UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of:	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE	)	Docket Nos. 50-443-OL 50-444-OL
(Seabrook Station, Units I and II)	)	

MEMORANDUM IN SUPPORT OF ATTORNEY GENERAL FRANCIS X. BELLOTTI'S MOTION FOR DISQUALIFICATION AND RECUSAL OF JUDGE HELEN F. HOYT AND MOTION FOR RECONSIDERATION OF JUDGE HOYT'S RULING ON MOTION FOR SUMMARY DISPOSITION AND MOTION FOR REHEARING

Introduction

Attorney General Francis X. Bellotti petitioned the Atomic Safety and Licensing Board ("Board") on or about November 18, 1981, to represent the public interest and the citizens of the Commonwealth before the Board on issues of concern regarding the Seabrook Nuclear Power Station, Units I and II. By order of the Board, Attorney General Bellotti was admitted to the proceedings.

On April 21, 1982, the New England Coalition on Nuclear Pollution ("NECNP") filed Contentions 111.12 and 13 relative to the accuracy and reliability of the applicants' evacuation time study for the Seabrook vicinity.[1/]

1/ Similar contentions submitted by Attorney General Bellotti were dismissed as premature. The Attorney General gave notice of his intent to file testimony and participate in the proceeding on NECNP's contention.

Judge Hoyt, as presiding officer of the Board, redrafted these contentions in her ruling on the Applicants' Twenty-First Motion for Summary Disposition. The redrafted contentions greatly narrowed the issues on which Attorney General Bellotti wished to present evidence and argument. This ruling was appealed by the Commonwealth on July 15, 1983, as an interlocutory matter, but the Appeals Board declined to entertain interlocutory review. Hearings on the redrafted contentions were held in August, 1983, in Dover, New Hampshire. Those hearings and the ruling made by Judge Hoyt on NECNP Contentions 111.12 and 13 are the subject of these Motions.

MOTION FOR RECUSAL

I. Standard of Review

A. The Appropriate Standard Of Review is the Objective Standard Found in 28 U.S.C. §455(a)

Any party to Nuclear Regulatory Commission (NRC) proceeding may move that a presiding officer or a board member disqualify himself. 10 CFR §2.704(c). The principal source of governing rules regarding disqualification is the Administrative Procedure Act (APA), which is applicable to NRC licensing proceedings.[2/]

The APA recognizes two broad categories of conduct which may give rise to disqualification of an agency employee who has adjudicatory responsibilities in a particular licensing proceeding. These categories are: (1) a requirement that

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2/ §181, Atomic Energy Act, 1954, as amended, 42 U.S.C 2231.

there be a separation of adjudicatory functions within an agency from its investigative and prosecuting functions, and (2) that the functions of the presiding officers of Atomic Safety and Licensing Boards (ASLB) be "conducted in an impartial manner" and "that a presiding officer may be disqualified for personal bias or other disqualifications" (Emphasis added.) 5 U.S.C. §556(b). Consumers Power Company (Midland Plant, Units I and II) ALAB-101, 6 AEC 60, 63 (1973).

The statutory language which underlies the second and far broader of these categories of disqualification is similar to that appearing in 28 U.S.C. §144, which applies to the disqualification of federal judges.[3/] Id. at 63.

In the Consumer Power Company case cited above, the Atomic Safety and Licensing Appeals Board ("ALAB") applied an objective standard when reviewing a motion for disqualification and recusal of an ASLB member and stated that an administrative trier of fact is subject to disqualification if he

> has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues. Id. at 65.

The NRC adopted the objective standard set out above when reviewing the ALAB's determination that there were no grounds

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3/ See footnote 5, infra, page 6.

for recusal in the Consumers Power case (Commonwealth Edison Company (LaSalle County Nuclear Power Station, Units I and II) CLI-73-8, 6 AEC 169, footnote 1 (1973)), and it applied the standard in Commonwealth Edison Company , supra.[4/]

Recusal in the context of NRC proceedings was most recently explored in Houston Lighting and Power Company, in which the Commission, in a three to two vote, overturned the ALAB's decision (ALAB-672, 15 NRC 677)(1982) disqualifying a licensing board member for the appearance of personal bias. CLI-82-9, 15 NRC 1363 (1982). In Houston Lighting, the intervenor, Citizens Concerned About Nuclear Power ("CCNAP"), sought recusal of Judge Hill due to 1) alleged personal bias against CCNAP, and 2) inherent bias rising from the judge's prior employment in nuclear related industry. The comments at issue were not made in the hearing, but rather in a written statement issued by the judge accompanying the denial of the intervenor's motion by the two other ASLB members. The Appeals Board found that certain language in Judge Hill's written statement "gave rise to a serious doubt respecting his present ability to judge CCANP and its assertions in this proceeding dispassionately." Id., at 680. Furthermore, his written statement demonstrated "a lack

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4/ In Commonwealth Edison, the NRC reversed the ALAB's determination that disqualification was mandated, finding that "preliminary assessments, made on the record, during the course of adjudicatory proceeding -- based solely upon application of the decision-maker's judgment to materials properly before him in the proceeding -- do not compel disqualification as a matter of law." Id. at 170, citing United States v. Grinnell Corp., 384 U.S.C. 563, 580-83 (1966).

of sensitivity for the role a judge must necessarily play." Id. at 682. The Appeals Board determined that an objective observer could reasonably infer that Judge Hill had a personal animus against CCANP which could affect his ability to pass objectively on the issues. Id., at 683.

Overruling two strong dissents, the Commission in Houston Lighting held that the circumstances did not warrant disqualification by law or as a matter of policy. According to the Commission, Judge Hill's alleged bias did not "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge leaned from his participation in the case." Id., at 1365. The Commission found that, although generally bias must be evident from extrajudicial conduct for a judge to be disqualified, some federal courts have held that a judge may be recused for "judicial conduct demonstrating such pervasive bias and prejudice as would constitute bias against the party." Id. at 1366. The Commission cautioned, however, that "courts have been hesitant to invoke that exception except in the most extreme cases." Id. at 1366, citing United States v. Ritter, 540 F.2d 463 (10th Cir. 1976) (per curiam), cert. denied, 429 U.S.C. 951 (1976). In Houston Lighting, the Commission found that Judge Hill's statement was not extrajudicial, nor was there such pervasive bias that an exception to the rule was warranted. The Commission relied on Grinnell, infra, and

Commonwealth Edison Company, infra, in requiring that the disqualifying conduct be extrajudicial. This reliance is misplaced, as both of these decisions were rendered prior to the enactment in 1974 of the new 28 U.S.C. §455(a), which sets forth the objective standard for disqualification of judges.

In Houston Lighting, the Commission looked to the objective standard of 28 U.S.C. §455(a) in reviewing and reversing the ALAB's determination to recuse Judge Hill. 28 U.S.C. §455(a) reads:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

Section 455(a), a 1974 amendment of an older section, was passed to make the disqualification statute conform generally with the Code of Judical Conduct's standards for disqualification of judges for bias, prejudice, or conflict of interest. This new section 455(a) set up an objective standard and removed the "duty to sit" doctrine.[5/] The policy reasons

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5/ "Under the broader standard of revised 455(a), disqualification is appropriate not only where there is actual or apparent bias or prejudice, but also when the circumstances are such that the judge's impartiality might reasonably be questioned...Thus, the grounds for disqualification set out in Section 144 - "personal bias or prejudice either against [a party] or in favor of any adverse party - are included in Section 455. Moreover, the language of Section 455(a) allows greater flexibility in determining whether disqualification is warranted in particular situations." United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976) citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §§3549, 3542.

behind this statute were expressed as follows:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. 1974 U.S. Code Cong. and Admin. News at 6355.

According to this "reasonable factual basis -- reasonable person" test, a judge or presiding officer should be disqualified "if a reasonable person, knowing all the circumstances, would reach the conclusion that the judge's or presiding officer's impartiality might be reasonably be questioned". Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 103 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 46 L.Ed. 2d 188 (1976) citing Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044, 1052 (5th Cir. 1975). Accord, Fredonia Broadcasting Inc., v. RCA Corporation, 569 F.2d 251, 257 (5th Cir. 1978), Nuclear Engineering Company, Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 303 (1978).

The rationale underlying this objective standard seeks to preserve the integrity of the administrative process. Both federal courts and agency decisions have noted that:

> An administrative hearing...must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirements of due process. (Emphasis added.) Consumers Power

Company, at 65 citing Amos Treat and Company v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); Houston Lighting and Power Company (South Texas Project, Units I and II) ALAB-672, 15 NRC 677, 681 (1982).

As was pointed out in Houston Lighting by both Commissioner Asselstine (in dissent), supra, at 1374, and in the majority decision, supra, at 1366, the federal courts have recognized that there is an exception to the extrajudicial source rule where pervasive bias and prejudice is shown.[6/]

B. The Standard of Review Established by the Commission in Houston Lighting is Too Narrow an Interpretation of 28 U.S.C. §455(a)

Although the Commission in Houston Lighting recognized the pervasive bias exception to the extrajudicial source rule, it erred in interpreting 28 U.S.C. §455(a) so narrowly as to eliminate judicial conduct as disqualifying. The Commission not only erroneously relied on Grinnell, infra, and Commonwealth Edison Company, infra, but also erroneously relied on In Re: International Business Machines Corp., 618 F.2d 923 (2nd Cir. 1980) to support its requirement that disqualifying conduct be extrajudicial. In IBM, the court reviewed motions for disqualification filed in the lengthy and rather famous anti-trust litigation. The motion for disqualification listed four types of conduct showing prejudice and bias, but focused

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6/ Commissioner Asselstine defines statements of a "judicial" nature as "those statements based upon matters coming before the judge or presiding officer during the course of the proceeding", and statements of an "extra-judicial" nature as "statements based upon information acquired prior to, or outdide the scope of, the proceeding." Id. at 1373.

mainly on the disproportionate number of rulings rendered adverse to IBM during the course of the four and one-half years of trial time. In its consideration of IBM's arguments under the objective standard of §455(a), the court denied the motion for disqualification on the basis that adverse rulings cannot create the per se appearance of bias. "A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias.... We conclude that under §455(a) the bias to be established must be extra-judicial and must not be based upon in-court rulings." Id. at 929.

