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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF RESPONSE TO INTERVENORS' MOTION
FOR RECONSIDERATION OF CLI-89-08 AND RENEWED
MOTION FOR STAY OF ISSUANCE OF LOW POWER LICENSE

Gregory Alan Berry
Counsel for NRC Staff

May 24, 1989

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INTRODUCTION

On May 22, 1989, the Massachusetts Attorney General, on behalf of himself and intervenors NECNP, SAPL, and the Town of Hampton, petitioned the Commission to reconsider its decision in CLI-89-08. 1/ In CLI-89-08, the Commission denied intervenors' applications for a stay pendente lite of the issuance of a low power license for the Seabrook Station. See Intervenors Motion For Reconsideration Of CLI-89-08 And Renewed Motion For A Stay Of The Issuance Of A Low Power License In Light Of The Present And Ongoing Litigation Of An Issue Material To The Issuance Of A Low Power License In The Full Power Proceeding at 1 (May 22, 1989) (hereinafter "Motion"). In intervenors' view, a low power license may not be issued until the offsite Licensing Board resolves a contention pending before it which, according to intervenors, is "relevant and material to the issuance of a low power license." Id. at 2.

1/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-08, 29 NRC ___ (May 18, 1989).

As explained in this response, intervenors' motions should be denied.

BACKGROUND

On May 18, 1989, the Commission issued CLI-89-08, in which it denied several motions filed by intervenors seeking a stay of the issuance of a low power license for the Seabrook Station. CLI-89-08, slip op. at 1, 29. In denying the stay applications, the Commission found that: (1) none of the intervenors would be injured irreparably if a stay was not granted, id. at 5-11; (2) none of the claims advanced by intervenors in support of their stay requests was likely to succeed on the merits, id. at 12-27; (3) Applicants would be harmed if the requested stay was granted, id. at 27-28; and (4) the public interest did not favor granting the requested stay. Id. at 28.

On May 22, 1989, intervenors filed the instant motion which seeks reconsideration of CLI-89-08 and renews intervenors' request for a stay of the issuance of a low power license for the Seabrook Station. In support of their position, intervenors argue that Basis D of the Massachusetts Attorney General's Exercise Contention 19 ("MAG EX 19) [2/] which is pending

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2/ MAG EX 19 states in pertinent part:

> The Exercise revealed a fundamental flaw in the Seabrook Station Radiological Plan and Emergency Response Procedures in that during the Exercise the licensee's personnel did not issue appropriate protective action recommendations ("PARs") to the NHY Offsite Response Organization, the State of NEw Hampshire, or the State of Maine, as required by 10 C.F.R. § 50.47(b)(10), and the guidance set forth in NUREG-0654, § II.J.7 and NUREG-0396.
>
> D. [T]he licensee's inappropriate PARs were derived from its METPAC computer model. It appears from what happened during the Exercise that this model has some fundamental

(FOOTNOTE CONTINUED ON NEXT PAGE)

before the offsite Licensing Board raises an issue relevant to low power operation which, pursuant to 10 C.F.R. § 50.57(c), must be resolved by the Licensing Board before a low power license may issue. See Motion at 2. 3/

DISCUSSION

A. Intervenors' Motion For Reconsideration Should Be Dismissed

As noted above, intervenors' motion requests the Commission to reconsider its determination in CLI-89-08. Motion at 1. The request should be denied summarily. Intervenors do not allege, let alone explain, that any of the conclusions reached therein by the Commission is erroneous. The Commission has made plain that unless it involves changed circumstances which could not have been presented earlier, a motion for reconsideration should confine itself to matters in the record at the time the Commission issued the decision sought to be reconsidered. See e.g

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE

> flaws that cause it to fail to take into proper consideration all known facts as well as existing uncertainties in the generation of PARs. It, among other things, fails to adequately considere ETEs, weather uncertainties including wind speed and directional changes, and release conditions. In recommending PARs to offsite officials, licensee personnel in the EOF merely passed on copies of the METPAC print-outs without offering any guidance on how much reliance the PARs contained therein should be given.

3/ Within hours of receiving the instant motion, Applicants moved the offsite Licensing Board to reconsider its decision admitting Basis D of MAG EX 19 for litigation on the ground that jurisdiction over the issue raised therein lay with the onsite rather than the offsite Licensing Board. See Tr. at 22178-81, 22200, 22210-11, 22219-20 (May 22, 1989). The Licensing Board agreed and granted Applicants' motion. Tr. at 22223-25. The Attorney General promptly petitioned for directed certification of the Licensing Board's action. Applicants and the Staff filed their responses to the Attorney General's petition on May 23 and 24, 1989, respectively.

