UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANTS' RESPONSE TO "INTERVENOR MIAMI VALLEY POWER PROJECT'S REQUEST TO INSPECT"

On April 20, 1979, Intervenor Miami Valley Power Project ("Project") requested that its representatives be allowed to enter the Zimmer Nuclear Power Station site to "inspect, measure, test, and sample any and every item known as a control rod, the seals on the control rods, and all cable trays."[1/] It was requested that such inspection take place on May 12, 1979.

Applicants, The Cincinnati Gas & Electric Company, et al., object to this discovery inasmuch as a similar request has already been denied by the Board and no reason to reconsider the decision has been asserted, the request is unduly broad, such inspection is unnecessary to the case, and such inspection is unduly costly to and burdensome upon the Applicants. Should the Board order that inspection be permitted, such discovery must be made subject to terms and conditions in order to protect the rights of the Applicants. In any event, inspections

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1/ "Intervenor Miami Valley Power Project's Request to Inspect Propounded on Applicants," dated April 20, 1979.

and testing as apparently contemplated by Intervenors would interfere with construction and create delays. Furthermore, Applicants move for a protective order that the requested discovery not be had or in the alternative that the Board impose certain terms and conditions to protect the rights of the Applicants.

10 C.F.R. §2.741(a)(2) provides that any party may serve any other party with a request to:

> Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of §2.740.

This Board has already denied a request for an extensive site inspection by the Project. In its "Order Determining Schedule," dated April 6, 1979, the Board rejected the Project's argument that "two full days" be allocated for an "in-depth" site inspection. A representative of the Project will, of course, accompany the Board on the site tour scheduled for the prehearing conference.

Moreover, as noted by the Board in its rejection of the previous request for inspection of the Zimmer site, the NRC's Office of Inspection and Enforcement is charged with inspection of the facility. Nothing has been advanced to show that the NRC's inspection effort has been in any way inadequate. The Project has not asserted any reasons why the Board's ruling

should be reconsidered, and, as the law of the case, it is determinative of the motion.

Furthermore, pursuant to another recent discovery request made by the Project of the Applicants relating to cable trays and control rods, extensive documentation relevant to the control rods and cable trays, including specifications and quality assurance records, has been requested. Thus, actual viewing of these components is unnecessary.[2/] Intervenor's request makes no showing that such information is not available from other sources and that on-site inspection, beyond that already provided by the Board's order, would provide any significant new information.

The inspection by Intervenors would be unduly burdensome on the Applicants. Because of the nature of the items for which inspection is sought and because of the extent of the inspection and testing requested, which request encompasses

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2/ See, e.g., Looper v. Colonial Coverlet Co., 29 F.Supp. 125 (D.C. Tenn. 1939); E. Totonelly Sons, Inc. v. Fairfield, 122 F.Supp. 849 (D.C. Conn. 1954). 10 C.F.R. §2.741(a)(2) closely parallels Rule 34 of the Federal Rules of Civil Procedure. It is well-established that the Commission's rules concerning discovery parallel those contained in the Federal Rules of Civil Procedure and that cases involving the Federal Rules may be looked to for guidance in interpreting the Commission's rules. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460-63 (1974); Illinois Power Co. (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 NRC 27, 33 (1976); Public Service Co. of Indiana (Marble Hill, Units 1 and 2), ALAB-374, 5 NRC 417, 421 (1977) (additional views of Mr. Farrar, joined in by the entire Board); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n. 13 (1977); Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

"any and every item known as a control rod, the seals on the control rods, and all cable trays" (emphasis supplied), a large manpower commitment and great expense would be incurred by the Applicants for both supervision of such inspection and handling of the items where necessary. In light of the availability of information necessary for the purposes of the hearing from other sources, placing this burden on the Applicant is unjustified.[3] This request for discovery should be denied as unduly broad.

Obviously, many such components have already been installed in the facility and are not subject to visual inspection. Even if inspection is ordered in this case beyond that provided for by the site inspection arranged by the Board, Intervenor's request for "testing" should be denied. It is not clear that the Intervenors have any understanding of the implied scope and complexity of their request. Indeed, read literally it could require disassembly of all cable trays and control rods. Testing is appropriate only where it could be performed subject to safeguards adequate to protect the rights of the parties.[4]

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3/ We again note in this regard, as did the Board, that the Commission's Office of Inspection and Enforcement does perform the type of "in-depth inspections" anticipated by the request, the results of which are a matter of public record.

