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January 19, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

On Appeal From A Decision of the Atomic Safety and Licensing Board LBP-89-28 (October 12, 1989)

APPLICANTS' BRIEF

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STATEMENT OF PRIOR PROCEEDINGS AND FACTS

This is an appeal from a decision of the Atomic Safety and Licensing Board which denied a reopening of the record in this proceeding to litigate certain late-filed contentions allegedly arising out of certain events which took place on June 22, 1989, during low power testing (LPT) of Seabrook Station Unit #1 (Seabrook).[1] The LPT was being conducted pursuant to a low power

[1] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-28, 30 NRC ___ (Oct. 12, 1989). (Hereafter "LBP-89-28" and cited to the slip opinion.)

operating license issued on May 26, 1989,[2] pursuant to a number of prior Commission (and a Court of Appeals) decisions.[3]

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[2]The Intervenors' statement that the license was issued on May 16, 1989, Intervenors' Brief on Appeal of LPB-89-28 (hereafter cited "Int. Br.") at 3, is in error.

[3]In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573 (1988), the Commission authorized the issuance of a low power license subject to the meeting of certain conditions requiring the provision of funds for decommissioning. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234 (1989), the Commission denied a motion for reconsideration of CLI-88-10 which motion alleged a lack of due process. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-7, 29 NRC 395 (1989), the Commission denied yet another motion for reconsideration of CLI-88-10, which motion alleged that a denial of access to certain waste disposal sites dictated reconsideration. On May 3, 1989, as contemplated by CLI-88-10, the Staff provided notice to the Commission that the Applicants had fulfilled the conditions set forth in that decision. Under the terms of that decision, 28 NRC at 580, this notice triggered a ten-day period during which the license would not issue to give parties opposing the license an opportunity to seek a stay of issuance from the Commission. Two such stay motions were filed on May 8, 1989, and another motion having the same effect had been pending before the Commission since Feb. 8, 1989. In addition, on May 11, 1989, a petition for review was filed in the United States Court of Appeals for the District of Columbia Circuit, together with an application for a stay which would, if granted, stay the issuance of the low power license. Commonwealth of Massachusetts v. NRC, No. 89-1306 (D.C. Cir.). On May 18, 1989, the Commission issued a decision denying all three stay requests pending before it. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399 (1989). Therein the Commission provided that no license should issue prior to May 25, 1989, at 4:00 PM EDT or such earlier date as the Court of Appeals denied the stay application before it. 29 NRC at 422. On May 22, 1989, the Intervenors again sought a stay, under the guise of a motion for reconsideration of CLI-89-8, which motion the Commission denied on May 24, 1989. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-9, 29 NRC 423 (1989). On May 25, 1989, the Court of Appeals denied the application for stay before it in No. 89-1306 in an unpublished order, and on May 26, 1989, the low power operating license issued.

As described in the decision on appeal,[4] the test being conducted on June 22, 1989, was a Natural Circulation Test. This test, which followed the completion of the LPT, was governed by Test Procedure "No. 1-ST-22". That test procedure provides, in material part, as follows:

> "B. Manual Trip Criteria: The test must be terminated and the reactor tripped if any of the following occur:
>
> "5. Pressurizer Water Level: < 17% or unexplained decrease of > 5%"

This criterion, by its terms, requires the manual trip of the reactor at a pressurizer level some 12 percentage points higher than would be required by license technical specifications attendant to normal operating procedures.

At 12:26:04 PM, a steam dump valve failed open, which had the effect of causing the pressurizer pressure and level to continue to drop from then existing levels. The pressurizer level continued to drop until 12:28:53 PM when it decreased below 17%. At the time this occurred, there were present in the control room three NRC Staff personnel, as well as other observers. Despite the fact that NRC personnel, on three occasions, brought to the attention of NHY operating and test personnel the fact that the pressurizer level had decreased below 17%, the reactor was not shut down until 12:35:54, or some seven minutes and one second after the pressurizer level had dropped below 17%. This shutdown was preceded by a successful effort to

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[4] LBP-89-28 at 28-32.

close the steam dump valve, a resulting turn around and rapid recovery of pressurizer level and pressure, a return of pressurizer level to above 17% and, indeed, to a level of 21%. The manual trip was actually ordered, not in response to the previous drop in pressurizer level, but rather in response to the approaching of a pressure manual trip criterion.

Subsequent investigation of the event revealed the following as to the safety consequences of the event:

> "During the transient, all systems, with the exception of the steam dump valve MS-PV-3011, functioned as designed. At no time did reactor power increase above its initial value, nor were any Technical Specification or design limits exceeded. Pressurizer level remained well above the 5% pressurizer level manual safety injection value and pressurizer pressure, although increasing, never reached the automatic trip setpoint of 2385 psig. At no time during the transient was there any adverse impact on the health and safety of the public, nor did unreviewed safety questions exist."[5]

As to the failure immediately to shut down the reactor, subsequent investigation concluded:

> "The Unit Shift Supervisor did not manually trip the reactor because he misinterpreted the 17% pressurizer level value to be test termination guidance, which was more conservative than the 5% pressurizer level safety injection requirement provided in station procedures. The pre-test briefing given to the crew performing the Natural Circulation Test was not effective. The required information was presented to the crew but the requirement to perform a manual

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[5] Licensee Event Report No. 89-008-00 (July 24, 1989) (LER) at 3.

reactor trip at 17% pressurizer level was not fully understood."[6]

After the event had occurred and initial debriefing of the players had taken place, at 6:00 PM, NHY personnel, headed by the Vice President - Nuclear Production, had a conference call with the onsite NRC inspectors and NRC Region I personnel to discuss the event. During that conversation the NHY personnel made statements which, in part, constituted an unwarranted defense of the operator actions taken or not taken, an assertion that the operators' actions were more conservative than strict compliance with the test procedure, and that NHY procedure compliance policy was essentially adequate as written; in addition, a proposal was made that reactor restart be allowed to occur in parallel with NHY/NRC event evaluation. The call concluded with agreement that a follow-up conference call with NRC Region I would be held at 7:30 AM on June 23, 1989, and that the reactor would not be restarted until NRC concurrence had been obtained.

