UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO APPLICANTS' APPLICATION
FOR AN EXEMPTION FROM 10 C.F.R. PART 50, SECTION IV.F.1
(ONSITE EXERCISE ONE YEAR BEFORE FULL POWER LICENSE)

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Counsel for NRC Staff

August 28, 1989

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I. INTRODUCTION

In a filing dated August 11, 1989, Public Service Company of New Hampshire, et al., ("Applicants") asked the Commission to make a finding of special circumstances under 10 C.F.R. 50.12(a) and grant an exemption from the requirement of 10 C.F.R. Part 50, Appendix E, § IV.F.1, that an onsite emergency planning exercise be conducted within one year before the issuance of a full-power operating license (hereafter "one year onsite exercise rule") for Seabrook Unit 1. 1/ As grounds for the motion, Applicants argue that the exemption is authorized by law and poses no undue risk to the public health and safety; and that three of the categories of special circumstances -- §§ 50.12(a)(2)(ii), (iii) and (vi) -- are present. Applicants also request that the Commission "retain

1/ Applicants' Application For An Exemption From The Requirement of 10 CFR Part 50, Appendix E, Section IV.F.1, For The Conduct Of An Exercise Of The Licensees' Onsite Emergency Plans Within One Year Before Issuance Of A Full-Power Operating License, August 11, 1989 ("Application").

jurisdiction over the application, and not delegate consideration hereof to any subordinate Board, because the issue presented hereby can ultimately only be resolved by the Commission itself." Application at 2.

For the reasons set forth below, the Staff opposes Applicants' request because they have failed to make the requisite showing of special circumstances [2/] or justify a waiver or exception from the rule under 10 C.F.R. § 2.758.

II. BACKGROUND

The Seabrook operating license application was docketed in 1981 and the notice of opportunity for hearing was published on October 19, 1981 (46 Fed. Reg. 51330). Evidentiary hearings have been held and initial decisions rendered with respect to all contentions except (1) contentions arising out of the emergency plans for the portion of the Seabrook Emergency Planning Zone ("EPZ") situated in Massachusetts and (2) contentions arising out of the full-participation graded exercise held June 28-29, 1988. [3/] Hearings on the remaining contentions were completed on June 30, 1989 (Tr. 28,290) and a decision is expected to issue by November 30, 1989. [4/] The Staff issued a low power license for the

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2/ Because the Commission's regulations do not specify a time period for filing responses to an application for exemption, the Staff has treated the Application, which was served by express mail on August 11, 1989, as a motion and is filing its response in accordance with the time periods set forth in 10 C.F.R. § 2.730.

3/ LBP-87-10, 25 NRC 177 (1987); CLI-88-10, 28 NRC 575 (1988); CLI-89-8, 29 NRC 399 (1989).

4/ [Atomic Safety and Licensing Board] Report to the Commission, July 6, 1989 ("ASLB Report") (unpublished), at 2.

facility in May 1989 and low power and physics testing was completed in June 1989.

Currently, there is an onsite emergency exercise scheduled for September 1989 and the Attorney General of the Commonwealth of Massachusetts ("Mass AG") has informed the Licensing Board and parties that he will file contentions on that exercise. ASLB Report at 2-3. Because the consideration of additional contentions has the potential to further delay license issuance until after June 1990 (two years after the last full scale exercise), Applicants seek an exemption from the one year onsite exercise requirement in order to avert delay. Id. at 12-15. As grounds for the exemption, Applicants allege that they have adequately demonstrated Seabrook's emergency preparedness in previously graded exercises and numerous training drills and, thus, application of the regulation would not serve, or is not necessary to achieve, the underlying purpose of the rule. Id. at 9-12. Applicants also allege that the delay costs associated with litigation of another exercise would result in undue hardship and other costs that are significantly greater than those contemplated when the rule was adopted. Id. at 12-15. Finally, Applicants allege that there is a public interest in the operation of Seabrook. Id. at 15. The Staff addresses each of these arguments below.

