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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 OL-1 50-444 OL-1
	)	On-site Emergency Planning
(Seabrook Station, Units 1 and 2)	)	and Safety Issues

NRC STAFF BRIEF IN OPPOSITION TO THE APPEAL OF THE ATTORNEY GENERAL OF MASSACHUSETTS FROM THE LICENSING BOARD'S ORDER OF OCTOBER 7, 1986

Robert G. Perlis
Counsel for NRC Staff

October 24, 1986

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On October 7, 1986, the Licensing Board issued an Order authorizing the issuance of an operating license to load fuel and conduct precriticality testing at the Seabrook facility. On October 16th, the Attorney General of Massachusetts ("Massachusetts") filed an application for a stay of, and a brief in support of an appeal from, the Licensing Board's Order. On October 17th, the Appeal Board summarily denied the application for a stay, and directed that the Staff and Applicants file briefs in response to Massachusetts' appeal by October 24th if Massachusetts in fact wished to pursue its appeal in the absence of a stay. Massachusetts subsequently orally indicated that it did wish to pursue its appeal. Pursuant to the Appeal Board's direction of October 17th, the Staff submits this brief in response to the appeal and, for the reasons presented below, submits that the appeal should be denied.

I. INTRODUCTION

On August 22, 1986, the Applicants in the Seabrook proceeding filed a motion before the Licensing Board pursuant to 10 CFR § 50.57(c) for authorization of an operating license that would allow the Applicants to load fuel and conduct precriticality testing at Seabrook in advance of completion of the litigation concerning non-offsite emergency planning issues. 1/ In their motion, Applicants relied upon maintaining a boron concentration over 2000 parts per million (PPM) in the reactor coolant to assure safe operation under the license. The Seacoast Anti-Pollution League filed a response opposing the motion on August 29th; Massachusetts filed its opposition on September 3rd. The Staff filed its response on September 8th, and filed a supplemental affidavit on September 18th; the Staff supported Applicants' motion. On October 7th, the Licensing Board issued LBP-86-34 granting the requested authorization.

Massachusetts filed its stay request and appeal on October 16th. 2/ In its appeal, Massachusetts does not raise any challenge to the safe operation of the Seabrook facility under the terms of the license, nor

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1/ The issues (other than offsite emergency planning ones) remaining before the Licensing Board deal with the time duration for the environmental qualification of electrical equipment, the acceptability of deferring various additions to the safety parameter display system until after the first refueling outage, and the acceptability of Applicants' emergency classification scheme. The record before the Licensing Board was closed with respect to these items on October 3, 1986.

2/ As noted earlier, the stay request was denied on October 17th. The license to load fuel and conduct precriticality testing was issued on that date.

does Massachusetts allege any potential environmental harm. Instead, Massachusetts' sole argument centers around a question of interpretation of two Commission regulations.

The license was issued before resolution of offsite emergency planning issues pursuant to 10 CFR §50.47(d), which states in pertinent part:

> 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 issuance of an operating license authorizing only fuel loading and/or low power operations (up to 5% of the rated power)....

While Massachusetts concedes that this Section precludes a challenge to the issued license based upon any allegations of inadequacy in the state of offsite emergency planning for Seabrook, that party contends that offsite plans must nonetheless be submitted to the NRC before any operating license, including one limited to less than 5% of rated power, may be issued. Appeal at 8. The basis for this assertion is 10 CFR §50.33(g). Section 50.33 delineates the general contents of applications for licenses; Section 50.33(g) reads in pertinent part:

> If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the the United States that are wholly or partially within the plume exposure pathway [EPZ], as well as the plans of state governments wholly or partially within the ingestion pathway EPZ.... [Footnotes omitted]

It is uncontroverted that offsite emergency plans for that portion of the Seabrook EPZ located in the Commonwealth of Massachusetts have not yet been submitted to the NRC. Under these circumstances, according to Massachusetts, no license may be issued. For the reasons presented below, the Staff disagrees.

