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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the matter of:

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, et al

Docket Nos.

50-443 OL
50-444 OL

(Seabrook Station, Units 1 and 2)

SAPL'S MOTION FOR DISQUALIFICATION OF JUDGE HOYT

Pursuant to 10 C.F.R. §2.704 (c) SAPL moves for recusal of Chairman Hoyt from these proceedings.

I. THE HOUSTON LIGHTING & POWER STANDARD REQUIRES RECUSAL.

In Houston Lighting & Power Company (South Texas Project, Units 1 & 2) CLI-82-9, 15 NRC 1363 (1982), the Commission dealt with the recusal of an ASLB member.

By a three to two vote, the Commission overturned an Appeal Board order disqualifying the member. The Appeals Board decision had focused on the appearances of hostility and partiality revealed in a memorandum made by the judge in responding to an intervenor motion for recusal. The comments at issue were not made in a hearing, but rather in a statement issued by the judge accompanying the denial of the intervenor's motion written by two other Board members.

Upon review of the Appeal Board's decision, the Commission ruled that the judge should be reinstated. The Commission concluded that although generally bias must be evident from extra-judicial conduct of the judge, it might be appropriate to remove a judge for judicial conduct "in the most extreme cases". (Id at 1366.)

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Thus, extra-record conduct such as stares, glares, and scowls do not constitute evidence of personal bias. [Citation omitted.] Similarly, occasional outbursts toward counsel during a long trial do not provide any basis for finding judicial bias against the party represented by counsel. [Citation omitted.] Judge Hill's statement clearly distinguishes between CCANP and the conduct of its representatives. We find that Judge Hill's statement does not constitute judicial behavior warranting an exception to the rule that bias must be extra-judicial.

As set forth with particularity in part III of this Motion, it is SAPL's position that the conduct of Judge Hoyt in this proceeding amounts to far more than "stares, glares and scowls" and more than an "occasional outburst" toward counsel during a long trial. Thus, it is SAPL's position that even under the stringent standard adopted by the Commission in Houston Lighting & Power the requirements for recusal of a judge have been met here. As set forth, infra, this is indeed an extreme case, where the evidence of bias and hostility is not occasional, but common and persistent.

Furthermore, although SAPL anticipates that this motion must be determined by this agency's boards in accordance with the Commission's decision in Houston Lighting & Power, it is SAPL's position that the Commission's decision is erroneous, and erroneously states the law regarding disqualification of judges. In order to preserve this issue for appeal, if necessary, SAPL now sets out its legal argument that the recusal standard should not be the one adopted by the Commission majority in Houston Lighting & Power.

11. THE APPLICABLE STANDARD FOR RECUSAL OF JUDGE HOYT AS SET FORTH IN §455 (a), SHOULD BE APPLIED TO THE JUDICIAL CONDUCT OF NRC ADMINISTRATIVE JUDGES.

Under the circumstances of these proceedings as set forth in this motion, the appropriate standard for review is found in 28 U.S.C. §455 (a). The statute requires that:

(a) any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned...

This standard has been held applicable to federal administrative proceedings generally. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir. 1970); Texaco, Inc. v. Federal Trade Commission, 336 F.2d at 754 (D.C. Cir. 1974).

An essentially identical standard mandating recusal where a judge "has engaged in conduct which gives the appearance of personal bias or prejudgement of factual issues" has long since been held applicable to ASLB members. Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 65 (1973), In the Matter of Nuclear Engineering Company, Inc., (Sheffield, Ill, Low-Level Radioactive Waste Disposal Site) ALAB-494, 8 NRC 299 (1978), In the Matter of Consumers Power Company (Midland Plant, Units 1 & 2) ALAB-395, 5 NRC 772 (1977), Separate Statement of Dr. Quarles submitting his recusal at 788, In the Matter of Houston Lighting & Power Company, et al. (South Texas Project, Units 1 & 2) ALAB-672, 15 NRC 677 (1982).

A. THE REVIEW STANDARD UNDER §455 (a) SHOULD NOT BE LIMITED TO "EXTRA-JUDICIAL" CONDUCT.

The applicability of the §455 (a) "appearance" standard was recently articulated by the Commission's recent decision in Houston Lighting & Power Company, supra.

In placing the "extra-judicial" burden upon a §455 (a) type petition, absent an "extreme" case, the Commission relied heavily on the principles articulated in U.S. v Grinnell Corporation, 384 U.S. at 563, 583 (1966). It noted a previous Commission's adoption of the rule that:

Preliminary assessments, made on the record, during the course of an adjudicatory proceeding--based solely upon application of the decision-maker's judgment to material properly before him in the proceeding--do not compel disqualification as a matter of law. Citing Commonwealth Edison Company (LaSalle County Nuclear Power Stations, Units 1 & 2), CLI-73-8, 6 AEC 169, 170 (1973).

The Commission's reliance on Grinnell, infra, and LaSalle, infra, concerning the requirements of "extra-judicial" conduct is misplaced. Both decisions were rendered prior to congressional adoption of the objective standards in §455(a). (§455 (a) was adopted in 1974).

The other decision relied upon in support of the "extra-judicial" criteria was In re: International Business Machines Corp. (2d Cir. 1980), 618 F.2d at 923, 927. In IBM, the Court reviewed motions for disqualification filed in the infamous and lengthy IBM Anti-Trust litigation. The motion focused on the disproportionate number of rulings rendered in a manner adverse to IBM during the course of the proceedings.

In its consideration of IBM's arguments under the objective standards of §455 (a), the Court denied the motion on the basis that adverse rulings cannot create the per se appearance of bias. To allow recusal based on in court rulings, the court ruled, would be to inhibit the judge's freedom to call the shots absent any apprehension that should he make a disproportionate number of rulings in favor of one litigant, he may establish grounds for disqualification.

The second policy consideration noted by the court was that in the IBM case, the Judge was the sole trier of fact in lengthy and complex litigation. Consequently, it was appropriate for the Judge to form attitudes toward the reliability and credibility of witnesses, and also shrewdly observe the strategies of opposing lawyers in order to ascertain the "real" purposes and motives behind the surface of their remarks. See IBM, infra, at 930 citing Judge Frank in In re: J.P. Linahan, Inc., 138 F.2d 650, 653-54 (2.d Cir. 1943).

However appropriate the Court's interpretation of §455 (a) may be for anti-trust litigation, it is entirely inappropriate for use as a recusal standard by this Commission. It is SAPL's position that §455 (a) should be afforded the broadest possible construction in ASLB proceedings.

First, the IBM decision places an over reliance on case law rendered well before Congress and the American Bar Association adopted

the objective, "appearance" standard.¹ In support of its position that the "appearance of bias" under §455 (a) can only stem from "extra-judicial" conduct, it refers to old cases relating exclusively to the original, subjective recusal standard first enacted in 1911. See IBM, supra, citing Ex Parte American Steel Barrel Company, 230 U.S. 35, 44 (1913), Burger v. United States, 255 U.S. 22, 31 (1921).

This narrow interpretation of §455 (a) applications runs contrary to Congressional intent in adopting the amendment.

The general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the Judge's impartiality, he should disqualify himself and let another judge preside over the case. [1974] U.S. Code Cong. and Admin. News at 6355.

The focus of the amendment and its intent is clearly on the appearance of partiality, not the time or place associated with the conduct creating that appearance. As noted in Commissioner Asselstine's dissenting opinion in Houston Lighting, infra, at 1374,

1. The original American Bar Association Canons of Ethics adopted in 1924 established only broad, general standards for judicial conduct. Indeed, these standards were perceived by many observers as too permissive. See e.g. Miller, Public Confidence in the Judiciary: Some Notes and Reflections, 35 L. & Contemp. Prob. 69, 71 (1970). In response to heightened ethical standards, the ABA replaced its Canons with the Code of Judicial Conduct. In 1974, Congress amended 28 U.S.C. §455 to bring the standard into conformance with the objective "appearance of bias" standards established under Canon of Judicial Conduct 3 (c) (1). A marked difference of import here is Congress' insertion of the word "shall" in place of the Canon's "should".

Taken to its logical conclusion, the majority opinion stands for the proposition that even if a disinterested observer were to conclude that a Licensing Board member's conduct or statements were sufficient to create a reasonable doubt regarding the Board member's ability to act fairly and impartially on matters before the Board, this would not be a sufficient basis for disqualification so long as the Board member's conduct or statement were related to matters within the proceeding. In my view, the adoption of the standard by the Commission majority sends an unfortunate signal to the Licensing Boards and to the public--a signal that serves to undermine public confidence in the objectivity of our adjudicatory proceedings.

Another reason why the IBM analysis is inappropriate for use here is that Judge Hoyt is not the sole trier of fact in this case, as was Judge Edelstein in IBM, supra. Her principal role is not only one of a trier of fact, but also as the Board's legal expert relied upon to conduct the hearings in an orderly manner and render judicial rulings.

In light of the fact that Judges Luebke and Harbour are not trained in the intricacies of legal procedure, the evidence they receive is heavily influenced, and in the case of exclusionary rulings, "filtered" through the rulings of Judge Hoyt. As discussed below, it is not SAPL's position that the appearance of partiality stems from the judge's rulings per se. But to the extent that the judge's hostile conduct towards intervenors and town representatives influences her rulings, the attitudes of Judges Luebke and Harbour as triers of fact are most certainly affected. In short, the need for the other two Board members to rely on Judge Hoyt's rulings and functions makes even more important the statutory requirement that these hearings be attended not only with every element of fairness

but with the very appearance of complete fairness. Amos Treat & Co. v SEC, (D.C. Cir. 1972), 306 F.2d at 260, 267.

Lastly with respect to the IBM decision, it should be noted that jurisdictions are split on the "judicial" versus "extra-judicial" sources of bias appearance under §455 (a). In several opinions rendered since adoption of the §455 (a) amendment, the First Circuit has held that a judge's prior judicial involvement in a case (as opposed to extra-judicial knowledge of the parties or evidence) can provide a factual basis for doubting impartiality. Blizard v Frechette, (1st Cir. 1979) 601 F.2d 1217, United States v. Cepeda Penes, (1st Cir. 1978), 577 F.2d 754, United States v Cowden, (1st Cir. 1976), 545 F.2d at 257.

Clearly, the Commission has discretionary authority to adopt a higher standard of judicial conduct than those required by the courts. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2) CLI-82-9, 15 N.R.C. 1363, 1374 (Note 1) (1982). Consistent with Congressional intent in the adoption of §455 (a), it is imperative that the Commission do all that is possible to foster public confidence in the fairness and impartiality of the licensing process.

It is particularly important that in proceedings before this agency the highest possible standard of judicial conduct be applied when a motion for recusal is made. This is so because, unlike federal judges who are nominated by the President and confirmed by the Senate, and preside over a wide variety of cases, NRC judges are not confirmed by any elected body. Also, they are a part of the very agency whose staff appears before them as a party to the proceedings and deal solely with nuclear issues. This situation, by its very nature, is

fraught with the danger of a perception of bias. It should require that the performance of judicial duties, as well as extrajudicial conduct, be such that there be no reasonable basis for a perception of bias or hostility on the part of the presiding officers.

That opportunity is available here through application of the standards suggested by Commissioner Asselstine in his Houston Lighting, infra, dissent. That standard requires disqualification of a Licensing Board member if a reasonable person, knowing all the circumstances, would reach the conclusion that the member's impartiality, that is, his or her ability to pass judgment on the merits of the case in a fair and impartial manner, might reasonably be questioned. This standard is appropriate regardless of whether the statements or conduct giving rise to the appearances are "judicial" or "extra-judicial" in nature. Houston Lighting, infra, at 1375.

Application of this standard is consistent with clear judicial and legislative trends favoring higher ethical standards and approved public perception of fairness at judicial proceedings. Moreover, the standard makes sense. Any negative impact of this standard, including any "chilling effect" on the intemperance of the judge's behavior is clearly outweighed by the recognized need for the perception of complete fairness in nuclear licensing proceedings.

III. CHAIRMAN HOYT HAS VIOLATED THE STANDARD OF 28 U.S.C. §455 (a) THROUGH HER CONDUCT IN THE HEARINGS TOWARD COUNSEL FOR THE INTERVENORS AS WELL AS REPRESENTATIVES OF INTERESTED MUNICIPALITIES.

A. JUDGE HOYT'S CONDUCT WITH RESPECT TO COUNSEL FOR THE COMMONWEALTH OF MASSACHUSETTS.

On August 17, 1983, Judge Hoyt commenced hearings pursuant to an Order of this Board dated July 11, 1983, "Notice of Hearing on Entrance of Facility Operating License."

