

Filed: October 26, 1982

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
before the  
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
PUBLIC SERVICE COMPANY OF NEW  
HAMPSHIRE, et al.  
(Seabrook Station, Units 1 & 2)

Docket Nos. 50-443 OL  
50-444 OL

APPLICANTS' RESPONSE TO  
"NECNP OBJECTIONS TO PREHEARING CONFERENCE  
MEMORANDUM AND ORDER AND MOTION TO  
CERTIFY OBJECTIONS TO THE APPEAL BOARD"

INTRODUCTION

Pursuant to the Board's Order of October 1, 1982,  
the Applicants hereby respond to "NECNP Objections to  
Prehearing Conference Memorandum and Order and Motion  
to Certify Objections to the Appeal Board" ("NECNP  
Objections"). See 10 CFR § 2.751a(d).

The function of a pleading such as NECNP Objections is that of a motion for reconsideration or petition for rehearing. As such its obligation is to point out particular points of law or fact which in the opinion of the moving party the tribunal has "overlooked or misapprehended." See Fed. R. App. P. 40(a). The motion should point to some specific point of fact that the decisionmaker supposedly did not take into account when first rendering its decision.

On the other hand, a motion for reconsideration does not properly lie simply to reargue or reassert propositions that the tribunal has already considered on their merits and rejected. Neither does such a motion authorize the litigant to assert new arguments not previously advanced, in a desperate search for error. In short, the motion for reconsideration is not the litigation equivalent of a "do over." No tribunal is obligated to consider again matters that it has already once fully determined, simply because the party who did not prevail is unsatisfied with either the result or the tribunal's articulation of the result.

For the most part, NECNP Objections are simply reargument of matters already considered. Nevertheless

we proceed, after addressing certain general points, to each of the specific objections raised.

#### GENERAL PROPOSITIONS

1. The Function of Licensing Boards in Operating License Proceedings. Running throughout NECNP Objections is NECNP's misapprehension concerning the role of Licensing Boards in operating license adjudications. Contrary to NECNP's apparent belief and repeated implicit assertion, the primary responsibility for reviewing an operating license application and for determining whether the proposal complies with applicable regulatory requirements and portends the requisite assurances regarding the public safety and national security lies with the NRC Staff.<sup>1</sup> The Staff reviews the entire application, all of the supporting information, and every jot, tittle and detail of the proposed use. Applying its technical expertise as well as its application-auditing resources, the Staff reaches a judgment, or, more accurately, a myriad of specific judgments which together form the basis for a

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<sup>1</sup>See 10 C.F.R. § 2.760a.

conclusion that the application should be granted, denied, or granted with conditions. The Licensing Board is neither permitted nor required -- nor, frankly, equipped in terms of manpower, resources or time -- to duplicate this effort.<sup>2</sup>

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<sup>2</sup>See Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331, 334-36 (1973); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 357-59 (1972), aff'd on this point, 499 F.2d 1069 (D.C. Cir. 1974). As the Court of Appeals observed: "As a practical matter, moreover, it would simply not be possible for the two technical numbers of the [Licensing Board] to evaluate in detail of the totality of material relevant to safety matters that the Staff and ACRS have generated through so many months of work. This fact is so obvious that it borders on the ludicrous to suggest that Congress intended the ASLB so to function." 499 F.2d at 1077 (footnote omitted). See also Cincinatti Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, NRC \_\_\_, CCH Nuc. Reg. Rptr. ¶ 30,691 at p. 30,383-4 (July 30, 1982):

"[T]he primary role of the Board is to adjudicate issues in dispute raised in the hearing process. We do not believe the role of the Board is to address as a technical review body each potential problem. The large technical staff of the NRC is charged with reviewing, monitoring, inspecting and enforcing actions for nuclear power reactors. The taxpayer provides a large amount of funds (over \$450 million per year) to support over 3,000 staff members of the NRC whose primary function is to insure the health and safety of the public are protected in the use of the commercial nuclear power."

(Additional views of Commissioners Ahearne and Roberts.)

Once the Staff has reached its conclusions, the possibility exists that either the applicant or an intervenor may disagree with one or more of them. The role of the Licensing Board is to resolve these disagreements and, having done so, to determine whether the Staff's ultimate conclusions remain valid or must be modified.<sup>3</sup>

As a condition precedent, the points of disagreement between the Staff and the disagreeing party must be designated and framed in a fashion suitable for resolution by the litigation process. It is beyond dispute that the party requesting that a particular topic be set aside for litigation bears the burden to specifying that topic with sufficient definiteness as to yield something that is litigable. It is no less beyond dispute that it does not suffice for the party wishing litigation simply to point to a

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<sup>3</sup>See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, \_\_\_\_\_ NRC \_\_\_\_\_, CCH Nuc. Reg. Rptr ¶ 30,678 at p. 30,315 (May 5, 1982); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2) ALAB-669, 15 NRC 453, 457 n.1 (1982); Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

general topic and say, in effect, "That looks like a fertile field; let us all throw our hooks into the water and see what (if anything) comes up." The Licensing Board adjudicatory process exists to serve controversies in search of a resolution; it does not exist to serve putative litigants in search of a controversy.

Finally, because there exists a definite set of regulatory standards against which the Staff will -- and must -- measure the pending application, a controversy must take the form of a contention that the application fails in some concrete fashion to measure up against those standards in order to be litigable before the Licensing Board. A contention to the effect that the standards ought to be changed, or that some topic is a worthwhile field of investigation in order that the universe of knowledge regarding nuclear power plants be expanded, or that for some reason or another there is a finite probability that a valid controversy will exist in the future -- all of these fail to meet the mark of litigability before the Licensing Board. Refinement of standards, enlargement of knowledge, and anticipation of potential future problems are all worthy endeavors; they happen, however, not to be on

the list of proper functions for a Licensing Board in operating license proceedings.

It is with the foregoing in mind that the rules regarding the admissibility of contentions have been framed. The requirements that a proposed contention be stated with specificity and definiteness, that it have a basis both in terms of the pending application and the governing body of regulatory standards, and that it take the form of an assertion that these standards are not met by the application are not just flexible principles of guidance. They are jurisdictional principles in the sense that they derive from the boundaries of the Licensing Board's proper function. That in a particular case they stand as a bar to a proposed contention demonstrates not that a prospective litigant has been somehow unfairly wounded, but rather that what the litigant has attempted is improper.

2. The Duty to Frame Proper Contentions. At least at one point NECNP seems to fault this Board for having failed to rewrite NECNP's proposed contention for it, so as, presumably, to create out of an inadmissible mass some admissible substitute. NECNP Objections at

26. While, to be sure, a Licensing Board may rewrite proposed contentions that, unless rewritten, would not be admissible, a Licensing Board is not required to do so and error cannot be predicated upon a Board's declination to rewrite a contention. Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974). See also Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), LBP-79-6, 9 NRC 291 (1979). Fault-finding of this ilk is particularly inappropriate (and unfair to the Board) where, as occurred here, the proponent was offered more than once an opportunity to rewrite his contentions in the light of the objections pointed out by other parties.

