UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar

SERVED AUG 7 1979

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

Messrs. John A. Ritsher, Thomas G. Dignan, Jr., and Robert K. Gad, III, Boston, Massachusetts, for the applicants, Public Service Company of New Hampshire, et al.

Mr. Robert A. Backus, Manchester, New Hampshire, for the intervenor, Seacoast Anti-Pollution League.

Mr. Lawrence Brenner for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

August 6, 1979

(ALAB-557)

In ALAB-548, 9 NRC ___ (May 14, 1979), we took note of the decision of the Court of Appeals for the First Circuit in Seacoast Anti-Pollution League v. Costle, ___ F.2d ___ (No. 78-1339, decided May 2, 1979). The court of appeals there upheld the determination last summer of the Administrator

of the Environmental Protection Agency that a nuclear facility on the Seabrook site would not require cooling towers; i.e., that the once-through cooling system proposed by the applicants would be acceptable. Because of this development, we tentatively concluded that there was no necessity to continue to move forward with our then pending inquiry into whether there is an alternate site for a nuclear facility anywhere in New England which would be "obviously superior" to the Seabrook site were cooling towers to be needed in conjunction with such a facility at Seabrook.[1/] Rather, we said,

> our present intention is to suspend forthwith any further consideration of the alternate site issue. In the event that Supreme Court review of the First Circuit's decision in the EPA proceeding either is not sought or is denied, we would then issue an order terminating the exploration of that issue on the ground of mootness. On the other hand, should there be a grant of certiorari, we would resume our deliberations and hand down a decision as expeditiously as possible.

9 NRC at ___ (slip opinion, pp. 5-6).

Acknowledging that this course might not meet with the approval of all of the parties, we invited the filing of

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1/ As indicated in ALAB-548, prior to May 2 we had completed a three-day evidentiary hearing on that issue and had received the post-hearing submissions of the respective parties. Our independent review of the full record was in progress when the First Circuit's decision was brought to our attention.

objections to it. That invitation prompted the submission of a memorandum by the applicants. The staff (but not the intervenor Seacoast Anti-Pollution League (SAPL)) filed a response to that memorandum.

A. The applicants' memorandum was filed contemporaneously with a motion for summary disposition on the alternate site issue. Taken together, the two documents put forth the following line of argument: In New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1978), the First Circuit had specifically approved the Commission's ruling in this case[2/] that, "in comparing construction costs of the proposed site and at alternate sites, actual completion costs should be used". Intervenor SAPL thereafter had conceded, in advance of the commencement of the evidentiary hearing we conducted in January on the alternate site issue, that Seabrook with cooling towers would prevail over any alternate site unless the First Circuit were to reconsider and withdraw its approval of the "completion cost" standard. SAPL had requested the court of appeals to take precisely that action in connection with its review of a June 1978 Commission decision.[3/] But the court

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2/ CLI-77-8, 5 NRC 503, 532 (1977).

3/ CLI-78-14, 7 NRC 952. In that decision, the Commission had, inter alia, terminated the comparison which it had earlier directed be made between certain alternate sites in southern New England and Seabrook with once-through cooling.

(in the course of affirming the decision) left the "completion cost" standard intact. Seacoast Anti-Pollution League v. NRC, ___ F.2d ___, __ n. 10 (No. 78-1172, decided May 30, 1979). Thus, according to the applicants, by virtue of SAPL's own concession the alternate site issue is now susceptible of disposition in the applicants' favor without regard to the disclosures in the record of last January's evidentiary hearing.[4/]

We cannot endorse this approach. It does not perforce follow that, because "all parties concede that no site is obviously superior to Seabrook with cooling towers if 'sunk costs' are counted, * * * there is no longer any necessity for this Board to resolve any factual issues arising from the evidentiary hearing * * *".[5/] What the applicants' thesis appears to overlook is the fact that independent responsibilities have been vested in this Commission and its adjudicatory boards by the National Environmental Policy Act. Whether or not the parties to a particular licensing proceeding may agree that none of the alternatives to the proposal under consideration is preferable on a NEPA cost/benefit balance, it remains

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4/ As we recently observed, summary disposition of an issue may not properly be sought on the basis of evidence adduced on that issue at a hearing in the same proceeding. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-554, 10 NRC ___, ___ (July 11, 1979) (slip opinion, p. 9).

