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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF	)	50-444 OL-01
NEW HAMPSHIRE, et al.	)	On-site Emergency Planning
	)	and Safety Issues
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSES TO SAPL RESPONSE TO APPEAL BOARD MEMORANDUM AND ORDER OF JANUARY 29, 1988 REGARDING FINANCIAL QUALIFICATION RULE AND MASSACHUSETTS ATTORNEY GENERAL JAMES M. SHANNON'S PETITION UNDER 10 C.F.R. § 2.758 FOR A WAIVER OF OR AN EXCEPTION FROM THE PUBLIC UTILITY EXEMPTION FROM THE REQUIREMENT OF A DEMONSTRATION OF FINANCIAL QUALIFICATION

Gregory Alan Berry
Counsel for NRC Staff

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INTRODUCTION

On February 23, 1988, pursuant to the Appeal Board's order of January 29, 1988, the Seacoast Anti-Pollution League, for itself and on behalf of the Town of Hampton and the New England Coalition On Nuclear Pollution (NECNP), filed a pleading which amends its July 31, 1987 petition for a waiver of the Commission's financial qualification regulations. 1/ Those regulations exempt a electric utility from the requirement to demonstrate its financial qualification to operate a nuclear facility. SAPL's original waiver petition was denied by the Licensing

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1/ See SAPL Response To Appeal Board Memorandum And Order Of January 29, 1988 Regarding Financial Qualification Rule (February 23, 1988) (hereinafter "SAPL Response").

Board on August 20, 1987 [2], from which denial SAPL's appeal currently is pending before the Appeal Board.

On March 7, 1988, and also pursuant to the Appeal Board's January 29, 1988 order, the Attorney General of Massachusetts filed a separate petition for waiver of the Commission's financial qualification rules. [3] The Attorney General alleges that special circumstances exist such that application of the Commission's financial qualification rules would not achieve the purpose for which they were promulgated. Thus, the Attorney General requests the Appeal Board to find that its petition makes the prima facie showing required by 10 C.F.R. § 2.758 and refer the petition to the Commission for a determination as to whether a waiver of or exception to the financial qualification rules should be granted.

For the reasons set forth below, the supplemental information submitted by SAPL in support of its original waiver petition is insufficient to cure the infirmity of its original petition: the failure to make out a prima facie case that application of the regulations at issue would not serve the purpose for which they were promulugated. The Attorney General's petition suffers from the same deficiency. Consequently, the Appeal Board should affirm the Licensing Board's dismissal of SAPL's waiver petition. The Appeal Board similarly should dismiss the waiver petition filed by the Attorney General.

2/ Memorandum and Order (Denying Petition To Waive Regulations) (August 20, 1987).

3/ See Massachusetts Attorney General James M. Shannon's Petition Under 10 C.F.R. 2.758 For A Waiver Of Or An Exception From The

(FOOTNOTE CONTINUED ON NEXT PAGE)

BACKGROUND

On July 31, 1987, and pursuant to 10 C.F.R. § 2.758, SAPL, the Town of Hampton, and NECNP filed a joint petition for waiver of sections 50.33(f) and 50.57(a)(4) of the Commission's regulations. 4/ Section 50.33(f) exempts an electric utility 5/ from the requirement to demonstrate in its application for an operating license that it is financially qualified to carry out the activities authorized by the license. 10 C.F.R. § 50.33(f). Section 50.57(a)(4) provides that an operating license may be issued by the Commission to a electric utility in the absence of an affirmative finding that the utility is financially qualified to carry out the activities authorized by the license. 10 C.F.R. § 50.57(a)(4).

The joint petitioners argued that these regulations should not be applied because in the particular circumstances of this case, application of

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Public Utility Exemption From The Requirement Of A Demonstration Of Financial Qualification (March 7, 1988) (hereinafter "AG Petition").

