UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Charles Bechhoefer, Chairman
Dr. Frank F. Hooper
Glenn O. Bright

In the Matter of:	Docket No. 50-358 OL
CINCINNATI GAS & ELECTRIC COMPANY, ET AL.	
(William H. Zimmer Nuclear Station, Operating License Proceeding)	January 23, 1981

MEMORANDUM AND ORDER
(Granting Motion for Summary
Disposition of Contention 5)

Contention 5, sponsored by Dr. David Fankhauser, an intervenor in this operating license proceeding, asserts that there are "no plans to provide knowledge and training of the populace in communities through which radioactive materials will be transported sufficient to allow them [i.e., the communities] to be able to cope with transportation accidents." The Applicants (Cincinnati Gas & Electric Co., et al.) have moved for summary disposition of this contention. Upon consideration of the filings of various parties to this proceeding, as outlined below, we conclude that there is no requirement that an applicant or licensee provide knowledge or training to the populace in communities through which irradiated

materials will be shipped; that there also is no obvious reason why a plan for the provision of such knowledge or training need be required prior to the grant of an operating license; and, accordingly, that the Applicants' motion should be granted.

A. Background

The Applicants' original motion for summary disposition of Contention 5 was filed on April 6, 1979. It was essentially founded on three premises: first, that questions related to the safety aspects of fuel transportation are outside the scope of matters before this Board; second, that safety in the transportation of radioactive material is provided primarily by the use of containers designed and constructed in accordance with 10 CFR Part 71[1/] to withstand severe transportation accidents without leakage, thus minimizing the danger or threat from radiation and making the likelihood of a release of any radioactive material in a transportation accident so small as to be considered negligible; and, finally, that in any event, it would be impracticable for an applicant to provide the suggested training inasmuch as spent fuel transportation which is carried out under applicable NRC, Department of Transportation, and state regulations, may encompass areas which are presently

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1/ "Packaging of Radioactive Material for Transport and Transportation of Radioactive Material Under Certain Conditions."

not ascertainable and which may be far removed from the plant site, and any releases which might occur would be highly localized and subject to adequate control through local emergency forces.

In his May 1, 1979 response, Dr. Fankhauser stated merely that, by their own admission, the Applicants had no plans for or knowledge of the shipping of waste material and, in addition, that safety in transportation is "partially dependant" upon transportation routes which as of that time had not been chosen. The Staff asked the Board to defer ruling on the Applicants' motion pending the consideration of new standards in the wake of the then-recent Three Mile Island (TMI) accident. No other party respondei to the Applicants' motion (insofar as it dealt with Contention 5).

We discussed the Applicants' motion for summary disposition of Contention 5 with the parties at the prehearing conference on May 23, 1979 (Tr. 434-41). We determined that, because the Commission was in the process of developing new regulations dealing with the transportation of radioactive material, we would defer action on the motion (Tr. 460). Thereafter, on June 15, 1979, the Commission published a proposed interim rule, to become effective on July 16, 1979. 44 Fed. Reg. 34466 (June 15, 1979). During the hearing on June 26, 1979, we invited the Applicants either to reconsider or to supplement their summary disposition motion in light of this rule (Tr. 1437-38). The Applicants did so by filing a "Renewed Motion" on July 25, 1979.

In their renewed motion, the Applicants asserted that, although the new rule covered shipments of irradiated reactor fuel, it focused on the prevention of sabotage of such shipments. The Applicants interpreted Contention 5 as not encompassing sabotage. Although imposing additional requirements for spent fuel shipments, the rule, according to the Applicants, made no reference to providing knowledge and training to the populace in communities through which irradiated fuel will be transported. Further, they noted that the coverage of the rule was limited to irradiated fuel shipments and did not extend to shipments of all types of radioactive material. The Applicants therefore claimed that their motion should be granted for the reasons they originally had advanced.

Dr. Fankhauser's response, dated August 1, 1979, took the position that the new rule required the Applicants to make plans for the routing of spent fuel, that the Applicants had not made any such plans, and that the renewed motion should be denied as a result of the lack of compliance with the new rule. Dr. Fankhauser added that his contention encompasses (although is not limited to) a concern with the threat of sabotage. No other party responded to the renewe motion.

