



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' ANSWER TO MVPP'S MOTION TO
REOPEN THE RECORD FOR ADMISSION OF
EIGHT CONTENTIONS ON QUALITY ASSURANCE

Preliminary Statement

On June 3, 1983, intervenor Miami Valley Power Project ("MVPP") moved to reopen the record in this proceeding, which closed on March 4, 1982 (Tr. 7979), to litigate eight contentions on quality assurance practices at the Wm. H. Zimmer Nuclear Power Station ("Zimmer"). The proposed contentions that MVPP would litigate in a reopened proceeding are virtually identical to those which the Commission rejected almost a year ago when it noted that the "basis for the eight contentions which the Board has accepted as Board issues is simply a repetition of some of the problems

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revealed in the reports of the investigations which have already been released to the public." ^{1/}

MVPP frankly admits that, with some additional material, its "original contentions are again presented" in the instant motion, such that "[t]he basis for each contention is the evidence in the previous MVPP submissions" ^{2/} Thus, MVPP relies upon essentially the same allegations and body of publicly available documents in existence when the Atomic Safety and Licensing Board ("Licensing Board" or "Board") denied the same motion almost a year ago. ^{3/}

MVPP seeks to reopen this proceeding on these late contentions approximately ten months after the period permitted under NRC practice for appeal or reconsideration of a licensing board decision. This belated motion also comes more than three months after the denial by the Commission on February 18, 1983 of MVPP's petition for reconsideration of its earlier order requiring dismissal of MVPP's late contentions accepted by the Licensing Board. ^{4/}

^{1/} The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109, 110 (1982).

^{2/} MVPP's Motion to Reopen the Record for Admission of Eight Contentions on Quality Assurance and Character and Competence at 7 (filed June 3, 1983) ("MVPP's Motion to Reopen").

^{3/} Zimmer, LBP-82-54, 16 NRC 210 (1982).

^{4/} Zimmer, CLI-83-4, 17 NRC _____ (February 18, 1983), denying reconsideration, CLI-82-20, 16 NRC 109 (1982).

Applicants, The Cincinnati Gas & Electric Company, et al. ("Applicants"), strongly oppose this motion as clearly beyond the jurisdiction of the Licensing Board. First, once jurisdiction passed to the Atomic Safety Licensing and Appeal Board ("Appeal Board") upon the appeal by other intervenors from the Initial Decision, ^{5/} the Licensing Board lost jurisdiction to consider other matters. Upon remand from the Appeal Board's decision to consider two narrow issues relating to emergency planning preparedness, this Board has jurisdiction limited to those specific areas for which the Appeal Board has found further proceedings necessary. Second, the time within which MVPP was entitled to appeal or seek reconsideration of the Board's original order of July 15, 1982 denying admission of the contentions has long since lapsed.

In any event, MVPP has wholly failed to satisfy the Commission's requirements for the submission of late contentions and reopening of a concluded proceeding. MVPP attempts to circumvent the finding by this Board that it has not satisfied the Commission's legal requirements for reopening and late contentions ^{6/} by updating its earlier motion with more recent documents. The mere supplementation of late contentions with additional documents, however,

^{5/} Zimmer, LBP-82-48, 15 NRC 1549 (1982).

^{6/} Zimmer, LBP-82-54, 16 NRC at 213-14.

cannot cure an intervenor's initial failure to demonstrate "good cause" for its untimeliness.

Moreover, while MVPP again attempts to create the impression that voluminous documents support its claims, it incorporates by reference documents which demonstrate its knowledge of the subject matter months and even years ago. ^{7/}

For example, it relies on the initial findings by the Office of Inspection and Enforcement in IE Investigation Report 50-358/81-13, issued on November 24, 1981. In short, MVPP has shown nothing to give this Board grounds to reconsider its prior holding that MVPP's "failure [to demonstrate good cause for lateness] is particularly significant" and that "the balance of the five factors [under the test for late contentions] in this case tips against MVPP." ^{8/}

Nor has MVPP met the separate requirements for reopening a closed proceeding. For the same reasons discussed above, its presentation of the matter is untimely. Further, while the Commission's investigation of quality assurance

^{7/} This attempt to incorporate by reference all of its previous submissions of documents is an enormous imposition upon the Licensing Board, which should not be expected to sift through the factual record in order to figure out what MVPP is alleging. Such incorporation is ordinarily frowned upon by the boards and demonstrates MVPP's general inability to focus its allegations in this motion.

^{8/} Zimmer, LBP-82-54, 16 NRC at 213-14.

practices at Zimmer certainly addresses a safety matter, MVPP's regurgitation of the Staff's findings does not. Were MVPP's issues to be litigated, the Licensing Board could do no more than order the Staff to perform the same function which the Commission itself has already directed. Thus, reopening for MVPP's late contentions would not create a different result in the proceeding.

With regard to the Staff's ongoing review of quality assurance at Zimmer, it is significant that on June 6, 1983 the Commission recently declined to review a decision of the Director, Office of Inspection and Enforcement, which granted relief sought by MVPP pursuant to 10 C.F.R. §2.206 insofar as the relief sought was consistent with the Commission's previous requirements. Relief was denied, however, insofar as MVPP sought, as it now seeks, to modify the carefully formulated plan ordered by the Commission for resumption and completion of construction at Zimmer. If MVPP is dissatisfied with that result, the appropriate remedy does not lie with this Licensing Board.

In sum and substance, MVPP's motion presents nothing which is new or unanticipated by the Commission at the time it required dismissal of the same eight contentions proposed again by MVPP. This Board should follow the recent example of the Licensing Board in Limerick, which summarily denied a motion to reopen that was merely a repetition of motions

previously denied. ^{9/} Accordingly, the motion to reopen should be denied in all respects.

Argument

I. The Licensing Board Lacks Jurisdiction
Over MVPP's Motion to Reopen.

A. Factual Background.

MVPP initially filed its motion to reopen the proceeding to admit late contentions on quality assurance on May 18, 1982. Eight new contentions were proposed along with the allegedly "new" documentary information that justified their late admission. In denying MVPP's motion to admit these contentions, although accepting them sua sponte, the Board expressly determined that, on balance, the criteria under 10 C.F.R. §2.714(a)(i)-(v) for admitting late contentions did not weigh in MVPP's favor. ^{10/} MVPP neither sought reconsideration of nor appealed the order of the Licensing Board refusing to admit its eight late proposed contentions as intervenor issues.

On July 30, 1982, the Commission instructed the Licensing Board to issue an order dismissing its eight sua sponte

^{9/} Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983) (slip op. at 9 n.3).

^{10/} Zimmer, LBP-82-54, 16 NRC at 213-14.

contentions from the proceeding. 11/ The order dismissing the eight contentions was entered by the Licensing Board on August 2, 1982.

