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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 - OL 50-444 Off-site Emergency Planning
(Seabrook Station, Units 1 and 2)	

NRC STAFF'S RESPONSE TO INTERVENORS' MEMORANDUM OF LAW REGARDING THIS BOARD'S PRESENT JURISDICTION

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April 5, 1990

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MEMORANDUM OF LAW REGARDING
THIS BOARD'S PRESENT JURISDICTION

On March 29, 1990, the Massachusetts Attorney General (Mass AG), Seacoast Anti-Pollution League (SAPL) and New England Coalition on Nuclear Pollution (NECNP) (hereinafter referred to as "Intervenors") filed a "Memorandum of Law Regarding This Board's Present Jurisdiction" ("Memorandum"), as promised by the Mass AG at oral argument on March 27, 1990. In their Memorandum, Intervenors state that they have filed appeals before the U. S. Court of Appeals challenging the Commission's decision authorizing the Seabrook operating license -- and they argue that the pendency of their Court appeals deprives this Board of jurisdiction to act on their pending, previously filed, intra-agency appeals in any manner which is inconsistent with, or which would interfere with, the Court's jurisdiction over matters they raised (or will raise) before the Court of Appeals.

The NRC Staff files this response in opposition to the Intervenors' Memorandum. For the reasons set forth below, the Staff submits that the Appeal Board continues to have jurisdiction to consider the Intervenors'

pending appeals, and that the Board should reject Intervenors' various jurisdictional arguments as unfounded, in the absence of any Order by the Court of Appeals directing the Board to stay further consideration of Intervenors' appeals.

DISCUSSION

A. Finality of the Commission's Decision.

The Intervenors assert that their currently pending appeals before the Court of Appeals challenge a final, reviewable agency action, which they contend consists of the Licensing Board's authorization of a license in LBP-89-32, "together with the non-adjudicatory executive decision of the Commission [in CLI-90-03] to allow that authorization to become effective" (Memorandum at 2). While the Intervenors recognize that the Court of Appeals dismissed their prior appeal from LBP-89-32, on the grounds that it was not a final agency action, they contend that their filing of subsequent appeals after the Commission's issuance of CLI-90-03 cured this defect (Memorandum at 2-3).

The Intervenors' arguments concerning the finality of LBP-89-32 and CLI-90-03 are in error. 1/ Plainly, the Commission's issuance of its immediate effectiveness decision had the effect of authorizing a license, and that decision, in certain respects, may now be reviewable by the Court of Appeals -- although it does not constitute the final agency decision on

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1/ Pursuant to NRC regulations, an initial decision authorizing issuance of a license does not become final agency action until 45 days after its date of issuance, provided no appeal is filed. 10 C.F.R. § 2.760(a). The filing of appeals pursuant to § 2.762, as in the instant proceeding, or the issuance of a Commission directive that the record be certified to it for final decision, tolls the finality of a Licensing Board's decision. Id.

these matters. 2/ However, the Licensing Board's prior decisions in this proceeding have not yet been finally adjudicated within the agency and they are, therefore, not yet reviewable by the Court of Appeals.

Section 189(b) of the Atomic Energy Act, 42 U.S.C. § 2239, provides that:

> Any final order entered in any proceeding of the kind specified in subsection a. above [e.g., a proceeding for the "granting, suspending, revoking, or amending" of an operating license] shall be subject to judicial review in the manner prescribed in the [Hobbs Act, 28 U.S.C. § 2341 et seq.,] and to the provisions of section 10 [section 704] of the Administrative Procedure Act, as amended.

The Hobbs Act, in turn, provides that the Court of Appeals has jurisdiction to review "all final orders" of the Commission which are "made reviewable by section 2239 of title 42," which jurisdiction is invoked by the filing of a petition for review within 60 days after entry of the final order. 28 U.S.C. §§ 2342(4), 2344.

