Filed: October 24, 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 FOR DISQUALIFICATION OF JUDGE HOYT"

Pursuant to 10 CFR §§ 2.704, 2.730, the Applicants hereby answer "SAPL's Motion for Disqualification of Judge Hoyt" (hereinafter "Motion"), served upon them by mail on October 7, 1983.

I. INTRODUCTION

1. Organization. The Motion is a paradigm of the "shotgun approach" to pleading: it is a patchwork of fragmentary episodes taken out of context in an already long and unusually arduous proceeding, stitched

together neither in chronological nor in any other apparent order. Such an approach leaves little option but to follow organizational suit. Accordingly, this answer is organized in accordance with the structure of the Motion. Before we proceed, however, a few general comments are in order.

2. Context. The Motion defies the essential starting point of any challenge of the type it launches, in that it fails to relate the judicial acts complained of to the context, both immediate and general, in which they occurred. See Commonwealth Edison Company (LaSalle County Nuclear Power Station, Units 1 and 2), ALAB-102, 6 AEC 68, 69 (1973), rev'd on other points, CLI-73-8, 6 AEC 169 (1973) ("The starting point of our inquiry necessarily is the context in which [the Licensing Board member's] statements were made. For, manifestly, the question as to whether those statements constitute a basis for his disqualification cannot be fairly decided by examining their content in isolation."). See also Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1367-68 (Additional Views of Commissioner Ahearne). We shall refer to the

specific context in discussing each of the counts of SAPL's indictment against Judge Hoyt, infra.[1] It is, however, no less necessary to prescind momentarily from specifics in order to grasp the pervading undertone of the entire proceeding to date.

There is a maxim attributed to some trial lawyers to the effect that "When the law is on your side, pound on the law, while when the facts are on your side, pound on the facts." For cases fitting neither of these descriptions, the advice is said to continue, one should "pound on the table." Given a case where advocates, for whatever reasons persuade them to do so, have decided (perhaps with an eye to additional audiences) to make speeches, to accuse the forum

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[1]Cognizant of the incompleteness of the "cold record," LaSalle, op. cit., supra, 6 AEC at 170, we must of necessity from time to time report such unrecorded facts as tone, demeanor and attitude. We will do so reluctantly, and with full regard for the spirit as well as the letter of Fed. R. Civ. P. 11, which, in the authors' view, is fully incorporated into 10 CFR § 2.713.

of prejudgment, and to invite controversy on issues collateral to the merits, the always difficult role of the judge assigned the task of maintaining order, productivity, and the dignity of the tribunal is made virtually impossible. To allow such behavior its course is to acquiesce in the plan, while properly to assert judicial authority creates the opportunity for accusations of bias.

We respectfully submit that such describes in large measure the overall and pervading context of the entire course of the Operating License proceedings in this case to date: frankly, the experience of having sat through it all convinces us that some people walked into the hearing room on Day One spoiling for a fight and anxious to provoke a contest over authority. We cite a single example.

On March 12, 1982, at the very outset of the proceedings the Licensing Board issued an order calling for the submission of proposed contentions by a certain date. Counsel for the Attorney General of Massachusetts ("MassAG") later claimed not to have received service of that order, though plainly counsel had notice of its terms. The obvious and plain remedy

for one in such a situation who is bona fide of the view that any failure of service has hampered his ability to respond in a timely fashion is to file a motion for enlargement of time grounded on the asserted failure of service. Counsel for MassAG abjured this simple course, apparently consciously. Instead, what counsel for the MassAG did was to file a "Notice of Non-Receipt" that (1) asserted non-receipt, (2) demonstrated notice in fact,[2] (3) sought nothing by way of relief, but instead (4) rather petulantly and defiantly asserted ipse dixit exemption from the Board's order and the intention to meet a different deadline of its own choosing. By this challenge to its authority and to the orderly course of proceedings was the Board in this case faced before the first day of hearings even commenced; the Board handled the situation and, we submit, handled it in the only

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[2]At a time when the initially decreed time period had not yet elapsed. Compare "Notice of the Commonwealth of Massachusetts[sic] of Non-Receipt of Order Setting Special Pre-Hearing Conference" (filed April 5, 1982), at 1, with Tr. 151 (May 6, 1982).

fashion consistent with its transcendant responsibility to preserve order and the dignity of the Commission as a federal agency, and eventually the confrontation passed. See Tr. 147-54 (May 6, 1982).

The attitude that spawned it, however, did not.

To the contrary, certain of the participants have brought to this proceeding a tension of defiance, obstinance and provocation that has been incessant and pervading. At least in part this seems to result from the attitude of one participant that counsel and the court are equals in the courtroom, with the court entitled to no more respect or courtesy from counsel than counsel may perceive herself to have received from the court. See Tr. 4 (Sidebar conference of August 18, 1983):

> "[Counsel]: I would like to say that I, in my entire life and experience in courtrooms and outside, have never been addressed by anyone in the tone in which I believe you [i.e., the presiding officer] address me repeatedly. . . . I believe I can respond in kind. . . . If I am spoken to in a respectful manner, I respond in a respectful manner."

