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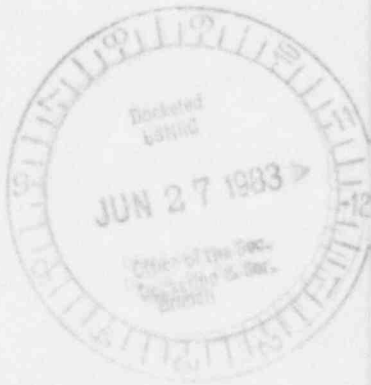

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING 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 & 2)	)	

APPLICANTS' RESPONSE TO "OBJECTION OF THE STATE OF NEW HAMPSHIRE TO THE BOARD'S MAY 11, 1983 MEMORANDUM AND ORDER"

Pursuant to the Board's Order of June 6, 1983 (see 10 CFR § 2.751(c)), and treating the pleading filed by the New Hampshire Attorney General ("NHAG") entitled "Objection of the State of New Hampshire to the Board's May 11, 1983 Memorandum and Order" ("NHAG Objection") as a motion for reconsideration, the Applicants herein respond and say that reconsideration should be denied.

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The Rulings of the Board

The Board dismissed two of NHAG's contentions on summary disposition pursuant to 10 CFR § 2.749. The contentions were as follows:

NH-9

> "The Seabrook design does not provide an adequate program for monitoring the release of radioactivity to the plant and its environs under post-accident circumstances. Thus, the Applicant has not complied with the requirements of NUREG-0737, Item II.B.3."

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."

Notwithstanding the facial breadth of the latter contention, NHAG's reponses to interrogatories propounded by the Applicants and NHAG's answer to the motion for summary disposition disclosed that Contention NH-13 was not pressed, and the motion to dismiss it was not opposed, except to a much narrower extent; the only issues on which NHAG still pressed the contention were:

(a) Applicants' compliance with NUREG-0737, Item I.A.1, with respect to Shift Technical Advisors (STA's) only; and

(b) Applicants' compliance with NUREG-0737, Item I.C.1.

See ASLB Memorandum and Order of May 11, 1983 ("ALSB Memo") at 15-16. In its motion for reconsideration, NHAG addresses only the first of these two issues. See NHAG Objection at 4-5. Compare Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB0461, 7 NRC 313, 315 (1978) (Appeal Board treats exceptions not briefed as waived).

As to both NH-9 and STA's, the Board had before it the Applicants' commitment to follow applicable regulatory requirements,[1] the Staff's concurrence

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[1]Though the term is so thoroughly ensconced in regulatory usage that no change is probably possible, the term "commitment" is unfortunate because it may mean very different things in different contexts and is, therefore, open to misinterpretation and distortion. In the context of a requirement calling for future action, a commitment to the future action is a promissory statement that remains executory until the action itself is forthcoming. In the context of a requirement that calls for an acceptance of a standard or guideline however, the commitment is the compliance itself. Finally, the term may also be used in the sense of incorporation by reference so as to eliminate the need for reassertion of lengthy and detailed materials (and so as to avoid the necessity of comparing the recitation with the original

that the commitments were sufficient for regulatory processing at this point, and NHAG's failure to even assert that the commitments ought not to be accepted at face value. As to both issues the Board ruled that there was no live controversy at this point in time, though, as shall appear below, the rulings were slightly different in their basis. NHAG now contends that the Board should reconsider its rulings.[2]

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to ensure the the copybook work was done correctly). Compare the situation with respect to Contention NECNP II.B.4, where the term was used (by the Applicants and the Board) in the sense of incorporation by reference, but is now being challenged (by NECNP) as an improper reliance upon a promissory assertion. See "Petition to the Appeal Board for Directed Certification" at 2 ("Under the Board's May 11 decision, all contentions raised by intervenors are subject to dismissal on the basis of an unsubstantiated promise by Applicants that the alleged defects will be cured.") (filed May 26, 1983) (emphasis added).

[2]We dc not see in NHAG Objection any argument that the Board's discussion of the standards governing summary disposition is in any respect incorrect or that the Board in any respect incorrectly apprehended the law. As we read NHAG Objection, it contends only that the Board misapplied the correct law to the record before it.

The Ruling on NH-9 was Correct

Contention NH-9 was one of those contentions that was premised, not on an applicant's stated unwillingness to follow, or disagreement with the necessity for, a regulatory requirement, and not on the inadequacy for some technical reason or another of an applicant's proffered compliance, but rather on the present unavailability of a document. As such, the contention raised only one issue: does the applicant accede to the regulatory requirement asserted by the contention to be applicable? If the answer were in the negative, then a ripe controversy would be presented over the applicability of the supposed requirement. If the applicant accedes to the asserted requirement, and says that the documentation of compliance will be forthcoming shortly (see Tr. 690), then two conclusions follow inexorably. First, the only issue that remains for litigation is whether the document shows compliance with the requirement. Second, until the document is published, that issue is not ripe and cannot be

litigated.[3]

In this proceeding, the Applicants' commitment to develop a post-accident monitoring program meeting the requirements of NUREG-0737, Item II.B.3 and to make a submission to the Staff (and to the other parties) demonstrating that compliance within a few months does something in addition to mooting any question of its acquiescence in the regulatory requirement: it highlights the common understanding of all parties (with which NHAG even today does not quarrel) that the submission that may or may not disclose a controversy will be made prior to the issuance of an operating license.[4] There is, therefore, no risk that

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[3]Indeed, until the document has been issued and reviewed, it cannot even be determined whether NHAG will wish further to press the point. Unless it is to be assumed that NHAG has made a present and immutable commitment to litigate the question regardless of what the document shows -- an assumption the Applicants do not make and an assumption that would be belied by NHAG's demonstrated willingness to withdraw a contention once it has found compliance in the technical materials -- it simply cannot be determined whether there will ever be a live issue on this point.

[4]Indeed, it may be assumed that (since it, too, is of the opinion that NUREG-0737 is something that must be complied with prior to licensing) the Staff will not issue an operating license to the Applicants until it is satisfied on this issue -- whether or not

the issue will pass without any review, nor is there any potential that the operating license will issue before NHAG has an opportunity to review the Item II.B.3 submission.[5]

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such issuance has been authorized by the Board and whether or not there ever is (or ever was) any controversy on this point.

[5]NHAG appends to its Objection a statement of its view as to the correct procedure for the Board to follow in this case given the dismissal of Contention NH-9 and the possibility that it might be succeeded by another contention at a later date. Prescinding from the fact that there is no present occasion to debate future procedure, NHAG's views are not correct. The correct procedure in this posture, which is procedurally indistinguishable from a case where a proposed contention has been excluded as being premature and there is the possibility that it might be reasserted at a later date, is that the Board should resolve all contested issues before it and, if they are resolved favorably to the granting of the operating license, issuance of that license by the Staff should be approved. Should that occur prior to the submission of the Item II.B.3 materials and should NHAG thereafter wish to move to reopen the record and to amend its petition to intervene to set forth a late-filed contention, it may do so. If the proposed contention meets the Catawba tests, it will enjoy the benefit of that decision. In no event, however, is it the proper role of an operating license Licensing Board to withhold a decision in an operating license proceeding because of the possibility of subsequent late-filed contentions on presently uncontested issues.

All of this the Board fully and correctly understood when it wrote:

> "At this point, the Board finds no genuine issue in dispute. New Hampshire's speculation that Applicants' submittal might not show compliance with Item II.B.3 of NUREG-0737 is insufficient to meet its burden of showing the existence of any triable issue at this time. If New Hampshire discovers specific problems with Applicants' program for monitoring the release of radioactivity when Applicants' submittal is available for review, New Hampshire may file a contention at that time in accordance with the Catawba decision."

ASLB Memo at 14 (emphasis in original; footnote citation omitted). The Board's ruling was proper, correct, and necessary; reconsideration is not warranted.

The Ruling on NH-13 was Correct

Contention NH-13 stood on a somewhat different footing. At issue was a regulatory requirement that called for the creation of a staffing position called a "shift technical advisor;" the regulatory provision went on to allow for the elimination of this position under certain circumstances. Presently before the Staff is a proposal by the Applicants for the combination (not the elimination) of the position of STA under precise conditions that the Staff finds is in general agreement with the current Staff position.