At approximately 11:15 PM, the NHY President and CEO, having arrived home from Washington, conferred by telephone with the Vice President - Nuclear Production wherein the latter purported to brief the CEO on the events of the day and, in particular, the 6:00 PM conference call with the NRC. Omitted from the briefing were the making of the statements particularized immediately above and the proposal for restart; indeed, the CEO had still not been informed of these matters when he participated in the

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[6] LER at 4.

planned telephone call with NRC Region I at 7:30 AM on June 23, 1989. NHY subsequently acknowledged that the statements made in the 6:00 PM telephone call were inappropriate and not in conformity with NHY policy.

On June 23, 1989, NRC Region I issued a Confirmatory Action Letter (CAL) confirming NRC's understanding that prior to any restart of the reactor, NHY would complete review of the event, establish short term corrective actions, determine long term corrective actions and schedule same, review the results of each of the foregoing with NRC staff and obtain concurrence of the Region I Administrator before any restart.

At the time these events occurred, there was sub judice the Licensing Board a motion filed by the Attorney General of The Commonwealth of Massachusetts (MAG) to hold open the record in the proceeding pending, inter alia, completion of LPT.[7] This motion proceeded from a premise that successful completion of LPT was material to, and a prerequisite for, the issuance of any full

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[7] Motion of the Massachusetts Attorney General to Hold Open the Record Pending Low Power Testing and the Required Yearly Onsite Exercise and for Other Related Relief (May 31, 1989). Answers to this motion were filed by the Applicant, Applicants' Response to Motion of The Massachusetts Attorney General to Hold Open the Record Pending Low Power Testing and the Required Yearly Onsite Exercise and for Other Related Relief (June 12, 1989), and Staff, NRC Staff Response to Motion of Massachusetts Attorney General to Hold Open the Record Pending Low Power Testing and the Required Yearly Onsite Exercise and for Other Related Relief (June 15, 1989). In addition, MAG filed a reply to the responses. Reply of The Massachusetts Attorney General to the Responses of the Applicants and Staff to the May 31 Motion to Hold Open the Record (June 21, 1989).

power operating license.[8] In its answer to the motion to hold open the record, the Staff argued, inter alia, that the Licensing Board was without jurisdiction to grant this motion.[9] On June 30, 1989, the Licensing Board closed the evidentiary record in this proceeding, and, in so doing, denied the motion to hold open the record basically on jurisdictional grounds as argued for by the Staff.[10]

On July 21, 1989, almost one month after the events of June 22, 1989, the Intervenors filed a motion seeking to have admitted for litigation a single contention arising out of the events of June 22.[11] This motion will be hereinafter referred to and cited as the "July 21 Motion." The contention which Intervenors sought to have admitted is set out in Exhibit 1 to the July 21 Motion. While the contention and accompanying bases are prolix, the heart of the contention is to the effect that the events outlined above:

> "Demonstrate that Applicants' plant operators, and management personnel, are not adequately trained or qualified, and lack adequate managerial and administrative

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[8]Motion to Hold Open the Record at 3-6.

[9]Staff Response at 2-8.

[10]Tr. 28287-88.

[11]Intervenors' Motion to Admit Contention, or, in the Alternative, to Reopen the Record, and Request for Hearing (July 21, 1989).

procedures and controls to operate the facility, at any level of power . . . ."[12]

It was contended that the events described above demonstrate that the Applicants could not comply with 10 CFR § 50.57; 10 CFR 50, App. B; 10 CFR § 50.34(b)(6); and 10 CFR § 55.53(d).[13] The July 21 Motion was accompanied by the joint affidavit of Gregory C. Minor and Steven C. Sholly[14] which essentially recited the events already outlined, gave the affiants' interpretations of the legal significance of certain of the Commission's regulations and their opinions that violations of these regulations occurred,[15] argued that previous inspection reports revealed that the "procedural noncompliance" which occurred "may not be an isolated event,"[16] concluded that the events were "part of a pattern of procedural noncompliance at the Seabrook Station,"[17] and opined that the events of June 22, 1989, represented "pervasive noncompliance."[18]

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[12]July 21 Motion, Exh. 1 at 1. In their brief to this Appeal Board, the Intervenors set out extensive quotes from what they state is the contention. Int. Br. at 5-6. All of the matters quoted came from a portion of the basis of the contention. See July 21 Motion, Exh. 1 at 3-4.

[13]Id. at 1-3.

[14]July 21 Motion, Attachment A.

[15]Id. at ¶¶ 1-23.

[16]July 21 Motion, Attachment A, ¶ 24.

[17]Id. at ¶ 26.

[18]Id.

The July 21 Motion was premised on the notion that issuance of the CAL had operated to suspend an operating license.[19] And, it was argued, even if there had been no suspension of a license, two decisions of the United States Court of Appeals for the District of Columbia Circuit[20] dictated that Intervenors had an absolute right to a hearing on their contention notwithstanding a Commission requirement that they satisfy certain procedural regulations governing late-filed contentions[21] and reopening the record.[22] Finally, the July 21 Motion argued that the procedural requisites for late- filed contentions and reopening the record had been met in any event.[23]

Answers to the July 21 Motion were duly filed by the Applicants[24] and Staff.[25] And Intervenors eventually filed a motion to reply to the answers, with a reply attached,[26] to which

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[19] July 21 Motion at 4-8.

[20] San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984); Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

[21] 10 CFR § 2.714(a)(1).

[22] 10 CFR § 2.734. See July 21 Motion at 8-10.

[23] July 21 Motion at 11-25.

[24] Applicants' Answer to Intervenors' Motion to Admit Contention, or, in the Alternative, to Reopen the Record, and Request for Hearing (Aug. 7, 1989).

[25] NRC Staff Response to Intervenors' "Motion to Admit Contention, or in the Alternative, to Reopen the Record, and Request for Hearing" (Aug. 18, 1989).

