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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20545

In the Matter of	)	
	)	
PUBLIC SERVICE COMPANY	)	Docket Nos. 50-443-CL-1
OF NEW HAMPSHIRE, <u>ET AL.</u>	)	50-444-OL-1
	)	
(Seabrook Station, Units 1	)	(Onsite Emergency
and 2)	)	Planning and Safety
	)	Issues)
	)	

On Appeal From a Decision of the  
Atomic Safety and Licensing Board  
Dismissing NECNP Contention IV

APPLICANTS' BRIEF

STATEMENT OF PRIOR PROCEEDINGS AND FACTS

Under date of June 17, 1982, New England Coalition on Nuclear pollution (NECNP), an intervenor herein, submitted for litigation the following contention:

"The Applicant must establish a surveillance and maintenance program for the prevention of the accumulation of mollusks, other aquatic organisms, and debris in cooling systems in order to satisfy the requirements of GDC 4, 30, 32, 33, 34, 35, 36, 38, and 39, which require the maintenance and inspection of reactor cooling systems. The design, construction, and proposed operation of Seabrook fail to satisfy these requirements."<sup>1</sup>

The basis upon which NECNP relied for admission of the

<sup>1</sup>NECNP's Supplemental Contentions (June 17, 1982) at 1.

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contention, in its entirety, reads as follows:

"On May 19, 1982, the Commission published in the Federal Register a notice of abnormal occurrences at a number of nuclear reactors around the country. 47 FR 21653. The notice described the accumulation of asiatic clams, mussels, and other aquatic organisms in reactor cooling systems which had hitherto gone unnoticed. At one reactor, Brunswick Unit One, blockage of coolant flow paths resulted in the 'total loss of both redundant trains of the residual heat removal system.' 47 FR at 21653.

"Noting that the dissipation of heat to the environment is an essential safety function, the Commission found the blockage of coolant systems by biological organisms and debris could cause 'possible degradation of the heat transfer capabilities of redundant safety systems to the point where system function is lost'. Id. at 21655.

"The abnormal occurrences at the six reactors showed that 'preventive measures and methods of detecting gradual degradation have been inadequate in certain areas to preclude the occurrence.' Id. The licensees in each case agreed to improve design features and detection techniques to prevent significant fouling.

"The Seabrook reactor uses ocean water for cooling and is particularly susceptible to fouling by aquatic organisms. The fouling does not occur only in the intake pipes of reactors. Organisms may find their way into the entire cooling system and even into the heat exchangers. Id. at 21654. In addition, the buildup of fouling organisms or corrosion products on piping walls, although not severe enough to block water flow during normal operation, could be dislodged by seismic activity and 'collect in equipment bearing or seal coolers blocking the cooling water flow.'

Id. Because it is particularly vulnerable to intrusion by aquatic organisms, the Seabrook plant should be equipped with a maintenance and inspection program to prevent the kind of degradation which current measures obviously do not achieve."<sup>2</sup>

A review of the Federal Register Notice relied upon will reveal that it was concerned with the buildup of marine organisms such as asiatic clams, oysters, blue mussels, barnacles, tubeworms and other such animals which might be dislodged and proceed downstream to block a needed safety related flow of water. In addition there was reference to "corrosion products" causing the same kind of problem.<sup>3</sup> The contention was excluded from litigation by the Licensing Board on the ground that the intake tunnels' design had been approved at the construction permit stage and therefore the contention was not open for litigation at the operating

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<sup>2</sup>NECNP's Supplemental Contentions (June 17, 1982) at 2-3. It is to be noted that NECNP does not argue in its brief that the reference to corrosion in the statement of basis quoted in the text refers to "Microbiologically Induced Corrosion" (MIC). This is not surprising, because a review of the document cited for the basis of the contention clearly was referring to ordinary chemically caused corrosion of unprotected metal surfaces. Abnormal Occurrence; Blockage of Coolant Flow to Safety-Related Systems and Components, 47 Fed. Reg. 21653, 21655 (May 19, 1982). And, in any event, the statement of basis cannot add substantive issues to the scope of a contention. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 1), 25 NRC 912, 932 n.83 (1987).

<sup>3</sup>NECNP does not argue these references to corrosion as saving the issue raised upon this appeal. See n. 2, supra.

license stage.<sup>4</sup>

NECNP appealed that rejection, and in its brief to the Appeal Board, NECNP, after quoting and citing the contention, described its basis as follows:

"The basis for this contention was a Federal Register notice dated May 19, 1982, which stated NRC's concerns over the accumulation of asiatic clams, mussels, and other aquatic organisms in six nuclear power plant reactor cooling systems. At one reactor, blockage of coolant flow path had resulted in the 'total loss of both redundant trains of the residual heat removal system.' <sup>4</sup> Fed. Reg. at 21,653. The Commission noted the 'possible degradation of the heat transfer capabilities of redundant safety systems to the point where system function is lost. Id. at 21655. The abnormal occurrences at the six reactors showed the 'preventive measures and methods of detecting gradual degradation have been inadequate in certain areas to preclude the occurrence.' Id. NECNP noted the ways in which biological fouling could affect the Seabrook reactor, which is cooled with ocean water and is thus particularly susceptible to fouling."<sup>5</sup>

At oral argument before the Appeal Board, counsel for NECNP described the contention as follows:

"The contention asserts that the applicants must have a sufficient maintenance and inspection program to prevent the fouling of the Seabrook cooling systems by marine organisms such

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<sup>4</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1075 (1982).

