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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) April 28, 1987

ATTORNEY GENERAL JAMES M. SHANNON'S BRIEF IN RESPONSE TO APPLICANTS' SUGGESTION OF MOOTNESS AND REQUEST FOR VACATION OF STAY

Attorney General James M. Shannon, pursuant to the Commission's Memorandum and Order of April 9, 1987, CLI-87-02, hereby submits this brief in response to Applicants' Suggestion of Mootness and Request for Vacation of Stay, dated April 7, 1987. For the reasons set forth below, the so-called "Seabrook Station Emergency Response Plan for the Commonwealth of Massachusetts" filed by Applicants on April 8, 1987 is neither "a state, local or utility plan" as required by CLI-87-02; "truly insuperable obstacles" remain to issuance of a full-power operating license for Seabrook; and, therefore, applicants request for vacation of stay should be denied and the existing stay continued.

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I. The Submitted Plans Are Not State, Local or Utility Plans and Therefore Do Not Satisfy the Commission's Filing Requirement.[1/]

A. The Submitted Plans Are Not Plans of the State and Local Governmental Entities as Required by Section 50.33(g).

Section 50.33(g) requires as part of the application process for a nuclear power reactor that the applicant submit to the NRC "emergency response plans of state and local governmental entities . . . within the plume exposure pathway Emergency Planning Zone (EPZ) . . . ". As noted by the Shoreham Licensing Board, the "plain meaning" of Section 50.33(g) requires "the filing of an off-site emergency response plan sponsored by the appropriate local government." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 620 (1983) (emphasis added), aff'd CLI-83-13, 17 NRC 741 (1983).

The "Seabrook Emergency Response Plan for the Commonwealth of Massachusetts," filed by applicants on April 8, 1987, is not and does not purport to be a plan of the state and local

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1/ The Applicant's Brief received today by the Commonwealth, states that the appellants "acknowledged [to the Appeal Board] that the filing of some kind of plan would operate to remove any basis for a challenge to the Licensing Board's decision on the basis of 10 C.F.R. 50.33(g)." Views of the Applicants in Response to CLI-87-02, dated April 27, 1987 [Applicants' Brief"], at p. 5. To the contrary, counsel for the appellants specifically indicated that the draft plans present in the hearing room, prepared in part by the Commonwealth and now submitted by the Applicants, would not meet the requirement under 10 C.F.R. 50.33(g).

governmental entities within the Massachusetts portion of the Seabrook EPZ. The plan submitted by applicants is a copy of a draft of plans which, although prepared in large part by the state with consultants paid for by the utility, was after careful review unanimously rejected by the vote of each of the Massachusetts local governments within the Seabrook plume exposure EPZ and by the Governor of Massachusetts. See Affidavit of Governor Michael S. Dukakis, attached hereto. As the Dukakis Affidavit makes clear, the plan is not "sponsored by the state and local governments." Indeed, even the applicants, in their filing before the Commission of April 7, 1987, refer to the April 8th submission, as a "utility plan" rather than as a "state or local plan." In fact, the only association one can make between the submitted plans and the Commonwealth is the state's earlier participation in the drafting of the plans. Yet, as stated by the Licensing Board in Shoreham, that participation cannot be a basis for labelling these plans, which are not sponsored by the state and local governments, emergency response plans "of the state and local governmental entities." Long Island Lighting Company, supra, 17 NRC at 619, n. 12.

B. The Submitted Plan Is Not a Utility Plan For The Commonwealth of Massachusetts.

Although the Licensing Board in Shoreham acknowledged that pursuant to Section 50.33(g) the filing of plans sponsored by

the state and local governments is mandatory, the Licensing Board allowed that in the event a state or local government refused to adopt or implement a plan a utility could file its own emergency response plan pursuant to Section 50.47(c)(1) to compensate for the lack of state and local government participation. Long Island Lighting Company, supra, 17 NRC at 625. Thus, the Commission in its Memorandum and Order of April 9, 1987, has required "the filing of a State, local, or utility plan before any operating license is issued." CLI-87-02, at 6 (emphasis added).[2/]

The "Seabrook Station Emergency Response Plan for the Commonwealth of Massachusetts" filed by applicants, although purporting to be a "utility plan" is clearly not one. Unlike the utility plan submitted in the Shoreham proceeding, this so-called "utility plan" contains absolutely no provisions for

