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Mr. Henry S. Fox
39 Liberty Street
Newburyport, Massachusetts 01950

Dear Mr. Fox:

Your letter of October 21, 1989 to Mr. Zech regarding the consideration of the financial status of Public Service Company of New Hampshire (PSNH) when judging PSNH's ability to safely operate Seabrook has been referred to me for response.

The section of the Newburyport, Massachusetts October 20, 1989 The Daily News, which you enclosed with your letter, had an article on the decision by the Nuclear Regulatory Commission (NRC) on the financial qualification issue.

The article quoted only part of a sentence (which you had underlined) from page 21 of the Commission's Decision. I have enclosed a copy of that document which puts the matter on financial considerations into accurate perspective. As discussed in pages 19-21 of their Decision, the Commission finds that the financial uncertainties involving PSNH do not lead to a nuclear safety problem. Existing safety requirements, coupled with extensive staff monitoring of PSNH, provide assurance that any nuclear safety issues will be promptly addressed. Other financial protections, such as property insurance, will be in place before a full power license is issued. As you can see from the Commission's Decision, the Commission has carefully considered the issue of financial qualification.

With regard to the Seabrook facility, as well as other nuclear facilities, the NRC, in carrying out its responsibility to ultimately decide licensing a nuclear facility, will use the best information available with a full awareness of our responsibility. We take this responsibility very seriously. The Seabrook plant will not commence operation unless and until we are fully satisfied that safe operation can be performed and that there is reasonable assurance the public health and safety is protected.

Sincerely,
/s/
Richard H. Wessman, Director
Project Directorate I-3
Division of Reactor Projects I/II
Office of Nuclear Reactor Regulation

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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39 Liberty Street
Newburyport, Massachusetts 01950

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R. H. Wessman

Richard H. Wessman, Director
Project Directorate I-3
Division of Reactor Projects I/II
Office of Nuclear Reactor Regulation

Enclosure:
As stated

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtiss

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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL

MEMORANDUM AND ORDER

CLI-89-20

For a second time in this operating license proceeding[1], we are called upon to decide with respect to financial qualification whether there are special circumstances that warrant the exceptional action of a waiver of the Commission's rules.[2] On both occasions, we were asked to waive those rules which, in sum, effectively find that public utilities are financially qualified because they are assured a source of funds for

[1] A group of New England owners, led by Public Service Company of New Hampshire (jointly "Applicants"), seeks a license to operate Seabrook Station, a nuclear power facility located in New Hampshire.

[2] Two requests for waiver or exception from the rules were presented by Applicants in this proceeding. The first, to reduce the size of the EPZ was rejected by the Licensing Board, Public Service Company of New Hampshire, (Seabrook Station Units 1 and 2), LBP-87-12, 25 NRC 324 (1987); the second, to seek an exemption from the requirement for an onsite emergency exercise within one year of the issuance of a full power license, was decided by us and similarly rejected. Public Service Company of New Hampshire, (Seabrook Station Units 1 and 2), CLI-89-19, Sept. 15, 1989.

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safe operation. The first waiver was sought in order to embark on a financial qualification review with respect to the Applicants' financial ability to operate their Seabrook nuclear facility at low power. We found that there were special circumstances which undercut the rationale supporting an assumption of financial qualification for public utilities, but once we had established certain decommissioning requirements for low power operation, no significant safety problem remained that would justify such an undertaking. Public Service Company of New Hampshire, (Seabrook Station Units 1 and 2), CLI-88-10, 28 NRC 573 (1988). Today, we find, as we will amplify below, that the circumstances do not undercut the assurance of the availability from governmental rate-setters of a source of funds adequate for safe operation pursuant to a full power license.[3] Nor have we been shown any other significant link between Applicants' financial situation and a safety problem. Accordingly, we do not grant the waiver sought.

