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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 JUN 30 A11:49

BEFORE THE COMMISSION

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

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NRC STAFF RESPONSE TO NEW ENGLAND COALITION ON  
NUCLEAR POLLUTION'S PETITION FOR REVIEW OF ALAB-892

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Gregory Alan Berry  
Counsel for NRC Staff

June 28, 1988

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NRC STAFF RESPONSE TO NEW ENGLAND COALITION ON  
NUCLEAR POLLUTION'S PETITION FOR REVIEW OF ALA-392

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Gregory Alan Berry  
Counsel for NRC Staff

June 28, 1988

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INTRODUCTION

On June 13, 1988, the New England Coalition On Nuclear Pollution (NECNP), joined by the Seacoast Anti-Pollution League (SAPL)<sup>1/</sup>, petitioned the Commission to review the Appeal Board's decision in ALAB-892.<sup>2/</sup> NECNP Petition For Review of ALAB-892 (June 13, 1988) ("Petition"). In that decision, the Appeal Board affirmed LBP-88-6<sup>3/</sup>, in which the Licensing Board held that neither of the remanded contentions<sup>4/</sup> then pending before the Board posed a bar to the

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1/ See Joinder Of Seacoast Anti-Pollution League In New England Coalition On Nuclear Pollution's Petition For Review of ALAB-892 (June 26, 1988).

2/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC \_\_\_\_ (May 24, 1988).

3/ Public service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-6, 27 NRC 245 (1988).

4/ NECNP Contention I.V (relating to inservice inspection of steam generator tubes) and NECNP Contention IV (concerning blockage of  
(FOOTNOTE CONTINUED ON NEXT PAGE)

reauthorization of low power operations at the Seabrook Station. The Appeal Board upheld the Licensing Board because "10 C.F.R. § 50.57(c) allows the authorization of low-power operation so long as no safety issues pertaining to such operation remain unresolved;" the record contained substantial uncontradicted evidence that neither of the remanded contentions then pending before the Board "bears upon low-power operation." ALAB-892, slip op. at 15-16. As explained below, Commission review of ALAB-892 is not warranted. ALAB-892 does nothing more than reaffirm what has long been the case: that a low power license may be authorized prior to the resolution of all issues material to full power where none of the unresolved issues are relevant to low power operations. Consequently, NECP's petition does not raise "an important matter that could significantly affect the environment, the public health and safety" or present an important procedural issue or question of public policy." Accordingly, the Petition should be denied.

#### LEGAL STANDARDS

Petitions for review, and responses in opposition, must satisfy the requirements of 10 C.F.R. § 2.786(b)(2). Those requirements are:

- (i) A concise summary of the decision or action of which review is sought;
- (ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Atomic

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

cooling systems caused by the accumulation of aquatic organisms and debris) were remanded for further litigation by the Appeal Board in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 276 (1987).

Safety and Licensing Appeal Board and, if they were not why they could not have been raised;

- (iii) A concise statement why in the petitioner's view the decision or action is erroneous; and
- (iv) A concise statement why Commission review should be exercised.

10 C.F.R. §2.786(b)(2)(i-iv). The Staff will address each of these points seriatim.

#### DISCUSSION

##### A. Summary of ALAB-892

ALAB-892 is the Appeal Board's decision affirming the Licensing Board's order of February 17, 1988, which held that the pendency of the two contentions remanded by the Appeal Board in ALAB-875 did not constitute a bar to the reauthorization of low power operations at the Seabrook Station. In ALAB-875 and CLI-87-13<sup>5/</sup>, the Licensing Board had been directed by the Appeal Board and the Commission to "expeditiously determine whether considering the issues that it is hearing on remand, it is appropriate to renew at this time its authorization of low power or whether low power operations must await further decisions." CLI-87-13, 26 NRC at 405; see ALAB-875, supra, 26 NRC at 276. On November 27, 1987, the Licensing Board issued an order directing the parties to file briefs addressing these issues. Memorandum Order (Briefing Schedule) at 1-2 (November 27, 1987).

In its brief, the Staff explained why neither of the remanded contentions constituted a bar to the reauthorization of low power

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<sup>5/</sup> Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-13, 26 NRC 400 (1987).

operations. See NRC Staff Response To Licensing Board Order Of November 27, 1987, passim (January 12, 1988). Specifically, the Staff presented the affidavits of experts in the issues raised by the remanded contentions which demonstrated that the dangers alleged by the remanded contentions will not arise during low power operations. Accordingly, the Staff contended that neither of the remanded contentions is relevant to the activity to be reauthorized. The Staff explained that under 10 C.F.R. § 50.57(c), a license to conduct activities short of full power operations may be authorized prior to the completion of the full power licensing proceeding if none of an intervenor's contentions is "relevant to the activity to be authorized." Id. at 2-7. In their brief, Applicants took a similar approach. See Applicants' Brief In Support Of Low Power Operations, passim (January 4, 1988).

