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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' PETITION
TO WAIVE REGULATIONS 50.33(f) AND 50.57[a](4)
TO THE EXTENT NECESSARY TO REQUIRE APPLICANTS
TO DEMONSTRATE FINANCIAL QUALIFICATION TO
OPERATE AND TO DECOMMISSION SEABROOK STATION

INTRODUCTION

On July 31, 1987, the Town of Hampton, the New England Coalition on Nuclear Pollution (NECNP), and the Seacoast Anti-Pollution League (SAPL) filed a petition under 10 C.F.R. § 2.758, seeking a waiver of Commission regulations to require Applicants to demonstrate their financial qualifications to operate Seabrook Unit 1 at low power for the period of the license, and to decommission the facility following such operation. ^{1/}

^{1/} "Intervenors' Petition to Waive Regulations 50.33(f) and 50.57[a](4) to the Extent Necessary to Require Applicants to Demonstrate Financial Qualification to Operate and to Decommission Seabrook Station" ("Petition"), dated July 31, 1987. Simultaneously with the filing of their Petition, the movants filed a motion before the Commission, requesting that the existing stay of low power licensing continue in effect pending a demonstration by Applicants of their financial qualifications for low power operation and decommissioning of the facility. "Intervenors' Motion For Leave to File A Supplement to Intervenors' Applications for A Stay of Licensing Board Order Authorizing Operation Up to Five Percent of Rated Power", dated July 31, 1987.

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For the reasons set forth below, the NRC Staff opposes the Petition and recommends that it be denied. ^{2/}

DISCUSSION

A. Legal Standards.

Pursuant to 10 C.F.R. § 2.758(a), Commission regulations may not be challenged or attacked in an adjudicatory proceeding involving initial licensing, such as the instant operating license proceeding, except as provided by 10 C.F.R. § 2.758(b). Under that latter provision, a party may petition that application of the rule in question be waived or an exception made for the particular proceeding, upon a showing of special circumstances:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Section 2.758(b) further requires that the petition be accompanied by an affidavit that explains in detail why application of the regulation in question would not serve the purpose for which it was adopted, and that

^{2/} The Petition was filed before the Licensing Board, which concluded its review of onsite emergency planning and safety matters upon issuance of its Partial Initial Decision of March 25, 1987. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-87-10, 25 NRC _____, (1987), mandate stayed, CLI-87-02, 25 NRC _____ (April 9, 1987), motion to vacate stay denied, CLI-87-03, 25 NRC _____ (June 11, 1987). On August 4, 1987, the Appeal Board, which is now considering appeals from the Licensing Board's PID, directed the Licensing Board to consider the Petition, in accordance with 10 C.F.R. § 2.758.

sets forth with particularity the special circumstances alleged to justify the waiver or exception requested.

Pursuant to § 2.758(c), if the presiding officer determines that the petitioner has not made a "prima facie showing", that application of the regulation in question in that proceeding would not serve the purpose for which the rule was adopted and that application of the regulation should be waived or an exception granted, "no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter." If, on the other hand, the presiding officer determines that such a prima facie showing has been made, before ruling thereon he is to certify the matter directly to the Commission for a determination as to whether application of the regulation should be waived or an exception made. 10 C.F.R. § 2.758(d). ^{3/} The petition for waiver should be granted only in "unusual and compelling circumstances." Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972).

While the regulation is silent with respect to the standard of proof required to make a "prima facie showing", Commission case law indicates that "[p]rima facie evidence must be legally sufficient to establish a fact or case unless disproved." Pacific Gas & Electric Co. (Diablo Canyon Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981). Other cases

^{3/} See generally, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-860, 25 NRC 63, 65 (1987); Id., "Memorandum and Order (Ruling on Applicants' Petition With Respect to Emergency Planning Zone in Excess of One Mile)" (unpublished), dated April 22, 1987, slip op. at 3-4.

have required the petitioner to set forth "substantial evidence" that application of the rule in question would not serve the purpose for which the rule was adopted. Carolina Power & Light Co. (Shearon Harris Plant), LBP-85-5, 21 NRC 410, 443 n.16 (1985) (to make a "substantial" showing, the supporting affidavits must "present each element of the case for waiver in a persuasive manner and with adequate supporting facts from a qualified expert, where appropriate"). ^{4/}

B. The Instant Petition.

The Intervenor's Petition seeks a waiver of two Commission regulations ^{5/} concerning the financial qualifications of electric utility

^{4/} Accord, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983) (to support a waiver petition, petitioner must present persuasive evidence rather than bare allegations). Cf. Seabrook, supra, Memorandum and Order of April 22, 1987, at 5-6 (adopting the "legally sufficient" test enunciated in Diablo Canyon, but rejecting the "substantial showing" test as requiring "much more than 'adequate supporting facts from a qualified expert.'")

