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May 10, 1989

UNITED STATES OF AMERICA

before the

NUCLEAR REGULATORY COMMISSION

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

APPLICAN RESPONSE TO MAY 8, 1989 APPLICATIONS FOR STAY OF AUTHORIZATION OF LOW POWER TESTING

## Introduction

Under date of May 8, 1989, two applications for a stay of authorization of low power testing of Seabrook Station were filed with the Commission; one by the Seacoast Anti-Pollution League (SAPL);[1] and one by counsel for the New England Coalition on Nuclear Pollution on behalf of that organization, the Town of Hampton, New Hampshire, and the Attorney General of The Commonwealth of Massachusetts (hereinafter referred to as "NECNP Application").[2]

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1 Application for Stay of Seacoast Anti-Pollution League (May 8, 1989).

2 Intervenors' Motion for a Stay of Low Power Operation Pending Commission or Appellate Review (May 8, 1989).



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Applicants herein reply to both Applications, directing their reply to the factors listed in 10 CFR § 2.788(e). In addition, in further support of their position, the Applicants also file herewith the Affidavit of George S. Thomas (Thomas Affidavit).

## I. Whether the moving party has made a strong showing that it is likely to prevail on the merits?

### A. Introduction

As this Commission has stated:

> "To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an 'overwhelming showing of likelihood of success on the merits' is necessary to obtain a stay where the showing on the other three factors is weak."[3]

As will be seen below, the showing on the other factors in the applications is weak indeed, and the showing on likelihood of success is far from overwhelming.

### B. None of The Errors Asserted has Merit.

The first error asserted is that the bond and other financial security furnished in response thereto, do not satisfy this Commission's orders requiring that funds be

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[3] Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). (Footnotes omitted, emphasis supplied.)

available to decommission the plant in the event that after low power testing a full power license is not granted.[4] In particular, it is pointed out that the triggering condition in the surety bond is the "denial" of a full power license as contrasted with the order's language "is not granted"; it is argued that a withdrawal of the application prior to that event would not trigger the bond. The language of the bond is unambiguous and is tied to action of the Commission not of the Applicants. After a Notice of Hearing has issued, a license application can only be withdrawn with approval of the presiding officer and, eventually, the Commission.[5] Therefore, if a request for approval of withdrawal was

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4 SAPL App. at 1-2; NECNP App. at 7-8. The Commission Orders are Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988) and Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-07, 28 NRC 271 (1988). NECNP also argues that the Commission's denial of the request for a waiver of the financial qualifications regulation is error. The Commission has already definitively ruled on this matter. CLI-88-10, supra, at 592-601; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC ___ (March 6, 1989); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-07, 29 NRC ___ (May 3, 1989). Therefore, we do not address this point further.

5 10 CFR § 2.107. See also, The Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667, 669 (App. P. Ch. Rosenthal, 1980); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981).

submitted, the Commission may issue an order denying the application, and the bond will be triggered. There is no merit in the intervenors' claim of error.

The second error claimed is that issuance of a low power license before litigation of all issues relevant to full power operation, and, in particular, emergency planning issues, is a violation of Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a).[6] This is a challenge to the regulations. It is an erroneous challenge. The Commission's regulations have long permitted low power testing before resolution in litigation of all issues pertinent to full power operation. 10 CFR § 50.57(c). Congress has long acquiesced in this practice and therefore can be presumed to be of the view that this constitutes no violation of Section 189(a) of the Atomic Energy Act.[7]

The third error alleged is the lack of a new or supplemental environmental impact statement covering low power operation.[8] This legal issue has been repeatedly and

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6 NECNP App. at 3-4; SAPL App. at 5, ¶ 5.

7 See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

8 NECNP App. 5-7; SAPL App. at 5 ¶ 6.

definitively resolved against the position of the intervenors.[9]

The fourth claim of error is that the Licensing Board decision in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-04, 29 NRC ___ (January 31, 1989), was in error.[10] This matter has been fully briefed to the Commission in the context of the prior stay application.[11]

The fifth claim of error is that the Appeal Board erred in permitting certain enhancements to the Seabrook safety parameter display system (SPDS) to await the first refueling outage.[12] We are unable to improve upon the Appeal Board's analysis of this claim:

> "Section 50.47(a)(1) provides generally that an operating license may be issued if construction of the facility has been substantially completed in accordance with statutory and regulatory requirements. Supplement 1, which sets out the requirements applicable to SPDS,

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9 Cuomo v. NRC, 772 F.2d 972, 974-75 (D.C. Cir. 1985); Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1588-89 (1985); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 439 (1987).

10 NECNP App. at 2-3; SAPL App. at 4 ¶ 1.

11 Applicants' Response to Intervenors' Application for Stay of Effectiveness of LBP-89-04 Pending its Appeal (Feb. 15, 1989).

