UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 50-444
(Seabrook Station, Units 1 & 2)	)	

PERMITTEES' MEMORANDUM IN RESPONSE TO ALAB-548

A. Background

On May 14, 1978, this Board issued a Memorandum and Order (ALAB-548) suspending forthwith, and at least until a petition for certiorari is filed by SAPL seeking Supreme Court review of SAPL v. Costle, No. 78-1339 (1st Cir., May 2, 1979), any further consideration of the issue, now sub judice by this Board, of whether there is an alternate site for a nuclear facility anywhere in New England which would be "obviously superior" to the Seabrook site were cooling towers to be needed in conjunction with a nuclear facility at Seabrook.

It will be recalled that all parties were agreed that if "sunk costs" could be counted in the final comparison of

Seabrook with any alternative site, Seabrook would prevail on the issue at bar under the "obviously superior" test. However, pursuit of the issue even after the upholding of the "sunk costs" rule by the United States Court of Appeals for the First Circuit in NECNP v. NRC, 582 F.2d 87 (1st Cir. 1978) was necessitated by SAPL's insistence that the Court of Appeals had before it in another case (SAPL v. NRC, No. 78-1172) the question of whether to reconsider and retreat from, or overturn, its "sunk cost" ruling. As a result an evidentiary hearing was required and was held on the assumption that sunk costs could not be counted in such a comparison.

In ALAB-548, this Board provided an opportunity for any party which objected to the proposed disposition of the matter addressed therein to file a memorandum detailing the nature and basis of the objection. In addition, this Board acknowledged that there is a possibility that EPA at some later date may order closed-cycle cooling at Seabrook. ALAB-548 at 5-7.

B. Intervening Event

Since the issuance of ALAB-548, an intervening event of some significance has occurred. The Court of Appeals has issued its decision in SAPL v. NRC, No. 78-1172 (1st Cir. decided May 30, 1979).* In that decision the Court of Appeals

* A copy of this decision is being sent herewith to all board members and counsel for the parties.

did not retreat from the "sunk cost" rule, but, indeed, reaffirmed it as being an appropriate factor to include in the final comparison of the alternatives studied. See Slip Opinion at 8, 24 n.10.

C. Permittees' Request for Action

In light of the fact that the Court of Appeals has adhered to the "sunk cost" rule and in light of the fact that all parties concede that no site is obviously superior to Seabrook with cooling towers if "sunk costs" are counted, the permittees respectfully suggest that the matter is now ripe for summary disposition and are filing herewith a motion seeking that relief. In short, there is no longer any necessity for this Board to resolve any factual issues arising from the evidentiary hearing because the matter can now be summarily resolved on the basis of "sunk costs".

The permittees hereby request that the above course of action be taken in order to obviate any need for further NRC proceedings if at some later time EPA should change its ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the applicants herein, hereby certify that on June 6, 1979, I made service of the within document by mailing copies thereof, postage prepaid, first class or airmail, to:

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