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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'89 JUN 19 P3:59

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Before Administrative Judges:

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

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY	)	(Off-Site EP)
OF NEW HAMPSHIRE, <u>ET AL.</u>	)	
	)	
(Seabrook Station, Units 1 and 2)	)	June 12, 1989

MASSACHUSETTS ATTORNEY GENERAL'S OPPOSITION  
TO APPLICANTS' MOTION TO STRIKE NOTICE OF APPEAL

On May 30, 1989, the Applicants filed a motion<sup>1/</sup> to strike the notice of appeal filed by the Massachusetts Attorney General ("Mass AG") on May 16, 1989. That notice of appeal was directed to a Licensing Board order of May 5, 1989, that the Mass AG asserts made final for the first time certain aspects of the Licensing Board's December 30, 1988 partial initial decision ("PID") concerning the impact of returning commuters on evacuation time estimates. Because the Mass AG had filed a statement regarding the prematureness of this notice of appeal,

<sup>1/</sup> Applicants' Motion to Strike Notice of Appeal and Response to Appeal Board Order of May 23, 1989 (May 30, 1989).

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on May 24, 1989, the Appeal Board sought the views of the Applicants and the NRC Staff "on the question of whether the Attorney General's notice of appeal is premature as he suggests." The Applicants have responded by arguing that the notice of appeal of this aspect of the returning commuters issue is not premature but instead is late. They argue that the language of the December 30, 1988 PID "could not be clearer" that the Board had retained jurisdiction only of the effects of "intra-EPZ commuters" on ETEs. That being the case, Applicants argue, the Mass AG should have appealed the Board's decision on other aspects of the returning commuters' issue at the time he made his original appeal of the PID, presumably by briefing those aspects of the issue in the brief filed by the Mass AG on all the other aspects of the PID.

The Applicants' motion to strike should be denied for the following reasons:

1. The language in the PID simply did not make it "clear" that the Board had retained jurisdiction only of the effect of "intra-EPZ commuters" on ETEs. This description--intra-EPZ commuters--was not even used. More importantly, a fair reading of the Board's opinion, paragraphs 9.35 through 9.60, 28 NRC at 783-789, gives one the impression that there were a number of issues the Board had concerns about beside "the narrow problem of commuters starting within the EPZ for homes also within the EPZ." Memorandum and Order (Returning Commuters Issue) (May 5, 1989) at 7. For example, in Paragraph 9.51, the Board describes Dr. Adler's concern about "commuters moving across

the general flow of evacuating traffic as they make their way home." 28 NRC at 787 (emphasis in original). The Board then noted:

According to Dr. Adler, commuter trips that flow across the flow of evacuating traffic at crucial intersections in the EPZ will have the effect of reducing the effective "green time" available to evacuating traffic at these intersections because the evacuating traffic will be forced to "give up time" to cross flows of commuter traffic. The Attorney General contends that the effects of cross flows of commuter traffic have not been included at all in the evacuation traffic model. The cross flows were not modeled, nor were their effects on intersection capacities considered. MAG PF 6.1.61, citing Adler, ff. Tr. 7109, at 30.

This is all the Board wrote about this issue; it left it unresolved. The Mass AG assumed, reasonably we believe, that this was a piece of what the Board had retained jurisdiction over in order to "return to the parties for further advice." See PID, Paragraph 9.60, 28 NRC at 789.

As to commuters whose trips home take them along roads which are evacuation routes but in a direction which is opposite to the evacuation stream, Dr. Adler argued that there would be a greater "frictional" effect than was assumed in the ETE study. See PID, Paragraph 9.49, 28 NRC at 786. That study had assumed that during an evacuation, only 10% of the vehicles on an evacuation route would be moving inbound. But because there could be as many as 41,500 commuter trips home altogether, see PID, Paragraph 9.40, 28 NRC at 785, Dr. Adler offered his expert opinion that 30-40% of the vehicles on evacuation routes would be moving inbound, thereby resulting in a greater frictional effect. The Board noted that "Applicants do no address the matter." The Board then offered its own

conjecture on the issue--that the additional capacity reduction which should stem from this extra friction would not be very great--but then concluded this section of its decision with the following:

Presumably the Highway Capacity Manual provides [capacity reduction] values for [directional] splits other than 90-10, and we assume that Dr. Adler had access to the Manual. There was no need for conjecture on his part. Nor will the board entertain conjecture now.

