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June 5, 1989

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
before the  
ATOMIC SAFETY AND LICENSING BOARD

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

**APPLICANTS' OBJECTION IN THE NATURE OF A MOTION  
IN LIMINE TO THE ADMISSION IN EVIDENCE OF THE  
PREFILED TESTIMONY OF DR. ALBERT E. LULOFF**

Applicants object to and move this Board in the nature of a Motion in Limine to exclude as evidence in this proceeding the "Testimony of Dr. Albert E. Luloff on Behalf of Attorney General James M. Shannon Regarding JI-2 and JI-21 (Permanent Resident Population)" [hereinafter "Luloff II"]. In support of their motion, Applicants say that the only issue raised in this testimony has already been litigated and decided in New Hampshire.

**SUMMARY OF TESTIMONY**

The witness states that the intent of his testimony is to criticize Applicants' methodology for determining, for

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ETE-calculation purposes, the permanent resident population of EPZ communities, and in addition to offer "a realistic appraisal" of the actual population based upon "the best demographic evidence." Luloff II at 3. The witness claims that Applicants' reliance on the population figures in NHRERP Volume 6, which in turn are based upon town clerk estimates, is improper. Luloff II at 4-5. He claims that this methodology uses "too short a period [1980-1985] upon which to develop reliable estimates of growth rates for this area." Luloff II at 6. Instead, the witness proposes a methodology of projecting compound growth rates from 1970-1986 U.S. census data. Luloff II at 5, 6. Employing this alternate methodology, the witness then projects 1989 population figures for the EPZ communities. Luloff II at 7.

#### ARGUMENT

This same witness offered exactly the same methodological attack in the New Hampshire portion of these proceedings. See Supplemental Direct Testimony of Dr. Albert E. Luloff on Behalf of James M. Shannon, Attorney General for the Commonwealth of Massachusetts, Concerning Various Matters Raised in the "ETE" and "Sheltering" Contentions, ff. Tr. 8211 [hereinafter "Luloff I"]. In its Partial Initial Decision on the New Hampshire proceedings, this Board adopted Applicants' proposed findings rebutting the Luloff I testimony, thus resolving the matter in Applicants' favor. Public Service Company of New Hampshire (Seabrook Station,

Units 1 and 2), LBP-88-32, 28 NRC 667, 782 (1988). This methodology issue which the witness now seeks to resurrect is thus res judicata.

In New Hampshire, as in his present testimony, the witness purported to offer "a realistic appraisal" based upon "the best demographic evidence." Luloff I at 3. In New Hampshire, as here, he criticized Applicants for relying on the NHRERP's town clerk data. Luloff I at 4. There, as here, he opined that 1980-1985 "is too short a period upon which to develop growth rates for this area." Luloff I at 5. There, as here, he proposed instead to rely on a longer span of U.S. census data -- 1970 to 1985 in his New Hampshire testimony, as opposed to 1970-1986 in the present offering. Compare Luloff I at 5 with Luloff II at 5. To be sure, in Luloff I the witness applied his alternate methodology to New Hampshire population figures, while in Luloff II he deals with Massachusetts populations. But this is a distinction without material difference: in both cases, the criticism of applicants' methodology is the same, as is the alternate methodology offered by the witness.

In NRC practice, as in the federal courts in general, res judicata will usually<sup>1</sup> bar the litigation of an issue if

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<sup>1</sup> To be sure, the NRC like all federal tribunals will apply the doctrine of res judicata "with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factor in the particular case." Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974)

four criteria are met: (1) the parties are the same; (2) the issue is the same; (3) the issue was in fact litigated and ruled upon; and (4) that ruling was material and relevant to the disposition of the earlier action. Carolina Power and Light Company (Shearon Harris Nuclear power Plant), ALAB-837, 23 NRC 525, 536-37 (1986); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), aff'd, ALAB-575, 11 NRC 14 (1980). A party may not revive an issue simply by advancing a new argument concerning it which that party just as readily could have raised in the prior litigation. Shearon Harris, 23 NRC at 537 n.37.

Each of the four res judicata factors applies to the Luloff II testimony. The party offering the testimony -- Mass AG -- is the same. The issue -- whether Applicants' or Luloff's methodology for determining resident population should be used -- is the same.<sup>2</sup> The issue was litigated, cross-examined, and ruled upon in New Hampshire. Tr. 8288-8298, 8314-8317; Seabrook, 28 NRC at 782. And the Board's acceptance of Applicants' methodology over Luloff clearly was material and relevant to the Board finding in Applicants' favor as to ETEs. Seabrook, 28 NRC at 803. The doctrine of \_\_\_\_\_  
(emphasis added).

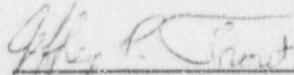
<sup>2</sup> To the extent that Luloff II contains any arguments not contained in Luloff I (and Applicants are hard-pressed to find any), Mass AG would have to show that those arguments could not have been made in the New Hampshire proceedings. Shearon Harris, 23 NRC at 537 n.37.

res judicata thus applies to bar Luloff II from admission into evidence.

**CONCLUSION**

For the reasons stated above, the testimony should be excluded.

By their attorneys,



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