

July 13, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 52-037-COL
UNION ELECTRIC COMPANY d/b/a AmerenUE)	
)	
(Callaway Power Plant, Unit 2))	ASLBP No. 09-884-07-COL-BD01

AmerenUE Reply to Responses to Motion Requesting Termination of Hearing

Pursuant to the Atomic Safety and Licensing Board's ("Board") July 7, 2009 Memorandum and Order (Permitting Reply to Responses to Motion to Terminate Hearing; Prehearing Conference Argument Time Allocations; Electronic Copy of Application) ("Memorandum and Order"), Union Electric Company d/b/a AmerenUE ("AmerenUE") hereby replies to the answers to its Motion Requesting Termination of Hearing, filed June 26, 2009 ("Termination Motion") by the Missouri Coalition for the Environment and Missourians for Safe Energy ("MCE/MSE") and the NRC Staff.

AmerenUE agrees with the NRC Staff that the Board has the authority to terminate the proceeding absent withdrawal of AmerenUE's combined construction and operating license application ("COLA"). AmerenUE disagrees with MCE/MSE's position that the Board can and should direct withdrawal of the COLA. Finally, AmerenUE disagrees with MCE/MSE's request that Board award MSE/MCE its litigation expenses, including attorneys' fees.

BACKGROUND

AmerenUE determined that it is in its best interests to suspend its pursuit of the COLA and requested that the NRC Staff suspend all activities relating to the COLA. *See* Termination

Motion. The NRC Staff agreed with AmerenUE's request, notifying AmerenUE that the Staff "has suspended all review activities relating to the Callaway Unit 2 COLA"¹

The Board's June 29, 2009 Order called for answers to the Termination Motion by July 6, 2009. Only the NRC Staff and MCE/MSE filed responses.² Neither the NRC Staff nor MCE/MSE opposed termination. MCE/MSE stated that it "support[s] the motion to terminate the proceeding"³ and that the Board has the authority to terminate,⁴ but requested that the Board either "order withdrawal of the COLA" or impose certain conditions if termination of the hearing is granted but the COLA is not withdrawn.⁵ As reflected in the Termination Motion, neither the Missouri Public Service Commission ("MPSC") nor the Missouri Office of the Public Counsel ("MPC") opposed the Motion. Missourians Against Higher Utility Rates ("MAHUR") did not respond to the Termination Motion.⁶

DISCUSSION

AmerenUE replies to three issues addressed in the NRC Staff Answer and the MCE/MSE Response – the Board's authority to terminate the hearing, the Board's authority to require the withdrawal of the COLA, and MCE/MSE's request that it be awarded its litigation expenses, including attorneys' fees.

¹ Letter from David B. Matthews, Director, Division of New Reactor Licensing (NRC) to Adam C. Heflin, Senior Vice President and Chief Nuclear Officer, AmerenUE/Callaway Plant (June 29, 2009) at 1.

² NRC Staff's Answer in Support of AmerenUE's Request to Terminate Hearing (July 6, 2009) ("NRC Staff Answer"); Response of MCE/MSE to AmerenUE's Motion Requesting Termination of Hearing (July 6, 2009) ("MCE/MSE Response").

³ MCE/MSE Response at 1.

⁴ *Id.* at 1-3.

⁵ *Id.* at 3-6. AmerenUE only objects to one of the conditions that MCE/MSE requests if the COLA is not withdrawn, *i.e.*, that the Board award MCE/MSE its litigation expenses, including attorneys fees.

⁶ On July 10, 2009, AmerenUE, the NRC Staff, MCE/MSE, MAHUR, and MPC filed a Joint Motion requesting leave to file a motion for reconsideration and requesting reconsideration of that part of the Memorandum and Order calling for oral argument on July 28, 2009 on standing and the admission of contentions. The Joint Movants believe that oral argument on those issues would be an unnecessary and costly use of the participants' and NRC's resources. As stated in the Joint Motion, MPSC did not oppose the Joint Motion.

A. The Board Has the Authority to Terminate the Hearing Absent Withdrawal of the COLA

As the NRC Staff Answer explains, the Board has the authority to terminate the proceeding before it absent withdrawal of the COLA. NRC Staff Answer at 4-7. AmerenUE agrees. The Board derives this authority from 10 C.F.R. § 2.319, which grants the Board broad discretion to control the course of proceedings.⁷ That authority is consistent with Commission precedent. *See, e.g., Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 N.R.C. 539, 544 (1975) (“Licensing boards have . . . the general authority to ‘[r]egulate the course of the hearing’ (10 CFR 2.718(e)) – an authority which we have held encompasses determinations as to when a particular hearing should take place.” (citation omitted)); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 N.R.C. 153, 154 (1980); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125, 1130 (1981).

