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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Emmeth A. Luebke
Jerry Harbour

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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In the Matter of

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, et al.

(Seabrook Station, Units 1 and 2)

Docket Nos. 50-443-0L-1-R
50-444-0L-1-R

(On-Site Emergency Planning
and Safety Issues)

(ASLBP No. 88-558-01-OLR)

February 5, 1988

CERTIFICATION OF A QUESTION TO THE COMMISSION PURSUANT TO §2.718(1)

In affirming the Appeal Board's Decision of October 1, 1987
(ALAB-875, 26 NRC __),* in a Memorandum and Order issued on November 25,
1987 (CLI-87-13, 26 NRC __), the Commission lifted its stay of low power

* In ALAB-875, inter alia, the Appeal Board affirmed in part and reversed and remanded in part this Board's Partial Initial Decision (LBP-10, 25 NRC 177 (1987)) wherein, having resolved all onsite safety and emergency planning issues, pursuant to 10 C.F.R. 50.47(d) and 50.57(c), we had authorized issuance of a license to operate Seabrook Station, Unit 1, up to 5% of rated power. On remand, the Appeal Board stated that this Board should admit for litigation two contentions which had been rejected in 1982 as issues in controversy -- NECNP Contention I.V. (concerned with inservice inspection of steam generator tubes) and NECNP Contention IV. (addressed to the accumulation of aquatic organisms and other foreign matter in cooling systems). The Appeal Board also stated that we should determine expeditiously the appropriateness of a renewal pendente lite of the low power authorization contained in our Partial Initial Decision.

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operations and ordered that this Licensing Board "shall expeditiously determine whether considering the issues that it is hearing on remand, it is appropriate to renew at this time its authorization of low power or whether low power operations must await further decisions."

Having earlier admitted for litigation the two remanded contentions in an Order of October 16, 1987 (unpublished), we requested in the Order of November 27, 1987 (unpublished) that the parties file responsive briefs to assist us in making the expeditious determination directed by the Commission. The Applicants and New England Coalition on Nuclear Pollution filed briefs on January 4, 1988 and the Staff filed its brief on January 12, 1988.

In a Memorandum and Order of February 3, 1988, (ALAB-883, 27 NRC ___), the Appeal Board granted two motions of the Attorney General of Massachusetts to reopen the evidentiary record in the onsite emergency planning and safety issues phase of this operating license proceeding and remanded to this Board for appropriate consideration and disposition the issue encompassed by the two contentions admitted by the Appeal Board, i.e. that no means have been established to provide the requisite early notification and clear instruction to Massachusetts residents within the EPZ. Citing the Statement of Consideration accompanying 10 C.F.R. 50.47(d), 47 Fed. Reg. 30,232 (1982), the Appeal Board concluded that "...Seabrook low power operation is precluded unless and until the Applicants have submitted substitute public notification plans for the Massachusetts communities within the EPZ that meet with Staff approval and, if challenged in an appropriate and timely manner by a

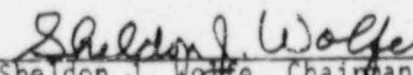
party to the proceeding, those plans are then found by the Licensing Board, as well, to satisfy the governing Commission regulation." (ALAB-883, slip op. at 23, 24).

We have been preparing and could issue within a short time our determination, but we are in a quandary. On the one hand, in CLI-87-13, the Commission has directed this Board to expeditiously determine, in considering the issues that it is hearing on remand (the accumulation of aquatic organisms and other foreign matters in cooling systems, and inservice inspection of steam generator tubes), (1) whether it is appropriate to renew at this time its authorization of low power, or (2) whether low power operations must await further decisions. As a trial board, we are bound by the Commission's directive, and we are familiar with no legal system -- judicial or administrative -- which allows a lower tribunal to disregard the directives of a superior one. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 870 (1975) On the other hand, in ALAB-883, the Appeal Board has effectively negated the two alternative determinations which the Commission has delegated to us to make.

Certified Question

Should the Licensing Board proceed to make the determination as directed by the Commission in CLI-87-13?

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 5th day of February, 1988.