

July 27, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Union Electric Co.)	50-483-LR
)	
(Callaway Plant Unit 1))	

NRC STAFF'S RESPONSE TO REQUEST TO SHOW CAUSE AS TO WHY NEW
CONTENTION MOTION SHOULD NOT BE DEEMED CONCEDED/UNOPPOSED

INTRODUCTION

The staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the Atomic Safety and Licensing Board's ("Board") July 24, 2012 Memorandum and Order (Request to Show Cause as to Why New Contention Motion Should Not Be Deemed Conceded/Unopposed) ("Show Cause Order").

As discussed below, the admissibility of the new contention based upon *State of New York v. NRC*,¹ should not be deemed conceded or unopposed by the Staff. The pleading filed by the Missouri Coalition for the Environment on July 9, 2012 was entitled "[Petitioner's] Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway."² Like the Applicant, Ameren, the Staff read the directive in the Board's May 4, 2012, Initial Scheduling Order³ as requiring replies to motions for leave to file

¹ 681 F.3d 471 (D.C. Cir. 2012) (vacating the Commission's "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) and temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010)).

² Similarly titled motions for leave to file were submitted in other proceedings on the same day.

³ Licensing Board Memorandum and Order (Initial Prehearing Order), at 4 n.3 (May 4, 2012) (unpublished) (Agencywide Documents Access and Management System ("ADAMS") Accession No. (continued. . .)

new contentions within 14 days, not answers to new contentions.⁴ Since the Staff did not oppose the filing of the Motion for Leave to File a New Contention, it did not file a reply to the Motion for Leave to File a New Contention within the 14-day timeline. The Staff apologizes for misinterpreting the Board's Initial Prehearing Order and appreciates the Board extending the deadline for submission of the Staff's answer on the new contention's admissibility to August 3, 2012.⁵

BACKGROUND

On April 24, 2012, the Missouri Coalition for the Environment ("MCE") filed its Hearing Request and Petition to Intervene ("Petition").⁶ The Petition contained three environmental contentions challenging Union Electric Co. d/b/a Ameren Corp.'s ("Ameren" or "Applicant") license renewal application ("Application") for Callaway Plant Unit 1 ("Callaway"). On May 4, 2012, the Board issued an Initial Prehearing Order addressing several administrative matters.⁷ The Initial Prehearing Order does not address the time for providing answers regarding the admissibility of new or amended contentions filed after the time specified in 10 C.F.R. § 2.309(b). Rather, the Initial Prehearing Order addresses motions practice. Footnote 3, under

(. . .continued)
ML12125A168) ("Initial Prehearing Order").

⁴ Ameren's Response to Request Show Cause and Ameren's Unopposed Motion for Extension (July 24, 2012) (ADAMS Accession No. ML12206A608) ("Ameren Response to Show Cause Order").

⁵ Licensing Board Order (Extending Time to Answer Motion to Admit New Contention) (July 26, 2012) at 2 ("Extension Order").

⁶ Missouri Coalition for the Environment's Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Apr. 24, 2012) (ADAMS Accession No. ML12115A371).

⁷ See Initial Prehearing Order at 2-5 (addressing: A) notices of appearance, B) page limitations for pleadings, C) motions for extension of time, D) attachments/enclosures to filings and exhibits, and E) filing due dates.

the heading “Motions for Extension of Time,” addresses the timing of motions for leave to file new or amended contentions and answers to such motions.⁸

On May 21, 2012, the Staff and Ameren filed answers opposing MCE’s hearing request and intervention petition on the grounds that MCE had submitted no admissible contentions.⁹ At a July 7, 2012 prehearing conference in Fulton, Missouri, the parties argued the admissibility of MCE’s contentions¹⁰ and on July 18, 2012, the Board ruled that all three of the contentions were inadmissible.¹¹

On July 9, 2012, similar to motions for leave filed in other proceedings, MCE filed its Motion for Leave to File a New Contention challenging the Callaway Environmental Report, submitted in support of the Callaway Application, because it did not address “the environmental impacts of spent fuel pool leakage and fires and the environmental impacts that may occur if a spent fuel repository does not become available.”¹² MCE bases the new contention on a recent decision by the United States Court of Appeals for

⁸ See Initial Prehearing Order at 4 n.3 (noting that to be considered timely, motions seeking the admission of new/amended contentions “should be filed within 30 days of the date upon which the information that is the basis of the motion becomes available to the petitioner/intervenor, with any response to such a motion due within 14 days of service of the motion, and any reply to a response due within seven days of service of the response.”)

⁹ NRC Staff’s Answer to Missouri Coalition for the Environment’s Hearing Request and Petition to Intervene (May 21, 2012) (ADAMS Accession No. ML12142A368); Ameren’s Answer Opposing Missouri Coalition for the Environment’s Hearing Request and Petition to Intervene (May 21, 2012) (ADAMS Accession No. ML12142A158).

¹⁰ Transcript of Union Electric Company Callaway Plant Unit 1 Oral Arguments, June 7, 2012 (ADAMS Accession No. ML12165A196).

¹¹ Licensing Board Memorandum and Order (Ruling on Standing and Hearing Petition Contention Admissibility), LBP-12-15, ___ NRC ___ (2012) (ADAMS Accession No. ML12195A117).

