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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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USNRC

In the Matter of

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, et al

(Seabrook Station, Units 1 and 2)

Docket Nos. 50-443 OL-1

50-444 OL-1

On-site Emergency Planning  
and Safety Issues

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SEACOAST ANTI-POLLUTION LEAGUE'S  
BRIEF IN SUPPORT OF APPEAL OF LICENSING BOARD ORDER  
AUTHORIZING ISSUANCE OF OPERATING LICENSE  
TO CONDUCT FUEL LOAD AND PRECRITICALITY TESTING

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October 29, 1986

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I. STATEMENT OF PROCEEDINGS

On August 22, 1986, Applicants in this proceeding filed a Motion, pursuant to 10 CFR §50.57(c), for authorization to issue a license to conduct fuel load and precriticality testing. The Seacoast Anti-Pollution League filed a response opposing the Motion on August 29, 1986. On September 3, 1986, Attorney General Francis X. Bellotti, representing the Commonwealth of Massachusetts, filed his Objection to the Applicant's Motion. The Nuclear Regulatory Commission Staff filed its response on September 8, and filed a Supplemental Affidavit on September 18; the Staff supported the Applicant's Motion. On October 7, 1986, the Licensing Board granted the Applicant's Motion.

See LPB-86-34. Massachusetts filed its Stay Request and Appeal on October 16, and the Seacoast Anti-Pollution League filed its Notice of Joinder in Appeal on October 21, 1986. On October 24, 1986, the Appeal Board held a conference call with all parties, pursuant to which this brief is filed this date.

## II. ARGUMENT

A. THE LICENSING BOARD ERRED IN AUTHORIZING ISSUANCE OF AN OPERATING LICENSE TO CONDUCT FUEL LOAD AND PRECRITICALITY TESTING IN THIS CASE SINCE APPLICANTS HAVE FAILED TO COMPLY WITH THE APPLICATION REQUIREMENTS OF 10 CFR §50.33(g).

1. 10 CFR §50.33(g) requires the submission of state and local governmental emergency response plans prior to the issuance of an operating license.

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 on-site emergency planning issues. 10 CFR §50.57(c) is entitled Issuance of Operating License. As a threshold issue, it is important to note that clearly what the Applicants are seeking is an operating license. It has become necessary to point out this rather obvious fact because in the proceedings below, and in the NRC Staff Brief, the argument is being made that a no power operating license is somehow different from all other operating licenses and therefore the provisions of 50.33(g) (requiring submission of state and local emergency response plans before issuance of an operating license) and 50.47(d) (requiring findings and determinations with regard to the adequacy of on-site emergency plans), somehow do not apply when an Applicant is seeking a no power license as opposed to a low power or full power license.

No evidence has been adduced by any of the parties involved that supports this proposition. If such a distinction had been intended, the regulations would have by their terms made such a distinction, or the regulations would have characterized a license to operate at no power as something other than an operating license. Consequently, if no power operating licenses were intended to be treated differently than low power or full power operating licenses, then the regulations would have explicitly done so.

10 CFR §50.33(g) of the Commission's regulations requires as a part of the application process for an operating license for a nuclear power reactor that

"...the Applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially 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."

The requirements of §50.33(g) are mandatory, not discretionary. The regulation does not state that the Applicant may submit radiological emergency response plans, but instead states that the Applicant "shall submit radiological emergency response plans." Absent an indication of intent to the contrary, it is a universally accepted rule of statutory interpretation that the word "shall" acts as a command. Therefore, a literal reading of §50.33(g) indicates that a Radiological Emergency Response Plan must be submitted before an application for an operating license is deemed complete. In addition, the Shoreham Licensing Board has stated:

[A]n interpretation [requiring the filing of local government off-site emergency plans only as such plans exist] would be contrary to the plain meaning of Section 50.33(g) and in conflict with the overall regulatory scheme of 10 CFR Part 50, which generally sets forth mandatory requirements for the issuance of a construction permit or an operating license. Indeed, Section 50.33 is entitled 'contents of applications; general information;' and begins with the general preamble 'Each application shall state:.'

Long Island Lighting Company, (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 620 (1983).

Finally, the Commission in its Statement of Consideration for the final rule made clear the mandatory nature of the §50.33(g) requirement of plan submission when it stated, "In order to continue operations or to receive an operating license, an applicant/licensee will be required to submit its emergency plans, as well as state and local governmental response plans, to NRC." 45 Fed.Reg. 55402, at 55403, Col. 2 (August 19, 1980).

In the instant case, no off-site plans at all have been submitted for the six Massachusetts communities within this Seabrook plume exposure pathway EPZ or for the Commonwealth of Massachusetts, and no plans have been submitted which attempt to compensate in any manner for the lack of Massachusetts' state and local plans. In addition, there is presently pending in the New Hampshire Supreme Court a case challenging the validity of the emergency response plans submitted by the State of New Hampshire on behalf of several towns in New Hampshire. See Vernet, et al v. Town of Exeter, et al, 86-118. In such circumstances, the Commission's regulations are clear: No operating license may be issued until Radiological Emergency Response Plans of state and local governmental entities are submitted. As the Commission's regulations do not distinguish between the types of operating licenses with respect to the §50.33(g) requirements for

submission of emergency response plans, the submission of such plans is a pre-requisite to the issuance of an operating license.

B. THE LICENSING BOARD ERRED IN AUTHORIZING ISSUANCE OF AN OPERATING LICENSE TO CONDUCT FUEL LOAD AND PRECRITICALITY TESTING IN THIS CASE WHERE NO FINDINGS HAVE BEEN MADE THAT THE STATE OF ON-SITE EMERGENCY PREPAREDNESS PROVIDES REASONABLE ASSURANCE THAT ADEQUATE PROTECTIVE MEASURES CAN AND WILL BE TAKEN IN THE EVENT OF RADIOLOGICAL EMERGENCY.

