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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:
Ivan W. Smith, Chairman
Gustave A. Linenberger, Jr.
Dr. Oscar H. Paris

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In the Matter of

PUBLIC SERVICE COMPANY OF INDIANA, INC.)
WABASH VALLEY POWER ASSOCIATION, INC.)

Docket Nos. 50-546-OL
50-547-OL

(Marble Hill Nuclear Generating
Station, Units 1 and 2)

ASLBP No. 83-487-02 OL

November 3, 1986

MEMORANDUM AND ORDER
TERMINATING OPERATING LICENSE PROCEEDING

I. INTRODUCTION

The Public Service Company of Indiana and the Wabash Valley Power Association were issued permits numbered CPPR-170 and 171 for the construction of Marble Hill Nuclear Generating Station, Units 1 and 2. They began construction and applied for an operating license for the units but have since decided not to operate. Consequently we have before us the Applicants' motion of April 4, 1985 to terminate the operating license proceeding without conditions. The motion is supported by the NRC Staff but opposed by intervention petitioners. The latter urge that the Licensing Board impose conditions that would require the utilities to restore the Marble Hill site. In the order

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below we grant the motion to terminate the proceeding and, for want of jurisdiction, deny the petitioners' requests.

II. BACKGROUND

An Atomic Safety and Licensing Board, having completed hearings in the Marble Hill construction permit proceeding, authorized the issuance of construction permits on April 4, 1978. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-78-12, 7 NRC 573 (1978). The permits issued that day. In accordance with the provisions of 10 C.F.R. § 2.717(a), the licensing board's jurisdiction in the construction permit phase of the proceeding terminated when its decision became the final Commission decision.

On February 24, 1983, the Applicant, Public Service Company of Indiana, filed an amendment to the licensing application in which it applied for a facility operating license for the Marble Hill units. Notice of opportunity for a hearing on the application was published on March 25, 1983. The notice provided for the traditional NRC process under 10 C.F.R. § 2.714 for the filing of intervention petitions and requests for hearing by persons whose interest may be affected by the proceeding. The notice provided also that an Atomic Safety and Licensing Board (designated by the Chairman of the Licensing Board Panel) would rule on any hearing request or intervention petition and that the Board would issue any notice of hearing or an appropriate order in the event a hearing request or intervention petition was filed. 48 Fed. Reg. 12609, March 29, 1983.

During April 1983 timely petitions to intervene were filed by Sassafras Audubon Society of South Central Indiana, Valley Watch, Inc., and Save The Valley. The Chairman of the Licensing Board Panel designated the members of this Board to rule on petitions to intervene and requests for hearing and to preside over any hearing in the event a hearing were ordered. 48 Fed. Reg. 19964, May 3, 1983.

On June 30, 1983 the Board ruled that Audubon Society and Valley Watch had failed to demonstrate standing to intervene but that they could exercise their right to file amended petitions. We also ruled that Save The Valley's petition established the standing of that organization to intervene.

On September 14, 1983 the Board noted in a memorandum that Audubon Society and Valley Watch had filed amended petitions but still had not established standing to intervene. But we deferred making a final ruling on intervention standing. We also provided for the filing of supplemental petitions with proposed contentions. Our expectation was that issues of standing and other threshold aspects of the petitions would be considered at a prehearing conference at the same time we considered the adequacy of the proposed contentions.

On October 21, 1984 Audubon Society and Valley Watch joined in filing a single set of proposed contentions and Save The Valley submitted its proposed contentions. The Applicants and the NRC Staff responded to the proposed contentions on November 30, 1983. Our next step would have been to convene a prehearing conference to resolve the outstanding preliminary issues. But before that could be done, counsel

for the Applicants informed the Board that a special task force appointed by the Governor of Indiana had recommended that construction of the Marble Hill units be cancelled. Counsel suggested that the Board defer any further action in the proceeding.¹ The matter rested in suspense until Applicants' April 4, 1985 Motion to Terminate Proceeding.

The Motion stated tersely that the Marble Hill construction permits had been surrendered to the Director of Nuclear Reactor Regulation and requested the Licensing Board to terminate the operating license proceeding. Applicants also forwarded a copy of the stabilization plan for the Marble Hill site. The NRC Staff² (as did the Board) assumed that the motion was brought under 10 C.F.R. § 2.107 (the general NRC regulation providing for the withdrawal of applications, n.8, infra), but the matter was again suspended at the Staff's request pending Staff's review of the Applicants' site restoration plan.

