

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:)	
PUBLIC SERVICE COMPANY OF)	Docket Nos.
NEW HAMPSHIRE, <u>et al.</u> ,)	50-443-OL
)	50-444-OL
(SEABROOK STATION, UNITS 1 AND 2))	(Offsite Emergency Planning Issues)

ORAL ARGUMENT

Pages: 1 through 103
 Place: Bethesda, Maryland
 Date: July 12, 1989

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ORAL ARGUMENT

Wednesday,
 July 12, 1989

U.S. Nuclear Regulatory Commission
 Fifth Floor Hearing Room
 4350 East-West Highway
 Bethesda, Maryland

The above-entitled matter came on for hearing,
 pursuant to notice, at 10:00 a.m.

BEFORE: JUDGE ALAN S. ROSENTHAL, Chairman
 Atomic Safety and Licensing Appeal Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE THOMAS S. MOORE, Member
 Atomic Safety and Licensing Appeal Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE HOWARD A. WILBER, Member
 Atomic Safety and Licensing Appeal Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

APPEARANCES:

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For the NRC Staff:

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EDWIN REIS
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United States Nuclear Regulatory Commission
Washington, D.C. 20555

For the Commonwealth of Massachusetts:

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Also Present:

DIANE CURRAN
New England Coalition on Nuclear Pollution
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Washington, D.C. 20009

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P R O C E E D I N G S

(10:00 a.m.)

JUDGE ROSENTHAL: Good morning, ladies and gentlemen. We are hearing oral argument this morning on the appeal of the Intervenor Attorney General of Massachusetts from the Licensing Board's March 8, 1989, memorandum and order in this operating license proceeding involving the Seabrock nuclear facility.

In that issuance, the Board denied the motion of that Intervenor that sought to pave the way for the litigation of the financial qualifications of the Seabrock owners to operate the facility at full power.

The March 8 memorandum and order also denied the motion of the Intervenor Seacoast Anti-Pollution League seeking the same outcome but on a different theory. SAPL has taken an appeal but is not represented at this argument. We have been recently advised by an official of that organization that it intends to submit its appeal on the brief that was filed in support of it.

The argument is governed by the terms of our June 7 order. As indicated therein, each side has been allotted 50 minutes for the presentation of argument. I might note in connection to setting that allocation, the Board had proceeded on the assumption that both the Attorney General and SAPL would be participating in the argument. While the

1 Board has not altered the time allocations, it wishes to
2 stress that it knows of no Constitutional requirement that
3 the parties use their full time.

4 The June 7 order also indicated that counsel would
5 be expected to address both the merits of the appeals and
6 the question raised by the NRC Staff, whether the March 8
7 order is interlocutory and, as such, not appealable at this
8 time. The Staff has now advised us, by July 7 letter,
9 however, that it does not intend to argue orally the
10 appealability question that it had raised in an early
11 motion.

12 I will now ask counsel to identify themselves
13 formally for the record, and I'll start with Mr. Traficonte.

14 MR. TRAFICONTE: John Traficonte, an assistant
15 attorney general with the Commonwealth of Massachusetts.

16 With me is Diane Curran, who represents NECNP, who
17 is not a party to the appeal.

18 JUDGE ROSENTHAL: Thank you, Mr. Traficonte.

19 Mr. Dignan?

20 MR. DIGNAN: Mr. Chairman, Members of the Board,
21 my name is Thomas G. Dignan, Jr. I'm a member of the firm
22 of Ropes & Gray, One International Place, Boston,
23 Massachusetts. I represent the Applicants.

24 JUDGE ROSENTHAL: Thank you, Mr. Dignan.

25 Mr. Berry?

1 MR. BERRY: Good morning, Your Honors. My name is
2 Gregory Berry. I represent the NRC Staff. With me today is
3 Edwin J. Reis, deputy assistant general counsel.

4 JUDGE ROSENTHAL: Mr. Berry, do you have with you
5 a copy of your July 7 letter? If so, I would appreciate it
6 if you would come to the rostrum and bring that letter with
7 you.

8 MR. BERRY: Yes, I do, Your Honor.

9 (Pause.)

10 JUDGE ROSENTHAL: Mr. Berry, the Board was both
11 puzzled and, quite frankly, distressed upon its receipt of
12 this letter. The letter opens up with the statement that
13 the Staff does not intend during the oral argument this
14 morning to press for a dismissal of the Intervenors' appeal
15 of the March 8 order, on the ground that an appeal is
16 premature.

17 It goes on to say that the Staff advanced this
18 position initially in order to avoid unnecessary expenditure
19 of time and resources by the parties and the Appeal Board on
20 a matter in which the Intervenor sought interlocutory
21 review.

22 Now, for openers, I would like to ask you what you
23 had in mind by "the parties"? What parties were you saving
24 or endeavoring to save resources for?

25 MR. BERRY: All the parties, Your Honor.

1 JUDGE ROSENTHAL: All the parties. Well, if
2 that's the case, let's review, if I might, with you the
3 timing of your motion.

4 The notice of appeal of SAPL was filed on March
5 20. The notice of appeal of the Massachusetts Attorney
6 General was filed on March 22. Your motion was filed on
7 April 17. On that date, when you filed that motion, the
8 SAPL brief was already on file; it had been filed on April
9 13. The Attorney General's brief, in light of the fact that
10 its notice of appeal was filed on March 22, was due to be
11 filed -- and in fact was filed -- on April 21, namely, four
12 days after your motion was filed.

13 Will you explain to me how your motion, filed four
14 weeks or so after the notices of appeal were filed, could
15 possibly have had the effect of saving the time or resources
16 of all of the parties? More specifically, how could it
17 possibly have saved any time on the part of either SAPL or
18 the Massachusetts Attorney General?

19 MR. BERRY: Your Honor, I agree with the Appeal
20 Board -- or I agree with the position that it would have
21 been better for the Staff to have filed its motion to strike
22 or dismiss the appeals even earlier than it did.

23 JUDGE ROSENTHAL: I'm not asking you whether it
24 would be better, Mr. Berry. What I'm asking you is, how can
25 you represent -- as you say you have represented in this

1 letter -- that the Staff's design was to save the resources
2 of all of the parties, when in point of fact, on the date
3 that the motion was filed, it could not conceivably have had
4 the effect of saving resources of either SAPL or the
5 Massachusetts Attorney General?

6 MR. BERRY: Your Honor, my recollection of the
7 sequence of events at that time was that the Intervenors'
8 briefs were due, I believe, on April 23. We have filed our
9 pleading a week in advance of that.

10 JUDGE ROSENTHAL: Excuse me. At the time you
11 filed the motion, the SAPL brief was already filed.

12 MR. BERRY: It turned out that that turned out to
13 be the case, Your Honor, but at the time the Staff filed the
14 motion to strike, we have not received SAPL's brief.
15 Apparently, they had crossed in the mail. We were unaware
16 that --

17 JUDGE ROSENTHAL: All right. I accept that you
18 were unaware of it.

19 Now, how did you compute the time for the filing
20 of SAPL's brief? The SAPL notice of appeal was filed on
21 March 20. Under the rules, the SAPL brief was due 30 days
22 thereafter; am I correct about that?

23 MR. BERRY: That's correct, Your Honor.

24 JUDGE ROSENTHAL: All right. What is 30 days from
25 March 20?

1 MR. BERRY: It's roughly April 20, give or
2 take --

3 JUDGE ROSENTHAL: April 19 more specifically; am I
4 correct?

5 MR. BERRY: Yes, Your Honor.

6 JUDGE ROSENTHAL: How did you think that a motion
7 filed on April 17, two days before the SAPL brief was due,
8 was going to possibly save SAPL's resources? Obviously, two
9 days before the brief was due, the brief had to have been
10 written.

11 MR. BERRY: Your Honor, the Staff won't disagree
12 that with respect to the Intervenors, SAPL and the
13 Massachusetts Attorney General, any resources sought to be
14 conserved or that would have been conserved, had the motion
15 been acted upon, would not benefit SAPL and the Attorney
16 General as much as it would, say, the Applicants or the
17 Staff. We'll concede that.

18 JUDGE ROSENTHAL: So, in fact, in your letter,
19 when you said that the design was to save the time and the
20 resources of the parties, you didn't mean that at all. You
21 meant some parties, not all parties. You meant simply the
22 Staff and the Applicants. Is that correct?

23 MR. BERRY: Yes. I certainly mean to be
24 understood as saying that the Staff would benefit more than
25 the Intervenors, that the Applicants would benefit more than

1 the Intervenors. The Intervenors would be benefited the
2 least of all the parties.

3 JUDGE ROSENTHAL: Not at all, would it? How would
4 the Intervenors be benefited at all? Their briefs would
5 have been already completed?

6 MR. BERRY: The Intervenors wouldn't have been
7 benefited at all, Your Honor.

8 JUDGE ROSENTHAL: All right. So that statement at
9 the outset that this was designed to benefit all the parties
10 it not accurate; is that true?

11 MR. BERRY: It's not as accurate --

12 JUDGE ROSENTHAL: Is it accurate at all?

13 MR. BERRY: Your Honor, as I stated before -- and
14 this is the statement that I'd like to rest -- it benefits
15 the Staff the greatest, the Applicants the next greatest,
16 and the Intervenors the least. I don't know that the brief
17 was written at the time; it turns out SAPL's brief was.

18 JUDGE ROSENTHAL: You didn't know whether the
19 brief was written, when it had to be filed two days after
20 your motion was filed? Come on now, Mr. Berry.

21 Isn't it reasonable to assume that on April 17 a
22 brief which was due on April 19 had already been written.

23 MR. BERRY: It's reasonable to assume that the
24 drafts would be done, Your Honor, that it would be in the
25 final stages, yes. That's reasonable to assume.

1 JUDGE ROSENTHAL: All right.

2 Let's move on, if we may, on your letter.

3 We're now told that the Staff does not retreat
4 from any of the legal arguments advanced in support of its
5 motion to strike the Intervenors' appeal. Now, I take it
6 from that sentence that the Staff still believes that this
7 is an impermissible interlocutory appeal. In other words,
8 it's an appeal that is barred explicitly by Section 2.730(f)
9 of the Commission's Rules of Practice.

10 Am I correct in that reading of your letter?

11 MR. BERRY: Yes. We believe that there is no
12 right to appeal --

13 JUDGE ROSENTHAL: Wait a minute. Do you believe
14 that the Commission's Rules of Practice preclude this
15 appeal?

16 MR. BERRY: Yes. We believe that there is no
17 right to an appeal here.

18 JUDGE ROSENTHAL: All right.

19 In that circumstance, how do you justify the last
20 sentence of your letter, in which you ask the Appeals Board
21 to go ahead and decide the appeal. This leaves us, frankly,
22 Mr. Berry, with the impression that the Staff is willing and
23 able to preserve the sanctity of the Commission's Rules of
24 Practice where the Staff derives some benefit from it; but
25 if here the Staff derives no benefit from it -- it's already

1 filed its brief, as it points out in the letter; no longer
2 are its resources being preserved -- then the sanctity of
3 the Rules simply disappears. You ask us in the letter,
4 notwithstanding an express provision of 2.730(f) of the
5 rules of practice, to go ahead and decide this appeal.

6 I would like to know, number 1, the theory on
7 which you advance that position, and I'd like to know, 2,
8 whether that position has the endorsement of your superiors
9 in the hearing division of the office of the general
10 counsel, and, 3, if so, then I think we might want to get
11 some kind of written representation from your superiors,
12 because it comes as considerable surprise to me that the
13 Staff would be taking the position that we should go ahead
14 and decide an appeal which the Staff continues to believe is
15 interlocutory and, therefore, is impermissible under the
16 Commission's Rules of Practice.

17 I see your superior, Mr. Reis, has stood up. Mr.
18 Reis, if you want to take over for Mr. Berry --

19 MR. REIS: No, I just want to assure the Board
20 that we have taken this position from the point of view that
21 the matter was not jurisdictional. Of course if the matter
22 was jurisdictional and completely jurisdictional, this Board
23 would have no authority.

24 We think the Board has the authority, as a matter
25 of discretion, to go off on that tack if it wishes to. We

1 don't think that it has --

2 JUDGE ROSENTHAL: Mr. Reis, where do you find in
3 2.730(f), the Rule of Practice that deals with this, the
4 granting of discretion to entertain an interlocutory appeal?
5 I recognize that the Appeal Board has the authority to grant
6 directed certification and to conduct an interlocutory
7 review under the provision of -- I think it's 2.718(i). I
8 see nothing in this letter which suggests that we ought to
9 invoke that authority, let alone which sets forth what the
10 Staff believes is the justification for a directed
11 certification review. As you well know, there are certain
12 standards that are established for that. I don't find that
13 here.

14 MR. BERRY: That is true, Your Honor.

15 JUDGE ROSENTHAL: All I find here is the Staff
16 telling us, "Well, our resources are no longer subject to
17 being preserved. We had advanced this impermissible-
18 interlocutory-appeal argument in order to preserve our
19 resources. They're no longer being preserved, so, Appeal
20 Board, just forget about the rules and go ahead and decide
21 this appeal." Why isn't that a reasonable as well as an, in
22 my view, outrageous, construction of this letter?

23 MR. REIS: Your Honor, first of all, as I said, it
24 was not jurisdictional.

25 Secondly, we feel we have a duty to preserve the

1 resources of the United States and the Nuclear Regulatory
2 Commission and raise those matters when we think it impacts
3 on Staff resources. We feel we have an absolute duty to do
4 so, not only a discretion to do so, but to preserve and --

5 JUDGE ROSENTHAL: Nobody is complaining at this
6 juncture about the fact that you raised this issue. It's
7 perfectly appropriate for you to raise it. My complaint
8 there simply was that you waited four weeks to do it, and
9 now were representing -- although Mr. Berry has retracted
10 that representation -- all of the parties' resources were in
11 mind at the time it was raised.

12 MR. REIS: I'm not saying -- if we didn't have
13 oral argument this morning we wouldn't have had an
14 expenditure of airfare by the state of Massachusetts;
15 certainly that's a substantial resource on their part, and
16 we could have put that over. We would not have had the
17 resources of the Board sitting here this morning.

18 JUDGE ROSENTHAL: Well, let's get to the question
19 as to why the Staff at this point is no longer pressing the
20 argument that this is an impermissible interlocutory appeal.
21 Isn't the Staff obligated to preserve the sanctity of these
22 Rules, and having once called our attention to its
23 belief -- which it retains -- that this appeal is barred by
24 the Rules of Practice, why isn't the Staff obligated at this
25 juncture to continue to press that point, whether or not a

1 saving or resources is still in the picture?

