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October 26, 1989
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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.	)	Docket Nos. 50-443-OL-01 50-444-OL-01
(Seabrook Station, Units 1 and 2)	)	Low-Power Testing Issues

APPLICANTS' RESPONSE TO APPEAL BOARD ORDER OF OCTOBER 23, 1989 AND [MASS AG] MOTION FOR EXPEDITED APPEAL

Under date of October 20, 1989, the Attorney General for the Commonwealth of Massachusetts ("Mass AG") filed a Notice of Appeal purporting to appeal "LBP-89-28, dated October 12, 1989, the Memorandum and Order of the Seabrook Licensing Board denying Intervenors' motions to admit low power testing contentions and bases or to reopen the record, and requests for hearing . . . ."[1] Under the same date, Mass AG also filed a motion requesting that an expedited briefing

[1] Notice of Appeal (October 20, 1989).

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schedule, as proposed by Mass AG, be established for Mass AG's purported appeal.[2]

In response to these two filings, on October 23 the Atomic Safety and Licensing Appeal Board issued an order requiring Applicants and the NRC Staff to respond to Mass AG's motion, and also to "address the current appealability" of LBP-89-28, no later than Friday, October 27.[3] Pursuant to that order, Applicants respond herein.

I. APPEALABILITY OF LBP-89-28

The Licensing Board's decision of October 12, 1989 is not appealable at this time, as it does not constitute a "final" decision for purposes of appeal. As this Board has repeatedly held, "a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory."[4] The second test clearly is not met, since Mass AG (and the other intervenors) still have a myriad of other contentions

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[2] Motion for Expedited Appeal (October 20, 1989) (hereinafter "Motion").

[3] Order (October 23, 1989). Subsequent to that order, the Seacoast Anti-Pollution League ("SAPL") filed a Notice of Appeal joining in Mass AG's appeal of LBP-89-28. See Notice of Appeal on Behalf of Seacoast Anti-Pollution League (October 25, 1989).

[4] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-917, 29 NRC 465, 468 (1989), quoting Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636 (1988).

and issues pending before the Licensing Board, this Board, and the Commission. Nor is the first test met; Mass AG's allegations arising from "an aberration" at the very end of an otherwise fully satisfactory low-power testing program[5] do not constitute "a major segment of the case."

In its unpublished Memorandum and Order of August 1, 1989, this Board considered the question of whether the "onsite" licensing board's disposition of Mass AG's attack on Applicants' mobile siren alerting system constituted "a major, rather than merely a discrete, segment of the proceeding."[6] The Board concluded that it did not. Given that Mass AG's broad-front assault on virtually every facet of Applicants' siren notification system does not constitute a "major segment" of the case for purposes of finality, then clearly his allegations concerning a single isolated incident during low-power testing do not amount to a major segment.[7]

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[5] See LBP-89-28, 30 NRC ___, slip op. at 42 (October 12, 1989); see also id. at 20, 21, 42-43.

[6] Memorandum and Order (August 1, 1989), slip. op. at 2.

[7] Indeed, it is far from clear that the low-power contentions even constitute a "discrete" segment. At least one contention concerning on-site performance is presently before the Licensing Board for decision in its ruling on the adequacy of Applicants' Seabrook Plan for Massachusetts Communities and 1988 exercise performance. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434 (1989). Mass AG has also tendered two contentions concerning the 1989 on-site exercise to the Licensing Board and has informed the Board and parties that it may be filing more. See Intervenors' Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (September 28, 1989), and Intervenors' Second

Accordingly, LBP-89-28 is not an appealable final decision. Mass AG's "Notice of Appeal" therefore is premature and should be dismissed.[8]

II. THE MOTION FOR EXPEDITED APPEAL

Assuming, arguendo, that appeal of LBP-89-28 were appropriate at this time, this Board should nonetheless deny Mass AG's motion for a radical truncation of the schedule for briefing the appeal, for at least two reasons. First, Mass AG has failed to make the showing of good cause required for the granting of his motion. Second, the schedule he proposes is neither appropriate nor fair.

A motion to shorten the time otherwise allowed for the filing of appellate briefs may be granted only upon a showing of "good cause." 10 C.F.R. § 2.711(a). Mass AG's Motion

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Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (October 13, 1989). Finally, Mass AG has stated that more low-power contentions, in addition to those rejected by the Board in LBP-89-28, may well be forthcoming: "Intervenors anticipate further filings in the form of additional bases or further contentions based on not-yet-available-but-expected-information." Intervenors' Motion for Leave to Add Bases to Low Power Testing Contention Filed on July 21, 1989 and to Admit Further Contentions Arising from Low Power Testing Events or, in the Alternative, to Reopen the Record and Second Request for Hearing at 5 (August 28, 1989). Thus, if LBP-89-28 were to be appealed now, while other on-site issues were still pending and/or about to be filed before the Licensing Board, there could occur just the sort of piecemeal review of related issues which this Board rejected in ALAB-917.

[8] For the same reasons, the Notice of Appeal filed by SAPL on October 25, 1989 is also premature, and should be dismissed. See Applicants' Motion to Strike Notices of Appeal (October 26, 1989), filed herewith.

makes no such showing. Mass AG's argument,[9] as Applicants understand it, is that expedition is warranted because some unspecified portion of one of the contentions rejected by the

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[9] In the course of making this argument, Mass AG makes a number of subsidiary misstatements of fact and mischaracterizations of the record which, mindful of this Board's warning in ALAB-917, 29 NRC at 471, Applicants feel impelled to take issue with. They include:

- Mass AG repeatedly states that the NRC has suspended Applicants' low-power license. Motion at 3, 6 and n.8. In fact, the Licensing Board found that no suspension has occurred. LBP-89-28 at 12 ("We accept the Confirmatory Action Letter at face value; it is not a suspension within the meaning of the [Atomic Energy] Act and no hearing rights ensue from it to the Intervenors.")

