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April 28, 1987

UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 & 2)	ONSITE EMERGENCY PLANNING & TECHNICAL ISSUES

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S
RESPONSE TO APPLICANTS' SUGGESTION OF MOOTNESS
AND REQUEST FOR VACATION OF STAY

Introduction

Pursuant to the briefing schedule established by the Commission in its April 9, 1987 Memorandum and Order (CLI-87-02), Intervenor New England Coalition on Nuclear Pollution ("NECNP"), present the following arguments in opposition to Applicants' "Suggestion of Mootness and Request for Vacation of Stay," dated April 7, 1987.

I. BACKGROUND

On January 9, 1987, this Commission issued an order stating its decision to review the Appeal Board's decision in ALAB-853 to consider the issue of whether 10 C.F.R. § 50.33(g) required a utility applicant to submit a radiological emergency plan prior to the issuance of a license to operate at any level of power. The Commission simultanuously stayed the Director of Nuclear Reactor Regulation from authorizing zero or low power operation at the Seabrook nuclear power plant until the Commission's review is completed. At that time, Applicants had not submitted

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radiological emergency plans for "state and local governmental entities" within the Seabrook EPZ as required by 10 C.F.R. § 50.33(g), due to the Commonwealth of Massachusetts' determination that adequate emergency planning for the Seabrook facility was not possible. Nor had Applicants filed a so-called "utility plan" to compensate for the lack of participation by state and local government entities. Instead, Applicants took the absolutist position that § 50.33(g) did not require the submission of either a state and local plan or a "utility plan" at all prior to the issuance of a low or zero power license.

On April 7, 1987, Applicants filed a "Suggestion of Mootness and Request for Vacation of Stay," arguing that the issue of whether § 50.33(g) required emergency response plans to be submitted prior to the issuance of a low or zero power license was now mooted based on their anticipated filing of a "utility plan," and that the stay of the low power license could therefore be vacated. On April 8, 1987, Applicants served on the parties a document that they described as a "utility plan."[1]

On April 9, 1987, the Commission issued a Memorandum and Order (CLI-87-02) reversing ALAB-853, and finding as a matter of law that "sound policy favors requiring the filing of a State, local, or utility plan before any operating license is issued, including a license confined to fuel loading or low-power test-

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1 Applicants' "Suggestion of Mootness and Request for Vacation of Stay," at ¶ 4.

ing."[2] In a footnote, the Commission noted the Applicants' eleventh-hour filing of the purported "utility" plan, and set a schedule to brief the question of mootness and other matters relevant to the vacation of a stay.

II. APPLICANTS HAVE NOT COMPLIED WITH THE EXPRESSS REQUIREMENT OF § 50.33(G) THAT "PLANS OF STATE AND LOCAL GOVERNMENTAL ENTITIES" BE SUBMITTED.

Section 50.33(g) plainly states that, as a pre-condition to the issuance of a license to operate at any level of power,

> ...The Applicant shall submit radiological emergency response plans of State and local governmental entities within the plume exposure pathway Emergency Planning Zone (EPZ), as well as the plans of state governments wholly or partially within the ingestion pathway EPZ.

10 C.F.R. § 50.33(g) (emphasis added). Nowhere in this regulation is there any authority for the notion that a "utility" plan is an acceptible substitute for a plan of "State and local governmental entities" within the EPZ.

The plan offered by Applicants does not satisfy the clear requirement of § 50.33(g) because it is not a plan of "State and local governmental entities." As noted by the Commonwealth of Massachusetts,[3] the plan is nothing more than a set of draft plans that were soundly rejected by Massachusetts as inadequate and unworkable. Moreover, the Commonwealth of Massachusetts has

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[2] CLI-87-02, at 6.

