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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'89 APR 11 A11:40

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman  
Thomas S. Moore  
Howard A. Wilber

April 11, 1989

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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SERVED APR 11 1989

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

MEMORANDUM AND ORDER

We have before us the Massachusetts Attorney General's February 27, 1989, motion for directed certification<sup>1</sup> of the Licensing Board's interlocutory ruling granting the summary disposition motion of Public Service Company of New Hampshire, et al., (applicants) on joint intervenor contentions 44A and 44B.<sup>2</sup> Both contentions challenge the underlying assumption of the applicants' emergency response plan that the Governor of Massachusetts has the legal authority to delegate certain of his powers in a radiological emergency to the applicants' emergency response

<sup>1</sup> Subsequently, on March 1, 1989, the Attorney General filed a memorandum in support of his bare bones motion.

<sup>2</sup> LBP-89-8, 29 NRC \_\_\_\_ (February 16, 1989).

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organization, the New Hampshire Yankee Offsite Response Organization (ORO).

The applicants developed their own utility plan, the Seabrook Plan for the Massachusetts Communities (SPMC), after the Commonwealth of Massachusetts and certain local governments in the Massachusetts portion of the Seabrook plume exposure pathway emergency planning zone refused to participate in emergency planning for the plant. In the event of a radiological emergency at the nuclear facility, the SPMC provides for several alternative responses by the ORO, each dependent upon the actions of the state and local governments. For example, under what is called the standby mode, the ORO merely monitors the state and local response. Under mode 1, upon the request of the state and local governments, the ORO makes its resources available to those governments to aid them in their emergency response. Under mode 2, the ORO takes full control and implements the utility emergency plan without governmental assistance upon the Commonwealth's delegation of certain authority to the ORO. The SPMC also anticipates a number of other responses between modes 1 and 2 that combine various elements of both but, in each instance, the Commonwealth determines the appropriate response.

The Licensing Board admitted joint intervenor contentions 44A and 44B as appropriate rebuttal to the presumption contained in the Commission's emergency planning



rules.<sup>3</sup> In pertinent part, those regulations provide that in circumstances where state and local governments refuse to participate in emergency planning "it may be presumed that in the event of an actual radiological emergency state and local officials would generally follow the utility plan."<sup>4</sup> Both contentions assert that the Governor of Massachusetts lacks the authority to delegate certain enumerated essential police powers to the ORO such as the authority to direct traffic and block roads. Hence, the contentions claim that mode 2 of the ORO cannot be implemented and the presumption contained in the Commission's emergency planning rules cannot be relied upon.

In granting the applicants' motion for summary disposition of joint intervenor contentions 44A and 44B, the Licensing Board looked to the Massachusetts Civil Defense Act and, after canvassing its provisions, held that seven activities specified in the SPMC can be delegated by the Governor to the ORO.<sup>5</sup> The Attorney General asks that we direct certification of the Licensing Board's ruling and reverse its grant of summary disposition. He argues that

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<sup>3</sup> See Memorandum and Order - Part I (Ruling on Contentions on the Seabrook Plan For Massachusetts Communities) (July 22, 1988) at 26-27, 111-12 (unpublished).

<sup>4</sup> 10 C.F.R. § 50.47(c)(1)(iii)(B).

<sup>5</sup> See Mass. Ann. Laws ch. 31 §§ 1-8.

the Licensing Board's interpretation of the Massachusetts Civil Defense Act is simply wrong. The applicants and the NRC staff oppose directed certification.

In considering motions for directed certification, we have repeatedly pointed out that "interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances."<sup>6</sup> A party seeking such review must make a "clear and convincing showing"<sup>7</sup> that the challenged ruling either "(1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."<sup>8</sup> The Attorney General here relies on only the second prong of this standard.

With regard to that criterion, we have indicated that it is not to be read expansively and that it takes much more to meet than a mere order "that has some discernible bearing

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<sup>6</sup> Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983) (footnotes omitted).