The bulk of the hearings focused on cross and redirect examination of expert witnesses regarding their submitted testimony on certain intervenor contentions. Those contentions dealt with the adequacy and usefulness of the Applicants' evacuation time estimates, along with other issues.

All counsel participating were directed by Judge Hoyt to submit detailed cross-examination plans in advance of the hearings. Jo Ann Shotwell, counsel representing the Attorney General for the Commonwealth of Massachusetts, complied with the Order. See Atomic Safety & Licensing Board Order, July 28, 1983. In doing so, she submitted the plan to Judge Hoyt with the understanding that its contents would remain confidential.

During Ms. Shotwell's cross-examination of Robert J. Merlino, witness for the Applicants, Judge Hoyt read out loud a portion of counsel's cross-examination plan. In so doing, Judge Hoyt alerted other parties as to an area of cross-examination which had not yet taken place. (See Appendix A, Record of Hearing Transcript, August 17, 1983 at 1065 et seq.) Subsequent to Attorney Shotwell's objection, Judge Hoyt ordered her to apologize both for the tone and substance of the objection. (See Appendix A, *infra*, at 1089.) In so doing,

Judge Hoyt threatened to suspend counsel from the proceedings unless she rectified her "contemptuous conduct". Counsel apologized for the tone of the objection, but stood on its substance. (Appendix A, infra, at pg. 1090.) In response, Judge Hoyt remarked:

Ms. Shotwell, I would prefer for you to be in the proceedings. I don't think the substance was appropriate, however I believe the state of the destructive conduct has been sufficiently cured, and the Commonwealth of Massachusetts counsel is welcomed back to the proceedings. (Appendix A, infra, at 1090.) (Emphasis added)

The judge's conduct in demanding an apology for the substance as well as the tone of Attorney Shotwell's objection indicates hostility and an appearance of partiality to a reasonable person. The judge's reading of any portion of sensitive cross-examination plans submitted in confidence is highly prejudicial to the rights of intervention counsel to conduct effective cross-examination of Applicant and Staff witnesses.² More disturbing than the act giving rise to the dispute, however, was Judge Hoyt's continued insistence, even after time for a recess and careful reflection, that the substantive content of Attorney Shotwell's objection was "destructive". Indeed, Judge Hoyt further demonstrated her hostility by referring to the wholly proper conduct of counsel as a "contempt". (Transcript, pg. 1087.) On the contrary, notwithstanding an understandably angry tone, the substance of the objection was both timely and highly appropriate under the circumstances.

Judge Hoyt continued to exhibit hostile behavior towards Attorney Shotwell in subsequent proceedings. For example, on August

2. At Transcript, pg. 947, Judge Hoyt had quite appropriately noted that the cross-examination plan would not be distributed "until after the cross-examination is completed".

19th, while Attorney Backus was conducting cross-examination of Dr. Urbanik, Ms. Shotwell make a motion to strike testimony with respect to evidence which had not been previously referred to through interrogatories or prefiled testimony. Attorney Dignan responded that Dr. Urbanik was not an applicant witness, and that the motion was therefore improper. Upon Ms. Shotwell's wholly proper withdrawal of the motion, Judge Hoyt commented "I think the record should reflect that at 11:40 we reached a new high." Notwithstanding the fact that Attorney Shotwell noted for the record her offense of that remark, Judge Hoyt merely stated her willingness to allow the record to so reflect. No apology was offered. The Judge's callous and hostile remark regarding Attorney Shotwell's motion is entirely improper, and created the distinct appearance of hostility against counsel for the Commonwealth.

B. JUDGE HOYT'S CONDUCT WITH RESPECT TO COUNSEL FOR THE SEACOAST ANTI-POLLUTION LEAGUE.

Over the course of the hearings, it was stated by various designated representatives from admitted, interested municipalities that they had observed "witness coaching" by counsel for the Applicants and NRC staff during cross-examination by intervenor counsel.

On the morning of August 23, 1983, Diana Randall, representative of the Town of Seabrook, noted her observations of witness coaching by attorneys for the NRC staff, particularly Mr. Patterson, while Attorney Backus (representing the Seacoast Anti-Pollution League, an intervenor in the proceedings), was conducting cross-examination of Dr. Thomas Urbanik II (witness for Staff).

Judge Hoyt's response was to order that an affidavit be procured from Dr. Urbanik by Mr. Lessy, lead staff counsel. However, by contrast in regard to a similar charge involving an applicant witness and applicant attorney, her order was that the witness be returned for live examination. (Transcript, p.1680.) Attorney Backus objected to the remedy, and asked that Dr. Urbanik be brought back so that he might be examined concerning the incident. (See Appendix B, Record Hearing Transcript for August 23, 1983, at 1685).

Judge Hoyt's denial of counsel's request not only contrasted with her ruling on the returning of applicants' witness to the hearing, it was combined with an attack on Attorney Backus on the basis that he was a member of the Bar, had not made personal observations of the incident, and was capable of "making such accusations known to the Bar Association". (See Appendix B, *infra*, at 1686.)

Clearly Mr. Backus was not "making allegations" but was rightfully representing the interests of his client in addressing observations of a serious nature made by another party to the proceeding. (See Appendix B, *infra*, at 1685.) (See also, attached Affidavit of Diane Curran.)

In response to Mr. Backus' request, the following statements were made:

Judge Hoyt: Mr. Backus, the relationship that you have in this case is considerably different than that of the town representatives. You are a member of the Bar, sir. You are perfectly capable of making such accusations, known to the Bar Associations--the Bars that these gentlemen are presently members of. The town representatives are not in that position. If you have any such allegation, you will direct them to the appropriate authorities, within the areas where these gentlemen serve.

Now that's the end of the matter. We will proceed with the witness.

Mr. Backus: With your indulgence, Ma'am.

Judge Hoyt: No, sir, Mr. Backus. Please be seated, sir.

Mr. Backus: I would like to state on the record, Madame--

Judge Hoyt: Mr. Backus, be seated, sir.

Mr. Backus: Madame, I would just--

Judge Hoyt: Sir, I have asked you please to be seated.

Mr. Backus: I would like to make one more statement on the record.

Judge Hoyt: Sir, please be seated. The record will not reflect any additional statements by you. I request sir, kindly, that you please be seated. Ms. Curran, please be seated.

Mr. Backus: I suggest error in that ruling to--

Judge Hoyt: Ms. Shotwell, please be seated.

Ms. Curran: I have something to add.

Judge Hoyt: No, ma'am. You will not add anything to this record. The reporter is directed that these remarks will not be recorded. You will please be seated. Town representatives are also added to that. Thank you, ladies and gentlemen. Now, are you ready with your witness, sir?

Mr. Perlis: Thank you. Yes, I am.

Judge Hoyt: Please present the witness.

The record clearly reflects hostile conduct directed both at Mr. Backus and at other counsel attempting to make statements on the record. The judge's ruling on a remedy concerning serious charges brought forth by hearing participants should, at the very least, have been rendered after providing counsel with an opportunity to make a statement for the record. The judge's intemperate remarks cutting counsel off, and in particular directing the reporter not to record the remarks of counsel on the matter, is highly improper. Judge Hoyt's ad hoc determinations as to which statements will and will not be inserted into the record clearly establishes an appearance of bias to a reasonable person.

It is not SAPL's position that the judge's ruling on this point establishes the appearance of bias, although SAPL believes the ruling was in error. Rather, such appearances result from the judge's unnecessary and consistently harsh manner and conduct in preventing counsel for intervenors, in this case Attorneys Backus and Diane Curran, (representing the New England Coalition Against Nuclear Pollution, hereafter "NECNP", another intervenor), from noting legitimate and reasonable objections on the record.

C. JUDGE HOYT'S CONDUCT WITH RESPECT TO DESIGNATED REPRESENTATIVES FROM INTERESTED MUNICIPALITIES.

Subsequent to witness prompting charges made by representatives

from the Towns of South Hampton, Kensington, Seabrook and Hampton Falls, both witnesses Merlino and MacDonald testified they had not been coached, or that if signals had been indicated by counsel, they had not observed them.

At the conclusion of Mr. MacDonald's testimony on the matter, Judge Hoyt severely reprimanded the town representatives for making the allegations in the first place, and threatened to eject them from the proceedings should they ever make such allegations again. (See Appendix B, *infra*, lines 2-25, page 1749, and lines 1-23, page 1750.)

The nature of Judge Hoyt's remarks, both in tone and substance, violates the standard appropriate for judicial conduct in these proceedings.

The charges made by the several town representatives were made in good faith. Indeed, they were made responsibly notwithstanding any lack of legal training on the part of those hearing participants. In response, Judge Hoyt characterizes the representatives' charges as being of a "juvenile" nature, "frivolous", and constituting a "juvenile whim". Further, the judge instructs that no further allegations of that type will be "tolerated" and that this will be the last time the Board will have to go through such a "ritual". Finally, the judge warns representatives that if any further "frivolous" allegations should arise, serious consideration will be given to their ejection. (Transcript, pg. 1750.)

The judge's characterization of the representatives' statements and observations are beyond mere intemperance; they create a distinct and unmistakable impression of hostility against the character, responsibility, and above all integrity of the representatives. This fact is all the more damaging to the public perception of Judge Hoyt's impartiality in light of the fact that the statements were directed toward appointed representatives of those members of the public most affected by and interested in the licensing hearings.^{3,4}

Judge Hoyt's hostility toward municipal representatives was apparent not only in the August hearings, but in the earlier pre-conference hearings as well. On April 8th, while in the process of recognizing the various town representatives, Judge Hoyt remarked:

3. A similar attack was made on Mr. Guy Chichester, representative from the Town of Rye. In commenting on Mr. Chichester's noted observations concerning witness coaching, Judge Hoyt stated flatly:

Now the Town of Rye will remain in this case just as long as that sort of accusation is the first, last, and only one you will make on this record. (See Appendix C, Record Hearing Transcript, lines 12-14, page 1541.)

4. A particularly dramatic example occurred at the end of the August 23rd session when Ms. Sandra Gavutis, a Kensington Selectman, attempting to note a simple correction to the record, was not permitted to do so:

Ms. Gavutis: Can I make a date correction on the record? I'd like to show the date of Mr. Merlino's testimony was Wednesday, August 17th, not Thursday as you thought.

Judge Hoyt: Those remarks will be stricken from the record. I have given the Town of Kensington ample opportunity to make these representations. Now to continually repeat the same error is no longer going to be tolerated. One more caution to you, ma'am.

"I will just briefly express the disappointment of the Board in having moved these times to participate to find that a hearing conference does not have these representatives present. It seriously calls into question whether or not there is any input desired by these towns, if that is the case." (Emphasis added.) (Transcript, pg. 811.)

Notwithstanding the Judge's insistence that town representatives travel to Boston for the conference, she disallowed any attempt on their part to state anything meaningful on the record during that proceeding. For example, at one point, the Judge was expressing her interest in ruling from the bench as to the scheduling for emergency plan contention litigation. Although Attorney Ahrens, representing the State of Maine, had expressed reservations about such a ruling without all the towns being present, the Judge indicated her determination to do so regardless of the fact. During the conversation between Judge Hoyt and Mr. Ahrens, Mr. Shivik, representative from the Town of South Hampton, respectfully asked if he might interrupt to contribute to the discussion. Judge Hoyt's response was short and abrupt; "No, sir, you may not. Would you please be seated?" (Transcript, pg. 8175.) This is the sole extent to which town representatives were allowed to make any significant representations before that proceeding. Notwithstanding the fact that the Judge had ordered their attendance, and indeed had insulted those town representatives which had been unable to attend, as well as questioning the validity of their interest, Judge Hoyt prevented any meaningful town participation in the hearings that day.

It is SAPL's position that the fairness perception of these people and the representatives they elect are of the utmost importance in light of §455 (a) standards. To date, Judge Hoyt has exhibited

contempt and disdain for the forthright manner in which the representatives conducted themselves, and has done irreversible damage to her appearance of impartiality before seacoast area residents and the New Hampshire public generally. [See attached newspaper articles: "Seabrook Hearings Close with Drama", Foster's Daily Democrat, Portsmouth Herald Editorial Page, Friday, September 2, 1983: "Is Deck Stacked?" noting observations of editorial staff along with those of New Hampshire State Senator Robert Preston, "Judgment or Prejudgment: To Many Participants, the Hearings on Licensing Seabrook were an Empty Exercise", by Hank Nichols, New Hampshire Times, September 12 to September 19, 1983.]

