2433

Filed: February 2, 1987

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 No. 50-443-OL/444-OL

REPLY BRIEF OF SEACOAST ANTI-POLLUTION LEAGUE IN SUPPORT OF REVERSAL OF ALAB-853

A. §50.33(g) is a response to a statutory requirement that every commercial power rector have an emergency plan as a condition to licensing. As such, the regulation is far more than a mere "checklist."

The Staff's position is that §50.33(g) has no independent utility, and is "nothing more than a procedural checklist." (Staff Brief, p. 10, note 8.) As discussed below, this ignores the basic requirement of §50.57(a)(2) that, in order to license, the Commission find that operation will be "in conformity with the application as amended." The Commission's §50.33(g) regulation therefore cannot be trivialized as the Staff suggests. (See pages 4-5, infra.)

More basically, however, the Staff's position ignores the full history of the Commission's emergency planning regulations. The §50.33(g) requirement was adopted against the background of

D503

Congressional action to require Commission action on emergency planning in the wake of Three Mile Island. This Congressional action culminated in the enactment of the 1980 Authorization Act, Public Law No. 96-295, 24 Stat. 780. That statute provided for Commission consideration of State, local, or utility plans, and required emergency plans as a condition to license.

Thus, §50.33(g) not only made it clear that it was the licensee's responsibility to furnish plans, as Staff urges. It also provided that the utility itself could furnish plans to compensate for deficiencies in governmental plans.[1]

Therefore, §50.33(g) was adopted in light of Congressional action to require emergency planning and must be considered to have a purpose beyond a mere staff "checklist." It requires not only that Applicants be responsible for submission of plans, as Staff urges, but it also provides for a matter Congress intended to require: That there be no licensing without emergency plans in place.

The most recently enacted Authorization Act, Public Law 98-553, October 30, 1984, is explicit on the subject. It provides as follows:

> (Sec. 108). Of the amounts authorized to be appropriated under this Act, the Nuclear Regulatory Commission may use such sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license (including a temporary operating license under Sec. 192 of the Atomic Energy Act of 1954, as amended) for a nuclear power reactor, if it determines that there exist a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned."

---

1. SAPL would note that it does not agree that Congress ever intended to permit a utility plan to be used in the total absence of governmental plans. SAPL would concur with the position taken in a Note, 66 B.U. Law Review 229 (March, 1986). See pages 258-261.

Thus, although there may be questions about the intent of Congress insofar as the extent to which a utility plan can be used to supplant totally lacking governmental plans, there can be no doubt about the intent of Congress to require that there be emergency plans in existence before the Commission is authorized "to issue an operating license..." This requirement was even extended to Section 192 Temporary Operating Licenses, which were formerly authorized at 5% power ascension increments, but initially were "not to exceed 5 percent of full rated thermal power." 42 USC §2242(a).

The Senate debate on this issue is very revealing. On July 16, 1979, the Senate took up the issue of a legislative response to the fact that there were "dozens" of operating reactors around the country without acceptable emergency plans. The Nuclear Regulation Subcommittee, chaired by former Senator Gary Hart, offered an amendment that would require emergency plans to be developed for all operating reactors within a nine-month period.

Opposition to the Subcommittee's Bill came from Senator Johnston of Louisiana. He was concerned about the possibility of a recalcitrant governor being thus empowered to force the closure of an operating plant. He proposed that in the event of a state refusal to act, the NRC be authorized to impose "an interim Federal plan." This generated debate on whether such a Federal role would impair the traditional rights of the states over civil defense, which Senator Simpson of Wyoming likened to the State's traditional land use power. In the end, the Johnston amendment was defeated. Congressional Record, July 16, 1979, pages 18663-18666.

However, the important point, as reflected in the clear language of the statute, is that there was agreement between all the senators on the need for emergency plans as a condition for licensing. Accordingly, the statute required emergency plans in order to license and, as most recently enacted, it still requires plans be in place in order to license.[2]

B. Contrary to Applicant's argument, §50.57(a) does require a "complete application."

As Applicants correctly point out (Applicants Brief, p. 5), §50.57(a)(1-6) governs the issuance of an operating license. They acknowledge that pursuant to §50.57(a)(2), the Commission must find that "the facility will operate in conformity with the application as amended...," and concede that the "application as amended" presently does not include any emergency plans (State, local, or even utility), for the approximately one-third of the plume exposure EPZ within Massachusetts. They further acknowledge that §50.33(g) by its terms requires that the Applicant "shall submit radiological emergency response plans of State and local government entities in the United States that are wholly or partially within the plume exposure Emergency Planning Zone (EPZ)."

But, they argue, this no barrier to licensing, because nowhere does §50.57(a) require the application to be "complete."

---

2. SAPL would again refer to its January 20, 1987 Brief in Support of Reversal of ALAB-853, pps. 6-7, in which SAPL again pointed out that there is no such thing as a "low power license" or a "fuel loading license." All the Commission's regulations authorize, and all that the Atomic Energy Act contemplates, are construction permits or forty-year operating licenses. It is a forty-year operating license that is at issue in this Appeal.

However, implicit in the requirement that in order to license a finding must be made that operation will be "in conformity with the application as amended" is the requirement that the application be, in all material respects, complete. Otherwise, the requirement to find operation will be "in conformity with" the application would be an empty and meaningless gesture, not a required finding in order to license.