4/ See Intervenors' Petition To Waive Regulations 50.33(f) and 50.57(a)(4) To The Extent Necessary To Require Applicants To Demonstrate Financial Qualification To Operate And Decommission Seabrook Station (July 31, 1987) (hereinafter "July 31 Petition").

5/ 10 C.F.R. § 50.2(x) defines an "electric utility" as:

> [A]ny entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included with the meaning of "electric utility."

the regulations would not achieve their intended purpose. See July 31, 1987 Petition, passim. The joint petitioners asserted, inter alia, that the lead Applicant, Public Service Company of New Hampshire (PSNH) was experiencing severe financial difficulties and was on the verge of bankruptcy. The joint petitioners claimed that under New Hampshire law Applicants are prohibited from recovering their costs through rates unless and until the Seabrook Station receives a full power license. The significance of this fact, according to the joint petitioners, is that the ratemaking process cannot "assure" that Applicants would be able to recover the costs of operating and decommission the facility. Id.

On August 20, 1987, the Licensing Board issued an order denying the joint waiver petition on the ground that the joint petitioners had not satisfied the standard set forth in 10 C.F.R. § 2.758 because the waiver petition did not make out a prima facie case that special circumstances with respect to the subject of the proceeding were such that application of the Commission's financial qualification rules would not serve the purpose for which they were adopted. See Memorandum and Order (Denying Petition To Waive Regulations) at 8 (August 20, 1987). The Licensing Board ruled that "the purpose of the rule was to exempt operating license applicants from the financial qualification requirement because the rate process assured that funds needed for safe operation would be available." Id. at 7. The Board found that the petition was deficient because it did not demonstrate that this purpose would not be served unless Applicants' financial qualification was examined in a hearing. The Board reached this conclusion because the joint petitioners had not made a prima facie showing that Applicants would not be

permitted to recover their costs through the ratemaking process in the event full power operations were authorized. Id. at 8. On the contrary, the joint petitioners had conceded that in the event that the Seabrook Station was authorized to operate at full power, Applicants would be permitted to recover their costs through the ratemaking process. See July 31 Petition at 3.

On September 24, 1987, the joint petitioners filed an appeal of the Licensing Board's order. 6/ The Staff and Applicants filed briefs in opposition on October 26, 1987 7/ and November 5, 1987 8/, respectively. On December 8, 1987, the Appeal Board heard oral argument on the joint petitioners' appeal.

Subsequent to the oral argument, two noteworthy events occurred. First, the New Hampshire Supreme Court issued an opinion upholding the constitutionality of that state's anti-CWIP statute. 9/ Essentially, the anti-CWIP law forbids return on or recovery of investments through

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6/ See Intervenors' Brief In Support Of Appeal Of Memorandum And Order Denying Petition To Waive Regulations 50.33(f) and 50.57(a)(4) To The Extent Necessary To Require Applicants To Demonstrate Financial Qualification To Operate And To Decommission Seabrook Station (September 24, 1987).

7/ See Brief of Applicants-Appellees On Appeal From A Decision Of The Atomic Safety And Licensing Board Denying A Petition To Waive Financial Qualification Regulation (October 26, 1987)

8/ See NRC Staff's Response To Intervenors' Appeal Of Memorandum And Order Denying Petition To Waive Regulations 50.33(f) and 50.57(a)(4) To The Extent Necessary To Require Applicants To Demonstrate Financial Qualification To Operate And To Decommission Seabrook Station at 2-7 (November 5, 1987).

9/ Petition of Public Service Company of New Hampshire, __ N.H. __, __ A.2d __, No. 87-311 (January 26, 1988).

utility rates before the project is completed and providing service to customers. 10/ Second, on January 28, 1988, the Public Service Company of New Hampshire (PSNH) filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the federal Bankruptcy Code. 11/ The following day, January 29, 1988, the Appeal Board issued an order stating:

> These developments may affect the pending appeals and, at a minimum, require an opportunity for the parties to address their relevance and impact. Further, even if the recent developments and their ramifications do not alter the ultimate outcome of the Licensing Board's disposition on the merits of intervenors' original waiver petition, these new matters may precipitate the filing of additional waiver petitions.

