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July 22, 1988

UNITED STATES OF AMERICA

before the

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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)	)	(Onsite Emergency Planning and Safety Issues)

APPLICANTS' RESPONSE TO THE COMMISSION'S ORDER OF JULY 14, 1988

Under date of July 14, 1988, the Commission issued an order in the above entitled proceeding, in which it directed the Applicants, inter alia, to file a response to address matters which the Applicants desire the Commission to consider in reviewing the Appeal Board's finding on the petition of the Attorney General of The Commonwealth of Massachusetts seeking an exemption or waiver from certain of the Commission's regulations regarding financial qualifications.

Statement of the Case

In ALAB-895, the Appeal Board certified to the Commission a waiver petition filed by the Attorney General of The Commonwealth of Massachusetts (Mass AG) in this proceeding under 10 CFR § 2.758. The thrust of this petition was to seek waiver of the regulations which prohibit

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examination, during an operating license proceeding, of an electric utility-applicant's financial ability to operate a nuclear power plant insofar as these regulations would prohibit such an inquiry prior to, and in light of, contemplated low power operation of Seabrook Station. The Appeal Board reached the conclusion that Mass AG had set out a prima facie case that the regulations at issue would not serve the purpose intended in connection with low power operation of Seabrook.

As stated in ALAB-895,[1] the gravamen of the determination that a prima facie case had been made was a single fact, i.e., the decision of one of the joint owners of Seabrook, Massachusetts Municipal Wholesale Electric Company (MMWEC), to attempt to get out of the project. As characterized by the Appeal Board, a second supplement to Mass AG's theretofore insufficient petition had made the necessary prima facie case because:

> "It clearly establishes that the joint owner with the fourth largest interest in Seabrook has ceased its monthly payments and is moving to get out of the project. Because MMWEC already had made pre-funded payments to the project, which at current expenditure levels will continue to meet its obligations for two to three months, the impact of MMWEC's action is the same as if the Board of Directors voted on June 1 to cease payments effective on August 2 or September 2. As matters now stand, the remaining joint owners and applicants will have a substantial 11.59340% deficiency in monthly operating

[1] ALAB-895 at 37 ff.

> expenses and additional funds necessary to operate Seabrook safely at low power at the expiration of that period."[2]

The Appeal Board then went on to say:

> "It is possible, of course, that other joint owners will step forward to meet the shortfall caused by MMWEC's action, although it is a reasonable inference from the Attorney General's documentation with respect to those owners and the possibility of a shortfall by PSNH that the other joint owners will not do so. It is also possible that MMWEC may return to the fold. Indeed, any number of possibilities can be postulated. But the Attorney General's prima facie case need not foresee and foreclose every such possibility. In the same way that the Attorney General cannot meet his burden by speculating on future events, speculation on future events cannot defeat the Attorney General's present showing that, as matters now stand, the applicants will have more than an eleven percent shortfall in the funds necessary to operate Seabrook safely at low power." (Emphasis added).[3]

Argument

In the above quoted language set forth with emphasis, as well as elsewhere in ALAB-895,[4] the Appeal Board made clear that speculation cannot be relied upon to supply a necessary element of a prima facie case. Yet this is, as seen below, exactly the activity that the Appeal Board itself engaged in to reach the result it did in ALAB-895.

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[2]ALAB-895 at 37.

[3]ALAB-895 at 37-38.

[4]ALAB-895 at 35-36.

To begin with, the Appeal Board has speculated that MMWEC will, in fact, persist in its course and actually default in its obligation to make payments in the event that no other solution is reached with respect to the matter. MMWEC has never so stated or voted. Indeed, in his Second Supplement to his petition, Mass AG states:

> "Although the June 1, 1988 action of the MMWEC Board of Directors does not explicitly call for permanent suspension of payments towards the costs of the Seabrook plant, it clearly has increased the level of risk associated with continued expenditures by any of the other joint owners and can only be seen as further reinforcing the capital market's already solid lack of interest in Seabrook related financings."[5]

