July 6, 2009

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'S ANSWER IN SUPPORT OF
AMERENUE'S REQUEST TO TERMINATE HEARING

In accordance with 10 C.F.R. § 2.323(c) and the Licensing Board's June 29 Order (Answers to Motion to Terminate Hearing) (Order), the staff of the US Nuclear Regulatory Commission (Staff) hereby answers "Motion of AmerenUE Requesting Termination of Hearing" (Motion) and responds to the Board's question regarding its authority to terminate the ongoing proceeding. As discussed below, the Staff supports the Applicant's Motion.

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), the 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 CFR 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 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).

Petitions to intervene were filed on April 6, 2009, by the Missouri Coalition for the Environment (MCE) and Missourians for Safe Energy (MSE), and Missourians Against Higher Utility Rates (MAHUR). Two Missouri State agencies, the Office of Public Counsel and the Missouri Public Service Commission, also filed petitions. On May 1, 2009, the Staff and Applicant filed answers to the petitions to intervene.

On April 28, 2009, prior to the filing of the Staff and Applicant's answers, the Applicant reported to the Staff that it was suspending its efforts to build Callaway Unit 2. Letter to NRC from T.E. Herrmann, Suspension of Efforts to Build Proposed Nuclear Power Plant at 1 (Apr. 28, 2009) (ML091210159) (April 28 Letter). The Applicant, however, requested that the Staff continue its review activities associated with the Callaway Unit 2 COL Application and stated that it was evaluating its options to move forward. *Id.*

Subsequently, on June 23, 2009, the Applicant requested that review of the Callaway Unit 2 COL Application be suspended. Letter to NRC from Adam Heflin, Request to Suspend Review of COL Application (ML091750988) (June 23 Letter). On June 26, 2009, the Applicant filed the instant Motion to terminate this adjudicatory proceeding. Motion at 1.

DISCUSSION

AmerenUE has determined that it is in its best interests to suspend review of the Callaway Unit 2 COL Application. Motion at 2. Thus, AmerenUE has requested that the Staff suspend all activities and that the Board terminate this proceeding. *Id*.[1] The Staff does not oppose termination of this proceeding with the understating that, if the Motion is granted, a new notice of hearing would be required to proceed. *Id*.

In accordance with the Applicant's request, the Staff has suspended all review activities associated with the Callaway Unit 2 COL Application but will keep the Callaway Unit 2 COL Application on the docket. Letter to Adam Heflin from David Matthews, Staff Review of the Combined License Application for Callaway Plant Unit 2 Nuclear Power Plant at 1 (June 29, 2009) (ML091750665).[2] In accordance with 10 C.F.R. §§ 52.3(b)(6) and 50.71(e), the Applicant is required to submit annual FSAR updates to the NRC. *Id.* If the Applicant requests that review of its Application resume, the Staff will conduct acceptance and technical reviews as necessary in consideration of resources and priorities. *Id.* Thus, because the Callaway Unit 2 COL Application has not been withdrawn by the Applicant and will remain on the docket, 10 C.F.R. § 2.107(a), Withdrawal of Application, is not applicable.

---

[1] The Applicant has requested to terminate the instant, contested proceeding currently pending before the Board. Motion at 2. In cases such as this, i.e., a COL application request, a proceeding is conducted before the licensing board only if contentions are admitted; in addition, an uncontested (mandatory) hearing is held before the Commission. *See* Staff Requirements – COMDEK-07-0001/COMJSM-07-0001-Report of the Combined License Review Task Force at 1 (June 22, 2007) (ML071760109).

[2] The Staff's decision to suspend review activities but leave the application on the docket is consistent with recent requests to suspend review of the COL applications for Victoria County Station and Grand Gulf. In both instances, the Staff stated that the applications would remain docketed but that it would suspend all or part of its review activities. *See* Letter to Thomas O'Neill from David Matthews, Staff Review of the Combined License Application for Victoria County Station, Units 1 and 2 (Dec. 18, 2008) (ML083510683); Letter to William Hughey from David Matthews, Staff Review of Combined License Application for Grand Gulf Station Unit 3 (Jan. 12, 2008) (ML090080523).