Again, MVPP neither sought any further relief from the Licensing Board regarding its denial of MVPP's late contentions nor appealed the denial. Instead, on August 20, 1982 MVPP filed a petition with the Commission for reconsideration of its order of July 30, 1982. In a subsequent order issued on February 18, 1983, the Commission denied MVPP's petition for reconsideration, noting as follows:

[I]nsofar as MVPP seeks relief from the Licensing Board or appellate review of the Licensing Board's determination that, on balance of the relevant factors, MVPP failed to meet the Commission's standards for the reopening of the record and admission of those contentions, this order leaves MVPP free to pursue its course in the normal fashion prescribed by agency rules.

. . . The Commission has no view on whether MVPP has met the standards for reopening or for admission of late contentions and does not wish to entertain the matter out of the normal sequence. Thus MVPP may seek reconsideration or further relief from the Licensing Board or appellate review from the Appeal Board as appropriate under Commission rules. 12/

Notwithstanding the express invitation of the Commission and the prescribed time limitations for seeking the relief

11/ Zimmer, CLI-82-20, supra.

12/ Zimmer, CLI-83-4, supra, at 2-3 (emphasis added).

available to it, MVPP did not move to reopen the record for admission of its previously denied eight late contentions on quality assurance until the filing of its renewed motion on June 2, 1983.

In the interim, the Licensing Board and the Appeal Board had completed all matters to be decided for the issuance of an operating license for Zimmer, except for two narrow issues related to emergency preparedness which the Appeal Board remanded for disposition. As the Licensing Board stated in denying MVPP's late contentions, its Initial Decision "normally would have concluded this Board's consideration of the license application." ^{13/}

^{13/} Zimmer, LBP-82-54, 16 NRC at 213. In a similar statement elsewhere, the Board criticized MVPP for waiting "until the eve of an Initial Decision which normally would conclude a proceeding" Id. at 214.

The Initial Decision expressly noted that the eight MVPP late contentions on quality assurance were a separate matter for which the Licensing Board was retaining jurisdiction to decide subsequently. Zimmer, LBP-82-48, 15 NRC at 1553. Elsewhere the Licensing Board stated: "This Board retains jurisdiction of this matter to rule on the motion of MVPP to admit new contentions and conduct any further proceedings which may become necessary as a result of that motion and the Board's rulings set forth herein." Id. at 1608 (emphasis added). This language reflects the Board's clear understanding, with which Applicant agrees, that the Board had authority to retain jurisdiction to rule upon MVPP's motion filed before the issuance of the Initial Decision. Such action did not, however, leave the record open indefinitely for whatever MVPP might file a year later.

Thus, in the Initial Decision, the Licensing Board decided all matters in controversy among the parties within its delegated jurisdiction, ^{14/} subject to its decision upon the then pending motion by MVPP to add the new, late contentions on quality assurance. The remand from the Appeal Board in ALAB-727, issued on May 2, 1983, vested the Licensing Board with jurisdiction only over those particular matters involving the adequacy of school evacuation plans for Clermont County, Ohio and Campbell County, Kentucky. ^{15/}

B. The Jurisdiction Of The Licensing Board
Upon Remand Is Limited To Narrow Aspects
Of Emergency Planning Preparedness.

The Licensing Board is a creature of the Commission's delegated authority and therefore may not act beyond its express grant of jurisdiction. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). The jurisdiction of the Licensing Board in an operating license proceeding such as Zimmer is limited to issues in controversy among the parties. ^{16/}

^{14/} 15 NRC at 1607.

^{15/} See Zimmer, ALAB-727, 17 NRC ____ (May 2, 1983). On June 13, 1982, the Commission extended the time for its review of ALAB-727 to July 13, 1983.

^{16/} See 10 C.F.R. §2.760a; Zimmer, LBP-82-48, 15 NRC at 1607.

Once a licensing board rules upon all such matters before it in an initial decision, and exceptions have been filed, the licensing board no longer has jurisdiction to entertain a request for further relief. As the Appeal Board stated in the Three Mile Island proceeding:

Taken together, these provisions [10 C.F.R. §§2.717(a), 2.718(j) and 2.760(a)] imply that a licensing board is empowered to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or an appeal board can exercise its right to review the record. 17/

Inasmuch as the Initial Decision rendered by the Licensing Board on June 21, 1982 by its terms covers all remaining issues necessary for the issuance of an operating license for Zimmer, it follows from the Three Mile Island decision that the Board possessed jurisdiction to consider requests for other relief only until the expiration of time for filing exceptions (ten days thereafter plus service time). 18/

17/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC ____ (October 27, 1982) (slip op. at 4-5). The same result was reached in Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC ____ (May 2, 1983) (slip op. at 3-4).

18/ See 10 C.F.R. §2.762(a). Of course, it is recognized that the Licensing Board also retained jurisdiction to dispose of MVPP's earlier motion to reopen filed on May 18, 1982. As discussed above, however, that motion was
(Footnote Continued)

Earlier decisions of the Appeal Board establish the basic proposition that retention of jurisdiction by a board to dispose of specific issues, following disposition of all contested issues in an initial decision, is limited to those specific issues alone. The first such situation arose in the Seabrook proceeding, ^{19/} where an intervenor moved to reopen the record for further consideration of the applicants' financial qualifications. The Appeal Board noted that it had already reviewed the initial decision authorizing issuance of the construction permits and that its decision had been affirmed by the Commission and the Court of Appeals for the First Circuit. It stated that "the fact that we still have before us an entirely discrete issue raised in the proceeding" ^{20/} did not alter its conclusion that it lacked jurisdiction to grant any reopening of the record. The Appeal Board added that its decision did not leave the intervenor without a remedy, since relief could be sought from the Director pursuant to 10 C.F.R. §2.206.

The same situation arose in the North Anna proceeding, which involved sua sponte review of an initial decision

(Footnote Continued)

in fact denied and MVPP's right to seek reconsideration or appellate review of that decision has long since expired.

^{19/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978).

^{20/} 8 NRC at 695.

authorizing the granting of an operating license. The Appeal Board retained jurisdiction with respect to three limited issues. Subsequently, the NRC Staff transmitted a Board notification which brought an unrelated safety question to the attention of the Appeal Board. Having requested the parties to comment upon its jurisdiction to consider the matter, the Appeal Board stated its agreement with the Staff's view that it lacked jurisdiction:

Where, as here, finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a "reasonable nexus" between those matters and the issues remaining before the board. 21/

Elaborating upon the authority of the Commission's subordinate boards to consider new matters, the Appeal Board stated:

The authority vested in the adjudicatory boards to raise or to consider new issues must be understood, however, to be qualified by settled principles relating to the finality of adjudicatory action; principles which govern our proceedings to no less an extent than those of the courts or other administrative agencies. Thus, once an appeal board has wholly terminated its review of an initial decision - whether it be a construction permit or an operating license proceeding - its jurisdiction over the proceeding comes to an end. To be sure, that jurisdiction may be resurrected by a remand order of either

21/ Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979).

the Commission or a court, issued during the course of its own review of our decision. What might be considered by us on the remand would, however, be shaped by that order, i.e., if (as would customarily be the case) the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of its scope to embrace discrete matters.

