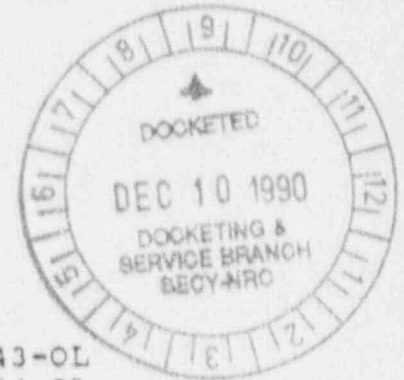


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December 7, 1990

UNITED STATES OF AMERICA  
before the  
NUCLEAR REGULATORY COMMISSION



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 and Safety  
Issues)

LICENSEES' PETITION FOR REVIEW OF ALAB-941

The Decision Below

As found by the Licensing Board, the graded qualifying exercise for Seabrook Station "was the most extensive exercise evaluation ever conducted by FEMA" and involved the participation of over 2,000 people.<sup>1</sup> Nevertheless, in a decision denominated as ALAB-941,<sup>2</sup> the Atomic Safety and Licensing Appeal Board, has found this exercise to have been deficient in scope to the extent that, according to the Appeal Board, too few school administrators in the New Hampshire portion of the Seabrook EPZ

<sup>1</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 618 at n.83 (1989).

<sup>2</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-941, 32 NRC \_\_\_\_ (Nov. 21, 1990), hereafter cited as ALAB-941 and to the slip opinion.

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participated in the exercise.<sup>3</sup> This decision was reached despite the fact that there was no contention admitted before the Licensing Board with respect to the participation of school administrators. This difficulty was overcome by the Appeal Board by holding that a contention which did not include school administrators, and which had been explicitly so interpreted by the Licensing Board was sub silentio broadened during the hearing.<sup>4</sup> This holding was, in turn, based on the novel propositions that (a) any footnote in a brief to the Appeal Board, which is not specifically challenged in an opposing brief, may be assumed to be gospel, and (b) that a Licensing Board decision, if capable of more than one interpretation, should be interpreted as containing a sua sponte broadening of a contention without the Licensing Board ever having complied with the Commission's Comanche Peak rules<sup>5</sup> for doing so.

#### Where Matters Raised Below

It is the Licensees' position that the holding of the Appeal Board was on a matter not properly raised below. In any event the Appeal Board relies upon the brief of an intervenor and its reading of the Licensing Board decision for the result it

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<sup>3</sup>ALAB-941 at 26.

<sup>4</sup>ALAB-941 at 20-21 and n. 43.

<sup>5</sup>Texas Utilities Generating Co. (Comanche Peak Steam Electric Generating Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981); Texas Utilities Generating Co. (Comanche Peak Steam Electric Generating Station, Units 1 and 2), LBP-81-23, 14 NRC 159 (1981).

reached. Thus the matters clearly were "raised" for the Appeal Board by the record below as it perceived it.

Why The Ruling Was Erroneous

In order to reach the result it did, the Appeal Board was faced with the fact that the contention at issue, known as bases "a" and "b" to contention TOH/NECNP EX-1, dealt, by its terms, solely, as the Appeal Board itself states, with the participation vel non of teachers as opposed to administrators.<sup>6</sup> Indeed, the Licensing Board had specifically held that the contention at issue was so to be construed in granting a motion by the Licensees to exclude certain testimony which had been prefiled by the Intervenors which would have dealt with the participation of school administrators.<sup>7</sup> Nevertheless, the Appeal Board stated:

"Subsequently, however, the issue was broadened to include as well the asserted lack of participation on the part of the school administrators."<sup>8</sup>

The Appeal Board's entire rationale for this assertion is found in a footnote appended thereto which reads, in its entirety as follows:

"In their joint brief, TOH/NECNP explain how the broadening occurred. Town of Hampton and New England Coalition on Nuclear Pollution Brief on Appeal of LBP-89-32 (January 24, 1990) at 8 n.12 [hereinafter TOH/NECNP Brief]. That explanation has not been challenged and it is apparent that, in the

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<sup>6</sup>ALAB-941 at 20.

<sup>7</sup>Tr. 22276-77.

<sup>8</sup>ALAB-941 at 21.

November 1989 initial decision, the Licensing Board treated the issue as covering both teachers and administrators. See LBP-89-32, 30 NRC at 638."<sup>9</sup>

Thus the Appeal Board gives two bases for its deciding that the issue had been broadened: (1) the failure of the Licensees to specifically address a footnote in the Intervenor's brief which gave their argument as to why the issue had been broadened, and (2) an alleged treatment by the Licensing Board of the issue as including school administrators.

