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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL-1 50-444-OL-1 (Onsite Emergency Planning and Safety Issues)

MEMORANDUM AND ORDER

CLI-89-08

The Commission has before it three separate motions with a single purpose: to stay authorization for Public Service Company of New Hampshire ("PSNH" or "Applicants") to conduct low-power testing at Seabrook.[1] On consideration of these papers and the responses to them, the Commission declines for the reasons set forth below to impose such a stay. A license for the conduct of low-power testing as circumscribed by

[1]The motions are: (1) Intervenors' Motion for a Stay of Low-power Operation Pending Commission or Appellate Review, dated May 8, 1989; (2) Application for Stay on Behalf of Seacoast Anti-Pollution League, dated May 8, 1989; and (3) Intervenors' Motion for a Stay of Effectiveness of LPB-89-04 Pending Appeal, dated February 8, 1989. The stay application on LPB-89-04 was accompanied by Intervenors' request that it be accepted for filing although in excess of the 10-page limitation set forth in our rules. The Commission grants this request, but notes with displeasure that margin requirements were disregarded and that the filing appeared to be unduly freighted with single-spaced footnotes. We do not expect future filings t abuse the Commission's indulgence in this regard. Oppositions to each of the stay applications have been filed by the Applicants and NRC Staff.

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the Commission's December 21, 1988 order may therefore be issued.[2] Public Service Company of New Hampshire, CLI-88-10, 28 NRC 573 (1988).[3]

I. Background

Authorization of the issuance of a license to conduct low-power testing at Seabrook was first granted on March 25, 1987 by the Atomic Safety and Licensing Board (Licensing Board) conducting the hearing on onsite emergency planning and safety issues in this proceeding (Onsite Board). Because of a number of intervening actions by the Commission and the Atomic Safety and Licensing Appeal Board (Appeal Board) that license has not been issued. The Commission does not here retrace the complicated litigation over the past two years that has prevented the issuance of that license. Suffice it to note that in that time the entire administrative appellate course has run on all issues on which the Seabrook low-power license depends save one - the Licensing Board's rejection of a contention challenging operator performance based on an emergency planning exercise. Nor are there any design or construction problems unresolved for full power operations. Thus, apart from the exercise contention and emergency planning issues, there is a final

[2] Provisions for the effective date of the authorization to issue a low-power license are set forth at the conclusion of this order.

[3] Hereinafter, all administrative decisions in the Seabrook proceeding will be cited only by number and date. The agency's citation system denotes decisions of the Licensing Board Panel as "LBP" decisions, of the Appeal Board as "ALAB", and the Commission decisions as "CLI".

agency decision that the Seabrook nuclear facility is safe to operate at full power.

In the two years since low-power testing was first authorized for Seabrook, the Commission itself has caused the license to be twice stayed.[4] First, as a matter of policy, the Commission required Applicants before low-power testing to submit their own plan to protect Massachusetts residents in the EPZ in light of the state and local governments' failure to participate further in emergency planning. That action was completed. See CLI-87-02, 25 NRC 267 (1987), CLI-87-03, 25 NRC 875 (1987) and CLI 87-13, 26 NRC 400 (1987). Second, the Commission required that the Applicants present a plan, with supporting documentation, to assure the availability of adequate funds for decommissioning the reactor in the hypothesized circumstances that low-power testing was conducted at Seabrook and subsequently a license to conduct full-power operations was not granted. See CLI-88-07, 28 NRC 271 (1988). That condition has also been fulfilled.

Pursuant to CLI-88-07, Applicants submitted a decommissioning funding plan which in CLI-88-10 the Commission found acceptable in part. To cure those portions that were unacceptable, the Commission ordered modifications to the submittal both to increase significantly the sum of funds to be assured---from a little over 20 million to 71.2 million dollars ---and to provide greater assurance of the availability of those

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[4] The Commission's stays did not cover this entire period. Other administrative decisions identified deficiencies in the earlier decisional foundation for low-power operations. See ALAB-883, 27 NRC 43 1988 (remand on public emergency notification). See also ALAB-875, 26 NRC 251 (1987) (remanding 2 rejected contentions).

funds. The Commission required the Applicants to submit the necessary assurances for compliance to the NRC staff for review. Staff in turn was to provide notice to the Commission that CLI-88-10's requirements had been satisfied. See CLI-88-10.

At the time of its CLI-88-10 decision, the Commission was aware that a new contention had been put before the Onsite Board. Taking account of this, the Commission provided that a low-power license could issue after the staff had provided notice of Applicants' compliance with the decommissioning funding requirements, but only after the Licensing Board had resolved the new contention. Recognizing that some parties might wish to seek an agency or a judicial stay, the Commission also established a period after these conditions were met within which stays could be filed.[5] The Licensing Board decided the matter before it on January 30, 1989. LBP-89-04, 29 NRC 62 (1989). On May 3, 1989 the NRC staff provided notice that the Applicants had satisfied the Commission's requirements of CLI-88-10. As noted above, on May 8 and 9 Intervenors filed requests to stay the low-power operation of the Seabrook facility, in addition to the request seeking a stay of LBP-89-04.