D. JUDGE HOYT'S REMARKS AT THE HEARING SIDE BAR CONFERENCE CONDUCTED ON THURSDAY, AUGUST 18, 1983 ESTABLISH A CLEAR APPEARANCE OF PARTIALITY.

On August 18, 1983, Judge Hoyt ordered a closed session side bar conference for the purposes of remedying, as she saw it, conduct which had gotten "absolutely out of hand". (See Appendix D, Hearing Record Transcript, Side Bar Conference, August 18, 1983, lines 1-9, page 2.) In the first instance, Judge Hoyt's characterization of the conduct exhibited by attorneys in the case runs entirely contrary to the perceptions of attorneys participating in the proceedings. It also runs entirely contrary to the record, which contains no improper or even impolite statements.

Yet, Judge Hoyt's comments included her observations that "all trappings of civilized behavior" had eroded, that she had seen "no semblance of intelligent, mature behavior exhibited by counsel", and that several intervenor attorneys, including Ms. Curran representing NECNP, had created the implication before members of the public "that

something evil had occurred". (See Appendix D, *infra*, lines 1-4, and lines 9-22, pg. 3, and lines 7-10, pg. 7.)

Of particular interest is the judge's chastisement of Attorney Curran for the on-the-record objections she had made to excluding the public from that particular conference. (Appendix D, lines 3-25, pg. 7, lines 1-3, pg. 8.) The judge's remark concerning the fact that Attorney Curran's legitimate objection might have adversely affected public perception of fairness in the proceedings is interesting in that with respect to that remark she states "and that was the reason that it had to be stopped at that point." Indeed the judge is quick to shut attorneys off when she feels public perceptions of fairness may be eroding, despite the fact that attorneys objections are legitimate and are consistent with reasonable ethical standards. As Attorney Curran states on the record, she was not interested in affecting the public perception adversely, she was interested in making a record. It is curious that although the judge insists that everyone be allowed an opportunity to make an adequate record in the proceeding, she continually shuts attorneys off, and interrupts their statements of objection ordering them to sit down, etc. Judge Hoyt has given the hearing participants the direct impression that her means toward rectifying any appearances of partiality is through silencing legitimate and reasonable objections of attorneys to her rulings, as opposed to allowing the statements to be made on the record and having to rule on them respectively.⁵

5. In jury trials, judges routinely advise jurors that no adverse inferences are to be drawn from an attorney's objections since this is part of an attorney's duty to "zealously" represent his client.

E. JUDGE HOYT'S STATEMENTS AND CONDUCT WITH RESPECT TO
ATTORNEYS JORDAN AND BISBEE IN THE PRE-CONFERENCE HEARINGS
DEMONSTRATES AN APPEARANCE OF BIAS.

During a pre-hearing conference held in Boston on April 8th, the schedule for emergency plan contention submissions was discussed at some length.

Several parties, including NECNP, had submitted proposed hearing schedules for the Board's consideration. At one point, Judge Hoyt invited comments from Attorney Jordan as to his proposal.

Counsels' comments (See Transcript, pg. 905, April 8, 1983) were directed to the specifics of the schedule and comparing it to that of Staff counsel, Mr. Lessy. In explaining why his schedule was somewhat more lengthy, Attorney Jordan pointed out the complexity and magnitude of the contentions likely to be adjudicated. Counsel also attempted to point out that several of the parties were not fully funded, and that the Commission should take into account the limited resources of intervenors in establishing such a short schedule for complex litigation.

At that point, Judge Hoyt cut counsel off, and refused to let him continue. Even when counsel attempted to get clarification from the Judge as to the proposed schedule, the Judge again cut him off and denied him that clarification opportunity. (See Transcript, pg. 908.)

The Judge's refusal to allow counsels' wholly appropriate statements on the record demonstrates once again her bias with respect to intervenor counsel. At no time were counsel for Staff or Applicant prevented from commenting on the record as to the specifics of scheduling proposals.

Another example of similar bad conduct occurred later in the day. After chastising intervenor counsel for their desire to have a more extended schedule for discovery, Judge Hoyt solicited a response from Dana Bisbee, representing the New Hampshire Attorney General's office. Attorney Bisbee pointed out the distinctions between schedules, and suggested it was not logical to require submission of direct testimony before summary disposition rulings had been rendered.

At that point, Judge Hoyt lashed out at counsel for making "excuses" and charged malpractice in counsel's representation of his client's interest (See Transcript, pg. 923). The foundation for Judge Hoyt's charges was based on the fact that state and intervenor counsel had relied on interrogatories, as opposed to depositions and other more expensive means of discovery.

Judge Hoyt's flagrant charges questioning Attorney Bisbee's representation were without merit and entirely inappropriate.⁶ Indeed, Mr. Jordan had attempted, albeit in vain, to note earlier in the record the obvious financial constraints under which intervenor parties were operating. For the judge to lash out at counsel merely for his wholly reasonable response to her own comment solicitation is another example of Judge Hoyt's hostility toward intervenor and state counsel.

6. The attack on Attorney Bisbee is totally unfounded since it was Judge Hoyt who ruled New Hampshire's submission of emergency planning contentions premature when they were submitted on May 24, 1982. Yet, the Judge attacked counsel for "making excuses" merely for pointing out these issues could not be litigated sooner, as a result of an Order issued by the Board itself. (See Board Memorandum and Order, September 13, 1982 at 33, and Transcript, 921-923, April 8, 1983.)

SAPL wishes to point out that there was nothing intemperate whatsoever about the manner in which Attorneys Jordan and Bisbee expressed their concerns. Despite their legitimate attempts to note remarks and objections concerning proposed scheduling, they were repeatedly cut off and harassed by Judge Hoyt. This appearance of bias is especially distressing when exhibited with respect to emergency planning issues.

In addition, emergency planning is of tremendous importance to the public safety, and Judge Hoyt's intolerance of any delay in the process, regardless of sound substantive reason, exhibits the worst appearances of bias to a reasonable person.

IV. JUDGE HOYT'S RULINGS WITH RESPECT TO INTERVENOR MOTIONS AND OBJECTIONS ARE CONSISTENTLY IN FAVOR OF THE APPLICANTS AND STAFF AND DEMONSTRATE BIAS AGAINST THE INTERVENORS IN THIS PROCEEDING.

Substantially all of Judge Hoyt's rulings with respect to evidentiary and other matters in the hearings conducted on emergency planning to date have been in favor of the Applicants and Staff respectively. SAPL does not rely on this fact exclusively in support of its Motion for Disqualification, but rather wishes to point out its consistency with Judge Hoyt's demonstrated hostility and contempt for intervenors and interested municipalities.

SAPL wishes to note in particular that twice the Appeal Board has seriously cautioned this Board with respect to rulings it has made. Although not actually reversing the Board on interlocutory appeal, the Appeals Board expressions of concern indicate problems with the fairness and correctness of Judge Hoyt's rulings with respect to intervenors. [See Atomic Safety & Licensing Appeals Board Memorandum and Order, ALAB-737, August 26, 1983, and Atomic Safety

& Licensing Appeals Board Memorandum and Order, ALAB-734, July 19, 1983, at pg. 7].

V. THIS MOTION FOR DISQUALIFICATION IS FILED IN A TIMELY MANNER CONSISTENT WITH THE APPROPRIATE CRITERIA ADOPTED BY THE COMMISSION.

The Commission has taken the position that the failure of a party to file a motion for disqualification once the information giving light to such a claim is available amounts to a waiver of the disqualification objection. Consumer Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC at 60, 63 (1963).

This objection is timely since the only Board ruling of significance since the conclusion of the August hearings was related to contentions submitted on the New Hampshire State Radiological Emergency Plan. (See Board's Order, August 30, 1983.) Due to the fact that all intervenors were pressed with a deadline requiring submission of contentions on local RERPs soon after conclusion of the hearings, SAPL was unable to complete this motion until now. Due to the time requirements for preparation of local plan contentions, SAPL asserts that the five-week delay in filing this motion is therefore not grounds for waiver of its right to move for disqualification.

VI. CONCLUSION.

SAPL has filed this Motion, not in an attempt to engage in "judge shopping", but rather to ensure that these hearings convey every element of complete fairness to the hearing participants and the general public.

Judge Hoyt's hostility toward intervenor and state counsel, as well as municipal representatives, has been apparent in both the

pre-conference hearings held in April, as well as the Phase 1 hearings held in August. This continuous and ever increasing hostility, moreover, has been conspicuously absent with respect to counsel for Staff and Applicants, particularly in regard to ordering counsel shut off.

Regardless of the extent to which SAPL has established the actual, subjective existence of bias on the part of Chairman Hoyt, the judge has clearly established the distinct appearance of partiality to a reasonably prudent person. The newspaper articles appended to this Motion indicate clearly that numerous objective observers of the hearings have concluded that the judge does in fact give every appearance of exhibiting bias, particularly against the municipalities.

To allow Judge Hoyt to continue in this case is to allow continued erosion of public confidence in the objectivity, credibility, and overall fairness of the Seabrook licensing process.

It is precisely this consequence that 28 U.S.C. §455 (a) and ABA Judicial Code (3) (C) (1) were designed to prevent. Apart from any rational associated with the judge's conduct, review of this Motion must focus on public perception. At this point, that perception is one of pervasive distrust of the judge's impartiality, and mandates her immediate disqualification from further participation in these proceedings.

By:

October 7, 1983

1 can rule on any future testimony that may be coming up. We
2 don't have that before us. We have this particular issue.

3 MS. SHOTWELL: The relevance of the testimony,
4 Your Honor, to this particular issue is that we have
5 witnesses being presented by various parties here who have
6 not only prepared their own estimates, but in some cases,
7 particularly our own, have been reviewing estimates by
8 others.
9

10 Mr. Merlino is someone who has also done that
11 in this particular field. And his testimony as to the
12 varying circumstances that lead to varying work product in
13 this area is certainly relevant.

14 JUDGE HOYT: Objection sustained.

15 Are we going ahead into page 9?

16 MS. SHOTWELL: We're well into page 9.

17 JUDGE HOYT: I believe we're into adverse weather
18 effect?

19 MS. SHOTWELL: I object. Madam, you have just
20 read from a portion of a cross-examination plan that was
21 submitted to you in confidence, and you have read from a
22 portion --
23

24 JUDGE HOYT: Sit down, Counselor.

25 MS. SHOTWELL: That was not addressed on cross-
examination. You have alerted other parties to this

1 proceeding of cross-examination that has not yet taken place.

2 JUDGE HOYT: Counsel, I'm going to ask you one
3 more time to please be seated.

4 Now, in some seven years of sitting in
5 administrative proceedings, I have never been addressed
6 by counsel in that tone before.

7 Let me assure you that that's going to be the
8 last time. And you may apologize to the counsel here or
9 we will just cease these proceedings at this point.

10 I have no intention of being addressed in that
11 tone.

12 It is not a person that you have addressed in
13 that fashion. It is the office that we all hold on this
14 bench.

15 I think, in order to clear the air a bit, that we
16 will have a five-minute recess.

17 You may individually approach the counsel and
18 apologize to them in our absence.

19 MS. SHOTWELL: I will not do so, Madam.

20 (Recess.)
21
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1 JUDGE HOYT: The hearing will come to order.

2 The parties that were present in the hearing room at
3 time of recess are again present in the hearing room.

4 The witnesses have resumed their place on the
5 witness stand. Gentlemen, you are reminded you are under
6 oath.

7 Ms. Shotwell, when we recessed a moment ago, I
8 asked that you state an apology to this assembly for the
9 conduct you exhibited. Have you registered that now?

10 MS. SHOTWELL: No, I have not. I have no apology.

11 JUDGE HOYT: Very well. Thank you, counsel. You
12 may be seated. Gentlemen, you may return to your chairs,
13 unless there is other cross-examination -- is the Staff
14 ready?

15 MR. LESSY: Your Honor, we have our own panel. We
16 haven't followed the plan with respect to these witnesses.

17 MR. BACKUS: I have, your Honor.

18 JUDGE HOYT: You have. All right.

19 MS. SHOTWELL: Is it the Board's ruling that the
20 Commonwealth will not be allowed to conduct cross-examination
21 on these witnesses? Is that the position of the Board?

22 JUDGE HOYT: The position of the Board, Ms. Shotwell,
23 is that you have not cured the mistake you have performed in
24 this courtroom. The conduct you have performed in this
25

1 courtroom is cured by an apology to the members of this court,
2 the panel, and the counsel appearing before us here. The
3 Commonwealth will not be able to continue to participate in
4 it.