3. The Request for "Certification". At the foot of NECNP's pleading there is an otherwise unadorned request that, should the Board not agree with NECNP's arguments in each and every particular, then the Board should certify NECNP's objections to the Appeal Board. NECNP Objections at 2. Regardless of the action taken by this Board on reconsideration, the certification request should be denied.

Authority for a Licensing Board to send matters up to the Appeal Board for interlocutory review lies in 10 CFR §§ 2.718(i) and 2.730(f). The former simply provides that, among the powers of the presiding officer is the power to "Certify questions to the Commission for its determination, either in his discretion or on direction of the Commission."<sup>4</sup> The latter, which is somewhat more on point as well as more specific, provides as follows:

"Interlocutory appeals to the Commission. No interlocutory appeal may be taken to the Commission<sup>[5]</sup> from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session."

Plainly this does not mean that "certification" should

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<sup>4</sup>In the present context, references to "the Commission" in 10 CFR § 2.718(i) or in 10 CFR § 2.730 mean "the Atomic Safety and Licensing Appeal Board." See 10 CFR § 2.785(b)(1).

<sup>5</sup>See note 4, supra.

be granted on request. To the contrary, not only do the quoted rules erect standards that limit the power to authorize interlocutory appeals to situations that are unusual, but the very fact the interlocutory appeals are generally forbidden requires that the power to refer be exercised only sparingly, lest the exception engulf the rule.

That the cases in which authorization for interlocutory appeal is proper are few is made clear by the pronouncements of the Appeal Boards when requests for directed certification have been presented to them. Thus, in Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB 641, 13 NRC 550, 551 (1981), the Appeal Board denied such a request, stating:

"The exercise of jurisdiction under Section 2.718(i) is reserved for those important licensing board rulings which, absent immediate appellate review, threaten a party with serious irreparable harm or prevasively affect the basic struction of the proceeding. . . ."<sup>6</sup>

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<sup>6</sup>Citing Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 n.5 (1979).

(Emphasis added.) Equally instructive is the Appeal Board's discussion in Houston Lighting & Power Company (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370 (1981):

"The Commission's Rules of Practice prohibit appeals of interlocutory Licensing board [sic] rulings such as those involved here. 10 C.F.R. 2.730(f). We will therefore treat both of intervenors' filings as requests for discretionary interlocutory review via directed certification. See 10 C.F.R. 2.718(i) and 2.785(b)(1). Such requests, however, are granted infrequently and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner.' Public Service Electric and Gas Co. (Salem Station, Unit 1), ALAB-588, 11 NRC 533, 536(1980), and cases cited."

Finally, the Board should be aware that the Appeal Boards are not required to and do not accept references without scrutiny of the sufficiency of the circumstances to warrant an exception to the rule against interlocutory appeals. Should the circumstances fall short of those required, the reference will be declined. See, e.g., Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 98-99 (1981):

"Section 2.730(f) does not oblige us to accept all referred rulings. . . . Interlocutory appeals are not favored in Commission any more than in judicial practice. Whether review should be undertaken on 'certification' or by referral before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner."

(Footnotes omitted.) See also Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-483, 6 NRC 638 (1977); Public Service Company of Indiana (Marble Hill Station, Units 1 and 2), ALAB 405, 5 NRC 1190, 1191 (1977); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258 (1973).

Few interlocutory appeals have succeeded on questions of the admissibility of contentions (apart from review of the denial of a petition for leave to intervene altogether under 10 CFR § 2.714a). For this there are two compelling a priori reasons. First, because the Rules of Practice contemplate that an appeal on exceptions from an Initial Decision of the Licensing Board lies to review the exclusion of proffered contentions, the first test under South Texas (i.e., does the order below "threaten the party adversely affected with immediate and serious

irreparable harm which could not be remedied by a later appeal") can seldom, if ever, be met. Likewise, where the Board has admitted some contentions and denied others, and the hearing is otherwise on course with respect to the admitted contentions, it can seldom, if ever, be said that the order denying contentions "affects the basic structure of the proceeding in a pervasive or unusual manner" so as to bring the proposed interlocutory review within the scope of the second South Texas test. In short, given the inevitable imperfection of any human institution, the Rules of Practice contemplate that orders excluding proposed contentions offered by otherwise admitted intervenors will be reviewed only after the final Licensing Board decision, even though they may be erroneous.

Second, the general proposition described above is, if anything, more compelling in the case of orders excluding contentions. This is so because section 2.714a of the Rules of Practice specifically addresses the appealability of orders denying contentions. That section envisions two possibilities leading to appeals by a prospective intervenor:

1. That the Licensing Board will exclude all of the prospective intervenor's proposed contentions, in which case the prospective intervenor may appeal immediately; and
2. That the Licensing Board will admit some of the proposed contentions and exclude others, in which case either the now-admitted intervenor or the party opposing intervention may appeal, but only after the final Licensing Board decision on the merits has been issued.<sup>7</sup>

Indeed, interlocutory appeal on the questions of proposed contentions lies not to resolve the admissibility of contentions per se but rather to resolve the admission or exclusion of parties. This follows from the fact that, even where an interlocutory appeal is authorized by section 2.714a, the Appeal Board will only consider whether the prospective intervenor pleaded one admissible contention, and should the Appeal Board find that he did, it will not proceed to consider whether other excluded contentions

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<sup>7</sup>Where the Licensing Board has admitted some contentions and excluded others, and has, therefore, admitted the prospective intervenor, the party opposing intervention may take an interlocutory appeal, but only on the ground that the intervenor should not have been admitted, either because he did not meet the standing or interest requirements or because all of his proposed contentions should have been excluded. 10 CFR § 2.714a.

of the intervenor should also have been admitted.

In short, the Rules of Practice contain a detailed provision explicitly dealing with the question of appeal -- and interlocutory appeals -- in the context of orders admitting and excluding contentions. Attempted interlocutory appeals by certification, directed certification, or reference must inevitably fly in the face of that carefully drafted scheme and are permissible, if ever, only in the most extreme of circumstances. Such review is not appropriate in the ordinary "garden variety" situation such as is presented here.

## SPECIFIC CONTENTIONS

### I.A.1. Environmental Qualification - Electrical Equipment

By this proposed contention NECNP sought to litigate the compliance with some unspecified electrical equipment with an asserted regulatory standard that, as matters progressed, seemed to shift from one place to another. Ultimately the only valid contention that would be admissible under the regulations is that the application fails to qualify with GDC 4 with respect to the qualification of electrical equipment; while at the outset NECNP sought much more, apparently now it concedes that such, in fact, is the appropriate regulatory standard. NECNP Objections at 2-3. However, before such a contention can be admitted, NECNP must at a minimum identify the equipment it believes to be improperly designed (or at least improperly documented) and it must both articulate and state a basis for the asserted deficiencies. This even to date NECNP has failed to do.