I. Background

A. The Framework Established by CLI-88-10

Less than a year ago in this docket, we construed and applied the Commission's waiver rule, 10 C.F.R. § 2.758.[4] We applied a three-part test for certification of a waiver petition to the Commission. Two parts followed from the explicit terms of the rule:

(1) The waiver petitioner must have presented "special circumstances" in the sense that the petitioner has properly pleaded

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[3] See 28 NRC at 597.

[4] See 28 NRC at 596.

one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived;

(2) those special circumstances must be such as to undercut the rationale for the rule sought to be waived.

28 NRC at 597.

The third prong of the test was implicit in long-standing Commission law, that a rule waiver would be granted only in unusual and compelling circumstances, Public Service Company of New Hampshire, (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 234, 239 (1989), and explicitly served notice that the Commission would not exercise its discretion to waive a rule for less than significant safety reasons:

(3) from the petition and other allowed papers it should be evident that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived.

28 NRC at 597.

Applying that test, the Commission found that the bankruptcy of Public Service Company of New Hampshire (PSNH) and the applicability of New Hampshire anti-CWIP statutes[5] were "special circumstances". In

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[5]Anti-CWIP statutes prohibit the rate authority from authorizing increased rates based on the costs of construction work in progress. Only when the plant begins commercial operation or delivering power to the public, may any of those costs be passed on to the public in the form of increased rates. We need not determine whether New Hampshire's anti-CWIP prohibition will terminate when the Seabrook facility furnishes net generation to the grid or at some later point. In the normal course of

(Footnote Continued)

addition, the Commission assumed without deciding that delay and cessation of project payments by some of the minority owners qualified under the first part of the test as a "special circumstance."

The Commission next found that bankruptcy and anti-CWIP in combination[6] undercut the rationale of the rule. This was so because under anti-CWIP "the utility cannot, strictly speaking, recover any portion of the costs of low-power testing" so long as it was not licensed to and did not produce commercial power. The Commission, on the strength of its recognition in its rulemaking that regulatory delays and phase-ins by the ratemaker did not undercut the rationale of the rule,[7] said that the anti-CWIP provisions, standing alone, might not be critical for most utilities, but that those provisions in combination with PSNH's bankruptcy did undercut the rationale of the rule because the bankruptcy signalled that the anti-CWIP provisions' bar of a source of funding had been critical to PSNH.

(Footnote Continued)
events it would come relatively soon after commencing operations under a full power license. For the most recent 10 facilities to be granted a full power operating license the average time to achieve full commercial operation was four months from the date of license issuance. See "Licensed Operating Reactors, Status Summary Report Data as of 6-30-89", NUREG 0020, Vol. 13, No. 7, passim (1989). In some cases a low power license had not been granted in advance, and thus the time was lengthened by inclusion of the duration of low power testing and time that was necessary to accomplish any remedial work.

[6]Because it was not pivotal to the decision, the Commission assumed without deciding that the minority owners' delay or cessation of project payments also undercut the purpose of the rule for low power when in combination with bankruptcy and anti-CWIP. 28 NRC at 599.

[7]28 NRC at 598, n.25, citing 49 Fed. Reg. at 35,749 (1984).

The Commission then looked to the underlying safety purpose of the requirement to conduct a financial qualifications review from which the rule sought to be waived provided an exception for public utilities. The Commission concluded that the sole reason was to "provide some added assurance that a licensee would not, because of financial difficulties, be under pressure to take some safety shortcuts." 28 NRC at 600.[8]

With this framework, we briefly set forth the administrative history of the petition for waiver certified to us by the Atomic Safety and Licensing Appeal Board ("Appeal Board"). Public Service Company of

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[8]The Commission quoted its 1984 rulemaking:

> A financial disability is not a safety hazard per se because the licensee can and under the Commission's regulations would be obliged to simply cease operations if necessary funds to operate safely were not available. At most, the Atomic Energy Commission, in drafting the rule, must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape. Accordingly, the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced by financial circumstances to choose between shutting down or taking shortcuts while the license was in effect.

Id. at 600 citing, 49 Fed. Reg. at 35,749.

