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January 4, 1988 DOCKETED
USNRC

UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of)
)
Public Service Company of)
New Hampshire, et al.)
)
(Seabrook Station, Units 1 & 2))
_____)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket Nos. 50-443 OL-1
50-444 OL-1
ONSITE EMERGENCY
PLANNING & TECHNICAL
ISSUES

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S BRIEF IN
OPPOSITION TO RENEWAL OF AUTHORIZATION TO OPERATE AT LOW POWER

Introduction

Pursuant to the briefing schedule established by the Atomic Safety and Licensing Board ("the Licensing Board") in its November 27, 1987 Order, Intervenor New England Coalition on Nuclear Pollution ("NECNP") presents the following arguments in opposition to renewal of authorization to operate the Seabrook nuclear power plant at low power.

I. BACKGROUND

On March 25, 1987, the Licensing Board issued a Partial Initial Decision ("PID") which authorizes Public Service Co. of New Hampshire ("Applicants") to operate the Seabrook nuclear power plant at power levels up to and including 5% of rated power.¹

1 Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-87-10, 25 NRC _____. Hereinafter, all administrative decisions in the Seabrook proceeding will be cited only by number and date. The agency's citation system denotes decisions of the Licensing Board Panel as "LBP" deci-

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The Intervenor appealed that decision on the merits, arguing, inter alia, that low power operation could not, under the Commission's rules, be authorized prior to the resolution of various contentions concerning onsite emergency planning and safety issues, and also made several legal arguments why low power authorization was improper prior to the resolution of all contentions concerning Applicants' ability to satisfy the mandatory licensing requirements for offsite emergency planning.

On October 1, 1987, the Atomic Safety and Licensing Appeal Board (the "Appeal Board") issued ALAB-875, reversing and remanding in part the March 25, 1987 Licensing Board decision authorizing a low power license for Seabrook. The Appeal Board ordered, inter alia, that the Licensing Board admit two of NECNP's contention concerning protection against steam generator tube ruptures (NECNP Contention I.V.) and potential degrading of the plant's heat removal capability due to build-up of biological organisms (NECNP Contention IV), and begin the litigation process for these improperly rejected contentions.² The Appeal Board also ordered the Licensing Board either to find as-yet unidentified support in the record for its ruling that a class of electrical cabling is

(continued)

sions, of the Appeal Board as "ALAB," and the Commission decisions as "CLI."

2 ALAB-875, slip op. at 13-20.

qualified to survive accident environments (NECNP Contention I.B.2), or to reopen the record on that issue.³ The Licensing Board issued its explanation and the parties are now briefing this issue before the Licensing Board.⁴

Discovery is now underway on NECNP's two, admitted contentions. With respect to NECNP Contention IV, NECNP has filed interrogatories to determine the extent to which there is a surveillance and maintenance program adequate to prevent the accumulation of biological organisms and the degradation of the heat transfer capabilities of safety systems as a result of such accumulation, and specifically to inquire about the extent to which biofouling was responsible for two reported equipment breakages.⁵ NECNP has also filed interrogatories with respect to

3 ALAB-875 slip. op. at 14, 20, 35-39.

4 Finally, on November 13, 1987, the Commonwealth of Massachusetts filed a motion to re-open the record and admit a late-filed contention challenging the adequacy of emergency notification siren sound levels in the towns of Newburyport, Massachusetts, and will soon file similar motions regarding siren coverage in other Massachusetts towns within the Seabrook EPZ due to the removal of city-owned sirens in these towns as well. Low power authorization should clearly be withheld until Applicants demonstrate that they have the means to provide early notification and clear instruction to the populace in these towns.

5 A pinhole leak on valve CC-V-298, the "D" primary component cooling water (PCCW) pump discharge check valve, observed in NRC Inspection Report No. 50-443/87-23, and tube degradation in the "B" train PCCW heat exchanger CC-F-17B, observed in NRC Inspection Report No. 50-443/87-23.

NECNP Contention I.V, regarding inservice inspection of steam generator tubing to determine the actual factual and analytical bases for the current inservice inspection program and to ascertain whether the current program is adequate to identify leaking and/or defective tubes given the history of problems with the Westinghouse steam generators.

The legal effect of the Appeal Board's ruling has been to vacate the low power authorization for Seabrook and foreclose any low power operation unless and until the Licensing Board issues a new decision justifying low power authorization. Should the Licensing Board decide to reinstate low power authorization before the conclusion of the remanded hearings, the Appeal Board's order in ALAB-875 requires it to grant a ten-day stay to give the parties an opportunity for appeal therefrom.⁶

ARGUMENT.

II. THE ATOMIC ENERGY ACT PROHIBITS AUTHORIZATION OF LOW POWER OPERATION PRIOR TO COMPLETION OF PUBLIC HEARINGS ON ALL ISSUES MATERIAL TO FULL POWER LICENSING.

As a result of the Appeal Board's ruling that the Licensing Board wrongly rejected NECNP Contentions IV and I.V, alleging that whether Applicants have satisfied mandatory onsite safety requirements required by specified General Design Criteria, NECNP

6 ALAB-875 slip. op. at 50.

is entitled to a full hearing on these contested safety issues prior to the issuance of a low power license. Moreover, the record may well be re-opened with respect to NECNP Contention I.B.2, relating to whether Applicants have satisfied GDC 4 with respect to environmental qualification of the RG58 coaxial cable, if the Appeal Board determines that the record as it now exists does not support the Licensing Board's initial findings. Issuance of a low power license prior to the resolution of these contested issues will violate NECNP's right under § 189 of the Atomic Energy Act, 42 U.S.C. § 2239(a), to a full operating license hearing before the license is granted.⁷

- A. The legislative history of the expired Temporary Operating License Authorization demonstrates that Congress did not authorize issuance of low power licenses until completion of all hearings relevant to licensing.