On March 26, 1986 the Staff filed its supplement to the Applicants' motion to terminate, informing the Board that it saw no significant environmental impact that would result from the termination of the proceeding. The Staff then approved a plan which would stabilize the

¹ Letter Harry A. Voigt to Board Members, December 22, 1983.

² Staff Response to Applicants' Motion to Terminate Proceeding, April 24, 1985. The Staff cited Duke Power Company (Perkins Nuclear Station, Units 1 and 2), ALAB-668, 15 NRC 450 (1982).

Marble Hill site essentially as it exists since construction was halted, i.e., "typical of any abandoned large industrial facility."³

On May 30 and June 18, 1986 the Board invited the parties to file briefs on the reach of the Board's jurisdiction to impose conditions on any withdrawal of the Marble Hill construction permits.

The Applicants,⁴ NRC Staff,⁵ Audubon Society,⁶ and Save The Valley⁷ filed briefs in response to the Board's invitation.

III. DISCUSSION

Our call for briefs last May was driven by two principal concerns. First, we noted a sharp contrast in the Staff's and Applicants' approach to this proceeding compared to such cases as Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), LBP-82-29, 15 NRC 762 (1982); Public Service Co. of Oklahoma, Associated Electric

3 ENVIRONMENTAL REVIEW RELATED TO PUBLIC SERVICE OF INDIANA'S REQUEST TO TERMINATE THE MARBLE HILL LICENSING PROCEEDING, at 2, February 20, 1986. (Attachment to the Staff's March 28, 1986 Supplement to Applicants' Motion to Terminate Proceeding.)

4 Applicants' July 2, 1986 Supplement to Motion To Terminate Proceeding.

5 NRC Staff July 21, 1986 Response to Memorandum and Order of May 30, 1986.

6 Sassafras Audubon Society's August 12, 1986 Response to NRC Staff Position on Marble Hill Site Restoration.

7 Save The Valley's August 14, 1986 Response To . . . Board Order of May 30, 1986.

Cooperative, Inc. and Western Farmers Electric Cooperative (Black Fox Station, Units 1 and 2), LBP-83-10, 17 NRC 410 (1983); and Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-652, 14 NRC 627 (1981). In this case, as noted above, the Staff is satisfied with stabilizing a large abandoned industrial site, while, in the cited proceedings, substantial site restoration agreements were approved by the adjudicating boards.

Second, we did not understand why the Applicants simply sought an end to the operating license proceeding without even a reference to 10 C.F.R. § 2.107(a), n.8, infra, which is the controlling NRC regulation for the withdrawal of applications. Nor could we understand why the Applicants apparently believed that it could sever its connection to the NRC simply by sending its construction permits back to the Director of Nuclear Reactor Regulation.

Now we learn from the Applicants' supplement to its motion to terminate that, in Applicants' view, neither the Board nor the NRC itself has jurisdiction over the Marble Hill construction. As we understand it, Applicants' reasoning goes this way:

(1) By its terms, 10 C.F.R. § 2.107(a) applies to the withdrawal of applications. But, in the case of Marble Hill, the construction permits have already issued. The application for the Operating License (Amendment 22 in the licensing application) refers only to an operating license. Therefore 10 C.F.R. § 2.107(a) does not apply to the already-issued construction permits. For that reason this Board has no jurisdiction over them under that regulation. Supplement at 10.

(2) Furthermore, according to Applicants, neither the Board nor any other component of the NRC has jurisdiction over the construction permits under any NRC regulation because there is no regulation even covering the voluntary surrender of construction permits as such. The Commission has no authority to promulgate such a regulation -- it may regulate the surrender of a licensed facility's license only.

Commercial nuclear power reactors are utilization facilities subject to the licensing requirements of Section 103 of the Atomic Energy Act (1982) (42 U.S.C. 2133). However, Marble Hill never attained the status of a utilization facility (as defined under Section 11 of the Act, 42 U.S.C. 2014(cc)) since construction never progressed far enough to permit the use of special nuclear material. Nor will it. Therefore, Applicants conclude, Marble Hill is not subject to the licensing authority of the Commission. Supplement at 6-9.