12 SAPL App. at 2-4.

> does not impose any fixed schedule for implementation of the SPDS. Rather, the schedule is left essentially to the Staff's discretion. Contrary to SAPL's assertion, we find no requirement that all elements of the SPDS must be completed before low-power operation is authorized. Thus, SAPL has failed to satisfy its heavy burden of demonstrating that the Licensing Board's determinations concerning the SPDS are wrong."[13]

The sixth, seventh, and eighth claims of error are made by SAPL in summary fashion with no further elucidation. These are: "[t]the failure to require the Applicants to demonstrate financial qualifications for overall plant operation and safety,"[14] the denial of the two motions to reconsider CLI-88-10,[15] and the fact that the Applicants have not been required to have the public alert and notification system in operation prior to low power operation.[16] The first of these matters is either a full power issue or an allegation that CLI-88-10 was wrongly decided; the second has been addressed by the Commission extensively in the decisions denying the two motions; the third is a challenge to the regulations. All are without merit, especially in the

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13 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 444 (1987) (footnote omitted).

14 SAPL App. at 4 ¶ 2.

15 SAPL App. at 4 ¶ 3.

16 SAPL App. at 5 ¶ 4.

absence of any elucidation of SAPL's reasoning as to why error has been committed.

In short, there has been no showing that there is a likelihood of success on the merits.

## II. Whether the Party will be Irreparably Injured Unless a Stay is Granted.

"The most significant factor in deciding whether to grant a stay request is 'whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted.'"[17]

The two applications between them raise some five claims of irreparable harm. The first is that the fuel and reactor will become contaminated.[18] If this be harm, it is economic harm to the Applicants, it is not harm to the intervenors. In addition, contamination levels in the reactor will be negligible. Thomas Aff. ¶ 13. The second concern is that workers will be exposed.[19] This has been rejected as grounds for irreparable harm to intervenors both by the Appeal Board

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17 Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980).

18 SAPL App. at 5; NECNP App. at 8.

19 NECNP App. at 8.

and the courts.[20] The third concern is that an accident at low power could cause damage.[21] This ground has also been rejected by the Appeal Board for good and sufficient reason. ALAB-865, supra, at 436-37.

The fourth claim of error is that alternatives will be foreclosed.[22] This too has been rejected by the Appeal Board for good and sufficient reason. Id. at 437. And, at any rate, Seabrook's nuclear portion of the plant, which is where all contamination would reside, would not be used in any alternative. Thomas Aff. ¶ 14. Thus, no alternative will be foreclosed. The last claim of error is that the Commission will be "permitting low power operation despite well-documented inadequacies in the training and knowledge of key plant operators."[23] This is really a claim of irreparable harm with respect to the Licensing Board decision in LBP-89-04, and is addressed in our response thereto. Insofar as it is a separate claim, it is simply a facet of the claim that low power operation creates the possibility of an accident which claim we have addressed above. There has been no showing of irreparable harm.

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20 Cuomo v. NRC, supra, at 976; ALAB-865, supra, at 437.

21 NECNP App. at 8.

22 SAPL App. at 5.

23 NECNP App. at 8.

III. Whether the Granting of a Stay Would Harm Other Parties?

Issuance of any stay will further delay low power testing of Seabrook Station. A delay in such testing until a full power license issues, or a delay caused after a full power license issues by a problem which could have been caught by early low power testing translates into a revenue loss of $2.8 - $3.6 million per day. Thomas Aff. ¶ 12. This Commission has long recognized the very real benefit of early low power testing as being a benefit which must be considered in ruling upon low power license stay applications.[24] See also Thomas Aff. ¶¶ 2-11. In response to this, the intervenors argue that there is "a lack of any reasonable prospect that this plant will ever operate at full power."[25] Per contra, the Bankruptcy Court in the Public Service Company Bankruptcy Proceeding thinks the plant will operate at full power.[26] And no insuperable legal barrier has been yet identified or erected to its full power operation.

IV. Where the Public Interest Lies.

There is a real public interest in getting Seabrook tested and on line. The New England power situation is

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24 Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1590 (1985).

25 NECNP App. at 10.

26 Applicants' Advice to the Commission, Attach. A at 3-4, 5 (April 24, 1989).

extremely tight and getting tighter. Thomas Aff. ¶¶ 15-20. This interest should be given its due weight in assessing the public interest.

## V. No Further Stays of any Nature Should be Granted by the Commission

Both Applications seek a stay pending appeal to the courts, and barring that, a housekeeping stay to assure that there is an opportunity to appeal to the courts. This stay motion is without merit. No stay should be granted pending appeal or for "housekeeping" purposes. There comes a time when the tactic of delaying progress by simply appealing everything should no longer be facilitated.

## Conclusion

The Applications for Stay should be denied; no further stays pending judicial appeal should be granted for any purpose whatsoever.

Respectfully submitted,

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