[26] Motion to Admit Reply to Applicants' and Staff's Responses to Intervenors' Motion to Admit Contention or in the Alternative to Reopen the Record and Request for Hearing (Sept. 1, 1989).

the Staff responded.[27] The Staff answer to the July 21 Motion was accompanied by two affidavits which set out the Staff's position (and reasons therefore) as to why the events in question did not reveal any fundamental flaw in the Applicants' operator training or low power testing program or give rise to any significant safety issue,[28] and made what was essentially a point-by-point analysis (and in large part refutation) of the conclusions expressed in the July 21 Motion and the affidavits which accompanied it.[29]

On August 28, 1989, the Intervenors filed a second motion seeking leave to have considered additional bases in support of the contention set out in the July 21 Motion (now denominated JI-LP-1) along with two new contentions.[30] This Motion is hereinafter referred to and cited as the "August 28 Motion." The first of the new contentions (denominated JI-LP-2) was:

> "Low-power testing has disclosed serious defects in the maintenance practices regarding valves and the quality control of such maintenance practices and the

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[27] NRC Staff Response to Motion to Admit Reply to Applicants' and Staff's Responses to Intervenors' Motion to Admit Contention or in the Alternative to Reopen the Record and Request for Hearing (Sept. 14, 1989).

[28] Affidavit of James G. Partlow and Victor Nerses (Aug. 18, 1989).

[29] Affidavit of Thomas T. Martin and Peter W. Eselgroth (Aug. 16, 1989).

[30] Intervenors' Motion for Leave to Add Bases to Low Power Testing Contention Filed on July 21, 1989 and to Admit Further Contentions Arising From Low Power Testing Events or, in the Alternative, to Reopen the Record and Second Request for Hearing (Aug. 28, 1989).

possibility of design defects in certain steam dump valves, in violation of 50 CFR Appendix B, V, XI, and XVI."[31]

The second new contention (denominated JI-LP-3) alleged that the June 22 events disclosed that Applicants:

"do not have adequate staff and procedures and otherwise are not capable of safely conducting start-up testing pursuant to the test program set forth in the FSAR at 14.2 . . . . The Applicants' deficiencies in this regard violate 10 CFR Appendix B, V, XI; FSAR, Chapter 14; 10 CFR 50.34(b)(6)(iii) and 10 CFR 50 Appendix A: GDC 1, 14, 18, 21, 30, 31, 32, 37, 40, 43, 46, 53, and 54 (all of which require testing of specific systems and components)"[32]

In due course answers were filed by the Applicants[33] and Staff.[34] In addition, MAG again filed a motion for leave to reply with reply attached[35] to which the Staff also duly responded.[36] On that

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[31] August 28 Motion Exh. 1 at 15.

[32] August 28 Motion Exh 1 at 17-18.

[33] Applicants' Response to "Intervenors' Motion for Leave to Add Bases to Low Power Testing Contention Filed on July 21, 1989 and to Admit Further Contentions Arising From Low Power Testing Events or, in the Alternative, to Reopen the Record and Second Request for Hearing" (Sept. 11, 1989).

[34] NRC Staff Response to Intervenors' Motion for Leave to Add Bases to Low Power Testing Contention, to Admit Further Contentions, or to Reopen the Record and Request for Hearing (Sept. 14, 1989).

[35] Mass. AG's Motion for Leave to File a Reply to the Applicants' and Staff's Responses to Intervenors' August 28, 1989 Motion to Add Bases and Further Low-Power Testing Contentions (September 19, 1989).

[36] NRC Staff's Response to "Mass AG's Motion for Leave to File a Reply to the Applicants' and Staff's Responses to Intervenors' August 28, 1989 Motion to Add Bases and Further Low-Power Testing Contentions" (Oct. 14, 1989).

same day, the Intervenors filed an "Informational Supplement"[37] which attached excerpts from a transcript of a meeting held in Durham, New Hampshire, to discuss the events of June 22 and Applicants' response thereto, and stated that the excerpts were to be incorporated into the "contentions statement attached as Exhibit 1 to their August 28, 1989 Motion and into Exhibit 1 to their July 21, 1989 Motion."[38] This was rapidly followed by Intervenors' second "informational supplement"[39] which sought to incorporate into their low power testing contentions certain portions of the natural circulation start up test procedure and a letter from NRC Region I stating that the region was going to conduct an evaluation of all shift operating crews at Seabrook.

At this point, the Licensing Board attempted to stem the paper tide by issuing a memorandum and order[40] which rebuked the Intervenors for filing documents such as the Second Informational Supplement and replies to motions which are unauthorized by the Rules of Practice, and stated that the Applicants and Staff need not reply to such filings in the future unless requested to do so by the Board. Undaunted, the Intervenors responded with a motion

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[37] Intervenors' Informational Supplement to Their Low Power Contentions Filed on July 21 and August 28, 1989 (Sept. 19, 1989).

[38] Id. at 2.

[39] Intervenors' Second Informational Supplement to Their Low-Power Contentions Filed on July 21 and August 28, 1989 (Sept. 22, 1989).

[40] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), MEMORANDUM AND ORDER (Unauthorized Pleadings) (Unpublished) (Sept. 26, 1989).

for reconsideration[41] which sought again to have the Licensing Board "accept" the documents attached to the Second Informational Supplement "as documentary supplements to the July and August low-power testing filings."[42]

On October 12, 1989, the Licensing Board issued the decision here on review wherein it denied both the motions to admit low power testing contentions. After first stating the general background of the matter, describing the legal theories upon which the Intervenors were proceeding, and rejecting jurisdictional and res judicata arguments raised by the Applicants,[43] the Licensing Board went on to address the issue of whether the issuance of the CAL had resulted in the suspension of the operating license. The Licensing Board held that no suspension had occurred and pointed out that if the CAL had amounted to a suspension this would mean that the matter was one of enforcement with respect to an already issued license, over which the Licensing Board had no jurisdiction.[44] Next, the Licensing Board addressed the issue of whether, as argued by Intervenors, the decisions of the United States Court of Appeals in Mothers for Peace and UCS conferred an absolute right to a hearing upon the Intervenors regardless of their ability to satisfy the procedural requirements for late- filed contentions

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[41]Motion for Reconsideration (Sept. 28, 1989).

