

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CINCINNATI GAS AND ELECTRIC)	Docket No. 50-358
COMPANY, <u>et al.</u>)	
)	
(Wm. H. Zimmer Nuclear Power)	
Station, Unit No. 1))	

NRC STAFF RESPONSE TO ZIMMER AREA CITIZENS' PETITION TO INTERVENE

On September 24, 1975 the Notice of Opportunity for Hearing in the subject proceeding was published in the Federal Register (40 Fed. Reg. 43959). That Notice provided that petitions to intervene must be filed on or before October 24, 1975. Shortly after the Three Mile Island accident in March 1979, citizens in Ohio and Kentucky living near the Zimmer facility formed unincorporated associations (Zimmer Area Citizens and Zimmer Area Citizens of Kentucky, both referred to hereinafter as ZAC) to inform themselves and to express their local concerns regarding the Zimmer facility. They now (March 21, 1980) seek to intervene on issues involving emergency plans, radiological monitoring and "the adequacy of research and expertise" on the effects of radiation upon humans.

The first question to be answered in addressing a petition to intervene is the interest of the petitioner in the proceeding. Here the petitioning organization states it is largely composed of persons who live and send their children to school within 10 miles of the Zimmer facility (Petition, pp. 3-4). Addresses are listed as members of the organization who reside within 10 miles of the facility (Petition, p. 7). Thus, it appears the organization has the requisite interest to intervene. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976).

However, the petition to intervene was not filed within the time set out in the Federal Register Notice, and in addition to a finding of interest (and of proper contentions), permission to intervene must be based upon a balancing of the five factors for late intervention set out in 10 C.F.R. §2.714(a)(1) of the Commission's Rules of Practice. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC ____ (February 22, 1980, slip op. p. 2). These factors will be discussed seriatim.

The first factor is good cause for failure to file on time. The petition expresses a concern with both emergency plans and radiological monitoring among other matters.

Emergency planning has substantially changed since the original notice of hearing and is still subject to change. On March 10, 1980 the Staff sent a letter to the Applicants advising them to comply with NUREG-0654/FEMA-REP-1, "Criteria For Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants." The letter further makes it clear the NUREG-0654 is only interim additional guidance and that the Commission's rulemaking proceeding may make further changes.

On March 7, 1980 the Staff released Draft 3 of NUREG-0660, "NRC Action Plans Developed as a Result of the TMI-2 Accident" and in Section III.D.2 changes are made in radiological monitoring.

The NRC's requirements for emergency plans and radiological monitoring have both changed in March 1980. These are new circumstances upon which the Staff

believes supply good cause for late intervention. In Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), LBP-78-4, 7 NRC 92 at 97 (1978) the Licensing Board authorized subsequent intervention, approximately five years after the initial notice of hearing, due to changes in the facility from once-through cooling with a lake to cooling towers, changing from 8 x 8 fuel bundles to 17 x 17 fuel bundles, as well as other changes. The intervention was authorized only on the new and changed circumstances. Previously litigated matters were not to be reopened. In addition, when the Allens Creek application was changed from a two unit station to a one unit station, new intervention was authorized upon the new circumstances. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1, Docket 50-466, see notices in 43 Fed. Reg. 23,666, May 31, 1978 and 43 Fed. Reg. 40,328, September 11, 1978) and see also ALAB-535, 9 NRC 377 (1979), ALAB-539, 9 NRC 422 (1979) and ALAB-544, 9 NRC 630 (1979). Although in those cases the physical characteristics of the facilities changed supplying the "good cause" for late intervention, the Staff believes that the changes in standards for licensing in this case similarly supply "good cause" for late intervention.

Even where a late intervenor has tendered a good excuse for lateness, a licensing board should also consider the other four factors, although not necessarily in the same detail as when no good excuse had been submitted. Metropolitan Edison Company, et al., Three Mile Island Nuclear Station Unit 2, ALAB-384, 5 NRC 612, 616

(1977). The second factor set out in 10 C.F.R. §2.714(a)(1) for evaluating late intervention petitions is "the availability of other means whereby the petitioner's interest will be protected." Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 648 (1975), indicated that the test under this provision of section 2.714(a) was whether there was a means outside of the subject NRC proceeding whereby the petitioner could protect his interest. The papers in this proceeding do not reveal other means whereby the petitioner can protect its interest in emergency planning and radiological monitoring in regard to the Zimmer facility, other than in this proceeding. The Staff is not aware of any formal adjudicatory proceedings before other agencies, state or federal, which would afford petitioners the opportunity to participate in a hearing on the issues of emergency planning and radiological monitoring, although other agencies are considering issues relating to emergency planning.