The court also stated that a second policy consideration underlying the rule that the bias necessary for recusal must be extrajudicial and not based upon what the judge has learned in the proceeding was that the judge was the sole trier of fact in very lengthy and complex litigation. Consequently, the court noted that it was appropriate for the judge to form attitudes about the reliability and credibility of witnesses, and also to shrewdly observe the strategies of opposing lawyers in order to ascertain the real purposes and motives behind the surfaces of their remarks. Id., at 930,, citing In Re: J.P. Linahan, Inc., 138 F.2d 650, 653-54 (2nd Cir. 1943).

The IBM case can be distinguished from the situation in the instant case as follows: First, the judge in the IBM case had

been the trial court judge for over four and one-half years at the time the motion for disqualification was made. The Second Court noted that he had time not only to form judgments as to the veracity of the witnesses before him, but also to lose patience as a result of the "seemingly interminable length of the trial." Id. at 931. In the instant case, all of the problems of which Attorney General Bellotti complains occurred at the pre-hearings conferences or during the first five days of the evidentiary hearings. Judge Hoyt did not have time to know the parties or their representatives, or to grow impatient. Her conduct, as set forth in Section II of this memorandum, can only lead one to the conclusion that she harbored a bias and animosity toward the intervenors and town representatives which influenced her conduct from the very start of the hearings.

Second, the IBM case relied heavily on case law rendered before Congress and the American Bar Association adopted the objective standard of review. In support of its position that an appearance of bias can only stem from extrajudicial conduct, it refers to old cases relating exclusively to the original subjective standard of recusal.

In some recent decisions, rendered after the adoption of §455(a) in 1974, the First Circuit has held that "a judge's conduct during prior judicial involvement in a case (as opposed to extra-judicial knowledge of the parties or evidence) can

conceivably provide a factual basis for doubting impartiality". Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979). In United States v. Cepeda Penes, the court held "that the newly amended recusal provision, 28 U.S.C. §455(a), now permits disqualification of judges even if alleged prejudice is the result of judicially acquired information, in contradistinction to the prior law that required a judge to hear a case unless he developed preconceptions by means of extra-judicial sources". (Emphasis in original.) 577 F.2d 754, 758 (1st Cir. 1978). In Bell v. Chandler, the Tenth Circuit found that Judge Chandler should have disqualified himself because of his personal animosity toward one of the attorneys appearing before him. The personal hostility developed in an earlier proceeding and was based on interactions between the judge and lawyer, not on any extrajudicial source. 569 F.2d 556 (10th Cir. 1978). In Nicodemus v. Chrysler Corporation, the Sixth Circuit reviewed a district court judge's conduct at a preliminary injunction hearing and found the following remarks made by the judge unsupported by the record and unnecessary in the circumstances:

> This thing is the most transparent and the most blatant attempt to intimidate witnesses and parties that I have seen in a long time. I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can, including their own employees, and I don't intend to put up with it. 596 F.2d 152, 155 (6th Cir. 1979).

The Sixth Circuit found that the judge failed, from the start of the hearing, to view the case with the impartiality between litigants that the parties are entitled to receive. The court reversed and remanded the case for a preliminary injunction hearing before a different judge, because "more drastic measures" needed to be taken.

> Ordinarily, when unfair judicial procedures result in a denial of due process, this court could simply find error, reverse and remand the matter. Recusal would be altogether inappropriate. However, the record in this case demonstrates more serious problems. The denial of fair procedures here was due not to good faith mistakes of judgment or misapplication of the proper rules of law by the district court. The record demonstrates overt acts by the district judge reflecting great bias against Reserve Mining Company and substantial disregard for the mandate of this court. Id. at 157, citing Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).

Third, the judge in the IBM case was the sole trier of fact. In the present case, Judge Hoyt sits on the Board not only as a trier of fact, but also as the Board's legal expert. In that position, she heavily influences the evidence Judges Luebke and Harbor consider. In the case of exclusionary rulings, that evidence is controlled by her decisions. In addition, Judge Hoyt's bias and animosity toward the intervenors and the town representatives, as exhibited in her conduct at the proceedings, must heavily influence the attitudes of Judges Luebke and Harbor. Because these two judges must rely on Judge Hoyt's rulings, it is mandatory that the hearings meet the statutory requirements of not only complete fairness but also the appearance of complete fairness.

Fourth, the IBM case was antitrust litigation, and not an NRC proceeding. Given the public concern with nuclear issues, the "extrajudicial source" rule, even with the pervasive bias exception, does not create a convincing standard that licensing proceedings are conducted in a fair and impartial manner.

C. Public Policy Dictates that the Objective Test of 28 U.S.C. §455(a) Be Interpreted Broadly in NRC Proceedings.

As Commissioner Asselstine pointed out in dissent in Houston Lighting:

> Taken to its logical conclusion, the majority opinion stands for the proposition that even if a disinterested observer were to conclude that a Licensing Board member's conduct or statements were sufficient to create a reasonable doubt regarding the Board member's ability to act fairly and impartially on matters before the Board, this would not be a sufficient basis for disqualification so long as the Board member's conduct or statements were related to matters within the proceeding. In my view, the adoption of this standard by the Commission majority sends an unfortunate signal to the Licensing Boards and to the public - a signal that serves to undermine public confidence in the objectivity of our adjudicatory proceedings. I believe that the Commission has the discretionary authority to impose a higher standard of conduct for Licensing Board members than this, and I believe there are strong public policy reasons for doing so. Houston Lighting, 15 NRC at 1374.

Such a higher standard of conduct was also proposed by Commissioner Ramey in Commonwealth Edison Company:

> [S]uch members should, out of an abundance of caution - voluntarily recuse themselves when they have reason to believe that their remarks could be interpreted as improper or as having produced an appearance of impropriety. supra, at 170, n.4.

Other non-NRC decisions have also advocated that a stricter standard be applied to administrative adjudicators.

It has been argued that "the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safequards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." National Labor Relations Board v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943). Since administrative discretion receives a proper deference from the courts, "all the more insistent is the need...that the inexorable safeguard of a fair and open hearing be maintained in its integrity." Phelps, Id., at 563, n.1 citing Morgan v. United States, 298 U.S. 468, 480-481, 56 S. Ct. 906, 80 L.Ed. 1288 (1936).

As pointed out in an article entitled "Nuclear Agency Called Too Close to Industry to Regulate It Properly," New York Sunday Times, October 16, 1983, pgs. 1 and 28, (attached as Exhibit A), the Nuclear Regulatory Commission has come under growing criticism from members of Congress, government aides and former agency officials who say it is failing to fulfill its mandate to oversee the nuclear industry. Congressman Edward J. Markey, Chairman of the Interior Committee's Panel on Oversight and Investigation, remarked that part of the problem is the Commission's coziness with the nuclear industry. The Justice Department has expressed strong reservations about the Commission's ability to develop its own

criminal cases. A former reactor engineer at the Commission pointed out that "you can spend a lifetime on the staff of the NRC as long as you approve whatever crosses your desk. Nobody ever asks, 'Why did you do that?' But the first time you disapprove something, watch out!"

The lack of public confidence in the agency that is the "watchdog" of the nuclear industry is of grave concern. The Commission makes licensing decisions that could affect the lives and welfare of hundreds of thousands of people; the public is entitled to know that impartiality on the part of judges is an absolute certainty. Raising the standard by which recusal can be used as a remedy when judges are biased or partial within a proceeding would be a step in the right direction.

D. Conclusion

For the reasons set forth above, the appropriate standard to be applied in this case is the objective standard found at 28 U.S.C. §455(a). If the NRC holds that disqualification can be based on judicial conduct, then Judge Hoyt should be disqualified as her conduct manifests bias and prejudice against the Commonwealth, other intervenors, and town representatives such that a fair hearing is impossible. If the NRC holds, however, that disqualification requires conduct of an extrajudicial source, then Judge Hoyt should be disqualified because 1) her hostility and bias is so pervasive that the exception to the extrajudicial source rule should be applied or, in the alternative, 2) the conduct complained of

in Section II of this memorandum is "extrajudicial", in that it is unnecessary and inappropriate to the judicial process. Judge Hoyt's exhibited hostility, bias and prejudice against the Commonwealth, other intervenors, and town representatives throughout the proceeding mandates disqualification and recusal.

II. JUDGE HOYT'S CONDUCT, AS SET FORTH BELOW, CALLS INTO QUESTION HER IMPARTIALITY AND DEMONSTRATES PERVASIVE BIAS AND PREJUDICE AGAINST THE INTERVENORS AND TOWN REPRESENTATIVES

A. Judge Hoyt Exhibited Personal Bias Against Intervenor Commonwealth of Massachusetts by Reading Aloud from a Pre-Filed Confidential Cross-Examination Plan, Thereby Alerting the Applicant's Witness to the Next Area of Inquiry, and Thereafter Demanding that Counsel for the Commonwealth Waive any Objection to that Disclosure as a Condition of Continued Participation in the Proceeding.

All intervenors had been directed by Judge Hoyt to file written cross-examination plans in advance of oral cross-examination. These plans were to be considered confidential. Atomic Safety and Licensing Order, July 28, 1983, pg. 2. At the hearing on August 17, 1983, Judge Hoyt violated her own rule of confidentiality and read aloud from the plan filed by Francis X. Bellotti, Attorney General for the Commonwealth of Massachusetts:

> Judge Hoyt:...Are we going ahead into page 9?
>
> Ms. Shotwell: We're well into page 9.

Judge Hoyt: I believe we're into adverse weather effect? 7/

Assistant Attorney General Jo Ann Shotwell objected to the Judge's action:

Ms. Shotwell: I object. Madam, you have just read from a portion of a cross-examination plan that was submitted to you in confidence, and you have read from a portion ---

Judge Hoyt: Sit down, counselor.

Ms. Shotwell: That was not addressed on cross-examination. You have alerted other parties to this proceeding of cross-examination that has not yet taken place.