Memorandum and Order at 2 (January 29, 1988) (unpublished). Accordingly, the Appeal Board afforded the joint petitioners 30 days from the service of its order "to amend their original petition, or to file a new one pursuant to 10 C.F.R. § 2.758, in a further attempt to establish a prima facie case that the application of the Commission's financial qualification rule with respect to low-power operation would not serve the purposes for which it was adopted." Id. at 3. Other parties were afforded a similar opportunity. Id. In response to the Appeal Board's January 29, 1988 order, on February 23, 1988, the joint petitioner -- SAPL, Town of Hampton, and NECNP -- amended their original waiver

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10/ Id., slip op. at 7; accord Appeal of Public Service Company of New Hampshire, 125 N.H. 46, 54-55, 480 A.2d 20, 25 (1986).

11/ The bankruptcy petition was filed by PSNH voluntarily pursuant to 11 U.S.C. § 301, not by PSNH's creditors pursuant to the "involuntary cases" provisions of 11 U.S.C. § 303.

petition. [12/] On March 7, 1988, the Attorney General of Massachusetts filed a separate waiver petition. [13/]

In this brief, the Staff explains why the bankruptcy petition filed by PSNH and the New Hampshire Supreme Court ruling on the constitutionality of the state's anti-CWIP law are not "special circumstances" within the meaning of 10 C.F.R. § 2.758. As discussed below, these developments are not sufficient to enable the joint petitioners or the Attorney General to carry their burden of showing that the application of the financial qualification regulations in this case would not serve the purpose for which they were adopted. Accordingly, the waiver petitions filed by the joint petitioners and the Attorney General should be dismissed.

ARGUMENT

A. Legal Standards

Regulations promulgated by the Commission may not be challenged in an adjudicatory proceeding. See 10 C.F.R. § 2.758(a). A party, however, may petition for a waiver of or exception from the application of the regulation in question. See 10 C.F.R. § 2.758(b). As is apparent from the text of section 2.758(b), the application of a duly promulgated regulation will not be waived lightly:

> The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

12/ See n.1, supra.

13/ See n.2, supra.

10 C.F.R. § 2.758(b) (emphasis added); see Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972) (waiver petitions should be granted only in "unusual or compelling circumstances"). Adjudicatory tribunals have no warrant to waive or grant an exception to a Commission regulation. Rather, section 2.758(d) provides that if a waiver petition makes a prima facie case that application of the regulation would not serve its intended purpose, the presiding officer is to refer the matter directly to the Commission for a determination as to whether a waiver or exception should be granted. 10 C.F.R. § 2.758(d). On the other hand, if the petition fails to set forth a prima facie case, the petition must be dismissed. 10 C.F.R. § 2.758(c).

While section 2.758 itself does not specify the quantum of proof necessary to establish a prima facie case, Commission case law establishes that it "must be legally sufficient to establish a fact or case unless disproved." Pacific Gas and Electric Company (Diablo Canyon Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981). Further, this standard must be applied in conjunction with the provisions of section 2.758(c), which commands the presiding officer to consider not only the waiver petition itself, but also supporting affidavits and responses, affidavits, and other information submitted in opposition to the petition. See 10 C.F.R. § 2.758(c). In view of these considerations, it is apparent that a waiver petition must be dismissed unless it is sufficient -- when considered in light of any response, affidavit, or other information submitted in opposition -- to establish that application of the regulation in question would not serve the purpose for which it was

adopted. For the reasons set forth in Part C of this brief, post, neither of the waiver petitions satisfy this showing.

B. The Commission's Financial Qualification Rules

The regulatory provisions for which the joint petitioners and the Attorney General seek a waiver or exception [14/] were first proposed by the Commission in April 1984. See "Elimination Of Review Of Financial Qualifications Of Electric Utilities In Operating License Reviews And Hearings For Nuclear Power Plants", 49 Fed. Reg. 13044 (April 2, 1984). In the preamble accompanying the proposed rule, the Commission stated that it is:

> reasonable to conclude that, as a general rule, the rate regulation process assures for regulated electric utilities (or for those able to set their own rates) the ability to meet the costs of safe operation of a nuclear facility.