Public Service Company of New Hampshire (Seabrook Station, Unit 1 and 2), CLI-89-03, 29 NRC ___, slip op. at 5, n.8 (March 7, 1989); Id., CLI-89-07, 29 NRC ___, slip op. at 4 (May 3, 1989). The claim raised by intervenors here, i.e., that low power license may not be issued until the Licensing Board resolves MAG EX 19 -- could have been, but was not, presented to the Commission in CLI-89-08. Intervenors' new claim is not based upon any material changes in circumstances; on the contrary and as intervenors concede, MAG EX 19 and its Basis D has been pending before the offsite Licensing Board since December 15, 1988. See Motion at 3, 6, 7.

Intervenors attempt to excuse the belated assertion of their claim that the pendency of Basis D of MAG EX 19 precludes the issuance of the low power license authorized by the Commission. See Motion at 5-6. According to intervenors, it was not until the Commission denied their requests for a stay in CLI-89-08 that they "first realized" that the subject contention may be relevant to low power operation. Id. at 6. This assertion is fatuous. Intervenors long have known that Commission was considering whether to authorize the issuance of a low power license for the Seabrook Station once all issues relevant to that activity had been resolved by the onsite Licensing Board. See e.g. Public Service Company of New Hampshire (Seabrook Station, Unit 1 and 2), CLI-88-08, 28 NRC 419, 421 (1988); thus intervenors long have been on notice that any issue bearing on the determination to issue a low power license must be brought to the Commission's attention promptly. The issue raised by intervenors' motion could and should have been presented to the Commission months ago. The motion for reconsideration of CLI-89-08 should be dismissed.

B. Intervenors' Renewed Stay Motion Should Be Denied

The decision to grant a stay is based upon a consideration of the four factors listed in 10 C.F.R. § 2.788(e). Intervenors' renewed stay motion does not even address any of these factors, much less demonstrate that on balance they weigh in favor of granting the requested stay. See Motion, passim. This is a sufficient reason in itself for the Commission to deny the requested stay. Moreover, a consideration of the four stay factors would result in a denial of the instant stay motion.

1. Irreparable injury if a stay is not granted

Applicants point out, and the Staff agrees, that intervenors' motion "adds nothing new to the 'irreparable harm' factor." Applicants' Response To Intervenors Motion For Reconsideration Of CLI-89-08 And Renewed Motion For A Stay Of The Issuance Of A Low Power License In Light Of The Present And Ongoing Litigation Of An Issue Material To The Issuance Of A Low Power License In The Full Power Proceeding at 5 (May 23, 1989) ("Applicants' Response"). In CLI-89-08, the Commission, in a lengthy and detailed discussion, reaffirmed its long held and oft-repeated position that low power testing does not cause irreparable harm. CLI-90-08, slip op. at 7-11. Irreparable injury is by far the most important of the four stay criterion. CLI-89-08 at 5. When an intervenor's stay motion does not make a meaningful showing on this fact, the Commission has stated "there is scarce basis" for granting a stay. Id. at 11.

2. Likelihood of success on the merits

Intervenors claim that Basis D of MAG EX 19 raises an issue which is relevant and material to low power operation and which must be resolved

before a low power license may be issued. 4/ There is no likelihood that this argument will succeed on the merits.

MAG EX 19, along with its supporting bases A, B, and D, was admitted by the offsite Licensing Board, over the objections of the Staff and Applicants, on December 15, 1988. See Memorandum and Order (Ruling on June 1988 Exercise Contentions) at 46-49 (December 15, 1988) (unpublished). Basis D was admitted on the ground that it involved an issue (i.e., the adequacy of the METPAC computer model) which could not have been raised in advance of the June 1988 emergency planning exercise. Id. at 48 (Basis D "alleges fundamental flaws in the model which were revealed by the exercise"). Indeed, it was the understanding of most of the parties that Basis D presented for litigation the adequacy of the offsite response organization's performance in response to the protective action recommendations received from Seabrook onsite personnel and not the performance of on-site personnel. See Tr. at 15823-24 (counsel for NRC Staff); Tr. at 15826 (counsel for Applicants); Tr. at 15827 (counsel for Massachusetts Attorney General); Tr. at 15827 (Judge Smith).

Subsequently, a controversy arose between intervenors and the Staff concerning intervenors' attempt to obtain discovery from the Staff regarding the performance of the Seabrook onsite staff's performance during the exercise. The Staff and Applicants objected on the ground that

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4/ Applicants argue that the offsite Licensing Board's dismissal of Basis D of MAG EX 19 eliminates the basis of the instant stay motion. See Applicants' Response at 3-4. As explained in this response, it is not necessary for the Commission to reach this question because there is no likelihood that intervenors' claim would succeed on the merits even had Basis D not been dismissed.

the performance of such personnel was an "onsite" issue and thus beyond the scope of the admitted contention. The Board was advised that to the extent intervenors claimed that the performance of onsite personnel was a focus of the contention, the contention should be dismissed on the ground that it was beyond the Board's jurisdiction to entertain. See Tr. at 15827. Counsel for the Massachusetts Attorney General, however, was adamant that the Board had jurisdiction over Basis D, exclaiming: "It's an off-site issue, not an on-site issue." Tr. 15827 (Mr. Fierce) (emphasis added). In response to Judge Smith's statement that "apparently everybody thought it was an off-site contention," Tr. at 15827, Mr. Fierce stated:

> And it is, Your Honor. It has nothing to do with the other contention [filed with the on-site Licensing Board].