Judge Hoyt: Counsel, I'm going to ask you one more time to please be seated. (Tr. 1063-1064)

Judge Hoyt strenuously reprimanded Ms. Shotwell for what Judge Hoyt believed to be an objectionable tone, demanded that an apology be made to the counsel at the proceeding, and ordered a recess. Following the recess, Ms. Shotwell was told that the Commonwealth was expelled from the proceeding.8/

7/ Transcript of License Application Proceeding, August 1983, at 1063. (Hereinafter cited as "Tr.".) Department of the Attorney General is moving to correct the record. It should read, "I believe we're into adverse weather affects...". Judge Hoyt was reading from a line in the pre-filed cross-examination plan. See Post Tr. 1755, Cross-examination Plan of Attorney General Francis X. Bellotti, at 9, Item VI A.

8/ Judge Hoyt: The position of the Board, Ms. Shotwell, is that you have not cured the mistake you have performed in this courtroom. The conduct you have performed in this courtroom is cured by an apology to the members of this court, the panel, and the counsel appearing before us here. The Commonwealth will not be able to continue to participate in it. Tr. 1065-1066.

When Ms. Shotwell stated that an appeal would be taken, Judge Hoyt did not permit her to speak on the record,[9] and Ms. Shotwell withdrew from the hearing room. When Ms. Shotwell returned, she was advised by Judge Hoyt that an apology for the tone and substance of the objection was required,[10] and that "it is within your power to remove any contemptuous conduct by apology". Tr. 1090. Ms. Shotwell stated that she could not apologize for the substance of her objection, that she had not intended to offend the Board by her tone, and that she apologized if her tone offended anyone.[11]

9/ Ms. Shotwell: We will be taking an interlocutory appeal to that decision.

Judge Hoyt: You may take whatever is lawful to provide --

Ms. Shotwell: The record will reflect --

Judge Hoyt: The record will not reflect -- the record will not reflect -- counsel will not participate any further if they do not wish to. Tr. 1066.

10/ Ms. Shotwell:...I understand that the Board has indicated that the Commonwealth will be precluded from submitting its own testimony in addition to cross examination, unless, as I understand it, I apologize for the tone of the objection that I made to the Chair's reading of a portion of my cross-examination plan.

Judge Hoyt: It was tone and substance, Ms. Shotwell. (Emphasis added.) Tr. 1089.

11/ Ms. Shotwell: Madam, in responding to that, I cannot apologize for the substance of the objection. I stand on the substance of the objection. I can say that there was no instention [sic] to personally offend any member of the Board, and I can apologize if my tone did offend any member of the Board. I cannot apologize for the substance of the objection. I believe the substance of the objection was founded. Tr. 1090.

Judge Hoyt retorted that she did not think the substance was appropriate, but that, since the "destructive conduct" had been sufficiently cured, Ms. Shotwell could rejoin the proceedings.[12/]

Judge Hoyt disregarded the confidentiality of the Intervenor Commonwealth's pre-filed cross-examination plan[13/] and responded with hostility when Ms. Shotwell objected to Judge Hoyt's reading of part of the plan. Judge Hoyt treated an appropriate and timely objection by Ms. Shotwell in an extremely biased and inappropriate manner; she classified Ms. Shotwell's objection as contemptuous and destructive behavior and expelled Ms. Shotwell from the proceeding until a demanded apology was tendered. Equally disturbing was Judge Hoyt's insistence that the substance of the objection was inappropriate, and her demand that Ms. Shotwell apologize for the substance. Judge Hoyt's demand that Ms. Shotwell waive or withdraw her objection indicates bias of a serious nature, and exhibits judicial conduct which cannot permit a fair and impartial evaluation of the evidence presented by intervenor Attorney General Bellotti.

12/ Judge Hoyt: Ms. Shotwell, I would prefer for you to be in the proceedings. I don't think the substance was appropriate, however, I believe the state of the destructive conduct has been sufficiently cured, and the Commonwealth of Massachusetts counsel is welcomed back to the proceedings. (Emphasis added) (Tr. 1090)

13/ See Atomic Safety and Licensing Order, July 28, 1983. Also note that earlier in the proceeding Judge Hoyt had appropriately stated that cross-examination plan would not be distributed "until after the cross-examination is completed". Tr. 947.

At a later point in the proceeding, this serious incident was mocked by Judge Hoyt when she asked the Applicants' attorney where he was on his cross-examination plan:

> Judge Hoyt: At the risk of the ceiling falling down, is that on page 3? Tr. 1197.

This exchange is a further indication of Judge Hoyt's bias toward Intervenor Commonwealth of Massachusetts. Her remark is most inappropriate; ridicule has no place in serious adjudicatory proceedings.

B. Judge Hoyt Exhibited Personal Bias Against the Representatives of the Towns of Hampton Falls, Rye, Seabrook, Kensington, and South Hampton By:

a. Failing to Treat Their Observations that Three Witnesses had been Signalled by Nuclear Regulatory Commission ("NRC") Staff and Applicants' Counsel as Serious;

b. Failing to Conduct a Full Evidentiary Hearing Regarding the Alleged Signalling;

c. Determining that NRC Witness, Dr. Urbanik, had not been Signalled Prior to the Receipt of any Evidence of that Nature from Dr. Urbanik: and

d. Threatening to Remove From the Hearing Room any Representative that Makes any such Allegation Again.

On August 19, 1983, the representatives from the towns of Rye and Hampton Falls, New Hampshire, informed Judge Hoyt that they had both observed Applicants' witnesses MacDonald, Thomas, and Anderson being signalled earlier that day by Applicants' counsel, Mr. Dignan, and that the representative from Hampton Falls had also observed the NRC staff witness, Dr. Urbanik, being signalled by staff counsel, Mr. Lessy. Judge Hoyt asked

each of the first three witnesses if they "have ever been signalled to or instructed by Mr. Dignan to give specific testimony in this case" (Tr. 1534-1535), and accepted Mr. Dignan's statement that he was not signalling a witness but responding to his partner's question when shaking his head. Mr. Lessy denied he had signalled Dr. Urbanik, who had already left the proceeding. Tr. 1535. Then Judge Hoyt proceeded strenuously to chastise the town representatives for bringing this matter to her attention, and said to the representative from Rye, Mr. Chichester:

> Judge Hoyt: It is not until this morning when you have chosen -- or rather this afternoon, when you have chosen to bring such a serious accusation before this Board, that I seriously question your ability to represent your town. Tr. 1539. . . . . Now, the Town of Rye will remain in this case just so long as that sort of accusation is the first, last and only one you will make on this record. (Emphasis added.) Tr. 1541.

On August 23, 1983, the representative from the town of South Hampton, New Hampshire, reported to the Board that she had observed the Applicants' counsel, Mr. Dignan, signal his witness, Mr. Melino on August 17, 1983 in response to a cross-examination question asked by Ms. Shotwell. Tr. 1680. The representative from the town of Kensington also reported that she observed the same signalling. Tr. 1681. The representative from the town of Seabrook then reported that on Friday, August 19, 1983, she had observed staff counsel, Mr. Patterson, "shaking his head in a negative way prior to the

witness responding." Tr. 1683. At this point, the representative from Hampton Falls attempted to read a statement[14] containing her observations of witness signalling into the record, but she was blocked by Judge Hoyt. Tr. 1682.[15]

Judge Hoyt addressed these new allegations by instructing Mr. Dignan to return his witness, Mr. Melino, to the proceeding and instructed Mr. Lessy to obtain an affidavit from Dr. Urbanik as to whether or not he was signalled. Tr. 1680, 1683-4. Mr. Patterson subsequently voluntarily denied any signalling. Tr. 1740.

When Attorney Backus, who was questioning Dr. Urbanik during the time the alleged signalling occurred, requested that an evidentiary hearing be conducted and that Dr. Urbanik be available for examination, he was met with unreasonable hostility from Judge Hoyt and told that he may make his accusations "known to the bar association -- the bars these gentlemen are presently members of." Tr. 1686. Judge Hoyt totally ignored the fact that the evidence would be tainted if signalling did occur; she merely suggested a remedy against the attorneys involved.

14/ a copy of the statement of State Representative Roberta C. Pevear is attached hereto as Exhibit B. Representative Pevear's statement, and especially the last paragraph, is in direct conflict with Mr. Dignan's statements regarding the incident. Tr. 1534.

15/ See Subsections 1 and 2, infra, pgs. 24-26.

The Applicants' witnesses, Mr. Merlino and Mr. McDonald, testified later that same day regarding signalling. After cursory questioning by Judge Hoyt, and prior to the receipt by her of the ordered affidavit on this issue from Dr. Urbanik, Judge Hoyt concluded that no signalling had occurred. Having reached this conclusion, Judge Hoyt then exhibited her bias and hostility against the town representatives. She stated that the Board "will not tolerate unprofessional conduct, allegations of a juvenile nature, to be ever again alleged against the honorable members of the profession that appear in the hearing room, . . . "(Emphasis added.) Tr. 1749. Judge Hoyt characterized the very serious allegations as "frivolous" (Tr. 1750), and threatened that if such allegations were made again "serious consideration will be given to the removal of such representatives from this hearing room". Tr. 1750.

It is the position of the Attorney General for the Commonwealth of Massachusetts that the allegations made by the town representatives deserved to be taken with utmost seriousness, and that a threat to expel representatives if future allegations must be made demonstrates prejudice, pervasive bias and strong hostility on the part of Judge Hoyt. Such a "gag rule" is totally improper.

Furthermore, Judge Hoyt failed to conduct a full evidentiary hearing in order to determine if signalling had, in fact, occurred. The failure to do so indicates bias in favor of the Applicants and NRC staff.

And lastly, Judge Hoyt's decision to bring the matter to a close and reprimand the town representatives prior to receiving even the limited evidence of Dr. Urbanik's affidavit, shows substantive bias of a nature that mandates disqualification and recusal.

C. Judge Hoyt Exhibited Personal Bias Against the Commonwealth's and Intervenors' Counsels and Town Representatives by Denying Them the Right to Make a Full and Complete Record of the Proceeding By:

a. Failing to Permit Them to Speak on the Record;

b. Instructing the Stenographer to Disregard Remarks; and

c. Refusing Them the Right to Cross-Examine Witnesses Unless a Cross-Examination Plan had been Pre-Filed.

