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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

JUL 29 1991

BEFORE THE COMMISSION

In the Matter of )  
 )  
PUBLIC SERVICE COMPANY OF )  
NEW HAMPSHIRE )  
 )  
(Seabrook Station, Units 1 and 2) )  
 )

Docket Nos. 50-443 OLA

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NRC STAFF RESPONSE IN SUPPORT OF  
LICENSEE'S MOTION TO DISMISS APPEAL

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Ann P. Hodgdon  
Counsel for NRC Staff

July 29, 1991

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I. INTRODUCTION

On July 17, 1991, Public Service Company of New Hampshire (PSNH) filed "Licensee's Motion to Dismiss Appeal," in which PSNH asked the Commission to dismiss Seacoast Anti-Pollution League's (SAPL's) appeal from an Atomic Safety and Licensing Board Order of June 18, 1991, LBP-91-28. In LBP-91-28, the Licensing Board denied SAPL standing to intervene in an operating license amendment proceeding concerning PSNH's transfer of its ownership interest in the Seabrook Nuclear Station to North Atlantic Energy Corporation (NAEC), a wholly owned subsidiary of Northeast Utilities (NU). On June 28, 1991, SAPL filed a notice of its appeal from LBP-91-28; this notice was not accompanied by a supporting brief.

In its motion, PSNH opposes SAPL's appeal because of SAPL's failure to accompany its notice of appeal with its brief on appeal, as required by applicable regulations in 10 C.F.R. § 2.714a.

On July 23, 1991, Seacoast Anti-Pollution League (SAPL) filed a brief in support of its appeal. The NRC Staff supports PSNH's motion.

## II. DISCUSSION

### A. The Commission Should Grant PSNH's Motion to Dismiss.

PSNH relies on a recent Commission decision in *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238 (1991), in support of its argument that the Commission should dismiss SAPL's appeal. PSNH argues that the Commission's dismissal of a lay person for failure to brief is ample authority for dismissal where, as here, both counsel and client are long experienced in NRC proceedings. Motion at 2. Further, PSNH argues that here, as in *Turkey Point*, the Licensing Board had fully advised the petitioner of the appellate rights under 10 C.F.R. § 2.714a. PSNH concludes that the Commission should dismiss SAPL's appeal. The case cited by PSNH fully supports its arguments. PSNH's motion should be granted and the appeal dismissed.<sup>1</sup>

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<sup>1</sup> The NRC Staff in its "Response to SAPL Notice of Appeal," dated July 15, 1991, at 3, argued that the appeal should be dismissed for failure of SAPL to file a brief within the time provided by 10 C.F.R. § 2.714a(a).

B. SAPL's Argument in Explanation of its Failure to File on Time is not Persuasive.

SAPL explains its failure to file its brief by June 28, 1991, the last day a brief would have been due under applicable regulations in 10 C.F.R. § 2.714a(a), by stating that it believed that it had 30 days or until July 28th to file, having filed a Notice of Appeal on June 28, 1991. Brief at 3. SAPL further states that it is now aware that its brief on appeal should have accompanied its Notice of Appeal. *Id.* SAPL explains the "mix-up" as an "oversight" and SAPL's "longstanding practice of filing briefs in the still not final operating license procedure." *Id.* SAPL argues that its failure to file its brief on time should not foreclose the Commission's consideration of its brief on appeal because of SAPL's longstanding status as an intervenor in Seabrook proceedings and because its Notice of Appeal was timely filed. *Id.*

The Staff believes that SAPL's longstanding intervenor status neither explains nor excuses SAPL's lapse. As the Staff pointed out in its Response to SAPL's Notice of Appeal (filed July 15, 1991), the Licensing Board's Order in LBP-91-28, at 6, indicated that any appeal to the Commission should be filed within ten days after service of the Order. Staff Response at 2-3. In arguing that the Commission should dismiss SAPL's appeal because of SAPL's failure to file its supporting brief together with its notice of appeal, the Staff noted that the Licensing Board's Order had explicitly directed SAPL's attention to 10 C.F.R. § 2.714a(a). SAPL is a sophisticated intervenor represented by counsel experienced in NRC proceedings. *See generally*

NRC Staff Response to SAPL Petition to Intervene in Proposed Amendment to Transfer Ownership Interest, April 22, 1991. Such experience does not excuse SAPL's failure to heed the directions in the Licensing Board's Order.

### III. CONCLUSION

As discussed above, the NRC Staff supports PSNH's motion to dismiss the appeal.<sup>2</sup>

Respectfully submitted,

*Ann P. Hodgdon*

Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 29th day of July, 1991

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<sup>2</sup> The Staff briefed the merits of the appeal in its July 15, 1991, "Response to SAPL Notice of Appeal," and showed the correctness of the ruling below. NRC Response at 3-6. As there pointed out, SAPL cannot raise issues concerning the effects of an amendment to transfer operation of the facility in a proceeding on another amendment involving a change in ownership but not operation. *See Wisconsin Electric Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). Further the pendency of an investigation does not indicate a substantive problem so as to cause the start of a proceeding. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station), CLI-86-1, 23 NRC 1, 5 (1986). Nor does the citation of the Systematic Assessment of Licensee Performance (SALP) Report of January 28-29, 1991 (Report Nos. 50-245/89-99, 50-336/89-99; 50-423/89-99) related to the Millstone facility add anything to the argument. The Staff concluded in the inspection report SAPL apparently relies upon (SAPL Petition at 2-3) that "there were no major safety significant issues." *Id.* at III.G., 38a. Further the SAPL Report rated the Millstone licensee as "Category 2" for safety assessment and quality verification. *Id.* at 4-6. SAPL showed nothing to rebut this assessment and thus provided no basis to indicate it had "sufficient information" to support its petition. *Cf.* 10 C.F.R. § 2.714(b)(2)(iii). Therefore, should the Commission waive the requirements of its regulation and consider this appeal on its merits, the Staff relies on its Response of July 15, 1991, to show that the appeal has no substantive merit.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION '91 JUL 29 P4:21

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
BECKINGHAM  
BRATTLE

In the Matter of )  
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PUBLIC SERVICE COMPANY OF ) Docket Nos. 50-443 OLA  
NEW HAMPSHIRE )  
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(Seabrook Station, Units 1 and 2) )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN SUPPORT OF LICENSEE'S MOTION TO DISMISS APPEAL" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of July 1991:

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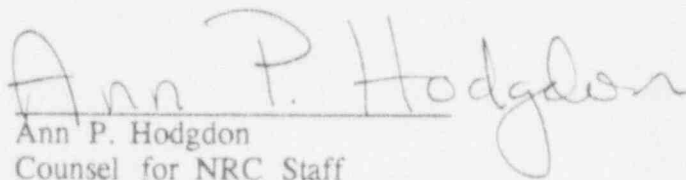
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