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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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before the

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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 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

Under date of June 1, 1988, New England Coalition on Nuclear Pollution (NECNP), has filed a motion "For Clarification or, in the Alterative, Motion for Leave to File a Notice of Appeal out of Time." The thrust of the motion is to keep alive NECNP's right to appeal to this Appeal Board the issue of whether the Licensing Board erred back on March 18, 1988 in holding that NECNP's then extant Contention IV did not encompass within it the issue of so-called "microbiologically induced corrosion" (MIC). The filing of the motion was apparently triggered by this Appeal Board's statement in ALAB-892 issued on May 24, 1988:

> "The Coalition repeats the statement in its papers below that its appeal [as to MIC] will be filed 'at the appropriate time.' [citation] We have not been asked for guidance, and we do not here

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> provide it, with respect to whether an appeal must have been taken from the [Licensing] Board's March 18 Memorandum and Order, or must be taken from the May 12 Memorandum and Order, or can await subsequent events. On this score, the time for the filing of a notice of appeal from the May 12 order has not yet expired (see 10 CFR 2.762) and, thus, an appeal from that order is still possible as of this writing."[1]

Despite the pointed hint set forth above with emphasis, NECNP waited until June 1, 1988 to file the motion at bar. For the reasons set forth below, the Applicants believe that the motion should be denied.

ARGUMENT

The question of whether to extend a time limit for appeal after the time limit set forth in the regulations has passed is addressed to the sound discretion of the Appeal Board. This is so because for some eight years, the rule has been that while time limits on appeals are strictly enforced as a general policy, they are not jurisdictional. Nuclear Engineering Co. (Sheffield Illinois Low Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980). Contrary to the assertions in the NECNP Motion, the "clock" does not begin to run on appellate rights only when a document entitled "Initial Decision" or "Partial Initial Decision" issues. See Motion at 3-5. Rather, the rule, as

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[1] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-892, __ NRC ___, Slip Op. at 6, n.12 (May 24, 1988). Emphasis added.

laid down in ALAB-300[2], and quoted without ellipses:

> "The test of 'finality' for appeal purposes before the agency as in the courts is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate, rulings which do neither are interlocutory."[3]

We are aware of no case on all fours with the one at bar. At first glance, one might argue that NECNP is in no different position than it would be had a contention been excluded at the outset of a proceeding and therefore it has the right to appeal that exclusion upon the issuance of a later initial decision, and therefore until another decision authorizing low power comes down, there was nothing to appeal. This is not the case though. Here, the Licensing Board did not exclude a contention; rather it held that an admitted contention did not encompass an issue which NECNP argued it did. Concededly, NECNP did not have to appeal the discovery ruling which made the Board's view known. However, on May 12, 1988, the Licensing Board dismissed as moot the contention itself which was the subject of interpretation. With that dismissal, there is nothing left to interpret. In an operating license proceeding, the breadth of the jurisdiction of the adjudicatory tribunals is defined by the

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[2]Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

[3]Id.

extant contentions. When a contention is dismissed, jurisdiction over issues encompassed within the contention ceases to exist unless it is kept alive by a proper appeal to a higher tribunal within the agency. Thus, the decision of the Licensing Board dismissing as moot the contention was "final" in all practical senses one can divine insofar as the MIC issue was concerned. It should have been appealed than and there.

The forgoing analysis gains further support by virtue of the fact that the MIC issue was allegedly encompassed within a contention which had been sent to the Licensing Board by virtue of a remand by this Board. It is settled that when a Licensing Board receives a case back on remand it has jurisdiction only over issues remanded to it.[4] Three matters were remanded to the Licensing Board by this Appeal Board arising out of the Partial Initial Decision on Onsite Matters. The Licensing Board decision of May 12, 1988 disposed of two of the matters. A fourth matter, which arises out of a late-filed contention made well after the Partial Initial Decision, also remains. In short the May 12, 1988 decision of the Licensing Board in a very real sense "dispos[ed] of at least a major segment of the case" before the Licensing Board. In every sense of the word it is final.