MCE/MSE appears to suggest that the Board’s authority to terminate the proceeding is predicated on withdrawal of the COLA. MCE/MSE Response at 1-2. Indeed, MCE/MSE requests that the Board order such withdrawal. *Id.* at 3. However, the two cases cited by MCE/MSE are inapposite. In one, the licensing board waited to rule on a motion to terminate until the applicant informed the board whether it was also withdrawing the application.⁸ In the other, the applicant filed a motion to withdraw the application and the board terminated the proceeding at the same time that it granted the motion to withdraw.⁹ In neither case did the applicant seek termination of the proceeding while the application remained docketed. Nor did the boards in those cases address that issue. MCE/MSE points to no regulation or case precedent

⁷ This provision is essentially identical to its predecessor, 10 C.F.R. § 2.718. 69 Fed. Reg. 2,182, 2,223 (Jan. 14, 2004).

⁸ *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 N.R.C. 667 (1980).

⁹ *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 55 (1983).

linking the Board's authority to terminate the hearing to withdrawal of the COLA. The authority for the withdrawal of an application is set forth in 10 C.F.R. § 2.107(a). That provision states in part, that "[t]he Commission may *permit* an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on *receiving a request* for withdrawal of an application, deny the application or dismiss it with prejudice." (Emphasis added). Nowhere in Section 2.107 is there authority for the Commission or a licensing board to compel the withdrawal of an application.

Nor does MCE/MSE's citation to *Consumers Power Co.* (Quanicassee Plant, Units 1 and 2), CLI-74-37, 8 A.E.C. 627 (1974), *see* MCE/MSE Response at 5, help its argument. There, the applicant had requested that the NRC withdraw the notice of hearing based on the Board of Directors' decision to defer the project for one year. After the applicant publicly announced that it was cancelling plans for the project (but failed to notify the AEC), the Commission, at the urging of the AEC Staff, ordered the applicant to show cause why the application should not be withdrawn. *Consumer Power Co.* (Quanicassee Plant, Units 1 and 2), CLI-74-29, 8 A.E.C. 10 (1974). At that point, the applicant withdrew the application. CLI-74-37, 8 A.E.C. at 627. The Commission's actions hardly support a forced withdrawal of the COLA in the face of AmerenUE's and the NRC Staff's positions that the application be suspended but not withdrawn.

MCE/MSE provides no rationale for the Board to order withdrawal. None of the three cases cited by MCE/MSE order the involuntary withdrawal of an application. In *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), CLI-82-5, 15 N.R.C. 404 (1982), the Commission deemed the applicant's "Notice of Prematurity and Advice of Withdrawal" to be a request for permission to withdraw, and referred the matter to the licensing board. The applicant wanted to withdraw the application. The only issue was whether NRC approval for the

withdrawal was necessary. *See generally Stanislaus*, LBP-83-2. In *Dairyland Power Cooperative* (LaCrosse Boiling Water Reactor), LBP-88-15, 27 N.R.C. 576, 580 (1988), “[t]he action giving rise to the request for termination is [the utility’s] withdrawal of its application for a full-term operating license” The issue in *Dairyland* was the licensing board’s concern that withdrawal of the pending license amendment application would leave the plant “without a currently effective license.” *Id.* at 579. The board therefore conditioned the termination of the proceeding not on the withdrawal of the application, but on the conversion of the license to a “possession only” license, i.e., one appropriate for the plant’s decommissioning status. *Id.* at 581. Finally, the language MCE/MSE quotes from *North Coast* only supports the Board’s authority to terminate the hearing where the “matters placed before [the Board] have been mooted by supervening developments.” ALAB-605, 12 N.R.C. at 154. *North Coast* says nothing that would support conditioning termination on withdrawal of the application.

MCE/MSE also suggests that AmerenUE’s stated reason for requesting termination is insufficient and encourages the Board to “demand an explanation.” MCE/MSE Response at 2, 5. As AmerenUE has previously explained,¹⁰ because proposed legislation to authorize funding mechanisms for Callaway 2 was not enacted, AmerenUE does not have the financial certainty needed to construct Callaway 2 in the near term.

