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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISEION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al. (Seabrook Station, Units 1 and 2)	)	Docket Nos. 50-443-OL 50-444-OL (Offsite Emergency Planning Issues)

APPLICANTS' RESPONSE TO "INTERVENORS NECNP, THE COMMONWEALTH OF MASSACHUSETTS, THE TOWN OF HAMPTON, AND SAPL'S JOINT APPEAL OF THE LICENSING BOARD'S SUPPLEMENTAL MEMORANDUM AND ORDER OF JANUARY 7, 1987"

INTRODUCTION

Under date of January 16, 1987, New England Coalition on Nuclear Pollution (NECNP), The Commonwealth of Massachusetts (Mass.), The Town of Hampton (TOH), and Seacoast Anti-Pollution League (SAPL) (hereafter "Joint Appellants") have filed with this Appeal Board a "*Joint Appeal of the Licensing Board's Supplemental Memorandum and Order of January 7, 1987.*" (Hereafter "Joint Appeal"). The Licensing Board Order under attack is one in which the Licensing Board let stand its prior order to the effect that responses to a

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pending petition filed by the Applicants under 10 CFR 2.759 should be filed with the Licensing Board in-hand by the close of business on January 27, 1987. In doing so, however, the Board noted that:

> "If . . . any party cannot complete its response by January 27, then that party will provide to this Board by close of business on January 27, 1987, its partially completed response and advise the Board of a reasonable date certain on which its written response can be completed." *Board Order of Jan. 7, 1987* at 3.

In addition, the Licensing Board indicated in the margin that it believed "*prima facie* [as used in 10 CFR 2.758] to mean evidence of a sufficient nature that would cause reasonable minds to inquire further." *Id.* at n.*.

The Joint Appeal purports to be filed under 10 CFR 2.714a, although there is at least one reference therein to the standards which are applicable to petitions for directed certification under 10 CFR 2.718(i). *Jt. App.* at 5. The Joint Appeal ultimately seeks to have this Appeal Board (1) reverse the Licensing Board's refusal to rescind the schedule it has set in the 2.758 proceeding, (2) set a new schedule which would include an opportunity for discovery and call for the filing of direct and rebuttal "testimony," (3) reverse the Licensing Board's statements as to the proper definition of *prima facie* to be applied by it, and (4) (and alternatively) to certify to the Commission the question of "Intervenors'

entitlement under the Atomic Energy Act to an adjudicatory hearing...." *Id.* at 13-14.

For the reasons set forth below, the Appplicants say that the Joint Appeal should be *denied*.

ARGUMENT

I. THE APPEAL IS PROCEDURALLY DEFICIENT

A. 10 CFR 2.714a Has No Applicability

As noted earlier, the Joint Appeal purports to be filed pursuant to 10 CFR 2.714a. The writer has confirmed with counsel filing the appeal that the reliance upon 10 CFR 2.714a is not an inadvertence. The theory suggested is that because a formal adjudicatory hearing had been requested from the Licensing Board and this request has been denied, the Joint Appellants have an appeal of right under 10 CFR 2.714a. This is not the law. The provisions of 10 CFR 2.758 do not contemplate the filing of petitions for leave to intervene or requests for a hearing before the Licensing Board. Rather the section sets out a special set of procedures which come into play when some party to an ongoing adjudicatory proceeding seeks relief from the regulations of the Commission. The provisions of 10 CFR 2.714a have nothing to do with that scenario. It is settled that an appeal under 10 CFR 2.714a will lie only when an intervenor has been totally excluded from participation. *E.g., Public Service Company of New*

Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, ___ NRC ___, CCH Nuc. Reg. Rptr. para. 30,972 (June 25, 1986). Here the Joint Appellants are being afforded no fewer rights than any other party to the proceeding. The provisions of 10 CFR 2.714a are wholly inapposite.

B. The Criteria for Directed Certification Are Not Satisfied

As also noted above, there is reference in the Joint Appeal to the standards applicable to directed certification under 10 CFR 2.718(i). *Jt. App.* at 5. Directed certification is granted "only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner." *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, ___ NRC ___ (Jan. 15, 1987), Slip Op. at 5, *citing Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). Here the alleged irreparable harm is that the schedule is so compressed as to deny the Joint Appellants a fair hearing. See ALAB-858 at 6 *citing Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981). The problem with this argument is that the Licensing Board has not at present foreclosed a further filing. Pointedly, it asked

that parties unable to respond fully advise the Licensing Board "of a reasonable date certain on which its written response can be completed." Thus, at this juncture, any irreparable harm argument is conjectural at best. The Joint Appellants also make at least a brief argument (*Jt. App.* at 5) to the effect that the action of the Licensing Board "affects the basic structure of the entire licensing proceeding in a pervasive and unusual manner." Yet, all that has happened is that the Applicants have filed a 2.758 petition, a petition hardly novel to licensing proceedings and all that the Licensing Board is doing is carrying out its obligations under 10 CFR 2.758 in precisely the manner dictated by the regulation. Thus, there is no force to an argument that the second of the *Marble Hill* criteria has been satisfied.