If an application ignoring important safety features is not necessary for licensing, there would be no need to require a finding concerning the ability of the Applicants to operate the facility "in conformity with" such an application.

It is true that an incomplete license may be docketed, thereby instituting formal Staff review. But after completion of that review, and required hearings on the license, it surely is required that the application be complete in all material respects in order to issue an operating license.[3]

In Concerned Citizens of Rhode Island v. NRC, 430 F.Supp. 627, 10 ERC 1075 (D.R.I., 1977), the Court held that an incomplete application could be docketed, but when on to state:

---

3. An application perhaps may have some minor, easily remedied omissions and still be the basis of a favorable §50.57(a)(2) finding. An Application totally lacking any mention of emergency planning, which the Commission and Congress have determined is an independent required safety feature, has a deficiency that goes beyond a minor and easily remedied deficiency.

However, this statutory section [42 USC §2232(a)] does not forbid the Commission from docketing an incomplete application, although it may well forbid issuance of a license until the application is complete. See, e.g., 10 CFR §2.104(b)(1)(i)(d)." Emphasis added, 10 ERC 1075 at 1080, Note 14.

Also, we submit it is significant that the regulation requires a finding that the plant will operate in conformity with the application "as amended." One normally refers to amending an incomplete document, and to completing, rather than amending, an incomplete document.

CONCLUSION

For the reasons stated in its original Brief, and because the Congress has clearly required this Commission to require emergency plans as a condition for issuing an operating license, including the operating license at issue here, the decision under review, ALAB-853, must be reversed.

Respectfully submitted,
SEACOAST ANTI-POLLUTION LEAGUE
By its attorney,
BACKUS, MEYER & SOLOMON

Robert A. Backus
P. O. Box 516
116 Lowell Street
Manchester, N.H. 03105
Tel: (603) 668-7272

DATE: February 2, 1987

I hereby certify that a copy of the within Reply Brief of Seacoast Anti-Pollution League in Support of Reversal of ALAB-853 has been sent this date, first class, postage prepaid, to those listed on the attached service list and Federal Expressed to those parties denoted with an asterisk., opposing counsel.

Robert A. Backus

Stephen E. Merrill
Attorney General
George Dana Bisbee
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301

Angie Machiros, Chairman
Board of Selectmen
25 High Road
Newbury, MA 09150

Allen Lampert
Civil Defense Director
Town of Brentwood
20 Franklin Street
Exeter, NH 03833

Charles P. Graham, Esq.
McKay, Murphy and Graham
100 Main Street
Amesbury, MA 01913

Diane Curran, Esq.**
Harmon & Weiss
2001 S Street, NW
Suite 430
Washington, DC 20009

Edward A. Thomas
Federal Emergency Management Agency
442 J.W. McCormack (POCH)
Boston, MA 02109

H.J. Flynn, Esq.
Assistant General Counsel
Federal Emergency Management Agency
500 C Street, SW
Washington, DC 20472

Atomic Safety and Licensing
Appeal Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Gary W. Holmes, Esq.
Holmes & Ellis
47 Winnacunnet Road
Hampton, NH 03842

Paul McEachern, Esq.
Matthew T. Brock, Esq.**
Shaines & McEachern
25 Maplewood Avenue
P.O. Box 360
Portsmouth, NH 03801

Roberta C. Pevear
State Representative
Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

Mr. Robert J. Harrison
President and Chief Executive Officer
Public Service Co. of New Hampshire
P.O. Box 330
Manchester, NH 03105

Robert A. Backus, Esq.**
Backus, Meyer & Solomon
116 Lowell Street
Manchester, NH 03106

Philip Ahren, Esq.
Assistant Attorney General
Office of the Attorney General
State House Station #6
Augusta, ME 04333

Thomas G. Dignan Jr., Esq.**
Ropes & Gray
225 Franklin Street
Boston, MA 02110

William Armstrong
Civil Defense Director
Town of Exeter
10 Front Street
Exeter, NH 03833

Atomic Safety and Licensing
Board*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jane Doughty
Seacoast Anti-Pollution League
5 Market Street
Portsmouth, NH 03801

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Maynard L. Young, Chairman
Board of Selectmen
10 Central Road
South Hampton, NH 03287

William S. Lord
Board of Selectmen
Town Hall - Friend Street
Amesbury, MA 01913

Michael Santosuosso, Chairman
Board of Selectmen
South Hampton, NH 03287

Peter J. Matthews, Mayor
City Hall
Newburyport, MN 09150

Mr. Robert Carrigg, Chairman
Board of Selectmen
Town Office
Atlantic Avenue
North Hampton, NH 03862

Judith H. Mizner, Esq.
Silverglate, Gertner, Baker
Fine and Good
88 Broad Street
Boston, MA 02110

R. K. Gad III, Esq.
Ropes & Gray
225 Franklin Street
Boston, MN 02110

Mrs. Anne E. Goodman, Chairman
Board of Selectmen
13-15 Newmarket Road
Durham, NH 03824

Sheldon J. Wolfe, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Emmeth A. Luebke*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Jerry Harbour
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Ms. Carol Sneider, Esq. **
Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

Beverly Hollingworth
209 Winnacunnet Road
Hampton, NH 03842

Richard A. Hampe, Esq.
New Hampshire Civil Defense Agency
107 Pleasant Street
Concord, NH 03301

Sandra Gavutis, Chairman
Board of Selectmen
RFD 1 Box 1154
Kensington, NH 03827

Calvin A. Canney, City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801