UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Callaway Plant Unit 2 Docket No. 52-037-COL

Combined Construction and License Application

RESPONSE OF MCE/MSE TO AMERENUE'S MOTION REQUESTING TERMINATION OF HEARING

Come now Petitioners Missouri Coalition for the Environment and Missourians for Safe Energy MCE/MSE) and pursuant to 10 CFR 2.323(c) respond to AmerenUE's motion of June 26. We support the motion to terminate the proceeding. However, we have concerns about the position in which this leaves us.

The Board's Authority to Terminate

In its order of June 29, the Board directed responding parties to address the question of its authority to terminate the hearing process. The Board has inherent authority to determine its power to grant relief. *Duke Power Co. (Perkins Units 1–3),* 11 NRC 741, 742 (1980).

Staff has already granted AmerenUE's request to completely suspend review of the COLA and has so notified the Board. An ASLB has the authority to order termination of the proceedings after the notice of hearing has issued and to impose conditions. 10 CFR § 2.107(a); *Yankee Atomic Energy Co. (Yankee Station),* LBP-99-22, 49 NRC 481 (1999). That rule, however, addresses only a voluntary motion by the applicant to withdraw the application.

Staff review of the application and ASLB conduct of the hearing are separate responsibilities. *New England Power Co. (NEP Units 1 and 2),* LBP-78-9, 7 NRC 271, 279 (1978). They proceed on parallel tracks. Withdrawal of the application and termination or dismissal of the hearing proceeding go hand in hand. *See Toledo Edison Co. (Davis Besse 2 and 3),* ALAB-622, 12 NRC 667 (1980) and LBP-81-33, 14 NRC 586 (1981); *Pacific Gas & Electric (Stanislaus Unit 1),* LBP-83-2, 17 NRC 45, 55 (1983). It would be a strange result, and a waste of resources by all parties involved, to continue with a hearing that looks increasingly likely to be an exercise in futility.

In its answer to our petition to intervene, AmerenUE announced its suspension of plans to build Callaway 2 but asked the Staff to continue reviewing the COLA with the exception of the financial qualifications requirement, which it admitted it could no longer meet (Answer p. 3). Now, in seeking complete suspension of review, the company gives no reason other than its "best interests." With the failure of CWIP legislation in the Missouri legislature, which AmerenUE has always admitted was prerequisite to its ability to finance the plant, the company's refusal to withdraw the COLA amounts to a desperate but forlorn effort to keep a terminally ill patient on life support.

If the COLA is allowed to ride the docket in limbo, AmerenUE will retain some advantages while the disadvantages accrue to MCE/MSE and the other intervenors. The company will husband its cash and hold its place in line for loan guarantees, probably while it seeks to salvage something from the COLA as a salable asset (this option was the subject of testimony in UE's latest Missouri rate case and is confirmed in a recent newspaper interview; see http://fultonsun.com:80/articles/2009/07/03/news/208news01.txt). If the hearing is revived, it will be under changed circumstances, and probably by a company other than AmerenUE. Yet the

Staff review would be frozen in place based on obsolete information. MCE/MSE would be stuck with an obsolete petition and either forced to file a new one or subjected to arguments that any new or updated contentions must meet the requirements for untimely contentions.

The Board has broad, discretionary authority over the licensing process. *Offshore Power Systems (Floating Nuclear Power Plants)*, ALAB-489, 8 NRC 194, 204-6 (1978). It has wide scope to satisfy its concerns if the integrity of the adjudicatory process is compromised. *Puerto Rico Electric Power Authority (North Coast Plant Unit 1)*, ALAB-662, 14 NRC 1125, 1134–5 (1981). It can fashion remedies, even *sua sponte*, to ensure fair treatment of the parties. *Jefferson Proving Ground Site*, 40-8838-ML-2, 62 NRC 435, 440 (2005).

In *Jefferson Proving Ground*, the Army kept changing proceedings, forcing intervenor Save the Valley to file three hearing requests. Finally, rather than allow the Army to file a license amendment application and withdraw a possession-only license application, the presiding officer reinstated a previously dismissed adjudication on a license termination plan. The presiding officer also referred the question to the Commission, 62 NRC at 441, which affirmed the reinstatement. CLI-05-23, 62 NRC 546 (2005). That case establishes the Board's discretionary power to fashion relief, which would include termination as well as reinstatement.

If the Board still doubts its authority, it can of course refer the question to the Commission to prevent a detriment to the public interest, avoid unusual delay or expense, or resolve a novel issue at the earliest opportunity. 10 CFR § 2.323(f)(1).

