

Filed: June 8, 1983

DOCKETED
USNRC

'83 JUN 13 A10:36

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.
(Seabrook Station, Units 1 & 2)

Docket Nos. 50-443
50-444

APPLICANTS' RESPONSE TO SEACOAST
ANTI-POLLUTION LEAGUE APPEAL
OF DISMISSAL OF CLASS 9
ACCIDENT CONTENTION OR, IN
THE ALTERNATIVE, REQUEST FOR
CERTIFICATION PURSUANT TO
10 CFR § 2.718(i)

On May 11, 1983, the Atomic Safety and Licensing Board granted Summary Disposition of a contention raised by the intervenor Seacoast Anti-Pollution League (SAPL) known as "SAPL Supp. 3." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-___, 17 NRC ____ (May 11, 1983), Slip Op. at 30-35. The Board acted on cross-motions for Summary

DS03

Disposition, SAPL being clear that no genuine issue of material fact was presented until it lost. SAPL now seeks appellate review of this ruling as of right or, if that is denied, by way of directed certification.

SAPL HAS NO APPEAL AS
OF RIGHT

SAPL acknowledges that the grant of summary disposition did not result in SAPL's dismissal from the proceeding as a party. SAPL nevertheless urges that it is entitled to an appeal as of right because SAPL Supp. 3 was "the only contention in which SAPL is the sponsoring party." SAPL Appeal at 2. However, SAPL "joined" and adopted another contention (of New Hampshire) and thus is still a party; SAPL has evidenced no interest in dismissing that other contention. This being the case, no direct appeal is available:

"The test of 'finality' for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a majority segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory."

Toledo Edison Co. (Davis-Besse Nuclear Power Station)

ALAB-300, 2 NRC 752, 758 (1975) (emphasis added).

Quoted with approval, Louisiana Power and Light Co.

(Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC ____, CCH Nuclear L. Rep. ¶ 30,727 at p. 30,535 (Sept. 7, 1982).

Thus, the appeal should be dismissed.

DIRECTED CERTIFICATION SHOULD
BE DENIED

In the alternative, SAPL seeks directed certification. It argues that it has met the second part of the usual test applied to petition for such relief i.e., that the ruling complaint of "[will affect] the basic structure of the proceeding in a perverse or unusual manner." Public Service Compnay of Indiana (Marble Hill Nuclear Generating Staion, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). SAPL's entire argument in this regard is:

"SAPL submits that the issue of compliance with the Commission's IPS on accident considerations is such an issue, and that its elimination from this proceeding will effect the proceeding in a 'pervasive or unusual manner.' The issue of accident considerations is central, not only to the determination of the balancing of risk and benefits, but also to the evaluation of the adequacy of emergency planning, and to the determination of whether or not the operating license, if granted, should provide for mitigating features. There is also no issue more central to the public concerns raised by the proposed license. If the Board's ruling is upheld, there will be no public hearing on this central issue."

This argument, stripped to its essentials, is that an error of law without more has been committed by the Licensing Board. In such circumstances the words of the Appeal Board in Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981) are dispositive:

"[I]t has not been satisfactorily explained why appellate scrutiny of the ruling cannot abide the event of the initial decision and (if dissatisfied with the result reached in that decision [Intervenor's] appeal from it. To be sure, if the ruling were found erroneous on such an appeal, the consequence might well be a vacation of the initial decision and a remand to the Board below. But the same possibility exists with respect to all interlocutory determinations made by licensing boards on matters which have a potential bearing upon the outcome of the proceeding. If, standing alone, that consideration were enough to justify interlocutory review, it would perforce follow that virtually every significant licensing board ruling during the course of a proceeding would be a fit candidate for immediate appellate examination. It is scarcely necessary to expound at any length upon why a drastic alteration of existing practice to accommodate that thesis would be intolerable - as well as in derogation of the Commission's explicit policy disfavoring interlocutory review. 10 CFR 2.730(f)"

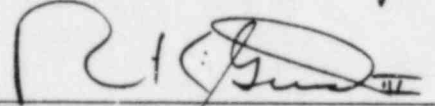
Directed certification should be denied.

CONCLUSION

The appeal should be dismissed; directed
certification should be denied.

Respectfully submitted,

Thomas G. Dignan, Jr.



Thomas G. Dignan, Jr.

R. K. Gad III

ROPES & GRAY

225 Franklin Street

Boston, MA 02110

(617) 423-6100

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on June 8, 1983, I made service of the within Applicants' Response to Seacoast Anti-Pollution League Appeal of Dismissal of Class 9 Accident Contention or, in the Alternative, Request for Certification Pursuant to 10 CFR § 2.718(i) by mailing copies thereof, postage prepaid, to:

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Gary J. Edles, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Reginald L Gotchy
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission

Washington, D.C. 20555
Diana P. Randall
70 Collins Street
Seabrook, NH 03874

Helen Hoyt, Chairperson
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

William S. Jordan, III, Esquire
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, DC 20006

Dr. Jerry Harbour
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Philip Ahrens, Esquire
Assistant Attorney General
Department of the Attorney
General
Augusta, ME 04333

David L. Lewis
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Rm. E/W-439
Washington, DC 20555

Mr. John B. Tanzer
Designated Representative of
the Town of Hampton
5 Morningside Drive
Hampton, NH 03842

Roberta C. Pevear
Designated Representative of
the Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

Dana Bisbee, Esquire
Assistant Attorney General
Office of the Attorney General
208 State House Annex
Concord, NH 03301

Roy P. Lessy, Jr., Esquire
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Robert A. Backus, Esquire
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

Anne Verge, Chairperson
Board of Selectmen
Town Hall
South Hampton, NH

Jo Ann Shotwell, Esquire
Assistant Attorney General
Environmental Protection Bureau
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

Ms. Olive L. Tash
Designated Representative of
the Town of Brentwood
R.F.D. 1, Dalton Road
Brentwood, NH 03833

Patrick J. McKeon
Selectmen's Office
10 Central Road
Rye, NH 03870

Mrs. Sandra Gavutis
Designated Representative of
the Town of Kensington
RFD 1
East Kingston, NH 03827

Ruthanne G. Miller, Esquire
Law Clerk to the Board
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington D.C. 20555

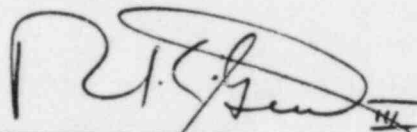
Mr. Maynard B. Pearson
40 Monroe Street
Amesbury, MA 01913

Donald E. Chick
Town Manager
Town of Exeter
10 Front Street
Exeter, NH 03833

Calvin A. Canney
City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801

Mr. Angie Machiros
Chairman of the
Board of Selectmen
Town of Newbury
Newbury, MA 01950

Richard E. Sullivan, Mayor
City Hall
Newburyport, MA 01950

A handwritten signature in black ink, appearing to read "R. K. Gad III", written over a horizontal line.

Robert K. Gad III