

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Herbert Grossman, Chairman
Robert L. Holton
J. Venn Leeds

In the Matter of

NORTHERN INDIANA PUBLIC SERVICE
COMPANY

(Bailly Generating Station,
Nuclear-1)

Docket No. 50-367
(Construction Permit
Extension)

April 12, 1982

MEMORANDUM AND ORDER

(Issuing Proposed Order Terminating Proceeding)

MEMORANDUM

The Board has before it a number of unresolved questions concerning the method and timing of the termination of this proceeding in light of Northern Indiana Public Service Company's (NIPSCO's) decision not to complete construction of the Bailly Generating Station. In our order of January 29, 1982, we approved NIPSCO's revised site restoration plan and directed NIPSCO to begin implementing that plan forthwith. Instead, NIPSCO has moved for reconsideration of the order and evinces a reluctance to begin site restoration without the finality of a termination order that decides in advance all of the conditions under which the project is to be terminated. Staff agrees with NIPSCO. Porter County Chapter Intervenors :

(PCCIs) seek to delay the issuance of an order of termination until NIPSCO has completed site restoration according to the agreed-upon plan, so that the Board can retain jurisdiction to insure that the plan is properly implemented.

Other matters pending include the questions of whether the termination of the proceeding should be "with prejudice" or "without prejudice," and whether the termination should be conditioned upon NIPSCO's payment of PCCIs' expenses and attorney's fees in the proceeding. A further question raised by PCCIs, as to whether discovery should be permitted with regard to site restoration, unlike the other questions which we answer directly in this order, would be mooted by our decision to terminate the proceeding (thereby precluding the possibility of further discovery), but is addressed indirectly by the reporting requirements made a condition to termination.

A. Termination at this Juncture

The Board has weighed a number of considerations for and against terminating the proceeding at this juncture. Some of the reasons for not terminating are, as follows:

- (1) The excavation to be backfilled has been in existence for a number of years. The lack of financial incentive to fill it, general corporate inertia, and the absence of initiation and completion dates in the restoration plan, suggest the possibility of an extended or indefinite delay in completing (or even beginning) the restoration.
- (2) Incorporating the terms of the revised site restoration plan in the termination order would seem to foreclose the possibility of

modifying the plan without breaching the terms of the termination order regardless of how beneficial such change might appear. No machinery would exist for modifying the site restoration plan.

- (3) In the event that NIPSCO were to breach the terms of the site restoration plan, made a condition of the termination order, or merely fail to continue to implement the plan, the means of enforcing the conditions or even conferring jurisdiction upon a responsible instrumentality are hazy, at best.
- (4) Were the Board to withhold the termination until the site restoration plan is implemented, we could insure its implementation within a reasonable time, permit reasonable modifications to the plan after giving full weight to the positions of the parties, and serve as an inducement for NIPSCO to complete the site restoration (in order to terminate the proceeding).

On the other hand, we see the following reasons to terminate the proceeding at this juncture:

- (1) By not terminating, we run the risk of wasting valuable Board time in considering petty disputes, promoted to litigable issues because of the basic antagonism between the parties, as amply evidenced in the past (and at present, by the current discovery dispute).
- (2) The mechanical function of supervising the implementation of a site restoration plan should not require the presence of a

hearing board and the Staff believes that it is able to insure implementation.

- (3) By insisting upon termination at this juncture with the current site restoration plan as a condition of termination, NIPSCO apparently accepts the immutability of the terms of the plan and, consequently, is willing to forgo the possibility of any future modification even under changed circumstances.
- (4) Finally, but not the least in our consideration, there is the Appeal Board's approval of the general procedure of terminating proceedings subject to site restoration conditions, rather than having the Licensing Board supervise the restoration and then terminate the proceeding. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667 (1980); ALAB-652, 13 NRC 627 (1981). To depart from a general procedure sanctioned by the Appeal Board, even under reasonable (but not compelling) circumstances, stands little chance of success.

On balance, we have found most weighty NIPSCO's willingness to bind itself to the exact terms of the current site restoration plan and Staff's confidence in its ability to insure the implementation of the site restoration plan even in the absence of a live proceeding over which the NRC has undisputed jurisdiction. Moreover, we are spelling out in considerable detail the requirements for site restoration, including initiation and completion dates, reporting requirements, and an inspection requirement, consonant with the general provisions of the site restoration plan, to insure either that the plan is fairly implemented within a

reasonable time or that a firm basis is established for taking action to compel implementation.

B. Termination With or Without Prejudice

NIPSCO and Staff take the position that the termination of this proceeding should be without prejudice; PCCIs contend that it should be with prejudice. As we read the submittals of the respective parties and the cases upon which they rely, Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC ____ (December 7, 1981), we see only a semantic difference between the parties. It appears to us that the parties and the Board are in agreement on the effect that termination of this proceeding should have on future activities at the Bailly site, notwithstanding the parties' disagreement as to how that effect should be characterized.