The Commission then commented that:

> "[w]hatever may be the legitimacy of this safety purpose for full-power operation, it stretches reason to suppose that the safety rationale would have any bearing on a limited license for low-power testing. Shortcuts in safety at full power conceivably could avoid shutdowns or derating and thereby contribute to greater plant availability and revenue from power sales. But shortcuts in low-power testing safety will not lead to generation of more revenue that would benefit the plant owners."

Id. (Emphasis added.)

New Hampshire, (Seabrook Station Units 1 and 2), ALAB-920, 29 NRC ____ (1989).[9]

B. The Massachusetts Attorney General's Petition for a Waiver

On February 1, 1989 the Massachusetts Attorney General (MassAG), filed a petition under 10 C.F.R. § 2.758 (the petition) that the rule exempting utilities from a financial qualification review be waived so that Applicants would be required to "establish prior to full power operation, financial qualifications sufficient to cover the cost of Seabrook Unit 1's operation for the period of the license." Petition at 2. The petition argued that the continued existence of two of the "special circumstances" found to exist in CLI-88-10--(1) the bankruptcy, and (2) delay and cessation in project payments -- was sufficient to undercut the rationale for the rule. Massachusetts also asserted that the Commission's reasons in support of its conclusion that there would be no significant safety problem at low power would not hold at full power. To the contrary, asserted Massachusetts, there are incentives to take shortcuts in safety at full power, the amount of money to operate the plant at full power is significant, and the safety risks at full power are substantial.

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[9] Less than a week before MassAG filed the petition certified to us, Seacoast Anti-Pollution League (SAPL) moved for admission of a financial qualification contention assertedly based on its assumption that the Commission had effectively waived the financial qualification exception by recognizing that its rule was undercut by full power. The motion was denied by the Licensing Board. SAPL did not take a separate appeal; however, SAPL submitted a brief in support of MassAG's appeal of the Licensing Board's rejection of his petition. It was SAPL's brief that carried the day for the MassAG before the Appeal Board.

Staff joined Applicants in opposing the petition, and on March 8, 1989, the Licensing Board denied it. Public Service Company of New Hampshire, (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297 (1989). The Licensing Board found that the MassAG had failed to rebut the presumption that the ratesetter would allow Seabrook's rate base to include the costs of safe operation that were prudently incurred. Id. at 303. In addition, the Licensing Board found the Affidavit of E. A. Brown, President and Executive Officer, New Hampshire Yankee Division of PSNH, to be of particular importance. Id. at 304. The Massachusetts Attorney General appealed and was supported in that appeal by SAPL.

C. ALAB-920

After receiving briefs, hearing oral argument and receiving response to a request for supplemental briefing, the Appeal Board decided the matter before it on August 21, 1989. The decision concluded that a prima facie case for waiver had been made.

En route to its ultimate conclusion the Appeal Board had rejected the original position of the MassAG set forth in his petition and brief. The rejection specifically included any argument that bankruptcy standing alone sufficed as a basis for waiver. See ALAB-920, slip op. at 18. The Appeal Board also found no warrant for speculation respecting ultimate ownership of Public Service Company of New Hampshire's share and other uncertainties respecting what regulatory ratesetting authority will

govern Seabrook.[10] Nonetheless, addressing itself to MassAG's "secondary argument", incorporated from SAPL's brief, the Appeal Board found that the effect of anti-CWIP could be felt for as long as 18 months into operations at full power and thus that the same combination that the Commission found to have undercut the rule at low power also would be present at full power. The Appeal Board then considered whether there was a significant safety question and decided that "under the Commission's analysis [in CLI-88-10] operation above five-percent, unlike low-power testing, potentially gives rise to a 'significant safety problem' warranting waiver of the 1984 rule."[11] ALAB-920, slip op. at 25.

The Appeal Board provided an additional reason for referring this matter to the Commission. That reason springs from the Appeal Board's concern that under the UCS case[12] any review by the Staff of financial qualification requires a rule waiver, and from the Commission's conclusion, shared by the Appeal Board, that the utility's bankruptcy "clearly signals that something very unusual and serious has occurred."