5/ Applicants' memorandum in response to ALAB-548, dated June 6, 1979, at p. 3.

the Commission's obligation to satisfy itself (if necessary to the disposition of the proceeding) that that is so. Although not directly addressing the point, the staff may have had it in mind. For, in its answer to the applicants' submissions,[6/] it stresses that, all of the evidence having already been adduced, we could dispose of the alternate site issue favorably to the applicant "on the basis of a preponderance of [that] evidence, without having to find that [because of the SAPL concession] there is no genuine issue of material fact to be heard".

The staff may well be right. But the question persists: what advantage would be now served by expending the time and effort necessary to complete our scrutiny of the evidentiary record and to translate the results of the scrutiny into written findings? Neither the applicants nor the staff dispute that, absent a Supreme Court reversal of the First Circuit's May 2 decision upholding the EPA approval of the proposed once-through cooling system for Seabrook, it is at present wholly academic how the Seabrook site with cooling towers might compare with any alternate site. Both of those parties allude, however, to the possibility that, at some future date, EPA might order (upon its further examination of the effects of once-through

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6/ Letter of July 2, 1979 from staff counsel to the members of this Board, at pp. 1-2.

cooling upon the marine environment in the area of the facility) the installation of cooling towers.

We referred to that possibility ourselves in ALAB-548 and suggested that it provided insufficient cause to decide the alternate site issue at this juncture. Our reasoning was that:

> Were the Administrator on such reexamination to conclude that cooling towers must be installed, this Commission might be called upon to reinstate the alternate site inquiry. That inquiry would, of course, take place in a quite different setting. More particularly, the balancing of the Seabrook site with towers against alternate sites would have to take into account, inter alia, the status then of both the Seabrook facility (which likely would be substantially completed if not already in operation) and the alternate sites (which might well have become dedicated to other uses). To the extent, however, that they had not been overtaken by changed circumstances, the disclosures in the present record -- together with the parties' commentaries on those disclosures -- could still be put to useful purpose. For even though consideration of the alternate site issue may go no further at this juncture, the record which has been developed will be preserved for such future use as might be appropriate.

9 NRC at ___ (slip opinion, pp. 6-7). The papers of the applicants and the staff do not bring to light any flaw in that reasoning or the conclusion which we derived from it. And, upon reexamination of the matter on our own initiative, we continue unpersuaded that the contingency of an EPA change in position (many years hence) is per se a weighty enough

consideration to warrant our determining -- in abbreviated form or otherwise[7] -- an issue which has been stripped of any current significance by recent judicial action.

B. We thus adhere to the course announced in ALAB-548. And the time has come to follow that course to its terminal point. The 90 day period within which to file a petition for a writ of certiorari from the May 2 decision of the First Circuit in the EPA proceeding[8] has now expired. Neither a petition nor an application for an extension of time[9] was filed with the Supreme Court on or before the expiration date. Thus, the May 2 decision has become final

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7/ In an endeavor to entice us into making the requested finding (albeit on the evidentiary record rather than by summary disposition), the staff suggests that this Board's "decision can be greatly abbreviated if it considers sunk costs in light of the views of the intervenors * * * that if sunk costs are counted there would be no justification for choosing an alternate site to Seabrook with cooling towers". July 2 letter, fn. 6 supra, at p. 2. We do not pause to consider whether, and if so to what extent, this might be true.

8/ See 28 U.S.C. 2101(c).

9/ A Supreme Court justice may, for good cause shown, extend the time for the filing of a certiorari petition for a period not exceeding 60 days. Ibid.

and it is now appropriate to terminate the exploration of the alternate site issue on the ground of mootness.

The applicants' motion for summary disposition is denied and the alternate site issue is dismissed as moot.[10/]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

10/ All that is left before us is the generic radon issue which we were directed by the Commission to consider in this and a number of other proceedings. See ALAB-480, 7 NRC 796 (1978).