5 MS. SHOTWELL: We will be taking an interlocutory
6 appeal to that decision.

7 JUDGE HOYT: You may take whatever is lawful to
8 provide --

9 MS. SHOTWELL: The record will reflect --

10 JUDGE HOYT: The record will not reflect --
11 the record will not reflect -- counsel will not participate any
12 further if they do not wish to.

13 (Ms. Shotwell left the hearing room.)

14 JUDGE HOYT: Mr. Backus, I believe your cross-
15 examination is next. Are you ready to begin, sir?

16 MR. BACKUS: Madam Chairman, I had anticipated that
17 cross-examination -- at least the plan was prepared in
18 anticipation that the cross-examination would be both on the
19 direct and redirect. That is going to require some
20 readjustment.

21 In fact, I would like to advise the Chair and the
22 members of the panel that in the event that there is going to
23 be no need for rebuttal because the testimony that is being
24 rebutted is not admitted, the examination I have can be very
25 brief, indeed.

1 JUDGE HOYT: Mr. Backus?

2 MR. BACKUS: I think that is all I have at this time,
3 Madam Chairman.

4 JUDGE HOYT: Ms. Curran?

5 MS. CURRAN: Madam Chairman, I have not submitted a
6 cross-examination plan. In order to conserve resources, and
7 not to be repetitious, I had previously conferred with counsel
8 for the State of Massachusetts, who was going to be addressing
9 NECNP's concerns.

10 I am very concerned that our concerns in this
11 proceeding will not be addressed now that Massachusetts has
12 been dismissed --

13 JUDGE HOYT: Pardon me, Ms. Curran. Let me
14 correct you. Massachusetts has not been dismissed as a party
15 in this proceeding. Massachusetts was told, because of its
16 conduct here, it had the means of curing its conduct by
17 apologizing to the counsel and to this Board.

18 Massachusetts has elected not to exercise that
19 option. It has not cured its contempt. And, until it does
20 so, there will be no participation. That is what the
21 Board's ruling was.

22 Now, if you want to ask questions, because the
23 Commonwealth of Massachusetts is not participating, then you
24 may. I would prefer that you determine if that is going to be
25 the case, if Massachusetts elects not to participate in here.

1 MS.CURRAN: Your Honor, I have no way of knowing
2 what Massachusetts would do. I would like to ask a few
3 questions of the witnesses for the Applicant.

4 JUDGE HOYT: Before you ascertain that, Ms. Curran,
5 I have concern that your rights be preserved if that is
6 necessary, and you will certainly be permitted to ask those
7 questions in spite of the fact that you have not filed a
8 cross-examination plan.

9 Do you want to ascertain that first?

10 MS. CURRAN: As far as I know, counsel for
11 Massachusetts has left.

12 MS.SHOTWELL: No, I have returned.

13 JUDGE HOYT: That is what I was trying to tell you,
14 Ms. Curran.

15 (Laughter)

16 MS. SHOTWELL: I have just come in. I don't
17 know what the issue is.

18 JUDGE HOYT: Why don't we have a two- or three-
19 minute recess for counsel to confer.

20 (REcess)

21 JUDGE HOYT: The hearing will come to order. Let
22 the record reflect that all the parties to the hearing before
23 the recess, are present now that the hearing has resumed.
24 And, the witnesses have taken their places on the stand.

25 Again, I remind you that you are under oath.

1 Ms. Curran?

2 MS. CURRAN: I cannot speak for Ms. Shotwell. I
3 defer to her.

4 JUDGE HOYT: Does Ms. Shotwell wish to speak?

5 MS. SHOTWELL: Yes, I do.

6 I have been informed, I think, of some of what
7 has happened during my absence, and I understand that the
8 Board has indicated that the Commonwealth will be precluded
9 from submitting its own testimony, in addition to cross
10 examination unless, as I understand it, I apologize for the
11 tone of the objection that I made to the Chair's reading of
12 a portion of my cross-examination plan.

13 JUDGE HOYT: It was tone and substance,
14 Ms. Shotwell. Let me remind you of the provisions of this
15 Commission's rules and regulations which you will find in
16 Section 2.713. In particular, Paragraph C recommends
17 censure or suspension from the proceedings. A presiding
18 officer on the Atomic Safety and Licensing Appeal Board of
19 the Commission may, if necessary, for the orderly conduct of
20 a proceeding, recommend censure or suspend from participation
21 in the particular proceeding pending before it, any party or
22 representative from a party, who shall refuse to comply with
23 its directions, or who shall be guilty of disorderly,
24 disruptive or contemptuous conduct.

25 Also, I would like to cite for you paragraph

1 2.718, in particular paragraph E on Powers of the Presiding
2 Officer. That one has the power to regulate the course of
3 the hearing and the conduct of the participants under those
4 sections. They are the ones that the Chair has acted upon --
5 and it is within your power to remove any contemptuous conduct
6 by apology. This Judge has stood on that and will continue
7 to stand on it.

8 MS. SHOTWELL: Madam, in responding to that, I
9 cannot apologize for the substance of the objection. I stand
10 on the substance of the objection. I can say that there was
11 no intention to personally offend any member of the Board,
12 and I can apologize if my tone did offend any member of the
13 Board.

14 I cannot apologize for the substance of the
15 objection. I believe the substance of the objection was
16 founded.

17 JUDGE HOYT: Is that all?

18 MS. SHOTWELL: Yes.

19 JUDGE HOYT: Ms. Shotwell, I would prefer for you
20 to be in the proceedings. I don't think the substance was
21 appropriate, however I believe the state of the destructive
22 conduct has been sufficiently cured, and the Commonwealth
23 of Massachusetts counsel is welcomed back to the proceedings.

24 MS. SHOTWELL: Thank you.

25 Shall I proceed with cross-examination?

1 Yes ma'am, Town of Kensington?

2 MS. GAVUTIS: I would like to go on record as
3 observing it at the same time. We looked at each other and
4 spoke of the issue but, not being aware of court procedure,
5 didn't stand up at that time. We're not attorneys and had we
6 known, we would have spoken on Wednesday morning.

7 JUDGE HOYT: Is that the same witness that you're
8 referring to? May I have that name again, Mr. Dignan?

9 MR. DIGNAN: Mr. Merlino.

10 JUDGE HOYT: Mr. Merlino will be --

11 MR. DIGNAN: You have already asked Mr. Merlino
12 whether, on this record, at any time he was signalled to.

13 JUDGE HOYT: Was he one of the same witnesses?

14 MR. DIGNAN: I'm sorry, it was the other witnesses.

15 JUDGE HOYT: That was the other three, Mr. Dignan.
16 That was the reason I wanted you -- is he easily available?
17 What is the situation?

18 Very well, representative from Hampton Falls?

19 MS. PEVEAR: It's Pevear.

20 JUDGE HOYT: Pevear.

21 MS. PEVEAR: I would like to read an amendment to
22 the file, which I went home Friday night and typed it.

23 JUDGE HOYT: May I see the memo before you do so?

24 MS. PEVEAR: Certainly.

25 (Document handed to Judge Hoyt.)

1 JUDGE HOYT: Very well, ma'am. Let me return this
2 to you. I believe this is, in substance, the same remarks that
3 you placed on the record on Friday. No additional remarks
4 are necessary. Thank you, very much.

5 MS. PEVEAR: Madame Chairman, there is the final
6 paragraph.

7 JUDGE HOYT: No, ma'am. I said the memorandum
8 would not be placed on the record, thank you.

9 Ms. Curran?

10 MS. CURRAN: Madame Chairman, I think that the
11 representative from the Town of Hampton Falls is being prevented
12 from putting something on the record that she has every right
13 to put on. And I think she should be allowed --

14 JUDGE HOYT: I'm not aware that you even know what's
15 in that memorandum.

16 MS. CURRAN: She has asked to state --

17 JUDGE HOYT: Ms. Curran, I don't believe you are
18 aware of what's in the memorandum and the ruling of the Board
19 stands.

20 Is the witness ready, Mr. Perlis?

21 MR. PERLIS: Yes.

22 MS. PEVEAR: I would like the record to so state
23 that I did not get to speak.

24 JUDGE HOYT: It will so reflect.

25 Town of Seabrook?

1 MS. RANDALL: Yes, I feel it's my responsibility
2 as a citizen to also enter on record my observations on Friday
3 morning.

4 JUDGE HOYT: I believe, ma'am, your recollections
5 of what occurred on Friday have already been placed on the
6 record.

7 MS. RANDALL: No, I'm sorry they were not.

8 JUDGE HOYT: Am I in error? Very well, if you
9 want to place them on, you may, but you're not going to have
10 a second chance is what I'm saying.

11 MS. RANDALL: I was not here on Friday afternoon
12 when this was discussed. During Friday morning's cross-
13 examination of Dr. Urbanik, when Mr. Backus was conducting
14 cross-examination I observed attorneys from the NRC Staff --
15 specifically Mr. Patterson -- between the point when a question
16 was asked and the witness was then asked to give a response
17 shaking his head in a negative way prior to the witness
18 responding.

19 JUDGE HOYT: Very well. Now that witness has
20 returned to Texa, which is my understanding. Is that correct,
21 Mr. Lessy?

22 MR. LESSY: Yes, Your Honor.

23 JUDGE HOYT: What I am going to do, in that case,
24 since the witness is not in the area and I don't intend to
25 require the Staff to have that witness returned to New Hampshire

1 at government expense, I intend to request and, indeed I
2 so order Mr. Lessy, that an affidavit be taken from the witness,
3 Mr. Urbanik, as to what were the circumstances at the time that
4 he was questioned by -- who was that?

5 MS. RANDALL: Mr. Backus.

6 JUDGE HOYT: Mr. Backus. And that I will, at the
7 time that affidavit is available, I would request that --
8 no, Mr. Lessy, I am going to order that it be done no later
9 than Wednesday next week, when this Board will meet again here
10 in New Hampshire.

11 MR. LESSY: You would like the affidavit --

12 JUDGE HOYT: To reflect what the circumstances
13 were during the -- whether or not he had been instructed by
14 you, signalled by you, in any way.

15 MR. LESSY: It was Mr. Patterson.

16 JUDGE HOYT: Was it Mr. Patterson? Very well,
17 that's your witness then, Mr. Patterson? But you are lead
18 counsel, Mr. Lessy, and I look to you so that the order will
19 be carried out.

20 MR. LESSY: We'll ask that an affidavit under
21 oath be obtained.

22 JUDGE HOYT: And it will be inserted in the
23 record.

24 MR. BACKUS: Madame Chairman?

25 JUDGE HOYT: Mr. Backus?

1 MR. BACKUS: Madame Chairman, since this pertains
2 to the cross-examination I did on behalf of the Seacoast Anti-
3 Pollution League, I'd like to say on the record that I feel an
4 evidentiary hearing of this matter is required. Although I
5 recognize Your Honor has said that an affidavit should be
6 furnished, I believe the witness should be brought forward to
7 testify on this matter on the record and be available for
8 examination.

9 JUDGE HOYT: Mr. Backus, you -- I think the record
10 can reflect this -- had your back turned to the witness. You
11 do not know what occurred. You're in no position to make any
12 additional comments on that. I have taken, I think, what is
13 a reasonable precaution in order to ensure that the record
14 will reflect that neither of these witnesses -- if, in fact,
15 this is true -- were instructed by counsel.

16 MR. BACKUS: I think you said I had my back to
17 the witness. I think you meant I had my back to the counsel
18 for the witness.

19 JUDGE HOYT: Very well, let me say your back to
20 the counsel.

21 MR. BACKUS: Which is, of course, true. These
22 ladies in the jury box are town representatives faced directly
23 both the witnesses and, directly across from them, counsel
24 for the Intervenor of the Commonwealth of New Hampshire.
25 Behind us, counsel for the Staff and the Applicant. I'm simply

1 saying that although I could not see counsel for the Staff,
2 I think I should have the right to examine the Staff witness
3 about what went on, in light of what the representatives
4 have said.

5 JUDGE HOYT: Mr. Backus, the relationship that
6 you have in this case is considerably different than that of
7 the town representatives. You are a member of the bar, sir.
8 You are perfectly capable of making such accusations, known
9 to the bar associations -- the bars that these gentlemen are
10 presently members of. The town representatives are not in
11 that position. If you have any such allegation, you will
12 direct them to the appropriate authorities, within the areas
13 where these gentlemen serve.