As we understand that effect, which would be automatic (by operation of law) even without our characterizing the termination, Construction Permit No. CPPR-104 will expire without opportunity for further extension because the time for filing a timely application for extension has passed. Since there has been no decision adverse to NIPSCO's building a nuclear plant at the Bailly site, NIPSCO would be free to file a new application to construct a nuclear plant on that site. We see no reason to depart from that result by either failing to specifically foreclose NIPSCO from reviving Construction Permit No. CPPR-104, or by permitting the expiration of that permit to prejudice NIPSCO's right to file a new application for a construction permit. We would spell out that result to assure its certainty.

C. PCCIs' Claim for Attorneys' Fees and Expenses

On the basis of the recent Appeal Board decision in North Coast, ALAB-622, supra, PCCIs have moved the Board to impose the condition upon NIPSCO's withdrawal of its application for extension of construction permit that NIPSCO pay PCCIs' expenses and attorneys' fees in this proceeding. In particular, PCCIs rely upon footnote 11 to that decision (Slip Op. at 17), which reads as follows:

We note that the case at bar did not entail lengthy discovery, or proceed through the trial stage. It hardly got off the ground. We leave open the question whether something short of a dismissal with prejudice, such as conditioning withdrawal of an application upon payment of the opposing parties' expenses, might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information which cast doubt upon the merits of the application.

NIPSCO and NRC Staff oppose the imposition of that condition primarily on the grounds that the Commission lacks the authority to award attorneys' fees and expenses and that the circumstances for awarding those fees and expenses do not exist in this proceeding. We decline to impose that condition.

Under the "American Rule," attorneys' fees and expenses are borne by the respective parties. They are not awarded to the prevailing party, as in England. The Supreme Court has recently reaffirmed the American Rule and indicated that it would recognize only statutory exceptions to the rule. Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 240 (1975); F. D. Rich Co. v. United States, 417 U.S. 116 (1974). Absent a statutory exception, the American Rule is not only binding upon courts but

upon administrative agencies as well. Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975).

PCCIs attempt to create for themselves an exception based upon NRC rules that is analogous to an exception recognized under the Federal Rules of Civil Procedure. Federal Rule 41(a)(2) permits a plaintiff to dismiss his action only "upon such terms and conditions as the court deems proper." Cases dismissed without prejudice under that rule have permitted the allowance of attorney's fees against the dismissing party. PCCIs contend that the language of 10 C.F.R. § 2.107(a) similarly permits the awarding of attorney's fees and expenses by requiring that the withdrawal of an application after the issuance of notice of hearing be "on such terms as the presiding officer may prescribe."

Even if PCCIs' are correct that the wording of 10 C.F.R. § 2.107(a) is similar to Federal Rule 41(a) and that Licensing Boards have the authority similar to Federal courts to award the fees and expenses under an exception to the American Rule, the requisite conditions are absent in this proceeding. In Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965), the Court of Appeals recognized that the cases permit the awarding of attorney's fees against the dismissing party only when the action is dismissed without prejudice. The reasoning for such rule, the court observed, is to compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum. However, where the dismissal is with prejudice, fees and expenses will not be awarded because the cause is finally being terminated and the defendant cannot be made to defend again.

In the instant proceeding, that reasoning would preclude awarding PCCIs their attorneys' fees and expenses. Whether the termination of this

proceeding is with or without prejudice, the effect of termination is to rescind the construction permit with finality. Where the statute of limitations has run on filing an application for extension of the construction permit (as it has here, under 10 C.F.R. § 2.109), even a dismissal without prejudice is a final determination of applicant's rights to the construction permit which cannot be further litigated. Cf. Carr v. Grace, 516 F.2d 502 (5th Cir. 1975). To extend the Federal Rule 41(a)(2) exception so as to award attorneys' fees and costs, where the effect of the termination is equivalent to a determination on the merits against the dismissing party, would constitute a repudiation of the American Rule, not an exception. We do not believe that the decided cases establish a basis for awarding the fees and expenses under those circumstances.

We recognize that NIPSCO will be free to file a further application for construction permit for the Bailly site, notwithstanding the expiration of the current construction permit, upon the withdrawal of the application for extension. If NIPSCO does file a further application and PCCIs choose to oppose it, PCCIs will incur further expenses. We cannot, however, equate the expenses incurred in this proceeding, involving only the merits of whether good cause had been established for extending the existing construction permit, with those that might be incurred in a future construction permit proceeding where the issues would be entirely different. Only the expenses already incurred in the original construction permit proceeding can logically be considered as subject to duplication in a future construction permit proceeding involving the same site, and we are not being asked to condition our termination on the recovery of those

expenses incurred in the prior litigation--a matter clearly outside of the Board's power.

