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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Commissioners

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	)	Docket Nos. 50-443/444-OL (On-Site EP) February 4, 1987

ATTORNEY GENERAL JAMES M. SHANNON'S REPLY BRIEF IN SUPPORT OF REVERSAL OF ALAB-853

Attorney General James M. Shannon[1/] hereby files his brief in reply to briefs advocating support of ALAB-853 filed by the Applicants and NRC Staff, on January 26, 1987 and January 28, 1987, respectively. Pursuant to the Commission's order of January 9, 1987, establishing a "permissive" briefing schedule for its review of ALAB-853, the Massachusetts Attorney General filed a brief before the Commission advocating reversal

1/ Attorney General James M. Shannon filed a motion before the Licensing Board on January 22, 1987 to substitute for former Attorney General Francis X. Bellotti as the designated party in this licensing proceeding representing the Commonwealth of Massachusetts. That motion is currently pending.

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of ALAB-853 on January 21, 1987. The Town of Hampton, Seacoast Anti-Pollution League and New England Coalition on Nuclear Pollution also filed briefs on that date seeking reversal of ALAB-853. Attorney General Shannon addresses herein only those arguments of Applicants and Staff not specifically addressed by the previously-filed briefs.

ARGUMENT

A. Absent a Formal Grant of an Exemption from the Requirements of Section 50.33(g), NRC Law Requires That an Emergency Plan Be Submitted Prior to Low-Power Operation.

Both the NRC Staff and Applicants argue in support of their position, that Applicants need not comply with the plan submission requirement of section 50.33(g) prior to issuance of an operating license for fuel loading and/or low-power operation, that "not all regulations must be complied with for an authorization for low power operation to issue." Applicants' Brief at 7, citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1440 (1984); see also NRC Staff Response to Attorney General of Massachusetts' Petition for Review of ALAB-853, dated December 22, 1986, at 8. However, this claim is based on a misreading of NRC precedent. The Commission's actual statement in the Shoreham proceeding was that:

> § 50.57(c) does not, by itself, carve out an exception from all health and safety regulations that would otherwise be applicable to a low-power license. [That] does not mean . . ., however, that every health and safety regulation, regardless of its purpose or terms, must be deemed fully applicable to fuel-loading and to every phase of low power operation . . . .

20 NRC at 1439-40. The Commission went on to affirm the Shoreham Licensing Board's grant of an exemption to a regulation (GDC-17) under 10 C.F.R. § 50.12(a). In fact, the Commission had previously expressly rejected the argument that section 50.57(c) allows the Licensing Board to determine that regulation to be inapplicable to low-power licensure. Instead, the Commission required the applicant to seek an exemption from the regulation under section 50.12(a) and emphasized that exemptions under that section were to be granted only in extraordinary circumstances. CLI-84-8, 19 NRC 1154 (1984).

In the present case, Applicants have not sought an exemption from the requirements of section 50.33 and indeed appear to make the very argument rejected in the Shoreham proceeding, that section 50.57(c) by itself gives the Board authority to determine a regulation -- in this instance, section 50.33(g) -- inapplicable to low power licensure.

Moreover, the decision cited by Staff and Applicants holds only that not all "health" and "safety" regulations must be complied with prior to low-power operation. It lends no support to the Applicants' position which seeks to bypass the NRC's procedural requirements for licensure. Adherence to

procedural regulations is important not simply to protect the health and safety of the public, but also to protect the interest of all parties in the proceeding in a fair and orderly resolution of the issues.

If the Commission's Shoreham decision is at all relevant it is only to demonstrate that an exemption from section 50.33(g) can be allowed only if the Applicants formally apply for waiver and demonstrate that special circumstances warrant its being granted in this case. The Applicants have not followed this procedure and, in fact, are utterly incapable of demonstrating that an exemption should be allowed. There is therefore simply no authority under NRC law to hold regulation 50.33(g), which by its terms clearly requires submission of all emergency response plans, to be inapplicable to fuel loading or low-power licensure.

B. The Regulatory History of Section 50.33(g), Which Is Silent As to Its Intent, Does Not Support the Staff's Argument.

The NRC Staff argues that section 50.33(g) imposes no affirmative obligation upon the Applicants to submit emergency response plans prior to licensure and that the sole purpose of section 50.33(g) is to designate who is responsible for submission of plans. NRC Staff Brief at 3-4. The Staff relies entirely for this argument on the regulatory history, which, as pointed out by the Staff, is completely silent on the subject. Thus the Staff's interpretation of the purpose of the

regulation rests not on the regulatory history, but on the Staff's own unfounded supposition as to what that silence must mean.

