892, the Appeal Board rejected NECNP's argument that the Licensing Board had no authority under Commission regulations or decisions to permit the authorization of low power operation while onsite safety contentions remain unresolved.² The Appeal

1 Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-892 (May 24, 1988), 27 NRC ____.
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, of the Appeal Board as "ALAB," and the Commission decisions as "CLI."

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Board declined to address NECNP's argument that the Licensing Board had no authority under the Atomic Energy Act to authorize low power operation prior to the resolution of pending contentions, on the grounds that only the Commission had the authority to entertain a claim that a Commission regulation -- namely, 10 C.F.R. § 50.57(c) -- should be disregarded as inconsistent with a statutory command.³ The Appeal Board also rejected NECNP's argument that the Licensing Board applied an inappropriate standard for authorizing low power operations.

II. Statement of Matters of Fact and Law Raised by this Petition.

On October 1, 1987, in ALAB-875, the Appeal Board vacated the Atomic Safety and Licensing Board's March 25, 1987 partial initial decision (P.I.D.) in the onsite emergency planning and safety issues phase of the Seabrook operating licensing proceeding,⁴ on the grounds that the Licensing Board erred in denying the admission of several NECNP contentions, including Contention I.V (Steam Generator Tube Inspection), and IV (Biological Fouling of Cooling Systems).⁵ The Appeal Board also reversed the

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2 ALAB-892, slip opinion at 15-16.

3 Id. at 7-8 (footnotes omitted). It should be noted that while NECNP believes the Commission's interpretation of 10 C.F.R. § 50.57(c) is inconsistent with the Atomic Energy Act, we do not consider the regulation itself to be inconsistent with the Act.

4 LBP-87-10, 25 NRC 177.

5 ALAB-875, 26 NRC 251, 275.

P.I.D.'s reasonable assurance finding for Applicants with respect to NECNP Contention I.B.2 (Environmental Qualification of RG58 Coaxial Cable).⁶ ALAB-875 remanded NECNP Contentions IV and I.V to the Licensing Board, and order the Licensing Board to provide an additional explanation of its decision regarding environmental qualification of the RG-58 coaxial cable.⁷ ALAB-875 also directed the Licensing Board to make a new determination about the appropriateness of low power operations in light of these remanded contentions.⁸

Between November, 1987 and February, 1988, NECNP Contentions IV and I.V were admitted and litigation proceeded before the Licensing Board.⁹ While discovery was still underway on these remanded contentions, the Licensing Board issued an order requesting that Applicants, the NRC Staff, and NECNP file briefs regarding the appropriateness of reauthorizing low power operation prior to the completion of the remanded proceeding.¹⁰

6 Id.

7 Id. On April 25, 1988, after several rounds of briefing failed to satisfy the Appeal Board's concerns with respect to the adequacy of the P.I.D., the Appeal Board remanded NECNP Contention I.B.2 to the Licensing Board. ALAB-891, slip opinion 25-26 (April 25, 1988).

8 Id. at 276.

9 NECNP focused much of its discovery under NECNP Contention IV on the adequacy of Applicants' program for controlling micro-biologically induced corrosion (MIC), one of the detrimental effects of fouling of nuclear power plant cooling systems.

10 ASLB Order dated November 27, 1987 (unpublished).

NECNP filed an opposition to low power authorization, arguing that the Atomic Energy Act prohibited low power operation prior to the resolution of all pending onsite safety contentions,¹¹ and that 10 C.F.R. § 50.57(c) supplied no authority for authorizing low power operation prior to the resolution of contested, onsite safety issues.¹² NECNP also argued that unless and until Applicants file a petition for a regulatory waiver under 10 C.F.R. § 758(b) of the General Design Criteria (GDC) that are the subject of NECNP's unresolved onsite safety contentions, no authorization to operate at low power can be issued.¹³

On February 17, 1988, the Licensing Board issued a Memorandum and Order renewing low power authorization for the Seabrook plant pursuant to 10 C.F.R. § 50.57(c) on the ground that the safety issues raised by NECNP's two, remanded contentions "were not relevant to low power operations."¹⁴ The Licens-

11 "NECNP's Brief in Opposition to Renewal of Authorization to Operate at Low Power," dated January 4, 1988. NECNP noted for the record, but did not reiterate its argument that the 10 C.F.R. § 50.47(d) violated the Atomic Energy Act's guarantee of a prior hearing to the extent it permitted low power operation prior to hearing and resolving Interveners' offsite emergency planning contentions, since the Appeal Board had previously expressly ruled that only the Commission had authority to address this issue. See ALAB-875, 26 NRC at 256 (1987) and ALAB-865, 25 NRC at 439 (1987).

