

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

BRIEF IN SUPPORT OF NOTICE OF APPEAL

PRELIMINARY STATEMENT

On March 21, 1980, more than four and one half years after the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Hearing on the application of The Cincinnati Gas & Electric Company, et al., ("Applicant") for an operating license for the Wm. H. Zimmer Nuclear Power Station, <sup>1/</sup> an untimely petition for leave to intervene in the operating license proceeding was filed jointly by two organizations, Zimmer Area Citizens ("ZAC") and Zimmer Area Citizens of Kentucky ("ZACK").

Over the objections of the Applicant, the Atomic Safety and Licensing Board, by Memorandum and Order dated April 22, 1980, granted ZAC-ZACK's petition for leave to intervene, "subject to [its] submission of at least one adequate contention."<sup>2/</sup> In so ruling, the Licensing Board exceeded its

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<sup>1/</sup> See 40 Fed. Reg. 43959 (September 24, 1975). That Notice specified October 24, 1975 as the last day for submittal of timely petitions.

<sup>2/</sup> Memorandum and Order at 16.

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jurisdiction and erred as a matter of law in applying the Commission's requirements regarding late intervention.

ARGUMENT

- I.           The Licensing Board Exceeded  
              Its Jurisdiction And Failed To  
              Follow The Rules Of Practice By  
              Granting Late Intervention Without  
              The Submission Of Contentions.

Under the Commission's Rules of Practice, the contentions which petitioner seeks to litigate, as well as the bases for each contention set forth with reasonable specificity, must be filed not later than 15 days prior to the special prehearing conference or the first prehearing conference.<sup>3/</sup> It follows that a late petition filed after the holding of the special prehearing conference on January 23, 1976 in this proceeding should have contained the itemized contentions with the bases for each contention set forth with reasonable specificity.<sup>4/</sup>

The Licensing Board below acknowledged that the petition contained no statement of contentions and that a petitioner

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3/ 10 C.F.R. §2.714(b).

4/ Certainly, a late petition to intervene would be subject to standards at least as exacting as those applicable to new contentions by existing parties. The Statement of Consideration accompanying the amendment of the Commission's Rules of Practice in 1978, 43 Fed. Reg. 17798 (April 26, 1978), makes it clear that late-filed petitions and amended or expanded contentions are to be judged by criteria at least as stringent as set forth for timely petitions. See also Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), LBP-79-2, 9 NRC 90, 105 (1979).

seeking late intervention "should as a general rule include contentions in its petition," but nonetheless permitted petitioner to file proposed contentions 20 days after the decision.<sup>5/</sup> The Licensing Board thereby adopted a procedure not authorized by the Rules, which expressly require that a petitioner "shall file . . . a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity" not later than 15 days prior to the holding of special prehearing conference pursuant to 10 C.F.R. §2.751a or the first prehearing conference.<sup>6/</sup> Quite simply, the Licensing Board exceeded its jurisdiction as the Commission's delegate in rewriting the Rules of Practice to permit late intervention contingent upon the filing of at least one good contention at a later time.

Licensing boards are not authorized to bypass the jurisdictional requirements for late intervention unless those requirements are expressly waived by the Commission itself.<sup>7/</sup> Because the Atomic Safety and Licensing Boards

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<sup>5/</sup> Memorandum and Order at 3 n.1, 16.

<sup>6/</sup> 10 C.F.R. §2.714(b) (emphasis added). One need not look beyond this very case to confirm the necessity for a finding on interest and contentions prior to admitting a petitioner as a party. Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8 (1976).