The only possible comment one can make based on that regulatory history, which does deal extensively with the substantive emergency planning requirements of section 50.47, is that the section 50.33(g) requirement of plan submission must be viewed distinctly from the section 50.47 substantive requirements for emergency planning. The Staff takes this conclusion one step further, however, and states that because the Staff is unable to discern any purpose for this procedural requirement of plan submission, the regulation must have been intended only to make clear that it is the applicant, not the off-site authorities, who is responsible for the submission of off-site plans. NRC Staff Response to Attorney General of Massachusetts' Petition for Review of ALAB-853 at 6. There is simply no language in the silent regulatory history, however, to support this narrow interpretation of the regulation, and, in the absence of such language, the clear terms of the regulation, requiring plan submission prior to issuance of an operating license, must prevail.

Even if one could speculate from the regulatory history on the purpose behind section 50.33(g), there is no need, or even authority, to do so where, as here, the terms of the regulation requiring plan submission are clear. Indeed, the only arguable ambiguity concerning the meaning of section 50.33(g) stems not

from that regulation but from regulation 50.47(d), which was enacted two years later. Since section 50.47(d)'s regulatory history is also silent as to its effect upon section 50.33(g), one can only conclude that section 50.47(d) was not intended to have any effect upon the 50.33(g) requirement of plan submission. If the intent were otherwise, it would have been so stated. Thus, there is no basis for the Staff's interpretation.

Moreover, merely because the Staff can discern no purpose for Section 50.33(g), it does not follow that no valid purpose exists. As the Attorney General stated in his previous brief, the requirement of plan submission prior to issuance of a low-power license serves to ensure that applicants have taken every step within their control to obtain a full-power license. Without having done so, it cannot be said that there is a strong likelihood that applicants will be eventually entitled to full power licensure.

Furthermore, Congress has found a valid purpose behind the requirement of plan submission. Thus, when Congress authorized the NRC to issue temporary operating licenses for low power testing at up to 5% of rated power, it conditioned the issuance of such licenses upon the filing of emergency response plans but did not require that any determination be made at that stage as to the adequacy of the response plans. See 42 U.S.C.A. § 2242 (1983) (expired December 31, 1983). This is precisely the distinction drawn by the Commission in promulgating sections 50.33(g) and 50.47(d).

Finally, to the extent there may exist any seeming ambiguity as to the proper interpretation of section 50.33(g) in conjunction with section 50.47(d), basic rules of statutory construction must be applied to require that the two regulations be interpreted so as to give effect to both. The only interpretation of the two regulations which accomplishes this end is the obvious one proposed by the Attorney General: that off-site emergency response plans must be submitted prior to fuel loading and low-power licensure.

C. Applicants' Submission of an Off-Site Emergency Response Plan Must be Made in Good Faith.

Applicants attempt to support their argument, that the requirement of plan submission is meaningless, by asserting that if ALAB-853 is reversed they may simply file a so-called "Massachusetts Plan," which has been expressly rejected by the State, and thereby remove any further barrier to low-power licensure. Yet even Applicants concede that any filing of plans "would have to be a 'good faith effort.'" Applicants' Brief at 12.

Although Massachusetts prepared a draft of an emergency response plan (in a good faith, but unsuccessful, attempt to develop adequate response measures), the Governor of Massachusetts has expressly rejected such plan, as have the local Massachusetts governments, as being incapable of working, and has directed that the State not participate in planning.

Thus, the "Massachusetts Plan" referred to by Applicants is of no effect or value.[2/] If Applicants had reasonably thought that the Commonwealth might implement such plan, indeed they would have submitted it. Clearly, then, the submission of that failed plan, rejected by the State, and which Applicants know will not be implemented, can never be deemed a good faith submission and cannot be deemed sufficient compliance with the terms of section 50.33(g) so as to authorize the issuance of any operating license.

CONCLUSION

The law is clear that section 50.33(g) requires submission of off-site radiological response plans prior to the issuance of any operating license. As stated previously, as a matter of policy such submission should be required. Applicants could point to but one case, in which problems discovered by a utility in the course of low-power testing required a year for correction, to support their own policy argument against plan submission. Such instances, however, are indeed rare, and where, as in the present case, full-power licensure is at least a year away, any possible benefit to be derived from commencing low-power testing at this stage must be deemed minimal. Although, as has been argued, there are costs to be considered in the event that full-power licensure is delayed as a result

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2/ Applicants mention that FEMA informally reviewed this plan. They fail to make mention of FEMA's conclusion, based on that informal review, that such plan is seriously deficient.

of problems discovered in the course of low-power operation, there are likewise costs that must be considered in the event the plant is allowed to proceed to low-power testing but never to full-power licensure. There are ratepayers in Massachusetts (residents of towns that have invested in the Massachusetts Municipal Wholesale Electric Company) who will pay the costs of low-power operation regardless of whether such costs are later deemed to be imprudent. Moreover, we will all pay the environmental costs resulting from the disposal of the high level radioactive waste produced during low-power operation. There is simply no basis for allowing the accrual of such costs, at least until the Applicants have submitted off-site response plans and provided some indication that they will at some point be able to meet the substantive emergency planning requirements of full-power licensure.

For all the foregoing reasons, the Commission should reverse ALAB-853.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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