

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. )

(Seabrook Station, Units 1 and 2) )

Docket No.  
50-443, -444

NECNP PETITION FOR DIRECTED CERTIFICATION

The New England Coalition on Nuclear Pollution (NECNP) petitions the Appeal Board to take directed certification of the Licensing Board's summary disposition of certain issues raised by NECNP's Contention III.12 in the Seabrook operating license proceeding. Contention III.12 challenged the adequacy of the Applicants' Evacuation Time Estimates (ETEs) on a number of grounds. Following the filing of summary disposition motions by Applicants, which were supported by the Staff, the Licensing Board substantially constricted the scope of the contention until only one narrow issue remained. In doing so, the Board committed three errors which shifted the burden of proof onto NECNP: it ruled against NECNP on issues that were not placed into controversy by Applicants; it ignored a number of factual issues raised by

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NECNP in opposition to summary disposition motions; and it accepted a commitment to complete the ETES as grounds for dismissing NECNP's charge that they were not accurate because they did not reflect true evacuation routes.

The first two of these errors are addressed by the petition of Attorney General Bellotti, filed with the Appeal Board on July 15, 1983. NECNP supports the petition by Attorney General Bellotti, and will not restate those arguments here. This petition will address the third error, acceptance of a commitment to comply with the regulations in lieu of a demonstration of compliance. This issue was recently raised by NECNP in a petition for directed certification on the Licensing Board's dismissal of NECNP Contention II.B.4. Although that petition was dismissed by order of July 19, 1983 (ALAB-734), the Appeal Board did express concern that the Licensing Board appeared to rely for its dismissal on the expectation that the deficiencies in the license application would be cured by forthcoming operational quality assurance procedures. Slip op. at 7. In dismissing NECNP's petition, the Appeal Board relied in part on Applicants' firm commitment to submit QA procedures by a fixed date. In this case, Applicants' ability to cure the alleged defect is not at all clear, because it depends on the availability of offsite emergency plans, which are not required by law. Hence, the Board's persistent and pervasive error in accepting applicant commitments as grounds for dismissing contentions is even more egregious here. In the absence of any

schedule for completion of the Evacuation Time Estimates, NECNP is required either to prove that there is no substance to the Applicants' commitment to comply with the regulations, or to reappear on the eve of licensing to protest, against the odds of the momentum for license issuance, that the Applicants are still not entitled to an operating license.

The Licensing Board thus impermissibly shifts the burden of proof from the Applicants to NECNP. The Licensing Board's persistent acceptance of commitments for future compliance as grounds for dismissal of contentions is a fundamental misconception of NRC rules of practice that pervasively affects NECNP's ability to participate in these licensing hearings. We therefore urge the Appeal Board to direct the Licensing Board to reinstate that portion of NECNP's Contention III.12 dismissed on these grounds, and to clarify that it is the Applicants' burden to demonstrate compliance with the regulations, rather than NECNP's burden to demonstrate noncompliance.

#### Background

NECNP's Contention III.12 states in part that:

The evacuation time estimates provided by the Applicants in Appendix C of the Radiological Emergency Response Plan are inaccurate in that they provide unreasonably optimistic estimates of the time required for evacuation.

On February 14, 1983, Applicants filed a summary disposition

motion on Contention III.12, which claimed that Applicants' Evacuation Time Estimates (ETEs) had been subjected to evacuation estimate analyses, including an NRC study, which concluded "that the Applicant has indeed provided an accurate assessment of population distributions and the dynamics of evacuation routings for pertinent cases and, therefore, has generated a useful base of information from which detailed evacuation management plans can be developed." "Applicants' Twenty First Motion for Summary Disposition," Affidavit of James A. MacDonald at 2. (February 14, 1983).