AmerenUE’s initial request that the NRC Staff continue the current activities associated with the COLA review was based on AmerenUE’s intent to review its options associated with the application and its interest in avoiding precipitous steps that might impact some of those

¹⁰ *See, e.g.*, “AmerenUE’s Answer Opposing The Missouri Coalition For The Environment And Missourians For Safe Energy’s Petition To Intervene And Request For Hearing In Callaway Plant Unit 2 Combined Construction And Operating License Application” (May 1, 2009) at 3.

options.¹¹ After its initial review, AmerenUE determined that it was in its best interests to seek the suspension of the NRC Staff review process and the termination of the hearing.¹²

Based on AmerenUE's initial review of options, it became clear that no near term actions were available that would benefit from continuing the NRC Staff review and the proceeding. AmerenUE continues to pursue options that might enable it to realize value from its investments to date in the Application. Because it is uncertain whether any of these options are likely to reach fruition in the near term, AmerenUE concluded that the additional costs associated with continuing the NRC Staff review were not justifiable. Suspending the NRC Staff's technical review of the COLA would preserve the Application and the review process as it now stands. Forced withdrawal of the Application would not. Terminating the hearing, however, would not diminish the availability and value of potential options, since the COLA, were it to be reactivated, would certainly require significant revisions, making a new notice of hearing virtually certain. Keeping the proceeding alive through a suspension would be of questionable value, given the uncertainty as to how long the suspension might last and the high likelihood that the adjudicatory proceeding would, for all intents and purposes, need to start afresh.

MCE/MSE attempts to justify a compelled withdrawal of the Application by asserting that "disadvantages [will] accrue to MCE/MSE and the other intervenors." MCE/MSE Response at 2. These "disadvantages" do not bear analysis. MCE/MSE says that it "would be stuck with an obsolete petition." *Id.* at 3. If the Application were reactivated, MCE/MSE's petition would indeed be "obsolete" to the extent that changes in the COLA made the petition moot. But it is not clear how this is a "disadvantage." If the Application should change, MCE/MSE cannot be suggesting that it would have the right to litigate a petition which is no longer relevant. On the

¹¹ See AmerenUE letter to NRC, dated April 28, 2009, attachment 2 to AmerenUE's May 1, 2009 answers to the petitions of MCE/MSE, MAHUR, MPC and MPSC.

¹² See Termination Motion and letter from AmerenUE to NRC dated June 23, 2009, attached thereto.

other hand, to the extent that significant portions of a reactivated application were to remain unchanged, then MCE/MSE is no worse (and no better) off than it would be were the proceeding to continue forward.

B. The Board Should Not Award MCE/MSE Its Litigation Expenses

MCE/MSE requests that, if the Board terminates the proceeding without compelling the withdrawal of the application, the Board should impose four conditions. AmerenUE does not oppose three of MCE/MSE's requested conditions.¹³ AmerenUE objects, however, to MCE/MSE's request that the Board award them their litigation expenses, including attorneys' fees. Although MCE/MSE's Response is silent as to whether that award should come from the NRC or from AmerenUE, it would appear based on MCE/MSE's single citation that MCE/MSE would have the Board require AmerenUE to fund such an award. But regardless of the source of funds, there is no basis for any award to MCE/MSE.

NRC is barred by statute from awarding funding to MCE/MSE. The Energy and Water Development Appropriations Act, which is the basis for any expenditures by NRC, explicitly bars the NRC from compensating those seeking to intervene in NRC licensing proceedings: "None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts." Pub. L. No. 102-377, § 502, 106 Stat. 1315, 1342 (1992), 5 U.S.C.A. § 504 note.

¹³ Those three conditions are (1) "Any reactivation of Staff review should occasion a new notice of hearing and opportunity to intervene. In addition to being published in the Federal Register, the new notice should be served on all parties on the current service list;" (2) "Severe limitations on contentions should not be imposed. Existing contentions should be accepted as part of the record. New and amended contentions filed after the case is reopened should not be subjected to the rules for untimely contentions;" and (3) "New parties should be allowed to petition without having to meet the standards for late intervention." MCE/MSE Response at 5-6 (citations omitted).

Nor is MCE/MSE's position any stronger if it is asking the Board to compel AmerenUE to pay MCE/MSE's litigation expenses. The federal courts follow the "American Rule," which holds that a prevailing party may not recover attorneys' fees absent statutory authorization. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). In *Alyeska*, environmental groups who had sued to bar construction of a trans-Alaska pipeline requested an award of expenses and attorneys' fees when they prevailed in the U.S. Court of Appeals. 421 U.S. at 241. Although the Court of Appeals acknowledged that there was no statutory authorization for such an award and that the case did not fall under any of the exceptions to the American Rule,¹⁴ it nevertheless fashioned an exception because it found that the groups had acted as "private attorneys general" to vindicate important statutory rights of all citizens and ensure that the governmental system functioned properly. *Id.* at 245. The Supreme Court reversed, holding that only Congress may create exceptions to the American Rule. *Id.* at 249.

