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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

In the Matter of	Docket No. 50-443-OL (444-OL) (Offsite EP)
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	April 13, 1989
(Seabrook Station, Unit 1)	

BRIEF ON BEHALF OF SEACOAST ANTI-POLLUTION LEAGUE ON APPEAL OF LICENSING BOARD MEMORANDUM AND ORDER DENYING FINANCIAL QUALIFICATION REVIEW FOR SEABROOK JOINT OWNERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

April 13, 1989

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:
Alan S. Rosenthal, Chairman
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In the Matter of	Docket No. 50-443-OL-1
PUBLIC SERVICE COMPANY OF OF NEW HAMPSHIRE, et al.	(Off-site Emergency Planning and Safety Issues)
(Seabrook Station, Unit 1	

BRIEF ON BEHALF OF SEACOAST ANTI-POLLUTION LEAGUE ON APPEAL OF LICENSING BOARD MEMORANDUM AND ORDER DENYING FINANCIAL QUALIFICATION REVIEW FOR SEABROOK JOINT OWNERS

INTRODUCTION

Since 1975 the issue of the financial qualification of the Seabrook owners, and particularly PSNH, has been a central concern of the Seabrook licensing. See ALAB-422, 6 NRC 33 (1967). In the succeeding 15 years, the concern of the Seabrook Intervenors over the financial qualifications of the Seabrook owners has proved to be well founded, just as has been the case in regard to emergency planning problems. PSNH is now bankrupt, the fourth largest owner, MMWEC, has been in default in its project payments for nearly a year, the third largest owner, EUA Power, lacks ratepayers to fund its share and has funds on hand only to carry

its costs through May 1990, and another small owner has been in default for more than three years. There has never been any joint and several liability, and none of the Seabrook owners has ever agreed to undertake any responsibility for open ended project costs in excess of its own pro rata share. Construction of Seabrook Unit 1 has been slowed and once halted due to a lack of funds, and Seabrook Unit 2 was abandoned in 1984, at a loss to PSNH of some 300 million dollars.

The response of the NRC to the 15-year slide from concern over financial qualification to outright default and bankruptcy on the part of several of its Seabrook owners has been quite similar to the Commission's response to the emergency planning concerns: backfit the regulatory requirements intended to insure safety to make it possible to somehow claim the requirements are met despite facts which clearly indicate that a serious issue exists.

In the emergency planning field, the backfit has been accomplished by a series of rule changes followed by adjudicatory decisions weakening even the amended regulations. (Exhibit 1 is LBP 88-32, the P.I.D. on the New Hampshire Emergency Plans, now before the Appeal Board.) In the financial qualification area, too, the backfit has been accomplished by a rule change, and disingenuous adjudicatory decisions, such as the decision below, that pay lip service to the requirement for financial qualification while substantially eliminating any meaningful requirement that applicants for nuclear licenses demonstrate

financial quality. Thus, the agency continues its history of weakening and, despite its disingenuous protestations that it is not actually so doing, practically eliminating its own safety requirements. It thereby continues to make a mockery of its once proud claim that its "first, last and a permanent" consideration in all licensing matters is nuclear safety. Power Reactor Development Corp. v. Electricians Union, 367 US 396 (1961).

BACKGROUND

The financial qualification issue at Seabrook was of course drastically altered by the Commission's 1984 rule change to eliminate financial qualification as a licensing issue except in certain exceptional circumstances.[1]

However, neither in 1984 nor since has the Commission had the temerity to actually flatly declare it need not be concerned about the financial qualification of its nuclear plant licensees. Instead, it facilely decided it could assume, since all its licensees had turned out to be regulated electric monopolies, that the relevant regulatory rate-setting commissions would assure those monopolies would have sufficient funds for safe nuclear operation. It was on this basis only that the Commission dispensed with the previous requirement for an on the record licensing decision establishing that its licensees had "reasonable

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1/ The alteration of the financial qualification rule in 1984 is ironic. That is the year in which the financial disqualification of so many of the Commission's client/permittees became irrefutable. The examples include WPPSS, Northern Indiana Public Service and, of course, PSNH, which that year was forced to halt construction of Seabrook due to a financial crisis.

assurance" that they either had or could obtain the funds for safe operation. It acknowledged there could be "exceptions" which could require financial qualification to be decided in a licensing proceeding by means of 10 CFR §2.758 waiver petition. ALAB-895. 28 NRC 7.

