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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

90 FEB -9 P3:43

Before the Commission:

Kenneth M. Carr, Chairman
Thomas M. Roberts, Commissioner
Kenneth C. Rogers, Commissioner

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	Docket Nos. 50-443-OL
)	50-444-OL
PUBLIC SERVICE COMPANY)	
OF NEW HAMPSHIRE, ET AL.)	
(Seabrook Station, Units 1 and 2))	February 8, 1990

INTERVENORS' REQUEST FOR AN OPPORTUNITY TO BRIEF
ALAB-924 IN THE EVENT THE COMMISSION DECIDES
TO REVIEW IT AND FOR A HOUSEKEEPING STAY

The Massachusetts Attorney General, the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (the "Intervenors") request that in the event the Commission decides to grant Applicants' Petition for Review of ALAB-924 the Intervenors be given an opportunity to file briefs in support of the correctness of ALAB-924. Filing this request at this time is prompted by the following representations made by the Staff and the Applicants in pleadings served on February 1, 1990 and filed with the Smith Board:

1. Commenting on the various pleadings presently pending in this proceeding before this Commission, the Staff asserted:

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Much of the parties' immediately [sic] effectiveness comments and other filings in response to the Commission's November 16, 1989 Order focused on the correctness of ALAB-924 and whether the Licensing Board's treatment of the ALAB-924 remand issues in LBP-89-32 and LBP-89-33 was appropriate.

NRC Staff's February 1 Further Response to January 11 [Smith] Board Order, at 2 (emphasis supplied).

2. Similarly, the Applicants stated:

The portions of ALAB-924 remanding four issues to the Licensing Board for further consideration are presently on appeal to the Commission. It was and remains the Applicants' position, as expressed in their Petition for Review thereof, that ALAB-924 was in error and should be reversed as to those issues. A ruling by the Commission on that petition may wholly eliminate any further need for this Board to address these matters in any way. Thus, Applicants respectfully suggest, the Licensing Board may wish to defer further action on the remanded issues until the Commission has spoken.

Applicants' Response to Licensing Board Order of January 11, 1990 at 2 (emphasis in original) (footnote stating that Intervenor "have appealed other portions" of ALAB-924 omitted). Intervenor do not want to acquiesce by silence in the Staff's and Applicants' mischaracterization of the present procedural posture of this case.

First, the Commission in its November 16 Order taking jurisdiction over Intervenor's November 13 Motion to Revoke away from the Appeal Board gave Intervenor an opportunity to file supplemental briefing based on the then-not-yet available Licensing Board "explanation" of its November 9 licensing authorization. The Intervenor in their December 1 Supplemental Motion did brief in detail the reasons why the

Licensing Board had disobeyed the mandate of ALAB-924.

However, the Intervenor did not brief and were not given the opportunity to brief the correctness of ALAB-924.^{1/} By taking jurisdiction over Intervenor's motions for mandatory relief, the Commission was stepping into the shoes of the Appeal Board to determine whether the mandate of ALAB-924 had been violated by the Smith Board.^{2/} This legal determination

^{1/} Intervenor notes that the Applicants in their December 8 Response [to the December 1 Motion] at 21 to 32 straightforwardly argue that ALAB-924 was not correctly decided as to the four remanded issues. Similarly, the Staff in its December 12 Response [to the December 1 Motion] at 13-19, 31-33 and 39-43 also directly briefed the correctness of ALAB-924. This was inappropriate and beyond the scope of the Commission's November 16 Order which only permitted the Staff and the Applicants to answer the Intervenor's December 1 supplemental pleading. That pleading, for the reasons set out in the text above, did not in any way argue in support of the correctness of ALAB-924. Thus, those portions of the responses filed by the Staff and Applicants that argued for the reversal of ALAB-924 were not in answer to the December 1 Motion and were not authorized pleadings. In any event, the Commission is aware the Intervenor was expressly foreclosed by the November 16 Order at 3 from filing a reply to the Staff's and Applicants' answers. See NRC Staff's January 30 Response to Intervenor's Motion for Leave to File Supplemental Brief at 2 (arguing that Intervenor's January 16 Motion to Supplement the December 1 Motion should be denied based on the November 16 Order). Moreover, Intervenor was entitled to assume on December 1 that, in the event Commission review of ALAB-924 was granted, they would be given an equal opportunity to brief the issues.

