

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the matter of)
CINCINNATI GAS AND ELECTRIC)
COMPANY, ET AL.)
(Wm. H. Zimmer Nuclear Power)
Station, Unit 1))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket No. 50-358

MIAMI VALLEY POWER PROJECT'S MEMORANDUM IN SUPPORT OF
MENTOR'S MOTION TO FURTHER DEFER RULINGS UNTIL COMPLETION
OF AN INVESTIGATION INTO MATERIAL FALSE STATEMENTS BY
APPLICANTS AND STAFF

I - PRELIMINARY STATEMENT

The Miami Valley Power Project ("MVPP") hereby submits this brief in support of Mentor's Motion to further Defer Rulings until Completion of an Investigation into Material False Statements by Applicants and Staff ("Mentor's Motion"). The effect of the Licensing Board's denial of MVPP's motion to file late contentions has been to unfairly penalize MVPP for the misconduct of other parties, namely, the Nuclear Regulatory Commission ("NRC") Staff and the Cincinnati Gas & Electric Company ("CG&E"). This misconduct consisted of failing to disclose significant evidentiary information ^{1/} and thereby failing to make it available to the public in

^{1/} This evidentiary information includes, but is not necessarily limited to, the evidence and text not released due to censorship of the 1981 NRC reports on Zimmer - see Mentor's Motion.

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a timely fashion. These wrongful acts prevented MVPP from filing timely contentions based upon this data. ^{2/} Mentor's Motion should be granted in order that this Board may guard against an unacceptable result - to hold MVPP accountable for the filing of non-timely contentions; and as a result to deny its due process rights to notice, hearing and the impartial adjudication of its proposed contentions.

II - THREE-PRONGED DUE PROCESS STANDARDS

In order for due process requirements to be satisfied, "notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner," Fuentes v. Shevin, 407 U.S. 67, 80 (1972), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This principle incorporates a flexible approach that "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The U.S. Supreme Court further elaborated this analysis in Mathews v. Eldridge, creating a three part test:

... identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

This Mathews test has been adopted recently by the NRC,

^{2/} For a more detailed procedural history, see Staff's Motion to Defer Rulings on MVPP's Motion to Reopen, pgs. 1 & 2

as seen in Kerr McGee (West Chicago Rare Earth Facility), 15 NRC 232, CLI-82-2 (1982) ("Kerr McGee"). Although the Commission in that case dismissed the due process arguments raised by petitioners, it further articulated the factors to be considered in this assessment. First, the "private interest" must be a cognizable or legitimate property or liberty interest, such as a statutory or regulatory right to notice and/or a hearing. ^{3/} Second, the factors to considered in whether a "risk of erroneous deprivation" would result from the denial of a hearing include whether facts are merely of a technical nature, or instead are in dispute by the parties, whether the resolution of these factual disputes is essential to develop an adequate record for review, whether credibility questions are raised by the parties, and finally, the extent of adverse health, safety and environmental impacts. ^{4/} Third, the "government's interest" in minimizing cost and delay is a factor to be considered, especially where no risk of erroneous deprivation is found to exist. ^{5/} Applying this analysis to the facts at Zimmer clearly reveals that a due process interest is at stake, for the reasons set forth below.

A. Property interest in Statutory or Regulatory Right to Notice and Hearing

MVPP has a property interest to which it is entitled as a matter of right in having an adjudicatory hearing, pursuant

^{3/} Kerr McGee, p. 257-58

^{4/} Id at 258-61

^{5/} Id at 261-62

to Sec. 189a of the Atomic Energy Act (42 USC Sec. 2239). This right is in no way forfeited because of delay by other parties in disclosing information solely within their control.

When a petitioner seeks to reopen hearings after the record is closed, the right to a hearing is qualified by the five criteria of 10 CFR Sec. 2.714(a), which include "good cause" for the filing of non-timely contentions. The significance of Mentor's Motion is that MVPP was deprived of notice, which has in effect been defined to mean "publicly available information," Duke Power Company, et al. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC ____ slip op. pp. 10-11), or public disclosure of evidence which would justify reopening the record.

MVPP was not only denied the notice necessary for timely exercise of its rights, but the deprivation was a direct result of withholding information by the parties (namely, the NRC Staff and Applicants) in control of the relevant records. If the information, which was withheld by Applicants and/or either censored from the published reports or improperly denied under the Freedom of Information Act by the NRC Staff, had been on the public record, MVPP would have had a clearly adequate basis to file timely contentions challenging the adequacy of the Staff's corrective action program.

In sum, MVPP can properly only be held to account for any delay on its own part, and not that of other parties, and only from the date when it received notice of the information necessary to support reopened hearings: to penalize MVPP for

filing untimely contentions, the factual basis of which it was not notified of and to which it was deprived of access due to other parties' delay, by means of denying it an adjudicatory hearing, clearly offends traditional notions of justice and fair play, which are integral components of due process. Since MVPP was entitled to proper notice and a hearing as derived by statute or regulation, MVPP clearly has the requisite property interest for purposes of satisfying the first prong of the three part test of due process.

