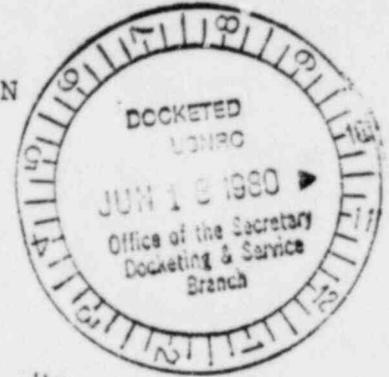


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Richard S. Salzman

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JUN 18 1980

In the Matter of)
)
ROCHESTER GAS AND ELECTRIC)
CORPORATION, et al.)
)
(Sterling Power Project, Nuclear)
Unit No. 1))
_____)

Docket No. STN-50-485

Mr. Eugene B. Thomas, Jr., Washington, D.C.,
for the applicants, Rochester Gas and
Electric Corporation, et al.

Mr. Edwin J. Reis for the Nuclear Regulatory
Commission staff.

MEMORANDUM AND ORDER

June 17, 1980

(ALAB-596)

In 1977, the Licensing Board rendered an initial decision authorizing the issuance of a construction permit for the Sterling Power Project, Nuclear Unit No. 1. LBP-77-53, 6 NRC 350. The following year, we affirmed that decision on all but two issues: the need for the power to be generated by the facility and the environmental impact of radon releases arising from the mining and milling of uranium. Jurisdiction over

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those two issues was retained. ALAB-502, 8 NRC 383 (1978),
affirmed, CLI-80-23, 11 NRC ____ (May 29, 1980).

Under New York law, the Sterling facility was required to obtain a certificate of environmental compatibility and public need from that State's Board on Electric Generation Siting and the Environment (Siting Board). In January 1978, the Siting Board granted such a certificate. Several months later, however, the Board announced its intention to reexamine the matter. On February 11 of this year, it issued an opinion vacating the certificate, denying the application and closing the proceeding.

In the wake of this development, the applicants have initiated steps looking to the "termination of contracts with those vendors supplying Sterling project services and plant components". Although "[n]o formal announcement of project cancellation is planned", the applicants take this measure as "effectively recogniz[ing] project discontinuance for all practical purposes". Accordingly, we are asked by them to "terminate all proceedings in this docket".^{1/}

^{1/} Letter, dated May 28, 1980, from Eugene B. Thomas, Jr., to the Secretary to the Appeal Panel.

This relief is plainly warranted. There is certainly no reason to continue to pursue the remaining issues raised by the intervenor's^{2/} appeal from the initial decision in circumstances where those issues have been effectively mooted by the applicants' decision (seemingly compelled by the Siting Board action) to abandon the Sterling project.

But as the NRC staff correctly points out in its response to the applicants' termination request,^{3/} there remains the question as to the status, once the proceeding has been terminated, of the construction permit which was issued by the Director of Nuclear Reactor Regulation on the strength of the initial decision. Although the applicants have sidestepped that question, its answer is dictated by considerations of fundamental fairness. Had the intervenor's appeal been prosecuted to a successful conclusion, the possible consequence would have been not merely the reversal of the initial decision but, as well, the revocation of the construction permit. Surely, the applicants cannot improve their position -- i.e., insure the retention of the permit -- by having us terminate the proceeding and thus bring a halt to the appeal.

^{2/} Ecology Action of Oswego.

^{3/} Letter, dated June 6, 1980, from Edwin J. Reis to the members of this Board.

The Supreme Court has illuminated the path which should be followed in the circumstances which confront us here. Specifically, the appropriate course is to couple the grant of the applicants' request with a vacation of the initial decision on the ground of mootness. United States v. Munsingwear, 340 U.S. 36, 39-41 (1950). See also Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 55 (1978), remanded on other grounds, sub nom. State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). The effect of this action will be to remove the authority underlying the issuance of the construction permit. This will, in turn, call upon the Director of Nuclear Reactor Regulation to perform the ministerial duty of revoking the permit -- i.e., the same duty that he would have had to discharge in the event that our appellate review of the merits of the initial decision had led us to conclude that the Licensing Board erroneously had authorized permit issuance.

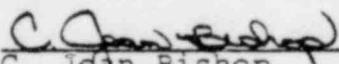
We need add only that the applicants cannot be heard to complain of this result. Apart from the factor of equity noted above, they scarcely have any further need for the permit in light of their abandonment of the Sterling project because of the action of the State Siting Board. Indeed, although we perceive no occasion to take the additional step of directing a dismissal of the permit application, it is reasonable to

suppose that the applicants will give thought to the withdrawal of that application.^{4/}

LBP-77-53, 6 NRC 350 (1977), is vacated on the ground of mootness; this construction permit proceeding is terminated; and the Director of Nuclear Reactor Regulation is instructed to revoke the outstanding construction permit by reason of the vacating of LBP-77-53.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board

^{4/} In this connection, we are not here confronted with the question, recently considered by a licensing board in a different proceeding, of the extent of the authority of such a board to order an involuntary dismissal of a construction permit application on the ground that the applicant has clearly (but without saying so) abandoned its purpose to build the facility in question. See Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), LBP-80-15, 11 NRC, _____ (May 29, 1980) (slip opinion, p. 3). In an unpublished order entered on June 4, 1980, we called upon the North Coast parties to brief that question.