Accordingly, in July 1987, three Seabrook intervenors, including SAPL, petitioned for a rule waiver to permit a financial qualification inquiry. The basis for the petition was the impending bankruptcy of PSNH, which PSNH itself had acknowledged in an SEC filing. Although this waiver petition was directed primarily to the issue of low power testing, it also raised the issue of financial qualification, in light of PSNH's bankruptcy forecast, in regard to full power licensing. The Licensing Board promptly disallowed the petition; an appeal to the Appeal Board followed, the Licensing Board being affirmed.

However, on appeal to the Commission, a somewhat different result obtained. The Commission declared that, for low power operation, a special decommissioning funding requirement needed to be established, in the form of a 72 million dollar bond, external fund or guaranteed amount. (CLI 88-10)

In CLI-88-10, the Commission purported to decide "all the pending financial qualifications questions of which have been brought for its consideration in Seabrook." (Slip Opinion, p. 1) However, among those questions was the issue of whether the financial qualification concern was pertinent to full power

operation, as well as low power operation. See Intervenors' Waiver Petition, attached, footnote 7, p. 8.

In its decision, the Commission denied the waiver petition, but decided to, in effect, grant part of the relief sought as to low power through its funding requirement for 72.1 million dollars. Insofar as the waiver petition was concerned, the Commission acknowledged that all previously known standards for a waiver pursuant to 10 CFR §2.758 had been met. That is, it concluded the Seabrook owners' financial condition, insofar as PSNH's bankruptcy and the owner defaults were concerned, amounted to "special circumstances" within the meaning of the waiver regulation; that the special circumstance of PSNH's bankruptcy together with the existence of the New Hampshire anti-CWIP law did indeed undercut the rationale of the 1984 rule change, ordinarily foreclosing a financial qualification inquiry; and that the defaults of other owners would be "assume[d] for purposes of analysis" to "indeed undercut the rule's rationale." (Slip Opinion, p. 30-31).

The Commission then minted a new requirement, which it now held petitioners would have to meet in order to have a regulation waived, that before a waiver could be granted, the issue involve a "significant safety problem on the merits." (CLI 88-10, Slip Opinion, p. 31) In its analysis, it found the requirement for the issue to involve a "significant safety problem on the merits" was not met at low power.

This it felt was the case for three reasons. First, according to the Commission, since low power generated no revenues, it could present no temptation to a nuclear licensee to attempt to cut corners by stretching plant operation when prudent safety concerns might indicate a derating or shutdown. Second, it concluded that the additional costs of low power operation, beyond those separately covered by its decommissioning funding requirement, were small. Third, it concluded, as it had previously ruled in another context, "the safety risks of low power are low." (CLI 88-10, Slip Opinion, p. 33).

In short, having found a rule waiver otherwise justified, the Commission denied the petition solely because of considerations applicable only to low power. By any fair reading, however, those "special circumstances" did apply to full power operation, and CLI-88-10 does justify a licensing inquiry into financial qualification as a full power issue since this would involve a "significant safety issue on the merits."[2]

Accordingly, SAPL moved for a reopening of the record to admit a late-filed contention on financial qualification. The Massachusetts AG, realizing the Licensing Board might well find a

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2/ SAPL continues to contend that the Commission has no right to pick and choose which issues it can treat as full power and which as low power issues. Indeed, under the Commission's own regulations, (which SAPL contends are themselves not properly authorized) it is only approval and review of emergency plans, as a licensing requirement, that may remain unresolved prior to low power nuclear operation. (10 CFR §50.47(d)). SAPL believes that pursuant to 10 CFR 50.57(a)(1) and (2), all safety issues must be determined prior to authorization for nuclear operation.

procedural basis to reject SAPL's proffered contention, since the Commission in CLI 88-10 had not expressly waived the financial qualification regulations insofar as full power was concerned[3] filed a renewed petition for waiver pursuant to 10 CFR §2.758.

In its Decision, the Licensing Board did reject the SAPL late-filed contention on the grounds that the Commission had not expressly granted a waiver of the financial qualification requirements. However, because of the renewed Massachusetts petition for waiver, the Board was unable to avoid reaching the issue on the merits, of whether a waiver to consider the financial qualification of the Seabrook owners, was indeed necessary.