Moreover, it is still not clear that NECNP has abandoned its impermissible attempt to substitute its own notions of what the appropriate regulatory standards ought to be for those the the Commission has

promulgated. In its pleading of June 17, 1982<sup>8</sup> NECNP urged that, by some unclear reading of CLI-80-21,<sup>9</sup> it was simultaneously permitted to litigate the supposed need for extra-regulatory electrical equipment environmental qualification while freed from the pronouncements of that decision.<sup>10</sup> As the Staff pointed out in its response:

"What the Commission stated in CLI-80-21 is:

'In this order we have not attempted to apply the lessons of Three Mile Island to environmental qualification. This issue is addressed in the NRC Action Plan [NUREG-0737]. 11 NRC at 716.'

"The TMI Action Plan, NUREG-0737 . . . does not require the action requested by NECNP in this contention."

While the Staff would have supported the admissibility of a contention on the basis of the Statement of Policy at 45 Fed. Reg. 85236 had NECNP satisfied the threshold

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<sup>8</sup>"NECNP's Reply to the Responses by the Applicant [sic] and the NRC Staff to NECNP's Contentions."

<sup>9</sup>Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707 (1980).

<sup>10</sup>Op. cit., supra note 8, at 2.

burden imposed on it by that document, NECNP had made no attempt to satisfy that burden, and any attempt to litigate extra-regulatory environmental qualification issues in the absence of a meeting of that threshold amounted to an evasion of the Commission's regulations. The Board properly excluded the contention.<sup>11</sup>

Now NECNP states that "[t]he question of what other measures are necessary to satisfy GDC 4 is a factual issue to be resolved during litigation." NECNP Objections at 3. The antecedent reference of "other"

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<sup>11</sup>Once again, the Staff has been more generous to NECNP than, in the Applicants' view, was warranted. What the Commission said in CLI-80-21 was that:

The Commission endorses the staff's actions to use the DOR Guidelines to review operating plants and NUREG-0588 to review plants under licensing review as well as those pieces of equipment in operating plants which do not meet the DOR Guidelines. Furthermore, pursuant to Section 161(b) of the Atomic Energy Act and based upon the record in this proceeding, the Commission is ordering today that these two documents form the requirements which licensees and applicants must meet in order to satisfy those aspects of 10 CFR 50, Appendix A, General Design Criteria (GDC)-4 which relate to environmental qualification of safety-related electrical equipment."

Id. at 711. This, then, is the presently effective regulatory standard.

is the requirements of CLI-80-21, and the sentence is properly read as saying "the question of what measures, in addition to those imposed by the Commission in CLI-80-21, should be imposed upon the Applicants is a factual issue to be resolved during litigation". Id. Thus, while NECNP appears in one paragraph to be conceding away any attempt on its part to go beyond CLI-80-21, in the very next paragraph it tips that such is precisely the hand it thinks it is holding. Such legerdemain falls short of the litigation comportment demanded by this agency.

It also appears to leave us right back with NECNP seeking to back-door extra-regulatory burdens on the Applicants that the Commission has not seen fit to impose, that the Staff has not recommended the Commission impose on pending applications, and that, even under the Staff's lenient view, NECNP still has

not demonstrated warrant litigation. There is no basis for reconsideration; less, for certification.<sup>12</sup>

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<sup>12</sup>There is an independently sufficient basis for denying this contention. In all the paper that NECNP has generated and filed, it has yet to attempt even an articulation of what, in the Seabrook environmental qualification, it thinks is deficient, or what changes, in the Seabrook environmental qualification, it would advocate be made. In fact, this contention is, as shall appear is the case in a number of instances, an impermissible attempt to freight on this proceeding a generic inquiry that, if appropriate at all, should be done in another proceeding and must be commenced on process other than the notice of hearing on this application.

### I.A.3. Environmental Qualification - Hydrogen

In this contention NECNP proposed that the operating license application should be measured against a regulatory standard that would require the qualification of electrical equipment for a hydrogen environment more onerous than that produced by the so-called 5% standard of 10 CFR § 50.44. Implicit in this contention is the assertion that the magnitude of the hydrogen generation with which the electrical equipment must be designed to cope is larger than that which, if § 50.44 means what it says, will ever occur. Patently, this contention was an assertion of a regulatory requirement not only not found in the regulations but rather clearly negated by the regulations. Contention NECNP I.A.3 cannot stand unless § 50.44 is repealed, relaxed, or ignored.<sup>13</sup>

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<sup>13</sup>The fact that another regulation may choose to ignore the limits imposed by § 50.44, to which NECNP points with fervor, is quite irrelevant. While everyone else in the process is bound by the Commission's regulations, the Commission is free to qualify or limit the application of a regulation, and it matters not whether the Commission chooses to express a limit on the otherwise unqualified applicability of § 50.44 in § 50.44 itself or in another regulation of equal dignity. It is, however, up to the Commission and not NECNP to choose to yield to or to ignore § 50.44, and the only legitimate comfort NECNP could take from the higher-than-5% limit in § 50.46(b) would be if it were attempting to litigate a contention under § 50.46(b). Manifestly the proposed contention at issue is not framed under § 50.46(b).

Before the Board, the Applicants contended that § 50.44 stood as a absolute bar to the litigation of a contention involving environmental qualification for a more-than-5%-reaction hydrogen environment. The Staff took a somewhat more liberal position; since the Commission has determined to permit litigation in the beyond 5% region for hydrogen mitigation contentions, under limited circumstances, the Staff took the position that a contention relating to hydrogen environmental qualification could also extend into the beyond-5% realm under the same circumstances.<sup>14</sup> Since

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<sup>14</sup>The hydrogen mitigation requirements go to, and dictate, the amount of hydrogen that will be assumed will be generated in the event of an accident, and the methods by which the hydrogen will be dealt with, i.e., by physical or chemical removal. Manifestly, one cannot postulate the existence of a more onerous hydrogen environment than that produced by the postulated 5% reaction without both ignoring the 5% standard contained in § 50.44 and assuming that equipment meeting the requirements of § 50.44 will fail to cap the hydrogen experienced at that yielded by a 5% reaction. The former is a direct challenge to the rules; the latter is only slightly more oblique. Neither is permissible.

the particular circumstances were not present,<sup>15</sup> the Board had no need to resolve the difference of interpretation between the Staff and the Applicants.

NECNP explicitly disclaims in its present filing any contention that the Board misapprehended its arguments: "The Board has succinctly summarized NECNP's argument, and we stand by it." NECNP OBJections at 4. NECNP's displeasure, rather, is simply that the Board disagreed with its legal position; this is a classic situation where reconsideration is not warranted.

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<sup>15</sup>The special circumstances referred to are, of course, the demonstration of a credible accident scenario leading to a greater hydrogen generation at the particular reactor in question. See the discussion regarding proposed Contention NECNP I.R, infra.

### I.E. RCP Flywheel

This contention presents two issues. First, NECNP seems to be distressed because the Board excluded a contention that, though inadmissible in the Board's view, might have contained something that could have been reworded into a proper contention. For the reasons pointed out supra, NECNP has no legitimate grounds for complaint on this score. Not only is the Board not required to rewrite contentions for an intervenor, but the intervenors were put on notice by this Board that it did not intend to rewrite contentions in order to salvage their admissibility. Contention NECNP I.E suffered the classic fate of a claim that included too much -- and, in particular, two unrelated subjects in the same package. That each topic became hostage to the other's validity per se is NECNP's fault, not the Board's.