Counsel is, of course, quite erroneous about the legal principle asserted in this revealing declaration: The

obligation of respect for the tribunal is simply not subject to a condition precedent that the court have (either in fact or as may be perceived by counsel) treated counsel with an acceptable degree of respect.

One needn't tarry long exploring the motives that have lead to the undercurrent that has been injected into these proceedings, however, for it is the fact of the tone, the insubordination, and the disruptive behavior with which the entire Board has been faced. Reduced to its essence, the assertion of the Motion is that, if a Licensing Board is faced with an intervenor bent on thus comporting himself (or herself), the Board must acquiesce in the behavior or else it is guilty of bias. SAPL is wrong. A court may -- indeed it must -- deal separately with the preservation of order and the dignity of proceedings, on the one hand, and the resolution of factual disputes on the basis of evidence presented, on the other. Totally missing from the Motion is any basis for asserting that the Board --the entire Board -- in this case will not do the latter, and for that reason the Motion must be denied.

3. Discretion. The concept of judicial discretion describes a question as to which any number of

different answers are equally "right," or, more particularly, none of which is "error." If a given situation is one addressed to judicial discretion,[3] and if a given judicial response is within the scope of permissible discretion, then the particular exercise of discretion by the judicial officer is simply not reviewable at all.[4] Likewise, there is not one of us who, upon later reflection, would not like to have done something a bit differently, in form, tone, or manner, though not in substance. Judicial discretion amounts to a margin of error for the manner of execution where the substance remains correct.

Dealing with challenges to order in the courtroom presents one of the most compelling situations

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[3]That is to say, the situation is not one of those for which the law prescribes but a single correct response that must always be made.

[4]"Reviewable" as we use the term in the sentence in text means reviewable by any different judicial level; we do not mean to imply that the judicial officer who made the original exercise of discretion is not free to reconsider his action (at least so long as the action remains non-final and no intervening detrimental reliance has occurred). But Judge Hoyt is not by the present motion asked to reconsider any rulings previously made; she is asked, rather, to censure herself for prior judicial acts, and this would amount to "review" as we used the term in text.

for allowance of judicial discretion. For this there are at least two reasons: first, seldom is such a challenge announced sufficiently in advance of its occurrence as to permit quiet reflection on the "best" way of handling the matter. To the contrary, such situations present themselves with no forewarning and they demand instant response. Second, where judicial authority is challenged, the response must be firm and authoritative if the threat is to be abated. This is not the situation where one sitting in review has the luxury of decreeing that some different way of handling the matter would have been preferable, for the price is simply, frankly, and quite ineluctably the encouragement of further challenges to judicial authority.

II. THE APPLICABLE LEGAL STANDARD

SAPL spends much time requesting the Board to overrule Commission precedent as to the legal standard by which its Motion must be judged. Its arguments are, we submit, unpersuasive. For instance, the inexorably corrosive effect of a rule that allows bias challenges to be grounded upon unappealed and unreversed exercises of judicial duties is quite unaffected by the substantive standard by which judicial conduct is to be assayed for evidence of bias: SAPL confuses a standard against which challenged conduct is to be tested with a source of conduct challengeable. Prescinding from interesting debates, however, the fact of the matter is that Commission precedent is binding at this stage. Thus the law of the Commission is that source of an allegation of bias or prejudice must be extra-judicial, and judicial reaction to a litigant's conduct in the courtroom does not suffice. Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363 (1982); Commonwealth Edison Company (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973).

It follows that the Motion must be denied. Each and every particular constituting a portion of the SAPL indictment against Judge Hoyt was an act or statement made during the hearing process and in the course of discharging judicial functions.

Indeed, it seems necessary to point out that the two judicial acts on which SAPL places its greatest reliance (though neither involved SAPL) -- the Board's handling of the conduct of counsel for the Attorney General of Massachusetts on August 17, 1983, and the Board's handling of the conduct of the at-the-time designated lay representative of the Town of Rye -- were orders that appear to be within the scope of 10 CFR § 2.713(c) and, therefore, were immediately appealable. The orders were not appealed; the time for doing so has long since expired; and the orders are now unchallengeably correct.[5] SAPL has cited no authority

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[5]Not only did counsel for the Attorney General of Massachusetts not appeal the order entered in her case, but she acquiesced in the Board's insistence of an apology for the tone of her oratory. Assuming the apology to have been genuine, the correctness of the order (at least insofar as it involved demeanor) thus stands conceded by the only person even arguably aggrieved by it.

for the proposition that bias might be found in a correct judicial order, and we have little difficulty in understanding why any search it made bore no fruit.

