

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
HAROLD R. DENTON, DIRECTOR

In the Matter of

UNION ELECTRIC COMPANY
(Callaway Plant, Unit 2)

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Docket No. STN 50-486

(10 CFR 2.206)

INTERIM DECISION UNDER 10 CFR 2.206

By petition dated August 14, 1979, the Public Service Commission of the State of Missouri (hereinafter referred to as PSC) pursuant to 10 CFR 2.206 of the Commission's regulations requested the Director of the Office of Nuclear Reactor Regulation, the Director of the Office of Nuclear Material Safety and Safeguards, and the Director of the Office of Inspection and Enforcement to issue a show cause order to suspend the construction permit granted to Union Electric Company for Callaway Plant, Unit 2. This matter was referred to the Director of the Office of Nuclear Reactor Regulation because the subject matter of the requested action was within the jurisdiction of this office. Notice of receipt of the PSC petition was published in the Federal Register, 44 Fed. Reg. 53116 (Sept. 12, 1979).

The basis for the PSC's requested action is recent information developed by the PSC (in Preliminary Union Electric Company Peak Demand Projection) which indicates that the peak demand forecast of Union Electric Company may be erroneous. The PSC states that the National Environmental Policy Act, (NEPA) 42 U.S.C. 4321 et seq., and the NRC's regulations implementing NEPA, 10 CFR Part 51, require the Commission to consider the environmental effects of the power to be generated by Callaway Plant, Unit 2. The PSC contends that in light of the recently discovered facts on peak demand forecast, this statutory obligation

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requires the NRC to suspend the construction permit while the facts upon which the permit was initially granted are reassessed.

For the reasons set forth in this decision, I have determined that no final decision on suspension of the construction permit for Callaway Plant, Unit 2 should be made at this time. A final decision on this matter should await the outcome of the hearings scheduled by the Missouri Public Service Commission for the spring of 1980.

I

An examination of the need for the generating capacity of a nuclear power plant is required to fulfill the Commission's obligations under NEPA. In a decision in the Seabrook case, Public Service Co. of New Hampshire (Seabrook Station, Units 1&2), ALAB-422, 6 NRC 33, 90 (July 26, 1977), the Appeal Board explained:

"Need for power" is a shorthand expression for the "benefit" side of the cost-benefit balance which NEPA mandates for a proceeding considering the licensing of a nuclear power plant.... A nuclear plant's principal 'benefit' is of course the electric power it generates. Hence, absent some 'need for power', justification for building a facility is problematical. Duke Power Co. (Catawba Nuclear Station, Units 1&2), ALAB-355, 4 NRC 397, 405 (October 29, 1976)."

Not only must the Commission determine that a need for the generating capacity of the plant exists, but it must also determine that the need for the plant coincides reasonably with the operational date of the plant. The reason the NRC concerns itself with the timing of the need for power is that a federal agency should not permit the environmental impacts of costs of a proposed action to be incurred earlier than necessary. The intent of NEPA is that any irretrievable

and irreversible commitments of resources should not be made while environmentally less damaging alternatives may exist or may be developed. Cf. Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1979 (D.C. Cir. 1973).

The Commission has recognized, however, that some uncertainty is inherent in any prediction of the need for or demand for the electricity to be generated by a nuclear plant.

"[E]very prediction has an associated uncertainty and ...long range forecasts of this type are especially uncertain in that they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, the general state of the economy etc. These factors exist even beyond the uncertainty that inheres in demand forecasts: assumptions on continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4). CLI-79-5, 9 NRC 609-610 (1979).