Second, NECNP complains about the Board's ruling that the reactor coolant pump flywheel need not be tested by the same environmental qualification requirements applied to safety-related equipment.<sup>16</sup>

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<sup>16</sup>At the risk of slight oversimplification, all equipment associated with a nuclear power plant falls

While the equipment that is safety-related may vary among type of nuclear steam supply systems, and while among reactors of a particular type small design differences may lead to small differences in the equipment that is safety-related, as a general matter the classes of equipment that are safety-related have become well established over the years and are fairly well known. Reactor coolant pump flywheels have not

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into two classes: safety-related equipment and non-safety-related equipment. Safety-related equipment is that amalgam of equipment necessary to control the reaction and cooling processes in an emergency, and upon which reliance is placed for shutdown of the reactor should shutdown be required. Non-safety-related equipment may, in fact, be extremely important to reactor operation, and its failure may, in fact, require the reactor to be shutdown, but it is equipment the failure of which implicates only operating efficiency and not safety. An example of non-safety-related equipment at Seabrook is the cooling tunnels that, in normal operation, bring ocean water to the condensers for normal reactor and station service cooling. Without these tunnels the plant cannot continue to be used for making electricity, and their failure or unavailability may cost the plant's owners a lot of money; the tunnels are not required either to achieve or maintain shutdown, however, and they are, therefore, not safety-related equipment. (Nor does this situation change if, in fact, the primary plan for achieving shutdown assumes the use of the tunnels; safety-related equipment is equipment the usability of which is mandatory for preserving safety, not equipment the use of which to achieve shutdown is optional.)

generally been included in any class of safety-related equipment.

This, of course, does not mean that for some particular reason the Seabrook reactor coolant pump flywheel might not take on a function that rendered it safety-related. As was pointed out at the hearing, however, the Staff was unaware of any regulatory requirement that made flywheels generically safety-related, and if there is some special reason that would change the case for Seabrook (and we are aware of none), then the Commission's basis rules require that NECNP tell us what it is. NECNP pointed to nothing unique to Seabrook. The bare assertion that "It is also equipment that itself is important to safety, as I understand it, in providing [inertia] to the pumping of the water, and that as being important to safety, it must then be [environmentally] qualified under GDC 4," Tr. 344 (7/16/82), simply does not make the grade.<sup>17</sup>

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<sup>17</sup>Part of NECNP's problem is that it made no attempt to connect the generic nature of its concern to Seabrook itself, and it made no attempt to demonstrate any inadequacy in the materials contained in the FSAR or any of the other materials contained in the Public Document Room regarding Seabrook. In fact the FSAR contains a plethora of detailed information regarding the RCP flywheel, see FSAR ¶ 5.4.1.5, including design basis, quality assurance procedures, materials acceptance criteria, and in-service inspection.

### I.H. Decay Heat Removal

With respect to this contention, NECNP has either completely failed to understand what occurred in the briefing and oral argument, or it has for some other reason misdescribed what the Board has done.

Presented by NECNP was a contention that asserted that, because of something that it had read in a report that did not refer to Seabrook, it was concerned about the size of the Seabrook heat exchangers. NECNP did not discuss the size or capacity of the Seabrook heat exchangers, nor their heat rejection capacity given quantified cooling water flows at quantified cooling water temperatures and quantified cooling water dwell times, nor did it discuss the Seabrook heat rejection requirements, either during normal operation or any other particular mode. In particular, NECNP made no attempt to demonstrate any basis for having concluded that the Seabrook heat exchangers were incapable of handling the Seabrook heat loads given the Seabrook heat sinks and heat rejection environment. Indeed, for aught that appears, NECNP has abjured even the thought of any sort of analysis of this type, and the contention as originally propounded was hopelessly vague and hopelessly without basis as to Seabrook.

By way of rejoinder NECNP sought to fall back upon the fact that the generic topic of decay heat removal capability has been identified as an unresolved safety issue. As River Bend, teaches, however, the unadorned battle cry "Unresolved Generic Safety Issue" is insufficient to carry the day. As a concession to NECNP, however -- one that is hardly warranted on this record -- the Board left open the opportunity for NECNP to address this issue in River Bend terms once the SER has been issued. If any error has been committed, NECNP has been the beneficiary, not the victim, and no revision on account of this proposed contention is in order.

#### I.O.1. Emergency Feedwater

In this contention NECNP attempted to litigate a major design change in the plant based on a technical application of technical standards. As pointed out by the Staff, however, NECNP was simply misreading the technical standards. NECNP's attempt at the pre-hearing conference to connect this connection to the definition of "single failure" in 10 CFR, App. A foundered upon footnote 2 to that Appendix, to the effect that:

"The conditions under which a single failure of a passive component in a fluid system should be considered in designing the system against a single failure are under development."

Plainly this negates NECNP's attempted assertion that these criteria presently require what NECNP desires.<sup>18</sup> In short, NECNP failed both in its pleadings and at the hearing to provide a regulatory basis for this contention. No error has been shown and reconsideration would be unwarranted.

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<sup>18</sup>NECNP's other want of basis for this contention lay in its assertion that under the regulations this particular piece of piping should be considered "high energy piping." According to a document in the Public Document Room (and freely available to NECNP) the NRC Staff has concluded that the emergency feedwater system for Seabrook is classified as "moderate energy piping" and not as "high energy piping." See Response to RAI 410.48 (March 12, 1982) (PSNH No. SBN-224). See also FSAR ¶ 3.6(B)b, defining "high" and "moderate" energy piping systems.

### I.O.2. Emergency Feedwater

Having failed to demonstrate a basis for this contention either in its pleadings or at the pre-hearing conference, NECNP now seeks to repair the damage by contending that the system in question is not empty during normal operations because the emergency feedwater system will be filled during start start-up and shut-down. Once again, NECNP has failed to connect this item to Seabrook. In particular, NECNP has failed to distinguish between the emergency feedwater and the auxilliary feedwater systems for Seabrook. The Seabrook emergency feedwater system is not used during start-up, shut-down, or hot standby modes, but rather during those modes the startup feedwater system is used. See FSAR ¶¶ 10.4.7.2.b, 10.4.9 and 10.4.12. The emergency feedwater system is not filled with water during normal operation.

### I.P. Human Engineering

By this contention NECNP proposed that the Board enter an order conditioning approval of the operating license application upon the Applicants moving one particular instrument from the "back" to, presumably, the "front" of the control room panel. NECNP pointed to no regulatory requirement that the particular

instrument even be included at all, much less that it be placed at some specific location. Nor did NECNP attempt any meaningful demonstration of the significance of the location of this instrument: missing from NECNP's pleadings is a discussion of the times and circumstances under which the particular instrument is important, what other instruments are located on the "back" of the panel, the means by which information portrayed by the particular instrument in question is factored into control-room decisionmaking, what other instruments are located on the "front" of the panel that might reduce the importance of the instrument upon which NECNP has latched to secondary or tertiary importance, what offsetting adjustments might have to be made to other instruments located on the "front" of the panel to accommodate NECNP's design suggestion of the moment, or any of a host of other factors in the absence of any acknowledgement of which NECNP's bare lament is virtually meaningless. Bearing in mind that it is not the function of this Board (or of the NRC Staff) to design the plant -- or the controlroom panel, but rather only to resolve concrete disagreements about whether the Staff has correctly determined that the Applicants' design meets the

Commission's regulations, this proposed contention fell woefully short of the mark.

