

6071

DOCKETED
USNRC

Dated: April 9, 1988
'88 APR 15 P 2:00

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

before the
ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

Docket Nos. 50-443-OL-1
50-444-OL-1
On-site Emergency
Planning Issues

APPLICANTS' RESPONSE IN OPPOSITION
TO MASSACHUSETTS ATTORNEY GENERAL'S
PETITION UNDER 10 C.F.R. 2.753 FOR
A WAIVER OF OR AN EXEMPTION FROM
THE PUBLIC UTILITY EXEMPTION FROM
THE REQUIREMENT OF A DEMONSTRATION
OF FINANCIAL QUALIFICATION

8804200100 880409
PDR ADOCK 05000443
G PDR

DS03

TABLE OF CONTENTS

I.	INTRODUCTION	1
	The Mass AG Petition	3
II.	ARGUMENT	4
	The Regulatory Scheme	4
	Mass AG's Petition Fails to Make A Requisite Showing for Waiver	5
III.	CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Judicial:

Coalition for the Environment v. Nuclear Regulatory Commission, 795 F.2d 168 (D.C. Cir. 1986) 9

Administrative:

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-88-2, slip. op., (February 1, 1988) 8

Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587 (1985) 5

Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-85-1, 21 NRC 275 (1985) 9

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323 (1984) 9

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032 (1984) 9

Pacific Gas & Electric Co. (Diablo Canyon Plant Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981) 4

Public Service Company of New Hampshire (Seabrook Station, Unit 1 and 2), ALAB-865, 25 NRC 430 (1987) 5

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ASLB Memorandum and Order (January 29, 1988) (unpublished). 2

REGULATIONS:

10 C.F.R. § 2.104(c)(4) 1

10 C.F.R. § 2.758 1-3, 5

10 C.F.R. § 2.758(a) 4

10 C.F.R. § 2.758(b)	4, 6
10 C.F.R. § 2.758(c)	4
10 C.F.R. § 50.33(f)	1
10 C.F.R. § 50.47(a)(1)	8
10 C.F.R. § 50.47(b)(5)	8
10 C.F.R. § 50.57(a)(4)	1
49 Fed. Reg. 35747 (September 12, 1984)	5
49 Fed. Reg. 13044 (April 2, 1984)	5

I. INTRODUCTION

The petition of the Attorney General for the Commonwealth of Massachusetts (Mass AG), filed with the Board under the date of March 7, 1988, purportedly pursuant to this Board's order of January 29, 1988, requests under the provisions of 10 C.F.R. § 2.758 a waiver of, or exception from, the public utility exemption from §§ 2.104(c)(4), 50.33(f) and 50.57(a)(4) styled the "Commission's financial qualification rule". The Board's order referred to was occasioned by events which were brought to the Board's attention following arguments on an appeal of three intervenors from the Licensing Board's August 20, 1987 denial of their Section 2.758 petition. Their petition sought a waiver of the Commission's financial qualification rule for reason of Public Service Company of New Hampshire (PSNH) forebodings of possible proceedings under the bankruptcy code.

The first of the matters brought to the Board's attention was the decision of the Supreme Court of New Hampshire in Petition of Public Service Company of New Hampshire, No. 87-311, January 26, 1988. That decision upheld the constitutionality of a New Hampshire anti-CWIP statute that had been challenged by PSNH. The statute proscribed recovery by an electric utility of its costs for construction work in progress (CWIP) on a facility through the ratemaking process prior to its commercial operation.

The second event, following on the heels of the first, was PSNH's petition for reorganization under Chapter XI of the Bankruptcy Code.

Acting on the belief that these events might affect the pending appeals or at least require an opportunity for the parties to be heard or perhaps precipitate additional waiver filings, the Board decided to allow any of the parties to the proceeding to join the issue. The Board reasoned that because it already had jurisdiction over the three intervenors' petition and inasmuch as a 10 C.F.R. § 2.758 determination usually does not require a hearing and could be made by it as well as the Licensing Board, it would be more efficient for the Board to preempt jurisdiction in the matter.

Accordingly [it ordered that],
[a]dditionally, any other party seeking a waiver of the Commission's financial qualification rule with respect to low-power operation based in whole or in part upon the current fiscal circumstances of the lead applicant must join those intervenors' petition or file its own petition with us within

Memorandum and Order of January 29, 1988 (unpublished) at 3.
Thereafter Mass AG responding to the Board's invitation filed his instant petition and within the window afforded by the Board.