II. THIS APPEAL BOARD IS WITHOUT JURISDICTION TO GRANT THE RELIEF SOUGHT IN THE JOINT APPEAL

The NRC regulatory scheme as presently constituted affords an NRC Appeal Board no appellate jurisdiction in proceedings before a Licensing Board on a 10 CFR 2.758 petition. The regulation contemplates actions by the Licensing Board and either that Board's denial or the certification of the petition, together with the accompanying affidavits and any responses thereto directly to the Commission in the event that the Licensing Board finds a *prima*

facie showing has been made. There is no review function of any kind contemplated at this stage of the Licensing Board's consideration of the petition.

The Commission's Rules of Practice, to begin with, prohibit appeals from interlocutory Licensing Board rulings of the type involved here. See 10 CFR 2.730(f). Thus, Joint appellants are left to but one other avenue for Appeal Board intercession, that is, by way of a Petition for Directed Certification under 10 CFR 2.718(i). But not only must Joint Appellants' request for relief by way of directed certification fail for the reason that they cannot satisfy the standards necessary to invoke this Appeal Board's discretion, but the route of directed certification to an Appeal Board provided by 10 CFR 2.718(i) and 2.785(b)(1) is itself foreclosed in 10 CFR 2.758 proceedings.

Paragraph (d) of 10 CFR 2.758 provides that "[i]f on the basis of the petition, affidavit and any response provided for in paragraph (b) of [the] section, the presiding officer determines that . . . a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission for determination [the issue of whether the petition should be allowed]." The paragraph, however, specifically directs by footnote that the matter will be certified to the Commission notwithstanding the provisions

of 10 CFR 2.785. Thus, what would otherwise fall within the jurisdiction of the Appeal Board is proscribed in 10 CFR 2.758 proceedings.

It perhaps should be noted that Applicants do not argue here that an Appeal Board cannot, under any circumstances, have a presence in a 10 CFR 2.758 matter. For example, an Appeal Board sitting as a trier of fact would not be precluded from dealing with a 10 CFR 2.758 petition brought to it in that capacity. See *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981), attachment to CLI-82-19, reported in 16 NRC 53 (1982). Nor would an Appeal Board in reviewing an initial decision of a Licensing Board necessarily be precluded from commenting upon the Licensing Board's holding in the proceeding under review that a *prima facie* showing had not been made. See *Commonwealth Edison Company* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984). Our argument as to the want of Appeal Board jurisdiction is directed soley to directed certification of 10 CFR 2.758 matters.

In addition, in light of the footnote to 10 CFR 2.758(d), no argument can be made that this Appeal Board has the authority to grant a right to discovery, or impose a requirement for the filing of testimony or any other of the

accoutrements of an adjudicatory hearing. To do so would, in effect, repeal the provisions of 10 CFR 2.758. Similarly, this Appeal Board has no authority through exercise of its directed certification authority to set the standard for the Licensing Board to follow in making its determination as to whether a *prima facie* showing has been made. The Commision has cast a fact-finding NRC tribunal which receives a 10 CFR 2.758 petition in essentially the position of a "gate keeper." In this respect its job is to separate wheat from chaff and it alone is the judge of what constitutes a "*prima facie* showing." Indeed, the regulation does not even contemplate that the Commission will review that aspect of the matter. The Commission will decide whether the waiver or exception should be granted. To be sure, it may be that the Commission will decide that the hearing tribunal should never have sent the matter up to it and deny the petition in language making that clear, but the Commission does not review the *prima facie* standard used by the trial tribunal, as such.

III. EVEN ASSUMING JURISDICTION, THE APPEAL IS WITHOUT MERIT

So much of the Joint Appeal as seeks relief from the scheduling order lacks merit in light of the fact that the Licensing Board has yet actually to cut off any further reply that any party wishes to make after January 27, 1987.

So much of the Joint Appeal as seeks to have this

Appeal Board set a schedule for discovery and the filing of testimony or to grant an adjudicatory hearing is without merit because 10 CFR 2.758 simply does not permit such proceedings.