The Staff, taking a somewhat more lenient position, would have admitted the proposed contention -- notwithstanding the lack of any regulatory requirement mandating the placement of this particular instrument in some particular place on the panel -- had NECNP met the threshold burden of relating its complaint to some significant controlroom design problem under NUREG-0737. Because NECNP had failed to meet even the relaxed standard that the Staff advocated, this Board had no occasion to resolve the difference between the Applicants and the Staff.

While this ought to end the matter, we feel obligated to advise the Board that, while it has yet to be published, a forthcoming amendment to the FSAR will amend the legend in Table 1.3-2 that caught NECNP's eye, and the instrument of concern will not be located on the back of the panel.

#### I.Q. Systems Interaction

In support of this contention NECNP attempted two distinct arguments. Its primary thrust was that a so-called "systems interaction study" was a condition precedent to the grant of any operating license for a

nuclear power plant. NECNP could and did point to no regulation mandating such a study, which comes as no surprise when it is recalled that many nuclear power plants have been granted operating licenses and none have submitted such studies. NECNP did point to one licensing board decision<sup>19</sup> admitting such a contention, but the Board in that case did so in spite of a ruling that such a study was not required -- that decision would appear on its face to have violated the principle established in Duke Power Co. (Catawba Nuclear Station, Unit 1 and 2), ALAB-687, \_\_\_ NRC \_\_\_ (August 19, 1982). NECNP did nothing to counter another decision<sup>20</sup> that rejected the same contention, also ruling (thus making the rulings unanimous on the point) that there was no regulatory requirement that such a study be performed as a condition precedent to an operating license.

NECNP's minor thrust was premised on the fact that the Staff seems to have identified, as least

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<sup>19</sup>Long Island Lighting Company (Shoreham Power Station, Units 1 and 2), LBP-82-19, 15 NRC 601 (1982).

<sup>20</sup>Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-27, 14 NRC 325, 331 (1981).

potentially, the question of systems interaction (quite different from a so-called systems interaction study) as an unresolved safety issue. But NECNP made no attempt to satisfy the well-known requirements for pleading unresolved safety issues into an operating license case. See Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-74 (1977). This Board ultimately rejected NECNP's proposed contention.

NECNP states now that "we do not object . . . " and "we see no need to burden the Board further at this point."<sup>21</sup> NECNP Objections at 12. Without expressing any opinion as to the correctness of NECNP stated premise, if it does not object then (in addition to failing to see why the issue is mentioned) there seems to be neither need nor warrant for the Applicants to respond.

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<sup>21</sup>Presumably NECNP is not requesting certification of this ruling, as well.

### I.R. Hydrogen Control

NECNP proposed two versions of this contention.

While originally arguing to this Board that its first version was a properly admissible contention, NECNP now concedes that the Board's rejection of that version "may well be consistent with Commission decisions that bind the Board . . . ." NECNP Objections at 13. Given NECNP's apparent concession that the rejection of its first version of this contention was required as a matter of law, there seems little need for further comment by the Applicants.

The second version of the contention proposed by NECNP was attempted under the rule established in Metropolitan Edison Co. (Three Mile Island, Unit 1), CLI-80-16, 11 NRC 674 (1980). Under that decision a party such as NECNP may be relieved of the otherwise operable total bar to contentions of this ilk should it essay and sustain the burden of demonstrating a credible accident scenario for the particular plant in question that would lead to certain consequences. NECNP's half-hearted attempt at meeting this requirement was properly rejected by the Board.

NECNP's present complaint -- i.e., that "[t]he Board has misplaced the burden of proof" (NECNP

Objections at 14) -- fails on two counts. First, this Board placed no burden of proof on NECNP, only a burden of articulation. NECNP failed to articulate a credible scenario for Seabrook, and failed to articulate any basis for concluding that its simple list of events was in fact a credible series of events that could occur at Seabrook and would produce the requisite consequences. To assert, as NECNP impliedly does, that all the Commission intended to require in CLI-80-16 was that someone parrot some words gleaned from a textbook (or, in the second and subsequent cases, from the NRC Reports) is to assume that the Commission intended both the wholesale repealer of 10 CFR § 50.44 (in which the Commission would have simply done so) and that the Commission intended to impose a meaningless requirement upon litigants. We are not willing to assume that the Commission spent so much time and effort on the point if it did not intend to impose a meaningful test that would function to separate the valid concern from the pleading exercise. It seems equally plain that the Appeal Board does not treat CLI-80-16 as cavalierly as would NECNP. See Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 462-66 (1982).

Second, had NECNP articulated a credible scenario for Seabrook for which a defensible basis existed, then, indeed, a burden of proof would properly have been imposed upon NECNP; since NECNP is seeking to litigate greater-than-5%-reaction hydrogen mitigation, and since ordinarily such as issue is foreclosed, NECNP bears the risk that the "credible scenario" will not be established. See Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-81-13, 13 NRC 652, 660 (1981), aff'd on other grounds, ALAB-669, 15 NRC 453 (1982):

"[A] party [wishing to litigate the issue that NECNP wishes to litigate] must show a credible condition wherein the core is inadequately cooled for a sufficient period of time. CESG [the intervenor in that case] has raised the hydrogen generation issue, and under the Commission's ruling, it is considered to have the burden to establish a credible accident scenario involving hydrogen production resulting in offside doses in excess of 10 CFR Part 100 limits."

What NECNP seems to forget it that it is NECNP that is seeking relief from the regulations, and in such a case it does and must bear the burden.

### I.S. Loose Parts Detection System

By this contention NECNP proposed that this Board amend the regulations of the Commission so as to insert, at some textually appropriate place, a regulation that says "An applicant for an operating license shall have a loose parts detection system." Such an amendment, were this Board inclined and empowered to enact it, would do two things: (1) it would add something to the regulations that are not presently there, and (2) it would provide a regulatory basis for NECNP's contention that, absent such an amendment, simply does not exist.<sup>22</sup> For that reason, the Board's rejection of this contention was proper, correct, and mandatory.

Stepping back from the trees a moment, it can hardly be denied that it is not a good thing for a

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<sup>22</sup>NECNP demonstrated starkly the lack of any warrant for this proposed new requirement when it attempted to ground it in 10 CFR § 20.1(c) (ALARA) and 10 CFR § 50.36 (technical specifications). Neither of those regulations addresses this subject; neither even approaches it closely. Were regulations such as these thought adequate basis for contending that the NRC regulations require (and have required all along, since each regulation has been around for some time) the specific piece of equipment that NECNP thinks is a good idea today, then there is no aspect of the design of the plant that would not be up for litigation de novo.

workman to leave a loose nut or bolt, or wrench, or transistor radio, inside a steam generator that has been dismantled for service. Obviously care is warranted to reduce the likelihood of such an event, or its consequences. A loose parts detection system is a rather new idea that, while it does not reduce the likelihood of leaving something behind, is hoped to have the effect of mitigating the consequences of inattention by calling attention to the presence of the derelict item sooner rather than later. Plainly, however, this new idea (which is by no means yet a standard item on all operating nuclear power plants) is only one means of addressing the issue, and is on its face not necessarily the ideal means. The NRC regulations, however, do not require this particular solution, and it is this fact that is fatal to NECNP's proposed contention.

