

NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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

APPLICANTS' RESPONSE TO MIAMI VALLEY POWER PROJECT
AND DR. FANKHAUSER'S MOTION TO DELAY THE
ZIMMER PROCEEDING

On April 17, 1978, the Miami Valley Power Project ("Project") moved the Atomic Safety and Licensing Board ("Licensing Board") to delay the operating license hearing for the William H. Zimmer Nuclear Power Station ("Zimmer Station") until "after forthcoming reports and studies precipitated by the accidents at the Three Mile Island Nuclear Power Station Unit 2 have been published; and until after the Applicants have demonstrated that no such accidents could occur at the Zimmer Station." Furthermore, the Miami Valley Power Project moved for additional time for discovery on Contention 13. On the same date, Dr. Fankhauser moved for a continuance of the scheduled hearing on similar grounds.^{1/} As discussed below, neither of the intervenors' motions have merit and both should be denied.

^{1/} Dr. Fankhauser's pleading to counsel for the Applicants was addressed to the wrong Zip Code and only received on April 25, 1979.

Initially, as recognized by Dr. Fankhauser, "substantial differences exist in the design of the effected [sic] power station at Three Mile Island from that of the Zimmer Nuclear Power Station" To emphasize this point, Three Mile Island is a pressurized water reactor, utilizing a Babcock & Wilcox nuclear steam supply system ("NSSS") while the Zimmer Station is a boiling water reactor with the NSSS supplied by the General Electric Company. The equipment and principles of operation are so different as to make a comparison impossible; there is no way to impute a Three-Mile-Island-Unit-2-type incident to the Zimmer Station. Thus, there is absolutely no reason to attempt to single out the Zimmer Station for special consideration at this time.

The argument that this Licensing Board should stay these proceedings is by definition grounded on the implicit proposition that the Nuclear Regulatory Commission, which is intensively investigating the Three Mile Island Unit 2 incident and the need to change its regulations or licensing requirements, will fail to take every action to protect the public health and safety. During the ongoing investigative process, the NRC has given no indication that, for facilities like Zimmer, the licensing of reactors, let alone all phases of the licensing process, are to come to a complete halt. Of course, any changes to NRC regulations and the licensing process applicable to plants such as Zimmer will be implemented at the appropriate time. Until the Commission has acted, it

is both beyond its jurisdiction and, in any event, premature for this Board to attempt on an ad hoc basis its own investigation and application of any new requirements to the Zimmer Station. Until the investigations are at a later stage, it is sheer folly to try to act on preliminary and incomplete information. This Licensing Board should not permit, contrary to every indication from the Commission, a de facto moratorium in the licensing of the Zimmer Station.

Assuming arguendo that there is even a scintilla of validity to the claim that licensing actions should not be taken until the various investigations are in a later stage, absolutely nothing has been advanced by either intervenor as to why the prehearing conference presently scheduled for the week of May 21, 1979 and the evidentiary hearings scheduled for two weeks in June should not go forward. We submit that all matters can and should be considered during the hearings and the Licensing Board should use current licensing requirements until otherwise directed by the Commission. These proceedings have been planned far in advance to accommodate the schedules of the members of the Licensing Board and parties, and no delay should be permitted. Any change in schedule is certain to bring with it substantial delay and threaten the timely completion of this proceeding.

In effect, these two motions request stays in this proceeding and must be tested against the requirements of 10

C.F.R. §2.788(e). Inasmuch as neither intervenor has addressed these factors, the motions may be denied out of hand. However, even a cursory review of these motions against factors in §2.788(e) demonstrates conclusively the intervenors, who have the burden of proof on these motions, cannot prevail.

It is clear that the four criteria first enunciated by the District of Columbia Circuit in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 925 (D.C. Cir. 1958) are to be utilized in deciding whether proceedings before a licensing board should be stayed.^{2/} These factors, as embodied by 10 C.F.R. §2.788 are as follows:

1. whether the moving party has made a strong showing that is likely to prevail on the merits;
2. whether the party will be irreparably injured unless a stay is granted;
3. whether the granting of a stay would harm other parties; and
4. where the public interest lies.^{3/}

The burden of persuasion is on the party seeking the stay and that party "bears the burden of marshalling the evidence

^{2/} Allied-General Nuclear Services (Tarnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-678 (1975).