NECNP responded to Applicants' motion with a citation to the validation study done by the NRC, NUREG/CR-2309, "An Independent Assessment of Evacuation Time Estimates for a Peak Population Scenario in the Emergency Planning Zone of the Seabrook Nuclear Power Station" (October, 1982), which disputed the accuracy of Applicants' ETEs. NECNP noted that in NUREG-CR-2309, the NRC Staff concluded the following:

a. That the Applicants' assumptions are "optimistic" and depend upon a level of traffic control the achievement of which cannot be confirmed in the absence of evacuation plans. See NUREG/CR-2903 [supra] at iv and 20.

b. That the evacuation time estimates in NUREG/CR-2903 and the Applicants' Preliminary Evacuation Time Study are based on the assumptions by the authors as to preferred evacuation routing and traffic management, as opposed to actual routes and traffic controls which planners have found feasible and agreed to implement, and are therefore not appropriate for use by decision makers during

emergencies and do not constitute the kind of evacuation time estimates required by the Commission's emergency planning criteria for use by decision makers. See NUREG/CR-2903, supra, at 1.

The NRC Staff also submitted a response in support of Applicants' summary disposition motion. The Staff did not flatly dispute NECNP's assertion that the ETES are overly optimistic because they don't reflect actual evacuation routes, or that they are not appropriate for use by decisionmakers during emergencies. Instead, the Staff argued that evacuation time estimates have two purposes: to "help pinpoint situations that may require special attention from planners" and to "provide decisionmakers a tool with which to make decisions on the appropriate protective action for a given circumstance." "NRC Staff Response to Applicants' Seventh (Contention NH-21) and Twenty-First (Contentions NECNP III.12 and III.13) Motions for Summary Disposition," Statement of Material Facts as to Which There is No Material Dispute. The Staff concluded that the Applicants' evacuation time estimates were "sufficiently accurate to serve as a useful tool for use by planners in developing local emergency response plans," and that the ETES will be useful to decisionmakers in the event of an emergency "if the local emergency plans reflect the traffic control and routing assumptions used by the Applicants in developing their time estimates." Id. (emphasis added)

In summary, although both Applicants and Staff argued that the ETES were adequate for planning purposes, neither party



asserted that they were adequate for use during emergency decisionmaking, or that they met the Commission requirements for adequacy of evacuation time estimates.

In ruling on Applicants' summary disposition motion, the Licensing Board agreed that evacuation time estimates have the dual purpose cited by the Staff, and found that

Only after the evacuation routes have been chosen can Applicants revise their estimates to fulfill the second purpose, and this Applicants have stated unequivocally they will do. Id. NECNP's last averment simply presents no litigable issue, nor can any adverse legal conclusion be drawn from the present incompleteness of the estimates. Accordingly, the Board grants Applicants' Twenty-First Motion with respect to this issue.

Atomic Safety and Licensing Board, Memorandum and Order of June 30, 1983, at 14-15. Hence, although the Board appeared to agree with NECNP that the ETES were insufficient at present, it found that Applicants' commitment to complete them, following its review of offsite emergency plans, was sufficient grounds for dismissal of NECNP's contention.

### Argument

#### 1. Applicants Were Not Entitled to Summary Disposition on the Merits

Part IV of Appendix E to Part 50 requires that an operating license applicant's Final Safety Analysis Report must include an emergency plan that

provide[s] an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway EPZ for transient and permanent populations.

This description must be "sufficient to demonstrate that adequate protective measures can and will be taken in the event of an emergency." 10 C.F.R. Part 50, Appendix E, § III.<sup>1</sup> Thus, evacuation time estimates are required not just as a "planning tool" but as a demonstration that there is a reasonable prospect of evacuating the public safely during an emergency. And, as pointed out in NUREG/CR-2309, the assumptions underlying Applicants' evacuation time estimates (which the NRC states are more optimistic than its own) cannot be assessed until evacuation plans are developed for the EPZ. NUREG/CR-2309 at 20. In the absence of information on the actual evacuation routes chosen, there can be no basis for a finding of reasonable assurance that the Seabrook EPZ can be evacuated within the times predicted by Applicants.