In determining whether an agency decision or action constitutes a "final order" within the meaning of these provisions, the courts have adopted a "pragmatic" test, governed by two relevant factors: (1) whether the process of administrative decision-making has reached the stage that judicial review will involve no possible disruption of the orderly process of adjudication, i.e., whether there is nothing else for the agency to

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2/ For instance, the Court may be asked to examine whether the Commission acted arbitrarily and capriciously in approving the Licensing Board's authorization of a license pending the outcome of Intervenors' various appeals and motions to reopen, or whether the Commission's action was so flagrantly wrong and demonstrably critical as to make apparent reversal of the agency's action. See Ohio Citizens for Responsible Energy v. NRC, 803 F.2d 258 (6th Cir. 1986), cert. denied, 481 U.S. 1016 (1987).

do, and (2) whether rights or obligations have been determined or legal consequences will flow from the agency's action. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970). Accord, Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 13-14 (1st Cir. 1988). The finality provisions of 28 U.S.C. § 2342 have been likened to the provisions of 28 U.S.C. § 1291, which governs appeals from final orders of Federal District Court decisions; and both provisions have been found to reflect the reasoned policy judgment that administrative and judicial processes should proceed with a minimum of interruption. Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1024 (D.C. Cir. 1976). Accord, New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F. 2d 1338, 1351 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 866 (1989).

The courts' adherence to this principle is based on a desire to permit the administrative agency with substantive expertise on the issues to complete its review, as well as considerations of judicial economy of resources and the avoidance of undertaking appellate reviews which may be mooted by ongoing proceedings within the agency. For instance, in Sierra Club v. NRC, 825 F.2d 1356 (9th Cir. 1987), the court declined to disturb a Commission order allowing restart of a reactor, which order was issued prior to receipt and resolution of petitioners' request for a hearing and request for a stay. While the petitioners appealed from the Commission's determination not to issue an immediate decision on their requests, they failed to appeal from the Commission's subsequent order denying their requests for hearing and a stay. In this posture -- even though the Commission's order allowing restart of the reactor was "final"

in the sense that, like the Commission's immediate effectiveness decision in CLI-90-03, it permitted reactor operation -- the court found the petition was "fatally premature" and dismissed it for lack of jurisdiction. The court stated:

> An order is final when the administrative agency has given its 'last word on the matter.'. . .
>
> "Judicial intervention in uncompleted administrative proceedings, absent a statutory mandate is strongly disfavored." We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary.

825 F.2d at 1362 (citations omitted). 3/

Other judicial decisions involving challenges to Commission actions support this outcome. In Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986), the court upheld the Commission's authorization of a full power license under its immediate effectiveness rule, despite the pendency of the petitioners' motions to reopen before the Appeal Board. The court found that the Commission's immediate effectiveness decision

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3/ The court in Sierra Club also found that the petitioners had failed to demonstrate "some overarching 'hardship,'" -- despite the effectiveness of the restart order -- because they "had the opportunity to present their grievances to the Commission and could seek appellate review of that decision." 825 F.2d at 1361. The court further stated (id. at 1361 n.6):

> It must be noted that the petitioners sought adjudication of their grievances in an administrative tribunal, the NRC. The NRC has expertise in this highly technical area, the NRC and litigants expended substantial resources in adjudicating the issues, and the petitioner appealed those issues before the NRC had an opportunity to pass on the controversy. Moreover, the time necessary for a final administrative ruling was minimal and the NRC proceedings involved the identical technical issues presented to this court.

constituted a non-merits review, and that the Commission's decision to allow the license to issue prior to resolution of petitioners' motions to reopen was entirely without prejudice to any later decision on those motions or other issues raised in the proceeding. Id. at 1203, 1206.

Upon reviewing the history and purpose of the Commission's immediate effectiveness rule, the court in Oystershell Alliance found that it "specifically contemplates Commission approval of a full-power operating license prior to the resolution of appeals or motions associated with ongoing challenges." Id. at 1206. The court upheld, as reasonable, the Commission's determination not to stay the effectiveness of the Licensing Board's decision, based on its review of the record and its conclusion that the plant could be operated safely pending resolution of the petitioners' motions; and it observed that this conclusion was "well within the Commission's discretion." The court concluded as follows:

