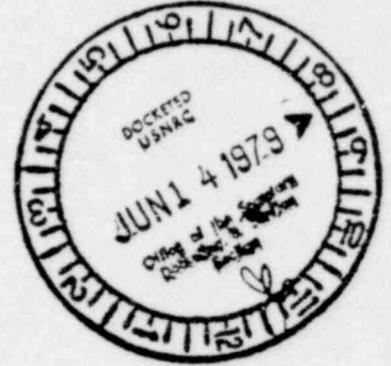


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
CINCINNATI GAS & ELECTRIC)
COMPANY, ET AL.)
(William H. Zimmer Nuclear Station))

Docket No. 50-358 OL

MEMORANDUM AND ORDER CONCERNING INTERVENORS'
REQUESTS TO UTILIZE LAY REPRESENTATIVES
(June 13, 1979)

By motion dated May 16, 1979, the Miami Valley Power Project (MVPP), an intervenor in this operating license proceeding, requested that certain of its non-attorney members be permitted to appear and represent it during the licensing proceedings. Seven members were designated. MVPP claimed that its attorneys were each working on a volunteer basis and that it would be impossible for them to be present throughout the hearings. It also asserted that the designated members were familiar with MVPP's contentions.

At the prehearing conference on May 21, 1979, we heard oral argument on this matter (Tr. 177-193). During the argument, Dr. Fankhauser made a similar request (Tr. 181), to permit him to represent himself when his attorney is not available. Both the Applicants and NRC Staff opposed the

motions. At that time, we granted the request of the Applicants to file a written response supplementing their oral presentation. They did so, adhering to the same position that they had advanced at the conference: that MVPP's and Dr. Fankhauser's proposals should be rejected since they are not authorized by the Commission's rules and also are objectionable as a matter of policy.^{1/} For reasons hereafter stated, we find the requests not foreclosed by NRC rules and, further, that they should be granted in part but denied in part.

The Commission's rules governing the representation of parties provide, in relevant part, that "[a] person may appear in an adjudication on his own behalf or by an attorney-at-law in good standing * * *." 10 CFR §2.713(a) (emphasis supplied). "Person" is defined as including, inter alia, a "corporation, partnership," or "group." 10 CFR §2.4(o). Commission practice has traditionally permitted an organization (such as MVPP) to appear on its own behalf through one of its members, who need not be an attorney. MVPP relies on this rule (as so construed) as the basis for its motion. On the other hand, the Applicants and Staff construe the alternative "or" as mandating that, when an organization is represented by an attorney in a proceeding, it may not also be represented during that proceeding by one of its members.

^{1/} MVPP subsequently filed a memorandum in support of its motion. Although such a filing is not expressly authorized by NRC rules, we have taken account of its contents in this opinion.

In our view, both the Applicants and Staff on the one hand, and MVPP on the other, read too much into this provision. Insofar as organizations are concerned, it clearly limits representation to either an attorney or a member, and it can logically be read as precluding representation by an attorney and a member at the same time. But it does not appear to bar representation by a member throughout a proceeding if, at some earlier time during that proceeding, an attorney has made an appearance for the organization. We, at least, are loath to read it that way, given the necessary consequences. Particularly, where (as here) an attorney is appearing on a volunteer basis for an organization, he or she might be most reluctant to offer his or her services if it were known that, through such representation, a further condition on the organization's participation would be the continued participation of the attorney.

In our view, the rules permit the course of action proposed by MVPP and Dr. Fankhauser, but they do not require it. We have broad discretion in matters such as this (see 10 CFR §2.718(e)). We are called upon to exercise it in such a fashion as to assure that the hearing process is conducted "as expeditiously as possible, consistent with the development of an adequate decisional record." 10 CFR

Part 2, Appendix A, Part V. To that end, we find that the record will be best served if MVPP is normally not permitted to use non-attorney members in the presentation of its own case, or in the cross-examination of other parties' witnesses on issues raised by MVPP (except as permitted by 10 CFR §2.733). The same ruling will apply to Dr. Fankhauser with respect to his issues. But, although we encourage MVPP and Dr. Fankhauser to have an attorney present at all times, we will permit one of the designated non-attorney members of MVPP, and Dr. Fankhauser to represent their respective interests in issues raised by other parties or by the Board itself.

In so ruling, we agree with the Applicants and Staff that a party is likely to be better represented, and the record is likely to be better developed, where the party is represented by an attorney. The purpose of the hearing is to assure the development of a record adequate for decision, and this purpose is furthered by having each party represented as expertly and as fully as possible. Where a party raises an issue, it has an obligation to make known to the Board all the important facets of the issue. Moreover, when a party presents a witness, its representative has a duty not only to assure that the relevant information possessed by the witness is entered into the record but also to protect that witness from any improper questions advanced by other parties. Resolving

issues through adjudication demands no less. And legal training presumably provides at least a modicum of skill in this regard. For that reason, given the circumstance that MVPP and Dr. Fankhauser have been and are being represented by attorneys, we will not, as a general rule, permit MVPP or Dr. Fankhauser to be represented by one not an attorney during the consideration of any issue raised by that party.

We realize that this adjudicatory process often makes costly demands upon its participants. We also recognize that the Commission is studying methods for making participation by intervenors less costly. See Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494, 514-16 (1976). For that reason, we will permit the intervenors to be represented by non-attorneys (if they so elect) with respect to issues raised by other parties or the Board. Participation by an intervenor with respect to those issues is of primary benefit to the Board and the public interest, rather than the party itself. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1 (1975). We believe it would be unfair to condition an intervenor's participation with respect to those issues upon its utilization of an attorney. We welcome an intervenor's assistance with regard to such issues, and requiring employment of an attorney in those circumstances might well deprive us of such assistance. We stress, however, our

belief that participation through an attorney would be desirable. Any party which utilizes a non-attorney representative in accordance with this order will, of course, be bound by that representative's actions.

The result we are reaching is not inconsistent with any of the cases cited to us by the Applicants or Staff. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 NRC 746, 748 (1978) involved the standards of conduct governing non-attorney representatives. In explaining why the standards appearing in 10 CFR §2.713(b) are applicable only to attorneys, the Appeal Board noted that "the likely reason is that the rules do not appear to contemplate the appearance in a representative capacity of other than lawyers." Ibid. That Board did not discuss the ramifications of pro se representation, which is explicitly covered by the rules. Thus, its comments must be construed as applying to representatives appearing in other than a pro se capacity. In any event, we so construe them. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-288, 2 NRC 390, 393 (1975) and Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 269 (1978) both involved the question whether a party can

drop in and out of the consideration of a particular issue at will. That situation is not comparable to the one here, which can be viewed as analogous to a party's changing attorneys midstream, or using a particular attorney for a particular issue. In the latter circumstances, the practices in question are routinely followed in NRC proceedings.

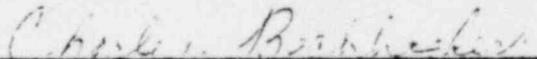
The Applicants also compare MVPP's request to that of an attorney in Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), who apparently was not permitted to withdraw from participation in the case. That withdrawal would have resulted in the continuation of the litigation of issues raised by an intervenor by a layman — a result which this order does not sanction.

Finally, the Applicants point to the obligation of all parties to assist in "making the system work" and to aid the agency in discharging its statutory functions. We have no reason to believe that the procedures we are here approving will in any way be inconsistent with that result.

For the foregoing reasons, and to the extent outlined in this Order, MVPP's and Dr. Fankhauser's motions for us to permit non-attorney representation are granted in part and denied in part.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD


Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland,
this 13th day of June, 1979.