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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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In the Matter of	)	
	)	Docket Nos. 50-443 OL-1
PUBLIC SERVICE COMPANY OF	)	50-444 OL-1
NEW HAMPSHIRE, <u>et al.</u>	)	
	)	Onsite Emergency Planning
(Seabrook Station, Units 1 and 2)	)	and Safety Issues

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NRC STAFF'S RESPONSE TO  
APPLICANTS' "SUGGESTION OF MOOTNESS  
AND REQUEST FOR VACATION OF STAY"

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May 1, 1987

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INTRODUCTION

On April 9, 1987, the Commission issued CLI-87-02, in which it continued its stay of the issuance of a low power license for Seabrook Unit 1 and set aside, as a matter of policy, the Appeal Board's decision in ALAB-853, which held that the Applicants need not submit offsite emergency plans for the Commonwealth of Massachusetts under 10 C.F.R. § 50.33(g), prior to issuance of a low power license for the facility. <sup>1/</sup> In so ruling, however, the Commission noted that on April 7, 1987, the Applicants had filed a "Suggestion of Mootness and Request for Vacation of Stay" ("Suggestion of Mootness"), in which they indicated they would soon submit a "utility plan" for portions of the EPZ within Massachusetts

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<sup>1/</sup> Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-02, 25 NRC \_\_\_\_\_ (slip op., April 9, 1987) setting aside ALAB-853, 24 NRC \_\_\_\_\_ (slip op., Nov. 20, 1986).

(Id., at 2 ¶ 4); according to the Applicants, this filing mooted the Commission's review of ALAB-853. The Commission determined it would treat the Suggestion of Mootness as a request to vacate CLI-87-02 on grounds of mootness, and it provided an opportunity for the parties to present their views "on the question of mootness and any other matters relevant to the maintenance of the stay." CLI-87-02, slip op. at 2 n.1. The Staff hereby responds to the Applicants' Suggestion of Mootness, as supplemented by Applicants' "response" to CLI-87-02, filed on April 27, 1987. <sup>2/</sup>

#### BACKGROUND

At the time the Commission began its consideration of ALAB-853, no emergency plan had yet been submitted for Massachusetts portions of the EPZ. See CLI-87-02, slip op. at 1-2. The Commission distinguished this circumstance from those present in the Shoreham proceeding where it had permitted low power operation to commence despite uncertainties over full power operation, <sup>3/</sup> because there, the uncertainties "were, by their nature, litigation and political disputes," the outcome of which "is particularly speculative." Id., at 5, citing Cuomo v. NRC, 772 F.2d at 976. As the Commission further noted, "the emergency planning

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<sup>2/</sup> On April 27, 1987, the Applicants filed a document entitled "Views of the Applicants in Response to CLI-87-02" ("Applicants' Response"), in which they supplement their Suggestion of Mootness based upon a letter submitted by PSNH to the Commission on April 24, 1987.

<sup>3/</sup> See Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587 (1985), stay pending appeal denied, Cuomo v. NRC, 772 F.2d 972 (D.C. Cir. 1986), appeal dismissed as moot, No. 85-1042 (slip op., March 12, 1987); Id., CLI-85-1, 21 NRC 275 (1985); Id., CLI-84-9, 19 NRC 1323 (1984); Id., CLI-83-17, 17 NRC 1032 (1983).

uncertainty at Shoreham could have changed favorably or adversely at any time as viewpoints changed or as accommodations were reached." Id., at 6. The Commission noted that a different situation was presented here, where uncertainties over full power operation stemmed from the fact that "some of the materials that normally are essential to support a full power license under our regulations were missing." Id.

In light of these facts, in CLI-87-02 the Commission decided, "as a matter of regulatory policy," to require the submission of a governmental or utility plan for Massachusetts portions of the EPZ prior to issuance of a low power license (Id.):

In the special circumstances of this case our judgment is 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 testing.

The Commission recited its observation in Shoreham, that the emergency planning issues there did not appear to be "categorically unresolvable", and indicated that a license to load fuel and conduct low power testing could be withheld "if it were established, beyond significant doubt, that there were truly insuperable obstacles to issuance of a license for operation at any substantial power level" (Id.). The Commission concluded that "sound policy requires that we retain this option at least for Seabrook" (Id.). Finally, the Commission observed (Id., at 7):

The filing of an offsite plan makes possible at least a summary review, of the type we performed in Shoreham, to determine whether adequate emergency planning is at least in the realm of the possible. Thus applicants must do at least this much before there can be any license issued.