On a number of occasions, Judge Hoyt did not permit intervenors' counsels or town representatives to speak on the record. In some instances, Judge Hoyt reprimanded individuals who were attempting to make a full and complete record. The following are examples of Judge Hoyt's biased conduct in restricting the development of the record, as noted in subsections(a) and (b) above:

1. The representative from Hampton Falls, New Hampshire wanted to read a statement into the record regarding her observations of witnesses being signalled:

> Ms. Pevear: I would like to read an amendment to the file, which I went home Friday night and typed it.
>
> Judge Hoyt: May I see the memo before you do so?
>
> Ms. Pevear: Certainly.
> (Document handed to Judge Hoyt.)

Judge Hoyt: Very well, ma'am. Let me return this to you. I believe this is, in substance, the same remarks that you placed on the record on Friday. No additional remarks are necessary. Thank you, very much.

Ms. Pevear: Madame Chairman, there is the final paragraph.

Judge Hoyt: No, ma'am. I said the memorandum would not be placed on the record, thank you. Ms. Curran?

Ms. Curran: Madame Chairman, I think that the representative from the Town of Hampton Falls is being prevented from putting something on the record that she has every right to put on. And I think she should be allowed.

Judge Hoyt: I'm not aware that you even know what's in that memorandum.

Ms. Curran: She has asked to state --

Judge Hoyt: Ms. Curran, I don't believe you are aware of what's in the memorandum, and the ruling of the Board stands. Is the witness ready, Mr. Perlis?

Mr. Perlis: Yes.

Ms. Pevear: I would like the record to so state that I did not get to speak.

Judge Hoyt: It will so reflect. Tr. 1681-1682.

2. At a later point in the proceeding, after Judge Hoyt incorrectly summarized the observations reported by Ms. Pevear, Ms. Pevear again attempted to read her statement into the record and Judge Hoyt responded:

Judge Hoyt: Ma'am, the statement will not be received into the record. That statement will not be received into the record. We have already indicated to you that once [sic]. I don't wish to have to remind you that once something is ruled upon, we will not rule upon it over and over again. Now, let us ascertain for sure - -

Ms. Pevear: I would like an apology, then, from the chair, stating that I was concerned in this, when I was not.

Judge Hoyt: Representative Pevear, you may be seated, if you will.

Ms. Pevear: Thank you.

Judge Hoyt: The record will not reflect your remark. I would like to be certain if the representative's accusation is against Mr. MacDonald when he was testifying with the previous panel and the testimony that he gave with Mr. Melino. Please respond to that.

Ms. Pevear: Perhaps the record could be read. I cannot read mine. Perhaps you could have the secretary read the record.

Judge Hoyt: No. Ma'am . . . Tr. 1747.

3. After Mr. Chichester was reprimanded by Judge Hoyt for reporting his observations regarding signalling of a witness, he attempted to add to the record:

Mr. Chichester: Madam Chairman - -

Judge Hoyt: Sir, we do not wish to hear you. You may be seated.

Mr. Chichester: Well, you have chosen to both reprimand me -

Judge Hoyt: Sir, you will be seated, and you will be seated immediately, sir.

Mr. Chester: - - and to denigrate the representation -

Judge Hoyt: Sir, I will only ask you one more time. Thank you.

Mr. Chichester: In fairness, you should allow us to respond.

Judge Hoyt: Mr. Chichester, that is it. Tr. 1541-1542.

4. After Mr. Backus, counsel for intervenor, SAPL, is directed by Judge Hoyt to report any allegation of witnesses being signalled to the appropriate bar associations, he attempts to speak on the record:

Mr. Backus: With your indulgence, ma'am.

Judge Hoyt: No, sir, Mr. Backus. Please be seated, sir.

Mr. Backus: I would like to state on the record, Madam -

Judge Hoyt: Mr. Backus, be seated, sir.

Mr. Backus: Madam, I would just -

Judge Hoyt: Sir, I have asked you please to be seated.

Mr. Backus: I would like to make one more statement on the record.

Judge Hoyt: Sir, please be seated. The record will not reflect any additional statements by you. I request sir, kindly, that you please be seated.
Ms. Curran, please be seated.

Mr. Backus: I suggest error in that ruling to -

Judge Hoyt: Ms. Shotwell, please be seated.

Ms. Curran: I have something to add.

Judge Hoyt: No, ma'am. You will not add anything to this record. The reporter is directed that these remarks will not be recorded. You will please be seated.

Town representatives are also added to that. Tr. 1686-1687.

5. When Jo Ann Shotwell, Assistant Attorney General for the Commonwealth of Massachusetts, attempted to make a statement on the record following her ejection from the proceeding by Judge Hoyt, she was not permitted to do so:

Ms. Shotwell: The record will reflect -

Judge Hoyt: The record will not reflect - - the record will not reflect -- counsel will not participate any further if they do not wish to. Tr. 1066.

6. After Ms. Curran, counsel for New England Coalition on Nuclear Pollution, pointed out that a discussion regarding

Seabrook Power Station site tours had been conducted off the record, and her putting her client's position on the record, she was attacked and reprimanded by Judge Hoyt:

> Judge Hoyt: Let me ask you this, Ms. Curran: Let me be a little bit fuller. I have never conducted any proceeding off the record. The implication you left before the members of the public that were sitting back there is that something evil had occurred; that some off-the-record conference had occurred; some meeting that the public was not privy to.
>
> The perception that the public has of what is occurring in this hearing room is what they see and what they hear out there [in the courtroom], not what in fact is sometimes happening. And it is that public perception that I felt keenly aware of when you made the remark earlier today. And that was the reason that it had to be stopped at that point.
>
> Ms. Curran: Your Honor, excuse me. I wasn't interested in affecting the public perception. I was interested in making a record.
>
> Judge Hoyt: I am, Ms. Curran.
>
> Ms. Curran: I have one other comment, and that is if the Board wishes to chastise all the Parties, the representatives of the Parties in this proceeding, then I believe it should be done before the public. I do not agree with the Board's procedure of excluding the public from this meeting, and I believe that everything that has happened here should be something that the public should have heard. Tr. 7-8. Side Bar Conference.

7. When Mr. Backus, counsel for Seacoast Anti-Pollution League put his client's concerns on the record regarding the Seabrook Power Station site tours, he was reprimanded.

> Mr. Backus: I just have two things.
> First of all, Madam Chairman, I don't think Attorney Curran intended --
>
> Judge Hoyt: Mr. Backus, let me stop you at that point. Ms. Curran is a member of the bar. She does not need a male colleague to do it for her.

Mr. Backus: Madam Chairman, I simply want to confirm, first of all, the right of any attorney to put what they want on the record.

Judge Hoyt: You may affirm it if you wish, Mr. Backus. But unless you have something at this time to address to that issue, we will not go into any further.
Do you have anything you wish to address to that issue?

Mr. Backus: I do.

Judge Hoyt: Very well. Proceed.

Mr. Backus: Just a second.
I have no objection and will have no objection to the Board holding off-the-record conferences regarding matters of scheduling and so forth.

Judge Hoyt: Mr. Backus, may I again reiterate to you what I advised Ms. Curran of before. This Board did not have any off-the-record conversations. We were in this room. We were before the entire assembly. And we asked for times and places.
You were perfectly present as a person [sic], I hope capable of making yourself heard. And you were, and your comments were considered.

Mr. Backus: May I continue, Madam Chairman?

Judge Hoyt: Only if you have something in addition, other than along the lines you have indicated.

Mr. Backus: I was beginning to say that I do not object -- and I want that to be clear, perhaps the Chair did not hear me -- that we have no objection of having, without the reporter present, discussions about scheduling among counsel. That is proper and necessary.
I do feel that we have the right to put the results of any such conference on the record. And I simply want the record to reflect that the Seacoast Anti-Pollution League also requested the right to have a representative other than their legal counsel attend the site visit and the Chairman denied it.

Judge Hoyt: That is correct, sir. And we will affirm that on the record -- if you had given us one more moment before you rose to the issue, we would have given you that ruling. Tr. 1300-1301.

8. When Attorney Curran attempted to make a statement regarding the issue of signalling witnesses, she was told by Judge Hoyt that "there's no further comment, you may be seated." Tr. 1750.

In addition, as noted in subsection (c), supra, Judge Hoyt interfered with the ability of the intervenors and town representatives to cross examine Applicants and NRC staff witnesses. Judge Hoyt ordered cross examination plans be filed,[16] and then proceeded to limit cross-examinaton to only the issues raised in the plan, as well as to restrict or deny cross-examination to certain intervenors and town representatives. The following are examples of her limiting or denying cross-examination:

1. Mr. Backus: I assumed the purpose of filing a cross-examination plan was to assist the Board in following the cross-examination...I would request permission to be able to complete this examination.

   Judge Hoyt: We would like to have you complete it, sir. But we wish to impress upon you the fact that your plan does not include such questions as you are now into. You have far exceeded the Board's order. We did not issue the order to have it exceeded. We asked for as clear a plan as possible. We will give you a few more minutes to wrap up your cross examination and along the lines as indicated in the cross-examination plan as filed.

   Ms. Shotwell: I would like to state for the record for the Commonwealth that we did not understand that in submitting a cross-examination plan, that we would be prohibited from following lines of inquiry that could not have been anticipated until testimony took place at hearing.

   Judge Hoyt: Did you receive the order of July 28th, Counsel?

16/ Tr. 1400 refers to Order dated July 28, 1983, pg. 1-2.

Ms. Shotwell: I did. And I submitted a cross-examination plan.

Judge Hoyt: That's correct.

Ms. Shotwell: In doing so, I did not agree to waive the right to cross-examination to the fullest extent that I believe we are entitled to under the law. I do not believe that the submission of a cross-examination plan can legally be used to prohibit cross-examination. Tr. 1401-1402.

2. Mr. Chichester: Madam Chairman, I have some questions that are germane to this testimony.

Judge Hoyt: You did not file cross-examination plans, so therefore the questions will not be asked. Tr. 1551.

