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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/13/06

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

SERVED 12/13/06

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

In the Matter of

STEVEN P. MOFFITT

Docket No. IA-05-054

ASLBP No. 06-847-03-EA

December 13, 2006

ORDER

(Approving Proposed Settlement
and Dismissing Proceeding)

Early last month, the parties to this enforcement proceeding, which arose out of the Davis-Besse reactor vessel head problems of several years ago, entered into a formal Settlement Agreement and submitted a joint motion asking this Board to issue their proposed settlement order and thereby to dismiss the proceeding. Those documents set forth, *inter alia*, conditions that will govern Mr. Moffitt's future employment opportunities and steps Mr. Moffitt has agreed to take in order to have the NRC Staff's original enforcement order – which had banned him, effective immediately, from all work in the regulated nuclear industry for five years – superseded by the new settlement order.

Upon review of the initial documents, we perceived certain ambiguities in their terms. Accordingly, we deferred action and asked for additional information to provide clarification. See our Order (Requiring Additional Information Regarding Proposed Settlement) of November 8, 2006 (unpublished).¹ The parties have since provided us the clarifying information needed,

¹ In that order (p. 3), we pointed out that “we cannot carry out our obligation to determine whether a settlement agreement is in the public interest if we cannot ascertain unambiguously what the terms of that agreement are intended to signify.”

and in conjunction therewith have submitted a Revised Settlement Agreement addressing the points that had concerned us.

1. The Public Interest. Given the long-standing NRC policy of encouraging parties' settlement efforts, we are pleased to learn that an agreement has been reached and to announce our approval of the proposed revised settlement. In its current form, that agreement not only complies with agency regulations, including 10 C.F.R. §§ 2.203 and 2.338, but – as we explain below – is also plainly seen to be in “the public interest.” See 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).

Given the showing made by the joint motion and its accompanying documents, the substance of which we adopt, the public interest does not require the adjudication of any issues herein. Rather than continue to contest the matter,² Mr. Moffitt has accepted responsibility for his role, has agreed to assist the Staff in other ongoing enforcement actions, and has acceded to a reduced and phased – but nonetheless still substantial – employment penalty: the five-year, quite stringent employment restrictions originally imposed upon him nearly a year ago will continue to be in effect for somewhat more than another full year, and then will be followed by two additional years of less stringent restrictions. In addition, Mr. Moffitt – who is currently employed in a related but unregulated field – has agreed to give a series of talks that are calculated to have a salutary educational effect upon key audiences, viz., employees in the regulated nuclear industry who provide information that makes its way to the NRC Staff.

² Mr. Moffitt's efforts in that regard would have been hampered by his inability to obtain the testimony of (1) a former subordinate against whom a criminal proceeding is pending and who has elected, in the exercise of his Fifth Amendment right against self-incrimination, not to provide testimony herein, and (2) other former co-workers similarly situated.

2. The Board's Concern. Having concluded that the ending of this proceeding is in the public interest, we also have a word to say about its beginning. In this and companion matters, the NRC Staff conducted a lengthy and thorough investigation, the results of which were embodied in an Office of Investigations report dated August, 2003. For whatever reason, the Staff did not take enforcement action until well over two years later, in January of 2006 – then, when it did so, it disqualified Mr. Moffitt and two others from work in the regulated nuclear industry, effective immediately, because of the imminent threat they were said to represent.³

This course of events evokes an apparent – and unexplained – inconsistency between (1) the lengthy delay (after the investigatory report was completed) before any enforcement action was taken, and (2) the subsequent sudden implementation of an assertedly urgent job debarment order.⁴ Whatever the explanation for that inconsistency here, such a course of events can be viewed as jeopardizing both (1) public confidence, in terms of creating negative perceptions about the quality and/or timeliness of government decision-making, and (2) public protection, in terms of allowing the continued presence at nuclear power plants of employees whose conduct had made them, at least as later asserted by the enforcement order, a threat to

³ According to the enforcement order, the Staff appears to have utilized the “public health and safety” provision of the regulation, not its “willful violation” aspect, to make its action immediately effective. 71 Fed. Reg. 2581, 2584 (Jan. 17, 2006); see 10 C.F.R. § 2.202(a)(5). Compare the Staff’s action in Safety Light Corp. (Materials License Suspension), as described in LBP-05-02, 61 NRC 53, 56-59 (2005).