The Commission's decision in CLI-87-02 effectively completes its consideration of ALAB-853, except for the limited question of whether the

emergency plan filed by the Applicants on April 8, 1987, warrants a vacation of CLI-87-02. The Staff's views in this regard are set forth below.

#### DISCUSSION

There is no question that the Applicants have now submitted an extensive set of documents containing emergency plans and procedures for Massachusetts portions of the Seabrook plume exposure pathway emergency planning zone (EPZ) (hereinafter referred to as the "Seabrook Station RERP").<sup>4/</sup> The Applicants state that this plan was developed by Massachusetts State and local governments "under the technical direction and supervision" of the Massachusetts Civil Defense Agency, and that the Federal Emergency Management Agency (FEMA) provided informal assistance to the Commonwealth in the development of the plan (Applicants' Response, at 6-7).

In addition, the Applicants assert that other facts indicate there is some potential the Seabrook Station RERP could be implemented, based upon (a) the Commonwealth's ongoing participation in exercises of limited portions of the plan for other nuclear facilities located within or near the

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<sup>4/</sup> The Applicants initially characterized their submittal as a "utility plan". See Suggestion of Mootness, at 2 ¶ 4; and letter from George S. Thomas (Vice President, PSNH) to the NRC, dated April 8, 1987. In their more recent filings, however, the Applicants avoid any characterization of their submittal, but refer to it simply by name -- the "Seabrook Station Radiological Emergency Preparedness Plan for the Commonwealth of Massachusetts," or "The Plan". See Applicants' Response, at 3; and letter from George S. Thomas to the NRC, dated April 24, 1987, at 1.

State (Id., at 7); <sup>5/</sup> (b) the fact that "several hundred members of the area and local emergency response organizations were trained to implement" the plan (Id.); (c) the fact that some equipment either was distributed or is available for distribution to supplement local response needs (see Id.); (d) the assertion that in the event of a radiological emergency, the Applicants' onsite emergency response organization would be activated and would notify the Massachusetts State Police (see Id., at 8-9); and (e) the assertion that some of the offsite response organizations have demonstrated some degree of ability to respond to an emergency (see Id., at 9-10).

The Staff does not dispute the Applicants' statements concerning the nature and origin of the Seabrook Station RERP. As set forth in the attached "Affidavit of Donald J. Perrotti" ("Perrotti Affidavit"), the Seabrook Station RERP consists of 25 volumes of plans and operating procedures for the Commonwealth of Massachusetts, six local communities located within Massachusetts portions of the Seabrook EPZ, four school districts, and two host communities (Id., at 1-2). On the basis of a preliminary examination of the Seabrook Station RERP, conducted in order to ascertain the nature of that document, the Seabrook Station RERP appears to be a copy of the draft state and local plans and procedures which had previously been prepared by the Commonwealth of

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<sup>5/</sup> These are the Massachusetts State Plan and the Nuclear Incident Advisory Team (NIAT) Handbook, which together constitute two of the 25 volumes submitted by the Applicants here. See Applicants' Response, at 5-6 and 7.

Massachusetts (Id.). <sup>6/</sup> The Staff is aware that in the period of 1983-1986, FEMA provided technical assistance to the Commonwealth in developing offsite emergency plans for Seabrook, pursuant to which FEMA conducted technical reviews and provided comments on draft state and local plans. However, a more detailed analysis of the Seabrook Station RERP would be necessary to ascertain whether this document is identical to the draft plan that was reviewed by FEMA and, if so, whether it incorporates some or all of FEMA's comments (Id., at 2-3).

The Staff has no independent knowledge as to the accuracy of the Applicants' other statements, recited above, concerning whether offsite response organizations have demonstrated a capability to implement the Seabrook Station RERP. However, the Staff is aware of no reason to dispute the Applicants' assertions in this regard.

Notwithstanding the above, a fundamental question remains unresolved by the Applicants' filing. When the Commission decided to take review of ALAB-853, it posed a single question for consideration:

[W]hether as a matter of law or policy a utility applicant should be required to submit a radiological emergency plan (either a governmental plan or a utility plan) for the entire emergency planning zone (EPZ) for the facility before any operating license may be issued.