> It is petitioners' implicit position that the regulatory scheme enshrined in section 2.764 is inherently flawed because it permits licensing decisions to become effective prior to a review on the merits. That position is without support. Nothing in the AEA makes resolution of all appeals by an Appeal Board mandatory prior to Commission action on a Licensing Board's initial decision. To the contrary, section 191(a) of the AEA, 42 U.S.C. § 2241(a), vests wide discretion in the Commission to establish 'one or more atomic safety and licensing boards . . . to conduct such hearings as the Commission may direct and make such intermediate and final decisions as the Commission may authorize. . . . ' Id.
>
> The Commission is thus well within its discretion in providing in 10 C.F.R. § 2.764 for immediate effectiveness of Licensing Board initial decisions upon Commission review notwithstanding the pendency of appeals to the Appeal Board, and especially notwithstanding motions to reopen on which the Appeal Board has not yet ruled. . . .

While the court in Oystershell Alliance did not expressly address the question of whether an immediate effectiveness decision constitutes a "final decision" under 28 U.S.C. § 2342, the court's analysis indicates that it does not. Thus, the Sixth Circuit Court of Appeals applied the reasoning of Oystershell Alliance in deciding that no "final decision" occurs until the agency's review is concluded. Ohio Citizens for Responsible Energy, Inc. v. NRC, 803 F.2d 258 (6th Cir. 1986), cert. denied, 481 U.S. 1016 (1987). There, the court found that a Commission order denying petitioner's motion to reopen, issued prior to a Commission meeting and vote on whether to authorize a full power license, was not a final order. The court stated as follows:

> We conclude that, in licensing proceedings before the NRC, a final order is the order granting or denying a license (citations omitted). The District of Columbia Circuit's decision in Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986) (per curiam), strongly supports our conclusion. In Oystershell Alliance, petitioners argued that their motions to reopen the licensing proceedings should have been decided before the Commission authorized full-power operation. The court disagreed, concluding that the Commission's decision to license after examining all relevant evidence and determining that the plant could be operated safely, was 'well within the Commission's discretion.' At 1206.
>
> The court also affirmed the Commission's decisions denying the motions to reopen. . . . Implicit in the court's entire discussion is the notion that review of the final licensing decision is the appropriate proceeding in which to consider all objections.
>
> We conclude that the analysis utilized in the decisions discussed above is the appropriate one for use in reviewing licensing decisions of the NRC. Because review of the final licensing decision may encompass all challenges raised in the proceeding, such review is to be withheld until a final decision is issued.

803 F.2d at 260-261 (emphasis added). 4/

Other courts have applied similar reasoning in finding that the filing of a motion for reconsideration renders the underlying agency decision "nonfinal" within the meaning of the Hobbs Act. For example, in United Transportation Union v. ICC, 871 F.2d 1114 (D.C. Cir. 1989), the court dismissed, for lack of jurisdiction, a petition for review of the ICC's denial of a motion to reopen. There, the agency had issued a decision denying petitioner's motion to reopen and allowing a purchase transaction to be consummated. The petitioner then filed, before the Commission, a motion for reconsideration of the denial and for review of an underlying arbitral award involving petitioner's claims; while the motion for reconsideration remained pending within the agency, the petitioner filed for judicial review. Upon reviewing the procedural posture of the petition, the court held, "a pending petition for rehearing must render the underlying agency action nonfinal (and hence unreviewable)

4/ The court's decision in Ohio Citizens employs the same reasoning as the Appeal Board utilized in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-349, 4 NRC 235, 244-45 (1976). There, the Appeal Board rejected Applicants' assertion that it lacked jurisdiction to consider certain pending appeals due to the filing of petitions for judicial review in the Court of Appeals. While the Appeal Board held that the licensing board's decision was a final order within the meaning of the Hobbs Act, it noted that the courts have insisted upon the exhaustion of administrative remedies prior to undertaking judicial review on the merits of an agency decision. It therefore concluded that the pendency of a petition for judicial review did not deprive it of jurisdiction to consider the pending appeals (Id. at 245)-- although it suggested, without deciding, that it might be appropriate for it to seek leave of the court to reconsider matters squarely pending before the court. Id. at 245 n.16. See also Id., ALAB-350, 4 NRC 365, 366 (1976) (finding that abstention might be appropriate as a matter of comity between court and agency); see also Id., CLI-76-24, 4 NRC 522, 523 (1976).

with respect to the filing party." Id. at 1116. In support of this conclusion, the court cited its prior decision in Outland v. CAB, 284 F.2d 224, 227-28 (D.C. Cir. 1960) (finding that a motion for rehearing rendered an agency action nonfinal), emphasizing its prior statement that "when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." Id. at 1117.