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No good reason appears why any different result might obtain where, as here, an operating license proceeding is involved and the question is one of jurisdiction to entertain an entirely new issue (rather than to reopen a previously resolved one). For the purposes of the application of the finality doctrine, the precise nature of the Commission license sought should be of little moment. And, irrespective of whether a reopening of a determined issue, or instead the raising of an issue not earlier considered, is involved, the concept underlying the finality doctrine - that litigation must come to an end at some point - comes into play. In both instances, the decisive factor is whether, except for those limited issues as to which jurisdiction has been expressly retained, the case has been decided. 22/

In the St. Lucie proceeding, the Appeal Board also dismissed a motion to reopen for lack of jurisdiction. That case involved an appeal from an initial decision which the Commission elected not to review and which was upheld on appeal in the federal courts. The Appeal Board retained jurisdiction, however, to consider two unresolved matters.

22/ Id. at 708-09.

During the proceeding on one of the matters, intervenors filed a motion to reopen the record on an unrelated issue. Reviewing its previous holding in the Seabrook proceeding, the Appeal Board stated:

The Seabrook intervenors later sought on grounds of supervening developments to resurrect the issue previously interred by the Board. As do intervenors in this case, they argued that we were free to act because the existence of discrete if unrelated issues still open before us meant that the proceeding was not final. We squarely rejected that argument. We held in Seabrook that after we had relinquished jurisdiction over a cause except for limited purposes, where the appellate process was otherwise completed we could not admit new contentions unrelated to those purposes. There must be an end to litigation sometime.

. . . . In the absence of a rational and direct link to the limited matters over which we retain jurisdiction, we are without authority to consider new or reopened issues at this stage of the proceeding. 23/

There is absolutely no reason why the limited jurisdiction of the Licensing Board in this proceeding to consider narrow issues related to emergency planning upon remand should be viewed any differently than the limited jurisdiction of the Appeal Board retained in the Seabrook, North

23/ Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980) (emphasis added). As in Seabrook, the Appeal Board emphasized that its ruling "does not leave intervenors remediless" in view of the relief available under 10 C.F.R. §2.206. 11 NRC at 226.

Anna and St. Lucie cases. ^{24/} The principle of finality in administrative proceedings and the Commission's express policy considerations favoring an expeditious completion of licensing proceedings ^{25/} dictate that a licensing board with limited jurisdiction on remand to consider discrete issues should not be deemed to possess unlimited jurisdiction to take up wholly unrelated matters which were never even litigated.

C. The Time Within Which MVPP May Have Appealed Or Sought Reconsideration Of The Denial Of Its Late Contentions Has Expired.

Inasmuch as the motion contains virtually the identical eight contentions previously proposed and rejected as

^{24/} As the Board stated in the Perkins proceeding: "Jurisdiction is lost over some issues upon completion of consideration of them, while retained over other issues pending completion of consideration. Accordingly, section 2.718(j) must be read to mean that an initial decision on some issues terminates a licensing board's jurisdiction to reopen the proceeding on those issues." Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), Docket Nos. STN 50-488-CP, 50-489-CP and 50-490-CP, "Order Relative to the Petition of David Springer and Intervenor's Motion of June 6, 1980" (August 14, 1980) (slip op. at 3). In the instant case, the Initial Decision issued by the Licensing Board similarly terminated its jurisdiction over all contested issues, except those for which remand was necessary. Jurisdiction over MVPP's motion to reopen, according to the holding in ALAB-699 in Three Mile Island and ALAB-726 in Limerick, terminated upon the expiration of time for filing exceptions.

^{25/} See generally Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). In particular, the Commission emphasized the desirability of completing initial decisions promptly. 13 NRC at 458.

inexcusably late, it is clear that the instant request is essentially a motion for reconsideration. In the Allens Creek proceeding, the Licensing Board faced an identical situation, which it handled as follows:

Our Memorandum and Order of June 2, 1982, denied an earlier Doherty motion of April 22nd which had requested in part that the record be reopened to consider his Contention 58A, the thrust of which was substantially similar, if not identical, to the currently proposed Contention 59A. Recognizing that his April 22, 1982 filing was defective, he now seeks to remedy those defects. Accordingly, we treat the instant motion to reopen the record, insofar as Contention 59A is concerned, as being a motion for reconsideration of our June 2, 1982 Order. 26/

Similarly, in the Bailly proceeding, the Board denied a motion to admit a new contention "which is, in effect, a motion to reconsider our prior denial of these issues that were contained in similar contentions that we had previously ruled inadmissible." 27/

Under the NRC's Rules of Practice, the time has long since expired within which MVPP could have timely appealed or sought reconsideration of the Licensing Board's denial of

26/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466-CP, "Memorandum and Order" (July 15, 1982) (slip op. at 1-2).

27/ Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), Docket No. 50-367 CPA, "Memorandum and Order" (March 30, 1981) (slip op. at 4).

its late contentions. Thus, if MVPP were aggrieved by the Licensing Board's order of July 15, 1982, it should have sought reconsideration at that time ^{28/} or have filed an appeal from the order. ^{29/} The fact that MVPP, for whatever

^{28/} While the NRC's rules do not expressly provide for the right of a party to seek reconsideration of an Initial Decision, the analogous rule under 10 C.F.R. §2.771 permits a party to seek reconsideration of a decision by the Commission within 10 days. The Appeal Board imputed Section 2.771 to apply to Licensing Board's decisions in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646-47 (1974) and reaffirmed this position in Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-659, 14 NRC 983, 985 n.2 (1981). See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289, "Memorandum and Order Modifying Partial Initial Decision of December 14, 1981" (January 26, 1982) (slip op. at 2).

^{29/} As a supplement to its Initial Decision, (see n.10, supra), the order of July 15, 1982 denying admission of the late contentions was a final, appealable order. Under the NRC rules, a party may appeal a decision or ruling which he can show will result in some discernible injury to itself. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975). Such "discernible injury" obviously resulted from the Board's denial of MVPP's late contentions since a party is in a far preferable situation litigating its own contentions. First, completely different standards govern the disposition of sua sponte contentions as opposed to those raised by the parties. A licensing board which raises an issue sua sponte need only satisfy itself that its questions "have been adequately answered." Public Service Electric & Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 451 (1980), aff'd, ALAB-650, 14 NRC 43 (1981), aff'd, Township of Lower Alloways Creek v. Public Service Electric & Gas Company, 687 F.2d 732 (3d Cir. 1982).

By contrast, the Applicant bears the burden of proof by
(Footnote Continued)

reason, only sought further relief from the Commission with regard to its own order of July 30, 1982 does not enlarge the time within which it otherwise should have acted.

