

For the reasons set forth below, the Appeal Board should reconsider and modify ALAB-505 by withdrawing any implication of misconduct by counsel for Applicants.^{3/}

At issue is the proper interpretation to be given to a letter dated September 5, 1978 from one of Intervenor's attorneys, Mr. Farris, to the Chairman of the Licensing Board.^{4/} A copy is attached hereto for ease of reference. The Appeal Board construes this letter to be tantamount to requesting a stay of relief from the Licensing Board.^{5/} Applicants did not so construe the letter in its October 27 reply, and after a fresh look at the situation we continue to believe that the September 5, 1978 letter cannot be fairly characterized as a motion for a stay. The letter, which was not served on the other parties to the proceeding, simply asserts that the LWA should be revoked because the Licensing Board violated Section 401(a)(1) of

^{3/} Although only the signature of Mr. Paul M. Murphy appears on Applicants' October 27, 1978 response in opposition to Intervenor's motion for a stay of the LWA, the pleading was reviewed by Joseph Gallo under the general supervision of Michael I. Miller. Consequently, Applicants' request that, regardless of its ruling with respect to this Motion, ALAB-505 as a minimum be amended to show Messrs. Miller and Gallo as well as Mr. Murphy as counsel of record.

^{4/} It is our understanding that Mr. Dalton continues to represent Intervenor, including CASE with respect to the pursuit of their appeal from the Licensing Board's "Partial Initial Decision" Authorizing Limited Work Authorization, dated July 24, 1978. Mr. Farris and his firm represent Intervenor in the ongoing health and safety hearings.

^{5/} ALAB-505, slip op. p.9.

the Federal Water Pollution Control Act when it authorized the issuance of the LWA. No argument was offered in support of their position, and Applicants, in their response to the letter before the Licensing Board styled that letter as a motion for reconsideration and did not address the factors set forth in 10 CFR § 2.788 applicable to a stay. It appears that a more accurate characterization might be that Intervenors were placing the Licensing Board on notice pursuant to Section 505 (b) (1) (A) (ii) of the Federal Water Pollution Control Act of its intent to file a lawsuit in the United States District Court unless it revoked the LWA. Indeed, only such an interpretation might explain the lack of any legal argument in the letter, i.e., the author of a letter providing notice of an intended action would not deem it necessary to expand the letter with argument. That this interpretation is more likely than that hypothesized by the Appeal Board is demonstrated by the fact that Applicants' counsel received the letter, not from Intervenors' counsel, but rather from the NRC's docketing section. Indeed, to this day Intervenors' counsel have not identified the letter or any other document as the source of the request for relief from the Licensing Board. Significantly, the draftsman of the letter did not then and does not now infer that the letter be taken as anything other than a notice of intent to file litigation. (See Affidavit of Paul M. Murphy, attached).

In any event the Licensing Board construed the letter as a motion for reconsideration stating as follows:

"The motion is denied because the argument is barren and conclusional in failing to delineate wherein our decision was erroneously or improvidently issued."^{6/}

The Appeal Board's judgment that the letter could be otherwise construed as a motion to stay is clearly a doubtful one. We believe it is unfair to criticize counsel when the facts which underlie the criticism are equivocal. The matter is not advanced by the Appeal Board's further observation that it "should have been perfectly obvious to the applicants[' counsel], given the Licensing Board's September 29 order any further attempt to obtain a lifting of the limited work authorization by the Board would have been futile."^{7/} Such a judgment is not warranted. Since arguments in favor of a stay were not presented by the Intervenors, we are unable to devine what the Licensing Board's ruling would have been had Intervenors filed a stay motion in accordance with the requirements of 10 CFR § 2.788 and, in particular, subsection (e). The Appeal Board's willingness to prejudge the Licensing Board's ruling is a disservice to the Licensing Board as well as Applicants' counsel.