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2/ The Commonwealth does not concede that the filing of a utility plan satisfies the filing requirement of Section 50.33(g) and urges the Commission to reverse its earlier affirmance of the Shoreham Licensing Board's decision, LBP-83-22, in that respect. The "plain meaning" of Section 50.33(g) requires the filing of a state or local government-sponsored response plan. Notwithstanding the compensatory provisions of Section 50.47(c)(1) (which the Commonwealth maintains does not allow for wholesale substitution by a utility of its own plans for those of state and local governments), we have learned from the Shoreham case that in the absence of a state or local government-sponsored plan, it is quite difficult, if not impossible, for a utility to demonstrate "reasonable assurance that adequate protective measures can and will be taken" and thereby satisfy the standard for full-power licensure. See, e.g., Notice of Proposed Rulemaking, Licensing of Nuclear Power Plants Where State and/or Local Governments Decline to Cooperate in Offsite Emergency Planning, 52 Fed. Reg. 6980, 6981 (March 6, 1987).

the utility to compensate for the lack of state and local government participation.[3/] Not suprisingly given its genesis, the plan is written entirely in terms of state and local government action. The illusory nature of the plans is apparent because the Commonwealth has expressly rejected them and will not "enter into any training, tests, drills, exercises or planning". Dukakis Affidavit ¶6.[4/]

The applicants even concede that the plans do not attempt to compensate for the lack of state participation. Applicants attempt to summarily dismiss this glaring deficiency with the mere statement that, "Applicants can, assuming non-cooperation continues, develop and implement effective measures which are reasonable and achievable to compensate for the lack of

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3/ The plan is written with the assumption that the state will compensate for the lack of local governmental participation. That assumption is completely without foundation in fact and is directly contradicted by the state's position that it will not participate. See Dukakis Affidavit ¶6. The plan does not even purport to provide for the lack of state participation.

4/ As to the applicants' argument that applicable provisions of Massachusetts law, specifically Spec. Law c. 31, "commands" the state to act in accordance with the Plan, the intent of that law, as recently stated by the Legislature, is "obviously not [to] require[ ] [civil defense] to develop and publish final plans until and unless a determination is made by the Governor that plans that are adequate to protect the public can be developed and implemented." Joint Committee on Energy Statement of Intent Committee Redraft of S. 330, S. 333, S. 334, H. 2152, H. 2153, H. 2226, H. 2732, H. 3688, H. 5019, dated April 9, 1987. The Governor has not made that determination for Seabrook. Dukakis Affidavit ¶4.

cooperation and preplanning by the Commonwealth." Views of the Applicants in Response to CLI-87-02, at 12. The Shoreham litigation tells us, however, that such compensation by a utility for a lacking local plan is not so readily achievable; such compensation in the present case where an out-of-state utility company would have to compensate for the lack of both state and local plans would be near impossible. If utility compensatory measures sufficient to meet licensing standards were indeed so easy to accomplish, applicants would have seen fit to submit such compensatory plans to NRC rather than to proceed by the more torturous and lengthy route of attempting to reduce the size of the Seabrook EPZ. At any rate, applicants' plan does not contain any such compensatory measures and cannot be said to even meet the requirement conceded by applicants, that the filing of plans be a good faith effort. See Brief of Applicants, dated January 26, 1987.

If applicants in all seriousness thought the submitted plan would be sufficient to meet the full-power licensing standards, they would have submitted this plan months ago. Obviously they did not, but merely submitted the plan on the eve of the Commission's decision in an attempt to comply with what they consider to be a mere "paper" requirement. Thus, in the absence of any compensatory measures in this so-called "utility plan" there is nothing whatever on the face of the plan to suggest that it can be implemented and that, therefore, emergency response for this site is "in the realm of the possible." CLI-87-02, at 7.

II. There Exist Insuperable Obstacles to Issuance of a Full-Power License for Seabrook Which Should Foreclose Issuance of a Low-Power Operating License for That Plant.

As the Commission noted in its decision of April 9, 1987 requiring the submission of "a state, local or utility plan prior to issuance of any operating license," its decision to allow low-power operation in Shoreham was premised on its conclusion that the emergency planning issues in that case did not appear to be "categorically unresolvable." The emergency planning issues for Seabrook are indeed categorically unresolvable and in many respects quite distinguishable from those at issue in the Shoreham litigation.

In Shoreham, at the time of the Commission's 1983 decision, the local government had only recently voted not to further participate in emergency planning; the decision by the local government not to participate appeared at that time to be less than firm or even unanimous, as evidenced by later statements of the Suffolk County Executive indicating a willingness to plan; and the Governor of New York was fully cooperating with the utility and the NRC in planning efforts, and refused only to impose a state plan on the local government to compensate for the lack of a county plan. See Long Island Lighting Company, supra, 17 NRC at 652.

