

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
UNION ELECTRIC COMPANY) Docket No. 52-037-COL
d/b/a AmerenUE)
)
(Callaway Plant Unit 2))

NRC STAFF ANSWER TO "PETITION TO INTERVENE IN DOCKET NO. 52-037, AMERENUE CALLAWAY 2 NUCLEAR POWER PLANT COMBINED CONSTRUCTION AND LICENSE APPLICATION" SUBMITTED BY THE MISSOURI OFFICE OF PUBLIC COUNSEL AND "PETITION FOR LEAVE TO INTERVENE AS AN INTERESTED STATE, OR, IN THE ALTERNATIVE, PETITION FOR DISCRETIONARY INTERVENTION" SUBMITTED BY THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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May 1, 2009

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Pursuant to Title 10, *Code of Federal Regulations* (10 CFR) § 2.309(h)(1), the staff (Staff) of the U.S. Nuclear Regulatory Commission (NRC or Commission) hereby answers the April 6, 2009 "Petition to Intervene in Docket No. 52-037, AmerenUE Callaway 2 Nuclear Power Plant Combined Construction and License Application" submitted by the Missouri Office of Public Counsel (Public Counsel) and the April 6, 2009 "Petition for Leave to Intervene as an Interested State, or, in the Alternative, Petition for Discretionary Intervention" submitted by the Public Service Commission of the State of Missouri (MPSC). For the reasons set forth below, the Staff does not oppose the participation of the State of Missouri in this proceeding as an interested state should a petition for intervention be granted. However, neither Public Counsel nor MPSC have shown that they are entitled to discretionary intervention.

BACKGROUND

On July 24, 2008 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML082140630), as supplemented by letters dated September 24, 2008 (ML082730080), November 14, 2008 (ML083360149), November 25, 2008 (ML083360148),

and February 25, 2009 (ML090710444), Union Electric Company d/b/a AmerenUE (Applicant) filed with the Commission, pursuant to Section 103 of the Atomic Energy Act of 1954 and 10 C.F.R. Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," an application for a combined license (COL) for an evolutionary power reactor (US EPR) nuclear power plant at the existing Callaway Power Plant site located in Callaway County, Missouri (Callaway Plant Unit 2).

The Commission docketed the application as sufficient for Staff review on December 18, 2008. Union Electric d/b/a AmerenUE; Acceptance for Docketing of an Application for Combined License for Callaway Plant Unit 2 Nuclear Power Plant, 73 Fed. Reg. 77,078 (Dec. 18, 2008). On February 4, 2009, the NRC published a "Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Callaway Plant Unit 2." 74 Fed. Reg. 6064 (Feb. 4, 2009).

Public Counsel and MPSC filed petitions on April 6, 2009 (Public Counsel Petition; MPSC Petition). Also on April 6, 2009, petitions to intervene were filed by Missourians against Higher Utility Rates, and a joint petition was filed by the Missouri Coalition for the Environment and Missourians for Safe Energy.

DISCUSSION

Public Counsel alleges standing to intervene in its own right based upon the proximity of its offices to the proposed plant. It also alleges representational standing to represent its staff, and because of its official role as the Missouri utility consumer advocate. Public Counsel Petition at 2. Public Counsel seeks intervention under 10 C.F.R. § 2.309(e), "Discretionary Intervention."

MPSC seeks to intervene as an interested state pursuant to 10 C.F.R. § 2.315(c), or in the alternative, seeks discretionary intervention under 10 C.F.R. § 2.309(e). MPSC states that it

“will be the State’s representative for this case.” MPSC Petition at 1. MPSC alleges that it is the state agency with general, continuing regulatory jurisdiction over the Applicant pursuant to Missouri law. MPSC Petition at 2. Both Public Counsel and MPSC are Missouri state agencies.

While neither organization appears to have submitted any contentions in its petition, Public Counsel states that it “also seeks to ensure that NRC adequately investigates the viability of AmerenUE’s plans for financing the Callaway Plant Unit 2. A financial plan that is poorly conceived or inadequate can lead to problems during construction and operation of the plant, which can in turn lead to health and safety concerns.” Public Counsel Petition at 2.¹

I. LEGAL STANDARDS

A. STANDING TO INTERVENE

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [AEA] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

10 C.F.R. § 2.309(d)(1).

As the Commission has observed:

[a]t the heart of the standing inquiry is whether the petitioner has “alleged such a personal stake in the outcome of the controversy” as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.

¹ While the Staff does not understand this language to constitute a contention, if analyzed as a contention, it does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), and is inadmissible.

