

June 1, 1988

UNITED STATES NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of)	
Public Service Company of)	
New Hampshire, et al.)	
(Seabrook Station, Units 1 & 2))	Docket Nos. 50-443 OL-1
_____)	50-444 OL-1
	ONSITE EMERGENCY
	PLANNING & TECHNICAL
	ISSUES

NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S
MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO FILE A NOTICE OF APPEAL OUT OF TIME

Intervenor New England Coalition on Nuclear Pollution ("NECNP") moves that the Appeal Board clarify its opinion in ALAB-892,¹ to correct any implication in that opinion that the Licensing Board's May 12, 1988 Memorandum and Order dismissing NECNP Contentions IV and I.V as "abandoned" constitutes an initial decision appealable under 10 C.F.R. § 2.762. In the alternative, NECNP requests that the Appeal Board allow it to file the attached Notice of Appeal out of time.

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1 Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC _____ (1988), slip opinion at 6 n. 12. Hereinafter, all administrative decisions in the Seabrook proceeding will be cited only by number and date. The agency's citation system denotes decisions of the Licensing Board Panel as "LBP" decisions, Appeal Board decisions as "ALAB," and Commission decisions as "CLI."

Background

On April 22, 1988, NECNP wrote a letter to the Licensing Board notifying the Licensing Board and the parties of NECNP's decision not to litigate NECNP Contention IV, regarding the accumulation of aquatic organisms in the cooling system, and NECNP Contention I.V, regarding in-service inspection of steam generator tubes. At the same time, NECNP notified the Licensing Board and the parties of its intention to appeal the Licensing Board's restrictive rulings which precluded NECNP from litigating the adequacy of Applicants' program for controlling microbiologically induced corrosion as within the scope of NECNP Contention IV "at the appropriate time."

On April 25, 1988, the Appeal Board issued a Memorandum and order reversing yet another aspect of the Licensing Board's March 25, 1987, partial initial decision ("P.I.D") with respect to NECNP Contention I.B.2, regarding environmental qualification of the RG58 coaxial cable, and remanded that Contention to the Licensing Board for further proceedings.²

On May 12, 1988, the Licensing Board issued an order, captioned as a "Memorandum and Order," dismissing NECNP Contentions IV and I.V, as "abandoned." NECNP did not file a

² ALAB-891, slip opinion, at 25-26.

notice of appeal at that time because it believed that, as a result of the pendency of NECNP Contention I.B.2, an appeal of the Licensing Board's May 12, 1988 Order regarding NECNP Contention IV would be rejected as interlocutory, pursuant to 10 C.F.R. § 2.730(f).

I. The Licensing Board's May 12, 1988 Order is not an Initial Decision Appealable Under 10 C.F.R. § 2.762.

In ALAB-892, this Board suggested, in dicta, that the Licensing Board's May 12, 1988, Memorandum and Order constitutes an initial decision appealable under 10 C.F.R. § 2.762. It is NECNP's belief that this Order does not constitute an appealable order within the meaning of 10 C.F.R. § 2.760. Rather, NECNP is precluded by 10 C.F.R. § 2.730(f) from appealing the May 12, 1988 order due to its interlocutory nature.

The Commission's rules of practice provide only for appeals from "initial decisions":

Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal.

10 C.F.R. § 2.762(a) (emphasis added). Section 2.730(f) prohibits parties from filing appeals of interlocutory rulings prior to the issuance of an initial decision. Thus, unless the Licensing Board's May 12, 1988 Order constituted an "initial decision," it is not appealable.

On its face, the Licensing Board's May 12, 1988 Order does not constitute an initial decision, as it is defined by 10 C.F.R. § 2.760. An initial decision must include:

(1) Findings, conclusions and rulings with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record:

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order or denial of relief with the effective date;

(4) The time within which a notice of appeal from the decision and a supporting brief may be filed, the time within which briefs in support of or in opposition to an appeal filed by another party may be filed...

10 C.F.R. § 2.760(c). Here, the Licensing Board's May 12, 1988 Order was not captioned as a "partial initial decision." It contained no findings of fact or law on the merits of NECNP Contention IV or I.V, nor did it set out the time within which a notice of appeal and supporting briefs must be filed. Accordingly, until such time as the Licensing Board appropriately issues a final, initial decision, NECNP may not appeal the Licensing Board's interlocutory rulings regarding the scope of NECNP Contention IV.

This reading of the Commission's rules is consistent with past Appeal Board decisions. It is well established that only "final" actions are appealable. A Licensing Board's action is "final" when it either "end[s] the proceeding... [or] sever[s] a participant." Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975). This order clearly did not end the onsite proceeding or sever NECNP's participation. Rather, as a result of the remand of the RG58 coaxial cable issue in ALAB-891,

NECNP has a third, contested onsite issue that must be resolved prior the issuance of an new initial decision.

