

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

Chairman Nunzio J. Palladino
Commissioner Victor Gilinsky
Commissioner Thomas Roberts
Commissioner James Asselstine



In the Matter of)

CINCINNATI GAS AND ELECTRIC)
COMPANY, ET AL.)

(Wm. H. Zimmer Nuclear Power)
Station, Unit 1))

Docket No. 50-358

MVPP MOTION TO DEFER RULING ON WHETHER TO REVIEW ALAB-727 UNTIL
ADJUDICATORY BOARDS HAVE RULED ON MVPP'S MOTIONS TO REOPEN THE RECORD
TO ADMIT CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND COMPETENCE,
AND IN THE ALTERNATIVE TO REOPEN THE RECORD TO ADMIT THOSE CONTENTIONS.

I. INTRODUCTION.

As is set out more fully in MVPP's MOTION TO REOPEN THE RECORD FOR
ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND
COMPETENCE, filed June 3, 1983 with the Atomic Safety and Licensing Board
(ASLB) and attached hereto as an exhibit, in the REPLY BRIEF BY MIAMI
VALLEY POWER PROJECT IN SUPPORT OF MOTION TO REOPEN THE RECORD FOR
ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND
COMPETENCE; AND MOTION TO COMPEL DISCOVERY ON THOSE CONTENTIONS, filed with
the ASLB on July 12, 1983, and incorporated herein by reference, and in
MVPP's MOTION TO ATOMIC SAFETY AND LICENSING APPEAL BOARD TO REOPEN THE
RECORD FOR ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE AND
CHARACTER AND COMPETENCE, filed with the Atomic Safety and Licensing Appeal
Board (ASLAB) on July 12, 1983, and incorporated herein by reference,

significant facts have recently been discovered which raise substantial questions as to the quality assurance program at the Wm. H. Zimmer nuclear plant, and as to the character and competence of the Cincinnati Gas & Electric Company (CG&E) to manage the project.

These newly-discovered facts indicate that an operating license can not be granted for the Zimmer plant without assuming unacceptable risks to public health and safety.

On the basis of these new significant and unresolved safety issues, MVPP has moved the ASLB, and in a separate protective action, the ASLAB, to reopen the record in this proceeding, in order to develop an adequate evidentiary basis for an informed decision on whether to grant an operating license for the Zimmer plant.

II. THE COMMISSION SHOULD EXTEND ANY PROCEEDINGS TO REVIEW OR DECLINE TO REVIEW THE MAY 2, 1983 DECISION OF THE APPEAL BOARD UNTIL THE ADJUDICATORY BOARDS RULE ON MVPP'S MOTIONS TO REOPEN THE RECORD.

As is set out in MVPP's motions to the Licensing Board and the Appeal Board to reopen the record, the adjudicatory boards do have the necessary jurisdiction to reopen the record to hear MVPP's contentions, since these motions were filed before this case has become final. 1 /

Nevertheless, a Commission decision not to review the case, which would ordinarily constitute final agency action, could "chill" the independent exercise of discretion by the two Boards, and potentially prejudice their review of the merits of reopening the case to take evidence on the vitally important issues of quality assurance and CG&E's character

1 / The law is clear that a decision becomes final agency action when the Commission has issued an opinion on its review of the decision below or has declined to review the decision below. See generally MVPP reply brief to the Licensing Board, p. 20 et seq.

and competence to manage the Zimmer project. A Commission decision might be interpreted to remove all jurisdiction from the Licensing Board and the Appeal Board, even to deal with previously-filed motions.

For these reasons, MVPP respectfully requests the Commission to extend for a reasonable period the time during which it can act to review the Appeal Board's decision on Zimmer (ALAB-727, May 2, 1983), to allow the adjudicatory boards below to exercise their responsible discretion in ruling on whether to reopen the record.

A balancing of the factors which bear upon a temporary extension of the decision whether to review ALAB-727 clearly favors deferral of the Commission's decision until the Boards have time to act.

Although there is no specifically articulated standard that addresses the factors which should be balanced in this instance, some guidance is afforded by the standards for the Commission to stay the effect of adjudicatory board decisions, as provided in 10 CFR 2.788(e).

First of all, even under the stringent standards for a stay of an adjudicatory board's decision, it is clearly appropriate for the Commission to temporarily defer action, as will be shown below. Further, it would be inappropriate to apply these standards as stringently to this motion as to a motion for a stay, because a stay is an extraordinary remedy whereas the requested temporary deferral of Commission action to review the case below is a common Commission action which is often taken sua sponte, as was done in this case on June 13, 1983, when the time to review ALAB-727 was extended until July 13, 1983. Additionally, MVPP moves for an extension of the review period in order to permit action at the lower level. A stay normally would temporarily defeat such action.

