

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.)

(Seabrook Station, Units 1 and 2))

Docket Nos. 50-443 OL
50-444 OL

NRC STAFF RESPONSE IN OPPOSITION TO
"SAPL APPEAL OF DENIAL OF MOTION TO DISMISS
APPLICATION FOR SEABROOK UNIT 2"

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Counsel for NRC Staff

March 8, 1984

DESIGNATED ORIGINAL

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TO "SAPL APPEAL OF DENIAL OF MOTION TO
DISMISS APPLICATION FOR SEABROOK UNIT 2"

I. INTRODUCTION

The Atomic Safety and Licensing Board conducting the proceeding on the application for operating licenses for Seabrook Units 1 and 2 has denied two attempts by Seacoast Anti-Pollution League (SAPL) to procure dismissal of the proceeding as respects Unit 2.^{1/} This appeal by SAPL seeks interlocutory review by the Appeal Board of the Licensing Board's rulings.^{2/} For the reasons which follow, the appeal should not be permitted.

^{1/} Unpublished Memorandum and Order dated January 13, 1984. SAPL had filed a "Motion to Dismiss" on September 26, 1983 and "[i]n anticipation of the Board's denial of its Motion to Dismiss" ("SAPL Appeal," p. 6), on December 14, 1983 SAPL submitted a late-filed contention which, in effect, seeks the same relief.

^{2/} Although SAPL characterizes its pleading as an "appeal", the Staff will, as directed by the Appeal Board in its Order of February 24, 1984, treat it as a petition for directed certification.

II. ARGUMENT IN OPPOSITION TO SAPL'S PETITION

A. Interlocutory Appeals Are Not Permitted and the Appeal Board Should Not Direct Certification

1. The Standard for Directed Certification

Under 10 C.F.R. § 2.730(f), interlocutory appeals may not be taken from rulings of Licensing Boards. Although, under the provisions of 10 C.F.R. §§ 2.718(i) and 2.785(b), Atomic Safety and Licensing Appeal Boards "have the power to direct the certification of legal issues raised in proceedings still pending before licensing boards," Commission policy does not favor appellate examination of interlocutory rulings. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). Exceptional circumstances must first be demonstrated before the Appeal Board will exercise its discretionary powers to direct certification of an issue under 10 C.F.R. § 2.718(i). Id. at 483. The Appeal Board will undertake discretionary interlocutory review "only where the ruling below either (1) threatened the 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." Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). The Appeal Board further emphasized in Marble Hill that it would not consider interlocutory appeals where any harm could be alleviated by an appeal at the conclusion of the proceeding. Id.; see also Cleveland Electric

Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2),
ALAB-675, 15 NRC 1105, 1113 (1982).

2. The Licensing Board's Order Does Not Affect the Basic
Structure of the Proceeding in a Pervasive or Unusual Manner

SAPL has grounded its petition solely on the second prong of the Marble Hill test, asserting that the Licensing Board's ruling affects the basic structure of the proceeding in a pervasive or unusual manner. SAPL Appeal at 1. SAPL argues that the delay in construction of Unit 2 means that this unit will not be completed prior to the conclusion of the hearing, and that SAPL is therefore presently unable to raise contentions challenging the adequacy of that future construction. Thus, the argument continues, the Licensing Board's order permitting the present hearing to continue on both units will prevent the timely filing of contentions challenging "safety systems yet to be installed in Unit 2", thereby pervasively affecting "the ability of the Board to conduct a fair hearing." Id.

SAPL's argument does not, however, suggest how the Board's order "affect[s] the basic structure of the proceeding in a pervasive or unusual manner" not subject to correction upon appeal after conclusion of the proceeding. For if indeed the Board wrongly ruled and the application for Unit 2 should have been dismissed, that can be corrected upon appeal. The question of whether permitting the present hearing to continue on both units is error because "safety systems are yet to be installed in Unit 2" can be fully reviewed upon appeal after the hearing and any purported errors can be fully corrected at that time. If any rights to a fair hearing are violated they can be fully reviewed upon

appeal after the conclusion of the hearing. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-393, 5 NRC 767 (1977); Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976). No error is shown that requires review now to prevent substantial prejudice.^{3/}

Further, the Appeal Board has explicitly stated that it will not accept for interlocutory review denial of admission of a contention, where the intervenor remains a party in the proceeding. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980); Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976). It has further stated that it will not review during the course of a proceeding a denial of a motion for summary disposition. See Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177 (1977); Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93 (1974). SAPL, which remains a party to this proceeding, here seeks interlocutory review of refusal to admit a contention and denial of a motion to terminate part of the proceeding. Under the precedents of the Commission, interlocutory review of these matters is not appropriate.

