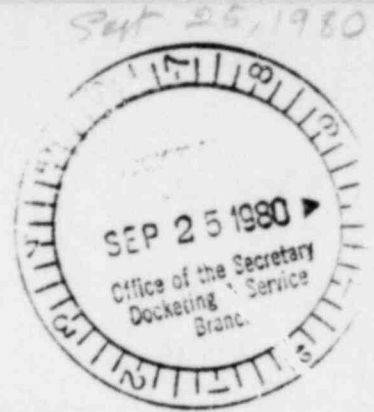


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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

APPLICANT'S RESPONSE TO KENTUCKY'S OPPOSITION TO
SUMMARY DISPOSITION OF CONTENTION 5

On September 4, 1980, the Commonwealth of Kentucky ("Kentucky") filed "Kentucky's Opposition to Summary Disposition of Contentions" relating to Dr. Fankhauser's Contention 5 in response to an Atomic Safety and Licensing Board Memorandum and Order dated July 14, 1980.^{1/} Pursuant to that same Memorandum and Order, Applicant responds to Kentucky's pleading.

Discussion

In its Memorandum and Order, the Atomic Safety and Licensing Board invited parties to address whether anything contained in a new interim rule relating to industrial security requirements for spent fuel transportation would modify its tentative conclusion that there is no "requirement or even warrant for providing knowledge or training of

^{1/} The Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station), Memorandum and Order (July 14, 1980).

8009800016

G

DS03
S 0/1

the general populace in communities through which spent (irradiated) fuel is to be transported."^{2/}

In its pleading at page 5, Kentucky plainly concedes that it is not aware of any studies or other basis for concluding that training of the general populace would be necessary or desirable in coping with transportation accidents. With this admission which would clear the way for the granting of Applicant's motion, the remainder of the pleading becomes surplusage^{3/} and irrelevant. For the sake of completeness, however, and in furtherance of its motion for summary disposition,^{4/} the Applicant has addressed those points raised by Kentucky which are beyond the scope of the Board's July 14, 1980 Memorandum and Order.

Kentucky discusses at great length its concern with regard to waste disposal and the possibility of long-term storage of spent fuel at the Zimmer site. Not only is this not at issue in this proceeding, but, as also acknowledged by Kentucky, storage and disposal of nuclear waste is the subject of an ongoing rulemaking proceeding. Issues included in the rulemaking are a reassessment of the "degree

^{2/} Id. at 2-3

^{3/} The Board may also properly ignore much of the pleading as raising matters which were briefed or already disposed of before Kentucky's belated entrance into this proceeding. Kentucky's admission was specifically subject to its "taking the proceeding as it finds it." Memorandum and Order Admitting Kentucky as an "Interested State" at 2 (April 1, 1980).

^{4/} See, generally, Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289, Supplemental Memorandum on Denial of Summary Disposition Motion of UCS (September 17, 1980).

of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of."^{5/}

The Commission has specifically stated that this rulemaking precludes any consideration of these issues in any individual proceeding. In its Notice of Proposed Rulemaking, the Commission specified that it "has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings."^{6/}

Licensing and Appeal Boards have consistently precluded consideration of issues related to this rulemaking in ongoing proceedings. For example, in Public Service Electric and Gas Co., (Salem Nuclear Generating Station, Unit 1), LBP-80-10, 11 NRC 337, 338 (1980), the Licensing Board held that consideration of post-operating license on-site storage "would be contrary to the Commission's policy" since "long-term storage is to be addressed by the Commission generically, and not by Licensing Boards in individual proceedings."

In arguing that Dr. Fankhauser's Contention 5 includes the effects of sabotage, Kentucky would have the Board

^{5/} 44 Fed. Reg. 61372 (October 25, 1979) (emphasis supplied).

^{6/} Id. at 61373 (emphasis supplied).