Although the threshold to grant the relief requested here should be at

a point well below that to grant a stay, MVPP goes well beyond that threshold and fully satisfies the criteria listed in CFR 2.788(e). Each of these will be addressed in turn.

- 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits.

In the current case, "prevailing on the merits" properly would refer to verification of MVPP's basic conclusions attacking the quality assurance program at Zimmer. MVPP's motions make a strong case both on the merits and for reopening the record by virtue of the overwhelming amount of evidence which has come out since the close of the hearings, and which shows a need for a public adjudicatory hearing on the crucial QA and character and competence issues. The Commission's November 12, 1982 suspension of safety-related construction, and many of the findings in the Report of the NRC Evaluation Team on the Quality of Construction at the Zimmer Nuclear Power Station, NUREG-0969 (April 1983), confirm the basic accuracy of the MVPP contentions. Indeed, even the NRC legal staff, which opposes our motion, has admitted that MVPP's contentions are valid on their merits: "If...the basic allegations of the MVPP contentions were to be litigated in the Zimmer operating license proceeding, the Staff position would be to agree in general with the substance of the contentions." NRC Staff Brief in Opposition to Miami Valley Power Project Petition to Admit Eight Contentions on Quality Assurance, at 12 (June 20, 1983).

To the extent that "prevailing on the merits" is defined as reopening the record, MVPP has also made a strong showing. Last year, the ASLB, on a much less-developed factual record, decided to reopen the hearings sua sponte. Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1) LBP-82-54, 16 NRC 210 (1982). Although the Commission

decided that the circumstances at the time did not warrant sua sponte reopening, it later left open the possibility of further relief from the Licensing Board, thereby implicitly recognizing the importance of the issues, and the availability of such a forum absent final agency action. Zimmer, CLI-83-4, 17 NRC ____ (Feb. 18, 1983), denying reconsideration of CLI-82-20, 16 NRC 109 (1982). Nor has there been any dispute in the proceedings below that the Atomic Energy Act requires hearings for genuine, unresolved factual disputes about significant safety questions.

See generally MVPP Reply Brief to Licensing Board, p. 31 et seq. Indeed, the Commission expressed unanimous agreement with this proposition last October at congressional hearings. See MVPP Motion to Reopen the Record for Admission of Eight Contentions on Quality Assurance and Character and Competence, p. 38 (June 3, 1983). The status of Zimmer's QA program represents virtually unanimous factual disagreement between MVPP and the applicant.

For all these reasons MVPP believes that it holds a substantial likelihood of prevailing on the merits of these motions.

- 2) Whether the party will be irreparably injured unless a stay is granted.

As explained above, a Commission decision not to review the case could tend to chill the exercise of the responsible discretion of the adjudicatory boards. Even worse, the Boards might believe that on the Commission's decision not to review the case, the "finality curtain," Virginia Electric Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979), has fallen even as to those issues which are still before the Boards on motions that were timely filed. Therefore they might judge themselves compelled to deny the motions in the

mistaken belief that they lack jurisdiction.

In either of these cases, especially the second, the interests of MVPP would be irreparably damaged by failing to have the crucial question -- whether to hold a hearing to determine the full extent and proper resolution of significant unresolved safety issues of quality assurance and character and competence -- decided on the merits.

Nor does the staff review of the QCP prevent this irreparable injury. Indeed, the staff review is part of the problem. See generally Petition for Reconsideration of the Commission's Order of July 30, 1982 (August 20, 1982) and Reply to NRC Staff and Applicant Responses to MVPP's Petition for Reconsideration (October 11, 1982). It is necessary to have public hearings on these issues, because of staff's historic inability to represent adequately the public interest in these matters. See Commissioner Gilinsky's dissent to Commission's July 30, 1982 Order, CLI-82-20.

Thus, MVPP would be irreparably injured by Commission action that could effectively foreclose a decision on the merits as to whether to grant public licensing hearings.

3) Whether the granting of a stay will harm other parties.

The granting of MVPP's request to extend the time during which the Commission may act to review this case would not harm any party in any way. The applicant's Construction Permit is currently suspended, by Commission Order of November 12, 1982. A deferral of Commission review for a reasonable time period during which the adjudicatory boards can exercise their reasonable discretion will not delay in any way the future date for

operation of the Zimmer plant. 2 /

Similarly, the staff can in no way be harmed by a temporary deferral of Commission action.

