

12/30/81

DOCKETED  
USNRC

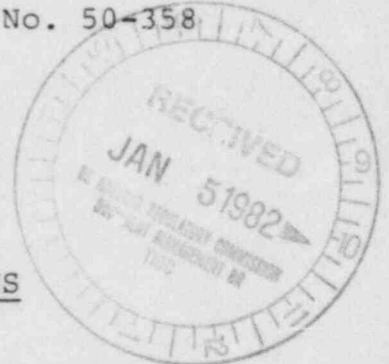
\*81 DEC 31 A10:14

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DE SECRET  
DOCKETING & STAFF  
TRAINING

In the Matter of )  
)  
The Cincinnati Gas & Electric )  
Company, et al. )  
)  
(Wm. H. Zimmer Nuclear Power )  
Station) )

Docket No. 50-358



APPLICANTS' OBJECTIONS TO  
ZAC-ZACK REQUESTS FOR ADMISSIONS

Background

On December 15, 1981, Zimmer Area Citizens/Zimmer Area Citizens of Kentucky ("ZAC/ZACK") submitted a set of 80 requests for admissions to Applicants. A response to most of the requests will be made under separate cover. Several of the requests, however, are objectionable as impermissibly seeking an admission on conclusions of law or as to mixed questions of law and fact, or improperly seeking opinions by posing requests that cannot be admitted or denied without explanation. Applicants therefore object to these particular requests as beyond the scope of the Commission's rules of discovery, in particular, the provisions of 10 C.F.R. §2.742 regarding requests for admissions.

Argument

Under the Commission's rules for discovery regarding requests for admissions in 10 C.F.R. §2.742(a) "a party may file a written request for the admission of the genuineness

8201060069 811230  
PDR ADDCK 05000358  
G PDR

D503  
S  
1/1

and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact." (Emphasis added.) It is important to understand that the NRC provisions for requesting admissions are based upon Rule 36 of the Federal Rules of Civil Procedure prior to its amendment in 1970 and thereafter. It is therefore appropriate to examine the cases and treatises interpreting Rule 36 in its original form as an aid to construing Section 2.742. See Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974).<sup>1/</sup>

As Professor Moore has indicated, the purpose of the 1970 version of Rule 36, after which 10 C.F.R. §2.742 was patterned, was to serve as a means of establishing essentially uncontroverted facts. Accordingly, as Professor Moore notes, a request for admissions under prior Rule 36 must deal with factual matters, would not involve what are essentially questions of law, could not deal with opinion, and must be susceptible of an admission or denial "without

---

<sup>1/</sup> Thus, while the Commission discovery rules were broadened in 1972 to reflect changes in the Federal Rules (see 37 Fed. Reg. 15128, 15134 (July 28, 1972)), the Commission did not adopt the changes made in Rule 36 which thereby authorized a party to seek admissions "that relate to statements or opinions of fact or of the application of law to fact . . . ." Instead, the Commission rule continues to be limited to requests for admissions as to "any specified relevant matter of fact."

qualification or explanation."<sup>2/</sup> The cases likewise recognize that Rule 36, in its original form, sought to expedite trial by obtaining agreement on essentially undisputed, relevant facts. Burns v. Phillips, 50 F.R.D. 187 (N.D. Ga. 1970).

Thus, requests could only seek the admission of undisputed matters of fact, and could not seek admissions on conclusions of law or as to mixed questions of law and fact. Such impermissible inquiries as to issues of law were rejected as a proper basis for requests for admissions in Driver v. Gindy Manufacturing Corp., 24 F.R.D. 473, 475 (E.D. Pa. 1959), as a "misuse of Rule 36." See also Fidelity Trust Company v. Village of Stickney, 129 F.2d 506, 511 (7th Cir. 1942); Lantz v. New York Central R. Co., 37 F.R.D. 69 (N.D. Ohio 1963). It is therefore clear that under the unamended form of Rule 36, upon which the NRC rule is based, requests for admissions relating to conclusions of law or mixed questions of law and fact are objectionable.

