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

LICENSEES' RESPONSE TO APPEAL BOARD ORDER OF MAY 14, 1990, AND MOTION TO STRIKE NOTICE OF APPEAL

By order of May 14, 1990, this Appeal Board asked Licensees to serve by hand, no later than noon on May 18, responses to three questions raised by a document filed by the Attorney General of The Commonwealth of Massachusetts ("Mass AG") styled "Notice of Appeal and Related Motion as to LBP-90-12" (May 11, 1990) [hereinafter "Notice"].[1] The three

[1] Although styled as a notice "on behalf of" the Seacoast Anti-Pollution League ("SAPL") and the New England Coalition on Nuclear Pollution ("NECNP") as well as Mass AG, in fact the Notice is signed only by counsel for Mass AG. Mass AG has no standing to notice an appeal on behalf of, or to assert the alleged interests of, SAPL and NECNP. See Carolina Power and

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questions are: (1) whether the Appeal Board should "enter an order precluding the Licensing Board from conducting any further proceedings concerning the issue of sheltering the beach population until such time as [the Appeal Board] resolve[s] those aspects of the sheltering issue for which [Mass AG] seek[s] review;" (2) whether Mass AG should "be permitted to have the issues raised in [his] notice of appeal deemed submitted on the basis of [his] May 11 submission and the pleadings attached thereto;" and (3) "whether [Licensees] intend to file a motion to dismiss [Mass AG's] appeal with respect to any of the issues identified in the May 11 submission and, with regard to each matter that will be subject of such a motion, specify briefly what the grounds for the motion will be." Licensees herein respond to each of the questions in turn and further, pursuant to the third question, move to strike Mass AG's notice of appeal in its entirety.

I. THE LICENSING BOARD SHOULD NOT BE STAYED FROM FURTHER PROCEEDINGS ON THE REMANDED BEACH SHELTER ISSUE.

This Board has already denied one attempt by Mass AG to block the Licensing Board from proceeding with the issues

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Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-43 n.58 (1986); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986).

remanded to it by this Board in ALAB-924.[2] Moreover, the Commission and this Board have, on three separate occasions, also rejected demands by Mass AG that agency proceedings be halted in favor of his attempts to pursue review by the Court of Appeals.[3]

Undaunted by these repeated rebuffs, however, Mass AG is back again, demanding that this Board issue "an order preventing the Smith Board from any further processing of the

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[2] Order of January 24, 1990 (summarily denying "Intervenors' Motion to Enjoin Licensing Board from Interference with Court Appeal" (Jan. 19, 1990)).

[3] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC __ (March 1, 1990) (denying, sub silentio, Mass AG's claim at pages 8-11 of "Intervenors' Supplemental Motion and Memorandum in Support of November 13 Motion to Revoke and Vacate the November 9 License Authorization" (Dec. 1, 1989) that he could strip the NRC of any further jurisdiction to proceed by his filing of a notice of appeal with the Court of Appeals); Order of April 12, 1990 (summarily denying as, inter alia, "totally lacking in substance," "Intervenors' Motion for Immediate Stay or Cessation of Further Appeal Board Review of LBP-89-32, LBP-89-33 and Related Issues" (April 11, 1990)); Order of April 13, 1990 (summarily denying "Intervenors' Motion for Reconsideration" (April 12, 1990)).

In its Order of April 12, this Board reviewed and rejected essentially the same jurisdictional argument which Mass AG repeats at pages 1-2 of the present Notice. Licensees accordingly do not address that issue further, other than to note that Mass AG's argument flies in the face of a line of recent decisions by the very court whose jurisdiction Mass AG claims has ousted the jurisdiction of this agency. See United Transportation Union v. ICC, 871 F.2d 114 (D.C. Cir. 1989); TeleSTAR, Inc. v. FCC, 888 F.2d 132 (D.C. Cir. 1989); ICG Concerned Workers Ass'n v. United States, 888 F.2d 1455 (D.C. Cir. 1989).

shelter remand issue."[4] Mass AG states that he is entitled to such an order "because further processing by the Smith Board of the sheltering issue as it now remains after the Board's literally absurd interlocutory rulings concerning its nature and scope, is a waste of judicial resources and itself a further aspect of the sham character of this proceeding."[5] In sum, Mass AG asserts that, because he does not like the Licensing Board's procedural rulings to date, he is entitled to a stay of proceedings by the Licensing Board. This assertion by Mass AG is unfounded as a matter of law, as well as erroneous as a matter of fact. Accordingly, this Board should deny Mass AG's demand for a stay.[6]

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[4] Notice at 12 (emphasis in original).