The court in United Transportation Union further cited the decision in ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1988), where the Supreme Court held that "a timely petition for administrative reconsideration stay[s] the running of the Hobbs Act's limitation period until the petition ha[s] been acted upon by the Commission," and where it interpreted Section 704 of the Administrative Procedure Act, despite its literal meaning, as allowing petitions for reconsideration to render agency actions nonfinal. 5/ 871 F.2d at 1117-18, citing

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5/ Section 704 of the Administrative Procedure Act provides, in pertinent part, as follows:

> Sec. 704. Actions Reviewable.
> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

West Penn Power Co. v. EPA, 860 F.2d 581 (3rd Cir. 1988), and Winter v. ICC, 851 F.2d 1056 (8th Cir.), cert. denied, 109 S.Ct. 308 (1988). 6/

An application of these principles to Intervenors' jurisdictional arguments compels the conclusion that Intervenors' currently pending appeals and motions to reopen before the Appeal Board and Commission render the Licensing Board's decisions nonfinal for purposes of judicial review. The Intervenors' pending appeals and motions involve the same matters as they raise, or will raise, before the Court of Appeals. Those matters are currently under review within the Commission, the agency having expertise to decide them, and could still result in a decision in Intervenors' favor, thus mooting any judicial appeal. The pendency of these appeals and motions militate against judicial review of the Licensing Board's decisions, and plainly render those decisions nonfinal for purposes of judicial review. Only at such time as the agency's internal appellate reviews are completed will the Licensing Board's decisions become final -- notwithstanding the fact that the Commission has allowed plant operation to commence, on the basis of its immediate effectiveness review.

Intervenors' argument that their filing of petitions for review before the Court of Appeals "deprives" the agency of jurisdiction to consider their pending motions and appeals (Memorandum at 5-6) is unfounded. First, if Intervenors were correct in their assertion, the pivotal determination of what constitutes a "final decision" under the

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6/ The Supreme Court's interpretation of Section 704 of the Administrative Procedure Act vitiates the Intervenors' reliance upon the literal terms of that provision. See Memorandum at 2-3.

Hobbs Act would be made, not on the basis of established law and regulatory process, but upon a party's unilateral determination to invoke judicial review. That unfettered election might be made, for instance, when a party is no longer content with the agency's handling of its concerns and decides that it might do better in some forum outside the agency -- and it would seek judicial review of a licensing board decision rather than allow established agency review processes to run their prescribed course. Such a result is clearly untenable.

Nor do the cases cited by Intervenors warrant a contrary result. For instance, Intervenors cite Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972), for the proposition that "[o]nce 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." (Memorandum at 5-6). That case states generally that a petition for review removes the agency's authority to conduct further proceedings without the court's approval. However, there, the agency's proceeding had already concluded and the agency (the FCC) asked the court to recall its mandate affirming a final FCC order in order to permit the agency to consider arguments concerning the reopening of the proceeding. Id. at 272. In those circumstances, where both the agency's proceedings and the court's review had concluded, the court declined to recall its mandate. Id. at 290-91. Greater Boston is simply not apposite to the case at bar.

Moreover, other statements by the court in Greater Boston support a finding that the Appeal Board continues to have jurisdiction to decide the

pending appeals. Thus, the Court defined a "final" administrative order as one "which is no longer subject to appeal to the court, for which no administrative reconsideration is permitted by regulatory statute." Id. at 282. Further, the court noted that the agency has undoubted authority to reconsider an order it has entered before it becomes final, in order to correct errors or to hear newly discovered evidence before an appeal. Id. And, the court observed that the need for administrative flexibility and the objective of securing the right result in a particular case have relative dominance where judicial review is sought prior to the effective date of a final administrative order. Id.

