

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 MOTION FOR PROTECTIVE
ORDER BY MIAMI VALLEY POWER PROJECT

Preliminary Statement

On July 12, 1983, Miami Valley Power Project ("MVPP") requested a protective order to withhold from The Cincinnati Gas & Electric Company, et al. ("Applicants") as well as their attorneys the identity of those persons upon whose allegations MVPP has relied in seeking to reopen the proceeding. In essence, this is the same relief previously requested by MVPP in seeking to reopen this proceeding more than a year ago.^{1/}

Applicants oppose the requested relief as wholly unauthorized, under the existing circumstances, by the Commission's regulations for the issuance of a protective order.^{2/} No factual basis whatsoever is given for this

^{1/} MVPP's Motion for a Protective Order (July 8, 1982).

^{2/} 10 C.F.R. §§2.744(d), 2.790 and 21.2 (1982).

extraordinary request, which is clearly intended to deny Applicants due process of law by depriving them of a full and fair opportunity to confront the witnesses and evidence against them and to refute the false charges made by the affiants. Such deprivation of due process would occur whether or not these affiants eventually became witnesses.

Although Applicants believe that the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") need not consider this request until it has ruled upon the pending motion to reopen,^{3/} the mere suggestion that neither Applicants nor their counsel would be entitled to have access to the identities of the accusers and potential witnesses against them is a flagrant affront to the most fundamental concepts of due process and fair play. The request should therefore be summarily denied.

Argument

Due process of law requires that an applicant in an NRC licensing proceeding have access to all information on an unqualified basis which will be made a part of the record of

^{3/} When previously faced with MVPP's motions for leave to file new contentions and for a protective order, the presiding Atomic Safety and Licensing Board ruled on the motion to reopen and deferred consideration of the request for a protective order until a later time. The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 214-16 (1982).

the application. An applicant must have the identities of any adverse witnesses and the full substance of their allegations in order to litigate its case and defend against any adverse assertions made by such individuals. As the Supreme Court stated in Jenkins v. McKeithen, 395 U.S. 411, 428 (1969), "the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."^{4/} The Court reiterated this point in Goldberg v. Kelly, 397 U.S. 254, 269 (1970), stating: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."^{5/}

The question of the right to know an informant's identity recently arose in the South Texas proceeding, where the Appeal Board reversed the Licensing Board's order directing the Staff to disclose the names of informants to intervenors. As the Appeal Board stated, the informant's identity must be disclosed where "relevant and helpful to the defense of an accused, or . . . essential to a fair determination of a cause."^{6/} The Appeal Board also stated

^{4/} See also Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

^{5/} See Green v. McElroy, 360 U.S. 474, 496-97 (1959).

^{6/} Houston Lighting and Power Company (South Texas Project Units 1 and 2), ALAB-639, 13 NRC 469, 473-74 (1981) (quoting Roviaro v. United States, 353 U.S. 53, 60-61 (1957)).

that in a licensing proceeding, the applicant, not the intervenor, is "the accused."^{7/} Obviously, Applicants cannot conduct a proper defense against any new contentions admitted by the Board if it cannot examine and cross-examine its accusers at depositions and at a hearing should one be necessary.

In the Fermi proceeding, where the petitioner, like MVPP, expressed concern about possible reprisals against its informants or proposed witnesses, the Licensing Board made it clear that the applicant is entitled to learn the identities of all such persons.^{8/} And in Allens Creek, while no protective order was deemed necessary to protect the identity of a member of the petitioner organization, the Appeal Board stated that, even if nondisclosure were appropriate, any withheld information should be supplied to the Board and "one or more designated representatives of the other parties to the proceeding."^{9/}

MVPP's reliance upon NRC decisions granting qualified protection against the disclosure of the identities of

^{7/} Id. at 474.

^{8/} Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), Docket No. 50-341, "Memorandum and Order Ruling on Discovery and Scheduling Motions" (February 15, 1980).

