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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF OPPOSITION TO INTERVENOR FANKHAUSER'S MOTION TO ADMIT ADDITIONAL CONTENTIONS

On September 24, 1975 Notice of Opportunity for Hearing was published in the Federal Register (40 Fed. Reg. 43959). That Notice provided that petitions to intervene (with contentions) must be filed on or before October 25, 1975. Pursuant to the Notice Dr. Fankhauser petitioned to intervene, and on November 28, 1975 this Board granted his petition along with the petition of Miami Valley Power Project (MVPP). Now, almost five years later Dr. Fankhauser, by and through his counsel, seeks to have two additional contentions admitted. Dr. Fankhauser's Motion is without merit and should be denied.

Late intervention and late contentions are governed by 10 C.F.R. § 2.714 (a)(1)(i)-(v). Those provisions require addressing (i) good cause, (ii) availability of other means to protect petitioner's interest, (iii) the extent to which participation could be expected to assist in developing the record, (iv) the extent to which the interest is otherwise represented and (v) the extent to which participation would broaden the issues or delay the proceeding. Dr. Fankhauser makes no effort to address the

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substance of these Commission requirements and in this regard alone his motion is fatally defective. See Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

The only hint of "good cause" is Dr. Fankhauser's assertion (Motion at page 3) that MVPP may not "vigorously litigate" their contentions which express similar concerns. It is inappropriate for Dr. Fankhauser to denigrate MVPP's participation in this proceeding. Dr. Fankhauser's concern regarding MVPP's pursuit of its contentions cannot, and does not, constitute "good cause" pursuant to 10 C.F.R. § 2.714(a)(1)(i). Nor is it sound for Dr. Fankhauser to allege, without some basis, that MVPP will not protect their interest expressed in contention 13 that the Applicant is financially unqualified to operate the proposed facility. Dr. Fankhauser alleges that his participation will help develop a sound record. Again, he so alleges without support. Dr. Fankhauser is a biologist with no expertise in energy forecasting or public utility financing and history would not support his allegation that he can aid in developing a record.

Dr. Fankhauser's first contention is that the economic costs of Zimmer do not justify the granting of an operating license. The Appeal Board stated in Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-204, 1 NRC 347, 369 (1975), "if the electricity to be produced by a proposed project is genuinely needed. . . then the societal benefits achieved by having that electricity available are immeasurable." Once need-for-power has been established, economic cost is beyond NRC's regulation (except to the extent that the Applicant must be financially capable of performing

the requested license). Further, unless some alternate way of producing needed power is environmentally superior, there is no need to compare the cost of producing power from the proposed facility with the costs of otherwise producing the power. As stated in Consumer Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162-163 (1978):

> . . . . But if there are no preferable environmental alternatives, such cost-benefit balancing does not take place. Manifestly, nothing in NEPA calls up us to sift through environmentally inferior alternatives to find a cheaper (but dirtier) way of handling the matter at hand. In the scheme of things, we leave such matters to the business judgment of the utility companies and to the wisdom of the State regulatory agencies responsible for scrutinizing the purely economic aspects of proposals to build new generating facilities. In short, as far as NEPA is concerned, cost is important only to the extent it results in an environmentally superior alternative. If the "cure" is worse than the disease, that it is cheap is hardly impressive. [footnote omitted]

Here the Licensing Board's Order of June 4, 1979 at page 18 granted summary disposition of MVPP's contention 11 which was that there was not a need-for-power for the Zimmer facility. The Licensing Board's Order of June 4, 1979 is the law of the case and, absent some very strong showing of error, controls. Dr. Fankhauser makes no showing, much less any strong showing, of error by this Licensing Board. He makes no claim in this contention that other methods of producing power are environmentally superior. In addition, we point out that where the need-for-power has been demonstrated, as here, alternatives ranked on economic costs are beyond the NRC's regulatory authority. See Illinois Power Co. (Clinton Power Station, Units Nos. 1 and 2), ALAB-340, 4 NRC 27, 48 (1976).[1/]

1/ The ability of a utility to economically market power as indicated in Midland, supra, is the decision of the utility and state utility commissions and not the NRC.

