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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF	)	50-444 OL-01
NEW HAMPSHIRE, et al.	)	On-site Emergency Planning
	)	and Safety Issues
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO JOINT INTERVENORS' APPLICATION FOR STAY OF LBP-89-04 PENDING APPEAL

Gregory Alan Berry
Counsel for NRC Staff

Edwin J. Reis
Deputy Assistant General Counsel

February 27, 1989

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INTRODUCTION

In this response, the NRC Staff opposes the application for a stay of the Licensing Board's decision in LBP-89-04 [1/] filed on February 8, 1989, by the Massachusetts Attorney General, the Seacoast Anti-Pollution League, the New England Coalition On Nuclear Power, and the Town of Hampton (collectively, "Joint Intervenors"). [2/] In LBP-89-04, the "on-site" Licensing Board denied Joint Intervenors' petition to admit a late-filed contention which alleged deficiencies in five "onsite" aspects of an emergency preparedness exercise conducted by Applicants in June 1988. See LBP-89-04, slip op. at 40. The Licensing Board also reauthorized the

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1/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-04, 29 NRC ___ (January 30, 1989).

2/ Joint Intervenors' stay application exceeds the applicable 10 page limit. See 10 C.F.R. § 2.788(b). The Staff's reply also exceeds that page limitation. 10 C.F.R. § 2.788(d). Therefore, the Staff also requests permission to exceed the page limitation. Good cause exists for exceeding the page limit because it was necessary to do so in order for the Staff to

(Footnote Continued)

issuance of a low power license for the Seabrook Station provided the remaining conditions set forth in CLI-88-10 3/ are satisfied. Id. 4/

The application for a stay of LBP-89-04 should be denied, as the two most important stay criterion for a stay in 10 C.F.R. § 2.788(e) are not met, i.e., there is little likelihood that Joint Intervenors will prevail on the merits of their appeal, and Joint Intervenors will not suffer irreparable harm if the instant stay application is not granted. The remaining stay criterion -- the harm to other parties if the stay is granted, and where the public interest lies -- neither weigh in favor of or against a stay.

BACKGROUND

On September 16, 1988, Joint Intervenors filed a "Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record" ("September 16 Motion") requesting that the Licensing Board admit a contention alleging five "fundamental deficiencies" in the June 27-29, 1988 emergency planning exercise which they maintained precluded the Board from finding there is reasonable assurance that adequate protective measures can and will be taken by Applicants in the event of a

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(Footnote Continued)
address adequately the complex procedural issues raised in Joint Intervenors' stay application.

3/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC ___ (December 21, 1988).

4/ Those conditions are that: (1) Applicants guarantee that $72.1 million will be available to decommission the facility after low power operation if full power operation is not authorized, and (2) the Director of the Office of Nuclear Reactor Regulation (NRR) not issue the license until at least 10 days after notifying the Commission that Applicants have
(Footnote Continued)

radiological emergency. See Motion at 1 and Exhibit 1 at 1. Joint Intervenors also argued that should the Board determine that the record had been closed in the on-site portion of this proceeding, the Board should reopen the record for the purpose of admitting their contention. Motion at 1. 5/

(Footnote Continued)
satisfied the first condition. See e.g. CLI-88-10, supra, slip op. at 1-2.

5/ The Staff and Applicants opposed Joint Intervenors' motion. See NRC Staff Response To Joint Intervenors' Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record (October 3, 1988); Applicants' Response To Joint Intervenors' Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record (September 28, 1988). The Staff opposed the admission of Joint Intervenors' exercise contention on the ground that it was not timely filed; Applicants' also maintained that the motion to reopen the record did not satisfy the requirements of 10 C.F.R. § 2.734.