^{2/} Intervenor earlier had had doubts about the posture in which the Commission would entertain their mandamus petitions. See Intervenor's November 17 Motion for Reconsideration of Commission's November 16 Order at 9-13; Intervenor's December 1 Motion at 6-11; and Emergency Petition for Mandatory Relief filed December 22, 1989 (D.C. Cir. Docket No. 89-1770) (denied January 3, 1990). The Commission has stated expressly to the Court of Appeals that it will address the Intervenor's mandamus motions on the merits. See Petitioners' [Intervenor's]

(footnote continued)

has absolutely nothing whatsoever to do with the legal merits or correctness of ALAB-924! Instead the issue is whether the letter and spirit of ALAB-924's mandate was disobeyed. Thus, Intervenor properly presented no argument in support of ALAB-924.^{3/}

Second, it is simply inaccurate to assert that ALAB-924 is presently "pending on appeal" to this Commission. As the Commission well knows, it has not granted any of the pending petitions for review of ALAB-924. Indeed, Intervenor's present request for an opportunity to file briefs on the correctness of ALAB-924 is predicated on 10 CFR §2.786(b)(6) which contemplates that only upon the granting of a petition for review will briefs and argument be entertained.

(footnote continued)

January 22, 1990 Response to Respondents' Motion to Supplement Respondents' Opposition to Motion for Expedited Review at 2-4, noting Commission's representations in its January 19 Supplement based on Chairman Carr's January 18 public statements.

^{3/} Had the mandamus motions remained before the Appeal Board it is obvious that Intervenor would not have needed to argue the correctness of ALAB-924 to that Board. In the same vein, the Staff and Applicants' arguments that ALAB-924 was wrongly decided would have been treated by the Appeal Board as either: 1) untimely petitions for reconsideration of ALAB-924 (see 10 CFR §2.771(a)), or 2) arguments on appeal of ALAB-924 appropriately put before the Commission if and when the Commission grants a petition for review of that decision. The fact that the Commission instead of the Appeal Board decided to rule on the mandamus motions does not change the legal issues presented by and the scope of appropriate legal argument relevant to those motions.

Although at this time Intervenor's make this request for an opportunity to file briefs in support of ALAB-924 in the event Applicants' November 12, 1989 Petition for Review is granted, they want to make very clear that at present the Commission's authority to proceed with further merits review in the Seabrook case is limited by the present jurisdiction of the Court of Appeals over the NRC's November 9 "final agency action." Indeed, this request should not be understood as an accession by Intervenor's in the present posture of this case to the Commission's further merits review of the correctness of ALAB-924.

As Intervenor's made clear in their January 22 Response to Respondents' Motion to Supplement Respondents' Opposition to Motion for Expedited Review, based on representations made by the Commission to the Court of Appeals, they have acceded to further merits disposition by the Commission only on issues encompassed by their December 22 Emergency Petition for Mandatory Relief. Thus, the Commission (standing in the shoes of the Appeal Board) may proceed to decide the merits of Intervenor's mandamus petitions and the question certified by ALAB-922. The Commission is not free, however, to take any other appellate steps which would interfere with the merits of Intervenor's appeal of the November 9 action before the Court of Appeals. Commission decision on the mandamus petitions will either moot Intervenor's court case (if they prevail) or permit them to return to the Court in the mandamus posture with the

legal merits of their mandamus claims unaffected. On the other hand, review and reversal by the Commission of ALAB-924's remand to the Licensing Board obviously affects the merits of Intervenor's court case. For this reason the Commission is not presently free to proceed with such merits review.^{4/}

So that there can be no mistake whatever concerning the Intervenor's present position on Commission review of ALAB-924 in light of this present request for a briefing opportunity, Intervenor set out the four possible courses of action that the Commission may take in this regard and their planned response to each:

