

LAW OFFICES
CONNER & WETTERHAHN, P.C.
1747 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

TROY B. CONNER, JR.
MARK J. WETTERHAHN
ROBERT M. RADER
INGRID M. OLSON
ARCH A. MOORE, JR.*
ROBERT H. PURL
OF COUNSEL
*NOT ADMITTED IN D.C.

August 10, 1983

(202) 833-3500

CABLE ADDRESS: ATOMLAW

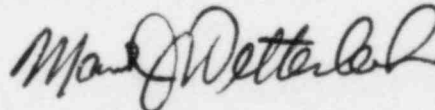
Richard C. DeYoung, Director
Office of Inspection
& Enforcement
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

In the Matter of
The Cincinnati Gas & Electric Company
(Wm. H. Zimmer Nuclear Power Station)
Docket No. 50-358

Dear Mr. DeYoung:

In response to the notice published in the Federal Register on July 6, 1983 (48 Fed. Reg. 31119) and the letter dated June 27, 1983 from Mr. James Lieberman, Office of the Executive Legal Director, I am hereby submitting "Comments of The Cincinnati Gas & Electric Company, et al., on Miami Valley Power Project's Letter to the Commission Dated May 25, 1983." For the reasons stated therein, no additional relief should be granted beyond that which was afforded by the "Director's Decision under 10 CFR 2.206," DD-83-02 (February 10, 1983), in the captioned proceeding.

Sincerely,



for Troy B. Conner, Jr.
Counsel for The Cincinnati
Gas & Electric Company

TBC/dlf

DS03
1/1

8308120171 830810
PDR ADOCK 05000358
G PDR

ADD: R. C. DeYoung
I+E Files

DR ENC
1 /
1 /

COMMENTS OF THE CINCINNATI GAS & ELECTRIC
COMPANY, ET AL. ON MIAMI VALLEY POWER PROJECT'S
LETTER TO THE COMMISSION DATED MAY 25, 1983

Preliminary Statement

On August 20, 1982, Miami Valley Power Project ("MVPP") submitted to the Nuclear Regulatory Commission ("NRC" or "Commission") a petition to suspend construction of the Wm. H. Zimmer Nuclear Power Station ("Zimmer"). A supplement to the petition was filed on October 18, 1982. The Commission referred the petition to the NRC Staff for consideration pursuant to 10 C.F.R. §2.206.

On February 10, 1983, the Director, Office of Inspection and Enforcement, issued a decision granting in part and denying in part the requested relief, noting that some of the relief requested by MVPP had been substantially satisfied by the Commission's Order to Show Cause and Order Immediately Suspending Construction, issued on November 12, 1982.^{1/} The Director found, however, "no basis for removing the licensee from responsibility for the quality verification program" and determined that "[i]mplementation of the appropriate recommendations resulting from the management review will help ensure that any future construction

^{1/} The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station), CLI-82-33, 16 NRC
(November 12, 1982) ("Order to Show Cause").

activities and reverification activities are conducted in conformance with the Commission's requirements."^{2/}

Ignoring the Commission's regulations, by letter dated May 25, 1983, MVPP requested the Commission to modify the Director's decision. The Commission's rules do not provide for a request by a petitioner to review a Director's decision under 10 C.F.R. §2.206.^{3/} The Commission, however, referred the letter to the Director as an additional matter for disposition under Section 2.206. By letter dated June 27, 1983, the NRC Staff offered The Cincinnati Gas & Electric Company, et al. ("Applicants" or "the Company") an opportunity to respond to MVPP's most recent letter.

MVPP has provided no basis in law or fact for the Director to reverse his previous decision denying the petition to suspend construction at Zimmer insofar as the petition requested relief in excess of that which he previously granted based upon the terms of the Commission's Order to Show Cause. No basis has been shown for the allegations raised by MVPP, which are speculative and do not presumptively warrant the extraordinary relief of suspending the construction permit for Zimmer.

^{2/} Zimmer, "Director's Decision under 10 CFR 2.206," DD-83-02, 17 NRC _____ (February 10, 1983) (slip op. at 5-6). The Commission subsequently declined to review the Director's decision, which became final agency action on June 6, 1983.

^{3/} See 10 C.F.R. §2.206(c)(2).