4/ Williams v. Continental Oil Co., 215 F.2d 4, 6-7 (10th Cir. 1954). See, e.g., City of Kingsport, Tennessee v. SCM Corp., 352 F.Supp. 287 (E.D. Tenn. 1972); Cox v. E.I. duPont de Nemours and Company, 38 F.R.D. 396 (D.S.C. 1965).

Such conditions include posting of an indemnity bond[5] and may require specificity as to the method, nature and extent of such examination and the nature and extent of tests to be performed, including whether they would materially alter or destroy the capabilities of the items in question.[6]

The request should be denied because the Intervenors have failed to meet any of the foundations requirements. They have not stated what inspection and testing they seek although the request involves miles of cables and thousands of components. They have not set forth any responsible approach for evaluating components, let alone doing so with the required specificity. Even if they were shown to have any of the engineering skills necessary to perform such activities, they have not shown that their inspection and testing would not ruin the components. Moreover, it would appear that the proposed testing, which is undefined, could very well violate quality assurance requirements of the Commission's regulations and render a qualified

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5/ Williams v. Continental Oil Co., 215 F.2d at 5; cf. Arkansas State Highway Commission v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962).

6/ E.g., Sparberg v. Firestone Tire & Rubber Co., 61 F.R.D. 80, 83 (N.D. Ohio 1973). Cf. United States v. National Steel Corp., 26 F.R.D. 603, 607 (D.C. Tex. 1960); Empire Metal Insurance Co. v. Independent Fuel & Oil Co., 37 Miss. 2d 905, 236 NYS 2d 579 (1962); Klein v. Bendix - Westinghouse Automotive Air Brake Co., 221 N.E. 2d 722, 725 (Ohio 1966).

component unfit. In any event, it is clear that if permitted to engage in such actions, that it would at least interfere with construction and delay the project to some extent. The request should be denied.

In light of the nature of the items for which a right of inspection and testing has been requested, should the Board order Applicants to permit the activities in question, it should condition that order to provide the following:

1. Intervenor Miami Valley Power Project should reimburse Applicant for any and all costs resulting from compliance with this discovery request, including direct, indirect, consequential and delay costs.

2. Intervenor Miami Valley Power Project should be required to specify at least fifteen days in advance of such inspection the method, nature and extent of the examination and any tests to be performed, including the potential for the alteration or destruction of the performance capabilities of the items in question as a result of such testing.

3. An indemnity bond with guaranteed security should be posted by Intervenor Miami Valley Power Project to cover the Applicants' costs set forth in Paragraph 1, including costs of any damage to the items in question as a result of inspection and testing, including replacement parts and the cost of reassembly, testing and inspection of any new parts. Such bond should be set by the Board after

specification of the type of inspection and testing contemplated and after an opportunity to estimate costs involved has been submitted by the Applicants.[7/]

4. Any measuring, surveying, photographing, testing, or sampling should be done only by qualified experts in the field, approved by the Licensing Board after opportunity for objection by the parties[8/] and be subject to observation and supervision by the Applicants.

Applicants further object to the date specified by Intervenors in its request as giving inadequate notice. It does not allow sufficient time for scheduling and coordination of Applicants' manpower resources to accommodate such an inspection should it be ordered by the Board, over the objections of the Applicants. In any event, May 12, 1979, a Saturday, is not acceptable to the Applicants.

For all of the above reasons, Applicants hereby object to the discovery request of Intervenor Miami Valley Power Project,

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7/ At the present time, one day's delay in the construction of the plant would cost the Company and ultimately the consumers, at least approximately $364,000 per day. This amount would increase much more if the Applicants were required to obtain all replacement power by purchase for other utilities. Obviously, the cost of ruining any component would depend upon the replacement cost, if a replacement is available, plus the costs of delays. In the circumstances, it would appear that the minimum bond, which should be required, should be between $10 and $20 million.

8/ Cf. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1406, affirmed, CLI-77-23, 6 NRC 455 (1977).

dated April 20, 1979, and move for a protective order that the requested discovery not be had.

Respectfully submitted,

CONNER, MOORE & CORBER

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Counsel for the Applicants

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to 'Intervenor Miami Valley Power Project's Request to Inspect,'" dated May 3, 1979, in the captioned matter, were served upon the following by deposit in the United States mail this 3rd day of May, 1979:

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