III. THE SHOTWELL AFFAIR OF AUGUST 17, 1983

SAPL's first count in its indictment of Judge Hoyt is entitled: "Judge Hoyt's Conduct with Respect to Counsel for the Commonwealth of Massachusetts."[6] For at least three threshold reasons, this episode should not even be considered at this point in time in connection with a motion by SAPL. First and foremost, it is settled in NRC practice that a party has no standing to complain of any judicial treatment suffered by another party. Puget Sound Power & Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 33 (1979). SAPL is a separate entity from the Massachusetts Attorney General. It is represented by its own counsel -- counsel who, except for the Applicants' counsel, has been engaged in the Seabrook licensing saga longer than any other current

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[6]Sic. As MassAG's attorney has made clear, she represents only one officer of the Commonwealth (the Attorney General), not the interests of the Commonwealth as a whole or of other officials of the Commonwealth. Tr. 1558 (August 19, 1983).

player -- and neither SAPL nor its counsel are in any way dependent upon representation by counsel for the MassAG.[7] Second, as noted above,[8] the order in respect of counsel for the MassAG was one that was subject to appellate review but no appellate review was claimed within the time specified. As a consequence, the order stands immune from collateral attack as to its correctness; a presumptively correct judicial ruling may not be the subject of a motion for recusal. Indeed, not only has counsel for the MassAG chosen neither to appeal the order in question nor to file any motion for recusal on her own, but counsel ultimately apologized to the Board for her outburst (thus establishing, as to the only party concerned, the correctness of the Board's ruling). Third, the orders and rulings of the Board on August 17, 1983 were

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[7]Indeed, under Massachusetts law counsel for the Commonwealth is bound to represent only the interest of the Commonwealth and it would be potentially a criminal offense for counsel for MassAG to even purport to represent simultaneously the interest of SAPL, notwithstanding that the goals, aspirations, and interests of SAPL might be identical to those of the party represented by counsel for the Commonwealth. See G. L. (Ter. ed.) ch. 268A, § 4(c), as amended.

[8]See note 5, supra.

all actions taken in the course of discharging judicial functions, and were based solely upon events that occurred in the courtroom. Under South Texas,[9] such orders and statements are not fit grounds for a motion for recusal.

On the merits, the Board's conduct on August 17, 1983 is beyond reproach. As required by a prior Board order, all parties intending cross examination of witnesses filed "Cross-Examination Plans." ASLB Order (Procedures for August Hearings) (July 28, 1983). As set forth in that Order, it was not sufficient simply to identify a topic; the plan had to be sufficient to permit the Board to assess the purpose and relevance of unfolding cross-examination. At a point where the direction of the cross-examination of counsel for the MassAG was unclear, the Board inquired. Tr. 1063 (August 17, 1983). After an unilluminating response, the Board made the inquiry of counsel that triggered the outburst for which counsel was censured -- and

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[9]Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363 (1982).

which, according to SAPL, amounted to disclosure of "sensitive cross-examination plans" in a manner that was "highly prejudicial to the rights of [counsel for the MassAG] . . . ." Motion at 11. Strangely, SAPL does not quote the transcript, for nothing of the sort took place.[10] The reaction of counsel for MassAG

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[10]The "highly prejudicial" disclosure is recorded as follows:

JUDGE HOYT: . . . Are we going ahead into page 9 [of MassAG's cross-examination plan]?"

MS. SHOTWELL: We're well into page 9.

JUDGE HOYT: I believe we're into adverse weather effect?

Tr. 1063 (August 17, 1983). When it is recalled that adverse weather effect (on evacuation time estimates) was one of the only two remaining topics for litigation under contentions NECNP III.12 and.13, that the bulk of the testimony of the witnesses then on the stand (Messrs. MacDonald and Merlino) was addressed to adverse weather effect, that the bulk of the proposed (and pre-filed) testimony of MassAG's witness (Professor Herr) was addressed to adverse weather effect, and that Professor Herr had already been examined at length upon, and had expounded upon, the deficiencies of the Applicants' consideration of adverse weather effect (as Professor Herr saw things), to suggest that the disclosure of the topic heading "Adverse Weather Effect" on a cross-examination plan prepared by MassAG enlightened counsel for the other parties at all (much less in a "prejudicial" fashion, which signifies that counsel learned something that

that followed was so swift, and so venomous, as to suggest (as does SAPL's revisitation of the episode) a pretense for outburst.

In any event, the manner in which counsel for MassAG expressed objection was, by its tone phraseology and loudness, so out of order as to warrant, if not to compel, swift judicial reaction if courtroom decorum and the authority of the Board was to be preserved. Indeed, the outburst received at the hands of this Board and Judge Hoyt far more lenient treatment than it would have received had it occurred in the federal courts in Boston or the Superior Court of Massachusetts. There is no ground for complaint by counsel for MassAG (which lodges none) or by SAPL.[11]

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would have given them a material advantage that, but for the "disclosure" they would not enjoy) is, we submit, absurd. The disclosure, if a disclosure it be, was so patently harmless as to render the outburst that followed all the more incomprehensible and out of order.