Indeed, it is clear from the General Manager's Report to the Board of Directors of MMWEC of May 26, 1988, that severe consequences follow from an actual default which no prudent management and Board of Directors would lightly undertake.[6] Furthermore, the press release which MMWEC issued on June 1, 1988, and which was furnished to the Appeal Board in an

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[5] Second Supplement to Massachusetts Attorney General James M. Shannon's Petition Under 10 C.F.R. 2.758 for a Waiver of or Exception from the Public Utility Exemption from the Requirement of a Demonstration of Financial Qualification at unnumbered page 5, paragraph numbered 4 (June 2, 1988). In short, the language quoted in the text shows that the status is no different than the situation of the PSNH bankruptcy which the Appeal Board held not to establish a prima facie case, i.e., there is an increased level of risk - nothing more.

[6] This report was part of the Mass AG's Second Supplement. The consequences of actual default are set out on page 9 thereof under "Option 5 - Nonpayment of Construction Cost Under JOA" "Disadvantages."

Advice to the Appeal Board under date of June 2, 1988, states that MMWEC intends to get out "in a financially responsible manner" and "that details regarding MMWEC's withdrawal from the project will be determined by the course of negotiations with other project owners." In short, MMWEC has not said it will, in fact, refuse to pay if no other solution is forthcoming; there exist heavy economic and legal incentives for MMWEC not to take such a course of action; and to say MMWEC will definitely take such a course of action is, we respectfully suggest, an exercise in speculation. Such speculation is not permitted under the Appeal Board's own analysis as set forth above.

The Appeal Board entered into further, and apparently erroneous, speculation on the question of whether a solution to the MMWEC problem would be forthcoming as the result of the activities of other Seabrook owners:

> "It is possible, of course, that other joint owners will step forward to meet the shortfall caused by MMWEC's action, although it is a reasonable inference from the Attorney General's documentation with respect to those owners and the possibility of a shortfall by PSNH that the other joint owners will not do so."[7]

Calling it "a reasonable inference" does not make a speculative statement any less a speculation. And it may be wholly wrong as shown by the Affidavit of John F.G. Eichorn, Jr. which accompanies this response. Indeed, given

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[7]ALAB-895 at 37.

the history of Seabrook and its financial history in particular, the reasonable inference, if it is permissible in this setting at all,[8] is that, as stated in the Eichorn Affidavit, a solution will be found. Seabrook has been buried by its opponents on numerous occasions on one theory of economics or another, yet it has always survived and has been constructed in a manner that has led to excellent SALP reports and no contention even being admitted for litigation as to the quality of construction. Indeed, repeated charges of alleged defects in construction, made outside of the litigation process, by plant opponents and Congressmen allied with them have consistently been proved erroneous upon thorough investigation by this agency.

The foregoing illustrates the major defect in the legal reasoning process which the Appeal Board engaged in. The Appeal Board went to great pains to demonstrate that there could be grounds upon which the waiver requested by Mass AG could be granted other than an inability to obtain sufficient rates to assure safe commercial operation. Accepting that analysis as accurate, this does not mean that the other exceptions can be based upon speculation. When, as, and if, the Seabrook project, in fact, runs short of funds and thereby is unable adequately to fund safety related matters,

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[8]If it be a reasonable inference that the other joint owners will not "step forward," it is an equally permissible "reasonable inference" that "MMWEC may return to the fold," ALAB-895 at 37, in light of the heavy legal penalties that may befall MMWEC if they, in fact, default.

then the prima facie case is made and not before. To say otherwise is to speculate.

Prescinding from all of the foregoing, it is also to be noted that in his filing, the Mass AG has not even attempted to demonstrate that the shortfall resulting from an MMWEC default, should it actually occur, would result in any compromise of safety. Again what is relied upon is speculation to the effect that such a shortfall would necessarily result in a compromise in safety. No such speculation should be permitted in this area either.

Finally, as pointed out in the Eichorn Affidavit, if anything should occur which renders it likely that a shortfall in financing will, in fact, occur, the Applicants are required by law,[9] and have committed, to notify the Commission so that it can take whatever action it deems appropriate.

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[9] See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973).

Conclusion

The request for an exemption or waiver should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on July 22, 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):

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