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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO INTERVENORS' "MOTION TO ADMIT CONTENTION, OR IN THE ALTERNATIVE, TO REOPEN THE RECORD, AND REQUEST FOR HEARING"

INTRODUCTION

On June 22, 1989, the Seabrook Station was shut down by Applicants after an event occurring in connection with the performance of a natural circulation startup test. The Applicants have committed not to restart the facility without the prior consent of the Regional Administrator for Region I. See Confirmatory Action Letter From Region I Administrator William T. Russell to Applicants at 1 (June 23, 1989), attached to letter from Edwin J. Reis to Licensing Board (June 26, 1989).

On July 21, 1989, the Massachusetts Attorney General, the New England Coalition On Nuclear Pollution (NECNP), and the Seacoast Anti-Pollution League (SAPL) ("intervenors") filed a motion to admit a contention which raises issues arising out of the event referred to above. Intervenors' Motion To Admit Contention, Or In The Alternative, To Reopen The Record, And Request For Hearing at 1-3 (July 21, 1989) (hereinafter "Motion"); Id., Exhibit 1, ("Intervenors' Contention Following License Suspension"), passim. Intervenors contend they are entitled to a hearing as a matter of

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right because the NRC's "suspension" of Applicants' low power license is "expressly designated as a 'proceeding' giving rise to a hearing" under § 189a of the Atomic Energy Act. Motion at 4. Intervenors also argue that this hearing right cannot be conditioned upon their compliance with the standards set forth in 10 C.F.R. § 2.714(a)(1) governing late filed contentions or 10 C.F.R. § 2.734 relating to motions to reopen the record. Id. at 11-12. Alternatively, intervenors argue that the proffered contention satisfies the standards set forth in those regulations so as to warrant reopening the record. Id. at 12-25. Finally, intervenors request the Board to prohibit further low power testing and withhold authorization to issue a full power license until after a hearing is held on all issues raised by their contention. Id. at 2.

For the reasons discussed in this response, the Staff urges the Board to deny intervenors' motion in its entirety.

DISCUSSION

A. Intervenors' Right To A Hearing On The "Suspension" Of Applicants' Low Power License

As noted at the outset, low power testing of the Seabrook Station has been halted and the Applicants have committed to the NRC that this testing will not be resumed without the prior approval of the Region I Administrator. Intervenors contend that this action should be regarded as the equivalent of initiating a proceeding to "suspend" Applicants' low power license. See Motion at 4-8. According to intervenors, because § 189a of the Atomic Energy Act expressly lists a license suspension as one of the eight types of proceedings giving rise to a hearing, they are entitled to a hearing on all issues raised by their contention. Id. at 6-7. There is no merit to this position.

First, the Staff has not suspended Applicants' low power license. Applicants voluntarily ceased operations in light of the June 22, 1989 event although to be sure, Applicants have agreed with the Staff not to resume low power testing without first obtaining the approval of the Staff. 1/ See Confirmatory Action Letter from William T. Russell, Region I Administrator to Applicants, supra, at 1.

Second even if the Staff's June 23, 1989 confirmatory action letter to Applicants were considered a "suspension" of Applicants' low power license, Intervenors would still have no right to raise that suspension in this proceeding. If as intervenors maintain, the letter is deemed a "suspension" order triggering an enforcement proceeding 2/, that proceeding, an enforcement proceeding, is to be held separate and apart from the pending full power operating license proceeding. See 10 C.F.R. Part 2, Subpart B. Such enforcement action is not a matter encompassed by the notice of hearing which set the bounds of the matters which might be considered by this Board. The Commission's regulations make clear that only the Commission is authorized to entertain and grant a request for hearing in connection with enforcement or licensing proceedings. See 10 C.F.R. §§ 2.104(a) (licensing) and 2.202(c) (enforcement actions). The jurisdiction of a licensing board extends only to those matters encompassed in the Commission's notice of hearing, e.g. Portland General

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1/ But see Commonwealth of Massachusetts v. NRC, ___ F.2d ___, No. 88-2211, slip op. at 11-13 (June 29, 1989).

