Dated: Filed July 8, 1986

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO PETITION OF ATTORNEY GENERAL FRANCIS X. BELLOTTI TO REVOKE REGULATION 59.47(d) OR IN THE ALTERNATIVE TO SUSPEND ITS APPLICATION IN THE SEABROOK LICENSING PROCEEDING

STATEMENT OF THE CASE

Under date of July 2, 1986 the Attorney General of Massachusetts ("Mass. AG") filed a "Petition . . . to Revoke Regulation 50.47(d) or in the Alternative to Suspend its Application in Seabrook Licensing Proceeding" (the "Petition"). The Petition purports to be brought pursuant to 10 C.F.R. § 2.758 and requests the Commission "to revoke (sic) the regulation appearing at C.F.R. 50.47(d) or in the

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alternative to suspend (sic) its application in the present proceeding."[1] The particular regulation which is the target of the Petition, 10 C.F.R. § 50.47(d) reads as follows:

> "(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, no NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and loca offsite emergency plans are required prior to issuance of an operating license authorizing only fuel loading and/or low power operations (up to 5% of the rated power). Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power operation may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The NRC will base this finding on its assessment of the applicant's emergency plans against the pertinent standards in paragraph (b) of this section and Appendix E of this Part."

The petition is accompanied by four affidavits. The first is the affidavit of Dr. Albert Carnesale who makes the point that low power testing results in the creation of

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[1] Revocation or suspension of NRC regulations is not contemplated by 10 C.F.R. § 2.758. Indeed, revocation or suspension of an agency's regulations would normally require the convening and completion of a rulemaking proceedings as contemplated in this agency under 10 C.F.R. § 2.800 et seq. Under 10 C.F.R. § 2.758(b) a party to an adjudicating proceeding "may petition that the application of a specified Commission rule or regulation, or any provision thereof, . . . be waived or an exception made for the particular proceeding." In this response we assume that what in fact is sought is a "waiver" in light of the use of that term in the body of the petition.

radioactive materials in the core and induces radioactivity within the structural components of the reactor. He also argues that operation of a reactor over time makes the fuel elements "more susceptible to leaking" and states the fact that such leakage, if it occurred, would introduce radioactivity into the primary cooling system. The second affidavit is an unsigned form of affidavit apparently authored by Dale G. Bridenbaugh and Gregory C. Minor for submission in the licensing proceeding for the Shoreham reactor owned by Long Island Lighting Company. The stated purpose of this form of affidavit "is to explain the technical reasons why low power testing to 5 percent power at Shoreham is of little value and, in fact, incurs irreversable losses while producing no electrical power." Bridenhaugh et al. Aff., at ¶ 4.[2] The third affidavit is that of Charles V. Barry, the Secretary of Public Safety for the Commonwealth of Massachusetts. The thrust of Secretary Barry's affidavit is that he has not yet recommended a plan for Seabrook to the Governor of the Commonwealth (¶ 2); that the Governor and Mass. AG have announced a position that Seabrook requires either construction of shelters or "summer

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[2] For purposes of this reply we shall treat this affidavit as though (a) it were signed and notarized and (b) as if the reasoning therein were applicable to the Seabrook type reactor. However, we urge the Board to summarily reject this unsigned affidavit purpoting to comment on a BWR.

shutdown" (¶ 3) that since the Chernobyl accident the Governor has put the planning process for the Seabrook Radiological Emergency Response Plan "on hold until further notice" (¶ 4) and is seeking advice in light of the Chernobyl incident (¶¶ 4-5); that five Massachusetts communities have voted to terminate or suspend planning in connection with Seabrook (¶ 6); and that the applicants have supposedly "elected not to agree to" a request of the Governor "to postpone fuel loading and low power testing," (¶ 7.)[3] The final affidavit is by Dr. Gordon R. Thompson and its thrust is that, assuming prolonged operation at 5 percent of rated power, a sufficient inventory of radioactive material could build up so that if a LOCA occurred it is possible that doses in excess of the Protective Action Guides ("PAGS") could occur offsite.[4]

This response is filed pursuant to 10 C.F.R. § 2.758(b). For the reasons set forth below, the applicants urge the Licensing Board to make a determination under 10 C.F.R. §

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[3] The "elect[ion] not to agree" is set out in a June 26, 1986 letter from Edward A. Brown to the Governor which is attached to the affidavit. Presumably a request to meet with the Governor and an assurance that the Seabrook Joint Owners will give the Governor's request "serious study" is an "elect[ion] not to agree."

