UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANTS' RESPONSE TO MOTION BY INTERVENOR MIAMI VALLEY POWER PROJECT FOR RESUMPTION OF EVIDENTIARY HEARING ON CONTENTION 13 AND MOTION FOR ADDITIONAL RELIEF

On April 21, 1981, James H. Feldman, Jr., as counsel for intervenor, Miami Valley Power Project ("MVPP") moved to reopen the evidentiary hearing on Contention 13 relating to the financial qualifications of the Applicants to operate the Wm. H. Zimmer Nuclear Power Station. The stated reasons were that:

> [N]ew and material evidence unavailable to intervenor at the time of the last evidentiary hearing has just been made available to intervenor and for the further reason that such information may indicate that witnesses for the applicants may have perjured themselves at the last evidentiary hearing concerning contention 13. 1/

1/ Motion by Intervenor Miami Valley Power Project for Resumption of Evidentiary Hearing on Contention 13 (April 21, 1981).

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MVPP also moved for a continuance regarding the filing of its proposed findings of fact and conclusions of law.[2/]

Applicants submit that this motion is completely without basis and should be denied. The allegation was made in flagrant disregard of Mr. Feldman's obligations as an attorney. Further, the pleading should be stricken as scandalous, and the Atomic Safety and Licensing Board should impose sanctions against Mr. Feldman.

The stated basis for the motion was a claimed discrepancy between an alleged statement by an otherwise unidentified member or members of Applicants' witness panel for Contention 13: "Defendant's [sic] answered that there would be little or no costs [to provide replacement power in the event of a total shut-down of the Zimmer Plant] since the power from Zimmer was not necessary due to the applicants' reserve capacity"[3/] and an April 2, 1981 letter from E. A. Borgmann, Vice President, CG&E, to Harold Denton, Director, NRR.

It is shocking that in advancing a charge of perjury, counsel for MVPP gives no record citation for the alleged statement by Applicants' witness or witnesses nor even identifies which member of the five-member panel is claimed

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2/ Applicants' Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision was filed on April 24, 1981. Paragraphs 93 through 142 give general background as to the issue of the financial qualifications of the Applicants.

3/ Memorandum in Support of Motion by Intervenor Miami Valley Power Project for Resumption of Evidentiary Hearing on Contention 13 (April 21, 1981).

to have made such statement. In a hearing spanning three days covering over 700 transcript pages, it is outrageous, where such a serious charge is made, that there is absolutely no effort made to document or specify the alleged perjury. This alone would be sufficient to deny the motion.

A review of the transcript has failed to confirm that any of the Applicants' witnesses made the alleged statement. To the contrary, testimony of the panel is entirely consistent with the information contained in the April 2, 1981 letter. Mr. Feldman's charges appear to result from his inability to comprehend the evidence of record. 4/

During the course of the hearing, Mr. Borgmann stated that were the Zimmer unit hypothetically taken out of service, power from the Applicants' other units would replace the out-

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4/ With regard to the invocation of a perjury charge as a substitute for the failings of counsel, the Supreme Court stated in Bronston v. United States, 409 U.S. 352, 360-61 (1972):

> The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner-- so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. United States v. Wall, 371 F.2d 398 (CA6 1967); United States v. Slutzky, 79 F.2d 504 (CA3 1935); Galanos v. United States, 49 F.2d 898 (CA6 1931); United States v. Cobert, 227 F. Supp. 915 (SD Cal. 1964).

put from Zimmer, as opposed to power purchased from other companies.[5/] However, it was never stated or suggested that such replacement power would not be more costly to Applicants' customers than that produced by the Zimmer Station. In fact, in response to a question by Dr. Hooper, the witness answered that there would be costs to the Applicants' customers associated with such use of older generating facilities. The following colloquy between Dr. Hooper and Mr. Borgmann demonstrates this clearly:

