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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	(Off-Site EP)
	)	
(Seabrook Station, Units 1 and 2)	)	June 21, 1989

REPLY OF THE MASSACHUSETTS ATTORNEY GENERAL
TO THE RESPONSES OF THE APPLICANTS AND STAFF
TO THE MAY 31 MOTION TO HOLD OPEN THE RECORD

On May 31, 1989 the Massachusetts Attorney General ("Mass AG") filed a motion seeking to have this Board assert jurisdiction over any litigation that arises from low power testing and the September 1989 onsite exercise. The Mass AG received the Applicants' response on June 12 and the Staff's response on June 16. The Mass AG submits this reply to those responses.

I. APPLICANTS' RESPONSE

A. The Motion Is Not Premature

The Applicants assert that the May 31 motion is premature because the relevant "contention-producing event[s]" (App. Response at 3) have not occurred (or at least in the case of low power testing are not yet completed). As a consequence,

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the Applicants would have this Board deny the motion now and leave the Mass AG to try to reopen the record with a late-filed contention at some later time.

The Applicants ignore the basis and the purpose of the motion.

1. By this motion the Mass AG is requesting a hearing pursuant to the Atomic Energy Act on issues that are material and relevant to the issuance of a full power license. Obviously, one predicate of this motion is the assertion that a full power license may not issue before low power testing is successfully completed and an onsite exercise is held and no fundamental flaws in the onsite plan are revealed by that exercise. The Mass AG is seeking in this motion a determination by this Board that whether the low power testing has been successfully completed and whether any fundamental flaws in the onsite plan have been disclosed by the next exercise are litigable issues. There is nothing premature about this legal question.

2. Moreover, the Mass AG seeks particular relief by this motion that could and should be granted now. First, the record should be held open so that the Mass AG at the point at which he would submit contentions does not have to move to reopen the record.[1/] (As discussed below, UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) held that if the NRC in the first instance requires that an intervenor reopen a closed record to obtain a

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1/ Obviously, there may be no contentions to submit if the "contention-producing events" do not permit the formulation of contentions. This fact does not make the request for a schedule for the filing of contentions premature.

hearing on an issue material to licensing his or her hearing right is impermissibly burdened.) Second, a schedule should be set for the filing of contentions so that if the late-filed contention standard of §2.714(a)(1) is applied,[2/] the Mass AG will be able to establish "good cause" for late-filing.[3/]

B. Low Power Testing and a Full Power License

1. In response to the substantive arguments concerning the materiality of low power testing to a full power license, the Applicants make two points. First, they argue as follows:

> 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 C.F.R. §50.57(c) and 10 C F.R. §50.47(d). Indeed, Seabrook could elect not to perform low power tests at this point and simply await its full power license.

Applicants Response at 5. The short answer to this argument is that once the Applicants have requested and received a low power license pursuant to §50.57(c) the successful completion

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2/ As the May 31 motion indicates at 9-10, it is the Mass AG's view that the late-filed standard should not be applied. This Board did not apply that standard to the contentions filed in April 1988 on the SPMC or to those filed in September 1988 on the June 1988 exercise. The Board's reasoning was sound then and applicable again now. The Mass AG had a right to litigate the adequacy of the SPMC and the performance during the June 1988 exercise. Deadlines had been set for contentions filed on both matters and the Intervenors timely filed in accordance with those deadlines. In these circumstances, §2.714(a)(1) is not applicable.

3/ Assuming §2.714(a)(1) applies here, the issue will become how soon after it was possible to file contentions were contentions filed. The Mass AG requests a schedule in advance so that he will meet this test without argument.

of the test program becomes a condition precedent to the issuance of a full power license. To hold to the contrary would mean that a full power license could issue (assuming there are no other open and contested issues) even if the test program disclosed, for example, that plant safety systems were not functional. As to the "need" for low power authority in a contested case, Applicants articulate no reason at all why an uncontested case would present any more or less need.[4/] In any case, whatever the "need" for the low power license, low power tests pursuant to a separate license are material and relevant to the issuance of a full power license.[5/]

2. Second, the Applicants argue that the NRC and AEC have permitted low power testing for years and "not allowed hearings as the result thereof." App. Response at 6. The Applicants cite no case in which the right of the public to a hearing on low power testing was decided or even addressed other than UCS. In short, the matter is one of first

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4/ Even in an uncontested case an applicant may be ready for low power operation before all legal requirements (such as adequate offsite plans that have been successfully exercised) for full power are met. Thus, the "need" for low power authority is uniform in both cases.

