RAS 12231

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/13/06

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

SERVED 09/13/06

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of	Docket No. IA-05-053
DALE L. MILLER	ASLBP No. 06-846-02-EA
	September 13, 2006

ORDER
(Requiring Additional Information
Regarding Proposed Settlement)

Two days ago, the parties to this enforcement proceeding, which arose out of the Davis-Besse reactor vessel head problems of several years ago, filed a joint motion asking this Board to dismiss the proceeding by entering the proposed settlement order that accompanied the motion. The joint motion and the proposed order indicate that the parties have reached an agreement to settle the case. To that end, the documents set forth the steps Mr. Miller has agreed to take in order to have the original enforcement order -- which had banned him, effective immediately, from all work in the regulated nuclear industry for five years -- "superceded by" the new Order accepting the settlement agreement.

In keeping with long-standing NRC policy, the Board certainly wishes to encourage the parties' settlement efforts. But any settlement agreement must comply with agency regulations, including 10 C.F.R. §§ 2.203 and 2.338. As submitted, the agreement does not so comply, and thus we must require that additional information be supplied before we consider approving it.

In the first place, those regulations require that the "proposed settlement agreement must contain" certain information (see 10 C.F.R. § 2.338 (h)(1)-(4)). None of that information is present here.

Second, the regulations require the parties to state "the reasons why [the settlement] should be accepted" (10 C.F.R. § 2.338(g)), but the papers fail to make any such statement. This omission prevents this Board from performing its regulatory duty of approving the settlement based on "giv[ing] due consideration to the public interest." Seqouyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994); see also 10 C.F.R. § 2.203 (settlement "shall be subject to approval by" the Board, which "may order such adjudication of the issues as [it] may deem to be required in the public interest"); id. § 2.338(i) (to same effect).

We are mindful that, in reviewing the proposed settlement in the course of exercising our approval authority, we must accord "due weight to the position" of the Staff. 10 C.F.R. §§ 2.203 and 2.338(i). We cannot, however, accord deference to the Staff's position regarding the public interest when the Staff fails to state why a settlement is consistent with that interest. In short, to give "due weight" to the Staff's position, we must be supplied with at least colorable supporting reasoning for that position.[1]

This is not to gainsay the remarkable educational and deterrent effect -- and the consequent benefit to the public interest -- that could stem from the talks that Mr. Miller would give under the terms of the agreement. And we are certainly in no position to have any idea of our own as to his guilt or innocence of the original charges the Staff leveled against him, or of the extent, if any, of his involvement in the underlying Davis-Besse transactions.

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[1] The Staff may think that paragraph five of the proposed Order supplies that reasoning. In the circumstances of this case, however, where – after years of investigation – the Staff concluded that Mr. Miller's conduct warranted the imposition of the harsh penalty of depriving him of his chosen livelihood, effective immediately, for five years, we believe that the regulations require more than what is essentially a mere ipse dixit assertion by the Staff that the settlement deserves approval. We do not suggest that the Staff lacks an adequately supported reason as to why settlement is in the public interest; we simply need to be advised of it.

But unless our role is only that of the proverbial “rubber stamp” -- and the regulations make clear that our role is more than that -- some additional substantive information is required to earn our approval. Because the proposed agreement must in any event be reconfigured to comply with Section 2.338(h) of the agency’s Rules of Practice, it should be an easy matter to incorporate the additional substance at the same time.

Accordingly, the relief sought by the joint motion is hereby DENIED, without prejudice to the early submittal of a renewed motion which meets the form and provides the substance required by the Agency’s regulations.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

[original signed by]
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

[original signed by]
E. Roy Hawkens
ADMINISTRATIVE JUDGE

[original signed by]
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 13, 2006

Copies of this Order were sent this date by e-mail transmission to counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DALE L. MILLER	)	Docket No. IA-05-053
	)	
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REQUIRING ADDITIONAL INFORMATION REGARDING PROPOSED SETTLEMENT) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 13th day of September 2006