2 MR. BERRY: I would be happy to answer that, Your
3 Honor.

4 JUDGE ROSENTHAL: One or the other.

5 MR. REIS: I'll defer to Mr. Berry.

6 MR. BERRY: Yes, Your Honor.

7 The Staff has a number of obligations with respect
8 to licensing proceedings. One is to uphold the integrity of
9 the Commission's rules, also to see that justice is done.
10 To be practical, Your Honor, in these circumstances, there's
11 no good reason to defer a ruling. This issue has been fully
12 briefed. We're here today with counsel for the Intervenors,
13 counsel for the Applicants, who have flown down from
14 Massachusetts this morning. This is a legal issue. It's
15 not dependent on any further development of the record. The
16 matter is ripe for determination. It's not related to any
17 other issues pending before any of the boards, and there's
18 no practical, sound reasons for deferring a decision on
19 this.

20 JUDGE ROSENTHAL: Isn't the sound reason, perhaps,
21 Mr. Berry, that there is a Rule of Practice which, according
22 to the Staff, comes into play here and prevents us from
23 deciding it?

24 MR. BERRY: Yes, Your Honor.

25 JUDGE ROSENTHAL: Where does that fit into the

1 picture.

2 MR. BERRY: I'll be happy to explain that, Your
3 Honor, and I think we also should not only look at the text
4 of the Rule to which you allude, but also the underlying
5 purpose of the rule.

6 One of the purposes of a rule barring
7 interlocutory appeals is to avoid the needless expenditure
8 of time and resources. Well, those resources have been
9 expended. The Massachusetts Attorney General and SAPL have
10 devoted the resources and they've written briefs. They've
11 come down to argue it orally before you today. The
12 Applicants have done the same, and so has the Staff. One of
13 the primary reasons behind the restriction on interlocutory
14 appeals, the avoidance of spending time and resources on
15 matters that may not affect the ultimate outcome of the
16 case, no longer obtains here. Now we have a matter, a
17 matter that's fully ripe, ready to be decided, so there's no
18 reason to send these parties back to Massachusetts and tell
19 them to come back six months from now for a decision.

20 JUDGE ROSENTHAL: So you're telling me that in
21 your view, at least, 2.730(f) no longer is in the picture.
22 Is that what you're telling me, that we can simply disregard
23 that rule because of the practical considerations that
24 you've set forth and go ahead and decide this appeal? Is
25 that what you're telling me?

1 MR. BERRY: No, Your Honor. What I'm saying is
2 that what the Staff argued in its motion to strike, what it
3 reiterated in its brief, is that there is no right to appeal
4 the Licensing Board order in this case, as there would be
5 were it a final initial decision as specified in 2.762. But
6 the fact there's not a right for them to take an appeal, the
7 fact that they're not entitled to an appeal, doesn't mean
8 there's not power in this Board to entertain the matter.

9 JUDGE ROSENTHAL: Where do you find that? I want
10 you to point out to me the provision in 2.730(f) dealing
11 with interlocutory appeals that gives this Board the
12 discretionary authority to which you've just alluded.

13 MR. BERRY: We don't have to look at 2.730(f).
14 You looked at 2.785; you looked at directed certification.

15 JUDGE ROSENTHAL: Well, now, there are certain
16 standards, are there not, for the invocation of directed
17 certification?

18 MR. BERRY: Yes, Your Honor.

19 JUDGE ROSENTHAL: All right. Have these standards
20 been met here? If so, why weren't we told that by you in
21 your letter?

22 MR. BERRY: We argued in the motion to strike, and
23 we filed it in April.

24 JUDGE ROSENTHAL: I'm not interested in your
25 motion to strike.

1 MR. BERRY: We argued that those standards were
2 not met.

3 JUDGE ROSENTHAL: That's correct. You argued they
4 weren't met, and now you're telling me, in effect, they are
5 met, even though your letter says that you do not retreat
6 from any of the legal arguments advanced in support of your
7 motion to strike the Intervenors' appeal.

8 MR. BERRY: We retreat from that, Your Honor.

9 JUDGE ROSENTHAL: But you just told me you didn't.

10 I tell you, Mr. Berry, quite frankly what troubles
11 us: we don't regard adjudication in this agency as a game,
12 and the impression that we are definitely getting from this
13 letter and, I would have to say, from what you have told us
14 this morning, is that the Staff regards it as a game. The
15 Staff believes that paramount is the preservation of its
16 resources, that where the preservation of its resources is
17 involved, it is perfectly free to advance the dictates of
18 the Rules of Practice. Once, however, as in this instance,
19 there is no longer a consideration of preservation of
20 resources, then the Rules of Practice are a "no, never
21 mind." Now, that is the impression that this letter gives
22 us, and frankly, if this letter had the sanction of your
23 superiors, we're even more troubled.

24 MR. BERRY: Well, first off, Your Honor --

25 MR. REIS: It had the sanction of the complete

1 separated staff for the legal --

2 JUDGE ROSENTHAL: If that's the case, Mr. Reis,
3 I'm not going to pursue this any further, but what I want is
4 a letter of explanation from whoever is the senior official
5 of the, as you put it, separated staff. I want a letter of
6 explanation with respect to this, and I also want that
7 letter covering the matter of the sanctity which the Staff
8 attaches to the enforcement of this Commission's Rules of
9 Practice. Because what we're hearing here is a game: that
10 in this posture of the case, it's perfectly proper for the
11 Appeal Board to go ahead and decide this. Clearly, it can't
12 decide it as an interlocutory appeal, and the Staff
13 previously took the position -- which is now says it is
14 adhering to -- that the standards for directed certification
15 are not met.

16 I think, in that circumstance, we are perfectly
17 justified -- since this letter apparently, as you say, had
18 the endorsement of the highest levels of the separated staff
19 -- to call for an explanation as to precisely what the
20 highest levels of the separated staff believe to be the
21 Staff's responsibility to enforce the Rules of Practice of
22 the Commission.

23 I would like that letter within a week from today.

24 Mr. Berry, you may resume your seat.

25 I'm sorry that we have had to take this much time

1 with a preliminary matter, but we will now hear from Mr.
2 Traficonte.

3 MR. BERRY: Before I sit down, Your Honor, I'd
4 like to say that certainly the Staff does not view these
5 proceedings as a game; the Staff has not acted based on that
6 assumption. If this letter was not as artfully phrased or
7 as carefully phrase as the Appeal Board would have
8 preferred, I hope you accept my apologies on behalf of
9 myself and the senior staff.

10 Finally, I would say that, as Mr. Reis pointed
11 out, all filings made in this proceeding going out under my
12 signature are reviewed and agreed to, and represent the
13 position of the separated staff.

14 JUDGE ROSENTHAL: I accept that. That's why I
15 want to determine just precisely what the top levels of the
16 separated staff believe to be the responsibility of the
17 Staff with regard to the enforcement of the Rules of
18 Practice.

19 All right.

20 Mr. Traficonte.

21 MR. TRAFICONTE: Your Honor, should I indicate at
22 the outset how much time I'd like to reserve?

23 JUDGE ROSENTHAL: Yes. You may assume, Mr.
24 Traficonte, that we read the briefs, that we are familiar
25 with the positions of the respective parties, and therefore

1 there is no necessity to get into any kind of lengthy
2 introduction. You may get right to the heart of your
3 argument.

4 MR. TRAFICONTE: I certainly don't believe I need
5 anywhere near 50 minutes.

6 Is the Board going to entertain argument on the
7 appealability issue?

8 JUDGE ROSENTHAL: Absolutely. The fact that the
9 Staff has chosen not to present argument on that question
10 does not mean that the question, having been raised, drops
11 out of the case.

12 MR. TRAFICONTE: In those circumstances, I have
13 very little to offer directly on the matter of
14 appealability, but I do have something to say, so I should
15 reserve, perhaps, 25 minutes on the merits and the
16 appealability issue, and reserve the rest. My direct
17 presentation will be 25 minutes, and I will reserve 25
18 minutes.

19 JUDGE ROSENTHAL: Well, bear in mind, Mr.
20 Traficonte, that rebuttal means precisely that. It has to
21 be limited to a response to arguments that your adversaries
22 have put forward, so that division, an even division between
23 an opening and a rebuttal, seems to me to weigh rather
24 heavily on the reservation of time for rebuttal. It's up to
25 you, but I just want to remind you that your rebuttal must

1 be confined to responses to matters that have been raised
2 during your adversaries' presentations.

3 MR. TRAFICONTE: I have learned to take advice.
4 I'll move it to 35 minutes and then 15 minutes.

5 JUDGE ROSENTHAL: Go ahead.

6 ORAL ARGUMENT ON BEHALF OF THE INTERVENOR

7 THE COMMONWEALTH OF MASSACHUSETTS

8 MR. TRAFICONTE: Let me just address first the
9 appealability matter. I am going to be very brief on that
10 point. I should preface these remarks by admitting that
11 when I read the Staff's letter, I stopped thinking about the
12 issue terribly carefully. But I can certainly answer the
13 questions that the Board set forth in its June 7 order.

14 The question was put to the parties whether the
15 consideration of a petition to waive a rule should be deemed
16 ancillary to a proceeding, if there is an ongoing
17 proceeding, as there is in this instance. The corollary to
18 that is, assuming it is seen as ancillary, if in those
19 circumstances, when it's denied, does it have an independent
20 finality sufficient to permit what essentially would be
21 interlocutory.

22 The answer to the first question, in my view, is
23 that it should not be viewed as ancillary to an ongoing
24 proceeding for a variety of reasons. The two most important
25 are that you don't need an ongoing proceeding to file a

1 waiver of a rule, and it in many ways happens to be a
2 contingent fact in this case that there is an ongoing
3 proceeding to which there is a waiver of a rule being filed.

4 JUDGE ROSENTHAL: If it isn't ancillary, how then
5 do you conclude that it has sufficient finality to warrant
6 an appeal at this time? Clearly, it doesn't dispose of a
7 major segment of the case, does it?

8 MR. TRAFICONTE: Well, that's exactly where I was
9 going to go next. I think that it does dispose of a major
10 segment of the case, because, in the event of a denial, as
11 we have here, it excludes or continues to exclude an entire
12 set of issues from the proceeding forever. It should be
13 viewed in this light, I think, against the standard rule,
14 which is that you can't raise matters -- you can't attack a
15 regulation in a proceeding; that's why you have a waiver
16 rule. If you file a waiver and it's denied, then the matter
17 that you're seeking to raise is forever barred from the
18 proceeding, according to the rule.

19 JUDGE ROSENTHAL: Let me ask you this question.
20 Supposing that an Intervenor presents a contention on a
21 particularly significant matter and that contention is
22 rejected at the threshold, doesn't it follow in that
23 circumstance that, unless there is a reversal of that
24 ruling, a significant issue is barred from the proceeding;
25 yet it's settled law, is it not, that the denial at the

1 threshold of a particular contention, no matter how sweeping
2 that contention might be, is not appealable until the end of
3 the case.

4 MR. TRAFICONTE: It is settled law that the denial
5 of the admission of a contention is not immediately
6 appealable. That seems to be the case.

7 JUDGE ROSENTHAL: Isn't that, as a practical
8 matter, what's involved here? It's a denial of an
9 opportunity to litigate the financial qualifications of
10 these Applicants to operate the plant safely at full power.
11 I don't see how you distinguish as a practical matter what
12 happened here from the action of a Licensing Board in
13 rejecting at the threshold an important contention.

14 MR. TRAFICONTE: I think the exercise of power
15 that's involved on the part of the Licensing Board is
16 distinct. This goes to the second point I was going to
17 make.

18 It has to do with, in many ways, the odd nature of
19 this rule. The Licensing Board is not empowered to grant a
20 petition, thereby admitting these issues. It could only
21 deny or certify up to the Commission or to the Appeal Board.

22 I think I may have misspoken. I think that
23 actually the rule says it's to certify it to the Commission.

24 In my view, that means that the nature of the
25 power that's at work, or the jurisdiction of the Licensing

1 Board to deal with these issues, is distinct. It's a
2 different kind of power than it would have in the normal
3 course to admit or not admit a contention on an issue that
4 is permissible and within the scope of a proceeding. I
5 think that's a meaningful distinction.

6 Now, you've hit on a very good example. If you
7 had a contention presented to a Licensing Board among a lot
8 of other contentions, and that contention that's at issue
9 addresses only an issue that by another rule you could not
10 attack in a proceeding, the only basis for the exclusion of
11 that contention was the determination by that Licensing
12 Board not to grant a waiver. Frankly, I think, to be
13 consistent -- and I don't think it's necessarily a hobgoblin
14 in this case -- I think that particular decision may well be
15 appealable at that time, because the petitioner, or the
16 Intervenor who's filing contentions in that posture, would
17 have to take that contention and identify it as requiring a
18 waiver of a standing rule. Absent a petition in which that
19 contention could be clothed, the Licensing Board could
20 certainly -- there would be no question the Licensing Board
21 could not admit that.

22 I grant you that you could have a circumstance
23 where in a group of contentions one is not admitted because
24 the petition that would be necessarily accompanying it would
25 be denied, but in that event, I think that particular

1 decision, that one denial, would be immediately appealable
2 as a denial of petition, not as the denial of the
3 admissibility of contention.

4 JUDGE ROSENTHAL: So that basically is your
5 position on this issue.

6 MR. TRAFICONTE: That, in combination with my very
7 strong sense that there's a finality to this, because this
8 is the end of the matter. The petition's been denied, and
9 that's the end of the matter. That's the other argument I
10 would make on this point.

11 JUDGE ROSENTHAL: Why don't you move on to the
12 merits.

13 MR. TRAFICONTE: Yes.

14 The merits are in many ways deceptively simple. I
15 have to say that at different times in preparation for this
16 argument, I find this either remarkably simple or remarkably
17 difficult, and I think, as will become clear, it really
18 comes all down to who has the burden, what is a prima facie
19 case, and what is it that the prima facie case in these very
20 peculiar circumstances is exactly at full power.

21 Just generally, I want to make these points.
22 First, to understand what the prima facie case for the
23 Intervenor is, I think you have to understand, for the rule
24 that requires financial qualifications for an applicant,
25 what the purpose of that rule is. And I think it's quite

1 clear from CLI-88-10 that the purpose of that rule is to
2 provide some additional assurance that after full-power
3 licensing, there will be adequate funds for safe operation.

4 Of course, that's not the rule at issue, because
5 the requirement of the financial qualification examination
6 is -- there's an exemption from that requirement for
7 electric utilities, so we have to move on to the next
8 question, which is, "Well, what's the purpose and basis of
9 the exemption from the financial Q investigation?" I think,
10 on that point, it's basically two-fold, and, again, I think
11 it's very clear from CLI-88-10 what it is. In the first
12 instance, there's a notion, supported by rulemaking in '84,
13 that an electric utility, as defined by NRC regulation, will
14 have sufficient revenues after full power for safe operation
15 because there is, if it's an electric utility, a rate-
16 setting process in place, and the sufficient revenues will
17 be flowing to the electric utility because the existing
18 rate-setting process is in place.

