

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of )  
 )  
Union Electric Company (AmerenUE) )  
 ) Docket No. 52-037-COL  
 )  
(Callaway County, Missouri - Unit 2) )  
 )  
\_\_\_\_\_)

**REPLY OF MISSOURIANS AGAINST HIGHER UTILITY RATES TO AMERENUE'S  
ANSWER OPPOSING PETITION TO INTERVENE**

**I. INTRODUCTION**

On May 1, 2009, the Applicant, Union Electric Company d/b/a AmerenUE ("AmerenUE") submitted its answer in opposition to the Petition to Intervene and Request for Hearing filed on April 6, 2009 by Missourians Against Higher Utility Rates ("MAHUR"). AmerenUE asserted that MAHUR's petition should be denied because MAHUR had not demonstrated that it had standing to intervene in the proceeding and that it had not proposed an admissible contention. MAHUR hereby submits its reply to AmerenUE.

**II. BACKGROUND**

On July 24, 2008, AmerenUE filed an application for a combined license ("COLA") for a nuclear power plant at the existing Callaway Power Plant Site in Callaway County, Missouri ("Callaway Unit 2"). In the COLA, AmerenUE stated that its funding of the project required

changing existing Missouri law regarding the funding of construction work in progress

("CWIP"):

The estimate assumes CWIP will be included in rate base in the State of Missouri. In November, 1976, a voter referendum, Proposition 1, was passed prohibiting CWIP in rate base. It is the position of AmerenUE that AmerenUE can effectively work with the Missouri legislature and the citizens of Missouri to exempt Callaway Plant Unit 2 and its associated facilities from this regulation. Should this effort be unsuccessful, the construction cost estimate would likely increase and AmerenUE would need to reevaluate its options.

COLA 1.2.2.2.2 at 1-12.

AmerenUE's proposed funding of construction costs and initial core fuel supply costs rested entirely on rate-based recovery for CWIP, which would allow AmerenUE to finance the project by raising consumer rates now and during project construction. CWIP recovery through increased rates, however, is prohibited by existing Missouri law (393.135 RSMo., hereinafter referred to as the "Anti-CWIP Law"). In early 2009, AmerenUE initiated a legislative attempt to change the Anti-CWIP Law. That attempt failed, and on April 23, 2009, senior management at AmerenUE announced that it was suspending its efforts to build the Callaway Unit 2 facility. In a letter dated April 28, 2009 to Nuclear Regulatory Commission ("NRC") staff, however, AmerenUE requested that activities associated with the NRC staff's technical review of the COLA continue as scheduled while AmerenUE reviewed its options associated with the COLA. Although AmerenUE has conceded that, in light of its failure to overturn the Anti-CWIP Law, NRC staff cannot review its financial qualifications, it wants review of the remainder of the COLA to continue.

### **III. DISCUSSION**

#### **A. Standing to Intervene**

##### 1. Legal Standard.

The legal standards to have standing are found at 10 C.F.R. § 2.309(d): the petitioner must state: (1) the name, address and telephone number of petitioner; (2) the nature of petitioner's right under the Atomic Energy Act (the "Act") to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

To determine whether a petitioner's "interest" provides a sufficient basis for intervention, the Commission relies on judicial concepts of standing. To demonstrate standing in NRC licensing proceedings under section 189a of the Act, a petitioner must allege: (1) a particularized injury; (2) that is fairly traceable to the challenged action; and (3) is likely to be redressed by a favorable decision. In addition, the Commission requires that the petitioner's interest fall "within the 'zone of interests' protected or regulated by the governing statute at interest."

In reactor license proceedings, such as this, licensing boards typically apply a "proximity" presumption to persons who reside within 50 miles of a proposed nuclear power because there is an "obvious potential for offsite consequences" within that distance. *See Diablo Canyon*, (Pacific Gas & Electric Co. [Diablo Canyon Power Plant Independent Spent Fuel Storage Installation], LBP-02-23, 56 NRC 413, 426 (2002)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001)). The proximity presumption establishes standing without the need to establish the elements of injury,

causation or redressability. *Turkey Point*, LBP-01-6, 53 NRC at 150. Because the COLA in this case is an application for a construction permit combined with an operating license, the proximity presumption should be applied to the COLA proceedings.