D. Even If The Commission Intended To
Give MVPP Additional Time, The Period
For Appeal Or Reconsideration Has Ended.

It is recognized that the Commission's denial of MVPP's petition for reconsideration stated that MVPP may seek "reconsideration or further relief from the Licensing Board or appellate review from the Appeal Board as appropriate under the Commission rules." ^{30/} It is clear from the Commission's decision, however, that it did not consider or prejudice the jurisdictional issue, but merely left MVPP in a position to pursue whatever remedy was open to it under the rules. Nonetheless, even assuming for the sake of argument that MVPP could have waited until the Commission decided its petition for reconsideration, the Commission's order of February 18, 1983 unambiguously states that MVPP should have sought relief promptly under the Commission's governing

(Footnote Continued)

a preponderance of the evidence on all contested issues throughout the proceeding. 10 C.F.R. §2.732; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 105 (1976). In contrast to a licensing board's discretion to dismiss a sua sponte issue when it feels satisfied with the record, a board cannot dispose of an intervenor's contention without an evidentiary hearing if any genuine issue of fact exists. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), ALAB-696, 16 NRC ____ (October 1, 1982) (slip op. at 23-24).

^{30/} Zimmer, CLI-83-4, supra, at 3.

rules. Thus, even with the clock beginning to run from February 18, 1983, the time within which MVPP had under the rules to seek reconsideration or appellate review has also long since expired.

II. MVPP's Motion Fails To Meet The Commission's Requirements For Late Contentions And Reopening.

Even if the Licensing Board should determine that it has jurisdiction to rule upon MVPP's motion to reopen, the motion should be denied because it does not satisfy the Commission's requirements for late contentions as well as the additional criteria for reopening. It is well settled that when an intervenor seeks to reopen a proceeding to litigate late contentions, it must satisfy both the requirements for reopening and those for late contentions under 10 C.F.R. §2.714(a)(1)(i)-(v). ^{31/} In the instant proceeding, the last day for filing contentions with a timely petition to intervene pursuant to the Notice of Hearing, dated September 24, 1975, was October 24, 1975. ^{32/}

^{31/} Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC (December 23, 1982) (slip op. at 4); Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC (December 21, 1982); South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), Docket No. 50-395-(L, "Memorandum and Order" (April 28, 1982) (slip op. at 2-3).

^{32/} See 40 Fed. Reg. 43959 (September 24, 1975).

Moreover, the criteria for accepting late contentions and reopening must be addressed in the context of the particular circumstances of each proceeding. In the instant case, the Commission has deeply immersed itself in the details of the ongoing quality assurance reviews at Zimmer and has carefully structured the manner in which the quality confirmation and verification programs must be completed to its satisfaction prior to resumption and completion of construction at Zimmer. It is significant that MVPP has clearly involved itself with this ongoing effort and has sought, in effect, to modify the Commission's approach by the filing of a petition for relief under 10 C.F.R. §2.206. The petition filed by MVPP under this provision on August 20, 1982 was in fact granted in part by the Director, Office of Inspection and Enforcement, in a decision rendered on February 10, 1983. ^{33/} In that decision, the Director observed that "[o]f MVPP's three basic requests for action, the Commission's order [to show cause issued November 12, 1982] satisfies substantially all of them." ^{34/} It would be inappropriate for this Board to determine collaterally that it regards the Commission's approach, as challenged by MVPP

^{33/} Zimmer, DD-83-02, "Director's Decision Under 10 CFR 2.206," 17 NRC ____ (February 10, 1983). On June 6, 1983, the Commission indicated that it would not review the Director's decision.

^{34/} Id. (slip op. at 3).

in the Section 2.206 petition, to be inadequate. It would also be inappropriate and highly inefficient for this Board to establish a "dual track" review for the same issues indisputably covered by the Commission's requirements.

A. MVPP's Late Contentions Do Not Qualify
For Admission Under The Five Factors
Of 10 C.F.R. §2.714(a)(1)(i)-(v).

The fact that MVPP has not made the showing necessary under 10 C.F.R. §2.714(a)(1)(i)-(v) to litigate its eight proposed quality assurance contentions has already been firmly established. The Licensing Board's prior ruling on these contentions in its order of July 15, 1982 is wholly dispositive on this point. Specifically, the Board stated at that time:

Applicants' discussion of the decisions interpreting the requirements which must be met if tardy contentions are to be accepted does, as recognized by Staff, have validity. Further, Applicants' argument that MVPP has not met these requirements, particularly the "good cause" requirement, has much to recommend it. 35/

The Board further observed:

With regard to the factors to be addressed in order to satisfy the requirements of 10 CFR §2.714 for acceptance of tardy contentions, MVPP makes a very weak showing.

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35/ Zimmer, LBP-82-54, 16 NRC at 212.

As to good cause for the late submission, MVPP fails to tell us when it learned the information which prompted the Motion and is vague as to precisely what this information is. Given the timing of its Motion (on the eve of an Initial Decision which normally would have concluded this Board's consideration of the license application) we think this failure is particularly significant. 36/

As to the remaining factors for considering late contentions, the Board ruled that MVPP's presentation on the availability of other means to protect its interest "seems to miss the mark," and further held "that MVPP is clearly and indisputably wrong in its belief that granting its Motion will not delay the proceeding" since the matters it raised "may well involve lengthy proceedings before this Board." 37/ The Board found that only the third and fourth factors of the test for late contentions weighed in MVPP's favor. Accordingly, the Licensing Board held: "In conclusion, we find that the balance of the five factors in this case tips against MVPP." 38/

36/ Id. at 213. Elsewhere, the Board stated that the motion "does not specifically identify the information which MVPP asserts it recently learned, or when that information was learned." Id. at 211.

37/ Id. at 213-14.

38/ Id. at 214.

Moreover, in reversing the Board's sua sponte action, the Commission itself agreed with the Licensing Board's conclusions, stating:

The basis for the eight contentions which the Board has accepted as Board issues is simply a repetition of some of the problems revealed in the reports of the investigations which have already been released to the public. The Miami Valley Power Project (MVPP), an Intervenor, which filed an untimely request with the Board that these issues be considered, suggested that it had new information on these matters. MVPP did not in its motion to the Board or elsewhere sufficiently identify any new information, its source, or say when it became available. The NRC staff supported the motion to reopen. However, the staff recognized and the Board ruled that the legal standards for further hearings were not met. 39/

In denying MVPP's petition for reconsideration, the Commission reiterated "the Licensing Board's determination that, on balance of the relevant factors, MVPP failed to meet the Commission's standards for the reopening of the record and admission of those contentions" 40/ An analysis of

39/ Zimmer, CLI-82-20, 16 NRC at 110 (emphasis added).

40/ Zimmer, CLI-83-4, supra, at 2. Although the Commission added that it did not have a view on whether MVPP had met the standards for reopening or for admission of late contentions, its earlier observations that the proposed contentions added nothing new to what had already been publicly reported by the NRC remains valid. This point was emphasized by Commissioners Ahearne and Roberts in their separate opinion in the Commission's Order of February 18, 1983, denying MVPP's petition for reconsideration. They expressed the view
(Footnote Continued)

the instant motion confirms that it, too, is similarly deficient.