19 Now, just very briefly, I will add that the rate
20 setting process that I think the Commission has in mind
21 there has two parts. I think these two parts are very
22 significant, and I think they play a major role in the issue
23 here. The two parts of a rate-setting process are that
24 somebody sets that rates and permits, in setting that rate,
25 certainly, operating expenses; let's start with that. I

1 can't think of a regulator on the face of the earth that's
2 not going to permit operating expenses.

3 Someone is setting the rate, but in addition to
4 somebody setting the rate, somebody who is setting the rate
5 is either directly or indirectly making sure that there is
6 revenue generation as a consequence of that rate. It
7 doesn't do us any good if somebody's setting a rate and the
8 power can't find a market. I think that, if you think
9 through what the basis for the exemption from the financial
10 qualifications rule was, it's clear that the Commission --
11 and I think properly -- decided that as long as there's an
12 electric utility whose rates are set, meaning rates set and
13 revenues "secured" -- and I don't mean, necessarily, that
14 there's a captured market; I just mean that there's a rate-
15 setter who is insuring that there is a revenue stream
16 adequate to provide operating expenses -- then we could go
17 ahead and exempt such an electric utility from the financial
18 qualifications rule.

19 JUDGE ROSENTHAL: Mr. Traficonte, in this case, if
20 one were to assume -- this may be a large assumption -- that
21 the anti-CWIP law kicks out, is there any reason to assume
22 in a real world that the Seabrook owners would not have
23 sufficient revenues to, in the words of the Commission,
24 remove them from pressure to take some safety shortcuts.
25 I'm talking about in the real world.

1 MR. TRAFICONTE: Well, I want to be in the real
2 world.

3 JUDGE ROSENTHAL: What I'm really getting at is,
4 does this really turn here on the operation of the anti-CWIP
5 law? Does it really hinge upon the interpretation of that
6 law, the application of that law, when it would kick out?

7 MR. TRAFICONTE: I see.

8 Let me be absolutely clear that, in our view -- we
9 base our petition on the proposition that at full power
10 anti-CWIP is of no effect.

11 JUDGE MOORE: You mean the moment this agency
12 grants a license permitting Seabrook to be operated at above
13 5 percent power with up to 100 percent power, there is no
14 interim period under the --

15 MR. TRAFICONTE: No.

16 JUDGE MOORE: There's no requirement under anti-
17 CWIP that it reach commercial status, that it be useful
18 power?

19 MR. TRAFICONTE: Your Honor, my point was slightly
20 different. There may well be; in fact, I believe there is.
21 There has to be, in fact, generation of electricity for
22 anti-CWIP to go away. That wasn't the thrust of my point.

23 My point was, we filed a petition claiming that,
24 before a full-power license issues, there should be an
25 investigation into the financial qualifications of the

1 Applicants. I indicated that that petition and the logic of
2 that petition assumes that at full-power operation, anti-
3 CWIP will have no impact on the situation.

4 We are not basing our claim on a vestigial impact
5 of anti-CWIP.

6 JUDGE ROSENTHAL: I don't really follow this.

7 Let's again assume hypothetically -- I don't know
8 what is the case -- that the day that this facility went 1
9 percent above the 5 percent, went to 6 percent, under a
10 full-power license, the anti-CWIP law disappears, and the
11 plant goes in the rate base --

12 MR. TRAFICONTE: Whose rate base? That's our
13 point, Your Honor. Our point is: whose rate base? We're
14 dealing with a bankrupt utility whose Seabrook asset is
15 sitting out there and subject to two or three financial
16 forces. It's receiving offers for all of its non-Seabrook
17 assets. The offer that's in issue in the petition was the
18 only one I'll speak to; there's been a subsequent offer.
19 The offer that is discussed in the petition is, "We'll buy
20 all your non-Seabrook assets, and we'll basically let the
21 Seabrook assets spin out and be held by an otherwise asset-
22 less company."

23 Now, the question is, as to that financial force
24 working on the Seabrook Applicants, whose rate base? Anti-
25 CWIP is a New Hampshire statute that runs to regulation of

1 rates set by the New Hampshire public utility commission.

2 JUDGE ROSENTHAL: Is it reasonable to assume that
3 if there's no legal obstacles, such as the CWIP law, in the
4 picture, that whoever has control over Seabrook from a rate
5 standpoint is not going to provide sufficient revenues to
6 enable Seabrook to operate at whatever level of power it is
7 without having to cut corners. That's the Commission's
8 assumption all along.

9 I don't think, from that standpoint, it makes any
10 difference whether it's X, Y, or Z that would be determining
11 what Seabrook's rates are. If there's no New Hampshire
12 legal impediment to providing them with rates which will
13 enable them to cover the cost of safe operation, it seems to
14 me that the Commission's rationale comes into play.

15 MR. TRAFICONTE: Well, does it? I think that's
16 the issue. I think the question you just put is precisely
17 the issue, and I'll try to explain why I don't think it does
18 come into play.

19 You would have a situation -- Your Honor mentioned
20 "whoever owns it," and of course --

21 JUDGE ROSENTHAL: Whoever sets the rates.

22 MR. TRAFICONTE: Whoever owns the Public Service
23 New Hampshire share of the Seabrook asset.

24 Somebody is going to set the rate. That would be
25 the first proposition the other side might offer. It seems

1 to me we'd like to know at the threshold, before we issue a
2 full-power operating license, who exactly would it be.
3 Right now, there's uncertainty at who the rate-payer would
4 be.

5 The second question: In light of the uncertainty
6 as to who the owner would be -- and therefore who the rate-
7 setter would be -- what kind of rates would they be? Would
8 they be wholesale rates, retail rates, and would there be a
9 market for those rates?

10 JUDGE ROSENTHAL: Do you know that in the case of
11 a non-bankrupt utility? Let's take any of the utilities
12 which get operating licenses. The Commission has said that
13 there will not be an exploration of financial qualification
14 for full-power operation. Now, the Commission has said that
15 with, I suppose, the same degree of uncertainty, isn't
16 there, as to --

17 MR. TRAFICONTE: I would stipulate to that. I
18 would agree that, probably, the Commission said that without
19 ever really asking itself, "Well, who would be setting those
20 rates, and what markets would those utilities have?"

21 JUDGE ROSENTHAL: How can you rely on those
22 considerations if the Commission apparently regarded them as
23 "no, never minds"?

24 MR. TRAFICONTE: It's true they probably regarded
25 them as "no, never minds," and they weren't dealing with

1 bankrupt utilities, Your Honor. The key to this petition is
2 the combination of two things. You have a bankrupt utility.
3 That is a special circumstance; there's no dispute about
4 that; CLI-88-10 said that. You have a bankrupt utility with
5 incentives, perhaps, to cut corners. That certainly flows
6 from the fact of its bankruptcy. Then you have the question
7 that now, subject to the bankruptcy and financial forces
8 that have impinged on it, you have uncertainty as to what is
9 going to happen to its share of the Seabrook project: where
10 is going to spin off to?

11 JUDGE WILBER: What difference does that make
12 until it happens? Right now you've got New Hampshire
13 Yankee, right? Isn't that the one we should worry about?

14 MR. TRAFICONTE: Right now you have New Hampshire
15 Yankee, and you've heard the argument from Staff and
16 Applicants that, once the license issues, anti-CWIP will go
17 away. On the other hand, inside the bankruptcy proceeding,
18 New Hampshire Yankee is desperately attempting to get the
19 bankruptcy court to assert his jurisdiction over rates and
20 set aside New Hampshire regulation in toto. Putting it on a
21 different plane: putting at issue what the relevance of the
22 anti-CWIP or the end of the anti-CWIP regime is.

23 The key to the matter is that it's very likely
24 that the Commission did not concern itself about rates,
25 level of rates, and customer base. It assumes, as long as

1 there's a rate-setter out there, we're probably going to be
2 fine.

3 The difference is, it wasn't making those
4 comfortable assumptions about a bankrupt, and now you do
5 have a bankrupt, and you have a bankrupt whose Seabrook
6 asset is, at least as it appears today, going likely to be
7 spun off and held by some separate set of owners.

8 JUDGE MOORE: The separate owners -- First, at
9 this point we have no idea whether there will be any other
10 owners. Is that correct?

11 Secondly, do we have any non-utility owners?

12 MR. TRAFICONTE: Let me answer the two questions
13 in sequence.

14 If the first question is, does somebody other than
15 PSNH presently own that Seabrook asset, the answer is no.
16 And if the prima facie case we would have to show to get the
17 petition allowed was that fact, then we lose, because that
18 hasn't happened yet. That's a fairly familiar argument,
19 that "bankruptcy hasn't happened yet; we've got to wait for
20 the bankruptcy," and then the bankruptcy occurs, and there's
21 a very serious possibility that the asset's going to be spun
22 off to an otherwise asset-less company. "Well, let's wait
23 till that happens." We can always wait, until the absolute
24 financial catastrophe is on hand and Don Trump Power Company
25 owns the 36 percent of the Seabrook asset; we can wait until

1 then and say, "Oops. Now I think you can make out financial
2 Q," but in the meantime, we would have given out the full-
3 power license. That's the first question.

4 The second question -- I'm sorry, Your Honor.
5 The second question was --?

6 JUDGE MOORE: Will it be a non-utility?

7 MR. TRAFICONTE: Non-utility.

8 We don't know. We don't know who it will be.
9 Will it be a regulated entity? I'm not sure the word
10 utility is a meaningful word; I'm not sure what the referent
11 is. But let's just ask ourselves, will it be regulated?
12 Well --

13 JUDGE MOORE: Will there be a rate-setter?

14 MR. TRAFICONTE: Will there be a rate-setter?

15 This is my point --

16 JUDGE MOORE: Whether it's a public utility
17 commission or a bankruptcy judge, it's still a rate-setter,
18 is it not?

19 MR. TRAFICONTE: Whether it's the federal
20 government through FERC, whether it's the bankruptcy judge,
21 whether it's a public utility, or some combination.

22 First, there's a question about that. I believe
23 that's uncertain.

24 JUDGE MOORE: Okay. But aren't the assumptions on
25 which the Commission does not want to look at financial

1 qualifications at full power hold true as long as there is a
2 rate-setter?

3 MR. TRAFICONTE: No. Because the assumption is --
4 this is really the heart of the matter, in terms of the
5 burden here, and who's got the burden -- the assumption is
6 that as long as it's an electric utility -- and, I might
7 add, a non-bankrupt electric utility -- we can assume there
8 will be a rate-setter, the revenues from the rates will be
9 adequate, and there will be enough for safe operation.

10 JUDGE ROSENTHAL: Why won't there be a rate-
11 setter?

12 JUDGE MOORE: Why does that change with a
13 bankrupt? Is the rate-setter going to somehow or other make
14 a decision different as far as providing revenues for safe
15 operation because it's bankrupt?

16 MR. TRAFICONTE: Not because it's bankrupt, but
17 because we don't know who the owner will be. Therefore, we
18 have no idea whether there will be a market for the power,
19 whether the rates set -- whoever sets them -- will ever end
20 up in a revenue stream.

21 JUDGE ROSENTHAL: What do you mean, "a market"? I
22 was under the impression that there's a market for electric
23 power in New England. Am I incorrect about that?

24 MR. TRAFICONTE: Well, you're certainly correct
25 that there is a market for electric power. People use

1 electricity.

2 JUDGE ROSENTHAL: What I don't follow is this:
3 You say, "We don't know who is going to own the plant."
4 That may be right, but whoever owns the plant, it seems to
5 me, at least if that owner is an electric utility, would
6 come within the scope of the Commission's regulation
7 because, presumably -- I would it's a virtually conclusive
8 presumption -- there's going to be somebody that's going to
9 be setting rates for the electricity generated by the
10 Seabrook plant, irrespective of who the owner is, and also
11 there's going to be a market for that power.

12 I don't follow why it is that you believe that
13 these uncertainties as to who might turn up to be the owner
14 comes into play here.

15 MR. TRAFICONTE: The uncertainly comes in because
16 it depends on who the owner is, whether that owner will have
17 -- Perhaps they'll have a rate-setter. Maybe we can assume
18 that. I don't think they can.

19 JUDGE ROSENTHAL: Who wouldn't have? Give me an
20 example of a potential owner of the Seabrook facility who is
21 interested, obviously, in generating and selling electricity
22 who would not have somebody setting the rates for the sale
23 of that electricity.

24 I don't understand the point you're making.

25 MR. TRAFICONTE: The point I'm making is that

1 setting the rate is half the equation. The other half of
2 the equation is having a market in which the revenues that
3 those rates are designed --

4 JUDGE MOORE: Okay. Take that half of your
5 equation.

6 MR. TRAFICONTE: Yes.

7 JUDGE MOORE: Doesn't the Commission's regulation
8 assume that it's not going to delve into the economics,
9 whether or not it's a bankrupt of a non-bankrupt power plant
10 owner?

11 MR. TRAFICONTE: Yes. I grant you that.

12 JUDGE MOORE: Okay. If that's true, what
13 difference does bankruptcy make?

14 MR. TRAFICONTE: The incentive to cut costs.
15 That's the key difference. When you have a bankrupt --
16 Let's take a couple of scenarios. Let's imagine the
17 bankrupt PSNH continues to own its presently held share.
18 It's a bankrupt. It may well have an incentive to cut
19 costs.

20 Let's take another scenario. Let's imagine it's
21 spun off to the debt-holders, the unsecured creditors in the
22 bankruptcy proceeding. Would those people have an incentive
23 to cut costs? It depends on their financial posture. They
24 may well have an incentive to cut costs. Would they be able
25 to have a rate set? Let's stipulate that they would have a

1 rate set. Would the rate be sufficient to allow us the
2 assumption that there would be no incentive to cut back on
3 safety? No. Because if the asset is spun off to the
4 unsecureds, they have an enormous stake; they have a
5 whopping amount of money that they're looking to recover.
6 There might be an incentive there.

7 JUDGE MOORE: I see your argument.

8 May we switch gears a moment --

9 MR. TRAFICONTE: Sure.

10 JUDGE MOORE: -- to the anti-CWIP law.

11 Is there a period, either short or long, in which
12 the anti-CWIP statute prohibition of placing Seabrook in the
13 rate base for New Hampshire remains in effect, even after a
14 full-power license is granted by this agency?

15 MR. TRAFICONTE: Assuming that the PSNH share of
16 Seabrook is retained by PSNH, for the sake of this question,
17 my understanding of the anti-CWIP statute -- and I'm sure
18 Mr. Dignan's going to correct me if I'm wrong -- is that
19 power is rateable when it's fed into a grid, when it reaches
20 consumers.

