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June 12, 1989
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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO MOTION OF THE MASSACHUSETTS ATTORNEY GENERAL TO HOLD OPEN THE RECORD PENDING LOW POWER TESTING AND THE REQUIRED YEARLY ONSITE EXERCISE AND FOR OTHER RELATED RELIEF

INTRODUCTION

Under date of May 31, 1989, The Attorney General of The Commonwealth of Massachusetts (MAG) filed a "Motion of the Massachusetts Attorney General to Hold Open the Record Pending Low Power Testing and the Required Yearly Onsite Exercise and for Other Related Relief" (The Motion). The Motion sought two types of relief. The first was an order directing the Applicants to permit observers, apparently to be designated by MAG, on the Seabrook site to observe low power testing. This portion of The Motion was denied by the

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Board on June 1, 1989. Tr. 23590. The second form of relief sought is an order from this Board declaring that it will hold open the evidentiary hearing record of the proceeding until such time as low power testing of Seabrook and the presently scheduled September, 1989, onsite emergency exercise have taken place. Motion at 9. As part of this request, the Board is requested to schedule a prehearing conference setting a schedule for the filing of contentions which may arise out of low power testing or the onsite emergency plan exercise. Motion at 9-10.

The Motion proceeds from a legal theory that the decision of the United States Court of Appeals in UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) requires that MAG be afforded a hearing on all matters material and relevant to the allowance of full power operation at Seabrook; that both low power testing and the scheduled onsite emergency plan exercise are such matters; and that, therefore, an opportunity must be given for the filing of contentions and litigation thereof before the evidentiary record on full power operating authority can close.

As seen below, this legal theory is flawed and, even if it were not, The Motion is premature.

ARGUMENT

I. THE MOTION IS PREMATURE

As of this time, low power testing of Seabrook has yet to commence, and, in any event, there exist no grounds for

assuming that anything that goes on during low power testing will provide a sufficient basis for a litigable contention. Obviously, the same is true with respect to the exercise scheduled in September. This being the case, MAG is premature in seeking the relief he does.

When, as and if something occurs in the low power testing program or during the exercise, which MAG believes gives rise to a legitimate contention, MAG can then file a proposed contention and an appropriate motion and brief seeking to be relieved of the record reopening requirements of 10 CFR § 2.734 and the late-filed contentions standards of 10 CFR § 2.714(a)(1) under his UCS legal theory. It is only if (a) a contention producing event occurs and (b) the alleged contention arising out of such an event cannot withstand the standards of 10 CFR § 2.714(a)(1) and 10 CFR § 2.734 that any adjudicator need resolve the legal question presented by The Motion. Absent these circumstances, the issue need not be resolved.

Thus, The Motion is premature and should be denied on that ground alone.

II. LOW POWER TESTING IS NOT A MATTER "RELEVANT AND MATERIAL" TO ISSUANCE OF FULL POWER OPERATING AUTHORITY

A good deal of space in The Motion, Motion 3-6, is devoted to the supposed demonstration that low power testing is "material and relevant to the determination by the Commission to issue a full power license," Motion at 3.

First, it is noted that 10 CFR § 50.34(b)(6)(iii) requires an application to set forth "[p]lans for preoperational testing and initial operation." (As quoted in Motion at 3.) It should be noted that the full context of this language in 10 CFR § 50.34(b)(6)(ii) is:

> "Each application for a license to operate a facility shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design bases and the limits on its operation and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:
> . . .
>
> (b) the following information concerning facility operation:
>
> (iii) Plans for preoperational testing and initial operations."
> (Emphasis added.)

Then it is argued that certain quotations taken from Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 794-95 (1983) and from Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1590 (1985) stand for the proposition that at least where a low power testing license is, in fact, issued successful completion of the low power test program is a "precondition for issuance of a full power license." Motion at 4-5. Finally, it is argued that certain portions of NRC's Brief before the court in the UCS case supports the proposition that "[t]he Commission itself views

preoperational and low power testing as material to its full-power licensing decision." Motion at 5-6.

What MAG has failed to distinguish between in his discussion of this point is the issuance of a full power license or operating authority and allowing a plant so licensed to ascend to full power. As the language of ALAB-728 relied upon by MAG acknowledges, low power testing may well be "scheduled as the first step toward operation under the authority of a full-power license." ALAB-728 at 795 quoted Motion at 4. MAG does not, and cannot, point to any law or regulation which requires the completion of a low power test program before a full power license issues. In an uncontested case, there is no need to seek low power operating authority under 10 CFR § 50.57(c) and 10 CFR § 50.47(d). Indeed, Seabrook could elect not to perform low power tests at this point and simply await its full power license. The full power license can simply issue and the power ascension program will be started and monitored by the Staff. If the power ascension program at any point gives evidence of a problem, the Staff will stop the power ascension in the unlikely event that the licensee does not. Never, has the successful completion of low power testing been a legal prerequisite to issuance of a full power license.