4/ The position of the Commission vis-a-vis the November 9 "final agency action" is essentially no different than the position of the Licensing Board. See Intervenor's [Mass AG and NECNP] February 1 Response to [Smith] Board Order of January 11, 1990 at 3-5 (noting that Board is not now free to hold post facto hearings, unlawfully denied earlier, thereby potentially moot Intervenor's claims of error in case now before Court of Appeals). Similarly, the Commission is not now free to reverse ALAB-924, thereby "fix" the Smith Board's unlawful action and potentially moot Intervenor's mandamus petition. Just as the Licensing Board can not fix its November 9 action with new facts, the Commission can not repair the problem with new law. Even were the Commission to grant an administrative stay and then argue to the Court of Appeals that Court review be deferred on the merits because the Commission intends to complete further intra-agency merits review before lifting the immediate effectiveness stay, there would be no reason for further delay in deciding Intervenor's mandamus petitions. The Smith Board's action on November 9, 1989 will always be a legal nullity if it clearly violated ALAB-924, which it obviously did, even if at some later time ALAB-924 is itself reversed.

1. The Commission can grant the Intervenor's pending mandamus motions and revoke the license thereby terminating the jurisdiction of the Court of Appeals. As a consequence, the Commission would then be free to grant any pending Petitions for Review of ALAB-924. Intervenor's present request for an opportunity to file briefs is premised on this Commission course of action.

2. The Commission may deny Intervenor's pending mandamus motions without reversing or otherwise affecting the correctness of ALAB-924.

3. Before ruling on the mandamus motions, the Commission could issue an order granting Applicants' now pending Petition for Review of ALAB-924 and, in accordance with regulations and Commission practice, issue a briefing schedule. In response, the Intervenor would seek to enjoin such further merits review on the grounds that such action will affect the merits of Intervenor's pending case before the Court of Appeals.

4. At the same time and in the same order, the Commission could grant the Applicants' Petition for Review, reverse ALAB-924 on the merits and then deny Intervenor's mandamus motions as moot. In response, the Intervenor would renew their mandamus remedy in the Court of Appeals on the grounds that:

a. the Commission's further merits review of ALAB-924 should be disregarded as beyond its jurisdiction and as simply a post facto "fix" of the Smith Board's action by which the Commission tacitly acknowledges the merits of Intervenors' mandamus motions; and

b. the Commission denied Intervenors an opportunity to be heard on appeal of ALAB-924.

REQUEST FOR SHORT HOUSEKEEPING STAY

In light of the circumstances of this case, including:

a. the procedural and substantive complexity of the issues;

b. the pendency of Intervenors' merits case before the Court of Appeals;

c. the public interest in a full and fair opportunity for Intervenors to obtain emergency relief in some form from the Court of Appeals;

d. the absence of any harm to any party in a further very short delay in operations in light of the extent of delay to date due to emergency planning issues; and

e. the technical and financial concerns raised if operations were to begin in the absence of a Commission stay, and then within a short period of time the Court were to grant its own stay;

the Intervenor request that in the event the Commission decides to lift the immediate effectiveness stay that a further housekeeping stay of 30 days be granted in which Intervenor may seek emergency relief including mandamus from the Court of Appeals.

Respectfully submitted,

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Dated: February 8, 1990

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PUBLIC SERVICE COMPANY)
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(Seabrook Station, Units 1 and 2))

Docket Nos. 50-443-OL
50-444-OL
(Emergency Planning Issues)

February 8, 1990

CERTIFICATE OF SERVICE

I, John Traficante, hereby certify that on February 8, 1990, I made service of the within "INTERVENORS' REQUEST FOR AN OPPORTUNITY TO BRIEF ALAB-924 IN THE EVENT THE COMMISSION DECIDES TO REVIEW IT AND FOR A HOUSEKEEPING STAY" by Federal Express as indicated by [*] and by first class mail to the following parties:

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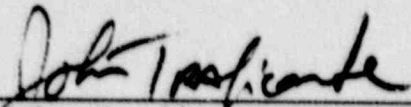
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