B. MVPP Has Not Shown "Good Cause"
For Its Extreme Lateness.

Given the Board's determination that the contentions proposed by MVPP in its submission of May 18, 1982 were inadequate, it follows a fortiori that the instant motion to reopen is even less meritorious. This much is obvious from a comparison of the two pleadings and their bases. First, not only are the subject matters of the two motions the same, but the wording of the May 18, 1982 and June 2, 1983 proposed quality assurance contentions are virtually identical. As MVPP itself openly acknowledges, the "original contentions are again presented" in the latest version of the motion. ^{41/} In addition, much of the language purporting to furnish the basis and specificity for the proposed contentions has been lifted practically verbatim from the earlier pleading. ^{42/}

(Footnote Continued)

that "the Commission at least implicitly affirmed the Board on the question of reopening the record" because the Commission "found no reason to disagree" with the Board's finding that MVPP had failed to show good cause for its untimely filing of its quality assurance contentions. Id. at 1 (views of Commissioners Ahearne and Roberts dissenting in part).

^{41/} MVPP's Motion to Reopen at 7.

^{42/} Compare, e.g., Contention 3 in MVPP's Motion for Leave to File New Contentions at 7-9 with Contention 3 in MVPP's Motion to Reopen at 10-12.

Moreover, none of the documents relied upon by MVPP demonstrates the requisite "good cause" for untimely contentions on quality assurance. It must be emphasized at the outset that the Commission's rules require a party to come forward with any late contention with reasonable promptness after the party has learned of the matters which provide the basis for the proposed late contention. Thus, while a party may not litigate a vague contention in the hope of discovering information to support it, conversely, it may not sit back and wait to file a late contention until, in its view, it has obtained "all" of the information supportive of the late contention. As the Appeal Board stated in the Catawba proceeding, "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." 43/

As MVPP freely admits, the instant motion is supported chiefly by MVPP's Petition to Suspend Construction of the Zimmer Station, filed on August 20, 1982, which contained issues "identical to eight contentions originally proposed by MVPP on May 18, 1982 as the basis for reopened licensing

43/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC _____ (August 19, 1982) (slip op. at 13).

hearings" ^{44/} MVPP also continues to rely upon IE Investigation Report 50-358/81-13, which was the culmination of the Staff's investigation of quality assurance practices at the Zimmer Station at the time the report was issued on November 24, 1981. Similarly, MVPP's reliance upon "ASME audit findings" in 1982, ^{45/} fails to show "good cause" for lateness. None of these documents, or any of the documents referenced therein, can possibly justify MVPP's extreme lateness in proposing the very same late-filed contentions previously rejected a year ago as untimely. ^{46/} MVPP's inflated, almost grandiose, view of its role in these

^{44/} Supplement to MVPP August 20 Petition to Suspend Construction of the Zimmer Station at 1 (October 18, 1982). The October 18, 1982 supplement is another document upon which MVPP substantially relies in seeking reopening now.

^{45/} MVPP's Motion to Reopen at 26.

^{46/} Nor do the other documents relied upon by MVPP demonstrate any "good cause" for waiting until June 2, 1983 to file their renewed motion. As with the first version, the motion relies to a great extent upon an assortment of newspaper clippings, congressional testimony and statements, and MVPP's own statements or those of its counsel.

matters 47/ certainly does not establish the missing "good cause" for its lateness.

Nor does the generation of more recent documents in the course of resolving quality assurance issues at Zimmer 48/ give rise to "good cause" for litigating these late contentions. In its order of July 30, 1982, the Commission clearly envisioned the fact that ongoing activities would

47/ For example, MVPP states that certain documentation will be submitted only "after obtaining this Board's guidance on how to create the record without compromising ongoing NRC and law enforcement investigations." MVPP's Motion to Reopen at 34 n.41. This statement is presumptuous and misleading in the extreme. MVPP explains that it released certain "evidence," which resulted in a complaint from the Region III Administrator on October 28, 1982. MVPP cites a January 10, 1983 letter from the Staff requesting that "MVPP not publish certain interviews during the pendency of the Zimmer investigation." Id. at 44. Reference to the correspondence cited by MVPP demonstrates that the "evidence" released by MVPP was transcripts of interviews conducted by the NRC, not by MVPP or its counsel.

48/ Principally, MVPP relies upon certain statements and findings in NUREG-0969, "Report of the NRC Evaluation Team on the Quality of Construction at the Zimmer Nuclear Power Station" (April 1983) ("NET Report"). MVPP also cites a memorandum dated January 31, 1983 (attached as part of its Exhibit 3), which pertains to the welder qualification review undertaken as part of Task II of the Quality Confirmation Program ("QCP"). Similarly, IE Investigation Report No. 50-358/82-10 (March 25, 1983), cited by MVPP at page 34 of its motion, relates to the welder qualification issue.

The legal pleadings and other documents relating to the rights of Applicants' shareholders or as between Applicants themselves are irrelevant as such matters lie beyond the jurisdiction of the NRC and fail to give rise to any litigable issue.

result in further findings and reports on quality assurance matters. ^{49/} The Commission stated:

The NRC has been investigating alleged quality assurance irregularities at Zimmer since January 1981. The investigations are still ongoing. The investigations have identified a number of quality assurance-related problems at the Zimmer site. An extensive review of the as-built plant is currently being performed. Before the plant can be licensed, a comprehensive quality confirmation program will have to be conducted and identified problem areas resolved. By itself, without factoring in any rework, the quality confirmation program will be both costly and time-consuming. ^{50/}

Likewise, the Commission's order to show cause, establishing the requirements for resumption of construction at Zimmer, certainly reflects the Commission expectation that further information would be developed. Nothing, however, in the Commission's order denying MVPP's petition for reconsideration indicates its belief that such recently generated documentation would in any way furnish the requisite "good cause" for MVPP's preexisting lateness.

^{49/} Zimmer, CLI-82-20, 16 NRC at 110.

^{50/} Id.

Rather, the Commission intended the Licensing Board to reconsider the matter of reopening, if requested, based upon the state of the record as of the date of MVPP's submittal of the contentions on May 18, 1982. Thus, the mere supplementation of documents already rejected by the Licensing Board as insufficient to demonstrate "good cause" with additional documents cannot logically "cure" the finding that, even as of a year ago, MVPP had not timely pursued these contentions. Moreover, nothing contained in those documents points to the existence of any situation not independently established in the record of this proceeding long ago or previously anticipated under the Commission's orders. Finally, MVPP has not and cannot establish "good cause" for its lateness by its self-serving claim that it possesses certain secret affidavits which it might submit at a later time. 51/

Nothing would be gained by Applicants' recitation of the decisional law which the Licensing Board previously found to require denial of MVPP's late contentions. In the interest of brevity, Applicants therefore respectfully

51/ In this regard, Applicants reiterate their strong opposition to any request for a protective order which would keep them from obtaining any affidavits or other materials submitted as a basis for reopening the proceeding. Such a procedure is contrary to the rules of the Commission and would violate Applicants' rights of due process. See generally Applicants' Answer to Motion by MVPP for Leave to File New Contentions at 48-50 (filed June 2, 1982).

incorporate their prior discussion of the governing law on late contentions. ^{52/} Nonetheless, it must be noted that MVPP clings tenaciously to the same excuse for lateness that the Licensing Board has already found unavailing, i.e., "it assumed that the NRC staff had the problem under control." ^{53/} The Commission's adjudicatory boards have consistently held that a party may not sit on the sidelines in the hope or expectation that the NRC Staff will adequately protect an interest which would otherwise justify intervention. ^{54/}

MVPP's further excuses for lateness are so patently incredible as to be disingenuous, i.e., the assertion that "MVPP did not actively investigate for an ongoing QA breakdown until after the record was closed" ^{55/} Nor

^{52/} See Applicants' Answer to Motion by MVPP for Leave to File New Contentions at 11-43 (June 2, 1982).

