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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Howard A. Wilber

June 14, 1988
(ALAB-894)

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)

Andrea Ferster, Washington, D.C., for the intervenor New England Coalition on Nuclear Pollution.

Thomas G. Dignan, Jr., George H. Lewald, and Deborah S. Steenland, Boston, Massachusetts, for the applicants Public Service Company of New Hampshire, et al.

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

In ALAB-892 in the onsite emergency planning and safety issues phase of this operating license proceeding,[1] we took note of the Licensing Board's unpublished May 12, 1988 Memorandum and Order in which the Board dismissed as abandoned two contentions advanced by the intervenor New England Coalition on Nuclear Pollution (Coalition).[2] One of those contentions concerned the adequacy of the applicants'

[1] 27 NRC ___ (May 24, 1988).

[2] See id. at ___ (slip opinion at 4-6).

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proposal for the inservice inspection of the Seabrook facility's steam generator tubes; the other focused upon the accumulation of aquatic organisms and other foreign matter in the facility's cooling systems.[3]

The basis of the Licensing Board's action in the May 12 order was the Coalition's announced decision not to litigate further either contention. In the case of the cooling systems contention, however, that decision was founded upon the Licensing Board's previous ruling that, although addressed to the possibility of a coolant flow blockage resulting from the buildup of macrobiological organisms, the contention did not also encompass microbiologically-induced corrosion. The Coalition, however, told the Licensing Board that it did not accept that interpretation of the contention and, moreover, that it continued to believe that the applicants' program for detecting and controlling microbiologically-induced corrosion was inadequate.

After setting forth these facts in ALAB-892, we observed that the Coalition had additionally informed the Licensing Board, and reiterated in a filing with us, that it

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[3] Both contentions had been submitted to, and rejected at the threshold by, the Licensing Board several years ago. In ALAB-875, 26 NRC 251 (1987), we concluded that the rejection was erroneous and, accordingly, remanded both contentions to the Licensing Board for consideration on the merits.

intended to take an appeal "at the appropriate time" from the Board's determination that the cooling systems contention did not embrace the issue of microbiologically-induced corrosion.[4] We went on to point out that the Coalition had not asked for guidance respecting whether the appeal (1) had to have been taken from a March 18, 1988 Licensing Board Memorandum and Order reaffirming the Board's interpretation of the cooling systems contention; (2) would appropriately be taken from the May 12 Memorandum and Order dismissing the contention; or (3) could "await subsequent events."[5] While stressing that guidance was not being supplied uninvited, we did mention that "the time for the filing of a notice of appeal from the May 12 order has not as yet expired (see 10 CFR 2.762) and, thus, an appeal from that order is still possible as of this writing."[6]

The Coalition's counsel was orally notified of the issuance of ALAB-892 on the day it was rendered (May 24) and, in the absence of any representation to the contrary, it may be assumed that counsel (located in Washington, D.C.) had the opinion in hand by May 27 -- the date upon which the

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[4] 27 NRC at ___ n.12.

[5] Ibid.

[6] Ibid.

period for noting an appeal from the May 12 order expired.[7] In the circumstances, out of an abundance of caution if nothing else, one might have expected counsel to have placed a notice of appeal from that order in the mail no later than the 27th. Apparently, however, counsel does not subscribe to the familiar adage to the effect that an ounce of prevention is worth a pound of cure. For no notice of appeal was filed by the 27th. Rather, counsel waited five additional days and then, on June 1, filed a motion seeking either (1) a declaration, in the guise of "clarification" of ALAB-892, that the May 12 order was interlocutory and consequently an appeal from it would have been premature; or (2) leave to file out of time an attached notice of appeal from the May 12 order.[8]

Although the matter may not be entirely free from doubt, we agree with the applicants that the May 12 order is appealable.[9] For this reason, we deny the declaratory

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[7] The May 12 order was officially served on counsel by ordinary mail on the date of its issuance. Thus, any notice of appeal from the order was due to be filed (i.e., mailed) within 15 days thereafter. See 10 CFR 2.710, 2.762(a).