Assuming, despite our substantial doubts to the contrary, that Applicants' arguments concerning the Commission's jurisdiction are fully accurate, why would the Board not have jurisdiction to impose site conditions on the withdrawal of the application for an operating license? Applicants do not discuss this aspect of their motion. An answer, at first overlooked by the Board, was provided by the Staff in its July 21, 1986 response to our request for briefs. Pursuant to 10 C.F.R. § 2.107(a) a presiding officer may prescribe terms for the

withdrawal of an application only after the issuance of a notice of hearing.⁸

According to the scheme for hearings under Section 189a(1) of the Atomic Energy Act, where a construction permit has been issued following a hearing, the Commission need not conduct a hearing on the operating license application unless requested by a party whose interest may be affected by the application. Notice of the intent to issue such a license and the opportunity for such a hearing must be published in the Federal Register with thirty days' notice.

Consistent with that statutory scheme the Commission, as is always the case in operating license proceedings, delegated to a licensing board (one designated by the Panel Chairman) two areas of jurisdiction. The first was to rule on requests for hearing and petitions for leave to intervene. The second was to exercise the Commission's authority to issue any notice of hearing in the event a hearing is granted upon a petition or to issue any other appropriate order. 48 Fed. Reg. 12609, March 25, 1983.

⁸ § 2.107 Withdrawal of application.

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

In compliance with the notice of opportunity for a hearing, and in accordance with 10 C.F.R. § 2.105(e)(2), the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (who is also the Chairman of the Panel) designated the members of this Board to rule on petitions and to issue a notice of hearing if one were warranted. At this preliminary juncture of an operating license proceeding the Board designated initially to rule on petitions is known as a "Petitions Review Board". The Chief Administrative Judge of the Panel has the continuing authority to designate presiding officers to preside over NRC adjudications. 10 C.F.R. § 2.721(a). For efficiency and continuity, the Chief Administrative Judge, usually in one order, designates the members of the Petitions Review Board as members of the Board to preside over any hearing which may be ordered pursuant to the Commission's notice of opportunity for hearing. That is precisely what the Chief Administrative Judge did in this case. 48 Fed. Reg. 19964, May 3, 1983.

As can be seen in the background discussion above, at the time this proceeding was suspended, no notice of hearing on the application had been issued. Standing to intervene had not been established by two of the three petitioners and the Board had not approved any issues for hearing from the lists of contentions filed by any of the petitioners. Nor is there presently any reason to issue a notice of hearing. The matter is patently moot. In view of the discontinuance of the Marble Hill project, none of the contentions advanced for litigation have any basis. Therefore, according to the express terms of 10 C.F.R.

§ 2.107(a), this Board has no jurisdiction to set terms on the withdrawal of the application.⁹

Petitioner Save The Valley mounts an argument to the effect that the notice of the receipt of the application, notice of proposed action, and notice of opportunity for hearing (supra, 48 Fed. Reg. 12608), issued under 10 C.F.R. § 2.105, was functionally the notice of hearing referred to in 10 C.F.R. § 2.107(a).¹⁰ In fact, the Board's first impression, arrived at without analysis, was just that. But, as we discuss above, full analysis leads to the conclusion that the regulations, statutes and the Federal Register notice all anticipate a bifurcated process in operating license proceedings where first the threshold intervention issue is settled, then the notice of hearing is issued.

We have also taken into account petitioners' request that, on the factual merits, the Board should take jurisdiction and order some type of site restoration. We cannot entertain those requests. In the early stages of this very proceeding a decade ago, the Appeal Board cited the jurisdictional standard in NRC proceedings. As agents of the

⁹ Counsel for Applicants avoids calling its actions a petition to "withdraw an application" under Section 2.107(a). While we believe that Applicants' analysis is strained, it is immaterial to the Board. Whatever the theory, the Marble Hill units will not operate pursuant to the application. Notice of that fact is either a withdrawal of the application or a sound response to the petitions to intervene. In either event, there will be no notice of hearing issued on the application.

¹⁰ Save The Valley's Response at 2-3.

Commission, Licensing Boards exercise only those powers which the Commission has given them. Marble Hill, ALAB-317, 3 NRC 167, 170 (1976).

IV. ORDER

The Motion to Terminate the Proceeding is granted without condition.

V. APPEAL

Since the effect of this order is to wholly deny petitions for leave to intervene, the Board informs the parties that it is appealable in accordance with the provisions of 10 C.F.R. § 2.714a.

ATOMIC SAFETY AND
LICENSING BOARD

Oscar H. Paris

Oscar H. Paris
ADMINISTRATIVE JUDGE

G. A. Linenberger, Jr.

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Ivan W. Smith

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

November 3, 1986