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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF)	50-444 OL-01
NEW HAMPSHIRE, <u>et al.</u>)	(On-site Emergency Planning
)	and Safety Issues)
(Seabrook Station, Units 1 and 2))	

NRC STAFF RESPONSE TO JOINT INTERVENORS'
PETITION FOR REVIEW OF ALAB-895

Gregory Alan Berry
Counsel for NRC Staff

July 22, 1988

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INTRODUCTION

On July 12, 1988, the Seacoast Anti-Pollution League (SAPL), the Town of Hampton, and the New England Coalition On Nuclear Pollution (NECNP) (collectively "joint intervenors") filed a petition pursuant to 10 C.F.R. § 2.786(b) (erroneously denominated as an "Appeal") in which they request the Commission to review the Appeal Board's decision in ALAB-895. ^{1/} See

^{1/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC ____ (July 5, 1988). In ALAB-895, the Appeal Board also had before it a petition for waiver of the Commission's financial qualification rules filed by the Attorney General of the Commonwealth of Massachusetts. The Appeal Board found that the Attorney General's petition, which rested upon the announced intention of the fourth largest co-owner of Seabrook to discontinue its contribution toward the maintenance costs of the Seabrook Station, made out a prima facie case that Applicants might not have the resources necessary to operate the facility safely at low power. See ALAB-895, slip op. at 37-38. Accordingly, pursuant to 10 C.F.R. § 2.758(c), the Appeal Board certified the Attorney General's waiver petition to the Commission. As the Appeal Board noted, section 2.758(c) provides that "[o]nly the Commission is authorized to grant the petition and waive a rule." Id., slip op. at 4. It is not necessary to address in this response whether ALAB-895 is correct insofar as it relates to the Attorney General's waiver petition since

(FOOTNOTE CONTINUED ON NEXT PAGE)

Joint Intervenors Appeal Of Partial Denial Of Waiver Request (ALAB-895) To Review Financial Qualifications Of Public Service Company of New Hampshire (July 12, 1988) ("Petition"). In that decision, the Appeal Board affirmed the Licensing Board's August 20, 1987 order denying joint intervenors' request for a waiver of the Commission's financial qualification rules. See Memorandum and Order (Denying Waiver Petition) (August 20, 1987) (hereinafter "August 20 Order"). The Appeal Board agreed with the Licensing Board that joint intervenors had failed to carry their burden of demonstrating that special circumstances exist such that the application of the regulations in question would not serve the purpose for which they promulgated. See ALAB-895, slip op. at 21-24. As explained below, Commission review of ALAB-895 is not warranted. ALAB-895 merely reaffirms the long established principle that a Commission regulation is not to be disregarded lightly; and that to obtain a waiver of or exception to a regulation a party must at a minimum demonstrate that circumstances are such that application of the regulation will not achieve its intended purpose. Joint intervenors' petition for review of ALAB-895 does not raise "an important matter that could significantly affect the environment, the public health and safety" or present "an important procedural issue or question of public policy." The Petition should be denied.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

that question is not presented by the instant petition for review. The Staff will address the question whether the Commission should grant the Attorney General's waiver petition in a separate response to be filed with the Commission on or before July 22, 1988. See Commission Order at 2 (July 14, 1988).

LEGAL STANDARDS

Petitions for review, and responses in opposition, must satisfy the requirements of 10 C.F.R. § 2.786(b)(2). Those requirements are:

- (i) A concise summary of the decision or action of which review is sought;
- (ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Atomic Safety and Licensing Appeal Board and, if they were not, why they could not have been raised;
- (iii) A concise statement why in the petitioner's view the decision or action is erroneous; and
- (iv) A concise statement why Commission review should be exercised.

10 C.F.R. §2.786(b)(2)(i-iv). The Staff will address each of these points seriatim.

DISCUSSION

A. Summary of ALAB-895

In ALAB-895 the Appeal Board, inter alia, affirmed the Licensing Board's dismissal of joint intervenors' petition for a waiver of the Commission's financial qualification regulations. The joint intervenors sought to have the Commission waive the rules which preclude inquiry into a regulated electric utility's financial qualification to operate a nuclear facility and require Applicants to demonstrate, prior to low power operation, their financial qualification to operate the Seabrook Station. Joint intervenors argued that application of the financial qualification rules would not serve the purposes for which they were adopted.

Joint intervenors' petition rested upon the claims that (1) the lead co-applicant, Public Service Company of New Hampshire, was experiencing financial difficulties which may lead (and ultimately did lead) to the filing of a petition in bankruptcy and (2) New Hampshire state law precluded PSNH from recovering the costs of operating the Seabrook Station unless and until the facility received a license to operate at full power. These developments, argued joint intervenors, made it impossible for the ratemaking process to assure that funds needed for safe operation of the Seabrook Station would be made available to Applicants, which joint intervenors stated was the purpose of the financial qualification rules.