[4] We are unadvised as to which particular PAGS the affiant refers to.

2.758(c) that Mass. AG has not made the prima facie showing required and thereafter not to further consider the matter.

ARGUMENT

In 10 C.F.R. § 2.785(b) it is stated that:

> "The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regultion was adopted."

And absent a "prima facie" showing to that effect, the Licensing Board "may not further consider the matter." 10 C.F.R. § 2.758(c). The Petition falls far short of establishing the necessary prima facie case that "special circumstances" exist. Indeed virtually every line of reasoning utilized by the Mass. AG, save one, is as applicable to any other nuclear power plant as it is to Seabrook. And as to the one that is to some extent Seabrook specific, the Commission has already ruled that such reasoning is not grounds for denying a low power license as a matter of policy.

As we read the Petition, Mass. AG makes four arguments as follows:

1. The regultion in question, 10 C.F.R. § 50.47(d), violates the Atomic Energy Act (Petition, ¶¶ 1-5 at pp. 1-3.)

2. Because the Governor of Massachusetts has suspended planning and various Massachusetts communities have voted not to participate as of now in planning, there is no assurance that a full power license will issue within a few months or at all. (Petition, ¶¶ 1-11 at pp. 3-5.)

3. Assuming a low power license issues, and operation at 5 percent of power occurs for a long time, the risk of off-site consequences will be increased to a level not considered by the Commission in adopting the target regulation. (Petition, ¶¶ 12-14, p.6.)

4. The happening of the accident at Chernobyl dictates waiver of the target regulation. (Petition, ¶ 16, p. 7.)

The first and fourth arguments are clearly generic and are as applicable to any other nuclear power plant as they are to Seabrook. Thus 10 C.F.R. § 2.758 is inapplicable. Likewise, the third argument, to the extent it is offered separately and as distinguished from the second, is also generic. Operation of any reactor at a low power level for a given period of time creates more fission product inventory than operation for a lesser time.

This leaves the second argument to the effect that the attitudes of Massachusetts state and local governments make it unlikely that Seabrook will receive a full-power

operating license in a short time, or, indeed, ever. This line of argument as a basis for holding up a low power license as a matter of policy has been clearly rejected in prior decisions in the Shoreham proceeding. In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032, 1033 (1983) the Commission rejected a Licensing Board that a low power license should be withheld as a matter of policy when there existed no reasonable assurance that a full power license would eventually issue:

> "Section 50.47(d) gives unqualified authorization to issue a low-power license in the absence of NRC or FEMA approval of an offsite emergency plan so long as other prerequisites, including an adequate state of onsite emergency preparedness, are met. The language of the regultion requires no predictive finding of "reasonable assurance" with regard to offsite emergency planning prior to low-power operation and one was intended by implication or otherwise. In issuing section 50.47(d), the Commission did not implicitly make any generic findings about the likelihood that emergency preparedness could be developed. Rather, our position was simply (1) not all of the emergency planning requirements were necessary for fuel loading and low-power operation because of the nature of the risks, and (2) we would not grant a full-power license until the emergency planning requirements for full power had been met. (The Board recognized this was a reasonable interpretation of the Commission's statements accompanying the rule. Id. at 601-92 n.8.) Moreover, it seems apparent that the Licensing Board's preliminary doubt about whether there is reasonable assurance that a sufficient offsite emergency plan can and will be developed is no different from preliminary doubt about whether a safety issue can be adequately resolved which has significance for

full-power operation but not for low-power activities. Interjection of such doubts into the low-power proceeding could create a limited full-power hearing, before authorization of the low-power license. Such a procedure would have little to commend it."