12 "NECNP's Brief in Opposition to Renewal of Authorization to Operate at Low Power," dated January 4, 1988, at 15.

13 Id. at 25-27.

14 MEMORANDUM AND ORDER (Renewal of Low Power Authorization; Denying NECNP's Motion for Leave to File A Reply), ASLBP No. 88-558-01-OLR, dated February 17, 1988, at 18. However, the Licensing Board expressly noted that low power operation must await

ing Board refused to consider NECNP's request for an opportunity to reply to Applicants' and the Staff's allegations of fact and opinion after the completion of discovery,¹⁵ on the grounds, inter alia, that much of NECNP's pending discovery related to MIC, which was not within the scope of NECNP Contention IV,¹⁶ and therefore such information would not have been relevant in any event.¹⁷

On March 3, 1988, NECNP filed a timely notice of appeal of this decision. In its supporting brief, NECNP reiterated its earlier arguments regarding the legal authority and standards for authorizing low power operation.¹⁸ On May 24, 1988, the Appeal

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resolution of the emergency notification contention remanded by the Appeal Board in ALAB-883, 27 NRC ____ (February 3, 1988). Id.

15 "NECNP's Motion for Leave to File a Reply to Applicants' and the Staff's Briefs Regarding Low Power Operations," dated January 14, 1988, at 6.

16 The Licensing Board decision that MIC was not within the scope of NECNP Contention IV was issued on February 17, 1988, the same day as the Order renewing low power authorization.

17 LBP-88-6, slip opinion at 16-17. The Licensing Board subsequently dismissed NECNP Contention IV. ASLB Memorandum and Order dated May 12, 1988 (unpublished). NECNP's motion for leave to file a notice of appeal of this dismissal is currently pending before the Appeal Board.

18 "NECNP's Brief in Support of Appeal of Memorandum and Order Renewing Authorization to Operate at Low Power," dated April 7, 1988. Again, NECNP noted for the record, but did not reiterate its argument that the 10 C.F.R. § 50.47(d) violated the Atomic Energy Act's guarantee of a prior hearing to the extent it permitted low power operation prior to hearing and resolving Interveners' offsite emergency planning contentions, since the Appeal Board had previously, in ALAB-875, 26 NRC at 256 (1987) and ALAB-865, 25 NRC at 439 (1987), expressly ruled that only the Commission had authority to address this issue. Id., at 5 note

Board affirmed the Licensing Board's renewal of low power authorization.¹⁹ NECNP took the instant appeal.

III. Statement of Why Re-Authorization of Low Power Operation is Erroneous.

NECNP seeks Commission review of the following aspects of the Licensing Board's renewal of low power operation, and the Appeal Board's affirmance of the same:

A. Section 50.57(c) Supplies No Authority For Low Power Operation Prior to the Resolution of All Contested Onsite Safety Issues

The regulatory history underlying 10 C.F.R. § 50.57(c), and § 50.47(d), indicates that the Licensing Board had no authority under 10 C.F.R. § 50.57(c) 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. Rather, both the plain language and the regulatory history of § 50.57(c) 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 § 50.57(c) vitiates the Licensing Board's obliga-

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19 ALAB-892, 27 NRC __ (May 24, 1988).

tion 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 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), 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).²⁰ 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."²¹ To the extent that Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437 (1984) suggests that § 50.57(c) does

20 Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984)

21 SECY-84-290A, at 2.

supply such authority, this statement is incorrect.