2/ Intervenors are correct in asserting that agency action to suspend a license is one of the actions to which § 189a hearing rights attach. See Ibid., at 6, n.4; Atomic Energy Act, as amended, § 189a, 42 U.S.C. § 2239.

Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979), or raised sua sponte in accordance with the provisions of 10 C.F.R. § 2.760a. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station), CLI-81-24, 14 NRC 614, 615 (1981). The Commission has not authorized this Board to preside over a license suspension proceeding.

More importantly, intervenors are incorrect in asserting that they are entitled, without more, to participate in such a suspension proceeding. The case law is clear that only one who will be adversely affected by the proposed action, i.e., a suspension, has the right to may request a hearing or participate in the proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Bellotti v. NRC, 725 F.2d 1380, 1382 (D.C. Cir. 1982).

In Marble Hill, the NRC Staff issued an order suspending construction activities at the Marble Hill facility. The order stated that in the event a hearing was requested, the issues to be considered at such hearing would be limited to whether the facts stated in the order were true and whether the order should be sustained. 11 NRC at 440. Intervenors requested a hearing and sought to raise issues not addressed in the suspension order. Id. at 439. The Commission rejected the request on the ground that petitioners were not adversely affected by the suspension order and thus lacked standing to intervene. Id. The Commission stated that for purposes of determining standing, the test is "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." Id., quoting, Nuclear Engineering Co. (Sheffield Low-Level Waste Disposal Site), ALAB-473, 7 NRC

737, 743 (1978). Because the licensee in Marble Hill did not request a hearing to contest the suspension order, there was no possibility that the suspension order would not be implemented and thus no adverse affect on petitioners, none of whom opposed the suspension of construction activity. See Marble Hill, supra, 11 NRC at 442; Bellotti v. NRC 725 F.2d at 1382-83 (in a proceeding convened to consider whether an order that imposed a civil penalty and modified applicant's license should be sustained, Massachusetts Attorney General would lack standing to participate because he did not oppose, and thus would not be adversely affected by the proposed agency action).

The decisions in Marble Hill and Bellotti are controlling here. Applicants have not requested a hearing to contest the "suspension" of low power testing and, consequently, there is no possibility that the "suspension" will not take effect (in fact, low power operation has ceased). None of the intervenors oppose this action; hence, none of them is adversely affected by the "suspension" of Applicants' low power license. 3/ Since none of the intervenors has suggested that it would be adversely affected by the suspension of low power testing at the Seabrook Station, none of them has standing as a matter of right to participate in a hearing pursuant to § 189a of the Atomic Energy Act. Marble Hill,

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3/ In the recent case of Commonwealth of Massachusetts v. NRC, supra, slip op. at 12-13, the court emphasized that there is no right to a hearing under § 189a the Atomic Energy Act where one seeks to support or prevent the vacation of a "suspension". See also San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984), reh'g en banc on other grounds, 789 F.2d 26 (1985), cert. denied, 479 U.S. 923 (1986).

supra; Bellotti v. NRC, supra. Their request for a hearing therefore should not be granted.

B. Intervenors' Contention Is Not Admissible Because It Does Not Involve A "Fundamental Flaw" In Applicants' Operator Training Or Low Power Testing Program

Intervenors argue in the alternative that they are entitled to a hearing on their contention because low power testing, adequate management, operator training, and operating procedures are "material" to the decision to grant a full power license. Motion at 8-12. As discussed below, assuming arguendo that intervenors' assertion are correct [4/], it is not sufficient to admit the proffered contention.

In Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447-49 (D.C. Cir. 1984), the U.S. Court of Appeals for the District of Columbia Circuit held that litigation of contentions that involve issues arising late in the proceeding could be limited by the Commission to those material to the decision, i.e. "fundamental flaws", in contrast to minor or ad hoc problems. In Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-86-11, 23 NRC 577, 581 (1986), the Commission adopted this standard, stating: "Since only fundamental flaws are material licensing issues, the hearing may be restricted to those issues." The Appeal Board further defined a fundamental flaw as one that "reflects a failure of an essential element of the plan" which can be remedied "only by a significant revision of the plan." Id., ALAB-903, 28 NRC 499, 505 (1988). In Public Service

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4/ In light of the Commission's decision in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 399, 413 and n.13 (1989), the claim that low power testing is material to the licensing decision appears dubious.

Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC ___, slip op. at 24-25 (June 20, 1989), the Appeal Board stated that where "problems are readily corrected by providing supplemental training to some of applicants' personnel," such problems could not be characterized as a "fundamental flaws".

While recognizing that the UCS v. NRC, Shoreham, and Seabrook cases cited above all involved contentions arising out of emergency planning exercises, the rationale of those cases is equally applicable to contentions arising out of low power or power ascension testing. 5/ As with an emergency planning exercise, low power testing is, as a practical matter, conducted near the end of the full power operating license proceeding; indeed, such testing frequently occurs after the proceeding has been completed and full power license has issued. See attached Affidavit of James G. Parlow and Victor Nerses at ¶ A5. Additionally, in evaluating the results of low power testing, the Commission's concern is not with minor or ad hoc problems occurring during the testing but rather with pervasive or "fundamental" deficiencies which pose significant public health and safety problems. Compare Shoreham, ALAB-903 with UCS v. NRC, supra, 735 F.2d at 1448. For these reasons, the contention must be rejected if it is shown that it does not involve a pervasive problem or fundamental flaw (as defined in ALAB-903) in Applicants' management,

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5/ Indeed in Shoreham, ALAB-903, 28 NRC at 507, the Appeal Board recognized that the fundamental flaw standard is akin to the standards for the admission of contentions in other areas, and the question is not only whether a particular event transpired, but whether the even is indicative of pervasive problems.

operator training or low power testing program. As discussed below, the proffered contention fails to satisfy this requirement.

As the attached affidavit of James G. Partlow, the Associate Director of Projects of the Office of Nuclear Reactor Regulation, and Victor Nerses, the Senior Seabrook Project Manager, indicates, the conduct of Applicants' management and operator personnel during the June 22, 1989 natural circulation startup test does not reflect a failure of an essential element of Applicants' low power testing or operator training program. See attached Affidavit of James G. Partlow and Victor Nerses, ¶ 5. As described in Chapter 14 of the Seabrook FSAR, the natural circulation test program is part of the Seabrook initial test program. Id. The program is conducted to assure that the facility performs as designed and can be operated safely, that plant operating and emergency procedures are adequate, and that plant personnel are properly trained, knowledgeable, and prepared to operate the facility in a safe manner. Id.

The Seabrook Safety Evaluation Report, issued in May 1989, documents the Staff's acceptance of the Seabrook initial test program, including the low power test program. Id. The adequacy of Applicants' preparations for low power testing and the readiness of both the licensee personnel and facility have been confirmed by the Staff and is documented in NRC Inspection Report No. 50-443/89-80. Id.

The Staff conducted extensive inspections of Applicant's low power testing operations during the period between June 13, 1989 (initial criticality) and June 22, 1989, when the reactor was tripped during the conduct of the natural circulation test. Id. These inspections confirmed that, with the exception of the errors made during the June 22, 1989

event, the low power test program was implemented in accordance with the license and the plant and equipment performed as designed. Id.

To be sure, during the natural circulation startup test, control room personnel failed to trip the reactor when pressurizer level reached 17% as called for in the applicable test procedure. While the Staff is not unconcerned with this matter, this lapse does not, as Messrs. Partlow and Nerses explain, "constitute a failure of an essential element of the primary program or plan but rather errors in not meeting a requirement specified in the program or plan." Id. Corrective action sufficient to prevent recurrence of the errors "does not require developing a whole new program or plan or even a significant revision to the existing program or plan." Id. Indeed, even intervenors' affiants, Messrs. Minor and Sholly, suggest only that some improvements in the training program are warranted. See Joint Affidavit of Gregory C. Minor and Steven C. Sholly ¶ 22, attached to Intervenors' Motion. The Staff agrees with this observation but notes that "some improvements" in the training program hardly translates into a "failure of an essential element" of Applicants' established programs or plans, specifically their operator training program. Partlow/Nerses Affidavit at ¶ 5. For these reasons, the Staff does not consider the performance of Applicants' management or control room operating personnel during the natural circulation startup test to evidence a fundamental flaw.

