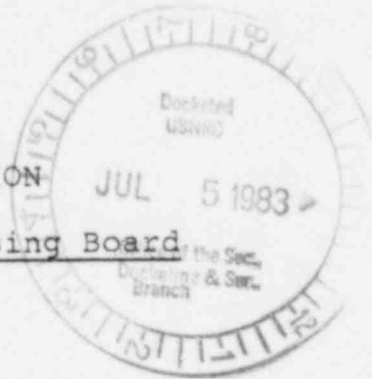


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of)

The Cincinnati Gas & Electric)
Company, et al.)

(Wm. H. Zimmer Nuclear Power)
Station))

Docket No. 50-358

APPLICANTS' ANSWER TO MOTION BY
MIAMI VALLEY POWER PROJECT FOR LEAVE
TO FILE A REPLY BRIEF

Preliminary Statement

On June 3, 1983, intervenor Miami Valley Power Project ("MVPP") filed a motion to reopen the record in the captioned proceeding for eight late contentions on quality assurance practices at the Wm. H. Zimmer Nuclear Power Station ("Zimmer"). The Cincinnati Gas & Electric Company, et al. ("Applicants") filed an answer opposing admission of the proposed contentions on June 20, 1983. The Staff of the Nuclear Regulatory Commission ("NRC") similarly opposed the reopening and late contentions. On June 29, 1983, MVPP filed a motion seeking leave to submit a reply brief to the Applicants' and Staff's answers.

As the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") is fully aware, voluminous legal pleadings have already been filed by the parties at all levels of the Commission fully setting forth their

position on the legal issues. No purpose would be served by permitting further, redundant discussion of these matters. Moreover, the Board should not authorize the receipt or consideration of additional affidavits which MVPP elected not to submit with its motion to reopen. In attempting to proffer these inexcusably late documents, MVPP seeks not only to deny Applicants' due process, but also to make a travesty of the Commission's rules requiring timely submissions. In sum, this most recent in a series of transparent attempts by MVPP to drag out this matter indefinitely for the sake of delay should be summarily rejected.

Argument

While MVPP has characterized the Applicants' and Staff's legal arguments under the regulations and Commission's precedents on reopening and the admission of late contentions as mere "technicalities,"^{1/} the Commission's rules and procedures are designed to afford all parties due process of law. For this reason, the Commission's boards are required to observe and enforce the requirements and standards under 10 C.F.R. Part 2, including the criteria for reopening and for accepting late contentions. Applicants do not regard the important due process safeguards afforded by these rules as any mere "technicalities."

^{1/} MVPP's Motion for Leave to File a Reply Brief at 1.

Each of the arguments made by MVPP in support of its request to file yet additional legal argument in the form of a reply brief is entirely without merit. As MVPP itself conceded, its most recent motion to reopen is basically a repetition of the earlier motion previously denied by the Licensing Board a year ago.^{2/} Similarly, the basic authorities upon which Applicants relied in arguing that the criteria for late contentions and reopening had not been met were drawn from their earlier opposition to the same contentions. The Board is fully conversant with these authorities and does not need additional briefing on the law.^{3/} MVPP should not be granted leave to expand its arguments beyond the 64 page brief it initially filed.

Reply briefs are not favored under the Commission's rules which expressly require a party to seek leave before a reply brief may be filed.^{4/} Unauthorized reply briefs are generally stricken or not considered.^{5/} These rules

2/ This point was previously discussed in Applicants' Answer to MVPP's Motion to Reopen the Record at 2 (filed June 20, 1983).

3/ Obviously, any party can claim that an opposing party has "misstated" the law. However, it is arrogant in the extreme for MVPP to claim that "[n]either applicant nor NRC staff has specifically contested the merits of the motion." MVPP's Motion for Leave to File a Reply Brief at 1.

4/ 10 C.F.R. §2.730(c).

5/ Consumers Power Company (Big Rock Point Nuclear Plant),
(Footnote Continued)

demonstrate the Commission's intent that a reply brief should be permitted only upon a showing of very good cause. No such justification has been offered here, nor would additional briefing appreciably enhance the Board's understanding of the issues.

A potentially more serious matter is raised by MVPP's proffer of additional affidavits. Such documents are clearly not in the nature of a "reply brief" and a reply brief does not properly raise what purports to be new matters. For several sound reasons, Applicants urge the Board to be adamant in limiting the record before it to those documents which were submitted with MVPP's motion to reopen filed on June 3, 1983.^{6/} MVPP asserts that four unidentified witnesses whose qualifications and involvement in quality assurance at Zimmer are entirely unstated, have agreed to provide affidavits on the basis of the NRC Staff's change in legal position on reopening the proceeding. The idea that new witnesses who have withheld important

(Footnote Continued)

ALAB-636, 13 NRC 312, 322 (1981); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981); Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466, "Memorandum and Order" (July 19, 1982); Allens Creek, supra, "Memorandum and Order" (June 2, 1982) (slip op. at 6-7).

^{6/} Applicant has contended, of course, that many of the documents submitted by MVPP, while a part of the record, should not be considered as they were not timely submitted.

information to this point have now stepped forward merely because of the position taken in a legal pleading from the Office of the Executive Legal Director is tenuous at best.

Similarly, the assertion that MVPP voluntarily withheld eight other affidavits in its possession on June 3, 1983 "in deference to any staff objections that introduction of the affidavits would interfere with ongoing investigations"^{7/} is self-serving and without merit. It is simply not credible that MVPP would have withheld affidavits which "represent the principal basis for major portions of [its] proposed contentions"^{8/} in order to defer to the Staff, which it has periodically castigated as biased and unable to carry out its assigned functions at Zimmer. Quite clearly, MVPP had the information in its possession at the time of its June 3, 1983 filing necessary for the submission of the affidavits in question. MVPP must be bound by the considered decision of its counsel that, as a tactical matter, the affidavits should be withheld and possibly submitted later. In sum, absolutely no valid reason is given as to why these affidavits could not have been submitted earlier.

If MVPP believes it has important information, it can furnish it to the Staff informally or pursue relief under 10 C.F.R. §2.206. Significantly, the Commission referred

^{7/} MVPP's Motion for Leave to File a Reply Brief at 2.

^{8/} Id.

MVPP's most recent submission to it to the Director, Office of Inspection and Enforcement, to be treated as a request under Section 2.206.^{9/}

To allow in even more late evidence or pleadings at this juncture would make a mockery of the Commission's regulations and its policy that licensing issues be timely concluded. As the Board aptly stated in initially denying these proposed contentions: "Litigation must come to an end."^{10/}

Conclusion

For the reasons discussed more fully above, the motion by MVPP for leave to file a reply brief should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Mark J. Wetterhahn
Robert M. Rader
Counsel for the Applicants

July 1, 1983

^{9/} A copy of the letter from the Director to MVPP's counsel, dated June 27, 1983, reporting this action is attached.

^{10/} Cincinnati Gas & Electric Company (Zimmer Nuclear Power Station, Unit 1), LBP-82-54, 16 NRC 210, 214 (1982).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Motion By Miami Valley Power Project For Leave To File A Reply Brief" dated July 1, 1983, in the captioned matter, have been served upon the following by deposit in the United States mail this 1st day of July, 1983:

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