<sup>5</sup>New England Coalition on Nuclear pollution's Brief in Support of Appeal of Partial Initial Decision Authorizing Issuance of a License to operate at Low Power (May 8, 1987) at 10.

as mollusks, tube worms and barnacles.

"It's based on a May 1980 (sic) notice of abnormal occurrences at six nuclear reactors around the country where the previous maintenance and inspection programs failed to show these problems up and they had serious problems with the cooling systems."<sup>6</sup>

On October 1, 1987, the Appeal Board reversed the Licensing Board's rejection of the NECNP Contention.<sup>7</sup> In so doing, the Appeal Board referred to the contention before it as follows:

"The Coalition based this assertion on a May 19, 1982 Federal Register notice in which the Commission discussed the accumulation of aquatic organisms and debris in cooling systems. [Footnote citation omitted] In that notice, the Commission indicated that, as a result of such accumulation, degradation of the heat transfer capabilities of safety systems had occurred at several nuclear power plants."<sup>8</sup>

The Appeal Board ordered a remand to the Licensing Board with instructions to admit the NECNP Contention. After admission of the contention and during discovery, there appeared for the first time in this proceeding since the contention was first proffered in 1982 reference to the phenomenon of "Microbiologically Induced Corrosion" (MIC). This occurred in NECNP's second set of interrogatories filed with respect

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<sup>6</sup>Tr. (July 24, 1987) at 33.

<sup>7</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 261-63 (1987).

<sup>8</sup>26 NRC at 262.

to the contention<sup>9</sup> and the term was defined therein as follows:

"Microbiologically Induced Corrosion" shall mean corrosion or degradation that is generally caused by sulfate-reducing bacteria, or any sedimentation caused by that process."<sup>10</sup>

At no time in this record had there ever been a reference to MIC before. Not surprisingly, the Applicants objected to discovery upon this subject as not being within the scope of the contention.<sup>11</sup>

Thereafter, NECNP moved for an order compelling the Applicants to answer interrogatories on the subject of MIC.<sup>12</sup> The Licensing Board denied the motion.<sup>13</sup> NECNP sought reconsideration of the ruling;<sup>14</sup> which was denied by the

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<sup>9</sup>MIC did not make it into the first set.

<sup>10</sup>New England Coalition on Nuclear Pollution's Second Set of Interrogatories and Request for the Production of Documents to Applicants on NECNP Contention IV (Dec. 23, 1987) at 3.

<sup>11</sup>Applicants' Responses to New England Coalition on Nuclear Pollution's Second Set of Interrogatories and Request for Production of Documents to Applicants on NECNP Contention IV (Jan. 14, 1988) at 2.

<sup>12</sup>New England Coalition on Nuclear Pollution's Motion to Compel Applicants to respond to NECNP's Second Set of Interrogatories and Request for Production of Documents in NECNP Contention IV (January 25, 1988).

<sup>13</sup>MEMORANDUM AND ORDER (Granting NECNP's Motion for Leave; Denying NECNP's Motion to Compel) (unpublished) (Feb. 17, 1988).

<sup>14</sup>NECNP's Motion for reconsideration of the Board's Denial of NECNP's Motion to Compel, Dated February 17, 1988 (March 1, 1988). It was in this pleading that NECNP, for the first time proffered the affidavit of Dr. James Bryers in which Dr. Bryers purported to do what is usually viewed as a

Licensing Board.<sup>15</sup> On April 22, 1988, NECNP wrote a letter to the Licensing Board stating that NECNP would not oppose summary disposition of the contention in light of the rulings theretofore made on MIC.<sup>16</sup> As a result of this letter, the Licensing Board declined to rule upon a pending motion for summary disposition on NECNP Contention IV, and dismissed the contention.<sup>17</sup>

Thereafter, NECNP filed an untimely notice of appeal, which was allowed as a matter of discretion by this Appeal Board.<sup>18</sup> It is in the foregoing posture that this matter comes before the Appeal Board.

#### ARGUMENT

It is respectfully submitted that the mere recitation of the background of this appeal demonstrates its lack of merit. For a period of five years after the contention at issue was

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Judge's task of interpreting the meaning of the language of a pleading, i.e., NECNP Contention IV.

<sup>15</sup>MEMORANDUM AND ORDER (Denying NECNP Motion for Reconsideration; Denying NECNP's Request for Entry Upon Land; Granting NECNP Motion for Leave to File A Reply; Directing \$2,749 Filings) (March 18, 1988). Because this was not served until March 21, 1988, NECNP, apparently prior to receipt of the decision filed, on March 22, 1988 another motion to compel with respect to the MIC issue which was summarily denied. ORDER (Denying NECNP's Motion to Compel of March 22, 1988).