NECNP's rights in this proceeding are governed by Section

⁷ The Appeal Board previously declined to address NECNP's argument that the Atomic Energy Act prohibits issuance of an operating license at any level of power prior to hearing and resolving Intervenors' contentions as to offsite emergency planning as well as onsite safety matters, stating that it had no authority under Commission regulations to entertain a challenge to § 50.47(d), which specifically exempts emergency planning from the prior hearing requirement for purposes of low power authorization. ALAB-875, slip op. at ____.

Now, as a result of the two remanded contentions in the onsite case, the Board's authority under the Atomic Energy Act to issue a low power license prior to the resolution of contested issues is again placed at issue. Since these contested issues are not even arguably subject to the regulatory exemption in § 50.47(d), this Board is in no way constrained in its ability to entertain and address this important legal issue.

189(a)(1) of the Atomic Energy Act, which requires that in any proceeding "for the granting, suspending, revoking, or amending of any license or construction permit,"

The Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a). The hearing must be held before the Commission takes the proposed licensing action. Sholly v. U.S. Nuclear Regulatory Commission, 651 F.2d 780, 789 (D.C. Cir. 1980), vacated on other grounds, 103 S.Ct. 1170 (1983); Union of Concerned Scientists v. Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir. 1984).

The Atomic Energy Act contains no provision permitting the Commission to authorize the operation of a nuclear power plant at low power levels before full power license hearings are complete and all relevant issues are resolved; nor does it dispense with the prior hearing requirement for any initial operating license decision. Rather, under the Act, all issues that are material to the full power operation of a nuclear power plant must be considered relevant to the issuance of a license for any level of operation.

This interpretation of the Atomic Energy Act is reinforced by the legislative history of the provisions regarding low power operation. On the two prior occasions when Congress perceived a

need to permit low power operation before licensing hearings were complete, it gave the Commission only temporary authority to do so.⁸ In both instances, Congress was responding to a perceived emergency, and in both instances Congress strictly limited the duration of the NRC's authority to issue a "temporary operating license" or "TOL." The legislative history of these two enactments demonstrates the strength of Congress' intent that in the absence of specific Congressional authorization, the public's statutory right to full hearings on the issuance of operating licenses may not be compromised by the issuance of a low power license before those hearings have been completed.

(1) 1972 temporary operating license amendment

In 1972, responding to a perceived threat of imminent energy shortages, Congress amended the Atomic Energy Act to permit the NRC to issue temporary operating licenses without the completion of the full adjudicatory hearings required by Section 189a of the Act.⁹ According to the Chairman of the Atomic Energy Commission, the legislation was needed in part to allow the NRC to speed reactor testing and thereby "properly anticipate emergency power needs." Statement of James S. Schlesinger before Joint Committee

8 See 42 U.S.C. § 2242, which expired December 31, 1983.

9 Section 192 of the Atomic Energy Act [42 U.S.C. § 2242], added June 2, 1972, Pub. L. 92-307, 86 Stat. 191.

on Atomic Energy, March 16, 1972, at 74.

The new provision required that before the Commission could issue a TOL, it must have received the letter of the Advisory Committee on Reactor Safeguards ("ACRS"), the Staff's Safety Evaluation Report ("SER"), and the environmental impact statement. However, intervenors were entitled to no more than an informal hearing on whether the plant could be operated safely on a temporary basis.

Section 192 did not eliminate the full licensing hearings required by Section 189a, but allowed the NRC to postpone them until after issuance of the low power license. As the House Report explained,

Under this new authority, the Commission is authorized to issue a temporary license to operate the reactor under these circumstances even though the full-term license is being contested by interested members of the public. The temporary license would not deprive the public of a full review of the health and safety and environmental matters which may be contested. All substantive requirements of applicable law would have to be satisfied.

House Rept. No. 92-1027, 1972 U.S. Code Cong. and Admin. News 2351 (emphasis added).

In permitting the issuance of TOLs, Congress attempted to avoid or ameliorate "threatened shortages" during the summer of 1972 and the winter of 1972-3. 1972 U.S. Code Cong. and Admin. News at 2352. Congress was also concerned that litigation of environmental impact statements under the NRC's newly promulgated regulations for the implementation of the National Environmental

Policy Act ("NEPA") would result in "prolonged" hearings that would delay licensing. Id. at 2355.¹⁰ In particular, the legislation was designed to overcome the court's ruling in Izaak Walton League of America v. Schlesinger, 337 F.2d 287 (D.C.D.C. 1971), in which the District Court enjoined issuance of a low power license because the Commission had failed to file an environmental impact statement for the plant or to offer a hearing on the adequacy of the EIS. See Statement of James S. Schlesinger before Joint Committee on Atomic Energy, March 16, 1972, at 77-78.

Sensitive to the interests of the public in licensing hearings, Congress stressed that the temporary licensing provision should be used by the Commission only where there was an "urgent need" for the energy. Id. at 2356. More important, the legislation contained an expiration date that gave the NRC less than a year and a half to implement the TOL provision. Thus, Congress gave the NRC only so much authority to issue TOLS as it deemed

10 As the House Report explains, after passage of the National Environmental Policy Act in 1970, the issues open for litigation in licensing hearings "were expanded so that the Commission had to consider all significant environmental matters in its decisionmaking process, which, under the Atomic Energy Act, includes the hearing requirements summarized above." 1972 U.S. Code Cong. and Admin. News at 2355. In response to the U.S. Court of Appeals' 1971 decision in Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), the Commission had "issued regulations which impose a very stringent environmental review" of proposed nuclear reactor licenses. Id.

was necessary to cope with a perceived short-term energy crisis. Clearly, Congress intended that under ordinary circumstances and in the absence of special legislation, the public was entitled to full adjudicatory hearings before the issuance of an operating license.