21 JUDGE MOORE: There's no requirement that the
22 plant reach what is often referred to as commercial service
23 level?

24 MR. TRAFICONTE: I think that is the requirement,
25 but at whatever point at which this particular plant -- and

1 I think it's a technical question -- is generating power
2 that feeds into a commercial grid, I believe the anti-CWIP
3 statute is no longer in play.

4 JUDGE MOORE: So, in your view, the language of
5 that statute that said construction project is actually
6 providing service to consumers means and had been
7 interpreted by the appropriate officials of New Hampshire to
8 mean providing power to the grid?

9 MR. TRAFICONTE: You're asking me to go too far,
10 because I'm not going to represent how this has been
11 authoritatively or otherwise interpreted by relevant
12 officials of New Hampshire. I'm telling you that it's my
13 understanding of the way the anti-CWIP statute functions
14 that when the power reaches the grid, it becomes rateable;
15 it's put into the rate base.

16 I should add, Your Honor, that, as I indicated a
17 few minutes ago -- and perhaps I was puzzling everyone --
18 our theory of why this question is legitimate at this point,
19 on full power, does not hinge on the anti-CWIP analysis.

20 JUDGE MOORE: I'm well aware of that.

21 MR. TRAFICONTE: All right.

22 JUDGE MOORE: Should there be a different
23 interpretation of the New Hampshire anti-CWIP law? Does a
24 problem arise in which there is this period in which a full-
25 power license has been granted, yet the plant is not placed

1 in the rate base, so that the financial pressures on Public
2 Service of New Hampshire go unabated?

3 MR. TRAFICONTE: It seems to me to follow
4 logically that that would be the case. It's an empirical
5 question: At what point is it rateable power, assuming that
6 the asset that we're dealing with here is retained by Public
7 Service of New Hampshire.

8 JUDGE MOORE: How does the system work? Does
9 Public Service of New Hampshire file a rate case before?
10 Have they already filed the rate case, for instance, or do
11 they wait for their full-power license? Are they entitled
12 to collect a higher rate immediately, while the rate case is
13 pending?

14 MR. TRAFICONTE: My father told me I should have
15 been a utilities lawyer, and I'm not, and I obviously should
16 have been. I can't answer those very precise questions. I
17 don't know the answer, nor was I preparing to answer them,
18 because as I indicated, we're not hanging our hat on that
19 hook, although it seems quite clear to me that there's a
20 gap, and there's an interim period of operation without any
21 opportunity to pass those costs into the rate base.

22 JUDGE ROSENTHAL: Wouldn't that make a difference
23 if that's the case, if there is that gap?

24 MR. TRAFICONTE: Well, I know SAPL believes it
25 makes a difference.

1 JUDGE ROSENTHAL: Well, do you? You have stressed
2 the fact that you're not relying upon the anti-CWIP statute.
3 I'm sort of curious as to whether, as a secondary or back-up
4 argument, you would rely on it if in fact the mere issuance
5 of the full-power license would not kick the anti-CWIP
6 statute out.

7 MR. TRAFICONTE: Certainly I would rely on it if
8 it turns out to be a lengthy period of time or any
9 significant period of time and there turned out to be
10 significant interim costs, and there's no possibility of
11 rating those costs and collecting revenues to cover them.
12 Sure.

13 Again, our view of the matter is different, I
14 think, because we see the uncertainty -- we don't think that
15 it's very likely that Public Service of New Hampshire is
16 going to own this asset. Even if they do own it, we think
17 it's very unlikely that it's going to be law of the State of
18 New Hampshire.

19 In our view, there seems to be an overemphasis on
20 the New Hampshire regulatory statutes, CWIP and anti-CWIP,
21 when we don't think that's the way it's going to --

22 JUDGE ROSENTHAL: I thought that the Commission's
23 view was that it can be presumed that whoever is the rate-
24 setter will provide sufficient revenues to enable the safe
25 operation of the plant, because it would be irresponsible

1 not to do so. I don't think they were focusing on the rate-
2 setter being this or being that or being some third party.
3 They just said, whoever it is, we assume will provide the
4 requisite revenue.

5 MR. TRAFICONTE: Yes. I believe you're right.

6 JUDGE ROSENTHAL: I still don't understand your
7 argument.

8 MR. TRAFICONTE: We're circling back on that
9 point; I think it's a crucial point.

10 The difference is, when they made those
11 comfortable assumptions -- which may be perfectly legitimate
12 assumptions when you have a health utility with a rate-
13 setter -- they were not thinking about a rate-setter setting
14 these rates for a bankrupt.

15 JUDGE ROSENTHAL: What difference does it make?

16 MR. TRAFICONTE: What difference does it make?

17 The bankrupt has an incentive -- or if it isn't a bankrupt,
18 it's the outcome of the financial debacle of the bankrupt,
19 which is the unsecured creditors committee translating its
20 debt into ownership rights to the Seabrook asset if and
21 nothing else, literally a Seabrook shell. Thirty-six
22 percent of Seabrook is owned by the --

23 JUDGE ROSENTHAL: You mean the rate-setter is not
24 in a position to assure that, when it sets rates, that the
25 revenues derived from those rates are used to operate the

1 plant safely? It can't do that? This is beyond the control
2 of the rate-setter? I wouldn't think so, but I may be
3 wrong.

4 MR. TRAFICONTE: Well, I think that's the heart of
5 the matter, frankly. I think that if the rule has any
6 purpose at all, if this rule requiring financial
7 qualifications investigation when the exemption serves no
8 purpose -- that's frankly how I see it -- it would only
9 require this investigation when the exemption serves no
10 purpose, if the rule has any meaning at all, it's because
11 the NRC has decided in its wisdom not to leave that precise
12 issue to the state rate-setters.

13 So the answer to your question, Your Honor, is
14 frankly I don't think the NRC should give a damn whether the
15 state regulators have power, authority, or otherwise to make
16 sure that the revenue stream they're providing to this
17 utility go to the right expenditures. First of all, they
18 don't have the expertise. Secondly, I'm not sure that's
19 their business. Thirdly, that's the NRC's business.

20 Again, I go back to the point, if this rule has
21 any significance. I puzzled this out. The reason why the
22 rule is here is because the Commission wants some assurance,
23 some additional level of assurance. It's made these
24 comfortable assumptions about rate-setting. It's assumed
25 that, since it's regulating over here directly on safety,

1 that all it really needs is to make sure there's an adequate
2 flow of funds and its direct safety regulation will cover
3 safe operation. So it really doesn't need very much under
4 financial qualifications review.

5 However, when you've got a bankrupt, the flag
6 should go up telling the Commission that there should be an
7 additional concern about the revenue stream.

8 JUDGE MOORE: Okay --

9 MR. TRAFICONTE: To finish the thought: that
10 direct safety regulation is not enough.

11 JUDGE MOORE: But you said that the danger is,
12 because the entity that may take over the plant may be
13 predisposed to cutting corners because of its financial
14 condition, which directly implicates safety, obviously.

15 MR. TRAFICONTE: Yes.

16 JUDGE MOORE: Why, then, if that's the concern and
17 the crux of the matter as you see it --

18 MR. TRAFICONTE: It is.

19 JUDGE MOORE: -- shouldn't one wait until that
20 entity actually is in the picture before you look at a rule
21 waiver, 1, and, 2, wouldn't such an entity in any event have
22 to undergo a license transfer and at that time is when the
23 rule waiver should be sought if this is a concern.

24 MR. TRAFICONTE: Yes. Let me deal with those two
25 questions. I think they're both very, very good questions.

1 JUDGE MOORE: Let me just add: the third point
2 is, if in fact it's a non-utility, then it must go through a
3 financial qualifications review automatically.

4 MR. TRAFICONTE: Let me deal with the second one
5 first, because the Applicants put it in their brief, and I
6 puzzled over it. Frankly, I have to say I was taken aback
7 by the argument about a transfer.

8 That seems to me to be the cart before the horse.
9 You don't give out a full-power license in the face of
10 uncertainty about who's going to end up holding it and then
11 say, "Well, if it's necessary, and if it is an outcome of
12 the bankruptcy of PSNH that that 36 percent share of this
13 license end up in the hands of a non-utility, we'll address
14 that matter when a transfer of the full-power license is
15 requested.

16 Sitting here looking forward, prior to that
17 issuance of a full-power license, we can see this might
18 happen. It's on the horizon; it may very well be the likely
19 outcome, although I'm not going to argue that there's any
20 one particular likely outcome. We can see this is down the
21 pike; it's on the horizon. You have a financial
22 qualifications rule and an exemption to that rule prior to
23 full-power licensing. The notion that you can ignore what
24 you see coming in the financial future, ignore that, give
25 out the full-power license and then solve whatever financial

1 problem arises later through a transfer proceeding, I just
2 think is putting the cart before the horse.

3 The other question, the timing question, is, I
4 think, intimately connected. Why not wait, in other words?
5 Why don't we wait until this unknown entity that's going to
6 end up holding this 36 percent share, why don't we wait to
7 see who it is, what its financial shape is, and then we can
8 decide whether we should have a financial cure.

9 JUDGE WILBER: Excuse me.

10 If you don't wait, what are you going to litigate?
11 You don't know who it is, so how are you going to --

12 MR. TRAFICONTE: It seems to us that we would want
13 to litigate what the possible options are. Is there going
14 to end up to be --

15 JUDGE WILBER: Doesn't that approach infinity?

16 MR. TRAFICONTE: Not at all.

17 JUDGE WILBER: Why not? You could have entities
18 from Japan coming in, or Trump, you mentioned.

19 MR. TRAFICONTE: I don't have any inside
20 information.

21 JUDGE WILBER: Well, no. I'm just saying I don't
22 see how in the world you can litigate anything if you don't
23 know who these new owners are. That's what you're telling
24 me --

25 MR. TRAFICONTE: I think there are cognizable

1 issues that could be identified for the litigation.

2 JUDGE WILBER: I further don't understand -- the
3 word "bankruptcy" keeps creeping in here, and it sounds to
4 me like you're getting rid of the bankrupt portion of this
5 group up here. Aren't you saying that someone is going to
6 take over that portion that is under the cloud of
7 bankruptcy?

8 MR. TRAFICONTE: Well, the cloud of bankruptcy is
9 pretty pervasive, and I think it catches all the assets of
10 PSNH. But the fact of the matter is that whoever, if it's
11 PSNH or if it's a replacement owner for the one-third share,
12 they are looking at debt, that they would have an incentive
13 to compromise safety for revenues. That is the heart of the
14 problem.

15 JUDGE MOORE: But you're assuming, also, that this
16 new entity is the operator.

17 MR. TRAFICONTE: No, I'm not, Your Honor. I think
18 CLI-88-10 answers that.

19 JUDGE MOORE: It's the coincidence that the
20 bankrupt is the managing partner that brings all this to the
21 fore. If this were another utility that was not the
22 managing partner and the operator, ultimate operator of the
23 plant, the problem would not take on the significance it
24 does, would it?

25 MR. TRAFICONTE: Well, that's an interesting

1 question. It leads me to the conclusion that, because we've
2 got a bankrupt managing partner, and we're talking about
3 that portion of the PSNH operation being spun off, we have
4 an intensified problem. Sure. The problem is worse.

5 JUDGE ROSENTHAL: You've taken your 35 minutes.

6 MR. TRAFICONTE: I'm sorry.

7 JUDGE ROSENTHAL: That's all right. You've been
8 answering questions. But I just wondered if you wanted to
9 reserve 15 minutes for rebuttal.

10 MR. TRAFICONTE: I did.

11 JUDGE ROSENTHAL: All right. This is the time to
12 close out.

13 MR. TRAFICONTE: All right.

14 I would just want to reemphasize at the conclusion
15 that the question is not just rate-setting. It's rate-
16 setting plus a revenue stream. I think that was the
17 assumption the Commission made in '84. I think that's a
18 reasonable assumption, and I think that's what the present
19 circumstances raise uncertainty or present uncertainty
20 about. It's a revenue stream issue as much as it's a rate-
21 setting issue.

22 JUDGE MOORE: Not to prolong --

23 MR. TRAFICONTE: Can't close on that? Okay.

24 JUDGE MOORE: Not to prolong the agony, but: by
25 revenue stream, are you suggesting that if the rates are set

1 higher than the market will bear, the market share will,
2 essentially, collapse, and there's no place to sell the
3 power?

4 MR. TRAFICONTE: I am suggesting that there's a
5 relationship between the bankruptcy of PSNH, the debt that
6 has been incurred to date, the high levels of investment and
7 therefore debt that whoever is owning this 36 percent share
8 is going to be looking at, the need therefore for high rates
9 to recover that, and perhaps the incapacity of the market to
10 bear those rates, and therefore uncertainty about sufficient
11 revenue stream. I grant you, they will always get operating
12 revenues. That is not in dispute. They will get operating
13 revenues. The question is, what will they do with the
14 operating revenues?

15 Thank you.

16 JUDGE ROSENTHAL: Thank you.

17 (Pause.)

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1 JUDGE ROSENTHAL: Mr. Dignan, how have you and Mr.
2 Berry divided your time?

3 MR. DIGNAN: Mr. Chairman, the time is to be
4 divided equally between us; 25 minutes at the most.

5 JUDGE ROSENTHAL: We would like to hear from you
6 briefly on the appealability question even though the Staff
7 doesn't wish to address it.

8 ORAL ARGUMENT ON BEHALF OF THE APPLICANTS

9 MR. DIGNAN: Yes, Your Honor.

10 I was specifically going to inquire of the Board
11 as to whether they wish me to have an opportunity, because I
12 admit, as the Board is aware, I stood silent on this matter.

13 JUDGE ROSENTHAL: Do you have a view?

14 MR. DIGNAN: I do have a view.

15 MR. DIGNAN: Mr. Dignan, you are one of the
16 leading authorities on the Commission's Rules of Practice.
17 We're always anxious to have your views to their
18 interpretation and application.

19 MR. DIGNAN: May the record show that that
20 statement often comes just before the Appeal Board disagrees
21 with me on the Rules of Practice.

22 But in any event, with the understanding that I
23 admit I stood silent, and therefore to the extent I am
24 taking Mr. Traficonte by surprise I assume the Board will
25 indulge him with rebuttal.

1 I agree with the Staff for a simple reason: taking
2 the Board question as it was phrased in the question to the
3 parties before the Staff withdrew on the matter, is it
4 ancillary? Is a 2.758 motion ancillary? I think clearly it
5 is. The only time you can use 2.758 is when you're in a
6 proceeding before a Licensing Board. It can't be used
7 otherwise. You cannot generate an exemption for your plant.
8 You use 50.12 or some other vehicle. So it's clearly
9 ancillary.

10 Does it have finality? No, I don't think it does.
11 And the analogy I would use is this: not only the rejection
12 of a contention, but as often happens in a Licensing Board
13 case an Intervenor will bring a contention in. The argument
14 of the Applicant or the Staff or both will be, that is
15 seeking to challenge the regulations of the Commission, that
16 contention. And the Licensing Board rules, yes, that's a
17 challenge to the regulations of the Commission and dismisses
18 the contention.