14 Now, that's the end of the matter. We will proceed
15 with the witness.

16 MR. BACKUS: With your indulgence, ma'am.

17 JUDGE HOYT: No, sir, Mr. Backus. Please be seated,
18 sir.

19 MR. BACKUS: I would like to state on the record,
20 Madam --

21 JUDGE HOYT: Mr. Backus, be seated, sir.

22 MR. BACKUS: Madam, I would just --

23 JUDGE HOYT: Sir, I have asked you please to be
24 seated.

25 MR. BACKUS: I would like to make one more statement

1 on the record.

2 JUDGE HOYT: Sir, please be seated. The record
3 will not reflect any additional statements by you. I request
4 sir, kindly, that you please be seated.

5 Ms. Curran, please be seated.

6 MR. BACKUS: I suggest error in that ruling to --

7 JUDGE HOYT: Ms. Shotwell, please be seated.

8 MS. CURRAN: I have something to add.

9 JUDGE HOYT: No, ma'am. You will not add anything
10 to this record. The reporter is directed that these remarks
11 will not be recorded. You will please be seated.

12 Towns representatives are also added to that.

13 Thank you, ladies and gentlemen.

14 Now, are you ready with your witness, sir?

15 MR. PERLIS: Thank you. Yes, I am.

16 JUDGE HOYT: Please present the witness.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Public Service Company of New
Hampshire, et al.

(Seabrook Station, Units 1 and 2)

)
)
) Docket Nos.
) 50-443, -444
)
)

AFFIDAVIT OF DIANE CURRAN

Diane Curran, being duly sworn, deposes and says:

1. I am counsel for the New England Coalition on Nuclear Pollution (NECNP) in the above-captioned proceeding.

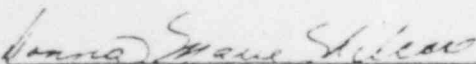
2. In this capacity, I represented NECNP in a hearing before the Atomic Safety and Licensing Board in the Strafford County Courthouse, Dover, New Hampshire, on August 17, 18, 19, and 23, 1983.

3. On August 23, 1983, during the course of the hearing, I rose to make an objection to the Board's handling of certain allegations that attorneys for Public Service Company and the Nuclear Regulatory Commission had been observed coaching witnesses regarding answers to cross-examination questions posed by counsel for intervenors. Tr. at at 1687. The Board did not give me an opportunity to speak, but told me to "please be seated." When I did not sit down immediately, but attempted to state my objection, the bailiff approached me until he stood directly in front of me on the other side of the counsel table and remained there until I sat down.

4. At no time later in the hearing was I given an opportunity to state my objection to the Board.


Diane Curran

Subscribed and sworn to before me this 12th day of September, 1983.


NOTARY PUBLIC

19c2 1 Q Would that be the first symptom of that event?

2 A The first symptom to the operator in the control
3 room; yes.

4 Q No other symptom would precede major damage to the
5 spent fuel?

6 A To the operator in the control room, no.

7 Q I see.

8 MS. CURRAN: I have no further questions.

9 JUDGE HOYT: I think those were the only two
10 cross-examination plans filed.

11 Do we have any redirect?

12 MR. GAD: Am I up, your Honor?

13 JUDGE HOYT: If you wish to be.

14 MR. GAD: Do you think that maybe we could take our
15 afternoon smoking break and maybe wrap this up in a couple
16 of minutes after that?

17 JUDGE HOYT: Yes. I think Judge Harbour has been
18 lobbying for that for some time.

19 (Recess)

20 JUDGE HOYT: The hearing will come to order.

21 Let the record reflect that all the parties
22 to the hearing who were present when the hearing recessed are
23 again present in the hearing room.

24 Ms. Shotwell?

25 MS. SHOTWELL: Madam, the representatives for the

1 towns of Hampton Falls and Rye have indicated to me on the
2 break certain observations that they made with respect to
3 something that happened prior to the break. I feel that the
4 observations should be put on the record at this time, and
5 I indicated my opinion on that score to the representatives of
6 the towns, and they have indicated that they wish to do so.
7 I feel that the matter is potentially very serious, and I will
8 defer to the representatives of the towns to indicate their
9 observations.

10 JUDGE HOYT: Yes, sir. Proceed.

11 MR. CHICHESTER: Sure. On the last question that
12 was put to these witnesses, I observed Counsel Dignan, before
13 answer was given, look directly at the table, move himself
14 into a position where he could be seen, and shake his head
15 vigorously "no," like that, vigorously.

16 It is not for me to make out what it was all
17 about, but I was watching for this simply because I had seen
18 during the course of the last few days situations like this,
19 in other words, signals like that, which I didn't understand,
20 and I wasn't about to say that they were meant to be signals
21 to the witnesses.

22 But I did discuss it at lunch with others who
23 thought they saw the same thing, and we decided among us
24 we would look very carefully for that sort of thing, to see if
25 in fact, what we thought we were seeing might be very real.

904
1 On the last question to these witnesses, before
2 the adjournment, the recess, that is in fact what I saw. I
3 saw Mr. Dignan shake his head vigorously "no" before
4 any answer was given from the witness table, and, in fact,
5 move himself into a position where he could be seen, looking
6 directly at the table.

7 JUDGE HOYT: Representative Pevear?

8 MS. PEVEAR: I observed the same thing: He shook
9 his head and he leaned around the counsel from Massachusetts
10 so that he could be seen by me even better, and he shook his
11 head vigorously "no," and then they answered "no."

12 I myself have noticed this -- not only Mr. Dignan
13 but the counsel for the Staff on previous --

14 JUDGE HOYT: Both of them, or one of them?

15 MS. PEVEAR: Mr. Lessy is the only one I noticed,
16 that when the expert witness would hesitate, I had seen they
17 had nodded, but I cannot give you specific questions at this
18 point. This one, I do know. I was watching.

19 MR. DIGNAN: Could I have the last question
20 answer from the witnesses? I honestly don't remember the
21 question.

22 JUDGE HOYT: Could you retrieve that, ma'am?

23 (The reporter read the record as requested.)
24
25

1 MR. DIGNAN: Madam Chairman, I ask the Board in
2 its consideration whether this accusation has any merit to
3 think through the likelihood that a lawyer whose background
4 is philosophy and law would purport to signal these three
5 witnesses for what the proper answer is to the question of
6 what symptom would first be observed in the event of a
7 radiological event such as the damage to the spent fuel.

8 That's number one.

9 Two, for the information of the Board, I do
10 recall shaking my head at that juncture which was when the
11 examination was being completed, and it was in response to
12 an inquiry which I normally don't bother to tell people,
13 because I'm at the counsel table, from my partner, Mr. Gad,
14 as to whether he should ask a certain question on redirect,
15 to which I replied, "Are you sure you know what the answer is?"
16 -- to which he replied he wasn't.

17 And I said, "Don't ask it." And I shook my head.
18 That is the facts. I don't like the accusation.

19 I would just as soon have these witnesses answer
20 under oath as to whether they have ever been told by me to
21 to me for a signal for an answer to a question.

22 JUDGE HOYT: I would like to have that responded
23 to by the witnesses.

24 First I will take you, Mr. MacDonald. Have you
25 ever been signalled to or instructed by Mr. Dignan to give

1 specific testimony in this case?

2 WITNESS MAC DONALD: Absolutely not.

3 JUDGE HOYT: So, you are under oath, and you give
4 that response under oath?

5 WITNESS MAC DONALD: Correct.

6 JUDGE HOYT: Mr. Thomas, have you ever been
7 signaled to, instructed by Mr. Dignan to give testimony in
8 this case?

9 And remember, sir, you are under oath.

10 WITNESS THOMAS: I have not.

11 JUDGE HOYT: Mr. Anderson, I ask the same question
12 of you, sir.

13 WITNESS ANDERSON: Absolutely not, Your Honor.

14 JUDGE HOYT: Mr. Lessy, you have also fallen
15 under the evil spell. So, may I have your response?

16 MR. LESSY: I'd like to remain seated, Your Honor.

17 Unfortunately, Mr. Urbanik has left, and I don't
18 have any specifics.

19 I can just state that, one, there was no such
20 signaling. I do recall shaking my head a couple of times
21 like this, yes, to what Dr. Urbanik had to say. I don't mean
22 these comments to go to substance. I have never worked with
23 him before, although I have heard of him, his reputation, and
24 reviewed a lot of his testimony. And in fact, in preparing
25 his testimony here for this proceeding, I did not do the

1 initial preparation. One of the other counsel did. But I
2 was very impressed with what he had to say, and I learned a
3 lot about the subject matter.

4 In fact, in that particular subject matter, this
5 is the first time I have, in fact, litigated that contention
6 or a contention like that. Mr. Perlis has been mostly doing
7 that because of events in another case --

8 JUDGE HOYT: Let me just get you down to the
9 signaling bit, Mr. Lessy.

10 Did you signal?

11 MR. LESSY: No, Your Honor.

12 JUDGE HOYT: Have you signaled any witness in this
13 case?

14 Remember, sir, you are a lawyer, and you are
15 subject to the canons of ethics of our profession.

16 MR. LESSY: Yes.

17 And I'm afraid I don't have the knowledge of the
18 subject matter of Dr. Urbanik to even engage in that even if
19 I were able to.

20 So, I had wished that if there was a feeling in
21 that regard -- in fact, I had a long conversation with
22 Ms. Pevear about another subject matter. I wish she had
23 brought it to my attention. We could have explained it off
24 the record. But if she wants to go on the record with it,
25 it's a very generalized kind of thing. The only thing I

1 could say is that it's just patently incorrect.

2 And I'm sure that there's really nothing more at
3 this point that can be added.

4 The subject matter of controlling these hearings
5 is a function of the Board, and the Board --

6 JUDGE HOYT: The Board intends to exercise its
7 function, Mr. Lessy.

8 MR. LESSY: Could I finish my sentence?

9 JUDGE HOYT: Go ahead. Let's have it, quickly.

10 MR. LESSY: The Board is in as much position as
11 the other observers to, and I'm sure the Board has been
12 exercising it's function, Your Honor.

13 JUDGE HOYT: All right, Mr. Dignan.

14 MR. DIGNAN: I'd like to ask one thing, Judge Hoyt.

15 I sort of rise to a point of personal privilege.
16 My integrity as a lawyer has been attacked in public.

17
18 I wish to advise the Board, which may be aware,
19 there is a decision in the books of the this Commission in
20 the Vermont Yankee proceeding by the Appeal Board which
21 mentions me by name.

22 I wouldn't bring it up normally, but it's an
23 interesting decision, because, in it, the Appeal Board went
24 out of its way to compliment my candor as a practitioner
25 before this agency. It came about as a result of the fact

1 that I received a decision from the Appeal Board which
2 permitted a client's reactor to operate.

3 But I also observed in that decision that the
4 Appeal Board has misunderstood a factual matter in the record
5 -- that is to say they cited as part of the reason for their
6 findings an affidavit that I knew had been superseded.

7 Because we were going to go on-line, I immediately
8 called the chairman of the Appeal Board and brought this to
9 his attention, because I felt, as a lawyer, that is your role
10 -- while you fight hard, you never mislead a board. That is
11 the way I have conducted myself for this agency and throughout
12 my professional life.

13 I resent the implications that have been made here.
14 I resent that an Assistant Attorney General lent her high
15 office to bring it to the attention of the Board, before
16 them. I don't like it. And I, frankly, expect an apology, at
17 least, from counsel who are members of the bar insofar as
18 she allowed this to be perpetrated.

19 MS. SHOTWELL: I believe I had a professional
20 responsibility to indicate that these observations had been
21 brought to my attention.

22 I believe that the observations needed to be put
23 on the record.

24 I still so believe.

25 I wish for the record to reflect that I have been

1 seated throughout these proceedings directly in front of the
2 table for counsel for the Applicants, and I am in no position
3 to observe and have indicated no such observation that has
4 been indicated on the record.

5 (Board conferring.)

6 JUDGE HOYT: Mr. Chichester, I think it was
7 indicated to you in this proceeding earlier there have been
8 a series of firsts for me, and this is the first time that I
9 have ever had counsel that appeared before me accused of
10 such a serious accusation.

11 You have placed into question the integrity of
12 professional persons that appear before this Commission.

13 Were the accusation to be true, it would fall
14 upon this Chairman to bring these matters to the attention
15 of the appropriate bar association.

16 I have observed these counsel in this case from
17 the beginning in some almost two years now that we have been
18 in session. I have not found counsel for any side to have
19 any cause to be questioned on their professional integrity --
20 counsel for all the states involved and counsel for the
21 Intervenors.

22 It is not until this morning when you have chosen
23 -- or rather this afternoon, when you have chosen to bring
24 such a serious accusation before this Board, that I seriously
25 question your ability to represent your town.