^{5/} In addition to the two rules cited by petitioners, 10 C.F.R. § 2.104(c)(4) provides that "the issue of financial qualification shall not be considered by the presiding officer in an operating license hearing if the applicant is an electric utility seeking a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22." Presumably, a waiver of this rule, as well, would be required before the Board could consider Applicants' financial qualifications to operate Seabrook.

applicants for an operating license, 10 C.F.R. § 50.33(f) ^{6/} and 50.57(a)(4), ^{7/} to the extent those regulations exempt such applicants

5/ § 50.33. Contents of Applications; General Information.

Each application shall state:

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license, plus the estimated costs of permanently shutting the facility down and maintaining it in a safe condition. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility and estimates of the costs to permanently shut down the facility and maintain it in safe condition. The applicant shall also indicate the source(s) of funds to cover these costs. . . .

7/ § 50.57. Issuance . . . Operating License.

(a) Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51, upon finding that:

(4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter. However, no finding of financial qualification is necessary for an electric utility applicant for an operating license for a utilization facility of the type described in § 50.21(b) or § 50.22.

from having to demonstrate their financial qualifications to operate and "decommission" the facility, prior to issuance of a low power license. ^{8/}

An analysis of the Commission's purpose in adopting these financial qualification rules demonstrates that the Petition fails to make the required prima facie showing of "special circumstances" such that application of the rules "would not serve the purposes" for which they were adopted.

The Commission first proposed to eliminate the review of financial qualifications, in both operating license and construction permit proceedings, in August 1981. This proposal was based on the belief that such a financial review "did little to identify health and safety problems and that the regulated status of electric utilities generally assured

^{8/} While the Commission has adopted regulations governing the safe shutdown and post-operative maintenance of a facility (see, e.g., 10 C.F.R. §§ 50.82, 20.105, Part 70, and Part 73), Commission regulations do not now require a demonstration of financial qualifications to decommission a facility. In this regard, the Commission has promulgated a proposed rule change to address the costs and other aspects of decommissioning. See Proposed Rule, "Decommissioning Criteria for Nuclear Facilities", 50 Fed. Reg. 5600 (Feb. 11, 1985).

Under the proposed rule, reactor licensees would be required to provide "reasonable assurance that adequate funds are available to ensure that decommissioning can be accomplished in a safe manner and that lack of funds does not result in delays that may cause potential health and safety problems." The proposed rule would require reactor applicants and licensees to provide information on funding methods, and proposes a decommissioning fund of \$100,000,000 (1984 dollars) per facility. It should be noted, however, that fission product build-up and plant contamination resulting from operation at 5% power are likely to be far less than would be expected to result from full power operation and, consequently, the costs of decommissioning following low power operation -- even where the facility has operated at 5% power over an extensive period -- are likely to be substantially less than the costs of decommissioning following full power operation.

recovery of reasonable costs." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 431 (1984), citing Proposed Rule, "Financial Qualifications; Domestic Licensing of Production and Utilization Facilities", 46 Fed. Reg. 41786 (August 18, 1981). ^{9/} The resulting rule change eliminating such review was adopted in March, 1982. See Statement of Consideration, "Elimination of Review of Financial Qualifications of Electric Utilities in Licensing Hearings for Nuclear Power Plants", 47 Fed. Reg. 13750 (March 31, 1982). ^{10/}

In February 1984, the Circuit Court of Appeals for the District of Columbia declared the financial qualification rule to be invalid and remanded it to the Commission, on the grounds that the rule's stated basis would apply generally to all applicants and not just to electric utilities. New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). Thereafter, the Commission proposed a revised rule which would eliminate financial qualification reviews for electric utilities applying for operating licenses for utilization facilities, if the utility is a regulated public utility or is authorized to set its own rates. Proposed Rule, "Elimination of Review of Financial Qualifications of

^{9/} See also, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978).