3. Ms. Curran requested permission to cross-examine Dr. Urbanik. She had not filed a plan because she was not able to anticipate that she would want to ask questions in certain areas that had come up during other cross. When asked, she estimated that she had ten questions. Judge Hoyt responded:

Ms. Curran, we will give you approximately 15 minutes to conduct the number of questions, and they will be limited strictly to the area that you have described to us at this point.

Ms. Curran: I hope that will be adequate. Tr. 1416.

4. When Mr. Chichester, representative from the town of Rye, requested permission to ask two or three questions on cross of Dr. Urbanik without having pre-filed a cross-examination plan (Tr. 1428), he was told by Judge Hoyt that he could ask "the one limited question." Tr. 1432. (Mr. Chichester did, in fact, ask a half-dozen questions of the witness. Tr. 1456-1457.)

These methods of controlling the proceeding not only indicate pervasive bias toward the intervenors and towns, but so clearly affect the intervenors' and town representatives' ability to protect their clients that disqualification and recusal are mandated.

D. Judge Hoyt Exhibited Personal Bias Against the Intervenor's Counsels and Town Representatives by Reprimanding Them at a Side Bar Conference for Behavior that the Record Indicates Was Appropriate in Substance and Form

On August 18, 1983, during the cross-examination of Dr. Urbanik, NRC staff witness, by Assistant Attorney General Jo Ann Shotwell, Judge Hoyt ordered a closed side bar conference to reprimand the attorneys and town representatives for behavior that, as she saw it, had gotten "absolutely out of hand." Tr. 2, Side Bar Conference. She felt the participants had suffered an "absolute erosion of all trappings of civilized behavior in the courtroom." Tr. 3, Side Bar Conference. Judge Hoyt suggested that the "appeals boards, the Commission and the Courts may overrule me, but I am going to at least try to bring some semblance to this hearing, some semblance of intelligent, mature behavior. And I haven't seen it up to this point. . . I am appalled at the professional conduct that is being exhibited in this room." Tr. 3, Side Bar Conference.

Judge Hoyt criticized Assistant Attorney General Jo Ann Shotwell, and chastised Attorney Curran at this conference for her on-the-record comments regarding off-the-record

conversations (see infra, page 28), stating that Ms. Curran's comments left the impression that "something evil had occurred; that some off-the-record conference had occurred; some meeting that the public was not privy to." Tr. 7, Side Bar Conference. Judge Hoyt was not able to recognize that Attorney Curran had an obligation to ensure a complete and accurate record.[17/]

Judge Hoyt addressed each attorney and town representative at this conference, asking them what behavior she could expect in the future. When she addressed the Applicants' attorney, Mr. Dignan, she again exhibited her bias in favor of the Applicants:

> Judge Hoyt: Mr. Dignan, do you want to add anything? I would hope that we could get something out of this, but I think this is probably again, a futile effort. Tr. 10-11, Side Bar Conference.

Judge Hoyt's intemperance toward the intervenor's counsels and the town representatives, her chastisement of Attorney Curran, and her hostility toward Attorney Shotwell at the conference are inappropriate. The record reveals neither improper nor impolite statements nor conduct which is in need of correction.[18/] The attorneys and representatives were

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17/ Ms. Curran: Your Honor, excuse me. I wasn't interested in affecting the public perception. I was interested in making a record. Tr. 7, Side Bar Conference.

18/ Mr. Backus: Ma'am, I respectfully disagree with the Chair's characterization of the conduct of counsel in this proceeding. I think counsel has been at all times considerate and polite. Tr. 8, Side Bar Conference.

attempting to zealously represent their clients; Judge Hoyt's unreasonable standards are a bar to a fair proceeding. Her conduct mandates the sanction of disqualification and recusal.

E. Judge Hoyt Exhibited Personal Bias Against the Commonwealth of Massachusetts and the Town of Rye By Expelling Assistant Attorney General Jo Ann Shotwell and Town Representative Guy Chichester From the Proceeding for Behavior that the Record Clearly Indicates Did Not Warrant Such a Sanction.

On August 17, 1983, Judge Hoyt ejected Assistant Attorney General Jo Ann Shotwell from the proceedings because of Ms. Shotwell's strenuous objection to Judge Hoyt's reading of the confidential cross-examination plan (see infra, pages 16-20). Ms. Shotwell's immediate objection to Judge Hoyt's action was characterized by Judge Hoyt as contemptuous and destructive. Tr. 1090.

Sometime during or after August 26, 1983, Judge Hoyt ejected Mr. Guy Chichester, representative from the town of Rye, from the proceeding due to his "contemptuous and disruptive" conduct. (Order, September 8, 1983).[19/] The conduct warranting expulsion, as set forth in the order, consisted of: (1) Mr. Chichester's behavior at the limited appearance hearing on August 16, 1983, and (2) Mr. Chichester's report to Judge Hoyt of his observation that

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19/ The town and the Board disagree as to when the expulsion occurred. (See letters from the Rye Board of Selectmen, dated August 31, 1983, September 26, 1983, and October 3, 1983, to Judge Hoyt, and Judge Hoyt's Order dated September 8, attached as Exhibits C-F.)

witnesses had been signalled. Judge Hoyt characterized that report in her order as "frivolous attacks on the conduct of counsel for Applicants and the staff, and has besmirched their integrity and the integrity of these proceedings." (Order, September 8, 1983, page 1).

The record reveals that at the hearing for limited appearance statements held on August 26, 1983, the conduct that Judge Hoyt finds "contemptuous" and "disruptive" consists of Mr. Chichester's requesting permission to question a witness (Tr. 1790) (he is told by Judge Hoyt that the witnesses may not be questioned, although she herself asks questions later on. Tr. 1806); comments of approval made to two witnesses; and an attempt to deliver an oral motion for Judge Hoyt's recusal. Tr. 1812.

It is the position of the Attorney General of Massachusetts that Judge Hoyt imposed the sanction of expulsion in situations that did not warrant such sanctions. With respect to Assistant Attorney General Jo Ann Shotwell, the objection she made was appropriate and timely. Judge Hoyt demanded an apology for the substance as well as the tone of the objection; Judge Hoyt's reaction exhibited clear bias and hostility.[20/]

20/ While Judge Hoyt did readmit Attorney Shotwell to the proceeding, we believe that she may have retaliated against the Commonwealth in her subsequent substantive rulings, in particular her decision to strike the majority of the Commonwealth's proferred testimony. See Post Tr. 1190, Testimony of Robert Mark; Post Tr. 1196, Testimony and Rebuttal Testimony of Phillip B. Herr.

With respect to Mr. Chichester, Judge Hoyt again overreacted. It is apparent from the record that Judge Hoyt was angry at Mr. Chichester's report of witness signalling,[21] and had previously threatened to expel him if he made allegations of that nature again Tr.1541. The conduct for which Judge Hoyt ejected Mr. Chichester was neither contemptuous nor disruptive, and certainly not of a nature to warrant permanent expulsion. Perhaps Judge Hoyt's imposition of the sanction of expulsion rested on a desire to prevent Mr. Chichester from again raising his motion for recusal and in retaliation for his reports of witness signalling, rather than any unreasonable or intolerable behavior on his part.

F. Judge Hoyt Exhibited Personal Bias and Improper Judicial Behavior by Contacting the Town of Rye Ex Parte and by Conducting an In-Chambers Ex Parte Session of all Attorneys But Excluding Town Representatives

On August 29, 1983, Judge Hoyt telephoned Mr. J.P. Nadeau, Chairman of the Office of Selectmen, Rye, New Hampshire relative to the town's participation in the proceedings. Tr. 1869-1870.

On August 31, 1983, Judge Hoyt did not commence the hearing at 3:00 p.m. as originally scheduled because Mr. Chichester was

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21/ Judge Hoyt did not permit Mr. Chichester to cross-examine the panel of witnesses (McDonald, Thomas, Anderson) appearing after the reports of witness signalling. She stated this was because he had failed to file a cross-examination plan. Tr. 1551. The record discloses, however, that he had previously questioned a witness without having filed a plan. Tr. 1455-57.

seated in the courtroom in the chair designated for the representative from Rye. She called all attorneys present into chambers, but excluded the representatives from Hampton Falls and Rye, who were present in the courtroom. At the closed, in-chambers session Judge Hoyt stated that she would not commence the hearing as long as Mr. Chichester remained in the chair reserved for the town representative, and discussed whether the hearing should be moved to another courtroom and Mr. Chichester prevented from entering. (See affidavit of Assistant Attorney General Jo Ann Shotwell, dated October 26, 1983.) It is the opinion of the Attorney General of Massachusetts that ex parte contacts of this nature are most inappropriate.22/

These extraordinary acts by the administrative law judge demonstrate a flagrant disregard for the rights of intervenors and towns. Ex parte contacts, and meetings in chambers that exclude representatives to the proceedings, demonstrate personal bias against the intervenors and the towns and mandate disqualification and recusal.

G. Judge Hoyt Exhibited Personal Bias Toward the Commonwealth's Counsel and Intervenors' Counsels and Town Representatives by Addressing Them With Ridicule and Intemperance.

The record is replete with remarks made by Judge Hoyt that indicate her personal bias against the intervenors and town

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22/ Canon 3A (4) of the Code of Judicial Conduct, adopted by the American Bar Association on August 16, 1972, prohibits ex parte contacts of this nature.

representatives. These remarks are of a ridiculing and an intemperate nature and demonstrate that Judge Hoyt has abandoned even the appearance of impartiality. The following are examples of this conduct:

1. At one point in the proceeding on Friday, August 19, 1983, Judge Hoyt ridiculed Ms. Shotwell when she sought to withdraw an objection:

> Ms. Shotwell: I withdraw the objection.
>
> Mr. Dignan: Thank you.
>
> Mr. Lessy: You withdraw the motion to strike?
>
> Ms. Shotwell: That's right.
>
> Judge Hoyt: I <u>think the record should reflect that at 11:40 we reached a new high</u>.
>
> (Laughter.)
>
> Judge Hoyt: Very well, Mr. Backus. Go ahead.
>
> Mr. Backus: All right.
>
> Ms. Shotwell: I must have the record reflect that I took offense at that remark. (Emphasis added.) Tr. 1411.