The Commission now turns to its decision on those requests.

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[5] In a later order the Commission established a 9-day briefing period for stay requests and provided parties the assurance that no low-power license would issue until any stay motions had been decided. Order (unpublished) March 22, 1989.

II. Decision on the Stay Factors

The Commission's determination of whether to grant or deny a stay application involves consideration of four factors. See 10 C.F.R. § 2.788(e). But it is incontrovertible that "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.'" Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), citing Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980). See also Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (irreparable injury is "the most crucial factor"). Because we find that our determination on that factor does not support the grant of a stay, we turn to it immediately.

A. Whether low-power testing irreparably injures Intervenors

Intervenors' Claims

Intervenors[6] offer a number of largely unsupported assertions of their claim that they will be irreparably harmed by the low-power operation of Seabrook:

[6]The term "Intervenors" will be used interchangeably to refer to the various groupings of the four parties: Attorney General for the Commonwealth of Massachusetts (MassAG), New England Coalition on Nuclear Pollution (NECNP), Seacoast Anti-Pollution League (SAPL), and the Town of Hampton (TOH).

1. Intervenors contend that irreparable harm results from the increased risk to the public from low-power testing which permits low-power operations to take place "despite well-documented inadequacies in the training and knowledge of key plant operators." (Since the Commission has identified no "well-documented inadequacies in the training and knowledge of key plant operators," the Commission assumes that Intervenors refer to disagreements they have with NRC Staff and FEMA regarding operator emergency performance during a recent emergency planning exercise. This matter is the subject of LPB-89-04.)

2. They contend that 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. SAPL claims in addition that it will suffer irreparable harm from the creation of a de facto nuclear waste dump at the site.

3. They state that "[o]peration at low power will also result in increased worker exposures, and poses a risk to the public health and safety."

4. They state further that should a radiological accident occur at the Seabrook plant, it could cause irreversible health damage.

5. Intervenors contend that to permit low-power operations with their irreversible consequences "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)."

6. SAPL further claims harm from the "tendency of low power operation to foreclose alternative courses of action at the site in the event that emergency planning problems prove to be intractable."

7. In their stay motion on LBP-89-04, Intervenors say that because they seek a hearing on the operator performance issues before low power, irreparable harm would arise from the potential mooting of their appeal of the Licensing Board's rejection of their emergency planning exercise contention.

Position of Applicants and Staff

In response, the Applicants and Staff emphasize that the plant has been found safe to operate and that under judicially upheld Commission law and precedent, there can be no finding of irreparable harm.

Decision

Neither separately nor in sum do Intervenors' claims of harm meet the standard of irreparable harm required by this Commission or the courts. E.g. Cuomo v. NRC, 772 F.2d 972, 976 (D.C. Cir. 1985), citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("harm must be both certain and great").

Essentially, in all its claims except the fifth and seventh as numbered above, Intervenors do no more than recite claims of risk of some future harm, without discussing the likelihood or degree of any such

risk. They also assert claims that irradiating the reactor will result in irreversible effects, without demonstrating how such effects constitute irreparable harm.[7] On the other hand, as Applicants and Staff have demonstrated, at a nuclear plant that complies with Commission requirements for low-power operation, there is no threat of irreparable harm from either the risks or the irradiation of the reactor that occur during low-power testing. And the Court of Appeals for the D.C. Circuit reached the same conclusion in Cuomo v. NRC, 772 F.2d at 976. With the record of this proceeding before us, the Commission concludes that the Intervenors have little likelihood of prevailing on a claim that Seabrook does not meet these requirements.

The Commission has consistently found that the risk of an accident during low-power operations is not irreparable harm. "[C]ertain factors contribute to a 'substantial reduction in risk and potential accident consequences for low-power testing as compared to the higher risks in continuous full-power operation.'" [Citing CLI-87-2, 25 NRC at 271]. ALAB-865, 25 NRC 430, 436 (1987). Even in the unlikely event of an accident during low power operations, the risks of any offsite harm are substantially less than at full power. See e.g., CLI-88-10. See also

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[7] To the contrary, for example, Intervenors' affiant Bridenbaugh has concluded with respect to worker exposures that they "probably would not exceed allowable limits." Intervenor's Stay Exhibit 3, Affidavit of Dale G. Bridenbaugh, ¶ 12, dated October 29, 1987. Moreover, that affidavit supports no claim of injury other than economic, and it is far from clear who suffers any economic harm.

Emergency Planning and Preparedness Final Rule, 47 Fed. Reg. 30232, 30233 n.1. (1982).[8] This is because:

> the fission product inventory during low power testing is much less than during higher power operation due to the low level of reactor power and short period of operation. Second, at low power there is a significant reduction in the required capacity of systems designed to mitigate the consequences of accidents compared to the required capacities under full power operation. Third, the time available for taking actions to identify accident causes and mitigate accident consequences is much longer than at full power.