SAPL does not brief the issue of whether the Board erred in refusing to address its late filed contention on procedural grounds. (The Board could have treated its pleading as a renewed petition for waiver pursuant to 10 CFR §2.758 and reached the merits, but it declined to do so.) However, since the issue on the merits was dealt with below, and is appropriately before the Appeal Board, and it is the merits that are of concern, SAPL requests that this Brief on the merits be allowed, if on no other basis, then in support of the Mass AG petition or, at least, as an amicus brief in support of the Mass AG appeal.

On the merits, the Board held that, in order to get a waiver, the Intervenors had to show--not that the normal rate-setting process either did not exist or did not suffice to "reasonably

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3/ Those regulations are found at 10 CFR §2.104(c)(4), 10 CFR §50.33(f) and 10 CFR §50.57(a)(4).

assure" the financial capability of the joint owners--but rather that the "owners, whoever they may be, will not be allowed to recover sufficient operating expenses in the rate base to allow for safe operation of the nuclear facility." (Slip Opinion, p. 12) (Emphasis added). It went on to state that, even at full power, there would be no "significant safety issue" as now required as a result of CLI 88-10, on the basis of a statement made by the chairman of New Hampshire Yankee, a division of PSNH, to the effect that the financial qualification issue was not an important safety issue at Seabrook because of the vigilance of the NRC's inspection and audit teams, which would sufficiently assure safe operation.

ARGUMENT

I. The Board erred in placing the burden of establishing financial qualification on the Intervenors, instead of the applicants.

The key to this issue is the fact that the Commission has never concluded, despite the change in 1984 to its financial qualification requirements, that its license holders do not have to be financially qualified. All that the Commission ever did, in amending its rules, was to eliminate the requirement for individualized showing of financial qualification in a licensing proceeding, on the theory that the rate-setting process would act as a surrogate for the showing that would otherwise have to be made in an adjudicatory hearing. As the Rulemaking Statement of Considerations pointed out:

> . . . Case-by-case review of financial qualification for all electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover, to a sufficient degree, all or a portion of the cost of construction and sufficient costs of safe operation through the rate-making process. 49 Fed. Reg. at 35748. (Emphasis added).[4]

At Seabrook, as the Commission found in CLI 88-10, the basis for the belief that financial qualification is reasonably assured "through the rate-setting process" does not exist. The "rate-setting process" has not sufficed to keep PSNH out of bankruptcy, which the Commission has acknowledged as a unique and unprecedented event, or keep the MMWEC, the fourth largest owner, or the Vermont Electric Generation and Transmission Cooperative from going into default, or the New Hampshire Electric Cooperative from going into arrears. The rate-setting process does not exist for EUA Power, the third largest owner, a company without retail customers.

Instead, at Seabrook, as the Licensing Board conceded, it is unknown who will even eventually be the largest owner of the plant. One utility, Northeast Utilities, has made an offer to acquire PSNH's assets, other than Seabrook, with the result that Seabrook's ownership would be spun off and placed in a new entity, to be owned by PSNH's present unsecured creditors, and which

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[4]/ The Commission noted it had been invited to eliminate the financial qualification requirement as unimportant to safety, and it declined to do so. "The Commission is not relying on this premise for its current rule." 49 Fed. Reg. 35751, 9/12/84.

might or might not end up being a utility, or if a utility, might or might not end up being a regulated utility.[5]

Since it is the Applicants that must bear the burden of establishing their financial qualification, that is, reasonable assurance that they can obtain the funds necessary for the safe operation of Seabrook, and since this reasonable assurance finding was to be made only on the assumption that the rate-setting process would assure the necessary funds, and since that rate-setting process plainly has not assured the necessary funds for PSNH and the defaulting owners, and since the Commission's own decision in CLI 88-10 establishes that full power operation does involve a "significant safety issue on the merits," it is clear that the Licensing Board avoided granting the rule waiver to permit the necessary financial qualification inquiry only by improperly shifting the burden of proof on the ultimate issue from the Applicants to the Intervenors.

II. The Board erred in concluding that, in effect, full power operation would "cure" the financial qualification problem.