[11]SAPL appends to the foot of this count of the indictment an unrelated incident that, as SAPL views things, "exhibit[ed] hostile behavior towards [counsel for MassAG] in subsequent proceedings." Motion at 11-12. For some reason, the Motion neither attaches nor provides a reference to the pages of the transcript at issue, which are Tr. 1409-11 (August 19, 1983). What happened is that counsel for MassAG lodged an

IV. THE PRETERMITTED BACKUS SPEECH OF AUGUST 23, 1983

SAPL's second count relates to a remonstration its counsel received for injecting himself into what became the most unfortunate incident of the entire hearings. To set the stage, some background must be described.

The hearings were conducted in a a large courtroom in the Strafford County Courthouse in Dover, New Hampshire. The size of the courtroom did not eliminate, however, the prospect of congestion; within the bar was required to be space for: Applicants' counsel (2) and witnesses (11); Staff counsel (3) and witnesses (2 at one time); MassAG counsel (1 or 2) and witness; NECNP counsel (1); SAPL counsel(1); NHAG counsel (1); MeAG counsel (1); and the lay representatives of intesested municipalities (a

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objection and accused a Staff witness, then on the stand, of relying on something that Applicants had not identified as having been relied upon by them in preparing their direct testimony. Applicants pointed out that the witness was not an Applicants' witness and thus the charge -- made in harsh, accusatory language and tone -- was wholly without foundation. Counsel for MassAG realized her error, and withdrew the objection, which had been phrased in terms to question the integrity of another party. As Judge Hoyt observed, a new "high" had, indeed, been reached.

maximum of 6 showed up though more had been admitted). As a result, the witnesses testifying took positions at a table parallel to and immediately in front of the jury box. Four tables, in two rows of two, were arranged facing the witness table (with counsel for the intervenors at the two closest to the witnesses and counsel for the Applicants and the Staff at the other two behind them). The intesested municipalities were assigned seats in the jury box. As a result of this arrangement:[12] counsel for the Applicants and the Staff had to look over or around counsel for the intervenors in order to see the witnesses; counsel for the intervenors had their backs to counsel for the Applicants and the Staff; and the lay representatives of interested municipalities could not see the faces

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[12]None of the interested municipalities filed cross-examination plans in response to the Board's order requiring such plans as a condition precedent to conducting cross examination. Nevertheless, the Board did permit cross-examination by representatives of the interested municipalities. When this occurred, room was made for the representative at one of the counsel tables so that the representative could face the witness while examining.

of the witnesses on the stand.[13] The only persons who could see everything were the members of the Board.

During the course of the hearings, certain of the representatives of interested municipalities chose to make accusations on the record to the effect that counsel for either the Applicants or the Staff were coaching witnesses on the stand by suggesting answers to questions. Tr. 1531-42, 1680 ff. These accusations were made repeatedly and, by the time the hearings closed, they had been made against virtually every lawyer serving either as counsel for the Applicants or counsel for the Staff. It turned out that, at least in part, the representatives had simply misunderstood what was going on in a proceeding with which they had no familiarity.[14] In some respects, the allegations

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[13]We appended to this memorandum a freehand sketch illustrating the Courtroom arrangement.

[14]See Tr. 1534. See also Tr. 1861-67 (August 31, 1983). It should be pointed out that, quite apart from the falseness of the accusation, the accusation was, in context, so intrinsically incredible as to raise doubts about the sincerity of the Representative for Rye in making it. First, the question propounded to the witness was extremely technical, and it distends credulity to assert that it was the sort of thing to which a lawyer would pretend knowing the answer at all -- much less preempting a highly qualified

were patently contrary to simple logic. Prescinding from the question of ulterior motive, however, the Board was in a position to observe and assess what was going on in the courtroom as a matter of primary fact; the Board made it clear that its eyes were open and it rejected the allegations as totally unfounded.

Notwithstanding the Board's pronouncement that the charge against him lacked foundation, counsel for the Applicants requested the opportunity to recall those Applicants-sponsored witnesses as to whom it had been alleged that signals had been sent. Tr. 1534. The Board acquiesced and the practice was continued as the charges proliferated.[15] The last of the accusations, however, was made concerning the testimony of an

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expert witness. Second, the precise question referred to (that appearing at Tr. 1531, lines 4-5) had already been asked and answered twice before -- there was, therefore, no answer to suggest. Finally, it is worth observing that the counsel accused of giving signals was not the counsel who was presenting these witnesses. See Tr. 1479.

[15]The first time this situation occurred, the witnesses involved were still in the courtroom. As the charges were repeated as to different witnesses (after those witnesses had left the courtroom), it became necessary to have one Applicants-sponsored witness drive back to Dover, New Hampshire from his office in Concord, Massachusetts.

outside consultant to the Staff, who, by the time the last accusation was made, had returned to his office in Texas. As to this witness, the Board directed the Staff to obtain and file his affidavit on the question of whether any signals had been sent to him. (This the Board did after having already ruled on its own that counsel was innocent of the accusation made against him.)