47 Fed. Reg. at 30232-33.

The Commission has recognized a somewhat increased risk of operator error in early phases of operations when operators are less experienced. Nonetheless, we determined that in light of the three reasons discussed infra the "slightly higher risks" due to the relative inexperience of operators are "significantly outweighed." 47 Fed. Reg. at 30232-30233.

Moreover, the greatly lowered likelihood of any offsite harm even in the unlikely event of an accident during low-power testing is all the more true in this instance where the Commission has strictly limited the operation that may occur pursuant to the low-power license without obtaining additional Commission approval. Under the terms of CLI-88-10, low-power testing operations (not to exceed power levels of 5%) are

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[8] Footnote 1 states as follows:

> The level of risk associated with low-power operation has been estimated by the staff in several recent operating license cases: Diablo Canyon, Dockets Nos. 275-OL, 323-OL, San Onofre, Docket Nos. 361-OL, 362-OL, and LaSalle, Docket Nos. 373-OL, 374-OL. In each case the Safety Evaluation Report concluded that low-power risk is several orders of magnitude less than full power risk. These findings support the general conclusion in the text that a number of factors associated with low-power operation imply greatly reduced risk compared with full power.

limited in duration to no more than the equivalent of .75 effective full power hours.

Similarly irradiation of the reactor is not irreparable harm to the intervenors. It is true that criticality of the reactor will irradiate the reactor core and thus effect some irreversible changes.[9] The Cuomo Court, in denying a stay of low power operation at the Shoreham reactor, evaluated the irreversible changes from low power and found that they did not rise to the level of irreparable injury. In ALAB-865, in denying 1987 stay petition for Seabrook low power, the Appeal Board evaluated nearly identical claims to those before the Cuomo Court and found no basis to distinguish them. It specifically concluded "that the contamination of the plant and the possibility that waste may need to be stored" did not constitute irreparable injury. The Appeal Board's conclusion then was properly founded on Commission and judicial precedent and is directly applicable now. ALAB-865, 25 NRC 430, 438 (1987). Moreover, the Commission's provisions to assure availability of funds to decommission after low-power testing, in the hypothesized circumstance that a full-power license would not be granted, mean that any necessary action to avoid hazards from radioactive contamination resulting from low-power testing activity can be taken promptly. They also assure that the economic burden will not fall on federal, state or local governments. In short, adequate provisions have been made for decontamination and decommissioning of the reactor and the safe storage of nuclear waste

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[9] After the projected low power testing, contamination levels in the reactor will be negligible apart from the irradiated fuel itself. Applicants Response, Affidavit of George S. Thomas ¶ 13.

until it can be removed from the site. Under no circumstances will Seabrook be turned into a "waste dump."

With regard to the fifth and seventh claims, Intervenors appear to be asserting that they would be irreparably harmed by the potential mootness of their claims. But those claims would not become moot simply by the occurrence of low-power operation. Because both claims are made under the Atomic Energy Act, the citation to Commonwealth of Massachusetts v. Watt, supra, whose holding is restricted to NEPA violations is inapposite. Nonetheless, that case is instructive that violations of substantive statutes are susceptible to judicial grants of relief and thus are unlikely to be mooted.[10] Were Intervenors ultimately to prevail on their claim before us that their operator-related exercise contention was wrongly rejected, their contention could be admitted to a reopened hearing for adjudication relevant to the grant of a full-power license. Were Intervenors to prevail in the ensuing litigation, Applicants would be required to cure whatever deficiencies were found. Thus Intervenors would not be deprived of the opportunity to have their cause of action heard and to receive meaningful relief.

Lacking any meaningful showing of irreparable harm to them, there is scarce basis for the Commission to grant Intervenors a stay. The Commission turns nonetheless to the three remaining stay factors.

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[10] Watt also makes clear that simply alleging a NEPA violation that would become moot is insufficient to justify a stay; a NEPA violation must be clearly established. 564 F.2d at 456. See also Cuomo 772 F.2d at 976. And the equities must be balanced and found to favor injunctive relief. Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987).

B. Whether the movants have made a strong showing that they are likely to prevail on the merits.

Intervenors MassAG, NECNP and TOH base their stay motions on claims of error that they group under four headings: 1. Onsite Exercise Contention; 2. Decommissioning; 3. Violations of the Atomic Energy Act; and 4. Violations of NEPA. To these, which SAPL adopts, SAPL adds 5. Partial Deferral of the Safety Parameter Display System.[11] Of these issues, all but the first and a single subissue of the second have already received a final agency decision which the Commission has either made itself, reviewed or after threshold consideration declined to review. See generally 10 C.F.R. § 2.786. Thus, only as to two issues is there even the possibility that movants can prevail on the merits before the Commission, let alone make the overwhelming showing needed to outweigh a weak case on irreparable harm. Accordingly, we turn to them first.

