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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
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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 RESPONSE TO "INTERVENORS' REQUEST
FOR AN OPPORTUNITY TO BRIEF ALAB-924 IN THE EVENT THE COMMISSION
DECIDES TO REVIEW IT AND FOR A HOUSEKEEPING STAY"

Edwin J. Reis
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for Reactor Licensing

February 23, 1990

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DECIDES TO REVIEW IT AND FOR A HOUSEKEEPING STAY"

On February 8, 1990, "Intervenors' Request For An Opportunity To Brief ALAB-924 In The Event The Commission Decides To Review It And For A Housekeeping Stay" (Request), was filed.

a. Section 2.787(b)(6) of the Commission Rules of Practice, 10 C.F.R. Part 2, provides:

If a petition for review [of an Atomic Safety and Licensing Appeal Board decision] is granted, the Commission may issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument to be held, or both.

Thus, the Commission has discretion to allow the filing of briefs where it has granted a petition to review a decision of an Atomic Safety and Licensing Appeal Board. On the other hand, the Commission could review an Appeal Board decision on the basis of the decision itself, the record, and the briefs filed before that Board.

In the event the Commission elects to review ALAB-924, the Staff would not object to the Commission providing for a single additional brief of not more than 25 pages from the petitioning Intervenors specifically

addressing the arguments Intervenor's call attention to in footnote 1 of the subject request. ^{1/} No argument is made from the point of view of "fairness" or otherwise as to why additional briefing is needed on any other matter addressed in ALAB-924. ^{2/}

The Petitions to Review ALAB-924 are separate from the motions to vacate and stay ALAB-924, as well as from the Commission's immediate effectiveness review of that decision pursuant 10 CFR § 2.764(f)(2). The allowance of a brief on the merits of ALAB-924, should the Commission determine to review that decision, would, of itself, have no bearing upon the Commission's presently pending immediate effectiveness review or the consideration of other motions directed at vitiating ALAB-924. ef. 10 CFR § 2.764(g).

b. The subject Request also contains arguments directed at the Commission's ability to proceed with "further merits review of the Seabrook case" in view of the Intervenor's appeal of LBP-89-32 to the Court of Appeals. However there is no final agency action here. Although the Licensing Board issued a decision authorizing the issuance of a full power operating license for Seabrook, that decision has no effect until it was

^{1/} Intervenor's, in that footnote, claim that the Applicants and Staff addressed a total of 24 pages to the correctness of ALAB-924.

^{2/} In not objecting to the filing of briefs from the Intervenor answering arguments made in the Staff and Applicants' opposition to the Motion to Vacate LBP-89-32, the Staff does not concede that any of the arguments therein were wrongly made. The Staff could rightly set out its answer to Intervenor's arguments as to why LBP-89-32 should be vacated including the Staff's views of why ALAB-924 was not correctly decided under the law of this Commission. The Intervenor's had a full opportunity to argue that ALAB-924 was correctly decided in the extensive briefs they previously filed seeking to vitiate LBP-89-32 and LBP-89-33.

approved by the Commission. As the Court of Appeals recognized in Oystershell Alliance v. NRC, 800 F.2d 1201, 1206 (D.C. Cir. 1986):

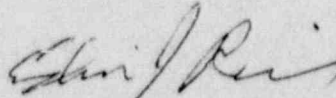
"[T]he Commission has revised its regulations as they pertain to the effective date of Licensing Board decisions. Under current regulations, those decisions will not become effective until they are reviewed and explicitly approved by the Commission. 10 C.F.R. §§ 2.764(a)(f)(2)(i)." [emphasis on original.]

Thus, at this stage of the proceedings, where the Commission has yet to act under 10 C.F.R. § 2.764(f)(2), there is nothing to prevent the Commission from reviewing ALAB-924 and LBP-89-32, and reversing or vacating those decisions, if appropriate. The Intervenor's filing of a petition for review in the Court of Appeals cannot affect the Commission's Rules of Practice and transform non-final, intermediate decisions into final orders so as to prevent the Commission from considering and possibly vacating intermediate orders. Intervenor's have no right to a merits review in the Court of Appeals of an order which the Commission has not approved, and no right to prevent the Commission from reviewing ALAB-924 as incident to seeing if LBP-89-32 was correctly issued and should be made effective. Cf. Intervenor's Request at 7-8.

c. The Intervenor's also request a housekeeping stay of 30 days should the Commission approve the immediate effectiveness order in LBP-89-32 allowing it to be effective. At 8-9. The Staff would not

object to a brief stay of 7 days. No reason is shown why a longer stay is needed, particularly in view of Intervenor's familiarity with the issues and its former applications seeking relief from the Court of Appeals.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Edwin J. Reis".

Edwin J. Reis
Deputy Assistant General Counsel
for Reactor Licensing

Dated at Rockville, Maryland
this 23rd day of February 1990