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UNITED STATES OF AMERICA
UNITED STATES NUCLEAR REGULATORY COMMISSION
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443-OL-1 50-444-OL-1
(Seabrook Station, Units 1 and 2)	)	(On-Site Emergency Planning and Safety Issues)

SAPL, TOWN OF HAMPTON AND NECNP APPEAL
OF PARTIAL DENIAL OF WAIVER REQUEST (ALAB 895) TO
REVIEW FINANCIAL QUALIFICATIONS OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

NOW COME the Seacoast Anti-Pollution League, the Town of Hampton, the New England Coalition on Nuclear Pollution, as joint intervenors, and hereby appeal to the Commission pursuant to 10 CFR §2.786(b), the July 5, 1988 Decision of the Atomic Safety and Licensing Appeal Board, ALAB 895, insofar as the Appeal Board denied the joint intervenors' waiver request which if granted would permit consideration of the issue of the financial qualifications of Public Service Company of New Hampshire (PSNH).

1. BACKGROUND AND INTRODUCTION

The joint intervenors by a pleading dated July 31, 1987, had sought a waiver of the Commission's rules pertaining to the determination of financial capability of applicants for nuclear operating licenses. The intervenors based their petition for a waiver on a July 1987 form 8K filed with the Securities and

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Exchange Commission by PSNH which disclosed that the avoidance of bankruptcy for PSNH was going to be "extremely difficult."

Accordingly, the joint intervenors sought a determination that a prima facie showing had been made, pursuant to 10 CFR §2.758, that the Commission's rules which ordinarily foreclose a financial qualification inquiry for regulated electric utilities should not be applied. The rules in question are found at 10 CFR §§50.33(f) and 50.57(a)(4). The intervenors thus sought a determination that, given the parlous financial condition of PSNH, and the fact that the Commission still held that there was a safety need to have financially qualified applicants, that the issue of PSNH's financial capabilities should be made available for litigation in the licensing hearings.

On August 20, the Licensing Board rejected the intervenors' waiver petition, and a timely appeal to the Appeal Board followed. Oral argument was held on December 8, and the issue was awaiting decision when two important events occurred.

First, on January 26, the New Hampshire Supreme Court unanimously upheld the New Hampshire Anti-CWIP statute, RSA 378:30-a. This statute flatly prohibits any ratepayer recovery for any generating plant "until and not before" the plant "is actually providing service to customers."

Second, on January 28, two days later, PSNH filed for bankruptcy protection, the first utility in modern history to do

so, and the first ever to do so while seeking a nuclear operating license from this Commission.

On January 29, the Appeal Board, noting these events, invited the joint intervenors to file new or amended petitions for waiver, and invited other parties to file petitions. In response, intervenors filed a supplemental brief and another party, the Massachusetts Attorney General (Mass AG), on March 7 filed a new petition for waiver.

In addition, Mass AG filed two supplements to its petition. The first, on May 13, disclosed the attempt by PSNH's third mortgage bond holders to obtain timely payment of the interest on their securities, which PSNH had conceded would likely prohibit it from meeting other obligations, including its more than 5 million dollar a month obligation to the Seabrook project, absent rate relief.

The second Mass AG supplement disclosed the decision of the fourth largest Seabrook owner, the Massachusetts Wholesale Municipal Electric Corporation (MMWEC) to cease making project payments as of June 2, 1988.

Seabrook project costs, allocated among the joint owners, apparently vary between 10 and 15 million dollars a month. PSNH's share, at its 35.56952% ownership level, has been averaging approximately 5.5 million dollars a month. It is conceded that low power operation will cause these costs to increase.

2. SUMMARY OF DECISION BELOW

On July 5, the Appeal Board ruled that a prima facie case for a waiver was met by the second Mass AG supplement: that is, due to the decision of MMWEC to cease funding the project as of June 2, 1988, the project would soon have a 11.5934% funding deficiency. This deficiency, the Appeal Board noted, might be overcome, but it was sufficient to present a "prima facie case that the applicants lack sufficient funds to operate Seabrook safely at low power" and therefore, we must "certify the petition to the Commission." (Slip Opinion at page 38)

However, the Appeal Board affirmed the denial of the intervenors' petition, which relied fundamentally on the bankruptcy of the largest Seabrook owner as, on its face, establishing a prima facie case for a financial qualification review of the project. The Appeal Board acknowledged:

> Because PSNH's bankruptcy filing is unprecedented, the appellants' arguments have a certain visceral attraction.

However, the Board added:

> Such a reaction, however, can never be a proper substitute for the showing required under 10 CFR 2.758--the only basis on which we are authorized to act. (Slip Opinion page 16)

Accordingly, the Appeal Board affirmed the denial of the intervenors' waiver petition. The Appeal Board's ruling was thus, in effect, that although the decision of the fourth largest owner, MMWEC, to withhold payments was sufficient to establish a prima facie case for a financial qualification review, the bankruptcy of

the largest owner was not sufficient.

3. THE DECISION WAS ERRONEOUS

The Appeal Board erred in ruling that the bankruptcy of the largest Seabrook owner was not a sufficient basis, in itself, to waive the rule which ordinarily forecloses a financial qualification hearing.

The Appeal Board clearly stated that the intervenors "if they are to rely on PSNH's filing of a Chapter 11 Reorganization Petition . . ., must demonstrate that the bankruptcy proceeding deprives PSNH and the other applicants of the financial resources to operate the facility at that power level" [low power]. (Slip Opinion at page 22)

In short, the Appeal Board would hold that the intervenors had to establish, not merely that a utility applicant was in bankruptcy, but that the bankruptcy would then result in an actual funding shortage. This, we submit, reversed the burden of proof on an important safety issue from the applicants to the intervenors, contrary to the requirements of 10 CFR §2.732.