"Order", dated January 9, 1987, at 1. In CLI-87-02, the Commission decided, as a matter of policy, to require the submission of "a State,

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<sup>6/</sup> Insofar as the Staff has been able to ascertain, the Applicants made only one change to the plan prepared by the Commonwealth, in that they attached a title page (stamped "For Information Only") which bears the title, "Seabrook Station Radiological Emergency Response Plan For The Commonwealth of Massachusetts" (Perrotti Affidavit, at 2).

local, or utility plan" prior to issuance of a low power license for Seabrook. CLI-87-02, slip op. at 6. Accordingly, it must be determined whether the Seabrook Station RERP constitutes a "State, local, or utility" plan under 10 C.F.R. § 50.33(g), sufficient to permit the Commission to conduct "a summary review of the type [it] performed in Shoreham, to determine whether adequate emergency planning is at least in the realm of the possible." CLI-87-02, at 7. <sup>7/</sup>

While the Seabrook Station RERP is a draft plan prepared by the Commonwealth of Massachusetts, and was intended to be implemented by state and local emergency response organizations (see Perrotti Affidavit, at 2), the Commonwealth has indicated that it now rejects that draft plan

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<sup>7/</sup> The Intervenor's assert that under 10 C.F.R. § 50.33(g), a "State" or "local" plan must be submitted by the Applicants, and that the submission of a "utility" plan will not satisfy this requirement. See, e.g., "Brief of Seacoast Anti-Pollution League in Response to the Commission's Order of April 9 (CLI-87-02)," dated April 24, 1987, at 5; "Town of Amesbury's Response to Applicants' Suggestion of Mootness and Request for Vacation of Stay," dated April 10, 1987, at 2-3. However, these assertions must fall, in light of the Commission's decision that 10 C.F.R. §§ 50.47(c)(1) and 50.47(d) permit an operating license to be issued where a utility plan has been found to satisfy the applicable regulatory standards. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983), aff'g LBP-83-22, 17 NRC 608 (1983); Id., CLI-83-17, 17 NRC 1032, 1034 (1983). Accord, Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-818, 22 NRC 651, 671 (1985), rev'd on other grounds, CLI-86-13, 24 NRC 22 (1986) (the emergency planning regulations "rejected any requirement that emergency plans sponsored by the state or local government be a condition of licensing").

and that neither it nor the local governments intend to implement it. <sup>8/</sup>  
An issue of first impression is thus presented: Whether a draft plan prepared and then rejected by a governmental entity, which the government has stated it will not implement, can be said to constitute a "State" or "local" plan within the meaning of 10 C.F.R. § 50.33(g).

At the same time, because the Seabrook Station RERP is not intended to be implemented by the Applicants or any non-governmental entity (Perrotti Affidavit, at 3), it does not appear to be a "utility plan" which Congress and the Commission contemplated might be filed where adequate State or local plans are unavailable. The concept of a "utility plan" emerged with the adoption of Section 109 of the 1980 NRC Authorization Act. <sup>9/</sup> That provision required that an operating license not be issued unless "there exists a State or local emergency preparedness plan which . . . provides for responding to accidents at the facility" and which complies with NRC guidelines for such plans. Nevertheless, Section 109 permitted issuance of an operating license in the absence of such a plan, if "there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of

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<sup>8/</sup> See "Attorney General James M. Shannon's Brief in Response to Applicants' Suggestion of Mootness and Request for Vacation of Stay" ("Mass AG's Brief"), refiled April 29, 1987, at 2-3, and "Affidavit of Michael S. Dukakis", attached thereto; see also, "Attorney General James M. Shannon's Response to Applicants' Suggestion of Mootness and Request for Vacation of Stay," dated April 9, 1987, at 2.

<sup>9/</sup> 1980 NRC Authorization Act, § 109, Pub. L. No. 96-295, 94 Stat. 780, (1980).

the facility concerned." <sup>10/</sup> In providing for the filing of a utility plan, Congress clearly contemplated that a utility plan would provide compensatory measures in the event a State or local government was unwilling or unable to develop an emergency plan of its own. The Commission's subsequent adoption of 10 C.F.R. § 50.47(c)(1), which permits an applicant to show the existence of interim "compensatory" measures, was intended to implement and is consistent with Section 109 of the 1980 NRC Authorization Act. <sup>11/</sup>

The Applicants argue that the Seabrook Station RERP demonstrates that "adequate" offsite emergency planning for Seabrook is within "the realm of the possible," thus satisfying the standard established by the Commission in CLI-87-02 (Applicants' Response, at 7-8). However, the Commission's statement should be read in conjunction with 10 C.F.R. § 50.47(a) which requires, prior to full power licensing, <sup>12/</sup> a finding