[8] See 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 (June 1, 1988) [hereinafter, Coalition's Motion].

[9] See Applicants' Response to New England Coalition on Nuclear Pollution's Motion for Clarification or, in the (Footnote Continued)

relief sought by the Coalition. Over the applicants' opposition, we are nevertheless accepting the untimely notice of appeal from that order. As the applicants themselves acknowledge, it is settled that "the time limits established by the Rules of Practice with regard to appeals from Licensing Board decisions and orders are not jurisdictional."[10] And while it is nonetheless true that "our general policy has been to enforce [those limits] strictly," there is precedent for "lay[ing] to one side the untimeliness of [an] appeal" where the "lateness likely was not occasioned by a lack of diligence but, rather, stemmed from an unfortunate misapprehension respecting the immediate appealability of [the order] in question."[11] Despite the judgment lapse inherent in the course that the Coalition

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Alternative, Motion for Leave to File a Notice of Appeal Out of Time (June 6, 1988). For its part, the NRC staff disagrees with the applicants on that score but maintains that, in the exercise of our discretion to undertake an interlocutory review of non-final orders, we should entertain at this time the Coalition's challenge to the Licensing Board's interpretation of the cooling systems contention. See NRC Staff Response to NECNP Motion for Clarification or, in the Alternative, Motion for Leave to File a Notice of Appeal Out of Time (June 13, 1988) [hereinafter, Staff's Response]. See also 10 CFR 2.718(i); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

[10] Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980).

[11] Ibid.

followed in the wake of ALAB-892, we are satisfied that that precedent is applicable here.

A. The Coalition's insistence that the May 12 order is not appealable rests on the proposition that only "initial decisions" are subject to appeal. In this connection, the Coalition emphasizes that the May 12 order neither is labelled an initial decision nor contains the ingredients of such a decision.[12] We are also reminded that the order did not end the onsite emergency planning and safety issues phase of the proceeding or conclude the Coalition's participation in it.[13] To the contrary, the Licensing Board presiding over that phase still has before it another issue raised by the Coalition -- the environmental qualification of certain coaxial cable used for data transmission in the facility's computer system.[14]

All this is true. But it is also quite beside the point. Although 10 CFR 2.762 speaks in terms of appeals from "initial decisions," we long ago decided that that phraseology was not to be taken too literally. As explained

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[12] See Coalition's Motion at 3-4.

[13] Id. at 4-5.

[14] Ibid. That issue was most recently returned to the Licensing Board in ALAB-891, 27 NRC ___ (April 25, 1988). In addition, the Board has before it on remand the public notification issue raised by another intervenor. See ALAB-883, 27 NRC 43 (1988).

in our 1975 decision in the Davis-Besse proceeding (which the Coalition itself cites):

> The test of "finality" for appeal purposes before this 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.[15]

Because it manifestly did not affect the Coalition's right to participate in the proceeding, the crucial question here is whether the May 12 order disposed of "a major segment of the case." Had the dismissal of the cooling systems and steam generator tube integrity contentions taken place at an early stage of this phase of the proceeding, when there remained for trial many additional safety or onsite emergency planning issues, the negative answer suggested by the NRC staff might have been required. But the context of the dismissal of the two contentions just last month is significantly different. As earlier noted, several years ago the Licensing Board rejected both contentions at the threshold.[16] That rejection was one of the issues the Coalition raised on its appeal from the Board's March 25, 1987 partial initial decision authorizing

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

[16] See supra note 3.

the issuance of a low-power license for the facility.[17] Although that decision was affirmed in large measure, we agreed with the Coalition that the contentions should have been accepted for litigation. Accordingly, they were remanded to the Licensing Board with directions to consider them on the merits.[18]

In these circumstances, we encounter no great difficulty in concluding, contrary to the staff's belief, that the Licensing Board's dismissal of the two remanded contentions in the May 12 order can and should be deemed to have disposed of a "major segment" of what remained of the onsite emergency planning and safety issues phase of the proceeding and, as such, to meet the Davis-Besse test of finality.[19] We are aided in reaching this conclusion by the

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[17] See LBP-87-10, 25 NRC 177.