In ALAB-903, supra, the Appeal Board stated "[t]he test for a fundamental flaw is akin to that required for contentions alleging quality assurance (QA) deficiencies." Under that test, the salient question is not whether deficiencies occurred (it is expected that they will), but

rather whether such errors are of sufficient dimension to lead one to conclude that there has been a "pervasive breakdown" in the QA program that raises legitimate doubt as to whether the plant can be operated without endangering the public health and safety. E.g. Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983). Applying this principle, it is clear that the June 22, 1989 event reflects only an isolated instance of a failure to adhere strictly to applicable procedure but does not represent a "pervasive breakdown" in Applicants' low power testing or operator training program.

C. Intervenors' Motion To Reopen The Record Should Be Denied

Motions to reopen a record are governed by 10 C.F.R. § 2.734. Paragraph (a) of this regulation provides:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
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> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
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> (2) The motion must address a significant safety or environmental issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989), the Appeal Board stated:

> [T]he Commission expects its adjudicatory Boards to enforce section 2.734 requirements rigoriously - i.e., to reject out-of-hand reopening motions that do not meet those requirements within their four corners. . .

Accord, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1); Id., CLI-89-1, 29 NRC 89, 93-94 (1989).

Intervenors argue (Motion at 7-12) on the basis of UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) and San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), that the standards of 10 C.F.R. § 2.734 cannot be applied to the reopening of a record to consider events transpiring late in the hearing. The Commission adopted 10 C.F.R. § 2.734 providing the tests for all motions to reopen, with full knowledge of these cases. See 51 Fed. Reg. 19535 (May 30, 1986). The courts in these cases recognized that the Commission might limit, as it has in 10 C.F.R. § 2.734(a), the consideration of new issues that could materially affect the Commission's ultimate decision. 735 F.2d at 1447-49; 751 F.2d at 1318. And the Commission in adopting the reopening standards particularly limited instances where a record might be reopened to only instances where there was material, probative evidence is shown that likely could change the result in the proceeding. 51 Fed. Reg. 19536-39. 6/

6/ In UCS, 735 F.2d at 1449-51, the Court recognized that a hearing might not be necessary on issues arising from the conduct of low-power tests under the Administrative Procedure Act. 5 U.S.C. § 554(a)(3). In Chemical Waste Managment, Inc. v. EPA, 873 F.2d 1447, 1481-83 (D.C. Cir. 1989), the Court emphasized that UCS only involved the question whether the NRC could "bypass [a statutory] hearing requirement altogether on issues material to its licensing decision." The court "decline[d] to adhere any longer to the presumption" announced in UCS that a statute which mandates a "hearing" requires formal "on the record" hearing procedures on all issues and left it "to the agency, as an initial matter, to resolve the ambiguity" of determining procedures to be followed. Id.; see also Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). UCS itself does not preclude the NRC from establishing reasonable threshhold, as are contained in 10 C.F.R.

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The requirements of 10 C.F.R. § 2.734(a) operate in the conjunctive; in other words, the motion must be denied unless the proponent of the motion demonstrates that each of the applicable standards is satisfied. Section 2.734(b) provides, inter alia, that a motion to reopen must be accompanied by one or more affidavits "which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section [§ 2.734(a)] have been satisfied. 10 C.F.R. § 2.734(b). Such affidavits must be executed by "competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." Id. This information must be set forth in greater detail than that required for contentions, and must be more than allegations; it must be tantamount to evidence. Shoreham, CLI-89-1, 29 NRC at 93.