NECNP, on the other hand, did not oppose the reauthorization of low power operations on the ground that the remanded contentions were "relevant to the activity to be authorized" as it could have pursuant to section 50.57(c). Instead, NECNP's brief was devoted mainly to the argument that the Commission and the Licensing Board lacked the legal authority to authorize the issuance of any type of license prior to the completion of the full power licensing proceeding. See NECNP Brief In Opposition To Renewal Of Authorization To Operate At Low Power, passim (January 4, 1988). This line of argument had been rejected by the Appeal Board even before NECNP filed its brief. See ALAB-875, supra, 26 NRC at 256; ALAB-865, 25 NRC 430, 439 (1987).

On February 17, 1988, the Board issued an order rejecting NECNP's arguments that neither the Board nor the Commission had the legal

authority to authorize low power operations prior to the completion of full power operating license proceeding. LBP-88-6, 27 NRC at 251-52. The Board agreed with the Staff and Applicants that neither NECPN Contention I.V or NECPN Contention IV were relevant to low power operations "inasmuch as the safety concerns raised therein would not adversely impact upon the public health and safety if Seabrook, Unit 1, were to be authorized to operate only up to 5% of rated power." 27 NRC at 253. The Licensing Board stated, however, that "we cannot give effect to our renewed authorization in light of ALAB-883 . . . and thus we do not authorize the Director of NRR, upon making the findings required by 10 C.F.R.

§ 50.57(a), to issue the low power license."<sup>6/</sup> The Board's factual findings and legal conclusions were upheld in their entirety by the Appeal Board in ALAB-892. See ALAB-892, *passim*.

B. The Matters Raised In The Petition Were Raised Below

In its petition, NECPN challenges the Appeal Board's determinations that (1) 10 C.F.R. § 50.57(c) authorizes low power operation prior to the resolution of all contested onsite safety issues; (2) the Licensing Board applied the correct legal standard in determining whether either of the contentions then pending must be resolved before low power operation could be reauthorized; and (3) low power authorization prior to the resolution

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<sup>6/</sup> In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 53-55 (1988), the Appeal Board held that no low power license could be issued to the Seabrook Station in the absence of finding by the Licensing Board that adequate means have been established to provide early notification and clear instruction to the Massachusetts portion of the Seabrook emergency planning zone. Applicants' petition for review of ALAB-883 is pending before the Commission.

of all issues material to full power licenses is not a violation of the Atomic Energy Act. Petition at 7-10. NECPA raised each of these arguments below. See NECPA Brief In Support Of Appeal Of Memorandum And Order Renewing Authorization To Operate At Low Power, passim (April 7, 1988).

C. ALAB-892 Contains No Error Of Fact, Law, Or Policy

The Appeal Board correctly interpreted section 50.57(c) to permit the issuance of a license for activities short of full power operation prior to the resolution of all issues material to full power operation. See ALAB-892, slip op. at 9-11. For more than seventeen years it has been the express policy of the Commission that, under specified conditions, activities short of full power operation may be authorized prior to the issuance of a full power license. For example, in the preamble accompanying proposed section 50.57(c), the Commission stated that "the proposed amendment to § 50.57(c) of Part 50 would permit the atomic safety and licensing board, while a proceeding is pending, upon motion in writing, to consider and act upon such request for low power testing." 35 Fed. Reg. 16687 (October 28, 1970). The Commission reaffirmed this point in the preamble adopting the final rule, stating again that the purpose of section 50.57(c) is "to provide for authorization, by atomic safety and licensing boards, of low power testing and operation under specified conditions." See 36 Fed. Reg. 8861 (May 14, 1971). In fact, the Commission noted that because licensing boards already possessed the authority conferred by section 50.57(c), the formal adoption of section 50.57(c) "would merely clarify existing authority." 36 Fed. Reg. at 8862. The Commission and its adjudicatory boards consistently have interpreted

section 50.57(c) to permit activities short of full power operation to be conducted in advance of the issuance of a full power license. E.g., Maine Yankee (Maine Yankee Atomic Power Station), CLI-72-22, 5 AEC 2 (1972); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1439 (1984); Duquesne Light Company (Beaver Valley Power Station, Unit 1), LBP-76-3, 3 NRC 44, 45 (1976); Commonwealth Edison Company (Braidwood Nuclear Generating Station, Units 1 and 2), LEP-86-31, 24 NRC 451 (1986). ALAB-892 therefore is consistent with long standing Commission policy and case law.<sup>7/</sup> For these reasons, the Appeal Board was correct in holding that "it is not every contention that need be heard or decided prior to the authorization of a low power license. Rather, in so many words, the section requires a hearing only on those contentions 'relevant to the activity to be authorized[.]'" Id., slip op. at 10.