B. Risk of Erroneous Deprivation

Moreover, there is a substantial risk of erroneous deprivation in denying an adjudicatory hearing in this case. It is clear that the evidentiary information in question is not merely of a technical nature, but is also controverted by all parties, and, therefore, essential to develop an adequate record for review. Further, a hearing is appropriate where credibility questions are raised, in this case, with respect to both Applicants' positions on the issues, as well as Applicants' and the NRC Staff's endeavors to conceal material information from the public and engage in what MVPP believes was a "cover-up." ^{6/} This case is also distinguishable from the facts in Kerr McGee, since the adverse health, safety, and environmental impacts are far from being de minimis or non-existent here.^{7/}

For these reasons, MVPP also satisfies the second prong of the three prong due process test.

^{6/} See generally MVPP's Petition for Reconsideration of the Commission's Order of July 30, 1982 (August 20, 1982) (MVPP August 29, 1982 Petition); and MVPP's Reply to NRC Staff and Applicant Responses to MVPP's Petition for Reconsideration (October 1, 1983) (MVPP October 11, 1982 Reply).

^{7/} See Kerr McGee, p. 261.

C. Government Interest in Avoiding Cost and Delay

The government interest in avoiding the administrative cost and potential delay in conducting any hearing certainly cannot be deemed to be compelling when asserted against MVPP, especially since most, if not all, of the potential cost and delay in this case are due to other parties' wrongdoing. MVPP has, furthermore, offered to accept time constraints that would guarantee against delay, and to enhance judicial economy by eliminating all issues from its contentions on which adequate corrective action can be agreed. ^{8/} In any event, an asserted interest in avoiding delay is inherently questionable in light of the recent two to three year estimates by CG&E's proposed constructor, the Bechtel Corporation. ^{9/}

It should further be noted that this third factor is not to be accorded great weight, unless "the need for additional procedures [is] highly questionable" ^{10/} in the first place, which is clearly not the case here for the above mentioned reasons.

For these reasons, it is manifest that a consideration of all three of the due process factors enunciated in Mathews and further expanded upon in Kerr McGee shows that MVPP is entitled to a hearing.

^{8/} MVPP's Petition, at 10. See generally MVPP's Petition for Reconsideration of the Commission's Order of 7/30/82 (8/20/82) (MVPP 8/20/82 Petition); and MVPP's Reply to NRC Staff and Applicant Responses to MVPP's Petition for Reconsideration (10/11/83) (MVPP 10/11/82 Reply).

^{9/} MVPP's Petition for Reconsideration of 9/15/83 Order (10/3/83), pp. 3-10 (MVPP Petition)

^{10/} Kerr McGee, p. 262

III - BIAS

It is clear that all parties have the primary duty to alert the Board of all significant factual developments, Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1-3), ALAB-677, 15 NRC 1387 (1982) and failure to provide "true and full information" constitutes a material false statement, whether by omission or commission, Virginia Electric and Power Company (North Anna Power Station, Units 1-2), CRI-76-22, 4 NRC 480 (1976). Since the NRC Staff and CG&E have concealed material information from the public, this clearly constitutes a breach of this duty, the dereliction of which threatens the "independence and integrity of [the] Licensing Board [which] is fundamental to due process." Texas Utilities Generating Co., et al (Commander Peak Steam Electric Station, Units 1-2), LBP-82-87, 16 NRC 1195, 1200 (1982).

MVPP also challenges, on due process grounds, the partiality of the NRC Staff in its role before this Board. It is apparent that granting Mentor's Motion is necessary to learn whether the presumption of administrative regularity or good faith will be rebutted by clear and convincing evidence in this case. Similarly, granting the motion is necessary to draw credible conclusions as to whether the relevant inquiry has been satisfied in this respect: a Board investigation could determine whether the Staff Management had "demonstrably made up [their] minds about important and specific factual questions and [were] impervious to contrary evidence." United

Steelworkers of America, Etc. v. Marshall, 647 F.2d 1189, 1209 (D.C. Cir. 1981) and Assoc. of Nat. Advertisers, Inc. v. F.T.C., 627 F.2d 1151, 1170 (D.C. Cir. 1979).

Under these circumstances, in order to avoid bias within the adjudicative process itself, the record must be fully developed to determine whether all parties have exercised legally required diligence before this Board. To date, only MVPP has been subject to such strict scrutiny. This unequal treatment is prejudicial to MVPP's interests, especially in light of the demonstrated misconduct on the part of the NRC Staff and CG&E in concealing material information from the Licensing Board and the public. An investigation by this Board, as contemplated by Mentor's Motion, is, therefore, an appropriate procedural remedy to protect MVPP's rights and those of the public.

For all of the above reasons, MVPP requests that the Atomic Safety and Licensing Board grant Mentor's Motion to further defer ruling on MVPP's Motion to Reconsider until it has completed an investigation into the NRC Staff's and CG&E's material false statements, or, in the alternative, that this Board grant forthwith MVPP's request for an adjudicatory hearing on its proposed quality assurance and management corrections.

Respectfully submitted,

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DATED: November 30, 1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing "Miami Valley Power Project's Motion For Leave To File a Reply Brief to Applicants and Staffs' Answers to MVPP's Motion to Compel Discovery" has been served upon the following by mailing first-class, postage prepaid, this 30th day of November, 1983.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing "Miami Valley Power Project's Motion For Leave To File A Reply Brief To Applicants and Staffs' Answers to MVPP'S Motion To Compel Discovery" has been served upon the following by mailing first-class, postage prepaid, this 11th day of August, 1983.

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