[42]Id. at 5.

[43]LBP-89-28 at 1-9.

[44]LBP-89-28 at 9-13.

and reopening the record.[45] The Board concluded the Intervenors had no such unfettered hearing right. First, the Board rejected the concept that the Commission's reopening regulation, 10 CFR § 2.734, was to be viewed as being nullified by Mothers for Peace and UCS, even though the regulation was promulgated after those decisions were handed down.[46] Next, the Licensing Board firmly rejected the Intervenors' argument to the effect that successful completion of LPT was material, and a necessary prerequisite, to issuance of a full power license.[47]

The Licensing Board next proceeded to address the standard that would apply to the admission of the proffered contentions assuming that the Licensing Board had erred in holding that LPT was not material to full power licensing. In so doing, the Licensing Board adopted an argument made by the Staff that such contentions not only would have to allege a problem revealed in LPT but also allege, with a basis for such allegation, that the problem revealed a "fundamental flaw" in operational preparedness.[48] The Licensing Board next reviewed in depth an affidavit filed by the Staff on the basis of which Staff argued, in essence, that the events of June 22 represented only an

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[45]LBP-89-28 at 13-16.

[46]LBP-89-28 at 13-15. We address this matter on the merits in the argument portion of this brief. However, in the last analysis, this argument is an argument that this Appeal Board should hold invalid a Commission regulation; something it cannot do.

[47]LBP-89-28 at 15-16.

[48]LBP-89-28 at 16-18.

isolated instance of poor performance in what had otherwise been an enviable record of performance both before and after LPT and in no way supported the concept that the Applicants' LPT or operating training program contained "fundamental flaws" or represented a "pervasive breakdown" in the programs.[49] Although it candidly stated that it agreed with the Staff's analysis, the Licensing Board, mindful of the limited role it has in screening contentions, went on to accept the allegations of the initial contention JI-LP-1 at face value and analyze them against the criteria for late-filed contentions and reopening the record.[50]

The Licensing Board began by rejecting what it termed the "training allegations" on the basis that, at most, they alleged a need for supplemental training and therefore by definition did not constitute allegations of a fundamental flaw.[51] In a "judgement call" made "for the sake of completeness" [52] the Licensing Board went on to assume that the non-training allegations did meet the test for alleging a "fundamental flaw" and analyzed them under the reopening and late-filed contentions criteria.[53] While holding the July 21 Motion to be timely,[54] the

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[49]LBP-89-28 at 19-23.

[50]LBP-89-28 at 23-45.

[51]LBP-89-28 at 24-25, citing Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 485-86 (1989).

[52]LBP-89-28 at 24-25.

[53]LBP-89-28 at 25-45.

[54]LBP-89-28 at 27.

Licensing Board went on to hold that the motion did not raise a significant safety issue; nor did it demonstrate that a materially different result would have been likely had the evidence been considered initially.[55] Further, the Licensing Board held that the pivotal third and fifth criteria for late-filed contentions weighed against admission, thus presumably holding that the motion would fail under the criterion set out in 10 CFR § 2.734(d).[56]

Finally, the Licensing Board addressed the August 28 Motion.[57] It concluded that neither of the new contentions nor additional bases for the contention originally filed on July 21 presented a significant safety issue and that the additional bases for JI-LP-1 and the new contention JI-LP-3 were rejected for the further reason that they were not pleaded with sufficient specificity.[58] The Licensing Board also held that with the exceptions of allegations arising out of certain language in a Staff report that certain actions of management were "safety significant" and allegations as to equipment quality control, the

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[55]LBP-89-28 at 28-44.

[56]LBP-89-28 at 44-45. Admittedly, the Licensing Board did not make the ultimate finding in haec verba, but this was the result the last time this same Licensing Board considered a situation where only factors three and five weighed against admission. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 59, aff'd, ALAB-915, 29 NRC 427 (1989). See also, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LPB-90-1, 31 NRC ___, Slip Op. at 32-33 & n.57 (Jan. 8, 1990).

[57]LBP-89-28 at 45-55.

[58]LBP-89-28 at 54.

Motion was not timely.[59] The Licensing Board concluded by denying both motions.[60]

Notices of Appeal were filed by MAG,[61] Seacoast Anti-Pollution League (SAPL)[62] and New England Coalition on Nuclear Pollution (NECNP.)[63] A single brief has been filed on behalf of all three appellants by MAG.

It is in the foregoing posture that this matter comes before this Appeal Board.

ARGUMENT

I. SUCCESSFUL COMPLETION OF LPT IS NOT A PREREQUISITE OR "MATERIAL" TO ISSUANCE OF A LOW POWER LICENSE.

A. The Fact That the Applicants Elected to Undertake LPT Prior to Receipt of a Full Power License Does Not Make LPT "Material" to Full Power License Issuance.

Intervenors argue first that LPT is material to the issuance of a full-power license because of the fact that Applicants made the election to conduct LPT before receiving a full-power license.[64] As we understand it, this is sort of a "waiver"

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[59]LBP-89-20 at 48.

[60]LBP-89-28 at 55.

[61]Notice of Appeal (Oct. 20, 1989).

[62]Notice of Appeal on Behalf of Seacoast Anti-Pollution League (Oct. 25, 1989).

[63]New England Coalition on Nuclear Pollution's Notice of Appeal (Oct. 27, 1989).

[64]Int. Br. at 10-11.

argument, i.e., the Applicants have, by undertaking LPT exposed themselves to a hearing which must be held as a matter of right before the full power license can issue. The theory is that when an Applicant undertakes to engage in LPT before the full-power license issues, it per se creates a lengthy delay in full power licensure by guaranteeing opponents of the plant a further opportunity to litigate.

The Intervenors cite no regulatory authority which supports this concept. Indeed, the one Appeal Board decision they do quote and cite,[65] does not support their position. The quoted language refers to LPT as a "first step toward operation" not a first step towards licensure. The same can be said for the language quoted wholly out of context from the NRC Staff affidavit by Intervenors.[66]

Not only is there no regulation or other law that supports the rule contended for by Intervenors, but also, the rule, if adopted, would be one of bad policy. There is a very real public interest both in terms of safety and economics for early and thorough LPT of a nuclear power facility.[67] If an Applicant thought that by conducting such testing it would be guaranteeing a further litigation delay in the issuance of a full power

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[65] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 794-95 (1983) cited Int. Br. at 11 n.16.