Moreover, even if the Commission has the authority to condition a termination upon a reimbursement of the contested expenses beyond the scope of judicial precedent, this Board lacks the authority to impose such a condition. We can go only as far as established precedent without adopting new Commission policy, and Commission policy can only be adopted by the Commission itself. The licensing and appeal boards are not empowered to make policy. Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257, 261 (1979); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-47, 14 NRC 866, 875 (1981), affirmed on other grounds, ALAB-663, 14 NRC ____ (December 14, 1981). We find no indication that the Commission has adopted a policy that goes beyond the established exceptions to the American Rule, none of which apply to the instant proceeding.

D. Conditions Imposed on Termination of this Proceeding

In addition to conditioning the termination upon the revised site restoration plan, the Board considers it imperative that further conditions be imposed to ensure that the site is restored without delay. Taking into account the revised site restoration plan's estimate (at p. 2) of approximately 120 days to complete backfilling (which will not begin, if the dredging option is elected, until the summer of 1982), the Board considers it reasonable to require the backfilling operations to begin by August 1, 1982 and to be completed by September 1, 1983. These time requirements would permit NIPSCO to elect the dredging option with the

knowledge that, under unforeseen circumstances, dredging could be continued through two summer seasons if necessary. To ensure that the parties and NRC Staff are kept informed of the progress of site restoration, the Board would impose a periodic reporting requirement on NIPSCO that can easily be accommodated. Similarly, to ensure satisfactory completion of the site restoration, or provide a basis for agency or judicial intervention if the site restoration is not satisfactorily completed within a reasonable time, the Board would impose a notification and inspection requirement upon completion of the project (or on the required completion date, whichever is appropriate). We would also require a completion report by NRC Staff to the NRC Commissioners.

E. Proposed Order

The following is our proposed order:

PROPOSED ORDER

1. That NIPSCO's motion to terminate proceeding is granted and its application for extension of construction permit is deemed withdrawn on the conditions set forth in the following paragraphs;
2. That Construction Permit No. CPPR-104 is deemed to have expired without further opportunity to NIPSCO to revive such permit;
3. That neither the expiration of Construction Permit No. CPPR-104, nor the termination of this proceeding (or any matters that have transpired during this proceeding), shall preclude NIPSCO from applying for a new construction permit in the future with regard to the Bailly site;

4. That NIPSCC must implement the revised site restoration plan agreed to by NIPSCO, NRC Staff, and PCCIs, and approved by the Board by Order dated January 29, 1982;

5. That NIPSCO must begin implementation of that plan no later than August 1, 1982;

6. That NIPSCO must complete the implementation of that plan no later than September 1, 1983;

7. That NIPSCO and NRC Staff must send a report (jointly, if possible, or separately) to each of the individuals and organizations currently on the service list on June 1, 1982 and the first day of each third month thereafter, and on the completion date of the site restoration (but no later than September 1, 1983 if not completed), reporting on the progress of the site restoration, to include a description of all activities undertaken and all matters accomplished; an estimate of the percentage of completion of the site restoration; and an estimated completion date for site restoration;

8. That, at the completion of the site restoration, but no later than September 1, 1983, if not completed, NIPSCO is to give notice of, and arrange for, an inspection of the site (under reasonable conditions) between 10 and 20 days thereafter at which each party, if an individual, or one representative from each organizational party (even if intervening jointly with other organizations), may be present;

9. That, in the event NIPSCO has not completed its site restoration by September 1, 1983, NRC Staff must file a complete report with the NRC Commissioners, with copies to those currently on the service list,

describing the status of the site restoration, giving the reasons why the site restoration has not yet been completed, and making recommendations for future NRC actions to compel the completion of site restoration;

10. That there be no modifications to the site restoration plan or the other conditions herein imposed upon NIPSCO with regard to site restoration without the approval of a representative of the Business and Professional People for the Public Interests (BPPI), which shall be deemed to have succeeded to the interests of PCCIs upon termination of this proceeding (or a representative for PCCIs if the proceeding has not yet been terminated);

11. That the conditions imposed by this termination order be considered as an obligation assumed by NIPSCO in consideration of the Commission's terminating this proceeding prior to the restoration of the site, enforceable by the NRC Commission and the courts.

ORDER

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 12th day of April, 1982

ORDERED

That the parties shall have 12 days from the service of this Memorandum and Order to file objections and/or requested modifications to the proposed order, stating their reasons. No replies will be permitted, except by further order of the Board.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Herbert Grossman
Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE