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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-00-18

DOCKETED 07/26/00

SERVED 07/26/00

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. David Schink

In the Matter of

WASHINGTON PUBLIC POWER
SUPPLY SYSTEM

(Nuclear Project No. 1)

Docket No. 50-460-OL

ASLBP No. 82-479-06-OL

July 26, 2000

MEMORANDUM AND ORDER
(Terminating Reactor Operating License Proceeding)

This proceeding concerns the application of Washington Public Power Supply System (WPPSS) for an operating license (OL) for its Nuclear Project No. 1 (WNP-1) located in Richland, Washington.¹ In 1983, this Licensing Board granted intervening party and interested governmental entity status, respectively, to the Coalition For Safe Power (CSP) and the State of Washington (State) relative to this proceeding. Several months later, however, the WNP-1 OL application was deferred and this proceeding has remained essentially dormant since that time. Recently, WPPSS requested that its OL application be withdrawn and that this proceeding be terminated, but subsequently asked that its withdrawal be held in abeyance pending consideration of new developments and budgetary restructuring. CSP and the State were invited to respond to both of these requests, but neither has done so. Both also failed to

¹ Although WPPSS was the applicant's name of record during most of this licensing proceeding, WPPSS is now conducting business under the name Energy Northwest. For the purpose of clarity, this order will refer to the applicant as WPPSS.

respond to a March 30, 2000 Board order to show cause as to why this proceeding should not be dismissed for want of prosecution.

With the failure of CSP and the State to acknowledge the Board's repeated requests for responses, in particular its order to show cause, there apparently is no longer any intervening party or interested governmental entity with an interest in continuing this adjudicatory proceeding. We thus dismiss this proceeding for want of prosecution.

I. BACKGROUND

On June 23, 1983, intervenor CSP and the State of Washington, an interested governmental entity, were admitted to this reactor OL proceeding pursuant to 10 C.F.R. §§ 2.714 and 2.715(c), respectively. See LBP-83-66, 18 NRC 780, 780-81 (1983). Subsequently, WPPSS notified the Board that construction of WNP-1 would be deferred indefinitely and asked that this proceeding be suspended as well. On October 14, 1983, the Board granted this request and required WPPSS to file quarterly status reports regarding the WNP-1 facility. See id. at 798-801. According to WPPSS, WNP-1 has been preserved in a deferred status since that time pursuant to the requirements found in the Commission's "Policy Statement on Deferred Plants," 52 Fed. Reg. 38,077 (1987). See Motion for Withdrawal of Application (Jan. 4, 2000) at 1.

After a number of years of filing quarterly reports with the Board, on May 13, 1994, the WPPSS Board Of Directors voted to terminate the WNP-1 project. However, in letters dated May 17, 1994, and February 15, 1995, the WPPSS Board of Directors informed the Board that it wished to maintain the WNP-1 construction permit and to continue the deferred status of the OL application in order to maximize the value of the project and the equipment involved until the

facility's future was decided. Since 1994, WPPSS has maintained a limited project preservation program while considering other alternative uses for WNP-1. See id. at 2.

On January 4, 2000, WPPSS filed a motion for withdrawal of application requesting, pursuant to 10 C.F.R. § 2.107(a), that the Board issue an order authorizing the withdrawal of the OL application and termination of this proceeding. WPPSS also indicated it was prepared to terminate the WNP-1 construction permit. See id. at 3. By order dated January 11, 2000, the Board provided the parties with an opportunity to file responses to the WPPSS withdrawal motion. The participants initially were given until January 31, 2000, to respond; however, because of a concern about service of process on the participants to the proceeding, by memorandum and order dated February 16, 2000, the Board extended the participants' scheduled responses until March 3, 2000. In that issuance, the Board also requested that the participants provide a current telephone number, facsimile number, and e-mail address for their counsel or other representative. The Board, however, received no response to the WPPSS withdrawal motion or the request for appearance information from either CSP or the State.

Before the Board could act on the WPPSS January 4, 2000 application withdrawal motion, on February 29, 2000, WPPSS filed a request that the Board defer and hold in abeyance a decision on that motion due to new developments and budgetary considerations regarding WNP-1. WPPSS further disclosed that it was reconsidering various alternatives for the facility and, therefore, requested that the licensing proceeding continue in its current deferred status until further clarification of the proposed plans. See [WPPSS] Request to Defer Licensing Board Ruling (Feb. 29, 2000) at 1-2.

On March 7, 2000, the Board ordered the parties to respond to the WPPSS February 29, 2000 request to defer its ruling on the pending application withdrawal request. In that order, the Board specifically requested that the intervening parties address whether or not

they wished to continue in this OL proceeding involving the WNP-1 facility. The Board ordered that any responses to the WPPSS deferral request should be filed on or before March 22, 2000. On March 21, 2000, the staff indicated that it had no objections to the grant of the request for deferral. See NRC Staff Response to [WPPSS] Request to Defer Licensing Board Ruling (Mar. 21, 2000) at 1. However, there were no responses by CSP or the State.

As a result of the failure to respond to various requests, on March 30, 2000, the Board put forth the pending show cause order, which was published in the Federal Register on April 5, 2000, see 65 Fed. Reg. 17,906, 17,906-07 (2000), inquiring why this reactor OL proceeding should not be dismissed for want of prosecution. The Board declared that the failure of CSP and the State to respond to the various WPPSS pleadings and the Board's information requests suggested that neither, as the parties involved in initiating this proceeding, had a continuing interest in pursuing this litigation involving the WPPSS WNP-1 facility.