(2) 1982 temporary operating license amendment

After the 1972 temporary operating license legislation expired, nine years passed before Congress again perceived the need to grant utilities relief from the Atomic Energy Act's strict prior hearing requirements. In January of 1983, in response to licensing delays caused by the Three Mile Island accident, Congress again enacted a special, limited-term temporary operating license provision. This new version of § 192 allowed the Nuclear Regulatory Commission to issue temporary licenses for fuel loading and operation at up to 5% of rated power, with special provision for incremental increases in power levels.¹¹

According to the Senate Report, the legislation was designed to alleviate the licensing delays that had been caused by the imposition of additional safety requirements following the Three Mile Island accident:

Largely as a result of this situation, it became apparent in late 1980 that some delays would be experienced

¹¹ 42 U.S.C. § 2242, Pub.L. 97-415, 96 Stat. 2072 (January 4, 1983).

between the time when construction of these plants would be sufficiently complete to allow fuel loading and the start of operation, and the time when all requirements for the issuance of an operating license, including the hearing requirements, of the Atomic Energy Act, would be met.

Sen. Rep. No. 97-113, 1982 U.S. Code Cong. and Admin. News at 3593 (emphasis added).

As summarized in debates on the bill,

The temporary operating license provision confers upon the NRC a much-needed authority arising out of the Post-TMI licensing delays, authorizing the NRC to issue operating licenses to applicants prior to the completion of that certain public hearing required under the Atomic Energy Act, if all other statutory requirements are met.

128 Cong.Rec. 15314 (December 16, 1982) (remarks of Rep. Simpson).

Like the original version of § 192, the 1982 amendment established as prerequisites for a TOL the filing of the ACRS letter, the Staff's Safety Evaluation Report, and a final environmental impact statement. In addition, the 1982 law required that no TOL could issue before the submission of a State, local, or utility emergency preparedness plan.

Were either of these two temporary operating license provisions in place today, they might conceivably give the Licensing Board the authority to issue an operating license permitting low power operation before completion of licensing hearings. However, both provisions have long since expired. The legislative history of the TOL bills demonstrates unequivocally that Congress considered pre-hearing licensing such as the low power authoriza-

tion sought here to constitute a short-term emergency stopgap measure. In the absence of such specific authorization from Congress, the Commission may not issue an operating license authorizing any level of operation at the Seabrook nuclear power plant until it completes hearings on all issues that are material to full power operation.

B. "Sholly Amendment" Legislative History

It is by now generally recognized that the issuance of a license authorizing low power operation would have the irreversible effect of causing the contamination of the Seabrook plant, and posing some risk to the public health and safety. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587 (1985). For this reason, the legislative history of the "Sholly Amendment" reinforces the view that Congress did not intend to authorize the initial operation of a nuclear power plant at any power level, with its accompanying irreversible changes and raised risk to the public health and safety, until the NRC completes hearings on all issues that are material to the full power licensing of the plant.¹² The "Sholly Amendment" amended Section 189(a) to permit the Commission to waive the prior hearing requirement for operating license amendments that pose "no significant hazards consideration." Significantly, Con-

12 42 U.S.C. § 2239(a), Pub. L. 97-415 § 12(a), 96 Stat. 2073 (January 4, 1983).

gress did not, at that time, include operating licenses within the ambit of that authority. Rather, only for license amendments which, despite their "irreversible consequences," pose "no significant hazards consideration" to the public, has Congress made an exception.

The following colloquy between Rep. Markey and Rep. Ottinger clearly indicates that the NRC is not permitted, absent specific Congressional authorization, to take any licensing action carrying "irreversible consequences" without granting a prior hearing on those actions.

MR. MARKEY: I note that with respect to section 12 of the bill, the so-called Sholly provision, the statement of managers emphasized that, in determining whether a proposed amendment to a facility operating license involves no significant hazards consideration, the Commission should be sensitive to those license amendments that involve irreversible consequences. As chairman of the subcommittee that originated the Sholly provision in this House, do you understand that statement to mean that the Commission should be especially careful in evaluating, for possible hazards consideration, amendments that involve irreversible consequences?

MR. OTTINGER: Yes, that is exactly what I understand our intent to have been. Once a license amendment with irreversible consequences has received the Commission's approval and has gone into effect, as a practical matter it will be impossible to correct any errors that may have entered into the Commission's decision. Therefore, we believed that the Commission has an obligation, when assessing the health and safety considerations of amendments having irreversible consequences, to insure that only those amendments that very clearly raise no significant hazards issues will be allowed to take effect before the required hearings can be held.

128 Cong. Rec. 8823 (December 2, 1982).

In sum, the Sholly Amendment contains no provision that would exempt operating licenses from prior hearings based on

something analogous to a "no significant hazards consideration" finding. Therefore, no matter how insignificant the Commission may view the consequences of low power operation in the context of the overall benefits of full power operation, the Atomic Energy Act forbids the issuance of a low power license until the Commission has made the findings and reached the conclusions required for issuance of an operating license for the Seabrook plant.