<sup>7/</sup> Houston Lighting & Power Company (South Texas Project, Units Nos. 1 and 2), CLI-77-13, 5 NRC 1303 (1977). See also Florida Power & Light Company (St. Lucie Plant, Units 1 and 2), LBP-77-23, 5 NRC 789 (1977).

may exercise only the authority delegated to them by the Commission, they may not admit parties nor hear testimony for which they have no express mandate.<sup>8/</sup> The limited jurisdiction of the Commission's licensing boards has been described as follows:

The authority to administer the licensing provisions of the Atomic Energy Act has been vested by Congress in the Nuclear Regulatory Commission (42 U.S.C. §5841(f) and (g)). The Commission is empowered by that Act to appoint Atomic Safety and Licensing Boards to conduct adjudicatory proceedings and "to conduct such hearings as the Commission may direct" (42 U.S.C. §2241). Accordingly, licensing boards are delegates of the Commission and exercise only those powers which the Commission has given them.<sup>9/</sup>

Notwithstanding its lack of plenary authority, the Licensing Board below revamped the requirements for late intervention by granting the petition on a contingent basis without the

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8/ South Texas, supra; Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25 (1980), rev'd in part on other grounds, CLI-80-12 (April 17, 1980); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976); Arkansas Power & Light Company (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 30-31 (1973); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-77-33, 5 NRC 1267 (1977); St. Lucie, supra.

9/ New England Power Company (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978). See also Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), ALAB-513, 8 NRC 694 (1978).

requisite list of contentions, thereby exceeding its delegated jurisdiction.<sup>10/</sup> Thus, it could only speculate on the matter to be addressed under 10 C.F.R. §2.714(a)(1).<sup>11/</sup>

The decision may be read as encouraging the intervenor to broaden the issues by filing contentions in new areas as to which good cause for lateness had not been shown.<sup>12/</sup> Inasmuch as a finding of good cause is required by the Rules for any late contention,<sup>13/</sup> the Board's Memorandum and Order

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<sup>10/</sup> The instant petition is readily distinguishable from Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978). In the Greenwood proceeding, the Board reserved decision upon the petition for late intervention until it had an opportunity to obtain the position of the parties on the validity of the contentions. However, the requisite proposed contentions had in fact been filed with the late petition. Here, on the other hand, the Board granted the petition even though contentions had not yet been filed.

<sup>11/</sup> In this instance, for example, the petition does not reflect any knowledge or familiarity with emergency planning for Zimmer as set forth in FSAR, Vol. 9, Appendix F, or with any of the Commission's interim guidelines or the proposed rule changes, or awareness of the status of emergency planning issues in this proceeding. The petition merely outlines certain "concerns" relating to the adequacy of some emergency planning. Thus, the Board could only speculate that petitioner might provide assistance in developing a sound record with its "possible knowledge of transportation and traffic conditions" (Memorandum and Order at 11), even though petitioner asserted no such knowledge or expertise by virtue of a statement of contentions or otherwise in its petition.

<sup>12/</sup> The Board's opinion is at best ambiguous in this regard. At pages 8-9 and 14 of its Memorandum and Order, the Board appears to limit petitioner's contentions to emergency planning and radiological monitoring. However, the Board's instructions for the filing of contentions contains no such restriction. These portions of the Board's decision cannot be reconciled.

<sup>13/</sup> See note 3, supra.

is defective in this regard.<sup>14/</sup>

II. The Licensing Board's Order  
Is Final For Purposes Of Appeal  
Under The Rules Of Practice

The Licensing Board also exceeded its jurisdiction under the Rules by granting the petition for leave to intervene while at the same time purporting to forestall the finality of its order for purposes of appeal under 10 C.F.R. §2.714a.<sup>15/</sup> The Board's reliance upon Greenwood<sup>16/</sup> is misplaced because the Licensing Board in Greenwood "did not admit [the intervenor] as a party to [the] proceeding" but merely "meant to say . . . that it was not going to deny the petition simply because it was late."<sup>17/</sup> Once a petition for intervention has been granted and a party has been admitted,

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<sup>14/</sup> Applicant further objects to the procedure designated by the Board by which it is directed to negotiate with the Staff and ZAC-ZACK as to admissible contentions and to report to the Licensing Board thereafter. Nothing in the Regulations coerces applicants to engage in this kind of self-flagellation; under the Rules, the responsibility for furnishing at least one good contention is solely the responsibility of the petitioner. "A petitioner who fails to file [contentions] . . . will not be permitted to participate as a party." 10 C.F.R. §2.714(b) (emphasis added).