1 Now, I have been fortunate or unfortunate, as the
2 case may be, sitting here on a raised platform where I could
3 observe all counsel at all times. There has been, by no
4 counsel, any conduct that I can determine -- and I have
5 observed them throughout -- that would cause me to censure
6 counsel.

7 I am shocked and amazed that you would feel that
8 for the first time as a participant of a city or town in
9 this state to make such a serious professional accusation of
10 misconduct.

11 I not only resent, as a member of that same
12 profession, such an accusation, totally unsubstantiated, to
13 be brought before us -- and I am shocked even further that
14 counsel for the very honorable Commonwealth of Massachusetts
15 would lend herself and her position to that serious an
16 accusation.

17 I am saddened that it has happened. I hope that
18 in my entire professional career, as long as it goes, I
19 shall never experience that feeling again.

20 What you chose to do about it, Ms. Shotwell, is,
21 of course, something you will have to live with your own
22 conscience with. You did not observe it; you did not see
23 anything and have so stated for this record, that your back
24 was turned to these counsel.

25 Now, I do not wish to bring this matter any

1 further.

2 If you take some sort of steps, which you may do,
3 that is your pleasure -- to cure this very serious fault.
4 You did not see anything, you are not even in a position, as
5 you have admitted, to being able to observe counsel.

6 You will have to take my representation that I saw
7 no signal. I see signals of shaking of heads. I see signals
8 of you moving papers. I see questions being passed to counsel
9 when I know that counsel did not have those questions in
10 their cross-examination plan. And I have not chosen to make
11 that observation of record.

12 Now, the Town of Rye will remain in this case just
13 so long as that sort of accusation is the first, last, and
14 only one you will make on this record.

15 Ms. Shotwell, I will expect, in the privacy of a
16 meeting with Mr. Dignan, to work something out with him that
17 is mutually satisfactory to both of you. And I hope that that
18 is the end of the matter.

19 MS. SHOTWELL: Any decisions about the matter will
20 be made by my superiors.

21 MR. CHICHESTER: Madam Chairman --

22 JUDGE HOYT: Sir, we do not wish to hear you. You
23 may be seated.

24 MR. CHICHESTER: Well, you have chosen to both
25 reprimand me --

1 JUDGE HOYT: Sir, you will be seated, and you will
2 be seated immediately, sir.

3 MR. CHICHESTER: -- and to denigrate the
4 represenatation --

5 JUDGE HOYT: Sir, I will only ask you one more
6 time.

7 Thank you.

8 MR. CHICHESTER: In fairness, you should allow us
9 to respond.

10 JUDGE HOYT: Mr. Chichester, that is it.

11 MR. CHICHESTER: The record is clear.

12 JUDGE HOYT: I would like to proceed on into this
13 case.

14 Do you have any redirect of these witnesses,
15 Mr. Gad?

16 MR. GAD: Very brief redirect, your Honor, if I
17 might proceed now.

18 JUDGE HOYT: Yes, please.

19 REDIRECT EXAMINATION

20 BY MR. GAD:

21 Q Mr. MacDonald, begin with is there a typographical
22 error on Table A.5 -- I was supposed to call to your
23 attention at the outset --

24 A (Witness MacDonald) Yes, Mr. Gad, there is.

25 Q Would you please set it straight now.

MM/mml 1

P R O C E E D I N G S

4:40 p.m.

2 JUDGE HOYT: The reporter is instructed to take
3 this conference verbatim.

4 The Board is concerned that this hearing is
5 dissolving into a shouting match. I think that there are
6 appropriate methods and ways in which everyone can get their
7 case on this record. I am very disturbed that no matter
8 what occurs in this case, what question is asked, there are
9 objections, and this conduct is absolutely out of hand, and
10 I and Dr. Harbour will not tolerate this any longer.

11 In the case of the attorneys in this case, I
12 cannot believe that we cannot demand a higher standard of
13 conduct than what I have seen exhibited in this case so far.

14 Now, I suppose that it falls on me to attempt to
15 implement some mechanism that will insure that we will get a
16 complete record and a fair record. But, I can assure you,
17 each and every one of you, that we are not going to tolerate
18 this any longer. Such exhibitions as occurred yesterday
19 will not occur again. I thought those things had ended and
20 we could have a fresh day. We do not seem to be able to
21 arrive at that point.

22 Now, I am going to ask each of you here in this
23 hearing room at this time to give me some sort of an idea
24 what we can expect. Are we going to expect a better and a
25 completer hearing, and a fairer hearing without all these

M/mm 1 innuendoes and this absolute erosion of all trappings of
2 civilized behavior in a courtroom?

3 I have never, in my entire long life, been addressed
4 in some of the fashions that I have seen here today and
5 yesterday. I suppose other judges with a lot broader
6 experience than I will ever have, may have, but I have not.
7 I have never been so much as late for a courtroom, because I
8 knew better.

9 We are going to be prompt, and we are going to
10 learn courtesy one way or the other, or believe me, I am
11 not hesitant, not in the least, to see that the sanctions
12 that we can impose on the persons and parties of this
13 hearing, are imposed to the fullest.

14 Appeal boards, the Commission and the courts may
15 overrule me, but I am going to at least try to bring some
16 semblance to this hearing, some semblance of intelligent,
17 mature behavior. And I haven't seen it up to this point.

18 I am sorry to have to inflict this upon the Town
19 Representatives. However, you are into it just as well as
20 the rest of us are here, and if you would have participated,
21 the same remarks would have applied to you. Very fortunately,
22 you have not.

23 But, I am appalled at the professional conduct
24 that is being exhibited in this room.

25 Now, I am going to ask each of you on this record

1 to give me some sort of assurance that this is not going to
2 happen again.

3 Ms. Shotwell, if you want to start off, go right
4 ahead.

5 MS. SHOTWELL: I have a response I would like to
6 make on the record, your Honor.

7 JUDGE HOYT: Yes, ma'am.

8 MS. SHOTWELL: I would like to say that I, in my
9 entire life and experience in courtrooms and outside, have
10 never been addressed by anyone in the tone in which I believe
11 you address me repeatedly.

12 JUDGE HOYT: Ms. Shotwell, let me stop your right
13 there. I am not interested in whether you like the hearing
14 or not. The problem is, each of us have our task to do. The
15 only thing that I want from you is some sort of indication that
16 we can conduct this hearing in a fashion that is not degenerate
17 to our profession.

18 MS. SHOTWELL: Madam, what I am saying is --

19 JUDGE HOYT: You just can try and judge Ms. Shotwell,
20 if you will.

21 MS. SHOTWELL: I believe I can respond in kind.

22 JUDGE HOYT: Very well.

23 MS. SHOTWELL: If I am spoken to in a respectful
24 manner, I respond in a respectful manner.

25 JUDGE HOYT: Ms. Shotwell, there has been no

1 discourteous conduct on my part towards you at any time
2 in this hearing, and you know that.

3 MS. SHOTWELL: I dsagree with that entirely,
4 madam.

5 JUDGE HOYT: You are entitled to it. But, we are
6 trying a case before the public, and if they think this is the
7 way we conduct the hearings, or the conduct in the courtroom --
8 I'm sorry, but I feel this is something we have just got to
9 stop at this point.

10 MS. SHOTWELL: I feel, for that very reason that
11 we should both stop.

12 JUDGE HOYT: Ms. Shotwell, the relationship here
13 is not between two lawyers. The relationship that we have in
14 this courtroom, so far as I am concerned, is as a judge and
15 you as a counsel. This is not the same relationship. You
16 have never been spoken to in such a fashion, and this is a
17 terrible, terribly erroneous thing that you are trying to do.

18 Now I am not going to become angry in each and
19 every case because I am -- nor, do I intend to allow you to
20 do so either, because the public is not interested in that.
21 We are not trying a jury case, Ms. Shotwell, we are trying a
22 technical case, and I, for one, would like to proceed along
23 those lines.

24 MS. SHOTWELL: I am doing my best to try the case.

25 JUDGE HOYT: That's all right. That is all.

1 Ms. Shotwell.

2 Mr. Bisbee, do you have anything you want to add?

3 MS. SHOTWELL: I must state on the record that I
4 disagree with that characterization of the manner in which
5 you have addressed me in this proceeding.

6 JUDGE HOYT: Ms. Shotwell, please sit down.

7 Thank you.

8 Mr. Bisbee, do you have anything you wish to add?

9 MR. BISBEE: I believe you asked something from us?

10 JUDGE HOYT: I did, Mr. Bisbee.

11 MR. BISBEE: I am happy to respond.

12 JUDGE HOYT: I am trying to get some thoughts from
13 you.

14 MR. BISBEE: I would like the record to reflect
15 that my participation in the last two days has been very
16 limited. I do apologize for arriving late after the lunch
17 break today.

18 JUDGE HOYT: I wasn't aware that you had. But,
19 very well. Thank you.

20 MR. BISBEE: I am committed to representing my
21 client in the most full and proper way that I can. And I
22 will make every effort to conduct myself in such a way as
23 will not offend any party or any member of the Board.

24 JUDGE HOYT: We appreciate that, Mr. Bisbee. We
25 wish to give you full and free opportunity to represent your

1 client to the fullest.

2 Ms. Curran?

3 MS. CURRAN: I don't believe that NECNP has
4 conducted itself improperly in this proceeding.

5 JUDGE HOYT: Let me ask you this, Ms. Curran:
6 Let me be a little bit fuller. I have never conducted any
7 proceeding off the record. The implication that you left
8 before the members of the public that were sitting back
9 there is that something evil had occurred; that some
10 off-the-record conference had occurred; some meeting that
11 the public was not privy to.

12 The perception that the public has of what is
13 occurring in this hearing room is what they see and what they
14 hear out there, not what is in fact sometimes happening. And
15 it is that public perception that I felt keenly aware of
16 when you made the remark earlier today. And that was the
17 reason that it had to be stopped at that point.

18 MS. CURRAN: Your Honor, excuse me. I wasn't
19 interested in affecting the public perception. I was
20 interested in making a record.

21 JUDGE HOYT: I am, Ms. Curran.

22 MS. CURRAN: I have one other comment, and that
23 is if the Board wishes to chastise all the Parties, the
24 representatives of the Parties in this proceeding, then I
25 believe it should be done before the public. I do not agree

1 with the Board's procedure of excluding the public from this
2 meeting, and I believe that everything that has happened here
3 should be something that the public should have heard.

4 MS. SHOTWELL: I agree.

5 JUDGE HOYT: Mr. Backus?

6 MR. BACKUS: Judge Hoyt?

7 JUDGE HOYT: Mr. Backus?

8 MR. BACKUS: Ma'am, I respectfully disagree with
9 the Chair's characterization of the conduct of counsel in this
10 proceeding. I think counsel has been at all times considerate
11 and polite.

12 On behalf of the Seacoast Anti-Pollution League I
13 have a duty under the Canon of Ethics and Code of Professional
14 Responsibility to vigorously -- the word is zealously --
15 represent my client. I intend to do so. I intend to do so
16 with perfect regard for the decorum of this courtroom and
17 this tribunal. I have done so and will continue to do so,
18 and I will speak out when it is necessary for my clients'
19 interests.

20 JUDGE HOYT: That is what we expect you to do,
21 Mr. Backus.

22 Do the Towns of Rye or Seabrook wish to -- I'm
23 sorry, the Town of Hampton Falls?

24 MS. PEAVER: I don't know whether I am overstepping
25 my bounds or not, but since I am not a lawyer, and am not in

1 this case as a lawyer, I would like to state that I have
2 worked in business for 30 years, big business. I worked
3 for lawyers, judges for seven years. At this point I would
4 be called a paralegal, but in that day I was a secretary.

5 I used to go to court with my bosses, by the way.

6 When I went into the first proceeding that I went
7 to on this proceeding, it was preconference hearing in
8 Portsmouth. I was surprised when there was an argument
9 between Massachusetts counsel and Judge Hoyt over whether
10 or not Massachusetts counsel had received some pleadings.
11 And Judge Hoyt asked Massachusetts counsel if she had looked
12 behind the file cabinet.

13 And since then, I feel -- and I mean this as no
14 disrespect to you, because I just am not that type of
15 person -- but I do feel as an outside person watching this,
16 that it is not all one-sided. It is as if my brother and I
17 were fighting, which we do.

18 JUDGE HOYT: Ms. Peaver, you understand the
19 relationship is not one that is necessarily that kind --

20 MS. PEAVER: I do understand that.

21 JUDGE HOYT: -- of brotherly relationship?

22 MS. PEAVER: I do understand that. But when I
23 heard that first preconference hearing I was not used to that
24 in a courtroom. As I say, I went many, many times with my
25 employers and I had never seen that where the judge asked

19 1 the counsel if she "looked behind the file cabinet."