5/ Moreover, even if low power testing followed the issuance of a full power license, successful completion of that testing would be a condition precedent to full power operation. The fact that in those circumstances a "license" has already issued without more would not dispose of an intervenor's hearing rights. As the Applicants are fond of reiterating, a 40-year license issued in 1986 and all subsequent Seabrook litigation has concerned issues material to higher levels of power authorization. This fact has had no impact on the public's rights to a hearing on all material issues deemed material by the NRC to each level of power authorization.

impression and in such circumstances, Congressional acquiescence in a past Commission practice is irrelevant.[6/]

C. The Next Onsite Exercise

With regard to the Mass AG's request for a hearing on the next onsite exercise, the Applicants appear to agree that that exercise is material and relevant to a full power license The Applicants, however, make two arguments for not permitting the Mass AG to litigate that exercise.

1. First, the Applicants assert that the onsite exercise is exempted from the hearing right granted by the Atomic Energy Act ("AEA") because it falls within the "inspections, tests or elections" exception set forth in the Administrative Procedure Act ("APA"). 5 U.S.C. §554(a)(3). App. Response at 6-8. In support of this assertion, the Applicants cite one consideration discussed by the Court in UCS which purportedly distinguishes offsite exercises (which are not within the exception) from onsite exercises (which assertedly are): the fact that in reviewing an onsite exercise the NRC reviews reports of Staff observers and not "third parties." On this slim reed, the Applicants assert that onsite exercises are exempt from a public hearing.

In response, the Mass AG notes the following:

a. The June 1988 onsite exercise which was part of the full participation exercise was litigable and the Applicants point out no distinction between it and the upcoming

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6/ Technically, because it appears that no request for a hearing in these circumstances has ever been addressed before, there is no past Commission practice to which Congress could be seen to have acquiesced.

exercise. The Mass AG filed a contention alleging a fundamental flaw in the onsite plan based on the onsite exercise. This contention was admitted.

b. The Applicants ignore the whole thrust of the APA's exception and rather mechanically latch onto one purported distinction which they claim supports their position. The exception is designed for those types of determinations which do not lend themselves to the hearing process. Feldman v. State Board of Law Examiners, 438 F.2d 699, 703 n.6 (8th Cir. 1971). See Door v. Donaldson, 195 F.2d 764 (D.C. Cir. 1952). See also Davis, Administrative Law, §12.12 (2nd edition). Determinations that do not lend themselves to the hearing process are those based on "technical facts" that once established do not lend themselves to further dispute concerning their meaning or significance. UCS v. NRC at 1449 n.22 (citing Door v. Donaldson, supra.) One of the key indicia of such determinations is a set of objective standards for the test or examination which are applied to the object or activity being evaluated. See Basciano v. Herkimer, 605 F.2d 605, 611 n.6 (2d Cir. 1978) (examination of human body follows "physicians' methods" and lawyers "complicate the process"). Here, the onsite exercise, just like the offsite exercise, is reviewed against a set of objectives (the June 1988 onsite exercise had 35 such objectives) and a judgment made which by its very nature does lend itself to the hearing process. Indeed, the UCS decision does not distinguish between onsite and offsite emergency exercises and no distinction between them which would have any meaning in light of the purpose of the

APA exception and the UCS Court's discussion of that exception is possible.

c. The Commission itself has identified no distinction between the onsite and offsite exercises that would support exceptional treatment of onsite exercises.

d. Finally, the Applicants ignore a critical distinction between the APA exception to a hearing and the AEA's grant of a hearing to the public. The APA's exception permits an agency to take an action affecting the interests of a party without granting that party a hearing if and only if that action is based "solely on inspections, tests, or elections." The exception is an exception to a hearing right that runs to the party whose interest is being directly affected. The hearing right under the Atomic Energy Act runs, however, not only to the Applicants but to the public. For this reason, it is not at all clear that the APA's exception was intended to limit public participation in licensing decisions even if the Applicants were more than willing to have the decision made based on an inspection or a test. Inspections and tests are permissible substitutes for a hearing as far as the party directly affected by a decision based on them is concerned but are not necessarily satisfactory substitutes for public participation through a hearing in matters deemed material and relevant to nuclear reactor licensing. As the UCS Court noted:

> Administrators may not lightly sidestep procedures that involve the public in deciding important questions of public policy.... [W]e believe Congress vested in the public, as well as the

> NRC Staff, a role in assuring safe operation of nuclear power plants.