10 CFR §50.47(d) states in pertinent part that:

"Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power operation may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency."

The Licensing Board erred in authorizing issuance of an operating license to conduct fuel load and precriticality testing in this case because the Board has made no finding that the state of on-site emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken. The Board's conclusion that no such findings have to be made because no party has raised a contention with regard to onsite emergency planning is plainly erroneous. The Board has an affirmative responsibility, even apart from the participation by the parties in this proceeding, to make the requisite findings that the state of onsite preparedness will be adequate.

Included in the Commission Response to public comment raised in regard to the rule change which allowed fuel loading and low power

operation up to 5% of rated power, the Commission stated very clearly that:

Prior to issuing an operating license authorizing low-power testing and fuel loading, the NRC will review the following offsite elements of the applicant's emergency plan. (emphasis added)

47 Fed.Reg. 30232, at 30234.

Thus, the Board must even make findings as to relevant offsite issues regarding the applicant's plan. It has not done so.

In concluding its response with regard to the above, the Commission went on to state that:

Knowing that the above elements of the applicants emergency plan have been reviewed by NRC should assure the public that, for low-power testing and fuel loading, adequate protective measures could and would be taken in the event of an accident. Id.

As a threshold issue, the Board's argument in its Order of October 7, 1986, LPB-86-34, appears to hold that since the application is being made pursuant to §50.57(c), that §50.47(d) and §50.33(g) need not be considered. This is an erroneous conclusion. The fact that an application is being brought pursuant to one regulation does not negate the effectiveness or the applicability of other regulations. Neither the Board nor the Applicant can pick and choose which regulations will apply at their convenience. All of the regulations were adopted pursuant to the same regulatory scheme and with the same regulatory goals in mind. Consequently, unless specific regulations are excluded, all regulations are relevant provided they address the subject matter of the application. By its very terms, §50.47(d) applies to licenses authorizing fuel loading and/or low power operation. It is uncontroverted that the license sought by the Applicant is a license to authorize fuel loading.

Even if the Board were correct in concluding that §50.57(c) should be read in isolation from the other regulations, SAPL did raise an issue that is relevant to the activity to be authorized. SAPL's Supplemental Contention No. 6 dealt with both the Detailed Control Room Design Review at Seabrook and the Safety Parameter Display System, the former of which SAPL holds is directly relevant to the issue of onsite safety. The Board, summarily disposed of that part of SAPL's Supplemental Contention No. 6 which dealt with the detailed control room design review and human engineering discrepancies. The action by the Board here under appeal deprives SAPL of the right to seek redress at the appropriate point in future of the denial of hearing on this issue which did have relevance to the loading of fuel in the reactor at Seabrook. Contrary to the Board's assertion, therefore, there is an issue which remains for ultimate decision pursuant to 10 CFR §50.57(c).

C. THE LICENSING BOARD ERRED IN AUTHORIZING ISSUANCE OF AN OPERATING LICENSE TO CONDUCT FUEL LOADING AND PRECRITICALITY TESTING IN THIS CASE BECAUSE THERE IS NO GUARANTEE THAT A CRITICALITY WILL NOT OCCUR.

Even though the Applicants have taken steps to prevent an inadvertent criticality, the Applicant has not proved that an inadvertent criticality could not occur. If such inadvertent criticality did occur, SAPL's due process rights to meaningful review of the on-site safety issues litigated by the parties before the Licensing Board in October would be seriously impaired. Although the Applicants have stated that they are going to take various precautions, the probability that an inadvertent criticality could

occur is by no means nil. Applicants claim that by keeping the water in the reactor coolant system borated at a level of 2,000 ppm, there would be no possibility of an accidental criticality. SAPL would agree that if that boron concentration is indeed maintained at that level, there would not be a criticality. However, there are circumstances that could occur that might lead to a criticality. For example, PSNH has not yet submitted the results of its leakage rate measurements necessary for the determination that the leakage rate program for Seabrook Station has been implemented successfully and, indeed there is a condition that has been attached to the Operating License that Applicants submit leakage rate measurements before proceeding above 5% of rated power. Leakage in the reactor coolant system could have an effect upon PSNH's ability to maintain boron concentration at the level specified in its motions since water would need to be added to the system. It is entirely possible, through an analytical error, that water that is not sufficiently borated could be added and could dilute the boron concentration below the level necessary to prevent criticality. Though this is not a high likelihood event, it is by no means impossible for this kind of an accidental dilution to occur. Additionally, there is also the potential that some disgruntled employee or other individual might deliberately seek to dilute the concentration of boron in the reactor coolant system through deliberate defeat of the safety and control systems that have been added (such as the chaining of valves, etc.) Although this possibility might again be considered remote, it has occurred in the past; in a Pennsylvania nuclear plant, a disgruntled

employee did attempt to sabotage the proper operation of a valve by chaining it.

CONCLUSION

In conclusion, for the above-stated reasons, the Board's order authorizing issuance of an operating license to conduct fuel load and precriticality testing should be reversed and vacated.

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

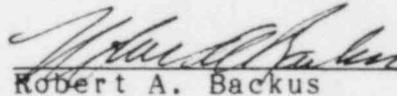


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DATE: October 29, 1986

I hereby certify that a copy of the within SEACOAST ANTI-POLLUTION LEAGUE'S BRIEF IN SUPPORT OF APPEAL OF LICENSING BOARD ORDER AUTHORIZING ISSUANCE OF OPERATING LICENSE TO CONDUCT FUEL LOAD AND PRECRITICALITY TESTING has been sent this date, Federal Express to those indicated by an \* on the attached service list, and first class, postage prepaid to other parties on the service list.



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