The Licensing Board did not appear to disagree that Applicants' evacuation time estimates are insufficient and incomplete. The Board conceded that the ETES cannot be used by decisionmakers during an emergency until they are updated to reflect evacuation routes. Memorandum and Order of June 30, 1983 at 14. The Board dismissed the contention, however, because although Applicants had not yet completed the evacuation time estimates, they had promised to do so.

This reasoning stands logic on its head. If the Applicants

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<sup>1</sup>By contrast, only a "preliminary analysis" is required at the construction permit stage. 10 C.F.R. Part 50, Appendix E, § II.G.

have not met a particular requirement that is a condition of receiving a licensing, NECNP is entitled to file a contention based upon that failure. Indeed, under the Commission's recent Catawba decision, CLI-83-19 (July 1, 1983), the Coalition must file contentions with respect to all issues as to which the Applicants have not met regulatory requirements. If it does not file such contentions as soon as it knows of the deficiency, Catawba precludes it from filing later contentions, even if the regulatory requirement is never met because the relevant documents never appeared or the expected changes were never made.

The example of local emergency plans clearly illustrates this dilemma. Normally, when the deadline for the filing of contentions first approaches, the local plans are not yet available, either from the localities themselves or from a utility attempting to substitute for uncooperative localities. At that point, it is indisputable that the utility is not entitled to a license, and a contention to that effect is ripe for litigation. Under Catawba, the contention must be filed. If it is not, and the local plans are never prepared, the intervenor will never be able to challenge the clear failure to comply with the regulations.

In most, if not all cases, the contention will be superseded once the local plans become available by specific contentions related to the flaws in those plans. While the need to file the contention based upon the absence of the plans



may thus seem to involve unnecessary paperwork, that is precisely the result mandated by the Commission in Catawba. Contentions must be filed as early as possible, even if it is clear that they will eventually become obsolete.

These principles apply directly to the case at hand. There is no serious dispute that the Applicants' Evacuation Time Estimates are inadequate to establish compliance with the regulations. NECNP filed a contention to that effect. The Licensing Board has now thrown out that contention, not because NECNP is wrong, but because the Applicants have committed to comply once the local plans become available and the estimates can be related to the actual evacuation routes.

The Board's ruling is backwards. Under Catawba, NECNP's contention is timely. Applicants have failed to demonstrate compliance with the regulations. The party entitled to summary disposition is not the Applicants, but NECNP. Had NECNP filed a motion for summary disposition on this issue, which for lack of resources it did not, it would have been entitled to prevail. It would then have been the Applicants' burden to reopen the issue with respect to its evacuation time estimates. It is incredible that the Licensing Board has turned this clear logical point around so far as to dismiss a major aspect of NECNP's contention completely.

2. The Appeal Board Should Grant Directed Certification in This Instance

The Appeal Board may take directed certification of an issue

only where the ruling below 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.

Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). This is the second time in the space of a few weeks that NECNP has sought directed certification on the basis of the second prong of the tests, a pervasive or unusual effect on the basic structure of the proceeding.

In the first petition, NECNP argued that the Board's acceptance of a commitment to comply as evidence of compliance with certain quality assurance-related requirements justified directed certification because, together with other Board rulings, it demonstrated that the Board had adopted a consistent practice of accepting commitments to comply as actual compliance. In NECNP's view, this practice has a pervasive effect on the basic structure of the proceeding both because it will result in a consistent succession of incorrect rulings, and because it places an improper burden on intervenors by forcing them to meet the Catawba burden for late-filed contentions, or even the burden of reopening the record, in order to file contentions on specific documents,

when the intervenors have already filed valid contentions based on the non-existence of those very documents or on the failure, at the time the contention was filed, to comply with regulatory requirements.

The Appeal Board denied NECNP's petition for directed certification with respect to the above claim, both because it believed the concerns could be adequately addressed on eventual appeal, and because it appeared that the relevant detailed information would become available soon enough to allow NECNP to file and litigate contentions. In this case, there is no such assurance that NECNP's grievance will be redressed. The Applicants' ability to update and complete the ETEs depends entirely on the issuance of offsite emergency plans, and is thus completely out of Applicants' control. There is no assurance that NECNP will ever have the opportunity to litigate the incompleteness of the ETEs, unless it is to raise a protest on the eve of license issuance that the estimates have yet to be revised, by which time Catawba could well preclude the admission of the contention.<sup>2</sup>

Based upon the language of Marble Hill, a Licensing Board ruling justifies directed certification if it has a pervasive effect upon the proceeding, presumably an effect beyond the narrow issue at hand. That is the basis for this petition.