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[10] The Appeal Board noted that the license recites "that Public Service 'has exclusive responsibility and control over the physical construction, operation and maintenance of the [Seabrook] facility'" and thus, under our regulations, that a transfer could not be effected without Commission approval. ALAB-920, slip op. at 17, n.30.

[11] The Appeal Board claimed additional support from the Commission's failure to exempt public utilities from its 1987 rule requiring all licensees to notify the agency upon the filing of bankruptcy petitions.

[12] Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert denied sub nom Arkansas Power & Light Co. v. UCS, 469 U.S. 1132 (1985).

ALAB-920, slip op. at 29. In these circumstances the Appeal Board believed the matter should be referred to the Commission for decision.

D. Positions of the Parties

On receipt of the Appeal Board's certification of the petition, the Commission promptly established an opportunity for the parties who opposed the waiver to address the Appeal Board's finding and for a response to those papers by the MassAG and any other party wishing to respond. "Applicants' Response to the Commission's Order of August 22, 1989" (Applicants Response) was filed on Sept. 7, 1989, as was the "NRC Staff's Opposition to Waiver of Financial Qualifications Regulations Applicable to Full Power Operation of Seabrook" (Staff Response). Responses were filed by the MassAG (MassAG's Response) and by SAPL (SAPL Response) on Sept. 26, 1989. SAPL also provided supplemental information in a cover letter which the Commission has considered.

1. Position of the Applicants

Applicants argue that the Commission's holding in CLI-88-10 is not transferable, as the Appeal Board would have it, to the circumstances surrounding full power licensing because in CLI-88-10 the Commission was presented with the possibility that after low power operations there would not be the grant of a full power license. In addition, they argue that the Appeal Board erred in considering regulatory delay following anti-CWIP as significantly different from the regulatory delays found by the Commission not to affect recovery of operating expenses.

In addition, Applicants criticize the Appeal Board for speculation that the regulatory delay will be sufficient to cause a problem and for not addressing, in its consideration of safety significance, the

Licensing Board's reliance on the affidavit of the President of New Hampshire Yankee.

2. Position of the NRC Staff

Staff asserts that the Appeal Board improperly overreached to determine that a prima facie case for waiver had been made. Staff's next major point is that the Appeal Board wrongly concluded that the CLI-88-10 tests for waiver had been met for the relevant period of the full power license. Staff understands the relevant time to be that period before a power level is reached that would justify inclusion of costs in the rate base regardless of when higher rates are in fact permitted.

Finally, the Staff maintains that the Appeal Board erred in finding Staff's actions improper under the UCS case. In Staff's view, it may gather information on financial qualification in order to advise the Commission on whether a waiver is necessary.

3. Position of the MassAG and SAPL[13]

MassAG argues first that PSNH's bankruptcy meets the Commission's three part test: (1) Bankruptcy is a special circumstance, (2) the operation of the anti-CWIP law[14] and the effect of the bankruptcy on the extent and timing of any rate recovery of the construction and operation costs undercut the assumption on which the rule is based, and (3) safety significance is present because "[n]o more powerful example [than

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[13]We treat the positions of MassAG and SAPL under one heading since each has specifically adopted the arguments of the other.

[14]MassAG also argues as a separate point that the Appeal Board was correct in finding that the delay in cost recovery due to anti-CWIP does not disappear on the grant of a full power license, and notes that the Appeal Board found that some delay was a virtual certainty.

bankruptcy] of a company encountering severe pressures to cut corners can be imagined." Response of MassAG at 3. See also SAPL Response at 2-5.

MassAG next argues that recovery of the construction and operating costs of Seabrook will occur outside of the normal ratemaking process and will be significantly and materially delayed. He asserts that the "bankruptcy has triggered an entirely different rate setting process" from that contemplated by the Commission. MassAG Response at 7. See also SAPL Response at 5-12, arguing that anti-CWIP will remain in force until the plant is "used and useful," not merely providing net power to the grid. SAPL's response additionally emphasizes that financial qualification review is needed in light of the defaults of certain other Seabrook owners. See SAPL Response at 12-14.