More importantly, as recognized in UCS, NRC and its predecessor AEC have, for years, permitted low power testing

and not allowed hearings as the result thereof (absent a successful motion meeting the criteria now set forth in 10 CFR § 2.734 or 10 CFR § 2.714(a)(1)). Congress has been well aware of this practice for years, and with due respect to the UCS dictum suggesting that perhaps it was not "confident" Congress had acquiesced in this practice, in fact Congress has.

III. UCS CANNOT BE READ AS GRANTING ANY UNCONDITIONAL RIGHT TO A HEARING ON EVENTS OCCURRING DURING THE SCHEDULED ONSITE EXERCISE

The Motion also asserts that the scheduled onsite emergency plan exercise is, under UCS, "material and relevant to the issuance of a full-power license." Motion at 7-8. However, MAG's argument ignores that portion of UCS v. NRC (which, of course, dealt with full participation graded qualifying exercises) where the court made clear that there were exceptions to the "material and relevant" rule which the court described as follows:

> "Although the AEA includes no exceptions to section 189(a), there is something to be said for the first proposition: Obviously, Congress did not mean to require a hearing where a hearing serves no purpose. In determining the scope of such an exception we look to the APA, where Congress exempted from the formal hearing procedures adjudicatory 'decisions [that] rest solely on inspections, tests, or elections,' 5 U.S.C. § 554(a)(3) (1982), 'because those methods of determination do not lend themselves to the hearing process.' S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945). The language of the APA exemption is circumscribed, and does not

> encompass all decisions which are based on evidence derived from tests or inspections. Were it not so circumscribed, an agency would have unfettered discretion to do away with hearings altogether and replace them with staff inspections as the sole method of developing evidence for its ultimate decision. For example, under such a broad reading, the NRC conceivably could remove safety review of nuclear reactor design from the license hearing by relying solely on tests and inspections to determine that the reactor operates safely. Obviously, the test exemption is not so broad.
>
> "In seeking to discern its limits, we look to the legislative history of the APA. There, although Congress did not elucidate its reasoning at length, it cited the Attorney General's report that analyzed the exemption as designed for on the spot decisions made by a qualified inspector who himself 'saw . . . tested . . . or examined' the evidence material to the decision. <u>There is no indication it was meant to apply to decisions that are made by weighing evidence tendered by third parties. Where, as with preparedness exercises, the decision involves a central decisionmaker's consideration and weighing of many others persons' observations and first hand experiences, questions of credibility, conflicts, and sufficiency surface and the ordinary reasons for requiring a hearing come into the picture</u>."
> (Emphasis added.) (Footnotes omitted.)
> 735 F.2d at 1449-50.

In holding that the offsite exercise did not fall within the above-described exception, the court relied upon the following characteristics of the offsite emergency plan exercise evaluation:

> "In evaluating the exercises, the Commission does more than just review on the scene reports by NRC staff observers.

> Rather, the Commission is called upon to consider and weigh evidence presented by FEMA, the licensee, and state and local officials as well as its staff in assessing whether the exercises demonstrate that adequate emergency preparedness plans can and will be implemented. In addition, the evaluation of exercises is itself just one, not the 'sole,' factor in the Commission's overall determination, required under the rule, that, in case of a radiological emergency, there is reasonable assurance that adequate measures can and will be taken to protect the health and safety of the population around a nuclear power plant. Thus, we conclude that evaluation of emergency exercises is not a determination resting solely on a test or inspection so as to qualify for a generic exemption from section 189(a)'s hearing requirements." (Footnote omitted.) 735 F.2d at 1450.

In the case of the onsite exercise contemplated herein the Commission will "just review on-the-scene reports by NRC Staff observers;" and the Commission will not "weigh evidence presented by FEMA, the licensee, and state and local officials."[1] In short, the onsite exercise does fall within the exception described in UCS.

Prescinding from the foregoing, MAG also ignores the fact that the scheduled onsite emergency plan exercise will be the fourth such exercise held at Seabrook, and the third since the fuel loading and zero power operating license

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[1] It obviously will weigh evidence presented by licensee to the extent it is included in Staff reports or seeks to explain findings of the Staff, but this is no more a factor here than it would be in the case of the Staff inspection of a piping system.

issued. This is not the case where the exercise involved is the only one of its kind available to litigate which was the situation presented in UCS.

CONCLUSION

The Motion should be denied. MAG should be left to his remedies under 10 CFR § 2.734, 10 CFR § 2.714(a)(1), and 10 CFR § 2.206, as applicable, in the event low power testing or the onsite exercise when held reveals a safety problem of any kind.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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