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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	Docket No. 055-8615-SC
)	ASLBP No. 91-646-02-SC
DAVID M. MANNING)	Senior Reactor Operator
)	License No. SOP-10561-1
Senior Reactor Operator)	E.A. 91-054

NRC STAFF'S MOTION TO TERMINATE PROCEEDING

INTRODUCTION

On January 27, 1992 and February 3, 1992, the NRC Staff (Staff) issued two Board Notifications in the above captioned proceeding. Board Notifications 92-01 and 92-02. The Board Notifications informed the Atomic Safety and Licensing Board (Board) designated in this proceeding that David M. Manning's Senior Reactor Operator's (SRO) license had expired due to the fact that his employment at the FitzPatrick Nuclear Power Plant (FitzPatrick) was terminated. Since Mr. Manning's license has expired, the Staff moves that the Board terminate the above captioned proceeding as moot.

BACKGROUND

On May 2, 1991, the Staff issued an Order Suspending License (Effective Immediately) and an Order to Show Cause Why License Should Not Be Revoked to David M. Manning, Senior Reactor Operator. 56 Fed. Reg. 22020 (May 13, 1991). On June 6, 1991, Mr. Manning, through his counsel, filed an answer to the order and requested that either the order be revoked or, in the alternative, a hearing be held on the order. Also on May 2, 1991, the Staff issued an Order Modifying License (Effective

Immediately) to the New York Power Authority (NYPA) with respect to the James A. FitzPatrick Nuclear Power Plant. 56 Fed. Reg. 22022 (May 13, 1991). NYPA filed an answer to the order directed to it on May 31, 1991 and also requested either revocation of or a hearing on that order.

In response to both answers, the Staff issued with respect to Mr. Manning, on August 9, 1991, Modification of Order Suspending License (Effective Immediately)(Modified Manning Order). 56 Fed. Reg. 41377 (August 21, 1991). The Modified Manning Order suspended Mr. Manning's SRO license for a minimum of three years and required an extensive drug testing and rehabilitation program. The Staff also issued on August 9, 1991, Modification of Order Modifying License (Effective Immediately) with respect to NYPA (Modified NYPA Order). 56 Fed. Reg. 41378 (August 20, 1991). The Modified NYPA Order permitted Mr. Manning to return to 10 C.F.R. Part 50 licensed duties provided he followed a specified drug testing program.

On August 28, 1991, Mr. Manning returned to 10 C.F.R. Part 50 activities, agreeing to follow, without prejudice, the less rigorous drug testing program of the NYPA Modified Order. On October 7, 1991, the Staff and NYPA filed with the Board a "Joint Motion of NRC Staff and New York Power Authority for Approval of Settlement Agreement" and "Settlement Agreement." The settlement agreement provided that NYPA would agree to implement a drug testing program for Mr. Manning and would withdraw its request for a hearing. In turn, the Staff agreed to withdraw the Modified NYPA Order. On January 21, 1992, the Board issued a Memorandum and Order (Terminating

FitzPatrick Proceeding). In that order, the Board approved the settlement agreement between the Staff and NYPA and terminated the proceeding regarding the FitzPatrick license.

On January 22, 1992, NYPA informed the Staff that Mr. Manning had been called for a random drug test, but had failed to report for the test. Mr. Manning, instead, left the FitzPatrick site. See Board Notification 92-01. NYPA further informed the Staff that NYPA considered Mr. Manning's refusal as a positive drug test and intended to terminate his employment. See *Id.* On January 24, 1992, NRC Region I, received a letter from NYPA notifying the Staff that Mr. Manning's employment had, in fact, been terminated. See Board Notification 92-02, enclosure 1. Accordingly, pursuant to 10 C.F.R. § 55.55(a), Mr. Manning's SRO license expired.¹

DISCUSSION

David M. Manning's employment at FitzPatrick has been terminated. Pursuant to 10 C.F.R. section 55.55(a), Mr. Manning's license expired automatically upon termination of his employment. Since Mr. Manning no longer possesses an SRO license, the Board is unable to grant the relief that Mr. Manning has requested, i.e., the lifting of the suspension of his license. Accordingly, this proceeding is moot and should be terminated.

¹ On January 30, 1992, NRC Region I issued a letter to Mr. Manning informing him that his SRO license had expired. A copy of this letter is enclosure 2 of Board Notification 92-02.

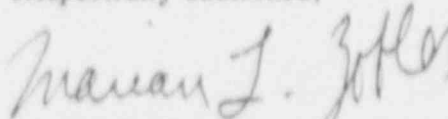
In a case similar to this one, the Commission held that where the facility licensee withdraws its request for an SRO license, the proceeding regarding the denial of that license is moot. *Alfred J. Morabito* (Senior Operator License for Beaver Valley Power Station, Unit 1), CLI-88-4, 28 NRC 5 (1988). In *Morabito*, the Commission vacated the decision of an Administrative Law Judge who had determined that the Staff had erroneously denied Mr. Morabito an SRO license. *Id.* at 5. After the Judge issued his initial decision, the facility licensee notified the Staff that Mr. Morabito was now employed outside the company's nuclear group and withdrew its request for his SRO license. *Id.* at 6. Because the applicant could not hold an SRO license without the facility licensee's request for one, the Commission held that the controversy over the issuance of that license was moot and vacated the Judge's decision. *Id.* The Commission rejected the applicant's assertion that the license should be issued retroactively and then canceled as of the date of his reassignment as calling for an "empty exercise." *Id.*

Similarly, here, since Mr. Manning cannot hold an SRO license relating to the FitzPatrick facility if he is not employed by the facility licensee, any further proceedings regarding the suspension of that license would also be an "empty exercise." Therefore, this proceeding should be terminated as moot.

CONCLUSION

For the reasons stated above, the proceeding regarding David M. Manning is moot and should be terminated.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marian L. Zobler".

Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this date 24th of February, 1992

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO TERMINATE PROCEEDING" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, postage prepaid, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of February, 1992:

Ivan W. Smith, Chairman*
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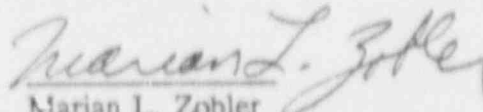
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Washington, D.C. 20555
Attn: Docketing and Service Section

Adjudicatory File (2)*
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A handwritten signature in cursive script, reading "Marian L. Zobler".

Marian L. Zobler
Counsel for NRC Staff