^{3/} This section codified established prior Commission practice, based on the Virginia Petroleum Jobbers decision. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 529-530 (1978); Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 556 n.18.

and making the arguments which demonstrate his entitlement to it."^{4/} A movant has the obligation "to come to grips with each of the factors in its papers."^{5/}

In applying the four criteria, a board must balance them all: "the strength or weakness of the showing by the movant on a particular factor influences . . . how strong his showing on the other factors must be. . . ."^{6/} However, the "most crucial" factor in ruling on stay requests has been held to be "the showing of irreparable injury to the movant."^{7/} Without an appropriate showing of irreparable injury, a stay will not ordinarily be granted.^{8/} In addition, "an overwhelming showing of likelihood of success on the merits" is required where the showing on the other factors has been weak.^{9/}

With regard to the first criterion, intervenors have made no showing that they will ultimately prevail on the merits of this case. Aside from generalities, they have

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- ^{4/} Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 785 (1977); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270-271 (1978).
- ^{5/} Black Fox, ALAB-505, 8 NRC at 530.
- ^{6/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977); Black Fox, ALAB-505, 8 NRC at 530.
- ^{7/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 616 (1977); Marble Hill, ALAB-437, 6 NRC at 632.
- ^{8/} Sterling Power Project, ALAB-507, 8 NRC at 556.
- ^{9/} Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1189 (1977).

pointed to no specific deficiency in the design of or application for the Zimmer Station which would indicate a substantial likelihood of prevailing. The differences between Three Mile Island Unit 2 and the Zimmer Station have already been discussed. Moreover, with regard to the second factor, there is no irreparable injury even possibly associated with the holding of the evidentiary hearings. On the other hand, a delay in the commencement of the hearings leading to a delay in the issuance of an operating license will undoubtedly harm the Applicants and their ability to provide reliable electrical service to their customers. We submit that the public interest lies in adhering to the longstanding schedule in this proceeding.

The Project has alleged there is no need for power from the Zimmer Station.^{10/} As may be seen from the attached affidavit of Robert Wiwi, the Project's reasoning, methodology and conclusions are erroneous. As discussed therein and in the "Supplemental Motion for Summary Disposition," dated April 23, 1979, should the Zimmer Station not be available to meet peak loads during 1980, the reliability of Applicants' systems would be considerably reduced and below acceptable levels. This represents an independent reason why the request for a stay should be denied.

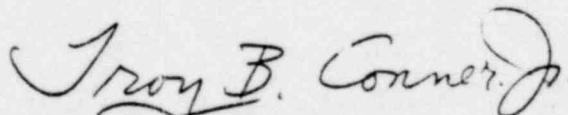
^{10/} Contrary to the requirements of 10 C.F.R. §2.788(a)(4), the facts upon which the Project relies are not contained in an affidavit signed by a knowledgeable person.

Finally, it must be emphasized that the Commissioners met on several occasions to determine whether to halt operation of reactors of the Three Mile Island type. On April 27, 1979, the Commission voted and decided that it would not halt operations at these plants once certain modifications peculiar to the Babcock & Wilcox design were made (In the Matter of Continuation of Factors Related to Current Status of Operating Reactors, see Tr. pp. 62-64, 69-72, 74-75). Hence, it is clear that the Commissioners in effect established a policy for the agency that there would be no interruption of licensing while the review of the Three Mile Island event is made. The intervenors' motion here would have this Licensing Board reverse that Commission policy.

For the foregoing reasons, the request to suspend licensing activities and defer the hearings should be denied. The same considerations apply to the motion to reopen discovery as to Contention 13 and this request should likewise be denied.

Respectfully submitted,

CONNER, MOORE & CORBER

A handwritten signature in cursive script that reads "Troy B. Conner, Jr.".

Troy B. Conner, Jr.
Counsel for the Applicants

May. 7, 1979

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STATE OF OHIO)
) SS
COUNTY OF HAMILTON)

AFFIDAVIT OF ROBERT P. WIWI

Robert P. Wiwi, being first duly sworn according to law comes forward and states:

1. My name is Robert P. Wiwi. I am employed at The Cincinnati Gas & Electric Company (CG&E) as Vice President of Electric Operations. In that position, I am responsible for, among other duties, the formulation of CG&E's long term energy and demand forecast and the determination of additional generation capability required so as to maintain an adequate generating reserve margin. A statement of my professional qualifications is attached and incorporated by reference herein.

