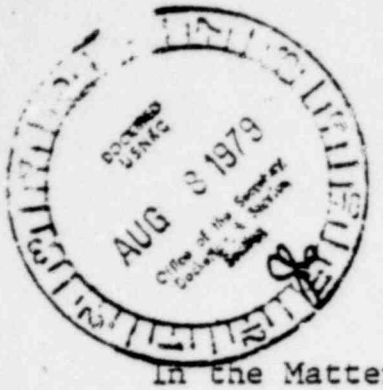

LBP-79-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CINCINNATI GAS & ELECTRIC COMPANY, ET AL.	)	Docket No. 50-358 OL
	)	
(William H. Zimmer Nuclear Station)	)	

MEMORANDUM AND ORDER
ADMITTING NEW CONTENTIONS
(August 7, 1979)

We have before us requests by two parties to this operating license proceeding to admit three additional contentions. Miami Valley Power Project (MVPP) on April 30, 1979 asked us to admit a proposed Contention 17, dealing with the adequacy of fire protection insulation material (Kaowool) planned to be used in the electrical cable trays. The City of Cincinnati, in a motion dated May 18, 1979, sought admission of two new contentions seeking continuous radiological air monitoring (to be referred to herein as proposed Contentions 18 and 19). Later, during the course of the evidentiary hearings in June, 1979, Cincinnati submitted new versions of both of its proposed new contentions (Tr. 2074-75).

The Applicants oppose the admission of all three contentions (memoranda dated May 9, 1979 (MVPP contention), June 4, 1979 and July 16, 1979 (Cincinnati contentions)). The NRC Staff opposes the admission of the MVPP contention (memoranda dated May 7 and

May 15, 1979), but it would admit the revised versions of Cincinnati's contentions (Tr. 2077). We held oral argument with respect to these contentions (Tr. 164-177, 463-465, 2070-89). For reasons hereinafter set forth, we admit all three of them.

1. In opposing the proposed MVPP contention, the Applicants emphasize its lateness. Both they and the Staff would balance the five factors specified in 10 CFR §2.714(a) for dealing with late-filed contentions (see 10 CFR §2.714(b)) against admission of the contention. Our balancing of those factors, however, leads us to a different conclusion.

The first factor is whether or not there is "good cause" for the delay. It is true that the contention was not submitted until April 30, 1979, more than 3½ years after the initiation of this proceeding. MVPP bases its contention, however, on tests performed during September, October and November, 1978, and January, 1979, the results of which were transmitted to the Commission (and the parties) on March 1, 1979 and presumably did not reach the parties until March 6, 1979 (see 10 CFR §2.710). MVPP claims that the test report was examined in mid-March by Mr. Edwin Hofstadter, a former employee of the company which performed the test (who has appeared for MVPP as a witness with respect to other contentions) and that Mr. Hofstadter's examination revealed that tests on insulation material were inadequately performed. Thereafter, MVPP asserts, Mr. Hofstadter confidentially secured

details of another, earlier test of the insulation material by Underwriters Laboratories, about which he previously had been unaware, and discovered that "the test of the material was actually a failure." This course of events, according to MVPP, constitutes "good cause" for its delay to April 30, 1979 in filing the proposed contention. We agree.[1/]

With respect to the second factor, MVPP claims that, because no contention regarding the adequacy of the insulation material is being considered, there is no other means available to protect its interest in seeing that all safety requirements are met. This argument may be more relevant to the fourth factor (concerning whether another party will represent MVPP's interest in this contention). But, in any event, MVPP does not appear to have available to it any other means to protect its interest.[2/] With respect to both the second and fourth factors, the Applicants claim that the Staff will represent the public interest and, by inference, MVPP's interest as well. Although the Staff clearly represents the public interest, it cannot be expected to pursue

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1/ We find nothing to support the Applicants' suggestion (Tr. 168) that Mr. Hofstadter knew anything about the Kaowool test by Husky Products as a result of his employment there. Mr. Hofstadter left Husky Products on August 4, 1978 (Tr. 1471), prior to the conduct of the test in question.

2/ A limited appearance statement would clearly not suffice. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975); Duke Power Co. (Oconee-McGuire), ALAB-528, 9 NRC 146, 150 (1979).

all issues with the same diligence as an intervenor would pursue its own issue. Moreover, unless made an issue in this proceeding, it would not attempt to resolve the issue in an adjudicatory context. Giving all possible deference to the adequacy of the Staff's review, we conclude that the Applicants' reliance on the Staff review gives inadequate consideration to the value of a party's pursuing the participational rights afforded it in an adjudicatory hearing.