49 Fed. Reg. at 13045. The Commission noted that "in financial qualification reviews at the operating license stage conducted under the original rule, [it] has found in every case that the state and local public utility commissions could be counted on to provide all reasonable operating costs to licensees, including costs of compliance with NRC requirments associated with safe plant operation." Id. In light of this experience, it appeared to the Commission that future "case-by-case review on this issue [i.e., the financial qualification of a regulated utility to operate a nuclear plant that has already been constructed] is neither necessary nor productive." Id.

14/ 10 C.F.R. §§ 50.33(f) and 50.57(a)(4).

According to the Commission, such case-by-case review would be unwarranted if it was in fact the uniform practice of state regulatory bodies to set the rates of regulated utilities "such that all reasonable costs of serving the public may be recovered, assuming prudent management of the utility." Id. and n.1. The Commission alluded to a study of public utility commissions then being conducted by the National Association of Regulatory Utility Commissioners "to determine whether, historically, utilities which have requested rate increases or rate provisions for operating safety requirements have regularly received them." Id., n.1. The Commission stated that if "this study should indicate that [the] Commission is mistaken in its present view that the late [sic] process assures electric utilities the financial resources needed for safe operation, the Commission will of course reassess its position on the proposed rule." Id. 15/

It is clear from the foregoing that the Commission had in mind only one reason for proposing to exempt regulated utilities from the requirement to demonstrate its financial qualification to operate a nuclear facility: the Commission believed that regulatory bodies could be counted on to provide all reasonable operating costs to licensees. The Commission's purpose in amending sections 2.104(c)(4), 50.33(f), and 50.57(a)(4) was to give effect to this belief. See 49 Fed. Reg. 13044-13046. Any doubts on this score are conclusively laid to rest by the Commission in its preamble accompanying the final rule:

15/ The study confirmed the Commission's view. See 49 Fed. Reg. 35747 (September 12, 1984).

> The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule, the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted.

"Elimination Of Review Of Financial Qualifications Of Electric Utilities In Operating License Reviews And Hearings For Nuclear Power Plants", 49 Fed. Reg. 35747, 35750 (September 12, 1984). Although eliminating case-by-case litigation in an operating license proceeding of an electric utility's financial qualification 16/, the Commission advised that it retained "its residual authority under Section 182a [42 U.S.C. § 2232(a)] of the Atomic Energy Act of 1954, as amended, to require such additional information in individual cases as may be necessary for the Commission to determine whether an application should be granted or denied or whether a license should be modified or revoked." 49 Fed. Reg. at 35751. Moreover, the Commission provided that the amended regulations -- as are all Commission regulations -- might be subject to a waiver or exception pursuant to 10 C.F.R. § 2.758. Id. The Commission gave an example of the type of showing necessary to permit financial qualification review for an operating license applicant:

> [A]n exception . . . might be appropriate where a threshold showing is made that, in a particular case, the local public utility commission will not allow the total cost of operating the facility to be recovered through rates.

16/ Case-by-case review of an electric utility's financial qualification would remain permissible in construction permit proceedings. See 49 Fed. Reg. at 13045 ("The Commission proposes to retain its current review under § 50.33(f) at the construction permit stage").

Id. (emphasis added). Such a showing might be sufficient under 10 C.F.R. § 2.758 because it is the kind of "special circumstances" which tend to indicate that the purpose of the financial qualification exemption for electric utility operating license applicants -- to obviate the need to review financial qualification in cases where the ratemaking process assures that funds needed for safe operation will be made available -- would not be served if the rule were applied. Compare 10 C.F.R. § 2.758(b), with, 49 Fed. Reg. 35750 (September 12, 1984) (final rule).

