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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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

APPLICANTS' RENEWED MOTION FOR SUMMARY DISPOSITION
OR, IN THE ALTERNATIVE, FOR CERTIFICATION

Preliminary Statement

This renewed motion is in response to the Atomic Safety and Licensing Board's ("Board") invitation to supplement the Applicants' pending Motion for Summary Disposition with respect to Contention 5 of Dr. David B. Fankhauser in the captioned proceeding. This contention states as follows:

There are no plans to provide knowledge and training of the populace in communities through which radioactive materials will be transported sufficient to allow them to be able to cope with transportation accidents.

On April 6, 1979, the Applicants moved for summary disposition as to this and other contentions of Dr. Fankhauser. At the pre-trial conference on May 23, 1979, Chairman Bechhoefer ruled that the Board would "defer for a later hearing the issue dealing with financial qualifications, monitoring and emergency planning, Contentions 4 and 5 dealing with emergency plan."^{1/}

^{1/} Tr. at 460 (May 23, 1979).

During the evidentiary hearing on June 26, 1979, the Board indicated that it would have difficulty in dismissing Contention 5 in light of the recent adoption by the Nuclear Regulatory Commission ("NRC" or "Commission") of an interim rule amending 10 C.F.R. Part 73, "Physical Protection of Plants and Materials," relating to certain requirements for safeguarding shipments of spent nuclear fuel against sabotage. The following colloquy between Chairman Bechhoefer and Mr. Conner, counsel for the Applicants, occurred:

CHAIRMAN BECHHOEFER: The other matter that the Board wanted to raise concerns another one of Dr. Fankhauser's contentions, contention 5. In the Federal Register of Friday, June 15, the Commission published what we term in an interim final rule effective July 16, which in effect requires certain plans for routing from a safety standpoint, both a routing and guidance of shipment of spent fuel. I think we have a motion for summary disposition which we have not acted upon and which we deferred because of the so-called Three Mile Island trial, but with this new rule which will be an effective rule -- the page on which it occurs is 44 Federal Register 34466. That's the 15th of June. In view of this, I wanted to inquire whether the Applicants would wish to withdraw their summary disposition motion on that contention because I would say that since the contention states that no plan exists and I think we have no showing a plan does exist, if we granted summary disposition it would have to go for the intervenors at this stage in view of these new regulations.

MR. CONNER: Mr. Chairman, we will examine the rule and then make an appropriate motion that may be necessary. I don't think we can respond to you directly until we have seen what the rule is.

CHAIRMAN BECHHOEFER: We only call your attention to it if you weren't aware of it and the other parties' attention to the issuance of this new rule which is effective July 16. It's open for comment, but after the fact comment. So the rule becomes effective subject to change. It appears to impose responsibilities both on carriers and on licensees.^{2/}

As discussed below, an analysis of the interim rule and the background material demonstrates that the rule is not in any way related to providing knowledge and training of the populace in communities through which radioactive materials will be transported to allow them to cope with transportation accidents.^{3/} Therefore, for the reasons stated in their April 6, 1979 Motion, Applicants are entitled to summary disposition with regard to Contention 5.

Argument

Contrary to the Chairman's initial impression, the interim rule has nothing whatsoever to do with training the populace to deal with transportation accidents. Part 73 of the NRC Rules provides regulations relating to the physical protection of nuclear facilities and materials against theft and sabotage. Accordingly, Part 73 does not relate to accidents in general or, specifically, plans to provide knowledge and training of the populace in communities in which there occurs a

^{2/} Tr. at 1437-38 (June 26, 1979) (emphasis added).

^{3/} It should be noted that the rule only covers shipments of irradiated reactor fuel and not all types of shipments of radwaste from a facility. Thus, for other than spent fuel shipments, the present requirements are unchanged.

transportation accident involving radioactive materials. As stated in the adopted interim rule itself, the new rule is intended to protect against "the sabotage of spent fuel shipments" in transit, see 44 Fed. Reg. 34466 (June 15, 1979), specifically, the threat of successful acts of sabotage in densely populated urban areas, including the hijacking of spent fuel in transit through low population areas and removal to a high population area.