2 I just would like to add that.

3 JUDGE HOYT: Ms. Peaver, I can only indicate to you
4 that that is incomprehensible, that you cannot have taken that
5 in the light in which it was asked at the time. But, you
6 are entitled to your opinion, of course.

7 Does Seabrook wish to have any --

8 MS. RANDALL: I guess that I would say, that it has
9 been pretty obvious to me, and I am sure to the public too,
10 that there has been some obvious tension in the air.

11 JUDGE HOYT: You understand this is an adversary
12 type of proceeding?

13 MS. RANDALL: Yes, and I guess some of that one
14 would expect. I can see more tension that is happening.
15 There is an undercurrent that is going on between individual
16 as opposed to between issues. I am not sure how much of that
17 is obvious to the public. I don't feel that I have been
18 involved with the interactions of this group long enough to
19 make a definite judgment. But I do feel that there is more
20 than just orders being given or responses being challenged
21 that is going on. I am not quite sure where that is coming
22 from.

23 JUDGE HOYT: Thank you very much.

24 Mr. Dignan, do you want to add anything?

25 I would hope that we could get something out of

Seabrook hearings close with drama

Judge lashes out at town representatives

Local people speak for and against the Seabrook plant

By PETER F. HOWARD
Democrat Staff Writer

DOVER — The Seabrook Station licensing hearings concluded Tuesday with Administrative Judge Helen Hoyt launching into a scolding verbal lashing of town representatives for charging attorneys with coaching witnesses throughout the hearing.

The representatives alleged that the attorneys for Public Service Company of New Hampshire and the Nuclear Regulatory Commission signaled to their witnesses which way to answer questions during cross examination by the inter-

venors.

Ms. Hoyt, after listening to the witnesses deny they were influenced by their attorneys, severely reprimanded the four women representatives for what she called "ridiculous accusations."

"When you play in this hearing room, you will observe the rules of conduct of a legal proceeding. I don't expect to go through this ritual with you ladies ever again," Ms. Hoyt said.

"This board will not allow accusations of a juvenile nature to be al-

☆ **Hearing**

Please turn to Page 16

By PETER F. HOWARD
Democrat Staff Writer

DOVER — Most of the people who spoke at Tuesday's public meeting on the licensing of the Seabrook nuclear plant were opposed to the project, but their numbers have dwindled considerably since the well-publicized protests of the late 1970s, when hundreds of people were dragged away from the construction site by security police.

About 15 people addressed the Atomic Safety and Licensing Board at the Strafford County Superior Court Tuesday morning, expressing their views on nuclear power.

Testimony ranged from people who saw the plant as necessary for the economic recovery of the state to residents who feared for the safety

of residents in the area and questioned emergency evacuation procedures in the event of a nuclear disaster.

One witness, Donna Sgrignuoli of Dover, said she lived eight miles from the Three Mile Island nuclear reactor when near-disaster struck that site in the spring of 1979.

Pregnant at the time of the nuclear incident, Mrs. Sgrignuoli recounted to the board and spectators the events surrounding the evacuation of the area and the agony she experienced by wondering if her unborn child would be affected by the radiation.

She urged the board not to issue an operating license to Public Service Company of New

☆ **Public comment**

Please turn to Page 16

leged against members of the bar association. I don't know whether you realize the seriousness of the charge."

The Atomic Safety and Licensing Board member then informed the representatives from Seabrook, Hampton Falls, South Hampton and Kensington that if such behavior continued they would be expelled from the proceedings.

State Rep. Roberta Pevear, Hampton Falls, the town's representative and Civil Defense director, said following Ms Hoyt's severe rebuke that she has found the whole proceedings "outrageous."

She also charged the judge "whitewashed" the four days of hearings by not allowing many comments of the intervenors and town officials to be included in the court record.

"I was insulted by her remarks," Ms Pevear said. "The actions of the attorneys are grounds for disbarment. I, as a citizen of New Hampshire and a representative of Hampton Falls, am outraged by the whole proceedings."

The town representatives, however, were not the only participants who were reprimanded. Attorneys Diane Curran of the New England Coalition on Nuclear Pollution and Robert Backus of the Seacoast Anti-Pollution League were also told by Ms Hoyt that certain of their objections to the proceedings would not be recorded by the court.

During the exchange, when Backus and Ms Curran failed to sit down after ordered to do so by Ms Hoyt, Stafford County Superior Court bailiffs George Dobson and Ed Croteau approached the attorneys to intervene if so ordered by the court. However, the confrontation ended without further incident.

Ms Curran said during a recess, however, that her clients will take some action against the court, possibly asking Ms Hoyt to remove herself from the case. Another alternative is to petition the appeals board of the Nuclear Regulatory Commission to recuse the judge, she said.

During the hearings, the intervenors, which include the coalition, the anti-pollution group and assist-

ant attorneys general for the states of Massachusetts and New Hampshire, have been "treated unfairly" by Ms Hoyt, she charged.

Backus would not say if his client would file any petitions against the board, but he did note he will discuss the legal steps needed to achieve a "full and fair hearing."

The clashes between Ms Hoyt and the intervenors have been ongoing since the first day of the hearings last Wednesday, when Assistant Attorney General JoAnn Shotwell of Massachusetts was briefly ejected from the hearings for strongly objecting to comments made by Ms Hoyt.

Later in the week, Ms Hoyt cleared the courtroom of spectators to reprimand all the attorneys and town representatives for the tone of the proceedings.

The charges by the town representatives of coaching witnesses

centered on testimony given by NRC staff witness Dr. Thomas Urbanik and Public Service Company of New Hampshire witness Robert Merlino.

They accused attorneys William Patterson of the NRC and Thomas Dignan Jr. of PSNH of shaking their heads to indicate either a "Yes" or "No" response when the witnesses were giving testimony. Both attorneys vehemently denied the charges.

"At no time in these proceedings did I signal or attempt to signal Dr. Urbanik, and I deny (the charges)," Patterson said.

On the final afternoon of testimony, NRC staff witness John Sears, a reactor safety engineer, testified about emergency procedures for contacting state and local officials.

Under cross-examination by New Hampshire Assistant Attorney General Dana Bisbee, he said officials

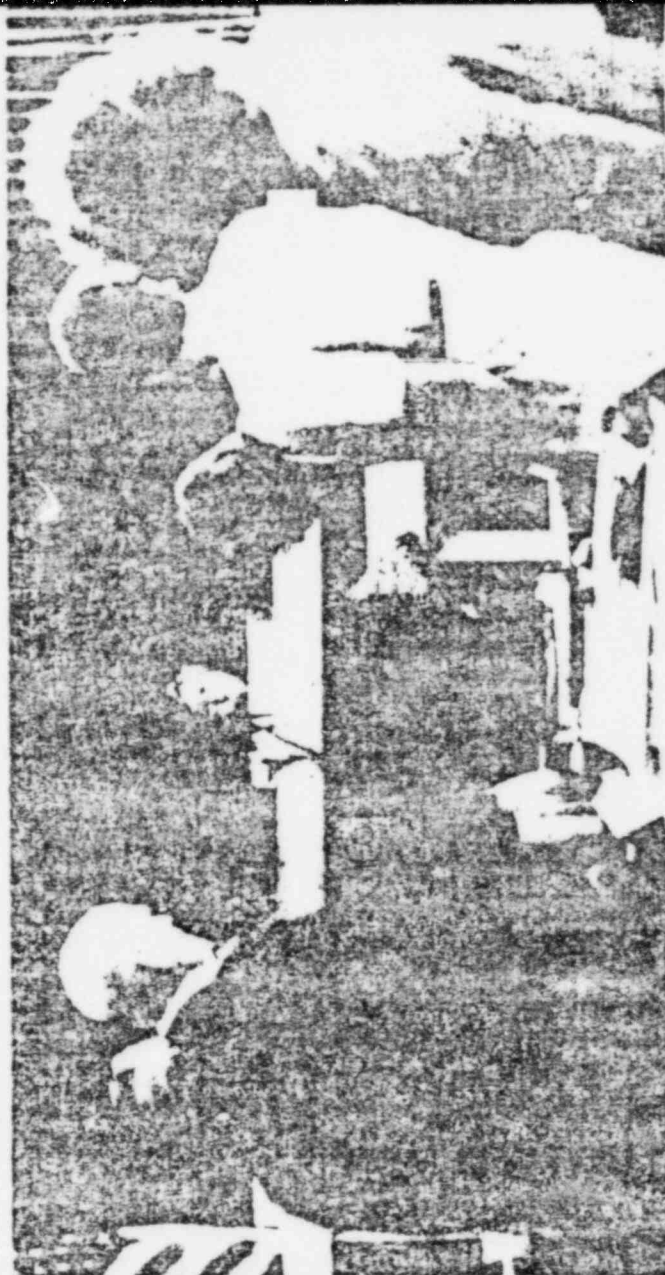
in surrounding communities would be notified within 15 minutes in the event of a nuclear accident at Seabrook.

Although the hearings had been scheduled to continue through the end of this week and next week there was no further testimony to be entered.

The hearings before the Atomic Safety and Licensing Board will resume in December with testimony on off-site evacuation and emergency planning.

Two limited appearances of the licensing board, during which the public will be allowed to address the board, are scheduled this month. On Friday, the board will hear comments at the Superior Court in Dover from 2:30 to 5:30 p.m., and on Wednesday, Aug. 31, at the Seabrook Fire Station.

The licensing board is scheduled to tour the Seabrook site today.



Atomic Safety and Licensing Board Judge Helen Hoyt (center) reprimands intervenor attorneys during Tuesday afternoon's licensing hearings at Stafford County Superior Court. Court bailiffs Ed Croteau and George Dobson (left) approach the table to intervene if ordered by the court. Attorneys

(from left) Robert Backus of the Seacoast Anti-Pollution League, Diane Curran of New England Coalition on Nuclear Pollution and JoAnn Shotwell of Massachusetts listen to the comments.

(Democrat photo — Howard)



Donna Sgrignuoli of Dover, testifying at Tuesday's public meeting on the Seabrook nuclear plant, recounts her experience of being pregnant and living eight miles from the Three Mile Island plant when it experienced a near-disaster in 1979.

(Democrat photo — Lorette)

Public comment

Hampshire for the Seabrook site, noting that an accident such as the one that occurred at Three Mile Island could happen here.

"I thought modern power was a great new invention until Three Mile Island, when my mind was completely changed," she said. "I can't understand the lack of apparent concern for our children and grandchildren — they are the ones who will have to deal with the waste and the mutations."

On the other side of the coin, Alden Howard of Rye, chairman of the New Hampshire Business and Industry Association's energy committee, testified that the "quality of life" in the state is dependent on industry.

And, because industry is dependent on energy, the Seabrook nuclear plant is needed to provide a "stable" price for that energy.

"The BIA feels the capacity of Seabrook station is needed," Howard said. "We are distressed by the escalating costs, but any further delays in bringing Seabrook on line will be detrimental."

Also in favor of nuclear power as a viable alternative to other energy sources were Howard Stiles of Manchester and Elizabeth Mudge of New London. Ms. Mudge referred to nuclear power as providing a "long-term economic advantage."

Susan Schwartz of Keene, a staff member of New England Coalition on Nuclear Pollution, lashed out at the construction operations at Seabrook, and the nature of the Nuclear Regulatory Commission's role in the licensing hearings held in Dover last week and Tuesday.

She said she has observed among the workers at the plant a "severe incompetency" and "markedly apathetic attitude."

"Public Service Company of New Hampshire should not be allowed to jeopardize our economy and our public health and safety by completing this obsolete project," she said.

Regarding the four days of licensing hearings, Ms. Schwartz said, "My understanding of the (NRC) mandate was that it regulate the nuclear industry in order to protect public health and safety, but in these hearings, NRC acts as an advocate for the industry."

Other opponents concentrated on the evacuation procedures at the nuclear site, arguing with estimates by PSNH that the area could be cleared safely in the event of a disaster.

Richard Kaufman of Durham related to the board the traffic jam that occurred in Newington when the Fox Run Mall opened earlier this year.

At that time, he said, only 30,000 people were trying to get to one area. It would be different, and impossible, to clear a 10-mile radius around Seabrook on a summer weekend day, he said.

Dennis Thom of Hampton said there are always constant traffic jams on the streets around Seabrook just from the change of shift of workers at the site.