Reopening a closed record is, as the Commission has noted, an "extraordinary action" and thus requires the movant to bear a "heavy burden." See 51 Fed. Reg. 19535, 19538 (May 30, 1986); accord Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978). In fact, the evidence marshalled in support of a motion to reopen must be of sufficient weight to withstand a motion for summary dispostion. Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 NRC 520, 523 (1973). The reason a motion to reopen is not to be granted lightly is because of the public interest in ensuring that "once a record has been closed and all timely

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§ 2.734, as a requisite to reopening a hearing. The Commission could apply standards to assure that issues which warrant reopening are important ones which could potentially change a licensing result.

raised issues have been resolved, finality will attach to the hearing process." 51 Fed. Reg. at 19539.

In addition, 10 C.F.R. § 2.734(d) provides that a motion to reopen which relates to a late-filed contention must also meet the standards governing late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1). In performing this function a Board must look closely at the information supplied by other parties to see if it indeed supports the contention and a reopening of the record. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC ___, slip op. at 32-35 (July 26, 1989). In passing upon a motion to reopen, a licensing board is required to consider the moving papers and any opposing filings. Id., ALAB-138, 6 AEC at 523. Filings in opposition, of course, may be accompanied by "affidavits or other evidence." 10 C.F.R. § 2.730(c) (emphasis added). If the evidence or affidavits filed in opposition to the motion to reopen indicate that no significant safety or environmental issue is presented or that a different result would not likely have resulted if the movant's evidence had been considered initially, or if the moving papers are not sufficient to withstand a motion for summary disposition of the issue, the motion must be denied. Vermont Yankee, ALAB-138, 6 AEC at 523. 7/

7/ In such a case:

> The 'record' (in the broad sense) will necessarily have been supplanted by the introduction of affidavits, letters or other materials accompanying the motion and the responses thereto. The 'hearing record,' however, has not been reopened. Typically, in this situation, the result will be designated a

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The Staff will address these requirements seriatim. As discussed below, the issues raised in intervenors' motion: (1) are not timely presented; (2) do not raise any significant safety or environmental issue; and (3) would not have led to a materially different result had they been considered before the record closed. Moreover, noted above inasmuch as intervenors seek to introduce a new contention, they are also required to demonstrate that a balancing of the five lateness factors listed in 10 C.F.R. § 2.714(a)(1) weigh in favor of admitting the contention. This showing has not been made. Intervenors' motion to reopen therefore should be denied.

1. Timeliness of the motion to reopen.

Intervenors discuss at length the reasons why they could not have filed the proffered contention prior to July 21, 1989. See Motion at 12-16. According to intervenors, despite diligent effort, it was not until July 14, 1989 that they were able to obtain information surrounding the incident of June 22, 1989 sufficient to formulate their contention. Id.

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> denial of the 'motion to reopen the record,' even though that description of the action taken does not precisely reflect what transpired. For clarity, the order denying the motion should state that the record has been supplemented and that the denial of the motion is based on the absence of a triable issue.

Id. at 523-24; see e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133-34 (1986) (motion to reopen denied based on Staff analysis prepared after close of evidentiary record); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-879, 25 NRC 410 (1987) (denial of motion to reopen record upheld on basis of additional tests performed after close of evidentiary record).

This explanation is not sufficient to establish good cause for not filing the motion earlier. Although the motion to reopen is prompted by and premised upon the incident occurring on June 22, 1989, intervenors did not file it until July 21, 1989, some 28 days later. In a recent decision issued in this case, the Commission indicated that a delay of 27 days from the time an intervenor possessed information sufficient to formulate its contention and the actual filing of the motion to reopen would not satisfy the requirement of reasonable promptness. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 414 (1989). The Commission there stated: "The Commission reasonably demands that contentions filed after the hearing is under way be filed promptly after receipt of information needed to frame those contentions." Seabrook, CLI-89-08, 29 NRC at 414.