Nor is American Farm Lines v. Black Ball Freight Service, 397 U.S. 540 (1970), cited by Intervenors (Memorandum at 5), to the contrary. There, the Court held that the agency did not act improperly in reopening a proceeding to take additional evidence, despite the pendency of judicial review and the entry of an order staying operation of the challenged decision. The Court recognized the agency's authority to grant rehearings and to modify or reverse its decisions, and found that while the operation of the challenged order had been stayed by the District Court, the agency had not been stayed from further consideration of the matter. The Court held that, despite the pendency of the petition for judicial review, the agency never lost jurisdiction to pass on petitions for rehearing. 7/

7/ The Court's statement, quoted only in limited part by Intervenors, was as follows:

> This power of the Commission to reconsider a prior decision does not necessarily collide with the judicial

(Footnote continued on next page)

B. The Appeal Board's Authority to Act.

The Supreme Court's decision in American Farm Lines, supra, is instructive in considering the Intervenors' assertion that the Appeal Board is proscribed from taking any action that would interfere with the Court's jurisdiction over their pending judicial appeals. It indicates clearly that the Intervenors' filing of judicial appeals does not deprive the Appeal Board of jurisdiction to consider the pending appeals. Indeed, the Appeal Board's own decision in Seabrook, ALAB-349, supra, reaches the same conclusion.

All that is left to decide is whether the Appeal Board is required to seek permission from the Court of Appeals for its review to continue. In this regard, it is clear that the Intervenors are entitled to seek a stay of any further review of their appeals, either from the Appeal Board or

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(Footnote continued from previous page)

> power of review. For while the court properly could provide temporary relief against a Commission order, its issuance does not mean that the Commission loses all jurisdiction to complete the administrative process. It does mean that thereafter the Commission is "without power to act inconsistently with the court's jurisdiction." Inland Steel Co. v. United States, 306 U.S. 153, 160. When the Commission made the additional findings after its first order was stayed by the court, it did not act inconsistently with what the court had done. It did not interfere in the slightest with the court's protective order. . . .

The Court further concluded that, because the agency had jurisdiction to act, had completed its reconsideration before the administrative record was filed and oral argument was held, and had not been stayed from reconsidering the matter, "it was not necessary for the Commission to seek permission of the court to make those rulings." Id. at 542. The agency's action was therefore found to be "in full harmony with the court's jurisdiction." Id.

from the Court. Thus, section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, provides:

> Sec. 705. Relief Pending Review.
> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

As the Staff understands the current status of their appeals, Intervenors have not sought to enjoin the agency from further consideration of their appeals. In our view, until they seek and obtain such relief, no reason exists for the Appeal Board to discontinue or limit its review of the pending appeals. The Court of Appeals currently has before it, at best, Intervenors' appeal from the Commission's immediate effectiveness decision; 8/ indeed, the Applicants point out that even that decision is not properly before the Court. 9/ In these circumstances, the merits of the Licensing Board's decisions are not squarely before the Court, and the agency properly may continue to review Intervenors' various appeals from those decisions without interfering with the court's jurisdiction. 10/ The cases cited by Intervenors suggesting that certain procedures should

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8/ As noted supra, at 3 n.2, review of the Commission's immediate effectiveness decision is properly limited to a determination whether the Commission's action was arbitrary and capricious, or whether it is so flagrantly wrong as to make reversal likely.

9/ "Licensees' Memorandum With Respect to Jurisdiction of This Appeal Board Over Appeals of LBP-89-28," dated April 4, 1990, at 2-4.

10/ Of course, the parties can always bring to the attention of the court any subsequent decisions of the agency, and the court could then stay the effectiveness of any such decision should it choose to do so.

be followed if further agency review is to be undertaken (Memorandum at 5-6) are not applicable here, inasmuch as final agency action on the Licensing Board's decisions has yet occurred.

CONCLUSION

For the reasons more fully set forth above, the Staff submits that there is no jurisdictional bar to the Appeal Board's continued consideration of Intervenors' pending appeals.

Respectfully submitted,

Sherwin E. Turk
Senior Supervisory
Trial Attorney

Dated at Rockville, Maryland
this 5th day of April, 1990

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' MEMORANDUM OF LAW REGARDING THIS BOARD'S PRESENT JURISDICTION" 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, this 5th day of April 1990:

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