<sup>15/</sup> Memorandum and Order at 18-19. Applicant believes that the order is final and files its appeal now in order to protect its rights. If the Appeal Board herein should nonetheless determine that the appeal is interlocutory, Applicant wishes to preserve these points for judicial review and/or further appeal in this proceeding.

<sup>16/</sup> Detroit Edison Company (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).

<sup>17/</sup> 7 NRC at 571-572.

regardless of whatever reservations the Board may make, the order is final under the terms of 10 C.F.R. §2.714a, which authorizes an appeal of "[a]n order granting a petition for leave to intervene."<sup>18/</sup> Just as the licensing boards have no authority to impose conditions so as to initiate adjudicatory proceedings,<sup>19/</sup> neither may they set conditions which, if enforced, would have the effect of preventing appeals from being taken.

Even if the Appeal Board should determine that the order of the Board below is not technically "final" for purposes of appeal, it should nevertheless review the order as final "except in the formalistic sense."<sup>20/</sup>

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<sup>18/</sup> See Memorandum and Order at 18 (emphasis added).

<sup>19/</sup> Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 29-30 (1980), rev'd in part on other grounds, CLI-80-12 (April 17, 1980). The Commission agreed that the Licensing Board had exceeded its jurisdiction by imposing a condition not authorized by the rules to trigger a hearing, but went even further to hold that the Appeal Board had exceeded its jurisdiction as well by imposing conditions that invaded the Staff's prerogatives. It stated that "the Appeal Board's remedy, like the Licensing Board's solution, exceeds the authority the Commission has delegated to adjudicatory tribunals." (Slip op. at 3.)

<sup>20/</sup> Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 (1976).

III. Petitioner Lacked "Good Cause"  
For Its Lateness As A  
Matter Of Law.

The Licensing Board incorrectly determined that ZAC-ZACK had shown "good cause" for the delay in its filing under 10 C.F.R. §2.714(a)(1)(i).<sup>21/</sup> The Licensing Board found good cause for a late filing in the "recent regulatory developments in emergency planning (including evacuation) and radiological monitoring,"<sup>22/</sup> while it acknowledged that these issues could have been raised much earlier:

It is true, of course, that emergency planning and radiological monitoring could have been raised as issues back in 1975, when the proceeding commenced. Both Dr. Fankhauser and the City of Cincinnati did so. But, at the time the relief which could be granted was far less than what it is today. <sup>23/</sup>

Nonetheless, the Licensing Board stated that late intervention was justified because "the criteria for emergency planning have undergone vast changes since the inception of this proceeding" and "[t]he publication of significant changes in the criteria governing emergency planning and radiological monitoring in March, 1980 constitutes new in-

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<sup>21/</sup> Initially, the Licensing Board rejected two reasons ZAC-ZACK had advanced for its lateness, *i.e.*, that its two constituent organizations were established only some time after the accident at Three Mile Island and hence were not in existence when a timely petition would have been submitted in 1975, and second, that petitioner had waited to achieve the degree of expertise "sufficient to be productive and assistive as a party." Petition for Leave to Intervene at 2. See Memorandum and Order at 3.

<sup>22/</sup> Memorandum and Order at 5.

<sup>23/</sup> Id.

formation on these subjects and provides 'good cause' for the petitioner's delay until March, 1980 in its seeking intervention with respect to these matters."<sup>24/</sup>

The Licensing Board clearly acted without precedent in permitting late intervention simply on the basis of a change in licensing requirements under the Commission's regulations. The decisions upon which it relied pertained to changed conditions and circumstances in the physical plant of the facility itself, not changes in licensing requirements to upgrade health and safety standards.

In holding that the Staff's recent publication of significant changes in the criteria governing emergency planning and radiological monitoring constitutes "new information" so as to provide good cause for late intervention, the Licensing Board has adopted an entirely novel and apparently limitless rationale for broadening late intervention. Unquestionably, the Commission's regulations and licensing requirements with regard to any number of issues, including emergency planning, are in a state of review and revision. However, it is the very nature of the regulatory function to examine the margin of protection to the public health and

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<sup>24/</sup> Id. at 7-8. An examination of the contentions granted by this Licensing Board in 1976 refutes as totally without basis the Board's implicit conclusion that the contentions it can grant today with regard to emergency planning and monitoring are somehow broader than those which could have been granted on a timely basis in 1976.

safety on a continuing basis and to amend existing regulations and standards to implement new criteria to the extent considered necessary. But, such policy changes have never been regarded as "new information" by the Commission.