Intervenors fail to describe with any precision the information they lacked which was needed to formulate and submit their contention in a more timely manner. See Motion at 12-16. Intervenors knew of the incident and the purported failure of the operators to follow procedures immediately after it happened. See Motion at 14; attached copies of June 24, 1989 Boston Globe at 1, 24, June 25, 1989 Boston Globe at 1,15, 24, June 24, 1989 Boston Herald at 1, 6 (all quoting the Massachusetts Attorney General's comments on the June 22 events). Intervenors have not established that they did not have sufficient information to file the contention long before obtaining Applicant's report of the incident on July 14, 1986. The motion to reopen and proffered late-filed contention were untimely presented under the standards of 10 C.F.R. §§ 2.734(a)(1)

and 2.714(1), and the delay in filing them weighs against granting the motion.

2. The motion does not raise a significant safety issue and would not likely lead to a different result had it been considered before the record closed.

The Appeal Board has held that the most important of the reopening standards is whether the motion raises a significant environmental or safety issue. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). Intervenors have not satisfied this standard. As explained below, none of the issues raised by intervenors raises a significant environmental or safety issue.

At the outset, it is worth emphasizing that at no time during the June 22, 1989 natural circulation startup test was reactor safety ever in question. See NRC Augmented Inspection Team Report (AIT) at 29, Attachment 5 to Affidavit of Thomas T. Martin and Peter W. Eselgroth. Intervenors do not offer any evidence to the contrary. Ordinarily, this consideration would be decisive as to whether intervenors have raised a safety issue significant enough to warrant a reopening of a closed record. Here, however, intervenors contend that the purported inability or unwillingness of plant operating personnel or management to adhere to applicable procedures raises a significant safety issue even though that noncompliance in itself has no safety significance. They are incorrect.

The report of the Augmented Inspection Team (AIT) assigned to investigate the June 22, 1989 event concluded that "reactor plant safety was never in question, and with the exception of the significant error of not tripping the reactor at the point first called for by the test procedure and loss of pressure control due to letdown isolation and

pressurizer heater deenergization, the operating staff performed well." AIT Report, supra, at 6. While the Staff does not minimize the importance of adhering to applicable procedures and looks disfavorably upon an applicant's failure to comply with applicable requirements, it is also important that the June 22, 1989 event be considered in context. As Messrs. Partlow and Nerses note, so viewed, this event is an aberration in what otherwise has been fully acceptable performance during the preparations for, and conduct of, low power testing. Partlow/Nerses Affidavit at ¶ 5.

The Staff continually assesses the performance and qualifications of an applicant through the inspection and Systemmatic Assessment of Licensee Performance (SALP) process. Id. During the previous SALP period, Applicants were evaluated as having a high level of technical competence during program planning and implementation; licensed operators exhibited conservative judgment and displayed a safety conscious attitude; the operators' conduct was highly professional during preoperational testing, core loading, and hot functional testing; and management was found to have been attentive to problem areas. Id. The Staff continues to believe, as supported by its inspection report findings, that personnel involved in the operations of the facility are well trained, dedicated, highly motivated, and responsive to NRC concerns. Id. In this connection, it should be noted that during the preparations for low power testing, the operating crews were observed conducting operations in a professional manner, following operating procedures, and of being cognizant of ongoing activities. Id. Test activities have been conducted in a smooth, safe,

and well coordinated manner. Id. Communication between management and operations staff was satisfactory. Id.

Based on the Staff's experience and knowledge of the Applicants' performance and considering all of the circumstances noted above, the mistakes made by management and operating personnel during the natural circulation startup test appear to be an isolated occurrence. It is, however, important that Applicants take corrective action so that mistakes of this kind do not recur. Applicants have committed to do so and the Staff will review and evaluate the efficacy of those corrective actions. Id.

For the reasons stated above, the June 22, 1989 event, when viewed in the overall context of facility and personnel performance and operator training at Seabrook Station, does not present a significant safety issue or otherwise threaten the public health and safety and likely would not have led to materially different result had it been considered before the record closed in this proceeding.