[66] Int. Br. at 11.

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

license, the Applicant would simply, in every case, forego any LPT until such time as the full power license issued. In short, the proposition contended for is not only bad law, it is even worse policy.

B. Issuance of the CAL Did Not Result in LPT Becoming Material to Full Power Licensing.

The Intervenors next argue that issuance of the CAL worked a suspension of the outstanding low power license and therefore LPT has, by virtue of that fact, become "material" to full power licensing.[68]

To begin with, there has been no suspension of any operating license. The CAL is bereft of any mention of a suspension. More importantly, if the Regional Administrator actually did intend to suspend the license, the CAL, in its present form, and the procedural steps taken to issue it, would be in clear violation of the Commission's Regulations. The Regulations are clear: A license may not be suspended except in two ways. First, a suspension may issue after issuance of a notice of violation, followed, in due course (and after opportunity for an answer), by an order to show cause, and after an opportunity for a hearing

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[68] Int. Br. at 12. We address this argument at length because it was made. But it would appear that even the Intervenors no longer seriously pursue it given the facts that (a) it is now compressed into one page (whereas when first made it took four and one-half pages, July 21 Motion at 4-8) and (b) it has been recast. When originally made, the argument was not that the supposed suspension made LPT "material"; it was that the existence of the suspension created a per se hearing right under § 189 of the Atomic Energy Act (AEA), 42 USC § 2239.

being given to the Licensee, and the holding of a hearing, if demanded.[69] Second, a suspension may issue instanter, without the Licensee having notice or an opportunity for a hearing, if the cognizant staff official makes a formal finding that either the public health, safety or interest so requires, or that a wilful violation has occurred.[70] The Regional Administrator in this case has neither followed the procedural steps for commencing a formal suspension process to suspend nor has he made the requisite findings that the public health, safety, or interest requires an immediate suspension, or that such action is dictated by the nature of the violations, if any, which occurred. This being the case, it cannot follow that any "suspension" has occurred.

Intervenors state that it is irrelevant that the CAL is not denominated a suspension citing Commonwealth of Massachusetts v. NRC, 878 F.2d 1516 (1st Cir. 1989). However, the very case cited by Intervenors, if anything, is directly the contrary to their position. To begin with, the Court in that case was not deciding the question of whether a "suspension" had occurred. Rather, the court was addressing the issue of whether or not the grant of permission to restart a reactor, after the issuance of a CAL, constituted a "reinstatement" of the license. Certainly, the court did not purport to address whether a "suspension" could occur without agency compliance with its own procedural

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[69] 10 CFR § 2.201; 10 CFR § 2.202.

[70] 10 CFR § 2.202(f). See also, 10 CFR § 2.201(c).

regulations for such action. More importantly, in a later portion of its decision, the court acknowledges that there is a legal distinction between a license "suspension" and the effect of a CAL although the practical effect may be the same:

> "We can see no principled reason to distinguish between the lifting of a license suspension and the reinstatement of a license for purposes of [§ 189(a) of the Atomic Energy Act]. The effects are the same: the licensee may now operate again under its original license; the terms of the license have not been altered."[71]

In short, to the extent Intervenors' argument for a hearing right is predicated upon there having occurred a suspension of Seabrook's operating license, the argument must fail for lack of the necessary premise.

Even assuming, arguendo, that the action of the Regional Administrator in issuing the CAL constitutes a "suspension" of the license, this does not mean that the Intervenors are entitled to a hearing as of right. Indeed, the law is quite the contrary and well settled. In Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), the court confronted the issue of whether The Commonwealth of Massachusetts had standing to obtain a hearing with respect to the issuance of an Order Modifying License which imposed a civil penalty upon the owners, and amended the operating license, of the Pilgrim Nuclear Power Station in Plymouth, Massachusetts. The then Attorney General of The Commonwealth had brought a 10 CFR § 2.206 petition to obtain such a hearing on the theory

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[71] 878 F.2d at 1522.

that he had a right to participate in the "proceeding" which had been commenced by the issuance of the modification order amending the license. The court flatly held that the Attorney General of The Commonwealth of Massachusetts had no standing to claim a hearing where, as here, all that is sought is a public exploration of issues allegedly growing out of an action by the Commission which has not eased any restrictions on the operation of the facility.[72] Applying Bellotti to this case, it is clear that only the Licensee has standing to demand a hearing on a suspension order, since only the Licensee is injured thereby.[73] By the same token, Intervenors have no right to "litigate" a "suspension" already ordered, since the order already grants them all they could seek in such litigation.[74] Two United States Courts of Appeals have also decided that when a "suspension" is lifted (or a CAL complied with to the satisfaction of the agency), intervenors are without any hearing rights as to the agency action allowing restart.[75] And no amount of attempted redefinition or characterization of the proceeding can create hearing rights where none exist.

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[72]725 F.2d at 1383.

[73]See also Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).

[74]725 F.2d at 1381-82.

[75]Commonwealth of Massachusetts v. NRC, supra, at 1522; San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984).

In fine, no "suspension" has occurred; thus, there is extant no "proceeding" of the nature claimed. Even if a suspension had occurred, and a "proceeding" commenced as a result thereof, MAG and the Intervenors still would have no standing to request a hearing.

C. The Commission Has Not Represented to any United States Court of Appeals that LPT is a Prerequisite to Issuance of a Full Power License.

Intervenors' next argument is to the effect that since the Commission represented in a brief to the United States Court of Appeals for the District of Columbia Circuit in UCS that there must be successful preoperational testing prior to issuance of a full power license and also argued that emergency preparedness exercises should be treated the same as preoperational tests in the licensing process, the result of the decision in UCS is that LPT results must also be subjected, as of right, to the hearing process.[76]

There are two basic flaws in this argument. First, the "preoperational tests" described in its brief by the Commission are not the same as LPT and are to be distinguished from it. Indeed, the very language quoted by Intervenors in their Brief[77] shows that the Commission viewed the "preoperational tests" as ones which must precede licensing of any kind whereas LPT only preceded "commencing full power operation." Thus, the Commission

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[76] Int. Br. at 13-14.