It was at this point that counsel for SAPL rose to inject himself into the fray.[16] Counsel began to express the opinion that a full evidentiary hearing was required (presumably on some factual issue), on a matter as to which counsel for SAPL had no basis for assessing the matter (his back having been turned) and on a matter as to which the Board (with the ability to see everything that was occurring in the courtroom) had already ruled that no factual issues needed resolution. Having been rebuffed, counsel for SAPL proceeded to

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[16]It may be observed that a prior allegation involving the same witness was made earlier. Tr. 1533. Staff counsel responded. Tr. 1535-37. There was no request at that time by SAPL for an evidentiary hearing.

make a speech. The Board perceived the speech has having the effect (if not the purpose) of lending counsel's credibility to the allegations already rejected. The Board pretermitted the speech.[17] In this there was no error, much less treatment of counsel suggesting grounds for recusal.

Counsel for SAPL was not seeking to make an objection. His own affidavit states that what he wanted to do was indicate that he "was not making accusations." Backus Aff. ¶ 4. What he was prevented from doing was making a speech, or perhaps from making further oral argument. Like this one complaint SAPL has standing to raise, a number of the complaints against the Chair's conduct are complaints that speech making or further oral argument was curtailed. SAPL apparently believes that all counsel have some "right"

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[17]After having been told that the Board did not wish to hear further on the subject, counsel for SAPL persisted in addressing it. He was finally told to sit down. He refused, saying "I would like to make one more statement on the record." Tr. 1686-87. No party has the right t insist upon making one more statement on the record on a topic that the Board has ruled is closed and after having been told to sit down.

to put whatever they want on the record. Unfortunately for SAPL that is not the law.

The best that can be said for SAPL Counsel's speech is that it could be considered oral argument. It is settled that there is no constitutional right of any nature to oral argument in administrative proceedings. FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 274-77 (1949); Arthur Lapper Corp. v. S.E.C., 547 F.2d 171, 182 n.8 (2d Cir. 1976), rehearing denied, 551 F.2d 915 (2d Cir. 1977), cert. denied, 434 U.S. 1009 (1978); Hartford Consumers Activists Assoc. v. Hausman, 381 F. Supp. 1275, 1283 (D. Conn. 1974). See also People of State of Illinois v. United States, 666 F.2d 1066, 1082 (7th Cir. 1981); National Trailer Convoy, Inc. v. United States, 293 F. Supp. 634, 636 (N.D. Okla. 1968).

The Atomic Energy Act says nothing about whether there should be a transcript or what should be in it. AEA § 189. The APA, which controls hearings before this agency, AEA § 181, nowhere grants any right of oral argument on the record or speechifying of any nature. Compare 5 U.S.C. §§ 556(d), 556(e). And finally, the granting of oral argument on motions or otherwise is strictly a matter of discretion under the

Commission's regulations. 10 CFR §§ 2.755, 2.730(d); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 167-68 (1976); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 n.12 (1979). In short, there is no right -- constitutional, statutory, or regulatory -- to "put remarks on the record" in NRC proceedings. Furthermore, by specific regulations the stenographic recording of NRC proceedings is "under the supervision of the presiding officer" 10 CFR § 2.750(a). In short, while testimony must be recorded in the transcript, the law applicable in this agency "does not require the perpetuation in a typewritten record of everything that lawyers say." NLRB v. Condensor Corp., 128 F.2d 67, 79 (3d Cir. 1972).

The only person who was out of line in the exchange between the Board and counsel for SAPL was counsel. The Board was quite correct in perceiving counsel as adding the credibility of his office as an attorney to the accusations of the representatives of the municipalities in rising to insist upon a remedy; such, indeed, is how his participation was widely viewed by

those in the room. For an attorney to lend credence to an accusation of this nature against another attorney without substantial justification is itself dubious conduct. The Commission has stated that such charges should be made only "after careful research and deliberation." Cincinatti Gas & Electric Company (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-36, 16 NRC 1512 (1982). In short, counsel for SAPL had no basis at all for his intervention in the first place; his persistence was even less justified. Proceeding obstinantly and defiantly with further argument after having received a ruling and a direction to sit down is a matter of contempt for the tribunal. We respectfully submit that the only aspect in which the conduct of the Board is even questionable was its decision to allow this display of disrespectful behavior by counsel for SAPL to pass without further remonstrance.

V. THE HANDLING OF THE ACCUSATIONS AGAINST COUNSEL

SAPL's next accusation against Judge Hoyt relates to the same affair (accusations of witness coaching); this time, however, SAPL complains of the treatment received by certain of the representatives of the interested municipalities. Once again, SAPL lacks standing to make the challenge that it does. ALAB-556, supra. Nothing about SAPL or its counsel was said during the exchange. It that point in time, SAPL had not seen fit even to inject itself into the exchange about matters of fact of which it was of necessity ignorant.[18]

The Board was quite proper in making a prompt pronouncement about the validity of the accusations that had been made As noted above, the Board members were the only persons physically situated so as to be able to see everything that happened in the courtroom,