[5] Id. at 6 n.7.

[6] Although Mass AG claims to be interested in avoiding "a waste of judicial resources", he also blandly announces that he "will shortly seek from the Commission an order enjoining the Smith Board from all further trial level process in this case." Id. Moreover, on May 16, 1990, Mass AG filed with the United States Court of Appeals for the District of Columbia Circuit a pleading styled as "Emergency Motion for an Order Enjoining the NRC from Further Trial-Level Adjudicatory Process" [hereinafter "Emergency Motion"]. In it, Mass AG demands that the Court of Appeals, "on or before May 23, 1990", "issue an order enjoining the NRC and its Licensing Board from further trial-level adjudicatory process in the Seabrook licensing proceeding." Emergency Motion at 6, 5.

Mass AG also states that "any further effort before the agency" to obtain such a stay would be "futile and pointless", id. at 5, thus raising a question of whether Mass AG still intends to seek relief from the Commission -- and indeed whether he still intends to press his present motion before this Board, since such an order by the Court of Appeals (or the Commission) would moot Mass AG's present motion to this Board, and render the

A. The Necessary Predicate to Mass AG's Motion -- Present Appealability of the Beach Shelter Sub-Issues -- is Lacking.

Mass AG asks this Appeal Board for a stay "until the Board rules on those aspects of [the beach shelter] issue for which Appeal Board review is now sought."[7] The necessary predicate to his stay request, therefore, is that those beach shelter sub-issues[8] must be properly before this Board for further appellate review at this time, since if there is nothing for this Board to review then there is no reason to stay the Licensing Board from proceeding.

In fact, however, none of Mass AG's identified "aspects of that issue" are properly now before this Board. As is discussed in detail in Section III infra, the sub-issues raised by Mass AG do not constitute a major segment of the overall licensing proceeding; nor should directed certification of those issues be granted (assuming, arguendo, that Mass AG has properly sought directed certification). Mass AG's motion therefore lacks its essential perquisite -- an Appeal Board review in favor of which the Licensing Board

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Board's and the parties' efforts to address the motion "futile and pointless".

[7] Notice at 12.

[8] Although Mass AG acknowledges that another, distinct beach shelter sub-issue was certified to this Board by the Licensing Board, he pointedly does not seek a stay pending an answer to the certified question. Compare Notice at 5 to id. at 12.

proceeding should be stayed -- and the motion should be denied on that ground alone.

B. Mass AG Has Not Shown That a Stay Pending Appeal is Warranted.

As noted above, Mass AG's sole stated justification for his stay request is that he does not like the order issued by the Licensing Board.[9] Dissatisfaction, however, does not constitute adequate grounds for the "extraordinary equitable remedy" of a stay pending appeal.[10] Rather, Mass AG must meet the substantive and procedural requirements of 10 C.F.R. § 2.788. Thus he has the burden of:

(1) making "a strong showing" that he is "likely to prevail on the merits";

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[9] Mass AG characterizes those rulings as "literally absurd". Notice at 6 n.7. Elsewhere he refers to the Licensing Board's proceedings as "so damaged by illogic and unreason as to be meaningless", id. at 10 n.13, and as error "so blatant, so ingrained, so audacious, so contemptuous of norms of legal reasoning that the process is properly adjudged as in 'bad faith' and therefore a sham." Id. at 7 n.8. The Notice contains still other intemperate and wholly unprofessional attacks on the Licensing Board, including the cryptic remark that the Board's "statements are probably more fruitfully analyzed from a nonlegal instead of a legal perspective." Id. at 10. Mass AG's pattern of attacking the Licensing Board, both in his pleadings and his public statements outside the proceeding, seems to be growing in fervor and recklessness with each decision adverse to him. The time has come, Licensees respectfully suggest, for this Board to put a halt to Mass AG's increasingly abusive conduct. See 10 C.F.R. §2.713; Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319 (1973); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 NRC 746, 748-49 (1978).