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<sup>10/</sup> The requirements of Section 109 of the 1980 NRC Authorization Act were retained in the 1982-83 NRC Authorization Act, Pub. L. No. 97-415, § 5, 96 Stat. 2067, 2069 (1983), and the 1984-85 NRC Authorization Act, Pub. L. No. 98-553, § 108, 98 Stat. 2825, 2827 (1984). While no NRC authorization act is currently in place, 10 C.F.R. § 50.47(c)(1) permits a utility plan to be considered. See discussion *infra*, at 9.

<sup>11/</sup> See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station), LBP-83-22, 17 NRC 608, 631-33 (1983), *aff'd*, CLI-83-13, 17 NRC 741 (1983) (quoting remarks by NRC General Counsel Leonard Bickwit and concluding that "the Commission's adoption of its final emergency planning rules was intended to and did fully implement the licensing flexibility provided by Section 109 of the NRC fiscal year 1980 Authorization Act."); *Id.*, ALAB-818, 22 NRC 651, 671 (1985), *rev'd on other grounds*, CLI-86-13, 24 NRC 22 (1986) (the emergency planning regulations are consistent with the 1980 NRC Authorization Act, *citing* "Statement of Consideration", 45 Fed. Reg. 55,402 (1980)).

<sup>12/</sup> See 10 C.F.R. § 50.47(d).

that "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." <sup>13/</sup> In sum, the Commission's statement in CLI-87-02 appears to require a demonstration, not just that some plan exists, but that there is at least some possibility that the plan will be implemented. <sup>14/</sup> Accordingly, the Applicants' argument that the mere submission of a "plan" demonstrates that adequate emergency planning is within "the realm of the possible", is overly simplistic. <sup>15/</sup>

In the present circumstances, the Applicants' filing of a "plan" without the commitment of the State emergency response organization that is identified as having the responsibility to implement the plan, lacks a

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<sup>13/</sup> As the Appeal Board has observed, while an applicant may submit a utility plan, "the mere existence of a utility plan is not a sufficient basis for the issuance of a [full power] license. The Commission must be able to conclude that the utility plan provides reasonable assurance that the public health and safety will be protected. Long Island Lighting Co. (Shoreham Nuclear Power Plant), ALAB-818, 22 NRC 651, 668 (1985), rev'd on other grounds, CLI-86-13, 24 NRC 22 (1986).

<sup>14/</sup> The Applicants assert that if the Commonwealth's "noncooperation continues", they "can . . . develop and implement effective measures which are reasonable and achievable to compensate for the lack of cooperation and preplanning by the Commonwealth." Applicants' Response, at 12. The Applicants fail to assert, however, that they will develop and implement such compensatory measures; and their unsupported assertion that they "can" do so fails to warrant a vacation of CLI-87-02, until such time as a compensatory plan is, in fact, submitted.

<sup>15/</sup> It should be noted that while the Applicants have asked to meet with the Staff to discuss the Seabrook Station RERP (letter of April 24, 1987, at 1), they have not requested a FEMA review of the plan, and have not suggested that litigation should commence on the merits of the plan in conjunction with their realism argument. In this regard, while the Applicants submitted copies of the plan to FEMA, that agency has returned the plans to the NRC without undertaking a review. See Perrotti Affidavit at 2, and Attachment A thereto.

fundamental element of an acceptable emergency plan and would fail to meet the requirements for full power licensing. Accordingly, if the Commission intended its decision in CLI-87-02 to require, prior to issuance of a low power license, the filing of a plan for Massachusetts portions of the EPZ which has some potential to meet full power licensing requirements, no such plan has yet been filed.

