

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))

APPLICANTS' OPPOSITION TO "INTERVENORS'
MOTION FOR ORDER STAYING LWA PENDING APPEAL"

Introduction

On July 24, 1978, the Licensing Board assigned to the above cause issued a "Partial Initial Decision Authorizing Limited Work Authorization" ("PID") wherein all the findings required by 10 CFR §50.10(e)(2) to be made prior to the issuance of a limited work authorization ("LWA") were made. On July 26, 1978, the Director of Nuclear Reactor Regulation issued an LWA for the Black Fox Station. On October 12, 1978, 80 days after the issuance of the PID and 78 days after the issuance of the LWA, Intervenor filed a motion for a stay of the LWA. The requested relief had not first been requested from the Licensing Board, and Intervenor has not attempted to comply with the requirements of 10 CFR §2.788. Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative ("Applicants") urge that Intervenor's Motion be summarily denied with prejudice because:

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- a) Intervenors' Motion is extremely untimely, and no good cause for late filing has been shown;
- b) Intervenors have not addressed the four criteria set forth in 10 CFR §2.788(e) which this Board must evaluate to determine whether a stay is appropriate; and
- c) the criteria set forth in 10 CFR §2.788(e) militate against granting of a stay.

Argument

A. Timeliness

The Commission's Rules of Practice provide that within 10 days after service (plus five days where service is by mail) of a decision, a party may move for a stay of the effectiveness of that decision (10 CFR §2.738(a)). The Commission's Rules also provide that "for good cause" time limits may be extended or shortened (10 CFR §2.711(a)). Intervenors' request for a stay came 80 days after the issuance of the PID and is, therefore, untimely by 65 days. Intervenors have made no showing that there is good cause for such an inordinately late filing. Pursuant to this Board's decision in Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-412, 5 NRC 1415, 1417 (June 15, 1977), an untimely request for a stay, unsupported by good cause, warrants summary dismissal with prejudice.

B. Compliance With 10 CFR §2.788 and Appeal Board Decisions

1. This Board has repeatedly urged parties to move first for a stay of the effectiveness of a decision

before the Board which made the decision. (See cases cited at footnote 2 in Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1186 (1977)). Although Intervenor state on page 2 of their Motion that this was done, they are simply wrong. Intervenor provide no citation in support of their assertion, and, based on its review of the pleadings filed in this case, Applicants can find none.

2. Intervenor have failed to address the four factors which, pursuant to 10 CFR §2.788 and existing precedent prior to the adoption of §2.788, the Board must consider prior to ruling on a motion for a stay. Intervenor's failure in this regard is itself sufficient to warrant summary dismissal of their Motion. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-412, 5 NRC 1415 (1977).

3. The four factors set forth in 10 CFR §2.788(e) militate against the requested stay. However, because Intervenor have failed to meet their burden of attempting to show that a stay is justified, Applicants will address these factors only summarily.

a) Likelihood of Success on the Merits

Intervenor will not prevail on the merits of their appeal. Intervenor appear at first blush to address the first factor under 10 CFR §2.788(e), but, in fact, confine their discussion to matters totally unrelated to the issue before the Licensing Board and the issue before this

Board. The issue before the Licensing Board, which Intervenor's claim was decided erroneously, was whether, for purposes of the application before it, the certification requirements of Section 401(a)(1) of the Federal Water Pollution Control Act ("FWPCA") (33 U.S.C. §1341(a)(1)) had been waived. Intervenor's argue that the Licensing Board lacked jurisdiction to find that a waiver had occurred and, moreover, that the facts did not justify the finding of a waiver. As is shown below, Intervenor's are wrong on both issues.

(1) Jurisdiction

Intervenor's argue, at that portion of their brief attached to their Motion, that only the State of Oklahoma or the Environmental Protection Agency could find that a waiver of the Section 401(a)(1) certification requirements had occurred. This argument is contrary to the plain language of Section 401(a)(1) and ignores the Licensing Board's jurisdiction and duty to determine whether the statutory prerequisites, including compliance with Section 401(a)(1), for issuance of a construction permit had been met. Section 401(a)(1) provides in essence that an applicant for certain classes of federal permits (which encompass both the NRC's construction permits and LWAs as well as National Pollution Discharge Elimination System (NPDES) permits) must provide certification from the appropriate authority that certain specified water quality laws will be complied with. However, as provided in Section 401(a)(1), "If the State, interstate

agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application" (emphasis supplied).^{*} Thus, the issue before the Licensing Board was not whether any particular federal or state agency had voluntarily waived its Section 401 certification responsibilities, but rather, whether the facts justified a finding that Section 401 certification requirements had been waived by operation of law.