Nor do the allegations that the NRC Staff has made certain findings, as fully contemplated by the Commission in its Order to Show Cause, warrant any relief. Such findings will be utilized by the Staff in determining its recommendations to the Commission for the resumption of safety-related construction at Zimmer and, ultimately, the issuance of an operating license for the facility. In sum, this most recent attempt by MVPP to upset the Commission's carefully formulated plan for completing the quality confirmation and verification programs at Zimmer prior to resumption and completion of construction should be denied.

Legal Analysis

Aside from gratuitous attacks upon the objectivity and competence of the NRC Staff's review of quality assurance matters at Zimmer,^{4/} which do not warrant a response here, MVPP's allegations boil down to three points. To examine these points in proper context, it must be remembered that safety-related construction remains suspended at Zimmer. Thus, the additional relief requested by MVPP is suspension of the Quality Confirmation Program and related quality assurance activities and removal of CG&E from its proper management and decision-making role with respect to quality confirmation and quality verification activities. The

^{4/} Letter dated May 25, 1983 from counsel for MVPP to the Commission at 2 n.*.

Director has previously determined that such relief is entirely inappropriate.

The staff sees no basis for removing the licensee from responsibility for the quality verification program. Under the Commission's regulations, the licensee is ultimately responsible for the establishment and execution of its quality assurance program, though it may delegate to others the work of establishing and executing the program. See 10 C.F.R. Part 50, Appendix B, Criterion I. Moreover, the changes in management of the Zimmer project made as a result of the recommendations under section IV.B(1) of the order will be applied to the management of the quality verification program. Implementation of the appropriate recommendations resulting from the management review will help ensure that any future construction activities and reverification activities are conducted in conformance with the Commission's requirements.^{5/}

The three points now raised by MVPP provide no basis for overturning that decision. First, while the "Report of the NRC Evaluation Team on the Quality of Construction at the Zimmer Nuclear Power Station" ("NET Report"), published as NUREG-0969 (April 1983), recommended an audit of the Sargent & Lundy design process in addition to the ongoing quality confirmation efforts in the design area,^{6/} there is absolutely no reason demonstrated why this further aspect cannot be handled by Applicants under the existing

^{5/} Zimmer, Director's Decision, supra, at 5-6.

^{6/} NET Report at 224.

framework.^{7/} MVPP claims that a single identified "conflict" between the voluminous NET Report and statements by the Applicants demonstrates "glaring generic deficiencies" and "hidden defects"^{8/} which should disqualify CG&E from the quality confirmation and verification

7/ For example, a letter of May 13, 1983 from the Company to the NRC states that in response to the NET Report, the Quality Confirmation Program ("QCP") will address conduit hangers and cable tray hangers in the control room, masonry wall construction and boltings. The letter of June 10, 1983 from the Company to the NRC provides an interim report on the concerns over bolting raised in the NET Report and indicates that a follow-up report will be provided on September 12, 1983. A letter of June 13, 1983 provides an interim report on masonry walls and indicates that a follow up report will be submitted on September 12, 1983. Another letter of June 13, 1983 provides an interim report on soil structure and compaction outside the power area, subjects which are also included in the NET Report. A third letter of June 13, 1983 transmits QCP Task descriptions for masonry walls and boltings.

A letter of June 30, 1983 from the Company to the Staff discusses a concern raised in the NET Report regarding the adequacy of design control process to assure that design output documents contain adequate erection and inspection criteria. At that time the Company determined that the matter was a potentially reportable deficiency within Section 50.55(e), and stated that it is conducting a more detailed investigation into specific items mentioned in the NET Report to report any items identified which meet Section 50.55(e) criteria. There is now in place an evaluation of the NET Report whereby each paragraph of the Report is being investigated. There is no reason why other matters arising under the NET Report cannot be similarly treated under the QCP, Section 50.55(e) reports, or other programs.

8/ MVPP letter dated May 25, 1983 at 4.

programs. While no such "conflict" exists,^{9/} this matter, as well as others identified in the NET Report, will be properly dispositioned under the quality confirmation and verification programs as well as any other actions the NRC Staff determines to be necessary for resumption of safety-related construction at Zimmer pursuant to the Commission's Order to Show Cause.

Under the Commission's rules, the Director "is not required to accord presumptive validity . . . [to MVPP's allegation], irrespective of its degree of substantiation,"^{10/} that CG&E cannot adequately meet the demands of expanded or augmented quality confirmation and verification programs to include items that are developed

^{9/} MVPP's lack of understanding of the scope of Task VIII and Task IX of the QCP is apparent. Task VIII addresses the total issue of design control and was predicated on the assumption that an independent design review would be performed prior to granting an operating license.