Neither of the waiver petitions filed by the joint petitioners and the Attorney General make a prima facie case that the the Commission's purpose in exempting electric utilities will not be served unless Applicants' financial qualification to operate the Seabrook Station is litigated in this operating license proceeding. In fact, neither the joint petitioners nor the Attorney General disputes that funds needed for safe operation of the Seabrook Station will be made available in the event the facility is authorized to operate at full power. Since this assumption was the reason the Commission adopted the rule in the first place, it is clear that neither of the waiver petitions satisfy the requirements of 10 C.F.R. § 2.758(b). The petitions therefore must be dismissed.

C. The Joint Petitioners' Waiver Petition

The joint petitioners make two arguments in support of their waiver petition. First, they are argue that the filing of a petition in bankruptcy in itself is sufficient to require an inquiry into Applicants' financial qualification to operate the Seabrook Station. SAPL Response at 5-6. In the alternative, the joint petitioners argue that because of the "uncertainties" posed by PSNH's bankruptcy petition, there is no basis

for concluding that there is reasonable assurance that funds will be available to operate the Seabrook Station safely. Id. at 6-10. As explained below, both of these arguments are lacking in merit and should be rejected.

1. The filing of a bankruptcy petition in itself is not sufficient to warrant a waiver or exception to the Commission's financial qualification rule.

As explained in Part B, ante, and as the joint petitioners agree, see SAPL Response at 5, the reason the Commission exempted case-by-case review and litigation of the financial qualification of a regulated utility applicant for an operating license is because "the ratemaking process assures that funds needed for safe operation will be made available to [it]." 49 Fed. Reg. 35747, 35750. Thus, for PSNH's bankruptcy petition alone to constitute a "special cirmcumstance" warranting the waiver sought by joint petitioners, the petition must demonstrate that there is a nexus between the filing of the bankruptcy petition and the refusal or inability of the New Hampshire Public Utility Commission to allow the costs of operating the Seabrook Station to be recovered through the ratemaking process.

The joint petitioners' waiver petition did not even attempt to make this showing. See July 31, 1987 Petition, passim. Joint petitioners attempt to cure this deficiency in their February 23, 1988 filing. See SAPL Response at 5-6. This attempt, however, is woefully inadequate. The joint petitioners' argument that the filing of a bankruptcy petition is sufficient in itself to trigger a financial qualification inquiry consists of the following statement:

> Th[e] rate-setting process may no longer be available to PSNH. Jurisdiction over PSNH as debtor in possession is

> now vested in the U.S. Bankruptcy Court, which may or may not attempt itself to exercise rate-setting authority.

SAPL Response at 5 (footnote omitted).

These conclusory assertions hardly satisfy joint petitioners' burden under 10 C.F.R. § 2.758. For example, the joint petitioners do not allege, much less establish, that the filing of a bankruptcy petition operates to deprive Applicants' of the benefits of the ratemaking process. Rather, joint petitioners only suggest (without elaboration) that PSNH's bankruptcy petition means that the "rate-setting process may no longer be available to PSNH." Id. (emphasis added). Nor does the joint petition attempt to make a credible showing that the Bankruptcy Court has the authority or inclination to preempt the New Hampshire Public Utility Commission's authority to set rates. Instead, joint petitioners again offer only an unsupported assertion: the Bankruptcy Court "may or may not attempt itself to exercise rate-making authority." Id. Even this assertion is hedged, however. See Id., n.3 (joint intervenors "believe it highly unlikely that the bankruptcy judge would attempt to exercise rate-setting authority").

Further doubt is cast upon joint intervenors' assertions by the text of section 1129(a) of the Bankruptcy Act, 11 U.S.C. § 1129, paragraph (6) of which provides in pertinent part:

> (a) The court shall confirm a reorganization plan only if all of the following requirements are met:
>
> > (6) Any govenmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change

> provided for in the plan, or such rate change is expressly conditioned on such approval. 17/

Thus contrary to the surmise of joint intervenors, the New Hampshire Public Service Commission appears to retain substantial control over the rates of the PSCN, notwithstanding the filing of PSNH's bankruptcy petiton.