19 Clearly, in such a case there is no right of
20 appeal absent the party being dismissed entirely as a result
21 from the proceeding. So I don't see how there can be an
22 appeal of right here.

23 On the question of whether -- if the Appeal Board
24 elected to take a look at it under 2.718(i), I confess to
25 not being fully prepared to answer that.

1 When I got the Staff's letter I assume, perhaps
2 improperly, that this was out of the picture.

3 JUDGE ROSENTHAL: Not improperly, but as it turned
4 out incorrectly.

5 MR. DIGNAN: Yes.

6 I would say that it sounds to me it is difficult
7 to meet the test. It certainly is a harm that can be
8 mitigated on appeal.

9 And then the question is: does it have a pervasive
10 effect on the proceeding? The answer to that is, no, it
11 can't; the proceeding is over. It may have a pervasive
12 effect if the Appeal Board later finds a prima facie case,
13 sends it to the Commission and the Commission says, yes, we
14 grant the waiver. But that pervasive effect won't be on
15 this proceeding. The proceeding for good or for ill is over
16 at this point before the Licensing Board.

17 So I think it's very difficult at this juncture to
18 meet that test.

19 JUDGE MOORE: Mr. Dignan, the practical matter in
20 the real world: does it make sense to leave a rule waiver to
21 the end?

22 MR. DIGNAN: As a practical matter in the real
23 world in this particular case, no. And that's why I stood
24 silent. I confess I did not -- I join the Staff in one
25 respect completely in some of their -- you know, 15 years

1 litigating before this Appeal Board usually my theory is
2 when the Chairman gets into it with the Staff, it's time to
3 get under the table.

4 But at risk of breaking that rule, I agree with
5 the Staff on one thing, it is not really jurisdictional in
6 this sense. While it is true, I would argue to you that
7 2.718(i) tests as laid down by the Appeal Board are not met
8 here.

9 The fact of the matter is, 2.718(i) is a
10 discretionary rule. Now, the Appeal Board has set certain
11 standards which they will follow in exercising that
12 discretion. But the Appeal Board can take anything it wants
13 to under 2.718(i).

14 JUDGE ROSENTHAL: I didn't mean to suggest the
15 contrary.

16 MR. DIGNAN: I didn't think anybody would.

17 So in that sense there is jurisdiction to take it
18 probably. And as a practical matter I have no doubt I'm
19 going to face this argument.

20 JUDGE MOORE: I'm speaking in a different sense.

21 When a rule waiver petition is filed and denied in
22 early stages of the proceeding, and if one then postpones
23 review of it until the end of the proceeding upon appeal and
24 a license is issued. In the real world, as a practical
25 matter, is there any chance that a rule waiver would ever be

1 granted in that circumstance?

2 Haven't you essentially precluded the operation of
3 the regulation?

4 To stop a license?

5 MR. DIGNAN: Well, to stop a license, obviously,
6 you have precluded stopping a license. But I don't
7 necessarily see any bar to the rule waiver being granted.

8 Let's take it out of this case, because when
9 you're fighting your own case you intend to. But let's
10 suppose a rule waiver was sought with a certain plant on the
11 ECCS rule. Let's say the temperature at which core melt
12 should be done. And somebody said it should be a lower
13 temperature than the rule allows. It goes down and it's
14 never reviewed. It gets up and finally the Appeal Board
15 says, we think a prima facie case was made and they certify
16 that to the Commission. And the plant is running and the
17 Commission could well say, all right, if the Appeal Board
18 thinks a prima facie case was made, we look at it and we
19 think so, too, we want that matter heard.

20 JUDGE MOORE: The Commission in 88-10 said it has
21 to be safety significant. So you're going to let a plant
22 run with an unresolved safety significant issue out there?

23 MR. DIGNAN: I'm saying at that point the
24 Commission has to bite the apple. They have to either say
25 to the plant, we think it's so safety significant in this

1 particular case that we're going to shut it down until it's
2 heard or they may let it run and go on.

3 There is plenty of room for that. I mean, under
4 the two -- the number of cases where things have come up
5 afterwards there was always an examination made as to
6 whether the reversal also requires the revocation of the
7 license.

8 And I would imagine the Commission would go
9 through an analysis. It would probably go through a
10 probability type analysis. I would imagine the kind of data
11 that would come before the Commission in such a proceeding
12 would be the probability that assuming the rule is set too
13 high will there be a LOCA in so many days and it will take
14 so much to hear, and it will be resolved.

15 But I don't see any jurisprudential reason why it
16 could not be done. If you're asking me in the real world
17 would the Commission perhaps be reluctant? That you have to
18 address to the Commission.

19 JUDGE MOORE: Mr. Dignan, getting to the merits,
20 can you tell me what the Commission meant in 88-10 when they
21 said that it must address safety significant matter?

22 MR. DIGNAN: Yes.

23 I think what they meant was that -- if I heard
24 them correctly and would back that up -- is that they
25 thought a rule waiver matter, a rule waiver petition which

1 didn't bring to them what they considered safety significant
2 simply wasn't worthy of taking the time and Commission
3 resources to be resolved. I think it was that blunt.

4 JUDGE MOORE: How then does the prima facie
5 requirement of the regulation extend to the safety
6 significant add-on?

7 MR. DIGNAN: I don't know. And this is my
8 problem: I have never been able to resolve in my own mind in
9 reading CLI-88-10, was this for financial qualifications
10 only they were talking about or was it across-the-board?

11 If it was across-the-board, then it's part of the
12 prima facie showing of safety significant matter. If it was
13 only financial qualification, which doesn't make any
14 difference for purposes of our case because we're in
15 financial qualifications and it clearly applies to financial
16 qualifications.

17 JUDGE MOORE: You say that a prima facie showing,
18 even though the language is that the petition and other
19 allowed papers indicate that a waiver is necessary to
20 address on the merits of a safety significant problem
21 related to the rules sought to be waived?

22 MR. DIGNAN: Yes. I thought what they were saying
23 in that case was that in their judgment the combination of
24 factors they had before them, correct, gave -- they agreed
25 the prima facie had been made. They said, albeit for some

1 different reasons than the Appeal Board thought so. They
2 agreed had been made, but they said there was no safety
3 significance to it in this setting in light of what they
4 were doing in terms of providing for more funds.

5 I read it that simply and perhaps too simply.

6 JUDGE ROSENTHAL: If that's the case, their
7 conclusion that there was no safety significance was tied,
8 was it not, to the fact that low-power operation was what
9 was at issue?

10 MR. DIGNAN: No, I thought it was tied to the fact
11 that they had put additional -- well, I'm not saying that
12 had no part in it, but certainly, it also was tied to the
13 fact that they had put additional financial strictures on
14 the granting of license.

15 JUDGE ROSENTHAL: Well, I don't know, they set
16 forth a number of reasons. I don't know whether they're
17 collective. The safety risks of low-power testing are low.
18 The amount of money in question is relatively small. Now
19 those two reasons were plainly tied to low-power operation.

20 MR. DIGNAN: Correct; there is no question about
21 that.

22 JUDGE ROSENTHAL: Now we're dealing with full-
23 power operation.

24 MR. DIGNAN: That's correct.

25 JUDGE ROSENTHAL: And why isn't this a horse, as

1 the old saying goes, of a different color?

2 MR. DIGNAN: Because you don't get there --
3 because you don't get the combination that you had below.
4 The anti-CWIP statute doesn't supply the second half of the
5 equation.

6 JUDGE ROSENTHAL: Why not?

7 MR. DIGNAN: It's essentially conceded by the
8 Commonwealth that they aren't basing their position on the
9 anti-CWIP statute.

10 JUDGE ROSENTHAL: Well, Mr. Traficonte I think
11 said that he would use that as a backup, if he had to.

12 MR. DIGNAN: Right.

13 But I think that it ought to be understood, as I
14 go into this argument, that I am not a rate lawyer nor
15 because of the way it had been argued am I here prepared on
16 the anti-CWIP statute.

17 But if the question is: will regulatory delay take
18 place of some nature? It will. At least it's my
19 understanding that New Hampshire is not so much different
20 than my home state that a rate case will have to be filed to
21 place the plant into rate base and so forth and so on.

22 JUDGE WILBER: When does it have to be filed, on
23 the supposition that you reach a certain plateau or that you
24 have reached that plateau?

25 MR. DIGNAN: This is what I was afraid of, we

1 would get into details and I'm not prepared. My guess is
2 they will go in as early as they can. And when they can go
3 in, I frankly don't know, Judge Wilber, because I'm just not
4 that familiar with New Hampshire law.

5 The one they will not be, however, which I think
6 should be understood is, Mr. Traficonte talked about a gap.
7 There will be no gap. A rate case which goes in and is
8 allowed reaches back. You recover the funds that were
9 expended in the period before the rate case was decided, so
10 there is no gap. There is a delay.

11 JUDGE MOORE: During the interim period there is a
12 lack, if you will, of funds that subsequently will be made
13 up.

14 MR. DIGNAN: There is a regulatory delay as there
15 is in any rate case.

16 JUDGE MOORE: So there's the potential for a
17 significant shortage, if you will, or there's a potential
18 for an incentive to cut corners during this delay.

19 MR. DIGNAN: No.

20 See, there's where I really get off the track. I
21 get off the track on the incentive for two reasons.

22 First of all, the one thing that both this Board
23 and the Commission said, was that bankruptcy alone cannot
24 provide the prima facie case. And I got a feeling it was
25 deja vu.

1 You heard Mr. Traficonte argue that bankruptcy
2 alone provided the prima facie case.

3 JUDGE ROSENTHAL: Well, the Commission says that
4 bankruptcy is a special circumstance.

5 MR. DIGNAN: It is a special circumstance, but
6 they didn't go so far as to say, it made it; they had to put
7 it in combination with anti-CWIP.

8 JUDGE MOORE: They had somebody that didn't it.
9 Indeed, we did and rather they corrected us.

10 MR. DIGNAN: I don't think they corrected you on
11 that point. I really don't. And I don't think they
12 disturbed that holding one bit and I said that in the brief
13 and I still don't think they did.

14 They got there through a different route. And
15 that's why -- as I sat at my counsel table I said, I've
16 heard this one before. This is an argument that bankruptcy
17 alone should result in a prima facie case. That's what Mr.
18 Traficonte argued to you for 35 minutes here.

19 JUDGE ROSENTHAL: I'll just tell you what my
20 problem is: it seems to me that it is at least possible that
21 the point at which the anti-CWIP law bows out is of
22 significance.

23 You're quite right, Mr. Traficonte --

24 MR. DIGNAN: Oh, it bows out. There is no
25 question when it bows out. It bows out at the completion,

1 as I understand it, of the warranty run of the plant; it
2 lows out.

3 JUDGE ROSENTHAL: Where do you get that?

4 MR. DIGNAN: Because as I understand it -- and
5 again, I am very reluctant here because I didn't -- given
6 the way this thing was argued I didn't bone up on it and I'm
7 not a New Hampshire rate lawyer.

8 JUDGE ROSENTHAL: Let me put it to you this way,
9 Mr. Dignan, we're going to cure that situation because we're
10 going to ask you to file a supplemental memorandum which is
11 going to address the matter of how the anti-CWIP statute
12 operates with, if there have been some judicial decisions
13 interpreting it and referencing it.

14 Because Mr. Traficonte may be telling it right,
15 that it makes no difference one way or another. But to our
16 way of thinking, at least tentatively, there may be some
17 significance.

18 MR. DIGNAN: Well, I question whether you can make
19 the prima facie case for the Commonwealth, Mr. Chairman.

20 The prima facie case stands or falls on the record
21 that was put before you.

22 JUDGE ROSENTHAL: Wait a minute.

23 The question of when -- what we're asking you to
24 address in a supplemental memorandum is a question of law.

25 MR. DIGNAN: Yes. But it's a question of law

1 which the Commonwealth conceded.

2 And, please understand, I of course will address
3 it, Mr. Chairman.

4 JUDGE ROSENTHAL: I'm not so sure that Mr. Backus
5 conceded it. And bear in mind, we have his appeal submitted
6 on the briefs.

7 MR. DIGNAN: Well, his appeal, I don't see again,
8 how it can be in the briefs because they have withdrawn in
9 the briefs.

10 JUDGE ROSENTHAL: You can run the argument, if you
11 wish, that given the present posture of the case we cannot
12 appropriately look into that question. But you will have to
13 at least humor us from the standpoint of this supplemental
14 filing. Because I'm not a utility lawyer either. And
15 fortunately, I can call upon you to provide the utility law
16 in the area.

17 MR. DIGNAN: There is no question, though. And
18 understand, I welcome the opportunity to brief it. And I'll
19 probably have a New Hampshire lawyer brief it for you.

20 But the point is, Judge Moore's question is well
21 taken in one respect: I have no doubt there has to be some
22 regulatory delay. I mean, there is no system that does not
23 have it.

24 In Massachusetts, for example, which I am somewhat
25 familiar with, a rate case is filed and usually what then

1 happens is that the rate is suspended at that point for a
2 period of, I think it's six months. And it's in that six
3 months we resolve it before the DPU. And if, as and when
4 the rate or to the extent the rate is allowed, it then
5 relates back, as I understand it, to the prior filing.

6 So there is always regulatory delay in the rate-
7 making process; and that's true whether you're being
8 regulated by the state or you're being regulated by FERC.

9 This case is somewhat further complicated because
10 Public Service just got another rate increase.

11 JUDGE MOORE: Mr. Dignan, doesn't that fact take
12 on added significance in light of the analysis that I think
13 the Commission applied in 88-10. They seem to be saying
14 that it was a "no, never mind" for low power because: one,
15 there was no incentives to cut cost at low power.

16 And two, there was no significant safety problem
17 at low power.

18 Now, both of those assumptions in the Commission's
19 analysis would seem to disappear once you go above low
20 power. There would seem to be every incentive, if you will,
21 to cut corners and, too, there clearly are significant
22 safety issues at full power in the event of corner cut.

23 MR. DIGNAN: All right.

24 But the problem is, I don't see how you can say on
25 the record there has been a demonstration of incentive.

1 That's forgetting the Brown affidavit which is uncontested.
2 The Brown affidavit, I think, the Licensing Board properly
3 relied on. That affidavit made it clear, by not only
4 generally in the industry is there no incentive. But more
5 importantly, here you have a group running this plant on
6 which the Public Service Company of New Hampshire has only
7 one vote of five. There is simply no incentive for New
8 Hampshire Yankee to cut corners.

9 JUDGE MOORE: Your same affidavit points out that
10 only Public Service of New Hampshire determines the
11 expenditures for safety matters, doesn't it.

