UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. Lawrence R. Quarles
Michael C. Farrar

SERVED JUN 9 1980

In the Matter of	)	
THE CINCINNATI GAS & ELECTRIC CO. et al.	)	Docket No. 50-358
(Wm. H. Zimmer Nuclear Power Station)	)	

Messrs. Troy B. Conner, Jr., and Mark J. Wetterhahn, Washington, D.C., for applicants, The Cincinnati Gas & Electric Company et al., appellants.

Mr. Andrew B. Dennison, Batavia, Ohio, for petitioners, Zimmer Area Citizens and Zimmer Area Citizens of Kentucky, appellees.

Mr. Charles A. Barth for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

June 9, 1980

(ALAB-595)

The Licensing Board ruled on April 22, 1980 that two local citizens' groups, Zimmer Area Citizens and Zimmer Area Citizens of Kentucky ("ZAC-ZACK"), could intervene out of time in this operating license proceeding, subject to their "submission of at least one adequate contention." LBP-80-14, 11 NRC __ (slip

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opinion at 16). The Board has not yet determined whether any of petitioners' contentions are admissible. On May 8th, the applicants (The Cincinnati Gas & Electric Company and other utilities associated with the Zimmer facility) filed a notice of appeal from the April 22nd ruling. The petitioners and the staff urge that appeal be dismissed as premature because the order it challenges is not one "granting a petition for leave to intervene" from which an interlocutory appeal -- otherwise precluded under the Rules of Practice -- may be taken. 10 C.F.R. §2.714a(c).

I.

This proceeding began some four years ago and intervention petitions were initially due in October 1975.[1/] ZAC-ZACK was formed in March 1979 and petitioned to intervene in March 1980. Its principal areas of concern involve emergency planning, evacuation and radiological monitoring.[2/] The granting of a late intervention petition turns on a licensing board's evaluation of factors specified in 10 C.F.R. §2.714(a), the first of which is whether there exists "[g]ood cause, if any, for [the] failure to file on time."[3/] For purposes of this

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1/ LBP-80-14, 11 NRC at __ (slip opinion at 3).

2/ Ibid.

3/ 10 C.F.R. §2.714(a)(1)(i).

appeal we may simply note that the petitioners' "good cause" argument, which the staff supported and the Board below accepted, was essentially that prior to very recent changes in Commission policy and criteria on emergency planning, consideration of many of petitioners' concerns and much of the relief they seek would have been foreclosed in these proceedings.[4/] After considering the other factors bearing on whether to allow late intervention,[5/] the Licensing Board concluded that the balance of considerations favored admitting the petitioners to the proceeding.[6/]

The petitioners' intervention papers did not set forth the precise contentions they wished to litigate. The Board

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4/ They also cited the availability of new information recently coming to light on these subjects as justifying their intervention at this time. The point is stressed at length in the opinion below. 11 NRC at ___-___ (slip opinion at pp. 3-9). In view of our disposition of this appeal, there is no occasion for us to discuss its merits.

5/ These are also set out in 10 C.F.R. §2.714(a) and are:

> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.
>
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

6/ 11 NRC at ___ (slip opinion at 15-16).

below recognized that submission of at least one adequate contention was a prerequisite to intervention in this Commission's adjudicatory proceedings.[7] It therefore gave petitioners 20 days to formulate appropriate contentions and to serve them on the applicants and staff, allowing those parties 20 days more in which to attempt to reach agreement on the acceptability of petitioners' contentions before the Board would itself consider and rule on them. 11 NRC at __ (slip opinion at 16). (As of this writing, petitioners have submitted their proposed contentions but the parties have not agreed on their acceptability; the Board itself has not acted.) The Board concluded its memorandum opinion by ruling:

> Subject to its furnishing at least one adequate contention, ZAC-ZACK's petition for leave to intervene is granted.
>
> 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. 8/

Applicants' appeal followed.

II.

The Commission's Rules of Practice discourage piecemeal appellate review. For the most part, the Rules preclude taking

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7/ Id. at ___ (slip opinion at 2-3).

