

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

CINCINNATI GAS AND ELECTRIC
COMPANY, et al.

(Wm. H. Zimmer Nuclear Power
Station, Unit No. 1)

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Docket No. 50-358

NRC STAFF RESPONSE TO
APPLICANTS' NOTICE OF APPEAL

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May 23, 1980

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I.

STATEMENT OF THE CASE

On March 20, 1980, Zimmer Area Citizens and Zimmer Area Citizens of Kentucky (referred to collectively hereinafter as ZAC) filed an untimely petition for leave to intervene in this proceeding. The Notice of Opportunity for Hearing in this proceeding was published in the Federal Register on September 24, 1975 (40 Fed. Reg. 43959). That Notice provided that petitions to intervene had to be filed on or before October 24, 1975. In its March 20, 1980 petition, ZAC asserts that it was formed shortly after the Three Mile Island accident in March 1979, to inform itself and to express its local concerns regarding the Zimmer facility. Realizing the lateness of its petition, ZAC has sought intervention on emergency plans, radiological monitoring, and one other issue.^{1/} ZAC has stated, and the Licensing Board found in its Memorandum and

^{1/} The Board found that "good cause" did not exist for ZAC's tardiness in seeking intervention on "the adequacy of research and expertise pertaining to thyroid disorder, or disease, leukemia, and other untoward effects of and to children due to radiation release and radioactive effluents." Order p. 8. But see Order, p. 9, n. 5.

Order, LBP-80-14, dated April 22, 1980, that it must take the proceeding as it finds it, apparently limiting its sponsorship of contentions to those two subjects for which "good cause" for delay were found, (i) emergency planning and (ii) radiological monitoring.^{2/}

The Staff in its response of April 10, 1980 supported the ZAC petition subject to ZAC proffering at least one valid contention relating to emergency planning and/or radiological monitoring. The ZAC petition was opposed in its entirety by Applicants.

The Licensing Board issued its Memorandum and Order, LBP-80-14 on April 22, 1980 (hereinafter "Order"). That Order has four principle components which will be briefly discussed below.

First, the Order found that ZAC has the requisite interest to intervene, ZAC being largely composed of persons who live and send their children to school within 10 miles of the Zimmer facility.

Second, the Licensing Board found, after analyzing and reviewing the five factors governing late intervention codified in 10 C.F.R. §2.714(a)(1)(i)(ii)-(v) that "good cause" for late intervention had been established and that balancing the remaining factors led to the conclusion that subject to ZAC's submission of at

^{2/} See Memorandum and Order, p. 14. Although these matters have been raised by others, neither subject has yet been litigated at the hearing.

least one adequate contention, ZAC should be admitted as a party to the proceeding. Third, the Board directed ZAC to file its contentions within forty days.

Fourth, the Board, "In order to alleviate any delay, . . . urge(d) the Applicants and Staff to attempt to reach agreement with ZAC-ZACK as to the acceptability of contentions" (Order, p. 16). ZAC was directed to provide copies of its contentions to the Applicants and Staff within twenty days, providing that "The Applicants and Staff and ZAC-ZACK shall then try and reach agreement on contentions and shall report to us within 20 days of the service of the proposals the results of such negotiations (and their positions on proposed contentions, to the extent they cannot reach agreement)." (Order, p. 16 (emphasis added).

The Licensing Board's Order concluded with the statement:

This Order is subject to appeal pursuant to the terms of 10 C.F.R. §2.714a. It will become final for purposes of appeal, however, only following our issuance of a further order accepting or rejecting contentions. Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570, 571 (1978).^{3/}

Notwithstanding the Licensing Board's above quoted concluding statement, and the provisions of 10 C.F.R. §2.714a, the Applicants have appealed the Licensing Board's April 22, 1980 Order. It is the Staff's view that the appeal is premature, not sanctioned by the regulations, and that it be dismissed without

^{3/} Order, pp. 18-19.

prejudice to its renewal should in fact the Licensing Board finally grant the petition following consideration of ZAC's contention(s), when and if proffered.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Applicants' appeal of the Licensing Board's April 22, 1980 Memorandum and Order presents the following issues. First, whether the Order (dealing only with the requirements of interest in the proceeding and standing to intervene) is now appealable by Applicants. Secondly, if so, whether the Licensing Board abused its discretion by either (i) granting ZAC's petition subject to the condition precedent that ZAC furnish "at least one adequate contention; or (ii) requesting that Applicants meet with the Staff and ZAC to discuss any contentions submitted by ZAC.