The undersigned are committed to the obligation of complete candor to the Appeal Board and any other judicial or quasi-judicial body. Our obligation in this respect is without

^{6/} See Page 1 of the Licensing Board's Order, dated September 29, 1978.

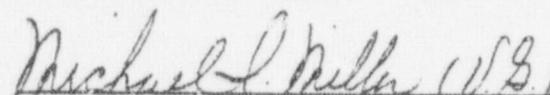
^{7/} ALAB-505, slip op. p. 9, fn. 14.

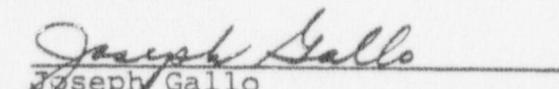
qualification. Likewise, the Appeal Board has an obligation to those who practice before it. The Appeal Board must recognize the significance of its position and power when it levies criticism at counsel. To be sure, the Appeal Board must insist upon the conduct of the highest standards of practice. However in cases such as this where the criticism rests solely on its interpretation of the record and the actions of others, the reasonableness of which are fairly open to challenge, the Appeal Board should have investigated further before publishing its criticism.

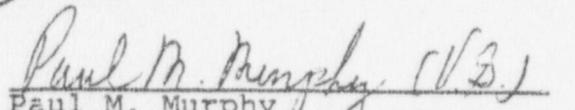
In view of the foregoing, Applicants' request that the Appeal Board reconsider and modify ALAB-505 by (i) adding the names of Michael I. Miller and Joseph Gallo as attorneys of record, and (ii) striking section 2. beginning with the last two lines on page 6 and continuing through the first seven lines on page 10.

Dated: November 17, 1978

Respectfully submitted,


Michael I. Miller


Joseph Gallo


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OF COUNSEL

September 5, 1978

Mr. Sheldon J. Wolfe, Esq.
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Wolfe:

On behalf of Citizens Action for Safe Energy (C.A.S.E.), an organization of Oklahoma residents who are intervenors in an action pending before the Atomic Safety and Licensing Appeal Board, styled In the Matter of Public Service Company of Oklahoma, Associated Electric Cooperative, Inc., and Western Cooperative (Black Fox Station Units 1 and 2), Docket Nos. STN 50-556 and 50-557, I hereby request that you revoke the Limited Work Authorization issued to Public Service Company of Oklahoma, et al., by the Licensing Board Panel on July 25, 1978 due to violation of 33 USC Sec. 1341(a)(1) (Sec. 401(a)(1) of the Federal Water Pollution Control Act), in that the Oklahoma Water Resources Board never certified Public Service Company of Oklahoma's plans, nor was there a waiver of such certification.

Should such revocation of the Limited Work Authorization not be forthcoming, I hereby give you notice in compliance with 33 USC Sec. 1365(b)(1)(A)(ii) (Sec. 505(b)(1)(A)(ii) of the Federal Water Pollution Control Act) that C.A.S.E. intends to sue in the United States District Court for the Northern District of Oklahoma for a Writ of Mandamus compelling the Atomic Safety and Licensing Board to revoke the Limited Work Authorization.

Sincerely,

Joseph R. Farris
Joseph R. Farris
For the Firm

JRF:cw

cc: Ms. Carrie Dickerson
Mrs. Ilene H. Youngheim
Mr. Lawrence Burrell



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

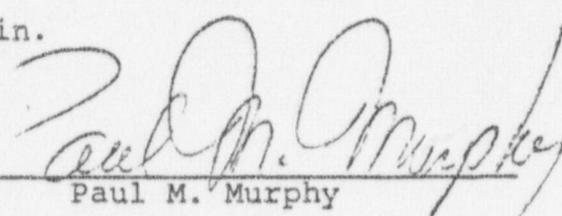
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of the Application of)
Public Service Company of Oklahoma,)
Associated Electric Cooperative, Inc.) Docket Nos.
and) STN 50-556
Western Farmers Electric Cooperative) STN 50-557
)
(Black Fox Units 1 and 2))

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

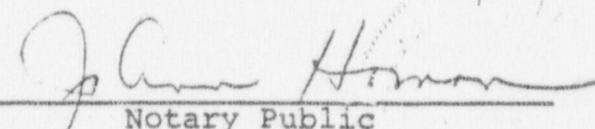
AFFIDAVIT OF PAUL M. MURPHY

I, Paul M. Murphy, being first duly sworn, on oath state that the information contained in the attached Affidavit is true and correct and is based on personal knowledge of the facts cited therein.