In our Memorandum and Order Denying Motion to Delay Delivery of Fuel To The Site, LBP-79-24, 10 NRC 226, 232 (August 15, 1979), we held that, "as a matter of law, there are no

requirements for training of the populace in the communities through which [unirradiated] fuel will be shipped." By virtue of that ruling, the thrust of Contention 5 was for all intents and purposes confined to shipments of irradiated fuel.[2/] Some time later, in our Memorandum and Order dated July 14, 1980, we announced our tentative conclusion that, under the proposed interim rule, "there * * * is no requirement or even warrant for providing knowledge or training of the general populace in communities through which spent (irradiated) fuel is to be transported." We noted that we had deferred ruling on the Applicants' summary disposition motion because of the interim nature of the proposed rule and the expectation of its further modification. We also pointed out that the Commission had adopted a "final" interim rule, 45 Fed. Reg. 37399 (June 3, 1980), together with interim guidance on the rule's implementation (NUREG-0561, Revision 1). This "final" interim rule became effective on July 3, 1980. By our Memorandum and Order of July 14, 1980, we invited all parties to submit additional comments on the Applicants' motion, taking into account the new rule (as well as several matters which we wished to have addressed).

2/ Neither the contention itself nor any of Dr. Fankhauser's papers filed or statements made concerning the contention evince any interest in radioactive material other than irradiated or unirradiated fuel.

Responses to our invitation were filed by the Applicants, the NRC Staff, Dr. Fankhauser, intervenor Zimmer Area Citizens-Zimmer Area Citizens of Kentucky (ZAC-ZACK), intervenor Miami Valley Power Project (MVPP), the City of Mentor, Kentucky, and the Commonwealth of Kentucky.[3/] The Applicants reiterated their argument that consideration of the safety aspects of spent fuel shipments is beyond our jurisdiction. They also claimed that there is no requirement for a spent fuel shipment plan as a prerequisite for an operating license. The Staff joined them in this latter argument. The other parties all expressed the view that measures for the security of spent fuel shipments (including training of the populace along routes of shipment) should be considered in this proceeding.

B. Discussion

1. At the outset, we must reject the Applicants' argument that we do not have jurisdiction to consider whether the spent fuel shipment measures proposed by Dr. Fankhauser should be applied in this proceeding.[4/] In their original motion, the

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3/ Responses of the NRC Staff and Dr. Fankhauser were dated August 1, 1980. ZAC-ZACK's comments were filed August 7, 1980. MVPP's comments were filed August 8, 1980. The Applicants and the City of Mentor responded on August 11, 1980. Kentucky responded on September 4, 1980. Dr. Fankhauser filed a response to comments of other parties on August 26, 1980.

4/ The Applicants correctly pointed out that the provisions of 10 CFR § 2.717(b) upon which we premised our jurisdiction to consider new fuel shipments (see LBP-79-24, 10 NRC 226,228-230 (1979)) do not provide us authority to consider spent fuel shipments at this time. We are not relying on those provisions here

Applicants pointed to the circumstance that the primary safety rules governing shipment of radioactive material appear in 10 CFR Part 71 and the regulations of agencies such as the Department of Transportation, and accordingly are not embraced by the requirements governing the grant of operating licenses, which appear in 10 CFR Part 50.[5/] As for the Commission's new security plan requirements, the Applicants advance much the same argument: the requirements appear in Part 73 and hence are not part of the operating license requirements of Part 50.

As a legal matter, the Applicants are correct in their claim that requirements of Parts 71 or 73 are not automatically subject to litigation in an operating license proceeding. But, as should have been apparent from the questions posed by our Memorandum and Order of July 14, 1980, certain requirements of Part 73 have been incorporated into the operating license requirements of Part 50. See 10 CFR § 50.34(c). Although we may not have authority to impose on an applicant requirements (if any) of Parts 71 or 73 not incorporated into Part 50, we clearly have authority to consider which requirements are incorporated into Part 50 and whether an applicant has satisfied those requirements. Cf. Duke Power Co. (Perkins Nuclear

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5/ The Applicants concede that the environmental impacts of transportation of radioactive material may be considered under 10 CFR Part 51; but they claim that Contention 5 focuses on safety rather than environmental considerations and that it raises no questions governed by the requirements of Part 51. We agree.

Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741 (1980). For that reason, we conclude that we have jurisdiction to consider whether there are any operating license requirements which comprehend the matters raised by Contention 5 and, if so, whether those requirements have been satisfied.

2. Under the Commission's Rules of Practice, a motion for summary disposition should be granted if the licensing board determines, with respect to the issue in question, that "there is no genuine issue as to any material fact and * * * the moving party is entitled to a decision as a matter of law." 10 CFR § 2.749(d). However, in an operating license proceeding such as this one, where significant health and safety or environmental issues are involved, a licensing board should only grant such a motion if it is convinced from the material filed that the public health and safety or the environment (as applicable) will be satisfactorily protected. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); 10 CFR § 2.760a.

For the purposes of this discussion, we will read Contention 5 in the light most favorable to its proponent (see Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974)). Even though it is not that clear on its face, we will assume that Contention 5 encompasses the protection of spent fuel shipments from sabotage as

well as from transportation accidents. See Dr. Fankhauser's filings dated August 1, 1979 and August 1, 1980. Even when read in that light, it is clear that there is no factual disagreement with respect to any material fact. Dr. Fankhauser contends that there is no plan for the shipment of spent fuel, and all parties agree. The only questions extant are legal in nature: whether there is any requirement for such a plan and, if so, whether a plan would have to include the training features sought by Dr. Fankhauser.[6/] We turn now to those questions.

3. We interpret the recently amended provisions of 10 CFR Part 73 as requiring licensees to prepare a plan for the physical protection of spent fuel shipments against sabotage. 10 CFR § 73.37. There is no requirement, however, that such a plan be submitted and reviewed prior to (and as a condition of) the grant of an operating license. Indeed, the physical protection plan for spent fuel shipments, by virtue of the express terms of Part 73, need only be submitted to NRC 7 days prior to a planned spent fuel shipment. 10 CFR § 73.72 (incorporated into 10 CFR § 73.37(b)(1)).[7/] Such shipments would not take place

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6/ We note that, if there were a legal requirement for the type of plan envisaged by Contention 5 (as we are here interpreting it), Dr. Fankhauser might well be entitled to summary disposition of the contention in his favor.

7/ The Staff interprets § 73.72 as requiring notification 10 days in advance of a shipment, rather than 7. We are unaware of the source of this interpretation; but, for purposes of this discussion, the difference is not material.

until long after issuance of an operating license--at least eight years, according to both the Applicants and Staff.[8/]

4. The absence of any requirement for a plan for the shipment of spent fuel prior to the issuance of an operating license is dipositive of Contention 5. We might add, however, that, as the Applicants and Staff point out, the current lack of any facilities for the storage or reprocessing of spent fuel would make any near-term evaluation by NRC of prospective routes--as provided by 10 CFR § 73.37(b)(7)--speculative at best. Without identification of specific routes, it would be impossible to determine where the training sought by Dr. Fankhauser should be carried out--even assuming we found that such training were warranted.[9/] Moreover, with respect to requirements of 10 CFR § 73.37 other than concerning shipment routes, the extended period before which shipments could take place is a persuasive reason for the Applicants' not being required to develop a plan

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8/ Although these assertions are not under affidavit, we take official notice that spent fuel will not be created--and hence cannot be shipped--until after issuance of an operating license and operation of the reactor.

9/ The specific routes that Dr. Fankhauser and the City of Mentor suggest be examined do not include a destination for the spent fuel shipments but merely encompass various egress routes from the site area.

Needless to say, given our rationale for dismissing Contention 5, we express no opinion as to whether, assuming there were a requirement for a plan, the training sought by Dr. Fankhauser should be included in such plan.

at this time, for any current review of that plan--involving such matters as the qualification of a shipper's employees--would also certainly have to be redone. Cf. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 544-47 (1975). For that reason, we find little warrant for a review at this time of a proposed shipment security plan.