The Licensing Board found that the petition failed to make out a prima facie case that application of the financial qualification regulations would not achieve the purposes for which they were adopted and denied the petition. The Board concluded that the "Commission did not implicitly or expressly contemplate or state that an operating license Applicant's financial distress and possible bankruptcy [an event which was yet to occur] were special circumstances which could result in an exception or waiver under 10 C.F.R. § 2.758." August 20 Order at 7. The Licensing Board agreed with the Staff and Applicants that joint intervenors' petition failed to make out a prima facie case because it did not demonstrate that, in event of the issuance of a full-power license, the New Hampshire Public Utilities Commission would not allow recovery of construction and operation costs. Id. at 8.

On September 24, 1987, the joint intervenors filed an appeal of the Licensing Board's order. The Staff and Applicants filed briefs in opposition on October 26, 1987 and November 5, 1987, respectively; and, on

December 8, 1987, the Appeal Board heard oral argument on the joint intervenors' appeal.

Subsequent to the oral argument, two noteworthy events occurred. First, the New Hampshire Supreme Court issued an opinion upholding the constitutionality of that state's anti-CWIP statute. Essentially, the anti-CWIP law forbids return on or recovery of investments through utility rates before the project is completed and providing service to customers. Second, on January 28, 1988, the Public Service Company of New Hampshire (PSNH) filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the federal Bankruptcy Code. The following day, January 29, 1988, the Appeal Board issued an order stating:

These developments may affect the pending appeals and, at a minimum, require an opportunity for the parties to address their relevance and impact. Further, even if the recent developments and their ramifications do not alter the ultimate outcome of the Licensing Board's disposition on the merits of intervenors' original waiver petition, these new matters may precipitate the filing of additional waiver petitions.

Memorandum and Order at 2 (January 29, 1988) (unpublished). Accordingly, the Appeal Board afforded the joint intervenors 30 days from the service of its order "to amend their original petition, or to file a new one pursuant to 10 C.F.R. § 2.758, in a further attempt to establish a prima facie case that application of the Commission's financial qualification rules with respect to low-power operation would not serve the purposes for which they were adopted." Id. at 3. In response to the Appeal Board's January 29, 1988 order, on February 23, 1988, the joint petitioners amended their original waiver petition to incorporate the two developments described above.

On July 5, 1988, the Appeal Board affirmed the Licensing Board's denial of the petition, stating:

On the basis of the factors asserted by the appellants in their petition and in their supplemental brief before us, such compelling circumstances are not present with respect to PSNH's low-power operation of the Seabrook facility. Therefore, the Licensing Board reached the correct result in denying the appellants' position. The appellants are correct that PSNH's recent bankruptcy filing is the first by a major utility since the Great Depression and that bankruptcy raises a host of uncertainties for PSNH. But without more, these developments, even when considered with the New Hampshire anti-CWIP laws, do not meet the test of section 2.758 for certifying their waiver petition to the Commission. Because PSNH's bankruptcy filing is so unprecedented, the appellants' arguments have a certain visceral attraction. Such a reaction, however, can never be a proper substitute for the showing required under 10 C.F.R. § 2.758 -- the only basis on which we are authorized to act.

ALAB-895, slip op. at 15-16. The instant petition, filed by joint intervenors seeks review of this determination.

B. The Matters Raised In The Petition Were Raised Below

In its petition for review, joint intervenors argue that 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." Petition at 5. Joint intervenors raised this argument below. See Joint Intervenors' Brief In Support Of Appeal, passim, (September 24, 1987).

C. The Appeal Board Correctly Decided The Issues Raised In The Petition

The Appeal Board did not err in rejecting joint intervenors' claim that PSNH's filing of a petition in bankruptcy, standing alone, warrants a waiver of the Commission's financial qualification rules. Simply stated, the joint intervenors' petition, as amended, did not make out a prima

facie case that the purpose of the financial qualifications rules would not be served if they were applied in this proceeding. In this regard, the Appeal Board noted that "the Commission's purpose in promulgating the electric utility exemption to the financial qualification regulations was to eliminate case-by-case review by the staff of an individual applicant's financial qualifications as part of the operating license review process and to remove such issue from adjudication in any operating license proceeding." ALAB-895, slip op. at 16. The Commission took this action because it was persuaded "that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities." 49 Fed. Reg. 35,747, 35,750 (1984). Thus, in order for joint intervenors to satisfy their burden ^{2/} under 10 C.F.R. § 2.758, they were required to make out a prima facie case that PSNH did not have access to funding from the ratemaking process to operate the Seabrook facility safely. This they failed to do.