III. THERE IS NO AUTHORITY IN THE COMMISSION'S REGULATIONS FOR ISSUANCE OF A LOW POWER LICENSE PRIOR TO FINDINGS ON ALL ISSUES RELEVANT TO FULL POWER OPERATION.

It is important to note, at the outset, that the Appeal Board's decision in ALAB-875 in no way authorizes the Licensing Board to issue a low power license prior to the completion of hearings on, and satisfactory resolution of, NECNP's three outstanding contentions alleging Applicants' failure to satisfy mandatory onsite safety requirements.¹³ ALAB-875 merely states that, on remand, "the [Licensing] Board should consider such factors as the bearing of the remanded issues upon low-power operation and the then status of the resolution of those issues." ALAB-875, slip op. at 49. We submit that this must be read consistently with the dictates of the Atomic Energy Act. Under the Act, low power operation is wholly inappropriate given the current, unsettled status of NECNP's outstanding contentions.

It has nonetheless been suggested elsewhere that 10 C.F.R. § 50.57(c) supplies the Licensing Board with authority to summarily dispense with mandatory onsite safety requirements if the Board

13 While this Board's November 27, 1987 Order directed the parties to brief whether renewal of low power authorization was appropriate prior to the resolution of NECNP's two, remanded contentions, we believe that low power authorization must also await resolution of NECNP Contention I.B.2, regarding environmental qualification of the RG58 coaxial cable, as the record has been reopened, and the Appeal Board may well direct, that further hearings be held with respect to that issue.

determines that they are not "relevant" to low power licensure. This construction of § 50.57(c) is inconsistent with both the plain language and regulatory history of § 50.57(c).¹⁴ Rather, both the regulatory history of § 50.57(c) and past licensing decisions reinforce the conclusion further demonstrates that the Commission has no authority to grant the equivalent of ad hoc, case-by-case "exemptions" from mandatory licensing requirements in the context of low power authorization, outside of the normative process of petitioning for regulatory waivers.

Commission regulation 10 C.F.R. § 50.57(c) provides that, in cases of motions for low power authorization,

Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent his contentions are relevant to the activity to be authorized.

It is this underscored language that is relied on, out of context, as ostensible authority for the Licensing Board to pick and choose among mandatory licensing requirements and to require Applicants to satisfy only those requirements that are, in the absolute discretion of the Board, "relevant" to low power licensure. However, this was plainly not the intention of this regulatory language. Rather, the real purpose of this provision is made plain by the next sentence of the regulation, which pro-

14 As discussed above, this construction of § 50.57(c) is also at odds with § 189 of the Atomic Energy Act.

vides that

Prior to taking any action on such motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section.

10 C.F.R. § 50.57(c) (emphasis added).

This language clearly indicates that the purpose of § 50.57(c) was simply to relieve the Licensing Board of the obligation to make positive findings on uncontested issues prior to low power operation, by delegating this function to the Director of Nuclear Reactor Safety (NRR). Nothing in the regulation vitiates the Licensing Board's obligation to make findings on all operating license issues "as to which there is a controversy" prior to issuance of a low power license. In other words, this regulation was clearly intended to be protective of the parties' rights to a prior hearing on contested issues, not to abrogate them altogether.

The regulatory history of § 50.57(c) reinforces this reading. The language relied on by Applicants was adopted in 1972, when § 50.57 was amended to adopt procedures designed to expedite and make more efficient administrative decisionmaking.¹⁵ There

¹⁵ See Notice of Proposed Rulemaking, "Restructuring of Facility License Application Review and Hearing Processes," 37 Fed. Reg. 15124, Col. 3 (May 9, 1972).

is absolutely no suggestion that the amendments were intended to effect a change so drastic as to permit the issuance of an operating license without resolving all safety issues. The statement of consideration accompanying the notice of final rulemaking make clear that "the amendments do not involve drastic changes in the administrative process or novel procedures."¹⁶ Rather, § 50.57(c) does no more than establish a policy for low power licenses of having the Licensing Board decide contested issues, and permitting the Director of NRR to make findings as to uncontested issues.

And in fact, between 1972 and 1984, this rule was not construed as permitting a Licensing Board to determine summarily that contested safety issues are "not relevant" to low power operation. Rather, past licensing decisions authorize low power operation only after resolution of contested onsite safety issues that were the subject of admitted contentions. For example, in Texas Utilities Electric Co. (Commanche Peak Steam Electric Station, Units 1 and 2), LBP-84-30A, 20 NRC 443, 444 (1984), denying low power authorization due to the pendency of a broad quality assurance contention, on the grounds that 10 C.F.R. § 50.57(c) "requires us to make the findings listed in § 50.57(a) with respect to the contested activity sought to be licensed." (empha-

16 37 Fed. Reg. 15127, 15128, Col. 1 (July 28, 1972).

sis in original).¹⁷

The licensing decisions permitting low power operation prior to the resolution of new, late-filed allegations, do not contradict our view that Commission has no authority to authorize low power operations prior to the resolution of admitted, unresolved onsite safety contentions. As was recognized by the D.C. Circuit in San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1312 (D.C. Cir. 1984), "the Commission's criteria for reopening a closed record are higher than the criteria for obtaining a hearing under section 189(a)." The Licensing Board does not possess such comparable discretion where the record remains open and there are outstanding, unresolved safety issues in controversy. Here, the Appeal Board's remand firmly establishes that NRC has already made the requisite showing that resolution of the remanded contentions is necessary to the safe