1. The Onsite Exercise Contention

This issue arose from the NRC Staff's report on Applicants' onsite emergency planning exercise which was conducted on June 28-29, 1988. The report found no violations, but Staff did find some matters relating to various operator responses which the Staff initially described as weaknesses. The Staff addressed these matters in follow-up discussions

[11] SAPL also "Simply Notes, But Does Not Argue At Length" what it perceives as several additional failures of the Commission to properly resolve the issues. This listing without more does not warrant individualized Commission response.

with Applicants, as is the normal procedure.[12] The matters were resolved in some cases by explanations of misunderstandings and in others by commitments to implement various initiatives and recommendations for improved guidance to operators. The issue that is raised by Intervenors is whether they have been wrongfully denied the opportunity, before low power may proceed, to litigate their contention that, contrary to Staff's view, the weaknesses that Staff noted have not been resolved and demonstrate that Applicants' onsite plan does not provide adequate protection for the public at low power.

Intervenors argue, inter alia, that the Board erroneously applied the standards for reopening a proceeding, and also misapplied the late-filed contention standards causing the rejection of their contention regarding the emergency response judgments of various NRC-licensed operators. The Applicants defend the decision of the Board and also maintain that the exercise performance is not a relevant standard for ruling on the adequacy of the Applicants' onsite emergency plan which must be available for low power. They also assert that under the Shoreham rule the exercise contention is inadmissible in any event since the Intervenors do not allege a "fundamental flaw" in the plan but at most a training problem. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) ALAB-903, 28 NRC 499 (1988). The Staff observed that the reopening determination was unnecessary, and that

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[12] "It is normal NRC procedure, when an exercise inspection report identifies "open items", for the staff to conduct a follow-up inspection to determine whether these items should be closed out." LBP-89-04, 29 NRC at 62.

Intervenors' failure to file their contention timely, and to satisfy late filed contention requirements, was sufficient to warrant dismissal.

The Commission's consideration of this issue is, of course, without prejudice to the merits of intervenors' ongoing appeal. However, in order to make the required predictive finding on likelihood of success on the merits, the Commission must give at least threshold consideration to the Licensing Board's decision and the record before the Appeal Board. As set forth below, we find that there is not such a likelihood of a changed outcome in the Licensing Board decision that the Commission might, as a matter of discretion, wish to stay the effectiveness of LBP-89-04.

In particular, as reflected in questioning by the Appeal Board at oral argument[13], there is at least a reasonable question whether the exercise is material to a decision on the adequacy of the onsite plan for low power.[14] The scenarios being tested were those that would bring into play offsite emergency plans and involved larger and more fast-breaking

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[13]"Judge Rosenthal: If in fact the Commission has authorized low power with respect to many reactors without an exercise having taken place, would you agree that that is at least implicitly a rejection by the Commission of your position on that?" Transcript of Oral Argument before the Appeal Board, April 21 , 1989 at 11.

[14]The Commission directed in CLI-88-10 that a low-power license could not issue in advance of a Licensing Board decision on admission of the contention and if admitted, until the litigation was completed. That direction did not decide that the issue was one properly before the Onsite Board, but simply required that the Onsite Board decide it before low power. If the Board found that the issue was susceptible to litigation before it and otherwise admissible, then the Commission required that the litigation be concluded before low-power operations could be authorized.

accidents than any that could reasonably be anticipated at low power in the very unlikely event that such an accident should occur at all.

Assuming, without deciding, that Intervenors are correct that the reopening standard does not apply, substantial timeliness issues must still be resolved to admit a late-filed contention. The answer to the question of whether the contention was timely does not clearly favor Intervenors. The exercise that is alleged to have revealed the flaws complained of by Intervenors occurred on June 28-29, 1988; Intervenors did not file this contention until September 16, 79 days later. Even assuming they needed the exercise report to frame their contention, that was received in mid-July. Even assuming they needed additional exercise information (contrary to the Licensing Board's finding), Intervenors received that information the "week of" August 15. Since they did not file their contention until September 16, there was a minimum of 27 days from the last day of "the week of August 15" when the last of the information they assert was necessary to their contention was received. That contention was the sole contention pertaining, in their view, to the otherwise concluded "onsite" or low-power portion of the hearing. The Commission reasonably demands that contentions filed after the hearing is underway be filed promptly after receipt of the information needed to frame those contentions. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). In these circumstances, we do not now see that there is a substantial likelihood that there will be a reversal of the finding that this contention was not timely and that its late-filing was without good cause.