III. DISCUSSION

A. The Application, whether considered under 10 C.F.R. §§ 2.758 or 50.12(a)(2)(ii), fails to support the relief sought and the Commission should exercise its discretion and rule on the request

As stated above, Applicants request that the Commission consider the merits of the Application rather than delegate the matter to a subordinate

Board because the Commission itself will, in the end, have to resolve the matter. However, Applicants do not address why the Application, which was filed pursuant to 10 C.F.R. § 50.12, is presented to the Commission rather the Staff which has been delegated the authority to act. See 10 C.F.R. § 2.717(b). Applicants' approach ignores the substantially different avenues an application for exemption under 10 C.F.R. § 50.12 and a petition for waiver under 10 C.F.R. § 2.758 would take en route to the Commission.

If the request deals with a matter in controversy, it must be considered by the Licensing Board in accordance with 10 C.F.R. § 2.758. 5/ On the other hand, an exemption sought under 10 C.F.R. § 50.12 is predicated on the absence of a related matter in controversy. Typically, such matters are acted on by the Staff. 6/ An applicant cannot elect whether it would be more expedient to start at the end of the road, as

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5/ The Fourth Circuit has observed that the Commission can use either § 2.758 or § 50.12 in resolving exemption requests and noted that the difference between the two provisions is that § 2.758 is directed more toward exemptions related to the subject matter of an ongoing licensing proceeding, while § 50.12 is more general in scope. Eddleman v. NRC, 825 F.2d 46 (4th Cir. 1987).

In cases where the Commission has delegated exemption requests to a licensing board for determination, the exemption requests raised matters that were already before the licensing board and for which the development of an evidentiary record was considered necessary. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984); Washington Public Power Supply Sytem (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-1, 5 NRC 719, 720 (1977).

6/ The Commission is briefed on them in connection with the Commission review of uncontested matters before authorizing the issuance of a full-power license. See Statement of Policy on Issuance of Uncontested Fuel Loading and Low Power Testing Operating Licenses, 46 Fed. Reg. 47906 (September 20, 1981).

Applicants here would have it. To allow such election at the option of a petitioner would stand a long existing process on its head.

Further, an exemption under 10 C.F.R. § 50.12, if unconnected to any matter in controversy, may be acted on without an opportunity for hearing. Massachusetts v. NRC, No. 88-2211 (1st Cir. June 29, 1989). However, Applicants have chosen not to address whether the subject of the exemption bears on matters in controversy. The intervenors, on the other hand, explicitly argue the exemption raises matters at issue before the Licensing Board and that Applicant should have followed the procedures of 10 C.F.R § 2.758. 7/ Although an argument might be made similar to that in Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 774 n.5 (1986), that an extension of time for the conduct of an exercise does not relate to substantive challenges to the emergency plan, Applicants have chosen not to make such an argument nor to

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7/ New England Coalition on Nuclear Pollution's Opposition to Applicants' Request for an Exemption from the Requirement to Exercise the Onsite Emergency Plan Within a Year Prior to Issuance of Operating License or, in the Alternative, Request for a Hearing on Applicants' Application, August 21, 1989 ("NECNP Opposition"), at 3; Response of Mass AG to Applicants' Application for an Exemption from the Requirement of 10 C.F.R. Part 50, Appendix E, Section IV.F.1., August 21, 1989 ("Mass AG Response"), at 3-7; Response and Objection to Applicants' Application for an Exemption from the Requirement of 10 CFR, Part 50, Appendix E, Section IV.F.1, August 21, 1989, at 1-3. For example, Mass AG asserts that the general training and performance of the onsite staff (including with respect to low power testing), the alleged fundamental flaws in the computer dose model used in the onsite plan to make offsite protective action recommendations, and the petition for review of ALAB-918, 29 NRC ___ (June 20, 1989), are matters in controversy related to the Application. Mass AG Response at 3-7.

apply such to the specifics matters at issue in the Seabrook proceeding. 8/

What must, therefore, be inferred from the Application is Applicants' conclusion that this matter is sufficiently related to a matter in controversy such that, notwithstanding their reliance on 10 C.F.R. § 50.12, a petition under 10 C.F.R. § 2.758 is required and adherence to its procedures may not be circumvented without sufficient justification.