735 F.2d supra at 1446, 1447.

2. The Applicants also argue that the Mass AG ignores the fact that the upcoming onsite exercise will be the fourth such exercise at Seabrook. The Mass AG did ignore this fact because it is irrelevant and Applicants offer nothing that would contradict this. As set forth at 7-8 of the May 31 motion, it is clear that within 1 year of the issuance of a full-power license an onsite exercise must be held. Once held, its results are material and relevant if they indicate that there is a fundamental flaw in the onsite plan.

II. STAFF RESPONSE

A. Preliminary Issues

1. In a section of its response entitled Background (Staff's Response at 2), the Staff attempts to poison the well by asserting that the Mass AG

> seeks to prevent completion of the full power proceeding to give intervenors time to raise additional issues for litigation in the full power proceeding which would substantially delay the completion of the proceeding.7/

7/ Apparently, the Staff believes that the motives behind the Mass AG's May 31 motion are relevant to assessing the legal issues raised therein. For the record, the Mass AG does not consider the motives of the Applicants or the Staff as revealed by their responses to the motion relevant to an assessment of those responses. Nevertheless, for the sake of a complete record in this regard, the Mass AG believes that the NRC Staff is guided in this proceeding by its goal of licensing Seabrook at the earliest possible moment notwithstanding the merits of any procedural or substantive legal issues raised at any time by the intervenors. To realize its goal, the NRC Staff has argued and will continue to argue for the interpretation of law and fact that in its view is most likely to result in the earliest possible licensing of Seabrook.

The short answer to this concern is that it is NRC regulation and not the perfidy of the Mass AG which prevents the immediate full-power licensing of Seabrook. The Mass AG is not seeking additional time in order to raise issues. Instead, the Mass AG is asserting a right sanctioned by Congress to litigate matters made material and relevant to full power licensing by the NRC itself.

2. In a very curious argument[8/] apparently based on jurisdiction (Staff's response 2-8), the Staff agrees that this Board has "general jurisdiction" over the issues raised by the motion but nonetheless does not have jurisdiction sufficient to grant the relief sought. Ostensibly, this Board lacks the requisite authority because no contantions have as yet been admitted by this Board. Obviously, this Board does have jurisdiction to admit contentions. Thus, the Staff's notion that the Board has no power until contentions are admitted is literally absurd. The relief sought here is all ancillary to the Board's basic power to admit contentions. Moreover, pursuant to §2.717(a), the presiding officer has jurisdiction over "motions and procedural matters." This jurisdiction has not been terminated.

8/ The Mass AG confesses that portions of the Staff's argument in this regard were unintelligible. It is unclear what "increase" in authority of this Board is sought by the Mass AG by requesting a schedule for the filing of contentions. Such a schedule was set during the New Hampshire proceeding for the filing of SPMC contentions. Similarly, a schedule was set during the pre-hearing phase in August 1988 for the filing of exercise contentions. The Staff never hinted that such Board control over the proceeding was extraordinary and unauthorized.

B. Materiality and UCS v. NRC

At page 6 of its response the Staff states that the UCS Court

> did not state that on-going hearings could not be closed before the exercise was conducted or before other matters material to the issuance of the license were resolved . . . . Thus, the court implied that a hearing record could be closed if a right to reopen the record to litigate significant late developing matters existed.

The Staff in this passage comes dangerously close to knowingly misstating the law as set forth in UCS and in San Luis Obispo Mothers For Peace v. NRC, 751 F.2d 1287, 1316-1317 (D.C. Cir. 1984). It is unclear what the Staff intends by the phrase "a right to reopen the record to litigate significant late developing matters." No such right exists under NRC law. An opportunity to seek reopening does exist but both the UCS and Mothers For Peace cases indicate that such an opportunity is not an "adequate substitute for the hearing guaranteed petitioners as a matter of right under section 189(a)." Id. at 1316. The Staff makes this ambiguous argument notwithstanding the following public warning in Mothers For Peace:

> Our holding today that consideration of a request to reopen the record does not satisfy the requirements of section 189(a) should preclude such Commission error in the future. In the unlikely event the Commission repeats its mistake, this court would have no choice but to presume bad faith on the part of the Commission and act accordingly.

