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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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*LBP-96-5

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

B. Paul Cotter, Jr., Chairman
Dr. Richard F. Cole
Dr. Peter S. Lam

1 SERVED APR - 1 1996

*RE-SERVED APR - 4 1996

In the Matter of
GULF STATES UTILITIES COMPANY,
et al.
(River Bend Station, Unit 1)

Docket No. 50-458-OLA

ASLBP No. 93-680-04-OLA

March 29, 1996

MEMORANDUM AND ORDER

(Grant of Motion to Terminate Proceeding)

Background

On January 25, 1996, Ralph R. Mabey, the court appointed Bankruptcy Trustee ("Trustee") for Intervenor Cajun Electric Power Cooperative, Inc. ("Intervenor"), filed with this Board a "Withdrawal of Contention and Motion for Termination of Hearing" ("Trustee's Motion").¹ The Motion seeks to withdraw the Intervenor's only contention and to terminate its litigation contesting a license amendment requested by Gulf States Utilities

¹On February 9, 1996, the Trustee filed a Supplement to Withdrawal of Contention and Motion for Termination of Hearing which confirmed his authority to act on behalf of Cajun in this proceeding.

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Company for its River Bend Station nuclear reactor.² The Motion seeks termination of the proceeding "without prejudice."

The NRC Staff supports the Trustee's motion insofar as it withdraws the admitted contention and asks that the hearing be terminated. However, the Staff takes exception to the Trustee's request that the contention be withdrawn without prejudice. The Staff does not believe that the Trustee can withdraw Cajun's contention without prejudice "given the posture of the proceeding before the Licensing Board".³ The Staff would have the Board dismiss the proceeding with prejudice.

In support of his request to withdraw Contention 2 without prejudice, the Trustee states that Cajun

. . . is not withdrawing its Petition to Intervene, as amended and supplemented, or any of the other issues, matters or contentions contained therein . . .

. . . Cajun continues to have concerns about EOI's lack of financial qualifications, although the Trustee does not wish to litigate the safety contention at this time. Withdrawal without prejudice is the standard at this Commission. See Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, AEC 1057 (1973). . .

The Trustee requests that the ASLB terminate the hearing proceeding. Since Contention 2 is the only contention and Cajun is the only intervenor, withdrawal should bring this hearing proceeding to an end. . . Since the Staff has advocated against Cajun's safety contention, no party remains which could assume Contention 2. Therefore, a hearin[g] (sic) on Cajun's Contention 2 would serve no purpose at this time.

²For the complete background in this proceeding, see this Board's decision on intervention reported at 39 NRC 31 (1994).

³NRC Staff Response To Chapter 11 Trustee's Motion for Termination of Hearing, February 14, 1996 ("Staff Response") at 1.

Trustee's Motion at 7.

Countering the Trustee's position, the Staff argues that dismissal of the Intervenor's contention without prejudice is somehow beyond the Board's jurisdiction, which the Staff insists is limited to "considering Cajun's petition for intervention and rendering a decision on any contentions that might be admitted." Staff Response at 2. The Staff says Grand Gulf, relied upon by the Intervenor, is not apposite because that proceeding apparently continued after the intervenor in question withdrew its contention. The Grand Gulf Licensing Board ruled that following a voluntary withdrawal an intervenor may reinstitute its intervention upon "good cause shown", the same standard as that for untimely intervention found under 10 C.F.R. 2.714(a). In other words, in an operating license proceeding, the intervenor, upon good cause shown, could again intervene in the ongoing proceeding. However, the Staff reiterates that "[t]his proceeding will not be an ongoing proceeding once the Trustee's contention is withdrawn." Id. at 3. The Staff argues that since withdrawal of the only admitted contention in a proceeding brings the proceeding to an end (citing Houston Lighting & Power (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985)), "the Trustee's unopposed withdrawal of Cajun's contention must result in a Licensing Board decision granting the Trustee's request and terminating the proceeding with prejudice." Id. (Emphasis supplied)

Analysis

There is no guidance in Commission rules addressing the situation before us. It is clear that the Trustee desires, in the best interest of Cajun's bankruptcy, to end Cajun's involvement in this proceeding. And the Trustee clearly acknowledges his understanding that the withdrawal of the only contention submitted by the only intervenor in the proceeding "bring[s] this hearing proceeding to an end." Trustee's Motion at 7. However, it is also implicit in the Trustee's statements that the Trustee does not wish Cajun to be barred from litigating its concerns at some future time. Therefore, the Trustee expresses his desire to have the contention dismissed without prejudice. It appears that the Trustee is following the guidance of Rule 41 of the Federal Rules of Civil Procedure.

Under Rule 41 of the Federal Rules of Civil Procedure, a voluntary dismissal of a court action is generally without prejudice to the action being reinstated at a later date. Although there is no provision in the Commission's Rules of Practice that corresponds to the voluntary dismissal procedure in a court action, we see no good reason why those rules should not be applicable here, especially since the public interest theoretically would be served if Cajun can later establish that additional financial assurances are needed. Financial assurance is an issue of renewed current importance given the industry's transition to a more competitive environment.

Moreover, even if it were within our power to bar future action, there is a consideration of fairness at play here. Cajun is withdrawing its contention and seeking the termination of this proceeding under the duress caused by its own fiscal situation. As the Trustee stated in his Motion

I believe that the creditors of Cajun Electric's estate will be benefitted by the savings realized from terminating further participation in [this Board Proceeding] and by the dedication of the estate's limited resources, so far as practicable, to Cajun Electric's effective reorganization.

Trustee's Motion at 6.

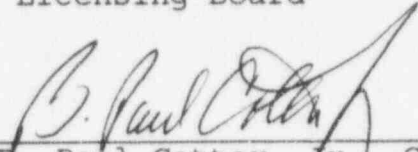
While the Trustee's current actions may be binding on Cajun in the event Cajun is returned to debtor-in-possession status, it would be unfair to impose a form of punishment, such as a bar of future action, against an Intervenor whose decisions are now being directed by a person with legal responsibilities other than those which supported the original intervention petition.

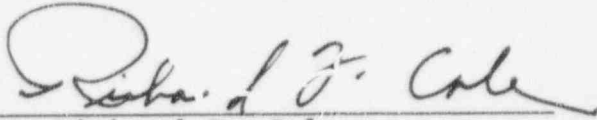
ORDER

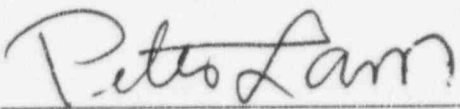
For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 29th day of March, 1996
ORDERED

That the motion of Cajun Electric Cooperative to withdraw its contention and terminate this proceeding, shall be, and it hereby is, granted and the proceeding is terminated without prejudice.

The Atomic Safety and
Licensing Board


B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE


Dr. Richard F. Cole
ADMINISTRATIVE JUDGE


Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 29, 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
GULF STATES UTILITIES COMPANY
(River Bend Station, Unit 1)

Docket No.(s) 50-458-0LA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O RE-SERVED AS LBP-96-5 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
4 day of April 1996


Office of the Secretary of the Commission