An organization that wishes to intervene in a proceeding may do so either in its own right, by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. *See Hydro Resources, Inc.*, LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. *See Private Fuel Storage, LLC*, (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Further, for the organization to establish representational standing, 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. *Palisades*, CLI-07-18, 65 NRC at 409; *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (*citing Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

## 2. Legal Analysis

AmerenUE asserts that MAHUR has not satisfied the Commission's requirements to demonstrate standing to intervene in the proceeding. *AmerenUE Answer*, p.7. To the contrary, MAHUR has provided affidavits of two members, Nicole Brown and Eric Brooks, who live within 50 miles of the proposed Callaway Unit 2 facility. Both Ms. Brown and Mr. Brooks have stated that they are concerned that AmerenUE does not have a reasonable assurance of obtaining

the funds necessary to construct a nuclear power plant in a manner that will be protective of human health, safety and the environment where they live and they have authorized MAHUR to represent them in this proceeding. Thus, both members seek to protect their life, health and safety interests in this proceeding and have established standing to intervene in their own right by satisfying the proximity presumption. *NRC Staff Response to MAHUR Petition*, p. 11-12.

MAHUR has also shown that the interests it seeks to protect are germane to its own purpose, and that neither its claim, nor the requested relief requires an individual member to participate in the action. As stated in its petition to intervene, MAHUR is a citizens group that was formed to provide an information and networking center for individuals concerned about nuclear energy and its costs, both in terms of its financial impact on ratepayers as well as its toll on human health and the environment. As stated in the affidavits of Ms. Brown and Mr. Brooks, these human health and environmental interests are germane to the interests of the members MAHUR seeks to protect. Thus, MAHUR has satisfied the standards for representational standing. *Id.*

AmerenUE highlights the fact that MAHUR has been active in opposing AmerenUE's efforts to overturn the Anti-CWIP Law. As provided in its organizational statement, MAHUR is concerned with the financial cost of nuclear energy as well as its impacts on human health and the environment. The fact that MAHUR is concerned about economic issues, which are not relevant to this proceeding, does not in any way negate its concern for human health and environmental issues, which are of primary concern to this proceeding. The fact that economic issues related to the construction of a nuclear power facility can significantly impact long-term

human health and environmental issues of members living in the vicinity of the proposed facility only serves to highlight the relevancy of MAHUR's concerns from an organizational viewpoint. Likewise, connections between MAHUR and Noranda, AmerenUE's largest electricity customer, are also irrelevant. Concern with rate-payer economic issues on one hand does not preclude an equally important concern with human health and environmental concerns that flow from inadequate or non-existent construction funding, on the other hand. Neither does MAHUR's status as a "continuing committee" preclude concerns with health and safety. An organization can work to influence voters at the same time it seeks to protect the environment and the health and safety of those voters. For example, the Ozark Chapter of the Sierra Club has a continuing committee (MECID C000531) organized for that very purpose. The Sierra Club is a well known environmental advocacy group that also seeks to influence voters. For the reasons stated above, MAHUR has satisfied NRC standing requirements.

**B. Contentions**

1. Legal Standard.

The legal requirements governing admissibility of contentions are set forth in 10 C.F.R. § 2.309(f). An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material

issue of law or fact. *Id.* The NRC rules focus the hearing process on real disputes susceptible of resolution in an adjudication. *See Duke Energy Corp. (Oconee Nuclear Station)*, CLI-99-11, 49 NRC 328, 334 (1999).

