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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL 50-444-OL February 1, 1990

RESPONSE OF THE MASSACHUSETTS ATTORNEY GENERAL AND THE NEW ENGLAND COALITION ON NUCLEAR POLLUTION TO BOARD ORDER OF JANUARY 11, 1990

The Massachusetts Attorney General ("Mass AG") and the New England Coalition on Nuclear Pollution (the "Intervenors") submit this response to the Board's January 11, 1990 Memorandum and Order Regarding Issues Remanded in ALAB-924 (the "Order"). In the Order the Board provided "interested parties" an opportunity to

> advise the Board on how to proceed in accordance with the directives of ALAB-924 and how they propose to participate in the resolution of the remanded issues.

The Intervenors advise as follows:

1. This Board acted unlawfully and beyond its jurisdiction on November 9 in authorizing a Seabrook license in

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the face of ALAB-924.[1] Not only did the Board openly and directly contradict the express holding of ALAB-924 as to the possibility of approving the NHRERP in its present posture,[2] the Board obviously denied Intervenors any possibility of a prelicensing hearing on the remanded issues thereby violating the Atomic Energy Act. This latter error was based on this Board's apparent belief that prior to licensing, it is free to determine whether any issues still to be resolved are "significant" and if they are not then to defer resolution

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1/ Attached as Exhibit 1 is the Intervenors' December 1 Motion to Revoke this Board's November 9 licensing action. A detailed analysis of the various infirmities in this Board's action is set forth at 17-35.

2/ The Appeal Board held that the NHRERP was not an approvable plan without sheltering detail a nd by this statement it held that no reasonab.e assurance finding could be made. ALAB-924 at 68, n. 194 and cases cited therein. Although on November 20, this Board noted the Appeal Board's ruling (LBP-89-3[illegible] at 4 n.3), this Board also asserted in flat contradiction to this ruling that ALAB-924 did not impact on the "requisite findings of reasonable assurance of public safety." LBP-89-33 at 4. This is the legal equivalent of 2 + 2 = 5. Notwithstanding all the arguments and post facto justifications made for this Board's actions by the Board, by the Staff and the Applicants to the Commission and by the Commission to the Court of Appeals, not one word of explanation has been offered as to how this lower Board could find "reasonable assurance" in the absence of sheltering detail and approve the NHRERP on November 9 when its superior appellate Board held that the NHRERP could not be approved without such detail on November 7. In this posture, it is difficult literally to even read this Board's January 11 Order regarding this Board's professed interest in proceeding "in accordance with the directives of ALAB-924." Order at 1. The only way for this Board to proceed in accordance with that decision is to revoke and vacate its November 9 action and to otherwise be guided by and act in accordance with law.

(including resolution by hearing when necessary) until after licensing. This procedure is manifestly unlawful and, indeed, is indistinguishable from the "no significant hazards" determination set out at 10 CFR §50.91 which is applicable only to license amendments but not to licenses. In these circumstances, Intervenors advise that the Board revoke and vacate its November 9 action so that it can proceed "in accordance with the directives of ALAB-924." Order at 1.

2. As this Board is aware, jurisdiction over its unlawful licensing action has passed to the Court of Appeals. In response to Intervenors' Emergency Petition for Mandatory Relief seeking judicial revocation of the November 9 licensing action, the Commission represented that it would decide similar Intervenor motions for revocation on the merits. In response, the Court on January 4, 1990 denied Intervenors' mandamus request expressly noting the Commission's representation. Intervenors expect the Commission will grant those motions thereby terminating its immediate effectiveness review and returning the licensing proceeding to the status quo ante November 9, 1989. In the event the Commission denies this relief, Intervenors expect the Court to strike down this Board's patently unlawful action.

In any event, this Board is without jurisdiction at this juncture to proceed, for example, with post-licensing hearings on the remanded issues. One major component of the legal error committed by this Board on November 9 concerns the denial of prelicensing hearing rights and this error is now before the Court of Appeals on the merits. Were this Board to now proceed

with hearings on the remanded issues, the fact that these hearings were held (or were being held) might be cited by the Commission to the Court in response to Intervenors' arguments that such hearings were unlawfully denied prelicensing. The Commission might well argue that such post-licensing hearings (although obviously evidence that this Board erred in issuing a license on November 9) moot the Intervenors' claim of error. Thus, the merits of Intervenors' appeal to the Court would be adversely affected. Indeed, through such an inverted procedure, the Commission and its licensing boards could routinely deny prelicensing hearing rights and then while appeal was pending conduct all necessary proceedings thereby potentially mooting appeal. Obviously, such a procedure might permit this Board's November 9 errors to escape review and reversal.

Furthermore, the appropriateness of the licensing action taken on November 9 in light of the posture of the remanded issues at that time is the heart of Intervenors' appeal of that action before the Court. For example, as discussed above, this Board made a "reasonable assurance" finding regarding New Hampshire's plan in the absence of any sheltering detail being in place when the Appeal Board had held that the NHRERP could not be approved in that posture. This error is now before the Court. It is simply not possible now for this Board to proceed to develop a record on sheltering detail after the fact thereby permitting the Commission to argue this post facto cure of the Board's legal error before the Court. As the Court has stated:

> Once a petition to review has been filed in court, the FCC has no authority to conduct further proceedings without the Court's approval. The reviewing court must order a remand if there is to be provision for further administrative consideration.

Greater Boston Television Corp. v. FCC, 463 F2d 268, 283 (D.C. Cir. 1971). Attached as Exhibit 2 is the Intervenors' January 19 Motion to Enjoin this Board from interfering with the review of its November 9 action now before the Court. Rather than repeat in detail the arguments set out in this pleading, the Intervenors simply incorporate the reasons set out there as further grounds for their claim that this Board has no authority to proceed in such a fashion so as to adversely affect the merits of Intervenors' appeal now pending.

3. Notwithstanding the foregoing and in order to protect their rights to participate in further proceedings if and when this Board is again free to proceed,[3/] the Intervenors reference the detailed analyses of the four remanded issues set out at 35-62 of Exhibit 1. These analyses discuss in detail ALAB-924, this Board's November 20 explanation and the record on the NHRERP. The conclusions reached are as follows:

A. New Hampshire teachers: Evidentiary submissions on the question whether New Hampshire teachers are ordinarily expected to perform certain services are necessary.

3/ Intervenors are in receipt of Applicants' fatuous January 26 Motion to Dismiss Abandoned Remand Issues and will timely file an opposition thereto. The Mass AG notes here, however, that after ALAB-924 issued he expressly claimed his right as an interested state to participate fully in all remanded issues. See Request of Intervenors for Prehearing Conference in Response to ALAB-924, dated November 9, 1989 and served by telefax on that date at 3 n.1.

B. Special Need Survey: The prelicensing hearing now denied Intervenors twice must be held.

C. ALS and ETEs for special populations: Planning omissions must be corrected first. Special facility ETEs must be submitted and then their adequacy as reliable and useable estimates for the various facilities must be evaluated and tested by the hearing process.

D. Beach Sheltering: Planning omissions must be corrected first. Then the adequacy of the beach sheltering procedures must be litigated by the parties.

At the point and only at the point at which this Board could proceed to act in accordance with ALAB-924 and provide the prelicensing hearings to which Intervenors were entitled without interfering with the appeal of the November 9 licensing action, should the Board conduct those hearings as set out above. Thus, until the November 9 license authorization is revoked or upheld on the merits on appeal, no further Board action is appropriate.

Respectfully submitted,

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Dated: February 1, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I, John Traficonte, hereby certify that on February 1, 1990, I made service of the within RESPONSE OF THE MASSACHUSETTS ATTORNEY GENERAL AND THE NEW ENGLAND COALITION ON NUCLEAR POLLUTION TO BOARD ORDER OF JANUARY 11, 1990[1] by Federal Express as indicated by (*) and by first class mail to:

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1/ Exhibits to the above referenced pleading are already a part of the record and have previously been furnished to all parties. For the convenience of the judges, they are being included with this new document.

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