- Mass AG asserts that "[t]he Licensing Board did not dispute Intervenors' assertion that 'the issues proffered in the contention are material and relevant to the grant of a full-power license.'" Motion at 5. To the contrary, the Licensing Board expressly rejected Intervenors' training allegations on the grounds that they did not allege fundamental flaws and thus were not material. LBP-89-28 at 24-25.

- Mass AG states that "[b]y conference call on October 19, 1989, the Licensing Board advised the parties of its intent to issue the PID on emergency planning for Massachusetts communities by November 10, 1989." Motion at 2 n.3. This statement is simply untrue. What the Board did say during that call was that it now believed the November 30, 1989 target date for its final decision to be reasonably attainable, and that in fact it might even be able to issue its decision a week or two earlier. No new deadline was set, and November 10 was never once mentioned.

- Mass AG claims that "the Licensing Board found that portions of Intervenors [sic] contentions 'meet the threshold test for alleging "fundamental flaws" as required by ALAB-903.'" Motion at 4. Mass AG neglects to mention that the Board made this "finding" only tentatively "in a judgment call for the sake of completeness." LBP-89-28 at 24.

Licensing Board in LBP-89-28 was rejected solely on the basis of failing to meet the requirements for reopening a closed record under 10 C.F.R. § 2.734.[10] The argument goes on to the effect that, because application of § 2.734 is so grievous an error as to be "plainly 'steering what is bound to be a collision course with governing legal principles,'"[11] Mass AG is entitled to expedited review of all of LBP-89-28 (presumably including those portions of the decision which rejected other contentions and portions of contentions, on additional or other grounds).[12]

Prescinding from the fact that Mass AG is trying to bootstrap himself into an expedited appeal of all of his contentions due to an alleged error in the resolution of one unspecified portion of one contention, and accepting arguendo that Mass AG is correct that that mystery portion was excluded solely on the basis of § 2.734,[13] the Motion still

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[10] Motion at 4.

[11] Id. at 7.

[12] Id.

[13] In fact, it is not at all clear that the Board did not have at least three independent reasons for rejecting all of Intervenors' July 21 contention. Aside from § 2.734, the Board found that Intervenors had not carried either the third (contribution to the record) or fifth (delay) factors of the "five factor test" of § 2.714. LBP-89-28 at 44-45. Failure as to those two factors is sufficient, in and of itself, to foreclose admission of a contention. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 59, aff'd, ALAB-915, 29 NRC 427 (1989). Moreover, the Board also stated that it lacked the jurisdiction to grant the

fails to show good cause for the truncated briefing schedule proposed.

The thrust of Mass AG's argument is that, when a decision is so erroneous as to be "plainly 'steering what is bound to be a collision course with governing legal principles,'" then public policy demands expedited review. This proposition has no basis in logic, and no support in the law of this agency. The case cited by Mass AG, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613 (1976), did not address the question of expedited review. Instead, ALAB-330 merely denied reconsideration of an earlier decision denying directed certification of certain licensing board decisions. The "collision course" test established in that earlier decision, and echoed in ALAB-330, relates to certification of issues for review, not expedition in review.

Indeed, logic would dictate that, when so important an error is alleged, full and careful briefing of the issues involved, rather than hurried and truncated briefing, is in order. It should not lightly be assumed, as Mass AG charges here, that a licensing board has committed such monstrous error as to constitute "bad faith."[14]

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relief--interference in an enforcement proceeding relating to low-power testing--sought by Intervenors. LBP-89-28 at 9, 12 13.

[14] Motion at 5.

Full and careful consideration is especially warranted in this case, where the "error" alleged by Mass AG is the Licensing Board's adherence to 10 C.F.R. § 2.734, which regulation Mass AG contends was invalidated by two decisions of the United States Court of Appeals for District of Columbia Circuit even before the Commission adopted it.[15] Prescinding from the fact that no adjudicatory board, including this one, has the power to pass upon the validity of a regulation duly promulgated by the Commission,[16] where the issue is one so weighty as the validity of § 2.734, hasty briefing clearly is not warranted.

Moreover, the schedule proposed by Mass AG is unreasonable. Mass AG offers to file his brief on October 27 and then requires the Applicants and Staff to file their responses by November 3.[17] Even assuming Mass AG hand-delivers his brief to Applicants and Staff before the close of business on October 27 (and he makes no promise to do so), those two parties are given only seven days to respond to what no doubt will be an extensive and complex appeal from a 55-page-long, multi-faceted Licensing Board decision filled with alternate holdings, jurisdictional limitations, and other intricacies. Furthermore, as Mass AG is aware,

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[15] Id. at 5, 6-7.

[16] 10 C.F.R. §2.758(a).

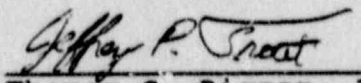
[17] Motion at 1.

November 3 also happens to be the day by which the Commission has required Applicants to file their brief on the issue certified to the Commission in ALAB-922.[18] Thus, even if good cause for expedition were shown to exist (and it has not been), Mass AG's proposed briefing schedule is neither realistic nor fair.

CONCLUSION

For the reasons stated above, Mass AG's and SAPL's notices of appeal should be dismissed as premature, or if appeal is allowed, the Motion for Expedited Appeal should be denied.

Respectfully submitted,



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[18] Order (October 13, 1989) at 2.

CERTIFICATE OF SERVICE

I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on October 26, 1989, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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