II. ARGUMENT

In addressing Massachusetts' appeal, it is well to remember what is not involved. Massachusetts does not (and could not) contend that the failure to submit plans prior to issuance of a fuel load and precriticality testing license raises any safety questions. Section 50.47(d) specifically states that no review or approval of offsite plans is necessary before power operation above 5% of rated power. The basis for Section 50.47(d) was made quite plain by the Commission when the regulation was adopted: at power levels below 5% of rated power, there is simply no need for any offsite emergency plans in order to protect the public health and safety. See 47 Fed. Reg. 30232 et seq. (July 13, 1982) (publication of final rule); 46 Fed. Reg. 61132 et seq. (December 15, 1981) (notice of proposed rulemaking).

Moreover, the Commission made clear in the Shoreham proceeding that a low power license could be issued without regard to speculation as to whether offsite emergency planning problems might serve as a bar to issuance of a full power license. See Long Island Lighting Company (Shoreham Plant, Unit 1), CLI-84-9, 19 NRC 1323 (1984); CLI-83-17, 17 NRC 1032 (1983). Under the circumstances, it can scarcely be argued that the Commission must engage in speculation as to whether any plans (either by the State and local governments or by the utility) will ever be submitted.

The only question raised by Massachusetts is one of regulatory interpretation concerning the interplay of Sections 50.33(g) and 50.47(d). Essentially, Massachusetts argues that although the Commission does not require approved offsite emergency plans for operation below 5% of rated

power, the Commission nonetheless intended that plans be submitted before any license could issue. The Staff has reviewed the legislative history of both regulations, and found nothing to support Massachusetts' position.

Section 50.33(g) was adopted by the Commission as part of the changes to the emergency planning regulations occasioned by the accident at Three Mile Island. These changes included drastic revisions to the existing Appendix E to 10 CFR Part 50, as well as the birth of Section 50.47. 3/ The legislative history of these radical changes to the emergency planning regulations indicates that the final rules were based on the Commission's perception that more involved offsite emergency planning was necessary to protect the public health and safety in the event of an accident. Thus the Commission increased the scope of the plans, and called for FEMA review of the adequacy of the plans. See 45 Fed. Reg. 55402 et seq. (August 19, 1980) (Final Rule); see also 44 Fed. Reg. 75167 et seq. (December 19, 1979) (Proposed Rule). Although the discussions accompanying the proposed and final rule were lengthy, these discussions centered upon the substantive changes under consideration. No direct mention was made in the discussions of the addition of Section 50.33(g). Under the circumstances, it seems logical to conclude that Section 50.33(g) was promulgated to assure that, even though offsite plans were the focus of these important new safety regulations, Applicants were responsible for providing these plans to the NRC.

3/ Section 50.47 and Appendix E to Part 50 contain the Commission's prescriptive requirements for emergency planning for nuclear power plants.

The Commission adopted Section 50.47(d) less than two years after promulgating the sweeping changes to the emergency planning regulations. As noted above, the basis for the adoption of Section 50.47(d) was the Commission's factual determination that offsite emergency planning was simply not needed to protect the public health and safety during low power operations.

Massachusetts takes the position that "the requirement of plan submission is quite distinct from the requirement that findings be made as to the adequacy of such plans." Appeal at 8. As shown above, the historical development of the two requirements was not distinct at all; Section 50.33(g) was adopted at the same time as the Commission's revised substantive emergency planning regulations. Nor is there any reason to assume that the regulations were intended to operate separately. There is nothing in either the legislative history or Commission precedent which supports a conclusion that the Commission intended plans to be submitted when (as during low-power operation) they are not needed to protect the public health and safety, or indeed that the Commission intended Section 50.33(g) to accomplish any purpose other than assuring that the requirements of Section 50.47 and Appendix E were met.