^{53/} MVPP's Motion to Reopen the Record at 42.

^{54/} See, e.g., Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 9 (1979), vacated as moot, CLI-80-34, 12 NRC 407 (1980); Consolidated Edison Company (Indian Point Station, Unit No. 2), LBP-82-1, 15 NRC 37, 39-40 (1982).

^{55/} MVPP's Motion to Reopen at 42. As the Board itself noted in denying the original motion, MVPP's presentation at that time "indicates that MVPP has long
(Footnote Continued)

does the assertion that MVPP waited to propose new contentions "[r]ather than raise potentially frivolous allegations" withstand serious scrutiny. ^{56/} MVPP presumes that in its self-appointed "watch-dog" role, it is entitled to special privilege, i.e., that it need not submit its evidence until months and even years after the facts "because [its] counsel had not yet met the witnesses," ^{57/} or because "MVPP had no responsibility to second-guess the NRC staff," ^{58/} or because "MVPP was attempting to avoid interfering or compromising with the staff's ongoing investigation." ^{59/} This is so much pretext and post hoc rationalization which is totally lacking in any legal substance.

Finally, MVPP's assertion that its delay in filing was due to the length of time taken by the Licensing Board and the Commission to resolve its prior motion is absurd. As noted, MVPP did not appeal or seek reconsideration of the Licensing Board's denial of its late contentions. Its choice to rely upon the sua sponte contentions instead was a

(Footnote Continued)

been critical of the Zimmer QA program." Zimmer, LBP-82-54, 16 NRC at 214.

^{56/} MVPP's Motion to Reopen at 42.

^{57/} Id. at 43.

^{58/} Id.

^{59/} Id. at 44.

tactical decision. If MVPP truly believed that it had satisfied the requirements for late contentions, the issue could have been resolved long ago. ^{60/} MVPP's other excuses, e.g., that it waited to review other documents, ^{61/} are equally lame. Simply put, the Commission's rules do not permit an intervenor to arrogate to itself the privilege of deciding when, in its unilateral view, circumstances warrant the raising of an issue in an adjudicatory proceeding. As the Supreme Court has held, intervenors in NRC licensing proceedings are obliged to "structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions." ^{62/}

C. Other Means Are Available To
Protect MVPP's Interests.

As previously noted in Applicants' earlier opposition, the NRC Staff has an independent, statutory responsibility to take all measures necessary to protect the public health and safety. As the Board is aware, the Staff is consumately involved in the oversight of the various review programs in

^{60/} Accordingly, the decision in Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162 (1979), cited by MVPP at page 45 of its motion, is inapposite. MVPP has no one but itself to blame for any delay in a decision on its contentions.

^{61/} MVPP's Motion to Reopen at 45.

^{62/} Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978).

effect at Zimmer to verify and confirm the quality of completed construction including, most significantly, the carrying out of all requirements under Part IV of the Commission's "Order to Show Cause and Order Immediately Suspending Construction." ^{63/} Under these circumstances, it is even more certain now than before that the reopening of the proceeding for a hearing would be a useless act since this Board, as the Board in Summer which denied a similar motion to reopen concluded, "could do no more than order that [alleged deficiencies] be corrected and that the corrections be monitored by Staff - a procedure that is already in effect without Board intervention." ^{64/}

Ultimately, it is the Staff which is obligated "to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations" before the issuance of an operating license. ^{65/} That the Staff is exercising its oversight of quality assurance activities at Zimmer effectively and thoroughly is confirmed by the very

^{63/} Zimmer, CLI-82-33, 16 NRC ____ (November 12, 1982).

^{64/} Summer, "Memorandum and Order" (April 28, 1982), supra, at 4.

^{65/} South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 896 (1981), aff'd sub nom. mem., Fairfield United Action v. NRC, No. 81-2042 (D.C. Cir. 1982). In that case, the existence of the Staff's independent duties was cited as a basis for denying late intervention.

documents upon which MVPP almost wholly relies, including most recently, the NRC NET Report.

Further, it is indisputable on the record that MVPP may protect its interests by way of a petition for relief under 10 C.F.R. §2.206. As discussed above, MVPP's petition was in fact granted in part by the Director in this instance. Similarly, the Appeal Board has indicated in other proceedings that Section 2.206 provides appropriate relief to parties whose late contentions must be rejected. ^{66/} This factor did not weigh in MVPP's favor in the earlier motion, ^{67/} and no greater showing has been made for the instant motion.

Allegations that the Commission's "previous commitment to maintain close personal oversight is no longer in effect," ^{68/} and unfounded criticism of the Staff's actions ^{69/} are irrelevant. The Commission has indicated in its various orders and directives that the Staff is to

^{66/} See St. Lucie, supra, ALAB-579, 11 NRC at 226; North Anna, supra, ALAB-551, 9 NRC at 709; Seabrook, supra, ALAB-513, 8 NRC at 696.

^{67/} Zimmer, LBP-82-54, 16 NRC at 213-14.

^{68/} MVPP's Motion to Reopen at 47.

^{69/} Id. at 52-56.

pursue a vigorous program of oversight and supervision for quality assurance activities at Zimmer, which the Commission itself will closely monitor. If at any time the Commission is dissatisfied with its Staff's activities, it always has the option to replace its Staff personnel. 70/

D. MVPP Has Not Demonstrated An Ability
To Assist The Board In Developing A
Sound Record.

The requirements for satisfying this factor were recently discussed in the WPPSS proceeding:

To prevail on the third factor petitioner must affirmatively demonstrate a special expertise which would aid in the development of a sound record. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP 80-14, 11 NRC 570, 576 (1980). A petitioner addressing this factor "should set out

70/ While MVPP recognizes at page 57 of its motion "that a number of other forums have played and continue to play a significant role in examining the QA violations," it maintains that these are inadequate to protect its interests. While nothing is literally a "substitute" for an NRC licensing hearing, such a requirement, as MVPP implies to exist, would essentially nullify the second factor under the five-point test for late contentions. These forums do, in fact, provide MVPP additional, alternative means to protect its interests.