II. DECISION

The Commission has reviewed the record on the waiver petition before the Licensing Board and the Appeal Board and has particularly considered the Appeal Board's certification (ALAB-920) and the papers of the parties. One fundamental issue--the effect of the delay in a rate increase beyond full power licensure-- governs our result, and thus we turn to it directly. Thereafter, we address the remaining matters requiring our attention.

A. Whether Delay of a Rate Increase Undercuts the Rule

The Appeal Board correctly recognized that bankruptcy, not alone[15] but in combination with the anti-CWIP law, was the basis for our holding at low power that special circumstances had been shown which undercut the basis of our regulation exempting public utilities from any requirement to demonstrate financial qualification. Bankruptcy remains a factor in full power licensing[16], but the critical dispute centers on whether the potential for delay in receiving the increase to cover the costs of safe operation is a special circumstance that undercuts the basis of the Commission's exemption for public utilities.

One side would have it that the following circumstances obtain: (1) the Commission had not considered anti-CWIP in its rulemaking; (2) the delay in receiving the costs of construction was due to anti-CWIP; (3) the anti-CWIP-caused delay in receiving a rate increase on construction costs makes critical an immediate rate increase to cover operation costs; and (4) such a raise is prohibited by anti-CWIP until the plant is "used and useful". Therefore, the argument concludes, anti-CWIP remains a

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[15] This is not to say that bankruptcy standing alone could never undercut the purpose of the rule. We do not here speculate on what circumstances could elicit such a finding, but simply note that the circumstances of this Chapter 11 reorganization do not, insofar as we are aware, undercut either the presumption that an adequate source of funds for safe operation will be allowed by the ratesetter or that the Applicants will be able to use those funds for operations.

[16] It is less clear that defaults will remain after the grant of a full power license in that full power operations can be expected to provide a source of revenue. Moreover, the sums defaulted by defaulting owners do not appear significant and appear to have been made up by other coowners as needed. In any event, our analysis does not depend on this factor.

special circumstance relevant to full power which, together with bankruptcy, continues to undercut the assumption of the rule that a source of funds for safe operation will be available.

Applicants argue the other side[17] that anti-CWIP by its terms is not a factor that diminishes the assurance that ratemakers will allow sufficient rates to produce adequate funds for safe operation at full power, on which the Commission relied when it promulgated the rule excepting public utility operating license applicants from financial qualification requirements.

We believe the Applicants' argument better reflects our intent. It was not simply a delay in recovering costs from low power until full power that dictated our result in CLI-88-10. Rather, because significant hurdles lay between the Applicants and a full power license, the possibility that such a license would not issue following low power was at the heart of the matter. The anti-CWIP law, in the no-full-power-license circumstance that the Commission hypothesized in CLI-88-10, would operate so that recovery of construction costs and costs of low power operation could never be allowed. Indeed, this conclusion infused the Commission's entire consideration of the issues presented in CLI-88-10 and led to a requirement for assurance in the sum of $72.1

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[17] The Staff asserts that anti-CWIP has force only until a power level is reached that satisfies the requirement that power is being supplied to the public. For that interim term, staff argues that power levels would be so low that the same holdings that applied at low power would be applicable for the same reasons. Beyond that point, the Staff says that any delay is too speculative to warrant consideration. We agree that delays are speculative but, as discussed in the following text, our decision here is based on the ground that the Commission considered such delays in its rulemaking.

million for decommissioning after low power if that became necessary. We are satisfied that had Applicants then held a full power license, the anti-CWIP law would not have been a factor, much less have played such a critical role, as is argued by petitioners here, when Applicants undertook low power testing. Nothing in the anti-CWIP law, as we understand it, prohibits including Seabrook's operating costs in the rate base when the plant is operating to serve the public, as it will be fully authorized to do if it receives its full power license.[18]

While a delay is possible, and some minimal delay is probably likely, such a delay is of the kind that the Commission recognized in its rulemaking and accepted as a circumstance that would not undercut the rule. No party has shown that the potential delay in New Hampshire for a rate relief to cover operating expenses is exceptional and outside the range of regulatory delay acknowledged by the Commission.

