



ADJUDICATORY ISSUE

April 22, 1983

SECY-83-145

(NEGATIVE CONSENT)

COMMISSION LEVEL
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For: The Commission

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REPORT ON ALAB-723
(PUBLIC SERVICE CO. OF OKLAHOMA, ET AL.)

Facility: Black Fox Station, Units 1 and 2

Review
Time Expires: May 24, 1983¹

Purpose: To inform the Commission of an Appeal Board decision [which, in our opinion,

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Discussion: In early 1982, after several delays, Public Service Company of Oklahoma abandoned its plans to build the two-unit Black Fox Station. The Licensing Board subsequently granted the applicant's motion to terminate the construction permit proceeding on March 7, 1983. The Board also vacated its 1978 partial initial decision on environmental issues and authorized revocation of the LWA. In ALAB-723, the Appeal Board Chairman granted the applicant's unopposed motion to terminate the Appeal Board's review of the radon issue which has been pending since 1979. See ALAB-573, 10 NRC 775 (1979). The Appeal Board Chairman noted that review of the radon

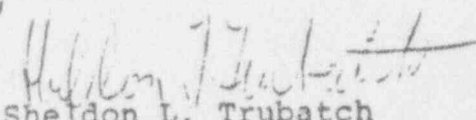
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Act, exemptions 5
FOIA 92-436

¹Under Negative Consent procedures, no further action by OGC is contemplated unless otherwise directed by the Commission.

issue is moot in the proceeding. Although the Licensing Board vacated its partial initial decision, the Appeal Board Chairman found no reason to vacate the Appeal Board's affirmation of that decision in ALAB-573. Such an action would have nullified rulings on generic issues, two of which had been addressed by the Commission. CLI-80-8, 11 NRC 474 (1980), CLI-80-31, 12 NRC 264 (1980).

Accordingly, we believe that

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Sheldon L. Trubatch
Acting Assistant General
Counsel

Attachments:

1. ALAB-723
2. March 7 ASLB Order

SECY NOTE: In the absence of instructions to the contrary, SECY will notify the staff on Monday, May 9, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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ATTACHMENT 1

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED

ATOMIC SAFETY AND LICENSING APPEAL PANEL

Alan S. Rosenthal, Chairman

'83 APR 14 P3:17

In the Matter of)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, ET AL.)
)
(Black Fox Station, Units 1)
and 2))
_____)

Docket Nos. STN-50-556
STN-50-557

SERVED APR 14 1983

Joseph Gallo and Lisa C. Styles, Washington, D.C.,
for the applicants, Public Service Company of
Oklahoma, et al.

MEMORANDUM AND ORDER

April 14, 1983

(ALAB-723)

1. In ALAB-573, 10 NRC 775 (1979), an appeal board affirmed in part a partial initial decision paving the way for the issuance under 10 CFR 50.10(e) of a limited work authorization (LWA) for the Black Fox facility. ^{1/} The Board retained jurisdiction over one issue -- the environmental effects associated with the release of radioactive radon gas (radon-222) to the atmosphere as a result of the mining and milling of uranium for reactor fuel. As ALAB-573 explained, that generic issue was then pending in Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3) on consolidation of several individual licensing proceedings. 10 NRC at 807.

1/ LBP-78-26, 8 NRC 102, as modified, LBP-78-28, 8 NRC 281 (1978).

Last November, the appeal boards in Peach Bottom rendered their ultimate decision on the radon issue. ALAB-701, 16 NRC ____ (November 19, 1982). The application of the conclusions reached in that decision to other proceedings was deferred, however, to await the outcome of possible Commission review of ALAB-701. Id. at ____, fn. 23. As matters currently stand, the Commission has before it a petition for such review but as yet has not acted upon it.

