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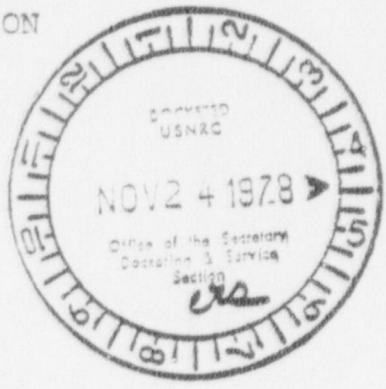

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. W. Reed Johnson
Jerome E. Sharfman

In the Matter of PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC. and WESTERN FARMERS ELECTRIC COOPERATIVE, INC. (Black Fox Station, Units 1 and 2)	Docket Nos. STN 50-556 STN 50-557

SERVED NOV 27 1978

Mr. Andrew T. Dalton, Jr., Tulsa, Oklahoma, for Ilene H. Younghein et al., intervenors.

Messrs. Michael I. Miller and Paul M. Murphy, Chicago, Illinois, and Joseph L. Gallo, Washington, D. C., for Public Service Co. of Oklahoma, et al., applicants.

MEMORANDUM AND ORDER

November 24, 1978

(ALAB-508)

In ALAB-505,[1] we denied intervenors' October 16th motion to stay the effectiveness of a Licensing Board decision authorizing a "limited work authorization" (LWA) for the Black Fox nuclear plant.[2] The intervenors and the applicants have moved us to reconsider discrete aspects

1/ 8 NRC__(November 2, 1978).

2/ LBP-78-26, 8 NRC 102 (July 24, 1978).

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of our decision. We turn first to intervenors' concerns.[3]

I.

Our denial of a stay was predicated on intervenors' failure to address three out of the four factors that Commission regulations require us to consider in deciding whether to grant that relief. See, 10 C.F.R. §2.788(e).[4] Intervenors ask us to reconsider, contending that they were not obliged to discuss the other factors because their claim on the merits is patently correct. They assure us that the issuance of an LWA in the absence of either a state certification under §401(a)(1) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1341(a)(1), or a formal waiver of that certification by the state concerned or the Environmental Protection Agency, was an illegal act

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3/ The staff responded to neither motion for reconsideration and the applicants did not respond to intervenors' motion. Under our practice, such responses are not expected unless we call for them. Maine Yankee Atomic Power Co. (Maine Yankee Station), ALAB-166, 6 AEC 1148, 1150 n. 7 (1973).

4/ Those factors are:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

that in and of itself warrants a stay.[5]

Intervenors confuse the merits of their appeal with the showing needed to obtain a stay. We pointed out in Seabrook,[6] referring to the considerations bearing on the right to such interim relief now codified in 10 C.F.R. §2.788, that, "[i]n our view, no single one of the four Virginia Petroleum Jobbers factors is of itself necessarily dispositive; rather, the strength or weakness of the showing by the movant on a particular factor influences principally how strong his showing on the other factors must be in order to justify the sought relief." Had intervenors made a very strong showing on the one factor they discussed -- the likelihood of their success on the merits -- a correspondingly lesser showing might have sufficed on the others. To prevail on that factor alone, however, they had to make "an overwhelming showing of likelihood of success on the merits * * * *."[7]

5/ In intervenors' words: "When a statute specifically forbids an act, questions of harm, irreparable injury and public interest have already been decided by the Congress. In such instances, it is necessary to demonstrate only that the forbidden act has occurred and to request relief." Intervenors cite no authority for this proposition.

6/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-338, 4 NRC 10, 14 (1976)(footnote omitted).

7/ Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1189 (1977). To put it another way, had we been able to say that intervenors' "no waiver" conclusion was ineluctable, we could have treated their motion as one for summary reversal.

In this case, the Board below made detailed findings in support of its conclusion that certification had in fact been waived. See 8 NRC at 121-23. For us to decide whether the Board erred in this regard requires an extended review of the evidence of record and a careful analysis of the governing law. It would be inappropriate for us to undertake that task now, without the benefit of a full briefing on the merits from the other side and, in all likelihood, oral argument as well. In these circumstances, intervenors' failure even to attempt to demonstrate that the other three factors militate strongly in favor of granting the relief they seek leaves us no choice but to deny once again their request for a stay.

II.

For their part, the applicants understandably do not complain of the result reached in ALAB-505. Rather, their request for reconsideration is directed exclusively to the criticism leveled in the second portion of that opinion against the papers they filed in opposition to the stay motion. Applicants insist that the criticism was unwarranted and therefore should now be withdrawn.