The Licensing Board had the clear jurisdiction and duty to determine whether Section 401(a)(1) had been complied with. Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251 (1973). Such jurisdiction would, of course, extend to determining whether the provisions of Section 401(a)(1) had been waived, just

* On its face, Section 401 makes clear that a determination by one agency that the Section 401 certification requirements have been waived with respect to the application before it does not affect the certification requirements with respect to an application for a different Federal permit before a different Federal agency. Thus, the body of Intervenor's Motion addresses itself entirely to specious material having no bearing on the correctness of the Licensing Board's finding that the Section 401 certification requirements had been waived with respect to the application for an NRC construction permit. The Licensing Board did not address the need for certification in connection with any NPDES permit applications.

as in the Marble Hill* case, the Licensing Board, in determining compliance with Section 401(a)(1), had the obligation to decide, as a matter of fact, the location of the boundary between Kentucky and Indiana, although it lacked jurisdiction to establish that boundary.

(2) Sufficiency of the Evidence

The evidence presented to the Licensing Board clearly established that the Section 401(a)(1) certification requirements had been waived for purposes of the Black Fox Station construction permit application. Dr. G. A. Shirazi, then Chief of the Water Quality Division of the Oklahoma Water Resources Board ("OWRB"), was called as a Board witness and testified that among the powers and duties of OWRB was participation in 401 certifications (Tr. p. 2037). Indeed, Applicants' request for 401 certification was filed on October 21, 1975, in the precise form and format agreed to at a meeting between representatives of OWRB, the Environmental Protection Agency and Public Service Company of Oklahoma ("PSO"), the lead Applicant (Mr. Conrad of PSO at Tr. pp. 2299-2307). Thus, the question of written procedures

* In Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, CCH Nuc. Reg. Rep. ¶30,323, p. 28,752 (August 30, 1978), the Licensing Board was required to determine whether a certification from Indiana was sufficient under Section 401. This question turned on whether the discharge originated in the waters of Kentucky or Indiana, which required finding the boundary between those states.

for processing 401 certification requests, as discussed in Intervenor's appeal brief at pages 64 and 65, is irrelevant. OWRB has the legal authority to grant such certifications and instructed Applicants on the procedures to be followed.

As of the time Dr. Shirazi testified on September 2, 1977, a full 23 months after Applicants' request for certification was filed, OWRB had not granted or denied certification (Shirazi at Tr. p. 2089) nor had OWRB requested any additional information from Applicants (Conrad at Tr. p. 2306). Given these unrefuted facts, the Licensing Board was entirely correct in finding that the State of Oklahoma had failed to act on Applicants' request for 401 certification within a reasonable time and that, therefore, the certification requirements of Section 401 of FWPCA have been waived by operation of law with respect to the Black Fox Station construction permit application before the NRC (PID, ¶55 at pp. 31, 32).

b) Irreparable Injury

Intervenors have not attempted to show injury to themselves, irreparable or otherwise. However, their Motion demonstrates that no irreparable injury to Intervenor would flow from the State's failure to issue a 401 certification prior to the NRC's issuance of an LWA. The legislative history of the FWPCA states with respect to Section 401 that "The purpose of the certification mechanism provided in this law is to assure that the Federal licensing or permitting agencies cannot override State water quality requirements."

(Senate Report No. 92-414, reprinted at 1972 U.S. Cong. and Adm. News 3668, 3735). As Intervenor's point out in their Motion, the State of Oklahoma can still issue a 401 certification for the Black Fox Station NPDES permit application now pending before the Environmental Protection Agency, and any effluent limitation contained therein becomes binding on Applicants by virtue of Section 401(d) of FWPCA. Licensing Board condition 5e (PID, p. 124) will assure that no work performed pursuant to the LWA will preclude compliance with such conditions.

c) Harm to Other Parties

An LWA was issued on July 26, 1978, and limited work began on the Black Fox Station on or about that date. If a stay were issued now, Applicants would be required to absorb certain otherwise unnecessary expenses associated with:

- 1) Protecting from the elements the site work already done for an indefinite time;
- 2) Shutting down the site work;
- 3) Security and maintenance of the site during any stay; and
- 4) Building up to the current work level after the stay is lifted.