The Mass AG Petition

The Mass AG petition, as filed under 10 C.F.R. § 2.758, is not confined to low power operation as the Board's order appears to direct, but is:

[F]or a waiver of or an exception from the public utility exemption from the Commission's requirement that a demonstration of financial qualification be made prior to the issuance of a commercial nuclear power plant operating license.

Mass AG petition, at 2 (emphasis added). Low power operation appears significant to his petition only in a temporal sense. That is,

The waiver is requested to require that the Applicant establish, prior to low power operation, financial qualification to cover the costs of Seabrook[s'] . . . operation for the period of the license . . .

Id. (emphasis added), while to be sure Mass AG also seeks to require the Applicants to establish their financial qualification to carry out low power operations,

[A]nd [cover] the costs to permanently shut [the facility] down and maintain it in a safe condition should it not receive a full-power license.

Id. The need for this, he argues, is because of the uncertainties of full power operations it is unlikely that the bankruptcy court will authorize PSNH to expend the necessary funds during the pendency of the "PSNH bankruptcy". Mass AG further requests that the Board grant his waiver

petition and order that a low power license not be issued pending a determination of the Applicants' financial qualification to operate Seabrook. Id. at 18.

II. ARGUMENT

The Regulatory Scheme

Section 2.758(a) permits a party to a licensing proceeding to petition under Section 2.758(b) that the application of a Commission rule be waived or an exception made for that proceeding, but only upon the sole ground of a showing that special circumstances with respect to the subject matter of the proceeding are such that the rule would not serve its intended purpose. Further, Section 2.758(b) requires that the petition be accompanied by an affidavit that explains why the regulation would not serve its intended purpose and sets forth with particularity the special circumstances alleged to justify the waiver or exception requested. Under Section 2.758(c) if the presiding officer determines that the petitioner has not made a prima facie showing as called for under Section 2.758(b), the matter is not to be further considered. If on the other hand the presiding officer determines that a prima facie showing has been made, he is to certify the matter directly to the Commission. A prima facie standard of proof has been held to be that evidence which is legally sufficient to establish a fact in a case unless disproved. Pacific Gas & Electric Co.

(Diablo Canyon Plant Nuclear Power Plant, Units 1 and 2),
ALAB-653, 16 NRC 55, 72 (1981).

Mass AG's Petition Fails to Make
A Requisite Showing for Waiver

Looking to the Mass AG petition, we find two affidavits attached to the petition. The first, in attachment "Appendix I" is that of Timothy Newhard, a financial analyst with the Mass AG's office. Mr. Newhard attests that he has compiled and has presented a history of the bond ratings of investor-owned utilities that have shares in Seabrook and of certain other utilities who have built nuclear power plants. The second affidavit, "Appendix X" is that of Dale G. Bridenbaugh signed under the date October 29, 1987. This, with some updates, is the same affidavit as that filed with the three intervenors, 10 C.F.R. § 2.758 petition. It is also, with some updates, the same affidavit (but dated March 31, 1987) which was filed as Exhibit 1 to the Mass AG's April 6, 1987 Application for a Stay of Licensing Board Order Authorizing Issuance of Operating License to Conduct Low-Power Operation. It deals with project costs, cost projections, inventory values and assesses the costs and some of the benefits of low-power operation and testing. In ALAB-865, 25 NRC 430 (May 8, 1987), this Board, in considering the stay motion denied by the Licensing Board, rejected the affidavit for the reason that the Commission had fully spoken to the matter in Long Island Lighting Company (Shoreham

Nuclear Power Station) CLI-85-12, 21 NRC 1587, 1590 (1985).
The much traveled Bridenbaugh affidavit stands in no better
stead here. Clearly the Mass AG affidavits do not measure up
to what Section 2.758(b) calls for, i.e.,

[A]n affidavit that identifies the
specific aspect or aspects of the subject
matter of the proceeding as to which
application of the rule or regulation
. . . would not serve the purposes for
which the rule or regulation was adopted,
and shall set forth with particularity
the special circumstances alleged to
justify the waiver or exception
requested.