17 In Commonwealth Edison Co (Braidwood Nuclear Power Station, Units 1 and 2), 24 NRC 451 (1986), the Licensing Board issued a license authorizing fuel loading and precriticality testing prior to the resolution of contested safety contentions, but expressly noted that a different standard would be applicable to a request for low power operating licenses than to "a mere request for fuel loading and precriticality testing." Id., at 457 n.2. While we do not believe that the distinction between precriticality and low power operation is a valid one, this case plainly indicates that onsite safety issues must be resolved prior to authorizing operations involving irradiation of the reactor core.

operation of the plant at any level of power, and no additional showing is required.¹⁸

The novel interpretation that § 50.57(c) authorizes discretionary Licensing Board determinations as to the "relevance" of particular safety requirements to low power operation can be traced to Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437 (1984), in which LILCO sought a low power license under § 50.57(c). In an earlier decision, the Commission held that as a condition of even low power operation, the Applicant must satisfy the mandatory General Design Criterion requiring reliable emergency power supplies, unless it satisfied the requirements for an exemption under 10 C.F.R. § 50.12(a), demonstrating, inter alia, that operation

18 Significantly, even those decisions involving permitting low power authorization prior to resolution of late-filed contentions or §2.206 petitions in no way indicate that "safety" means something different depending on the level of power to be authorized. See Diablo Canyon, DD-84-20, 20 NRC 776, 780 (1984) (a low power license may not be issued prior to the resolution of a petition filed under 10 C.F.R. § 2.206 if the allegations raise significant new information concerning "safety-related" activities or equipment); Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), DD-87-6, 25 NRC 387, 388 (1987) (if issues in petition filed under 10 C.F.R. § 2.206 "do not present significant safety concerns, the Nuclear Regulatory Commission may issue the low-power or full-power operating license."). It would be illogical to have a lower standard for issuance of a low power license where, as is the case here, NECNP has already demonstrated that the safety concerns raised by its rejected contentions are so substantial as to require a remand of the initial decision.

without compliance with the rule would be "as safe as" operation in compliance with the rule.¹⁹ Shoreham, CLI-84-8, 19 NRC 1154 (1984). In a revealing SECY paper responding to this decision, the Commission staff recognized that a Licensing Board could not "distinguish more carefully among safety requirements for fuel loading and other operational phases, ... without extensive changes to the regulations."²⁰ Instead, the Staff suggested that the Commission would have greater flexibility if it relaxed the "as safe as" standard it had set for granting exemptions. The Staff relied on the following reasoning to justify this less restrictive exemption standard:

Some regulations, including some GDC, may properly be considered inapplicable to fuel loading and low power testing if such a conclusion is fairly compelled by simple logic and common sense. However, a regulation cannot be considered inapplicable merely because, as applied to fuel loading or low-power testing, it is logical but arguably excessive.

SECY-84-290A, at 26 (emphasis added).

The first part of the above-quoted language was then seized out-of-context by the Licensing Board as authority for simply disregarding on a case-by-case basis mandatory safety requirements which do not appear to the ASLB to be necessary for operation at less than full power. Shoreham, LPB-84-35A, 20 NRC 920,

¹⁹ 10 C.F.R. § 50.12(a) also requires, inter alia, a showing of exigent circumstances justifying an exemption.

²⁰ SECY-84-290A, at 2.

924 (1984). In so holding, the Licensing Board cited no authority (other than the inapposite SECY paper) and essentially ignored the express language in the SECY paper stating that the "flexibility" perceived by the Licensing Board was not possible under the current language of § 50.57(c), as well as the overall thrust of the SECY paper that the sole way to avoid a safety requirement was to apply for an exemption under § 50.12. Despite the total lack of regulatory or case authority for this novel reading of §50.57(c), the Commission approved the Licensing Board's decision. Shoreham, CLI-84-21, 20 NRC 1437, 1439-1440 (1984). Again, no authority other than "simple logic and common sense" was cited.

Interestingly, had the Commission intended to interpret § 50.57(c), which has been in existence since 1972, in this novel manner, it would presumably have found it unnecessary, ten years later, to promulgate § 50.47(d) to provide a specific, generic exemption from the regulatory requirements governing offsite emergency planning for low power license applications. As was noted in Pacific Gas and Electric Co (Diablo Canyon, Units 1 and 2), 17 NRC 777, 789 (1983), "This amendment [§ 50.47(d)] makes clear that for fuel loading and low power testing it is the applicant's onsite emergency plan and preparedness that is crucial,..." More importantly, the promulgation of an express exemption from emergency planning regulations for purposes of low power operation demonstrates that, in 1982, the Commission felt

that it had no existing authority -- under § 50.57(c) or elsewhere -- to give Licensing Boards the uncontrolled discretion to grant what amount to regulatory exemptions on such an ad hoc, basis, or to place the burden upon those opposing a license to establish the applicability to low power of any and all rules.

Finally, any reading of § 50.57(c) which gives licensing boards uncontrolled discretion to grant the practical equivalent of regulatory exemptions would stand the Commission's licensing scheme on end. NRC regulations establish a presumption that licensing regulations are mandatory for all nuclear power plants and may not be relitigated or challenged in an operating license case, except via the formal process for obtaining regulatory exemptions. 10 C.F.R. § 2.758(a). To permit Applicants to bypass mandatory safety requirements outside the formal exemption process would establish a presumption that no regulation is relevant to low power operation unless an intervenor shows that compliance is necessary. Accordingly, 10 C.F.R. § 50.57(c) cannot be construed as granting the licensing board the authority, on an ad hoc, case-by case basis, to waive mandatory safety requirements.