The first reason, a failure on the part of the appellate brief of the Licensees to specifically address a footnote in an appellants' brief as grounds for adopting that footnote as an accurate statement of fact and law, is, indeed, a novel legal proposition. While it is true that at the trial level the failure to traverse an allegation in a complaint or meet an evidentiary assertion is an admission or gives rise to a presumption of its accuracy under most systems of civil procedure, no such general rule applies to statements in appellate briefs. The Appeal Board cites no authority for this proposition and we are aware of none.

Prescinding from the foregoing, the Licensees did dispute the entirety of the argument proffered by TOH/NECNP.<sup>10</sup> In so doing, Licensees expressly based their argument on the Licensing

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<sup>9</sup>ALAB-941 at 21, n.43.

<sup>10</sup>See "Applicants' Brief" (March 5, 1990) at 112-114.



Board's analysis, including citing ¶12.59 of LBP-89-32 which clearly focused just on participation by teachers.<sup>11</sup>

Likewise, the Appeal Board was wrong in accepting TOH/NECNP's characterization of the Licensing Board's decision as embracing an expanded version of the contention. Both TOH/NECNP in the footnote in their brief cited by the Appeal Board, and the Appeal Board in ALAB-941 cite to 30 NRC at 638, with TOH/NECNP specifically citing ¶12.61 of the Licensing Board decision. At that page, however, the Licensing Board clearly, in ¶¶ 12.57 and 12.58, limits the contention to teachers. The reference to "both teachers and administrators" in ¶12.61, relied on by TOH/NECNP (and presumably the Appeal Board), is merely the Licensing Board quoting an argument from Intervenors' proposed findings as to the needed scope of a remedial exercise -- which argument, moreover, the Licensing Board went on to reject.

Prescinding from the foregoing, the Appeal Board's reading of the Licensing Board decision requires acceptance of the proposition that the Licensing Board deliberately ignored the directives of the Commission as to the procedures to be followed by Licensing Boards in raising issues sua sponte.<sup>12</sup> Contentions in an operating license proceeding before this agency do not simply expand because certain evidence is introduced, or examination permitted.

"[I]t is well-settled that in a Commission

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<sup>11</sup>Id. at 113, citing to 30 NRC at 638.

<sup>12</sup>See n. \_\_, supra.

operating license proceeding a party is bound by the literal terms of its own contention and, unless a licensing board raises an issue sua sponte, it is authorized to decide only those matters put in controversy by the parties"<sup>13</sup>

The Licensing Board here evidenced no intention to take up the issue of school administrators' participation in the exercise as an issue, indeed, rejected such a move by the Intervenors, and, in any event, made no effort to follow the Comanche Peak procedures,<sup>14</sup> a necessary prerequisite before there is any exercise of the sua sponte authority of a licensing board.

#### Why Commission Review Should be Exercised

The Appeal Board has resolved an issue of fact contrary to the resolution of that same issue by the Licensing Board.<sup>15</sup> Moreover it has substituted its judgement as to the proper scope of an exercise for that of the Federal Emergency Management Agency (FEMA), the lead agency with respect to such matters.

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<sup>13</sup>Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986) (footnote omitted, emphasis supplied). Accord, Texas Utilities Generating Co. (Comanche Peak Steam Electric Station), ALAB-868, 25 NRC 912, 932 at n.83 (1987); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 242 (1986); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 475, 505 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985).

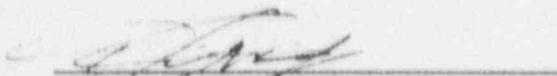
<sup>14</sup>Note \_\_, supra.

<sup>15</sup>10 C.F.R. § 2.786(b)(4)(ii).

CONCLUSION

The Commission should grant review of ALAB-941 insofar as it reversed the decision of the Licensing Board.

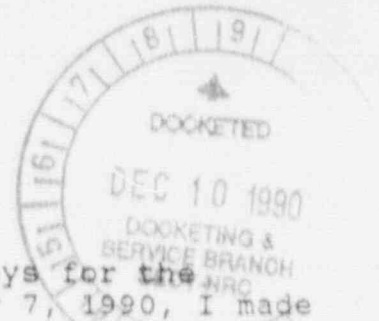
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CERTIFICATE OF SERVICE



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