

8580

May 8, 1989
USNRC

UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

'89 MAY -9 P2:38

| | |
|---------------------------------|---|
| _____ |) |
| In the Matter of |) |
| |) |
| Public Service Company of |) |
| New Hampshire, et al. |) |
| |) |
| (Seabrook Station, Units 1 & 2) |) |
| _____ |) |

OFFICE OF CLERK
DOCKETING & SERVICE
BRANCH

Docket Nos. 50-443 OL
 50-444 OL
Onsite Emergency
Planning & Technical
Issues

INTERVENORS' MOTION FOR A STAY OF LOW POWER OPERATION
PENDING COMMISSION OR APPELLATE REVIEW

1. INTRODUCTION AND PRAYER FOR RELIEF

On December 21, 1988, in CLI-88-10, the Commission conditionally authorized low power operation at Seabrook, pending notification by the Staff that Applicants had satisfied certain conditions with respect to the establishment of a decommissioning fund. On May 3, in a memorandum from EDO to the Commission, the Staff reported that those conditions have been met. Operation has been stayed until the Commission rules on any stay motions.

Pursuant to 10 CFR § 2.788, the New England Coalition on Nuclear Pollution, Massachusetts Attorney General, and Town of Hampton ("Intervenors") renew and supplement their request that the Commission stay low power operation of the Seabrook nuclear plant pending the Appeal Board's decision on Intervenors' appeal of LBP-89-04. In the alternative, Intervenors request a stay of low power operation pending review of this case by the U.S. Court of Appeals.

While the Commission's order of March 22, 1989, stays low power operation until it reaches a decision on Intervenors' motions, it provides no additional stay during which Intervenors

D503

may appeal any adverse decision to the United States Court of Appeals. Therefore, should the Commission deny this motion, Intervenor's seek a one-week housekeeping stay following issuance of the Commission's decision, in order to provide them with sufficient time to seek a judicial stay of low power operation. Intervenor's request that the Commission give expedited consideration to this housekeeping stay motion and issue a decision on or before May 10, 1989, so that if necessary, they may file the necessary pleadings with the U.S. Court of Appeals before the current stay expires.¹

2. GROUNDS FOR ISSUANCE OF A STAY

1. Substantial Probability of Success on the Merits

As briefed extensively elsewhere², and summarized here in the few pages allowed by NRC regulations, Intervenor's have a substantial likelihood of prevailing on the merits.

1. Onsite Exercise Contention

As directed by the Commission, Intervenor's will not repeat

¹ Intervenor's have contacted opposing counsel regarding this request for a housekeeping stay. Applicants stated that they oppose the request. The NRC Staff stated that it would not consent to the request.

² See, e.g., New England Coalition on Nuclear Pollution's Opposition to Applicants' Motion for Issuance of Partial Initial Decision Authorizing Low Power Operation, filed before the Licensing Board on July 2, 1986 (Atomic Energy Act violations); Atty. Gen. James M. Shannon's Brief in Support of Reversal of Licensing Board's Partial Initial Decision..., dated May 6, 1987 (NEPA violations); Brief of Appellants on Appeal of LBP-89-04, filed with the Appeal Board on February 13, 1989 and Intervenor's Application for Stay of Effectiveness of LBP-89-04 Pending Its Appeal, filed with the Commission on February 8, 1989, as supplemented on April 3, 1989; various briefs filed by Intervenor's with the Commission with regard to financial qualifications and decommissioning fund issues.

their previous arguments in support of a stay pending issuance of the Appeal Board's decision on LBP-89-04. However, we note in addition that since February 8, when Intervenors' stay motion was filed, the case has been briefed before the Appeal Board, and was argued on April 21, 1989. Given the imminence of a decision from the Appeal Board, the parties' interest in the orderly and fair administration of this case would be best served by staying low power operation until the Appeal Board has reached its decision as to whether the onsite exercise contention should be admitted for litigation.