8/ Mass AG claims that contention MAG EX-19 in the so-called "offsite proceeding" raises questions regarding the adequacy of onsite emergency preparedness. Mass AG Response at 3-7. MAG EX-19 states in part:

> The Exercise revealed a fundamental flaw in the Seabrook Station Radiological Plan and Emergency Response Procedures in that during the Exercise the licensee's personnel did not issue appropriate protective action recommendations ("PARs") to the NHY Offsite Response Organization, the State of New Hampshire, as required by 10 CFR § 50.47(b)(10), and the guidance set forth in NUREG-0654, ¶ II.J.7 and NUREG-0396.
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> . . .
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> In all instances described above, the licensee's inappropriate PARs were derived form its METPAC computer model. It appears from what happended during the Exercise that this model has some fundamental flaws that cause it to fail to take into proper consideration all known facts as well as existing uncertainties in the generation of PARs.

In admitting this issue, the Licensing Board stated "the issue of the METPAC computer model . . . alleges fundamental flaws in the model which were revealed by the exercise." Memorandum and Order (Ruling on June 1988 General Exercise Contentions), December 15, 1988 (unpublished), at 48. In their proposed findings, Mass AG alleges that inconsistencies between the criteria for precautionary beach closings in the SPMC and other plans was an issue raised by this contention, however, MAG-19 contains no reference to beach closings. See Massachusetts Attorney General James H. Shannon's Proposed Findings of Fact, Rulings of Law, and Conclusions with respect to the Seabrook Plan for Massachusetts Communities and the Exercise Contentions, August 14, 1989, at 243-48.

Despite the foregoing, the Commission has the discretionary authority to reach down and direct certification of matters to it through the exercise of its plenary supervisory jurisdiction. 9/ Given the policy implication of the matters put forth in the Application, the Commission should exercise its supervisory authority and consider the matter in the first instance -- whether under § 2.758 or § 50.12. 10/ In doing so, the Commission should find, for the reasons described more fully below, that Applicants have failed to demonstrate that the request for a waiver of the one year onsite exercise requirement should be granted under either provision.

1. The Standards for Waiver or Exception

A licensee that seeks a waiver or exception from Commission rules that are in controversy in a contested proceeding should submit an application under 10 C.F.R. § 2.758 for waiver of the rule. 11/ That provision states in relevant part:

9/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 516-17 (1977); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), [Commission] Order, November 9, 1988 (unpublished).

10/ As the Commission now has the views of all parties, including the Staff, it would be more efficient for the Commission to act now, rather than referring the matter to the Licensing Board under § 2.758 or the Staff under § 50.12.

11/ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 444-45 (1985) (a claim asserting costly delays rather than that application of the rule would not serve the purpose for which the regulation was adopted is appropriate under § 50.12), aff'd, ALAB-841, 24 NRC 64, 99 (1986). Accord, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595-97 (1988).

> The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter . . . are such that application of the rule . . . would not serve the purposes for which the rule or regulation was adopted . . . . [The petitioner] shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested.

10 C.F.R § 2.758(b). The remedy under this regulation is extraordinary. The Commission has observed that it has not waived a rule in the past and previously rejected certification of a waiver petition because it presented "no 'special circumstances' peculiar to the case but rather presented generic questions common to all light-water power reactors and best resolved by rulemaking." 12/ The special circumstances which satisfy the requirement for a prima facie showing must undercut the rationale for the rule sought to be waived. 28 NRC at 597.

2. The has been no prima facie showing warranting the grant of a waiver or exception per § 2.758

The grounds asserted by Applicants do not justify the granting either a § 2.758 waiver (or a § 50.12(a)(2)(ii) exemption) 13/ from the one year onsite exercise requirement in 10 C.F.R. Part 50, Appendix E, § IV.F.1. The purpose of the one year exercise requirement is to assure that adequate emergency response capability exists at the time of licensing. In revising the time requirement for a full-participation, preoperational

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12/ Seabrook, CLI-88-10, 28 NRC at 596. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674 (1980).