[3] See Attorney General James M. Shannon's Response to Applicants Suggestion of Mootness and Request for Vacation of Stay," filed April 9, 1987, at 2.

consistently stated that it will not implement those plans. Nor does Applicants' "Suggestion of Mootness or Request for Vacation of Stay," or cover letter under which the plan was submitted contain any assertion that the plan submitted constitutes a State and local plan. In apparent recognition of the fact that the refusal of the state and local governments within the Massachusetts portion of the EPZ to endorse emergency plans or participate in preparedness exercises prevents the submission of plans of "State and local governmental entities," Applicants instead describe the plan submitted on April 8th as a "utility plan." Id., at ¶ 4. Thus, Applicants' latest filing, by its own admission, fails to comply with the the plain language of § 50.33(g).

Applicants' latest filing can only be construed as a misinterpretation of requirements and purpose of § 50.33(g). Any suggestion that § 50.33(g) permits the substitution of "utility plans" for "the plans of State and local governmental entities" is contrary to established principles of administrative law. It is well settled that administrative regulations cannot be construed to mean what an agency did not express; rather the plain language of the regulation controls. Oliver v. U.S. Postal Service, 696 F.2d 1129 (5th Cir. 1983).

Moreover, to say that a "utility plan" satisfies the requirements of § 50.33(g) would violate a second established rule of construction that "a term carefully employed in one place in a regulation and excluded in another should not be implied where excluded." Diamond Roofing Co. v Occupational Safety &

Health Review Commission, 528 F.2d 645, 648 (5th Cir. 1976); KCMC, Inc. v. F.C.C., 600 F.2d 546, 550 (5th Cir. 1959). As the Commission recognized in In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 742-743 (1983), so-called "utility plans" -- i.e. plans which attempt to compensate for the refusal of State and local governments within the EPZ to participate in emergency planning and preparedness exercises -- are submitted pursuant to 10 C.F.R. § 50.47(c)(1). That regulation provides that:

> Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the Commission denying to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

10 C.F.R. § 50.47(c)(1). Accordingly, it is clear that if the Commission had wished to provide that submission of documents demonstrating that "adequate interim compensating actions have been or will be taken promptly" satisfies § 50.33(g), it would have made reference to "utility plans" or "interim compensatory measures" in addition to "State and local plans." By the same token, had the Commission intended submission "compensatory" plans in lieu of "State and local" plans to satisfy the requirements of § 50.33(g), § 50.47(c)(1) would have included reference to the "applicable standards set forth in paragraphs (b) and (c)." (added words underlined). The express inclusion and omission of reference to "compensatory" plans and "state and local"

plans and their applicable paragraph sections in §§ 50.33(g) and 50.47(c)(1) must be given effect. Therefore, § 50.33(g) cannot be satisfied by the submission of "compensatory" or "utility plans."

Because Applicants have not, by their own implicit admission, submitted "plans of State and local governmental entities," as required by the plain language of § 50.33(g), and because § 50.33(g) cannot be construed as permitting the submission of "compensatory" or "utility plans" in lieu of "State and local" plans, the question of whether Applicants have satisfied the requirements of § 50.33(g) for issuance of a low power license is not mooted by Applicants' latest filing, and maintenance of a stay of the low power license continues to be warranted.

III. APPLICANTS' APRIL 9, 1987 FILING DOES NOT CONSTITUTE A "COMPENSATORY" OR "UTILITY PLAN."

As noted above, there is only one regulatory provision which could conceivably authorize submission of so-called "utility" or "compensatory plans." That regulation is § 50.47(c)(1), which permits licensure when the emergency planning requirements have not been met where the applicant can demonstrate to the satisfaction of the Commission that (1) "deficiencies in the plans are not significant for the plant in question," or (2) "that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation." 10 C.F.R. § 50.47(c)(1).

