

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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 MIAMI VALLEY POWER
PROJECT'S MOTION TO REOPEN THE RECORD FOR
ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE

Preliminary Statement

On July 12, 1983, the Miami Valley Power Project ("MVPP") filed with the Atomic Safety and Licensing Appeal Board ("Appeal Board") a motion seeking to have the Appeal Board reopen the record in this proceeding for a hearing on quality assurance issues which MVPP initially raised before the Atomic Safety and Licensing Board ("Licensing Board") over a year ago.

The Cincinnati Gas & Electric Company, et al. ("Applicants") oppose the requested relief on several grounds. First, MVPP did not appeal any aspect of the Initial Decision in this proceeding,^{1/} nor did it appeal the

^{1/} The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549 (1982).

denial by the Licensing Board of its eight quality assurance contentions in the Licensing Board's order entered on July 15, 1982.^{2/} At this juncture, therefore, MVPP has absolutely no standing as an appellant and, at most, could only urge the Appeal Board to review its proposed contentions sua sponte. In effect, MVPP is attempting to avoid the obvious consequences of its failure to file any appeal on the very contentions denied by the Licensing Board by presenting them to the Appeal Board directly. Even assuming that the Board would tolerate this maneuver by MVPP, sua sponte review of these issues has been expressly foreclosed by the Commission, which determined a year ago that nothing raised in the eight contentions justified sua sponte review.^{3/}

In any event, the motion lacks substantive merit inasmuch as MVPP has not satisfied the requirements under the Commission's rules for the admission of late contentions and reopening of a proceeding. As a practical matter, MVPP's request for relief is the same as it has already submitted to the Licensing Board, which MVPP acknowledges in incorporating its pleadings before the Licensing Board.^{4/}

2/ Zimmer, supra, LBP-82-54, 16 NRC 210 (1982).

3/ Zimmer, supra, CLI-82-20, 16 NRC 109 (1982).

4/ Incorporation of such documents is clearly impermissible under Appeal Board practice and is a
(Footnote Continued)

The motion before the Appeal Board therefore suffers the same infirmities. The Appeal Board should dismiss this motion for lack of jurisdiction or, alternatively, on the merits for lack of any proper showing supporting the request for relief.^{5/}

Procedural Background

On May 18, 1982, MVPP initially filed its motion to reopen this proceeding for the admission of eight late filed contentions related to quality assurance at Zimmer. The Licensing Board denied MVPP's motion, expressly determining that MVPP had, on balance, failed to satisfy the criteria under 10 C.F.R. §2.714(a)(i)-(v) for admitting late contentions.^{6/} The Licensing Board nonetheless ruled that it would hear the contentions under its sua sponte authority. MVPP did not appeal the denial of its eight late proposed contentions as intervenor issues.

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particular imposition in a case such as this in which the issues raised by MVPP have never been before the Appeal Board. See Part III, infra. Applicants decline to follow suit. If the Appeal Board believes that it needs further briefing of the legal issues on the merits of the motion, it should set a formal briefing schedule.

^{5/} There is no point in having the Appeal Board determining the substantive merits of the motion before the Licensing Board has done so. Accordingly if the Appeal Board does not deny the motion outright, it should at most defer further action on the motion until the Licensing Board has acted.

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

Subsequently, the Commission determined that the Licensing Board had not justified the exercise of its sua sponte powers and instructed the Board to dismiss the eight contentions.^{7/} The Licensing Board dismissed the eight contentions by order dated August 2, 1982.^{8/}

No appeal was taken by MVPP of the latter order. Instead, MVPP pursued relief before the Commission, resulting in a subsequent Order by the Commission issued on February 18, 1983, in which the Commission noted that MVPP had previously failed to meet the Commission's standards for reopening the record and admitting late contentions, but left MVPP free to seek "reconsideration or further relief from the Licensing Board or appellate review from the Appeal Board as appropriate under Commission rules."^{9/} No such appellate review was sought by MVPP prior to the filing of its instant motion on July 12, 1983.^{10/}

^{7/} Zimmer, supra, at CLI-82-20.

^{8/} Zimmer, supra, "Memorandum and Order (Dismissing Eight Contentions Raised as Board Issues)" (August 2, 1982).

^{9/} Zimmer, supra, CLI-83-4 at 2-3.