Joint petitioners have not made a prima facie case that PSNH's bankruptcy petition forecloses Applicants from recovering the costs of operating the Seabrook Station through the rate-making process. 18/ The joint petitioners' position that the filing of a bankruptcy petition is sufficient in itself to warrant a waiver of or exception from the Commission's financial qualification rules therefore should be rejected.

17/ This provision is contained in the Bankruptcy Reform Act of 1978, PL 95-958, 92 Stat. 2549, 2635 (1978). The Senate report states:

> Paragraph (6) permits confimation only if any regulatory commission that will have jurisdiction over the debtor after confirmation of the plan has approved any rate change provided for in the plan. As an alternative, the rate change may be conditioned on such approval.

S. Rep. No. 989, 95th Cong. 2d Sess., at 126, reprinted in 1978 U.S. Code Cong. and Admin. News; see also H. Rep. No. 595, 95th Cong. 2d Sess., at 412, reprinted in 1978 U.S. Code Cong. and Admin. News 5963, 6368.

18/ In the event that Seabrook Station is authorized to operate at full power, it appears that the financial difficulty Applicants currently are experiencing will be ameliorated. Under New Hampshire law, "[a]fter a plant has begun to operate, the commission allows the company to recover the cost of money invested in it by including the depreciated cost of the plant in the rate base, on which it allows the rate of return." Appeal of Public Service Company of New Hampshire, supra, 125 N.H. at 25; 480 A.2d at 55.

2. The "uncertainties" arising from PSNH's bankruptcy petition alleged by joint petitioners do not warrant a waiver or exception to the Commission's financial qualification rules.

The Appeal Board should also reject the joint petitioners' alternative argument that "the bankruptcy of a utility applicant raises such major uncertainties that, absent definitive decisions, no assurance of financial quality can be reasonably assured." SAPL Response at 7. Among the "uncertainties" listed by the joint petitioners are: (1) whether the Bankruptcy Court has rate-setting power; (2) whether PSNH's prosecution of an operating license for the Seabrook Station is an activity within the ordinary course of business; and (3) whether the Bankruptcy Court will require or encourage the sale of the Seabrook Station. See Id. at 7-8. The joint petitioners' speculations hardly satisfy their obligation under section 2.758 to make an affirmative showing that application of the financial qualification rules in this proceeding will not serve the purposes for which they were adopted.

As of this writing nothing has occurred in this proceeding which undermines the Commission's assumption in exempting electric utilities from the requirement to demonstrate their financial qualification to operate a nuclear facility. The Bankruptcy Court has not attempted to set rates for PSNH without approval of the State regulatory authority, much less establish rates which would be insufficient to cover the costs of safely operating the Seabrook Station. 19/ Additionally, the New Hampshire

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19/ As noted above, it appears doubtful that the Bankruptcy Court possesses the power to set rates for PSNH without concurrence of the Public Service Commission. The Bankruptcy Court also has not

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Public Utility Commission has not indicated that PSNH's bankruptcy petition renders the company ineligible to avail itself of the rate-making process. In short, joint petitioners offer only speculation -- but not any sound reasons for concluding -- that the Commission's assumption that "the rate process assures that funds needed for safe operation will be made available to regulated utilities," 49 Fed. Reg. at 35750, is unwarranted with respect to the Seabrook Station. 20/

The burden is upon the joint petitioners, the proponents of the waiver petition, to establish their entitlement to the relief sought. See 10 C.F.R. § 2.732. The only way for the joint petitioners to prevail is for

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precluded PSNH from expending funds to pursue its application for an operating license or to maintain the facility. Nor has the Court ordered or encouraged PSNH to abandon or sell its interest in the facility.