[10] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977).

(2) showing that he would be "irreparably injured" if a stay is not granted;

(3) demonstrating that others would not be harmed by a stay; and

(4) showing that "the public interest" favors a stay.[11]

Mass AG's terse demand for a stay does not contain even an attempt to plead many of the requirements of §2.788. On that ground alone, his motion should be denied.[12] Even if he had pled all four stay factors, moreover, it is clear that he could not have made the requisite showing that they weighed in favor of his motion.

1. Irreparable Injury.

The Commission has made clear that "[t]he most significant factor in deciding whether to grant a stay request is whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted."[13] The only

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[11] 10 C.F.R. §2.788(e); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

[12] Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-412, 5 NRC 1415, 1417 (1977) ("A stay application which is . . . in substantial nonconformity with the requirements of [2.788] will be subject to summary denial with prejudice to its renewal in the absence of materially changed circumstances."); cf. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 353 (1989); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352-53 (1980).

[13] Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631, 662 (1980).

argument by Mass AG which could conceivably be construed as addressing this factor is his bare assertion that "a sham legal process is a form of irreparable injury."[14] This simply does not do the job for him. Even if Mass AG were correct in arguing that the Licensing Board's handling of the various beach shelter sub-issues was flawed, Mass AG has not advanced even a single reason to believe that any error could not be corrected on appeal to this Board, once the Licensing Board had completed its proceedings on the entirety of the remanded issue.

2. Likelihood of Success.

Mass AG does not directly address the question of his likelihood of success on the merits of his present purported appeal. Moreover, to the extent that his arguments as to the merits of the Licensing Board's beach shelter rulings amount to anything more than personal attacks, conclusory allegations, and blanket incorporations of other pleadings, Mass AG mainly disagrees with factual findings which clearly have the requisite evidentiary support to withstand a stay request.[15] Looking to each of the four "rulings" with which Mass AG takes issue, it is clear that:

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[14] Notice at 6 n. 7.

[15] Toledo Edison Co. (Davis-Besse Nuclear Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977).

(a) There is ample record support, cited by the Licensing Board itself, for that Board's interpretation of the meaning of the term "shelter-in-place" as used in the NHRERP.[16]

(b) That same record supports the Licensing Board's conclusion that, once Licensees rescinded their assertions of February 1, 1990, Intervenors' motion of February 6, which had been premised on those assertions, also collapsed.[17] Mass AG also fails to note the Licensing Board's independent, and clearly correct, ground for finding the February 6 motion to be moot -- i.e. that it had been superseded by Intervenors' February 28 motion.[18]

(c) The Licensing Board's finding that Intervenors' February 28 Motion was untimely has ample record support.[19] On safety significance, the Licensing Board's holding, far from being

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[16] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC __ (May 3, 1990), slip. op. at 34-38 [hereinafter cited as "LBP-90-12" and to the slip opinion].

[17] Id. at 28-30.

[18] Id. at 30-31.

[19] Id. at 34-38.

"conclusory",[20] were expressly grounded in this Board's holdings as to the inefficacy of available shelter and the unlikelihood that sheltering would be called for.[21] Likewise, the Licensing Board was unquestionably correct in finding that the motion "has no supporting affidavit and that defect alone would be fatal."[22] Nor has Mass AG shown any error as to the other facets of the Board's holding on the February 28 motion.

(d) Given that Mass AG is not able to point to a single place where the Licensing Board "has artificially limited" its further consideration of "Condition (2)",[23] Mass AG has not even

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[20] Notice at 11.

[21] LBP-90-12 at 39.

[22] Id.; see 10 C.F.R. §2.734(b); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989).

[23] Notice at 12.

raised a litigable issue on that point,[24] let alone show any likelihood of success.