Sequoyah Fuels Corp. and Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (citing *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978)).

An organization may establish its standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding), or representational standing (based on the standing of its members). Where an organization seeks to establish representational standing, it must show that at least one of its members may be affected by the proceeding, it must identify that member by name and address and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." See, e.g., *Entergy Nuclear Operations Inc. and Entergy Nuclear Palisades, LLC, et al.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC ____ (Aug. 22, 2008) (slip op. at 6-7); *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006) (citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)).

Further, for the organization to establish representational standing, the member seeking representation must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Consumers Energy Co. et al* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409; *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (2007).

However, for states, municipalities, and Federally-recognized Indian Tribes, a different standing inquiry is used for hearings concerning facilities within the jurisdiction's boundaries:

State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected

Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

10 C.F.R. § 2.309(d)(2). For participation as an interested state, Commission rules provide:

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. Each State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request to participate in a hearing, each designate a single representative for the hearing. The representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions. The representative shall identify those contentions on which it will participate in advance of any hearing held.

10 C.F.R. § 2.315(c). Lastly, for a party seeking discretionary intervention,

10 C.F.R. § 2.309(e) provides:

(e) Discretionary Intervention. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention--

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention--

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

B. LEGAL REQUIREMENTS FOR CONTENTIONS

Contention admissibility criteria are found in Commission regulations at 10 C.F.R. § 2.309(f)(1). However, neither Public Counsel nor MPSC appear to have submitted any contentions; therefore, these standards need not be discussed.

II. STANDING, INTERESTED STATE PARTICIPATION, AND DISCRETIONARY INTERVENTION

Both Public Counsel and MPSC make claims for discretionary intervention. MPSC requests discretionary intervention only in the alternative of intervention as an interested state pursuant to 10 C.F.R. § 2.315(c). With respect to MPSC's interested state claim, MPSC, Public Counsel, and any other state organization must decide amongst themselves who will represent the State of Missouri pursuant to 10 C.F.R. § 2.315(c); the Staff does not object to Missouri's participation as an interested state in this proceeding. With respect to Public Counsel and MPSC's discretionary intervention claims, neither MPSC nor Public Counsel have made the necessary showing for discretionary intervention.

A. Participation as an interested state pursuant to 10 C.F.R. § 2.315(c).

Only MPSC explicitly requests leave to participate in this proceeding (assuming the admission of at least one contention) as an interested state; based upon its right to represent the State of Missouri in this matter (MPSC Petition at 1); Public Counsel alleges standing based upon its right to represent the ratepayers of the State of Missouri (Public Counsel Petition at 3). MPSC designates three representatives² to participate in this proceeding: Steven Dottheim, Chief Deputy General Counsel; Steven C. Reed, Litigation Counsel, and Kevin A. Thompson, General Counsel. Public Counsel designates one representative: Lewis Mills, Public Counsel. The Staff does not object to the participation in this proceeding by the State of Missouri as an interested state, given that the proposed Callaway Plant Unit 2 would be located in Missouri. However, 10 C.F.R. § 2.315(c) provides that “[e]ach State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request to participate in a hearing, *each designate a single representative for the hearing.*” (Emphasis added.)

Therefore, the Staff requests, consistent with Commission rules, that the State of Missouri designate a single representative for participation in this proceeding.

B. Discretionary Intervention.

Both Public Counsel and MPSC have requested discretionary intervention to participate in this proceeding (MPSC has requested discretionary intervention as an alternative to participation as an interested state). In addition to showing that a balancing of the factors found in 10 C.F.R. § 2.309(e) weigh in favor of intervention, a petitioner must also satisfy the traditional standing requirements in 10 C.F.R. § 2.309(d)(1). For the reasons discussed below, neither Public Counsel nor MPSC have satisfied the requirements for discretionary intervention.

² MPSC also requests that Michael Taylor, Utility Engineering Specialist III be copied on all correspondence. The Staff does not object to the addition of Mr. Taylor to the Electronic Information Exchange service list.

1. Public Counsel has not satisfied the requirements to participate in this proceeding through discretionary intervention.
 - i. Public Counsel has not demonstrated organizational or representational standing.