[77] Int. Br. at 13.

was not saying that LPT and emergency preparedness exercises should be treated similarly.

Second, it is true that the Commission stated that emergency preparedness exercises should be treated the same as preoperational testing, but it lost on that position in UCS. Thus, UCS, if anything, stands for the proposition that LPT (even if it was part of "preoperational testing," which it is not) is to be distinguished from and should be treated differently than emergency preparedness exercises.

D. Mothers for Peace Does not Stand for the Proposition That a Hearing Must be Granted as a Matter of Right With Respect to Allegations as to Operator Competence.

Intervenors next argue that certain language in Mothers for Peace is to be read as standing for the proposition that a hearing is required as a matter of right with respect to issues as to the competence of plant operators.[78] Again, intervenors miss the mark. An opportunity to challenge the competence of plant operators was available in this proceeding before the low power license was issued. Thus, an opportunity for a hearing as of right was afforded. The issue of operator competence now is one which, if there is to be any litigation at all, must be

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[78] Int. Br. at 14.

preceded, at a minimum, by a proper motion to reopen the record[79] and satisfaction of the late-filed contentions criteria.

II. EVEN ASSUMING THAT SUCCESSFUL COMPLETION OF LPT WAS MATERIAL TO THE ISSUANCE OF A FULL POWER LICENSE, THE INTERVENORS STILL HAD TO COMPLY WITH 10 CFR § 2.734 AND THEY HAVE FAILED SO TO DO.

A. The Licensing Board Did Not Err in Closing the Record.

Intervenors argue that the Licensing Board erred in not granting the motion filed by MAG to hold open the record.[80] As noted earlier,[81] the Licensing Board denied the motion on the basis that it had no power to hold open a record in order to vest itself with stand-by jurisdiction over of subsequent events to see whether a litigable contention might surface.

The Intervenors' Brief acknowledges that the denial of MAG's motion was on jurisdictional grounds in a footnote.[82] Despite this recognition, nowhere in the Intervenors Brief is the issue of the Licensing Board's jurisdiction to grant the relief addressed except a cryptic reference in the footnote to language in a decision of the Appeal Board stating that the Licensing Board had jurisdiction "over all matters pertaining now or in the

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[79]A record which is now, not only closed, but as to which final agency action has been taken and which is now before the United States Court of Appeals. Commonwealth of Massachusetts v. NRC (D.C. Cir. No. 89-1306).

[80]Int. Br. at 23-26.

[81]Supra at 7.

[82]Int. Br. at 24 n.28.

future to the application for a license to operate Units 1 and 2 of Seabrook Station."[83] This language which actually was, in turn, quoted from a Federal Register Notice issued by the Chief Administrative Law Judge is of no help to Intervenors with respect to jurisdiction. The law is clear that a Licensing Board's jurisdiction extends only to the admitted contentions before it[84] or matters which it raises sua sponte.[85] In addition, the Commission has made clear that its adjudicatory boards are not empowered to create special procedures to enable themselves, or parties before them, to search out possible contentions for litigation.[86] A fortiori, they are not empowered to hold proceedings open on the surmise that something might arise in the future worthy of litigation.

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[83]The citation (without a jump cite reference) in Intervenors Brief is to Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989). In fact what is quoted was language in turn quoted by the Appeal Board from a January 10, 1989 Federal Register Notice. Notice of Reconstitution of Board, 54 Fed. Reg. 2009 (1989).

[84]10 CFR § 2.104(c); 10 CFR § 2.760a; Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Union Electric Company (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), ALAB-319, 3 NRC 188, 190 (1976).

[85]10 CFR § 2.760a.

[86]Louisiana Power and Light Co. (Waterford Steam Electric Station, Units 1 and 2), CLI-86-1, 23 NRC 1, 6-7 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Station, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 (1986).

B. The Intervenors Were Required to Satisfy the Criteria in 10 CFR § 2.734 in Order to Have The Contentions at Issue Admitted for Litigation.

Intervenors argue at length that the decisions in Mothers for Peace and UCS require that their LPT contentions be admitted for litigation even absent a showing that all of the criteria in 10 CFR § 2.734 were satisfied.[87] This argument is made on the premise that LPT is material to licensing[88] which, as shown in Section I above, it is not.[89] In any event, as seen below, even assuming arguendo that LPT is material to full power license issuance, this still would not relieve the Intervenors of the burden of complying with 10 CFR § 2.734.

Intervenors, in their arguments to the Licensing Board, and again before this Appeal Board, continue to ignore the significance of the fact that Mothers for Peace and UCS were both decided in 1984. At that time, the law was that after an evidentiary record closed, the only way a plant's license could be attacked was by a petition under 10 CFR § 2.206 if final agency action had been taken, or by a motion to reopen if the proceeding was still in the agency, which procedure had been recognized in NRC adjudicatory case law, but was not, at that time, provided for in the Rules of Practice. This case law was,

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[87] Int. Br. at 15-23.

[88] Int. Br. at 15.

[89] And Applicants do not concede to the contrary as Intervenors state in their brief. Int. Br. at 17.

in most respects, the same as the present 10 CFR § 2.734. However, as of that time, the NRC case law on reopening had, in actuality, recognized two different "different results" standards for reopening. In some decisions, the standard had been articulated as requiring a showing that a different result "would" have been reached if the proffered evidence had been originally considered;[90] in others the articulated standard was "might" have been reached.[91]

In UCS the only discussion of any of these principles was a discussion of 10 CFR § 2.206.[92] This section of the Rules of Practice leaves the decision as to whether to commence a proceeding of any kind thereunder to the discretion of the Staff, reviewable only by the sua sponte action of the Commission itself and only for an abuse of that discretion.[93] Doubtless, it was this history that led this Appeal Board to observe previously in this proceeding:

> "[T]he UCS case does not prohibit placing reasonable procedural requirements upon the filing of late-filed contentions. Rather, it holds that a party's statutory hearing rights on a material licensing issue cannot be made

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[90] E.g., Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

[91] E.g., Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant), ALAB-598, 11 NRC 876, 879 (1980).