"assume that such a committed and resourceful terrorist group may be successful" in the sabotage of spent fuel. However, such a position is contrary to Commission policy. In this regard, the Commission stated, in the Statement of Considerations accompanying the rule, that if the requirements of its rule are met, the "Commission reaffirms its judgment that spent fuel can be shipped safely without constituting unreasonable risk to the health and safety of the public."^{7/}

The purpose of the Interim Final Rule is to establish criteria which, when satisfied by the responsible party, assure that sabotage would not be successful; thus the consideration of the hypothesized effects of such successful sabotage is precluded.^{8/} To assume successful sabotage would permit a prohibited challenge to these regulations; any such suggestion of a deficiency in the rule would be cognizable only as part of the ongoing rulemaking proceeding.

Kentucky's comments include an allegation as to the inadequacy of the design criteria of spent fuel casks.^{9/}

^{7/} 45 Fed. Reg. 37399, 37403 (June 3, 1980).

^{8/} In the analogous case of a facility industrial security plan, consideration of the consequences of sabotage has been precluded. See Commonwealth Edison Company (Zion Station, Units 1 and 2), LBP-80-7, 11 NRC 245, 283-84 (1980); Consolidated Edison Company (Indian Point, Units 1 and 2), DD-80-5, 11 NRC 351, 352 n.1 (1980). See generally Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order at 13 (January 27, 1978); Ohio Edison Co. (Erie Nuclear Plant, Units 1 and 2), Order (August 18, 1977).

^{9/} Kentucky's Opposition to Summary Disposition at 4-5.

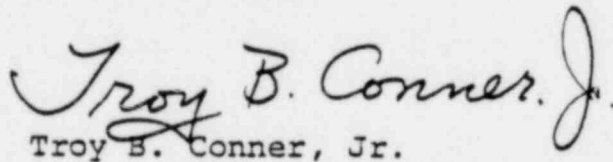
Not only is this discussion completely beyond any reading of the issue before the Board, but such a challenge to the specific design requirements contained in Part 71, Appendix B without any attempt to make the required showing, clearly is prohibited by 10 C.F.R. §2.758. Thus, Kentucky's challenge regarding the design of spent fuel casks is barred as a matter of law.^{10/}

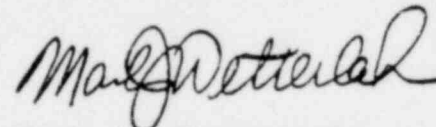
Conclusion

Kentucky raises nothing which changes the Board's tentative conclusion contained in its July 14, 1980 Memorandum and Order and the Applicant's Motion for summary disposition of Contention 5 should be granted.

Respectfully submitted,

CONNER & MOORE


Troy B. Conner, Jr.



Mark J. Wetterhahn
Counsel for the Applicant

September 23, 1980

^{10/} Part 71 challenges such as Kentucky's were rejected by the Licensing Boards in Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 4 and 5), Memorandum and Order at 3 (May 18, 1978); Shoreham, supra, at 14. See generally Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 221 (1978); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-456, 7 NRC 63, 65 (1978). Similarly, Kentucky's allegations regarding quality assurance related to shipping casks are a prohibited attack on the regulations. See 10 C.F.R. §71.24 and Appendix E to Part 71.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Docket No. 50-358

Dr. Lawrence R. Quarles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

POOR ORIGINAL

Mr. Chase R. Stephens
Docketing and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

William Peter Heile, Esq.
Assistant City Solicitor
City of Cincinnati
Box 214
Cincinnati, Ohio 45202

Mrs. Mary Reder
Box 270
Route 2
California, Kentucky 41007

Andrew B. Dennison, Esq.
Attorney at Law
200 Main Street
Batavia, Ohio 45103

Leah S. Kosik, Esq.
Attorney at Law
3454 Cornell Place
Cincinnati, Ohio 45220

John D. Woliver, Esq.
Clermont County Community
Council
Box 181
Batavia, Ohio 45103

David K. Martin, Esq.
Assistant Attorney General
Acting Director
Division of Environmental Law
Office of Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601

Robert A. Jones
Prosecuting Attorney of
Clermont County, Ohio
154 Main Street
Batavia, Ohio 45103


Mark J. Wetterhahn