⁴ So there can be no room for any misunderstanding, we point out that we of course have no quarrel either with the Staff’s need, in appropriate circumstances, to investigate matters thoroughly before taking enforcement action, or with the long time that can be consumed in the investigation of a complex matter involving numerous participants and witnesses. Nor do we question that in some circumstances the need can arise to take urgent enforcement action, removing from their positions immediately any employees thought to be an imminent threat to the public health and safety. Our concern here is only with the unexplained lapse of time between the completion of the thorough investigation and the initiation of the urgent action; although we note in the text on this page the impact of that delay on two aspects of the public interest, we decline to speculate as to what its cause might have been here.

the public health and safety. We trust that whatever factors led to the troubling course of events here can be avoided in the future.⁵

3. The Settlement Terms. In light of the observations made in Section 1, above, and notwithstanding the concerns stated in Section 2, it is appropriate for us to rely upon the jointly-submitted proposed order by incorporating its terms – consisting of eight numbered paragraphs (which include reference to the “Exhibit A” Revised Settlement Agreement that we append hereto) – in this Order, as follows:

1. On January 4, 2006, the Staff issued an Order (Effective Immediately) Prohibiting Involvement in NRC Licensed Activities to Mr. Steven P. Moffitt, a former employee of Davis-Besse Nuclear Power Plant.
2. On February 23, 2006, Mr. Moffitt properly and timely answered the Order, denied the allegations in the Order, and requested an expedited hearing.
3. On March 16, 2006, this Licensing Board was established.
4. On March 20, 2006, the Staff answered the hearing request, and agreed that Mr. Moffitt was entitled to a hearing.
5. On March 27, 2006, the Board granted Mr. Moffitt’s hearing request.
6. The Order issued on January 4, 2006 to Mr. Steven P. Moffitt is superseded by this Order.
7. The Revised Settlement Agreement, attached as Exhibit A to this Order, is hereby incorporated into this Order.

⁵ If similar circumstances were to arise again and a challenge to an order’s immediate effectiveness were to be brought, it is not apparent why a long delay between investigation and action, while a supposed threat to public safety continued unabated, would not require some degree of explanation by the Staff in defending the order’s immediate effectiveness. No such challenge was lodged here, presumably because of the strategic implications of the severe limitations the operative regulations otherwise place upon the scope and timing of such a challenge. See 10 C.F.R. §§ 2.202(c)(2)(i); In re Geisen, LBP-06-13, 63 NRC 523, 543, 558 (2006) (citing Oncology Services Corp., CLI-93-17, 38 NRC 44, 58 (1993), and Tr. at 68-69 (Apr. 11, 2006)).

8. Upon review of the Revised Settlement Agreement, the Licensing Board is satisfied that its terms reflect a fair and reasonable settlement of this matter, in keeping with the objectives of the NRC's Enforcement Policy, and that no further adjudication of any matter is required in the public interest.

With all matters that were subject to adjudication herein having thus been amicably resolved in the public interest, the relief sought by the joint motion is hereby GRANTED, the controversy before us is TERMINATED in accordance with the Revised Settlement Agreement (Exhibit A hereto), and the proceeding is DISMISSED.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2006

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

In the Matter of STEVEN P. MOFFITT Docket No. IA-05-054 ASLBP No. 06-847-03-EA

“EXHIBIT A” to
December 13, 2006 Licensing Board Order:

REVISED SETTLEMENT AGREEMENT

1. On January 4, 2006, the Staff issued an Order (Effective Immediately) Prohibiting Involvement in NRC Licensed Activities to Mr. Steven P. Moffitt, a former employee of Davis-Besse Nuclear Power Plant.

2. On February 23, 2006, Mr. Moffitt properly and timely answered the Order, denied the allegations in the Order, and requested an expedited hearing.

3. On March 16, 2006, the Atomic Safety and Licensing Board with jurisdiction over Mr. Moffitt’s hearing request was established.