IV. APPLICANTS MUST SATISFY COMMISSION REGULATIONS WITH RESPECT TO REMANDED CONTENTIONS, OR SATISFY THE STANDARD FOR AN EXEMPTION, PRIOR TO RENEWAL OF LOW POWER AUTHORIZATION

A. No Operating License May be Issued Until NECNP's Admitted, Outstanding Contentions Are Resolved.

It is fundamental that the Applicants must satisfy Commission safety regulations prior to issuance of a low power license. In ALAB-875, the Appeal Board found that NECNP satisfied its burden of proving that the Licensing Board wrongly rejected NECNP Contentions I.V and IV, and ordered that the record be reopened to litigate these contested issues. NECNP Contention I.B.2 is also in controversy because, as the Appeal Board found, the Licensing Board has not resolved this contention adequately. Thus, there is a material issue as to whether Applicants have satisfied the General Design Criteria (GDC) that are the subject of these outstanding contentions.

At this time, there has been no resolution of these outstanding contentions. Until Applicants demonstrate that they satisfy the GDC that are the subject of NECNP's outstanding contentions, Applicants' compliance with which has been placed into controversy, the presumption is that Applicants do not satisfy these mandatory safety requirements. 10 C.F.R. §§ 2.732 and 50.47(a). Accordingly, under the plain language of Commission regulations, no operating license can be issued at any level of power until these contested safety issues are litigated and resolved.

There is simply no support in the regulations, or in past

licensing decisions, for requiring Intervenors to make some additional showing that resolution of these contested issues is necessary to the safe operation of the plant at low power.²¹ Rather, the fact that NECNP's contentions were admitted demonstrates that serious and substantive safety concerns as to whether Applicants had satisfied the GDC with respect to these issues are present in this case.²² In other words, NECNP has already made the necessary showing that resolution of the remanded contentions is necessary to the safe operation of the plant at any level of power by satisfying the standard for admission of a contention. Accordingly, no low power license may be issued unless and until these outstanding contentions are resolved.

B. Applicants Must Satisfy the Standard for a Regulatory Waiver to Receive Low Power Authorization Prior to the Resolution of NECNP's Outstanding Contentions.

The only alternative means available to Applicants that would enable them to bypass litigation of these outstanding contentions prior to receiving low power authorization is to petition for a regulatory waiver of the General Design Criteria that are the subject of NECNP's contentions, pursuant to 10 C.F.R. §

21 See discussion of past licensing decisions involving low power authorization in Section III, supra.

22 See Part V, infra, for a discussion of the serious safety concerns presented by these remanded contentions.

2.758(b).²³ Any other standard would violate the presumption of the validity and general applicability of all regulations that is embodied in 10 C.F.R. § 2.758, and unlawfully shift the burden of proof away from the party seeking a waiver of a regulatory requirement, placing it instead on parties who seek to ensure compliance with valid regulations.

Indeed, this is the standard that has been applied by the Commission in past proceedings. For example, in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984), the Commission held that LILCO must satisfy the mandatory General Design Criterion requiring reliable emergency power supplies (GDC 17) prior to issuance of a low power license, or demonstrate that it satisfies the standards for an exemption under 10 C.F.R. § 50.12. On remand, the Licensing Board stated "[a]n exemption to GDC 17 may be authorized for low power operation where applicant has shown that operation would be as safe as it would be if it were in full compliance, and that

23 Regulatory exemptions may be granted only where the applicant can demonstrate special circumstances with respect to the subject matter of the proceeding such that application of the regulation would not serve the purposes for which it adopted, or upon a showing of "exceptional circumstances." 10 C.F.R. §§ 2.758(b) and 50.12. Under both exemption standards, "the burden is on ... the petitioner for a waiver." Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410, 443 n.16 (1985), aff'd, ALAB-837, 23 NRC 525 (1986)

exigent circumstances favor the grant of the exemption."

Shoreham, LBP-84-45, 20 NRC 1343, 1345 (1984).

In sum, the presence of unresolved, admitted contentions concerning mandatory, onsite safety requirements, is sufficient by itself to establish that these contentions are relevant to the license under consideration, and the issuance of a license to operate at any level of power is barred until these outstanding issues are resolved. Insofar as NECNP's rights are concerned, it is entitled to be in the same posture as if its contentions had not been erroneously rejected. Had NECNP's contentions been properly admitted, there would have been no question that the issues needed to be fully heard and resolved in the Applicants' favor in an initial decision. Accordingly, the only alternative to the litigation and resolution of these contentions is for Applicants to petition for a waiver of the General Design Criteria at issue. However, Applicants have not petitioned for a waiver of any of these GDC. Until Applicants do so, and satisfy the formidable burden placed on one seeking a regulatory waiver, no low power license can be granted.

V. NECNP'S UNRESOLVED, REMANDED CONTENTIONS ARE IMPORTANT TO PLANT SAFETY

Assuming, arguendo, that it is necessary for NECNP to make some additional showing in order to receive a hearing on its outstanding contentions prior to low power authorization, NECNP need only demonstrate that the allegations contained in its contentions are important to plant safety. See Pacific Gas & Electric Co. (Diablo Canyon, Unit 1), CLI-83-27, 18 NRC 1146 (1983), in which the Commission held that Intervenors were entitled to a prior adjudicatory hearing on whether to extend a low power license when, in the interim, the hearing record had been reopened by the Appeal Board on issues pertaining to design quality assurance and completion of an Independent Design Verification Program. The Commission reasoned:

The concern which supported the original license suspension was not purely procedural or a matter of clarifying some uncertain part of the record. Serious and substantive safety concerns relating to design quality assurance led to the license suspension. These same safety concerns are now the subject of adjudicatory hearings before the Appeal Board. The license suspension and order requiring further hearings recognizes that the adjudicatory record may not now include essential findings on design quality assurance. In the special circumstances of this case, the Commission may well choose to await the conclusion and decision in the Appeal Board hearings before reaching any decision to further lifting of the license suspension and further extending the validity of the license to authorize criticality and low-power operation.