12 JUDGE ROSENTHAL: Also, Mr. Dignan, all three of
13 the reasons that the Commission assigned in 88-10 were in
14 the context of low power. And they were talking about, the
15 only purpose of low power was such and such; and therefore,
16 there was every incentive to do the job well and no rational
17 incentive to cut corners.

18 Now the Commission at that point, I don't think,
19 was talking about disclosures in the record. They were
20 coming forth with their own analysis. And they said, okay,
21 folks, we have special circumstances here brought about the
22 bankruptcy, et cetera, but for three reasons those special
23 circumstances do not translate themselves into a safety
24 problem. Bang, bang, bang, low power, low power, low power.

25 Now I just say to you, we are now dealing with

1 full power and it looks to me unless one can say, well, the
2 anti-CWIP law, which is one of the things that provided the
3 special circumstances is out of the picture.

4 MR. DIGNAN: It was the whole thing. There was
5 nothing else. That was the key to the Commission decision,
6 was the anti-CWIP law.

7 JUDGE ROSENTHAL: Well, that's why we're very
8 interested in knowing where the anti-CWIP law fits in now.

9 MR. DIGNAN: But whether it fits in now or I'm
10 sure I'm going to be having to tell you, it's a delay, what
11 difference does it make. Because that regulatory delay
12 operates in every utility. And it still did not bar the
13 Commission from putting the rule in. Regulatory delay
14 always operates.

15 JUDGE MOORE: But that's in the teeth, Mr. Dignan,
16 of their second reason that there is no incentive to cut
17 corners of low power even though bankrupt.

18 MR. DIGNAN: Yes, but there is no incentive to cut
19 corners on low power for anybody, is what they were saying.
20 And all I'm pointing out is the regulatory delay factor on
21 the CWIP is no different with any other utility any time.
22 You don't get things in rate base unless you've got a pro-
23 CWIP law, you don't get things in rate base until the plant
24 is finished and you bring a rate case somewhere. Unless
25 you've got a pro-CWIP law.

1 As the Commission said, they thought anti-CWIP was
2 not an ordinary thing.

3 JUDGE ROSENTHAL: Why did they stress the low
4 power aspects in this opinion?

5 MR. DIGNAN: I assume they stressed the low power
6 aspects in this opinion because the opinion was about low
7 power. And it was a way of resolving the thing. But I
8 don't think per contra you can flip and say, well, because
9 they stressed low power they must have meant at full power
10 they should be --

11 JUDGE ROSENTHAL: What I read the decision of a
12 tribunal which comes down heavily on the fact that this is
13 low power and these are the conclusions that flow from the
14 fact it's low-power and have the emphasis, I might draw the
15 inference that if you don't have low power you may, in the
16 mind of the tribunal, have a --

17 MR. DIGNAN: Mr. Chairman, you and I could read a
18 case and read it differently. And if you read the cases
19 doing two things: doing that and plus reversing you on your
20 decision that prima facie isn't made by bankruptcy, then you
21 should certify it up. Because certainly this bankruptcy --
22 that's all that has been argued to you today -- that
23 bankruptcy alone is a prima facie case and you should send
24 it up, in your judgment.

25 But if you do, you're reading that case as

1 reversing this panel on that question and I don't think it
2 did.

3 JUDGE ROSENTHAL: The Commission never reverses
4 us.

5 (Laughter)

6 MR. DIGNAN: That's what you have to do. Because
7 every argument you heard from Mr. Traficonte from this
8 podium flow from one thing: bankruptcy alone. Nothing he
9 told you came from anything but bankruptcy alone. And that
10 means, you have to read that decision as having reversed the
11 very clear statement by this panel that prima facie case was
12 not made by bankruptcy alone.

13 And that's why the first note I had here in my
14 argument was deja vu. I've heard this one before, I think.
15 And if it's successful this time around, so be it, but
16 that's it.

17 I do want to add one note that perhaps is
18 underlining a question by, I think it was Judge Wilber. The
19 other argument, if there's any argument that isn't the
20 bankruptcy alone it's the so-called "uncertainty argument."
21 You know, we don't know who is going to own 35 percent of
22 this plant. And there are two answers it seems to me in
23 that.

24 You don't know who is going to own 35 percent of
25 any plant when you give a license all through its future.

1 Now, granted there may be some more immediacy here one can
2 argue, but the fact of the matter is, legally any plant can
3 be transferred.

4 If there is one thing that is clear in the
5 regulations, as I think it's about to be demonstrated in
6 spades by my brothers over on the Shoreham side of the
7 world, is license transfers, as I understand it, are not
8 just cut and dried things. I mean, there's rights to
9 hearings. It's a license amendment. It's this; it's that.
10 And that's the time you deal with that. If it turns out
11 some non-utility somehow gets into a non-regulated business
12 of selling power out of Seabrook, and that's going to be the
13 trick of the month, but somebody does the Commission can
14 hold a financial qualifications hearing before allowing the
15 transfer; and I think that's a simple answer.

16 I'm not sure that I have much more to say in light
17 of view that it was deja vu.

18 JUDGE ROSENTHAL: All right. Your 25 minutes has
19 about expired anyway.

20 Thank you, Mr. Dignan.

21 Mr. Berry?

22 ORAL ARGUMENT ON BEHALF OF THE NRC STAFF

23 MR. BERRY: I appear before you on behalf of the
24 Staff. I appear to urge you to affirm the Licensing Board's
25 order.

1 Your Honor, there will not be much more that the
2 Staff would add to the position expressed in its brief and
3 comments made by the Applicants.

4 Now, the Licensing Board's order is clearly
5 correct, Your Honor, it applied to guidance laid down by the
6 Commission in 88-10. It's consistent with the regulations.
7 It reached the only conclusion that was proper in the
8 circumstances.

9 The Commission has stated in 88-10 that before a
10 waiver petition may be certified by a Licensing Board to the
11 Commission the Licensing Board must find that the petition
12 makes a prima facie showing. That special circumstances
13 exist which undercut the rationale of the rule sought to be
14 waived.

15 And further, find that if a hearing is needed.
16 The waiver is granted so a hearing may be held to address
17 the significant safety issue on the merits.

18 Now, it's clearly --

19 JUDGE WILBER: Mr. Berry, that significant safety,
20 the Commission was quite clear when they said there was not
21 one at five percent.

22 Can you tell me at what power level there is one?

23 MR. BERRY: With respect to the financial
24 qualification waiver petition, I don't believe that we have
25 a significant safety problem. I mean, I don't think it

1 turns on the power level. I think it turns on the
2 circumstances, the special circumstances alleged.

3 JUDGE ROSENTHAL: The Commission, Mr. Berry, has a
4 third reason for deciding that there was no safety concern,
5 was that these safety risks of low-power testing are low.

6 MR. BERRY: And the third reason for low-power.

7 JUDGE ROSENTHAL: Mr. Wilber's question is: at
8 what level of operation do the safety risks become more than
9 simply low?

10 MR. BERRY: And the answer is: I don't know, the
11 Commission didn't say. The third reason that you pointed
12 out in 88-10 was the Commission's third reason for finding
13 that low-power operation didn't present a significant safety
14 question.

15 Would the Commission have made the same statement
16 had it been six percent or seven percent or 10 percent or 50
17 percent or 80 percent, I don't know. But I do know that in
18 88-10 they found out with respect to five percent the safety
19 risks were low.

20 Mr. Dignan made the point that the Intervenors --
21 Mr. Traficonte's argument basically boils down to that
22 bankruptcy changes everything. I agree with that.
23 Primarily that's what we have heard this morning is because
24 of the bankruptcy and the uncertainty that flows from that,
25 that somehow there's a prima facie case here.

1 I think the Commission laid that notion to rest in
2 88-10. The Commission said: bankruptcy, although a special
3 circumstance is not enough to grant a waiver. The
4 Commission found in 88-10 and it stated: that bankruptcy in
5 combination with the anti-CWIP undercuts the rationale of
6 the rule. And why did it reach that, I think it's clear?

7 The anti-CWIP precluded the Applicants from
8 getting money from others, ratepayers. And the bankruptcy
9 shows that they may not have the money themselves. You put
10 those two together there was the showing the Commission
11 found that funds may not be available to operate the
12 facility safely at low power.

13 You take the anti-CWIP and you're just left with
14 the bankruptcy. One hand can't clap, Your Honor.

15 JUDGE MOORE: Well, maybe one hand can't clap, but
16 I don't think you have accurately represented what the
17 Commission said, because they indicated that having held
18 that Public Service of New Hampshire bankruptcy anti-CWIP
19 statutes and delay are a cessation of project payments by
20 minority owners, all present special circumstances not
21 considered when the 84 rule was adopted. And that these
22 circumstances at least considered together undercut the
23 rationale of the 84 rule.

24 That's significantly different, is it not, than
25 saying that they ruled out that anyone of those alone cannot

1 meet that standard?

2 MR. BERRY: Well, I would just go back and see
3 what the Commission stated.

4 JUDGE MOORE: I just read you what they stated,
5 Mr. Berry, and they stated, at least in combination.

6 MR. BERRY: Again, the answer is: no, the
7 Commission did not hold -- and I don't read the Commission's
8 order to hold that, to leave open any possibility that
9 bankruptcy standing alone would be enough. That anti-CWIP
10 standing alone would be enough. That any of the other
11 circumstances presented to the Commission in 88-10 would be
12 enough. I do not read the Commission to state that.

13 I read the Commission to state that, we think the
14 combination of these two circumstances: bankruptcy and the
15 anti-CWIP statute does undercut the rationale of the rule.

16 The Commission goes on to say that, it's less
17 clear whether the cessation of project payments undercuts
18 the logic of the rule. The record does not clearly suggest
19 the reasons for cessation of payments. But in view of the
20 discussion below, it is not critical to our decision to know
21 whether these delays or project payments undercut the logic
22 of the rule.

23 But we will assume for purposes that they do.
24 It's clear that the Commission assumes that it didn't hold
25 it, didn't rely on it. But what it did rely upon was the

1 combination of the anti-CWIP statute and the bankruptcy. I
2 think that's clear in the Commission's order and that's the
3 way the Staff reads it.

4 And applying that as the Licensing Board did to
5 the Attorney General's petition he found that the standards
6 had not been met. That although there were the special
7 circumstance to bankruptcy, but it wasn't sufficient to
8 undercut the rationale of the rule.

9 And in combination with the other circumstances
10 relied upon by the Attorney General's petition, that they
11 weren't sufficient alone or in combination, in any
12 combination to undercut the rationale of the rule.

13 JUDGE MOORE: Mr. Berry, I have a more generic
14 question. Under your reading of 88-10, is it your view that
15 the Commission is essentially taking the position that
16 whatever happens in this bankruptcy proceeding that they
17 will not and cannot look at this problem as to whether what
18 comes out of this -- whether there is going to be a
19 financial viable entity running this plant?

20 MR. BERRY: It's my view of what the Commission's
21 view is or concern is, I just take it from their order, from
22 88-10. And it's clear to me that, in that order, they were
23 deciding the matter put before them.

24 JUDGE MOORE: I have in mind the Part V under
25 additional comment where they took the Staff to task for

1 suggesting, not to worry because the Staff is going to be
2 looking after this. And if any problems crop up the Staff
3 is going to be eyeballing this and we'll take care of it.
4 And the Commission said, no, we're very sorry you can't have
5 it both ways.

6 Now, doesn't that suggest that you either got to
7 litigate it or it can't be looked at, because how else can
8 the Commission look at it?

9 MR. BERRY: Well, the Commission looked at it in
10 88-10. And the one reason they looked at it, they directed
11 the Applicants to provide the financial assurance specified
12 therein and asked the Staff to monitor it to make sure that
13 the reasonable assurance was met.

14 JUDGE MOORE: Wait a minute.

15 Did you just say that they are asking the Staff to
16 monitor this?

17 MR. BERRY: I said they did. In 88-10 when the
18 Applicant -- 88-10 itself states, that the Applicant shall
19 provide reasonable assurance that the funds in the amount of
20 72.1 million will be available; and asked the Staff to
21 report to the Commission when those arrangements --

22 JUDGE MOORE: That was for the decommissioning
23 part of the case.

24 MR. BERRY: But the point of the decommission --

25 JUDGE MOORE: Let's deal with the other part of

1 the case that dealt with financial qualification for low
2 power.

3 MR. BERRY: But the whole point of the
4 decommissioning and the requirement to set aside funds was
5 to alleviate any concern that could arise out of the alleged
6 unavailability of funds to operate a plant safely. I don't
7 think you should separate the two.

8 But beyond that in 88-10, as you put it, the
9 Commission took the Staff to task, I think what the
10 Commission was speaking to was, you know, the impression it
11 had apparently gotten that the Staff on the one hand was
12 saying that there was nothing to worry about; and therefore,
13 there is no need to inquire further. No need to entertain
14 the Intervenors' waiver petition. While on the other hand
15 it was saying, well, we're looking into the situation.
16 We'll look at it, but it shouldn't be examined in a hearing.

17 That was the position, in fact, that the Staff --
18 incidentally, the Staff was stating, there's a big, big
19 difference. There's a big difference between saying, well,
20 that issue should not be the subject of a hearing. And
21 saying that, well, it will never be looked at or nobody will
22 ever follow it or monitor it or look at it. I think that's
23 just apples and oranges. But apparently -- the Commission
24 singled the Staff out for that. I would suspect that's the
25 reason they said what they said, although I will leave it to

1 the Commission to be the final word on that.

2 But as far as what that has to do with this case,
3 Your Honor, is very little. The Commission stated the
4 circumstances of when a waiver petition should be referred
5 to it. I mean, it's clear what those standards are. And
6 it's what the Licensing Board found, and I believe correctly
7 so, the Intervenor's waiver petition don't meet those
8 standards. The Licensing Board denied the petition. That
9 denial was correct.

10 The special circumstances which undercut the
11 rationale of the rule. We had a special circumstance, we
12 didn't have undercutting of the rationale of the rule.
13 Under 2.758, under CLI-88-10 that conclusion, those
14 findings, require a denial of the petition.

15 We have not heard anything today. I have not seen
16 anything in the Intervenor's brief that alters that fact.
17 That demonstrates that the rationale of the rule was
18 undercut. The rationale of the rule the Commission held
19 was that electric utility or regulated utilities will have
20 access --

21 JUDGE MOORE: In your answer, I'm sorry, I missed
22 what I'm sure was your answer to my question.

23 But my question is simply: may the Staff look at
24 the financial qualifications of this Applicant for full-
25 power operation outside of the hearing context?

1 MR. BERRY: May we look at it? Yes. It's been
2 done so in the past.

3 JUDGE ROSENTHAL: How does it look at it?

4 Does it require the Applicants to come forth with
5 a demonstration satisfactory to the Staff that it has the
6 requisite financial qualification?