¹² [Petitioner’s] Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway (July 9, 2012) at 1 (ADAMS Accession No. ML12191A359) (“Motion for Leave to File a New Contention”).

the District of Columbia Circuit in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).¹³

Prior to filing the Motion for Leave to File a New Contention, MCE's counsel contacted Staff counsel to discuss the Motion for Leave to File a New Contention in accordance with the consultation requirements in 10 C.F.R. § 2.323(b). Staff counsel responded that the Staff did not oppose the filing of the Motion for Leave to File a New Contention and that, as it did not have enough information to take a position on the admissibility of the contention, it would respond on the issue of admissibility in accordance with 10 C.F.R. § 2.309.¹⁴ Neither the Staff nor Ameren filed an opposition to MCE's Motion for Leave to File a New Contention, and on July 23, 2012, the Board issued the Show Cause Order, requesting the Staff and Ameren to explain why the new contention should not be deemed conceded or unopposed.¹⁵ On July 24, 2012, Ameren filed a response to the Board's Show Cause Order and request for extension of time to August 3, 2012 to respond to the new contention.¹⁶ On July 26, 2012, the Board granted Ameren's request for extension of time.¹⁷

DISCUSSION

Footnote 3, in the Initial Prehearing Order in this proceeding provided, in part:

The Board notes, however, relative to motions seeking the admission of new/amended contentions, see 10 C.F.R. § 2.309(f)(2), that to be considered timely such motions should be filed within 30 days of the date upon which the information that is the basis of the motion becomes available to the

¹³ *Id.*

¹⁴ E-mail from Mary Spencer, Attorney, NRC, to Henry Robertson, Attorney, Great Rivers Environmental Law Center (July 6, 2012) ("E-mail from Spencer to Robertson, Attachment A").

¹⁵ Show Cause Order at 2.

¹⁶ See Ameren Response to Show Cause Order.

¹⁷ Extension Order at 2 (extending the time for both Ameren and the Staff to provide answers on the admissibility of MCE's new contention).

petitioner/intervenor, with any response to such a motion due within 14 days of service of the motion, and any reply to a response due within seven days of service of the response.¹⁸

Because MCE filed the Motion for Leave to File a New Contention on July 9, 2012, more than fourteen days have now elapsed without a response from the Staff or applicant. Consequently, the Board has asked the Staff and Applicant to “show cause why the admissibility of this contention should not be deemed conceded/unopposed by those participants.”¹⁹

Like Applicant, the Staff failed to recognize that footnote 3 in the Initial Scheduling Order was intended to reduce the time for filing an answer to a new contention. The Staff incorrectly viewed the 14-day response deadline as applying to MCE’s Motion for Leave to File a New Contention, to which the Staff had no objection.²⁰ The Staff now recognizes the Board’s meaning of footnote 3 in the Initial Prehearing Order, and appreciates the Board extending the deadline for submission of the Staff’s answer on the new contention’s admissibility to August 3, 2012.

¹⁸ Initial Prehearing Order at 4 n.3.

¹⁹ Show Cause Order at 2.

²⁰ See E-mail from Spencer to Robertson, Attachment A.

CONCLUSION

As explained above, the Staff misread the Board's Initial Scheduling Order. The Staff apologizes for misreading the Order, and appreciates the Board extending the deadline for submission of the Staff's answer on the new contention's admissibility to August 3, 2012.

Respectfully submitted,

/Signed (electronically) by/

Mary B. Spencer
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Date of signature: July 27, 2012

Spencer, Mary

From: Spencer, Mary
Sent: Friday, July 06, 2012 5:15 PM
To: 'Henry Robertson'; david.lewis@pillsburylaw.com; dcurran@harmoncurran.com
Cc: Ghosh, Anita; Kanatas, Catherine; Mizuno, Beth
Subject: RE: Consultation pursuant to 10 CFR 2.323

The NRC Staff does not oppose the filing of the motion, but based on the representation in your email, the Staff does not have enough information to take a take a position on the admissibility of the proposed contention. The Staff will respond to the contention in accordance with 10 C.F.R. 2.309 when filed.

Mary B. Spencer
Counsel for NRC Staff
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Phone 301-415-1324

From: Henry Robertson [<mailto:hrobertson@greatriverslaw.org>]
Sent: Friday, July 06, 2012 2:53 PM
To: david.lewis@pillsburylaw.com; Spencer, Mary; Mizuno, Beth; Ghosh, Anita; Kanatas, Catherine
Cc: dcurran@harmoncurran.com
Subject: Consultation pursuant to 10 CFR 2.323

On behalf of Missouri Coalition for the Environment, I intend to file a Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway Nuclear Power Plant.

Pursuant to 10 C.F.R. 2.309(f)(1) and 2.309(f)(2), the new contention will challenge the failure of the Environmental Report for Callaway operating license renewal to address the environmental impacts of spent fuel pool leakage and fires as well as the environmental impacts that may occur if a spent fuel repository does not become available. The contention is based on the United States Court of Appeals for the District of Columbia Circuit's recent decision in *State of New York v. NRC*, No. 11-1045 (June 8, 2012), which invalidated the Nuclear Regulatory Commission's Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) and the NRC's final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)). *State of New York* vacated the generic findings in 10 C.F.R. 51.23(a) regarding the safety and environmental impacts of spent fuel storage. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings. Accordingly, these impacts must be addressed before a license is issued.

Pursuant to 10 C.F.R. 2.323, I am writing to see if you would oppose this Motion. I intend to file on Monday, and I would appreciate a response as soon as possible. If you have any questions, please do not hesitate to contact me.

Henry Robertson
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO REQUEST TO SHOW CAUSE AS TO WHY NEW CONTENTION MOTION SHOULD NOT BE DEEMED CONCEDED/UNOPPOSED" and "E-mail from Mary Spencer, Attorney, NRC, to Henry Robertson, Attorney, Great Rivers Environmental Law Center" in the above captioned proceeding have been served upon the following by the Electronic Information Exchange, this 27th day of July, 2012:

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/Signed (electronically) by/

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