The Commission's financial qualification rule which Mass
AG seeks to have waived was first proposed so as to eliminate
financial qualification reviews for regulated electric
utilities applying for operating licenses. "Elimination of
Review of Financial Qualification of Electric Utilities in
Licensing Hearings for Nuclear Plants," 49 Fed. Reg. 13044
(April 2, 1984). The proposed rule was based on the
Commission's belief that "case-by-case" review of financial
qualification for those electric utilities at the operating-
license stage was unnecessary due to the ability of such
utilities to recover through ratemaking to a sufficient
degree, the cost of construction and to conduct safe
operation. This belief of the Commission was reiterated as
the rationale for the rule upon adoption. 49 Fed. Reg.
35747, 35748 (September 12, 1984).

Thus, for Mass AG to prevail on his petition, he must
make a prima facie showing that special circumstances exist

such that application of the Commission's financial qualification rule would not serve the purpose intended in this proceeding. In other words, he must show that the Commission's assumption in rulemaking, that electric utility applicants will be able to recover the cost of safe operation through the ratemaking process is unfounded with respect to Seabrook owners because the ratemaking process has somehow been shut down to them.

This Mass AG, not surprisingly, has failed to do. Indeed, his petition does not even allege that the Applicants will be denied recourse to the ratemaking process should Seabrook be fully licensed and achieve commercial operation. Mass AG's only venture on this point (Mass AG petition p. 16) is to note that the Commission did not address the question of the availability of adequate funds for safe operation during the pendency of the bankruptcy of an electric utility in its September 1984 rulemaking. While the Mass AG is correct in his observation, nothing turns on it unless, of course, it be established that the ratemaking process is foreclosed to a bankrupt utility seeking the funds needed for safe operation of its facility. This has not been done here. There is simply nothing in the Mass AG petition to the effect that the New Hampshire Public Utilities Commission will deny PSNH recourse to the ratemaking process. Insofar as Mass AG's petition must establish the special circumstances

singled out by the Commission to justify a waiver of its financial qualification rule, his petition is in default.

Mass AG has chosen instead to portray PSNH financial difficulties and the position of the co-owners and a discussion of the costs and effects of low power operations. Rather than try to prove the special circumstances earmarked by the Commission to justify a waiver of the rule, Mass AG side-steps them and asserts that the Applicants will be unable to avail themselves of the ratemaking process. His logic is that the ratemaking process cannot assure that adequate funding will be afforded Applicants for the reason that because of New Hampshire's anti-CWIP law no funds can be had until a full license issues; the issuance of a full power license is highly unlikely because Applicants must first develop and implement means to provide early notification to the Massachusetts EPZ populace in accordance with 10 C.F.R. § 50.47(b)(5); they must also demonstrate under 10 C.F.R. § 50.47(a)(1) that their own emergency plan in lieu of plans from Massachusetts state and local governments provide reasonable assurance that adequate measures can and will be taken in the event of a radiological emergency; and on this score he opines that utility plans cannot provide that level of protection, citing Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), LBP-88-2, slip. op., (February 1, 1988). Finally, he asserts that low power operation should not be authorized for reason that due to the

uncertainties in connection with a full power license the Bankruptcy Court may not approve the expenditure of funds necessary for the cost of safe low power operation.

The Commission has consistently expressed disfavor with speculating on the outcome of ongoing proceedings (issuance of a full power license) to determine the application of specific regulations to a proceeding. Long Island Lighting Company (Shoreham Nuclear Power Station) CLI-85-1, 21 NRC 275, 278-279 (1985); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-83-17, 17 NRC 1032, 1034 (1984). Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1327-28 (1984); also see Coalition for the Environment v. Nuclear Regulatory Commission, 795 F.2d 168, 175 (D.C. Cir. 1986),

The Commission has determined that the ratemaking process provides that reasonable assurance and that determination is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent.

Mass AG's contention that the ratemaking process cannot assure adequate funding because of the uncertainty of the full power license to open the process to the Applicants accordingly is without merit.

Mass AG's final point that the Bankruptcy Court, because of the uncertainties of full power operation, may not approve the expenditure of funds necessary for the costs of safe low power operation is likewise without merit. Moreover, the

argument is pure speculation. Nothing here indicates or even suggests that the Bankruptcy Court or anyone else has considered such action.¹ Nor is any evidence offered, nor could there be, that PSNH is not presently making its contributive share payments to the Seabrook project.