3. Harm to Others and Public Interest.

Mass AG offers no argument, let alone any analysis, as to what effect a stay would have upon other parties or the general public. This is not surprising, given the irony of his present demand of a stay. For months Mass AG has been declaiming, in every adjudicatory and public forum he could conceive of, that the Licensing Board must take up the issues remanded in ALAB-924, and that until the Board did so then "tens of thousands of citizens of New Hampshire and Massachusetts who frequent the heavily populated Seabrook beach area [are put] at great risk in the event of a reactor accident."[25] Yet now Mass AG seeks to halt the very remand proceedings which he has claimed are essential to protect the public. In short, based on Mass AG's own allegations the

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[24] Mass AG points to none, because the Licensing Board has imposed no such limitations. In its Notice of Prehearing Conference (May 4, 1990), for example, the Board indicated that it would address the sub-issue of shelter when "evacuation of beach visitors is not possible because of physical impediments to evacuation such as weather and highway conditions." (Emphasis added.) Likewise, in LBP-90-12, at pages 45-53, the Board asks some questions and makes some observations, but it does nothing to limit the litigation, to add anything new to the NHRERP, or to take out of the NHRERP anything it already contains.

[25] Mass AG's "Application for Stay Pending Appeal in District of Columbia Circuit", Application No. A-745, to Chief Justice William H. Rehnquist (April 24, 1990), at 1-2.

"public interest" factor would weigh against further delay in taking up the remand issues.

II. IF THIS BOARD DEEMS THAT AN APPEAL PROPERLY LIES AND HAS BEEN TAKEN AT THIS TIME, IT SHOULD REQUIRE MASS AG TO FILE A PROPER BRIEF.

As is discussed in detail in Section III infra, Licensees do not believe that Mass AG may properly notice for appeal at this time (or, as to some of the issues, ever) the issues raised in the Notice. Assuming arguendo that the Notice were proper, then pursuant to 10 C.F.R. §2.762 Mass AG would be required, in the ordinary course, to file an appellate brief which:

(1) "clearly identif[ies] the errors of fact or law that are the subject of the appeal;"[26]

(2) "[f]or each issue appealed", cites to "the precise portion of the record relied upon in support of the assertion of error;"[27]

(3) explains in detail, beyond mere incorporation of pleadings rejected below, why each challenged ruling was allegedly erroneous;[28]

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[26] 10 C.F.R. § 2.762(d)(1).

[27] Id.

[28] E.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1987); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 547 (1986).

(4) contains a statement of the case and relevant procedural history;[29] and

(5) if the brief exceeds 10 pages, contains a table of contents and table of authorities.[30]

These requirements for appellate briefs are not mere formalities. Rather, they serve two distinct and very important purposes.

> We have observed that briefs are necessary to "flesh out" the bare bones of the exceptions, not only to give [the Appeal Board] sufficient information to evaluate the basis of objections to the decision below, but also to provide an opponent with a fair opportunity to come to grips with the appellant's arguments and attempt to rebut them. The absence of a brief not only makes [the Appeal Board's] task difficult but, by not disclosing the authorities and evidence on which the appellant's case rests, it virtually precludes an intelligent response by appellees.[31]

Rather than file such a brief, however, Mass AG asks this Board to accept the Notice and the three superseded pleadings attached thereto "as Intervenors' brief and argument on those specific claims of error in LBP-90-12 identified [t]herein."[32] In so doing, Mass AG implicitly

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[29] E.g., Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769 (1977); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640 (1977).

[30] 10 C.F.R. §2.762(d).

[31] Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 315 (1978).

[32] Notice at 12-13.

asks the Board to waive all of the brief requirements cited above, instead forcing the Board and the parties to piece Mass AG's arguments together from four or more pleadings,[33] most of which were written months ago for other purposes.

Absent a claim of prejudice from another party, the Board presumably would have discretion as to whether to waive the various requirements and dispense with a brief. However, Licensees respectfully suggest that all concerned would benefit -- especially in light of Mass AG's suggestion that he intends to brief still "other rulings" as a result of LBP-90-12[34] -- from Mass AG being required to file a single, comprehensive, and procedurally complete brief.