III.

ARGUMENT

10 C.F.R. §2.714a defines the appealability of licensing board orders ruling on petitions to intervene. 10 C.F.R. §2.714a(b) permits appeal of "an order wholly denying a petition for leave to intervene" and 10 C.F.R. §2.714a(c) permits appeal of "an order granting a petition for leave to intervene" The Licensing Board's Order of April 22, 1980 neither grants nor denies the

ZAC petition to intervene and therefore in the Staff's view it is not appealable at this time. The Applicants' assertion that the Licensing Board admitted ZAC as an Intervenor^{4/} is incorrect. The Board found that petitioners had demonstrated the requisite interest and standing, but inasmuch as petitioners had not proffered a single contention, the Licensing Board afforded petitioners 40 days to submit valid contentions at which time the Board would finally rule on the ZAC petition. As authority, the Licensing Board cited Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC, 550, 571 (1978). In Greenwood, the Board found interest and standing, but deferred ruling until the parties had the opportunity to comment upon contentions. The Appeal Board's decision in Greenwood, which is consistent with 10 C.F.R. §2.714a, makes it clear that a Licensing Board's finding of interest and standing may not be appealed absent the final granting or denying of the petition to intervene--and this may not occur until a licensing board finds at least one valid contention. Here Applicants contend that Greenwood is distinguishable,^{5/} arguing that in Greenwood, the Licensing Board reserved decision upon the late intervening petition, whereas here the Board has already granted the petition. In the Staff's view, the Licensing Board did not finally grant ZAC's intervention petition as Applicants contend, but expressly conditioned the grant of the petition, on ZAC subsequently proffering at least one valid contention. Accordingly, the Staff believes that Appellants' proffered distinction of Greenwood provides no basis for their interlocutory appeal. Moreover, it has been held that a licensing board has wide

^{4/} Applicants' Brief pp. 6, 11, and 12.

^{5/} Applicants' Brief, p. 5, n. 10.

latitude to permit the supplementation of defective intervention petitions prior to the issuance of its final order on intervention. Thus, the Board's decision to allow such amendment should not be disturbed on appeal absent a showing of gross abuse of discretion. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 194 (1973). Such a case has not been presented here.^{6/}

Applicants also argue at p. 7 of their brief

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.^{20/}

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

This argument is also without merit. The Commission's Order in Diablo related to intervenors who were requesting designation of a Board to hear their appeal of a Licensing Board Order, which order did not relate to a petition to intervene. The Order which Applicants seek to appeal lacks finality both in a "formalistic sense" as Applicants admit, and in the real sense as it cannot be now determined whether ZAC will be finally permitted to intervene until it is seen whether ZAC has any proper contentions. As no "final determination"

^{6/} Appellant makes the claim that the Licensing Board exceeded its jurisdiction in allowing extra time for the submission of contentions where petitioners seek late intervention. It bases this argument on 10 C.F.R. §2.714(b) which provides that a supplement to petition setting forth contentions shall be submitted 15 days before a prehearing conference. This subsection has no direct applicability where one petitions to intervene late under 10 C.F.R. §2.714(a) after the prehearing conferences contemplated in §2.714(b) already have been held. Obviously the contentions could not then be submitted prior to the prehearing conference. It is noted that amendments and additions to contentions have often been permitted after prehearing conferences. See Indiana and Michigan Electric Co. (Donald C. Cook, Units 1 & 2), CLI-72-25, 5 AEC 13, 14 (1972); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 374 (1973).

has been made on ZAC's intervention, there is no final order to appeal. As in the case of other interlocutory appeals, the Commission's resources should not be spent reviewing the matter until it is finally determined that ZAC shall be admitted as a party. The factual and legal situations between Diablo and the instant matter are in the Staff's view clearly distinguishable.