## 2. Legal Analysis.

In its petition, MAHUR asserted in its single contention, and provided ample supporting evidence, that AmerenUE does not meet the financial qualification requirements of 10 C.F.R. § 50.33 because, without being able to access CWIP funds, which are currently prohibited by Missouri law, AmerenUE does not possess, and cannot demonstrate a reasonable assurance of obtaining the funds necessary to cover its construction costs. The NRC's regulations at 10 C.F.R. § 50.33(f) require AmerenUE to provide:

If the application is for a construction permit, the applicant shall submit information that demonstrates that the **applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs**. The applicant shall submit estimates of total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

10 C.F.R. § 50.33(f)(1) (emphasis added).

The requirement that an applicant demonstrate that it possesses or has a reasonable chance of obtaining necessary construction and related fuel cycle costs is clearly within the scope of the proceeding and an issue that is material to the findings the NRC must make to support an application for the construction of a nuclear power facility. AmerenUE has not met this criteria, and in its April 28, 2009 letter to NRC staff, admitted as much. Thus, MAHUR has (1) provided a specific statement of a legal and factual issue sought to be raised; (2) provided a brief explanation of the basis for the contention; (3) demonstrated that the issue is within the scope of

the proceeding; (4) demonstrated that the issue is material to the findings the NRC must make to support the COLA; (5) provided a concise statement of the alleged facts, including references to specific sources and documents that support MAHUR's position and upon which it intends to rely at the hearing; and (6) provided sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific parts of the application that MAHUR disputes and identified the deficiencies which MAHUR believes exist in the AmerenUE application. Thus, MAHUR's contention satisfies the NRC's contention admissibility criteria. *See NRC Staff Response to MAHUR Petition*, p.13-15.

AmerenUE asserts that because it will no longer rely on CWIP funds and acknowledges that it will need to develop other financing mechanisms, therefore, no genuine dispute exists with the applicant on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). *AmerenUE's Answer*, p. 17-18. In Section 1.2.2.2.3 (Construction Cost Funding Plan) of the COLA, AmerenUE identifies a number of other options for funding the construction costs of Callaway Unit 2 and provides some general descriptions of how it might finance construction of the facility. However, the application fails to provide any details on how such funding will occur in the absence of CWIP. In its petition to intervene, MAHUR cited public statements by AmerenUE representatives, admitting that obtaining outside financing for the project, as proposed in Section 1.2.2.2.3 of the COLA, was virtually impossible at this time because the risk would be too great and no one would lend them money. *MAHUR Petition to Intervene*, p. 9-10. Thus, contrary to AmerenUE's assertion, the fact that AmerenUE no longer relies on CWIP funds only serves to heighten the dispute.

MAHUR's contention is that AmerenUE does not meet the financial qualification requirements of 10 C.F.R. § 50.33. AmerenUE's reliance on CWIP to fund construction costs was only an example of the inadequacy of AmerenUE's purported financial assurance. Without CWIP, MAHUR believes that AmerenUE has identified **no** funding mechanism to construct Callaway Unit 2, and therefore patently fails in its duty to "demonstrate[] that the applicant possesses or has a reasonable assurance of obtaining the funds necessary to cover estimated construction costs...." 10 C.F.R. § 50.33(f)(1). Thus, a genuine dispute still exists with the Applicant, and MAHUR's contention is still valid.

MAHUR has identified a genuine dispute with the AmerenUE on a material issue of fact, cited the specific parts of the application with which it takes issue, and provided supporting reasons for the dispute. See 10 C.F.R. § 2.309(f)(1)(vi). The dispute is within the scope of the proceeding and is material to the findings that the NRC must make. *See NRC Staff Response to MAHUR Petition*, p. 13-15. MAHUR's proposed contention satisfies the NRC contention admissibility criteria and should be admitted.

#### **IV. CONCLUSION**

MAHUR's members, Nicole Brown and Eric Brooks, have established standing to intervene in their own right by satisfying the proximity presumption, and MAHUR has satisfied the standards for representational standing. MAHUR's single proposed contention satisfies the NRC contention admissibility criteria and should be admitted.

Respectfully submitted this 14<sup>th</sup> day of May, 2009.

By: /signed (electronically) by Hubert A. Farbes, Jr.  
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