[92] UCS, 735 F.2d at 1444.

[93] 10 CFR § 2.206(c); Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

to hinge upon the agency's unfettered discretion to reopen the record."[94]

In Mothers for Peace the principle discussed was the "would" standard.[95] Of course, neither case discussed 10 CFR § 2.734, because it was not yet part of the regulations. In 1986, the Commission promulgated 10 CFR § 2.734. This was done with the full knowledge and understanding of both UCS and Mothers for Peace as is clear from the Statement of Considerations which accompanied the promulgation wherein Mothers for Peace was fully discussed along with the existence of the two different standards in NRC case law.[96] The Commission having adopted the regulation after the issuance of the decisions relied upon as grounds for holding it invalid, this Appeal Board, as a result, would be and, indeed, is without power to adopt the Intervenors' argument.

Intervenors also appear to suggest in their brief that whatever may be the rule when there has been final agency action, in cases such as this where the full power license has not yet issued, 10 CFR § 2.734 is not governing.[97] There are two problems with this argument. First, the issues which the Intervenors sought to raise out of LPT are operator competence and operating procedures issues. All of these fall within the

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[94]Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 481 n.21 (1989).

[95]Mothers for Peace, 751 F.2d at 1316.

[96]Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19535, 19536-37 (May 30, 1986).

[97]Int. Br. at 21-23.

class of issues which underlie a "technical qualifications" finding. The technical qualifications of the Applicants to run the plant was open for litigation in the "onsite" docket many years ago. Indeed, in September of 1982, the Licensing Board admitted for litigation in the Seabrook Operating License Proceeding the following contention denominated NH-13:

> "The Applicant has not demonstrated that the following and all other operations personnel are qualified and properly trained in accordance with NUREG-0737, Items I.A.1.1, I.A.2.1, I.A.2.3, II.B.4, I.C.1 and Appendix C: (a) Station Manager, (b) Assistant Station Manager, (c) Senior Reactor Operators, (d) Reactor Operators, and (e) Shift Technical Advisors."

Summary Disposition was granted with respect to this contention on May 11, 1983.[98] Final agency action has long since been taken with respect to this matter, and, therefore, even assuming the Intervenors' argument to be good law, satisfaction of the 10 CFR § 2.734 criteria would be in order.

Prescinding from the foregoing, it is apparent from the Statement of Bases and Purpose which accompanied the promulgation of 10 CFR § 2.734, that the Commission did intend the regulation to apply fully once the evidentiary record closes and even before an Initial Decision actually issues.[99]

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[98] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), MEMORANDUM AND ORDER (Memorializing Prehearing Conference and Ruling on Motions for Summary Disposition) (unpublished) at 14-18 (May 11, 1983).

[99] Criteria for Reopening Records in Formal Licensing Proceedings, supra, 51 Fed. Reg. at 19536. ("The words 'might be' were added to address the situation where a motion to reopen is filed after the record is closed but before an Initial Decision is issued. As one Commentator has intimated, this

C. The Intervenors Failed to Satisfy the Criteria of 10 CFR § 2.734.

Intervenors devote a substantial portion of their brief to attempting to demonstrate that they satisfied the criteria of 10 CFR § 2.734.[100] Their entire discussion proceeds from an erroneous premise which Intervenors create out of their reading of a 1973 Appeal Board decision which the Intervenors claim put a "gloss" on a regulation promulgated some 13 years later.[101] Even assuming that decision to be good law since the passage of the regulation, 10 CFR § 2.734,[102] Intervenors misread the case. Therein the Appeal Board was not saying that if the moving papers could be viewed as strong enough to avoid summary disposition this guaranteed reopening, rather, this was the minimum that must be done to obtain a reopening. The Licensing Board, on a motion to reopen, is not reduced to simply deciding whether someone has alleged a dispute, which would always be possible; rather, the Licensing Board is to take a hard look at the affidavits and

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change was added to clarify a situation in which some of the licensing boards have assumed that the 'different result' criterion is only applicable after the issuance of the Initial Decision." [Citation omitted]).

[100] Int. Br. at 26-40.

[101] Int. Br. at 27 citing and discussing Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

[102] In one area it clearly is no longer good law. In ALAB-138 the Appeal Board recognized the concept that a Staff document or Applicant document could, without more, provide the basis for a reopening motion. The regulation now requires the use of an affidavit which covers all criteria of the regulation.

other materials before it and make up its mind whether (a) the issue alleged is significant and (b) whether it would likely change the result (not simply the timing of the result). The heavy burden which faces a proponent of reopening has been stated thus:

> "At a minimum . . . the new material in support of a motion to reopen must set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence . . . [and] possess the attributes set forth in 10 C.F.R. 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically the new evidence supporting the motion must be 'relevant, material, and reliable.'"[103]

When all is said and done, the events of June 22, 1989 amounted to the failure of certain personnel to appreciate that they were required to shut the reactor down upon passing a limit which was set well to the conservative side of normal operating limits. No one contends that the event itself in any way represented a threat to the public health and safety. There simply was no significant safety issue raised by these motions. The affidavits filed with the motions simply parroted the Applicants' Response to the CAL in one case and the findings of the Augmented Inspection Team in the other, along with certain

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[103]CLI-86-1, supra, at 5, quoting Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366-67 (1984), aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985).

legal conclusions reflecting the lay-affiants' view of what the law was or should be. All of this would have been objectionable if offered: the legal conclusions as such; and the recitations concerning the Applicants' Response and AIT Report because the documents speak for themselves and, in any event, do not constitute the best evidence.