On October 25, 1988, the Licensing Board issued an order, stating:

> We find that additional briefing and affidavits are necessary with respect to that part of the motion seeking to reopen the record. We will consider these briefs and affidavits to determine whether a significant safety issue has been raised and whether a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Memorandum Order (Directing Additional Briefing And Affidavits) at 1 (October 25, 1988) (unpublished). Pursuant to that order, on November 8, 9, and 28, 1988, respectively, Applicants, Joint Intervenors, and the Staff filed responses to the Board's order. See Applicants' Response To Board Order Of October 25, 1988 (Directing Additional Briefing And Affidavits) (November 8, 1988); Memorandum Of Joint Intervenors In Response To October 25, 1988 Order Of Licensing Board (November 9, 1988); NRC Staff Response To Licensing Board Order Of October 25, 1988 (November 28, 1988) ("November 28 Staff Response"). The Staff explained that Joint Intervenors' motion did not raise a significant safety issue but, citing the decision in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), reiterated its position that "because the emergency planning exercise conducted by Applicants in June 1988 is 'material' to the licensing decision," the standards governing motions to reopen a record
(Footnote Continued)

On January 30, 1989, the Licensing Board issued an order denying Joint Intervenors' motion. LBP-89-04, supra, passim. The Board's decision rests primarily upon Joint Intervenors' failure to demonstrate that a balancing of the five lateness factors listed in 10 C.F.R. § 2.714(a)(1) weighed in favor of admitting the late-filed contention. Id. at 4-11. Regarding the first factor, the Licensing Board concluded that there was not good cause for the late filing as Joint Intervenors had sufficient information to formulate a valid contention on July 15, 1988 but inexcusably delayed filing that contention for more than six weeks until September 16, 1988. Id. at 8-9.

With respect to the third factor in 10 C.F.R. § 2.714(a), the extent to which a petitioner's participation reasonably may be expected to assist in developing of a sound record, the Board weighed this factor against Joint Intervenors because "[g]eneralities, rather than precise issues, were presented and we will not do Intervenors' homework for them by reading the affidavit and then summarizing the proposed testimony. Absent such a summary, we don't know with any degree of certainty that which will be the substance and extent of the proposed testimony." Id. at 11.

The fifth factor -- the extent to which a petitioner's participation will expand the issues or delay the completion of the proceeding -- also weighed against Joint Intervenors. Id. In this regard the Board observed that because no other matter relating to low power operation was pending,

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(Footnote Continued)
were not applicable to Joint Intervenors' motion. November 28 Staff Response at 2-3.

"[o]bviously the admission of this late-filed contention and subsequent discovery would delay our proceeding." Id.

The Board also considered and denied Joint Intervenors' alternative motion to reopen the record to admit their exercise contention. Id. at 12-40. 6/ The motion to reopen was denied because it did not raise a "significant safety issue" as required by 10 C.F.R. § 2.734(a)(2). Id. 7/ On February 1, 1989, Joint Intervenors filed a notice of appeal of LBP-89-04, and on February 8, 1989, filed the instant application for a stay pending the outcome of their appeal.

DISCUSSION

Under 10 C.F.R. § 2.788(e) four factors are considered in determining whether a stay should be granted: (1) whether the movant has made a strong showing that it is likely to prevail on the merits; (2) whether the movant will be irreparably injured unless a stay is granted; (3) whether the

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6/ In their September 16 Motion, Joint Intervenors moved the Board to admit the exercise contention. In Joint Intervenors' view, the standards governing motions to reopen a closed record did not apply because the "onsite" record had not closed and the application of such standards was barred by the the decision in UCS v. NRC, supra. See September 16 Motion at 4-8. In the alternative, however, Joint Intervenors argued that were the Board to determine that the reopening standards set forth in 10 C.F.R. § 2.734 applicable, the motion nonetheless should be granted since it satisfied those standards. Id. at 9-11.

7/ It should be observed that it was unnecessary for the Board to make this determination because, among other things, in light of the Board's disposition of Joint Intervenors' late-filed contention, it was apparent their motion to reopen could not possibly be granted. Paragraph (d) of 10 C.F.R. § 2.734 provides that a motion to reopen "which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.714(a)(1)(i) through (v). Since the Board previously had determined that the requirments for nontimely contentions had not been satisfied, Joint Intervenors' motion to reopen could and should have been denied on the

(Footnote Continued)

granting of a stay would harm the other parties; and (4) where the public interest lies. The Staff will address these factors seriatim.

1. Likelihood of success on the merits

   a. The standards in 10 C.F.R. § 2.714(a) and (b) for the admission of a new contention were not met.

Joint Intervenors argue that LBP-89-04 is likely to be reversed on appeal because: (1) the Board erred in ruling that their exercise contention was untimely and thus subject to a balancing of the five lateness factors; (2) the Board erred in determining that a balancing of the lateness factors weighed against them; (3) the Board erred in ruling that the standards governing motions to reopen a record were applicable in this case; and (4) the Board erred in concluding that the record should not be reopened because Joint Intervenors had not raised a significant safety issue. See Stay Application, passim.