The Board Should Order Withdrawal of the Application

Since AmerenUE's motion is a request for withdrawal in all but name, the Board should call it what it is and order withdrawal of the COLA with conditions. 10 CFR § 2.107(a).

The Board has the authority to look behind the veil of Ameren's filings and treat them as a request to withdraw the application. *Pacific Gas & Electric (Stanislaus Unit 1),* CLI-82-5, 15 NRC 404 (1982). In *Dairyland Power Cooperative (Lacrosse BWR),* LBP-88-15, 27 NRC 576, 581 (1988), the board decided that a motion to amend an application for a full operating license to a continued possession license, after the facility had already been shut down, amounted to withdrawal of the license application.

In *Puerto Rico Electric Power Authority (North Coast Unit 1),* ALAB-605, 12 NRC 153 (1980), the appeal board reversed a decision by the ASLB that the licensing board had no authority to dismiss or deny a construction license application even where the applicant had clearly abandoned its intention to build. What the appeal board said is highly relevant here:

> It is true, of course, that neither the Atomic Energy Act nor the Rules of Practice specifically establish a procedure for dismissing (or denying) a construction permit application on the ground that the applicant has clearly abandoned its purpose to build the facility in question. It scarcely perforce follows, however, that a licensing board is required to retain on its docket in perpetuity an application which has become entirely academic. In this connection, we find nothing in Section 189 of the Act or Section 2.104 of the Rules of Practice which might support such a curious result. To be sure, those Sections may preclude the *grant* of a construction permit application without some hearing of the 'health, safety and environmental issues' which either must be routinely considered as a matter of law or have been properly raised by a party to the proceeding. But their terms are devoid of anything which immediately suggests to us an intended limitation upon the inherent authority of adjudicatory tribunals to dismiss those matters placed before them which have been mooted by supervening developments.

12 NRC at 154. AmerenUE's course of conduct culminating in the present requests to suspend Staff review and terminate the proceeding, clearly motivated by its inability to finance construction, demonstrate mootness.

If the Board is not satisfied of this, it has the power to pierce the veil of corporate "best interests" and demand an explanation of what those interests are. The Commission took this course in *Consumers Power Co.,* 8 AEC 627 (1974), by issuing an order to show cause why an application should not be withdrawn after the applicant indicated an intent to cancel.

Conditions of Termination

In the event the Board decides to grant Ameren's exact request, terminating the hearing but leaving the COLA docketed, MCE/MSE would like to invoke the Board's power (discussed above under "The Board's Authority to Terminate") to impose conditions on the termination in the interest of fairness to the intervenors.

(a) Any reactivation of Staff review should occasion a new notice of hearing and opportunity to intervene. *Rochester Gas & Electric (R.E. Ginna Unit 1),* LBP-83-73, 18 NRC 1231 at 1231, 1233–4 (1983). In addition to being published in the Federal Register, the new notice should be served on all parties on the current service list.

(b) Severe limitations on contentions should not be imposed. *Houston Lighting & Power Co. (Allens Creek Unit 1),* ALAB-535, 9 NRC 377, 385 (1979). Existing contentions should be accepted as part of the record. *Rochester G & E,* 18 NRC at 1237. New and amended contentions filed after the case is reopened should not be subjected to the rules for untimely contentions. *Houston Lighting and Power (Allens Creek Unit 1),* ALAB-539, 9 NRC 422, 426 (1979).

(c) New parties should be allowed to petition without having to meet the standards for late intervention.

(d) MCE/MSE ask the Board to award them their litigation expenses, including attorneys' fees, accrued to date. The Board has authority to award such fees as a condition of dismissal as compensation for having had to prepare the case only to have the applicant change its mind and render the petitioner's work for naught, while reserving the right to reopen the case. *Duke Power Co. (Perkins 1–3),* LBP-82-81, 16 NRC 1128, 1139–40 (1982).

Conclusion

Wherefore MCE/MSE request that the Board terminate the proceeding and dismiss AmerenUE's COLA pursuant to 10 CFR § 2.107(a) and the Board's inherent authority to control the hearing process.

In the alternative, we ask that the Board terminate the hearing subject to the conditions listed above.

As a last alternative, we ask the Board to refer the motion to the Commission pursuant to 10 CFR § 2.323(f)(1).

Respectfully submitted,
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Dated July 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of July, 2009, copies of the foregoing motion were electronically served on the following through the Electronic Information Exchange.

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