"NRC Staff Response to Applicants Sixth Motion for Summary Disposition (Contention NH-13)" (filed 3/18/83) at 4. Similarly before the Commission are certain proposals by the Staff for modifications of the regulatory provisions on STA's. The Commission has not yet acted upon the Staff's recommended regulatory changes, but if it did so and acted favorably, then the Applicants' proposal would be acceptable under the modified requirements. See Tr. 702-06. This is the posture in which Contention NH-13 came before the Board.

The Applicants' position was (and is) that it would prefer the elimination of the separate staffing of the STA position, and it intends to implement the same if the Staff's recommendations are approved. If they are not (and if its own proposal is not approved), the the Applicants have committed to the separate STA position manned by a separate person. It follows of necessity that in either eventuality the applicable regulatory requirement would be met; technically the record at the moment stands on the Applicants' commitment to have the separate STA person unless and until its pending proposal for combination of that position is approved

by the Staff (which, in turn, apparently depends upon the approval of the Commission of modifications proposed by the Staff to the STA regulatory requirements).

NHAG's opposition to the application on STA-related grounds was based on what it perceived to be a proposal for elimination of the STA position. It raised (and raises) no objection to the implementation of the separate STA position by the Applicants with separate people. For this reason, the "unless and until" posture in which the matter stands at the moment wholly moots the contention as presently asserted. NHAG misses the boat entirely in its focus upon the "upgrad[ing of] the man-machine interface in the control room," NHAG Objection at 4, for the simple reason that, since the Applicants have not proposed eliminating the STA position, there is no such requirement. If the Commission approves the Staff's regulatory position, there is no such requirement, and if the Commission does not approve the modification, then there is no proposal for the combination of

the STA and other positions.[6] Either way, the sole basis for the objection of NHAG is irrelevant and, therefore, the opposition to the summary disposition motion was insufficient.

The ruling of the Board on this motion was correct for an independant reason. The ultimate requirement of the regulations in their present formulation is not for an "upgrading" for the sake of upgrading; it is, rather, for the making of those changes (if any) that may be required to provide assurance that adequate engineering and accident assessment will be available to the shift crew. Indeed, bearing in mind that Seabrook is a new plant for which there is no "existing" control room layout that has already been licensed, the notion of "upgrading" (which NHAG reads to imply a mandatory movement from an "old" to a "new") does not make sense literally and slavishly read. (It should also be borne in mind that the

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[6]NHAG makes no argument (and under the regulations it could make no argument) the the "upgrad[ing of] the man-machine interface in the control room" is litigable under this contention in the absence of a proposal for the elimination of the separate STA position.

so-called TMI lessons of NUREG-0737 in general, and the STA item at pp. 3-3 through 3-5 in particular, were written with existing, licensed facilities in mind, which explains the terminology.) The fact of the matter is that the presently proposed state of the "man-machine interface in the control room" at Seabrook (which is obviously sufficient in the opinion of the Staff to support elimination of the separate STA position, see Wiggins Aff. ¶ 4) is something that is available to NHAG and has been available since discovery commenced, and yet NHAG at no time offered (and even on reconsideration offers) no assertion (much less an evidentiary showing by a qualified and competent witness) that there is any deficiency in the Seabrook "man-machine interface in the control room" that would preclude the requisite assurance under the existing formulation. Thus NHAG has failed to meet the burden of one who would oppose summary disposition. For these reasons, the Board's ruling on Contention NH-13 was correct; reconsideration is not warranted.

Conclusion

For the foregoing reasons, if NHAG Objection is treated as a motion for reconsideration, it should be denied.

Respectfully submitted,

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Dated: June 24, 1983

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on June 24, 1983, I made service of the within "APPLICANTS' RESPONSE TO 'OBJECTION OF THE STATE OF NEW HAMPSHIRE TO THE BOARD'S MAY 11, 1983 MEMORANDUM AND ORDER'" by mailing copies thereof, postage prepaid, to:

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