4. On March 20, 2006, the Staff answered the hearing request, and agreed that Mr. Moffitt was entitled to a hearing.

5. On March 27, 2006, the Board granted Mr. Moffitt’s request for a hearing.

6. The parties agree that the Order issued on January 4, 2006 to Mr. Moffitt will be superseded by an Order approving and incorporating this Agreement.

7. Mr. Moffitt agrees that, by virtue of his position as Director of Technical Services, he was responsible for misinformation communicated to the NRC during the Fall of 2001 related to NRC Bulletin 2001-01.¹ Mr. Moffitt agrees the NRC was misled by FirstEnergy’s oral and written submissions to the NRC during the Fall of 2001 related to Bulletin 2001-01.

8. Mr. Moffitt agrees to take the following corrective actions:

a. Mr. Moffitt agrees not to seek employment in any NRC-licensed activities prior to January 4, 2008.

b. Between January 4, 2008 and January 4, 2010, Mr. Moffitt agrees not to seek employment at an NRC-licensed operating nuclear power facility, or with the corporate parent of a nuclear power facility in a position related to oversight or operation of a nuclear power plant, as either a manager or a supervisor, above the first-line supervisor level prior to January 4, 2010.²

¹ The NRC initiated enforcement actions against other individuals who it believes provided inaccurate and/or incomplete information to the NRC in connection with the Bulletin.

² A “first-line” supervisor is the first person, starting from the bottom of the organization, with supervisory or managerial authority.

c. Mr. Moffitt agrees to use his best efforts to make presentations to the INPO Senior Nuclear Plant Manager (SNPM) training course regarding lessons learned from the incident at Davis-Besse for directors and future directors of nuclear power facilities.

d. Mr. Moffitt agrees to use his best efforts to make presentations to an NRC leadership development program regarding lessons learned from the incident at Davis-Besse. The NRC Staff agrees to make every effort to arrange said presentations.

9. With regard to the presentations to the SNPM training course and the NRC Leadership Development Program:

a. Mr. Moffitt agrees to provide drafts of his presentations to the Director of the Office of Enforcement for review prior to making the presentation.

b. Mr. Moffitt will use his best efforts to make presentations to the NRC class for at least the next two years, from the date of this Agreement.

c. Mr. Moffitt will use his best efforts to make four presentations to the SNPM course over the next two years, from the date of this Agreement.

10. With regard to Mr. Moffitt's employability:

a. Mr. Moffitt may engage in sales of products and services to nuclear facilities.

b. Mr. Moffitt's current position complies with the terms of this Agreement.

c. Mr. Moffitt cannot hold any position with his current employer that violates the terms of this Agreement.

11. The corrective actions listed in Item 8 are sufficient to satisfy the NRC's underlying concerns with Mr. Moffitt's trustworthiness and reliability regarding the incident at Davis-Besse. Furthermore, the NRC Staff believes Mr. Moffitt's acceptance of responsibility and agreement to undertake corrective actions serves the public interest.

12. Mr. Moffitt agrees to cooperate with any on-going investigations or proceedings in connection with the incident at Davis-Besse.

13. The NRC Staff agrees to provide copies of this Agreement to the licensees for the Fermi, Perry, and Davis-Besse nuclear power stations for their information and consideration in regard to the Personnel Access Data System (PADS) for access authorization.

14. In light of the above, the parties agree that all further procedural steps before the Licensing Board and any right to challenge or contest the validity of the order entered into in accordance with the Agreement, and all rights to seek judicial review or otherwise to contest the validity of the order are expressly waived.

15. The parties further agree that the order accepting the Agreement has the same force and effect as an order made after a full hearing.

16. It is also agreed by the parties that all matters required to be adjudicated as part of this proceeding have been resolved upon the Licensing Board's approval of this agreement and the parties agree that the proceeding, ASLB-06-847-03-EA, should be dismissed upon the Licensing Board's approval of this Agreement.

[As submitted to the Board, the foregoing Revised Settlement Agreement was subscribed to on behalf of Counsel for the NRC Staff and Counsel for Mr. Moffitt]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
STEVEN P. MOFFITT) Docket No. IA-05-054
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (APPROVING PROPOSED SETTLEMENT AND DISMISSING PROCEEDING) (LBP-06-26) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Washington, DC 20555-0001

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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 December 2006