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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'91 MAR 22 P4:20

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

G. Paul Bollwerk III, Chairman
Alan S. Rosenthal
Howard A. Wilber

In the Matter of

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, ET AL.

(Seabrook Station, Units 1 and 2)

)
) Docket Nos. 50-443-OL
) 50-444-OL
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) March 21, 1991
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MASSACHUSETTS ATTORNEY GENERAL'S RESPONSE
TO THE APPEAL BOARD ORDER OF MARCH 8, 1991

In an Order dated March 8, 1991 the Appeal Board observed that it in light of the recent issuance of Executive Order No. 303 by Governor William Weld, it was obliged to consider the affect of the change in the Commonwealth's emergency planning status upon the Licensing Board's findings, conclusions, and interlocutory rulings on the SPMC that are still pending on appeal. Therefore, the Appeal Board directed that:

"Each intervenor should advise us as to those pending appellate issues sponsored by him or it that, in his or its opinion, are affected by the Executive Order. As to each such issue, the intervenor should fully explicate the basis for his or its conclusion and, additionally, should set forth with particularity the course that he or it believes we should now follow in disposing of the issue."

The Massachusetts Attorney General ("Mass AG") makes the following response to the directive of the Appeal Board.

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Preliminary Observations

The Mass AG has appealed to this Board the licensing decision contained in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) LBP-89-32, 30 N.R.C. 375 (1989). The Licensing Board's authorization of the issuance of a full-power operating license in that decision rested, at least in part, on a finding by the Licensing Board that the Seabrook Plan for Massachusetts communities ("SPMC") provides reasonable assurance of adequate protective measures in the event of radiological emergency at Seabrook Station. The fact that the Commonwealth of Massachusetts is now commencing emergency planning under Executive Order No. 303 does not eliminate the reliance on the adequacy of the SPMC as a basis for that licensing decision. The correctness of the Licensing Board's finding as to the adequacy of that plan is still key to the Licensing Board's decision authorizing the issuance of a full-power operating license for Seabrook Station. The licensing decision was not made on the speculation that at some point in the future the Commonwealth might commence emergency planning. Therefore, even though the Commonwealth is now undertaking emergency planning in accordance with Executive Order No. 303, appellate review of the Licensing Board's decision on the SPMC is still appropriate.

Moreover, the practical reality exists that even though the Commonwealth is participating in emergency planning, it will take a substantial period of time to actually develop planning

strategies for the Seabrook EPZ and to train state personnel to implement those strategies. Given the unformed state of emergency planning by the Commonwealth for the Seabrook EPZ, the SPMC is, and is likely to remain for some period of time, the only planned response to a radiological emergency at Seabrook Station. While Executive Order No. 303 creates the potential that various issues raised in the appeal of the SPMC may at some point in time be rendered moot, at least for the present, few issues pending on appeal appear to be directly affected by the Executive Order. Furthermore, it is the Mass AG's position that given the unique characteristics of the Seabrook EPZ, even the best planning efforts will fail to provide reasonable assurance of adequate protection for the public.

Furthermore, the Executive Order is limited in its affect. While the Governor has authority to, and does direct, state agencies under the Executive Branch to commence emergency planning and begin working in cooperation with the operators of Seabrook Station, the Executive Order does not, and in all legal probability could not, direct the government officials of the six Massachusetts towns in the Seabrook EPZ to engage in planning. While the Executive Order urges the six Massachusetts towns to commence emergency planning, the Executive Order, in and of itself, does not provide an adequate basis to assume that the towns will commence such planning and cooperate with Seabrook Station.

Issues Pending On Appeal That Are
Affected By Executive Order 303

The most obvious group of issues pending on appeal affected by Executive Order No. 303 is the series of Licensing Board's rulings challenged by the Mass AG concerning the utility rule of 10 C.F.R. §50.47 (c)(1). The Mass AG appealed the Licensing Board's rulings on the utility plan rule on several grounds. The Mass AG challenged: 1) the Licensing Board's rejection of Contention MAG 2; 2) the Licensing Board's rulings on the presumption that non-participating governments would generally follow the utility plan; 3) the Licensing Board's ruling with respect to the delegation of authority issues under the utility rule; 4) the Licensing Board's presumption that not only would state and local governments follow the SPMC in the event of a radiological emergency, but also that response would be adequate; and 5) the Licensing Board's findings made in connection with the role of FEMA. Those challenges to the Licensing Board's rulings on the utility rule all pertained to the lack of participation by local governments as well as the state government. Since Executive Order No. 303 applies only to state government, the Licensing Board's rulings applicable to local governments appear to be unaffected by the order. Therefore, it appears that this Board should proceed with its review of those rulings as they apply to local governments.