Massachusetts seems to assume that the Commission mandates that compliance with all regulations be demonstrated before any operation can be authorized. Contrary to this assumption, the Commission in the Shoreham proceeding specifically rejected the proposition 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...." CLI-84-21, 20 NRC 1437, 1440 (1984). In the Shoreham

decision, the Commission determined that GDC 17 [4/] was not applicable to fuel loading and precritical and cold critical testing because under no circumstances at such power levels would AC power be needed to protect the public health and safety. 20 NRC at 1439. Applying that logic to the facts of this case, Section 50.33(g) would be similarly inapplicable to fuel loading and precriticality testing activities since it is uncontroverted that offsite plans are not needed to protect the public health and safety before operation above 5% of rated power.

Other than pointing to the language of Section 50.33(g), the only basis Massachusetts provides for its position is a decision by the Licensing Board in the Shoreham proceeding. See LBP-83-22, 17 NRC 608 (1983). But that decision does not support the proposition that offsite emergency plans must be submitted before a low-power license may issue. In LBP-83-22, the Licensing Board determined that a license applicant was required to submit offsite plans prepared by governments in order to receive a full-power operating license, but further determined that the failure to submit such plans could be mitigated pursuant to 10 CFR Section 50.47(c)(1). [5/] 17 NRC at 620-627. Applying that rationale to the issuance of a license to load fuel and conduct precriticality testing, no mitigation would be necessary, because for operation at power levels

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4/ GDC 17 establishes requirements for the onsite and offsite electric power supplies at nuclear power plants.

5/ Section 50.47(c)(1) provides that where an applicant fails to meet the substantive emergency planning requirements of Section 50.47(b), the applicant will be given an opportunity to demonstrate that the deficiencies are not significant for the plant in question, that adequate interim compensating measures have been taken, or that other compelling reasons exist to permit plant operation.

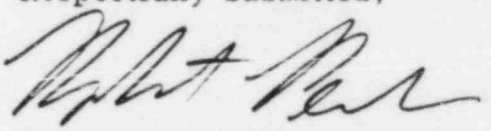
below 5% of rated power, no offsite emergency planning is necessary. See 10 CFR §50.47(d).

Massachusetts advances in its appeal the proposition that, despite the fact that offsite emergency planning has no safety significance for operation at power levels of below 5% of rated power, the submittal of such plans is nonetheless required before a license to load fuel and conduct precriticality testing can be issued. There is no indication that such a result was contemplated when Sections 50.33(g) and 50.47(d) were promulgated, and logic and Commission precedents seem to strongly suggest the contrary. The appeal should therefore be denied.

III. CONCLUSION

For the reasons presented above, the Staff submits that Massachusetts' appeal from the Licensing Board's Order authorizing issuance of a license to load fuel and conduct precriticality testing at Seabrook should be denied.

Respectfully submitted,



Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of October, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO THE APPEAL OF THE ATTORNEY GENERAL OF MASSACHUSETTS FROM THE LICENSING BOARD'S ORDER OF OCTOBER 7, 1986" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of October, 1986.

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

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

Beverly Hollingworth
209 Winnacunnet Road
Hampton, NH 03842

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

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

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

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

Stephen E. Merrill
Attorney General
George Dana Bisbee
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301-6397

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

Calvin A. Canney, City Manager
City Hall
126 Daniel Street
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

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

H.J. Flynn, Esq.
Assistant General Counsel
Federal Emergency Management Agency
500 C Street, S.W.
Washington, D.C. 20472

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

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

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

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

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

Diane Curran, Esq.
Harmon & Weiss
2001 S Street, N.W.
Suite 430
Washington, D.C. 20009

Philip Ahrens, 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

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

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

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

Maynard L. Young, Chairman
Board of Selectmen
10 Central Road
Rye, NH 03870

Michael Santosuosso, Chairman
Board of Selectmen
South Hampton, NH 03827

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

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

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

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

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

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

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

Robert G. Perlis
Counsel for NRC Staff