By contrast, the Commonwealth of Massachusetts has taken a consistent position for over thirteen years that emergency planning is not feasible for the Seabrook site. See e.g.,

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-76-26, 3 NRC 857,922-26 (1976); DD-81-14, 14 NRC 279 (1981). The recent decision by the Governor and all of the local Massachusetts governments in the Seabrook EPZ not to participate in emergency planning is merely an affirmation of that single, unwavering position taken by the state. Indeed, the Commonwealth's and local governments' preparation and review of draft response plans for the Seabrook EPZ served to confirm and strengthen the Commonwealth's conviction that emergency planning for this site is not feasible. Furthermore, unlike in the Shoreham case, the decision not to engage in planning for the Massachusetts portion of the Seabrook EPZ is a unanimous one and involves refusals to participate not only by all of the local governments but also by the state government.

The position of the Commonwealth does indeed represent an insurmountable obstacle to full-power licensure for Seabrook. After dealing generally with these emergency planning issues surrounding Seabrook licensure for thirteen years and specifically with these issues for the six and a half years since the Commission's emergency planning regulations went into effect, it has become quite clear that these issues are simply not resolvable for this state.

Moreover, as is apparent from the Shoreham case, even where a decision not to participate in planning is less entrenched than the Commonwealth's, involves only the local government,

and is not necessarily unanimous, the emergency planning issues presented by governmental non-participation present considerable barriers to full-power licensure. Thus, almost four years after the Commission's determination that these issues in Shoreham were "not categorically unresolvable," and nearly two years after the Shoreham plant's receipt of a low-power operating license, the Shoreham plant still does not have a full-power operating license and the emergency planning problems at that plant remain unresolved. For the Seabrook plant, there is simply no basis to believe that the intractable emergency planning issues surrounding licensure of this plant can be resolved any time soon, if ever.

In short, where the Commonwealth and all local communities involved have expressly rejected the applicants' submission and have stated that they will not train, test, drill, exercise or plan further in connection with that submission, the applicants have fallen far short of demonstrating that emergency planning is in the "realm of the possible" for the Commonwealth portion of the Seabrook EPZ.[5/] The utility itself has recognized the

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5/ The Commonwealth today received the "Views of the Applicants in Response to CLI-87-02" ["Applicants Brief"]. The Applicants' Brief contains several misstatements of fact. The Attorney General requests from the Commission an opportunity to respond more fully. By way of brief response, neither the Commonwealth nor any of the Massachusetts local governments participated in any manner in the NRC observed emergency preparedness exercise for the Seabrook EPZ held on February 26, 1986; nor have they participated in any other exercise or drills of the Seabrook plan. The Applicants' assertions with respect to drills or exercises for other reactors should not even be considered because they are made without any factual

(footnote continued)

insuperable obstacle to licensure presented by that stance of the Massachusetts state and local governments and tried to circumvent this problem by petitioning the NRC to reduce the Seabrook EPZ to one mile so as to exclude Massachusetts.[6/] On April 22, 1987, the Licensing Board denied the applicants' petition and therefore under the current regulations the only possibility of full-power licensure is the filing of a utility plan pursuant to 50.47(c) to compensate for the lack of state and local government participation. In the absence of such a filing and without the participation of the state and local governments there can be absolutely no demonstration that emergency planning for this site is even in "the realm of the possible."

(footnote continued)

support in the record. Moreover, emergency response drills or exercises for other reactors within the state, which are not located in proximity to the Seabrook plant, do not demonstrate a capability or preparedness to respond to emergencies at the Seabrook site, and certainly do not represent any ability at all to compensate for the lack of participation by the Massachusetts local governments. The Commonwealth has argued consistently in this litigation that the Seabrook siting is particularly poor and presents unusually difficult evacuation issues not necessarily applicable elsewhere. State and local government officials and employees have not been trained to implement emergency response plans for Seabrook, and as to emergency response equipment, dosimeters that have been distributed are no longer functional. In addition, two of the six local Massachusetts communities have determined that siren permits issued to the utility were issued without authority and have ordered their removal within thirty days.

6/ Indeed, the NRC in its recent proposal to amend the emergency planning regulations has acknowledged the great difficulty, if not near impossibility, of satisfying the full-power licensing standards in the absence of state and local government participation. See Notice of Proposed Rulemaking, supra, 52 Fed. Reg. at 6981.

CONCLUSION

For all the foregoing reasons, the Commission should deny applicants' request for a vacation of stay and should continue the stay in effect until such time as the applicants can meet the requirements of 10 C.F.R. 50.33(g).

Respectfully submitted,

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