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[4] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

Having established the appealability of the May 12, 1988 order, the issue now becomes a question of whether this Appeal Board should relieve NECNP of the consequences of the failure to bring a timely appeal, as a matter of discretion. We submit, no such relief should be granted. The Appeal Board's remarks certainly put NECNP on notice of the problem.[5] At no time that we are aware of did anyone acquiesce in the procedure that NECNP apparently believed was available to it. The Applicants will be prejudiced by yet another issue remaining open in this matter.

CONCLUSION

The motion should be denied in its entirety.

Respectfully submitted,

Thomas G. Dignan, Jr.
George H. Lewald
Deborah S. Steenland
Ropes & Gray
225 Franklin Street
Boston, MA 02110
(617) 423-6100

Counsel for Applicants

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[5]We note that NECNP does not argue that it did not have knowledge of the Appeal Board's statement on appealability until too late to meet the filing deadline contemplated by the regulations.

CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on June 6, 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):

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Howard A. Wilber
Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Thomas S. Moore
Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Mr. Ed Thomas
FEMA, Region I
442 John W. McCormack Post Office and Court House
Post Office Square
Boston, MA 02109

Administrative Judge Sheldon J. Wolfe, Esquire, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Robert Carrigg, Chairman
Board of Selectmen
Town Office
Atlantic Avenue
North Hampton, NH 03862

Administrative Judge Emmeth A. Luebke
4515 Willard Avenue
Chevy Chase, MD 20815

Diane Curran, Esquire
Andrea C. Ferster, Esquire
Harmon & Weiss
Suite 430
2001 S Street, N.W.
Washington, DC 20009

Dr. Jerry Harbour
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Stephen E. Merrill, Esquire
Attorney General
George Dana Bisbee, Esquire
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301-6397

Adjudicatory File
Atomic Safety and Licensing
Board Panel Docket (2 copies)
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Philip Ahrens, Esquire
Assistant Attorney General
Department of the Attorney
General
Augusta, ME 04333

Paul McEachern, Esquire
Matthew T. Brock, Esquire
Shaines & McEachern
25 Maplewood Avenue
P.O. Box 360
Portsmouth, NH 03801

Mrs. Sandra Gavutis
Chairman, Board of Selectmen
RFD 1 - Box 1154
Route 107
Kensington, NH 03827

*Senator Gordon J. Humphrey
U.S. Senate
Washington, DC 20510
(Attn: Tom Burack)

*Senator Gordon J. Humphrey
One Eagle Square, Suite 507
Concord, NH 03301
(Attn: Herb Boynton)

Mr. Thomas F. Powers, III
Town Manager
Town of Exeter
10 Front Street
Exeter, NH 03833

Sherwin E. Turk, Esquire
Office of General Counsel
U.S. Nuclear Regulatory
Commission
One White Flint North, 15th Fl.
11555 Rockville Pike
Rockville, MD 20852

Robert A. Backus, Esquire
Backus, Meyer & Solomon
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

Mr. J. P. Nadeau
Selectmen's Office
10 Central Road
Rye, NH 03870

Carol S. Sneider, Esquire
Assistant Attorney General
Department of the Attorney
General
One Ashburton Place, 19th Flr.
Boston, MA 02108

Mr. Calvin A. Canney
City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801

R. Scott Hill-Whilton, Esquire
Lagoulis, Clark, Hill-
Whilton & McGuire
79 State Street
Newburyport, MA 01950

Mr. Peter S. Matthews
Mayor
City Hall
Newburyport, MA 01950

Mr. William S. Lord
Board of Selectmen
Town Hall - Friend Street
Amesbury, MA 01913

H. Joseph Flynn, Esquire
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W.
Washington, DC 20472

Brentwood Board of Selectmen
RFD Dalton Road
Brentwood, NH 03833

Gary W. Holmes, Esquire
Holmes & Ells
47 Winnacunnet Road
Hampton, NH 03841

Richard A. Hampe, Esquire
Hampe and McNicholas
35 Pleasant Street
Concord, NH 03301

Judith H. Mizner, Esquire
79 State Street, 2nd Floor
Newburyport, MA 01950

Charles P. Graham, Esquire
Murphy and Graham
33 Low Street
Newburyport, MA 01950

Thomas G. Dignan, Jr.

(*=U.S. First Class Mail.)