Similarly, there is no reason to issue an order reversing what appears as the Licensing Board's *dicta* as to what constitutes a *prima facie* showing. *Licensing Board Order of January 7, 1987* at 3 n.*. So far as we are aware, the concept of a "showing ... sufficient to require reasonable minds to inquire further" first found its way into nuclear jurisprudence in the Commission's decision in *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 32 at n.27 (1974), *reversed sub nom. Aeschliman v. NRC*, 547 F.2d 622 (D.C. Cir. 1976), *reversed and remanded sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). This phraseology, later explicitly approved by the Supreme Court, was utilized by the Atomic Energy Commission to describe the threshold test which an intervenor had to meet in seeking to have contentions litigated. The Commission stated that the intervenors "have a burden of coming forward with *some affirmative showing* if they wish to have these novel contentions explored further." (Emphasis added). *Id.* at 32. There, in a footnote, the Commission distinguished "affirmative showing" from "the civil litigation concept of a *prima facie* case, an unduly heavy burden in this setting." *Id.* at n.27.

Instead the Commission equated the intervenors' burden with the language used by the Licensing Board here, *i.e.*, that "the *showing* should be sufficient to require reasonable minds to inquire further." *Id.* (Emphasis added). The language of the text in juxtaposition with the footnote would seem to support the conclusion that a "*prima facie* showing" is something less than a "*prima facie* case." And of course the phrase used in the regulation is "*prima facie* showing" not "*prima facie* case." It is presumably this concept which the Licensing Board had in mind when it included the *dicta* here under question. In ALAB-653, *supra*, the Appeal Board therein sitting as the fact finder made the following observation in rejecting a 2.750 petition:

> "Neither the allegations in [Intervenor's] petition nor the evidence in the record before us make a prima facie showing of special circumstances which would justify a waiver or exception in this case. *Prima facie evidence must be legally sufficient to establish a fact or case unless disproved.*" 16 NRC at 72 (emphasis added).

This later declaration is perhaps more in tune with the concept of a *prima facie* case found in the dictionaries. See, *e.g.*, *Black's Law Dictionary*: "Such as will suffice until contradicted and overcome by other evidence." Of equal interest is the definition in *Black's* of the words *prima facie* standing alone: "At first sight; on the first appearance; on the face of it; so far as can be judged from the first

disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." Both the definition of the Appeal Board in ALAB-653, and the more traditional definitions in the dictionaries appear to contemplate that the question of whether a *prima facie* showing exists is to be judged by looking only at the showing itself and assuming all statements in it to be true, unless incredible. Applicants see no difficulty were the Licensing Board ultimately to adopt the classic standard. It is doubtful, however, that the Joint Appellants want that standard applied here. But the unassailable point the Board has made here is that it is not going to decide the petition on the merits, nor is it required to do so.

Finally, it is to be noted that a great deal of this is simply a tempest in a teapot. Whichever of the standards discussed above an NRC tribunal applies to determine whether or not a *prima facie* showing has been made, the fact is that eventually the petitioner under 10 CFR 2.758 must convince the Commission of the merits of its petition. Whether a given Licensing Board was correct or not correct in deciding whether to send a petition up to the Commission is a question that has no effect on the ultimate decision to be made. The Commission might be rightfully annoyed if frivolous petitions get by a Licensing Board because its standard of judging them were too

low, but that concern is one for the Commission not this Appeal Board.

IV. THERE IS NO REQUIREMENT FOR FURTHER NRC PROCEEDINGS

On January 21, 1987, we were advised that the Appeal Board wished the following question to be addressed in this response:

> "Assuming the Licensing Board finds there is a *prima facie* case, then can the Commission fix the size of the Plume Emergency Planning Zone without any further adjudication?"

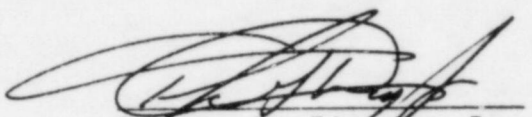
We believe the answer to this question to be unequivocably in the affirmative. The regulations are clear. Under 10 CFR 2.758(d), the Commission:

> "may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination."

The language could hardly be clearer. The Commission has reserved to itself the authority to act as it sees fit with respect to further procedures, including having no further proceedings of any kind. In the overall context of the petition before the Licensing Board in this case, the Commission could "legislatively" fix the boundaries of the Seabrook Plume EPZ on the basis of the record certified to it.

CONCLUSION

The Joint Appeal should be dismissed for procedural inadequacy and for lack of jurisdiction. In the event this Appeal Board concludes that it should reach the merits of the Joint Appeal, it should be denied. Finally, because this Appeal Board lacks jurisdiction over the subject matter of the Joint Appeal, it is also without jurisdiction to certify any question in connection therewith to the Commission, and, thus, the alternate relief requested should be denied.



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CERTIFICATE OF SERVICE

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