Further, the Commission has not been shown any other factor that would make it unreasonable for us to continue to rely on the presumption of reasonable assurance of adequate funding for public utilities. As noted above, commercial operations that would trigger rate relief are reasonably to be expected within a few months from the grant of a full power license. In addition, materials provided by MassAG appear to indicate that PSNH has access to adequate revenues and cash on hand to cover its share of Seabrook's operating costs during the period in which

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[18]Although we place no reliance on it, we find that MassAG's failure originally to make the anti-CWIP argument at full power and reluctance to espouse it when suggested, is at least an indication that he too found it a bad fit.

it has not yet reached commercial production.[19] Moreover, the grant of a full power license, without more, by reducing the possibility of cancellation and making eventual recovery of prudently incurred costs likely may be expected to significantly enhance the ability of the company to raise cash in the credit markets. Cf. Coalition for the Environment v. NRC, 795 F.2d 168, 175 (D.C. Cir. 1986). Thus the Commission finds that the grant of a full power license can, as presumed in the generic exemption for public utilities, reasonably assure that Applicants will be able to bridge the gap of any reasonably expectable regulatory delay and will be assured recovery of the costs of safe operation.[20] Because the rule serves its purpose under these circumstances, no waiver is warranted, and none will be granted.

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[19]PSNH's 10-Q filing with the SEC indicates that PSNH likely does have adequate revenues to cover its 36% share of Seabrook operations, particularly in the few months between issuance of the full-power operating license and rate recovery allowed by the New Hampshire PUC. In any event, the filing does not support Intervenors' position that there is clearly such a lack of funds as to raise a significant safety problem. The filing shows that PSNH generated operating income (i.e., operating revenues after expenses other than interest and taxes) of $17.8 million for the three month period ending June 30, 1989 (compared with $21.9 million for 1988). For the six-month periods ending on June 30, 1989 and 1988, the respective amounts are $46.2 million and $58.4 million. Additionally, cash flow for the six months ending on June 30, 1989 and 1988 was $60.3 million and $122.4 million, respectively. "Cash and cash equivalents on hand", which are good indicators of the degree of short-term or medium- term solvency, was $91.7 million as of June 30, 1989. See PSNH's filing of SEC Form 10-Q for Quarterly Period Ended June 30, 1989, provided as Exhibit B to Response of MassAG.

[20]MassAG tells us that reorganization plans are under consideration in bankruptcy court and are all expressly contingent on the consummation of rate agreements. The agreements provide for temporary increases that do not provide revenues to the utility until after final court approval of the reorganization plan and necessary acquisitions are complete.

(Footnote Continued)

B. Indication of a Significant Safety Problem

Given our determination above, we need not reach a discussion of whether a safety-significant problem would be shown were the rationale of the rule undercut. However, we believe it is useful to address the issue in light of the misunderstanding by the Appeal Board, MassAG, and SAPL, of the Commission's discussion of its finding that there was no significant safety problem at low power. Even were the Commission to agree with the Appeal Board, and we do not, that MassAG had made his case that special circumstances were present that undercut the rationale of the rule, we disagree that the pleadings of these parties indicate in terms of CLI-88-10 that a waiver is "... necessary to address ... a significant safety problem related to the rule sought to be waived." 28 NRC at 597. In CLI-88-10, the Commission said:

(Footnote Continued)
MassAG Response at 7. MassAG thus concludes that if "licensure were to occur prior to the completion of the bankruptcy a potentially very lengthy time period would exist in which a bankrupt utility would have a full-power operating license with no or virtually no rate recovery of the costs of construction and operation of Seabrook." MassAG's Response at 8. We think that MassAG's premise does not necessarily support such a conclusion. It appears to us that there are other more obvious explanations for an agreement not to permit revenues to an acquiring utility that has not received all necessary approvals to its acquisition than to exhibit an intent not to grant legally required rate increases to the current utility licensees.