Accordingly, there is no initial decision that is appealable under 10 C.F.R. § 2.762.³ Until the Licensing Board issues a new P.I.D., the Licensing Board's interlocutory orders and rulings are not ripe for review, and any appeal of these rulings would be prematurely taken.⁴

II. NECNP's Failure to File a Notice of Appeal Within the Applicable Time Limits is Due to Good Cause.

In the alternative, NECNP requests that the Appeal Board grant NECNP's motion for leave to file the attached notice of appeal, because NECNP has good cause for the late filing. First, NECNP's understanding that the remand of the RG58 coaxial cable issue in ALAB-891 rendered any appeal

3 The Licensing Board's February 17, 1987 renewal of low power authorization for Seabrook (LBP-88-6) did not renew the previously reversed aspects of the March 25, 1987, P.I.D. Rather, the Licensing Board renewed low power authorization despite the unresolved status of NECNP Contentions I.V and IV, pursuant to its supposed authority under 10 C.F.R. § 50.57(c) to authorize low power operation prior to the issuance of an initial decision.

4 In fact, the purpose of appealing the dismissal of NECNP Contention IV is to appeal the Licensing Board's March 18, 1988, discovery ruling that microbiologically induced corrosion was not within the scope of NECNP Contention IV, and that the contention was limited to only the accumulation of macro-organisms and debris resulting in blockage of coolant flow. As the Appeal Board stated in Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975) "An order which does no more than deny discovery is wholly interlocutory."

from the dismissal of NECNP's other, pending contentions interlocutory was reasonable. This interpretation of the effect of ALAB-891 was consistent with past practice in this proceeding, in which the Appeal Board's October 1, 1987, reversal of the March 25, 1987, P.I.D. with respect to NECNP Contentions IV and I.V. had the legal effect of vacating the underlying P.I.D. (see discussion above).

Moreover, if the Licensing Board's May 12, 1988 Order did, in fact, constitute a final appealable decision, the Licensing Board erred in failing to caption it as such, or to otherwise comply with the requirements of 10 C.F.R. § 2.760(c), particularly with respect to the requirement that the Licensing Board inform the parties of their appeal rights, and the applicable deadlines for filing such appeals.

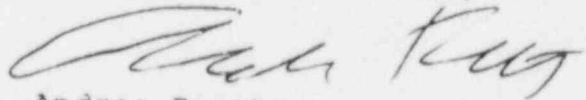
Failure to permit NECNP to file this appeal will cause extraordinary hardship to NECNP. NECNP clearly communicated its continued belief that Applicants' program for controlling microbiologically induced corrosion is inadequate, and its intention to appeal the Licensing Board rulings precluding NECNP from litigating this issue as within the scope of NECNP Contention IV. NECNP has invested considerable time and resources into developing this issue, and no other party is available to represent NECNP's interest in this regard. Moreover, permitting the appeal will not unduly delay the issuance of partial initial decision or a low power author-

ization, which must await the resolution of the remanded contention on environmental qualification of the RG58 coaxial cable, and the Commonwealth of Massachusetts' newly admitted contention on emergency notification.

Finally, the public interest favors permitting NECNP to file this appeal out of time. NECNP strongly believes that the issue of microbial fouling and microbiologically induced corrosion is a serious safety concern. If, in fact the Licensing Board erred in ruling that it is not within the scope of NECNP Contention IV, this issue must be resolved prior to issuance of an operating license. The public's right to a hearing on this important safety issue should not be denied due to a procedural error.

Accordingly, NECNP had good cause for the failure to file its notice of appeal on time, and respectfully requests the Appeal Board to accept this late filing.

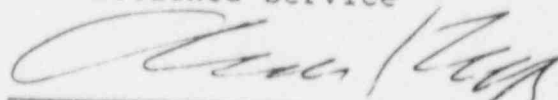
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on June 1, 1988, copies of the foregoing pleading were served by first-class mail or as otherwise indicated on all parties listed on the attached service list.



Andrea Ferster

UNITED STATES NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of
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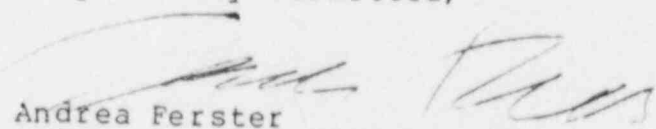
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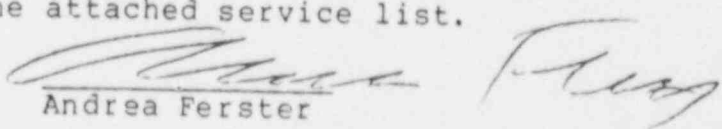
Pursuant to 10 C.F.R. § 2.762, the New England Coalition On Nuclear Pollution (NECNP) hereby gives notice of its appeal of the Atomic Safety and Licensing Board ("Wolfe Board") MEMORANDUM AND ORDER), dated May 12, 1988, to the extent that Order dismisses NECNP Contention IV, regarding accumulation of aquatic organisms in cooling systems.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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