Without even reaching the "fundamental flaw" issue, the Commission is satisfied that Intervenors have not demonstrated a likelihood that

they will prevail in overturning the result of LBP-89-04. The Commission is also satisfied that, whether it was required or not, the Board's diligent threshold examination of the significant safety question provides important assurance that no significant safety matter has been overlooked. See LBP-89-04, 29 NRC at 72-86.[15]

As we have noted supra, this onsite exercise contention is the only issue relevant to the safety of Seabrook low-power operations where appellate review of the Licensing Board decision has not been concluded. If the Intervenors' showing raised a meaningful doubt whether key plant personnel, who had met NRC operator-licensing requirements, were insufficiently trained and knowledgeable to operate Seabrook safely at low power, then the Commission itself would want to examine this matter further. But both FEMA and the NRC Staff have found that the level of training and knowledge is adequate and that the onsite exercise did not show otherwise, even though some problems were observed. The Intervenors' differing evaluation appears largely conclusory and at most simply reflects their disagreement with FEMA and with the Staff's expert evaluation. The Licensing Board's opinion remains under review but the likelihood that the staff's and FEMA's judgment will be overturned seems small and is certainly not enough to support a stay.

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[15] Of course, even in the absence of the adjudication sought by intervenors the issues presented by the contention are not unexamined ones. FEMA and the NRC Staff have independently been satisfied that the June 28-29, 1988 Seabrook exercise, which included exercise of the Applicants' onsite plan has demonstrated reasonable assurance of adequate protection for the public. See Letter, Peterson to Stello (Dec. 14, 1988) referencing FEMA's "Seabrook Exercise Report" (Sept. 1, 1988); NRC Staff Inspection Report No. 50-443/88-09 (July 6, 1988).

2. Decommissioning

The Commission's rules are clear that only the Commission may waive a rule in an NRC proceeding. See 10 C.F.R. 2.758. A rule waiver will be presented to the Commission only when the adjudicatory tribunal finds that a prima facie case for waiver has been made, but the decision on whether a waiver is necessary rests with the discretion of the Commission. As explained previously, the Commission on analysing the concerns of the parties found that a waiver of its rule exempting public utilities from financial qualifications review and findings was not needed. This was in large measure because the Commission could reasonably and without a waiver provide the principal relief sought, i.e. assurance that notwithstanding the pendency of a Chapter 11 Bankruptcy proceeding for Public Service Company of New Hampshire, adequate funds would be available to decommission Seabrook under the hypothesized circumstances that low-power operation was concluded and that a full-power license was not granted.

Answers to Intervenors' claims of error in our resolution of what must comprise the decommissioning funding plan may be found in our responses to Massachusetts AG's successive requests for reconsideration of CLI-88-10.[16] We do not repeat them here, nor do we believe Intervenors can be heard to complain of the Commission's efforts to establish a reasonable funding mechanism for decommissioning. In brief,

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[16] See CLI-89-03, 29 NRC ---(March 6, 1989) and CLI-89-07, 29 NRC ---(May 3, 1989).

the Commission rejected Applicants' proffer of $21 million in an internal fund as insufficient in amount and in security. It required assurance of $72.1 million dollars prefunded in 1988 dollars in a separate and segregated internal account with specified additional guarantees or by surety or other guarantee method.[17]

One new argument raised in Intervenors' stay papers may be easily dispatched. With regard to implementation of CLI-88-10, Intervenors argue that the agreement is deficient in that it provides for obligation of the surety only on denial of a full power license. Intervenors fear that Applicants might withdraw their application and thus prevent the Commission from denying the license and triggering the surety agreement.

The simple answer is that withdrawal of an application is neither automatic nor a matter of right[18], especially where as here Applicants would be in possession of an irradiated reactor. The Commission may deny a pending full-power application if it is not pursued. Subsequent to the denial of the application, NRC would nonetheless retain regulatory authority over applicants which are in possession of nuclear materials.

In light of the foregoing, Intervenors cannot claim a likelihood of success on this issue.

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[17] On review of Applicants' first proffer of compliance, the NRC Staff found that in changing from a prefunded account to a surety method of guarantee to be paid out in successive years as the need arose, Applicants had insufficiently allowed for the sum to be in 1988 dollars. Adjustments increasing the amount of surety were made before Staff provided notice that Applicants had complied.

[18] See 10 CFR § 2.107(a): "The Commission may permit an applicant to withdraw an application..., or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice...."

3. Violations of the Atomic Energy Act

Intervenors also claim that the NRC has erred in interpreting the Atomic Energy Act to permit any operation of a nuclear reactor before all issues material to the issuance of a full power license are decided. This claim directly challenges the Commission's regulation at 10 C.F.R. § 50.57(c). An adjudicatory licensing hearing is not a permissible forum for a challenge to Commission regulations. See 10 C.F.R. § 2.758. Such a challenge may be brought by means of a petition for rulemaking.

Intervenors state in their stay motion that "[i]t is clear that Congress did not intend to allow the initial operation of a nuclear power plant at any power level" before the conclusion of all hearings. Intervenors' stay motion at 4. This claim which is unsupported is difficult to understand in view of the Commission's consistent interpretation of its organic statute as permitting low-power testing before the conclusion of all hearings.[19]

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[19] See § 50.57(c) 37 Fed. Reg.15127 (1972):

> An applicant may, in a case where a hearing is held in connection with [an operating license proceeding] make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized....