No such Congressional authority exists here. Nor does any NRC regulation authorize licensing boards to order applicants to pay intervenors' or petitioners' expenses. Neither the Commission nor the licensing boards have ever awarded attorneys' fees to a prevailing party in an NRC proceeding, let alone a party that is still litigating its contentions or (as in this case) a petitioner who has not even been granted intervenor status.

Though the few licensing boards that have ruled on intervenor requests for attorneys' fees have been divided as to whether they have authority to award such fees, none has awarded them. The licensing board in *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 N.R.C. 762, 766-68 (1982), for example, found no justification for making an exception to the American Rule. Further, that board found that

¹⁴ Those exceptions include an award against a party who acted in bad faith, and the common benefit exception, which spreads the cost of litigation to those persons benefiting from it. *Alyeska*, 421 U.S. at 245.

even if the Commission has the authority to condition a termination upon a reimbursement of the contested expenses beyond the scope of judicial precedent, this Board lacks the authority to impose such a condition. We can go only as far as established precedent without adopting new Commission policy, and Commission policy can only be adopted by the Commission itself. The licensing and appeal boards are not empowered to make policy.

Id. at 768 (citations omitted). Similarly, in *Stanislaus*, LBP-83-2, the licensing board found that the facts of that case did not require it to determine whether it had the authority to award litigation expenses.

Under the circumstances of the proceeding there is no need to determine whether the Commission has the power to authorize payment of litigation expenses as a condition for permitting withdrawal of an application without prejudice, *but it would appear not*. The Commission is a body of limited powers. Its enabling legislation has no provision empowering it to require the payment of a party's costs and expenses. The regulations the Commission has promulgated do[] not provide for it. It has no equitable power it can exercise as courts have. The concept is foreign to the Commission's adjudicatory process.

LBP-83-2, 17 N.R.C. at 54 (emphasis added). *See also Cincinnati Electric & Gas Co.* (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 N.R.C. 1538, 1548 (1982) (holding that it lacked authority to award litigation expenses and attorneys' fees).

In contrast, the licensing boards in *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 N.R.C. 1128 (1982), and *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 N.R.C. 45 (1999), suggested that they *might* have the authority to order an applicant to pay an intervenor's litigation expenses.¹⁵ Both boards held that in order to award litigation expenses to an intervenor, they would have to find that there has been legal harm to the intervenors caused by some activity or action of the licensee. The prospect of a second hearing alone, both explained, was not a legally cognizable harm. LBP-82-81, 16 N.R.C. at

¹⁵ In *Perkins*, the board said that "the payment of attorney's fees is not necessarily prohibited, as a matter of law," LBP-92-81, 16 N.R.C. at 1141, hardly a ringing jurisdictional endorsement. The *Yankee* board in turn relied largely on the *Perkins* decision. LBP-99-27, 50 N.R.C. at 53.

1135; LBP-99-27, 50 N.R.C. at 53. Neither board found that the intervenors had demonstrated legal harm, and neither awarded intervenors their litigation expenses.

The *Perkins* and *Yankee* decisions do not apply here. Both involved intervenors. There is no suggestion that those boards' analyses have any applicability to petitioners not admitted to the proceeding. Unlike *Callaway*, both involved proceedings that were well underway.¹⁶ Even if the Board were to determine that it has the authority to order payment of litigation expenses, the Board should not issue such an order because MCE/MSE has not made the requisite showing of legally cognizable harm. MCE/MSE simply asks for an award "as compensation for having had to prepare the case." MCE/MSE Response at 6. MCE/MSE does not indicate any legal harm caused by the termination of the hearing. Nor could they make such a showing, given that they have not even been admitted as intervenors, nor litigated any of their contentions.

CONCLUSION

AmerenUE has requested that the Board terminate the hearing. Based on the above analyses of MCE/MSE's arguments, the Board should reject MCE/MSE's request that it order withdrawal of the COLA and that it award litigation expenses to MCE/MSE.

Respectfully submitted,

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¹⁶ The intervenors in *Perkins* had litigated their contentions through the hearing stage, and the intervenors in *Yankee* were in the discovery stage when that proceeding was terminated.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of July 2009, a copy of the foregoing “AmerenUE Reply to Responses to Motion Requesting Termination of Hearing” dated July 13, 2009, was provided to the Electronic Information Exchange for service upon the following persons:

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