^{10/} MVPP renewed its motion for reopening of the proceeding and admission of the eight late contentions before the Licensing Board on June 3, 1983. Both Applicants and the NRC Staff opposed the motion on the grounds, inter alia, that it was essentially a request for reconsideration of the Board's earlier denial of MVPP's contentions as intervenor issues and that the Board's limited jurisdiction since the time for reconsideration had long since passed.

In the interim, the Licensing Board issued the Initial Decision for Zimmer, which concluded all outstanding issues necessary for the issuance of an operating license, except two narrow issues related to emergency preparedness. In its review in ALAB-727, which included sua sponte review of matters not embraced by the appeal,^{11/} the Appeal Board determined that further hearings would be necessary for these issues. Although it was the sponsor of contentions (not related to emergency planning) decided by the Initial Decision, MVPP did not appeal. Having remanded the matter to the Licensing Board for further hearings on emergency planning on the two discreet issues remaining, the Appeal Board did not purport to retain jurisdiction over any issues, whether raised or not raised by ALAB-727.

Argument

I. MVPP's Motion is an Improper Attempt to Perfect an Untimely Appeal

As MVPP frankly acknowledges,^{12/} its motion before the Appeal Board is wholly intended to compensate for any jurisdictional deficiencies which may be determined by the

^{11/} Zimmer, supra, ALAB-727, 17 NRC ____ (May 2, 1983) (slip op. at 28 n.23). By Order of June 13, 1983, the Commission extended until July 13, 1983 the time for its determination whether to review ALAB-727. On that date, the Commission took no further action, thereby declining review of ALAB-727 and rendering it final agency action.

^{12/} See MVPP's Motion to Atomic Safety and Licensing Appeal Board at 1-2.

Licensing Board as a result of the position taken by the Applicants and the NRC Staff below, to wit, that MVPP failed to pursue its late contentions in a timely manner in accordance with the rules and precedents of the Commission and, in particular, the Commission's Order of February 18, 1983. However, having failed to perfect an appeal in a timely manner when this issue was initially determined by the Licensing Board or, at the latest, after the Commission's order of February 18, 1983, MVPP cannot now correct this inaction on its part by asking the Appeal Board to take up the same matter in a sua sponte proceeding itself. MVPP's tactics constitute a clear abuse of the Commission's rules, which contemplate that a party dissatisfied with a ruling by the Licensing Board will utilize the appropriate appellate procedures rather than ask the Appeal Board itself to conduct an evidentiary hearing.

As noted above, the Licensing Board accepted MVPP's late contentions as sua sponte issues, but expressly determined that MVPP had, on balance, failed to satisfy the criteria under 10 C.F.R. §2.714(a)(i)-(v) for admitting its late contentions. It is equally clear that, as a supplement to its Initial Decision,^{13/} this order was final and

^{13/} The Initial Decision 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, supra,
(Footnote Continued)

appealable on the same basis as the Initial Decision itself. Under the NRC rules, a party may appeal a decision or ruling which it can show will result in some discernible injury to itself.^{14/}

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 as opposed to sua sponte issues. First, completely different standards govern the disposition of sua sponte contentions in contrast to those raised by parties. A licensing board which raises an issue sua sponte need only satisfy itself that its questions "have been adequately answered."^{15/} By contrast, the Applicant bears the burden of proof by a preponderance of the evidence on all contested issues throughout the proceeding.^{16/} Finally, in contrast

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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.

^{14/} 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).

^{15/} Public Service Electric & Gas Company (Salem Nuclear Generating Station, Unit 1), LBP-80-27, 12 NRC 435, 451 (1930), 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).

^{16/} 10 C.F.R. §2.732; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 105 (1976).

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.^{17/}

Nonetheless, no such appeal was filed by MVPP. Nor did MVPP appeal the denial of its contentions when the Licensing Board, as directed by the Commission dismissed the sua sponte issues.^{18/} Thus, even if MVPP were to argue that it sustained (or perceived) no discernible injury from the denial of its contentions since they were initially accepted sua sponte, it certainly could not have failed to apprehend the significance of the subsequent orders of the Commission and Licensing Board resulting in the dismissal of the sua sponte issues, thereby entirely eliminating a hearing on quality assurance.