III. LICENSEES MOVE TO STRIKE ALL ASPECTS OF MASS AG'S NOTICE OF APPEAL.

Mass AG's purported notice of appeal should be struck in its entirety. The hodge-podge of issues and sub-issues which he seeks to appeal do not constitute a major segment of the overall case, and accordingly his appeal of them (or at least, of those he would ever have standing to appeal) is

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[33] In addition to the Notice and the three pleadings attached thereto, Mass AG also purports to incorporate by reference arguments from 12 pages of a pleading filed with the Commission on December 1, 1989 (Notice at 3 n.4 and 4 n.5) as well as unspecified portions of another brief filed with this Board on April 27, 1990 (Notice at 3 n. 4). In lieu of a brief, therefore, Mass AG asks the Board and parties to "follow the dots" in his footnotes to the Notice, jumping back and forth between five separate additional pleadings to try to sketch out what his present appellate arguments may be.

[34] Id. at 13 n. 16.

premature. To be sure, the portion of LBP-90-12 which accepted SAPL's voluntary withdrawal and dismissed SAPL from the proceeding is presently appealable, but only by SAPL; Mass AG cannot notice or pursue the appeal on SAPL's behalf. Finally, to the extent that Mass AG's pleading could be construed to have buried within it an unlabelled and unarticulated request for directed certification of certain beach shelter sub-issues, that request should be denied.

A. Controlling Principles of NRC Appellate Practice.

It is useful, at the outset, to review the controlling agency law as to the three questions which are dispositive of Mass AG's notice: (1) finality for purposes of review; (2) standing to appeal; and (3) the requirements for directed certification.

1. Finality for Purposes of Intra-Agency Appeal.

It is well settled that

> The test of "finality" for appeal purposes before the agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.[35]

The latter test, termination of a party's participation, is self-explanatory. The former test, however, as to what

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[35] Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

constitutes a "major segment of the case", has been repeatedly examined and refined in the course of these very proceedings. For example, this Board recently held that the remanded issue concerning the adequacy of the siren system in the Massachusetts EPZ did not constitute a major segment, but rather was just one of many pending emergency planning issues.[36] A few months later, the other appeal board sitting in this case concluded that Intervenors' proffered low-power testing contentions did not constitute a major segment of the case.[37] And previously, this Board concluded that dismissal of two of only four pending issues in the low-power licensing proceeding did constitute a major segment of that proceeding, especially since those issues had "nothing whatever to do with any other matter still pending below."[38]

2. Standing to Appeal.

NRC practice now clearly limits an intervenor to appealing only those "issues which the intervenor-appellant [itself] placed in controversy or sought to place in controversy in

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[36] Memorandum and Order (August 1, 1989); see also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-917, 29 NRC 465 (1989) (holding appeal of returning commuter ETE sub-issues to be premature).

[37] Memorandum Order (November 14, 1989). The Board then went on to observe, however, that this tentative conclusion had been mooted by supervening events.

[38] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 637 (1988).

the proceeding."[39] This rule builds upon, and is the logical culmination of, the recent trend in agency case law to the effect that "whether an intervenor has the right to pursue a particular issue on appeal is a function of the level of interest expressed by the intervenor in such issue throughout the course of the proceeding."[40] If one intervenor does not press an issue at the hearing level, leaving it for a second intervenor to pursue, then the first intervenor runs the risk that the second will withdraw the issue, and/or withdraw from the proceeding altogether.[41]

This standing rule applies to all intervenors, including governmental intervenors participating pursuant to 10 C.F.R.

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[39] 10 C.F.R. § 2.762(d)(1), as amended effective September 11, 1989; see 54 Fed. Reg. 33168, 33182 (August 11, 1989). The amendments enacted therein do not apply to proceedings initiated prior to September 11, 1989, except to the extent that those amendments codify existing NRC practice. 54 Fed. Reg. at 33179.

[40] Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 253 (1986); see also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-43 n.58 (1986); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447 (1980); 54 Fed. Reg. at 33178.

[41] Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605 (1988), aff'd on this point sub nom. Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 55 (5th Cir. 1990); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-440, 6 NRC 642 (1977).

§2.715(c).[42] While §2.715(c) participants are accorded special treatment at the initial intervention stage, once into the case they are bound by the same requirements as any other party.[43]

Nor may the rule be evaded by the simple expedient of claiming to appeal "on behalf of" another intervenor; a party to NRC proceedings only has standing to argue its own grievances, and may not unilaterally act to speak for or bind another party.[44] A party which has not previously pressed an issue may not suddenly step in and "pinch hit" for a

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[42] The Commission expressly rejected the suggestion of making an exception for "interested states". 54 Fed. Reg. at 33178.