4. Balancing of the five lateness factors

The failure of intervenors to satisfy each of the reopening criteria compels the denial of their motion to reopen the record. In these circumstances, it is not necessary to determine whether a balancing of the five lateness factors listed in 10 C.F.R. § 2.714(a)(1) weighs in favor of admission of the proffered contention. See 10 C.F.R. § 2.734(d). Nevertheless, in the interest of completeness, the Staff addresses these factors as well.

a. Good cause, other means and parties to protect intervenors' interests

As noted above, the first lateness factor -- good cause for filing late -- weighs against intervenors' motion. The second and fourth factors, the availability of other means or parties to protect intervenors' interest, generally favor a petitioner, as they do in this case. However, Commission case law makes clear that the second and fourth factors are the least weighty of the five lateness factors. E.g., Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

b. The extent to which intervenors can contribute to the development of a sound record

Commission case law emphasizes the importance of the third factor: the extent to which petitioner can contribute to the development of a sound record. The Commission has observed that "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Braidwood, supra, 23 NRC at 246; accord, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC ___, slip op. at 18-20 (June 20, 1989). Intervenors have identified two prospective witnesses, and have set out with particularity the issues they plan to cover in their testimony. See Motion at 17-20. However, neither Mr. Minor nor Mr. Sholly possesses the qualifications or expertise in these areas needed to enable them to make a meaningful contribution to the development of a sound record. See Applicants' Answer, August 7, 1989, at 24. As the Commission has indicated, the essential test concerning whether the third lateness factor

weighs in a petitioner's favor is whether the petitioner has demonstrated "that it has special expertise on the subjects which it seeks to raise." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986). Intervenors have not made this showing. The third factor therefore weighs against them.

c. Broadening of issues and delay to the proceeding

Admission of intervenors' late-filed contention will broaden the issues and delay the completion of the proceeding. This cannot be disputed. There is little reason to doubt that intervenors will request time to conduct discovery and much time will be utilized to litigate the contention. The Board must find that the late-filed contention will occasion a broadening of the issues.

Admitting intervenors' late-filed contention will result in a significant delay to this proceeding. As noted earlier, the evidentiary record is closed. All that remains to be completed in this proceeding is for the Licensing Board to issue an initial decision resolving the matters placed in controversy by the remaining emergency planning contentions. In view of the absence of any significant safety or environmental issue, to admit intervenors' late-filed contention at this stage will substantially delay the timely completion of the proceeding without any corresponding benefit to the public health and safety. The fifth factor must weigh heavily against intervenors. Since the first, third, and fifth factors --

the most weighty of the five lateness factors -- weigh against intervenors, their late-filed contentions should be rejected. 8/

CONCLUSION

For the reasons stated herein, intervenors' motion should be denied in all respects.

Respectfully submitted,

Edwin J. Reis

Edwin J. Reis
Deputy Assistant General Counsel
Reactor Licensing Branch

Dated at Rockville, Maryland
this 18th day of August 1989

8/ The Staff does not concur in Applicants' jurisdictional arguments (Applicants' Answer, August 7, 1989, at 25-28), except to the extent it is argued that this Board has no jurisdiction in regard to a suspension of the low power license. To the extent the intervenors ask (at 3 of their Motion), for a continuation of what intervenors term a "suspension," that matter is not a subject of this proceeding and this Board has no jurisdiction over it. See Part A, above. In regard to matters relevant to the issuance of a full power license, the Appeal Board in ALAB-916, 29 NRC 434, 438-39 (1989), ruled that this Licensing Board has jurisdiction over all issues but those explicitly given to other licensing boards. The matters on which Intervenors seek to reopen the record in regard to the issuance of the full power license is not before other boards and is, hence, before this Board. See Notice of Reconstitution of Board, 54 Fed. Reg. 2009 (Jan. 10, 1989). Further, the Staff does not believe that the doctrine of res judicata applies. As Applicants point out, at 27 n. 66, of their Answer, the doctrine of res judicata has limited applicability in administrative proceedings where there are changed circumstances. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216 (1974).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 the "NRC STAFF RESPONSE TO INTERVENORS' MOTION TO ADMIT CONTENTION, OR IN THE ALTERNATIVE, TO REOPEN THE RECORD, AND REQUEST FOR HEARING" 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 18th day of August 1989:

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