This analysis is supported by the Staff paper which preceded adoption of the interim rule. In the memorandum from William J. Dircks, Director, Office of Nuclear Material Safety and Safeguards, to the Commissioners, SECY-79-278 (April 18, 1979), the Commission was advised that the "primary objective" of the interim rule was "the avoidance of sabotage." In general, the Staff's paper reviewed previous studies which examined the likely consequences of a breach of a spent-fuel cask by explosives and evaluated the necessary protective measures "to mitigate the possibility of sabotage." The Staff paper discusses local police only in its role as providing an escort and armed assistance to the shipment's guards in the event of a threat or emergency.^{4/} As such, the protective

^{4/} The Staff paper states as follows:

These measures, while providing a capability that response forces can be summoned in a timely manner, will not necessarily prevent an armed group from attacking the cask in place (or in the

(Footnote ^{4/} continued on next page)

measures recommended by the Staff pertain only to reducing the threat of sabotage.

With regard to licensees of nuclear power plants, the rule requires that the NRC be notified in advance of each shipment governed by the rule, that arrangements be made with local law enforcement agencies along the route for an emergency response and that shipments be planned and scheduled to minimize the risk of sabotage. Specific requirements have been made as to shipment escorts and periodic in-transit communications, whether shipment is by road or by rail.

From this discussion, it is evident that the thrust of the rule relates to industrial security. While the new requirements for guards and coordination with local authorities might aid in reporting an emergency or accident as well as mitigating its effect, such assistance is plainly incidental to the

4/ (continued)

extreme case from diverting the shipment to another location.) On balance, the staff believes that considering the difficulty of breaching a spent fuel cask and pulverizing the spent fuel, and the absence of information confirming any identifiable threat to such shipments, these measures provide a reasonable level of protection. The focus of concern is on possible successful acts of sabotage in densely populated urban areas. Because of the possibility that spent fuel shipments could be hijacked and moved from low population areas to high population areas, the interim requirements apply to all shipments even though the planned shipment route may not pass through densely populated urban areas. [Emphasis added.]

purpose of the rule. Again, nowhere in the rule is there any requirement with regard to providing "knowledge or training of the populace."

Finally, it must be recognized that, at this stage, the Applicants have not selected a carrier to transport spent fuel (or made any arrangements to transport irradiated spent fuel themselves) or designated the location to which the spent fuel will be shipped. It is unlikely that the carrier and location will be selected for a number of years. Since neither the carrier nor the ultimate destination of the spent fuel has yet been identified, the Applicants could, at this time, be in no position to do more than make a general commitment to comply with the regulation. Moreover, there is no indication whatsoever that the Commission contemplated that this new regulation would impose any present requirements upon applicants for operating licenses prior to definite plans for shipment of spent nuclear fuel being made.

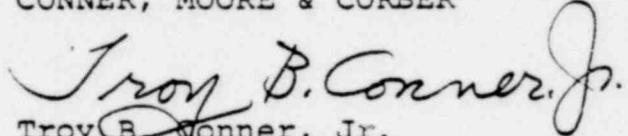
Conclusion

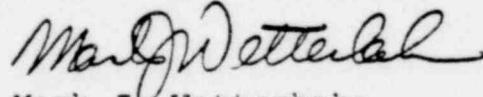
In sum, the Board should grant the Applicants' Motion for Summary Disposition as to Contention 5. The Applicants have no responsibility to formulate plans to provide knowledge and training of the populace in the communities through which radioactive materials will be transported in the event of an accident as a result of the new amendments to 10 C.F.R. Part 73 or, for that matter, any other part of the NRC's regulations.

If, nonetheless, the Board herein should deny Applicants' Renewed Motion for Summary Disposition as to Contention 5, Applicants request that the Board certify the question to the Atomic Safety and Licensing Appeal Board pursuant to 10 C.F.R. §2.718(i) or §2.730(f).

Respectfully submitted,

CONNER, MOORE & CORBER


Troy B. Conner, Jr.


Mark J. Wetterhahn
Counsel for the Applicants

July 25, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Renewed Motion for Summary Disposition Or, In the Alternative, For Certification," dated July 25, 1979, in the captioned matter, have been served upon the following by deposit in the United States mail this 25th day of July, 1979:

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