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LBP-86-25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Emmeth A. Luebke
Jerry Harbour

In the Matter of	Docket Nos. 50-443-OL-1 50-444-OL-1
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	(On-Site Emergency Planning and Safety Issues)
(Seabrook Station, Units 1 and 2)	(ASLBP No. 82-471-02-OL)
	July 30, 1986

MEMORANDUM AND ORDER
(Denying Massachusetts 10 C.F.R. § 2.758 Petition)

MEMORANDUM

On July 2, 1986, the interested State of Massachusetts filed a Petition To Revoke Regulation 50.47(d) Or In the Alternative To Suspend Its Application In the Seabrook Licensing Proceeding. The Applicants filed an opposing response on July 8 and the NRC Staff filed its opposing response on July 22, 1986. On July 23, 1986, New England Coalition on Nuclear Pollution and Seacoast Anti-Pollution League filed an untimely motion to join in support of the Massachusetts' petition. Since they merely adopt the arguments advanced in the Massachusetts' petition, the motion to join is granted.

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The petition is based upon 10 C.F.R. § 2.758.[1] We note that Massachusetts seeks to revoke or to suspend the application of regulation §

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1 10 C.F.R. § 2.758 provides in pertinent part:

> (a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof, . . . shall not be subject to attack by way of discovery, proof, argument or other means in any adjudicatory proceeding....
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> (b) A party to an adjudicatory proceeding involving initial licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for 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 regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter-affidavit or otherwise.
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> (c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

50.47(d).[2] Since Licensing Boards have only limited jurisdiction, we are not authorized to revoke or to suspend the Commission's rules or regulations, and thus we could summarily deny the instant petition.[3] However, the body of the petition (except with respect to Massachusetts' first argument) reflects and we assume that Massachusetts is actually requesting that the application of § 50.47(d) be waived or an exception be made in this proceeding. Accordingly, we proceed to discuss and rule upon the petition.

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2 10 C.F.R. § 50.47(d) provides:

> (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 local 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.

3 Pursuant to 10 C.F.R. § 2.802, Massachusetts' recourse would be to file a petition for rulemaking with the Commission requesting that § 50.47(d) be amended or rescinded.

The Massachusetts petition, accompanied by affidavits,[4] presents four arguments. First, Massachusetts argues that, in permitting the

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4 The first affidavit dated July 2, 1986 is that of Dr. Albert Carnesale, Professor of Public Policy and Academic Dean of the John F. Kennedy School of Government, Harvard University. Dr. Carnesale asserts in substance (a) that low-power testing creates an irreversible accumulation within the fuel elements of radioactive materials, which would affect the severity of potential accidents that might occur during the testing program, (b) that even if a full power license was not granted, radioactivity induced during the low-power testing would increase the risks and costs associated with disassembly or entombment of the reactor, and (c) that, over time, low-power testing would render the fuel elements more susceptible to leaking, which would further complicate disassembly or entombment even if an operating license were not to be granted.

The second affidavit, unsigned, undated, and prepared for use in the Shoreham proceeding, is that of Messrs. Dale G. Bridenbaugh and Gregory C. Manor, the president and vice-president, respectively, of MHB Technical Associates, San Jose, California. They assert, in substance, (a) that none of the benefits assumed in the NRC's 1977 Environmental Impact Statement for the Shoreham plant in New York State would be achieved by low-power testing because low-power operation would result in environmental impacts, such as plant contamination with radioactive material, the likely loss of the resale value of the fuel and other components once they become irradiated, the cost of decontamination, decommissioning and disposal, and worker exposure, and (b) that low-power testing can be rationally justified only where there is no substantial doubt that the plant will be granted an operating license.

The third affidavit, dated July 2, 1986, is that of Mr. Charles V. Barry, who is Secretary of Public Safety for the Commonwealth of Massachusetts. He asserts, in substance, (a) that, after the Chernobyl accident, Governor Dukakis directed that the radiological emergency response plans be put on hold until federal agencies such as the NRC have thoroughly assessed nuclear power in light of that accident, and (b) that five of the six Massachusetts' communities within the plume exposure pathway have voted not to participate in radiological emergency response planning.

The fourth affidavit, dated July 2, 1986, is that of Dr. Gordon R. Thompson, executive director, Institute for Resource and Security Studies, Cambridge, Massachusetts. He asserts (a) that prolonged

(Footnote Continued)

issuance of an operating license authorizing fuel loading and/or low power operation at up to 5% of rated power before any findings or determinations are made "concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and local offsite emergency plans," § 50.47(d) violates Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1982) which provides a right to a prior hearing on all issues material to issuance of an operating license. Thus, Massachusetts urges that § 50.47(d) must be held invalid. (Pet. pars. 1-5, at pp. 1-3). As noted above, as a Board with limited jurisdiction, we have no authority to determine that § 50.47(d) violates the Atomic Energy Act and is thus invalid. However, we will assume that Massachusetts is arguing that, since this regulation violates the Atomic Energy Act, the application of this regulation should be waived or excepted with respect to the subject matter of this proceeding.