The Commission has long issued low-power licenses pursuant to 50.57(c). E.g., Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), LBP 76-3, 3 NRC 44 (1976). Consolidated Edison Company of New York (Indian Point Nuclear Generating Unit 3), LBP-75-18, 1 NRC 431 (1975).

In particular, Intervenors have challenged the Commission's regulation that specifically eliminates the need for review and findings on offsite state and local emergency response plans before a low power license may be granted. See 10 C.F.R. § 50.47(d).[20] This challenge is also impermissible under the Commission rules. See 10 C.F.R. § 2.758. Regulation § 50.47(d) was issued on a legally sound basis and for seven years the Commission has been issuing low-power licenses pursuant to § 50.47. It is also significant that Congress has been made aware of this process through quarterly reports which include notification of the issuance of such licenses. Congress has never suggested that the practice is unlawful.

Intervenors also assert that "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." Intervenors' Stay Motion at 4. Intervenors profess that there is great uncertainty because the "Commonwealth's nonparticipation in emergency planning" compounds the unlikelihood that Seabrook will meet the Commission's emergency planning regulations and secondly because, in their view, it is highly questionable (although Intervenors do not state why) that PSNH, "which has declared bankruptcy, will ultimately receive a license to operate Seabrook."

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[20] This provision has been in place since 1982. See 47 Fed. Reg. at 30236.

Our discussion of Intervenors' "improbability" claim infra at 22-24 is equally applicable here. The Commission will not speculate at this stage whether and if so when a full power license will issue for Seabrook, but we do note the following. In every NRC authorization act which has been passed since 1980, Congress has instructed the Commission to consider utility emergency plans whenever state or local governments refuse to submit plans. The NRC has amended its rules to make clear that it will consider such plans as a basis for a full power operating license. 10 C.F.R. § 50.47(c). That rule has been judicially upheld. Commonwealth of Massachusetts v. United States, 856 F.2d 378 (1st. Cir. 1988). The utility has prepared such plans for those portions of the Seabrook EPZ which are in Massachusetts. The plans have been exercised. The emergency planning for both the New Hampshire and Massachusetts portions of the emergency planning zone have been found adequate by FEMA. A Licensing Board has already found that the New Hampshire plan meets the Commission's licensing requirements. LPB-88-32, 28 NRC 667 (1988). Hearings are underway on the utility's plan for the Massachusetts portion of the emergency planning zone. In those hearings, FEMA's favorable finding has the status of a rebuttable presumption.

With respect to Public Service's bankruptcy petition, insofar as it has been relevant to our provisions for the public health and safety the Commission has taken account of it and will continue to do so.

In these circumstances we continue to find that eventual full-power licensing of Seabrook is in the "realm of the possible."[21] Thus it is reasonable for the Commission to act promptly, before a final resolution of all full-power issues, so that the Applicants may derive the full benefits of low-power testing.

4. Violations of NEPA

Intervenors contend that low-power operation is either a significant new circumstance necessitating a supplement to the 1982 Final Environmental Impact Statement (EIS) or a separate federal action requiring its own EIS. The sole reason presented for this asserted obligation is the alleged improbability of Seabrook's receiving a full-power license. This improbability, they argue, mandates that the costs and benefits of operating only at low power be separately evaluated.

This is not the first time that the Commission has faced such a NEPA claim. As the Appeal Board observed in rejecting Intervenors' argument, "[t]he principal and decisive difficulty with this line of argument" is that it has been rejected both by us in the Shoreham proceeding and by the Court of Appeals for the District of Columbia Circuit. ALAB-875, 26 NRC 251, 259 (1987), citing Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984) and

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[21] See 26 NRC at 404. Given the current state of the record of emergency planning hearings it would appear that PSNH's likelihood of receiving a full power license is greater than it was when the Commission first made this observation in 1987.

CLI-85-12, 21 NRC 1587, 1590 (1985); Cuomo v. NRC, 772 at 974-976 (D.C. Cir. 1985). Intervenors base their belief that full-power operation is unlikely on the fact that in September 1986 the Commonwealth of Massachusetts refused to submit emergency plans for the Massachusetts sector of the ten-mile emergency planning zone (EPZ) around Seabrook.[22]

In this proceeding, as in Shoreham, the Commission recognized that "low-power testing could be held up if it were established, beyond significant doubt, that there were truly insuperable obstacles to issuance of a license for operation at any substantial power level." 25 NRC at 271. To assure itself that this was not the case, the Commission, as a matter of policy, required the applicants to file an offsite emergency response plan to include the Massachusetts portion of the EPZ. Id.; CLI-87-03. The applicants did so.[23] The Commission examined that plan and concluded that adequate emergency planning for the Massachusetts portion of the EPZ is at least "in the realm of the possible." CLI-87-13, 26 NRC 400, 404 (1987). While uncertainty exists with respect to the ultimate outcome of the ongoing litigation over the adequacy of

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[22] Intervenors also assert that "[T]he 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." Stay Motion at 6. Why this should be the case is totally unexplained. The PSNH bankruptcy conceivably could affect the utility's ability to decommission the facility should it not ultimately be granted a full-power license. To assure itself that decommissioning funds will be available in such an eventuality, the Commission has required the establishment of a decommissioning surety fund.