7 MR. BERRY: In the past if the Staff had questions
8 or there were concerns or questions the Staff had, the Staff
9 would request information from the Applicants and the
10 Applicants would provide the information, the Staff would
11 review it and determine what action, if any, should be taken
12 next. That's what we have done in the past.

13 JUDGE MOORE: Mr. Berry, what did the Commission
14 mean by the statement on page 601 of 28 NRC when they said:
15 "Only by obtaining a waiver of the rule," which the Staff
16 has not sought here, "may Staff assert authority to deny or
17 condition the low-power testing license because of a concern
18 about financial qualifications."

19 MR. BERRY: I think he's saying that the Staff
20 itself does not have the final authority or the authority to
21 deny a license.

22 JUDGE ROSENTHAL: The final authority?

23 Well, where does it get this information from?
24 You just told me that --

25 MR. BERRY: If you let me complete my answer, I

1 would be happy to answer the question.

2 I think that what the Commission is stating is
3 that the Staff, although it may request information from the
4 Applicants to address its concerns, if any it has, does not
5 have the authority to make the determination whether the
6 license should be issued or not on that basis, but let's go
7 to the Commission on those concerns.

8 JUDGE MOORE: If that's your answer, Mr. Berry,
9 what did they mean by the second sentence where they said:
10 "Staff cannot have it both ways. It cannot advise the
11 Commission that there are no grounds for a rule waiver and
12 at the same time conduct its informal licensing review as if
13 a waiver was, in fact, needed."

14 MR. BERRY: I read the same words, Your Honor.

15 JUDGE MOORE: Well, now we have established that
16 you and I can both read, what does it mean?

17 MR. BERRY: Again, it would appear that what the
18 Commission is saying is that it cannot conduct an informal
19 license review as if a rule waiver was, in fact, needed.

20 JUDGE MOORE: So I go back to my original
21 question, Mr. Berry, may the Staff look at the financial
22 qualifications of this Applicant in determining whether this
23 license should issue outside of the hearing context?

24 MR. BERRY: The Staff may not conduct a financial
25 qualification review. You can read the Commission's order

1 to suggest that.

2 JUDGE MOORE: So are you agreeing with me or not?

3 MR. BERRY: I'm agreeing that it says what you
4 said it says, yes.

5 JUDGE MOORE: If that's the case, then, I'm left
6 with this terribly disquieting feeling that there is no way
7 under the present regulatory scheme to make sure that this
8 entity, utility entity, Public Service of New Hampshire is,
9 in fact, financially qualified to operate this plant even
10 though they are bankrupt.

11 Are you left with that same feeling, Mr. Berry?

12 MR. BERRY: No.

13 JUDGE ROSENTHAL: Why not?

14 JUDGE MOORE: Would you be so good as to tell me
15 why?

16 MR. BERRY: Because, first off, the Commission has
17 held that the bankruptcy in itself does not satisfy the
18 waiver rules.

19 Secondly, 88-10 doesn't hold that you can't have a
20 waiver. And I suspect that if something were to happen --
21 even if you're reading of the Commission's order is correct,
22 and I'm inclined to agree, and say the Staff is completely
23 barred from looking at a financial qualification. Even if
24 that's so, I suspect that if these were the facts, if
25 circumstances were to develop sufficient to undercut the

1 rationale of the rule, you're going to have a hearing.
2 There's going to be a review of the hearing.

3 JUDGE ROSENTHAL: How do you know whether there's
4 such circumstances if you can't request information from the
5 utility?

6 I take it now your answering the question I posed
7 to you a while back differently. Now you're telling me
8 that, in fact, they cannot seek from the utility information
9 going to the matter of its financial qualifications to
10 operate the plant safely; am I right about that?

11 The Staff cannot request that information; is that
12 true?

13 MR. BERRY: According to what reading of -- that's
14 a proper reading of the --

15 JUDGE ROSENTHAL: I am asking you, you are up here
16 representing the Staff. You have read that opinion.

17 MR. BERRY: That's my answer, Your Honor.

18 JUDGE ROSENTHAL: You're not required to agree
19 with Mr. Moore's reading.

20 What I want to know is: whether or not you read
21 the Commission's decision in 88-10 as foreclosing the Staff
22 from seeking any kind of information with respect to the
23 financial qualifications of the particular utility to
24 operate the plant at full-power safely?

25 I'm asking you. You're the Staff representative.

1 If you're not in position to speak for the Staff, then you
2 can file a supplemental memorandum after you have talked to
3 your superiors. And I'm not trying to force you into taking
4 a position for the Staff if you are not able to do so at
5 this time. But you make your choice: you can tell us now or
6 you can file a memorandum addressed to that.

7 MR. BERRY: It's my understanding, Your Honor,
8 that the Staff -- the matter hasn't come up since 88-10 --
9 but the Staff has not requested any financial qualification.

10 JUDGE ROSENTHAL: I'm not asking you whether they
11 requested it; I'm asking you whether they are empowered to
12 request it, how do they read 88-10?

13 MR. BERRY: Your Honor, perhaps it will be better
14 for the Staff to file with the Appeal Board a written
15 explanation on this question.

16 JUDGE ROSENTHAL: All right. That sounds fine.

17 MR. BERRY: But in further response to Judge
18 Moore's question. The point is, one reason now these
19 matters -- they still would arise is because perhaps we
20 would have Intervenorers that would file another waiver
21 petition, alleging special facts and circumstances. If they
22 undercut the rationale of the rule you're going to have --
23 and raise a significant safety question -- you're going to
24 have an inquiry into the financial qualification of the
25 Applicant.

1 So I don't think that in the real world there is
2 much chance that a blind eye will be turned to the financial
3 circumstances of a bankrupt utility, Your Honor.

4 I see my time is up, Your Honor. I would only
5 repeat that the Licensing Board had an obligation to apply
6 the standard set down by the Commission in 88-10 and the
7 requirements of 2.758 of the Commission's regulations. The
8 Licensing Board did that. It found that the Massachusetts
9 Attorney General's petition did not make a prima facie
10 showing of special circumstances which undercut the
11 rationale of the rule sought to be waived. That petition
12 did not establish that a hearing was needed to address the
13 significant safety problem on the merits.

14 In these circumstances, the Licensing Board
15 properly could not certify that petition to the Commission.
16 And that determination was correct, the petition was denied.
17 It deserved to be denied. And that decision deserves to be
18 affirmed.

19 Thank you.

20 JUDGE ROSENTHAL: Thank you, Mr. Berry.

21 Mr. Traficonte, you have 15 minutes for rebuttal,
22 bearing in mind that it has to be rebuttal.

23 MR. TRAFICONTE: Yes, and that I'm under no
24 constitutional obligation to use it all up.

25 JUDGE ROSENTHAL: That, too.

1 REBUTTAL ARGUMENT ON BEHALF OF THE INTERVENOR

2 THE COMMONWEALTH OF MASSACHUSETTS

3 MR. TRAFICONTE: Just some brief introductory
4 points in rebuttal. For what it's worth, I will just make
5 the representation that SALP reports which the Staff has
6 prepared for the Seabrook facility, certainly within the
7 last year have a section, which I believe is labeled
8 something to the effect of financial qualifications loosely
9 termed where there is reporting in the SALP report on
10 financial qualifications or financial issues as the Staff
11 believes that that prior reporting period reveals such
12 matters.

13 I think Judge Moore's inquiry as to what the Staff
14 has been doing, I don't think there is any question that the
15 Staff, at least within the last year, has been engaged in
16 some form of inquiry as to financial qualification.

17 Second point: the SAPL issue with regard to the
18 argument that perhaps has merit, and I underappreciated that
19 merit, with regard to the timing of the anti-CWIP and the
20 regulatory rate gap that may, in fact, exist. Whether it's
21 a gap or a delay, but there still would be a period where
22 you would have full-power license and no revenues.

23 I just want to repeat, if I was unclear, that our
24 brief on this matter filed on April 21 at page two adopts
25 the arguments made by SAPL in its pleadings. If those

1 arguments are sound I would certainly grab on to those coat
2 tails.

3 JUDGE ROSENTHAL: And leaving nothing to change.

4 MR. TRAFICONTE: I certainly don't want to
5 indicate that silence is in some form of agreement with
6 Mr. Dignan that we have waived the argument.

7 My point was, and I think it was clear on the
8 record, I was stating how our petition is structured. What
9 the nature of our petition is.

10 JUDGE ROSENTHAL: How do you respond to Mr.
11 Dignan's assertion that he has this feeling of deja vu, that
12 this all comes down once again to the fact that there has
13 been a bankruptcy and that the Commission has decided
14 standing alone isn't enough?

15 MR. TRAFICONTE: That was my third point,
16 fortunately.

17 With all due respect I think the Commission in
18 CLI-88-10 reversed ALAB-895. I think this Board approached
19 the issue at that time. There was a comment in your opinion
20 where you note the visceral appeal of looking at a
21 bankruptcy as sufficient in and of itself.

22 You went on and said, although there is a visceral
23 appeal the real issue is, is there sufficient funds to
24 operate safely at low-power. You found we didn't make out
25 the prima facie showing that there was not sufficient funds,

1 ergo setting the MWEC issue aside, you didn't think there
2 was a sufficient showing.

3 The Commission, I believe, reversed -- and I grant
4 you there were combined circumstances in CLI-88-10. But I
5 also noted the phrase about "at least in combination." And
6 I think it certainly doesn't preclude the possibility that
7 bankruptcy alone is enough.

8 I think the Commission reversed on the basic logic
9 and they substituted a different question. I don't think
10 the question any longer is: are there sufficient funds? I
11 think the question is: is there a sufficient rate setting
12 process that will secure a sufficient revenue stream to
13 provide our comfortable assumption that we need not look any
14 further.

15 And that being the question, they answered that
16 question in the affirmative at low power, frankly, I think
17 based on anti-CWIP alone. They looked at low power and
18 said, there is no rate setting process at all at low power.
19 Ergo, there is the showing prima facie. They moved then to
20 the -- let's not kid ourselves, they found that the utility
21 was not financial qualified at low-power. That's a finding.
22 That's a holding, CLI-88-10.

23 They went then and said, well, does that mean
24 there should be a waiver. Financially unqualified, though
25 it is, it doesn't matter there won't be significant safety

1 issues because it's only low power.

2 And frankly, I think Mr. Dignan is dead wrong in
3 not acknowledging that it is entirely based on low power
4 considerations. That was the whole logic of the
5 determination, there was no significant safety.

6 And, in fact, when you flip and you look at the
7 full power issue all those reasons go out the window and
8 their mirror images take their place.

9 Frankly, I think when you pose the question: is
10 there a sufficient assurance of an adequate revenue stream
11 at full power, just as that question was posed at low power,
12 the answer is, no, not on the record as it stands now.

13 The reason is different, because then the reason
14 why was, anti-CWIP prevents any rate setting at low power
15 combined with a bankrupt, that's a serious matter.

16 Now it's the bankruptcy and the financial
17 implications of the bankruptcy and uncertainty surrounding
18 the rate setting and revenues that will attach to 36 percent
19 of this Seabrook project.

20 The way I'm thinking about this analytically is,
21 if you need a substitute at full power for the anti-CWIP
22 component of CLI-88-10 at low power, it is the fact of the
23 uncertainty that is present, existing now, as to the rate
24 setting and the rate revenues for this 36 percent share.

25 So I could not disagree with Mr. Dignan more when

1 he says that bankruptcy -- and maybe it is deja vu, I didn't
2 have the good fortune of being here in December of '87, but
3 if it is deja vu so be it -- I don't think it's just
4 bankruptcy, however. I think it's bankruptcy plus. Plus
5 what? Plus the very natural financial consequences of a
6 bankruptcy.

7 Serious uncertainty as to who is going to own this
8 asset.

9 JUDGE ROSENTHAL: I think that Mr. Dignan made the
10 point or maybe it was Mr. Berry or maybe it was both of
11 them, that you will always have uncertainty as to who down
12 the line is going to own and operate a plant. That
13 ownership of plants sometimes changes. And, of course, in
14 order to affect the change there must be a license amendment
15 which can be subject to a hearing, which can bring to the
16 floor any issues that may be associated with that change in
17 ownership.

18 What makes this from that standpoint any
19 different?

20 MR. TRAFICONTE: It's different because we have
21 the opportunity and the good fortune now of being able to
22 prevent the issuance of a low-power license to a bankrupt in
23 the context of uncertainty, number one.

24 Number two, what if the bankrupt who is the
25 purported transferee is bankrupt? What if the transferee in

1 the future is a bankrupt?

2 JUDGE ROSENTHAL: But there's a lot of "what ifs."

3 But the point is, as I understand Mr. Dignan, his
4 point is that you wait to see whether those "what ifs"
5 materialize and if they do, at that point you deal with
6 them.

7 We don't obtain assurance before we give an
8 operating license to the XYZ utility. That that XYZ utility
9 is going to operate that plant for the life of the license.
10 It may or may not. There may be changes. And if there are
11 changes, that's what we have a license amendment procedure
12 to deal with, is it not?

13 MR. TRAFICONTE: And if one of those changes
14 involved a transfer to a purported transferee that was a
15 bankrupt, you would inquire and you probably would not
16 permit the issuance of the transfer of the license to a
17 bankrupt. And yet, you would entertain the issuance of a
18 license to a bankrupt in the first instance.

19 JUDGE WILBER: But that would be at that time,
20 wouldn't it?

21 MR. TRAFICONTE: Excuse me?

22 JUDGE WILBER: That would be at that time?

23 MR. TRAFICONTE: Sure, at the point of transfer.
24 We are now at the point of issuance in a license and we have
25 a bankrupt.

1 JUDGE WILBER: But you don't have any transfer.

2 MR. TRAFICONTE: And we don't have any issuance
3 yet either.

4 JUDGE ROSENTHAL: Again, you come back to the fact
5 that we're dealing here with a bankrupt.

6 MR. TRAFICONTE: Yes.

7 JUDGE ROSENTHAL: And that what Mr. Dignan
8 suggests is not enough. Now maybe there's a matter of
9 interpretation of 88-10 as to what the Commission had to say
10 with respect to the significance per se of bankruptcy.

11 MR. TRAFICONTE: I don't want my time to run out
12 without making one more substantive point that is slightly
13 different, but I do want to respond to the question.

14 And I think the response is: I don't want to
15 characterize the argument as just bankruptcy. I think it's
16 bankruptcy plus the natural consequences of the bankruptcy.

17 Do I think CLI-88-10 held that that was enough?
18 No. Do I think CLI-88-10 held out the possibility that that
19 was enough? Very definitely. Do I think the logic
20 undergirding CLI-88-10 would require a finding that
21 bankruptcy plus is enough? Yes. And that's exactly how we
22 structured the petition.

