

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



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

APPLICANTS' MOTION TO REQUIRE STAFF TO PROVIDE  
JUSTIFICATION OF ITS INABILITY TO PROCEED

NOV 20 1980  
OFFICE OF THE SECRETARY  
LICENSING & SERVICE  
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By Memorandum dated September 17, 1980, the Atomic Safety and Licensing Board reiterated its scheduling philosophy "that hearings on particular issues be held as soon as it is appropriate to do so, taking into account such matters as the availability of information and the development of regulatory standards as a result of the Three Mile Island (TMI) accident."<sup>1/</sup> Specifically, the Board raised the "financial qualifications" issue as one for which early disposition might be appropriate:

Of the matters left for hearing in this proceeding, it appears to us that early disposition of the financial qualifications issue might be feasible. With that in mind, we call on the Staff to advise us whether it might be prepared to produce the financial qualifications supplement to the SER at a time which would permit us to hold hearings on that issue (if necessary) this fall or winter. 2/

1/ Memorandum at 1.  
2/ Id. at 2.

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The Board also requested the Staff to advise it of its best estimate for issuance of the SER supplement dealing with unresolved generic issues:

Consideration of [the resolution of unresolved generic issues applicable to the particular reactor, whether or not the issues are the subject of contentions] (if necessary) prior to the hearing of other contested issues might also be desirable. We call on the Staff to advise us of its best estimate for issuance of the SER supplement dealing with unresolved generic issues. 3/

On October 17, 1980, more than a month after the Board's Memorandum, the Staff indicated its agreement with the Board's philosophy of moving the case forward, but stated that "[t]he staff financial analysts are presently involved on a full time basis on the financial aspects of Three Mile Island" and that "due to other commitments of the staff financial analysts, we cannot now provide you with a meaningful schedule."

Applicants submit that the Staff's response to a Board order is entirely unacceptable. Mere incantation of the TMI proceedings is no longer justification for ignoring the statutory responsibility resting upon the Commission, in general, and the Staff, in particular. The Commission has indicated that its Staff should return to the licensing of nuclear power plants, 4/ and the mere invocation of the Three

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3/ Id. at 3.

4/ See, for example, Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy, 45 Fed. Reg. 41738 (June 20, 1980).

Mile Island proceedings cannot excuse the Staff from the performance of its duties in other cases.

The current roster of the Office of Nuclear Reactor Regulation reflects that there are seven professionals in the Utility Section of the Utility Finance Branch (a total of fourteen in the Branch overall), in addition to persons who may have similar qualifications in the Office of the Controller. Given these organizational resources, it would appear that the Staff's unsupported conclusion must be given greater scrutiny given that personnel could likely be made available to review the necessary aspects of pending proceedings, particularly in a case designated by the Commission as "near term."

Section 20.0 of the Staff Safety Evaluation Report dated January 1979 (NUREG-0528) already contains the Staff's basic analysis of the financial qualifications of the Applicants. The Staff has not even requested a routine update of this information which would permit its review of this matter to continue even after issuance of the Board's Memorandum over seven weeks ago. To attempt to break the logjam, Applicants are transmitting, under separate cover, an update of the financial information previously supplied in the form usually requested by the Staff.

Moreover, the Staff's letter totally ignores the Board's request for information from the Staff regarding treatment

of generic issues. The Staff has made no attempt to respond to this matter which surely may profitably be considered on an expedited basis by the Board.

In Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12, 14 (1979), the Atomic Safety and Licensing Appeal Board ("Appeal Board") stated that it was appropriate for licensing boards to note for the record the circumstances that had occurred in order to call "the matter to the attention of the Commission, which has supervisory authority over the staff." The Appeal Board was considering a similar request for allocating Staff time after TMI:

The Commission is more familiar than we are with how the Three Mile Island accident has affected day-to-day agency operations outside of the adjudicatory arena. If the Commission believes that the manner in which the staff is allocating its resources is not prudent, it can deal with the situation. If, on the other hand, the Commission is satisfied that its intercession is unnecessary or undesirable, its silence will leave undisturbed the full extension of time now allotted. 5/

In Offshore Power, 6/ the Appeal Board recognized the responsibility of a licensing board to avoid delay caused by

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5/ What might have been good cause for Staff delay in July 1979, the date of this St. Lucie decision, would certainly not hold water in November of 1980. See also Puget Sound and Light Company (Skagit Units 1 and 2), ALAB-552, 10 NRC 6-7 (July 9, 1979) as cited by the Appeal Board in St. Lucie, 10 NRC at 13, n.6.