Id. at 1150.

In a similar manner, NECNP's outstanding contentions raise "serious and substantive" safety concerns that must be resolved before an operating license is granted. NECNP's two remanded

contentions (NECNP Contentions I.V. and IV) are critical to plant safety, and their admission by the Appeal Board recognizes that there is a substantial question as to whether Applicants satisfy these important and mandatory safety requirements. Both contentions make allegations which, if true, would call for the conclusion that a number of the General Design Criteria are not met. At this stage, the appropriate presumption is that they are true. Moreover, the record may well be re-opened with respect to NECNP Contention I.B.2, relating to whether Applicants have satisfied GDC 4 with respect to environmental qualification of the RG58 coaxial cable, if the Appeal Board determines that the record as it now exists does not support the Licensing Board's initial findings. Since these serious questions may well block full power licensure for Seabrook, it is particularly important that they be resolved prior to authorizing low power operations.

A. NECNP Contention IV, Regarding Biofouling by Aquatic Organisms and Debris, is Important To Plant Safety

NECNP Contention IV, relating to the adequacy of Applicants' surveillance and maintenance program for preventing the accumulation of biological organisms and the degradation of the heat transfer capabilities of safety systems as a result of such accumulation, strikes to the very core of plant safety. The Seabrook plant relies on various circulating, auxiliary cooling, and service water systems to provide essential cooling to safety-related equipment, such as the Emergency Core Cooling System, the Primary Component Cooling System, and the Secondary Component

Cooling System, in the event of various postulated accident conditions. These cooling systems are served by both fresh and salt water sources which carry biological organisms and other debris. These organisms and debris may cause blockage of intake tunnels and piping carrying water to cooling systems. In addition, they may cause sedimentation and degradation of heat exchangers, pumps, pipes and valves these systems.

Without adequate programs for monitoring these essential safety systems for potential biofouling, blockage or degradation can occur which will impair these safety systems, or cause them to fail altogether. For that reason, General Design Criteria 2, 4, 5, 44, 45, 46 require Applicants to institute monitoring and surveillance programs and take any other measures necessary to preclude long-term corrosion and organic fouling that would tend to degrade system performance, and also require that agents used for the control of water chemistry, corrosion and organic fouling be compatible with system components and piping materials. See NRC Standard Review Plan, Sections 9.2.1-2, 9.2.2, and 10.4.5, NUREG 75/087. A finding of compliance with these rules requires resolution of NECNP's contention in the Applicant's favor. Accordingly, it is critical for plant safety that there are adequate assurances that Applicants have instituted such measures prior to issuance of a an operating license.

- B. NECNP Contention I.V. Regarding the Adequacy of Applicants' Steam Generator Tubing Inservice Inspection Program, is Relevant To Plant Safety

The adequacy of the Seabrook plant's steam generator tubing inservice inspection program raises serious safety considerations. Steam generator tubes act as the barrier between the plant's primary and secondary systems, or in other words, between the radioactive system and the nonradioactive system. If even one of the many steam generator tube breaks, then the reactor coolant system boundary is breached and the secondary coolant system will become contaminated with radiation. In addition, the pressure differentials which result from a tube break may cause the steam generator safety valve to open, and radioactive gases may be released into the air, outside the containment building. See Reg. Guide 1.83.

It is inevitable that, during the life of a plant, steam generator tubes will thin and crack because of various factors which cause corrosion and stress. It is, therefore, vital that cracking and leaking tubes are identified and detected by an inservice inspection program before a tube rupture actually occurs. For these reasons, General Design Criteria 1 and 32 require that components, such as steam generator tubes, which are part of the reactor coolant boundary, be designed to permit periodic inspection and testing of important areas and features to assess their structural and leaktight integrity. See NRC Standard Review Plan Sections 5.2.4 and 5.4.2.2. General Design Criterion 30 requires that means shall be provided for detecting and, to the extent practical, identifying the location of the source of

reactor coolant leakage. See NRC Standard Review Plan Section 5.2.5. Again, a finding of compliance with these requirements requires satisfactory resolution of NECNP's contention. The long history of problems with steam generators as well as accidents at Ginna and more recently, at North Anna indicate that the adequacy of the steam generator tubing inservice inspection program is vital for preventing tube breaks which lead to destruction of the reactor coolant system boundary and the release of radioactive gases into the air. See NECNP Contention I.V. and Virginia Reactor Shut Down After Leak, Washington Post, July 16, 1987 at 1 (Attached as Exhibit 1).

C. NECNP Contention I.B.2, Regarding Environmental Qualifications of the RG58 Coaxial Cable, is Important To Plant Safety

Finally, NECNP has contended that the Applicants have not satisfied GDC 4, requiring safety structures, systems, and components to be environmentally qualified, with regard to the RG58 coaxial cable. The Appeal Board found that, because this cable was deemed to be environmentally qualified based solely on tests performed on the RG59 cable, a cable having different conductors and insulation, there was "nothing in the file that could possibly provide any additional support for a conclusion that the RG58 cable is environmentally qualified."²⁴ Therefore, the

24 ALAB-875, slip op. at 37.

Appeal Board remanded the issue to the Licensing Board either to identify support for its conclusion that the cable is qualified, or to reopen the record "for a further exploration of the question whether the RG59 cable test results can serve as the foundation for the environmental qualification of the RG53 cable."²⁵ The Licensing Board issued its explanation and the parties are now briefing the issue before the Licensing Board.