Moreover, NECNP made no attempt to assess how the issue of loose parts is to be dealt with at Seabrook; they made no attempt to assess the necessity for loose parts detection or interdiction measures at Seabrook; and they made no attempt to assess how the issue is, in

fact, intended to be handled at Seabrook.<sup>23</sup> Indeed, for all that appears NECNP simply read in a flyer somewhere that someone thought this new concept of loose parts detection systems was a good idea at all nuclear power plants and it made no attempt to connect this generic interest to the specific plant at issue. What NECNP has attempted, rather, is to impose a new regulatory requirement upon nuclear power plant designers; wholly prescindng from the merits of the new requirement it proposes, NECNP can accomplish its goal only by petitioning the Commission to amend its regulations, see 10 CFR § 2.802, and not by urging this Board to exercise a power not conferred upon it.

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<sup>23</sup>Interestingly enough, had NECNP made any attempt to relate this issue to the FSAR, it would have found that a "loose parts monitoring system has been specified and will be purchased based on the guidance of Regulatory Guide 1.133 Revision 1. The FSAR will be revised as delineated in the Regulatory Guide when the system has been selected." FSAR ¶ 4.4.6.4. "All recommendations of Regulatory Guide 1.133 will be followed in the specifying of this equipment and its operation." Id. at p. 1.8-51.

### I.T. Steam Generators

By this contention NECNP proposed, not a litigation, but an investigation. NECNP did not assert any defects in design or execution of the steam generators that will in fact be used in Seabrook; instead, NECNP urged that, because other steam generators have proved to have problems, there is ample warrant to investigate the situation regarding the proposed Seabrook steam generators. Prescinding from the nature and occurrence rate of the problems at other steam generators, to which NECNP adverts but concerning which NECNP offered little hard information, the fact remains that, assuming there is warrant for an investigation of the proposed Seabrook steam generators,<sup>24</sup> the NRC Staff is presently engaged in precisely the investigation that NECNP refers to. What NECNP proposes, therefore, is that this Board sit as a

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<sup>24</sup>We are willing to assume as a philosophical matter that there is warrant for an investigation of some sort regarding every facet of a proposed nuclear power plant. That, as we understand matters, is the reason why the NRC Staff has been charged with the responsibility of reviewing the application in such excruciating detail and investigating everything that, in its judgment, requires investigation.

sort of "board of inquiry" to audit, in a highly undirectio alized fashion, and to duplicate the efforts of the Staff.

For the reasons set forth above, that simply is not the function of this Board. NECNP's contention was rejected because it did not propose something in form suitable for litigation, and because it offered no basis whatsoever for a contention that there exists any defects in the Seabrook steam generators.<sup>25</sup>

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<sup>25</sup>The fact of the matter is that the FSAR contains lengthy analyses of the Seabrook steam generators, including analyses of the differences between them and the Westinghouse Model D steam generators to which NECNP referred in its pleadings. Thus not only was NECNP's proposed contention without any stated basis, but the subliminal inference it sought to induce this Board to draw, namely that the Seabrook steam generators are sufficiently similar to the Model D steam generators as to permit generalizations about performance, is contrary to the materials that are available. See FSAR ¶¶ 5.4.2 and 10.4.8 (and, in particular, see ¶ 5.4.2.3.d). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-442, 6 NRC 728 (1977).

#### I.V. Steam Generator Tube Inspection

In this contention NECNP proposed what appears to be a generic investigation of steam generator tube in-service inspection technology. Significantly, NECNP did not point to any aspect of the Seabrook in-service inspection regime that it thought was in need of modification (nor did it suggest the modification it thought necessary) and NECNP admitted that the Seabrook in-service inspection program complied with Reg. Guide 1.83. It became apparent to the Board (as the pleadings themselves make clear) that what NECNP wanted to litigate was not Seabrook at all, but Reg. Guide 1.83. Indeed, for aught that appeared (and appears to date), NECNP has never reviewed the Seabrook inspection program, has no idea what it contains, and, apart from knowing that it complies with Reg. Guide 1.83, has no idea whether the inspection program is good or bad.

The basis requirement for proposed contentions in NRC operating license litigations exists to prevent precisely such a warrantless fishing expedition. All that NECNP has said in support of what it proposes is that "[t]he Ginna accident . . . was not prevented by a steam generator tube inspection that complied with the Reg. Guide and that occurred shortly before the

accident," NECNP Objections at 18, pointedly NECNP does not contend that the Ginna accident was caused by any deficiency in the inspection procedures called for by the Reg. Guide, nor does NECNP contend that the accident was caused by any deficiency in the inspection procedures employed at Ginna, nor does NECNP make any attempt to relate what did in fact occur at Ginna to the actual Seabrook inspection program.

In short, apart from the bare statement of the contention, NECNP's pleadings fell woefully short of the Commission's pleading rules.

Now on reconsideration NECNP attempts an argument based on what it portrays as a double standard regarding this Board's use of the Staff's Regulatory Guides. Prescinding from the fact that NECNP has either misapprehended or deliberately misstated the facts, the contention, NECNP's argument seems to flow from a misunderstanding of what the Regulatory Guides are and what their significance is.

On their face, the Regulatory Guides are a statement by the NRC Staff of what, in the Staff's expert judgment, constitutes one acceptable means of complying with a specified Commission technical regulation. Gulf States Utilities Company (River Bend

Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977): "In other words, a [Reg. Guide] sets forth one, but not necessarily the only, method by which an applicant may choose to employ in order to conform to a regulatory standard." These guides may not be "back-doored" into regulatory standards against which an operating license application is to be measured-- an effort by NECNP which, as it notes, this Board properly pretermitted -- for two reasons: first, because the Regulatory Guides have not been duly promulgated as regulations they are not and may not be employed as regulatory standards ex proprio vigore. This does not mean that the Guides are without significance, only that they are only a discussion of a standard existing elsewhere, rather than the standard themselves. Second, the Regulatory Guides do not even purport to describe the only way in which the particular technical regulation may be complied with; that is to say, while compliance with the Regulatory Guide tells us that in the Staff's opinion the regulations have been complied with, non-compliance with a Regulatory Guide is not the equivalent of the Staff's opinion that the regulations have not been complied with.

In short, the Regulatory Guides provide a basis for concluding that something is "good," but they do not on their face provide a basis for concluding that something is "bad." It follows from this asymmetry that the "double standard" of which NECNP complains -- while it had little if anything to do with the reasons for the failure of NECNP's contention -- is not only proper but necessary given the text, status and purport of the Regulatory Guides themselves.

