

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)

The Cincinnati Gas & Electric)
Company, et al.)

(William H. Zimmer Nuclear Power)
Station))

Docket No. 50-358

5/27/81

INTERVENOR MIAMI VALLEY POWER PROJECT'S REPLY
TO APPLICANT'S RESPONSE TO MOTION BY MIAMI
VALLEY POWER PLANT FOR RESUMPTION OF EVIDENTIARY
HEARING ON CONTENTION 13 AND MIAMI VALLEY POWER
PROJECT'S RESPONSE TO APPLICANT'S MOTION FOR
ADDITIONAL RELIEF

In their combination response Memorandum and Motion, Applicants have asked for various forms of relief, to wit:

- 1) That Miami Valley Power Project's (MVPP) Motion should be denied.
- 2) The pleadings should be stricken as scandalous.
- 3) That the Board should impose sanctions against the attorney for MVPP.

At this time, MVPP will respond to each of these requests for relief.

I. MVPP's Motion should not be denied.

Contrary to Applicant's assertion, MVPP has not accused Applicants of perjury. Rather, in its Motion, MVPP suggests Applicants' witnesses may have committed perjury, based upon the recollection of MVPP's attorney as to the testimony of Applicants' witnesses.

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At the time such Motion was filed, MVPP's attorney did not have knowledge of the existence of any transcript of the proceedings to which he had access, and therefore, he had to rely upon his recollection of the proceedings. Portions of the transcript which Applicants' have cited in their response indicate that perjury was indeed not committed. MVPP certainly intended no harm to Applicants' witnesses when it filed its Motion, but simply wanted to pursue a seeming contradiction in the record. MVPP's attorney's recollection of the testimony was not unreasonable, given the fact that Judge Hooper had a similar recollection. (See quotation on page four of Applicants' Memorandum.)

In any event, Applicants' testimony was misleading enough to cause Judge Hooper to think that replacement power could be supplied at little or no cost. This fact alone should be sufficient to call for a reopening of the hearings to further explore this issue.

With regard to the test of Pacific Gas and Electric Company (Diablo Canyon, Nuclear Power Plant, Units I and II), ALAB-598, 11 N.R.C. 876, 879 (6/24/80), the three prongs have been met in this case.

1) The Motion was filed soon after MVPP received information which suggested a contradiction in testimony.

2) The issue of financial qualifications is significant, and can, as the Board itself has noted, affect safety issues.

3) The third part of the test is impossible to answer since no decision has been reached. However, the information gained at the hearing could be significant.

The testimony of Applicant's witnesses are certainly misleading, if nothing else. For instance, on page 4225-4226 of the transcript, the witness from Columbus and Southern Ohio Electric Company essentially testified that he did not think that in the event of an outage at Zimmer that his company would have to purchase replacement power. The witness from Cincinnati Gas and Electric Company and Dayton Power and Light Company also pooh-poohea the significance of replacement power. See pages 3632B, 4046, and 4226-4229. The Applicant's later revelation that in the event of an outage, replacement power would cost an estimated \$5.3 million per month; is certainly out of line with their previous testimony, and is therefore misleading.

II. Pleadings should not be stricken.

MVPP's Motion has not cast an excessively adverse light on the character of any of Applicants' witnesses. MVPP did not accuse any witness of perjury. MVPP's intent clarified by this reply to the Memorandum any hint of such reflection of the character of Applicants' witnesses should be cured.

III. The Board should not impose sanctions on MVPP's counsel.

10 C.F.R. 2.713(c) provides the grounds for suspending an attorney from taking part in a proceeding. That section reads as follows:

A presiding officer may, by order, suspend or bar any person from participation as an attorney in a proceeding if the presiding officer finds that such person:

- (1) Is not an attorney at law in good standing

admitted to practice before any court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States;

(2) Has failed to conform to the standards of conduct required in the courts of the United States;

(3) Is lacking in character or professional integrity;

(4) Engages in dilatory tactics or disorderly or contemptuous conduct; or

(5) Displays toward the Commission or any of its presiding officers conduct which if displayed toward any court of the United States, would be cause for censure, suspension or disbarment.

Any such order shall state the grounds on which it is based. Before any person is suspended or barred from participation as an attorney in a proceeding, charges shall be preferred by the presiding officer against such person and he shall be afforded an opportunity to be heard thereon before another presiding officer.

None of these conditions have been met in this case:

1) MVPP's counsel is an attorney at law of good standing admitted to practice before the Supreme Court of Ohio, United States District Court for the Southern District of Ohio, the United States District Court for the Eastern District of Kentucky, and the Court of Appeals for the Sixth Circuit.

2) There is no evidence that MVPP's counsel failed to conform to the standards of conduct required in the Courts of the United States. At the time Counsel filed the Memorandum, he honestly believed there was a contradiction between the testimony at the hearing and the evidence provided by the Exhibit attached to the Motion. At the time, MVPP's Counsel had no knowledge of the

existence of any transcript to which he had access. MVPP's Counsel, in fact, felt that his duty to see that this seeming contradiction be investigated.

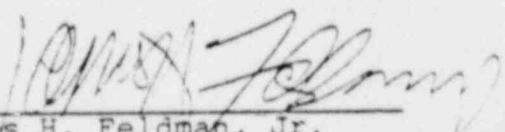
3) MVPP's Counsel's actions have displayed no lack of professional character or integrity. MVPP's Counsel was merely following his duty to the Board, to point out what seemed to be, at the time, a flagrant contradiction in testimony.

4) There has been no allegation of dilatory tactics or disorderly or contemptuous conduct.

5) There has been no allegation of any display on the part of MVPP's attorney or the commission or any of its presiding officers of conduct which if displayed towards any Court of the United States would be cause for censure, suspension or disbarment.

For these reasons, no sanction should be imposed. In any event, 10 C.F.R. §2.713(c) provides that before such sanction can be imposed, such charge must be preferred by the residing officer and the attorney must be afforded an opportunity to be heard thereon before another presiding officer.

Respectfully submitted,


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
Dr. Frank F. Hooper, Member
Dr. M. Stanley Livingston

In the Matter of :
: CINCINNATI GAS AND ELECTRIC : DOCKET NO. 50-358
COMPANY, et al. : APPLICATION FOR
(William K. Zimmer Nuclear : OPERATING LICENSE.
Power Station) :

CERTIFICATE OF SERVICE

I hereby certify that copies of Intervenor Miami Valley Power Project's Reply to Applicant's Response to Motion by Miami Valley Power Plant for Resumption of Evidentiary Hearing on Contention 13 and Miami Valley Power Project's Response to Applicant's Motion for Additional Relief in the above-captioned proceeding have been served on the following persons by posting the same in the U.S. Mails, postage prepaid, this 2 day of May, 1981.

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