Id. at 1317.[9/]

9/ The Staff, interestingly, never addresses the issue whether low power testing or the September onsite exercise are material to a full power license. The Staff assumes that they are, but that because they came up so "late" in the "hearing process," a motion to reopen standard is applicable to any contention

(footnote continued)

The Staff goes further at page 7, n.5 and intentionally blurs the distinctions between "materiality" for purposes of determining whether there exists a hearing right and "materiality" pursuant to the motion to reopen standard. As to the first, it is undisputed that a hearing can be limited to issues that are "material" to the decision to license. (In fact, it is obvious that the Mass AG has asserted that low power testing and the next onsite exercise are material in this sense.) As to the second, in order to successfully move to reopen a closed record a movant must show that a "materially different result" would have been likely had the evidence been presented earlier. As the Court in Mothers For Peace stated:

> In order to obtain reopening, petitoners were required to show that they possessed new evidence which was timely; material, in the sense that it would have resulted in a different outcome had it been known earlier; and safety-significant. None of these three criteria applies to requests for a hearing under section 189(a). . . . At most, parties must show that a particular issue is "material" in order to

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(footnote continued)

arising from them. To support this view, the Staff totally distorts Chemical Waste Management, Inc. v. EPA, No. 88-1490, slip opinion (D.C. Cir. May 5, 1989) and argues that whether a formal adjudicatory proceeding is necessary is "an open question." Staff's response at 7 n.5. It is not an open question at all in light of long-standing Commission policy and law which provide such a formal adjudicatory proceeding once an issue is determined to be material and relevant. Although in Chemical Waste, the Court announced that the presumption in UCS was no longer good law, it characterized the pertinent UCS statement as unnecessary to its decision in that case and therefore as dicta. Moreover, the Court noted that on the record hearings were required on emergency exercises "based both upon NRC's unsuccessful efforts to convince Congress to do away with such procedures and upon NRC's consistent position, over a twenty year period, that the statute [the AEA] required formal procedures." Id. at 9. (emphasis supplied). It is puzzling how the Staff now views the nature of NRC hearings as an "open question."

> prevent its exclusion from a hearing under section 189(a); this much our decision in [UCS v. NRC] establishes. But the material issue requirement implicit in section 189(a) is significantly different from the material evidence requirement of the Commission's reopening criteria. In most cases, as here, the latter requirement will impose a substantially more onerous burden on parties than the former.

751 F.2d at 1316. Notwithstanding this very clear statement by the Court, the Staff asserts:

> Certainly, standards relating to reopening a record would be applicable to such issues if they were submitted late in the licensing process after a hearing record had closed. The court in UCS stated that the Commission could refuse to admit a contention if it was not "material to its decision." 735 F.2d at 1448. The Commission's rule governing a motion to reopen a record provides that before a record is reopened it must be shown that "a materially different result would be or would have been likely" had the evidence or issue been presented earlier. 10 C.F.R. §2.734(a)(1). Thus, the [UCS] court and the Commission set out a similar standard for contentions submitted late in a proceeding.

Staff Response at 7, n.5.[10/]

Respectfully submitted,

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10/ The Mass AG believes that such intentional and flagrant omission and miscitation of federal law by the NRC Staff to an adjudicatory body of the NRC should be sanctioned by this Board. At the very least, the intentional obfuscation of the issues and the failure to even address the relevant matters, condemns the Staff's response to deserved irrelevance.

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Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	(Off-Site EP)
(Seabrook Station, Units 1 and 2)	June 21, 1989

CERTIFICATE OF SERVICE

I, Leslie B. Greer, hereby certify that on June 21, 1989, I made service of the REPLY OF THE MASSACHUSETTS ATTORNEY GENERAL TO THE RESPONSES OF THE APPLICANTS AND STAFF TO THE MAY 31 MOTION TO HOLD OPEN THE RECORD and the REVISED TESTIMONY OF DR. COLIN J. HIGH ON BEHALF OF JAMES M. SHANNON, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS CONCERNING CONTENTION OF JI-56 (Monitoring Rate) via hand delivery as indicated by [*] and by First Class Mail on June 21, 1989 to:

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