In this regard, it is also far from obvious to us that an injunction against a rate commission from a proceeding against a utility need also be read, as SAPL reads it, to bar a successful application for a rate increase needed for safe operation of a nuclear facility. And, were it to be so read, it would, in appropriate circumstances, be subject to alteration by the court that issued it.

> Whatever may be the legitimacy of this safety purpose [21] for full-power operation, it stretches reason to suppose that the safety rationale would have any bearing on a limited license for low-power testing. Shortcuts in safety at full power conceivably could avoid shutdowns or derating and thereby contribute to greater plant availability and revenue from power sales. But shortcuts in low-power testing safety will not lead to generation of more revenue that would benefit the plant owners. Low-power testing does not generate revenue from power sales. The only purpose of low-power testing is to further ensure plant safety ... There is every incentive to do the job well and no rational incentive to cut corners. [emphasis of "only" in original; other emphases are added].

28 NRC at 600.

Contrary to the apparent or professed understanding of the Intervenors[22], and the apparent reading that led to the constraint felt by the Appeal Board to certify the instant petition to us, CLI-88-10 can not fairly be read that the Commission found that where exceptional circumstances at full power undercut the rationale of the exception for public utilities, there is necessarily a significant safety problem. In the quoted material and following text, the Commission contrasted the circumstances of full power with low power testing operations where it said there was no conceivable incentive for cost-cutting. And, in many other ways, the Commission made clear that in its view there could be no

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[21] The only safety purpose of the rule discerned by the Commission was the intuitive judgment that some additional assurance could result from avoiding a situation where a lack of funds could cause pressure to cut corners. 28 NRC at 600. Nonetheless, the Commission retained its principal reliance on other regulatory means to assure the public health and safety.

[22] SAPL would have us believe that it read our language in comparing low power with full power as so strong as to have constituted a waiver of the rule at full power. We reject that reading.

significant safety problem at low power that required attention in the circumstances that prevailed. What was inconceivable at low power was merely stated to be conceivable at full power. But the standard for showing a significant safety problem has never been "what is conceivable". Thus the Commission did not intend to and did not resolve the question for full power. The Commission made no determination on a matter not before it and left for a later day, if necessary, to decide in the circumstances then before it whether a significant safety problem was presented by any certified petition for waiver on which it was ruling.

Also, there can be no doubt that the Commission intended that the indication of a significant safety problem be something more than simply showing that exceptional circumstances undercut a rule with some basis in safety. Since the vast majority of Commission rules have some basis in safety, if that was all the Commission meant it would have been superfluous for the Commission to announce to its Boards that it did not want a rule waiver certified absent the indication of a significant safety problem. The Commission used the terminology "significant safety problem" to note that it intended to require something more than a theoretical--or conceivable--issue, but insisted on there being a real matter that required resolution.[23]

As we stated earlier, even were there to have been a showing in the matter before us that the rationale of the rule was undercut, the

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[23] Under Commission precedent and the Commission's rulemaking pronouncement, predictions that PSNH will not properly use its source of funds may not be addressed in financial qualification hearings were they

(Footnote Continued)

Commission sees no indication that PSNH's financial uncertainty will overcome the substantial protections that the Commission has in place by means of all its requirements to prevent the occurrence of a significant nuclear safety problem.[24] In the event any full power license is granted, the Commission requires a greater than usual presence by the staff throughout power-ascension. This will be the case at Seabrook as well. After normal full power operation is underway the Commission can direct greater than usual surveillance, if there is any indication that it would be advisable to do do. Any scrimping on compliance with safety requirements will be dealt with promptly and aggressively.

C. The Commission's Role in 2.758 rule waivers

We have concluded, in the part of the process that is tantamount to a review of the certification of the petition, that the petition failed to make a prima facie case and to indicate a significant safety problem. Because the arguments of the parties suggest that the Commission's role in a 10 C.F.R. § 2.758 proceeding is simply to affirm or overrule the certification of the referring board, we think it is important also to

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(Footnote Continued)
initiated. Financial qualification review is satisfied if there is an adequate source of funding. 49 Fed. Reg. at 35749. How funds are spent is a management integrity issue.

