

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)	
)	
The Cincinnati Gas & Electric)	Docket No. 50-358
Company, et al.)	
)	
(Wm. H. Zimmer Nuclear Power)	
Station))	

APPLICANTS' MOTION TO STRIKE "INTERVENOR FANKHAUSER'S
TESTIMONY FOR JUNE HEARING"

On June 1, 1979, Intervenor Dr. David B. Fankhauser filed a document captioned "Intervenor Fankhauser's Testimony for June Hearing." Applicants, The Cincinnati Gas & Electric Company, et al., hereby move that this document be stricken on the grounds that it is not competent evidence, is insufficient and improper on its face, fails to meet the requirements of the Board's Order of April 6, 1979 that written testimony related to Contention 6 be filed by June 1, 1979 and no foundation of expertise is shown for opinions indicated therein.

Section 2.743(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, provides that "only relevant, material and reliable evidence which is not unduly repetitious will be admitted."

Moreover, Section 2.743(b) of the Commission's regulations provides, in pertinent part, that "[t]he parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections

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presented." The direct testimony of Dr. David B. Fankhauser in written form, offered as evidence in this proceeding on his admitted Contention 6, was required to be filed on June 1, 1979.^{1/} The parties to this proceeding were served with a document alternatively designated as "Intervenor Fankhauser's Testimony," "a summary of Intervenor Fankhauser's prepared testimony," or "Notes for Testimony" by Dr. Fankhauser. It is clear that, no matter how this document is characterized, it is not written testimony as required by the Commission's rules or the Board's Order. The "Notes" consist largely of incomplete sentences and do not express cohesive thoughts, let alone testimony, on Contention 6.

This matter was specifically dealt with by the Board at the prehearing conference on May 23, 1979. The Applicant noted the apparent misunderstanding of Intervenor's counsel that only a "summarization of testimony" would have to be filed. In its ruling, the Board was quite clear that a summary would be filed in the response to discovery by May 28, but that "the testimony, nevertheless, would be due on June 1 or June 8 in connection with certain of their contentions." The Chairman in fact interrogated Intervenor's counsel to assure that this point was understood and received an affirmative reply. (Tr. 461-462) Accordingly,

^{1/} Licensing Board's "Order Determining Schedule," dated April 6, 1979.

no justification exists for the proffering of the present "Notes."

At the prehearing conference, the Board ruled that Dr. Fankhauser's Contention 1 involving spent fuel was dismissed (Tr. 455) and that for the present hearing only his Contention 6 as to hypothetical dose levels at the Moscow Elementary School would be considered. Nevertheless, the "Notes" submitted by the Intervenor appear to deal entirely with the issue of spent fuel as set forth in Contention 1, except for the last two sentences. These comments deal with the need for power which is not even a contention sought by or granted to Dr. Fankhauser. The contention of Miami Valley Power Project on the need for the Zimmer plant was dismissed by the Board. (Tr. 445)^{2/}

The "Resume" of Dr. Fankhauser attached to the "Notes" fails to establish his qualifications as an expert on the calculation of dose levels and thus he may not sponsor this testimony. The "possession of the required qualifications by a particular person offered as a witness, must be expressly shown by the party offering him." 2 Wigmore, Evidence §560, at pp. 640-41 (ed Ed. 1940) (emphasis in original), quoted in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). Opinion testimony is admissible only when presented by an expert witness and "supported

^{2/} Even if this matter had remained in issue, Dr. Fankhauser may not submit direct testimony with regard to another intervenor's contention. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 869 n. 17 (1974), aff'd CLI-75-1, 1 NRC 1 (1975).

by a rational explanation which reasonable men could accept as more probably correct than not correct." Nanda v. Ford Motor Co., 509 F.2d 213, 219 (7th Cir. 1975), cited in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), et al., Docket Nos. 50-514 and 50-515, "Order Denying Intervenor's Motion to Strike Certain Testimony of Gordon T. C. Taylor," November 4, 1976, unreported.

In addition to being irrelevant to Contention 6, most of the matters contained in Dr. Fankhauser's "Notes" are incompetent and immaterial being based merely upon unsupported statements or conclusions from newspaper reports and political speeches. No foundation is shown that the authors of the referenced statements had any qualifications to make them, or that they in any way related such statements to Zimmer. Essentially, most of Dr. Fankhauser's comments are simply argumentative and unsupported conclusions which are of no probative value.

For these reasons, the proffered testimony of Dr. Fankhauser should be stricken.

Respectfully submitted,

CONNER, MOORE & CORBER

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June 9, 1979

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Strike 'Intervenor Fankhauser's Testimony for June Hearing,'" dated June 9, 1979, in the captioned matter, have been served upon the following by deposit in the United States mail this 9th day of June, 1979:

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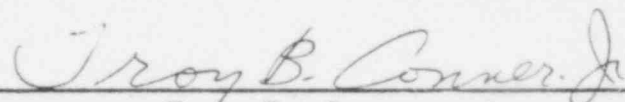
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