A. Applicable legal standards regarding a licensing board's authority

Absent withdrawal, the Board has authority to terminate the ongoing adjudication in which petitions for intervention are pending. Pursuant to 10 C.F.R. § 2.319, the presiding officer has those powers necessary to "conduct a fair and impartial hearing . . . to take appropriate action to control the prehearing and hearing process, to avoid delay and maintain order," which includes the power to regulate the course of the proceeding, dispose of motions, and issue orders necessary to carry out the presiding officer's duties and responsibilities. 10 C.F.R. § 2.319(g), (p), and (q). *See also Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 544 (1975) ("Licensing boards have . . . the general authority to '[r]egulate the course of the hearing' (10 CFR 2.718(e))[3] - an authority which we have held encompasses determinations as to when a particular hearing should take place.") (internal citation omitted).[4]

As stated by the Appeal Board, an adjudicatory tribunal's powers include "the inherent

---

[3] 10 C.F.R. § 2.319 clarifies and consolidates the provisions regarding a licensing board's responsibilities, notably 2.718 and 2.1233(e). Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2217 (Jan. 14, 2004).

[4] *Douglas Point* raised the issue of whether evidentiary hearings should proceed notwithstanding the applicant's postponement of proposed in-service dates of the facility after a number of petitions for leave to intervene had been granted. *Douglas Point,* ALAB-277, 1 NRC at 542. The Appeal Board reasoned that the Licensing Board should consider a variety of factors in determining when hearings should be held on specific issues, including

> 1) the degree of likelihood that any early findings on the issue(s) would retain their validity; (2) the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issue(s); and (3) the extent to which the hearing of the issue(s) at an early stage would, particularly if the issue(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants.

Id. at 547. Unlike AmerenUE in the instant proceeding, this applicant had the intent of moving forward with the project as evidenced by the postponed schedule. *See id.* at 542-43.

authority . . . to dismiss those matters placed before them which have been mooted by supervening developments." *Puerto Rico Electric Power* Authority (North Coast Nuclear Plant, Unit 1), ALAB–605, 12 NRC 153, 154 (1980).[5] Nothing in the Commission's regulations appears to limit the Board's discretion to terminate a proceeding absent withdrawal. *See id.* ("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.") (citing unpublished order dated June 4, 1980); *Puerto Rico Electric Power* Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1130 (1981) (referencing ALAB-605, 12 NRC 153, and stating "the Atomic Energy Act and Commission regulations were devoid of anything which suggested an intended limitation upon the inherent authority of adjudicatory tribunals to dismiss those matters placed before them which have been mooted by supervening developments.").

Case law supports the proposition that licensing boards have the authority to terminate proceedings absent withdrawal. For example, in *North Coast,* the Appeal Board stated that a board may dismiss a proceeding, absent withdrawal, if the matter has "been mooted by supervening developments" such as an applicant's abandonment of the proposed project. *See North Coast,* ALAB-605, 12 NRC at 154. The Appeal Board found that the Board erred in concluding that absent withdrawal of the application, "it lacked the authority to dismiss or deny a construction permit application . . . even if it should clearly appear that the applicant had

---

[5] *See also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-93-20, 38 NRC 83, 85 (1993) (referencing *North Coast*, ALAB-605, 12 NRC at 154, and stating that the licensing board had the authority to terminate a license amendment proceeding after a hearing request had been referred to the Board, but before a notice of hearing had been issued).

abandoned any intention to build the facility in question." *See id*. (citing LBP-80-15, 11 NRC 765).[6]