23 But I do want to make this additional point. The
24 additional point has to do with the safety significance
25 aspect. This is a very important point. Mr. Dignan seems

1 to indicate that, well, even if you go all the way down that
2 road and you're at the point where you think they have made
3 the prima facie case, we've got an affidavit from our
4 operating official who indicates that we're going to play it
5 by the books, don't worry. We have no incentive to do
6 anything crazy.

7 The problem with that is two-fold. First of all,
8 that's sort of obvious and the Commission must have known
9 that when it adopted the financial Q exemption. And it
10 really stands for the proposition that there should be no
11 waiver of that rule in any circumstance because that would
12 be crazy to derate the plant. And yet, there is a waiver
13 possibility and there are circumstances when it would be
14 appropriate, so that can't be right.

15 The second argument is that that very point was
16 already rejected by the Commission in CLI-88-10. Because
17 the very argument was made to the Commission that there's no
18 incentive, that we are one of five joint owners. That we
19 couldn't, even if we were desperate for funds, we couldn't
20 cheat on safety. That same argument was made, of course, in
21 the low power context and rejected because the concern the
22 Commission has is apparently that 36 percent is a pretty
23 good healthy percentage. It's the managing agent, and
24 that's a serious matter.

25 Frankly, and I'm not trying to cast aspersions on

1 anybody, but a self-serving affidavit that says, we're going
2 to do everything by the book, is really quite irrelevant.
3 And to the extent that the Licensing Board grabbed on to
4 that affidavit and said, we think there is sufficient
5 evidence in the record that they will never cheat on safety,
6 they were basically finding that there could never be a
7 waiver of the financial qualification exception.

8 JUDGE MOORE: Well, I would agree that it would be
9 an extraordinary utility that would step forward and say,
10 I'm going to violate your rules, Commission.

11 MR. TRAFICONTE: It would be a bankrupt one and
12 one that is in bad shape.

13 JUDGE MOORE: Well, that would step forward and
14 announce publicly that they were going to do it.

15 MR. TRAFICONTE: Nobody is going to step forward,
16 Your Honor. No one is going to step forward and say, we
17 will violate your safety regulations.

18 Thank you very much.

19 (The Board confers.)

20 JUDGE ROSENTHAL: Mr. Dignan, Mr. Moore has one
21 question for you.

22 JUDGE MOORE: I recognize that you thought you
23 were through. Do you have a response to my inquiries of Mr.
24 Berry as to what the Staff can do in light of 88-10
25 concerning obtaining assurances that your client is

1 financially qualified to operate?

2 MR. DIGNAN: I have a response, but I don't think
3 it's going to be satisfactory but I will give it anyway.

4 I read the Commission's language exactly as you
5 do, Your Honor. On the other hand, I cannot believe the
6 Commission would be upset that if the Staff was seriously
7 concerned and made the inquiry they would berate them for
8 it.

9 And secondly, as a practical matter if the Staff
10 made the inquiry, my client would answer it. And I mean no
11 disrespect, long after we're through with the Judges we have
12 to deal with the Staff. And when the Staff makes a request
13 it gets answered.

14 JUDGE ROSENTHAL: That's reality; that's not
15 disrespect.

16 MR. DIGNAN: That's reality.

17 My only point is: I read that in fairness to the
18 Staff. And I can read it exactly as you did. But I also
19 read it that I thought what the Commission was upset about
20 was that they were being argued to one way and yet something
21 else was going on that was inconsistent with this argument.

22 I don't believe the Commission seriously is
23 telling the Staff: Staff, if you ask those Applicants about
24 financial qualifications, we're expecting them to send a
25 letter right back on the Ropes and Gray letterhead saying,

1 take off, guys, it's without your jurisdiction, we'll back
2 them up on it. I don't they were telling us that.

3 JUDGE MOORE: So you read it as I read it?

4 MR. DIGNAN: I read it as you read it. As a
5 practical matter, I don't think that's what the Commission
6 meant. I can't believe they meant it. I cannot believe the
7 Commission ever intends to restrict the Staff's inquiry into
8 the operations of a nuclear power plant.

9 JUDGE MOORE: But isn't it telling them that if
10 they're going to do it in this context that the Staff ought
11 to be out front asking for the rule waiver. And in this
12 instance, you ask for a rule waiver.

13 MR. DIGNAN: Maybe that's what they're telling
14 them, I don't know. I leave that between them and their
15 Staff.

16 I just cannot conceive that the Commission is ever
17 really restricting its Staff from making what the Staff
18 honestly believes is a safety inquiry to an Applicant. I
19 just can't conceive it.

20 JUDGE MOORE: But procedurally --

21 MR. DIGNAN: Procedurally, you're right.

22 The opinion writer gets "D" for his choice of
23 words.

24 JUDGE MOORE: But procedurally have not we painted
25 ourselves into a corner, that the Staff can't look unless

1 they seek a rule waiver?

2 MR. DIGNAN: No, I don't see why it has painted
3 you in a corner. Because if it literally means that I
4 imagine the Staff would ask for a rule waiver and it would
5 be granted like that.

6 In other words, if seriously what happened --
7 let's look at it practically. Suppose the Staff tomorrow
8 really got concerned about financial matters. Say something
9 happened up at the Bankruptcy Court and everybody went
10 bonkers, all right. The Staff immediately is going to send
11 a letter, I know the Staff.

12 Now, one of two things is going to happen: we're
13 going to answer it and nobody is ever going to hear anything
14 about other than we answered it, which is what would really
15 happen.

16 Well, let's suppose that the client got tough and
17 said, Dignan, write that Staff back a letter right along the
18 lines of Judge Moore and you tell them they have got no
19 right to send this. Well, I imagine the next thing Mr. Reis
20 and the boys would do is draw a nice-looking piece of paper
21 with a caption on it. Probably try to get me disbarred from
22 practicing before the Commission. But also, by the way,
23 asking for the rule waiver and it would be granted like
24 that.

25 All I'm saying, Judge, is -- and maybe this isn't

1 a good lawyer's argument -- I quite agree, a legal mind
2 would follow that language exactly as you do. And I think
3 your reasoning is absolutely right. I cannot firmly believe
4 the Commission meant that. That they really are putting the
5 Staff through that hoop if they thought there was a safety
6 question. It would be a first.

7 JUDGE ROSENTHAL: Thank you, Mr. Dignan.

8 MR. DIGNAN: I think it's ill-chosen language in
9 the opinion.

10 JUDGE MOORE: You're not suggesting, though, that
11 the Commission isn't telling the Staff that in these
12 circumstances apply for a rule waiver?

13 MR. DIGNAN: I guess in this particular case, if I
14 were -- and thank God I'm not -- if I were the Staff lawyer
15 who had to make that decision I would probably shoot a rule
16 waiver out along with a letter to my client.

17 JUDGE ROSENTHAL: Mr. Reis?

18 MR. REIS: Mr. Moore, on this question -- I know
19 Mr. Berry argued -- I just want to point out the context in
20 which this is said.

21 And further, the sentence as read in the flat
22 words makes no sense. You could never see -- the context
23 was that we were saying to the Commission, well, we'll take
24 care of it all, you don't have to be worried about it. And
25 the Commission said, no, that's no good.

1 But we always have to see whether -- there has to
2 be a preliminary inquiry even if we can do what they say we
3 can do.

4 So we have to get some information some place in
5 order to make that determination. They said, come to us if
6 you think there should be a rule waiver. Well, we have to
7 know whether we think so. And that makes sense in its flat
8 words.

9 JUDGE MOORE: Except in the second sentence they
10 ended it by saying: "And at the same time conduct its
11 informal licensing review as if a waiver was, in fact,
12 needed."

13 MR. REIS: Right. "As if a waiver was, in fact,
14 needed." But it doesn't mean that we can't see whether that
15 waiver is needed. That is, of course, part of the licensing
16 process. But we have to see whether that waiver is needed.
17 It may be that we can't do it. No, we can't condition a
18 license; they are very clear about that. You have to go to
19 the Commission and get the Commission to do that.

20 But we at least have to get some information that
21 we say to the Commission, hey, Commission, you have to look
22 at this area. We're not supposed to deal with it out of the
23 top of our heads. Some place or other, we have to start.
24 And start is the basis of information.

25 Now, maybe the threshold of information that we

1 have to get is the threshold and the bottom, the depth of
2 information we have to get is cut off in both ways or short.
3 But we have to, in some way, get information. And when you
4 go above, that indicates what they're talking about.

5 JUDGE MOORE: Mr. Reis, the Commission cites you
6 to Union of Concerned Scientists versus NRC which held, I
7 believe, that if it is an issue material to a license you
8 cannot preclude it from the hearing process.

9 MR. REIS: Right. But we first have to know
10 whether it's material to license.

11 JUDGE MOORE: If the issue of financial
12 qualification is material, it can't be precluded from the
13 hearing process. So that's the context in which --

14 MR. REIS: No, even in Union of Concerned
15 Scientists the court indicated that an issue to being
16 material has to have a certain threshold. That it is not
17 anything that somebody says that falls within the context of
18 the regulations. That there has to be a basis for it.

19 Even in setting their context in Union of
20 Concerned Scientists the court was very clear about the
21 Commission able to not expend resources on needless
22 inquiries.

23 JUDGE MOORE: Well, the context was an emergency
24 planning exercise.

25 MR. REIS: That's right.

1 JUDGE MOORE: And the Commission on the one hand
2 said, it's a "no, never mind." But the court found that,
3 point of fact, the Commission relied on that exercise in
4 determining whether ultimately to grant a license.

5 MR. REIS: Right.

6 But the court also indicated, in so many words,
7 that you could see whether proper contentions formulated on
8 the emergency planning exercise. You just can't say, the
9 emergency planning exercise was no good.

10 Here again, we're back to it: can we make a
11 preliminary inquiry to see whether there are grounds for a
12 rule waiver? Yes, we can make that preliminary inquiry
13 otherwise it doesn't make any sense whatsoever to say that
14 the sentence is that flat.

15 JUDGE ROSENTHAL: Thank you, Mr. Reis.

16 I think, in that case, we will not need a
17 supplemental memorandum from the Staff. We'll take your
18 summary as being the official Staff position. If it's
19 altered in any respect you will let us know.

20 Now, just to recapitulate, we will expect one week
21 from today a letter or memorandum under the signature of the
22 senior official of the so-called Separated Staff which is to
23 go into the question of the Staff's responsibility to
24 enforce the Rules of Practice of this Commission. I would
25 want that response to be in the context of the last three

1 sentences of the July 7 letter to the Board from the Staff.

2 The first of those three sentences is to the
3 effect that the Staff does not retreat from any of the legal
4 arguments advanced in support of its motion to strike the
5 Intervenors' appeal.

6 The second sentence was to the effect that however
7 the Staff's resources -- excuse me, the resources which the
8 Staff sought to conserve have now been expended.

9 And the third sentence was that in these
10 circumstances -- in other words, the Staff's resources
11 having been expended to public interest in the efficient and
12 expedition resolution of licensing proceeding will be served
13 where the Appeal Board to decide Intervenors' appeal on the
14 merits.

15 So I want the response to be in the context of
16 those three sentences.

17 Now, the Applicants. As indicated during Mr.
18 Dignan's argument the Appeal Board would appreciate getting
19 a supplemental memorandum from the Applicants on the matter
20 of the operation in the circumstances at hand of the anti-
21 CWIP statute.

22 What we are particularly interested in is, at what
23 point would the anti-CWIP law kick out, so to speak, were
24 the full-power license to issue. You can turn to New
25 Hampshire counsel, if you wish, but in any event we would

1 like a memorandum on that subject with citations to any New
2 Hampshire decisions interpreting the anti-CWIP law -- I
3 don't know whether there are any -- that might have some
4 bearing upon that.

5 We would like that memorandum to be served and
6 filed by Friday the 28th of July, that's two weeks from this
7 Friday.

8 Responses to the memorandum can be filed if other
9 parties so desire by the 9th of August. That would be the
10 date for filing and service.

11 I might say with respect to those memoranda, it
12 will not be necessary to utilize Express Mail or its
13 equivalent. The ordinary United States mail will suffice.

14 As I say, I'm relieving the Staff of their
15 obligation to file a memorandum on the matter of the Staff's
16 entitlement to inquire on its own and to financial
17 qualifications, although the Staff if it wishes to
18 supplement what Mr. Reis has said can do so in a memorandum
19 to be filed by one week from today.

20 If there is nothing further.

21 (The Board confers.)

22 JUDGE ROSENTHAL: Mr. Wilber has an additional
23 comment.

24 JUDGE WILBER: In relation to the anti-CWIP, when
25 it falls out, I think you mentioned that perhaps at the end

1 of the warranty run or something like that, we would like to
2 know when this point occurs in the sequence of the program
3 to reach full power. Is it at the end of the entire
4 program? Is it somewhere in the middle of it or exactly
5 where is it?

6 MR. DIGNAN: All right.

7 Could I make another inquiry in this memo, Mr.
8 Chairman?

9 JUDGE ROSENTHAL: Yes.

10 MR. DIGNAN: I may well, although I will stand
11 behind it because I will select a counsel whom I'm willing
12 to stand behind, I may well refer the CWIP question to New
13 Hampshire counsel and in essence file with you a covering
14 memo saying our response.

15 JUDGE ROSENTHAL: That's fine.

16 MR. DIGNAN: But what I wish to know is this,
17 especially in light of Judge Moore's questioning: do you
18 wish the memo to include experience of New Hampshire
19 counsel's best judgments as to time factors? Because what
20 Judge Moore and I really almost discussed was not so much
21 when it legally kicks in and out, but the regulatory delay
22 process, I understood, is to be required.

23 And we wish it to include an analysis by that
24 lawyer of how long it takes their Commission generally to
25 act and so forth.

1 JUDGE ROSENTHAL: We appreciate inclusion of that.

2 JUDGE MOORE: And what happens to the revenue
3 flow.

4 MR. DIGNAN: That is generated -- excuse me, what
5 happens to revenues not captured in that period.

6 MR. TRAFICONTE: Your Honor, I also would like to
7 make an off the record request, so that certainly doesn't
8 have to be done on the record, but of a different matter.

9 JUDGE ROSENTHAL: All right.

10 We'll close the record formally with the
11 expression of the Board's appreciation to counsel and with
12 the notation that the appeals, actually both appeals:
13 Massachusetts and the SAPL appeal which has been submitted
14 on its brief are now submitted.

15 We're off the record.

16 (Whereupon, at 12:15 p.m. the oral argument was
17 concluded.)

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CERTIFICATE

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter

of: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
(SEABROOK STATION UNITS 1 & 2)
Name:

Docket Number: 50-443-OL and 50-444-OL

Place: Bethesda, Maryland

Date: July 12, 1989

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

1s/ *Mark D. Handy*
MARK D. HANDY

(Signature typed):

Official Reporter

Heritage Reporting Corporation