^{10/} In the Statement of Consideration, the Commission noted that it had determined to eliminate any consideration of decommissioning funding in the final rule, on the grounds that "any action on decommissioning is more appropriate in the context of the generic rulemaking now being conducted." The Commission further noted that the generic decommissioning rule was scheduled to be published later that year, and that "since all licensees will be required to meet any financial requirements imposed as a result of that rulemaking, there should be little practical effect in temporarily eliminating consideration of decommissioning funding from licensing activities." Id.

Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants", 49 Fed. Reg. 13044 (April 2, 1984). The proposed rule on remand was based on the Commission's belief that "case-by-case" review of financial qualifications for electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover through ratemaking, to a sufficient degree, the costs of construction and of safe operation. Id., 49 Fed. Reg. at 13045. The Commission's belief in this regard was reiterated upon adoption of the final rule later that year. See Statement of Consideration, "Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants", 49 Fed. Reg. 35747 (September 12, 1984). 11/

Accordingly, for the instant Petition to be granted, the Intervenor must make a prima facie showing that special circumstances exist in this proceeding such that application of the financial qualifications rules would not serve the purpose for which they were adopted -- i.e., that the

11/ The Licensing Board in the Shoreham proceeding summarized the Commission's purpose in adopting the revised rule, as follows:

The purpose of the financial qualifications regulations, applicable to electric utilities, is to eliminate Staff review of the issue in operating license proceedings on a case-by-case basis. . . . The Commission clearly stated that the basis for this exemption was that a utility's regulated status ensured that it recovered reasonable costs of operation, assuming prudent management. Costs to operate a nuclear power plant in conformance with NRC regulations are presumed to be reasonable and thus recoverable through the ratemaking process.

Shoreham, LBP-84-30, supra, 20 NRC at 432.

Commission's assumption that electric utility applicants will be able to recover the costs of operation through the ratemaking process is unwarranted with respect to the Seabrook owners. See Shoreham, supra, LBP-84-30, 20 NRC at 432.

In support of their Petition, the Intervenor's cite a Securities and Exchange Commission Form 8-K filing of July 22, 1987, made by Public Service Company of New Hampshire ("PSNH"), the lead Applicant and 35% owner of Seabrook. In that filing, PSNH recounted recent difficulties it has had in securing short-term financing, stated that it had instituted "strict cash conservation measures that should allow it to meet its estimated cash requirements . . . through the end of 1987", and indicated that it was attempting to develop "alternate financial plans". PSNH further stated as follows:

Given the uncertainties surrounding the Company, its limited financial flexibility, the amount of debt service which the Company can reasonably expect to carry, the political, economic and competitive limits on rate increases in New Hampshire, and the regulatory approvals that will be required, it will be extremely difficult to develop and implement such a plan to improve significantly the Company's circumstances within the limited time available. Should an adequate plan not be developed and placed into effect before the end of 1987, it will be difficult, if not impossible, for the Company to avoid proceedings under the Bankruptcy Code.

(Form 8-K for PSNH, Sheet 2, July 22, 1987; emphasis added).

Based upon these statements, the petitioners assert (1) that the Applicants' lead owner "is on the brink of bankruptcy" (Petition at 2); (2) that "if a full power license is later denied", the Applicants will be unable to recover their costs through ratemaking proceedings, and PSNH's potential bankruptcy therefore presents "uncertainties" as to

whether the Applicants will have the ability to operate the facility at low power, shut it down permanently and maintain it in a safe condition (Id., at 4-6; emphasis added); (3) that the Applicants "may lack the tens of millions of dollars necessary 'to permanently shut down the facility and maintain it in a safe condition,' if a full power license is later denied" (Id., at 4-5; emphasis added); (4) that "the direction of Applicants' management may be radically altered if PSNH is superceded by a bankruptcy trustee" (Id., at 6; emphasis added); (5) that if a trustee is appointed, it is "uncertain" whether he "may decline to pursue a full power license" (Id.; emphasis added); and (6) that such a trustee "may refuse to expend additional monies" on Seabrook, and "[a] Bankruptcy Court, rather than the Applicants, may ultimately determine if additional monies will be spent on Seabrook Station" (Id.; emphasis added).