Applicants so-called "utility plan" obviously cannot be accepted for the purposes of remedying insignificant deficiencies

in State and local government plans, since no such plans exist. Rather, Applicants plan can only been seen as an attempt to satisfy § 50.47(c)(1)'s requirement that "adequate interim compensating actions have been or will be taken promptly." However, even a cursory review of the plans demonstrates that they contain no compensatory steps that the utility would take to make up for the lack of state and local governmental participation in emergency planning, much less demonstrate that these steps "have been or will be taken promptly." NECNP refers in particular to the defects noted in the "Brief of Seacoast Anti-Pollution League in Response to the Commission's Order of April 9 (CLI-87-02)," filed on April 24, 1987, in the "Town of Amesbury's Response to Applicants' Suggestion of Mootness and Request for Vacation of Stay," filed on April 10, 1987, and the pleadings filed by Commonwealth of Massachusetts on April 9, 1987 and April 28, 1987 in response to Applicants' Suggestion of Mootness and Request for Vacation of Stay, and incorporates those arguments herein. Accordingly, the plan submitted on April 8, 1987, does not constitute a "compensatory" or "utility plan" under 10 C.F.R. § 50.47(c)(1).

IV. COMMISSION REGULATIONS DO NOT AUTHORIZE THE ISSUANCE OF A LOW POWER LICENSE PRIOR TO FINDINGS ON THE ADEQUACY OF A "COMPENSATORY PLAN".

Even assuming, solely for the purposes of argument, that the document submitted by Applicants on April 8, 1987 constitutes a "compensatory" plan referred to in § 50.47(c)(1), the mere submission of such a plan is plainly insufficient, under the Commis-

sion's regulations, to warrant issuance of low power license. The plain language of the Commission's regulatory provisions governing the issuance of low and full power licenses require it to complete hearings on the adequacy of "compensatory" or "utility plan" under 10 C.F.R. § 50.47(c)(1) before it can allow Seabrook to operate at any level of power. This mandate is clearly expressed in § 50.47(d), which is the only regulatory provision that could conceivably authorize the issuance of low power licenses prior to hearings and findings on the adequacy of offsite emergency preparedness.[4]

Section 50.47(d) provides that

> 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 the issuance of an operating license authorizing only fuel loading and/or low power operations.

10 C.F.R. § 50.47(d) (emphasis added). Two aspects of this regulation operate to exclude Applicants' "utility plan" from the ambit of § 50.47(d). First, by its express terms, § 50.47(d) authorizes the issuance of low power licenses prior to hearings and findings under §§ 50.47(a) and (b) on the adequacy of offsite emergency preparedness only where Applicants have submitted

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[4] NECNP continues to assert its contention, argued elsewhere, that § 50.47(d) violates the Atomic Energy Act. However, that issue does not arise here because, by its plain terms, § 50.47(d) is not applicable to "utility plans."

"State and local offsite emergency plans." That is not the case here.

Second, § 50.47(d) only purports to waive application of the standards under §§ 50.47(a) and (b). As the Commission recognized in CLI-87-02, § 50.47(d) plainly does not waive the requirement of § 50.33(g) that "State or local plans" be submitted. Nor does § 50.47(d) waive the requirements of § 50.47(c). These three regulations, when read together, clearly command that § 50.47(d)'s waiver of the requirements of §§ 50.47(a) and (b) only applies when "State and local" plans are submitted under § 50.33(g). Section 50.47(d) simply does not apply when utility plans are submitted under the standard of paragraph (c). Where Applicants choose to submit "utility plans" in lieu of state and local plans, no low power license may be issued before the adequacy of a compensatory plan has been fully litigated as required by § 50.47(c)(1). This is the only reading that gives effect to all three regulations -- §§ 50.33(g), 50.47(c)(1), and 50.47(d). By the same token, permitting low power operation to commence after the mere submission of "utility plans" would be inconsistent with the plain language of §§ 50.33(g), 50.47(d), and 50.47(c)(1), and would violate the basic principle that exemptions should, wherever possible, be construed narrowly.