2. On August 19, 1983, when the town representatives wish to question witnesses, Judge Hoyt suggests that the questions be channeled through New Hampshire Assistant Attorney General, Mr. Bisbee. The following dialogue ensues:

> Mr. Bisbee: I would like to make one final point. I don't think you do fully understand -- respectfully, ma'am -- the relationship of the State New Hampshire and its representatives and the towns.
>
> Judge Hoyt: I am certain I don't, Mr. Bisbee.

> Mr. Bisbee: There's been reference to advice given to the towns. I am not in a position to offer them advice, under state law. I am bound to give my advice only to state agencies and the legislature of the state; therefore, I am really not in a position to offer any advice to the town representatives.
>
> I think, for that reason, it would be inappropriate for me as a representative of the State of New Hampshire to be asking their questions, for which they have their concerns.
>
> Judge Hoyt: Mr. Bisbee, <u>if you do not wish to meet the needs of the citizens of your state, that's your problem</u>. It's certainly not the Board's. (Emphasis added.) Tr. 1431-2.

3. After Assistant Attorney General Shotwell's objection to Judge Hoyt's reading of a portion of her pre-filed confidential cross examination plan, Judge Hoyt ridiculed Ms. Shotwell by asking Mr. Dignan who was asking questions on cross:

> Judge Hoyt: At the risk of the ceiling falling down, is that on page 3?

4. After Judge Hoyt determined, in response to reports by the town representatives, that there had been no witness signalling, she reprimanded Assistant Attorney General Jo Ann Shotwell for bringing the matter to the Board's attention.

> Judge Hoyt: I am shocked even further that counsel for the very honorable Commonwealth of Massachusetts would lend herself and her positon to that serious an accusation....What you chose to do about it, Ms. Shotwell, is of course, something you will have to live with your own conscience with. Tr. 1540.

5. Assistant Attorney General Jo Ann Shotwell raised questions before the Board on the scope of participation, and Judge Hoyt responded with ridicule:

> Judge Hoyt:...Am I understanding you to interpret the term "interested state" as giving you free reign to hot-dog it through this record?...Tr. 1143.

6. In regard to the admissibility of Professor Herr's testimony, Judge Hoyt jabbed at Ms. Shotwell:

> Ms. Shotwell: We have got a couple of mechanical difficulties here, which is that Mr. Herr's testimony --
>
> Judge Hoyt: I don't seem to have any, Ms. Shotwell, but you do, and if you have them you know what they are.
>
> Ms. Shotwell: I do...Tr. 1185.

7. At a pre-hearing conference in Portsmouth, New Hampshire, when Assistant Attorney General Jo Ann Shotwell requested leave for filing contentions due to the fact that the Commonwealth had not been served with notice of the commencement of the proceeding, Judge Hoyt remarked:

> So before we have any future pleadings, any allegation made that you were not served, let me urge you to first of all check your own files to be sure that it isn't behind the cabinet. (Emphasis added). Tr. 8, Pre-hearing Conference, May 6, 1983. See also, Tr. 8-10, Side Bar Conference, comments by Ms. Pevear.

8. Mr. Backus addressed the Board regarding its requirement that all parties be in attendance and was addressed harshly by Judge Hoyt:

> Mr. Backus: Just one thing, Madam Chairman. The Board's order on this hearing directed that all parties in [sic] all interested states or municipalities would be in attendance throughout the proceedings.
>
> Judge Hoyt: I don't think that's exactly a unique position, Mr. Backus. If you intervene in a case, if you file pleadings in a case -- do you think it's a little bizarre that the Board expects the people to be in attendance? What did you intervene for if you have no intention of being present? (Emphasis added.) I find that a little bit difficult to understand.
>
> Mr. Backus: I have two things to say here, Madam Chairman. First of all, on behalf of SAPL, SAPL has indicated clearly in its correspondence with the Board, its cross-examination

plan, that its cross-examination here is limited to certain areas and certain witnesses, not to all issues. I fail to see why SAPL should be put to the expense and burden of supporting attendance here when those witnesses and issues are not being addressed.

Judge Hoyt: Mr. Backus, I am going to cut you off at this point, and tell you if you do not intend to participate in the hearings, then that is the risk that you run. For your client's sake, I would suggest that you be present. (Emphasis added.) Tr. 954-5.

The record does not disclose similar types of remarks toward the Applicants or NRC staff counsel.

These examples demonstrate that Judge Hoyt has abandoned even the appearance of impartiality.

MOTION FOR RECONSIDERATION OF JUDGE HOYT'S RULING ON MOTION FOR SUMMARY DISPOSITION AND MOTION FOR REHEARING

Given the extent of hostility, bias and prejudice demonstrated by Judge Hoyt against the Commonwealth of Massachusetts, other intervenors and town representatives at the hearings on Contentions NECNP 111.12 and 13 in August, 1983, it is highly probable that Judge Hoyt maintained a similar perspective when considering the Applicants' Twenty-First Motion for Summary Disposition of Contentions NECNP 111.12 and 13. Such bias and prejudice resulted in a redraft of the contentions by Judge Hoyt, which greatly narrowed the issues on which Attorney General Bellotti wished to present evidence and argument.[23/] Evidence on the redrafted contentions was presented at the hearings in August.

23/ See Petition of Francis. X. Bellotti for Directed Certification of ASLB Decision on Applicants' Twenty-First Motion for Summary Disposition, filed July 15, 1983.

If a finding is made that Judge Hoyt's hostility, prejudice and bias against the Commonwealth of Massachusetts, the intervenors and the town representatives warrant her disqualification and recusal then a full and complete remedy can only be accomplished by a reconsideration of the Applicants' Twenty-First Motion for Summary Disposition, as well as a rehearing of the Contentions 111.12 and 13, either as they remain following a new ruling on the Motion for Summary Disposition, or, if the Motion for Reconsideration is denied, on the existing redrafted contentions.

This remedy is not uncommon. The Appeals Courts have ordered new hearings in cases where judges have been disqualified and a new judge assigned. United States v. Thompson, 483 F.2d 527 (3rd Cir. 1973). Accord, Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1972); Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979).

Conclusion

For the reasons set forth in this memorandum, Attorney General Francis X. Bellotti requests that Judge Helen F. Hoyt be disqualified and recused. In addition, the Attorney General moves that the ruling on the Applicants' Twenty-First Motion for Summary Disposition (to the extent it applied to Contentions NECNP 111.12 and 13) be reconsidered, as the bias evidenced by Judge Hoyt in this proceeding was present and

influenced her decision on that Motion. In any event, Attorney General Bellotti moves that Contentions NECNP 111.12 and 13 as redrafted by Judge Hoyt in her ruling on the Applicants' Motion for Summary Disposition be reheard, as a full and fair proceeding was impossible due to the pervasive bias exhibited by Judge Hoyt against the Commonwealth, other intervenors, and town representatives.

Respectfully submitted,

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EXHIBIT A
1 OF 4

Nuclear Agency Called Too Close To Industry to Regulate It Properly

By BERNARD WEINRAUB
Special to The New York Times

WASHINGTON, Oct. 15 — Eight years after its creation, the Nuclear Regulatory Commission is coming under growing criticism from members of Congress, Government aides and former agency officials who say it is failing to fulfill its mandate to oversee the nuclear industry.

Several critics in Congress say the agency is too closely aligned to the industry it is supposed to regulate.

The criticism centers on those areas:

¶A Justice Department official told his superiors that the commission was not eager to develop criminal cases and seemed "somewhat protective of the operators of nuclear power plants."

¶Congressional sources say the commission has been riven by internal turmoil since the country's worst commercial nuclear power accident at Three Mile Island near Middletown, Pa., in March 1979.

¶Last month a Congressional panel said the commission gave the owners of three nuclear reactors draft reports on quality control before Congress saw them. Members of Congress said the practice, while legal, raised doubts about the agency's independence from the nuclear industry.

¶A Federal judge declared in May that the office of the agency's top internal investigator, who was recently reassigned to a new job, had acted to prevent the release of information about a troubled nuclear plant in Ohio.

Nunzio J. Palladino, chairman of the commission since 1981, said: "I've heard the criticism, but I don't think it's generally valid. The picture has improved here, it's improved significantly."

He said that in the aftermath of the Three Mile Island accident the commission's staff had engaged in "intense self-examination, with a banishing of

Continued on Page 28, Column 1

Critics Say Nuclear Agency Is Too Close to Industry to Regul

EXHIBIT A
2 OF 4

Continued From Page 1

complacency, a strengthening of authority and a tightening of operations in every area."

Although most of the Congressional criticism of the commission has come from Democrats, even commission officials acknowledge that there are problems in the agency and that the criticism is probably not politically motivated.

Congressional critics say the agency has, essentially, failed to carry out its mandate to regulate the civilian nuclear energy program.

"There's this coziness with the nuclear industry, that's part of the problem," said Representative Edward J. Markey, chairman of the Interior Committee's panel on Oversight and Investigations. "There's also an incompetence in the N.R.C. and a mind-set that operates on the assumption that nuclear power is inherently safe. All these have combined to turn the commission into a lapdog rather than a watchdog."

He added: "The N.R.C. is structurally incapable of calling the tough shots on a consistent basis. Although it may do sporadically good work, it doesn't consistently produce the kind of criticism of the industry that would build public confidence."

He alluded to the fact that the commission, unlike most other Government agencies, has no independent inspector general to deal with internal misconduct. Its inspection force reports only to the commission.

Internal Confusion Seen

Beyond this, such Congressional critics as Mr. Markey and Representative Morris K. Udall, Democrat of Arizona, who is chairman of the House Interior and Insular Affairs Committee, argue that the agency's internal policies have stirred confusion about its role and sent ambiguous signals to its employees. Other key Congressional critics of the agency include Representative Richard L. Ottinger, Democrat of Westchester, chairman of the Subcommittee on Energy Conservation and Power; Senator Gary Hart, Democrat of Colorado, and Senator George Mitchell, Democrat of Maine.