Second, Massachusetts asserts that five of the six Massachusetts communities within the plume exposure pathway have voted not to participate in emergency response planning and that, after the Chernobyl accident, the Governor of Massachusetts has suspended the Commonwealth's

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(Footnote Continued)
operation at five percent of rated power may create the potential for core damage and release of radioactive material to the environment, and (b) that, regarding the particular circumstances at Seabrook, it is important to determine the duration of operation at the five percent level because there could be a long delay, perhaps a year or more, which could, in the event of an accident, lead to excess offsite doses.

emergency response planning process. Massachusetts argues that, since there is a "strong likelihood" that the Seabrook plant may not receive a full power license until after several years of litigation, if ever, any possible benefits to be attained from beginning low-power testing at this time would be far outweighed by the significant and irreversible environmental consequences of such operation.[5] (Pet., pars. 1-11 at pp. 3-6). Third, Massachusetts argues that, if a low-power license is issued, such operation would very likely continue for a period of time much longer than that contemplated by the Commission in promulgating § 50.47(d) and thereby raise a risk of offsite consequences not intended in adopting this regulation (Pet., pars. 12-14, at p. 6). Fourth, Massachusetts argues that § 50.47(d) should be waived pending a full investigation and assessment of the Chernobyl accident (Pet., par. 16, at p. 7).[6]

With respect to all four arguments, Massachusetts has failed to comply with § 2.758(b) - it does not specify the special circumstances with respect to the subject matter of this particular proceeding, which are such that application of the regulation would not serve the purpose for which the regulation was adopted. We conclude that the circum-

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5 At page 4 of the petition, in citing 50.47(a)(1), Massachusetts deleted the words "Except as provided in paragraph (d) of this section,". The Board has the right to expect that a party will not selectively delete important wording from a regulation in an effort to advance an argument.

6 There is no numbered paragraph 15 in the petition.

stances adverted to in these arguments are generic in nature and are not unique to this Seabrook proceeding.

With respect to both its second and third arguments, we note that Massachusetts apparently equates the duration of operation at low power with the length of time postulated between receipt of the low-power and full-power licenses rather than with the Applicants' low-power testing plans. The statement that "such operation [at low-power] is very likely to continue for a period of time much longer than that contemplated by the Commission in promulgating Regulation 50.47(d)" (Pet., par. 14, at p. 6) is nowhere present in the Thompson affidavit cited to support it. That affidavit postulates potential accident effects that might occur "after prolonged operation at the 5 percent level," but neither the affidavit nor the argument suggest why the Seabrook low-power testing would be prolonged or significantly different from any other low-power testing program. Thus, we adhere to our conclusion that the circumstances adverted to in all four arguments are generic in nature and are not unique to this proceeding.

Moreover, we also conclude that the second and third arguments raise issues that have been rejected by the Commission. With respect to the second argument which asserts that the low-power testing will significantly and irreversibly affect the environment, in Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1590 (1985), the Commission observed that "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." This being so, the Commission concluded that:

> The environmental effects of low-power testing are well known, i.e., moderate irradiation of the core and contamination of the remainder of the primary coolant system, with no significant impact on the surrounding environment by releases of effluents during normal operation. These effects of low-power testing are subsumed in the FEIS's analysis of the far greater, but nonetheless very small impacts from full-power operation. In our view, the benefits of low-power operation clearly outweigh the environmental costs. Id.

With respect to the third argument which asserts that the low-power testing raises the risk of off-site consequences, the Commission has indicated that it had adopted § 50.47(d) because it had determined that fuel loading and low-power operation do not pose significant risks to public health and safety. In Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032, 1034 (1983), the Commission stated:

> 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 regulation requires no predictive finding of "reasonable assurance" with regard to offsite emergency planning prior to low-power operation and none 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 601-02 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.

Thus, Massachusetts' petition fails to set forth special circumstances with respect to the subject matter of this particular proceeding which are such that application of the regulation would not serve the purposes for which the regulation was adopted and moreover has raised issues which have been previously rejected by the Commission.

ORDER

In light of the discussion, supra, the 10 C.F.R. § 2.758 petition is denied since Massachusetts has not made a prima facie showing that the application of § 50.47(d) in this proceeding would not serve the purpose for which the regulation was adopted and that the application of the regulation should be waived or an exception granted.

THE ATOMIC SAFETY AND
LICENSING BOARD

Sheldon J. Wolfe
Sheldon J. Wolfe, Chairman
Administrative Judge

Emmeth A. Luebke
Emmeth A. Luebke
Administrative Judge

Dated at Bethesda, Maryland,
this 30th day of July, 1986.

SEPARATE OPINION OF JUDGE JERRY HARBOUR

I concur in the denial of the Petition of Attorney General Francis X. Bellotti to Revoke Regulation 50.47(d), but I would have dealt differently with this pleading. I would have dismissed the petition because of its obstructionist positions.

In the petition, filed pursuant to 10 C.F.R. § 2.758, the Attorney General would have us "revoke" 10 C.F.R. § 50.47(d) in this proceeding and not conduct low-power license hearings on the grounds that, inter alia, Massachusetts will either delay or halt production of necessary emergency response plans, with the result that the full-power license for Seabrook will be delayed for a year or more, or may never issue at all. Hence, via this bootstrap argument, the Attorney General urges that a low-power license should not be issued. Petition at 3-6, ¶¶ 3-6, 8-11, Carnesale, Barry and Thompson affidavits.

Thus, by its own admitted action (or inaction), the Attorney General intends to obtain the relief it would seek, and petitions the Licensing Board to sanction this action under the guise of adjudication. This is an affront to the judicial process, and, in my view, grounds for dismissal of the petition.

Further, the Attorney General makes the point that five of the six Massachusetts communities involved have voted not to participate in any exercise of emergency response plans for Seabrook (Petition at 3, ¶ 2) followed by the position that the Governor has not indicated any intention to submit, or to implement in the event of an emergency

(emphasis added), compensatory plans for the five recalcitrant Massachusetts communities (Id., ¶ 3, citing Barry affidavit). The Attorney General indicates here that even if the Seabrook plant were to operate, the Commonwealth would not prepare or implement emergency plans to protect its citizens in the event of an emergency. I find this statement by the Attorney General appalling, and in direct contradiction of stated concerns for protection of the public health and safety expressed elsewhere in the petition. The statement is not supported by the Barry affidavit so cited.

Jerry Harbour
Administrative Judge