2. A month ago, the Licensing Board in this proceeding granted, subject to certain conditions, the applicants' motion seeking (1) leave to withdraw without prejudice their application for construction permits for the Black Fox facility, and (2) a termination of the proceeding. ^{2/} In the same order, the Board vacated its 1978 partial initial decision (see fn. 1, supra) and authorized the revocation by the Director of Nuclear Reactor Regulation of the outstanding LWA.

Given this development, the radon issue is now clearly moot insofar as this proceeding is concerned. Without objection, the applicants have moved on that ground to terminate the appellate jurisdiction retained in ALAB-573

^{2/} March 7, 1983 memorandum and order (unpublished). The basis of the motion was the applicants' determination to cancel their plans to build the facility.

with regard to the issue. The motion is hereby granted.

3. The Licensing Board's vacation of its 1978 partial initial decision may have been prompted by our action in Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980). In that proceeding, the Licensing Board had rendered in 1977 an initial decision authorizing the issuance of a construction permit for the Sterling facility. ^{3/} On appeal, we had affirmed the decision on most of the issues presented but had retained jurisdiction over both the generic radon issue and the question of the need for the power to be generated by the facility. ALAB-502, 8 NRC 383 (1978), affirmed, CLI-80-23, 11 NRC 731 (1980). Thereafter, because of the loss of a necessary state approval to build the facility, the applicants moved before us to terminate the construction permit proceeding. In granting that relief, we took yet another step:

[A]s the NRC staff correctly points out in its response to the applicants' termination request, 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

^{3/} LBP-77-53, 6 NRC 350.

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.

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.

11 NRC at 868-69 (footnote omitted).

At the same time, however, we did not go still further and vacate also our affirmance in ALAB-502 of the initial decision on all but the radon and need for power issues. Although not explicated in ALAB-596, the reason is discernible. On the one hand, the vacation of the initial decision was all that might have been necessary to

accomplish the desired result of removing "the authority underlying the issuance of the construction permit." On the other hand, a vacation of ALAB-502 would have had the effect of stripping controlling precedential significance from the several holdings in that decision on generic legal questions. Indeed, it might even have cast doubt on the continued vitality of the Commission's explicit affirmance in CLI-80-23, supra, of one of those holdings. Assuredly, the happenstance that the Sterling applicants had been compelled by state action to abandon their plans to build the facility provided insufficient justification for such an outcome. Stated otherwise, the precedential value of an ultimate appellate determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding.

In the case at bar, the same considerations are present. It may or may not have been necessary for the Licensing Board to vacate its 1978 partial initial decision in order to clear the path for the revocation of the outstanding LWA for the Black Fox facility. But, manifestly, the vacation of ALAB-573 is not a precondition to the accomplishment of that objective. And, were ALAB-573 now to be withdrawn, the rulings in it on generic legal issues perforce would lose much, if not all, of their


vitality. Further, as in Sterling, the Commission itself took up and rendered its own decision on one of the issues addressed by the Appeal Board. See CLI-80-8, 11 NRC 433 (1980). See also (on remand), ALAB-587, 11 NRC 474 (1980). There is at least room for question as to what the future status of CLI-80-8 might be were ALAB-573 vacated.

It need be added only that the situation at hand is markedly different from that in such cases as Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980). There, unlike here, the termination of the construction permit proceeding occurred while the Commission still had before it for possible review an appeal board decision on an interlocutory matter. Because that decision thus had not achieved finality -- i.e., might have been overturned or modified had Commission review gone forward -- the Commission understandably vacated it on mootness grounds.

In sum, the grant of the applicants' motion to terminate the appellate jurisdiction retained in ALAB-573 has no effect upon any other portion of that decision. The legal conclusions in ALAB-573 not altered by the Commission in CLI-80-8, supra, retain such force as they would have possessed but for the election of the applicants to abandon the proposal to build the Black Fox facility.

It is so ORDERED.

FOR THE APPEAL PANEL CHAIRMAN


C. Jean Shoemaker
Secretary to the Appeal Panel

This action was taken by the Appeal Panel Chairman
under the authority of 10 CFR 2.787(b).