2. I have read "Intervenor Miami Valley Power Project's Motion to Delay The Operating License Hearings And To Extend The Time For Discovery". Certain allegations contained in that Motion are inaccurate or misrepresentative for the following reasons:

A.) The conservation of energy that was a necessity during the coal strike in the winter of 1977-1978 was an important factor in the 1.1% rate of increase in electric kilowatt hour (kwh) sales in 1978 compared to 1977. However, for the first one hundred days in 1979 CG&E's customers used 11.4% more energy then during the same period in 1978.

B.) The alleged 1978 generation reserve margin of 34% asserted in the above Motion is incorrect in that it is based on the winter capability of CG&E's generating capacity as reported in CG&E's 1978 Annual Report. Some generating units are derated for summer operating conditions and it is this summer capability that must be used in determining the percent reserve margin at the time of the annual peak demand which occurs in the summer for CG&E. The reserve margin for the 1978 summer peak using actual summer capability was 26.8%. With the peak load projected for a typical "hot spell" in CG&E's service area, the reserve margin would have been 22.7%.

C.) The peak load forecasted for the summer of 1980 is 3218 megawatts and represents an annual compounded growth rate of 4.8% over the projected peak demand that could have occurred had CG&E experienced a typical "hot spell" in 1978. The projected reserve margin in 1980 with Zimmer Unit 1 in service will be 21.6%. If the unit is not in service the reserve margin will be 11.7%. Without Zimmer Unit 1 in service in early 1980, the reserve margin will be far below the desired reserve range of 18-25% and could have a serious impact on CG&E's ability to provide reliable electric service to its customers.

D). While the in-service dates of four jointly-owned 600 megawatt coal-burning units have been deferred, these deferrals were based on the presumption that the Zimmer Unit 1 would be placed in service as scheduled.

Robert P. Wiwi
Robert P. Wiwi

Sworn to before me this 30th day of April, 1979.

Mary B. Fleming
Notary Public

My Commission expires _____.

MARY B. FLEMING
Notary Public, State Of Ohio
My Commission Expires July 28, 1982

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QUALIFICATIONS
ROBERT P. WIWI
VICE PRESIDENT - ELECTRIC OPERATIONS
THE CINCINNATI GAS & ELECTRIC COMPANY

My name is Robert P. Wiwi. My place of business is Fourth and Main streets, Cincinnati, Ohio. I am Vice President of Electric Operations of The Cincinnati Gas & Electric Company.

I received a Bachelor of Science Degree in Electrical Engineering from the University of Cincinnati in 1964. I received a Master of Business Administration Degree from Xavier University in 1969. I also attended an Electric Utility Management Program at the University of Michigan in 1972. I have been employed by The Cincinnati Gas & Electric Company and its Subsidiaries since 1964. I have held various positions in the Electric Department in both the operating and planning divisions. I was Manager of the Electric Operations Department from May, 1972 until May, 1976 when I became Vice President of Electric Operations.

I am a member of the Institute of Electrical and Electronic Engineers, the Association of Edison Illuminating Companies and the Coordination Review Committee of East Central Area Reliability (ECAR).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Miami Valley Power Project and Dr. Fankhauser's Motion to Delay the Zimmer Proceeding," dated May 7, 1979, in the captioned matter, were served upon the following by deposit in the United States mail this 7th day of May, 1979:

Charles Bechhoefer, Esq.
Chairman, Atomic Safety
and Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Frank F. Hooper, Member
Atomic Safety and Licensing
Board
School of Natural Resources
University of Michigan
Ann Arbor, Michigan 48109

Mr. Glenn O. Bright, Member
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Richard S. Salzman, Esq.
Chairman, Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Lawrence R. Quarles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Michael C. Farrar, Esq.
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman, Atomic Safety and
Licensing Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Charles A. Barth, Esq.
Counsel for the NRC Staff
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

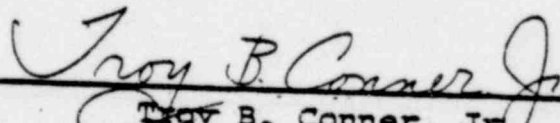
William J. Moran, Esq.
General Counsel
Cincinnati Gas & Electric
Company
Post Office Box 960
Cincinnati, Ohio 45201

Mr. Chase R. Stephens
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

William Peter Heile, Esq.
Assistant City Solicitor
City of Cincinnati
Box 214
Cincinnati, Ohio 45202

Leah S. Kosik, Esq.
Attorney at Law
3454 Cornell Place
Cincinnati, Ohio 45220

John D. Woliver, Esq.
Clermont County Community
Council
Box 181
Batavia, Ohio 45103


Troy B. Conner, Jr.

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