> JUDGE HOOPER: I have one clarifying question of Mr. Borgman[n]. Yesterday we were talking about situations with an accident where there could be a long down time, and I believe that you said that Cincinnati Gas and Electric could absorb the load at little or no cost and without any outages because of the relatively small fraction of power you had in '76 with this plant. What other resources would be used in that situation, Mr. Borgman[n]? What other power resources would you be substituting?
>
> MR. BORGMAN[N]: I don't think I said "at no cost." I said we could supply it within our system, and as I indicated in conversation with Mr. Heile, normally we build a generating system with on the order of 20 percent reserve over peak load. So even at the peak period of a year, he'd have 20 percent reserve, and in the seven percent, you will subtract 20 percent, and theoretically you still have 13 percent reserved, even at peak times.
>
> Now, there are other periods of the year where your load would be less, but you schedule machines for outages.

5/ See, for example, Tr. 3683, 4046, 4223-24, 4294-95.

> If the accident would occur in those periods of time, you could conceivably keep equipment running for a year or maybe 18 months to carry you through that period of time, because you do have the built-in reserves, monitoring facility system in the system.
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> JUDGE HOOPER: I understand you have these reserve factors in the facility, but I'd like to know what they are.
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> MR. BORGMAN[N]: It would be a combination of older coal-fired units and some gas turbines. We have a combination of 500 megawatts combusti[on] turbines we use in the summer, we have two 40-year-old coal-fired, converted boilers which we bring in for peak periods of time. Then we have some late 1940 coal-fired units which right now are intermediate-type units. They are not used continuously, so that would be the type of equipment that would come on. There would be some incremental cost differences in the kilowatt hours, but it would not outage powers. 6/

Thus the testimony is that older units on the system would be utilized and fuel charges would account for increased costs to be eventually made up by the customers. Again, Applicants' review of the transcript reveals no inconsistent statement made by its witnesses. The April 2, 1981 letter shows that the monthly replacement energy cost is $5.3 million calculated using a replacement fuel mix of 95% coal and 5% oil. Thus, there is no inconsistency between the witness panel's statement and the April 2, 1981 letter.

It cannot be even argued that replacement power cost is a matter which first arose at the latest hearing session.

6/ Tr. 4293-95 (emphasis supplied).

The matter of replacement power costs has previously been discussed as early as August 9, 1979 in the context of Contention 6 relating to compliance with 10 C.F.R. Part 50, Appendix I. In response to a Board question, the Applicants stated that if Zimmer were not operating, replacement power, generated from the Applicants' own system, could result in increased costs of $169,138 a day, which correlates remarkably well with the $5.3 million month figure given in the April 2, 1981 letter.[7/]

MVPP has also failed completely to satisfy the Commission's requirements for reopening the record. The test as recently set forth by the Appeal Board in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (June 24, 1980) is as follows:

> (1) Is the motion timely? (2) Does it address significant safety (or environmental) issues? (3) Might a different result have been reached had the newly proferred material been considered initially?

See also Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), Docket Nos. 50-369 and 50-370, "Memorandum and Order Ruling on Motions to Reopen Record," (April 10, 1979)(slip op. at 11-14); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), Docket Nos. STN

7/ Applicants' Response to the Atomic Safety and Licensing Board's Two Questions Relating to 10 C.F.R. Part 50, Appendix I, following Tr. 2937; $169,138 per day x 30 days/month = $5.1 million/month.

50-488, 50-489 and 50-490, "Order Relative to Motions to Reopen the Record for Additional Hearings" (April 12, 1979)(slip op. at 4).

Petitioner here has failed to meet any of the three requirements for reopening the record. As previously noted, analyses of cost factors have long been part of the record of this proceeding and could and should have been fully addressed earlier. As there is no inconsistency between statements made at the hearing and the April 2, 1981 letter, there is no new information which can serve as the basis for reopening. Information regarding replacement power costs could have easily been obtained as part of the discovery process. Nor does any such information bear upon a significant safety or environmental issue. MVPP does not even make a bare allegation that the fact that replacement power could cost the Applicants' customers $5.3 million per month would even significantly affect the ability to finance the facility, let alone keep them from fulfilling the NRC's financial requirements.