4) Where the public interest lies.

The public interest lies both in affording public hearings on significant material issues of fact that directly relate to public health and safety, and in allowing the Licensing Board and the Appeal Board time to decide whether the hearings should be reopened. This strong public policy of protecting hearing rights is embodied in, for example, the requirements of section 189 of the Atomic Energy Act.

The facts which have been discovered since the record in this proceeding closed clearly establish that the issues in question are highly significant and material issues of fact concerning crucial unresolved safety concerns at the Zimmer plant. It is beyond question that the public interest lies in affording public adjudicatory hearings on these issues.

It is crucial that these significant issues be addressed in an adjudicatory setting. As explained more fully in MVPP's motions cited above, hearings provide a uniquely effective means to ascertain the true facts that are determinative of disputed issues, such as the degree to which Cincinnati Gas & Electric intentionally violated quality assurance requirements.

As this review of the standards for granting a stay has demonstrated, even under those relatively stringent standards MVPP has fully met the

2 / If the motions are granted, and there are hearings where the real facts about Zimmer quality assurance can be litigated, it could severely harm CG&E's interests by leading to such remedies as denial of a license, and/or criminal prosecution. However, these effects are irrelevant to the decision whether the Commission should temporarily defer its review of ALAB-727.

requirements for a stay. Therefore it is even more apparent that MVPP has justified the requested temporary deferral of Commission action, for which the standards should be substantially lower.

MVPP respectfully submits that the Commission should temporarily defer its review of this case until the adjudicatory boards can act on MVPP's motions.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD REOPEN THE RECORD TO ADMIT MVPP'S CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND COMPETENCE.

As is noted in MVPP's motions to the Licensing Board and the Appeals Board, those adjudicatory boards have the necessary jurisdiction to reopen the record up until the time when the case becomes final. In addition, of course, it is virtually beyond dispute that the Commission itself could reopen the record.

It is well-settled that the Commission has the inherent authority to regulate agency activities, even those in an adjudicatory setting. But in addition to its general inherent powers, this entire case is now before the Commission for review, until July 13, 1983, or a later date if the Commission, on its own motion or in response to MVPP's request, extends the time during which it can act.

NRC precedent establishes that on appeal to an Appeal Board, the Appeal Board can order the record reopened sua sponte to consider new issues that were not addressed below. E.g., Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980). The Appeal Board can remand the the case or take evidence itself. E.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 231 (1980).

Similarly, the Commission can also order the record of a case before

it reopened to take evidence on an important safety issue such as this one, and either remand it or take evidence itself.

In the case now before the Commission for review, it is extremely important that the record be reopened to take evidence on the crucial public health and safety issues raised by the massive quality assurance breakdown at Zimmer. In light of the scope of the breakdown, it is simply unrealistic to contend that violations can be resolved without full public participation through reopened hearings. The staff's failures in 1981 and 1982 to keep up with the quality assurance violations and disputes; the limited staff resources; the desire to expeditiously achieve a final resolution of Zimmer's problems, rather than uncover further allegations of misconduct; and the significant contributions of MVPP through even the limited vehicle of petitions all support this conclusion.

As is detailed in MVPP submissions since June 3, 1983, there is a very large and highly significant body of evidence that has arisen since the record in this proceeding closed. This evidence is not being properly dealt with by the staff review of quality assurance at Zimmer. These matters deserve to be aired in a public hearing of the sort contemplated by section 189 of the Atomic Energy Act. MVPP has met all applicable standards for reopening the record and for admitting late contentions.

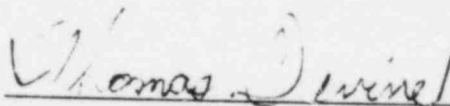
Thus, although MVPP believes it would be appropriate for the Commission to let the adjudicatory boards below rule in the first instance on whether to reopen the record, it is also proper for the Commission to reopen the record on its own accord. This would send a very clear message both to the adjudicatory boards and to the public that the Commission is serious about openly resolving the quality assurance and management problems at Zimmer in accordance with the public-hearing requirements of

the Atomic Energy Act.

IV. CONCLUSION.

For these reasons, MVPP respectfully requests the Commission to defer its decision on whether to review this case until the adjudicatory boards below can act on MVPP's motions to reopen the record, and in the alternative respectfully requests the Commission to order the record reopened for admission of the eight proposed MVPP contentions.

Respectfully submitted,



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