This is also the only reading of § 50.47(c)(1) that is consistent with the policies underlying the emergency planning regulations. As the Commission plainly stated, "the emergency

planning standards in 10 C.F.R. § 50.47(b) and Part 50, Appendix E are premised upon a high level of coordination between the utility and State and local governments." In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, slip op. at 10 (emphasis added). A regulatory scheme that permits low power operation after the good faith submission of "state and local" plans, is consistent with this policy, since the existence of state and local government plans, prepared in cooperation with, and carrying the endorsement of, all governmental entities within the EPZ, does provide sufficient assurance that the emergency planning regulations will be met to warrant issuance of a low power license.

In contrast, the submission of "compensatory" or "utility" plans under the alternative route of § 50.47(c)(1) provides no comparable assurances that the emergency planning standards of §§ 50.47(a) and (b) will ultimately be satisfied. To the contrary, compensatory plans are only necessitated by the refusal of state and local governments within the EPZ to cooperate in emergency planning or preparedness exercises. Therefore, the submission of compensatory or "utility" plans in lieu of state and local government plans, is tantamount to a statement that there is no assurance that the emergency planning and preparedness requirements of 50.47(b) will ever be met.

Thus, the express reference only to "state and local" plans in §§ 50.33(g) and 50.47(d), and § 50.47(d)'s express failure to waive application of § 50.47(c)(1), or to refer to "compensatory"

or "utility plans" as well as "state and local" plans reflects the sound policy that the mere existence or good faith submission of a "compensatory plan" simply cannot provide sufficient assurance, that the plans might eventually be found adequate or that they will be implemented by state and local governments in the event of a radiological emergency, to warrant issuance of a low power license

This reading of § 50.47(c)(1) is fully consistent with the Commission's decision in Shoreham (CLI-86-13). The decision in Shoreham, while endorsing the notion that the Commission must consider "compensatory plans," does not address the issue of the timing of when such a hearing should be held. Hence, the question of whether a low power license can be issued where Applicants have not complied with § 50.33(g), and instead submit a "utility plan," assumedly under the authority of § 50.47(c)(1), is an issue of first impression.

In sum, where Applicants have failed to submit "State or local plans" as required by § 50.33(g), but instead go the route of submitting "compensatory" or "utility" plans under § 50.47(c)(1), the plain language of the Commission's regulations as well as sound policy reasons mandate that no low power license be issued until there are Commission findings under 10 C.F.R. §

50.47(c)(1) "that adequate interim compensating actions have been or will be taken promptly."[5]

V. CONCLUSION

In sum, the so-called "utility plan" offered by Applicants, on its face, fails to comply with the plain language of § 50.33(g), which requires that plans of "State and local governmental entities" be submitted prior to the issuance of a low power license. Moreover, even if § 50.33(g) permitted the substitution of a "utility plan" for a "state and local" plan, Applicants' April 8, 1987 filing does not constitute a "utility plan," under 10 C.F.R. § 50.47(c)(1) since it fails to identify any compensatory measures that will be taken by the utility to make up for the lack of state and local governemntal participation in the planning effort, much less demonstrate that these steps can and will be implemented. And finally, even if Applicants' latest filing could be considered a "compensatory" or "utility plan" under § 50.47(c)(1), no low power license can be issued because the NRC has held no adjudicatory hearings on the question of whether the so-called "utility plan" satisfies the requirements of 10 C.F.R. § 50.47(c)(1). Hence, the question of

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[5] The question of whether Applicants' "utility plan" satisfies the terms of § 50.47(c)(1) must be fully litigated in an adjudicatory hearing, providing Intervenors with all the procedural rights guaranteed under the Atomic Energy Act, as required by Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1435, 1437 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985).

whether Applicants have satisfied the requirements of § 50.33(g) for issuance of a low power license is not mooted by Applicants' latest filing, and maintenance of a stay of the low power license continues to be warranted.

Respectfully submitted,

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April 28, 1987

I certify that on April 28, 1987, copies of the foregoing pleading and "NECNP's Response to Applicants' Suggestion of Mootness and Request for Vacation of Stay" were served by first-class mail or as otherwise indicated on the attached service list.

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