The Licensing Board correctly applied 10 C.F.R. § 2.714(a) and (b) and determined that the contention was filed late. LBP-89-04 at 4-6. Section 2.714(b) of the Commission's Rules of Practice explicitly provides that any contention filed after the expiration of the time period specified in the notice of hearing, or as provided by the Commission or the presiding officer must meet the "good cause" test that set out in 2.714(a) for contentions filed after that time. 8/ In Duke Power Company

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(Footnote Continued)
sole ground that it failed to satisfy the requirements of section 2.734(d).

8/ It is well settled that the provisions of 10 C.F.R. § 2.714(a)(1) are applicable to late-filed contentions. See e.g. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 28 NRC 241, 251 (1986).

(Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046 (1983), the Commission held that when issues are sought to be raised after the time for raising issues set out in 10 C.F.R. § 2.714(a)(1) and (b) has expired, a balancing must be made of the factors there prescribed before any additional contentions may be admitted. Applying these rules, the Board determined that Joint Intervenors' contention, which was filed on September 16, 1988, was untimely because the notice of hearing was issued and the first prehearing conference was held several years ago and thus the new contention was subject to consideration under the factors set out in section 2.714(a) governing late-filed contentions. The Licensing Board correctly applied the relevant legal principles to the facts of the case and there is little likelihood that this determination will be reversed on appeal.

The first factor to be considered in determining whether to admit a late-filed contention is whether there is good cause for filing the contention after the original time provided in the regulations. 10 C.F.R. § 2.714(a)(1). As the Catawba case teaches, these new contentions must be submitted promptly once information is available which would allow them to be formulated. 17 NRC at 1048. The Board found that by July 15, 1988, Intervenors were in possession of a copy of NRC Staff Inspection Report No. 50-443/88-09 which formed the bases of the contention and that they could have submitted their contention by July 29, 1988. LBP-89-04, slip op. at 4, n.4. Joint Intervenors, however, inexcusably delayed an additional six weeks, until September 16, 1988, to file the contention. The Board correctly rejected Joint Intervenors' assertion that this delay was justified because it was necessary for them to await receipt of "the

exercise scenario documentation" to gain "a proper technical understanding" of the Seabrook personnel's actions which they claimed they did not receive until the week of August 15, 1988. September 16 Motion at 9-10. Nowhere in their motion did Joint Intervenors explain why they needed this information to file the subject contention. Their unsubstantiated assertion that they "needed" this information was not sufficient to establish good cause. At page 8 of their stay application, Joint Intervenors refer to documents relating to the exercise objectives and scenario but fail to explain why it was essential for them to have access to these documents in order to formulate their contention.

Joint Intervenors have not explained to the Licensing Board or to the this Commission why the contention they submitted depended on any more knowledge of the accident scenario or objectives than they already possessed on July 15, 1989, the date they received a copy of NRC Inspection Report No. 443/88-09. The unavailability of additional licensing-related documents does not establish good cause for late filing if, as was the case here, information was publicly available early enough to provide for an earlier filing of the contention. Catawba, supra, 17 NRC at 1045. The Licensing Board's determination that Joint Intervenors' filing was untimely was in accord with law and is unlikely to be overturned on appeal. 9/

9/ Joint Intervenors also sought to justify their untimely filing by noting that the "offsite" Licensing Board afforded the parties in that proceeding until September 21, 1988 to submit contentions challenging the emergency planning exercise conducted by Applicants. September 16 Motion at 10. The Board properly was unpersuaded by this assertion. LBP-89-04, slip op. at 4, n.4. Scheduling orders issued by the off-site Board are applicable (Footnote Continued)

Joint Intervenors also fault the Licensing Board for finding that they had not established that they would assist in developing a sound record, as required by 10 C.F.R. § 2.714(a)(1)(ii). See LBP-89-04, at 10-11. The Commission in Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986), stated that an intervenor must summarize its proposed testimony whenever it seeks admission of a late-filed contention. Joint Intervenors, experienced litigants in NRC proceedings, did not do so. This factor was properly weighed against admission of the contention and is unlikely to be overturned on appeal.