Public Counsel claims both organizational and representational standing. Public Counsel claims representational standing “to represent its staff, and because of its unique role as the official state utility consumer advocate . . . to represent the members of the public in Missouri that may be affected by the NRC's decision in this matter.” Public Counsel Petition at 2. Public Counsel claims organizational standing because:

its offices are located within about 30 miles of the site of the proposed nuclear power plant An accident at the proposed nuclear power plant could result in radiological releases and environmental contamination that would adversely affect the health of Public Counsel staff and members of the public whose interest Public Counsel represents. The undersigned is an attorney-at-law, is the director of the Office of the Public Counsel, and resides and works within approximately 30 miles of the proposed site for Callaway 2.

Id. However, Public Counsel has demonstrated neither organizational nor representational standing.

As noted above, organizations seeking to intervene in their own right must satisfy the same standing requirements as individuals seeking to intervene. *Palisades*, CLI-07-18, 65 NRC at 411. For an organizational petitioner to establish standing, it must show either immediate or threatened injury to its organizational interests or to the interests of identified members. “An organization seeking to intervene in its own right . . . to establish organizational standing . . . must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA.” *Crow Butte Res., Inc.*, (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 271 (2008) (internal citations omitted.)

Here, Public Counsel’s claim of organizational standing falls outside the zone of interests protected under the AEA, and confuses representational and organizational standing. Public

Counsel's claim to standing as a result of possible injury to its employees is a claim to representational, not organizational standing. Public Counsel's claim to standing because of its role as the state utility consumer advocate goes to organizational standing. However, as *Palisades* makes clear, "'economic use of energy' falls outside the zone of interests protected by . . . the [AEA] . . . Also, [the *Palisades* petitioners'] promotion of 'the public interest, environmental protection, and consumer protection' are broad interests shared with many others and too general to constitute a protected interest . . ." *Palisades*, 65 NRC at 411. Similarly, Public Counsel "seeks to avoid or minimize health and safety risks by ensuring that all safety and environmental concerns are fully addressed in the NRC's licensing proceeding for the proposed Callaway 2 plant." Public Counsel Petition at 2. Therefore, Public Counsel has not articulated a proper ground for organizational standing.

In addition, as noted above, to establish representational standing, an organization must demonstrate, among other things, that at least one of its members would otherwise have standing to participate in his or her own right and at least one of its members has authorized the organization to represent the member's interests. See *Palisades*, CLI-07-18, 65 NRC at 409. Here, Public Counsel has not attached any supporting affidavits or other evidence to indicate that any of its members has authorized it to represent his or her interests in this proceeding, as NRC case law requires. See *Palisades*, CLI-07-18, 65 NRC at 409; *GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station)*, CLI-00-6, 51 NRC 193, 202 (2000).

Our reasoning [for this requirement] is simple. If an organization does not identify the members it purportedly represents, we cannot determine whether the organization actually does represent members who consider that they will be affected by [the licensing action] . . . or rather, [i]s simply seeking the vindication of its own value preference. And without written authorization for such representation, we would have no concrete indication that, in fact, the member wishes to have [the organization represent its interests] in th[is] proceeding. The failure both to identify the member(s) they purport to represent and to provide proof of authorization therefore precludes [the *Palisades* petitioners] from qualifying as intervenors.

Palisades, CLI-07-18, 65 NRC at 409-10 (internal quotation marks omitted). Thus, Public Counsel has demonstrated neither organizational nor representational standing, and therefore has not satisfied the requirements of 10 C.F.R. § 2.309(d)(1). Therefore, Public Counsel has not satisfied the standing requirement for discretionary intervention because, as discussed below, Public Counsel has also failed to show that a balancing of the factors for discretionary intervention found in 10 C.F.R. § 2.309(e) weighs in its favor.

- ii. Public Counsel has not shown that balancing the factors for discretionary intervention weighs in its favor.

As the Commission has stated, discretionary intervention is “an extraordinary procedure” that has rarely been granted in NRC proceedings – in fact, no requests for discretionary intervention were granted in a 12-year period prior to 2006, and only eight such requests were ever granted (without reversal) in the 30 years that the NRC has applied the factors in 10 C.F.R. § 2.309(e). *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 716-17 (2006).

Here, Public Counsel attempts to show that a balancing of the considerations specified in 10 C.F.R. § 2.309(e) supports its request that it be afforded the “extraordinary” grant of discretionary intervention. Public Counsel states that:

Public Counsel and its staff have expertise in the regulations and statutes governing utility regulation and project financing in Missouri, and as such will be able to assist in developing a sound record. . . . Public Counsel can provide important information about utility financing and utility regulation from a unique perspective.