Tr. at 15828 (emphasis added). Thus, by the admission of its sponsor, Basis D of MAG EX 19, as admitted for litigation by the Board, raises only an issue relating to offsite emergency planning. The offsite Licensing Board does not now, and did not then, have jurisdiction over any issue respecting the issuance of a low power license; rather, jurisdiction over issues relating to low power is and was vested in the onsite Licensing Board. See e.g. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-906, 28 NRC 615, 617 (1988) ("in general, the former [i.e., onsite] Board was concerned with matters requiring resolution prior to low-power operation, while those matters relating to full-power operation alone were within the domain of the latter [i.e., offsite] Board").

Two things are clear in view of the foregoing, neither of them favorable to intervenors' position. First, if jurisdiction over Basis D of MAG EX 19 properly is vested in the offsite Licensing Board, by

necessary implication it cannot be regarded as raising any issue relevant to low power operation. In this circumstance, there is no merit to intervenors' claim that 10 C.F.R. § 50.57(c) requires that the contention be resolved prior to the issuance of a low power license. See Motion at 6. That section requires the prior resolution of a pending contention only where that contention is "relevant to the activity to be authorized." 10 C.F.R. § 50.57(c) (emphasis added); accord Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485, 489-93 (1988). A contention challenging the adequacy of the performance of offsite personnel during an emergency planning exercise is not relevant to low power testing, "the activity to be authorized.'

Second, if, as intervenors now maintain, Basis D is construed to raise an issue relevant to low power operation, the contention and basis could and should have been filed with the onsite Licensing Board, the only board with jurisdiction over the issue. It was not. Significantly, intervenors' motion does not even attempt to explain away this failure. Intervenors filed the contention in question with the offsite Licensing Board on September 21, 1988. See Massachusetts Attorney General's Exercise Contentions Submitted In Response To The June 1988 Seabrook Initial Full-Participation Exercise (September 21, 1988). Had the contention been filed instead with the onsite Licensing Board on that date, it is clear that a balancing of the five lateness factors set forth in 10 C.F.R. § 2.714(a)(1) would have militated against admitting the contention for litigation. The contention was based upon the results of the emergency planning exercise held June 28-29, 1988, during which intervenors were present as observers. Nearly three months elapsed,

however, before intervenors submitted the contention. In considering a motion to admit another contention arising out of the June 1988 exercise, the onsite Licensing Board held that a balancing of the five lateness factors weighed against admission of the contention. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LPB-89-04, 29 NRC 62 (1988). 5/ Since MAG EX 19 arises out of the same factual circumstances but was filed five days after the contention rejected by the onsite Licensing Board in LBP-89-04, it is clear that it would have been rejected as well.

In short, intervenors' instant stay motion presents no claim that is likely to succeed on the merits. If Basis D of MAG EX 19 properly is before the offsite Licensing Board, then it raises no issue relevant to low power operation. On the other hand, if the basis in fact raised an issue relevant to low power operation, it was not filed in the forum which had jurisdiction over the matter. The time to do that has long since passed. The second stay factor (likelihood of success on the merits) therefore weighs heavily against granting the requested stay.

3. Harm to other parties and the public interest

Similarly, nothing in the instant motion addresses the third (harm to other parties if a stay is granted) and fourth (where the public interest lies) stay factors previously determined to weigh against granting a stay.

5/ In denying intervenors' request for a stay of low power testing in CLI-89-08, the Commission, noting that an appeal of this decision was pending before the Appeal Board, observed that "we do not now see that there is a substantial likelihood that there will be a reversal" of this finding. CLI-89-08, slip op. at 15.

See CLI-89-08, slip op. at 27-29. These factors therefore must be weighed against granting the instant stay motion.

In sum, a consideration of the four stay factors indicates that intervenors will not suffer irreparable injury if a stay of low power testing is not granted and have presented no claim that is likely to succeed on the merits. It is clear that Applicants will be harmed if the requested stay is granted and that the public interest will not be furthered if low power testing of the Seabrook Station is delayed. Intervenors "renewed" motion for stay of low power testing therefore should be denied.

CONCLUSION

For the reasons stated in this response, intervenors' motion for reconsideration of CLI-89-08 should be dismissed and their renewed motion for a stay of the issuance of a low power license for the Seabrook Station should be denied.

Respectfully submitted,

Gregory Alan Berry

Gregory Alan Berry
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of May 1989

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR RECONSIDERATION OF CLI-89-08 AND RENEWED MOTION FOR STAY OF ISSUANCE OF LOW POWER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks, by telecopier this 24th day of May 1989:

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