2. Violations of Atomic Energy Act.

Intervenors contend that the Commission's regulations at 10 C.F.R. § 50.47(d), which eliminate the requirement for approval of offsite state and local emergency response plans at the low power authorization stage, violate their right under the Atomic Energy Act, 42 U.S.C. § 2239(a), to litigate all issues material to a full power operating license decision, before the Seabrook plant is allowed to operate at any power level.³

The Atomic Energy Act makes no distinction between low power and full power licensing requirements, nor does its legislative history support a conclusion that Congress intended to allow low power operation before all issues relevant to full power are resolved in Section 189(a) hearings. On the two prior occasions

³ We note that the Appeal Board has refused to consider this challenge to Commission regulations and asserted that this issue must be raised before the Commission. ALAB-865, 25 NRC 430, 439.

when Congress perceived a need to permit low power operation before licensing hearings were complete, it gave the Commission only temporary authority to do so.⁴ Moreover, although Congress has amended Section 189(a) to permit the Commission to waive the prior hearing requirement for license amendments that pose "no significant hazard," it has not included original licenses within the ambit of that authority. It is clear that Congress did not intend to allow the initial operation of a nuclear power plant at any power level, with its accompanying irreversible impacts and raised risk to the public health and safety, before completion of hearings on all issues that are material to the full power licensing of the plant. Before Seabrook can be licensed for low power operation, Intervenors are entitled to full hearings on the adequacy of offsite emergency planning for Seabrook.

Moreover, even if the Commission reads the Atomic Energy Act as permitting the issuance of low-power licenses, it would be arbitrary and capricious to issue one in this case, in light of the great uncertainty that Seabrook will ever receive an operating license. As demonstrated in the appellate briefs recently filed by the Commonwealth, the Town of Hampton, and the Seacoast Anti-Pollution League before the Appeal Board, the unique features of the Seabrook site render it virtually impossible to provide adequate sheltering or reasonably prompt evacuation for the

⁴ See 1972 and 1983 versions of 42 U.S.C. § 2242, which expired October 30, 1973 and December 31, 1983, respectively. The complete text of these provisions is attached as Exhibits 1 and 2.

thousands of people who may be stranded on the barrier beach during an accident. The unlikelihood that Seabrook can ever meet the Commission's emergency planning regulations is compounded by the Commonwealth's nonparticipation in emergency planning for the Massachusetts sector of the EPZ. Moreover, it is highly questionable whether the lead applicant, which has declared bankruptcy, will ultimately receive a license to operate Seabrook. Under these circumstances, it would be irrational for the Commission to approve the incursion of the financial and environmental consequences of low power operation, which were recognized by the Commission in CLI-88-10.

3. Violations of NEPA

The Licensing Board, as affirmed by the Appeal Board in ALAB-875, violated the National Environmental Policy Act (NEPA) by authorizing low power operation without having required the preparation of either a new Final Environmental Statement (EIS) or a supplement to the 1982 EIS weighing the costs against the benefits of low power operation at Seabrook Station. The 1982 EIS, which was premised upon the assumption that Seabrook would ultimately be operated at full power, concluded that the benefits of electricity generation outweighed the environmental impacts and costs of Seabrook operation. However, the 1982 EIS did not consider the possibility that the Seabrook plant may never operate at full power -- a situation that became highly probable in September of 1986, when the Commonwealth of Massachusetts unequivocally refused to submit emergency plans for the Massachu-

setts sector of the 10-mile EPZ around Seabrook. The bankruptcy of Public Service of New Hampshire, the lead applicant for the Seabrook license, considerably deepens the doubt that Seabrook will ever get its full power license. As the Commission recognized in CLI-88-07, the "unique circumstances of this case" warrant special consideration of the contingencies that may arise if Seabrook does not receive a full power license. 28 NRC 271, 273. The strong likelihood that Seabrook will never receive a full power operating license thus constitutes a significant new circumstance relevant to environment concerns, rendering it necessary to file a supplement to the 1982 Final EIS pursuant to 10 C.F.R. § 51.92 before either a low power or full power license may be issued.