[24] We cannot now know whether a case could realistically be hypothesized where we would disturb the financial qualification rule exception for public utilities. Perhaps public utilities' status makes them less likely to succumb to a temptation to cut corners to save money because the prospect of savings is not a realistic one. When funds expended for safe operation are recoverable and when a rate of profit is allowable on the investment portion, any incentive to cut corners could be highly speculative. In any event, we need not decide this generic matter at this time.

discuss briefly the Commission's role, even though the Commission does not here reach the policy decision that is contemplated under its regulation at section 2.758 in that it has found that Intervenors did not make a prima facie case.

Under § 2.758 the boards are not permitted to make a rule waiver decision, but a board must simply certify a rule waiver petition to the Commission after finding that the petitioner has met extremely high standards--compelling circumstances in which the rationale of a rule is undercut. What the Commission has protected by this process is the ability of the Commission itself to decide as a matter of policy, once a prima facie case has been made, when, and if so, to what extent its codified regulations are to be waived. This is done only after an informed judgment in the totality of the circumstances, recognizing and evaluating any relevant circumstance that in the judgment of a majority of the Commissioners should be taken into account.[25] Only the Commission has the necessary authority and perspective to respond to whatever exigent circumstances it finds upon review of a waiver request.[26] Indeed

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[25] It is significant that under § 50.12(a)(2)(vi) the regulations permit the grant of a rule exemption where "there is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption." No less latitude would be available to the Commission under 2.758 when deciding to let an exemption stand, i.e. in this case NOT to waive a rule.

[26] On a related point, we agree with the Appeal Board that the staff may not make financial qualification determinations relative to licensing without a rule waiver. On the other hand the staff is surely correct that it may make threshold inquiry sufficient to decide whether to seek a rule waiver. Any such threshold inquiry will be conducted outside the adjudicatory portion of an ongoing operating license proceeding. Staff inquiries without more cannot be sufficient to waive the rule contrary to the Commission's carefully constructed Section 2.758 regulation.

there is precedent in this proceeding for the Commission to take special steps, short of rule waiver, to deal with potentially significant safety issues. Specifically, we refer to the decommissioning requirement imposed at low power. Typically, parties should expect that where appropriate the Commission will attempt to find practical solutions to alleged safety issues associated with petitions to waive its rules.

The Commission expects here that the Staff shall apply the necessary resources to monitor Seabrook's compliance with safety regulations. The Staff shall be particularly sensitive to any signs that cost-cutting is impinging on safety. The Commission has consistently preferred to place its reliance on the ability of its inspectors to discern the indicia of corner-cutting that could lead to a lack of safety rather than on its ability to make financial predictions. See e.g., 49 Fed. Reg. 13044, 13046 (1984). In addition, other financial protections will be in place before a full power license is granted as a result of our requirement that Applicants be in compliance with property insurance and decommissioning plan requirements relevant to full power before such a license is issued.

In consideration of the foregoing, we find that no financial matter need be expected to disturb a finding of reasonable assurance that

Seabrook's operations will be consistent with public health and safety if it is allowed to operate at full power.

It is so ORDERED.

For the Commission[27]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of October, 1989

[27]Commissioner Rogers was unavailable to participate in the formal vote on this order; if he had been present he would have approved it.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

EDO Principal Correspondence Control

ACTION

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DOC DT: 10/21/89
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Henry S. Fox

TO:

Chairman

FOR SIGNATURE OF: ** GRN ** CRC NO: 89-1166

Murley

DESC: ROUTING:

CONCERNING SEABROOK NUCLEAR PLANT Russell, RI
Scinto, OGC

DATE: 10/27/89

ASSIGNED TO: CONTACT:
NRR Murley

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ACTION OFFICE: EDO

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SUBJECT: Financial status of Public Service Company of New Hampshire

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