The Board ignored the fact that every item the Commission relied on to find financial qualification was not a "significant safety issue on the merits" at low power, according to its newly

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5/ It must be remembered that PSNH is, after all, the entity which was found responsible for the safe operation and management of the plant, under the operating license issued by the Commission in October of 1986. New Hampshire Yankee, which likes to think of itself as a separate entity, in fact is not, and remains a division of PSNH, and is included on the Bankruptcy Petition.

minted requirement, would be such an issue at full power. That is, each of the reasons the Commission assigned for finding that financial qualification was not a "significant safety issue" at low power vanishes at full power. First, at full power, the potential incentive to extend operation for maximizing revenue would exist; second, at full power ongoing increased expenses would amount to far more than the 3.5 million dollars the Commission found at low power to be "de minimus"; and third, at full power, the risks of a nuclear accident are very much greater and require full application of safety requirements.

Presumably, the Board did not deal with this issue because it agreed with the Applicant and NRC staff position that the Commission finding that there were "special circumstances" that undercut the "rationale" of the 1984 rule at low power, would not fully exist at full power. The argument is that at low power it is the combination of two "special circumstances," the PSNH bankruptcy and the New Hampshire anti-CWIP law, that served to undercut the rationale of the rule, and that at full power only one of these special circumstances, the bankruptcy, would continue to exist.

It is undisputed that at commercial operation the anti-CWIP law would no longer bar an application for rate increases based upon Seabrook costs. Thus, according to the Applicant and staff position, evidently adopted by the Board, the bankruptcy, standing alone at full power, would not suffice to undercut the rationale

of the rule, within the Commission's discussion at CLI 88-10. This is erroneous for three reasons.

First, as in all licensing issues, the Commission must find "reasonable assurance" its requirements, including financial qualification requirements, are met prior to, and not after, licensing. The Licensing Board cannot simply "assume" licensing will "cure" the lack of financial health of the Seabrook utilities, which included utilities other than PSNH, any more than it can "assume" licensing will "cure" emergency planning problems by causing State and local officials to undertake radiological planning. The Commission must find that its regulations have been complied with prior to, and not after, licensing. As set forth in the 1984 financial qualification rule-making:

> Accordingly, the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced to choose between shutting down or taking shortcuts while the license was in effect. 49 Fed. Reg. at 35749. (Emphasis added).

Given the bankruptcy of Public Service, there is no reasonable assurance that the commercial licensing will result in the elimination of the anti-CWIP bar having any financially beneficial effect for PSNH.

Second, there is no evidence as to what power level in fact results in generation of power for commercial sale. It may well require power levels substantially in excess of low power testing levels, said to be substantially below 5 percent of rated power, so that there may be levels of operation where the safety concerns

are greater than those acknowledged by the Commission for low power, but where the alleged "cure" of commercial sales is not yet possible. Thus, even on the Licensing Board's flawed theory that licensing can "cure" the financial qualification issue, there is no assurance of financial qualification for power levels above those dealt within the Commission's CLI 88-10 Decision, but which may not be at sufficient levels to assure the commercial generation of power.

Third, the issue is not whether the anti-CWIP law bar against ratepayer recovery ends with full power. The issue is whether, given the bankruptcy of Public Service, with the consequent uncertainty as to the ultimate reorganization or liquidation of the company, coupled with the defaults of other owners, the joint owners can rely on the regulatory rate-setting process to establish that they are financially qualified in the circumstances of this case at power levels above 5 percent.

The fact that the anti-CWIP law theoretically does not bar rate recovery at full power, for Public Service, is of no moment unless Seabrook remains part of Public Service's asset base after the bankruptcy. On the basis of the present record, this does not seem likely. It certainly is not "reasonably assured."

So far, no potential utility purchaser of PSNH has proposed to acquire PSNH's 35.6 percent Seabrook interest. One potential purchaser, Northeast Utilities, plans to spin off PSNH's Seabrook interest, and leave it as a sole asset to be owned, perhaps via a

new entity, by PSNH's unsecured creditors. Whether this new entity would be a utility, or if a utility a regulated utility, is not known. This plan obviously provides no reasonable assurance of financial qualification for the operation of the Seabrook plant.

The State of New Hampshire has itself proposed an energy authority with the potential for acquiring PSNH's assets. Spokesmen for the State have said, however, that they too would not plan to acquire PSNH's Seabrook interest. Thus, if the energy authority was to be activated, and undertake an acquisition, it provides no assurance for funding for the Seabrook project. Thus, the fact that the anti-CWIP law would no longer bar rate recovery for PSNH's Seabrook costs provides no "reasonable assurance" of financial qualification in this situation, since the new owners "whoever they may be" may not have access to the rate-setting process, or may not choose to use the rate-setting process.