[18] See ALAB-875, 26 NRC at 275.

[19] As the basis for its opposite conclusion, the staff states that:

> A "major segment of a case" appears to be a segment of a case separated for discrete proceedings, such as has been done to consider on-site safety issues, environmental issues or off-site emergency planning issues. No discrete proceeding had been established to consider the cooling system; rather it was part of on-site issues that resulted in the remand in ALAB-875, which also included the environmental qualification issue still pending in this proceeding.

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consideration that there is no apparent, good, or practical reason to defer to some undetermined later day our resolution of the Coalition's claim that the Licensing Board misinterpreted its cooling systems contention. That claim has nothing whatever to do with any other matter still pending below. And, assuming that the claim is valid -- i.e., that the cooling systems contention does extend to microbiologically-induced corrosion -- established Commission policy mandates an expeditious inquiry into the merits of the Coalition's assertion that such corrosion poses a potential safety problem.[20] This is especially so inasmuch as this proceeding has already been protracted.

B. We have previously referred to our belief that, no matter what might have been the Coalition's own thinking on the appealability of the May 12 order, prudence dictated the

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Staff's Response at 6 n.2. But we are cited to no authority that might support the staff's premise that, to be treated as final for appellate purposes, an order necessarily must dispose of all pending issues in that "discrete" proceeding in which it was entered. The seeming absence of any precedential foundation for the premise is scarcely surprising. For, if the staff's view were accepted, it would necessarily follow that, in circumstances where the particular case had not been "separated for discrete proceedings," no order that fell short of disposing of all remaining issues in the entire case could ever be deemed appealable. We are satisfied that Davis-Besse did not contemplate such a result.

[20] See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

filing of a timely notice of appeal from that order. The most that the Coalition would have risked would have been a dismissal of the notice on the ground of prematurity. Had that contingency materialized, the Coalition would, of course, have lost nothing. The dismissal necessarily would have been without prejudice to the renewal of the notice at the appropriate future time.[21]

But it scarcely follows that the Coalition can be charged with a lack of due diligence. Nor are we prepared to say that its conclusion on the appealability question was so untenable as to indicate a possible lack of good faith in pressing the position that the May 12 order was not the proper vehicle for triggering its appellate claim that the cooling systems contention had been misconstrued. We are aware of no litmus paper test for determining what constitutes a "major segment" of a particular case and reasonable minds might well differ on that score with

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[21] Even without the advantage of the discussion in footnote 12 in ALAB-892, the sensible course would have been the filing of a timely, precautionary notice of appeal. But any uncertainty on that score should have evaporated once the Coalition learned from that footnote that, although not there ruling on the matter, we thought it at least possible that an appeal from the May 12 order was the available mechanism for challenging the interpretation below of the cooling systems contention. Needless to say, the precautionary notice could have been accompanied by a statement of the Coalition's reasons why it thought an appeal to be premature.

respect to the content of the May 12 order. Moreover, only a few days elapsed between May 27 (the deadline for filing a notice of appeal) and June 1 (the date upon which the notice was in fact submitted). Thus, the tardiness of the notice should have little, if any, effect upon the timing of the disposition of the appeal.[22]

The June 1, 1988 motion of the New England Coalition on Nuclear Pollution is granted insofar as it seeks leave to file out of time a notice of appeal from the Licensing Board's May 12, 1988 Memorandum and Order.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[22] In an unpublished June 6, 1988 order, we denied the Coalition's motion to defer the briefing of its appeal to await our action on the June 1 motion. Given that denial, we will expect the Coalition to file its brief within 30 days of the date of the notice of appeal (as required by 10 CFR 2.762(b)).