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[18]SAPL's Motion is not organized chronologically. Without carefully following the dates of the transcripts cited, it is not immiediately clear that the Board's pronouncements about the merits of the accusations made by the municipal representatives discussed at Motion 15 ff occurred prior to the time that SAPL decided to join the fray.

and the accusations were distinctly as to matters of fact that were asserted to have occurred in the courtroom and in the presence of the Board. The Board found the accusations to have been false. That falsity itself was sufficient basis to permit a finding of negligence, if not worse, in the making of the accusations. Given the limited nature of the remaining issues for litigation at the time the hearings opened and the lack of any startling disclosures during cross-examination of the Applicants' witnesses, coupled with the attentive attendance of the press and the theretofore demonstrated proclivity of some of the representatives of the municipalities to "make their case" through that medium, unless allegations that the Board had determined to be patently groundless were promptly and vigorously squelched, participants unfamiliar with the limits of proper courtroom decorum might have formed the misimpression that they were free to use the hearings for a repetition of such behavior -- as, indeed, proved to be the case.

Unlike certain other people in the room, the Board viewed -- and properly so -- allegations of unlawful and unethical conduct by attorneys conducting a trial

to be a serious matter. As Judge Hoyt stated at the time, she had never had such allegations made in any prior proceeding she had presided over.

In any event, a tribunal which has observed a party make accusations of unlawful and unethical conduct against an opponent that the tribunal itself is in a position to find are totally false is within its rights (i) to pronounce the perceived falsity and (ii) to issue an injunction against repetition. Any indignity suffered by the thwarted proponents of the accusations flows from their own conduct, not from having it labeled for what it is.

VI. THE SHIVIK INTERRUPTION OF APRIL 8, 1983

SAPL is truly reaching for the next arrow it flings at the Chair. After having duly noticed a pre-hearing conference in Boston, Massachusetts (which is within 45 miles from the Seabrook site, and which was not an evidentiary session), the Board took pains to give special notice to the representatives of the several municipalities that had petitioned for and been granted status as "interested states." Very few announced themselves when appearances were taken at the

commencement of the proceedings. Tr. 658-59 (April 7, 1983), 808-13 (April 8, 1983).

A few hours after the commencement of the proceedings on the second day, someone who had just walked into the courtroom, and whose appearance had not been filed at the commencement of the case (or ever, as matters turned out) sought leave to interrupt. Tr. 874 (April 8, 1983). Believing the person to be a member of the public, the Board declined to entertain the person's remarks. Id. When it turned out that the person was a purported representative of an "interested municipality" who had decided to appear only several hours after the proceedings had gotten underway, the Board told him to return after lunch, make his appearance, and it would be received. Tr. 879.

In a proceeding that involves so many people, the preservation of order requires more adherence to basic rules (such as showing up on time for hearings, making appearances in a cognizable fashion and limiting oral argument on matters of scheduling to admitted litigants) than might be tolerable in a proceeding involving fewer participants. The Board's conduct was correct and beyond reproach. No disrepect was intended

by the Board or perceived by the Applicants; if, as SAPL seems to believe, the municipality involved sensed disrespect, we suggest that it has in fact mistakenly identified only adherence to the rules.

VII. THE REMONSTRATION AND PLEA FOR ORDER AT THE SIDEBAR OF AUGUST 18, 1983

By the afternoon of August 18, 1983, deportment in the courtroom had indeed gotten out of hand. Counsel for MassAG had engaged in a vituperous outburst for which an apology was later received, patently false accusations had been made against counsel, and interruptions both of witnesses giving answers and attorneys addressing the bench had become the order of the day. See, e.g., Tr. 1056. Procedural chaos, it had been observed by some in the room, was just around the corner.

The straw that broke the camel's back, however, occurred when counsel for MassAG blatantly and rudely interrupted counsel for the Staff, who was then in the process of requesting a ruling that counsel for MassAG refrain from interrupting witnesses in the middle of answers. Tr. 1318-23 (August 19, 1983). At that point

the hearings had become a shouting match. Firm response from the bench was called for.[19]

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[19]Counsel for SAPL spends much of this section of the Motion challenging a rebuke extended by the bench to counsel for NECNP. The situation that provoked that response was this: The Board determined that it wished to take a site visit. Rather than simply announcing a time, however, it canvassed counsel in the hearing room at the beginning of one of the sessions, but before the Reporter had set up her equipment and the proceedings had come to order, as to their interest in attending the site tour and preference as to dates. This discussion, in which the Board reached no final determination as to the time of the visit, included a request by NECNP, which the Board denied, that members of the organization other than counsel be allowed to accompany the Board and counsel on the visit.