[43] E.g., Gulf States Utilities Co. (River Bend Station, Units 1 and 2), LBP-76-32, 4 NRC 293, 299 (1976); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535, 537 n.1 (1977); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 180 n.7 (1976).

[44] See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-43 n.58 (1986); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-86-34, 24 NRC 549, 550 n.1 (1986).

Likewise the rule cannot be avoided by the tactic of suddenly announcing, on remand, an interest in an issue never previously pursued by that party. "Parties may not dart in and out of proceedings on their own terms and at their own convenience . . . ." Consumer Powers Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 907 (1982); see also Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156 (1976).

withdrawing party that had raised the issue. As the Court of Appeals observed two decades ago, "[w]e do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger."[45]

3. Requirements for Directed Certification.

The case law of this agency emphasizes that directed certification of an interlocutory licensing board ruling is an extraordinary step, "to be resorted to only in 'exceptional circumstances'," [46] and to be used "most sparingly".[47] As one appeal board has observed, "interlocutory appellate review of licensing board orders is disfavored and will be undertaken as a discretionary matter only in the most compelling circumstances."[48]

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[45] Easton Utilities Comm'n v. AEC, 424 F.2d 847, 852 (D.C. Cir. 1970).

[46] Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977).

[47] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978).

[48] Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).

Previously in the Seabrook proceeding, this Board observed that "at the very minimum, a party [seeking directed certification] must establish that a referral would have been proper; i.e., that, failing a certification, the public interest will suffer or unusual delay or expense will be encountered."[49] The standard applied by this and other boards has been the one articulated in the Marble Hill proceedings:

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened a party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.[50]

In the same decision, this Board also provided guidance as to what constitutes a ruling which "affect[s] the basic structure of the proceeding in a pervasive or unusual manner", holding that a licensing board ruling as to the scope of its jurisdiction vis-a-vis another licensing board had that effect.[51] On the other hand, it is clearly established that primarily factual rulings are not

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[49] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975).

[50] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 436 (1989), quoting Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

[51] ALAB-916, supra, at 437.

appropriate for directed certification under the Marble Hill test.[52]

Finally, it should be noted that a request for directed certification is a serious step, not one to be buried unlabeled in the interstices of other pleadings. Thus it has been held that a motion for directed certification should comply with the procedural requirements for an appellate brief, and that a request which does not precisely identify, with record citation, the ruling challenged will be rejected out of hand.[53]

B. The Defects in Mass AG's Notice.

Applying these principles to Mass AG's Notice, it is clear that his purported notice of appeal should be struck in its entirety. The only portion of the Licensing Board's decision presently appealable as of right is the section which accepts SAPL's voluntary withdrawal and dismisses SAPL from the proceedings.[54] That ruling, however, is only appealable by SAPL itself, since only SAPL has standing to address the question of its own participation. Mass AG's attempt to appeal "on behalf of" SAPL, by means of a pleading which most

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[52] Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 12 (1979).

[53] Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85 & n.2 (1981).

[54] LBP-90-12 at 5.

pointedly is not signed by SAPL,[55] would be unavailing in any case, under the settled law discussed in Section III.A.2. above. In this case, however, it is doubly inappropriate for Mass AG to purport to speak for SAPL, since the Licensing Board's ruling was prompted by SAPL's own statement that it had nothing more to say.

Turning to the specific rulings which Mass AG seeks to appeal, it is clear that none are presently ripe for appellate review, and that as to at least several of them Mass AG again lacks standing.

1. LOAs for Evacuating Teachers.

Mass AG apparently asserts that this issue has achieved finality for appellate purposes.[56] He is mistaken. Teacher LOAs are just one of a number of emergency planning issues either presently before the Licensing Board on remand or else potentially before it after this Board's decision on the SPMC and remaining NHRERP issues presently under review. Thus, like the remanded sirens issue,[57] it does not constitute a major segment of the case. Moreover, even if the issue were now final, Mass AG would have no standing to seek review of it, since it was SAPL (and Town of Hampton, who is not even

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[55] See Notice at 13.