Moreover, much of Applicants' current construction work force would face an indefinite layoff and any construction delays could delay the commercial operation date of the Station.

d) The Public Interest

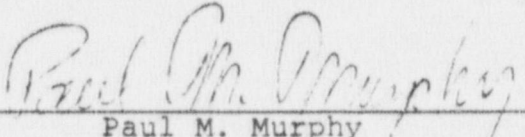
The Licensing Board found that energy to be produced at the Black Fox Station will be necessary to meet growing demand for electricity and, in any event, early completion of the Black Fox Station could help conserve dwindling supplies of natural gas (the primary boiler fuel of two of the three Applicants) (PID, ¶181 at p. 92). Any stay of construction is contrary to the public interest.

Conclusion

For all the foregoing reasons, "Intervenors' Motion For Order Staying LWA Pending Appeal" should be denied.

DATED: October 27, 1978

Respectfully submitted,



Paul M. Murphy

ISHAM, LINCOLN & BEALE
One First National Plaza
Suite 4200
Chicago, Illinois 60603
(312)786-7500

One of the Attorneys
for Applicants

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CERTIFICATE OF SERVICE

I, Paul M. Murphy, one of the attorneys for Public Service Company of Oklahoma, certify that copies of "Applicants' Opposition To 'Intervenors' Motion For Order Staying LWA Pending Appeal'" have been served in the above-captioned matter on the following by United States mail, postage pre-paid, this 27th day of October, 1978:

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Board
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board Panel
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome E. Sharfman
Atomic Safety and Licensing Appeal Board Panel
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Sheldon J. Wolfe, Esq.
Atomic Safety and Licensing Board Panel
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon
Atomic Safety and Licensing Board Panel
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Paul W. Purdom
Director, Environmental Studies Group
Drexel University
32nd and Chestnut Streets
Philadelphia, Pennsylvania 19104

L. Dow Davis, Esq.
Office of the Executive Legal Director
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Andrew T. Dalton, Esq.
1437 South Main Street
Room 302
Tulsa, Oklahoma 74119

Joseph R. Farris, Esq.
Green, Feldman, Hall & Woodard
Suite 816 Enterprise Building
Tulsa, Oklahoma 74103

Mrs. Ilene Younghein
3900 Cashion Place
Oklahoma City, Oklahoma 73112

Mrs. Carrie Dickerson
Citizens Action for Safe Energy, Inc.
P.O. Box 924
Claremore, Oklahoma 74104

Chief Hearing Counsel
Office of the Executive Legal Director
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary
Attention: Chief, Docketing and Service Section
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Gallo, Esq.
Isham, Lincoln & Beale
1050 17th Street, N.W.
Washington, D.C. 20036

Mr. Maynard Human
General Manager
Western Farmers Electric Cooperative
P. O. Box 429
Anadarko, Oklahoma 73005

Mr. Gerald F. Diddle
General Manager
Associated Electric Cooperative, Inc.
P.O. Box 754
Springfield, Missouri 65801

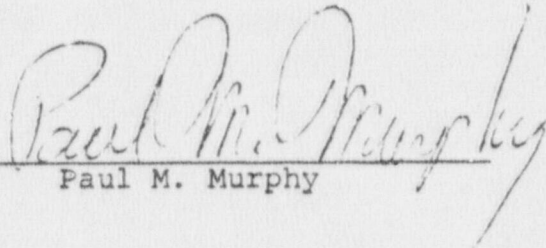
Mr. Lawrence Burrell
Rt. 1, Box 197
Fairview, Oklahoma 73737

Dr. M. J. Robinson
Black & Veatch
P.O. Box 8405
Kansas City, Missouri 64114

Mr. Vaughn L. Conrad
Public Service Company of Oklahoma
P.O. Box 201
Tulsa, Oklahoma 74102

Mr. T. N. Ewing
Public Service Company of Oklahoma
P.O. Box 201
Tulsa, Oklahoma 74102

DATED: October 27, 1978



Paul M. Murphy