

Filed: June 8, 1983

DOCKETED  
USNRC

'83 JUN 13 10:36

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
before the  
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443
	)	50-444
(Seabrook Station, Units 1 & 2)	)	
	)	

APPLICANTS' RESPONSE TO  
NECNP PETITION TO THE  
APPEAL BOARD FOR DIRECTED  
CERTIFICATION

On May 11, 1983 the Atomic Safety and Licensing Board in this proceeding entered a Memorandum and Order<sup>1</sup> dismissing "Contention II.B.4" (the Contention) raised in this proceeding by the New England Coalition

<sup>1</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-\_\_\_, 17 NRC \_\_\_ (1983). Hereafter cited to the slip opinion as "ASLB Memo."

8306150387 830608  
PDR ADOCK 05000443  
G PDR

D503

on Nuclear Pollution (NECNP). This contention, in its entirety, was as follows:

"The Quality Assurance Program for operations as described in the FSAR does not demonstrate how the Applicant will assure that replacement materials and replacement parts incorporated into structures, systems, or components important to safety will be equivalent to the original equipment installed in accordance with proper procedures and requirements, and otherwise adequate to protect the public health and safety. Similarly, the Quality Assurance Program does not assure or demonstrate how repaired or reworked structures, systems, or components will be adequately inspected and tested during and after the repair or rework and documented in 'as built' drawings."<sup>2</sup>

The contention was dismissed upon motions of the Applicants' and the Staff for Summary Disposition. NECNP now seeks directed certification of this ruling.<sup>3</sup>

---

<sup>2</sup>ASLB Memo at 27.

<sup>3</sup>NECNP has numerous issues still pending; the ruling on the particular contention at issue is interlocutory; and thus there is, and NECNP asserts, no right of appeal.

For the reasons set forth below the Applicants say that the petition for directed certification should be denied.<sup>4</sup>

---

<sup>4</sup>This response deals only with the issue of whether directed certification should be granted; when, as and if the Appeal Board grants directed certification, the Appellants will brief the merits of the issues raised.

Nevertheless, it does seem appropriate that two observations be made at this stage. First, NECNP does not appear to assert that Contention II.B.4 was not ripe for summary disposition (see NECNP Petition at 4-5); NECNP's position, rather, is that the disposition (properly) made summarily ought to have been in its favor (though NECNP filed no motion of its own). Second, NECNP in its petition has mischaracterized the nature of the Licensing Board's ruling below (and, therefore, it has of necessity mis-stated what the legal issue on appeal will be when the matter is ripe for appellate review): prescinding from any rulings on other contentions of other parties, the ruling on this contention is not a case where the Licensing Board relied upon Applicant commitments. Rather, as one of two alternate grounds for decision, the Board relied upon material incorporated by reference into the FSAR (to provide the supposedly missing details of "how" something will be done in the future). See ASLB Memo at 29. See Tr. 751-53 (4/7/83). That, indeed, this contention was not resolved by reliance on a commitment to "do" something in the future is necessarily belied by the fact that the contention itself, as admitted by the Board, was limited to the adequacy of the FSAR submission on the topic. See the Licensing Board's Memorandum and Order of 9/13/82 at 80.

Stripped of rhetoric, NECNP's petition seeks a ruling that an asserted error of law by a Licensing Board in granting a summary disposition motion as to one of several contentions in a proceeding (many of which remain for hearing) is grounds for the grant of a petition for directed certification. It is argued that this error is one that meets the second part of the usual test applied to petition for directed certification i.e., that it is one that "[will affect] the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1109, 1192 (1977).<sup>5</sup> While NECNP argues that, the

---

<sup>5</sup>NECNP advances no assertion that the ruling in question would qualify under the first prong of the Marble Hill standard.

argument still comes down to an argument that what has happened is that mere error of law has been committed.<sup>6</sup> In such circumstances the words of the Appeal Board in Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981) are on point and dispositive:

"[I]t has not been satisfactorily explained why appellate scrutiny of the ruling cannot abide the event of the initial decision and (if dissatisfied with the result reached in that decision) [Intervenor's] appeal from it. To be sure, if the ruling were found erroneous on such an appeal, the consequence might well be a vacation of the initial decision and a remand to the Board below. But the same possibility exists with respect to all interlocutory determinations made by licensing boards on matters which have a potential bearing upon the outcome of the proceeding. If, standing alone, that consideration were enough to justify interlocutory review, it would perforce follow that virtually