8/ Id. at ___ (slip opinion at 18-19).

an appeal from an interlocutory order entered during the course of a licensing proceeding. 10 C.F.R. §2.730(f). An exception appears in 10 C.F.R. §2.714a(c), which provides in pertinent part that "[a]n order granting a petition for leave to intervene * * * is appealable by a party other than the petitioner on the question whether the petition * * * should have been wholly denied."[9/] The principal issue before us is whether the order in question comes under that provision and is therefore appealable now.

As we mentioned, the Licensing Board conditioned its "intervention" ruling on petitioners' future submission of acceptable contentions and characterized its ruling as "final for purposes of appeal * * * only following * * * issuance of a further order accepting or rejecting [those] contentions";[10/] a "further order" that the Board has not yet issued. The applicants, however, construe the Board's ruling as actually granting intervention, thereby making it appealable. They argue that the Board's requirement that petitioners submit acceptable contentions must be disregarded for purposes of section 2.714a(c), asserting that a licensing board may not

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9/ Orders denying petitions to intervene are also subject to interlocutory appeal. 10 C.F.R. §2.714a(b).

10/ 11 NRC at __ (slip opinion at 19).

"set conditions which, if enforced, would have the effect of preventing appeals from being taken." Applicants contend that even if the order is not "technically" final, it is so except in a "formalistic sense"; in either event, they urge us to review it now. We decline to do so.

1. In Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978), we faced a situation virtually identical to that presented here. Greenwood, like the instant case, involved a late petition to intervene in a licensing proceeding. In that case, as in this one, the licensing board had ruled that the petitioner had demonstrated the requisite "interest" (i.e., standing) to intervene and "good cause" for filing late, but the Board had not yet determined the adequacy of petitioner's contentions. There, as here, the applicants invoked section 2.714a(c) as a basis for taking an interlocutory appeal from the Licensing Board's ruling. We held in Greenwood that "[i]t is plain from the terms of 10 C.F.R. §2.714a that an appeal thereunder must await the ultimate grant or denial of the intervention petition in question." We therefore dismissed the appeal as premature, albeit without prejudice to its renewal should the

licensing board grant intervention after considering petitioner's contentions. 7 NRC at 571-72.

In our judgment, Greenwood is on all fours with this case both as to the issue it presents and the result which the law requires.[11/] Applicants attempt to distinguish that case on the ground that the Greenwood board did not admit the petitioner as an intervenor but only indicated that it would not deny the petition just because it was late. But that is precisely the purport of the Licensing Board order sought to be appealed in this case.

Applicants' argument boils down to the claim that 10 C.F.R. §2.714 requires licensing boards to rule upon the adequacy of a late petitioner's standing to intervene, excuse for being late, and contentions in a single order, the appealability of which is not affected by the Board's failure to rule on contentions. Applicants misconstrue the Rules. Their position disregards the fact that in 1978 the Commission amended section 2.714 to provide for the bifurcated procedures and delayed rulings on contentions employed by the the Licensing Board here. 43 Fed. Reg. 17798, 17799 (April 26, 1978). The Commission recognized that even under the old

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11/ The Board below rested its construction of its April 22 order on the Greenwood decision. 11 NRC at __ (slip opinion at 19).

rule (which had been construed to require that formal contentions accompany the intervention petition),[12/] licensing boards regularly passed on the adequacy of contentions separately -- albeit under the guise of allowing late "amendments" to them -- and that this practice was in fact desirable. As the Commission explained in its "Statement of Considerations" accompanying the rule change (43 Fed. Reg. at 17799):

> It has become common practice for parties and petitioners in nuclear power plant licensing proceedings to discuss informally the framing of contentions until just before the special prehearing conference which is held some months or more after expiration of the 30 day period for timely petitions pursuant to §2.751a. During this period the contentions are frequently revised based on the discussions among the parties and petitioners. Often the petitioners and parties will be able to present the presiding atomic safety and licensing board with an agreed upon set of contentions at the special prehearing conference. This practice reduces unnecessary controversy and litigation and should be encouraged. Accordingly, the rules are amended to permit the filing of contentions until shortly before the special prehearing conference.