The reckless accusation of perjury, which is unsupported by any specific citation, is scandalous and should be stricken. [8/] Metropolitan Edison Co. (Three Mile Island Nuclear Station,

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8/ Scandalous matters are those casting an excessively adverse light on the character of an individual or party. Budget Dress Corporation v. International Ladies' Garment Workers' Union, AFL-CIO, 25 F.R.D. 506, 508 (S.D.N.Y. 1959).

Unit No. 2), ALAB-474, 7 NRC 746, 748-49 (May 5, 1978); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391, 1396-97 (1977).

Moreover, the unsupported allegation is cause for disciplining Mr. Feldman pursuant to 10 C.F.R. §2.713(c) by permanently suspending him from participation in this proceeding.

The accusations made against Applicants' witnesses are particularly egregious inasmuch as the members of the panel are respected members of their community, four of them being officers of their respective companies and, as a practical matter, it is impossible for them adequately to defend themselves against such an insidious allegation. 9/ Mere allegations of possible perjury cause injury, and once made public and picked up by the press, as happened here, there is no adequate remedy. With consequences so severe and so irreversible, as should be obvious to any one, particularly a member of the bar, allegations should not have been made except after close scrutiny and investigation which led to the conclusion that they were of unquestionable accuracy. 10/ Nothing approaching that standard has been met here.

9/ In this regard, see Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-121, 6 AEC 319, 320 n.2 (1973).

10/ See ABA Code of Professional Responsibility and Ethical Considerations, Disciplinary Rule 7-102 which was adopted by the Ohio State Supreme Court in October 1970.

Under 10 C.F.R. §2.708(c), an attorney's signing of a pleading constitutes his personal representation that he believes the matters represented therein to be true. In alleging that the applicants' witness may have committed perjury, Mr. Feldman thereby represented that a factual basis existed for such an allegation. The accusation of perjury is an extremely serious matter, as perjury is a felony punishable under the criminal laws of the United States pursuant to 18 U.S.C. §1621.[11/] As the Appeal Board

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11/ 18 U.S.C. §1621 states:

> §1621. Perjury generally
> Whoever--
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> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
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> (2) in any declaration, certification, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
>
> is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

stated in a different context, "[c]ounsel appearing before this Board (as well as other NRC adjudicatory tribunals) have a manifest and iron-clad obligation of candor." Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 532 (November 2, 1978). This Board, as in its discretion sees fit, should exercise its authority pursuant to 10 C.F.R. §2.713(c) to reprimand, censure or suspend Mr. Feldman from participation in this proceeding.

Finally, given the facts as developed here, there is absolutely no reason for tolling the time for submission of proposed findings of fact and conclusions of law of MVPP or other party.

For the above stated reasons, MVPP's request for relief should be denied. Furthermore, the pleading should be stricken and Mr. Feldman subject to the penalties of 10 C.F.R. §2.713(c).

Respectfully submitted,

CONNER & MOORE

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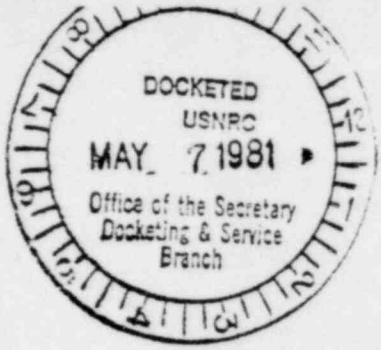
May 6, 1981



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Motion by Intervenor Miami Valley Power Project for Resumption of Evidentiary Hearing on Contention 13 and Motion for Additional Relief," dated May 6, 1981, in the captioned matter, have been served upon the following by deposit in the United States mail this 6th day of May, 1981:

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