More specifically, at issue is the propriety of the failure of applicants' counsel to have mentioned in their brief that, on September 5th, intervenors' counsel had written the Licensing Board specifically requesting that it revoke the limited work authorization because it was issued in violation of the certification requirements of the Federal Water Pollution Control Act. The letter had gone on to give notice that, unless that request were honored, intervenors intended to seek a writ of mandamus in a federal district court compelling the Board to take that action.

In ALAB-505, we stated that counsel for the applicants had a duty at least to acknowledge the existence of the September 5th letter, given their argument to us that the stay motion was not made until eighty days after the issuance of the July 24th partial initial decision (LBP-78-26, supra) and that the intervenors had not heeded our admonition in earlier cases that stay relief should be first sought from the Licensing Board. We recognized that the letter did not explicitly request a stay and, further, that it had

been treated (and denied on September 29) by the Licensing Board as in effect a motion for reconsideration of the July 24th order. Nonetheless, we expressed the view that

> what was being sought, (i.e., a lifting of the limited work authorization) was in essence the same relief which a formal stay motion would have requested. Further, as should have been perfectly obvious to the applicants, given the Licensing Board's September 29 order any further attempt to obtain a lifting of the limited work authorization by that Board would have been futile. Thus, even if the September 5 letter were not regarded the equivalent of a stay motion, the applicants still could not have fairly argued (without reference to the letter) that the intervenors should have formally moved for a stay from the Licensing Board before filing their motion with us.

ALAB-505, supra, slip opinion, p. 9 n. 14, 8 NRC at ___ n. 14. We went on to criticize counsel for applicants for not fulfilling their obligation of candor when they failed to call our attention to the September 5th letter and its treatment by the Licensing Board. Id., slip opinion, pp. 9-10, 8 NRC at ___.

Applicants' counsel tell us that we were in error about this and that, contrary to our further suggestion, [8]

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[8] At slip opinion, p. 10 n. 16; 8 NRC at ___ n. 16.

they were justified in making the arguments they advanced without any reference to the September 5th letter. That is because, in their view, the letter was not a motion at all but merely a notice of intent to institute a legal proceeding against the Licensing Board if it did not change its decision. They claim that this interpretation is supported by (1) the failure of intervenors to have served the letter upon applicants' counsel, (2) the absence of any discussion in the letter of the four factors governing stay relief[9/] and (3) two telephone conversations which they say they had with intervenors' counsel.

None of these factors proves their point. The lack of service implies nothing with regard to the purpose of the letter; no matter what its objective may have been, intervenors' counsel was under a plain duty to serve it on all other parties to the proceeding. 10 CFR §§2.701, 2.780. Similarly, little weight can be attached to intervenors' failure to address the four stay factors in the letter,

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9/ See n. 4, supra.

in light of the fact that the intervenors' motion to us -- expressly seeking a stay -- was equally deficient in that respect.

The third ground urged on us by counsel for the applicants is based upon an affidavit appended to their most recent filing. In it, one of them states that, in a telephone conversation following his receipt of the September 5th letter, he was advised by intervenors' counsel that the letter was not intended to be a request for affirmative relief but only the statutory notice required prior to the institution of a lawsuit against the Licensing Board under the Federal Water Pollution Control Act. The affidavit goes on to aver that this advice was repeated in a second telephone conversation which took place subsequent to the issuance of ALAB-505.

The matters alleged in the affidavit are irrelevant to the issue here. Applicants' attorneys admit (affidavit, paragraph 4) that they filed a pleading in response to the September 5th letter.[10/] Thus, they treated it as a motion.

10/ Though they say that they did so "out of an abundance of caution", they showed no similar abundance of caution in telling us that their review of the pleadings

(FOOTNOTE CONTINUED ON NEXT PAGE).

It is beyond dispute that the Licensing Board also treated the letter as a motion and denied it. Applicants' counsel should therefore have disclosed it to us, so that we could evaluate its nature for ourselves. Their failure to do so left open the possibility that we might be misled into thinking that relief from the partial initial decision had not been sought before the Licensing Board, particularly as applicants urged that intervenors' failure to seek relief from that Board was an important factor militating against the grant of a stay. Of course, had applicants' counsel mentioned the letter, they would have been free to explain it or characterize it in any way they liked. Our criticism was based on their failure to mention it at all.