He also took offense to the licensing board not allowing testimony from Hampton Police Chief Robert Mark to be entered into the record at the hearings last week.

"If it is a hearing, everything should be heard," Thom said.

Harriet Allen of Dover said she was concerned about how the utilities planned to dispose of the waste from the nuclear plant once it goes on line. She cited that as one reason why she does not want the plant licensed.

in surrounding communities would be notified within 15 minutes in the event of a nuclear accident at Seabrook.

Although the hearings had been scheduled to continue through the end of this week and next week, there was no further testimony to be entered.

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centered on testimony given by NRC staff witness Dr. Thomas Urbank and Public Service Company of New Hampshire witness Robert Merlino.

They accused attorneys William Patterson of the NRC and Thomas Dignan Jr. of PSNH of shaking their heads to indicate either a "Yes" or "No" response when the witnesses

ral for the states and New Hampshire treated unfairly." charged.

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JUDGMENT OR PREJUDGMENT?

To many participants, the hearings on licensing Seabrook were an empty exercise

By Hank Nichols

THE ATOMIC Safety and Licensing Board (ASLB) has packed its bags and gone home, but a blanket of bitterness hangs over the Seacoast area in the wake of recent hearings held by the board on a Public Service Company request for an operating license for the Seabrook nuclear power plant.

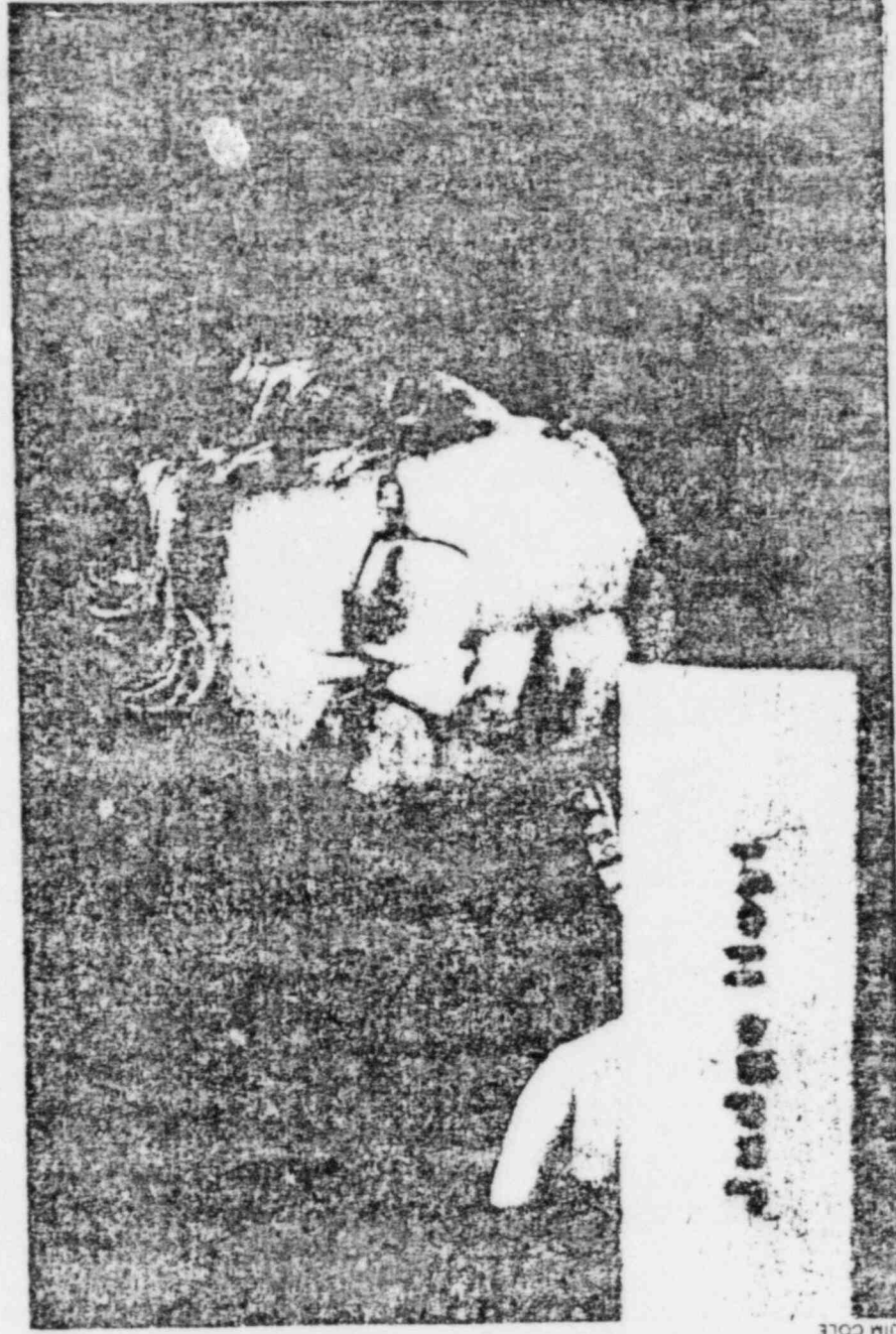
"The whole process is outrageous," Rep. Roberta Pevear of Hampton Falls said after the board had gone. "I think it is disgusting. The people of New Hampshire do not realize what is being perpetrated upon them. Those people (the licensing board) are hired and paid by the Nuclear Regulatory Commission to license nuclear power plants. They don't give a good damn about the safety of the people of New Hampshire and I think it's time the people of New Hampshire woke up."

Many who attended the ASLB hearings believe there is little or no chance of the board recommending that Public Service be denied an operating license, and they are probably right: No utility has ever been denied an operating license by the NRC.

There are two steps involved in granting approval for nuclear power plants—getting first a construction permit and then an operating license. In 1976, after submitting a 20-volume application and going through interminable hearings and challenges, Public Service was granted a construction permit. Last year the company submitted a 23-volume request for an operating license. The request was first reviewed by the NRC's Advisory Committee on Reactor Safeguards, and that group has recommended that the NRC grant a low-power operating license to Public Service, the first step toward full-power approval.

The Atomic Safety and Licensing Board is also charged with making a recommendation to the NRC, and last month the board came to New Hampshire to hear comments from intervenors on Public Service Company's application. The three-member board consists of two technical experts and an administrative law judge, Helen Hoyt.

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Judge Hoyt

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for safety, and that group had recommended that the NRC grant a low power operating license to Public Service.

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The substance of the four days of formal hearings centered around three areas where the intervenors questioned the proposal of Public Service:

- Did Public Service properly list some equipment as "safety grade?" Safety-related equipment has to function under harsh conditions, such as high temperatures and high humidity, and the intervenors questioned whether some of the equipment would meet the test.
- Did Public Service Company properly classify the severity of certain accidents in setting emergency action levels? This involves the method of classifying accident scenarios and the emergency responses to them.
- Were Public Service Company's time estimates for evacuating the area around the Seabrook plant adequate and realistic?

It was not surprising that most of the discussion in the hearings centered around the evacuation planning question, but the debate was tricky because the intervenors were in the awkward position of being allowed to question only the time factors without questioning the plans themselves. Later this year, or sometime next year, the board will take a look at the evacuation plans, but the August hearings were not allowed to cross into that area. The result was some fancy footwork and more than a few confrontations between Judge Hoyt and the intervenors.

On the first day of the hearings, attorney Jo Ann Shotwell, representing Massachusetts, was ejected from the hearings by Judge Hoyt after Shotwell objected to the judge's discussion of her planned cross examination of Public Service witnesses. Testimony by Public Service was filled with the board before the hearings and the intervenors were required to file their cross examination plans. When Shotwell jumped up to object to Hoyt's open discussion of her planned cross examination, Hoyt told her to sit down, and Shotwell refused. "In seven years in administrative proceedings, I've never been addressed in that tone by counsel," Hoyt said. She demanded an apology, Shotwell refused, and Hoyt had her removed from the courtroom. Later, Shotwell apologized for the tone but not the substance of her objections and she was allowed back into the hearings.

Sitting In Judgment: Controversial administrative Judge Helen Hoyt presided over the Seabrook hearings.

BY ITSELF, the confrontation between Hoyt and Shotwell was not of great consequence, but it illustrates the strained emotions and the short tempers that characterized the hearings. On another occasion Hoyt ordered the courtroom cleared so she could talk with lawyers about the proceedings, but she had no success in her attempt to smooth those troubled waters.

Diane Curran, a lawyer for the New England Coalition on Nuclear Pollution, said intervenors were not allowed to raise points they considered important to the case. "We can't challenge the numbers," Curran said. "We've been foreclosed on."

Robert Backus, lawyer for the Seacoast Anti Pollution League, said after the hearings had ended that it was the procedural bickering that caused the hearings to last as long as they did. "There was not enough testimony for two days of hearings," Backus grumbled. "Their goal is to speed things up and they accomplish exactly the opposite."

Most of the non-procedural testimony centered around estimates of the time it would take to evacuate the Seacoast area around the power plant. An estimate prepared for Public Service Company set evacuation time at six hours and five minutes, but this estimate did not include the city of Portsmouth. That city must now be included in the area to be evacuated. A study for the NRC staff said Public Service Company used optimistic assumptions about traffic flow and set the evacuation time at 12 hours, but that estimate also failed to include Portsmouth or several towns that must now be incorporated into evacuation planning.

And then, figuring a 30 percent factor to allow for bad weather in the area, such as heavy fog, an evacuation time of 15.6 hours was submitted. Backus said none of these estimates is realistic.

According to Backus, the Seacoast Anti Pollution League has taken the position that "No place in the U.S. has a more severe evacuation problem than Seabrook. Other places have larger populations, but none has as big a population as close to the plant with such limited protection..."

"The question is: What is the standard for an acceptable evacuation plan? There is none. Will Public Service deny an operating license? That hinges on a reasonable and adequate evacuation plan. If it takes 15.6 hours to get people out of the area, is that reasonable and adequate?"

Rep. Roberta Pevear says anything over 30 minutes may not be reasonable and adequate. "We tried for years to find out how long it would take people in Hampton Falls to be contaminated if there was an accident at the Seabrook plant. We were finally told it would take 30 minutes. There is no way we could possibly get people out of here in minutes in a safe and timely way."

Pevear attended the hearings and she was not impressed. "I have never seen anything like the performance at those hearings," she complained. "There was no indication that they were sitting there for our protection. The NRC staff never once said there is something we need the people, they only objected when Public Service Company objected. Everything she (Judge Hoyt) did was biased against the towns and the people. The NRC says it is concerned about its image, and if you could see the way it operates, you'd understand why they are concerned."

The board sat and listened, but many at the Seabrook hearing felt the board had already made up its mind. In a statement read by his wife, David McDonald of Rye said the board, particularly Judge Hoyt "show a uniform indifference to the concerns of the public and a predisposition favorable to the interests" of Public Service. "It became clear that this board perceives justifying the issuance of a license as its purpose," McDonald concluded.

The Atomic Safety and Licensing Board had planned to hold hearings on the evacuation planning in December but Massachusetts does not have its plan ready and may not have it ready by that time, forcing a delay in the next round of hearings. And, when Massachusetts does come in with a plan there is a good chance that the Bay State Attorney General's Office will oppose that state's own plan.

"Curiouser and curiouiser," Alice said during her visit to Wonderland. Alice would have loved nuclear power regulation.

6-Portsmouth Herald (N.H.) Fri., Sept. 2, 1953

Herald

Editorial Opinion

Is deck stacked?

Whatever one might think of the Seabrook nuclear plant, it does seem the recent series of licensing hearings were conducted in a rather heavy-handed manner.

At the risk of being cited for contempt, we would have to say Judge Helen Hoyt certainly behaved as an autocrat of the bench.

Oh, we don't blame her forousting one particularly obnoxious participant, but she was, or appeared to be, more than a little impatient with a number of speakers and their legitimate interests.

State Sen. Robert Preston perhaps best expressed the mood of the people. He said he resented the attitude that "the plant is to go on the line at any cost and the public be damned."

He expressed skepticism, and he's probably right, that

the public's opinion expressed at the hearing, would make any difference in the licensing process.

Preston said, "I think the deck is stacked," and then went on to challenge Judge Hoyt to "prove me wrong."

Executive Councilor Dudley Dudley made the point that is increasingly worrying everyone of all political persuasions and stations in life. That is, the increasing costs of Seabrook.

Said Dudley, "The economic hazards posed by these plants may outdo the health and safety hazards. Electric rates could increase in New Hampshire as they never have anywhere else in the country."

That is a fast growing concern for the state and the people who live and work here.