UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

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

MEMORANDUM AND ORDER

May 14, 1979

(ALAB - 548)

In January of this year, we held a three-day evidentiary hearing which was devoted to the exploration of a single issue in this construction permit proceeding: 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 a nuclear facility at Seabrook. What prompted the hearing is amply illumed in prior decisions of the Commission and this Board;[1] that ground need not be replowed here. Suffice it for present purposes to note that, for the reasons detailed in those decisions, the determination as to whether a nuclear

1/ See ALAB-471, 7 NRC 477 (1978); CLI-78-14, 7 NRC 952 (1978); ALAB-488, 8 NRC 187 (1978).

facility at Seabrook must have cooling towers is for the Environmental Protection Agency and not this Commission to make. Although the EPA Administrator had ruled in August 1978 that cooling towers need not be employed (i.e., he had approved the applicants' proposed once-through cooling system for Seabrook),[2/] as of the time of our January hearing that ruling had not become final. This was because a petition for review of it remained pending before the Court of Appeals for the First Circuit.

All of the witnesses who testified at the hearing were members of the NRC staff. Their testimony was directed to staff exhibit 79-1, a voluminous report of the analysis made by the staff on the alternate site issue.[3/] That analysis, of perhaps unprecedented depth, had produced the conclusion that none of the twenty-two New England sites considered as possible alternatives (eight of which received intensive study after a preliminary "coarse" screening process)

2/ The Administrator had previously given such approval in a decision rendered in June 1977; on judicial review of that decision, however, the matter had been remanded to him for further consideration.

3/ In advance of the hearing, that report (bearing the designation NUREG-0501) had been furnished to the Board and the other parties to the proceeding as the staff's prepared testimony.

was "obviously superior" to the Seabrook site with cooling towers.[4/] Each of the witnesses had played a significant role in one or another facet of the overall analysis. In addition to direct examination by staff counsel, they were subjected to extensive cross-examination by counsel for the other parties (the applicants and the intervenor Seacoast Anti-Pollution League (SAPL)) and were also questioned at some length by members of this Board.

On a schedule established by us, the parties thereafter tendered their post-hearing submissions. That of the staff, which was received first, took the form of a proposed decision which essentially tracked the staff's analysis as presented in its direct evidence. In their responsive filing, the applicants urged us to adopt virtually all of that proposed decision, quarreling only with two of the specific findings contained therein and offering but a few additional findings of their own. For its part, SAPL took the position that the staff's alternate site inquiry had been "wholly irrational" and that, "on the basis of the record and analysis to date", there was "no hope of answering" the ultimate question before us. Having said

4/ The staff did conclude that one of the alternate sites (Phillips Cove on the Maine coast) is "marginally superior" to Seabrook. Under the rule established by the Commission in this very proceeding, that would not be enough to warrant rejection of the Seabrook site. See CLI-77-8, 5 NRC 503, 526 (1977), affirmed, sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F. 2d 87, 95 (1978). In any event, the applicants maintain that provisions of a Maine statute would preclude resort by them to the Phillips Cove site.

that, SAPL did go on to suggest that, if tested against any reasonable objective siting standards which might exist, both the Pilgrim site (on the Massachusetts coast) and the Phillips Cove site (see fn. 4, supra)"could be found to be obviously superior" to Seabrook with towers.

Upon being advised in mid-March that the staff did not propose to reply to the applicants and SAPL, but rather would stand upon its prior submission, we set about the task of independently reviewing with care the full record as a precursor to the preparation of our own decision. Before that task was completed, however, the Court of Appeals for the First Circuit announced the result of its review of the EPA Administrator's approval of once-through cooling for the Seabrook site. Finding no error had been committed by the Administrator, the court upheld his decision that cooling towers were not required. Seacoast Anti-Pollution League v. Costle, ___ F.2d. ___ (No. 78-1339, decided May 2, 1979).

In view of the First Circuit's decision, we are confronted with the question whether we should continue to move forward at this time to resolve the pending alternate site inquiry. Our tentative answer is that we need not, and because of the other demands upon us should not, pursue

that course. Plainly, absent Supreme Court intervention, that alternate site issue has now become wholly academic: that issue assumed that cooling towers would be required at Seabrook and, with only the possibility of Supreme Court review now remaining, the EPA Administrator's judicially-approved ruling is that they will not.

We do not know, of course, whether certiorari will be sought by SAPL (or the other unsuccessful challenger of the EPA ruling). Nor do we presume to speculate on what would be the outcome of a certiorari petition. But it seems to us that we can stay our hand to await further developments on that front without substantial risk of adversely affecting the interests of any of the parties. Should a certiorari petition be both filed and granted, there will be enough time (while the Supreme Court has the merits under advisement) for us to complete consideration of the alternate site issue and to render our decision.

In short, 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.

Although this course commends itself to us as being fully warranted in the circumstances, we cannot exclude the possibility that it may not meet with the approval of all of the parties. For this reason, any party which objects to our proposal in whole or in part may file a memorandum to that effect within thirty days of the date of this order.[5/] The memorandum shall detail the nature of and the basis for the objection. Responses shall be due within twenty days after service of the memorandum.

One final matter merits brief mention. Even if his current approval of a once-through cooling system for Seabrook is allowed to stand, the EPA Administrator may at some later date have to determine anew whether the facility should be required to employ cooling towers. See Sections 402(a)(3) and 402(b)(1)(B) of the Federal Water Pollution Control Act (as amended in 1972), 33 USC 1342(a)(3) and 1342(b)(1)(B); see also Section 316(c) of that Act, 33 USC 1326(c). 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

5/ Any party believing the matter to be quite urgent is free, of course, to file its memorandum well before the thirty days expire.

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.6/

6/ As of this writing, the Court of Appeals for the First Circuit still has under submission a petition for review of CLI-78-14. Seacoast Anti-Pollution League v. NRC (No. 78-1172, argued October 3, 1978). Among other things, that petition challenges the Commission's conclusion (7 NRC at 954-56) that it should terminate (as no longer productive) its previously directed inquiry into whether there is a southern New England site which would be "obviously superior" to the Seabrook site without cooling towers (i.e., with a once-through cooling system). The First Circuit may or may not agree with that conclusion. Should the court affirm it, the entire alternate site inquiry will be at an end (again, absent Supreme Court review). On the other hand, should the court overturn the Commission's conclusion, we will then have to consider whether the record developed at the January

(FOOTNOTE CONTINUED ON NEXT PAGE)

It is so ORDERED.

FOR THE APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

6/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

hearing (insofar as it deals with the southern New England sites) is itself sufficient to permit an informed comparison of those sites and the Seabrook site without cooling towers. Before making a final judgment in that regard, we would have to solicit the views of the parties -- obviously, they would be entitled to be heard on whether there is justification for using the record for a purpose quite distinct from that which had prompted its compilation.