Moreover, MVPP could not have been given more explicit guidance than was provided by the Commission in this respect in its Order of February 18, 1983. In that Order, the Commission denied MVPP's petition for reconsideration of its earlier order requiring dismissal of the sua sponte contentions, but left MVPP free to pursue available remedies:

^{17/} Wisconsin Electric Power Company (Point Beach Nuclear Power Plant, Units 1 and 2), ALAB-696, 16 NRC ____ (October 1, 1982) (slip op. at 23-24).

^{18/} See note 7, supra.

[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. 19/

Under the provisions of 10 C.F.R. §2.762(a), a party may appeal to the Commission an initial decision within 10 days after service by the filing of exceptions to that decision or designated portions thereof. This provision is strictly enforced and the failure of a party to file timely exceptions will necessitate dismissal of the appeal.^{20/}

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

20/ See 10 C.F.R. §2.762; 10 C.F.R. Part 2, App. A. IX(d)(3); Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162, 165 n.3 (1982); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554, 556 (1979). In contrast, there was certainly no basis for Applicants to raise the issue before the Appeal Board as to whether the Licensing Board properly disallowed MVPP's late contentions as intervenor issues. Exceptions are unnecessary to defend a decision in a party's favor and, therefore, only a party aggrieved
(Footnote Continued)

Just as the Appeal Board will not ordinarily "entertain an issue raised for the first time on appeal,"^{21/} it should not permit a party to raise an issue before it for the first time by some substitute mechanism when the ordinary appeal procedures have been eschewed. In either case, "[an intervenor] is scarcely in a position, legally or equitably, to protest the determinations made by the [Licensing] Board in connection with it."^{22/} In sum, MVPP should not be permitted to flout the normal appellate procedures which the Commission expressly invited MVPP to utilize.

II. The Commission has Ruled that MVPP's
Eight Late Contentions do not
Justify Sua Sponte Consideration

(Footnote Continued)

by, or dissatisfied with the action taken by a licensing board may invoke appellate jurisdiction. South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959-60 (1982).

21/ Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978).

22/ Id. at 348, citing Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974) (first brackets in original). A similar situation arose in Black Fox where an intervenor asked the Appeal Board to reconsider its reversal of a grant of discretionary intervention by the Licensing Board. Noting that the intervenor had chosen not to contest the appeal, the Appeal Board held that "a party who eschews the opportunity to participate on an appeal affecting her interests is in no position later to complain if the outcome is not to her liking." Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-402, 5 NRC 1182-83 (1977).

MVPP concedes, as it must, that any consideration of the issues it has raised would have to be accomplished by the Appeal Board's exercise of its sua sponte authority.^{23/} The exercise of such authority, however, is not unlimited and is governed by the provisions of 10 C.F.R. §2.760a, which restricts sua sponte consideration to issues only where the Board "determines that a serious safety, environmental, or common defense and security matter exists." The Commission has, in several instances, rejected overzealous exercises of this authority.^{24/} In its motion, MVPP disavows the discussion of any issue beyond the jurisdiction of the Appeal Board.^{25/} Thus, MVPP has wholly

^{23/} MVPP's Motion to Atomic Safety and Licensing Appeal Board at 4.

^{24/} See, e.g., Texas Utilities Generating Station (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-12, 16 NRC 1 (1982).

^{25/} See note 12, supra. While the cases discussing the existence and transfer of jurisdiction among the various adjudicatory levels of the Commission are less than fully clear, it is questionable whether the Appeal Board even has jurisdiction in this matter. As the Appeal Board stated in the North Anna proceeding, "once an appeal board has wholly terminated its review of an initial decision . . . its jurisdiction over the proceeding comes to an end." Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979). Here, the Appeal Board terminated its review of the issues raised in the Initial Decision with the rendering of ALAB-727 on May 2, 1983. No appeal was taken from that decision, and the time for appeal expired 15 days after

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failed to discuss, let alone show, why sua sponte issues should be accepted by the Appeal Board.