^{9/} Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979).

informants who made disclosures to the NRC as a basis for the issuance of a protective order is entirely misplaced. The cases it relies upon do not hold that the protection afforded informants to Government officials under the common law and to NRC informants under the Commission's rules is available to nongovernmental entities such as MVPP. As the Supreme Court stated in Roviaro v. United States, 353 U.S. 53, 59 (1957), the basis of the informant's privilege "is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Accordingly, the Court has unambiguously identified the "informant's privilege" as one assertable exclusively by the Government:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.^{10/}

Other decisions of the federal courts are uniform in recognizing the "informant's privilege" as belonging only to the Government. Indeed, in Black v. Sheraton Corp., 564 F.2d 550, 556 (D.C. Cir. 1977), the court expressly held that a

^{10/} 353 U.S. at 59.

private litigant "has no right to assert or waive the privilege; it has no special relationship to or influence over the government."^{11/} Thus, the privilege may be asserted only by the Government.

In the context of NRC proceedings, it has therefore always been understood that the privilege applies to NRC proceedings only when informants have "made statements to compliance inspectors" or other NRC officials.^{12/} It is also clear from the Commission's regulations, as discussed most recently by the Appeal Board in South Texas, that the privilege is to be asserted by the NRC with regard to its informants, and not by private parties claiming to have information from purportedly confidential sources.^{13/} The

^{11/} Similarly, in Usery v. Ritter, 547 F.2d 528, 531 (10th Cir. 1977), the court referred to the privilege as involving the "interest of the government in protecting its sources." And in M. ex rel. R and S v. Board of Education Ball-Chatham Community Unit School District No. 5, 77 F.R.D. 463, 467 (S.D. Ill. 1978), the court cited Professor Wigmore to the effect that the privilege applies only to communications to law enforcement officers.

^{12/} Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-16, 4 AEC 435, 436, aff'd, 4 AEC 440 (1970).

^{13/} See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714 (February 24, 1983) (slip op. at 10-11); see generally South Texas, supra, 13 NRC at 473 (discussing 10 C.F.R. §§2.744(d), 2.790(a)(7) and 21.2). The Appeal Board reversed the Licensing Board decision upon which MVPP relies. South Texas, supra, LBP-80-11, 11 NRC 477 (1980).

Appeal Board in that case underscored this important distinction in noting that it was fully appropriate

. . . that the staff did not object to disclosure of the private intervenors' informants; the informer's privilege inures only to law enforcement officials. Roviaro, supra, 353 U.S. at 59. Intervention in one Commission proceeding does not entitle Citizens to privileged information that, if disclosed, might jeopardize the NRC's likelihood of receiving similar reports in future cases involving other plants. It is the NRC's continuing need for confidential informants that made the Licensing Board's failure to recognize the importance of the privilege shortsighted and arbitrary.^{14/}

Accordingly, there is no basis for affording MVPP this special governmental privilege which only the NRC may assert to protect its informants. The "informant's privilege" simply does not apply to these circumstances.

Against these standards, MVPP has made no showing whatsoever of any entitlement to a protective order, certainly not an order which would preclude even Applicants' counsel from obtaining the necessary information. Although MVPP avers "good cause" for a protective order, it has clearly shown no factual predicate for the belief that any form of reprisal would be taken against employees or former employees testifying on quality assurance practices at Zimmer. As the Appeal Board described similar claims in

^{14/} South Texas, supra, ALAB-639, 13 NRC at 478 n.26.

South Texas, "[a]ll that the [movant] has supplied are broad, vague, and essentially unsupported allegations"^{15/} that such harassment may occur. Applicants are well aware of the statutory protection afforded to employees who report violations or potential violations of NRC regulations,^{16/} and there is no basis for indulging the presumption that Applicants would act in contravention of these important safeguards.

Conclusion

MVPP has wholly failed to make any showing that its affiants or any personnel or former personnel at Zimmer require the protection of this Licensing Board by the nondisclosure of their identities. The relief sought by MVPP is intended to add a touch of drama to their cause and to stigmatize Applicants. The motion for a protective order is therefore entirely without merit and should be denied.

Respectfully submitted,

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July 27, 1983

^{15/} South Texas, supra, ALAB-535, 9 NRC at 399.

^{16/} 10 C.F.R. §50.7. See also 29 C.F.R. Part 24 (1982).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Motion for Protective Order by Miami Valley Power Project," "Applicants' Answer to Miami Valley Power Project's Motion to Defer Ruling on Whether to Review ALAB-727" and "Applicants' Answer to Miami Valley Power Project's Motion to Reopen the Record for Admission of Eight Contentions on Quality Assurance" all dated July 27, 1983, in the captioned matter, have been served upon the following by deposit in the United States mail this 27th day of July, 1983:

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