Thus the Board errs when it finds:

> Moreover, we find nothing in the Attorney General's petition to keep us from applying a Commission presumption that Seabrook's rate base will, if a full power license is issued, include the costs of safe operation which is prudently incurred.
> (Slip Opinion, p. 12)

There is no "Commission presumption" in the 1984 rule change or elsewhere that states "Seabrook's rate base" will include the costs of safe operation, when there is no longer any basis for assuming PSNH's Seabrook's interest will be in PSNH rate base or

any other utility's rate base.[6] For once and for all, it is time for this Commission's Licensing Boards to stop trying to decide serious safety issues, that depend upon factual determinations, on the basis of fictional "presumptions" that all will be well. That is plainly and absolutely not assured in the circumstances of this case.

III. The Board erred in refusing to treat the utility defaults as "special circumstances" requiring a rule waiver.

In CLI 88-10, the Commission stated that because of its decision that low power does not involve a "significant safety issue on the merits" it "is not critical to our decision to know whether delays or cessation of project payments undercut the logic of the rule, and we will assume for purposes of our analysis that the minority owners delay or cessation of project payments does indeed undercut the rule's rationale." (Slip Opinion, p. 30-31)

Since the issue now presented by the renewed petition to the Licensing Board is the need for a financial qualification hearing prior to operation in excess of low power, the Board had a duty to confront the defaults as establishing a "special circumstance," which "undercut the rationale of the 1984 rule," and thereby would require a financial qualification inquiry.

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[6]/ Indeed, there is no such thing as "Seabrook's rate base." Utilities have rate bases for rate-making purposes. Seabrook is not a utility. Moreover, utility operating expenses are not recovered as part of the "rate base," but as part of the "test year" operating expenses. The Licensing Board obviously is simply speaking with a complete lack of understanding of what it is saying in making this pronouncement.

However, all the Board did was to state that, "the remaining assertions in the Attorney General's pleading [including the defaults of MMWEC, VG&T, and the partial defaults of the NHEC] are merely conjectural statements that do nothing more than highlight the current uncertainties surrounding the future ownership of Seabrook Station." (Slip Opinion, p. 9).

This represents a total abdication of the Board's duty to decide the issue before it. The defaults are not conjectural, they are an undeniable fact. They surely undercut the rationale of the 1984 rule which presumed the "rate-setting process" or self-regulation would always assure regulated utilities would have access to the funds necessary to provide the required extra level of safety in operating a nuclear plant.

The fact that regulated utilities are not making the required project payments to even sustain their pro rata share of the project in a pre-licensing phase surely cast doubt on the assumption that the "rate-setting process" will suffice to assure their financial qualification to participate in the operation of a nuclear plant at power levels in excess of those used at low power testing.

The Licensing Board's error may derive from its faulty use of the fact that the Commission stated, in adopting the 1984 rule, that:

> [The Commission's] concern is that reasonable and prudent costs of safely maintaining an operating nuclear plant will be allowed to be recovered through rates. This concern does not extend to any level of profit, rate of return beyond those operating expenses. The Commission's concern is with safe operation, not profits.
> 49 Fed. Reg. at 35749.

The Licensing Board appears to believe that this indicates that all that need be dealt with is whether the rates are going to be sufficient to meet the operating costs of a nuclear plant, and not whether the overall revenues of a nuclear plant owner are sufficient to assure operation will occur without a tendency or temptation to operate the plant when it ought not be operated at full power, or to take shortcuts. However, the revenues a regulated utility is allowed, by its rate-setting commission, are not allocated only to certain approved costs. A utility may be allowed to earn revenues sufficient to cover the estimated operating costs of a plant, but because of its overall financial condition, choose not to use its revenues for that purpose.[7] It is for this reason that the Commission must be concerned with the overall financial qualification of its licensees, and not merely with whether an allowed rate of return is sufficient to pay nuclear plant operating expenses. This would obviously trivialize the financial qualification requirement, and indeed make it meaningless.

7/ PSNH has already, in its financial distress, threatened to cease connecting new customers and taken steps to cut its maintenance budget drastically.