[23] The utility plan addresses the sixteen planning standards by which emergency plans are judged (see 10 C.F.R. § 50.47(b) and NUREG-0654) and has compensating measures for the lack of state and local government participation.

offsite emergency planning, such uncertainty is no different from the uncertainty that always exists where full-power issues remain in dispute.[24] See 19 NRC at 1327. In short, Intervenors' contention that full-power operation is unlikely amounts to no more than speculation as to the eventual outcome of litigation on offsite emergency planning issues and is not a new circumstance requiring further analysis under NEPA.

Finally, we repeat here what we said in the Shoreham proceeding:

> [E]ven were we required to perform some cost/benefit analysis at this interim stage of these proceedings, we would not say that the uncertainty of [Seabrook] full-power operation is so great that it necessitates avoidance of the environmental effects of low-power testing. The environmental effects of low-power testing are well known, i.e., moderate irradiation of the core and contamination of the remainder of the primary coolant system, with no significant impact on the surrounding environment by releases of effluents during normal operation. These effects of low-power testing are subsumed in the FEIS's analysis of the far greater, but nonetheless very small impacts from full-power operation. In our view, the benefits of low-power operation clearly outweigh the environmental costs.

21 NRC at 1590.

5. Partial Deferral of the Safety Parameter Display System

SAPL contends that the Appeal Board (ALAB-875, 26 NRC 251,264-267 (1987)) erred in affirming the Licensing Board's finding (LBP-87-10, 25

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[24] We note again that the Licensing Board resolved all contentions relating to emergency response planning for that portion of the EPZ within New Hampshire in favor of applicants. LBP-88-[illegible], 28 NRC 667 (1988). We also again note that although Massachusetts refuses to cooperate with Seabrook emergency planning, such cooperation is not a sine qua non for a full-power license. 10 C.F.R. § 50.47(c)(1)(1988); Commonwealth of Massachusetts v. United States, supra. In this regard

(Footnote Continued)

NRC 177, 183-[illegible] (1987)) that certain deficiencies noted by the staff in the Seabrook Safety Parameter Display System (SPDS) could await correction until the first refueling outage after full-power operation with no undue risk to the public health and safety.[25] SAPL argues that such delay ignores the Staff's statement in Supplement 1 that "[p]rompt implementation of an SPDS can provide an important contribution to plant safety." Supp. 1 at 8.[26]

It is important to emphasize that what the Appeal Board sanctioned was not a delay in implementation of the entire SPDS but simply a

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(Footnote Continued)
the Federal Emergency Management Agency has approved the utility's plan for the Massachusetts portion of the EPZ, thus establishing a rebuttable presumption that the plan is adequate.

[25]Although all the information available on the SPDS is displayed elsewhere in the control room, the SPDS serves the function of providing in a convenient location in the control room a concise display of critical plant data. The key purpose of the SPDS is to aid control room personnel during abnormal or emergency conditions. The SPDS is one of the requirements approved for implementation in NUREG-0737, "Clarification of TMI Action Plan Requirements," (November 1980). Depending upon safety significance and the immediacy of need for corrective action, NUREG-0737 set an implementation schedule specifying that many of the post-TMI requirements be implemented prior to initial criticality, but did not impose such a requirement with respect to the SPDS. In NUREG-0737, Supplement No. 1 (Supp. 1), published in January 1983, the staff provided further clarification regarding the SPDS but determined not to specify an implementation schedule. Rather, Staff decided to permit development of plant-specific schedules which would take into consideration the degree of completion of the power plant. Supp. 1 at 1-2.

[26]SAPL tries to convey the impression that because Supplement 1 was published in 1983, deferral of correction of any deficiencies until a point after the beginning of low-power operation at Seabrook cannot be "prompt". This completely ignores the fact that Supplement 1 deliberately chose not to impose generic schedules based upon lapse of time from 1983 but instead recognized that an SPDS must be integrated with other systems and thus plant-specific schedules were needed based on the point of development of the particular facility.

schedule setting the first refueling outage as the deadline for three corrective measures required by the staff.[27] Those measures pertained to (1) the containment isolation display, a device that depicts the open and closed status of valves that come into play when there is a need for the sealing of the containment; (2) the data validation algorithms, a procedure for treating several measurements of the same parameter to obtain the desired signal for the SPDS; and (3) the tests of SPDS computer response time under heavy loading. See 26 NRC at 265-267.