13/ The standard in § 2.758(b) that the "application of the rule would not serve the purpose for which the rule was adopted" is essentially the same as that for a finding of special circumstances under § 50.12(a)(2)(ii) -- that application of the regulation would not serve the underlying purpose of one year onsite exercise requirement.

emergency preparedness exercise, the Commission decided to "strike a new balance" between "the desirability for an exercise close to the date of licensing in order to assess the adequacy of the emergency plan being tested and the countervailing need to avoid scheduling and resource burdens." 52 Fed. Reg. 16823, 16824 (May 6, 1987). The Commission decided to require a full-participation exercise "within two years prior to the licensing of a power plant, the same scheduling requirement mandated for full-participation exercise after licensing." Id. In extending the time for the pre-license exercise, the Commission found that resource and scheduling burdens created by the one year timing requirement for full-participation exercises had proven "far more onerous than originally expected" in light of the decision in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985), which required the NRC to provide the opportunity to litigate the results of pre-licensing exercises and the difficulty in completing litigation within the one year period. Id. at 16824. In revising the timing requirement, the Commission acknowledged the difficulty in precisely scheduling a full-participation exercise, but repeatedly relied on the fact that onsite exercises would continue to be held within one year before full-power license as one of the bases for its conclusion that licensee preparedness would not deteriorate. E.g., 52 Fed. Reg. at 16825, 16826.

The Commission expressly rejected the suggestion that the time period for the onsite exercise be similarly extended and concluded that onsite exercises are not of marginal value, particularly since operating plants

are required to annually exercise their onsite plan. Id. As the Commission stated:

> This annual emergency response function drill ensures that the licensee's new personnel are adequately and promptly trained and that existing licensee personnel maintain their emergency response capability. The existing requirement of a pre-operational onsite exercise within one year prior to full-power license issuance is consistent with this philosophy as well as the Commission's general desire to have pre-operational emergency planning exercises as close as practicable to the time of licensing. And since, unlike the situation with offsite exercises, no one has identified any existing response or timing difficulty with the onsite requirement, we find no reason to revise the requirement.
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> . . . While the offsite emergency test is important to judge the the ability of [State and local emergency response organizations] to respond to a particular of a [sic] radiological emergency, in light of their ongoing responsibility for all types of emergencies a demonstration of offsite preparedness by such agencies within two years prior to licensing affords reasonable assurance of their capabilities at the time of licensing. In contrast, as an applicant makes a full-scale shift from a facility construction to a facility operation mode within the last twelve to eighteen month prior to operation, as a general rule many new operational personnel are retained who must be ready to carry out the utility's onsite emergency response responsibilities. It is also in recognition of this distinction that the Commission find that an onsite exercise should be required within one year of licensing to provide assurance that the applicant's onsite response capabilities are adequate.

Id. at 16824-25. [14/] Moreover, the Commission made it clear that its retention of the one year onsite exercise requirement evidenced its

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14/ Under 10 C.F.R. Part 50, Appendix E, § IV.F.2, onsite plans of operating reactors are to be excercised annually. The NRC has issued guidance that the annual exercise requirement may be interpreted as requiring onsite exercises to be held once per calendar year. IE Information Notice No. 85-55, Revised Emergency Exercise Frequency Rule, July 15, 1985.

(FOOTNOTE CONTINUED ON NEXT PAGE)

continued support of the principle that "'exercises are best held at a later time when the operating and management staff of the plant -- who are central figures in an exercise -- are in place and trained in emergency functions.'" 15/

In light of the Commission's considered judgment that the one year pre-full-power onsite exercise be retained, Applicants must present unique timing and resource constraints in order to undermine this rationale and prevail on their request. 16/

Because the underlying purpose of the rule is to test or confirm emergency preparedness as close as practicable to the issuance of a full-power license in order to assess the preparedness of operational staff, the Application does not demonstrate how this principle would be satisfied without the September 1989 exercise. While the Application asserts that the Seabrook Emergency Response Organization (ERO) is "highly experienced" because key individuals in the response organization have participated in previous exercises and ERO response has been fully

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The Commission also noted that the occurrence of changes in emergency procedures prior to the issuance of an full power license, which are addressed in the utility's onsite plan, was a further basis for the retention of the pre-full-power, onsite exercise requirement. Id. at 16826.

15/ 52 Fed. Reg. 16827, citing 47 Fed. Reg. 30233 (July 13, 1982).