Thus, while the Commission is appropriately not concerned with the level of profit a utility makes, it must be concerned with a utility's overall financial qualification, and not merely whether its revenues are sufficient to operate the nuclear plant if, for example, it decides to forego paying dividends to its shareholders.

Given the fact that two Seabrook utility owners, which are solely responsible for their pro rata share of Seabrook costs in the absence of joint and several liability, are in fact in default in their required payments to the project, there is no basis for asserting, on purely conjectural theories, that the financial qualification of the Seabrook owners is reasonably assured by the rate-setting process and no financial qualification inquiry is warranted.

Finally, the Board, in what it concedes is of "little use" in terms of its holding, goes on to quote the chairman of New Hampshire Yankee, Mr. Edward Brown, to the effect that the financial qualification issue is a "never mind" because, according to Mr. Brown, the NRC's fearless and independent inspection and audit teams will adequately check every aspect of Seabrook operation.

Even if this is true, this is entirely beside the point. The premise of the financial qualification rule is that, quite apart from inspections and audits, an additional layer of safety is required to be provided through some assurance that nuclear

licensees have sufficient financial capability not be tempted to cut corners. As set forth at the time the financial qualification rule was changed,

> . . . the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced by financial circumstances to choose between shutting down or taking shortcuts while the license was in effect.
> CLI 88-10, Slip Opinion at 32.

The purpose of achieving that additional level of nuclear safety through a financial qualification requirement is in no way met by having a licensee executive tout the effectiveness of the NRC's inspection and audit program.

CONCLUSION

Once again, this Licensing Board has trivialized one of the Commission's safety requirements, when the facts, if a hearing were to be held, might well indicate that that requirement cannot be met. Once again, the Licensing Board has placed upon the Intervenors the burden of proving a nuclear hazard, rather than upon the Applicants and their staff allies to prove the Commission's regulations have been met. Once again, the Licensing Board has dealt, in a slip-shod and haphazard way, with a serious safety issue.

Once again, the Intervenors call upon the Appeal Board to deal with this matter in a responsible and rational manner, by finding that a *prima facia* case for a waiver of the regulation barring a financial qualification inquiry has been established,

given the bankruptcy of the lead owner, with the consequent uncertainty and lack of assurance as to the financial capability as a result, and in light of the defaults of other utility owners of the project.

Respectfully submitted,

Seacoast Anti-Pollution League
By its Attorneys,

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DATED: April 13, 1989

I hereby certify that copies of the foregoing brief have been forwarded this day by first-class mail, postage prepaid to all persons on the attached service list.

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Robert A. Backus

ATTACHMENT

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Emmeth A. Luebke
Jerry Harbour

In the Matter of Public Service Company of Hew Hampshire, et al. (Seabrook Station, Units 1 and 2)	Docket Nos. 50-443-OL-1 50-444-OL-1 On-Site Emergency Planning & Technical Issues

INTERVENORS' PETITION TO
WAIVE REGULATIONS 50.33(f) AND 50.57(4)
TO THE EXTENT NECESSARY TO REQUIRE APPLICANTS TO
DEMONSTRATE FINANCIAL QUALIFICATION
TO OPERATE AND TO DECOMMISSION SEABROOK STATION

Now come the Town of Hampton, New England Coalition on Nuclear Pollution, and Seacoast Anti-Pollution League (hereinafter "Intervenors"), pursuant to 10 CFR §2.758, and, based upon the Affidavit of Dale G. Bridenbaugh, petition the Commission to waive regulations 50.33(f) and 50.57(4) to the extent necessary to require Applicants to demonstrate, prior to low power operation, that Applicants are financially qualified to pay the costs to operate, for the period of the license, and to decommission, the Seabrook Nuclear Power Plant. In support of this petition, Intervenors state:

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1. Under date of July 22, 1987, Applicants' lead owner, Public Service Company of New Hampshire (PSNH), filed with the Securities and Exchange Commission a FORM 8-K, which in relevant part provided:

> The Company has instituted strict cash conservation measures that should allow it to meet its estimated cash requirements, including the refunds described above, through the end of 1987. The Company is working jointly with the investment firms of Merrill Lynch Capital Markets and Drexel Burnham Lambert, Inc. to develop alternate financial plans. Given the uncertainty surrounding the Company, its limited financial flexibility, the amount of debt service which the Company can reasonably expect to carry, the political, economic and competitive limits on rate increases in New Hampshire, and the regulatory approvals that will be required, it will be extremely difficult to develop and implement such a plan to improve significantly the Company's circumstances within the limited time available. Should an adequate plan not be developed and placed into effect before the end of 1987, it will be difficult, if not impossible, for the Company to avoid proceedings under the Bankruptcy Code. See Exhibit A attached. (Emphasis supplied).