The recent 8-K filing by PSNH clearly demonstrates that the company is encountering severe financial strains which very well may -- but not necessarily will -- force it into bankruptcy; at this time, however, it remains a matter of speculation that PSNH will be unable to develop and implement an adequate financial plan before bankruptcy results. Such speculation is insufficient to support a determination either that PSNH will, in fact, file in bankruptcy, or that it will be unable to obtain the funds necessary to operate at low power and permanently shutdown and maintain the facility in a safe condition following such operation.

Second, even if PSNH does file in bankruptcy, that circumstance, by itself, would not demonstrate that the composite group of Applicants are

financially incapable of operating and safely maintaining the facility. ^{12/}
At this time, it remains a matter of speculation as to whether a bankruptcy trustee would be appointed, and whether he would discontinue the company's efforts to obtain a full power operating license. Also, despite PSNH's financial difficulties, no reason has been presented which would suggest that any successor to PSNH (including either a reorganized company, an acquiring company, or a trustee in bankruptcy), would not pursue the company's application for a full power operating license and continue its efforts to put the plant into commercial operation -- and thereby recover the company's considerable investment in the facility through its inclusion in the ratebase. In this regard, if a full power license is issued, the facility is likely to be a source of substantial revenue for its owners, whether one of those owners is PSNH or a successor company.

Third, no reason has been presented which would suggest -- contrary to the Commission's stated belief -- that once a full power license is issued and the plant is placed into commercial operation, an electric utility such as PSNH (or any successor company) and the other

^{12/} Similarly, even if PSNH should lack the financial resources for low power operation, no reason has yet been presented to suggest that the remaining Seabrook owners -- who collectively own 65% of the facility -- lack the requisite financial resources, or will be unable or unwilling, to cover PSNH's share of the costs of low power operation and subsequent shutdown and maintenance, through either rate-making or application of capital funds. Nonetheless, the Staff is transmitting a letter to the Applicants requesting information as to the projected costs of low power operation and subsequent permanent shutdown and maintenance of the facility, as well as the sources and likelihood of availability of funds to cover such costs in the event that PSNH is unable to pay its share of the costs.

Seabrook owners would be unable to recover the costs of safely maintaining and operating the facility through ratemaking proceedings before the governing public utility commissions. In the absence of any reason to believe that such rate relief will be unavailable to PSNH or the remaining Applicants upon issuance of a full power license and commencement of commercial operation, there is no reason to waive the financial qualifications rules in this proceeding.

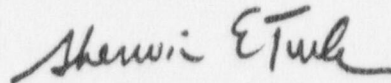
Finally, and most importantly, the Intervenor's concern that funds may be unavailable for low power operation and permanent maintenance following shutdown is founded upon an assertion that a full power license ultimately may be denied. However, the Motion provides no basis for assuming that a full power license will not be issued, nor would a filing in bankruptcy by PSNH, by itself, preclude issuance of a full power license. In this regard, the Commission has indicated (albeit in a different context) that uncertainty as to the outcome of litigation on full power issues, and speculation as to whether a full power license ultimately will be issued, should not be considered in connection with issuance of a low power license. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-84-9, 19 NRC 1323, 1327 (1984). ^{13/}

^{13/} Accord, Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589-90 (1985), stay pending appeal denied, Cuomo v. NRC, 772 F.2d 972, 975-76 (D.C. Cir. 1986), appeal dismissed as moot, ___ F.2d ___ (D.C. Cir., March ___, 1987); Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275, 278-79 (1985). The Shoreham decisions held that an Environmental Impact Statement was not required for low power licensing, despite the uncertainties surrounding the outcome of full power (offsite emergency preparedness) litigation.

CONCLUSION

For the reasons set forth above, the Petition fails to make a prima facie showing of "special circumstances" such that the financial qualification regulations should be waived in this proceeding. Accordingly, the Petition should be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sherwin E. Turk".

Sherwin E. Turk
Senior Supervisory
Trial Attorney

Dated at Bethesda, Maryland
this 17th day of August, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' PETITION TO WAIVE REGULATIONS 50.33(f) AND 50.57[a](4) TO THE EXTENT NECESSARY TO REQUIRE APPLICANTS TO DEMONSTRATE FINANCIAL QUALIFICATION TO OPERATE AND TO DECOMMISSION SEABROOK STATION" 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 17th day of August, 1987:

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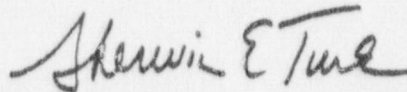
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