Further, MVPP has misquoted CG&E's Response to the NRC Demand for Information at page four of its letter in asserting that DDC's are "dispositioned" instead of "considered." Once this error is understood, it is apparent that there is no "conflict" between the NET Report and the CG&E Response to the NRC Demand for Information. Thus, Task IX of the QCP addresses proper "consideration" of Design Document Changes (DDC's) in inspection documents. Therefore, MVPP is evidently unknowledgeable as to the scope of these two distinct tasks or is deliberately attempting to fabricate some "conflict" by confusing them.

^{10/} Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 432 (1978).

from these programs as anticipated. MVPP's unsupported assertion is therefore a "mere dispute over factual issues [which] does not suffice" to show that any substantial, imminent threat exists to the public health and safety.^{11/}

The second point raised by MVPP involves allegations of so-called "secret plans" by CG&E to "undercut the legitimacy of the publicly-conducted work in the Commission's November 12 Order."^{12/} As stated in Applicants' letter to the Commission dated June 3, 1983, it can only be assumed that this charge refers to the fact that Applicants have engaged well qualified technical consultants to assist them in reviewing the present situation at Zimmer and in examining possible alternatives so that it may better respond to the recommendations of Torrey Pines Technology upon the completion of its independent management review.^{13/} There is absolutely no basis for the NRC to give any credence to this extremely vague innuendo that Applicants are planning to undercut or have in some way failed to abide the terms of the Commission's Order to Show Cause. Far from acting in

^{11/} Consolidated Edison Company of New York, Inc. (Indian Point, Unit Nos. 1, 2 and 3), CLI-75-8, 2 NRC 173, 176 n.2 (1975).

^{12/} MVPP letter at 5.

^{13/} The Region III Administrator stated at the public meeting on May 26, 1983, as noted in Applicants' letter, that it would be surprising if the Company were not considering such matters.

secret, Applicants have kept the NRC and the public well informed of activities related to implementation of the terms and conditions of the Order to Show Cause.^{14/}

The final point raised by MVPP involves the further innuendo that pending litigation involving the Zimmer station has placed the Company in an alleged "conflict of interest" situation. MVPP implies that the Company would fail to make necessary disclosures to the NRC regarding quality assurance at Zimmer in order to protect its litigating position. There is no support for such wild charges.

The Company, like all NRC applicants and licensees, is fully aware of its responsibilities under the Commission's regulations, e.g., 10 C.F.R. Part 21 and Section 50.55(e), for reporting and disclosing matters which might have a potentially adverse effect upon the quality of construction at a nuclear facility. The Company is equally cognizant of the penalties and sanctions which the NRC has at its disposal if an applicant should fail to meet these important responsibilities with less than complete candor. MVPP's mere speculation to the contrary certainly provides no basis

^{14/} See, e.g., letter dated February 28, 1983 from W.H. Dickhoner, President, CG&E to James G. Keppler, Region III, Administrator; letter dated June 1, 1983 from Joe Williams, Jr., Senior Vice President, CG&E to the Cincinnati Enquirer; letter dated June 30, 1983 from Joe Williams, Jr. to A.J. Neylan, Torrey Pines Technology.

for removing the Company from its customary management and decision-making role.

Moreover, the suggestion that pending litigation which might result in money damages against the Company would provide an incentive for the withholding of such information is contrary to the express views of the Commission in recently eliminating the financial qualifications review for electric utility applicants.^{15/} In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 18-19 (1978), the Commission noted that "recent experience does not suggest that a utility short of

^{15/} In adopting the rule, the Commission rejected the argument that the inability of a utility to recover all of its costs might provide an incentive "to skimp on important safety components and quality assurance standards." See "Elimination of Review of Financial Qualifications of Electric Utilities in Licensing Hearings for Nuclear Power Plants," 47 Fed. Reg. 13750 (March 31, 1982). Answering opponents of the new rule who argued that quality assurance violations at the South Texas facility demonstrated a link between quality and a utility's financial status, the Commission stated that it "cannot accept unsupported statements that, as a general matter its inspection and enforcement efforts are inadequate. The examples that commentators cite (e.g., South Texas) appear to substantiate, rather than undercut, the Commission's view that any violations of safety regulations are being found and corrected and that, in any event, such violations cannot be shown to arise from a licensee's alleged lack of financial qualifications." Id. at 13751. Task IX reviews inspection documentation to see if the latest applicable DDC was "considered" by the inspector. Task VIII seeks to determine design document control assurance by Sargent & Lundy. Neither Task discusses "disposition" of DDC's since disposition refers to a step in processing nonconformance reports, not DDC's.

funds will cut corners on safety," and that the vast sums involved in building a nuclear power plant run into "amounts far exceeding the comparatively small sums a utility might expect to save by cutting corners in construction."