Notwithstanding the conclusions reached above, the Commission could find that "adequate emergency planning is at least in the realm of the possible," if it accepts the Applicants' assertion that, "in the event of an incident at Seabrook the appropriate officials of the Commonwealth would do their duty and would act in accordance with The Plan" (Applicants' Response at 10). As set forth above, the Seabrook Station RERP was developed by the Commonwealth of Massachusetts over an extended period with technical assistance provided by FEMA <sup>16/</sup> and, according to the Applicants, portions of that plan are currently being utilized by the Commonwealth in conjunction with other nuclear power plants within or near the state. In addition, the Applicants recite various provisions of Massachusetts State law which require the State civil defense director to plan for nuclear power plant accidents, and which endow the Governor

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<sup>16/</sup> The Staff is without knowledge, and expresses no view, as to whether the Seabrook Station RERP has been found to be acceptable by FEMA.

with the authority to direct an emergency response (Id., at 10-12). <sup>17/</sup>

Relying upon these considerations, the Applicants assert:

In short, it is not only realistic for the Commission to assume that if Seabrook is licensed to operate at 5% power that adequate provision will be made for emergency planning by State Officials, but also Massachusetts law commands them to do so. In addition, these same laws fully support the rationale that in the event of a real emergency at Seabrook, appropriate officials will respond and will do so pursuant to The Plan which the Applicants have filed and which the Commonwealth itself authored.

Id., at 12, citing Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-86-13, 24 NRC 22 (1986).

Acceptance of the Applicants' "realism" argument here -- at least for purposes of low power licensing -- would be consistent with the Commission's decision in the Shoreham proceeding. There, the Commission expressed its belief that it could "reasonably assume some 'best effort' State and County response in the event of an accident," and that this "best effort" would utilize the applicant's plan, as "clearly superior to no plan at all." Long Island Lighting Co. (Shoreham Nuclear Power Plant), CLI-86-13, 24 NRC 22, 31 (1986). <sup>18/</sup> Similar

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<sup>17/</sup> In this regard, the Commonwealth asserts that these statutory provisions were not intended to require the civil defense agency "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." Mass AG's Brief, at 5 n.4.

<sup>18/</sup> It should be noted that the "uncertainties" as to whether Seabrook will receive a full power license are similar to the uncertainties present in Shoreham, having both resulted from political decisions of the respective governmental officials not to participate in emergency

considerations suggest that in the event of an emergency at Seabrook, the Commonwealth of Massachusetts might utilize the Seabrook Station RERP as "clearly superior" to no plans at all -- particularly since the Commonwealth developed the plan and may now be using portions of it in connection with other nuclear power plants located within or near the State. <sup>19/</sup>

Thus, if the Commission did not intend in CLI-87-02 to require the filing of an acceptable governmental or utility plan prior to issuance of a low power license, but only wanted some level of assurance that adequate emergency planning is possible for Massachusetts portions of the EPZ, it may find that such assurance is provided by (a) the Applicants' filing of the Seabrook Station RERP, (b) the governments' efforts in developing that plan, and (c) acceptance of Applicants' assertion that, in the event

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

planning. True, in Shoreham, LILCO had submitted a utility plan to be implemented by a non-governmental organization that LILCO had created, while no such plan has been submitted here. However, implementation of that plan remained uncertain as a result of two judicial decisions adverse to LILCO whereby a New York State court had held that LILCO could not implement its plan, and a federal District Court had held that Suffolk County could not be compelled to participate in emergency planning. See Cuomo v. Long Island Lighting Co., No. 84-4615, (N.Y. Sup. Ct., Feb. 20, 1985), aff'd, 511 N.Y.S. 2d 867 (App. Div., Feb. 9, 1987); Citizens For An Orderly Energy Policy, Inc. v. County of Suffolk, 604 F.2d 1084 (E.D.N.Y. 1985), aff'd per curiam, \_\_\_ F.2d \_\_\_ (2nd Cir., March 9, 1987). The Commission determined to permit low power operation for Shoreham even though it remained uncertain whether LILCO's plan could be implemented.

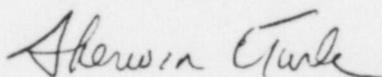
<sup>19/</sup> This approach, however, requires that the Applicants request a FEMA review of the plan and that litigation be commenced on the plan and the merits of the Applicants' realism argument.

of an emergency at Seabrook, the governments would respond by utilizing the plan which they, themselves, developed.

CONCLUSION

For the reasons set forth above, if the Commission intended in CLI-87-02 to require the filing of an acceptable "State, local, or utility plan" prior to issuance of a low power license, no such plan has yet been submitted. However, if the Commission in fact was seeking assurance -- solely for purposes of low power licensing -- that adequate emergency planning for Massachusetts portions of the EPZ is possible, such assurance has been provided by the Applicants' filing of the Seabrook Station RERP which demonstrates the feasibility of developing an offsite plan upon which the Commonwealth of Massachusetts could undertake a protective response.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 1st day of May, 1987