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April 4, 1990
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 Issues)

LICENSEES' MEMORANDUM WITH RESPECT TO
JURISDICTION OF THIS APPEAL BOARD
OVER APPEALS OF LBP-89-28

Under date of March 29, 1990, the Intervenors have filed a memorandum addressing the issue of this Appeal Board's jurisdiction to entertain the appeal of LBP-89-28. As we understand the position taken by the Intervenors, it is that the pendency of Commonwealth of Massachusetts v. NRC, No. 90-1132 (D.C. Cir.) (hereafter "No. 90-1132") precludes this Appeal Board from entertaining this appeal absent the assent of all parties thereto. The Intervenors have given limited assent, good until they file their docketing statement.¹ Licensees have taken the

¹We confess to a lack of understanding as to the significance of the filing of the docketing statement. Jurisdiction either is with this Appeal Board now or it is not; the filing of the docketing statement does nothing to confer,

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position that if assent is required, as Intervenors argue, Applicants do not consent.² However, as seen below, no such assent by anyone is necessary for an Appeal Board of the NRC to entertain an appeal of LBP-89-28 as of this time.

NRC case law is clear to the effect that the Commission and its appeal boards will proceed with intra-agency appeals even though a petition for review is pending in a Court of Appeals at least absent a situation where the intra-agency appeal is of a decision which is squarely before the Court of Appeals under the petition for review.³ Unfortunately for Intervenors, LBP-89-28 is not before any Court of Appeals.

At this juncture, the only live case dealing with Seabrook's full power license in the United States Court of Appeals for the District of Columbia Circuit is No. 90-1132.⁴ Another case which attempted to bring up for review the decision of the Licensing Board authorizing issuance of the full power license, LBP-89-32, Commonwealth of Massachusetts v. NRC, No 89-1743 (hereafter "No. 89-1743") has been dismissed.⁵ Thus, to the extent the

move or erase jurisdiction in any tribunal.

²Tr. 62 (March 27, 1990).

³Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 242-45 (1976); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-350, 4 NRC 365, 366 (1976). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-24, 4 NRC 522, 523 (1976).

⁴The other live case deals with the low power license. Commonwealth of Massachusetts v. NRC, No. 89-1306.

⁵No. 89-1743 Order (March 7, 1990).

jurisdictional argument relies upon the concept that LBP-89-28 was included in the Petition for Review filed in No. 89-1743, the order of dismissal vitiates that argument.

The matters which are the subject of No. 90-1132 were first brought to the Court by various motions filed in No. 89-1743. These motions included a motion entitled: "Petitioners' Motion to Amend Petition for Review or, in the Alternative, to Have Their March 7 Dispositive Motion Deemed a Petition for Mandamus" (here after "Motion to Amend").

After the Court dismissed No. 89-1743, it entered another order which, inter alia, gave birth to No. 90-1132. In that order, referring to the Motion to Amend, the Court:

"ORDERED that the motion to amend petition be construed as a new petition for review or in the alternative, a petition for writ of mandamus. The new petition shall be designated as No. 90-1132 and captioned Commonwealth of Massachusetts, et al. v. NRC."⁶

As a result of the above-quoted order, the scope of the live case, No. 90-1132, is the review sought in the Motion to Amend. A review of that document reveals that the review thereby sought is solely of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-02, 31 NRC ____ (March 1, 1990) and only Pages 1-15 of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-03, 31 NRC ____ (March 1, 1990).⁷ CLI-90-02 of course has nothing to do with

⁶No. 89-1743 Order (March 7, 1990) (emphasis added).

⁷Motion to Amend at 3 n.2.

LBP-89-28, it being the answer to a certified question. In the case of CLI-90-03, Pages 1-15 dealt only with the Commission's denial of Intervenors' motion to vacate LBP-89-32 on the grounds that the Licensing Board had no power to authorize a full power license in light of the Appeal Board decision in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC ____ (Nov. 7, 1989). The portion of CLI-90-03 that deals with LBP-89-28 deliberately was not taken up. It is true that in a footnote in a reply brief before the Court of Appeals, the Intervenors stated:

"Petitioners, as noted, analogized the situation to noticing the appeal after the disposition of a discretionary motion for reconsideration or new trial. If this is in error and the court finds that the Petition for Review in Docket No. 90-1132 must also expressly identify the non-adjudicatory portions of CLI-90-03 for jurisdiction to lie, Petitioners request that this reply be deemed an amended Petition for Review."

Prescinding from the propriety of tucking a motion to amend in a footnote of a reply brief,⁹ the fact is the Court has not acted on the motion and therefore, as of this writing, LBP-89-28 is

⁸No. 90-1132, Petitioners' Reply to the Respondents' Opposition to "Dispositive Motion" and "Motion for Expedited Consideration" (March 13, 1990) at 9 n.11.

⁹In addition, the footnote went on to make clear that the Intervenors were seeking the amendment only for jurisdictional purposes, repeating that "[t]hey do not seek judicial review of the non-adjudicatory, non-merits discretionary decision 'approving' the license." Petitioners' Reply, supra n.8 at 9 n.11.

simply not before the Court of Appeals, never mind squarely
before it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

90 APR -9 P3:46

I, Thomas G. Dignan, Jr., one of the attorneys for the Licensees herein, hereby certify that on April 4, 1990, 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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