B. Low Power Authorization Prior to Resolution of Contentions Violates the Atomic Energy Act.

Section 189(a) of the Atomic Energy Act prohibits authorization of low power operation prior to completion of public hearings on all issues material to full power licensing. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

This view is supported by the legislative history of the expired Temporary Operating Licensing Authorization²² and the "Sholly Amendment,"²³ which demonstrate that on the two prior occasions when Congress perceived a need to permit low power operation before licensing hearings were complete, it did so by express statutory language, and gave the Commission only temporary authority to do so. Because NECNP has not yet received a full hearing on its still pending onsite safety contentions,²⁴ and on its pending offsite emergency planning contentions, no low power license may be issued until the satisfactory resolution of those contentions.

C. The Licensing Board Applied an Erroneous Legal Standard in Re-authorizing Low Power Operation.

The history of the decision in Shoreham makes clear that the only available avenue for Applicants to obtain low power author-

22 42 U.S.C. § 2242, which expired December 31, 1983.

23 42 U.S.C. § 2239(a), Pub. L. 97-415 § 12(a), 96 Stat. 2073 (January 4, 1983).

24 NECNP Contention I.B.2, and N. CNP Contention IV (microbiologically induced corrosion).

ization prior to the resolution of NECNP's unresolved, remanded safety contentions is to apply for an exemption under 10 C.F.R. § 2.758(b) of the General Design Criteria that are placed at issue by these contentions. Otherwise, the litigation of all outstanding contentions must be completed before Applicants may be authorized to operate Seabrook at any power level.²⁵ There can be no test for "relevance" to low power other than the fact that a safety contention has been admitted for litigation. In requiring NECNP to meet the heavy burden of showing that its contentions "would adversely impact upon public health and safety if the plant were to be reauthorized to operate only up to 5% of rated power,"²⁶ the Licensing Board unfairly and illegally shifted the burden of proof from Applicants to NECNP.²⁷ Accor-

25 This litigation must be completed and resolved in favor of Applicants. At this writing, litigation of NECNP Contention I.B.2 is barely underway before the Licensing Board, and the Licensing Board's adverse ruling that microbiologically induced corrosion was not within the scope of NECNP Contention IV is on appeal.

26 LBP-88-6, 27 NRC 245, ____, slip opinion at 13.

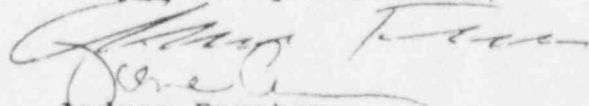
27 The Licensing Board's decision does not even comport with the standard for issuing exemptions. While the SECY paper underlying the Shoreham decision suggests that even if the Commission does have some greater "flexibility" in issuing exemptions in the context of low power authorization, this flexibility is much narrower than that applied by the Licensing Board. This SECY paper makes clear that a regulatory requirement "cannot be considered inapplicable merely because, as applied to fuel loading or low-power testing, it is logical but arguably excessive. SECY-81-290A, at 26. Neither Applicants nor the Staff presented evidence that NECNP's remanded contentions were not relevant to safety. Rather, they focused on the lesser degree of hazard presented by low power operation, and the Licensing Board plainly relied on this in making its determination. See e.g. LBP 88-6, at 8 (quot-

dingly, the standard applied by the Licensing Board was improper.

IV. Why Commission Review Should Be Exercised.

Both the Appeal Board and the Licensing Board have reiterated that only the Commission has authority resolve the issues raised by this appeal, as they involve review of prior Commission decisions interpreting 10 C.F.R. § 50.57(c), and challenge the validity of Commission regulations §§ 50.47(d) and 50.57(c). Since these issues may ultimately be resolved by the courts, it is important that the Commission's views be stated.

Respectfully submitted,



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ing Masnik affid., pp. 6-9).

Moreover, the Licensing Board's failure to even address the issue of microbiologically induced corrosion prior to authorizing low power operation, an issue that NECNP believes to be within the scope of remanded Contention IV, or to permit NECNP a meaningful opportunity to present evidence on this important safety issue, constitutes reversible error. See Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), 12 NRC 231, 232 n.1 (1980) (Where safety is at issue, special care must be exercised to allow all parties a full opportunity to be heard.)

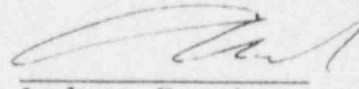
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CERTIFICATE OF SERVICE

I certify that on June 13, 1988, copies of the foregoing pleading were served by first-class mail on all parties listed on the attached service list.

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