Intervenors further contend that the issuance of a low power license is, under the unique circumstances of this case, a separate federal action having a significant environmental impact, triggering the NRC's duty under NEPA and 10 C.F.R. § 51.20 to prepare a separate EIS. Given the lack of any reasonable prospect that Seabrook will be licensed to operate at full power, the costs and benefits of low power operation can no longer be said to be subsumed in the EIS prepared for the full power license.⁵ Thus, NEPA mandates that the costs and benefits of operating only at low power be separately evaluated, and weighed in an EIS

⁵ The limitation on the duration of low-power operation to an effective .75 full power hour further changes the balance in a way not contemplated, never mind considered, in the 1982 EIS.

before the issuance of a low power license.

4. Decommissioning

Intervenors continue to assert that the Commission erred in its disposition of Intervenors' petition for a waiver of the financial qualifications rule with respect to low power operation. In particular, the Commission ignored material evidence bearing on the cost of decommissioning the Seabrook reactor; it wrongfully engrafted an additional criterion ("significant safety problem") onto the standard for granting petitions for regulatory waivers, without giving Intervenors an opportunity to comment on or address the new standard; and it reached a merits decision regarding the amount of funding needed for a post-low power decommissioning fund, without providing an adequate opportunity for a hearing pursuant to Section 189a of the Atomic Energy Act.

Moreover, Applicants' arrangements for providing a low power decommissioning fund do not adequately address the requirements of CLI-88-07 and CLI-88-10, that funds be available in all cases where decommissioning has occurred "and a full-power license is not granted for Seabrook Unit 1." In particular, the obligation under the surety bond provided by Applicants is triggered only "as a result of a denial by NRC of a full power license." See Staff Evaluation of PSNH Decommissioning Fund Assurance Plan for Seabrook, etc., attached to Memorandum to Commissioners from Victor Stello, Jr., EDO, dated May 3, 1989, at 7. Thus, the surety would not be obligated if Applicants withdrew their application for a full power license, and the Commission no longer had before

it an application that it could deny. The Staff dismisses the significance of this limitation, stating that the Commission would always have "adequate authority to impose necessary decommissioning funding assurance requirements on such withdrawal ..." Id. This reasoning ignores the fundamental problem caused by Applicants' insolvency, which is that regardless of the Commission's authority to require additional funding in the event of withdrawal, Applicants may simply be unable to obtain it.

2. Irreparable Injury to Intervenors.

By permitting low-power operation despite well-documented inadequacies in the training and knowledge of key plant operators, the Commission will be greatly increasing the risk to the public. This in itself constitutes irreparable harm. Moreover, as the Commission recognized in CLI-88-10, and as further demonstrated in the attached Affidavit of Dale G. Bridenbaugh (Exhibit 3), even temporary operation at low power will result in irreversible plant contamination caused by radiation of the reactor and its component parts, and the creation of high-level radioactive waste. Operation at low power will also result in increased worker exposures, and poses a risk to the public health and safety. Should a radiological accident occur at the Seabrook plant, it could cause irreversible health damage to the population around the plant.⁶ Moreover, in failing to extend the

⁶ Although the Commission considers this risk to be insignificant, the risk does exist. See Letter from Nunzio J. Palladino to Edward J. Markey, dated June 15, 1984, Enclosure 1, attached as Exhibit 4. Moreover, the health consequences of a radiological release at Seabrook would be irreparable.