16/ Because the Commission has stressed that there be consistency between the timing of exercises for prior to, and after, a full-power license issues, 52 Fed. Reg. at 16824-25, an exemption from the one year requirement for onsite exercises would not warranted without a substantial showing of special circumstances not considered by the Commission.

successful in three prior exercises, 17/ Applicants admit that almost half of the approximately 500 member response organization have not participated in a previous exercise. Id. at 4-5.

As described more fully in the attached Affidavit of Frank J. Congel, the Staff is unable to conclude that Applicants' ERO personnel in important emergency response positions have recently shown adequate emergency response capability so as to obviate the need for the preoperational, onsite exercise. For example, the Application shows that over half of the 51 identified key ERO positions are staffed by individuals that have not participated in an exercise in their currently assigned position and almost half of the ERO have not had the opportunity to participate in any of the three onsite exercises. Congel Affidavit at 5. In addition, Staff questions concerning the performance of the onsite response organization during the June 1988 exercise and weaknesses in control room staff performance during recent low power testing, while not arising to the level of a fundamental flaw, show the importance of continued training. Id. at 5-6. The Staff concludes that Applicants have not demonstrated that the background and training of the emergency response staff is such that an onsite exercise close to the time the full-power license issues is not needed to confirm the adequacy of the onsite aspects of emergency preparedness. Id. at 6.

17/ Past findings of adequate emergency preparedness alone have not resulted in the relaxation of the requirement that operating plants annually exercise their onsite plans. As far as the Staff can determine, it has only granted one exemption from the annual exercise requirement for operating plants and that was due to constraints

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In short, Applicants have not shown that an onsite exercise within one year of the start of full power operation is not necessary to satisfy the rule. Consequently, Applicants have not made a prima facie showing to warrant further consideration of its waiver request or special circumstances under 50.12(a)(2)(ii) which would warrant the granting of an exemption.

B. The Application also fails to make the requisite showing of special circumstances under 10 C.F.R. §§ 50.12 and may be decided without a hearing

1. No special circumstances under 10 C.F.R §§ 50.12(a)(2)(iii) or (vi) are present

Even if Applicants' request were proper for consideration under Section 50.12(a)(2), the Application does not demonstrate that there are other special circumstances that support an exemption in this instance.

Applicants have not demonstrated that there are unique circumstances under § 50.12(a)(2)(iii) -- extreme hardship or costs in excess of those considered in promulgating the rule -- are present. Applicants argue that the intervenors' persistent attempts to thwart full-power operation of Seabrook, as evidenced by the recent motion to hold the record open and

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resulting from the first refueling outage at the facility. Kansas Gas and Electric; Exemption, 51 Fed. Reg. 42027 (November 20, 1986) (three months extension).

that an opportunity be provided to litigate the next onsite exercise, [18] has the potential to extend Seabrook litigation past June 29, 1990 -- the date when the two-year full-participation exercise window will expire. Yet, plant delays due to litigation of issues introduced in an operating license hearing was considered by the Commission in revising the timing of full-participation exercises and it found that, unlike the situation with offsite exercises, onsite exercises posed no response or timing difficulty. 52 Fed. Reg. at 16825. [19]

It is premature to conclude that operation of the plant may be substantially delayed due to litigation of onsite exercise results which could eventually run against the two year full-scale exercise requirement. Although intervenors have stated they will file contentions on the September 1989 onsite emergency planning exercise and attempt to delay licensing of Seabrook, their success to that end is highly conjectural. Contentions on the scheduled exercise may not be admitted unless intervenors prevail on a motion to reopen the proceeding under 10 C.F.R. § 2.734 and meet the late-filing criteria of 2.714(a)(1). Under these provisions, the movant bears a heavy burden. The movant must show that,

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18/ 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, May 31, 1989. This motion and a later motion seeking admission of issues regarding Applicants' conduct during low power testing are attached to the Mass AG Response as Exhibits B and A, respectively.