#### I.W. Seismic Qualification - Electrical

This contention was borne of professed doubts by NECNP as to whether the Seabrook electrical equipment had been seismically qualified per Reg. Guide 1.100. This was an impermissible use of the Reg. Guide, and therefore NECNP sought to qualify the contention on the ground that "seismic qualification is an unresolved safety issue." NECNP Objections at 31. In a fashion that erred, if at all, only in its generosity to NECNP, the Board denied this contention subject to refiling upon the Staff having addressed the supposedly unresolved safety issue, ruling that, prior to that occurring, the contention is premature.

As NECNP attempted to frame its contention, the Board's ruling was correct. Moreover, an independent

basis for exclusion lies in NECNP's complete abdication of any attempt to specify what equipment it thought was not properly qualified, what changes it thought were required in the qualification of that equipment, or otherwise to frame the contention in a fashion that would have rendered it suitable for litigation. At best all NECNP has identified is a topic that, in its judgment, is worthy of generic investigation and review. That may be, but this proceeding is not the place to conduct such a study.

II.A.1. Q.A. - Design and Construction

During the construction permit stage of the Seabrook saga, the nature of the quality assurance program that should be approved and followed during the forthcoming construction was resolved. On the basis of that resolution the Applicants proceeded to construct the plant employing the quality assurance program that had been approved for that construction.

At its inescapable bottom, this contention asserts that, notwithstanding the litigation, the decision, and the appellate review of the Seabrook construction permit proceedings, the result reached regarding the nature of the quality assurance program that should be

followed was erroneous. NECNP seeks to relitigate precisely that issue now, before this Board.

If ever there was a case where public policy dictated application of the doctrine of repose, it is where years of construction have taken place in reliance upon the approval of a quality assurance program granted years earlier. Happily, the Commission has endorsed those doctrines, and it has decreed that Licensing Boards in operating license cases do not sit to review the rectitude of judgments reached and effected in construction permit cases. The Board's ruling was manifestly correct, sensible, and necessary.<sup>26</sup>

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<sup>26</sup>NECNP seeks to avoid the bar of prior adjudication by asserting a change in the law. Prescinding from the fact that the limitation upon this Board's sitting as a super Appeal Board is insitutional and hence not sensitive to the grounds on which it is asserted that the prior decisions were incorrect, NECNP proceeds on the thinnest of reeds. It does not point to any change in the regulations. It does not point to any decision of the Appeal Board or the Commission. It does not even point to a "policy statement" published in the Federal Register. It points, rather, to one item in a long agenda of generic topics that the Commision wishes to study. Moreover, as described in its pleading of April 21, 1982 at 55, the item to which NECNP points does not contend that any prior decisions were incorrect; at best it suggests the possibility that the Commission may determine to change its regulations in the future. This "basis" falls far short of what would be required to legitimate the massive disruption that NECNP urges.

## II.A.2. Q.A. - Design and Construction

This proposed contention has a certain chameleon-like character. While it appeared from NECNP's original statement of its bases that it wanted to litigate the adequacy of construction (i.e., were the welds done as they were supposed to be, etc.), but NECNP said that, to the contrary, they wanted to litigate the adequacy of the execution of the construction "quality assurance" ("QA") program (i.e., did the proper person sign the proper forms regarding the welds, etc.). Now it would appear that what NECNP wanted to litigate was all design issues that were not litigated in fact at the construction permit stage.

As originally submitted by NECNP, this proposed contention was supported by a list of 13 supposed construction errors that were caught by inspectors for either the Applicants or the Staff during the on-going construction. As the Applicants made clear at the prehearing conferences, they did not oppose litigation of whether -- on those or any other specified grounds -- the plant as constructed met the requirements of the design, i.e., were the welds performed correctly? Tr. 430-31, 446-47 (July 15, 1982).

It turns out, however, that what NECNP wanted to litigate was something different. What NECNP was looking for was "a complete independent audit of all design and quality assurance documentation, a complete physical reinspection of all aspects of the plant, and a thorough conservative engineering analysis of all aspects of the plant that cannot now be inspected . . . ." "NECNP Supplemental Petition for Leave to Intervene" (April 21, 1982) at 57. See also Tr. 439 (July 15, 1982). This, NECNP asserted, was required not because NECNP was contending that there is, in fact, anything wrong with the plant, but rather because there was, NECNP asserted, something wrong with the way the QA program was executed. In the Applicants' view, this is the point at which NECNP went astray.

One of the issues that an applicant for a construction permit must satisfy the staff (and, should a contest be properly instigated on the point, the construction permit licensing board) as to is that it possesses and intends to execute a QA program meeting the requirements of the construction permit regulations. If the proposed QA program is inadequate, the construction permit is denied. If the applicant

does not convince the Staff or the Board (as the case may be) that it is competent to and intends to execute the QA program, the construction permit is denied. If, after the construction permit has been issued, the permittee demonstrates that, in fact, it does not possess either the ability or the determination to execute the QA program, the construction permit may be suspended. As a separate topic, the program for assuring conforming construction is a construction permit issue.

Since, as NECNP acknowledges, to a limited extent design finalization, like construction, takes place after the construction permit is issued, the design QA program, and the ability and intention of the construction permit applicant to execute it faithfully, are also construction permit issues.

In the case of Seabrook, proposed QA programs were submitted to, and approved by, the NRC Staff. To whatever extent issues regarding these programs were framed for litigation, these issues were resolved. Thereafter the Applicants proceeded to build the plant (and to finalize its design) in accordance with these QA programs, and the Staff has continuously monitored the Applicants' activities.

If today there is reason for legitimate doubt about the adequacy of the Seabrook construction QA program -- and we submit there is not -- then the proper remedy is for a proceeding to consider suspension of the construction permits pending repairs to the QA program. Such a proceeding may be commenced by the Staff on its own motion, and an outsider such as NECNP may petition for such the proceeding under 10 CFR § 2.206. (We reiterate that there is no basis for such a proceeding, which explains why the Staff has not commenced one and why NECNP has not submitted a petition under § 2.206.) Unless and until there is such a proceeding, and unless and until there emerges from that proceeding some changes in the design and construction QA programs approved in the construction permit stage, however, the Applicants can and must continue to apply the program approved in that stage. This Board was not convened for the purpose of either reviewing the decisions made at the construction permit stage nor for the purpose of policing conformance by the Applicants with the terms and conditions of their construction permit.

We reiterate that we are not saying that there is no room for "adequacy of construction" issues at the operating license stage. To the contrary, it is the

duty of the Staff to satisfy itself that the plants have in fact been constructed properly and -- if a properly pleaded contention is admitted framing that issue -- this Board has a like obligation. But this is a question different from that which NECNP wants to litigate, and properly so: the issue at the operating permit stage is whether a piece of machinery that has been constructed and stands ready to operate should be allowed to operate. Relevant to that question is whether the machinery has been properly constructed. Not relevant to that question is why the machinery is properly (or improperly) constructed; that is to say, the operating license should be granted if the machine is properly constructed even if the QA was deficient, and the operating license should be denied (or conditioned upon repair) if the machine was improperly constructed even though the QA design and execution were perfect. It is this fundamental difference between the nature of construction permit and operating license proceedings, and between the nature of the relief available at each that led NECNP astray.