<sup>16</sup>Letter Ferster to Licensing Board (Apr. 22, 1988).

<sup>17</sup>MEMORANDUM AND ORDER (Unpublished) (May 12, 1988).

<sup>18</sup>Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC \_\_\_ (June 14, 1988).

filed MIC remained unspoken and unheard of in the Seabrook lexicon. The contention itself does not even use the word fouling or biofouling. Rather the operative words in it are the "prevention of accumulation of mollusks, other aquatic organisms, and debris." Both in its brief on appeal of the Partial initial Decision and in its oral argument to the Appeal Board, NECNP has described the contention in terms that simply do not encompass, by any stretch of the imagination, MIC. The Appeal Board likewise described it in the decision granting NECNP's Appeal. MIC was an afterthought in every sense of the word, and the contention, as phrased, with basis, hardly put the Applicants or anyone else on notice that MIC was to be litigated under it.

The law is clear. The intervenor is bound by the terms of the contention;<sup>19</sup> and even a statement in the statement of basis filed with the contention cannot serve to breathe vitality into issues not encompassed within the language of the contention itself.<sup>20</sup>

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<sup>19</sup>Carolina Power and Light Co. (Shearon Harris Nuclear Power PLant), ALAB-852, 24 NRC 532, 545-46 (1986); Carolina Power and Light Co (Shearon harris Nuclear power PLant), ALAB-856, 24 NRC 802,815 (1986); Carolina Power and Light Co. (Shearon Harris Nuclear Power PLant), ALAB-843, 24 NRC 200, 208 (1986); Philadelphia Electric Co. (Limerick Generating Station, units 1 and 2) ALAB-845, 24 NRC 220, 242 (1986); Philadelphia Electric Co. (limerick Generating Station, Units 1 and 2), ALAB- 836, 23 NRC 479, 505 (1986); Philcdelphia Electric Co. (limerick Generating Station, Units 1 and 2), ALAB- 819, 22 NRC 681, 709 (1985).

<sup>20</sup>Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 1), 25 NRC 912, 932 n.83 (1987).

Despite all of the foregoing, NECNP argues that error has been committed by virtue of the fact that the Licensing Board used a subjective "intent" standard when determining the scope of the contention. NECNP, however, mischaracterizes the Licensing Board's position. The Board correctly stated that the scope of the contention is determined by its literal terms.<sup>21</sup> As regards an "intent" standard, the Licensing Board was merely restating NECNP's argument.<sup>22</sup>

In addition, NECNP argues that the Licensing Board erred when it did not adopt the view of their contention set forth by Dr. James Bryers, an associate professor of biochemical engineering at Duke University's center for Biochemical Engineering. This is indeed a novel theory that NECNP is proposing; i.e., that an expert is to be called in to interpret the equivalent of the complaint in normal judicial practice.<sup>23</sup> NECNP cites no precedent for such a practice either in the reports of this agency or the courts. This is

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<sup>21</sup>MEMORANDUM AND ORDER (Granting NECNP's Motion for Leave; Denying NECNP's Motion to Compel) (unpublished) (Feb. 17, 1988) at 5, citing Carolina Power and Light Company (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986).

<sup>22</sup>MEMORANDUM AND ORDER (Granting NECNP's Motion for Leave; Denying NECNP's Motion to Compel) (unpublished) (Feb. 17, 1988) at 6.

<sup>23</sup>Indeed, that the proponent of the contention had to call in an expert to argue for the interpretation it now champions makes a claim that the Applicants and Staff were, or should have been, put on notice as to this meaning of the contention ring somewhat hollow.

not surprising because the interpretation of the scope of issues raise by a pleading is a quintessential legal exercise which is the sole province of the tribunal before which the litigation is taking place. Even accepting the premise that in a situation where the pleading utilized highly technical terms, a law judge might wish to consult lexical definitions in reaching his or her decision, this does not mean that outside experts may tescify on such matters to influence the decision, especially where as here the terms used are well defined in every day English parlance.<sup>24</sup>

#### CONCLUSION

The appeal should be dismissed.

Respectfully submitted,



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<sup>24</sup>In its brief, NECNP states that, as regards Dr. Bryers' testimony, "Applicants rested merely on the bald assertions of counsel that Dr. Bryers' testimony is 'unpersuasive'." NECNP Br. at 15. In fact, while Applicants did find the affidavit unpersuasive, Applicants also argued, on the basis of legal authority, that the opinion of Dr. Bryers as to whether MIC was within the scope of the contention was irrelevant and should be disregarded, since that issue was a legal issue to be decided by the Board. Applicants' Response to NECNP's Motin for Reconsideration of the Board's Order Denying NECNP's Motion to Compel (March 14, 1988) at 2-3.

CERTIFICATE OF SERVICE

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I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on July 27, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to where indicated, by depositing in the United States mail, first class, postage paid, addressed to):

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