

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

In the Matter of)
)
THE CINCINNATI GAS AND ELECTRIC)
COMPANY, et al.)
)
)

'83 DEC -5 A11:17
Docket No. 50-358
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

MVPP RESPONSE TO APPLICANTS' NOVEMBER 15 ANSWER
AND MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE

Pursuant to the Licensing Board's November 21, 1983 Order, MVPP files this response to Applicants' November 15 answer to Staff's October 31 motion to defer ruling on MVPP's October 5 petition for reconsideration. Additionally, MVPP moves for leave to file additional evidence with the Board prior to the December 15, 1983 conference of counsel. More specifically, MVPP moves that the Licensing Board consider MVPP's public comments on Applicants' proposed Course of Action.

I. SCOPE OF THE COMMISSION'S STATEMENT OF POLICY.

Applicants' argument -- "The Commission's Statement of Policy Applies Only to Issues in Controversy"^{1/} -- is based on a false premise; namely that no legally-relevant proceeding exists. This premise is based on a false assumption; that the Zimmer proceeding is not a proceeding. In its October 3 petition for reconsideration, MVPP demonstrated that the Commission's Policy for review of pending investigations applies to "contested proceedings," which exist when an attempt to intervene is

^{1/} 48 Fed. Reg. 36358, 36359 (August 10, 1983.) (Policy Statement.)

pending.^{2/} Applicants failed to address MVPP's analysis. The omission fatally undercuts Applicants' position, since at Zimmer, MVPP's proposed contentions are pending.

Nuclear Regulatory Commission (NRC) regulations do not define the term "proceeding," but its application in the regulations confirms MVPP's position. To illustrate, the regulation on alternative licensing procedures applies to "proceedings in progress where hearings have already been requested or ordered. . ."^{3/} Similarly, the Commission's ex parte rules, cited by Applicants in a separate context for this stage of the Zimmer case, also are triggered by the existence of a proceeding.

Second, Applicants are wrong to assert that the policy only applies to ongoing hearings. Initially, such an interpretation conflicts with the plain language of the Policy. The duty is subjective, and occurs where OI or Staff "believes" that a duty exists to inform the Board of new developments.^{5/}

Third, Applicants misstate prior case law to conclude that the duty of disclosure is limited by technicalities such as the formal legal status of proposed contentions. Although the facts in cases cited by the Staff and analysed by Applicants occurred in the context of ongoing proceedings, the relevant rules of law

^{2/} "MVPP's Petition for Reconsideration of September 15, 1983 Order" (October 3, 1983) (Petition for Reconsideration).

^{3/} 10 C.F.R. 2.700. (Emphasis added.)

^{4/} 10 C.F.R. 2.780.

^{5/} 48 Fed. Reg. 36358, 36359 (August 10, 1983) (Policy Statement.)

cited by the ruling did not include the explicit limitations added by Applicants. As the Commission explained in North Anna, the duty of disclosure arises because it is "vital" to serve "the Commission's primary duty . . . to protect public health and safety."^{6/} The relevant standard is whether the information is "material to the licensing decision, and therefore to the public health and safety,"^{7/} not merely to an ongoing hearing. Contrary to Applicants' preference for legal technicalities, the Commission required "careful, common sense judgments . . ."^{8/}

The reason that the duty to disclose most commonly occurs in licensing hearings is because hearings are near the final licensing decision, and therefore the consequences of an error are more severe. As the Commission explained,

At the very beginning of the licensing process, when initial investigations are being made, the applicant has greater latitude to inquire into areas that may prove, when the inquiry is concluded, to be without significance in terms of the licensing decision. At the hearing stage, in contrast, where agency decisionmaking is imminent, arguably relevant data must be promptly furnished if the agency is to perform its function.^{9/}

Unlike Applicants' position, the Commission's explanation serves common sense and the agency mission. The duty to disclose may be of vital assistance for the Licensing Board to determine

^{6/} Virginia Electric and Power Company (North Anna Power Station, Unit 1 and 2), CCI-76-22, 4 NRC 480, 488 (1976).

^{7/} Id., at 491.

^{8/} Id.

^{9/} Id., at 487-88.

whether public health and safety considerations require renewed hearings into safety hazards that were missed previously.

II. DELEGATING THE BOARD'S RESPONSIBILITIES TO THE COMMISSION.

Applicants misstate the context of the Commission's decision in Three Mile Island to conclude that the Board should, in effect, let the Commission perform the Board's function.^{10/} In Three Mile Island, the Commission did not declare that its function was to substitute for the adjudicatory board in making an initial decision on a motion to reopen, or the relevant evidence necessary for the initial decision. Rather, the Commission was fulfilling its responsibility to review lower decisions.^{11/} That option still exists here, and the Commission has already indicated that it does not wish to interfere with the orderly course of the Zimmer proceeding.^{12/}

Similarly, Applicants suggest that the Board should defer, because the Office of Investigations (OI) will present the report at issue to the Commission. This argument is frivolous. All OI reports are presented to the Commission. The point of the Commission's Policy Statement is to alert Licensing Boards of the circumstances when they do not have to wash their hands of relevant information. This case is a clear illustration of such circumstances.

III. RELEVANCE OF THE OI INVESTIGATION OF MVPP'S PETITION.

Applicants misstate the issue by limiting the relevance of OI's work to an examination of "good cause" for late filing.^{13/}

^{10/} Applicants' Answer, at 5 n.10.

^{11/} Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), Order (October 7, 1983).

^{12/} Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station), Order (August 23, 1983).