The Licensing Board also correctly weighed the last factor in 10 C.F.R. § 2.714(a)(1) against Intervenors since admission of the late-filed on-site emergency planning contention would broaden the issues and delay the completion of the proceeding. LBP-89-04, slip op. at 11.

In sum, the determination that the new on-site emergency planning contention could not be admitted under the test in 10 C.F.R. § 2.714(a) was correct and is not likely it would be overturned upon appeal. 10/

b. The Licensing Board's order is not likely to reversed on the ground that Board erroneously applied the reopening standards of 10 C.F.R. § 2.734 to Joint Intervenors' late-filed contention.

Joint Intervenors next argue they are likely to succeed on their claim that the Board erred in applying the reopening standards of

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10/ At pages 7, 10, and 11 of their stay application, Joint Intervenors cite the UCS case for the proposition that the Commission cannot apply standards to emergency planning exercise contentions submitted late in a proceeding that are more stringent than those applied to other contentions. While UCS held that tests for reopening a record could not (Footnote Continued)

10 C.F.R. § 2.734 to their motion. See Stay Application at 9. The Staff does not dispute that the reopening standards did not have to be met [11/]; however, the Board's application of the reopening standards has no practical or legal significance on the pending stay application. As explained above, Joint Intervenors' failed to show that the five factors set forth in 10 C.F.R. § 2.714(a)(1) weighed in favor of admission of their untimely contention. Joint Intervenors' therefore contention would have been rejected even if the Board had not subjected it to the reopening requirements of 10 C.F.R. § 2.734. In these circumstances, the Licensing Board's application of the reopening standards amounts to harmless error. For all the foregoing reasons, there is little likelihood that LBP-89-04 will be reversed on appeal.

2. Irreparable harm if a stay is not granted

As the Appeal Board has observed, "the most significant factor in deciding whether to grant a stay is whether irreparable harm will result in the absence of a stay." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 436 (1987). This

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(Footnote Continued)
be applied to matters which are "material to the licensing decision," the court explicitly recognized that the Commission could properly apply stricter standards to the admission of emergency planning exercise contentions which are submitted near the end of a proceeding and could employ expedited procedures to resolve those contentions. 735 F.2d at 1448. Thus nothing in the UCS case forecloses the application of 10 C.F.R. § 2.714(a) to exercise related contentions submitted late in a proceeding.

11/ From the inception of this controversy, the Staff has taken the position that the standards governing motions to reopen are inapplicable because the June 1988 exercise is "material to the licensing decision." See e.g. October 3, 1988 Staff Response at at 2, n.1; November 28, 1988 Staff
(Footnote Continued)

factor weighs heavily against Joint Intervenors. As explained below, they will suffer no harm, much less irreparable harm, if a stay of LBP-89-04 is not granted at this time.

Joint Intervenors say they will be irreparably harmed in two ways if the requested stay is not granted. First, they assert LBP-89-04 "would permit low-power operation to take place when significant safety questions remain concerning the training and competence of key plant operators," and thus that risk to the off-site public is substantially increased. Application for Stay at 13. However, the Commission, in amending its regulations to eliminate the requirement of providing off-site emergency planning preparedness (as contracted with on-site preparedness) for low power (5%) operation, stated:

> The Commission agrees that there may be slightly higher risks due to the plant operators having less experience with the plant at this stage and with a potential for undiscovered design and construction defects. However, in the Commission's view, this risk is significantly outweighed by several other factors. First, the fission product inventory during low power testing is much less than during higher power operation due to the low level of reactor power and short period of operation. Second, at low power there is a significant reduction in the required capacity of systems designed to mitigate the consequences of accidents compared to the required capacities under full-power operation. Third, the time available for taking actions to identify accident causes and mitigate accident consequences is much longer than a full power. This means the operators should have sufficient time to prevent a radioactive release from occuring. In the worst case, the additional time available (at least 10 hours), even for a postulated low likelihood sequence which could eventually result in release of the fission products accumulated at low power

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(Footnote Continued)
Response at 4-5. This is one of the teachings of the UCS decision. See 735 F.2d at 1443-44.