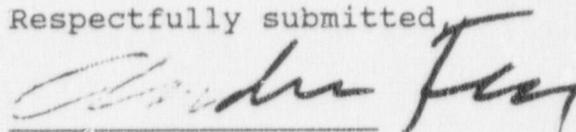
Due to the large quantities of RG58 coaxial cable used in the Seabrook plant (over 10,000 feet), the issue of its ability to perform as needed in accident conditions may have profound safety implications for the safety of the plant, at all operational phases of power. Accordingly, the unsettled issue of the environmental qualification of RG-58 coaxial cable should clearly be resolved prior to low power licensure.

25 Id. at 39.

VI. CONCLUSION

In conclusion, considering all of the circumstances here, there is no justification for authorizing low power operations prior to the resolution of NECNP's outstanding onsite safety contentions.

Respectfully submitted,



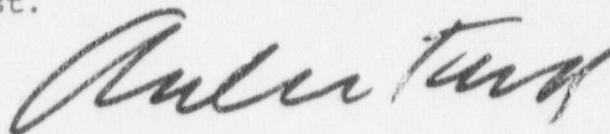
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January 4, 1988

CERTIFICATE OF SERVICE

I certify that on January 4, 1988, copies of this pleading were served by first-class mail or as otherwise indicated on the parties to the attached service list.



Andrea Ferster

Va. Reactor Shut Down After Leak

Tube at North Anna Recently Inspected

By Sandra Evans
and Lynda Richardson
Washington Post Staff Writers

A tube carrying radioactive water ruptured at Virginia Power's North Anna nuclear power station yesterday, releasing small amounts of radioactive gas into the atmosphere for 1½ hours and forcing the company to shut down one of two reactors there for an indefinite period, utility officials said.

There were no injuries, and company and federal officials said the incident posed no threat to the health and safety of employees or residents of the area, about 90 miles southwest of Washington.

The total amount of radiation released was a fraction of the level of one chest X-ray and less than 1 percent of the amount the Nuclear Regulatory Commission allows to be released from the plant, the officials said.

All of about 10,000 tubes in the reactor's three steam generators had been inspected within the last three months as part of a regularly scheduled refueling at North Anna's Unit 1, which was shut down for the refueling from April 16 to June 30, according to William N. Curry, a Virginia Power spokesman.

At the time, 117 of the tubes in the "C" steam generator were plugged because of flaws, bringing the total number plugged to 270, or 8 percent of the tubes in that generator, he said. Utility officials said they were at a loss to explain why a problem within the tube that ruptured was not detected then.

"We do a tremendous amount of inspections, and in most cases we do every tube twice," William L. Stewart, the utility's vice president in charge of nuclear operations, told reporters at the site yesterday.

Coming on the heels of a fatal accident seven months ago at Virginia Power's other nuclear plant at Surry, the incident drew renewed

See REACTOR, A11, Col. 1

REACTOR, From A1

questions from critics of the industry about potential risks at aging nuclear plants. The critics charge that old power plants, just like aging airplanes, develop problems that are not anticipated during design and construction and that may elude discovery during routine inspections.

Yesterday's incident "does indicate that the plant is aging a lot faster than it was supposed to," said Joshua Gordon, a nuclear analyst with the Public Citizen consumer interest group. Steam generators are supposed to last the 30- to 40-year life of the plant, but some plants have had to replace them after only seven or eight years, he said.

"This time it looks like they got away with it" because of the low level of radiation released, said Robert Pollard, a nuclear safety engineer and member of the Union of Concerned Scientists. But he said that inspections are inadequate, that plants are allowed to operate with cracked and leaking tubes, and that there have been problems with steam generators at other plants in the country.

On Dec. 9, a pipe carrying superheated, nonradioactive water burst in a nonnuclear portion of the Surry plant, 200 miles southeast of Washington, killing four workers and injuring two.

That accident shut down Surry's two reactors for three months, costing the utility an estimated \$40 million for replacement power. The State Corporation Commission late last month granted Virginia Power a 2.4 percent rate increase to pay for the added fuel costs, and is considering a request for an increase in base rates, a commission spokeswoman said yesterday.

The North Anna power plant, which began operations in 1978, is five years newer than the Surry facility and supplies about 20 percent of the electricity needs of Virginia Power customers, according to company figures.

Curry said the shutdown will create no electricity shortage because the utility can buy power from other sources. Officials said such power would cost \$200,000 to \$500,000 a day.

"This time it looks like they got away with it."

— Robert Pollard, nuclear safety engineer

The Surry accident raised a number of questions among nuclear power experts nationwide about potential dangers at aging nuclear plants. That accident was blamed on corrosion in the ruptured pipe, which utility officials attributed to a unique combination of the shape of the pipe, high water purity and unusual turbulence in the pipe. They said there is no connection between the Surry accident and yesterday's incident.

The Nuclear Regulatory Commission, after investigating the Surry accident, told Virginia Power in February to improve maintenance procedures.

In December, officials tested the pipes in the nonnuclear portion of the North Anna Unit 1 and said they found no sign of erosion. At the time, they said the nonnuclear portions of the power plants had not received the same scrutiny and routine inspections as the nuclear portion, where yesterday's incident occurred.

Exhibit 1

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