<sup>7</sup> Id.

<sup>8</sup> Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

upon the future course of a proceeding."<sup>9</sup> As we have pointed out in this proceeding, the fact that a licensing board ruling may be in error<sup>10</sup> or that future litigation may be required does not justify our review of that ruling by directed certification.<sup>11</sup> Indeed, in a related context, we have held that

in the absence . . . of a potential of truly exceptional delay or expense, the risk that a licensing board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed<sup>12</sup> by that board and the parties to the proceeding.

In attempting to meet this criterion, the Attorney General first asserts, without more, that the Licensing Board's ruling, in combination with the fact that the Board has attached presumptive validity to the Federal Emergency Management Agency's (FEMA) review of the SPMC, has had the effect of substantively determining the form of the governments' response at the time of an emergency. Second, the Attorney General argues -- again without elaboration --

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<sup>9</sup> Palo Verde, 18 NRC at 383.

<sup>10</sup> ALAB-734, 18 NRC 11, 15 (1983).

<sup>11</sup> ALAB-737, 18 NRC 168, 176 n.12 (1983).

<sup>12</sup> Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 600 (1985) quoting from Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973).



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that the Board's ruling has the procedural effect of placing upon the intervenors the burden of rebutting the FEMA finding that the SPMC is adequate and will be generally followed by the nonparticipating governments in an emergency. Thus, according to the Attorney General, the Licensing Board's ruling has a pervasive and unusual affect on the basic structure of the proceeding.<sup>13</sup>

Contrary to the Attorney General's assertions, we cannot conclude that the Licensing Board's ruling, even if erroneous, affects the basic structure of the proceeding in a pervasive or unusual manner. Indeed, the Attorney General's arguments are so abbreviated and the impacts he alleges so obscure, that he has not made the "clear and convincing showing" required in order to prevail on a directed certification motion.<sup>14</sup> First, as we read the Licensing Board's decision, it does not appear to limit the trial of any factual issues and the Attorney General will have the opportunity to challenge factually the adequacy and implementability of the SPMC. In granting summary disposition, the Licensing Board decided only the legal issue of whether Massachusetts law permitted the Governor to

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<sup>13</sup> Memorandum of the Massachusetts Attorney General in Support of his February 27, 1989 Motion for Directed Certification (March 1, 1989) at 6-7.

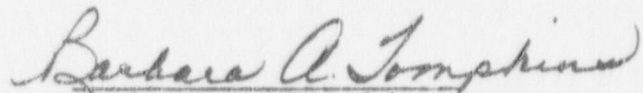
<sup>14</sup> Palo Verde, 18 NRC at 383.

delegate certain powers to the ORO in an emergency. The Board specifically did not determine what response the Governor would select in an emergency.<sup>15</sup> Second, regardless of the assumptions FEMA employed in reviewing the SPMC or the outcome of that review, the Commission's regulations provide that the FEMA finding "will constitute a rebuttal presumption on questions of adequacy and implementation capability."<sup>16</sup> Hence, it is the Commission's regulations, not the challenged Licensing Board ruling, that has set the basic structure of this part of the proceeding and we do not understand the Board's ruling to have altered it.

For the foregoing reasons, the Attorney General's motion for directed certification is denied.

It is so ORDERED.

FOR THE APPEAL BOARD



Barbara A. Tompkins  
Secretary to the  
Appeal Board

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<sup>15</sup> LBP-89-8, 29 NRC at \_\_\_\_ (slip opinion at 24).

<sup>16</sup> 10 C.F.R. § 50.47(a)(2).



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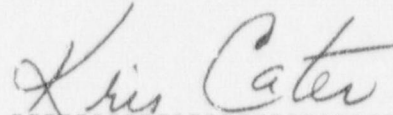
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Dated at Rockville, Md. this  
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Office of the Secretary of the Commission