Moreover, the record reflects MVPP's participation in the ongoing management review program and related activities. For example, GAP submitted a response on November 30, 1982 in support of another intervenor's petition for appointment of a consultant to monitor the third party review. In addition, GAP has participated in the review process by attending public meetings, such as those on January 5 and March 28, 1983, and by corresponding with the Staff. See, e.g., letter of January 31, 1983 from GAP to Chairman Palladino, objecting to Region III's review of the proposal to conduct the third party review at Zimmer.

with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. Vague assertions regarding petitioner's ability . . . are insufficient." Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2) ALAB-704, 16 NRC, slip op. at 10, December 8, 1982. 71/

Although MVPP has no doubt shown facility for collecting large quantities of documents, its motion to reopen is predicated almost entirely upon information generated by the Applicants, its constructor and subcontractors, the NRC Staff and other regulatory agencies. Exaggerated, self-laudatory claims of its importance are no substitute for an objective demonstration that MVPP or its representatives are by training, education or experience, technically qualified and competent in the area of quality assurance. No such showing has been made by MVPP.

E. MVPP's Interest Will Be Adequately Represented By The Staff.

For the reasons discussed more fully above with regard to the second factor, MVPP's interests have been and will continue to be adequately represented by the NRC Staff under existing procedures within the agency. As demonstrated by its thorough investigation, inter alia, of the allegations

71/ Washington Public Power Supply System (WPPSS, Nuclear Project No. 3), Docket No. 50-508, "Memorandum and Order" (April 21, 1983) (slip op. at 12).

initiated by MVPP's counsel, the NRC Staff is fully capable of resolving quality assurance issues of importance to MVPP. 72/

Additionally, the Commission has itself expressed confidence in the Staff's ability to represent the interest of the public without the necessity of litigating these late contentions. In directing the Licensing Board not to pursue such matters sua sponte, the Commission observed that the Staff "has been investigating alleged quality assurance irregularities at Zimmer since January 1981" and that these investigations "are still ongoing." 73/ The Commission concluded that "the issues raised in the eight contentions are being dealt with in the course of the ongoing investigation and in the NRC staff's monitoring of the applicants' Quality Confirmation Program." 74/

Likewise, in its Order to Show Cause, the Commission reviewed the investigation conducted by the Staff to date and delegated to Region III responsibility for review and approval of "a comprehensive plan, based on the results of

72/ See IE Investigation Report No. 50-358/81-13 (November 24, 1981). With regard to the extent to which MVPP has a substantive "interest," it is noteworthy that the Staff determined in Section 5 of the Report that practically all of the charges made by MVPP's counsel, the Government Accountability Project, were unfounded.

73/ Zimmer, CLI-82-20, 16 NRC at 110.

74/ Id.

the verification program, for the continuation of construction, including reworking activities." ^{75/} In further response to the Commission's Order to Show Cause, the Executive Director for Operations issued a plan of action for reviewing implementation of the Order, which included, inter alia, a plan for the NRC Staff to perform an independent evaluation of the quality of construction at Zimmer. ^{76/}

An NRC team consisting of personnel from the Offices of Nuclear Reactor Regulation and Inspection and Enforcement, and various regional personnel and consultants conducted a

^{75/} Zimmer, CLI-82-33, supra, at 17.

^{76/} The fact that the Staff's actions in implementing the Order to Show Cause will adequately protect MVPP's interests is confirmed by the decision of the Director, Office of Inspection and Enforcement, on February 10, 1983, granting and denying in part MVPP's petition under 10 C.F.R. §2.206. As noted therein, "the Commission's order satisfies substantially all" of MVPP's basic requests for action. Zimmer, DD-83-02, supra, at 3. Accordingly, the Order to Show Cause establishes a framework by which the Staff will fully protect all interests of the public, including those of MVPP. As MVPP itself acknowledges, it has already participated substantially in Region III's oversight of the Zimmer Action Plan. See MVPP's Motion to Reopen at 50 and discussion at note 70, supra. The record establishes that MVPP's input has been received and considered in good faith by the Staff. See, e.g., Summer, "Memorandum and Order" (April 28, 1982), supra, at 2-3.

broad baseline evaluation of construction at Zimmer during the period of January 24 through March 4, 1983. The results, conclusions and recommendations of this independent evaluation by the NRC Staff were published in the NET Report, NUREG-0969, in April, 1983. In seeking to raise quality assurance issues, MVPP itself emphasizes the NET Report as a comprehensive and authoritative document. It is therefore self-evident that the Staff's actions fully encompass MVPP's interests in this proceeding.

F. Reopening The Record For MVPP's Late Contentions Will Create New Issues And Greatly Delay The Proceeding.

As the Board is well aware, the only matter pending disposition before it at this time, aside from the instant motion, is an isolated aspect pertaining to the adequacy of school evacuation under the emergency preparedness plans for Zimmer. It is now clear that the applicable NRC regulation under 10 C.F.R. §50.47(a)(2) "does not require deferment of any hearing on State and local government emergency response plans to await FEMA's issuance of final findings on those plans." ^{77/} The hearing on these narrow issues can be completed promptly. The Board itself "anticipates that these matters should be expeditiously concluded." ^{78/} By contrast, MVPP would reopen the hearing for the implied if

^{77/} Zimmer, ALAB-727, supra, at 25.

^{78/} Zimmer, LBP-82-54, 16 NRC at 213-14.

not express reason of lengthy litigation with the potential for years of delay in concluding this proceeding.

Such delay as MVPP would gladly see visited upon this proceeding is clearly contrary to the Commission's policies on conduct of its licensing proceedings. ^{79/} Moreover, the Licensing Board has previously found that this factor in the test for late contentions weighs against MVPP's late submission. The Board stated:

Finally, we believe that MVPP is clearly and indisputably wrong in its belief that granting its Motion will not delay the proceeding. If the Motion is denied, two matters relating to offsite emergency planning remain to be considered. The Board anticipates that these matters should be expeditiously concluded. On the other hand, MVPP's Motion raises matters which may well involve lengthy proceedings before this Board. ^{80/}

Given the lapse of a year in MVPP's pursuit of these issues before the Board, the likelihood of serious delay is even greater now. And in light of its rather frenetic opposition to the Zimmer facility, MVPP's speculation that reopened hearings on quality assurance would not cause delay because of other pending matters cannot be seriously entertained. If allowed, MVPP will continue to pursue the tactic of formulating new charges based upon the Staff's findings, as

^{79/} See Applicants' Answer to Motion by MVPP for Leave to File New Contentions at 30-32 (filed June 2, 1982).

^{80/} Zimmer, LBP-82-54, 16 NRC at 213-14.

they develop, whether or not the Commission is itself satisfied that all quality requirements have been met.