As the only Missouri state entity lawfully charged with representing the public in utility matters, and as an agency whose offices are located only a short distance from the proposed site, Public Counsel has a significant interest in the proceeding. Public Counsel has no means, other than participation in this matter, in which it can adequately protect these interests. The Commission’s decision in this matter could have a profound effect on Public Counsel and the members of the public which Public Counsel represents. Although it is unknown at this point what entities will ultimately be parties to the proceeding, given Public Counsel’s unique status as Missouri’s official utility consumer advocate, it does not appear that any other party will represent Public Counsel’s interests. Public Counsel’s participation will not inappropriately broaden the issues or delay the proceeding.

Public Counsel Petition at 3. Here, balancing of the 10 C.F.R. § 2.309(e) factors weigh against Public Counsel's claim for discretionary intervention. Regarding the extent to which the petitioner's participation may be reasonably expected to assist in the development of a sound record (10 C.F.R. § 2.309(e)(i)), while Public Counsel claims to have expertise in regulations, statutes and project financing in Missouri, such considerations are outside the scope of the NRC's licensing process. Although its expertise might benefit a Missouri state regulator in making its findings, the NRC's licensing decision is based upon the AEA and the NRC's regulations. Thus, Public Counsel has not shown that its expertise in Missouri regulations would assist in the development of a sound record in this proceeding.

Factors concerning the petitioner's interest (10 C.F.R. § 2.309(e)(1)(ii) and (iii)) would seem to weigh in favor of Public Counsel, as Public Counsel has articulated its interest in this proceeding as the Missouri public utility advocate, and stated that the NRC's licensing decision might have an impact on its interest. The final § 2.309(e)(2) factor also weighs in favor of Public Counsel's discretionary intervention; because Public Counsel has not proposed additional contentions, it would not be expected to inappropriately broaden or delay the proceeding. See 10 C.F.R. § 2.309(e)(iii).

However, the first two factors in 10 C.F.R. § 2.309(e)(2) weigh against Public Counsel, as it can avail itself of Missouri regulatory processes to vindicate its interest. Further, if the State of Missouri participates in this proceeding as an interested state (as MPSC proposes to do), the interests of Missouri, including its ratepayers, would be represented. Therefore, because Public Counsel would not assist the Commission in the development of a sound record, has another forum in which to avail its interest, and its interest is encompassed within that of the State of Missouri, a balancing of the 10 C.F.R. § 2.309(e) factors weighs against discretionary intervention.

Therefore, because Public Counsel has not demonstrated standing as required by 10 C.F.R. § 2.309(d)(1), and because a balancing of the factors found in 10 C.F.R. § 2.309(e) weigh against discretionary intervention, Public Counsel has not shown that it is entitled to discretionary intervention.

2. MPSC has not shown that it satisfies the requirements to participate in this proceeding through discretionary intervention.

MPSC claims to represent the State of Missouri in this proceeding. MPSC Petition at 1. Therefore, because the proposed facility is located in the State of Missouri, MPSC does not need to demonstrate standing. 10 C.F.R. § 2.309(d)(2). However, if MPSC is not representing the State of Missouri in this proceeding, because it has not addressed the Commission's standing requirements, it has not made the requisite showing for standing required by 10 C.F.R. § 2.309(d)(1).

MPSC has also not addressed the discretionary intervention factors that a petitioner must address in 10 C.F.R. § 2.309(e), and thus MPSC has not shown that it is entitled to the "extraordinary" grant of discretionary intervention. See *Siemaszko*, CLI-06-16, 63 NRC at 716-17.

CONCLUSION

The Staff does not object to the participation of the State of Missouri in this proceeding pursuant to 10 C.F.R. § 2.315(c) if another petitioner's request for a hearing is granted. However, 10 C.F.R. § 2.315(c) permits an interested state only one representative. Therefore, the Staff requests that the appropriate parties confer to determine who will represent the State of Missouri as an interested state. Lastly, neither Public Counsel nor MPSC has demonstrated that it is entitled to discretionary intervention.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 1st day of May, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF ANSWER TO "PETITION TO INTERVENE IN DOCKET NO. 52-037, AMERENUE CALLAWAY 2 NUCLEAR POWER PLANT COMBINED CONSTRUCTION AND LICENSE APPLICATION" SUBMITTED BY THE MISSOURI OFFICE OF PUBLIC COUNSEL AND "PETITION FOR LEAVE TO INTERVENE AS AN INTERESTED STATE, OR, IN THE ALTERNATIVE, PETITION FOR DISCRETIONARY INTERVENTION" SUBMITTED BY THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI has been served upon the following persons by Electronic Information Exchange and electronic mail this 1st day of May, 2009:

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