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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

In the Matter of:

CINCINNATI GAS & ELECTRIC
COMPANY, et al.

(William H. Zimmer Nuclear
Power Station)

No. 50-358

MIAMI VALLEY POWER PROJECT'S OPPOSITION
TO APPLICANTS' MOTION TO STRIKE MVPP'S REPLY BRIEF

On October 26, 1982, applicants filed a motion to strike Miami Valley Power Project's ("MVPP") Reply Brief on the ground that the Commission's rules do not allow filing of a brief at the same time as a motion seeking leave to file the brief.

MVPP opposes applicants' motion on the ground that it submitted the reply brief together with its motion seeking leave to reply in order to bring all relevant and important information before the Commission prior to its decision on MVPP's Petition for Reconsideration and to expedite the Commission's deliberations. Because of the unique nature of these proceedings, MVPP believes the Commission should have before it all necessary and important information prior to making a decision on whether to open licensing hearings at Zimmer and whether to suspend construction at the plant.

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I. BACKGROUND

On August 20, 1982, MVPP filed a petition for reconsideration asking the Nuclear Regulatory Commission ("NRC" or "Commission") to reconsider and vacate its order of July 30, 1982, reversing the Licensing Board's decision to allow litigation of MVPP's proposed eight contentions on the quality assurance failures and lack of applicants' character and competence to operate Zimmer.

The Commission, in ordering that the Licensing Board dismiss MVPP's eight contentions, held that it was closely supervising the staff's investigation of problems at Zimmer and the staff was continuing to investigate intensively allegations of quality assurance deficiencies. The Commission stated that it agreed with the Licensing Board that issues outlined in MVPP's contentions are "indeed serious." Cincinnati Gas and Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20 (Slip op. at 1).

The August 20, 1982 Petition for Reconsideration incorporated MVPP's Petition to Suspend Construction, which was 121 pages in length and contained 205 attachments. The two petitions placed before the Commission significant new information, substantiated by internal CG&E and Kaiser memoranda, about quality assurance problems at the plant, in the past and continuing in the Quality Confirmation Program ("QCP").

The NRC Staff supported MVPP's petition requesting licensing hearings on MVPP's eight contentions. Applicants opposed MVPP's petition for reconsideration but failed to answer in any way the specific allegations contained in MVPP's Petition to Suspend

Construction. Subsequently the NRC send a Demand Letter to CG&E requiring it either to admit or deny each allegation in the Petition to Suspend Construction.

On October 11, 1982, MVPP submitted a motion for leave to file a Reply Brief to NRC Staff and Applicant Responses to its Petition for Reconsideration and the Reply itself.

On October 26, 1982, applicants moved that MVPP's Reply Brief be stricken on the ground that the reply brief was submitted at the same time as the motion for leave to file the reply brief was filed.

II. THE ZIMMER LICENSING HEARINGS ARE SUI GENERIS;
THE COMMISSION SHOULD HAVE BEFORE IT ALL RELE-
VANT INFORMATION PRIOR TO DECIDING ON MVPP'S
PETITION FOR RECONSIDERATION.

The quality assurance breakdown at Zimmer has revealed perhaps the most serious QA problems discovered at any nuclear plant in the country.

The Commission, regardless of its ultimate decision on MVPP's Petition to Reconsider, has stated clearly that it intends carefully to oversee the staff's monitoring of the new QA program at Zimmer. To date, CG&E's progress has been far from promising. In fact, at the latest briefing of the Commission by Region III, regional administrator James Keppler admitted that the allegations about problems at Zimmer were coming into the NRC faster than Region III could investigate them. Chairman Palladino stated that he was disturbed to hear that this was true.

The Commission, therefore, is in a unique position of overseeing the progress, if any, of applicants in remedying the severe

quality assurance deficiencies found at Zimmer in the past.

Secondly, the NRC Staff has admitted that MVPP and Thomas Applegate and their counsel, the Government Accountability Project, have been the ones to bring the quality assurance problems to the NRC's attention. Mr. Keppler acknowledged to Congressman Udall's subcommittee that GAP, not NRC investigators, discovered many of the problems at Zimmer.

Third, the Commission, in overseeing the NRC Staff's QCP, has no independent factfinding capabilities. The discerning questions of Commissioner Ahearne at the October 28, 1982 briefing demonstrated that the Commission is in need of additional facts in order to evaluate the truth of allegations about continuing QA deficiencies at Zimmer. In fact, MVPP's call for licensing hearings is to aid the Commission to do just that -- bring all facts into a public forum where they can be tested through cross-examination and time-tested trial inquiry.

Therefore, because of the unique posture of this case, the Commission's need for all relevant facts to make a reasoned decision, and GAP's longstanding role in bringing QA deficiencies to the NRC's attention, MVPP's reply brief should be considered by the Commission.

III. APPLICANTS CITE NO CONVINCING AUTHORITY FOR STRIKING MVPP'S REPLY BRIEF.

Applicants argue that the Commission's rules prohibit filing of a reply brief at the same time as a motion seeking leave to file the reply brief. However, none of the cases cited by applicants in fact provides authority for that proposition.

The Appeals Board in Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981), found that the materials attempted to be filed were supplemental argument filed after the appeal had been argued, and that the supplemental arguments, moreover, were irrelevant to the case.

Similarly, in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71 (1981), the Licensing Board found that the pleading which an intervenor was attempting to file was not a reply brief, but rather a response to a motion to dismiss the intervenor's contentions. As such, the response was properly filed. In Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466 CP, "Memorandum and Order (July 19, 1982) (Slip op. at 6), the Licensing Board struck a pleading submitted by an intervenor because, although he had law school training, he had not attempted to ask permission to file the brief. In addition, the original motion before the Board was itself a "renewed motion," which the Board said it believed was clearly untimely.

Here, by contrast, MVPP has submitted extensive new evidence to support its petition for reconsideration.

Finally, the Black Fox case cited by applicants is inapposite. See Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), LBP-76-38, 4 NRC 435 (1976). In that case the Licensing Board accepted the reply brief submitted by intervenors even though the intervenors had not requested leave to file the reply brief. In fact, the Licensing Board minimized the legal technicalities in stating clearly that it had considered the reply brief even though no motion for leave to file it had been filed. Id., at 441.

IV. CONCLUSION

For all the above reasons, intervenor MVPP respectfully requests that the Commission deny applicants' motion to strike.

Respectfully submitted,

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DATED: November 10, 1982.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Miami Valley Power Project's Opposition to Applicants' Motion to Strike MVPP's Reply Brief was mailed, first-class postage prepaid, this 10th day of November, 1982, to each of the following:

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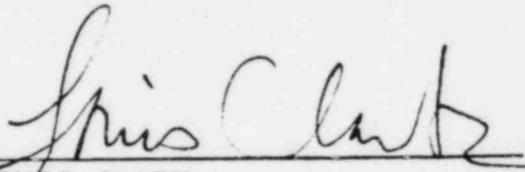
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