The Motions did not come close to satisfying the "affidavit" criterion set out in the regulation. The requirement is that:

> "The Motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section."[104]

Neither of the affidavits filed by the Intervenors come close to meeting this criterion. To begin with, neither affidavit separately addresses each of the criteria in 10 CFR § 2.734(a). No attempt is made by affidavit to address the "different result" criterion. And although the August 28 Motion contained some lawyers' assertions as to why a different result

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[104] 10 CFR § 2.734(b) (emphasis added).

would have been forthcoming after a hearing,[105] the fact is that all of the allegations were allegations which, even assuming their truth, were of a nature that they could have been corrected by further training and procedure writing. This is not a "different result;" it is only a "delayed" result which is not the same thing.

D. Neither of the Motions Satisfied the Late-Filed Contention Criteria.

Wholly apart from the inability of the Intervenors to satisfy the criteria for a reopening of the record, a balancing of the "five factors" under 10 CFR § 2.714(a)(1) reveals that the contentions should not be admitted. Accepting, arguendo, that portions of the contentions as to which admission was sought were timely, and assuming that the less weighty[106] second and fourth factors weigh in favor of admission, the fact remains that the third factor and the fifth factor weigh heavily against the Intervenors. As to the third factor the rule is that:

> "[Commission] case law establishes both the importance of the third factor in the evaluation of late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. [Citation omitted.] The Appeal Board has said: 'When a petition addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify

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[105] August 28 Motion at 19.

[106] Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

its prospective witnesses, and summarize their proposed testimony'."[107]

Neither of the affiants set forth in their affidavits qualifications which would qualify them as expert witnesses in the specific areas to which the proposed contentions pertained. Neither of them recited qualifications in the areas of training or in the quality assurance area.[108] In addition, even assuming general technical qualifications on the part of one or both of the affiants, the second motion must fail, in any event, for a lack of particularization under the rule.

As to the fifth factor, it is beyond question that the admission of the contentions would have broadened the issues and delayed the proceeding. In short, even accepting that at least portions of the Intervenors' effort were timely, the all important third and fifth factors operate to tip the balance against admission of the contentions.

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[107] Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing with approval, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). Accord, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 483-84 (1989).

[108] Intervenors argue that the Licensing Board should have surmised from a citation made to it that witness Minor was qualified in operator training. Int. Br. at 25 n.30. The citation reveals that he apparently did not qualify on operator training, and, in any event, it was the Intervenors' job to see to it that the full extent of their witness' qualifications is in the record. The Board and the other parties are not required to search out NRC Reports to ascertain witness qualifications.

III. THE LICENSING BOARD DID NOT ERR INSOFAR AS IT REJECTED CERTAIN CONTENTIONS AND BASES FOR REASONS OTHER THAN FAILURE TO COMPLY WITH 10 CFR § 2.734.

A. The Licensing Board Correctly Adopted the "Fundamental Flaw" Doctrine in Resolving the Admissibility of the Contentions.

1. "Fundamental Flaw" is Applicable.

Intervenors argue that the Licensing Board erred insofar as it rejected certain contentions because they did not allege what amounted to a "fundamental flaw" as that term has come to be defined in emergency planning aspects of nuclear licensing. To begin with, the Intervenors wrongly assert that "fundamental flaw" was the only basis on which the training aspects of JI-LP-1 (Bases B.2, B.5, C) were rejected.[109] This is not so. The training aspects of JI-LP-1 were also rejected for failure to raise a significant safety issue,[110] and failure to satisfy the late-filed contention criteria.[111]

Prescinding from these problems, Intervenors then argue that the "fundamental flaw" doctrine should not have been applied at all in this setting. The only argument that is made for this proposition is basically that a Licensing Board should never adopt a novel theory of law in deciding a case of first

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[109] Int. Br. at 40-41.

[110] LBP-89-28 at 41-43.

[111] LBP-89-28 at 44-45.

impression.[112] This is absurd. The fact is, for the reasons stated by the Licensing Board,[113] the analogy drawn by the Staff between contentions arising out of LPT and contentions arising out of emergency planning exercises is sound. Indeed, inasmuch as the Intervenors had a full opportunity to litigate in the onsite phase of the case, if they had so desired, these very issues, it makes no sense to return to such matters absent a showing that a fundamental flaw has been revealed in the training program.

2. No "Fundamental Flaw" was Demonstrated by the Events of June 22.

As stated earlier, the fact of the matter is the entire event of June 22 is properly characterized as an isolated incident in an otherwise enviable record. The Staff affidavit filed with respect to this matter is conclusive on this matter.[114] The Intervenors argue that certain unsworn bases set out in the July 21 Motion overcome this affidavit, but they do not. These bases allege deficiencies that, assuming them to exist, are readily correctable or can be overcome by further training. And,

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[112] Int. Br. at 41.

[113] LBP-89-28 at 17-18.

[114] Affidavit of Partlow and Nerses attached to the Staff Response to the July 21 Motion.

by definition a flaw which is readily correctable or can be overcome by supplemental training is not a "fundamental flaw."[115]

B. The Licensing Board Did Not Err Insofar as it Rejected Certain Contentions as Not Well Pleaded.

Intervenors take issue with the fact that the Licensing Board rejected portions of their issues because of their failure to plead with sufficient precision and specificity.[116] The Intervenors take the position that under a recent decision in the Vermont Yankee docket,[117] the Licensing Board had a duty to parse through the welter of documents referred to in order to determine for itself what was and what was not timely. To begin with, that case stands for the proposition that a Licensing Board should look at a cited document to be sure that it says what the pleader says it says. It was not a case imposing on Licensing Boards the duty to do an Intervenor's pleading for it. The pleader of a late-filed contention has the burden of showing that the filing is timely. In so doing, the pleader has a duty to spell out for the Licensing Board why the contention could not have been raised as the result of matters which were earlier known or should have been known to the pleader. A Licensing Board has no duty to recast contentions for an intervenor to make them acceptable

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[115]ALAB-918, supra, at 485-86; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 506 (1988).

[116]Int. Br. at 44-47.

[117]Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC ___ (July 26, 1989).

under the regulations.[118] Similarly, it has no duty to straighten out a pleading morass created by the pleader.

CONCLUSION

The decision of the Licensing Board should be affirmed.

Respectfully submitted,

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[118] Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on January 19, 1990, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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(*=Ordinary U.S. First Class Mail.)