Before the Board had an opportunity to reach a final decision as to the most convenient time and to place the matter on the record, counsel for NECNP rose to precisely that on her own. Tr. 1297. The comments, besides suggesting by their tone some impropriety in the inquiries made by the Board off the record (but in the presence of all), had the effect of pre-empting the Board's decision as well as its function to see to the accurate recording of NECNP's rejected request. SAPL then joined the fray, premising its attack on the erroneous proposition that there exists "the right on any attorney to put what they want on the record." Tr. 1300. As we have pointed out in Section IV of this memorandum, supra, there exists no such right. The problem facing SAPL and perhaps others in this proceeding to date, however, is that they do not distinguish between objections and speeches, and the rule for which SAPL really contends is that he and other counsel are free at any time to rise to orate on the fairness of the Atomic Energy Act, the fairness of the Commission's regulations, or any other topic of relevance only to the afternoon editions and not to

VIII. THE PRETERMITTED JORDAN INDICTMENT OF NRC'S POLICY ON INTERVENOR FUNDING OF APRIL 8, 1983

SAPL's next argument once again relates to something in which he was not involved -- this one occurred more than four months before the commencement of the evidentiary hearings. As SAPL points out, the issue on the table was the relative merits of two competing proposals for a schedule. Counsel for NECNP was engaged in defending his proposal over the other when he shifted gears and launched into what was expected to be a critique of the Commission's policy

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the issues up for factual hearing. Control of the proceedings includes the right and the duty to prevent the forum from being so misused; the ultimate power of determining the course of proceedings is and must remain with the presiding officer.

on intervenor funding:

> "I would remind the Board as well that if we take into account reality and wetake into account the fact that the various Intervenors, including the towns, do not have the resources to be on this every day. The fact is that a hearing schedule of this sort is virtually unprecendented in any other sort of arena. Anything else this complex would take considerably longer than this, even the schedule I have proposed. Even with fully-funded parties.
>
> "That is not the case here, and it is clear that the Intervenors are not provided -- in fact, becasuse Intervenors are not allowed to have support from the Commission, the Commission must take into account --
>
> "JUDGE HOYT: Mr. Jordan, I am going to stop you right at that point. I am not going to entertain on behalf of this Board any arguments of that nature, and I am going to only caution you the one time.
>
> "You know that this Board has no control over those matters, and indeed, this Commission does not.

Tr. 907 (April 8, 1983). The Board, of course, was correct. The question of intervenor funding is not one that the Board can control; neither is it a fit topic for debate in an operating license prehearing conference, nor is there any rule that requires a Board, in order not to be accused of bias, to listen to criticisms of the legal system on matters that are simply beyond the scope of the issue at hand. On the

other hand, all that was pretermitted was argument on intervenor funding; counsel was expressly invited to continue argument on scheduling insofar as it involved other topics. To say, as SAPL does, that "At that point, Judge Hoyt . . . refused to let [Mr. Jordan] continue. Even when counsel attempted to get clarification from the Judge as to the proposed schedule, the Judge again cut him off and denied him that clarificatino opportunity," Motion at 21, is hopelessly to distort what occurred.

SAPL combines another attack on the Chair in this section of the Motion, this one relating to the Judge's comments about "excuses" and failures of counsel to prosecute the positions they had taken with vigor. What SAPL omits is the context in which the comment was made. The general context was argument about scheduling, while the specific context was a contention being advanced that more than the proposed allotment was required for discovery. In response the judge pointed out, quite correctly, that most of the time previously alloted for discovery on the technical side had not been used. Tr. 921 (April 8, 1983). The judge's facts were correct.

IX. THE RULINGS OF THE BOARD THAT WERE THE SUBJECT OF UNSUCCESSFUL PETITIONS TO THE APPEAL BOARD FOR DIRECTED CERTIFICATION

SAPL's ultimate attack is on prior rulings made by the Board, either on motions made by parties or, presumably, on contentions proposed for admission to the proceeding.[20] Yet it is axiomatic that rulings by themselves neither establish nor support a claim of bias. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974). Indeed, even were the rulings error -- which is not the case here -- a claim of bias and and claim of error are two very different things. We trust that the day has not come when every disappointed litigant may find solace in his defeat by alleging bias on the part of the tribunal.

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[20]As to the latter, it is worth observing that many of the rulings made by the Board -- and we presume (apparently contrary to SAPL) that all of the Board's substantive rulings on motions for summary disposition and on proposed contentions were made by the entire Board, and not by a single member -- were rulings that had the effect of excluding a party altogether. Such rulings are immediately appealable, yet none were appealed. This by itself says something for the rectitude of the rulings, since none of the parties ruled against had enough conviction in the arguments the Board had rejected to advance them to the Appeal Board.

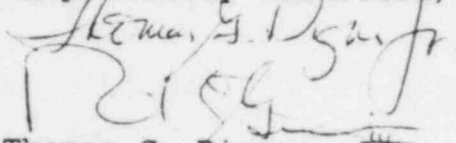
X. CONCLUSION

SAPL has met with two disappointments in this proceeding thus far. One, which probably comes as less of a surprise, is that its contentions on the merits do not seem to be faring well. The second is that the Licensing Board in this case intends to run a "tight ship," one that is limited to evidence and arguments regarding relevant issues in contention and one that minimizes opportunities for delay, stalling, posturing and the like. Whether all of the rulings on the merits have been correct is a matter properly left to another day. Whether the Board is correct in running a "tight ship" is an issue that can be resolved promptly.