[56] Notice at 3.

[57] See supra at note 36 and accompanying text.

nominally a proponent of the Notice) who had litigated the issue previously before the Licensing Board.[58]

2. New Hampshire Special Needs Survey.

This issue, too, is but one of a number of present or potential emergency planning remand issues, and hence does not constitute a major segment of the case. The contrast with the situation in ALAB-894 (the only case on finality cited anywhere in Mass AG's brief) is stark. In ALAB-894, the Board found that two of only four remaining issues relating to low-power licensing, which two issues moreover were totally unrelated to any of the others, constituted a major segment of that proceeding.[59] In this full-power licensing proceeding, on the other hand, literally scores of emergency planning issues are still in play, of which the New Hampshire special needs survey is but one.

Here again, moreover, Mass AG seeks to appeal an issue raised and presented only by SAPL, a request he clearly has no standing to make.[60]

3. ETEs for ALS Patients.

Despite the fact that this issue has been set for consideration at the June 5 pre-hearing conference,[61] Mass AG

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[58] See supra at notes 40-41, 44-45 and accompanying text.

[59] See supra at note 38 and accompanying text.

[60] See supra at notes 40-41, 44-45 and accompanying text.

[61] Notice of Prehearing Conference (May 4, 1990) at 1.

contends that one "discrete subissue" within it is now final for appellate purposes.[62] Not so. One sub-part of one issue amidst numerous emergency planning issues simply does not amount to a major segment of the full-power licensing case.

4. Beach Shelter Implementing Procedures.

Here again, Mass AG seeks immediate review as to various sub-issues of an issue that has been set for hearing. As to the four specific sub-issues which Mass AG raises, it is unclear which he contends are "final" and which interlocutory.[63] Moreover, it is unclear whether Mass AG is seeking directed certification of some of the sub-issues, and, if so, which ones.[64] Despite this opacity, however, it is clear that present appellate review of these sub-issues is unwarranted.

Clearly Mass AG's sub-issues do not amount to a "major segment of the case", for the reasons discussed above. Nor has Mass AG shown (assuming arguendo that he has properly pled) that directed certification is warranted. As discussed in Section I.B.1 above, Mass AG has not shown, and cannot show, that the Board's rulings and statements on those sub-issues threaten him with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated

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[62] Notice at 5 n.6.

[63] Id. at 5.

[64] Id. at 5-6 and n.7.

by later appeal."[65] Nor has Mass AG shown, or can he show, that the filings have "affected the basic structure of the proceeding in a pervasive and unusual manner" in the sense meant by ALAB-916.[66] To the contrary, three of the four sub-issues raised by Mass AG -- "'Actual sheltering' vs. 'Sheltering-in-place'",[67] "Intervenors' February 6 Motion to Reopen",[68] and "Intervenors' February 28 Motion to Reopen"[69] -- all turn on the Licensing Board's factual determination of the meaning of the term "shelter-in-place" as used in the NHRERP.[70] Such factual determinations are not appropriate for directed certification.[71] And the last "sub-issue" -- "Interlocutory Rulings on Sheltering for Condition (2)" -- is, as discussed in part I.B.2 above, not an issue at all,[72] and so there is nothing to appeal in any case.

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[65] See supra at note 50 and accompanying text.

[66] Id.

[67] Notice at 6.

[68] Id. at 9.

[69] Id.

[70] LBP-90-12 at 34-38.

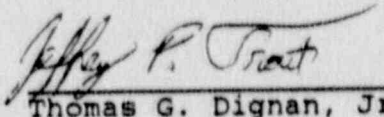
[71] See supra at note 52 and accompanying text.

[72] See supra at note 24 and accompanying text. Moreover, Mass AG's failure to cite to the specific ruling he contests is fatal to his request. See supra at note 53 and accompanying text.

CONCLUSION

For the reasons stated above, the Appeal Board should deny Mass AG's motion for a stay and strike his notice of appeal. If the Board finds that Mass AG may properly appeal some issues at this time, then the Board should exercise its discretion to require him to file a proper brief as to those issues, in conformance with 10 C.F.R. §2.762.

Respectfully submitted,



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