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Filed: April 20, 1984

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO "ATTORNEY GENERAL OF MASSACHUSETTS CONTENTION CONCERNING THE FINANCIAL QUALIFICATIONS TO OPERATE AND DECOMMISSION THE SEABROOK NUCLEAR PLANT"

Under date of April 5, 1984, the Massachusetts Attorney General ("MassAG") filed a proposed late-filed contention to the effect that the Applicants lack whatever financial qualifications are required under the Commission's regulations precedent to the issuance of an operating license. Under date of April 13, 1984, the Seacoast Anti-Pollution League, Inc. ("SAPL") joined in that motion. In response, the Applicants say

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that, for the reasons set forth herein, the motion should be denied.

Introduction and Prior Proceedings

This is not the first time that this issue has come before this Board. On September 13, 1982, the Board denied a proposed contention -- submitted by SAPL -- on operating license financial qualifications. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1083 (1982). It did so because the Commission's regulations preclude such litigation. 10 CFR § 50.57(a)(4), as amended by 47 Fed. Reg. 13750 (March 31, 1982). On February 10, 1984, SAPL moved the Board for reconsideration of this ruling, premising its request upon a certain decision of the United States Court of Appeals for the District of Columbia Circuit, and on February 29, 1984, New England Coalition on Nuclear Pollution, Inc. ("NECNP") filed a motion of like tenor.

On March 23, 1984, the Board denied both the SAPL motion and the NECNP motion. It did so on the ground that, perforce the Commission's policy statement issued February 27, 1984, "[the Board] has no jurisdiction at this time to consider either SAPL or NECNP motions for

relief in view of the Commission's direction to its Safety and Lecensing Boards to treat the Commission's rule on financial qualifications as valid."

The Commission had rested its decision in 1982 to eliminate the financial qualifications review in the case of regulated public utilities, at both the construction permit and operating license stage, on two grounds: first, the Commission determined that, in the case of regulated public utilities, the system of state regulation tended to render ad hoc Commission consideration of financial qualifications moot and purposeless. Second, the Commissioned had determined that, based on its experience, the supposed connection between financial qualifications and radiological health and safety that had warranted the whole concept of financial qualification review in the first place did not exist. See 47 FEd. Reg. 13750 (March 31, 1982) and 46 Fed. Reg. 41786 (August 18, 1981). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 17-23 (1978), aff'd, 582 F.2d 87, 92-93 (1978).

The decision of the Court of Appeals upon which the several movants have placed their sole reliance did not

question the sufficiency of the Commission's rationale for having eliminated the financial qualification rule in the case of regulated public utilites, nor did it find the record insufficient to support the Commission's articulated rationale. What did trouble the Court, apparently, was that one of the two prongs of the Commission's rationale (i.e., the lack of nexus between financial qualifications and radiological health and safety) would have warranted a more broader elimination of the requirement than the Commission had promulgated: one that would have exempted all persons from the requirement. The Court remanded the matter to the Commission for further consideration of its 1982 statement f basis and purpose.

On February 27, 1984, the Commission issued the Statement of Policy to which the Board had referred in its earlier order. For the reasons set forth therein, the Commission "direct[ed] its Atomic Safety and Licensing Board and Atomic Safety and Licensing Appeal Panel to continue to treat the rule [as amended in 1982] as valid." The Statement of Policy has never been withdrawn or cancelled.

On March 28, 1984, the Commission issued a notice of proposed rulemaking, in response to the Court of Appeals' decision. Therein the Commission reiterated the other prong of its rationale for the utility-only exemption and proposed a substitute regulation that, once again, would eliminate the financial qualification investigation in the case of utilities seeking operating licenses. (In the case of construction permits, the Commission determined to study the matter further.) Comments to the new proposed rule are scheduled for June 1, 1984.

On the question of operating license proceedings, the Commission published the following:

> "At the operating license review stage, however, the regulated status of electric utilities continues to provide a reliable basis for finding financial qualification. Here the focus is not on construction but on safe operation. The Commission believes that case-by-case review of financial qualifications for all electric utilities at the oeprating license stage is unnecessary for the following reason. Utilities are usually regulated through state and/or federal economic agencies, and generally are allowed to recover all of the costs of operation, subject to the oversight of such state and/or federal agencies. [Citations omitted.] These landmark court decisions established the principle that public utility commissions are to set a utility's rates such that all reasonable costs of serving the public may be recovered, assuming prudent management of the utility. Obviously, the funds needed to operate

> the plant in conformance with NRC safety regulations should be recoverable as reasonable costs of operation. The Commission believes it reasonable to conclude that, as a general rule, the rate regulation process assures for regulated electric utilities (or those able to set their own rates) the ability to meet the costs of safe operation of a nuclear power facility."

Id. at 4-5.

It is in this posture that MassAG and SAPL (once again) come before this Board with the request that the Board act as if the rule had never been amended.

Argument

The MassAG/SAPL motion should be denied for the controlling reason that, at least at the moment, the Commission has directed that the Board treat the rule, as amended in 1982, "as valid." We respectfully submit that the Board has no authority to challenge, question or defy that direction. The direction has, at least in the case of operating license proceedings, not been withdrawn or cancelled, and the record makes it plain that the Commission intends that, at least in the case of operating license proceedings, the direction continue to operate.

Second, if the question were one that the Board might properly entertain on its own, admission of the

proposed contention for ad hoc litigation in this proceeding should still be denied. It is well established the Licensing Boards ought not to engage in ad hoc litigation of issues that are pending before the Commission for generic treatment by regulation. See, e.g., PotomacElectric Power Co. (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). Operating license financial qualifications in the case of regulated public utilities is precisely such an issue and, if anything, the proposition applies a fortiori here because the Commission has repeatedly expressed its view is to the propriety, wisdom, and utility of such a case-by-case litigation.

Finally, we suggest that, if the question of what action the Commission ought to take pending the completion of the rulemaking were one on which the Board might properly exercise its own discretion, the better exercise would be to deny admission of the contention, at least for the moment. There is nothing in the opinion of the Court of Appeals that tends to negate (much less suggest the legal untenability of) the Commission's regulated public utility basis for the 1982 amendment, nor is there anything in the Court of

Appeals decision to suggest that the question of operating license proceedings was the focus of the Court's concern. Whatever may ultimately be the case with respect to other aspects of the financial qualification inquiry, the lack of warrant for ad hoc litigation at the operating license stage in the case of regulated public utilities stands unquestioned to date.

For the foregoing reasons, the MassAG/SAPL motion should be denied.

Respectfully submitted,

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Dated: April 20, 1984

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on April 20, 1984, I made service of the within APPLICANTS' RESPONSE TO "ATTORNEY GENERAL OF MASSACHUSETTS CONTENTION CONCERNING THE FINANCIAL QUALIFICATIONS TO OPERATE AND DECOMMISSION THE SEABROOK NUCLEAR PLANT" by mailing copies thereof, postage prepaid, to:

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