^{3/} The fact that a Board may consider matters that need not be considered and thereby expand the scope and length of the proceeding is similarly no cause for the grant of interlocutory review. See Perry, supra, 15 NRC at 1114.

No showing is made that the rulings below affect the proceeding in such "a persuasive or unusual manner" as to allow an interlocutory appeal and the petition should therefore be denied.^{4/}

B. The Licensing Board Did Not Err in Denying SAPL's Motion to Dismiss and Late-Filed Contention

As discussed above, SAPL has failed to show that the Board's order of January 14 affects the structure of this proceeding in so pervasive or unusual a manner as to warrant directed certification. Even if a contrary conclusion were to be reached as to the order's impact, however, SAPL has not shown error in the Board's denial of its motion and contention, and therefore is not entitled to relief.

1. SAPL's Motion to Dismiss

SAPL premised its motion to dismiss the Unit 2 operating license application on the assertion that a regulatory prerequisite for issuance of an operating license was a finding by the Licensing Board that "construction of the facility has been substantially completed" pursuant to 10 C.F.R. § 50.57(a)(1). Because the construction of Unit 2 has been delayed, SAPL argued that "there is no way in which this Board can make a finding of 'substantial completion,'" and therefore the

^{4/} SAPL cites South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140 (1981), in support of its interlocutory appeal. That case is inapposite, inasmuch as it involved the Licensing Board's authority to engage independent consultants to help it determine substantive issues, which changed the adjudicatory nature of the proceeding.

application for Unit 2 should be dismissed as untimely. SAPL Motion to Dismiss at pp. 3-4.

In denying the motion, the Licensing Board concluded that there was "no basis for it to consider dismissal of the application," noting that the 10 C.F.R. § 50.57(a)(1) findings are made, not by the Licensing Board, but by the Commission through its delegate, the Director of Nuclear Reactor Regulation. January 13 Order at 5. The Board thus distinguished its own authority to authorize issuance of a license from the authority to issue the license, which 10 C.F.R. § 1.61 vests in the Office of Nuclear Reactor Regulation. Id. In its petition SAPL argues that this distinction is unsound and contrary to Commission policy. SAPL Appeal at 2.

This issue, however, has already been addressed by the Appeal Board in the course of affirming the Licensing Board's denial of an untimely intervention petition raising the same issue which SAPL seeks to raise. In Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-750, 19 NRC ____ (January 24, 1984), the Appeal Board observed that "the Licensing Board's analysis of the Unit 2 prematurity question in its January 13 memorandum and order is not manifestly (or even probably) erroneous." Slip op. at 8. In an accompanying footnote the Appeal Board offered the following analysis:

To the contrary, this much is clear: First, the Licensing Board correctly held that it is not its responsibility, but that of the Director of Nuclear Reactor Regulation, to make the finding required by Section 50.57(a)(1) as a precondition to the issuance by the Director of an operating license. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 410-11 (1974).

Second, there is nothing in the Commission's regulations specifically providing that a reactor must have reached a particular stage of completion before an operating license application may be filed. Third, just 16 months ago the Commission denied a petition for rulemaking that sought amendments to the Rules of Practice that would have, inter alia, limited the scope of each operating license hearing to a single reactor unit even if that unit were one of several similar units constructed on a multi-reactor site. 47 Fed. Reg. 46,524 (1982). In support of his proposal, the petitioner had noted that the "time lag between inservice dates for individual reactors at multi-reactor nuclear plants has been increasing for many years." Ibid. In the Commission's view, however, that consideration did not provide a sufficient basis for requiring "an exclusive hearing on each reactor unit." Id. at 46,525.

Id. Thus it is clear that the Licensing Board did not err in denying SAPL's motion to dismiss.

2. SAPL's Late-Filed Contention

On December 14, 1983, two and one-half months after filing its motion to dismiss, SAPL proffered the following contention:

The operating license hearings for Seabrook Unit 2 are untimely and premature because Unit 2 construction will not meet the levels of substantial completion required for license issuance for many years.

"Memorandum in Support of SAPL's Motion to Dismiss the Operating License Application for Seabrook Unit 2 and Petition for Late-Filed Contention" (SAPL Petition for Late-Filed Contention) at 12. The basis for the contention revealed that it was grounded on the same argument as SAPL's motion to dismiss, i.e., the 10 C.F.R. § 50.57(a)(1) requirement of a finding of "substantial completion" prior to issuance of an operating

license. In its order of January 13, the Licensing Board dismissed the contention after balancing the five 10 C.F.R. § 2.714(a) factors.^{5/}

Before discussing the Licensing Board's analysis of the lateness factors, it should be noted that the Appeal Board's prior analysis of the legal insufficiency of the premise underlying both SAPL's motion to dismiss and its contention, discussed in Part II.B.1, supra, constitutes an independent basis for affirming the Licensing Board's dismissal of the contention.