6/ Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206 (1978).

the Staff, in that case related to the schedule for issuance of an environmental impact statement:

It is one thing to recognize that the staff must have both independence and time to fulfill its environmental obligations. It is quite another to infer that the staff's responsibilities override or dilute the Licensing Board's. Once an application is on its way through the hearing process (see fn. 33, supra), the Licensing Board must be able to insure the "prompt and orderly dispatch of [this] public business" and a "sound and timely" decision. Especially in the face of numerous and prolonged delays, one step toward that end can be a properly executed scheduling order. 7/

The specific procedure which we submit should be invoked here was discussed in detail and approved by the Appeal Board in Offshore Power:

One thing the Board may do is ascertain why the staff document in question has not been forthcoming. Certainly if it is to conduct the hearing in accordance with responsibilities assigned to it, the Board must at a minimum be entitled to look behind the staff's explanation for delay in submitting the environmental statement. If the staff can provide adequate assurance that it is acting as quickly and reasonably as the circumstances permit - and we emphasize the word reasonably - then the Board can ask no more and should reschedule the filing date accordingly.

Where the Board finds, however, that the staff cannot demonstrate a reasonable cause for its delay, the Board may issue a ruling (with appropriate findings supported by the record) noting the staff's unjustified failure to meet

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7/ Id. [footnotes omitted].

a publication schedule. It may then either proceed to hear other matters or, if there be none, suspend the proceedings until the staff files the necessary documents. In either situation the Board, on its own motion or on that of one of the parties, may refer the ruling to us. See 10 CFR 2.730(f). We would hear such referrals expeditiously; and, were we to agree with the Board, we would certify the matter to the Commission. Its authority to rectify the situation is undoubted. 8/

Applicants therefore move that, by November 7, 1980, the Staff be ordered to submit a detailed explanation of why it is unable to proceed expeditiously in this matter or even determine a schedule for proceeding. If, upon receipt of the Staff response, the Board finds that the Staff cannot demonstrate cause for its delay, it should issue a ruling noting the Staff's unjustified delay and expeditiously refer the matter to the Appeal Board for its consideration.

Alternatively, Applicants move that if the Board is dissatisfied with the Staff's schedule or explanation, and determines that there is no justifiable basis for the Staff's refusal to act, that the Staff be dismissed as a party or otherwise denied participation in the proceeding on the financial qualifications issue. The Board would thereafter promptly convene a hearing to resolve this issue on

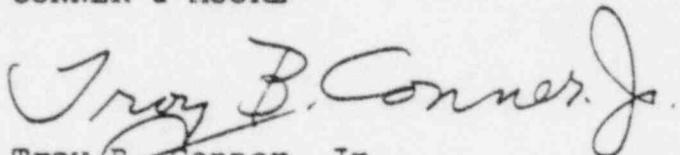
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8/ Id. at 207 [footnotes omitted]. See also Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289 SP (Restart), Memorandum and Order dated September 17, 1980.

the basis of the evidence presented by the remaining parties. In this connection, we are mindful of the statement in Offshore Power, supra, which considered the Staff "a necessary party."<sup>9/</sup> However, there is a clear distinction between the Staff's status on environmental issues under the National Environmental Policy Act, 42 U.S.C. 4321, et seq., as distinguished from its statutory role on "safety issues" under the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, et seq. In Offshore Power, the issue involved the Staff's failure to timely publish its Final Environmental Statement, as required by NEPA. There is no concomitant legislative mandate requiring the Staff to participate before a licensing board on "safety" issues.<sup>10/</sup>

Respectfully submitted,

CONNER & MOORE

  
Troy B. Conner, Jr.



Mark J. Wetterhahn  
Counsel for the Applicants

November 19, 1980

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<sup>9/</sup> 10 NRC at 207.

<sup>10/</sup> It is noted that in St. Lucie, 10 NRC at 14, n.7, "safety issues" were involved but the issue of the Staff's status of a party thereon was not raised.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Require Staff to Provide Justification of Its Inability to Proceed," dated November 19, 1980, in the captioned matter, were served upon the following by deposit in the United States mail this 19th day of November, 1980:

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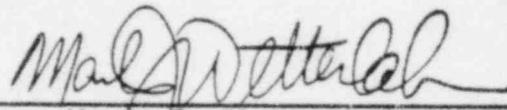
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