Moreover, the Atomic Safety and Licensing Appeal Board has stated, "[g]iven the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service - and the severe consequences which may attend upon a failure to discharge that responsibility - the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made." Kansas Gas & Electric Co., Kansas City Power & Light Co. (Wolf Creek Generating Station, Unit No. 1.) ALAB-462, 7 NRC 320, 328 (1978) (citations omitted). Consequently, applicants have never been required to demonstrate that need for the capacity of a plant and its proposed operational date coincide

exactly. */

II

During the construction permit proceeding for the Callaway plants, the Nuclear Regulatory Commission in accordance with NEPA and the Commission's own regulations implementing NEPA, 10 CFR Part 51, made a good faith assessment of the need for power from the Callaway Plants based on the information then available to it and authorized construction based on that assessment. **/

The Public Service Commission has now submitted to the Commission a Preliminary Peak Demand Projection which reaches a different, i.e., a lower demand forecast than that currently projected by Union Electric. ***/ The PSC's

*/ As the Appeal Board has stated:
"[i]f the electricity to be produced by a proposed project is genuinely needed...then the societal benefits achieved by having that electricity available are immeasurable. Those benefits need not be discounted because some possibility exists that the need for power may develop nearer the end than the beginning of the forecast spectrum. The adverse consequences to the public of insufficient generating capacity are serious ones, (discussed supra, p. 364, n.57), far more so than those flowing from having the plant on line a year or even two before its capacity is absolutely necessary." Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 368-69 (1975).

**/ Union Electric Co. (Callaway Plant, Units 1 & 2), Partial Initial Decision, LBP-75-47, 2, NRC 319, 335-340 (1975); Initial Decision, LBP-76-15, 3 NRC 445 (1976), affd, ALAB-347, 4 NRC 216 (1976); ALAB-426, 6 NRC 206 (1977).

***/ By letter dated February 17, 1977, Union Electric Company informed the Commission that it was revising the scheduled operation date for Callaway, Unit 2, from April 1, 1983, to April 1, 1987.

Report concludes, "While Unit 2 is planned for completion in 1987, the graph shows that it is not needed until after 1988. If Unit 2 were finished as UE plans, there will be approximately 1,350 megawatts of excess capacity in 1987 above that which is projected by the staff [PSC Staff] model." The PSC asserts that in light of these recently discovered facts, "the NRC would be derelict in its statutory obligation if it did not suspend this construction while the facts upon which the agenc[y] granted...the...[construction] permit four years ago are reassessed in light of this change." PSC petition at p.5.

As was noted in an earlier decision on a request for action under 10 CFR 2.206,^{*/} the Appeal Board for the Commission has dealt with efforts to reopen the record of proceedings in situations analogous to that presented by this 2.206 petition. The Appeal board noted in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620-21 (1976):

"After a decision has been rendered, a dissatisfied litigant who seeks to persuade us - or any tribunal for that matter - to reopen a record and reconsider 'because some new circumstance has arisen, some new trend has been observed or some new fact discovered,' has a difficult burden to bear. The reasons for this were cogently given by Mr. Justice Jackson more than 30 years ago in ICC v. Jersey City, 332 U.S. 503, 514 (1944):

One of the grounds of resistance to administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence - particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it - always creates a gap between the time the record is closed and the time administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and

^{*/} Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1&2), DD-79-4, 9 NRC 582, 584-85 (1979).

careful. If upon the coming down of the order; litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

There is, however, another factor to be considered in this case. The Commission has, in the past, placed heavy reliance on information developed by local regulatory bodies which are charged with the duty of insuring that utilities within their jurisdiction fulfill the legal obligation to meet customer demands. Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241 (1978), aff'd, CLI-79-5, 9 NRC 607, 608 (1979). The Missouri Public Service Commission has scheduled a hearing to begin in April 1980 on the generation expansion program of Union Electric Company. This proceeding will consider the revised peak forecast for the utility and will determine whether or not to proceed to reconsider the matter of the certificate of public convenience and necessity for Callaway, Unit 2.

As described in the petition, the PSC retains jurisdiction over the construction of a generation facility by virtue of its statutory authority to grant a certificate of public convenience and necessity and its authority to set rates. Under this jurisdictional authority and based on the information to be developed in its upcoming hearings, the PSC could conceivably withdraw the certificate issued to Union Electric Company for Callaway Unit 2 upon a finding that Unit 2 is not needed to maintain the Company's electric plant for safe and adequate service at reasonable rates. The PSC's final determination on this matter is expected in the fall of 1980. See PSC petition at pp. 2-3.

No construction is currently taking place on the Callaway Unit 2 facility.

