

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H. Frye, III, Chairman
M. Stanley Livingston
Frank F. Hooper

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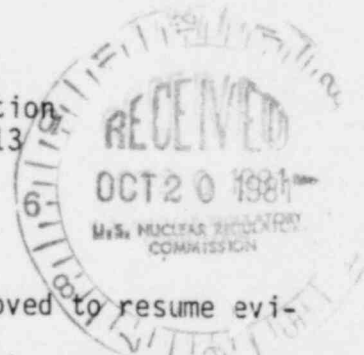
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In the Matter of
CINCINNATI GAS & ELECTRIC COMPANY, et al.
(Zimmer Nuclear Power Station, Unit 1)

Docket No. 50-358-OL

October 16, 1981

MEMORANDUM AND ORDER
(Ruling on Miami Valley Power Project's Motion
for Resumption of Hearings on Contention 13
and Related Matters)



On April 21, 1981, Miami Valley Power Project (MVPP) moved to resume evidentiary hearings on contention 13 (financial qualifications). MVPP based its motion on information furnished by Applicants to the Staff indicating that the monthly cost of replacement energy should Zimmer be off-line is \$5.3 million. This cost is inconsistent, MVPP alleges, with testimony of Applicants' witnesses which MVPP characterizes as asserting that no cost would be incurred for replacement power. MVPP, in its motion, states that the information on replacement energy costs "... may indicate that witnesses for the applicants may have perjured themselves...." MVPP does not, however, name such witnesses nor identify particular statements.

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Both Applicants and Staff oppose the motion. Both take the position that the testimony adduced at the hearing is not inconsistent with the information furnished the Staff by the Applicant. In a reply to Applicants' opposition, MVPP furnished transcript citations to the alleged inconsistent testimony. A review of this testimony confirms Applicants' and Staff's position. None of the witnesses testified that replacement power would be without cost. Rather, their point was that replacement power could be generated within Applicants' systems and would not have to be purchased from other utilities. The \$5.3 million per month cost furnished by Applicants reflects the additional cost of fossil fuel which would be utilized to generate the replacement energy, and is consistent with earlier testimony offered by Applicants on the daily cost of replacement power. Under these circumstances, MVPP's motion falls far short of the showing necessary to justify the reopening of a record. Pacific Gas & Electric Company (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC ____ (1981); Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320 (1978).

In their opposition to MVPP's motion, Applicants sharply attack MVPP for raising the possibility that perjury may have been committed. Applicants seek to have MVPP's motion stricken and its counsel disciplined under 10 CFR § 2.713. In its response to the Applicants' opposition, MVPP asserts that its counsel based his suspicion of perjury on his recollection of the hearings in question

and was unaware of the existence of a transcript to which he might have access. MVPP's counsel further states that a review of the transcript indicates that Applicants are indeed correct that perjury was not committed. MVPP disclaims any intent to cause personal harm to Applicants' witnesses, and states that counsel's recollection of the testimony was not unreasonable. A review of the transcript does indicate that MVPP counsel sought to bring out the cost of replacement power, but that Applicants' witnesses did not respond to these questions. Instead, they indicated that replacement power likely could be generated internally rather than be purchased from other utilities.^{*/} Counsel could

^{*/} For example, Tr. 3682-3 clearly shows that the witness did not answer the question of the cost of replacement power:

MR. FELDMAN: Well, it's quite simply put what I'm asking. I'm asking the witness to make an assumption that during the fifth year of operation the plant is not operated. It produces no power. Now, they've given the answer that it will cost \$197.4 million dollars in any event, and I'm asking how much replacement power would cost to replace the power produced by the plant that wouldn't be produced by the plant.

MR. CONNER: We object, Your Honor. Their replacement power has nothing to do with the operation of Zimmer.

MR. FELDMAN: Well, it does in the sense that it's going to cost more money and we're talking about money right now, and if the plant is not working and having to pay almost \$200 million dollars for nothing, I want to know how much they're going to pay for something and get a figure together as to how much money they're going to have to come up with to make this whole operation viable and whether they can do it.

CHAIRMAN BECHHOEFER: I think whether the Applicants afford such a shutdown is relevant certainly the questions we ask are undoubtedly projected operation for the first five years. So, I think the question can stand.

[FOOTNOTE CONTINUED ON NEXT PAGE]

well have erroneously recalled this testimony as indicating that no cost was involved.

While MVPP's counsel may have been ill-advised in voicing his suspicions, his conduct does not require that sanctions against him be considered or that his pleading be stricken. Leaving aside the question whether the statements of counsel relevant to the proceeding in which he participates may be privileged, counsel's conduct in this instance was not clearly outrageous or scandalous. Counsel's explanation of the basis for his suspicions is not unreasonable, and he has forthrightly stated that he was in error. In these circumstances, the Board believes it best to let the matter rest.

For the foregoing reasons, it is this 16th day of October, 1981,

ORDERED that:

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

MR. BORGMAN: It more than likely would come off of other units on the system, the replacement part.

MR. FELDMAN: You wouldn't have to go outside of your system to purchase power?

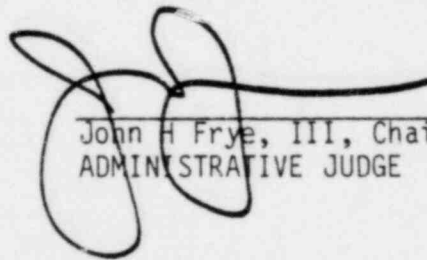
MR. BORGMAN: We may or may not. It would depend upon the performance of just the units. We have reserves and we should be able to cover them.

1. MVPP's motion to reopen the record on contention 13; and
2. Applicants' request to strike that motion and impose sanctions against MVPP's counsel,

are hereby denied.

Judges Hooper and Livingston concur in the result but did not participate in the preparation of this Memorandum and Order.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a small flourish.

John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 16th day of October, 1981.