20/ Bankruptcy does not invest a debtor in possession or a trustee with the power to abandon property or avoid complying with state or federal laws designed to protect the public health and safety. See 11 U.S.C. § 362(b)(4) and (5); 28 U.S.C. § 959(b); Midatlantic National Bank v. New Jersey Department of Environmental Resources, 474 U.S. 494, 500-04, 106 S. Ct. 755 (1986). In Midatlantic, the Supreme Court affirmed an order prohibiting a trustee from abandoning certain property pursuant to 11 U.S.C. § 554(a) stating: "Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." 474 U.S. at 504. See also In re Wall Tube & Metal Products Co., 831 F.2d 118, 121-23 (6th Cir. 1987) (giving priority to expenses incurred in cleaning up hazardous waste site so as to protect the public health and safety). In Midatlantic, the Court cited with approval Ottenheimer v. Whitaker, 198 F.2d 289, 290 (4th Cir. 1952), which held that a trustee's interest in abandoning barges on a navigable waterway must give way to the federal government's superior interest in protecting the public safety. See 474 U.S. at 500.

them to make a prima facie case that application of the regulations in question would not serve the purpose for which they were adopted. To do that, the joint petitioners must show that the rate-making process is not available to Applicants. The joint petitioners have not made this threshold showing. Accordingly, they have failed to carry their burden under 10 C.F.R. § 2.758. The joint waiver petition, therefore, must be dismissed.

D. The Attorney General's Waiver Petition

For much the same reason, the Attorney General's waiver petition also should be denied. The Attorney General's waiver petition basically chronicles the financial problems encountered by PSNH and its co-applicants as a result of their inability thus far to obtain a full power license. See AG Petition at 3-10. The Attorney General therefore requests that the Appeal Board grant his waiver petition and order that no low-power license be issued pending a determination of Applicants' financial qualification to operate the Seabrook Station. Id. at 18.

The Attorney General's request for an order prohibiting the issuance of a low power license lacks merits and should be denied. To the extent the Attorney General's position is based solely on an argument that the issuance of a low power license without the assurance that a full power license would ultimately issue, the petition must be denied for failing to address the relevant portions of 10 C.F.R. § 50.57(c). Under that section, a party opposing an application for a low power license is required to demonstrate that its contentions are relevant to the activity sought to be authorized. E.g. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-21, 20 NRC 1437, 1439 (1984);

Commonwealth Edison Company (Braidwood Nuclear Generating Station, Units 1 and 2), LBP-86-31, 24 NRC 451, 453-54 (1986). Thus, the Attorney General would need to demonstrate why particular admitted contentions are relevant, e.g., would necessarily compel the conclusion that no full power license would be authorized thereby raising the financial qualification issue of 10 C.F.R. § 50.57(a)(4) with respect to low power operations. The Attorney General has not done so.

As with the joint petitioners' waiver petition, the Attorney General's petition contains several striking omissions. First, the petition does not allege, much less make a threshold showing, that funds will not be available to Applicants through the rate-making process should the Seabrook Station be authorized to operate at full power. 21/ Similarly, nothing in the Attorney General's petition indicates that the New Hampshire Public Utilities Commission does not continue to possess the authority to set rates or has or will deny Applicants recourse to the rate-making process. See 11 U.S.C. § 1129(a)(6). In sum, the Attorney General has not demonstrated that the rate-making process will not provide the funds needed for safe operation of the Seabrook Station. 22/

21/ As noted earlier, under New Hampshire law Applicants will be entitled to recover the costs of operating the Seabrook Station through the rate-making process in the event the Seabrook Station receives authorization to operate at full-power. See n.17, ante.

22/ The Attorney General states that the Commission did not address explicitly "the question of the availability of adequate funds for safe operation during the pending of the bankruptcy of a public utility licensee." AG Petition at 16. This is true but of no consequence. As noted in Part C, ante, the Commission exempted electric utilities from the requirement to demonstrate their financial qualification to

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Instead, the Attorney General's position reduced to its essentials can be stated as follows: The rate-making process cannot assure that adequate funding will be available because no funds can be recovered until a full power license is issued; and low power operations should not be authorized because the Bankruptcy Court may not approve the expenditure of funds necessary to conduct them. The first point should be rejected because:

> [F]inancial qualification review, even when case-by-case, never required absolute certainty, only a showing that there was "reasonable assurance" of financing the costs of operation. The Commission has determined that the ratemaking process provides that reasonable assurance, and that determination is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent.