PID, Paragraph 9.50, 28 NRC at 787.

Given that Applicants, who did not address this matter at all, had the burden of proof on this issue, we did not read this language to mean that the Board had shifted the burden to the Mass AG and then found that he had failed to carry it. That would have been blatant error. Instead, when the Board a few paragraphs later indicated it was retaining jurisdiction "so that we may return to the parties for further advice," Paragraph 9.60, the Mass AG assumed that the Board, rather than relying on its own conjecture (or Dr. Adler's expert opinion), wanted the parties to inform the Board what the Highway Capacity Manual lists as the specific capacity reduction factors for these other directional splits.<sup>2/</sup>

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<sup>2/</sup> When the Board subsequently sought "further advice" from the parties on the issue of returning commuters, the Mass AG submitted an Affidavit of Dr. Adler on March 26, 1989. In that Affidavit, Dr. Adler presents further Highway Capacity Manual data and calculations which supported his earlier opinion that the additional friction on these roads due to commuters would significantly reduce the capacity of those roads. See Affidavit of Dr. Thomas J. Adler Regarding Interaction of Commuter Flow and Evacuation Traffic Flow Within The Seabrook EPZ (March 26, 1989).

Thus, a fair-minded reading of the PID reveals unresolved issues in all three aspects of the returning commuters issue addressed by the Board in its PID.

The Applicants (and NRC Staff) both point to the language contained in the final paragraph of the ETE section of the PID, Paragraph 9.130, to support their view that the Board clearly reserved jurisdiction over only those commuters who are "intra-EPZ commuters," i.e., those who both work and live in the EPZ. The language used in Paragraph 9.130 is not so precise, however. For all three groups of returning commuters discussed above, the only part of their trips home which is relevant to the evacuation time estimates is that part which is "within the EPZ." Outside the EPZ, commuter trips home will not interact with evacuation trips in a way which influences ETES. Thus, the Board's statement in Paragraph 9.130 of its intention to retain jurisdiction over "trips by returning commuters within the EPZ to their homes in the EPZ" can reasonably be read, as the Mass AG did, to encompass the ETE effects of all three groups: those traveling inbound, those traveling across evacuating traffic streams, and those traveling with evacuating traffic streams. In addition, this latter group is not the only group of commuters with both jobs and homes in the EPZ. Commuters traveling inbound could be returning home from jobs outside or inside (near the edge) of the EPZ. The ETE effects "within the EPZ" are the same. Similarly, commuters traveling across evacuating traffic

streams could be returning home from jobs either outside or inside the EPZ, and the ETE effects of these trips "within the EPZ" are not distinguishable. The language in Paragraph 9.130 simply cannot carry the day for the Applicants here. The language of the PID, fairly read, appears to leave open a number of returning commuters issues.

The fact that the Board, in its order of May 5, 1989, now says that it meant to do something else in its PID cannot be allowed to add weight to Applicants' argument that this notice of appeal is late. The Mass AG fairly relied on the Board's PID language, believed all returning commuters issues had been retained, and did not brief any returning commuters issues in its brief on appeal of the PID on the New Hampshire plans. That detrimental reliance cannot be ignored when the Licensing Board admits that it did not clearly write what it meant in the PID.

The Mass AG should not lose the right to appeal one of its strongest issues in the case through the Licensing Board's failure to be clear in its PID. At the time it was issued, we thought it was clear--the Board had retained jurisdiction over the entire returning commuters issue. The motion to dismiss the Mass AG's notice of appeal should be denied.

2. In the event that the Appeal Board somehow finds that the Licensing Board did clearly retain jurisdiction of only one aspect of the returning commuters issue, the Applicants still should not prevail, however. The appeal at that time of some but not all aspects of the returning commuters' issue would

still have been premature, as the test of "finality" on this matter would not have been met. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636 (1988). Whether it is deemed to have been done in the Board's December 1988 PID or in its May 5, 1989 order, disposing of some but not all the issues in the "returning commuters" challenge made by the Mass AG neither terminated the Mass AG's right to participate nor disposed of a major segment of the case. See Massachusetts Attorney General's Statement Regarding Prematureness of Accompanying Notice of Appeal (May 16, 1989).

The Applicants' Motion to Strike Notice of Appeal should be denied. The Appeal Board should find that the Notice of Appeal is premature.

Respectfully submitted

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*Allan R. Fierce*

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