In rejecting an argument that a new EIS had to be prepared before a low-power license could issue to the Shoreham facility, the Commission, in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1327 (1984), stated:

"Suffolk County (County) contends that the proposed low-power operating license for Shoreham presents an unusual case because it believes that an offsite emergency plan cannot be developed for this plant. This circumstance, in the County's view, makes low-power operation without subsequent full-power operation a reasonably foreseeable alternative for the purposes of NEPA. Accordingly, the County believes that a separate EIS or environmental evalution is necessry for the proposed low-power license for Shoreham.

Suffolk County's position is based on its speculation on the outcome of the adjudication of offsite emergency planning issues. The appropriateness of such speculation in this proceeding has already been addressed by the Commission in response to an earlier certified question by the Licensing Board. In LBP-83-21, 17 NRC 593 (1983), the Licensing Board suggested that a low-power license should not be issued where there is no reasonable assurance that a full-power license will ever be issued.

The Commission rejected this suggestion. The Commission found that 10 C.F.R. § 50.47(d) established unqualified authorization to issue a low-power license without the need for a predictive finding of reasonable assurance that a full-power license will eventually issue. CLI-83-17, 17 NRC 1032, 1034 (1983). Accordingly, the Commission declined to speculate on whether offsite emergency planning issues would be resolved satisfactorily for the purposes of a full-power license.

The Commission's earlier decision did not explicitly address Suffolk County's NEPA argument. However, that

decision does not implicitly suggest that uncertainty about the ultimate disposition of contested offsite emergency planning issues is too speculative to be cognizable as a changed circumstance for the purposes of finding that a supplementary environmental evaluation is required by NEPA. Uncertainty over offsite emergency planning is not a changed circumstance. In any contested full-power proceeding there is uncertainty over the outcome of full-power licensing issues. Controversy over offsite planning is not some new, recent development in this case or, for that matter, distinguishable from controversy over other contested full-power issues. Accordingly, the Commission finds that the pendency of a contested issue related to full-power operation may not be considered as changed circumstances for the purposes of NEPA."

In a discussion permitting the licensing board decision to allow low-power testing to become effective, Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275, 278-79 (1985), the Commission again reiterated its views:

"The Commission has previously rejected the suggestion in this proceeding that a low-power license should not be issued where there is no reasonable assurance that a full-power license will ever be used. CLI-83-17, 17 NRC 1032, 1034 (1983); CLI-84-9, 19 NRC 1323, 1327 (1984). In doing so, the Commission found that 10 C.F.R. § 50.47(d) of its regulations established unqualified authorization for it to issue a low-power license in the absence of either NRC or FEMA approval of an off-site emergency plan and without the need for a predictive finding of reasonable assurance that a full-power license will eventually issue, so long as the prerequisites for a low-power license are met. CLI-83-17, supra, 17 NRC at 1034. Accordingly, in the context of this low-power proceeding, the Commission declined to speculate on whether offsite emergency planning issues would be resolved satisfactorily for purposes of a full-power license. In any contested full-power proceeding, there is uncertaintly over the outcome of full-power licensing issues; nevertheless, 10 C.F.R. § 50.57 authorizes the

issuance of a low-power license even though such uncertainty might exist. Indeed, the interjection of such doubts into the low-power proceeding could create a limited full-power hearing before issuance of the low-power license. Such a procedure for a low-power license would have little to commend it. Id., 17 NRC at 1034.

The State and County's position regarding public interest considerations appears to be predicated, to some extent at least, on the belief that Shoreham will never be allowed to operate in excess of 5% power. Thus, according to their theory, the plant's fuel will be used for no beneficial purpose because the plant will never be able to achieve its intended purpose. This is largely based on their speculation on the outcome of the NRC adjudication and of the New York State court litigation concerning offsite emergency planning issues. Reliance on such speculation for public interest determination purposes being considered here is unfounded, and is rejected for the same reasons found in CLI-83-17, and in CLI-84-9, to wit: the Commission's authority to issue a low-power license does not depend on a predictive finding of reasonable assurance that a full-power license will eventually issue; the interjection of speculation on such matters into the low-power licensing process would render it essentially meaningless."