---

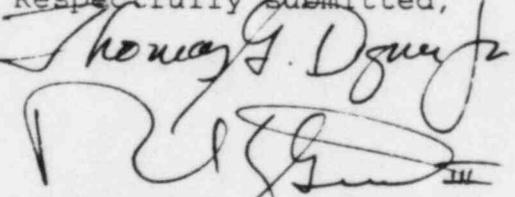
<sup>6</sup>The argument that the asserted error is pervasive in that two other contentions, raised by a different intervenor who does not seek interlocutory review, were also dismissed is merely an argument that the ruling, if unjustly made (as NECNP says) and if applied elsewhere (as NECNP says), is the law of the case at the Licensing Board level. This is true of all rulings of law: it does not single out this case as being one in which "the public interest will suffer or unusual delay or expense will be encountered," Public Service Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 479, 483 (1975).

every significant licensing board ruling during the course of a proceeding would be a fit candidate for immediate appellate examination. It is scarcely necessary to expound at any length upon why a drastic alteration of existing practice to accommodate that thesis would be intolerable - as well as in derogation of the Commission's explicit policy disfavoring interlocutory review.

Here as in Allens Creek, "No serious claim has been, or could be, made that the ruling in question has 'affected the basic structure of the proceeding in a pervasive or unusual manner'." 13 NRC at 311 n.1.

Conclusion

For the foregoing reasons, the petition for directed certification should be denied.

Respectfully submitted,  


Thomas G. Dignan, Jr.  
R. K. Gad III  
ROPES & GRAY  
225 Franklin Street  
Boston, MA 02110  
(617) 423-6100

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on June 8, 1983, I made service of the within Applicants' Response to NECNP Petition to the Appeal Board for Directed Certification by mailing copies thereof, postage prepaid, to:

Alan S. Rosenthal, Chairman  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Gary J. Edles, Esquire  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Dr. Reginald L Gotchy  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission

Washington, D.C. 20555  
Diana P. Randall  
70 Collins Street  
Seabrook, NH 03874

Helen Hoyt, Chairperson  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Dr. Emmeth A. Luebke  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

William S. Jordan, III, Esquire  
Harmon & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, DC 20006

Dr. Jerry Harbour  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Dana Bisbee, Esquire  
Assistant Attorney General  
Office of the Attorney General  
208 State House Annex  
Concord, NH 03301

Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Roy P. Lessy, Jr., Esquire  
Office of the Executive Legal  
Director  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Atomic Safety and Licensing  
Appeal Board Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Robert A. Backus, Esquire  
116 Lowell Street  
P.O. Box 516  
Manchester, NH 03105

Philip Ahrens, Esquire  
Assistant Attorney General  
Department of the Attorney  
General  
Augusta, ME 04333

Anne Verge, Chairperson  
Board of Selectmen  
Town Hall  
South Hampton, NH

David L. Lewis  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory  
Commission  
Rm. E/W-439  
Washington, DC 20555

Jo Ann Shotwell, Esquire  
Assistant Attorney General  
Environmental Protection Bureau  
Department of the Attorney General  
One Ashburton Place, 19th Floor  
Boston, MA 02108

Mr. John B. Tanzer  
Designated Representative of  
the Town of Hampton  
5 Morningside Drive  
Hampton, NH 03842

Ms. Olive L. Tash  
Designated Representative of  
the Town of Brentwood  
R.F.D. 1, Dalton Road  
Brentwood, NH 03833

Robert C. Pevear  
Designated Representative of  
the Town of Hampton Falls  
Drinkwater Road  
Hampton Falls, NH 03844

Patrick J. McKeon  
Selectmen's Office  
10 Central Road  
Rye, NH 03870

Mrs. Sandra Gavutis  
Designated Representative of  
the Town of Kensington  
RFD 1  
East Kingston, NH 03827

Calvin A. Canney  
City Manager  
City Hall  
126 Daniel Street  
Portsmouth, NH 03801

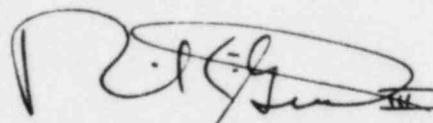
Ruthanne G. Miller, Esquire  
Law Clerk to the Board  
Atomic Safety and Licensing  
Board  
U.S. Nuclear Regulatory  
Commission  
Washington D.C. 20555

Mr. Angie Machiros  
Chairman of the  
Board of Selectmen  
Town of Newbury  
Newbury, MA 01950

Mr. Maynard B. Pearson  
40 Monroe Street  
Amesbury, MA 01913

Richard E. Sullivan, Mayor  
City Hall  
Newburyport, MA 01950

Donald E. Chick  
Town Manager  
Town of Exeter  
10 Front Street  
Exeter, NH 03833



---

Robert K. Gad III