By its own admission, Applicants' lead owner is on the brink of bankruptcy.

2. 10 CFR §50.33(f) and 50.57(4) require certain applicants, prior to receipt of an operating license, to demonstrate that these applicants possess, or have reasonable assurance of obtaining, the funds necessary to cover estimated operation costs, for the period of the license, plus the costs to permanently shut down the facility and maintain it in a safe condition. 50.33(f)(2), (3) and (4).

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3. By rulemaking on September 12, 1984, the Commission exempted publicly regulated utilities, including Seabrook Station owners, from demonstrating these financial qualifications prior to receipt of an operating license. As sole grounds for this exemption, the Commission stated:

> The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule, the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted. 49 Fed.Reg. 35750 (9/12/84). (Emphasis supplied.)

4. The purpose of the financial qualification rule, therefore, was to ensure safe operation. For publicly regulated utilities, however, the Commission created an exemption based on the generic determination that state PUCs, through ratemaking, would provide adequate revenues for these facilities to be operated, maintained, and decommissioned safely.[1] Accordingly, the Commission concluded, generically, that it was not "warranted" to subject publicly regulated utilities to financial qualification review when that function was effectually being performed already by state PUCs.

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[1] "No sound basis has been shown for . . . the allegation that publicly-owned utilities are not assured of funding through the rate-making process. The NRC's analysis of the NARUC survey, discussed infra, has shown that all State public utility commissions have sufficient ratemaking authority to ensure sufficient utility revenues to meet the cost of NRC safety requirements. Similarly, it has been shown that publicly-owned utilities have independent rate-setting authority which is used to cover the costs of operation, including those of meeting NRC safety requirements." 49 Fed.Reg. 35750 (9/12/84)

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5. In their present financial distress, Applicants for Seabrook Station present special circumstances that contravene this generic determination, and undermine the Commission's purpose that all facilities have adequate revenues to ensure safety.[2] These special circumstances include:

a. Under New Hampshire law, Applicants are barred from recovering the costs to decommission Seabrook Station unless, and until, that facility commences full power operation.[3] Accordingly, if Applicants are permitted to proceed to low power operation, without proof of financial qualification, Applicants will irradiate the facility, generate high level nuclear waste, yet may lack the tens of millions of dollars necessary "to permanently shut down

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[2] The Commission specifically declined to base the financial qualification exemption for publicly regulated utilities upon allegations that there is not a sufficient relation between financial health and safe operation, noting it "is not relying on this premise for the current rule." 49 Fed.Reg. 35751 (9/12/84).

[3] Pursuant to NH RSA 162-F:19, decommissioning costs will be paid from a fund established in the office of the State Treasurer. Revenues for the decommissioning fund are obtained through charges against customers, but those charges may only be assessed, and payments to the fund shall commence, "in the billing month which reflects the first full month of service from the facility." NH RSA 162-F:19(II). Since Seabrook Station has not, and may never, commence full power operation, no such fund has been established to pay decommissioning costs.

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the facility and maintain it in a safe condition" if a full power license is later denied. See §50.33(f)(2).[4] Similarly, the costs incurred in operating the plant at low power would not be recoverable if Seabrook never proceeds to full power operation.[5]

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[4] The cost of decontaminating, decommissioning, and disposal of fuel and portions of the reactor system following a low power testing period is estimated to be tens of millions of dollars. The cost of spent fuel disposal alone is $20 to $30 million. Reactor component removal, handling, and disposal would require additional expenditures. See Affidavit of Dale G. Bridenbaugh, ¶14, Exhibit B, attached hereto. From the recent FORM 8-K filing by Applicants' lead owner, supra, it is reasonable to assume Applicants do not have adequate funds to pay decommissioning costs following low power operation.