None of MVPP's conjecture amounts to "new information regarding the issue under consideration" which identifies "a significant unresolved safety issue"^{16/} at Zimmer. In essence, MVPP seeks relief from the Director that exceeds the scope of the Commission's Order to Show Cause, which sets forth the conditions precedent to resumption and completion of construction at Zimmer. Such a request is wholly inappropriate. First, as the Commission has held, "parties must be prevented from using 10 CFR 2.206 procedures as a vehicle for reconsideration of issues previously decided."^{17/} A fortiori, this principle applies to matters decided by the Commission itself.

Second, the Commission's policy established in the Marble Hill proceeding "that encourages licensees to consent to, rather than contest, enforcement actions"^{18/} means that

^{16/} Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), DD-79-21, 10 NRC 717, 719 (1979) (footnote omitted).

^{17/} Indian Point, CLI-75-8, supra, at 177.

^{18/} Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980). The Commission added: "Such a policy would be thwarted if licensees which consented to
(Footnote Continued)

a petitioner seeking Section 2.206 relief "is not entitled to a hearing on the enforcement order as a matter of right" in order to argue "that the remedy proposed by the Director [in this case, the Commission itself] is insufficient to protect the public health and safety."^{19/}

Third, and most important, it is not for the Director to determine that MVPP is entitled to relief greater than that which the Commission itself has required in its Order to Show Cause. The Commission has defined the entire framework in which outstanding quality assurance matters will be addressed and resolved. If MVPP were dissatisfied with the terms of that Order, it could have sought judicial review. As the Commission stated in the Indian Point proceeding, Section 2.206 procedures may not be used for "avoiding an existing forum in which [issues] more logically should be presented."^{20/}

Finally, it bears reiterating that nothing contained in this request by MVPP has any potential safety significance inasmuch as safety-related construction at Zimmer has been halted until the Staff, which is closely monitoring the

(Footnote Continued)

enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions." Id.

^{19/} Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 289 (1980).

^{20/} Indian Point, CLI-75-8, supra, 2 NRC at 177.

management review and quality confirmation and verification activities, has concluded that Applicants have complied with the Commission's requirements for resumption and completion of such construction. Under similar circumstances, the Director has found it unnecessary to grant yet additional relief under 10 C.F.R. §2.206. See, e.g., Commonwealth Edison Company (Byron Station, Units 1 and 2), DD-81-5, 13 NRC 728, 740 (1981); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), DD-81-9, 13 NRC 1125, 1128 (1981); Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), DD-80-3, 11 NRC 175, 179-81 (1980).

Precisely the same point was made by the Appeal Board in the Seabrook proceeding, where an intervenor sought suspension of the facility's construction permits pending the completion of a hearing on seismic issues. The Appeal Board denied the request, holding:

Whatever the result of the remand, before receiving operating licenses the applicants will be required to do anything necessary to accommodate it. To repeat, should the ultimate determination be that the facility's present seismic design is inadequate, the requisite changes will have to be made and implemented regardless of the amount of cost and inconvenience which might be involved

Given the fact that the applicants must meet absolute safety standards as a precondition to Seabrook operation, it also follows that a permit suspension is not needed to obviate "likely prejudice

to further decisions that might be called for by the remand."21/

Accordingly, MVPP's unsubstantiated charges present no significant safety problems at Zimmer.

Conclusion

As the Director of Nuclear Reactor Regulation previously stated, "the granting of immediate relief would be an extraordinary action that would be warranted only if immediate action were required to abate some imminent and substantial hazard that threatened public health and safety or the environment."22/ Nothing approaching such an imminent and substantial hazard to the public health and safety has been shown here. For the reasons discussed more fully above, the Director should deny MVPP's request for relief.

21/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-623, 12 NRC 670, 677-78 (1980) (footnotes omitted). See also Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1369 (D.C. Cir. 1979), holding that "permitting continued construction of the plant despite unresolved safety questions does not of itself pose any danger to the public health and safety."

22/ Letter dated August 4, 1982 from Harold R. Denton, Director, NRR, to Robert J. Sugarman, Esq. in the Limerick proceeding.