Callaway is a two-unit facility in which construction of Unit 1 is far advanced. The principal environmental impacts associated with construction of both units which were identified in the FES, i.e., site clearing and excavation, have already occurred. Furthermore, the Permittee has indicated by letter dated January 4, 1980, that, apart from work on certain facilities which are closely associated with Unit 1, no major construction of plant structures for the Callaway Unit 2 plant will be resumed until sometime in early 1981. ^{*/} Thus, the remaining environmental impacts resulting solely from the construction of Unit 2, principally socioeconomic impacts of construction and those associated with the building of the Unit 2 cooling tower, will be delayed until sometime in 1981.

In light of the Commission's practice of placing great weight on the decision of local regulatory bodies in the area of need for power and the current hiatus in Unit 2 construction, I have determined that no action need be taken on PSC's request for a hearing to consider the effect of changes in the peak load forecast for Union Electric Company until after the completion of its hearings concerning the utility. The PSC's decision is expected in the fall of 1980. No construction of Callaway Unit 2 is scheduled to begin until 1981. Consequently, no prejudicial delay to either the petitioner or to the utility will result from deferring a decision on this petition pending the outcome of PSC's proceeding, nor will any premature environmental impacts from construction take place. ^{**/}

III

Based on the foregoing discussion, I find that consideration of PSC's petition for a show cause order to suspend the construction permit for Callaway

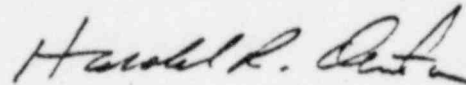
^{*/} Letter from John K. Bryan, Vice President, Union Electric Company to Harold R. Denton, dated January 4, 1980. See Attachment 1.

^{**/} Deferral here of final action pending completion of state proceeding is consistent with the action of the Appeal Board in a similar situation. See Rochester Gas & Electric Corporation, et al. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383 (1978).

Unit 2 should be deferred pending submission by PSC of its final decision in its proceeding on the generation expansion program of Union Electric Company.

A copy of this interim decision will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D. C. 20555, and the local public document rooms for the Callaway Nuclear Plant, Unit 2, located at Fulton City Library, 709 Market Street, Fulton, Missouri 65251 and Olin Library of Washington University, Skinker & Lindell Boulevard, St. Louis, Missouri 63130.

FOR THE NUCLEAR REGULATORY COMMISSION



Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this ~~10~~ day of March, 1980

Attachment:

1/4/80 Ltr to Denton fm Bryan/Union Elec. Co.

UNION ELECTRIC COMPANY
1901 GRATIOT STREET
ST. LOUIS, MISSOURI

January 4, 1980

JOHN K. BRYAN
VICE PRESIDENT

MAILING ADDRESS:
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Mr. Harold R. Denton, Director
Office of Nuclear Reactor Regulation
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Washington, D. C. 20555

ULNRC-332

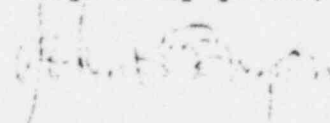
Dear Mr. Denton:

DOCKET NO. STN 50-486
CALLAWAY PLANT, UNIT 2
REQUEST FOR ACTION UNDER 10 CFR 2.206

By letter dated September 28, 1979, Messrs. Gerald Charnoff and Thomas A. Baxter, Counsel for Union Electric Company, submitted comments on our behalf relative to the Missouri Public Service Commission's request for institution of proceedings to suspend the Construction Permit for Callaway Unit 2 as provided for in 10 CFR 2.206.

In addition to the information provided by Counsel in that letter, we are pleased to submit this report on the current status and projection of construction efforts on Callaway Unit 2. At this time, no major field construction activity is in progress. Excavation for Unit 2 was completed concurrent with work on Unit 1. Limited portions of underground piping and electrical duct banks associated with Unit 2 continue to be installed, along with subfoundations of the emergency service water pump house and cooling tower. This work has been undertaken because its close proximity to Unit 1 structures renders it infeasible for construction to be deferred. Apart from this work and based on our current schedule for Unit 2, with commercial operation in April, 1987, we do not intend to commence major construction of plant structures until early 1981.

Very truly yours,



John K. Bryan

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Mr. Harold R. Denton, Director
January 4, 1980
Page Two

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