19/ Because the Commission stated that it had not based the revised timing requirement on the time needed to litigate results (52 Fed Reg. 16827), a circumstance similar to the impetus behind the instant exemption request, it would appear that an exemption solely to reduce hearing opportunities would be inconsistent with the rationale underlying the rule.

inter alia, there is a significant safety issue that could likely lead to a different result in the proceeding and that there are facts and witnesses to support such averments [20] which show a "fundamental flaw" in the Applicants' emergency plans. [21] If the scheduled onsite exercise confirms Applicants' assertion that onsite preparedness is adequate, intervenors would have great difficulty in successfully proffering a contention asserting a "fundamental flaw." The hardship which forms the basis for Applicants' assertion that its exemption request satisfies § 50.12(a)(2)(iii), is basically premised on intervenors' potential success in having a contention admitted which shows, with basis and specificity, that a "fundamental flaw" in Applicants' emergency plan is

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20/ Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978); Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 NRC 520, 523 (1973) (evidence supporting reopening must be of sufficient weight to withstand a motion for summary disposition); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986) (the most important reopening standard is whether the motion raises a significant environmental or safety issue); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (moving party sponsoring a late-filed contention must demonstrate that it has special expertise on the subject which it seeks to raise, identify its prospective witnesses and summarize their proposed testimony).

21/ Fundamental flaws are those exercise "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken," Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986), and reflect "a failure of an essential element of the plan, and, second, it can be remedied only through significant revision of the plan," Shoreham, ALAB-903, 28 NRC 499, 505 (1988). Further, the Appeal Board has recently indicated that errors arising from insufficient training do not ordinarily establish a fundamental flaw. Seabrook, ALAB-918, 29 NRC 473, 485-86 (1989).

demonstrated by the onsite exercise. There is no sound basis for such speculation.

Furthermore, the Commission could take other action to avoid lengthy delay such as accelerating the litigation schedule in order to "avoid an endless loop of litigation brought about by the interplay of our scheduling requirement and the need to offer an opportunity to contest the results of the exercise." 22/ Thus Applicants' request does not satisfy 10 C.F.R. § 50.12(a)(2)(iii).

Finally, Applicants claim that special circumstances exist under § 50.12(a)(2)(vi) because the public interest favors the granting of the requested exemption inasmuch as power from the facility is needed. There is little doubt that there is an important public interest in the operation of a safe nuclear power facility. Strong public interest considerations, however, also support the Commission's regulations governing emergency planning. In the absence of a demonstration that, in this instance, an onsite exercise would be of little value in confirming the preparedness of the emergency response organization, it cannot be concluded that Applicants have satisfied § 50.12(a)(2)(vi).

In sum, none of the circumstances alleged in the Application justify the grant of an exemption.

2. No hearing is required to decide the Application

The intervenors argue they have a right to, or should be granted, a hearing, on the exemption request as it relates to a matter in

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22/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 570 (1970).

controversy. Mass AG Response at 20-22; NECNP Opposition at 2-3, 10-12. As stated above, while it may be inferred from Applicants, approach that the instant exemption request relates to a matter in controversy in the proceeding, 23/ no hearing rights need be afforded. The Commission is empowered under the regulations to decide the matter based on, among other things, the written filings of the parties or direct such proceedings, as it deems appropriate, be held to aid its determination. As the Application does not meet the threshold for certification to the Commission, there is no need to develop a record concerning the request and hence, no hearing is necessary. See 10 C.F.R. §§ 2758(c) and 50.12(b)(2). Moreover, a waiver of the rule is not an action which suspends, revokes, or amends a license and thus would not trigger hearing rights under Section 189 of the Atomic Energy Act. See Massachusetts v. NRC, supra, slip op. at 8-10. In re Three Mile Island Alert, Inc., 771 F.2d 720, 728-30 (3d Cir. 1985). Accordingly, the intervenors request for a hearing should be denied.

IV. CONCLUSION

For the reasons stated above, the Application neither satisfies the criteria for waiver under 10 C.F.R. § 2.758 nor makes the requisite showing of special circumstances to warrant an exemption under 10 C.F.R.

23/ The Commission should reject intervenors' argument that their recent motion to reopen the record and litigate contentions on Applicants low power testing provides shows that there is a nexus between the that matter and the instant exemption request. See Mass AG Response at 8. The proffered contentions are not matters in litigation since they have not been admitted as issues in the proceeding.

§ 50.12. The Commission should exercise its supervisory authority, consider the Application in the first instance and find that Applicants have failed justify the requested waiver or exemption from the one-year onsite exercise requirement.

Respectfully submitted,

Mitzi A. Young

Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of August, 1989