[5] NH RSA 378:30-a. "Public Utility Rate Base; Exclusions. Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers." (Emphasis supplied). Low power operation does not generate any net electric power. Bridenbaugh Affidavit ¶4, 15. RSA 378:30-a therefore bars Applicants from recovering costs to operate or decommission Seabrook Station if the facility never operates beyond low power.

b. The likely bankruptcy of Applicants' lead owner is without precedent. Clearly the pending bankruptcy of such a publicly regulated utility presents an extreme circumstance not addressed by the Commission at the time it approved the financial qualification exemption.[6] On the present record, it would be grossly irresponsible for Applicants to proceed to operate Seabrook, even at low power, without clear evidence of their financial means to operate, and to decommission, safely.

c. In addition to the financial uncertainties presented, the direction of Applicants' management may be radically altered if PSNH is superceded by a bankruptcy trustee. Whether the trustee may decline to pursue a full power license in the face of insuperable regulatory obstacles remains uncertain. The Commission, however, should not permit Applicants to proceed to any level of power operation, absent proof of financial qualification, when their lead owner may soon forfeit its management rights over Seabrook Station.

d. If appointed to manage Seabrook Station, a trustee or examiner may refuse to expend additional monies on a wasting asset which continues to drain all available capital from PSNH. A Bankruptcy Court, rather than Applicants, may ultimately determine if additional monies will be spent on Seabrook Station. The

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[6] See 49 Fed.Reg. 35750 (9/12/84), quoted at page 2, supra.

. . .

Commission therefore should move to address this contingency, and require evidence of financial qualification, before bankruptcy occurs.

5. Even as the Commission exempted publicly regulated utilties from financial qualification requirements, the Commission was careful to preserve its right to require proof, in special circumstances, that a particular utility applicant is financially qualified.

> By this rule, the Commission does not intend to waive or relinquish its residual authority under Section 182a of the Atomic Energy Act of 1954 as amended, to require such additional information in individual cases as may be necessary for the Commission to determine whether an application should be granted or denied or whether a license should be modified or revoked. An exception to or waiver from the rule precluding consideration of financial qualification in an operating license proceeding will be made if, pursuant to 10 CFR 2.758, special circumstances are shown. For example, such an exception to permit financial qualification review for an operating license applicant might be appropriate where a threshold showing is made that, in a particular case, the local public utility commission will not allow the total cost of operating the facility to be recovered through rates. 49 Fed.Reg. 35751 (9/12/84). (Emphasis supplied).

6. The special circumstances contemplated by the Commission are now squarely presented. If Seabrook Station never operates at full power, Applicants cannot recoup the tens of millions of dollars necessary to promptly and safely decommission the facility,

. . .

and dispose of the high level nuclear waste, following low power operation. Prior to operation at any level of power, therefore, Applicants should demonstrate independent financial means to meet these decommissioning costs.[7] See note #3, supra.

7. Apparently in recognition of the potential hazards, and associated costs, of decommissioning, the Commission itself has proposed financial qualification requirements for the decommissioning of all licensed facilities. 50 Fed.Reg. 5600, et seq (2/11/85).

> The objective of the proposed rule on financing the decommissioning of nuclear facilities is to require licensee to provide reasonable assurance that adequate funds are available to ensure that decommissioning can be accomplished in a safe manner and that lack of funds does not result in delays that may cause potential health and safety problems. The licensee is responsible for completing decommissioning in a manner that protects health and safety. Id. at 5602.

This rule has not yet been finally adopted. By the proposed rule, however, the Commission has expressed clear concern that all facilities be promptly and safely decommissioned. The Commission itself thereby provides significant evidence that Applicants should be required to demonstrate financial qualification before proceeding to operate Seabrook Station.

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[7] Applicants additionally should be required to demonstrate that Applicants possess, or have reasonable assurance of obtaining, the funds necessary to cover estimated operating costs for the period of the license. See §50.33(f)(2). Even in the unlikely event a full power license is granted, it remains doubtful that PSNH will receive sufficiently prompt rate increases to avoid bankruptcy. The Commission, therefore, should require proof of financial qualification to meet operating costs to reduce the anticipated financial and management disruptions of a bankruptcy proceeding.

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CONCLUSION

Intervenors therefore respectfully request that Applicants' exception from financial qualification be waived for purposes of this proceeding, and that Applicants, prior to low power operation, be required to demonstrate financial qualification in accordance with Commission regulations 50.33(f)(2), (3) and (4) and 50.57(4).

Respectfully submitted,

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