The Applicants and Staff each stress that MVPP has failed adequately to address the third factor — the extent to which its participation may reasonably be expected to assist in developing a sound record. They each emphasize that the test reflected by the March 1 report, upon which MVPP relies, is not relevant to this proceeding inasmuch as the Staff, by letter to the Applicants dated April 19, 1979, declined to accept its results as fulfilling applicable requirements. The Staff, however, has qualified this position by stating that if MVPP were also challenging an earlier test upon which the Staff is relying, the contention would be relevant. At oral argument, MVPP in fact confirmed that it is indeed challenging such earlier test (Tr. 175). Moreover, it is clear to us that MVPP is raising a question as to adequacy of the cable tray insulation material generally and that the Staff is not yet entirely satisfied with the proposals heretofore submitted by the Applicants (Tr. 174). We note that the Applicants

recently sent us (as well as the Staff and other parties) copies of a report of yet another test of the insulation material, performed in June, 1979 — clearly reflecting that the issue raised by MVPP is still open.

The Applicants and Staff also indicated that MVPP had not demonstrated that it would produce an expert witness with adequate credentials to address the proposed contention. MVPP advised the Board, however, that it would rely on Mr. Hofstadter's son, who assertedly was formerly the project engineer in the fire protection department at Underwriters Laboratories (Tr. 176). We are not prepared to find MVPP's proposed witness to be unqualified on the basis of what is now before us.

In addition, the Applicants contest the factual accuracy of a number of MVPP's assertions. This is a matter to be resolved at an evidentiary hearing, or through summary disposition procedures, not through rejection of a pleading.

Finally, turning to the fifth factor, the Applicants claim that admission of this contention will delay the proceeding. At the time they made this claim, the evidentiary hearing on all issues was scheduled for late June, 1979, and the contention could clearly not have been heard at that time. But, as reflected in our Prehearing Conference Order of June 4, 1979, hearings on many issues have been deferred until the fall of 1979, and admission of the contention would not appear to preclude its being heard along with other issues scheduled at that time.

In short, all of the factors of 10 CFR §2.714(a) balance in favor of admitting this contention. Given the potential importance of the questions raised, we admit the contention.

2. Cincinnati's two proposed contentions were submitted at an even later date, but the factors governing their acceptance differ from those which we discussed in conjunction with the MVPP contention. For, as the Staff has pointed out (Tr. 2077), Cincinnati would have the right to raise these issues as an "interested * * * municipality," within the meaning of 10 CFR §2.715(c). The "lateness" factors specified in 10 CFR §2.714(a) are applicable only to contentions submitted by parties admitted under that section of the rules. Cincinnati, of course, was admitted as a party under 10 CFR §2.714(a).[3/] But it nevertheless has a right to raise other issues under 10 CFR §2.715(c). Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976). For that reason, we agree with the Staff that it is inappropriate to apply strictly the §2.714(a) factors in determining whether to accept Cincinnati's contentions.

As the Staff also has pointed out, monitoring of the facility's radioactive releases is the subject of one of Dr. Fankhauser's contentions already accepted in this proceeding — namely, Contention 2. The evidentiary hearing on this contention

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3/ At the time of Cincinnati's admittance, the provisions of §2.715(c) extended only to "interested States" and did not include cities or municipalities.

has been deferred pending the completion of certain Staff studies undertaken in response to the Three-Mile Island accident. The Commission may well develop new standards to govern this area. In these circumstances, admission of Cincinnati's new contentions should not unduly broaden the issues to be heard or result in any substantial delay in the proceeding.[4/]

Although we are not required to balance the factors in 10 CFR §2.714(a) with respect to Cincinnati's late-filed contentions, we believe that a brief comment on certain of the Applicants' claims made in balancing those factors would be in order. First, they claim that Cincinnati's reliance on the Three-Mile Island accident as reason for raising the late contentions is misplaced, inasmuch as the Zimmer station's emergency plan (appearing in the FSAR) is designed to accommodate an accident with consequences more severe than occurred at Three-Mile Island. While that may be so, it misses the point that Cincinnati is making: that the response to the accident at Three-Mile Island (which presumably was also designed to accommodate a greater accident) was so inadequate as to give rise to a need for further study of the imposition of additional requirements (monitoring and otherwise). In our view, the Three-Mile Island accident provided a sufficiently different focus for viewing monitoring and emergency response plans as to constitute new information of the type which can justify admission of late-filed contentions. See Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-25, 5 AEC 13, 14 (1972).