Sholly Amendment's "no significant hazards" exemption to original licensing decisions, Congress has made it clear that it intended to prohibit the incursion of irreversible consequences, no matter how insignificant, until all licensing issues were resolved in prior adjudicatory hearings. To deny Intervenors' stay motion would be to allow precisely the harm that Congress intended to prevent in enacting Section 189(a) of the Atomic Energy Act. See Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

3. The Grant of A Stay Will Not Harm Applicants.

In view of the unlikelihood that Applicants will obtain a full power license at any time in the near future and the limited duration of low-power testing, there is no benefit to Applicants in conducting low power testing at such an early stage. As attested to in the affidavit of Dale Bridenbaugh, "the initial operating phase at a new nuclear unit can be most efficiently performed if a smooth transition is made from fuel loading to low power operation and on to the power testing above 5%." Exhibit 3 at 4.

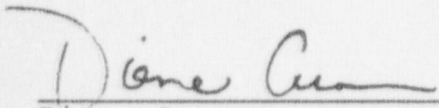
Finally, each of the benefits of low power operation -- early discovery and correction of possible problems which may prevent or delay full power operation, and providing operator and plant staff experience on the actual plant -- are all premised on the assumption that operation at full power, with its attendant benefits of electricity generation, will, at some point, occur.

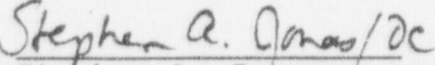
However, given the lack of any reasonable prospect that this plant will ever operate at full power, these alleged benefits of low power operation disappear. Thus, the Applicants will in no way be harmed by denial of the license. In fact, Applicants will avoid an unnecessary expenditure of time and money. If, at some later point, Applicants surmount their serious financial problems and issues surrounding the adequacy of the emergency planning process are resolved, Applicants are free to renew their application for a low power license.

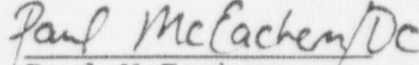
4. The Public Interest Favors Issuance of A Stay

The public can only benefit from being spared the risks of low power operation, which in and of itself has no benefits, where the possibility of obtaining the benefits of full power operation is so remote. Moreover, the issues raised here are important and of first impression. The balance of equities clearly favors the grant of a stay which would preserve the status quo pending a decision on the full power license or further review.

Respectfully submitted,


Diane Curran
Harmon, Curran & Tousley
2001 S St. N.W. Suite 430
Washington, D.C. 20009
(202) 328-3500


Stephen A. Jonas
Deputy Attorney General
Chief, Public Protect. Bur.
Dept. of Attorney General
One Ashburton Pl., 19th Fl.
Boston, MA 02108
(617) 727-2200


Paul McEachern
Shaines & McEachern
25 Maplewood Avenue
P.O. Box 360
Portsmouth, NH 03016
(603) 436-3110

May 8, 1989

Ch. 23

ATOMIC ENERGY

42 § 2242

§ 2242. Temporary operating licenses for nuclear power reactors—Prerequisites for filing applications; affidavits; hearing

(a) In any proceeding upon an application for an operating license for a nuclear power reactor, in which a hearing is otherwise required pursuant to section 2239(a) of this title, the applicant may petition the Commission for a temporary operating license authorizing operation of the facility pending final action by the Commission on the application. Such petition may be filed at any time after filing of: (1) the report of the Advisory Committee on Reactor Safeguards required by section 2232(b) of this title; (2) the safety evaluation of the application by the Commission's regulatory staff; and (3) the regulatory staff's final detailed statement on the environmental impact of the facility prepared pursuant to section 4332.2(C) of this title or, in the case of an application for operating license filed on or before September 9, 1971, if the regulatory staff's final detailed statement required under section 4332.2(C) of this title is not completed, the Commission must satisfy the applicable requirements of the National Environmental Policy Act prior to issuing any temporary operating license under this section. The petition shall be accompanied by an affidavit or affidavits setting forth the facts upon which the petitioner relies to justify issuance of the temporary operating license. Any party to the proceeding may file affidavits in support of, or opposition to, the petition within fourteen days after the filing of such petition, or within such additional time not to exceed ten days as may be fixed by the Commission. The Commission shall hold a hearing after ten days' notice and publication once in the Federal Register on any such petition and supporting material filed under this section and the decision of the Commission with respect to the issuance of a temporary operating license, following such hearing, shall be on the basis of findings on the matters specified in subsection (b) of this section. The hearing required by this section and the decision of the Commission on the petition shall be conducted with expedited procedures as the Commission may by rule, regulation, or order deem appropriate for a full disclosure of material facts on all substantial issues raised in connection with the proposed temporary operating license.