> into the containment, would allow adequate precautionary actions to be taken to protect the public near the site. Weighing all risks involved, the Commission has determined that the degree of emergency preparedness necessary to provide adequate protection of the public health and safety is significantly less than that required for full-power operation.[1/]

1/ The level of risk associated with low-power operation has been estimated by the staff in several recent operating license cases: Diablo Canyon, Docket Nos. 275-OL-, 323-OL, San Onofre, Docket Nos. 361-OL, 362-OL, and LaSalle, Docket Nos, 373-OL, 374-OL. In each case the Safety Evaluation Report concluded that low-power risk is several orders of magnitude less than full power risk. These findings support the general conclusion in the text that a number of factors associated with low-power operation imply greatly reduced risk compared with full power.

47 Fed. Reg. at 30232-33 (1982). Thus, the Commission concluded that, even considering less experienced operators, the risks to the public were substantially less at low-power than at full power operations. Joint Intervenors have provided no support for their statement that risk to the public resulting from low power operation is "substantially increased" and it should be rejected. 12/

Further, the Director of Nuclear Reactor Regulation (NRR) is required to make the reasonable assurance findings under 10 C.F.R. § 50.57(a) and find that the facility meets all applicable regulations, including those

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12/ The affidavit annexed to the subject motion states that certain operator actions and analyses might be necessary during low power operation (Affidavit, ¶¶ 16, 18), but does not deal with the manner in which the purported failure of the operations foreseeably could affect the public during low power operation considering the low amounts of fission products present, the increased capacity of the plant to mitigate accidents, and the increased time available for response during low power operation. Thus, the affidavit provides no support for the claim of "substantially increased" risk to the public during low power operation.

parts of 10 C.F.R. § 50.47 applicable to low power operation before issuing a license for such operation. No harm to public will result were the Director of NRR authorized to make the requisite reasonable assurance findings regarding protection of the public health and safety and of compliance with the regulations.

Next, the Joint Intervenors assert that they would be irreparably harmed by their appeal being mooted because a low power license might be issued before their appeal is heard. Application for Stay at 13. However, the effectiveness of the low power license reauthorization is conditioned upon Applicants submitting information to demonstrate that there is assurance that $72.1 million dollars would be available to decommission the facility after low power operations in the event full power authorization is not authorized and upon the Staff notifying the Commission at least 10 days in advance that Applicants have complied with these decommissioning funding requirements. See CLI-88-10, slip op. at 2; see also LBP-89-04, slip op. at 41. Neither of these conditions has been satisfied. Applicants have yet to any submit information to the Staff guaranteeing that funds in the amount of $72.1 million will be available to decommission the facility after low power operation and, obviously, the Staff has not notified the Commission that this condition has been satisfied. Consequently, for all practical purposes, the effectiveness of LBP-89-04 already has been stayed. Joint Intervenors' have failed to demonstrate that their appeal of LBP-89-04 may be mooted or that there would be any harm to the public if a stay is not granted at this time.

3. Harm to other parties and the public interest

Should the Commission grant a stay of LBP-89-04 pendente lite harm to Applicants is somewhat conjectural. As explained above, LBP-89-04 does not in itself result in the issuance of a low power license. The harm to Applicants would not become concrete until such time as Applicants submit information to the Staff sufficient to demonstrate that funding in the amount of $72.1 million currently is available to decommission the facility after low power operation and the Staff makes a notification to this effect to the Commission. Thus, the third stay criterion, harm to other parties if a stay is granted, should not weigh heavily in any party's favor.

Consideration of the final stay criterion, where the public interest lies, also does not yield a decision favoring one party or the other. Joint Intervenors certainly are correct that there is a strong public interest in ensuring that a low power license is not issued where there are good grounds to suspect that adequate protective measures may not be taken in the event an emergency occurs during low power operation. This interest, however, is counterbalanced by the equally strong and important public interest in the expeditious resolution of licensing proceedings.

CONCLUSION

The Commission should deny Joint Intervenors' stay application because the two most important stay criterion -- the likelihood of success on the merits and whether Joint Intervenors will suffer irreparable harm if a stay is not granted -- weigh heavily against granting the requested

stay and the other stay criterion weigh neither in favor of or against a stay.

Respectfully submitted,

Gregory Alan Berry
Counsel for NRC Staff

Edwin J. Reis/gab

Edwin J. Reis
Deputy Assistant General Counsel
Reactor Licensing Branch

Dated at Rockville, Maryland
this 27th day of February 1989

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT INTERVENORS' APPLICATION FOR STAY OF LBP-89-04 PENDING APPEAL" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 27th day of February 1989:

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