NECNP also contends that ALAB-892 is in error to the extent it sanctions the issuance pendente lite of a low power license to an applicant that has not first obtained an exemption from the regulatory requirement at issue in the pending contention. See Petition at 8. NECNP is incorrect. ALAB-892 is in accord with Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1439 (1984) which holds that there is no need for an applicant to obtain an exemption where the regulatory requirement in question is inapplicable to the activity to be authorized. Compare ALAB-892, slip op. at 14, with,

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<sup>7/</sup> NECNP does not argue that ALAB-892 is inconsistent with Commission policy or case law. See Petition at 7.

Shoreham, supra at 20 NRC at 1439-40. The Licensing Board and the Appeal Board applied the correct legal standard and concluded that because the contentions then pending before it did not raise a safety matter with regard to low power operation, they were not relevant to the activity to be authorized.<sup>8/</sup> For this reason, NECP's claim that the Board utilized an incorrect standard to reauthorize low power operation lacks merit.

Finally, the Appeal Board declined to reverse the Licensing Board on the ground that section 189a of the Atomic Energy Act prohibits the issuance of any type of operating license prior to the resolution of all issues material to full power operation. ALAB-892, slip op. at 7-8. This determination was correct because, as the Appeal Board observed, adjudicatory boards "lack the power to entertain a claim that a Commission regulation should be disregarded as inconsistent with a statutory command." Id., slip op. at 8; accord 10 C.F.R. § 2.758(a).

#### D. Commission Review Is Not Warranted

As 10 C.F.R. § 2.786(b)(4) makes clear, "the grant or denial of a petition for review is within the discretion" of the Commission. The Commission has indicated that review will not be granted in the absence of a showing that the case "involves an important matter that could significantly affect the environment, public health and safety, . . . involves an important procedural issue, or otherwise raises important questions of public policy[.]" 10 C.F.R. § 2.786(b)(4)(i). Further, a

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<sup>8/</sup> It should be noted that NECP did not challenge below the factual underpinnings of the Licensing Board's finding that neither of the remanded contentions raised a safety issue with regard to low power operation.

petition for review "of matters of fact will not be granted unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board." 10 C.F.R. § 2.786(b)(4)(ii).

NECNP does not argue that its petition involves an important matter which could significantly affect the public health and safety or raises an important question of policy, the criteria against which the Commission determines whether a petition for review should be granted. See 10 C.F.R. § 2.786(b)(4)(i). Instead, NECNP states only that because validity of sections 50.57(c) and 50.47(d) and the Commission's decisions interpreting those sections "may ultimately be resolved by the courts, it is important that the Commission's views be stated." Petition at 10. This purpose does not satisfy the standards set forth in 10 C.F.R. § 2.786(b). Moreover, as explained in the preceding section of this response, the Commission's views on the issues for which review is sought already are matters of public record. See e.g., Maine Yankee, supra, 5 AEC at 2-3; Shoreham, supra, 20 NRC at 1439-40; 36 Fed. Reg. at 8861-62; 35 Fed. Reg. 16687-88. <sup>1/</sup> Accordingly, the petition should be denied.

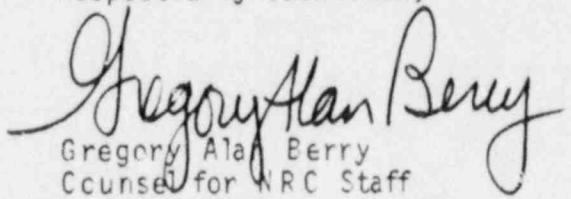
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1/ NECNP suggests, without analysis, that section 50.57(c) has been superseded by the decision in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984). Petition at 8. NECNP is incorrect. Nothing in the Union of Concerned Scientists decision prohibits the authorization of low power operations in this proceeding when all contested issues relevant to low power operation have been resolved. Moreover, it should be noted that that decision was issued five months before the Commission's Shoreham decision (CLI-84-21) in which the Commission again made clear that section 50.57(c) permits, where appropriate, the authorization of low power operation prior to the resolution of all issues material to full power operation.

CONCLUSION

For the reasons stated herein, the Petition for Review of ALAB-892  
filed by the New England Coalition On Nuclear Power shculd be denied.

Respectfully submitted,

  
Gregory Alan Berry  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 27th day of June 1988

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S PETITION FOR REVIEW OF ALAB-892" 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 28th day of June 1988.

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