Nonetheless, the Licensing Board did not err in concluding that the balancing of the Section 2.714(a) factors did not warrant granting the late-filed contention. Below, in addressing the "good cause" for its late submission of the contention, SAPL argued that it was first given reason to discount the original completion date for Unit 2 by the combination of an April 29, 1983 report of the New Hampshire Public Utilities Commission and the September 8, 1983 vote of the Seabrook Ownership Group to delay continued construction of Unit 2. SAPL Petition for Late Filed Contention

^{5/} Those factors are:

- (i) Good cause, if any, for failure to file on time;
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) The extent to which the petitioner's interest will be represented by existing parties; and
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

at 14.^{6/} Yet SAPL offered no adequate explanation for its delay in filing of between three and eight months after the events by which it was put on notice that Unit 2's original completion date would likely be missed by several years. Indeed, the only reasons given by SAPL before the Licensing Board for its failure to file the contention contemporaneously with (or in lieu of) its motion to dismiss was SAPL's reluctance to suggest that the proceedings should continue by introducing a contention on the subject. SAPL Petition for Late Filed Contention at p. 15. On these facts the Licensing Board correctly concluded that SAPL had not shown good cause for its late filing. The failure of SAPL to show good cause meant that the petition should have been denied in the absence of a

^{6/} In its instant petition SAPL states for the first time that it was lulled into inaction by the possibility that the Doherty petition for intervention might be granted, and that only upon its denial on November 15, 1983 was it "apparent to SAPL that the Board was not addressing the merits of the issue of Unit 2 completion date." SAPL Petition for Directed Certification at 8. Even if this good cause argument, raised for the first time on appeal, is considered, its post hoc character considerably diminishes its credibility, for one would rightfully expect SAPL to have mentioned this when first it offered the contention if the Doherty petition's denial was in fact influential in SAPL's decision. More importantly, even if SAPL did rely on the possibility of Doherty's petition being granted, this reliance cannot serve as good cause for its failure to timely put forth a contention it had an interest in litigating. If a party chooses to rely upon the efforts of another in advancing its interest, that party must assume the risk that its representative may not succeed. Cf. Gulf States Utilities Company (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796-97 (1977) (tardiness not excused on theory that potential intervenor was lulled by the intervention of another who later withdrew).

"particularly strong" showing on the other four factors. Puget Sound Power and Light Company, et al. (Skagit Project, Units 1 and 2), ALAB-552, 10 NRC 1, 5 (1979).

In addressing the remaining factors, the Licensing Board correctly observed that SAPL did not demonstrate any special expertise on the issue presented by the contentions, so that the third factor (contribution SAPL could make in developing a sound record) did not weigh in SAPL's favor. Nor was the Licensing Board in error when it ruled that the broadening of issues or delay in the proceeding that would likely result from litigation of the proffered contention was not so small as to permit the fifth factor (extent to which SAPL's participation will broaden or delay the proceeding) to weigh in SAPL's favor.

Similarly, while the Licensing Board resolved the fourth factor (extent to which SAPL's interest can be protected by other parties) in SAPL's favor, it viewed the second factor (availability of other means to protect SAPL's interest) as weighing against admission of the contention.^{7/} January 13 Order at 8. However, even if weighed in favor of SAPL, these two factors were not sufficiently weighty to overcome the negative influence of the remaining two factors so as to constitute the "particularly strong" showing required to offset SAPL's failure to show good cause for its late filing.

^{7/} The Staff concluded below that the second factor weighed in SAPL's favor. "NRC Staff Response to 'Memorandum in Support of SAPL's Motion to Dismiss . . . and Petition for Late-Filed Contention'", filed January 3, 1984, at 6.

On balance, therefore, it is clear that the Licensing Board did not err in concluding that the Section 2.714(a) factors weighed against the grant of SAPL's petition.

III. CONCLUSION

As discussed in Part II.A, supra, SAPL has failed to meet the stringent requirements for directed certification, and its petition should therefore be denied. Furthermore, as discussed in Part II.B, the Licensing Board did not err in its denial either of SAPL's motion to dismiss or of SAPL's late-filed contention.

Respectfully submitted,

William F. Patterson, Jr.

William F. Patterson, Jr.
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Dated at Bethesda, Maryland
this 8th day of March, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO 'SAPL APPEAL OF DENIAL OF MOTION TO DISMISS APPLICATION FOR SEABROOK UNIT 2'" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 8th day of March, 1984.

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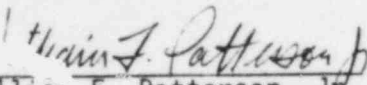
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