For these reasons, the exclusion of this proposed contention was correct. NECNP might have, but did not,

attempt to frame a proper contention relating to construction adequacy.

#### II.B.2. Q.A. - Operations

The premise of the objection made to this contention was that the contention was lacking in specificity, i.e., that it left unanswered the question of what "structures, systems, and components" were to be litigated. NECNP replied with a reference to "examples," which was somewhat non-responsive to the objection. NECNP might have offered to limit the contention to the "examples," in which case the "examples" (wherever located in the documents) would have cured the defect. It did not, and the Board properly sustained the objection. This Board did not, contrary to NECNP's assertion, simply object to turning the page. The problem was that the what appeared on the other page did not, by its terms, satisfy the specificity requirement upon which insistence was being made.

#### III. Emergency Planning

Though substantially in agreement with the Board that NECNP's proposed contentions should be excluded, the Applicants believe that those contentions should have been excluded on other grounds.

NECNP originally proposed a single broad emergency planning contention, together with 16 sub-parts called "bases." For reasons that need not be rehearsed again, the Applicants took the position that they would not object to (i.e., they would waive any objection to) the admission of NECNP upon a broad emergency planning contention (albeit framed differently than NECNP had proposed), with the question of the specificity of NECNP's emergency planning contentions for actual litigation to be resolved at a later stage. The Staff, however, was unwilling to acquiesce in the Applicants' suggestion, and the Board was obligated to treat NECNP's emergency planning offerings under the rules strictly applied.

Accordingly, the Board invited NECNP to restate its emergency planning contentions, together with any argument it wished to furnish in support of each one. NECNP did so, replacing their original submission with 15 more specific proposed contentions. By leave granted to them, the Applicants responded to each of NECNP's new 15 proposed contentions.

The Applicants recommended the exclusion of 11 of the 15 of NECNP's proposed contentions. Thus, for instance, the Applicants objected to proposed

contention NECNP-EP 1 on the ground that it sought to elevate NUREG-0654 to the status of a regulation, and thereby NECNP sought to impose an extra-regulatory requirement upon the Applicants much as NECNP had earlier attempted to do in connection with the Reg. Guides. The Applicants objected to proposed contention NECNP-EP 3 on the ground that recent amendments to the emergency planning regulations had removed the issues covered thereby from the issues to be litigated in the operating license proceeding. See "Applicants' Reply to 'NECNP Supplemental Filing on Emergency Planning Contentions'" (August 2, 1982) at 3-4.

For the most part, however, the Applicants did not either object to or suggest the deferral of the proposed contentions on the ground of prematurity. As we stated at the pre-hearing conference, there is a good deal of material presently available and presently discoverable, if not finally litigable, regarding the emergency planning contentions; the Applicants fear that the wholesale deferral of these issues is likely to inject unwarranted delay into these proceedings and create the potential, on which some of the opponents of the plants may attempt to capitalize, that the plants' operating license is held hostage to more litigation.

The Applicants would not object to reconsideration being granted of so much of the Board's Order of September 13, 1982, as defers all of NECNP's proposed emergency planning contentions pending the completion, submission and FEMA review of off-site plans. The Board should then proceed to assess the admissibility of each of the 15 contentions separately, and the Board should exclude proposed contentions NECNP-EP 1, 3, 4, 5, 7, 8, 9, 10, 13, 14 and 15 for the reasons set for in the Applicants' filing of August 2, 1982.

#### IV. Ultimate Heat Sink

This Board originally entertained two contentions going to the ultimate heat sink, one submitted by New Hampshire and one submitted by NECNP. Both proposed contentions were based upon the assumption that the cooling tunnels are the ultimate heat sink for the plant; once New Hampshire realized that that assumption was, in fact, erroneous, it promptly (and properly) withdrew its proposed contention.

NECNP should have done likewise. This proposed contention is based upon the assumption that the availability of the cooling tunnels is necessary to preserve safety of the plant. In fact, as we thought had been made clear to everyone (and as has been made

clear to almost everyone), the cooling tunnels are not the ultimate heat sink for Seabrook. They are not safety-related equipment. Their availability does not affect safety. If for any reason the tunnels are not available, the ultimate heat sink will be used as a path for heat rejection. See FSAR ¶ 9.2.5. The fact that the tunnels may -- should they be available -- be used as an optional source of cooling water to the heat exchangers<sup>27</sup> any type of operation, including accidents, does not

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<sup>27</sup>NECNP's assertion that "This means that the cooling tunnels will be circulating seawater into the safety systems of the plant, with the risk of carrying biological fouling organisms into those systems," NECNP Objections at 32, is, for a very good reason, devoid of any citation. Seawater is not "circulat[ed] . . . into the safety systems of" Seabrook or any other nuclear power plant. The seawater is circulated only through a heat exchanger; station service cooling water, like secondary-side reactor cooling water, is fresh. See FSAR Fig. 9.2-7 (where the legend "HX" stands for heat exchanger). See also id. ¶ 10.4.5.3.

require that they be protected against a failure, whether it be induced by a seismic event, biofouling, or any other cause. NECNP's contention is simply directed at a design for a power plant cooling system that is not the Seabrook design.

The only failure, we submit, has been of comprehension and it has been on the part of NECNP.

### V. Table S-3

As NECNP acknowledges, the United States Court of Appeals for the District of Columbia Circuit has stayed its mandate in Natural Resources Defense Council v. NRC, \_\_\_ F.2d \_\_\_ (D.C. Cir. April 27, 1982). A petition for certiorari is presently pending before the Supreme Court of the United States. The Commission has yet to determine what action it desires its licensing boards to take regarding pending construction permit and operating license applications; nor has the Commission repealed or suspended 10 CFR §§ 51.20, 51.21, which, unless and until repealed or suspended, is a command which this Board has an ironclad obligation to obey. Nor has the Court of Appeals ordered the NRC to suspend the effectiveness of that rule (nor, given the foregoing, is that Court likely to issue such an order).

The fact of the matter is that the resolution of Table S-3 issue is presently up in the air. The suggestion of NECNP that litigation that may prove to be a total waste of time commence now, rather than when a decision comes down on this matter, is as unreasonable as it is without legal basis.

# CONCLUSION

For the reasons stated herein, the Board should not and need not make any modifications to its Memorandum and Order of September 13, 1982, nor should any aspect thereof be certified to the Atomic Safety and Licensing Appeal Board.

Respectfully submitted,

/s/R.K. Gad III  
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Dated: October 26, 1982

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that I made service of the within "Applicants' Response to 'NECNP Objections to Prehearing Conference Memorandum and Order and Motion to Certify Objections to the Appeal Board'" by causing copies thereof to be delivered to the office of the persons shown below and marked by an asterisk on October 26, 1982, by sending a copy thereof to NHAG by Federal Express on October 25, 1982 and mailing copies thereof, postage prepaid, to the balance of the persons set forth below on October 25, 1982:

\*Helen Hoyt, Chairperson  
Atomic Safety and Licensing  
Board Panel  
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