In short, the change codified the accepted practice of allowing contentions to be cast into acceptable form after the board has passed on petitioner's "interest" in the proceeding. The fact that this case involves a late petition does not change the result we must reach. The rule governing

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12/ See 10 C.F.R. §2.714(b)(1978 ed.).

appeals from intervention orders -- section 2.714a -- was not modified; only the rule governing the way licensing boards review intervention petitions -- section 2.714 -- was recast. And in doing so, the Commission expressly stated that the change did not disturb the existing "practice of granting intervention based upon adequate interest and at least one adequate contention." 43 Fed. Reg. at 11799 (emphasis added). Put another way, even though a petitioner seeking to intervene demonstrates standing to be heard and good cause for being late, unless that petitioner also submits an acceptable contention, intervention may still be denied. It follows (as it did in Greenwood) that, because the Licensing Board's April 22nd ruling did not even pass on the acceptability of contentions -- much less admit any -- its ruling cannot be construed as an order "granting a petition to intervene"; hence it is not now appealable.[13/] [14/] 10 C.F.R. §2.714a(c).

13/ Applicants' suggestion that the Board's order has the effect of preventing appeals from being taken is mistaken; the appeal must simply abide a final ruling on the intervention petition, the normal practice.

14/ It may well be a good idea, as the Board below suggested, that one "seeking intervention after the normal time for submission of contentions should as a general rule include contentions in its petition." 11 NRC at ___ fn. 1 (slip opinion at 3, fn. 1). But section 2.714 does not make this mandatory. We are hesitant to read such a prerequisite into a rule only recently amended to allow an intervenor's showing of "interest" to be treated separately from its "contentions." But we do agree that a licensing board must set a reasonably short schedule for passing on a late intervenor's contentions to avoid unnecessarily delaying the course of the hearing. The Board below appears to have done so here.

2. Alternatively, applicants suggest that we hear their appeal now even if the ruling below must be viewed, in their phrase, as "technically" not final. We pass the question whether we would have authority to do this, for we reject the idea on its merits. The issue on appeal from an order of this kind would be whether, in allowing new intervenors into the proceeding at this late stage, the Board's action was abusive of its discretion.[15/] A number of factors bearing on the resolution of that question can be affected by the contentions that are admitted: for example, whether petitioners' participation will broaden the issues or delay the proceeding, and the extent to which petitioners' interests could be protected by others. See 10 C.F.R. §2.714(a)(1). We perceive no prejudice to applicants (and they suggest none) that would flow from awaiting the Licensing Board's ruling on the contentions. It therefore seems the wiser course to abide that event and we will do so.

3. Finally, it does not follow that petitioners would be denied intervention even were we to construe the Licensing Board's order as appealable. Were that the case, applicants'

15/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); Florida Power & Light Co. (St. Lucie Plant, Unit 2), ALAB-420, 6 NRC 8, 13 (1977), affirmed, CLI-78-12, 7 NRC 939, 946 (1978).

appeal would have to be deemed late.[16] And because it was not accompanied by a motion for leave to file it out of time, it would even be subject to dismissal. See Iowa Electric Light & Power Co. (Duane Arnold Energy Center), ALAB-108, 6 AEC 195 (1973); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977). In light of the disposition we make of this matter, there is no need for us to consider that question.

The appeal is dismissed without prejudice to its renewal if the Licensing Board admits any of petitioners' contentions.[17]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

16/ The Licensing Board's order was docketed and served by mail on April 22, 1980. Assuming arguendo that the order was subject to interlocutory review, applicants had 15 days to file a notice of appeal. 10 C.F.R. §§2.710 and 2.714a. That period expired on Wednesday, May 7, 1980. Applicants' appeal was filed May 8th.

17/ Our action neither expresses nor implies any position on the merits of the Licensing Board's order.