The Mass AG's challenge to the Licensing Board's rejection of Contention MAG 2, and the ruling that governments will

generally follow the utility plan appear to be rendered moot as they pertain to state government. First, now that the Commonwealth is participating in emergency planning, the factual premise of MAG 2 no longer applies to the state. Furthermore, since there is at the present time no other emergency plan and state government officials are directed to cooperate with Seabrook Station, it is likely that the state government officials will in the event of an emergency follow the SPMC, at least until some alternative plan is developed. Similarly, the Mass AG's challenge to the delegation of authority issue appears to be mooted as it applies to the Commonwealth. While it is still the Mass AG's position that certain governmental powers, such as the police power, are non-delegable, since the Commonwealth is now participating in emergency response activities, as a factual matter the Governor will not have to delegate such powers. Instead, he can direct state employees to assume the non-delegable responsibilities.

The Mass AG's challenge to the Licensing Board's presumption that a state response following the SPMC will be an adequate response still appears to retain its vitality at this time. Since emergency planning efforts by the Commonwealth are to date inchoate, it can not be presumed that emergency response efforts by state officials, even if they follow the SPMC, will be an adequate response. Finally, the Mass AG's appeal of the Licensing Board's rulings on the role of FEMA in connection with its review of utility plans appears to be

unaffected by the state's participation in planning because the SPMC is still the only plan relied upon for licensing purposes. No state plan has to date been drawn up or proposed to supplant the SPMC.

The other issues pending on appeal that appear to be affected by the Executive Order are the challenges to the Licensing Board's findings that the state and local police will come to the assistance of traffic guides during an evacuation and can be relied upon to identify road impediments in the first hours of an evacuation. It would appear that in accord with the Executive Order state police will endeavor to follow the SPMC and fulfill those responsibilities. However, at present there is no basis upon which to conclude that local police will similarly assist traffic guides or function to identify road impediments in the first hours of evacuation. Furthermore, it is unclear merely from the existence of the Executive Order whether there will be sufficient state police to respond promptly throughout the Massachusetts EPZ to adequately fulfill the roles assigned to them. Since the SPMC relies upon the participation of local as well as state police to fulfill these functions, presumably the SPMC views the participation of local police as as necessary to an adequate response. Thus, it appears that the Mass AG challenges to the Licensing Board's findings at PID 3.31, 3.84, and 3.106 still are not moot.

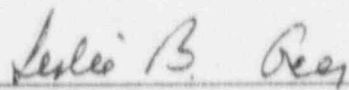
PROPOSED COURSE OF ACTION FOR THE APPEAL BOARD

While in light of Executive Order No. 303, it now appears that it can be presumed that state personnel will follow the SPMC, that presumption does not extend at this point in time to local officials. Almost all the issues presented in the Mass AG's appeal to the extent that they are in any way affected by the Executive Order, also address local government responses as well as state response. Those issues appear to still be open and unresolved as they apply to local governments, and it appears that this Board should proceed to decide them. Where all parties agree that an issue is moot, the Board may proceed to dismiss it as moot per stipulation. Where parties disagree as to whether an issue is moot, the Board may call upon the proponents of mootness to file appropriate motions to dismiss, and after considering the motions and any responses thereto, may rule upon the motions.

Respectfully submitted,

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Date: March 21, 1991

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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I, Leslie Greer, hereby certify that on March 21, 1991, I made service of the enclosed Massachusetts Attorney General's Response to the Appeal Board's Order of March 8, 1991 by Federal express as indicated by (*) and by first class mail to:

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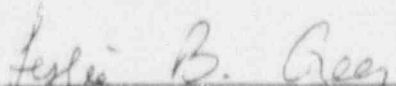
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Dated: March 21, 1991