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UNITED STATES OF AMERICA

before the
NUCLEAR REGULATORY COMMISSION

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| In the Matter of<br><br>PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.<br><br>(Seabrook Station, Units 1 and 2) | Docket Nos. 50-443-OL-<br>50-444-OL-<br>(Off-Site Emergency Planning and Safety Issues) |

INTERVENORS' PETITION FOR REVIEW OF ALAB-940

THE DECISION BELOW

In ALAB-940, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), __ NRC __(1990), the Appeal Board affirmed a decision of the Licensing Board, LBP-89-28, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 30 NRC 271 (1990), that rejected contentions arising from problems exhibited while a test was being conducted under Seabrook Station's low power license. That test occurred on June 22, 1989, prior to the close of the hearing record in the Seabrook operating license proceeding. While that record was still open, the Intervenors informed the Licensing Board that they were intending to file a contention arising out of the problems demonstrated in the test. The Intervenors moved the Licensing Board to hold open the record



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pending resolution of those issues. The Licensing Board denied that request and closed the record on June 30, 1989. T28290.

The contentions that the Intervenors filed as a result of the June 22 incident challenged the training and qualifications of the plant operators and management, and asserted that adequate management and administrative controls to operate Seabrook as required by the Commission's quality assurance regulations, 10 C.F.R. Part 50, Appendix B, were lacking. Those assertions were supported by affidavits furnished by experts who opined that the Applicants had violated the Commission's quality assurance regulations and that such a violation had significant safety implications. The Intervenors' experts further opined that the events of June 22 when considered with other operational errors showed a "pattern of procedural non-compliance at the Seabrook Station." Minor/Sholley Affidavit, Attachment A to the July 21, 1989 Motion at Pp 22, 23, 26. In rejecting those contentions the Licensing Board held that the Intervenors' Motion had to meet the Commission standards for reopening the record found in 10 C.F.R. §2.734, and concluded that the motion did not meet those standards. LBP-89-28, 30 NRC at 284-92.

The Appeal Board upheld the Licensing Board's determination that the Intervenors' Motion was required to comply with the Commission's standards for reopening the record. ALAB-940, Slip Op. at Pp 8-26. The Appeal Board then went on to concur with the Licensing Board that the Intervenors' Motion failed to

meet the stringent criteria of 10 C.F.R. §2.734. Id. at 27 through 32. As seen in the reasons provided below, that determination was clearly erroneous.

## WHERE THE MATTERS ARE RAISED BELOW

All matters were raised by the parties in briefs below.

## WHY THE RULING WAS ERRONEOUS

The Appeal Board erred in holding that the Intervenors' motion failed to meet the criteria for reopening the record set forth in 10 C.F.R. §2.734. In upholding the Licensing Board's finding on that issue, the Appeal Board agreed with the Licensing Board that the motion failed to present a significant safety issue. ALAB-940, Slip Op. at 31. In so holding, the Appeal Board cited to its ruling in ALAB-756 that:

> for new evidence to raise a "significant safety issue" for purposes of reopening the record, it must establish either that uncorrected . . . errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983).

After first noting that the Intervenors did not claim that the safe operation of the plant was threatened by the natural circulation test, the Appeal Board declared that the Intervenors "have focused on the second prong of this test by attempting to show that failures in the applicants training, maintenance, and start-up quality assurance programs are so

pervasive as to raise legitimate doubt that the plant can be operated safely". ALAB-940, Slip Op. at 32. The Board then went on to conclude that even assuming the factual representations of the Intervenors were true, they failed as a matter of law to raise a legitimate doubt that the plant can be operated safely. In essence, the Appeal Board concluded that a single incident of personnel error can never be used as a basis to show "a wholesale and widespread breakdown of the applicants' quality assurance programs." Id. at 32.

This conclusion is erroneous for two reasons. First, it ignores the assertions in the Intervenors' motion, and the affidavits attached thereto, that the incident of June 22, 1989 when considered with other incidents showed a pattern of non-compliance. In upholding the Licensing Board on this issue, the Appeal Board engaged in the same mistake as the Licensing Board did below of making an initial factual determination on the merits of the proffered contentions. The Licensing Board below had indulged in pure conjecture on the merits of the contentions and decided that the contentions did not make out a case of pervasive breakdown. LBP-89-28, 30 NRC at 54. Thus, the Licensing Board concluded that the issues presented in the contentions were not safety significant.

The Appeal Board, in turn, repeated the error of the Licensing Board by ignoring the factual allegations in the contentions of a pattern of non-compliance based upon the events of June 22, 1989 and other incidents.

Only by ignoring the allegations in the contention that the June incident was part of a pattern of non-compliance, could the Appeal Board determine that there was no pattern showing a breakdown of the quality assurance programs. In actuality, what the Appeal Board was doing was stating that it did not believe the allegations that pattern of non-compliance existed. Such a factual threshold determination is not a permissible ground for rejecting a contention.

Apparently, the Appeal Board recognized that it was on thin ice in rejecting the contentions by making such a factual determination. Therefore, to buttress its position it held that as a matter of law an incident of personnel error can not raise a significant safety issue. The logical implication of such a holding is that a personnel error, even if it was greivous enough to cause core meltdown, could not raise a significant safety issue. That position is facially absurd. Under that view of safety significance, personnel deficiencies could never give rise to contentions that meet the reopen the record standard. That would result in being able to reopen the record only to challenge technical or mechanical failures in a plant.

The Appeal Board implies that as a matter of law it would take a great deal more than a single personnel incident to ever raise a significant safety issue. Id. at 32. The Board does not identity what further factual allegations would be necessary to show a significant safety issue. As previously stated, the Board ignores that in this case the Intervenors'

experts had opined that the June 22 incident in conjunction with other events showed a pattern of a noncompliance. Even if one were accept Appeal Board's holding as implying nothing more than the semantic truism that one incident can not show a pattern which by definition must be made up on more than one event, that does not absolve the Appeal Board's error since here there were allegations of a pattern.

CONCLUSION

Therefore, since the Appeal Board erred in holding that the Intervenors failed to meet the reopen the record standard and thus, cut off the Intervenors' hearing rights, the Commission should review and reverse ALAB-940.

COMMONWEALTH OF MASSACHUSETTS

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DATED: November 7, 1990
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom



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CERTIFICATE OF SERVICE

I, Leslie Greer, hereby certify that on November 7, 1990, I made service of the within INTERVENORS' PETITION FOR REVIEW OF ALAB-940 by Federal Express as indicated by (*), by hand as indicated by (**), and by first class mail to:

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