Requisite findings of Commission: terms and conditions of temporary licenses: judicial review

(b) With respect to any petition filed pursuant to subsection (a) of this section, the Commission shall issue a temporary operating license upon finding that:

- (1) the provisions of section 2235 of this title have been met with respect to the temporary operating license;
- (2) operation of the facility during the period of the temporary operating license in accordance with its terms and condi-

tions will provide adequate protection of the environment during the period of the temporary operating license; and

(3) operation of the facility in accordance with the terms and conditions of the temporary operating license is essential toward insuring that the power generating capacity of a utility system or power pool is at, or is restored to, the levels required to assure the adequacy and reliability of the power supply, taking into consideration factors which include, but need not be limited to, alternative available sources of supply, historical reserve requirements for the systems involved to function reliably, the possible endangerment to the public health and safety in the event of power shortages, and data from appropriate Federal and State governmental bodies which have official responsibility to assure an adequate and reliable power supply.

The temporary license shall contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for the extension thereof, and the requirement that the licensee not retire or dismantle any of its existing generating capacity on the ground of the availability of the capacity from the facility which is operating under the temporary license. Any decision or other document authorizing the issuance of any temporary license pursuant to this section shall recite with specificity the reasons justifying the issuance. The decision of the Commission with respect to the issuance of a temporary operating license shall be subject to judicial review pursuant to the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129).

Vacation of temporary license

(c) The hearing on the application for the final operating license otherwise required pursuant to section 2239(a) of this title shall be concluded as promptly as practicable. The Commission shall vacate the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license with due diligence. Issuance of a temporary operating license pursuant to subsection (b) of this section shall be without prejudice to the position of any party to the proceeding in which a hearing is otherwise required pursuant to section 2239(a) of this title; and failure to assert any ground for denial or limitation of a temporary operating license shall not bar the assertion of such ground in connection with the issuance of a subsequent final operating license.

Expiration of authority

(d) The authority under this section shall expire on October 30, 1973.

Aug. 1, 1946, c. 724, § 192, as added June 2, 1972, Pub.L. 92-307, 86 Stat. 191.

§ 2242. Temporary operating license

(a) Fuel loading, testing, and operation at specific power level; petition, affidavit, etc.

In any proceeding upon an application for an operating license for a utilization facility required to be licensed under section 2133 or 2134(b) of this title, in which a hearing is otherwise required pursuant to section 2239(a) of this title, the applicant may petition the Commission for a temporary operating license for such facility authorizing fuel loading, testing, and operation at a specific power level to be determined by the Commission, pending final action by the Commission on the application. The initial petition for a temporary operating license for each such facility, and any temporary operating license issued for such facility based upon the initial petition, shall be limited to power levels not to exceed 5 percent of rated full thermal power. Following issuance by the Commission of the temporary operating license for each such facility, the licensee may file petitions with the Commission to amend the license to allow facility operation in staged increases at specific power levels, to be determined by the Commission, exceeding 5 percent of rated full thermal power. The initial petition for a temporary operating license for each such facility may be filed at any time after the filing of: (1) the report of the Advisory Committee on Reactor Safeguards required by section 2222(b) of this title; (2) the filing of the initial Safety Evaluation Report by the Nuclear Regulatory Commission staff and the Nuclear Regulatory Commission staff's first supplement to the report prepared in response to the report of the Advisory Committee on Reactor Safeguards for the facility; (3) the Nuclear Regulatory Commission staff's final detailed statement on the environmental impact of the facility prepared pursuant to section 4.2222(c) of this title; and (4) a State, local, or utility emergency preparedness plan for the facility. Petitions for the issuance of a temporary operating license, or for an amendment to such a license allowing operation at a specific power level greater than that authorized in the initial temporary operating license, shall be accompanied by an affidavit or affidavits setting forth the specific facts upon which the petitioner relies to justify issuance of the temporary operating license or the amendment thereto. The Commission shall publish notice of each such petition in the Federal Register and in such trade or news publications as the Commission deems appropriate to give reasonable notice to persons who might have a potential interest in the grant of such temporary operating license or amendment thereto. Any person may file affidavits or statements in support of, or in opposition to, the petition within thirty days after the publication of such notice in the Federal Register.