Even so, the Appeal Board is in the fortunate position of not having to resolve this question itself. In its order of July 30, 1982,^{26/} the Commission reviewed the eight identical quality assurance contentions adopted by the Licensing Board sua sponte and determined that no such sua sponte review had been justified. The Commission agreed with the Board that the issues outlined in the contentions are serious, but noted that the Staff's investigation of alleged quality assurance irregularities at Zimmer resulted in "[a]n extensive review of the as-built plant" and the establishment of a "comprehensive quality confirmation program" to be completed prior to the licensing of the facility.^{27/} The Commission stated 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."^{28/} Accordingly, the Commission concluded "that the Board has not set forth a sufficient justification

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service of the decision. See 10 C.F.R. §2.786(b)(1). As noted, the Commission permitted the time for its sua sponte review of ALAB-727 to expire on July 13, 1983.

^{26/} Zimmer, supra, CLI-82-20, 16 NRC 109 (1982).

^{27/} Id. at 110.

^{28/} Id.

supporting its order reopening the hearing record to consider the eight contentions as Board issues"^{29/} and directed dismissal of the contentions from the proceeding.

Subsequently, upon MVPP's petition for reconsideration, the Commission tersely denied the petition insofar as it "requests reconsideration of the Commission's determination not to permit the Licensing Board to reopen the hearing sua sponte to consider the eight contentions proposed by MVPP. No fact or argument presented by MVPP alters the Commission's view in this regard as it is expressed in its July 30, 1982 order."^{30/}

Actions by the Commission in the interim have further diminished the appropriateness of sua sponte review. In an Order to Show Cause and Order Immediately Suspending Construction to CG&E issued November 12, 1982, the Commission required an immediate halt to safety-related construction on the Zimmer Station and required the licensee to show cause why the suspension should not continue pending review and implementation of various management improvements, completion of quality confirmation and verification programs and efforts to ensure that future construction conforms to the Commission's requirements. Applicants did not contest the order and it is currently

^{29/} Id.

^{30/} Zimmer, supra, CLI-83-4 at 1.

being implemented under the supervision of Region III as directed by the Commission.^{31/} Thus, the Commission has expressly designated the specific terms and conditions upon which the quality assurance matters alleged by MVPP will be resolved at Zimmer prior to the issuance of a full power operating license.

It is also significant that the Commission declined review of a decision by the Director, Office of Inspection and Enforcement, in response to a petition by MVPP pursuant to 10 C.F.R. §2.206, where the Director determined that MVPP's allegations, which are also presented here, were being adequately treated under the Commission's Order to Show Cause.^{32/} Whatever the ambit of the Appeal Board's sua sponte authority might be in any other case, the Commission has expressly determined that it is inappropriate for Zimmer. Given the carefully formulated plan ordered by the Commission for the resumption and completion of safety-related construction at Zimmer, the Appeal Board is not in a position to second-guess on these particular issues.

^{31/} Zimmer, supra, CLI-82-33, 16 NRC ____ (November 12, 1982).

^{32/} See Zimmer, supra, DD-83-02, 17 NRC ____ (February 10, 1983). The Commission permitted the time for its review of this decision to expire on June 6, 1983, at which time it became final agency action.

III. MVPP has Failed to Substantiate
its Allegations or Brief the
Issues it has Raised

Although MVPP purports to address only a jurisdictional issue in its motion, the relief it seeks quite clearly entails substantive issues involving the proposed adoption of sua sponte contentions by the Appeal Board. Its incorporation by reference of various pleadings filed before the Licensing Board to state its position on these issues is wholly inappropriate and impermissible under the rules. See generally Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, "Order" (July 20, 1983); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC ____ (March 22, 1983) (slip op. at 17-19); Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1176-77 (1977); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 315 (1978); Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), Docket Nos. 50-553 and 50-554, "Opinion" (November 1, 1977) (slip op. at 2). MVPP's failure to file a motion which

appropriately briefs the issues or otherwise substantiates its allegations is alone grounds for its denial.^{33/}

Conclusion

The relief sought by MVPP, however labeled, is in actuality an untimely appeal from earlier rulings by the Licensing Board. The Appeal Board should discourage such attempted manipulations of the Commission's rules by determining that it cannot hear the matter at this time. Moreover, the relief sought is plainly contrary to the orders of the Commission establishing the terms and conditions for the review and disposition of outstanding quality assurance issues at Zimmer. Finally, MVPP has failed to brief the very issues it raises. Its motion should therefore be denied in all respects.

Respectfully submitted,

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^{33/} See, e.g., Marble Hill, supra; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473 (1975).