



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

before the Atomic Safety and Licensing Board

SERVED FEB 23 1979

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

Docket No. 50-358 OL

MEMORANDUM AND ORDER WITH RESPECT TO
APPLICANTS' MOTION TO DISMISS MIAMI VALLEY
POWER PROJECT AS A PARTY

On January 29, 1979, the Applicants filed a motion to dismiss the Miami Valley Power Project (MVPP) as a party to this proceeding. The basis for this motion is that MVPP failed to respond to interrogatories which the Applicants had served on December 19, 1978. MVPP also has not responded to this motion. The Staff would not dismiss MVPP but would have us order the group to answer the interrogatories.

Responses to the 21 interrogatories in question were originally due to be filed by January 9, 1979. The Applicants point out that they and MVPP discussed the interrogatories by telephone on that date and that this discussion was confirmed

by letter (dated January 9, 1979) from Applicants' counsel to MVPP, offering to extend the time to answer the interrogatories to January 16, 1979. The Applicants advise that as of January 29, 1979 they had received no response to their discovery request. The Staff, in its response to the motion, also indicated that it had not received copies of any answers to the interrogatories. As of this date, the Board likewise has received no such copies. Because of MVPP's failure to respond to the interrogatories, the Applicants seek its dismissal as a party. In support of this result, they point out that MVPP's participation in this proceeding has, in any event, been minimal. In the alternative, the Applicants seek an order from this Board requiring MVPP to respond to the interrogatories.

The Applicants emphasize the importance of their receiving answers to the interrogatories, in terms of their ability to prepare their case for trial. We agree with their assessment of this matter. Commission proceedings should not be permitted to become the setting for "trial by surprise", and providing responses to proper discovery requests is one means to help assure that such surprise does not occur. Moreover, as another Licensing Board has observed:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record. [Footnote omitted.]

Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977).

At the same time, however, we agree with the Staff's position that the proper remedy at this stage is not dismissal but, rather, for the Board to issue an order pursuant to 10 CFR Section 2.740(f) requiring MVPP promptly and meaningfully to respond to the interrogatories. In that regard, the description of the conversation between the Applicants and MVPP appearing in the letter of January 9, 1979 appears to suggest that MVPP was attempting to prepare answers to the interrogatories but was having some difficulty in doing so. In the case of a group such as MVPP, such difficulties are not unexpected and deserve to be taken into account in determining the sanction which should be imposed for a failure to adhere to obligations imposed on it by virtue of its participation in the proceeding. We have here done so. We are of the view that MVPP should be

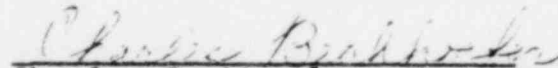
given a further opportunity to respond to the interrogatories. We note that in the Tyrone case, supra, relied on by the Applicants, the intervenors were ordered by the Board to answer interrogatories and were dismissed only when they then failed to respond adequately to the Board order.

For the foregoing reasons, we direct MVPP to provide answers to the Applicants' interrogatories of December 19, 1978--but with three exceptions. The first three interrogatories are directed not to the substance of any contention but, rather, merely request data on MVPP, its officers and spokesman. Under 10 CFR Section 2.740(b)(1), discovery in an operating license proceeding of this type may "relate only to those matters in controversy" which have been accepted as contentions by the Board. We fail to see how the first three interrogatories relate to any matters in controversy. (The request for a listing of each MVPP "spokesman" in interrogatory 1, to the extent it is seeking a list of witnesses, may so relate, but the request appears to be covered by interrogatories bearing upon specific contentions.) We therefore construe the first three interrogatories as falling outside the scope of discovery permitted by the Commission's Rules. Cf. Detroit Edison Company (Enrico Fermi Atomic

Power Plant, Unit 2), LBP-78-37, 8 NRC ____ (November 13, 1978). Accordingly, the order which we are issuing is limited to responses to interrogatories 4 through 21. Pursuant to 10 CFR Section 2.740(f), MVPP is directed to answer those interrogatories within fourteen days after service of this Order.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland
this 22nd day of February 1979.