Filed: October 6, 1983

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING 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 & 2)	)	

APPLICANTS' ANSWER TO SAPL's MOTION
TO DISMISS THE OPERATING LICENSE
APPLICATION FOR SEABROOK UNIT II

INTRODUCTION

Under date of September 26, 1983 SAPL has filed a motion to dismiss the operating license application for Seabrook Unit 2. The factual basis for the motion is the recent action of the Applicants to slow down construction on Unit 2 until completion of Unit 1. SAPL points out that no target completion date for Unit 2 has been established in light of the slowdown.

The legal basis for the motion is stated three different times in the motion. On page 1 it is said:

> "Under 10 CFR § 50.47(1), an Operating License may not be issued without a finding by this Board that 'construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act and the rules and regulations of the Commission . . . .'" SAPL Motion at 1.

On page 3 SAPL argues:

> "The language of 10 CFR § 50.47(1) is clear. The finding by th[illegible]ard that construction of Seabrook Unit II has been 'substantially' completed is an absolute prerequisite to issuance of an Operating License. The finding is also mandatory regardless of the scope of contentions admitted for adjudication in these proceedings. (Citation)[1]" SAPL Motion at 3.

And again on page 3 of the motion:

> "SAPL asserts that the language of 50.47(1) is plain, and that there is no way in which this Board can make a finding of 'substantial completion' in light of these delays" SAPL Motion at 3.

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[1] Sic. Apparently the signal (Citation) came from an earlier draft and was not removed. SAPL was unable to find the "citation" to support its assertion which is not surprising in light of the authorities discussed infra.

ARGUMENT

First, SAPL has cited the wrong regulation. The regulation it cites, 10 CFR § 50.47, deals with emergency planning. The regulation that SAPL relies on is 10 CFR § 50.57(a)(1), which provides:

> "Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51 upon finding that: (1) construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission . . . ."

Second, SAPL has lost sight of the fact, that Atomic Safety and Licensing Boards do not issue licenses -- the Director of Nuclear Reactor Regulation does. 10 CFR § 1.61 See also 10 CFR § 2.764(f); 10 CFR 2 App. A & VIII(c). And in operating license proceedings, Atomic Safety and Licensing Boards decide only matters in controversy, leaving the making of the ultimate § 50.57 findings to the Staff. 10 CFR § 2-760a. For example, one finds the following typical initial conclusion of law in a "two unit" operating license case:

> "In an operating license proceeding, the Board is called upon to decide only the issues in controversy among the parties. 10 CFR

> § 2.760a. Other matters required to be determined prior to the issuance of an amendment to the zero-power operating license for Unit 1 authorizing full-power operation or of an operating license for Unit 2 are entrusted to the Director of the Office of Nuclear Reactor Regulation. 10 CFR §§ 2.760a, 50.57." Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-81-13, 13 NRC 652, 674 (1981).

In short SAPL's assertion that the Board as opposed to the Staff must order the findings regardless of the scope of the contentions is just plain wrong. And not one issue was ever proffered in this proceeding that distinguished between Unit 1 and Unit 2, either on a safety issue or on any other topic.

Third, the very argument that SAPL is making was considered and rejected by the Appeal Board over nine years ago. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 410-11 (1974). Therein appears the following:

> "The intervenors refer to testimony establishing that, at the close of the evidentiary hearing, the construction of Unit 2 was not yet complete. They assert that, by virtue of Section 185 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2235 (1970), the Board was required (before authorizing operation) to make a finding on the basis of the record that construction was completed, and that the record permits no such finding.

"The intervenors misread the statutory requirement. Section 185 in pertinent part provides that 'the Commission' shall issue an operating license to an applicant

> "[u]pon the completion of the construction . . . of the facility . . . and upon finding that the facility authorized has been constructed . . . in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission . . . .[50]

"Nothing in that section purports to impose upon any particular constituent part of the Commission, such as its adjudicatory tribunals, the responsibility for such finding. To the contrary, the statute mandates only that the finding be made by the Commission or its authorized delegate prior to the issuance of a license. Cf. Union of Concerned Scientists v. AEC, supra, ____ F.2d at ____, 6 ERC at 1708-09. Under the restructured rules, such a finding would be made by a board only with respect to those issues bearing upon completion of a unit which have been properly put into controversy by the parties (10 CFR § 2.760a).

"The only issues raised by the intervenors bearing upon the satisfactory completion of Unit 2 are the QA issues which we have heretofore treated.[51] Beyond that, the intervenors' general answer to the notice of hearing, which expressed their intent to controvert each of the matters encompassed by the Commission's ultimate findings, did not, as they claim, oblige the Board to make the ultimate finding of completion. Only to the extent intervenors went beyond that general answer and specified particular matters in controversy would the responsibility for

making findings on such matters pass to the Board.[52] As is manifest from this opinion, we are satisfied that the Board addressed in its findings each issue put in controversy by the intervenors."

> "[50]See also 10 CFR § 50.57(a), which delineates the requisite finding in terms of construction having been 'substantially completed', and § 2.104(c), which speaks in terms of 'reasonable assurance' of substantial completion on a timely basis.
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> "[51]See Part IV. C, supra.
>
> "[52]Since the Licensing Board was not as a matter of law required to hold its hearing after completion of both units, its denial of intervenors' motion for summary disposition for lack of completion of Unit 2 was correct."

The foregoing leaves no doubt as to the appropriate ruling on SAPL's motion. This in no way compromises the public health and safety because the Staff will have to assure itself that there is an adequate basis on which to make the necessary finding of completion before actually issuing the Unit 2 license whenever that occurs. See South Carolina Electric and Gas Co. (Virgil C. Sumner Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981); Commonwealth Edison Co.

(Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1420 n.35 (1982).

CONCLUSION

The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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