The answer, like many answers, is "It depends." If these hearings are to be limited to the matters in controversy under the Atomic Energy Act and the Commission's regulations, the answer is yes. If there is no place in these hearings for addressing the Six O'Clock News, a disaffected constituency and "pounding the table," the answer is yes. If attempts to divert attention from contentions whose merits are fast flagging by attacks on counsel, the process and the bench, the answer is yes.

If the answer to these questions is yes, and if judge-baiting is to be denied its hoped-for fruits, the Motion must be denied.

Respectfully submitted,



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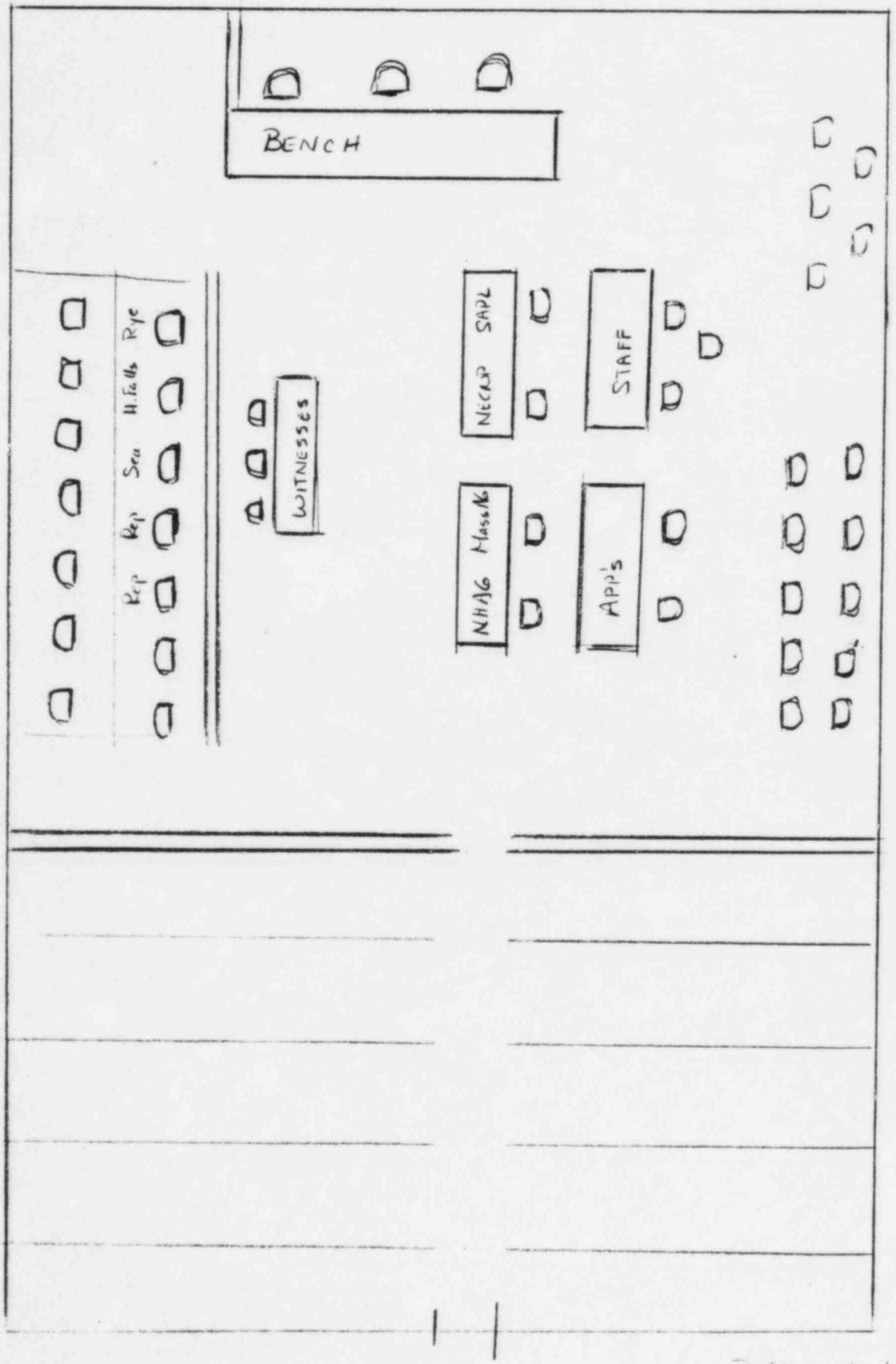
Dated: October 24, 1983

STRAFFORD COUNTY COURTROOM

LAs arranged for Scheduled
OL Hearings 5/22)



Public Seating

RKG 10/18/12

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on October 24, 1983, I made service of the within "APPLICANTS' ANSWER TO "'SAPL'S MOTION FOR DISQUALIFICATION OF JUDGE HOYT'" by ~~mailing~~ Federal Express copies ~~thereof, postage prepaid~~, to:

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