With regard to the first, the Appeal Board noted that witnesses for Staff and Applicants had testified that a modified display on the main control board would suffice until the display was incorporated into the SPDS, a position unrebutted by SAPL. With regard to the second, the Appeal Board noted that the Staff's concern "appeared to be limited to the case where an off-normal signal might lead to a faulty measurement of one of the parameters displayed by the SPDS" but that staff testimony showed "that, if such a signal should change enough to affect adversely the information conveyed by the SPDS, it would most likely activate an alarm on the main control board...[and that] the operators do not rely on SPDS information alone but are required to corroborate any SPDS data with other control room information before taking any corrective action." 26

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[27] The Staff argued before the Licensing Board that all eleven deficiencies found in a Staff audit of the Seabrook SPDS could await correction until the first refueling outage. The Board examined each deficiency and concluded that, except for three deficiencies which would have to be corrected prior to full-power operation, the applicants had established that the others either would have no adverse impact on the public health and safety if corrections are deferred to the first refueling outage or had already been corrected by the applicants in such a manner as to protect the public health and safety.

NRC at 266. With regard to the third, the Appeal Board noted that uncontradicted testimony showed "that some level of plant operation is required to load the computer to provide a test that will give representative SPDS response times." Id. SAPL provided no explanation to the Appeal Board or to us as to why permitting corrective measures with respect to these three items to occur at any time up to the first refueling outage would result in a lack of reasonable assurance that health and safety of the public will be protected nor do we find any reason to disturb the contrary conclusions of the two boards which carefully considered this matter.[28]

C. Harm to Other Parties

The Commission finds that there will be harm to the Applicants from further delay of low-power testing. In general the Commission has found that longer periods of time for low-power testing hold the advantage that any problems that may be revealed during the testing process can be corrected without delaying full-power operations with their attendant benefits. See Shoreham, 21 NRC at 1590.

The anticipated time left for low-power testing before a full-power license can be granted is not long. An Atomic Safety and Licensing Board

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[28] SAPL implies that deferral of these corrections to the first refueling outage means that the Supplement 1 requirement that "operators should be trained to respond to accident conditions both with and without the SPDS available" cannot be met. First, it is misleading to call the SPDS unavailable simply because a few corrections in the system need to be made. Second, the significance of that operator training requirement is that operators are fully able to handle emergencies with or without an SPDS. Thus the incompleteness of an SPDS does not mean that an operator is not trained to respond to accident conditions.

decision on a full-power license for Seabrook is expected before September 30, 1989. See Commission's Memorandum (unpublished), February 3, 1989.[29] If that decision is favorable to Applicants, Seabrook could have a full-power license within 5 months after receiving a low-power license. This is no longer than Intervenors' affiant Bridenbaugh has asserted was the average time between the grant of low-power and full-power licenses during a period when he found that the "two-step process worked reasonable well." Intervenors' Stay Exhibit 3 at 6-7, ¶ 8 and n.2.

D. Where the public interest lies

Finally, as the Commission has consistently held, the public has an interest in the resolution of licensing proceedings with reasonable expedition.

Furthermore, it is consistent with the expressed intent of Congress, which defines the public interest, that a plant that has been found to be safe for purposes of low-power testing and is ready to be tested be so permitted. It serves the public interest to have adequate time to test and cure any problems revealed in order that if and when the plant is licensed to operate and provide the benefits of nuclear power to the public, there will be no further delay.

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[29] In its February 3, 1989 Memorandum, the Commission noted that, extrapolating from the Licensing Board's published schedule, it appeared that September 30, 1989 would be a realistic time to expect a final initial decision on offsite emergency planning. The Commission then stated that it "would like the Licensing Board to inform the Commission

(Footnote Continued)

Thus, the Commission finds that the public interest does not favor the grant of a stay.

Conclusion

In light of the foregoing, the three pending applications for a stay are denied.

Effectiveness of Order

Intervenors have filed a challenge to the Seabrook low-power license in the United States Court of Appeals for the District of Columbia Circuit. Commonwealth of Massachusetts v. United States Nuclear Regulatory Commission, No. 89-1306 (D.C. Cir., filed May 11, 1989). In connection with that challenge Intervenors have also sought a stay of any low-power license for Seabrook pending resolution of the issues raised in their appeal. That stay request has not been acted on by the Court.

Although, for the reasons set forth in this order, the Intervenors have not made a case for a stay, in order to give the Court an opportunity to review these stay claims and any oppositions that may be filed, we are entering a brief housekeeping stay at this time. No license authorizing low-power testing for Seabrook shall issue before

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(Footnote Continued)
promptly if, at any time, it becomes apparent that the September 30, 1989 target schedule for a final initial decision cannot be achieved." The Commission has received no such notification from the Board.

May 25, 1989 at 4 p.m. EDT, or such earlier date as the Court may deny the stay requests now before it.

It is so ORDERED.

For the Commission,*

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 18 day of May, 1989

*Commissioner Curtiss did not participate in this Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL-1

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMO & ORDER (CLI-89-08) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-443/444-OL-1
COMM MEMO & ORDER (CLI-89-08)

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Dated at Rockville, Md. this
18 day of May 1989

Patty Henderson
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