III. CONCLUSION

For the reasons stated, Mass AG's 10 C.F.R. § 2.758 waiver petition should be dismissed.

George H. Lewald

Thomas G. Dignan, Jr.
George H. Lewald
Kathryn A. Selleck
Ropes & Gray
225 Franklin Street
Boston, MA 02110
(617) 423-6100

Counsel for Applicants

¹ Indeed, to the contrary is the "Resolution of the Official Unsecured Creditors' Committee of Public Service Company of New Hampshire" appended hereto.

DOCKETED
USNRC

CERTIFICATE OF SERVICE

'88 APR 15 P2:00

I, George H. Lewald, one of the attorneys for the Applicants herein, hereby certify that on April 11, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or where indicated, by depositing in the United States mail, first class postage paid, addressed to) the individuals listed below.

Administrative Judge Sheldon J.
Wolfe, Esq., Chairman, Atomic
Safety and Licensing Board Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Robert Carrigg, Chairman
Board of Selectmen
Town Office
Atlantic Avenue
North Hampton, NH 03862

Judge Emmeth A. Luebke
Atomic Safety and Licensing
Board Panel
5500 Friendship Boulevard
Apartment 1923N
Chevy Chase, Maryland 20815

Diane Curran, Esquire
Andrea C. Ferster, Esquire
Harmon & Weiss
Suite 430
2001 S Street, N.W.
Washington, DC 20009

Dr. Jerry Harbour
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Stephen E. Merrill
Attorney General
George Dana Bisbee
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301-6397

Adjudicatory File
Atomic Safety and Licensing
Board Panel Docket (2 copies)
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Sherwin E. Turk, Esquire
Office of General Counsel
U.S. Nuclear Regulatory
Commission
One White Flint North, 15th Fl.
11555 Rockville Pike
Rockville, MD 20852

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

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

Philip Ahrens, Esquire
Assistant Attorney General
Department of the Attorney
General
Augusta, ME 04333

Paul McEachern, Esquire
Matthew T. Brock, Esquire
Shaines & McEachern
25 Maplewood Avenue
P.O. Box 360
Portsmouth, NH 03801

Mrs. Sandra Gavutis
Chairman, Board of Selectmen
RFD 1 - Box 1154
Route 107
Kensington, NH 03827

*Senator Gordon J. Humphrey
U.S. Senate
Washington, DC 20510
(Attn: Tom Burack)

*Senator Gordon J. Humphrey
One Eagle Square, Suite 507
Concord, NH 03301
(Attn: Herb Boynton)

Mr. Thomas F. Powers, III
Town Manager
Town of Exeter
10 Front Street
Exeter, NH 03833

H. Joseph Flynn, Esquire
Office of General Counsel
Federal Emergency Management
Agency
500 C Street, S.W.
Washington, DC 20472

Gary W. Holmes, Esquire
Holmes & Ells
47 Winnacunnet Road
Hampton, NH 03841

Mr. J. P. Nadeau
Selectmen's Office
10 Central Road
Rye, NH 0370

Carol S. Sneider, Esquire
Assistant Attorney General
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

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

Mr. Angie Machiros
Chairman of the Board of Selectmen
Town of Newbury
Newbury, MA 01950

Mr. Peter J. Matthews
Mayor
City Hall
Newburyport, MA 01950

Mr. William S. Lord
Board of Selectmen
Town Hall - Friend Street
Amesbury, MA 01913

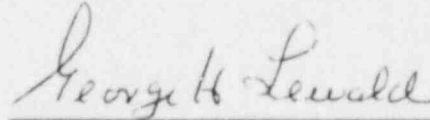
Brentwood Board of Selectmen
RFD Dalton Road
Brentwood, NH 03833

Richard A. Hampe, Esquire
Hampe and McNicholas
35 Pleasant Street
Concord, NH 03301

Mr. Ed Thomas
FEMA, Region I
442 John W. McCormack Post
Office and Court House
Post Office Square
Boston, MA 02109

Judith H. Mizner, Esquire
Silverglate, Gertner, Baker,
Fine, Good & Mizner
88 Broad Street
Boston, MA 02110

Charles P. Graham, Esquire
McKay, Murphy and Graham
100 Main Street
Amesbury, MA 01913



George H. Lewald

(* = Ordinary U.S. First Class Mail.)