III. MVPP's Motion Likewise Fails To Satisfy
The Commission's Requirements For
Reopening.

As discussed above, the Licensing Board explicitly found that MVPP did not meet the criteria for late contentions. Similarly, with respect to the requirements for reopening, ^{81/} the Licensing Board held that MVPP had not met the requirements under the Commission's decisions to reopen a closed record, specifically, that the matter be "timely presented." The Licensing Board held:

. . . MVPP's presentation in answer to Applicants suffers from the same difficulties identified above with respect to its showing of good cause for failure to file its proposed contentions in a timely fashion. While MVPP asserts that it proceeded expeditiously after it learned of new information, it does not specifically identify this information or tell us when it became available. In fact, that presentation indicates that MVPP has long been critical of the Zimmer QA program. More should have been furnished to indicate why, at a

^{81/} See, e.g., Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The Wolf Creek test requires satisfaction of three criteria: (1) that the motion be "timely presented"; (2) that it be "addressed to a significant safety or environmental issue"; (3) that it "be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.'" The Wolf Creek test was approved by the Commission in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981).

minimum, MVPP waited from November, 1981, to May, 1982, to file its contentions. Litigation must come to an end. A party should not wait until the eve of an Initial Decision which normally would conclude a proceeding before advancing new contentions unless substantial justification for that course is present. 82/

As with the authorities previously briefed by Applicants on the requirements for admitting late contentions, little would be served by a recitation of the case law already presented, which is likewise incorporated herein. 83/ Nevertheless, analysis of the three requirements for reopening reveals that MVPP's showing is even less cogent today than it was a year ago.

82/ Zimmer, LBP-82-54, 16 NRC at 214. Applicants agree with the Board that there is no basis upon which to conclude "that a less stringent standard should apply" to a motion to reopen in a proceeding in which a matter in question had never been raised. Id. Reopening has been considered in such cases under the standards approved by the Commission for reopening in general. Summer, "Memorandum and Order" (April 28, 1982), supra; Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), Docket Nos. 50-369-OL, 50-370-OL, "Memorandum and Order Regarding CESG's Motion to Reopen Record" (November 25, 1980).

83/ See generally Applicant's Answer to Motion by MVPP for Leave to File New Contentions at 33-48 (filed June 2, 1982).

First, the motion is extremely untimely for the reasons discussed more fully above. The idea that the motion would be timely if filed before completion of the Zimmer Action Plan is untenable on its face. ^{84/} The issue is not what remains to be done under the Commission's requirements for Zimmer, but rather when MVPP had sufficient information to make a timely presentation for reopening. In short, MVPP has stated nothing which requires the Board to depart from its previous finding of untimeliness.

While it is indeed beyond dispute that "issues outlined in the contentions are indeed serious," ^{85/} it does not follow that MVPP has met the second requirement for reopening of establishing the existence of a significant safety or environmental issue. Whether or not an issue has significance must be determined within the context of the particular proceeding in which it is raised. It is reiterated that in the Summer proceeding, ^{86/} the Licensing Board agreed that "each of the alleged deficiencies with regard to Applicants' operating procedures . . . would have some significance to the safety of the plant if it actually exists and were to go uncorrected," but concluded that the

^{84/} MVPP's Motion to Reopen at 62.

^{85/} Zimmer, CLI-82-20, 16 NRC at 110

^{86/} Summer, "Memorandum and Order" (April 28, 1982), supra.

intervenor did not show any problem with the Staff's handling of the issue. ^{87/} The Board stated:

The affidavits submitted by Staff and Applicants establish that the shortcomings to Applicants' operating procedures are being routinely handled by Staff, and Applicants have committed themselves to upgrade and correct the operating procedures in accordance with Staff's suggestions. In the face of this established procedure for identifying the deficiencies and correcting them, their mere existence loses its significance in the context of this operating license proceeding. Were the Board to take this issue and determine that the alleged deficiencies actually exist, we could do no more than order that they be corrected and that the corrections be monitored by Staff - a procedure that is already in effect without Board intervention. ^{88/}

Since the previous decision denying admission of the proposed contentions, the Commission's oversight of quality assurance practices at Zimmer and the Staff's ongoing review has been stepped-up considerably. Any doubt as to the intensity of the Commission's direct involvement in this proceeding regarding quality assurance matters or its intent as to the Staff's responsibilities for assuring compliance with all regulatory requirements at Zimmer in such matters has been laid to rest by the Order to Show Cause issued by

^{87/} Id. at 3.

^{88/} Id. at 4.

the Commission on November 12, 1982. ^{89/} As Commissioners Ahearne and Roberts stated in the denial of MVPP's petition for reconsideration:

We continue to believe it is not appropriate to hold an adjudicatory hearing simply to inform the public or to convince them that NRC is committed to ensuring the public health and safety and that Zimmer will be safe before it is allowed to operate. ^{90/}

Finally, since Applicants may not resume and complete construction without satisfying the requirements laid down by the Commission, which the Staff must confirm, any adjudication by this Board will simply add an unnecessary tier of review and will not ultimately affect the outcome of the proceeding. Therefore, MVPP has not met the third and final criterion for reopening. ^{91/}

^{89/} Zimmer, CLI-82-33, supra.

^{90/} Zimmer, CLI-83-4, supra, at 3 (views of Commissioners Ahearne and Roberts dissenting in part).

^{91/} In Applicants' earlier submission, Applicants took the position that, in light of their acquiescence to the Notice of Violation and the proposed assessment of a civil penalty for quality assurance violations at Zimmer, Applicants should not be exposed to the same charges by way of these late contentions. See Applicants' Answer to Motion by MVPP for Leave to File New Contentions at 41-43. The case for not subjecting Applicants to a hearing on these issues after having consented to the NRC's findings became even stronger with Applicants' acquiescence to the terms of the Commission's Order to Show Cause issued on November 12, 1982. The Commission's important policy of encouraging licensees to consent to, rather than contest, its enforcement actions "would be thwarted if licensees

(Footnote Continued)

Conclusion

For the reasons discussed more fully above, the Licensing Board should determine that the instant request by MVPP lies beyond its limited jurisdiction to consider the narrow aspects of Applicants' emergency planning preparedness which remained for disposition prior to authorization of the issuance of a full power operating license. Even assuming that the Board had jurisdiction to consider the matter, it has not been brought before the Board on a timely motion for reconsideration, nor was any timely appeal filed.

In any event, the motion has been filed at the conclusion of the proceeding and is untimely in the extreme. No good cause has been shown for this lateness, nor has MVPP satisfied the other requirements under the Commission's rules for submitting late contentions or reopening a closed record.

The unnecessary diversion of Staff and Applicant resources from the completion of the verification and confirmation programs required under the Commission's

(Footnote Continued)

which consented to enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions." Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980). Accordingly, the Licensing Board should not accept contentions which have a serious potential for conflict with the carefully crafted program for compliance articulated by the Commission in its Order to Show Cause.

requirements for resumption of construction that would result from reopened hearings on quality assurance at this late juncture further justifies denial of the motion. In view of the elaborate and carefully constructed framework established by the Commission for the completion of construction at Zimmer in full compliance with all regulatory requirements, this Board should not interpose yet another level of review.

As the Board itself aptly stated: "Litigation must come to an end." ^{92/} As to all contested matters except the

^{92/} Zimmer, LBP-82-54, 16 NRC at 214.

... narrow remanded issues, that end has now come. The motion should therefore be denied in all respects.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

A handwritten signature in dark ink, appearing to read "Mark J. Wetterhahn", written in a cursive style.

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