Paul M. Murphy

Subscribed and sworn to before me this 16th day of November, 1978.



Notary Public

My commission expires: July 8, 1981

AFFIDAVIT OF PAUL M. MURPHY

I, Paul M. Murphy, being duly sworn, state under oath:

1. I am one of the attorneys representing Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative ("Applicants") in Docket Nos. STN 50-556 and STN 50-557.

2. Shortly after September 11, 1978, I received from the NRC Docketing Service a copy of a letter dated September 5, 1978 from Mr. Joseph R. Farris to Mr. Sheldon J. Wolfe. Although the letter was from one of the attorneys representing Intervenors, it was directed to the Chairman of the Licensing Board and appeared to request affirmative relief in the above cause, it was not served on myself or any other attorney representing the Applicants, nor does it appear on its face to have been sent to the Applicants. Because Mr. Farris had recently entered his appearance in this proceeding and may have been unfamiliar with the rules of practice, I telephoned him to point out that 10 CFR § 2.701(b) and § 2.730(a) would appear to require that requests such as that made in his September 5, 1978 letter be served on counsel for Applicants. I also pointed out that 10 CFR § 2.780(a) appears to prohibit the type of ex parte communication embodied in the September 5, 1978 letter.

3. To the best of my recollection, Mr. Farris express some surprise that I characterized his letter as a request for affirmative relief that would be subject to the rules of practice I cited. He stated, in essence, that he viewed the letter as nothing more than the notice required pursuant to 33 USC § 1365(b)(1)(A)(ii) prior to the filing of a lawsuit against the Licensing Board under that Statute. I also recall that Mr. Farris said that had he intended the letter as a motion for affirmative relief, he would have prepared a proper motion and complied with the appropriate rules of practice. However, I recall that Mr. Farris did acknowledge that the letter could be read as inconsistent with 10 CFR § 2.780 to the extent that it mentioned revocation of the Black Fox LWA. We then discussed whether under 33 USC § 1365 Interveners could, in fact, file suit against the Licensing Board. Mr. Maury Efros, a member of Mr. Farris' law firm, and whom I understand actually drafted the letter, joined that portion of the telephone conversation.

4. On September 25, 1978, I filed a pleading in response to the letter out of an abundance of caution. Therein, I expressed my view that to the extent that a revocation of the LWA was requested, the letter constituted an untimely and unsupported request for reconsideration which should be denied. I did not address the requirements of 10 CFR § 2.788 or the cases decided thereunder, because I did not believe that the letter could be interpreted as a request for a stay of the LWA pending appeal.

5. On November 15, 1978, I telephoned Mr. Maury Efros and asked him again about the September 5, 1978 letter. He stated that, he recalled the letter, that he had drafted the letter and that it had been intended only as a statutory notice of intent to file suit. Mr. Efros told me that although he had read ALAB-505, it had not occurred to him that the letter he had drafted was the letter discussed in that decision because the letter was not intended as a motion for a stay.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of the Application of)
Public Service Company of Oklahoma,)
Associated Electric Cooperative, Inc.) Docket Nos. STN 50-556
and) STN 50-557
Western Farmers Electric Cooperative)
)
(Black Fox Station, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Motion To Reconsider And Modify ALAB-505," was served on the individuals listed below by deposit in the United States mail, first class, this 17th day of November, 1978.

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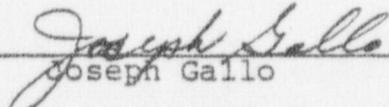
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