^{13/} Applicants' Answer, at 5.

The proper criterion is whether the information is relevant for reopened hearings, rather than the more limited purpose of only examining "good cause" for late filing. It has been the law for over a decade that "a matter may be of such gravity that the motion to reopen should be granted notwithstanding that it might have been presented earlier."^{14/} It is impossible to predict whether the OI report will reveal evidence meeting that threshold, without first examining OI's work. Indeed, the information may be crucial for the Board to make an informed decision whether it must fulfill this requirement by application of its sua sponte authority due to unexcused intervenor tardiness. Applicants conveniently ignore this possibility.

This is not to imply that the OI report is necessarily irrelevant to "good cause" for MVPP's tardiness. The report may well confirm MVPP's position that applicants' misstatements and withholding both explain and justify the public's delay in raising issues that had been withheld from the public record.

Further, the report may well be relevant for examination of Applicants' compliance with its duty to disclose during July 1982, when the proposed contentions were admitted for nearly a month. To illustrate, withholding relevant evidence during that time frame could be of decisive significance for MVPP's character and competence contention. In short, an informed Board decision requires its review of the completed OI report, complemented by the parties' briefing on the relevance of the new information contained therein.

^{14/} Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-138, 6AEC 520,523 (1973).

IV. RELEVANCE OF WARNINGS AGAINST OPEN-ENDED LICENSING PROCEDURES.

Applicants' fears of open-ended proceedings based on endless "new developments"^{15/} are ironic, and based on unfair assumptions both about the Licensing Board and MVPP. The irony is that the accuracy of the prophesy is within Applicants' control. As long as Applicants continue to trample on legal quality assurance requirements, indeed there will be "new developments." There should be. If Applicants change courses and begin complying with the law, there will not be such developments.

Contrary to Applicants' assumption, MVPP neither has the resources nor the desire to raise frivolous issues. MVPP's good faith is evidenced by its offer to accept time limitations on reopened hearings, and to restrict the proceedings to issues upon which adequate corrective action cannot be agreed.^{16/} Again, Applicants conveniently overlooked this offer while hysterically attacking MVPP's motives.

Similarly, Applicants' fears assume that the Board would not be able to control its proceedings. MVPP is confident of the Licensing Board's ability to insure orderly litigation. MVPP also believes that it is premature to accept CG&E's judgment that the job cannot be done, until the Board and all the parties have tried to meet the challenge.

V. RELEVANCE OF EX PARTE CONCERNS.

Applicants' shrill protest of ex parte Board briefings^{17/}

^{15/} Applicants' Answer, at 6-7 n.7.

^{16/} MVPP Petition, at 10.

^{17/} Applicants' Answer, at 8-12.

challenge the Commission's Statement of Policy generically, without engaging in the necessary application of sound principles to the facts of this proceeding. Certainly even Applicants would not seriously contend that in camera ex parte proceedings are never appropriate. Applicants must apply the general prohibition against ex parte contacts to this particular proceeding in order to present a prima facie argument.

MVPP agrees that the preferable policy would be to avoid ex parte proceedings. Rather, the Board should order the parties to review and brief the OI results for relevance to the proposed contentions, as soon as the report is available.

MVPP does not understand the harm that Applicants would suffer, however. Applicants suggest that the proper course is a public hearing, rather than ex parte communications.^{18/} But a public hearing is what Applicants fear the most, as well as the most drastic change from the status quo that could result from the alleged misconduct.

Similarly, Applicants assert that ex parte briefings on the merits of MVPP's proposed contentions would "have an incalculable effect on the rights of Applicants in this proceeding."^{19/} This again is hard to understand, since Applicants also believe that the merits of the contentions are "immaterial" to the issues pending before the Licensing Board.^{20/} The contradictions expose the weakness of Applicants' position. It is too self-serving to be either consistent, or credible.

^{18/} Id., at 8, 10 n.19.

^{19/} Id., at 10.

^{20/} Id., at 8.

VI. RELEVANCE OF MENTOR'S MOTION.

Ignoring the Board's September 15 Memorandum and Order, Applicants reiterate the tired refrain that hearings are unnecessary, in light of the NRC Staff's program.^{21/} This assertion cements the relevance and necessity of Mentor's motion for the Board to order an investigation of material false statements by the NRC Staff and Applicants through withholding information from the Board. The significance of Mentor's concern is that hearings may be necessary because of the Staff's negative leadership at Zimmer.

VII. MOTION TO SUPPLEMENT THE RECORD WITH COMMENTS ON THE COURSE OF ACTION.

MVPP moves that this Board accept its public comments on Applicants' proposed Course of Action. The comments and related exhibits are essential for the Board to understand the threat to public health and safety that the Course of Action represents. The information demonstrates that Applicants plan to systematically waive the quality assurance requirements of 10 C.F.R. 50, Appendix B in order to obtain a license for Zimmer. As a result, its relevance for the Licensing Board may be even greater than OI's findings of previous violations.

It is especially chilling that almost all of the issues raised by MVPP in its comments have been overlooked by the Staff. This is precisely why MVPP moved for public hearings in May 1982 and June 1983 -- to fill in the holes in the Staff's enforcement program, holes which represent an unacceptable risk to public health and safety.

Respectfully submitted,

Thomas Devine
Legal Director

Dated: December 2, 1983

^{21/} Id., at 7.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing "MVPP Response to Applicants' November 15 Answer and Motion for Leave to File Additional Evidence" has been served upon the following by mailing first-class, postage prepaid, this 2nd day of December, 1983.

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