Dr. Fankhauser's second contention is that costs for the Zimmer project have risen. Inflation has been a continuing factor in power plant construction for some time. Costs of Zimmer have risen from the day the PSAR and ER were docketed and will certainly continue to rise. Again, what Zimmer costs in monetary terms is not a matter to be here litigated, once need-for-power has been established. Economic costs and economic interests are not cognizable matters to be litigated in an NRC licensing proceeding, either pursuant to the Atomic Energy Act or National Environmental Policy Act (NEPA), Portland General Electric Co. (Pebble Springs Nuclear Plants, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481 (1977); and other cases. Insofar as Dr. Fankhauser alleges that data in the FES has changed, as the basis of his good cause argument, his motion fails. The Commission noted in Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), 9 NRC 607 (1979) in regard to need-for-power that data does change, but such change does not in and of itself require Board reconsideration. This is a dynamic environment and society and data are constantly in microflux. To reopen for reconsideration of changing data the proponent (Dr. Fankhauser) has a heavy burden to demonstrate that the issue would be differently resolved with the introduction of the new data, see Kansas Gas and Electric Co. (Wolf Creek Generating Station), ALAB-462, 7 NRC 320, 330 (1978) and cases cited therein and Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 21-22 (1978). In his motion and memorandum, Dr. Fankhauswer has not even attempted to address this burden and little would be gained by further addressing his memorandum in this regard.

In the absence of some strong showing that new data has been omitted from the record which would, or might, change the result, Dr. Fankhauser's motion must be denied.

In substance, Dr. Fankahuser's newly proposed contentions are based upon a theory that if data changes the NRC's environmental analysis must be redone. Essentially, Dr. Fankhauser wants the environmental analysis re-opened or reconsidered. The legal standards for re-opening or reconsideration are quite specific. There must be a significant unresolved safety issue, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1977) or a major change in facts material to the resolution of major environmental issues, Commonwealth Edison Co. (La Salle County Nuclear Station, Units 1 and 2), ALAB-153, 6 AEC F.2d (1973). The proponent of such a motion has a heavy burden to bear. Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320 (1978). None of the aforesaid affirmative requirements are met in Intervenor's motion.

The burden required of a moving party to reopen the record and the sound policy reasons behind that burden were articulated in denying a motion for reconsideration of the need-for-power issue on the basis of new evidence in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619 at 621 (1978), and bear repeating here:

> After a decision has been rendered, a dissatisfied litigant who seeks to persuade us -- or any tribunal for that matter -- to reopen a record and reconsider "because some new circumstance has arisen, some new trend has been observed or some new fact discovered," has a difficult burden to bear. The reasons for this

were cogently given by Mr. Justice Jackson more than thirty years ago in ICC v. Jersey City, 322 U.S. 503, 514 (1944):

> One of the grounds for resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence -- particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it -- always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.1/

This "difficult burden" includes a showing that "a different result would have been reached initially had [the new information] be considered."2/ Dr. Fankhauser's motion and memoranda completely fail to meet these requirements.

1/ Accord, United States v. ICC, 396 U.S. 491, 521 (1970); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 n. 4 (1974); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 750-51 (1977).

2/ Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), supra, at 418, citing Unarco Industries, Inc. v. Evans Products Company, 403 F.2d 638 (7th Cir. 1968); and Knight v. Hersh, 313 F.2d 879 (D.C. Cir. 1963).

As noted above, the Commission in Shearon Harris has held that the Staff's environmental assessment need not be re-done for changes in data except when these changes might significantly change the environmental assessment. Judicial interpretation of NEPA is in accord, i.e., courts recognize that data constantly changes and wher a matter is addressed in an agency's environmental assessment, it need not be re-addressed for updating and changing data, Environmental Defense Fund, Inc. v. Froehlke, 368 F.Supp. 231 (W.D. Ma. 1973), aff'd sub nom Environmental Defense Fund, Inc. 497 F.2d 1340 (8th Cir. 1974).

In summary, Dr. Fankhauser's motion does not address the five factors required to be considered in determining whether to admit late contentions, 10 C.F.R. § 2.714(a)(1)(i-v); it provides no factual basis for its assertions, and it does not make a strong showing of significant new facts which might change the evidence (Wolf Creek, supra). Therefore, the Staff recommends that this Board deny the motion.

Respectfully submitted,

Charles A. Barth

Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of August, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENOR FANKHAUSER'S MOTION TO ADMIT ADDITIONAL CONTENTIONS" 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 5th day of August, 1980.

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