They criticize, for example, the agency's action in providing the draft reports on quality control to the owners of nuclear reactors before Congress saw them. One of the reactors was the still-incomplete Diablo Canyon plant in California, where a utility engineer discovered in 1981 that the agency had approved the safety of the reactor on the basis of the wrong blueprints.

The critics also cited bonus awards of $1,000 each given last week to two ranking commission employees who have been criticized in Congress.

One of the awards was given to Walter Kepper, a regional administra-

The New York Times

Nunzio J. Palladino, left, Nuclear Regulatory Commission chairman, says criticism of his panel is not "generally valid." Representative Edward J. Markey disagrees, calling the agency "a lapdog rather than a watchdog."

serving after nine years, said: "There is obviously a strong sentiment in favor of nuclear power in this agency, and there has certainly been a problem here in dealing with wrongdoing. It's a technical agency, engineers mostly, and for a whole lot of reasons, partly background, predilection and training, they're comfortable dealing with pipe cracks but less comfortable dealing with wrongdoing.

"We're still digging our way out of the problems created in the sixties," Mr. Gilinsky said. "The original idea — and it was a flawed idea — was that we could operate on the basis of self-regulation. A system was set up that was not adequate to the task. Add to that the nuclear ideology of the sixties, a boom atmosphere in nuclear energy, the strong feeling that regulators ought not stand in the way of the boom. There was a fairly deliberate policy of keeping the regulatory body weak, and there was always a certain confusion at the top about who was responsible for what."

Justice Department Critical

Unusually blunt criticisms of the commission have come from the Justice Department. In a letter last March to Ben B. Hayes, the director of the commission's new Office of Investigations, Julian S. Greenspun, deputy chief of litigation in the Justice Department's Criminal Division, expressed strong reservations about the commission's ability to develop criminal cases on its own.

Mr. Greenspun said: "The N.R.C. has not been found by the courts and is [illegible] by the public of being

cident the management falsified data about a leaky valve to avoid having to shut down the nuclear power plant.

Justice Department officials say another investigation focuses on the allegations of Thomas Applegate, a former private detective at the Zimmer plant in Ohio. He reported evidence of faulty welding, theft of materials and cases of plant managers overruling inspectors who found the faulty welds.

The plant itself, whose total cost was initially estimated at $240 million in 1972, is virtually complete at a cost of $1.6 billion. But its builder, the Cincinnati Gas and Electric Company, is considering scrapping the project because

have been criticized in Congress.

One of the awards was given to James Keppler, a regional administrator responsible for two nuclear power plants that have been plagued with difficulties and criticism. Such Congressmen as Mr. Markey and Mr. Udall have said the commission officials missed serious construction flaws in the projects, the Zimmer Nuclear Power Plant in Moscow, Ohio, and the Midland Plant in Midland, Mich.

The other award went to Victor Stello, who is deputy executive director for regional operations. He was publicly criticized in April by three of the agency's five commissioners for his report that said little was learned from the Three Mile Island trial this year in which the operators of the nuclear plant sued the manufacturers.

New Concerns About Company

An internal commission report last week said a review of the trial record raised seven new concerns about the integrity of General Public Utilities Corporation, the company that owns the Three Mile Island plant. Among the "management competence/integrity" concerns raised in the report are allegations that the company falsified leak rates from the plant's cooling system before the accident, and that plant operators and trainees cheated on licensing exams.

Commission officials as well as Congressional sources also say factionalism is rife in the agency, especially since the Three Mile Island accident.

"There're lots of animosities, tremendous factionalism, it's like this thing is falling apart," said one Congressional aide close to the commission. "Six years ago they thought there'd be a thousand reactors in the year 2000. They thought people would get promoted, be in charge of bigger and bigger things. Now all this is a mess. There's a lot of finger pointing."

Agency officials expect about 130 nuclear reactors by the year 2000. There are now 79 nuclear power plants licensed to operate in the country.

The commission was created by Congress in 1975. In splitting up the Atomic Energy Commission into two agencies, the Ford Administration recognized the need for "an independent and technically competent" agency that was designed to regulate rather than promote nuclear energy.

Blurred Intentions Seen

On one level, the problems in the commission seem rooted in what Robert D. Pollard, a former reactor engineer at the agency, called a blurred definition about its intentions. Mr. Pollard, a former Naval officer under Adm. Hyman D. Rickover, is now a nuclear safety expert with the Union of Concerned Scientists, which often criticized the agency.

"Over the years the A.E.C. was divided between the regulators and promoters, and the promoters gained the upper hand," he said. "When the split came, it was a paper split. We had the same managers in charge who were supposed to be regulating. They had a vested interest in protecting past decisions."

Mr. Pollard added: "You can spend a lifetime on the staff of the N.R.C. as long as you approve whatever crosses your desk. Nobody ever asks, 'Why did you do that?' But the first time you dis-

Mr. Greenspun said: "The N.R.C. has not been found by the courts and is hardly viewed by the public of being guilty of systematic and overzealous enforcement of the law. Indeed the N.R.C. has been subject to intense Congressional and public scrutiny and criticism for underwhelming enforcement efforts, as well as allegations of filial-like relationships and investigations."

He said the commission's Office of Inspection and Enforcement, which examined accidents and technical violations at nuclear plants, "was not anxious to have criminal cases developed and indeed was somewhat protective of the operators of nuclear power plants."

Justice Department officials said that although a dozen possible criminal cases have been referred from the commission to the Attorney General since 1979, not one case dealt with safety or construction matters. The cases referred were relatively insignificant, ranging from allegations that an employee cheated on a test to a guard lying about a prior conviction, Justice officials said.

Whistleblowers Stir Inquiries

In two highly publicized and possibly criminal cases involving nuclear safety, the Justice Department opened investigations only after "whistleblowers" went to the press or public interest groups when commission investigators took no substantive action.

One of the Justice Department investigations, which officials believe will soon lead to grand jury indictments, involve charges by Harold W. Hartman Jr., a reactor operator at Three Mile Island, that shortly before the 1979 ac-

EXHIBIT A
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Mr. Pollard added: "You can spend a lifetime on the staff of the N.R.C. as long as you approve whatever crosses your desk. Nobody ever asks, 'Why did you do that?' But the first time you disapprove something, watch out!"

Victor Gilinsky, one of the agency's five commissioners, who was first appointed by President Ford and is the

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EXHIBIT A
4 OF 4

EXHIBIT B

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

9:00 P.M.
8/19/83

MEMO TO FILE (Seabrook):

The following are my observations of events at approx. 4:10 P.M., this date:

Miss Curran of NECNP was questioning the PSC panel of witnesses, with Mr. Dignan acting as attorney for PSC concerning emergency procedures at the Seabrook Plant. She asked her final questions concerning list of events and questioned "if there was a more specific list and no other procedures?".

Before Mr. McDonald answered, Mr. Dignan - who, in my line of vision was partially obscured by the Mass. Ass't. A.G., shook his head from side to side.

Mr. Dignan, then, proceeded to lean way over to his right and forward, so that he was completely in my line of vision, to Miss Shotwell's right, and vigorously shook his head from side to side.

The witness, Mr. McDonald, then answered no to the questions.

During this time, Mr. Gad, also of PSC, did not move his lips or open his mouth or give any indication he was carrying on a conversation with Mr. Dignan.

Roberta C. Pevear

Roberta C. Pevear

EXHIBIT C

OFFICE OF SELECTMEN

RYE, NEW HAMPSHIRE

DOCKETED USNRC

August 31, 1983

RECEIVED '83 SEP -9 P12:16

OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH

E. P. D.

SERVED SEP 9 1983

Honorable Helen F. Hoyt
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: PSNH, et al Docket Nos. 50-443OL and 50-444OL

Dear Judge Hoyt:

This is to acknowledge your telephone conference with Chairman J.P. Nadeau on Monday, August 29, 1983.

We extend to you our apologies for any breach in decorum which may have occurred during the course of your proceedings and which involved any representatives of the Town of Rye.

Although you advised in your telephone conference that a MOTION FOR RECUSE AND REHEARING, dated August 24, 1983, and which was submitted on stationary from our office, had not been filed during the hearing session, nevertheless, we are now advised that such a motion may have been placed in the mails to you. After our now reviewing the content of that motion, we are hereby withdrawing same.

It is our understanding that one or more participants in the proceedings before you may consider a motion for recuse and/or rehearing. When we have reviewed all of the facts pertaining to such and particularly the record of the proceedings to date, we will then formally consider whether or not to sponsor and/or join in such a motion.

The present representatives on Rye's Nuclear Intervention Committee consist not only of Mr. Guy Chichester, but also includes Mr. Richard Tompkins and Mr. David MacDonald. Action by that committee requires a majority vote of it's members, all of which is subject to Board of Selectmen approval. By copy of this letter, we are reminding those members of the guidelines which this Board set in establishing that committee.

We recognize that your task is a difficult one and we trust that you recognize how vital our concerns are.

Very truly yours,

BOARD OF SELECTMEN

J.P. Nadeau, Chairman

Maynard L. Young

Frances I. Holway

EXHIBIT D
1 OF 2

OFFICE OF SELECTMEN

RYE, NEW HAMPSHIRE

September 26, 1983

OCT 6 1983
E. P. D.

Honorable Judge Helen Hoyt
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: PSNH, et al Docket Nos. 50-443OL and 50-444OL

Dear Judge Hoyt:

We wish to have placed on the record in these proceedings our objection to your conduct at the August 31, 1983, hearing session relative to the continued participation by one of our Town's representatives, Mr. Guy Chichester.

We have conferred with individuals who were in attendance at that hearing, and we have reviewed newspaper accounts covering the events of the 31st. At no time, during your unusual call to our office the Monday before, did you advise that you had "dismissed" Mr. Chichester from further participation on behalf of the Town of Rye, nor was any such impression given by you or understood by us. We acknowledge that you suggested that we consider appointing a new representative, but the whole tenor of our conversation centered around your concern to avoid future confrontation. Our letter of response was intended to assure you that we would counsel our representative on courtroom demeanor expected in judicial as well as semi-judicial proceedings.