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4/ It is true that Cincinnati's contentions overlap Dr. Fankhauser's Contention 2 to some extent. The Commission has held, however, that the representative of a private party cannot be expected to represent adequately the presumably broader interests represented by a governmental body. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

Second, the Applicants would condition the admission of any new air monitoring contentions on adoption by the Commission of new regulations. Any such new regulations must, of course, be taken into account in reaching our decision. But the Commission's current regulations do not appear to be so restrictive as to preclude granting of the relief sought by Cincinnati.

Finally, the Applicants claim that Cincinnati has not sufficiently specified the monitoring equipment it would have installed and whether the monitoring requirements it seeks concern routine releases or accident conditions. At the oral argument, Cincinnati made it very clear that it sought monitoring of all releases exceeding the levels specified in 10 CFR Part 50, Appendix I (Tr. 2087-88). Whatever category those releases fall into — at their upper limit, they certainly would encompass accident situations — Cincinnati has adequately defined the releases it wishes to be monitored. Moreover, Cincinnati has specifically stated that it desires continuous monitoring with readouts directly to the City (Tr. 2088). Whether equipment is available to accomplish such monitoring, and whether such monitoring would be useful or necessary, are evidentiary matters going to the merits of the contentions.

In short, we find ample reason to accept Cincinnati's new contentions, even if a balancing of the 2.714(a) factors were required.

3. The following schedule will govern the consideration of these contentions:

1.	Discovery commences	Issuance of this Order.
2.	Last day for submission of discovery requests	August 24, 1979 or (with respect to Contentions 18 and 19) 10 days following service of the Staff's recommendations for monitoring and emergency plans arising from the TMI accident, whichever is later.
3.	Responses to discovery requests	Within 15 days after service of request.
4.	Requests for summary disposition	Not later than 45 days prior to scheduled hearing dates.
5.	Responses to requests for summary disposition	Within 20 days after service of request.
6.	Filing of testimony	15 days prior to start of evidentiary hearings.

For the foregoing reasons, the three new contentions listed in the Attachment to this Memorandum and Order are admitted.5/

IT IS SO ORDERED.

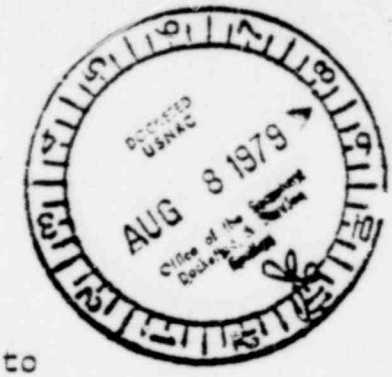
THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland,
this 7th day of August, 1979.

Attachment:
New Contentions

5/ This Memorandum and Order was drafted prior to our receipt of the City of Cincinnati's "Response to Applicants' Supplemental Response to City of Cincinnati's Motion for Leave to Amend Its Petition For Leave to Intervene," dated July 31, 1979. Because such pleadings are not authorized without prior leave from the Board (see 10 CFR §2.730(c)), and because Cincinnati did not seek such leave, we grant the Applicants' August 2, 1979 motion to strike Cincinnati's "Response."



ATTACHMENT

NEW CONTENTIONS

17. Fire insulation material which is being used to protect the cables in the cable trays from fire is inadequate to protect the cables in light of the cable tray installation design and cable tray load. The tests of the fire insulation material were improperly performed in that conditions which will exist during operation were not adequately simulated.

18-19. Adequate regard for the health and safety of the citizens of Cincinnati requires that the Zimmer Nuclear Power Station not be licensed for operation without an early warning and detection system which provides for:

18. The continuous transmittal of monitoring data capable of showing releases from the plant in excess of 10 CFR Part 50, Appendix I levels, with the capability of making a permanent record thereof, to the appropriate city agencies from continuous stack monitors already provided for at the station, and from any such other known paths of radioactive emissions into the air from the plant.

19. A system of continuous air monitors to be situated in such a manner as to have the capability of detecting the direction and radioactive content of airborne radiation or radioactive plumes from plant releases in excess of the levels prescribed in 10 CFR Part 50, Appendix I, which monitors shall have the capability of making a permanent record of the monitoring data received and analysed on a continuous basis, and the data from which can be transmitted continuously to appropriate city agencies.