ATTACHMENT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Dr. Paul W. Purdom
Frederick J. Shon

In the Matter of
PUBLIC SERVICE COMPANY OF OKLAHOMA,
ASSOCIATED ELECTRIC COOPERATIVE, INC.
and
WESTERN FARMERS ELECTRIC COOPERATIVE
(Black Fox Station,
Units 1 and 2)

ASLBP Docket No. 76-304-02 CP

(NRC Docket Nos: STN 50-556
STN 50-557)

March 7, 1983

ORDER

(Granting, Without Prejudice, But Subject To Conditions,
Applicants' Motion To Terminate and To Withdraw)

MEMORANDUM

On January 23, 1983, Applicants filed a Motion For Termination
Of Proceeding And Withdrawal Of Application.* The NRC Staff responded
on February 7, 1983, and on February 25, 1983, the State of Oklahoma,
as an interested State, advised that it did not intend to file any
objections to the instant motion. Intervenors did not file a response.

Applicants' Motion, supported by the affidavit of their Black
Fox Station Project Manager, states in pertinent part at pages 6-8:

* On June 18, 1982, in an unpublished Memorandum and Order, the Board
denied, without prejudice, Applicants' original Motion filed on
April 6, 1982.

"On November 26, 1982, Public Service Company of Oklahoma ("PSO") publicly announced plans for the construction of Inola Station, a coal-fired electric power-generating station, to be built at the site of the cancelled Black Fox Station nuclear project. Current plans provide for commercial operation of Inola Station Unit 1 at the Black Fox site during 1992 with Unit 2 to follow during 1994....Tentative long-range plans ultimately provide for the construction of up to four coal-fired units at the cancelled Black Fox site."

* * * * *

"The final decision on whether some or all of the construction improvements accomplished under the Black Fox Station LWA, as amended, will be utilized at the large coal-fired electric generating complex should be made during the design of the Inola Station layout and site facilities, currently expected to begin during 1984."

* * * * *

"As design and construction efforts for Inola Station progress, Applicants commit to dismantle unnecessary Black Fox site improvements which will not be utilized and to return disturbed site areas to conditions consistent with the site development and environmental requirements of a coal-fired electric power-generating station. During the interim period, the Applicants will complete the soil stabilization program approved by the NRC Staff and will maintain the site so as not to adversely impact the surrounding offsite environment."

In light of the Applicants' commitments, and provided that its two recommended conditions are imposed, the Staff requests that the instant motion be granted. The Applicants have not objected to the imposition of these conditions.

ORDER

Upon our consideration of the Staff's assurance that it will continuously monitor the remedial action required by the two conditions, pursuant to 10 C.F.R. § 2.107, it is, this 7th day of March, 1983

ORDERED

1. That Applicants' Motion For Termination Of Proceeding And Withdrawal Of Application to construct the Black Fox Station, Units 1 and 2, is granted, without prejudice, subject to the two following conditions:


a) Subject to the NRC Staff's monitoring and approval, Applicants shall implement their Black Fox Station Soil Stabilization and Erosion Control Plan, as approved by the Staff on September 24, 1982, by no later than October 1, 1983, and

b) Subject to the NRC Staff's monitoring and approval, Applicants shall dismantle those site improvements, not to be utilized at the Inola Station, in such a manner as not to cause any onsite or offsite detrimental environmental impacts.

2. That the Licensing Board's Partial Initial Decision, LBP-78-26, 8 NRC 102(1978), authorizing the issuance of a limited work authorization for Black Fox Station, Units 1 and 2, is vacated.

3. That the Director of Nuclear Reactor Regulation (a) is authorized to revoke the outstanding limited work authorization, as amended, and (b) will cause to be published in the Federal Register a notice of the withdrawal of the application for a construction permit.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 7th day of March, 1983.