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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'90 FEB 12 P8:04

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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  
) Offsite Emergency Planning

NRC STAFF'S RESPONSE TO APPLICANTS'  
MOTION TO DISMISS CERTAIN REMANDED ISSUES

On January 26, 1990, the Applicants filed a motion requesting the dismissal of certain issues which were remanded to the Licensing Board in ALAB-924, 30 NRC \_\_\_\_ (Nov. 7, 1989), on the grounds that those issues have now been abandoned by their sole proponent, SAPL. <sup>1/</sup> Specifically, the Applicants urged the dismissal of those portions of SAPL's NHRERP Contentions 15, 18 and 25, which were remanded in ALAB-924, based on SAPL's letter to the Board of January 19, 1990, in which SAPL expressed its intention not to participate in further proceedings before the Board on these matters. For the reasons set forth below, the NRC Staff supports the Applicants' Motion.

In an Order dated January 11, 1990, the Licensing 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." Order at 1. In

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<sup>1/</sup> "Applicants' Motion to Dismiss Abandoned Remand Issues," dated January 26, 1990 ("Motion").

response to that Order, SAPL informed the Board that it "did not have the least interest whatsoever in any further proceedings before the Board," since the Board had already authorized the issuance of a full power license for Seabrook Station. At the same time, SAPL indicated that "[i]f . . . these new proceedings involve licensing, SAPL will again be a participant." <sup>2/</sup>

In their Motion, Applicants assert that three of the four issues remanded by the Appeal Board in ALAB-924 had been raised solely in contentions filed by SAPL. Motion at 1-2. Specifically, these issues involve (a) the Board's finding that letters of agreement (LOAs) are not required for teachers who may accompany schoolchildren on evacuation buses; (b) the adequacy of the March 1986 NHCDA special needs survey; and (c) whether the ETEs include loading times for advanced life support patients. Applicants also note that the second and third issues listed above were litigated and appealed solely by SAPL (Motion at 2); that a party may not elect to abandon and resurrect issues at will; that other parties, having chosen not to litigate the issues previously, may not now be permitted to pick up the issues abandoned by SAPL; and that even if SAPL did not intend to withdraw altogether from the litigation of these issues, the issues nonetheless should be dismissed as a sanction for SAPL's "contumacious response" to the Board's Order (Motion at 3-4).

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<sup>2/</sup> Letter from Robert A. Backus, Esq., to the Board, dated January 19, 1990, at 1, and 2 n.1.

It is undisputed that these three issues arose and were litigated as SAPL contentions. <sup>3/</sup> At the same time, the Staff concurs with Intervenor's assertion that SAPL did not manifest an intention to abandon the remanded issues altogether, but merely declined to participate in any proceedings which do not affect license issuance (e.g., SAPL Response at 2). However, in light of the Board's determination in LBP-89-33 that these issues should and will be addressed as post-licensing matters, SAPL's letter to the Board constitutes an effective withdrawal from any such further proceedings before the Board on these matters. In the absence of any Commission determination to vacate the Board's authorization of a license pending resolution of these issues, SAPL's withdrawal from post-licensing proceedings acts to deprive these issues of a proper sponsoring party in those proceedings. Accordingly, unless some other party has effectively adopted these three remanded issues as their own, the Applicants' motion to dismiss these issues should be granted.

It is elemental that in a proceeding held only to consider matters placed in controversy by the board or parties, the withdrawal of the only contentions at issue in the proceeding would end the proceeding. E.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985); Rochester Electric & Gas Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-84-34, 20 NRC 769 (1984). Where the proponents of other contentions remain in the proceeding, the withdrawal

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<sup>3/</sup> See "Seacoast Anti-Pollution League's Objection to Applicants' Motion of January 26, 1990" ("SAPL Response"), dated February 1, 1990; and NECNP/MassAG's "Intervenor's Opposition to Applicants' January 26 Motion to Dismiss Abandoned Remand Issues" ("NECNP/MassAG Response"), dated February 7, 1990.

of an intervenor would not terminate the proceeding, but would serve to remove the withdrawing party's contentions from litigation. South Texas, 21 NRC at 382-83; see also Project Management Corp. (Clinch River Breeder Reactor Plant, ALAB-354, 4 NRC 383, 391-92 (1976). Contentions are not cognizable issues for litigation which are independent of their sponsors. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113-14 (1981). Moreover, there is no automatic "right" to litigate important safety matters associated with an operating license application. South Texas, 21 NRC at 382. The threshold decision to admit an issue for litigation does not turn it into a cognizable issue for litigation independent of its sponsoring intervenor. South Texas, 21 NRC at 383 & n.100, citing Comanche Peak, supra. To the contrary, upon the withdrawal of a contention's sponsor, other intervenors have no automatic right to "pick up the baton" and litigate the contention, since the failure to sponsor the contention has the attendant risk that the issue will have a nonadjudicatory resolution. South Texas, supra; Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 705-98 (1977). <sup>4/</sup>

In order for a contention to remain in issue in the proceeding after its sponsor has withdrawn from participation, the Board must either raise it sua sponte based upon the requisite findings set forth in 10 C.F.R.

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<sup>4/</sup> The Staff notes that parties may not be allowed to step in and out of contested issues at will. See e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975); Public Service Co Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 268-69 (1978).

§ 2.760a, or must approve its adoption by another party based on a balancing of the five late-filing criteria set forth in 10 C.F.R. § 2.714(a). South Texas, 21 NRC at 382-84. <sup>5/</sup> In the instant case, NECNP and the Mass AG have failed to request leave from the Board to adopt SAPL's issues as their own, nor have they made any attempt to satisfy the five factors specified in 10 C.F.R. § 2.714(a). For example, they have uniformly failed to indicate how they would litigate these issues, much less who their witnesses would be and what their testimony would establish. In light of these circumstances, the three remanded issues have not been adopted by any other Intervenor. <sup>6/</sup>

While NECNP and the Mass AG assert that they have adopted these issues by taking certain other actions (NECNP/MassAG at 3-5), those actions cannot reasonably be said to constitute an effective adoption of these issues. First, NECNP and the Mass AG's appeal from the Licensing Board's license authorization (NECNP/MassAG Response at 2-3), and their various motions seeking to vacate and/or stay that decision (*id.* at 4-5),

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<sup>5/</sup> A previous ruling allowing SAPL to adopt an withdrawn contention is consistent with these general principles since the withdrawn contention was already incorporated by reference in an admitted SAPL contention. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-488, 8 NRC 187, 191 (1978).

<sup>6/</sup> As the Staff has previously noted, the Appeal Board's decision in ALAB-924 does not address the issue of whether the remanded matters constitute significant safety issues; nor is there any basis to conclude that the Appeal Board's remand of these three issues constitutes anything more than an identification of areas where the Board's rulings require further refinement. In addition, the Licensing Board has indicated its view that these three issues do not involve significant safety issues. LBP-89-33, 30 NRC (November 20, 1989), slip op. at 4-6, 9-12, 16-17, 28-29, 31-32. In the absence of any serious safety issue, there is no basis for the Board's sua sponte authority to be exercised.

do not constitute an adoption of the issues, nor do they serve to countermand the effect of SAPL's withdrawal of its sponsorship. Second, upon SAPL's withdrawal, the pendency of an appeal on those issues by any other party (NECNP/MassAG Response at 3) could be dismissed as moot, absent a Board ruling adopting the issue sua sponte or permitting those parties to adopt the withdrawn issues as their own.<sup>7/</sup> Similarly, the Mass AG's participation in the proceeding as an "interested State" (NECNP/Mass AG Response at 3-4) does not confer broader participatory rights in this regard than are available to Intervenors. To the contrary, once an interested State has been admitted to a proceeding, it must comply with all procedural rules and is subject to the same requirements as parties appearing before the Board. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). In addition, the case law set forth above establishes, contrary to SAPL's assertion, that SAPL's issues do not automatically become litigable by other parties in the proceeding simply because they "involve issues of the public health and safety" (SAPL Response at 2). Instead, upon a sponsor's withdrawal, the abandoned issue becomes subject to resolution outside the bounds of the adjudicatory forum.

Finally, the Staff shares the Applicants' view that SAPL's letter to the Board evidences disrespect for the Board's authority. Pursuant to 10 C.F.R. § 2.713(c), the Board is empowered to reprimand, censure or

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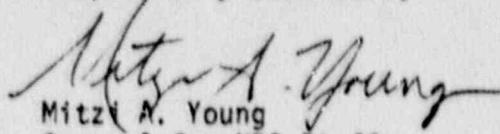
<sup>7/</sup> Given SAPL's apparent interest in continuing to litigate these issues if they are treated as relevant to licensing (i.e., as matters to be resolved prior to license authorization), the Staff does not suggest that the appeals from LBP-89-32 are mooted by SAPL's withdrawal from post-license authorization proceedings.

suspend from the proceeding any party or representative of a party "who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct." Indeed, the failure to comply with orders issued by an NRC adjudicatory board can lead to the imposition of serious sanctions, including the dismissal of an entire proceeding. <sup>8/</sup> See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Units 1 and 2), LBP-88-24, 28 NRC 311 (1988), aff'd, CLI-89-2, 29 NRC 211 (1989). Nonetheless, the Staff is not prepared to agree that SAPL's letter in this instance is so "contemptuous" as to warrant the imposition of sanctions.

CONCLUSION

In light of SAPL's withdrawal from participation in further proceedings before the Board with respect to these three remanded issues, and in the absence of any Commission action requiring that such proceedings be held prior to license authorization, these three issues should be dismissed.

Respectfully submitted,

  
Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 12th day of February, 1990

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<sup>8/</sup> See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).

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OFFICE OF SECRETARY  
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Docket Nos. 50-443 OL  
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Off-site Emergency Planning

CERTIFICATE OF SERVICE

I hereby certify that copies of "(1) NRC STAFF RESPONSE TO MASSACHUSETTS ATTORNEY GENERAL AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION COMMENTS ON REMAND ISSUES; (2) NRC STAFF'S RESPONSE TO APPLICANTS' MOTION TO DISMISS CERTAIN REMANDED ISSUES" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by double asterisks, by express mail, this 12th day of February 1990:

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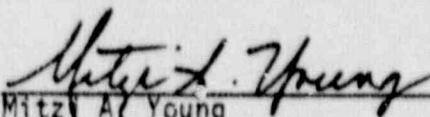
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