The third factor is the extent to which the petitioner's participation may be expected to assist in developing a sound record. The ZAC petition does not make a showing of expertise, either of ZAC members or of other qualified experts, which could be of assistance in developing the record. Cf. Detroit Edison Co. (Greenwood Energy Center), ALAB-476, 7 NRC 759, 764 (1978).

Accordingly, that requirement is lacking in this case on the basis of the petition.^{1/}

^{1/} However, it should be noted that some members of ZAC (who reside near the plant) may possess some practical working knowledge as to transportation and traffic conditions which may be relevant to emergency planning.

The fourth factor is the extent to which the petitioner's interest will be represented by existing parties. On page 4 of its petition, ZAC distinguished its interests as an organization of citizens of Ohio and Kentucky who live and send their children to school within 10 miles of the plant, from the interests of other intervenors in this proceeding. From the averments in the petition it appears no other organization particularly representing individuals residing or sending children to school within 10 miles of the plant are parties to this proceeding. The other intervenors are the City of Cincinnati, the City of Mentor, the State of Kentucky, the Miami Valley Power Project, and a Dr. David Fankhauser. No governmental units have intervened specifically representing the interests of Ohio citizens residing within 10 miles of the plant concerning emergency planning and radiological monitoring matters. Cincinnati is beyond this distance. The Miami Valley Power Project and Dr. Fankhauser, while raising emergency planning and radiological monitoring issues, do not appear to have the identical interests as ZAC from the point of view of residents and parents of public school children residing or attending schools within ten miles of the plant.

The fifth and final factor is the extent to which petitioner's participation will broaden the issues or delay the proceeding. Petitioner has expressly stated that it will take the proceedings as it now finds them (Petition, p. 5), thereby implying that ZAC contemplates little or no delay of the proceeding. Moreover, no hearings have been held or evidence received on emergency planning or radiological monitoring, and quite likely will not be held until late fall 1980 or early 1981. The standards upon which these matters will be judged

are still evolving. If intervention by ZAC on these two issues is permitted at this time, it would appear unlikely that more than a week of delay would result from ZAC presenting their own evidence (if they so choose) and cross-examine and in the Staff's view does not substantially prejudice Applicants' rights. Moreover, the Board has the authority to control any potential delay that might result from the participation by ZAC in the discovery process. Balancing the rights of the Applicant and the ZAC petitioners in regard to delay of the proceeding, the Staff concludes that the interests of the petitioners should prevail.

On balance because of the changed and evolving nature of emergency planning and radiological monitoring standards, because there appears no other means for ZAC to protect its members' interest in these matters, because no other party appears to represent the interests of at least some of the members of ZAC in the proceeding, and because ZAC's participation will apparently have little adverse effect on the expeditious conclusion of the proceedings, the Staff concludes that the petition of ZAC to intervene should be granted.

However, the Staff notes that there are no cognizable contentions (10 C.F.R. §2.714) set forth in the ZAC petition. Pursuant to 10 C.F.R. §2.714(b) one has until 15 days before a prehearing conference to frame such contentions. The prehearing conferences were, of course, held long before the subject petition to intervene was filed. In these circumstances, the Staff recommends that the ZAC petitioners be given 30 days to amend their petition and frame proper contentions relating to emergency planning and radiological monitoring. This would be in accord with the present rules in section 2.714 bifurcating the

setting out of interest and the admission of parties and the framing of particular contentions at a later date.

The Staff strongly oppose litigating as a contention in this proceeding, as asserted in the ZAC petition, the adequacy of research in the United States and other countries of radiation effects upon humans. Such a vague general statement lacks any relationship to the Zimmer plant.^{2/}

In conclusion, the Staff recommends that the petition to intervene be granted, upon condition that ZAC within 30 days submit adequate contentions regarding emergency planning and radiological monitoring as discussed above. The Staff further recommends that no contention on research into the effects of radiation on humans be permitted and that no lay persons now be authorized to represent ZAC.

Respectfully submitted,

Charles A. Barth

Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of April, 1980

^{2/} The intervention petition concludes with a listing of eleven individuals who have been designated as "representatives" as well as ZAC's counsel to represent them and there is no provision under the Commission's Rules of Practice for representatives other than ZAC's counsel. Therefore, the Board should make clear that ZAC may only appear and be represented by its counsel.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ZIMMER AREA CITIZENS' PETITION TO INTERVENE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 10th day of April, 1980:

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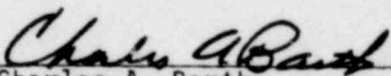
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