Alternatively, a licensing board may suspend a proceeding. As illustrated below, suspension seems appropriate where an applicant intends to move forward with a project, but outside events may impact the licensing proceeding.[7] For example, in *Northern States Power Company,* the applicant requested suspension where its proposed Independent Spent Fuel Storage Installation (ISFSI) was being challenged under state law and resolution was pending in state court; a resolution was expected in approximately six months. *Northern States Power Company* (Independent Spent Fuel Storage Installation), LBP-96-26, 44 NRC 406, 408 (1996). The Board found that the balance of equities favored granting the Applicant's motion to suspend the proceeding and hold it in abeyance pending resolution in state court. *Id.* at 409.[8] Similarly, in *Nine Mile Point,* the Commission granted the co-owners request to suspend the proceeding pending their determination to exercise a right of first refusal. *Niagara Mohawk Power Corp., New York State Electric & Gas Corp., & AmerGen Energy Co., LLC* (Nine Mile Point, Units 1 & 2), CLI-99-30, 50 NRC 333, 342-43 (1999). The Commission reasoned that a "temporary suspension" was appropriate because it was not "sensible . . . to require the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be

---

[6] One month after the Appeal Board issued ALAB-605, the applicant withdrew its application. *See Puerto Rice Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 35 (1981); *North Coast*, ALAB-662, 14 NRC at 1131, 1138-1139 (affirming licensing board's decision to terminate proceeding without prejudice).

[7] Although the Commission's regulations do not provide for a "motion to suspend," the Commission has considered such requests. *See AmerGen Energy Co., LLC,* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484-85 (Oct. 2008).

[8] This proceeding was subsequently terminated without prejudice after the Applicant withdrew its application. *See Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-97-13, 46 NRC 11 (1997), *reconsid. denied,* LBP-97-17, 46 NRC 227 (1997).

rendered moot in the immediate future." *Id.* at 343.[9] Finally, in the *Clinton* operating license proceeding, the Applicant submitted an application for two units but subsequently determined that "there [wa]s no need to proceed with the application for an Operating License for Unit 2" where the construction schedule for Unit 2 was significantly delayed compared to Unit 1 and the Commission's regulation provided that an operating license could only be issued upon a finding that "construction of the facility has been substantially completed." *Illinois Power Co.* (Clinton Power Station, Units 1 & 2), LBP-81-56, 14 NRC 1035, 1035 (1981) (citing 10 C.F.R. § 50.57(a)(1)). The Applicant filed a Motion for Severance and Stay of the Proceedings for Unit 2 without withdrawing its application, after petitions to intervene had been filed. *Id.* The other parties did not oppose the motion, which was granted by the Board. *Id.* at 1036.[10]

B. Termination of the instant proceeding is appropriate.

Suspension of the instant proceeding is not appropriate because unlike the suspension requests discussed above where the applicant had intent to move forward with the project at the time of the request, here the Applicant has stated that it is suspending its efforts to move

---

[9] This proceeding was dismissed after the applicant withdrew its application. *See Niagara Mohawk Power Corp., New York State Electric & Gas Corp., & AmerGen Energy Co., LLC* (Nine Mile Point, Units 1 & 2),CLI-00-09, 51 NRC 293, 294 (2000).

[10] There have also been a number of instances where motions for suspension have been denied. For example, in *Private Fuel Storage,* the Board denied the petitioner's request that suspension and renoticing was appropriate where the petitioner claimed that it could not meaningfully participate in the proceeding and was prejudiced in developing contentions because the application and supporting documents were not sufficient. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), No. 72-22-ISFSI, 1997 WL 687737 (LBP Oct. 17, 1997) (unpublished order) (*PFS*). Similarly, in a subsequent *PFS* decision, the Commission denied petitioner's request to suspend the proceedings pending resolution of the Commission's review of terrorism policies after September 11. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001). The Commission stated that in determining whether the proceeding would move forward, it will "consider whether moving forward . . . . will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule of policy changes that might emerge from our important ongoing evaluation of terrorism-related policies." *Id*. at 380.

forward with Callaway Unit 2 and has not indicated if or when it will again pursue this project. *See* April 28 Letter; June 23 Letter; Motion at 2. Because the Applicant has suspended its efforts to pursue Callaway Unit 2 and has requested that the Staff suspend all review activities, termination of this proceeding is appropriate.