Had you even inferred that you had in fact "dismissed" Mr. Chichester from further representation and that it was necessary for us to obtain new representation, we most definitely would have advised you of our objection to same in writing. From our conversations with several residents and non-residents of Rye, who were in attendance during the sessions giving rise to this incident, we are hard pressed to find any conduct on the part of Mr. Chichester that would warrant such a severe sanction as dismissal.

If our understanding of our pronouncements at the August 31 hearing concerning this issue is other than what you intended, then of course, you should disregard this letter. However, if it is your intention not to recognize Mr. Chichester at future hearings, we respectfully request that you place such an order and the reasons therefore in writing to us so we may note our exception and preserve our appellate rights.

Very truly yours,

BOARD OF SELECTMEN

J.P. Nadeau, Chairman

Maynard L. Young

Frances I. Holway

plh

cc: JoAnn Shotwell, Esquire, Assistant Attorney General, Environmental Protection Bureau, Department of the Attorney General, One Ashburton Place, 19th Floor, Boston, Massachusetts 02108

EXHIBIT E
1 OF 3

OFFICE OF SELECTMEN

RYE, NEW HAMPSHIRE

October 3, 1983

OCT 6 1983
E. P. D.

Honorable Helen F. Hoyt
Administrative Judge
Atomic Safety and Licensing Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Judge Hoyt:

We are in receipt of your letter of September 20, 1983, in which you inform this Board of the Atomic Safety and Licensing Board's rejection of the "Contentions of the Town of Rye Relative to Emergency Planning for New Hampshire and Town of Rye". Your reason for rejection of the contentions is a result of the permanent suspension of Mr. Guy Chichester from participation in the proceedings.

It is this Board's position that your letter of September 20, 1983, is the first indication that Mr. Chichester has been permanently barred as a representative of Rye. We feel that such a sanction is extreme and question the necessity of any sanction whatsoever. Further, this Board wishes to appeal that decision and are now formally requesting that you outline for us the necessary procedures and forms in order to process such an appeal.

Further, it is this Board's position that given your rejection of the signature of Mr. Chichester on the Contentions the pleading was also signed by the Board of Selectmen of the Town of Rye, and the rejection of the Contentions due to Mr. Chichester's signature was unreasonable. Such a rejection gives the appearance of your lack of recognition of our signatures on the pleading. Because we consider this Board to be party to the hearings, however, we will resubmit the contentions.

In compliance with your request, we will observe the request that the service list you forwarded be used to serve the Town of Rye's contentions upon the parties and the certificate of service will be executed by the proper town official.

Very truly yours,

BOARD OF SELECTMEN

J.P. Nadeau, Chairman

Maynard L. Young

Frances I. Holway

clr

CERTIFICATE OF SERVICE

I hereby certify that copies of the October 3, 1983, letter to Honorable Helen F. Hoyt in the above captioned proceedings have been served on the following by deposit in the United States Mail, first class, this 5th day of October, 1983.

SERVICE LIST

Helen Hoyt, Esquire, Chairman
Atomic Safety & Licensing board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Harbour
Atomic Safety & Licensing board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Counsel for NRC Staff
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas G. Dignan, Jr., Esquire
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110

Public Service Company of New Hampshire
D. Pierre G. Cameron, Jr.
General Counsel
1000 Elm Street
Manchester, New Hampshire 03105

Mr. Calvin A. Canney, City Manager
City Hall, 126 Daniel Street
Portsmouth, New Hampshire 03801

Mr. J.P. Nadeau, Chairman
Board of Selectmen
10 Central Road
Rye, New Hampshire 03870

William S. Jordan, III, Esquire
Ellyn R. Weiss, Esquire
Hasmon & Weiss
1725 I Street, N.W., Suite 506
Washington, D.C. 20006

Ms. Anne Verge, Chairperson
Board of Selectmen
Town Hall
South Hampton, NH 03844

Philip Ahrens, Esquire
Assistant Attorney General
State House Station, #6
Augusta, Maine 04330

Alfred V. Sargent, Chairman
Board of Selectmen
Town of Salisbury
Salisbury, Massachusetts 01950

Mr. Nicholas J. Costello
Commonwealth of Massachusetts
House of Representatives
State House
Boston, MA 02133

Paul A. Fritzsche, Esquire
General Counsel
Public Advocate
State House Station 112
Augusta, Maine 04333

Edward L. Cross, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
State House Annex
Concord, New Hampshire 03301

Board and parties - continued

50-443OL, 50-444OL

JoAnn Shotwell, Esquire
Assistant Attorney General
Public Protection Bureau
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

Walter Lormer, Chairman
Board of Selectmen
Town Hall
North Hampton, NH 03862

Senator Gordon J. Humphrey
U.S. Senate
Washington, D.C. 20510

Robert A. Backus, Esquire
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

David R. Lewis, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Senator Gordon J. Humphrey
1 Pillsbury Street
Concord, New Hampshire 03301
Attn: Herb Boynton

Mr. Angie Machiros, Chairman
Newbury Board of Selectmen
Newbury, Massachusetts 01950

Donald E. Chick, Town Manager
Town of Exeter
10 Front Street
Exeter, New Hampshire 03833

Ms. Sandra Gavutis, Selectwoman
Town of Kensington
RFD#1
East Kingston, NH 03827

Rep. Roberta C. Pevear
Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

Town Manager's Office
Town Hall, Friend Street
Amesbury, Massachusetts 01913

Honorable Richard E. Sullivan
Office of the Mayor
City Hall
Newburyport, MA 01950

Mr. John B. Tanzer
Town of Hampton
5 Morningside Drive
Hampton, New Hampshire 03842

Mr. Letty Hett
Town of Brentwood
RFD, Dalton Road
Brentwood, NH 03833

Brian P. Cassidy, Esquire
Federal Emergency Management Ag
Region I
J.W. McCormack POCH
Boston, MA 02109

Ms. Diana P. Randall
70 Collins Street
Seabrook, New Hampshire 03874

J.P. Nadeau, Chairman
Board of Selectmen
Rye, New Hampshire

EXHIBIT F
1 OF 4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Helen F. Hoyt, Chairperson
Emmeth A. Luebke
Jerry Harbour

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	(ASLBP No. 82-471-02-OL)
	)	
(Seabrook Station, Units 1 and 2)	)	September 8, 1983

ORDER
(Reaffirming Suspension of the
Representative of the Town of Rye, New Hampshire)

On August 26, 1983, this Board suspended from the proceedings the representative of the Town of Rye, New Hampshire--Mr. Guy Chichester. Tr. 1810. Mr. Chichester's conduct had been contemptuous and disruptive. He had previously made frivolous attacks on the conduct of counsel for Applicants and the Staff, and has besmirched their integrity and the integrity of these proceedings. Tr. 1531-42. During hearings on August 26, 1983, he persisted in shouting remarks while the Board was conducting the proceedings.

Pursuant to 10 CFR § 2.713, representatives are required to conduct themselves with honor, dignity, and decorum as they should before a court of law; and a presiding officer may, if necessary for the orderly conduct of the proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), attached to this Board's Memorandum and Order, dated January 31, 1983 and served on all parties. The Board was convinced that Mr. Chichester would not contribute to the proceeding. It chose, therefore, as the appropriate sanction, the suspension of the representative. This sanction does not prevent the Town of Rye from participating further in these proceedings through a new representative. The Board has so advised the Chairman of the Office of Selectmen of Rye. Tr. 1869-70.

The Board has reviewed these matters, and hereby reaffirms its prior oral decision. Mr. Chichester is permanently suspended from participation in this proceeding. The Board advises the Town of Rye and its former representative that they may, within ten days after issuance of this Order, file an appeal with the Atomic Safety and Licensing Appeal Board and request a stay. 10 CFR § 2.713(c)(2). The procedures are set out in 10 CFR § 2.713(c)(3),(4), attached.

After the Board suspended Mr. Chichester from the proceedings, the Board received a motion for recusal, filed and signed by Mr. Chichester. The motion was dated August 24, 1983, but the postmark revealed it had in fact been mailed on August 29, 1983. The motion was subsequently withdrawn by the Town of Rye. Letter from Board of Selectmen, Rye, NH

to Helen F. Hoyt (August 31, 1983). Accordingly, the Board will not rule on the motion.

IT IS SO ORDERED

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Helen F. Hoyt

Helen F. Hoyt, Chairperson
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 8th day of September, 1983.

ATTACHMENT

EXHIBIT F
4 OF 4

§ 2.713 Appearance and practice before the Commission in adjudicatory proceedings.

(a) Standards of Practice. In the exercise of their functions under this subpart, the Commission, the Atomic Safety and Licensing Appeal Boards, the Atomic Safety and Licensing Boards, and Administrative Law Judges function in a quasi-judicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) Representation. A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law provided the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number; the name and address of the person on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) Reprimand, Censure or Suspension from the Proceeding.

(1) A presiding officer, an Atomic Safety and Licensing Appeal Board, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

(2) A reprimand, a censure or a suspension which is ordered to run for one day or less shall be ordered with grounds stated on the record of the proceeding and shall advise the person disciplined of the right to appeal pursuant to paragraph (c)(3) of this section. A suspension which is ordered for a longer period shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal and to request a stay pursuant to paragraphs (c)(3) and (c)(4) of this section. A proceeding may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Atomic Safety and Licensing Appeal Board or the Commission, as appropriate. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Appeal Board or Commission, as appropriate, shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Appeal Board or Commission, as appropriate, may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Appeal Board or the Commission, as appropriate, provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, the Appeal Board, or the Commission, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Appeal Board or Commission.

(4) A suspension exceeding 1 day shall not be effective for 72 hours from the date the suspension order is issued. Within this time a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension shall be stayed until the reviewing tribunal rules on the motion. The stay request shall be in writing and contain the information specified in §§ 2.788(b)(1), (2) and (4) of this part. The Appeal Board or Commission, as appropriate, shall rule on the stay request within 10 days after the filing of the motion. The Appeal Board or Commission shall consider the factors specified in §§ 2.788(e)(1) and (e)(2) of this part in determining whether to grant or deny a stay application.

45 FR 65977

45 FR 65977