With respect to PSNH's filing of a petition in bankruptcy, joint intervenors were required to make out a prima facie case that the filing of the bankruptcy petition would result in the refusal or inability of the New Hampshire Public Utilities Commission to permit Applicants to recoup the cost of operating the facility. See ALAB-895, slip op. at 21-22.

^{2/} There is no merit to joint intervenors' claim that in requiring a prima facie showing that PSNH's filing of a petition in bankruptcy deprives Applicants of the funds necessary for safe operation of the facility, the Appeal Board "reversed the burden of proof on an important safety matter from the applicants to the intervenors, contrary to the requirements of 10 C.F.R. § 2.732." Petition at 5. Joint intervenors, as the "proponent of an order" under section 2.758, bore the burden of proof. See 10 C.F.R. § 2.732.

Joint intervenors did not even attempt to make this showing. Instead, joint intervenors stated, without elaboration, that "[j]urisdiction over PSNH as debtor in possession is now vested in the U.S. Bankruptcy Court, which may or may not attempt itself to exercise rate-setting authority." Joint Intervenor Response To Appeal Board Memorandum And Order (February 23, 1988) at 5. Joint intervenors readily conceded, however, that this prospect was nighly unlikely. Id. at n.3.; see also ALAB-895, slip op. at 22-23.

Similarly, the Appeal Board was correct in holding that joint intervenors' petition, as amended on February 23, 1988, failed to demonstrate that Applicants were precluded by either the New Hampshire anti-CWIP law or any action of the Bankruptcy Court from expending currently available resources to operate the Seabrook Station safely at low power. Joint intervenors' argument on this point consisted of nothing more than the unsupported assertion that Applicants did not have the funding necessary to conduct low power operations safely. See ALAB-895, slip op. at 22-23. ^{3/}

Essentially, joint intervenors argue that their waiver petition, as amended, should have been granted because of the special and unprecedented circumstance of PSNH's resort to the protection of the Bankruptcy Court. What joint intervenors fail to grasp, however, is that in order to make out a prima facie case, it is not enough for the movant to demonstrate the existence of "special circumstances." Rather, section 2.758(b) requires

^{3/} As noted earlier, the Appeal Board reached the opposite conclusion with respect to the Massachusetts Attorney General's waiver petition. See n.1, ante.

the movant to demonstrate the existence of "special circumstances" such that "application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.758(b) (emphasis added). Since joint intervenors' petition, as amended, did not make this prima facie case, the petition correctly was denied.

D. Commission Review Is Not Warranted

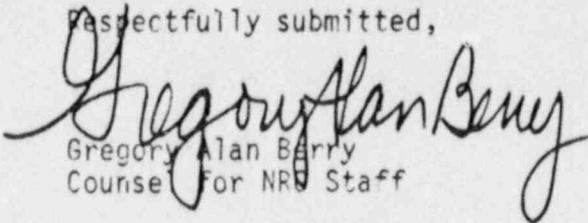
The grant or denial of a petition for review is within the discretion of the Commission. See 10 C.F.R. § 2.786(b)(4). The Commission has stated that a petition for review will not ordinarily be granted "unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, . . . involves an important procedural issue, or raises an important question of public policy." Id. The instant petition for review does not satisfy any of these standards. At bottom, the petition presents a single, simple issue: Whether a waiver petition which fails to demonstrate that the application of the regulation in question will not serve the purposes for which it was adopted should be granted. Clearly, the answer is no. Accordingly, joint intervenors petition for review of ALAB-895 should be denied. ^{4/}

^{4/} The Staff will continue to follow its usual practice of monitoring developments bearing on Applicants' ability to maintain and operate the Seabrook Station safely and, pursuant to section 182 of the Atomic Energy Act, will require Applicants to demonstrate -- prior to the commencement of low power operation -- that there is reasonable assurance that they possess or can obtain the financial resources needed to conduct that activity in a manner that does not threaten the public health and safety.

CONCLUSION

For the reasons stated herein, the Petition for Review of ALAB-895 filed by the Seacoast Anti-Pollution League, New England Coalition On Nuclear Pollution, and the Town of Hampton should be denied.

Respectfully submitted,


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Dated at Rockville, Maryland
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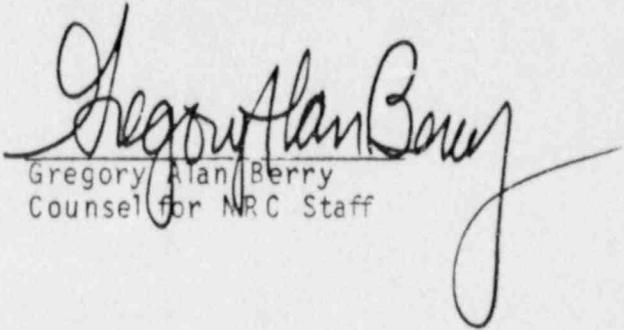
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