And later in rejecting a request to reconsider the need for a supplemental EIS in Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1590-91 (1985), the Commission stated:

"The primary benefit of early low-power operation is that it will allow the early discovery and correction of unforeseen but possible problems which may prevent or delay full-power operation at an enormous expense to LILCO and/or its customers.[3] Thus, early low-power testing greatly increases the possibility that if and when the plant is ready for full-power operation, the benefits of that operation will be realized without

delay. This benefit does not require speculation over the outcome of the full-power proceeding. So long as an applicant is willing to invest the substantial effort and money necessary to attempt to obtain a full-power license, the possibility of full-power operation at a future date gives substantial value to low-power testing. Moreover, whenever a low-power motion has been filed where full-power issues are also pending (a common occurrence), there is always uncertaintly over the outcome of the full-power proceeding. Delaying the low-power license until that uncertaintly is eliminated irretrievably deprives the applicant and its customers of the substantial benefits of early low-power testing.

To refuse to authorize low-power operation whenever there is uncertainty over whether full-power operation will be authorized would ignore Commission regulations which allow low-power operation when there is reasonable assurance that it will present no undue risk to the public health and safety notwithstanding the pendency of full-power issues. 10 C.F.R. § 50.57(c). This regulation is premises on the idea that the inherent benefits of early low-power testing outweigh the uncertainty that a full-power license may be denied. We see no reason to refuse to recognize this premise in this case. In short, the sooner low-power testing is begun, the greater the probability that it will serve the purpose for which it is intended, i.e., to facilitate the earliest possible full-power operation of the plant in the event that the Commission finds reasonable assurance that full-power operation will present no undue risk to the public health and safety.

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[3] We note that low-power test programs for recently licensed reactors have identified problems which have taken many months to correct and consequently have delayed full-power operations. At Palo Verde, a pressurized water reactor, for example, a coolant pump design problem identified

during initial testing took over 1 year to correct."

It might be argued that all of the foregoing Shoreham decisions were not decisions on a petition to waive 10 C.F.R. § 50.47(d) but rather assumed its effectiveness. This is true, but it is to be remembered that this entire line of decisions had its genesis in a Licensing Board holding that "public policy" dictated the withholding of the low-power license. The Commission in all of the above referenced decisions gave no hint that the wisdom of the regulation was suspect. Moreover, in the last above quoted decision, CLI-85-12, the Commission outlined the purposes and benefits of low-power testing. It was to facilitate these purposes that 10 C.F.R. § 50.47(d) was adopted. Indeed, to grant the Petition would directly contravene the purposes and benefits outlined by the Commission in CLI-85-12. Therefore, there can be no argument that a prima facie case has been made that "the application of [10 C.F.R. § 50.47)(d)] . . . would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.758(b).

CONCLUSION

The Licensing Board should determine pursuant to 10 C.F.R. § 2.758(c) that Mass. AG "has not made a prima facie showing that the application of [10 C.F.R. § 50.47(d)] to a particular aspect or aspects of the subject matter of the

proceeding would not serve the purposes for which [10 C.F.R. § 50.47(d)] was adopted and that application of the regulation should be waived or an exception granted," and thereafter "not further consider the matter."

By their attorneys,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on July 8, 1986, I made service of the within document by mailing copies thereof, postage prepaid, to:

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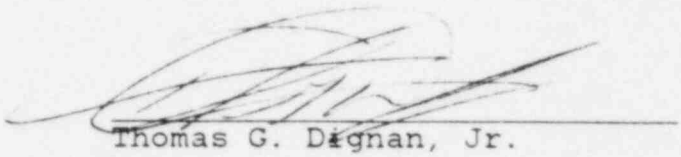

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