Although the staff indicated that it did not intend to file a response to the Board's show cause order, see Letter from Ann P. Hodgdon, NRC Staff Counsel, to the Licensing Board (Apr. 12, 2000), the period of time permitted for responses lapsed without any answer from the other participants.

II. ANALYSIS

The question now before the Board is whether this case should be dismissed because of the failure of intervening party CSP and interested governmental entity State of Washington, to provide any indication of their intent to participate further in this OL proceeding despite several Board requests for such information. For the reasons set forth below, the Board concludes that this action should be terminated for want of prosecution by CSP and the State.

When parties, for whatever reason, fail to respond or otherwise comply with Board requests, the Board has the authority to take appropriate action in accordance with its power and duty to maintain order, to avoid delay, and to regulate the course of the hearing and the conduct of the participants. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-5, 51 NRC 64, 67 (2000); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP- 82-115, 16 NRC 1923, 1928 (1982). In this regard, 10 C.F.R. § 2.707 declares “[o]n failure of a party to file an answer or pleading within the time prescribed . . . as specified in the notice of hearing or pleading . . . [or] to appear at a hearing or pre-hearing conference . . . the presiding officer may make such orders in regard to the failure as are just . . .” (footnote omitted). Indeed, this provision has previously been invoked as a basis for dismissing a stated contention following the intervening party’s failure to prosecute the issue. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156, 157 (1976); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, aff’d in part, ALAB-934, 32 NRC 1 (1990); Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982). Moreover, as the Commission emphasized in its recent Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21-22 (1998), it is the Board’s duty to set and adhere to reasonable schedules for the various steps in the hearing process, with the expectation that the parties will comply with the scheduling orders set forth in the proceeding and that the Board will take appropriate action against parties who fail to comply.

Accordingly, notwithstanding the considerable passage of time since there has been any substantive activity in this case, as an intervening party and an interested governmental entity, respectively, CPS and the State are under an obligation to comply with the Board’s requests for information and to demonstrate through their responses that they have an interest in continuing

to participate in this litigation. The repeated failure of these participants to respond, as detailed infra, leaves the Board with no reasonable alternative other than to dismiss this proceeding.

Intervenor CSP and interested governmental entity State of Washington have demonstrated a lack of interest in this proceeding on numerous occasions. They first neglected to provide responses to the January 4, 2000 WPPSS withdrawal motion. This failure occurred even after the Board extended the filing date from January 31, 2000, to March 3, 2000, based on the possibility that these parties may not have received service of process. In addition, during this time frame, the Board sought twice to obtain current appearance information from these participants, which also proved unsuccessful. Thereafter, by order dated March 7, 2000, the Board requested that these participants respond to the WPPSS February 29, 2000 withdrawal deferral motion, specifically requesting that they inform the Board of any decision they had made regarding their continued participation in this OL proceeding. The Board's attempts once again proved fruitless as no responses were filed by CSP or the State. Then, as a final appeal to these participants, on March 30, 2000, the Board issued and published in the Federal Register a show cause order asking why this proceeding regarding the WNP-1 OL application should not be terminated due to want of prosecution by CSP and the State.² CSP and the State have failed to respond to this Board request as well.

As a result of these repeated failures to act, the Board finds that this OL proceeding involving the WNP-1 facility should be terminated. In taking this dismissal action, however, we

² Despite the extended period of inaction in this proceeding, individual service of the show cause order on these participants at the last known address they provided the Office of the Secretary for this proceeding's service list, in combination with its publication in the Federal Register, provides CSP and the State with the requisite notice of the Board's proposed dismissal action. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 173 (citing 42 U.S.C. § 1508), reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd, CLI-98-13, 48 NRC 26 (1998).

note that there is case law suggesting that when terminating a proceeding based on a party's failure to comply with a Board directive, a presiding officer should undertake a review of outstanding issues to ensure that there are no serious matters that require consideration. See Pilgrim, LBP-76-7, 3 NRC at 157; see also Private Fuel Storage, LBP-00-5, 51 NRC at 68; Seabrook, LBP-90-12, 31 NRC at 431. More recently, however, in its Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 22-23, the Commission again emphasized that only in "extraordinary circumstances" should the Board, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of the contentions at issue, and that such a determination should be followed by a referral to the Commission. We know of nothing here that falls into that category.

III. CONCLUSION

Because intervening party CSP and interested governmental entity State of Washington have failed to respond to numerous Board orders, including the Board's March 30, 2000 order to show cause why this proceeding should not be dismissed, it appears they no longer have an interest in continuing this litigation. Accordingly, this OL proceeding regarding the WPPSS WNP-1 facility is terminated for want of prosecution.

For the foregoing reasons, it is this twenty-sixth day of July 2000, ORDERED, that the pending contentions of intervenor CSP regarding this operating license proceeding involving the WPPSS WNP-1 facility are dismissed and this proceeding is terminated.

This memorandum and order terminating this proceeding will constitute the final decision of the Commission forty (40) days from the date of its issuance, or on Tuesday,

September 5, 2000, unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise. Within fifteen (15) days after service of this memorandum and order, any party may file a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, any party to the proceeding may file an answer supporting or opposing Commission review. The petition for review and any answers shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. David R. Schink
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 26, 2000

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant WPPSS, and (2) the staff; and by regular mail to all other participants on the existing service list for this proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
WASHINGTON PUBLIC POWER)	Docket No. 50-460-OL
SUPPLY SYSTEM)	
)	
(WPPSS Nuclear Project No. 1))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (TERMINATING REACTOR OPERATING LICENSE PROCEEDING) (LBP-00-18) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER
(TERMINATING REACTOR
OPERATING LICENSE PROCEEDING)
(LBP-00-18)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of July 2000