Dilatory parties cannot be allowed to wait in the wings on the off chance that the Commission might amend its licensing requirements years down the road. To sanction lateness for regulatory revisions is to deny any degree of finality to a deadline on intervention.

The Licensing Board's approach is also defective because the Board accepted without critical examination petitioner's generalized claims that it filed late because of "regulatory revisions." In fact, petitioner has neither cited nor shown any familiarity whatsoever with any of the Commission's interim guidelines or the proposed rule changes (which were first brought forth in the Staff's response to the petition below); nor has ZAC-ZACK shown any awareness of the status of emergency planning issues in the Zimmer proceeding. The petition merely outlines certain "concerns" relating to the adequacy of some emergency planning procedures. It was impossible for the Licensing Board to have deduced "good cause" for late filing from the scant references by petitioner to "new developments," especially where petitioner itself claims to have spent a full year studying emergency planning preparatory to its intervention.<sup>25/</sup>

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<sup>25/</sup> See petition at 2. It is again emphasized that good cause cannot be determined in the absence of specific contentions.

IV. The Licensing Board Should  
Have Denied Late Intervention To ZAC.

Assuming, arguendo, that ZACK was properly admitted as a party to this proceeding, the Licensing Board erred in permitting late intervention to ZAC. The petition candidly describes how the two organizations were separately organized and administered, and how the two were combined to form a joint petitioner to intervene in the instant proceeding. Since, as discussed below, late intervention would have been denied to ZAC standing alone, ZAC cannot circumvent the criteria for late intervention simply by uniting with a totally separate and distinct organization that can possibly make out a better case.

To the extent the Board below found that ZAC-ZACK was entitled to late intervention, its findings were supported almost wholly by considerations pertaining to ZACK. It is clear on the record that ZAC could not have independently justified its late intervention. ZAC was formed one year ago, and some of its members live within one mile of the Zimmer facility. Obviously, ZAC could not have shown "good cause" on the basis of "regulatory revisions" because its members would have been covered even under the earlier emergency planning requirements. Also, its interests have been adequately represented by existing Ohio intervenors, a fact acknowledged by the Board below.<sup>26/</sup>

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<sup>26/</sup> Memorandum and Order at 12-13.

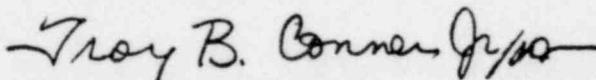
It is well established that newly acquired standing by <sup>27/</sup> an organization is not a proper basis for late intervention. The same rule must logically apply to organizations which themselves merge in order to overcome factors weighing against late intervention by at least one of the two. To endorse ZAC's obvious end-run around the rules would render the restrictions on late organizational intervention a virtual nullity. Thus, as a consequence, the Board should have denied ZAC's petition to become a party and restricted the scope of permissible contentions to those involving emergency planning and monitoring in Kentucky.

CONCLUSION

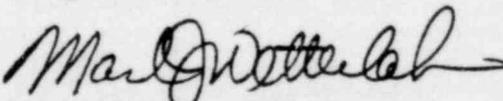
For the reasons discussed above, the Appeal Board should reverse and vacate the order of the Licensing Board below and instruct the Board to deny the petition for late intervention.

Respectfully submitted,

CONNER & MOORE



Troy B. Conner, Jr.



Mark J. Wetterhahn  
Counsel for the Applicant

May 8, 1980

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<sup>27/</sup> Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582 (February 22, 1980); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330 (1979).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Notice of Appeal" and "Brief in Support of Notice of Appeal," dated May 8, 1980, in the captioned matter, were served upon the following by deposit in the United States mail this 8th day of May, 1980:

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