The Appeal Board's error stems from a mischaracterization of the purpose of the financial qualification rule. As previously noted, the financial qualification rule, as recast in 1984, was not premised on the conclusion that there was no relationship between financial qualification and safety. Indeed, the Commission, in adopting the current rule, specifically eschewed

this rationale:

> The Commission is not relying on this premise for its current rule. 49 Fed. Reg. 35751 (September 12, 1984)

Rather, the rationale for the rule was that case by case adjudication of financial qualification is "unnecessary due to the ability of such utilities to recover, to a sufficient degree, all or a portion of the cost of construction and sufficient costs of safe operation through the rate making process." (Emphasis added.) Id. at 3548.

In short, the rule obviating the need for case by case adjudication of financial qualification was based on the fact that electric utility applicants are rate regulated (or can themselves set rates), and on the assumption that the rate regulation process itself reasonably assures the availability of necessary funds.

The bankruptcy of Public Service has eliminated the basis for the assumption. Under bankruptcy, there is no assurance that the rate setting process is available to provide reasonable assurance of funds.1 Whether or not the bankruptcy process itself can act as a basis for providing the necessary funds is another question, and one not within the rationale underlying the Commission's current rule.

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1 /The only reference in the Bankruptcy Code to a rate setting commission is at 11 USC 1129(a)(6) which provides that if a plan of reorganization requires a change in rates, the rate change must be approved by the rate setting commission. PSNH is a long way away from having a plan of reorganization and just sought an extension, for filing a plan, which was granted to December 31, 1988.

The intervenors, in short, have fully met their burden of proof by establishing that the rate setting process, which was to act as a surrogate for Commission case by case inquiry into financial qualification, is no longer available. That burden having been met, the Commission now should authorize a financial qualification inquiry, as to the bankrupt entity which is the lead owner, PSNH.

Thus, the PSNH bankruptcy, by itself, establishes the prima facie case necessary for a waiver pursuant to 10 CFR §2.758. This is so because the purpose of the rule eliminating the inquiry was not that the intervenors should be given the burden of showing an actual unavailability of funds, but to avoid case by case adjudication of financial qualification where the rate setting process could act as a surrogate for the confidence the case by case adjudication would otherwise provide in assuring that a nuclear operating license applicant had or could obtain the necessary funds for safe operation. That assurance does not exist for a bankrupt applicant, because the normal rate setting process does not exist for a bankrupt applicant, and the waiver should be granted.

4. REASONS FOR THE COMMISSION TO ACCEPT REVIEW

The Commission should review ALAB 895 both because the Appeal Board erred in denying the waiver by reversing the burden of proof on an important safety issue, financial qualification, and because this case presents a major policy question of first impression:

Should the Commission authorize a bankrupt utility applicant to initiate nuclear operation? Not only is PSNH the first utility seeking a nuclear license to ever file for bankruptcy, not only is it the largest the Seabrook owner with more than double the ownership of the second largest owner, it is also the lead owner, the holder of the fuel loading license issued in October, 1986, and the parent of an entity known as New Hampshire Yankee, which is purportedly the present operator of the facility, as a division of PSNH. The intervenors submit that the Appeal Board decision fails to deal with this underlying reality, and the major policy issues it presents.

In addition, the intervenors suggest that the Appeal Board decision is fundamentally opposed to the Commission's policy as set forth in its recently adopted decommissioning regulation.

In its new decommissioning rule, at 53 Fed. Reg. 24018, the Commission specifically rejected the request from many utilities that they be allowed to meet the financial requirements for decommissioning through use of an internal fund. 10 CFR 72.18(3) In so doing, the Commission in its Statement of Considerations noted that:

> Although the law in this area is not fully developed, in the event of bankruptcy there is no reasonable assurance that either unsegregated or segregated internal reserves can be effectively protected from claims of creditor . . .
> 53 Fed. Reg. at 24033.

If the uncertainties of bankruptcy, including the specifically mentioned bankruptcy of PSNH, are so great that nuclear licensees cannot be permitted to use internal funds for meeting decommissioning requirements, even if those funds are segregated, then it seems that the Commission must treat bankruptcy as an issue that can impact on the "reasonable assurance" that its licensees can obtain the funds necessary for other aspects of safe nuclear operation.

In addition, the Appeal Board refused to deal with the possibility that Seabrook, even if authorized to initiate low power operation, might never obtain a full power license.

In this event, there is now evidence before the Bankruptcy Court that operational costs would increase, as found by the Appeal Board, a decommissioning liability would be incurred, and yet PSNH would be prohibited by the New Hampshire Anti-CWIP statute from obtaining ratepayer recovery of these costs. Thus, a potential public hazard would exist for which no funding is reasonably assured.

Whether, in this event, there is assurance that the costs of nuclear operation can be met, including the handling of decommissioning expenses, is a matter the Appeal Board declined to address, because it felt that it ran afoul of the "Commission's prohibition on speculation as to the outcome of ongoing proceedings in applying specific regulations . . ." (Slip Opinion at page 35)

However, no such "speculation" is needed to realize that it is more than a bare possibility that Seabrook will not obtain a commercial license, even if low power is undertaken. The Commission cannot ignore this possible outcome, and the likely financial risk it would present, any more than it can assume the outcome of issuance of a full power license.

For the Commission to authorize these licensing proceedings to be concluded without consideration of the financial qualification of the Seabrook owners, including the lead owner's position as debtor in possession under the Bankruptcy Act, would be to fail to meet the Commission's duty to insure that its applicants have clearly established that all requirements for nuclear licensing have been met.

DATED: July 7, 1989

Respectfully submitted,

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I hereby certify that copies of the foregoing have been forwarded by first-class mail to all parties listed on the attached service list.

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