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<sup>2</sup>Under the Commission's standard for consideration of late-filed contentions, the Board must consider "the extent to which the petitioner's participation will broaden the issues or delay the proceeding." 10 C.F.R. § 2.714(a)(iv)

The pervasive effect is two-fold. First, there will be, as NECNP has demonstrated, a consistent series of erroneous rulings accepting commitments as compliance with requirements. Second, intervenors will consistently be saddled with the improper and unfair burden of filing and justifying new contentions after they have already filed contentions that were valid when filed. This burden can extend as far as being forced to attempt to reopen the proceedings, when a correct ruling on the original contention would have resulted in license denial, and the Applicants would have been forced to carry the burden of reopening when the relevant information became available. That is the result dictated not only by Catawba, but also by any concept of fundamental fairness. In light of the examples given in NECNP's previous petition and the issue at hand here, it is difficult to imagine a clearer case of pervasive effect upon the proceeding. It is now NECNP's burden to overcome a ruling by the Board, as well as the late-filed contention standards (and possibly the standard for reopening the record) in order to raise the adequacy of the evacuation time estimates again. Moreover, by dismissal of the contention, NECNP has lost its right to remain informed through the discovery process of Applicants' revision of their evacuation time estimates. It may well be that these errors can be remedied on ultimate appeal, but that is not the standard. The standard is pervasive effect, which is met in this case.



The Licensing Board's dismissal of a controversial licensing issue on the simple grounds of lack of current information constitutes an abdication of its responsibility to develop a sufficient record for a finding of reasonable assurance on the record. Where, as here, the Board's action "threatens to impede rather than aid the full development of the record," the Appeal Board must reverse. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565 (1977)(Appeal Board found that licensing board abused its discretion in sequestering staff witnesses)

The Licensing Board's June 30 ruling is the second one appealed to this Board, and the fourth ruling<sup>3</sup> in this case dismissing a contention on the basis of a commitment by Applicants to comply with a regulatory requirement. At this stage, it is clear that the Licensing Board is on a "collision course" with fundamental principles of NRC practice, and must be reversed. Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, 407 (1976), reversed in part on other grounds sub. nom. U.S.E.R.D.A. (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976). We therefore request the Appeal Board to direct the Licensing Board to restore the language of Contention

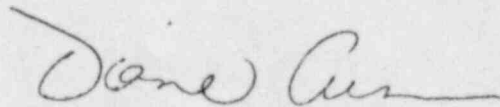
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<sup>3</sup>The other contentions which were dismissed on the basis of commitments by Applicants to comply with various regulatory requirements were New Hampshire Contentions 9 and 13 and NECNP Contention II.B.4. See Licensing Board's Memorandum and Order of May 11, 1983 at 14, 17, and 29-30, respectively.

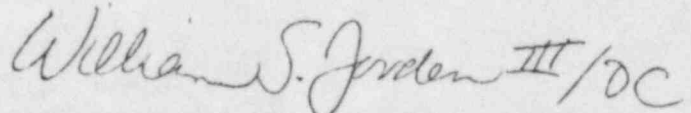


III.12 challenging the optimism of Applicants' evacuation time estimates, based on the lack of actual evacuation routes in the model.

Respectfully submitted,



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DATED: July 21, 1983

CERTIFICATE OF SERVICE

I certify that on July 22, 1983, copies of NECNP PETITION FOR DIRECTED CERTIFICATION were served by first-class mail on the following:

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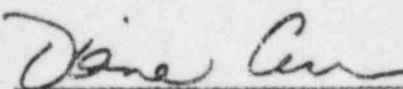
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