Counsel for applicants now argue that our "judgment that the September 5th letter could be otherwise construed as a motion to stay is clearly a doubtful one."[11] But we

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10/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) filing in this case uncovered nothing to support the allegation in intervenors' motion papers that the Licensing Board had refused to grant the relief requested in the stay motion. See pp. 11-12, infra. Their treatment of the letter as a motion at that earlier time renders suspect their thesis that they could not possibly have regarded it as one when they filed their brief in opposition to the stay motion before us. If it was subject to being interpreted as a motion by those not privy to their first phone call to intervenors' attorneys, they should have at least mentioned it, so that we would not be misled by the argument they were making.

11/ Motion for reconsideration, p. 4.

never construed it as a motion for a stay; we merely said that it sought "in essence the same relief which a formal stay motion would have requested."[12] On reflection, we realize that even that is not quite correct. A stay motion would only have sought suspension of the limited work authorization pending appeal, whereas the September 5th letter demanded its revocation. It is true that a licensing board's decision to grant reconsideration might require it to admit that it made a mistake, whereas a stay may be granted on equitable grounds.[13] Therefore, as a general proposition, denial of reconsideration by a licensing board does not dictate its denial of a stay. However, in this case, intervenors urged the same single ground in support of the stay motion made to us (legal error in the partial initial decision) that they had urged in their motion for reconsideration below. Therefore, we believe that we were correct in concluding in ALAB-505[14] that application for a stay from the Licensing Board in the circumstances of this case would have been futile. Thus, applicants' argument (made in

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12/ ALAB-505, supra, slip opinion, p. 9 n. 14, 8 NRC at ___ n. 14.

13/ See 10 C.F.R. §2.788(e).

14/ Slip opinion, p. 9 n. 14, 8 NRC at ___ n. 14.

opposition to the stay motion) that the motion should have been first addressed to the Licensing Board had no merit. Of course, we would not have been able to reach that conclusion had we not become aware on our own of the September 5th letter, the existence of which applicants' counsel chose not to mention to us.

Finally, nowhere in their motion for reconsideration do applicants' counsel reply to the following point which we made in footnote 16 of ALAB-505:[15/]

> Indeed, in this instance there might well be more involved than simply a failure to mention relevant facts. In their stay motion (at p. 2), the intervenors stated, without elaboration, that the Licensing Board had refused "to grant the relief requested". The applicants' response to this assertion (at p. 3) was that the intervenors "are simply wrong." Intervenors provide no citation in support of their assertion and, based on [their] review of the pleadings filed in this case, Applicants can find none." Even giving the applicants the benefit of all doubt with respect to the import of the intervenors' September 5 letter, we nonetheless find that statement misleading in the extreme.

Even though the relief sought in the September 5th letter was not precisely that sought in the stay motion, it was similar enough so that counsel could not say with complete

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15/ Slip opinion, p. 10; 8 NRC at ___.

candor that he had searched all the pleadings filed in the case and could not find any support for intervenors' claim that the Licensing Board had refused them the relief requested. The appropriate course would have been for counsel to mention the September 5th letter and its disposition by the Licensing Board, and then to argue about its significance.[16/]

The motions for reconsideration are denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Romayne M. Skrutski
Secretary to the
Appeal Board

[The concurring opinion of Mr. Salzman follows.]

16/ Applicants now advise us that, although (as reflected by the listing of counsel in ALAB-505) only one of their attorneys signed the opposition to the stay motion, in actuality three were involved directly or indirectly in its preparation. Although we see no reason to add the names of the other two to the ALAB-505 listing, we note that assertion here. All three attorneys signed the motion for reconsideration now at bar and each is accordingly included in the listing of counsel in this opinion.

Mr. Salzman, concurring:

I join in Part I of the Board's opinion and, for the reasons which follow, concur in Part II.

My assignment to this case occurred after ALAB-505 was rendered and I did not participate in that decision. I concur in my colleagues' judgment, however, that the motion to reconsider and withdraw the criticism directed at applicants' counsel should be denied. Even if intervenors did not explicitly ask the Licensing Board to "stay" the effectiveness of the LWA, counsel was cognizant of their letter to that Board and of its treatment by the Board as a motion for relief that, if granted, would have obviated the need for a stay. In these circumstances, it was less than candid -- if not potentially misleading -- to oppose intervenors' request to this Board for a stay with the unqualified representation that they had not sought relief below. We ought to be able to rely on counsel's representations about what transpired in the course of the proceeding. We could not do so here.