(b) Operation at greater power level; criteria, effect, terms and conditions, etc.; procedures applicable

With respect to any petition filed pursuant to subsection (a) of this section, the Commission may issue a temporary operating license, or amend the license to authorize temporary operation at each specific power level greater than that authorized in the initial temporary operating license, as determined by the Commission, upon finding that—

- (1) in all respects other than the conduct or completion of any required hearing, the requirements of law are met;
- (2) in accordance with such requirements, there is reasonable assurance that operation of the facility during the period of the temporary operating license in accordance with its terms and conditions will provide adequate protection to the public health and safety and the environment during the period of temporary operation; and
- (3) denial of such temporary operating license will result in delay between the date on which construction of the facility is sufficiently completed, in the judgment of the Commission, to permit issuance of the temporary operating license, and the date when such facility would otherwise receive a final operating license pursuant to this chapter.

The temporary operating license shall become effective upon issuance and shall contain such terms and conditions as the Commission may deem necessary, including the duration of the license and any provision for the extension thereof. Any final order authorizing the issuance or amendment of any temporary operating license pursuant to this section shall recite with specificity the facts and reasons justifying the findings under this subsection, and shall be transmitted upon such issuance to the Committees on Interior and Insular Affairs and Energy and Commerce of the House of Representatives and the Committee on Environment and Public Works of the Senate. The final order of the Commission with respect to the issuance or amendment of a temporary operating license shall be subject to judicial review pursuant to chapter 158 of Title 28. The requirements of section 2239(a) of this title with respect to the issuance or amendment of facility licenses shall not apply to the issuance or amendment of a temporary operating license under this section.

(c) Hearing for final operating license; suspension, issuance, compliance, etc., with temporary operating license

Any hearing on the application for the final operating license for a facility required pursuant to section 2239(a) of this title shall be concluded as promptly as practicable. The Commission shall suspend the temporary operating license if it finds that the applicant is not prosecuting the application for the final operating license with due diligence. Issuance of a temporary operating license under subsection (b) of this section shall be without prejudice to the right of any party to raise any issue in a hearing required pursuant to section 2239(a) of this title; and failure to assert any ground for denial or limitation of a temporary operating license shall not bar the assertion of such ground in connection with the issuance of a subsequent final operating license. Any party to a hearing required pursuant to section 2239(a) of this title on the final operating license for a facility for which a temporary operating license has been issued under subsection (b) of this section, and any member of the Atomic Safety and Licensing Board conducting such hearing, shall promptly notify the Commission of any information indicating that the terms and conditions of the temporary operating license are not being met, or that such terms and conditions are not sufficient to comply with the provisions of paragraph (2) of subsection (b) of this section.

(d) Administrative remedies for minimization of need for license

The Commission is authorized and directed to adopt such administrative remedies as the Commission deems appropriate to minimize the need for issuance of temporary operating licenses pursuant to this section.

(e) Expiration of issuing authority

The authority to issue new temporary operating licenses under this section shall expire on December 31, 1983.

(As amended Jan. 4, 1983, Pub.L. 97-415, § 11, 96 Stat. 2071.)