

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Richard F. Cole
Dr. Jeffrey D. E. Jeffries

In the Matter of

AMERENUE

(Callaway Plant Unit 2)

Docket No. 52-037-COL

ASLBP No. 09-884-07-COL-BD01

July 16, 2009

MEMORANDUM AND ORDER
(Postponing Initial Prehearing Conference
and Setting Schedule for Submission
of Settlement Agreement)

Pending with the Licensing Board is a July 10, 2009 joint motion of applicant AmerenUE (AUE), the NRC staff, and petitioners Missouri Coalition for the Environment and Missourians for Safe Energy (MCE/MSE), Missourians Against Higher Utility Rates (MAHUR), and the Missouri Office of the Public Counsel (MPC), for reconsideration of the Board's July 7, 2009 memorandum and order in which, among other things, the Board set for oral argument the various items pending with the Board. In their joint motion, these participants ask, in effect, that the Board not conduct the scheduled July 28, 2009 initial prehearing conference in Fulton, Missouri, during which they were to make oral presentations and answer Board questions regarding a pending June 26, 2009 AUE motion to terminate the hearing as well as the questions of the standing of petitioners MAHUR and MPC and the admissibility of the contentions of petitioners MCE/MSE and MAHUR. According to the motion,

[g]iven [AUE's] pending motion to terminate the hearing, the fact that neither the NRC Staff nor any of the petitioners in this

proceeding objects to termination of the hearing, and the fact that none of the Joint Movants has suggested that oral argument on standing or contentions is either necessary or appropriate, Joint Movants respectfully submit that a prehearing conference in Fulton, Missouri to hear oral argument on issues regarding standing and the admissibility of contentions would result in a costly and unnecessary use of the participants' and the NRC's resources.

Joint Motion By [AUE], NRC Staff, MCE/MSE, MAHUR, and MPC Requesting Leave To File A Motion For Reconsideration and Requesting Reconsideration (July 10, 2009) at 1-2 [hereinafter Joint Reconsideration Motion].¹

As is outlined in its June 26 termination motion and a subsequent staff submission, rather than withdrawing its pending combined license (COL) application so as to bring to a close all aspects of this COL proceeding, applicant AUE has requested, and the staff has agreed, to suspend the staff's review of the application. See Motion of [AUE] Requesting Termination of Hearing (June 26, 2009) at 2; Letter from Jessica A. Bielecki, NRC Staff Counsel, to Licensing Board (June 30, 2009). Applicant AUE does, however, want to terminate one facet of this COL proceeding: the contested portion of the adjudicatory hearing.² As is reflected most clearly in the joint reconsideration motion, apparently the other participants are in agreement as to most of the conditions associated with such a termination, including the need for the staff to renotece the opportunity for a hearing at some future point if the application is revitalized. See Joint

¹ To the degree the participants' July 10 joint motion is a reconsideration request, the Board grants the participants request for leave to file their motion.

² Regardless of the status of the contested adjudication, per the notice of hearing already issued in this proceeding, see AmerenUE; 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), both AUE and the staff would be obligated to participate as parties in a mandatory hearing regarding uncontested matters associated with the Callaway COL application once the staff's safety and environmental reviews of the application are completed.

Reconsideration Motion at 6 n.7. Such a result would provide the apparent advantages of (1) avoiding any Board rulings on the merits regarding petitioners' standing or the admissibility of their contentions that might provide the basis in any future noticed proceeding for invoking issue/claim preclusion principles to bar the admission of those participants or contentions; and (2) relieving AUE and the staff of the possibility of having to comply with any discovery or other obligations that could arise if any of the hearing petitions is granted.

On the other hand, it is not apparent why, lacking a request by AUE to withdraw the application or a request by the various petitioners to withdraw their hearing requests, termination of this hearing is necessarily mandated. As the Board suggested previously, see Licensing Board Memorandum and Order (Permitting Reply to Responses to Motion to Terminate Hearing; Prehearing Conference Argument Time Allocations; Electronic Copy of Application) (July 7, 2009) at 1 (unpublished) [hereinafter Argument Allocation Order], given the pendency of the application and the hearing petitions, another approach would be (1) the Board rules on the matters that are before it by reason of the pending application/hearing petitions; and (2) then suspends the hearing proceeding, just as is being done with the staff review process, until such time as AUE decides to move forward with, or withdraw, its application. This approach would avoid any issues regarding the ability of the admitted petitioners to participate if the application were reactivated rather than withdrawn.

If, as the joint reconsideration motion seems to suggest, the various participants believe that the first course is the one they all wish to pursue, then it seems incumbent upon the participants to present the Board with a settlement agreement that reflects the conditions under which the current litigation regarding the AUE application and the pending hearing requests would be resolved. Accordingly, the Board will provide the participants with an opportunity, on or before Friday, August 14, 2009, to file such a settlement agreement with the Board for its

consideration in accordance with 10 C.F.R. § 2.338.³ In addition, the participants should advise the Board chairman on or before Thursday, July 23, 2009, if they wish to have a settlement judge appointed to help in reaching such an agreement.

In the interim, the Board will postpone the initial prehearing conference that is now scheduled for Tuesday, July 28, 2009, in Fulton, Missouri. If the participants are unable to reach an agreement regarding the dismissal of this contested adjudicatory proceeding, then the Board will determine the next appropriate step, which may include convening the initial

³ Although, as the Board has indicated, interested governmental entity Public Service Commission of the State of Missouri (PSCM), does not have a formal role in this proceeding absent the admission of parties and contentions, see Argument Allocation Order at 2 n.2, the Board would expect that PSCM would be kept appropriately apprised of the other participants' settlement efforts, see Pa'ina Hawaii, LLC (Materials License Application), CLI-06-18, 64 NRC 1, 7 (2006).

prehearing conference and, thereafter, ruling on whether the pending hearing petitions should be granted or denied.⁴

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
CHAIRMAN

Rockville, Maryland

July 16, 2009

⁴ In this regard, given its potential length and the number of participants involved, the Board would not be inclined to conduct the conference by teleconference. Moreover, depending on the circumstances, the Board may hold the prehearing conference either in the vicinity of the Callaway facility or in the Licensing Board Panel's Rockville, Maryland hearing room and would expect at least one counsel/representative from each of the participants to attend at the designated location.

⁵ Copies of this memorandum and order were sent this date by the agency's E-Filing system to counsel for (1) applicant AUE; (2) petitioners MCE/MSE, MAHUR, PSCM, and MPC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
UNION ELECTRIC COMPANY D/B/A AmerenUE)
)
(Callaway Power Plant, Unit 2)) Docket No. 52-037-COL
)
(Combined License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (POSTPONING INITIAL PREHEARING CONFERENCE AND SETTING SCHEDULE FOR SUBMISSION OF SETTLEMENT AGREEMENT) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-037-COL

MEMORANDUM AND ORDER (POSTPONING INITIAL PREHEARING CONFERENCE AND
SETTING SCHEDULE FOR SUBMISSION OF SETTLEMENT AGREEMENT)

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of July 2009