It should be noted that Dr. Fankhauser (as well as ZAC-ZACK, MVPP, the City of Mentor, and the City of Cincinnati) assert that Contention 5 includes protection from transportation accidents generally and is not limited to protection from sabotage. ZAC-ZACK would read 10 CFR § 73.37 as including this subject, whereas Dr. Fankhauser, the City of Mentor, and the City of Cincinnati rely on generalized "public health and safety" findings required under 10 CFR § 50.40 and § 50.57 as authority to consider this matter.

In issuing its 1980 amendments to the final interim rule, the Commission made it very clear that 10 CFR § 73.37 is limited to a plan for the prevention of sabotage in spent fuel shipments. The Statement of Considerations explicitly indicates that the potentially serious consequences analyzed in the report upon which the revised 10 CFR § 73.37 is based (Sandia Laboratories Report SAND-77-1927, May, 1978) could occur only in the event of sabotage in or near a heavily populated area and only if the

sabotage were to be carried out "through the skillful use of explosives." 45 Fed. Reg. 37399, 37402 (June 3, 1980).

Insofar as public health and safety issues are concerned, in normal circumstances an applicant which demonstrates that it has complied with applicable regulations would be granted an operating license. Only in unusual circumstances, where possibly a demonstrable threat to the public health and safety had been shown to exist, could a licensing board consider and impose, if necessary, corrective measures additional to those prescribed or at least comprehended by the rules. See Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1004-1010 (1973), remanded on other grounds, CLI-74-2, 7 AEC 2, 3-5 (1974). As indicated above, the Commission already has determined that transportation accidents generally do not pose a significant risk to the public health and safety sufficient to warrant the consideration of protective measures beyond those prescribed in 10 CFR Parts 71 and 73. And nothing provided by Dr. Fankhauser or the other intervenors has convinced us that there is any unusual circumstance which suggests that the protection of spent fuel transportation against either sabotage or accidents need be considered in this proceeding. Thus, we decline to consider Contention 5 in the context of the generalized findings required by 10 CFR §§ 50.40 and 50.57.

5. Our holding here will necessarily put the consideration of the adequacy of a plan for the transportation of spent fuel submitted under 10 CFR § 73.37 beyond the purview of this operating license proceeding. In our Memorandum and Order of July 14, 1980, we asked the parties whether there is any other procedure by which compliance with Part 73 can be questioned by a member of the public prior to the occurrence of a shipment. Taking into account the limited, 7-day period for review of a proposed plan, the answer is obviously negative. The Applicants and Staff suggest a request for a show-cause order under 10 CFR § 2.206. Although we agree that such mechanism is the only one available, it is obvious that, at best, that route can provide only after-the-fact review. We suggest that further review, affording the opportunity for public participation, might well be warranted.[10/] But the decision as to that matter is not in our hands. It has already been made by the Commission and can only be changed by the Commission.

10/ Indeed, the 7-day review period for each shipment seems inadequate, even for Staff review; it would seem that a review of at least an initial shipment would require a longer period if the review is to be completed prior to shipment. Moreover review of such matters as the adequacy of the training of escorts or of a licensee's communications center (see 10 CFR §§ 73.37(b)(4) and (10)) could likely be effectively undertaken well in advance of the initial shipment. However, the 7-day period is currently authorized by 10 CFR § 73.72 for notification of both initial and subsequent shipments and cannot be modified by this Board, even were we to favor such modification.

That public participation might prove useful is suggested by the recent decision in Duke Power Co. (Oconee-McGuire), LBP-80-28, 12 NRC ___ (Oct. 31, 1980).

C. Order

For the foregoing reasons, it is, this 23rd day of January, 1981

ORDERED

That the Applicants' motion for summary disposition of Contention 5 be granted.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(William H. Zimmer Nuclear Power Station)	)	
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
26th day of Jan 1981.

Gerald C. Higgins
Office of the Secretary of the Commission

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