Coalition for the Environment, et al. v. NRC, 795 F.2d 168, 175 (D.C. Cir. 1986). The simple answer to the second point -- that the Bankruptcy Court may order that no funds be expended to pursue a full power license or to conduct low power operations -- is that the Bankruptcy Court has yet to take such action, or even indicate that it

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

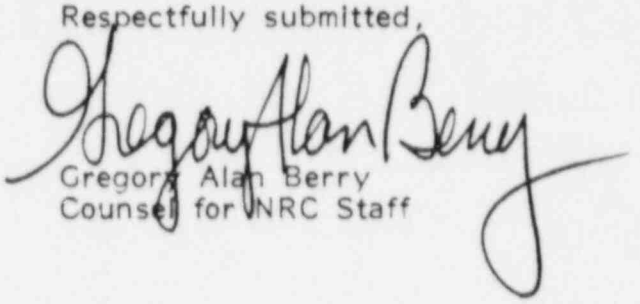
> operate a nuclear facility because "the rate process assures that funds needed for safe operation will be made available[.]" 49 Fed. Reg. at 35750. Unless it is true that a bankrupt utility is precluded from resorting to the rate-making process to obtain the funds needed for safe operation of its nuclear facility (a fact not established on this record), there is simply no basis for speculating that the Commission would have created an exception to 10 C.F.R. §§ 50.33(f) and 50.57(a)(4) requiring electric utilities which file bankruptcy petitions to demonstrate their financial qualification.

possesses the authority under the law to do so. 23/ In the absence of such an order, there simply is nothing in this record to prohibit Applicants from continuing to prosecute its application for a full-power license, seeking to obtain a low-power license, or contributing to the maintenance of the Seabrook Station. The Attorney General's waiver petition should be dismissed. 24/

CONCLUSION

For the reasons stated in this brief, the waiver petitions filed jointly by the Seacoast Anti-Pollution League, the Town of Hampton, and the New England Coalition On Nuclear Pollution, and by the Attorney General of Massachusetts, fail to make a prima facie showing that application of the Commission's financial qualification rules would not serve the purpose for which they were adopted. The waiver petitions therefore should be dismissed.

Respectfully submitted,



Gregory Alan Berry
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of March 1988

23/ At p. 18 of his brief the Attorney General raises the specter that funds may not be made available for the safe shut down of the Seabrook Station. As the Attorney General recognizes, (AG Petition at 13-14), the costs of safely decommissioning the plant would be accorded priority over other claims. See also n.20, ante.

24/ Even though the waiver petitions filed by the Attorney General and the joint petitioners fail to meet the applicable standards, it should be noted again that the NRC Staff will exercise its authority under section 182a of the Atomic Energy Act to require from Applicants such information as may be necessary for the Commission to determine whether its application for a license should be granted or denied. See 49 Fed. Reg. at 35751.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF	)	50-444 OL-01
NEW HAMPSHIRE, et al.	)	On-site Emergency Planning
	)	and Safety Issues
(Seabrook Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSES TO SAPL RESPONSE TO APPEAL BOARD MEMORANDUM AND ORDER OF JANUARY 29, 1988 REGARDING FINANCIAL QUALIFICATION RULE AND MASSACHUSETTS ATTORNEY GENERAL JAMES M. SHANNON'S PETITION UNDER 10 C.F.R. 2.758 FOR A WAIVER OF OR AN EXCEPTION FROM THE PUBLIC UTILITY EXEMPTION FROM THE REQUIREMENT OF A DEMONSTRATION OF FINANCIAL QUALIFICATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of March 1988.

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