As the Applicant stated in its Answer to MAHUR's Petition to Intervene, the NRC "will not (and cannot) continue" its review of the Applicant's financial qualifications at this time because "the premise of the financial qualifications analysis in the Application is no longer correct." AmerenUE's Answer Opposing Petition to Intervene and Request for Hearing by Missourians Against Higher Utility Rates at 3 (May 1, 2009) (Applicant Answer to MAHUR). Since the withdrawal of the proposed legislation to revise an existing Missouri law that prevents Missouri investor-owned utilities from recovering any plant development costs until the plant is operating, the Applicant no longer has "the financial certainty needed to complete the project." *Id.* at 2-3.

The issue of financial assurance is a key area for determination in the COL Application and there is no indication if or when the Applicant may be able to establish that it meets these requirements. In order to move "forward with any plans to construct Callaway 2" the Applicant "will need to develop a financing mechanism which provides reasonable assurance . . . ." *See* Applicant Answer to MAHUR at 17. Also, as there is nothing that would prevent the Applicant from changing other portions of its Application before deciding to move forward with this COL Application, there is no certainty that the petitions to intervene would retain their validity. Litigation of a partially moot application would not further fair and efficient decision-making, and considering the uncertainty of whether AmerenUE will go forward with the proposed Callaway Unit 2 in the future, the Board and participants should not expend limited resources reviewing and litigating contentions based on this COL Application. Therefore, termination of this proceeding is appropriate. *See North Coast,* ALAB-605, 12 NRC at 154 (licensing boards have the authority to dismiss matters that "have been mooted by supervening developments").

Accordingly, the Staff supports the Applicant's Motion. If the Motion is granted, a new notice of hearing would be required to again proceed with this COL Application, thereby affording interested participants an opportunity for hearing regarding the updated application.

CONCLUSION

For the foregoing reasons, the Staff supports AmerenUE's Motion. In this context, cancellation of the oral argument on standing and the admissibility of proposed contentions scheduled for July 28, 2009, would be appropriate.

Respectfully submitted,

/Signed (electronically) by/
Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1391
Jessica.Bielecki@nrc.gov

/Executed in accordance with 10 C.F.R. § 2.304(d)/
Ann P. Hodgdon
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1587
Ann.Hodgdon@nrc.gov

Dated at Rockville, Maryland
this 6th day of July, 2009

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER IN SUPPORT OF AMERENUE'S REQUEST TO TERMINATE HEARING" have been served upon the following persons by Electronic Information Exchange and electronic mail this 6th day of July, 2009:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Paul.Bollwerk@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Richard.Cole@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Jeffrey D.E. Jeffries
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Jeffrey.Jeffries@nrc.gov

Steven Dottheim
Steven C. Reed
Kevin A. Thompson
Missouri Public Service
P. O. Box 360
Jefferson City, MO 65102
E-mail: steve.dottheim@psc.mo.gov
E-mail: steven.reed@psc.mo.gov
E-mail: kevin.thompson@psc.mo.gov

Hubert A. Farbes, Jr.
John A. Helfrich
Victoria O. Williams
Counsel for Missourians Against High Utility Rates
Brownstein Hyatt Faber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
E-mail: hfarbes@bhfs.com

Jay E. Silberg
Robert B. Haemer
Jason B. Parker
Alison M. Crane
Counsel for the Applicant
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
E-mail: jay.silberg@pillsburylaw.com
E-mail: robert.haemer@pillsburylaw.com
E-mail: jason.parker@pillsburylaw.com
E-mail: alison.crane@pillsburylaw.com

Henry B. Robertson
Bruce A. Morrison
Attorneys for Missouri Coalition for the Environment and Missourians for Safe Energy
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, Missouri 63101
E-mail: hrobertson@greatriverslaw.org
E-mail: bamorrison@greatriverslaw.org

Lewis Mills
Public Counsel
Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
E-mail: lewis.mills@ded.mo.gov

/Signed (electronically) by/
Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1391
Jessica.Bielecki@nrc.gov