Moreover, as previously stated, the Licensing Board granted the late petition after analyzing and balancing the five factors governing late intervention specified in 10 C.F.R. §2.714a. The Licensing Board concluded that "good cause" existed for the untimely petition not only because emergency planning and radiological monitoring had undergone many changes since the close of the initial intervention period^{7/} but because of the availability of new information appearing in previously unavailable documents relative to these issues.^{8/} A Licensing Board's determination that good cause exists for the filing of an untimely intervention petition may be reversed only for an abuse of discretion, which has not been shown to exist here. USERDA (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976); Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-339, 4 NRC 20 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607 (1976).

^{7/} See Memorandum and Order, pp. 7-8.

^{8/} Allowing intervention to organizations representing persons residing and sending children to elementary school within ten miles of the Zimmer facility based, in part, on recent significant changes in Commission standards for emergency planning and radiological monitoring is not materially different from past Commission regulations and practice for allowing new issues to be raised within the course of ongoing Commission proceedings, on the gaining of new knowledge, or changes in design criteria. Indiana and Michigan Electric Co. (Donald C. Cook, Units 1 & 2), supra note 6; Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), supra note 6. See also Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 385-87 (1979); id. ALAB-539, 9 NRC 422 (1979); id., ALAB-544, 9 NRC 630 (1979). Cf. 10 C.F.R. §2.714(a)(1) with 10 C.F.R. §2.714(a)(3).

There is one final matter raised in Applicants' appeal which the Staff would like to address. In footnote 14 of its Brief the Applicants object to that part of the Licensing Board's Order which "directs" Applicants and the NRC Staff to consult with ZAC on their contentions, if any, and to report the fruits of those discussions to the Board. Applicants characterize this as "coerc[ing] applicants to engage in . . . self-flagellation" The Staff cannot agree with this characterization. In substance, the Board has only requested that the Applicants, Staff and ZAC talk to each other about contentions when, and if, ZAC submits contentions. The Order makes it clear that the Applicants, Staff, and ZAC are to "try and reach agreement on contentions" (Order, p. 16). It is standard practice in the Federal District Courts to require opposing parties to consult with each other and to try to reach agreement on certain matters prior to trial or hearings.^{9/}

The Administrative Procedure Act also authorizes presiding officers to order the parties to talk (consult with) to each other, 5 U.S.C. §556(c)(5), and the Commission's regulations, 10 C.F.R. §2.718(e), grant the Licensing Boards the power to regulate the course of the hearing and the conduct of the participants. The objection of the Applicants to the Licensing Board's request that the Staff and Applicants consult with ZAC on contentions is without merit, and does not constitute an abuse of discretion.^{10/}

^{9/} See Callighan's Federal Local Court Rules, S.Fl. Rule 14, Md. Rule 34-- relating to discovery, etc. The rules of this Commission also encourage boards to obtain stipulations which aid in the conduct of proceedings. See 10 C.F.R. §§2.752, 2.753.

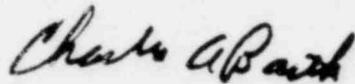
^{10/} Appellant also raises issues involving the admission of Zimmer Area Citizens (ZAC) as well as Zimmer Area Citizens of Kentucky (ZACK) as an Intervenor. No abuse of discretion is shown in allowing these allied groups represented by the same counsel to intervene. It is noted although the State of Kentucky has been admitted to participate in this proceeding, the State of Ohio, where ZAC's members reside, has not appeared in this matter. Emergency planning in Ohio, where the plant is located, is as important as it is in Kentucky.

IV.

CONCLUSION

For the above reasons, the Staff recommends that the Applicants' appeal be dismissed without prejudice to its renewal should in fact the Licensing Board finally grant the petition following consideration of ZAC's contention(s), when and if proffered.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of May, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANTS' NOTICE OF APPEAL" 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 23rd day of May, 1980:

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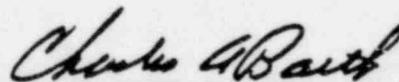
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