Even under the Commission's broad discovery rules, it is well settled that "interrogatories seeking legal conclusions are improper." Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 588 (1975). Interrogatories and requests for admissions seeking legal conclusions were also rejected by the Board in

---

<sup>2/</sup> 4A Moore's Federal Practice §36.04[1] (2d ed. 1981).

US Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), Docket No. 27-39, "Prehearing Conference Order and Order Ruling on Discovery Requests, Objections and Motions" (February 25, 1981) (slip op. at 2). As the Appeal Board reiterated recently in the Susquehanna proceeding in explaining the scope of proper discovery, the NRC discovery rules permit only "requests for admissions of fact."<sup>3/</sup>

As a related principle governing requests for admissions, a party may not seek opinions or otherwise pose matters that cannot be admitted or denied without qualification or explanation. Kasar v. Miller Printing Machinery Co., 36 F.R.D. 200, 203 (W.D. Pa. 1964); Waider v. Chicago, R.I.&P.R. Co., 10 F.R.D. 376, 378 (S.D. Iowa 1950); In re Reinauer Oil Transport, Inc., 19 F.R.D. 5 (D. Mass. 1956).

Accordingly, based upon the governing legal principles and precedents, Applicants object to ZAC/ZACK's Requests for Admissions Nos. 26, 28-35, 38, 54, 57, 59, 61, 63 and 64. These requests clearly call for Applicants' conclusion as to the content or application of state law and as such impermissibly seek legal conclusions, or they seek opinions by making statements which cannot be admitted or denied

---

<sup>3/</sup> Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980).

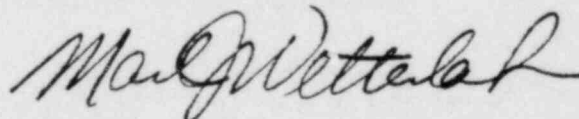
without some qualification or explanation. An example of the former is Request for Admission No. 30, which would, by way of admission, seek to define the legal authority of the Sheriff of Clermont County. This is clearly prohibited under the cited authority. An example of the latter is Request for Admission No. 57, which requests an admission that a particular roadway is "narrow, winding and hilly in many parts." This statement is so subjective and susceptible to so many interpretations that a simple "admitted" or "denied" is not possible. This is not a proper request for admission.

Conclusion

For the reasons discussed more fully above, the aforementioned requests for admissions are objectionable and need not be answered. Furthermore, a protective order that the objectionable discovery not be had should be entered.

Respectfully submitted,

CONNER & WETTERHAHN



Mark J. Wetterhahn  
Counsel for Applicants

December 30, 1981



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
The Cincinnati Gas & Electric ) Docket No. 50-353  
Company, et al. )  
 )  
(Wm. H. Zimmer Nuclear Power )  
Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Objections to ZAC-ZACK Requests for Admissions," and "Applicants' Objections to 'Intervenor Zimmer Area Citizens-Zimmer Area Citizens of Kentucky Requests for Admissions by Applicant'" both dated December 30, 1981, in the captioned matter, have been served upon the following by deposit in the United States mail this 30th day of December, 1981:

Judge John H. Frye, III  
Chairman, Atomic Safety and  
Licensing Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Chairman, Atomic Safety  
and Licensing Board  
Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Dr. Frank F. Hooper  
Administrative Judge  
Atomic Safety and Licensing  
Board  
School of Natural Resources  
University of Michigan  
Ann Arbor, Michigan 48109

Charles A. Barth, Esq.  
Counsel for the NRC Staff  
Office of the Executive  
Legal Director  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Dr. M. Stanley Livingston  
Administrative Judge  
1005 Calle Largo  
Sante Fe, New Mexico 87501

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

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

Chairman, Atomic Safety  
and Licensing Appeal  
Board Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

Deborah Faber Webb, Esq.  
7967 Alexandria Pike  
Alexandria, Kentucky 4100

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

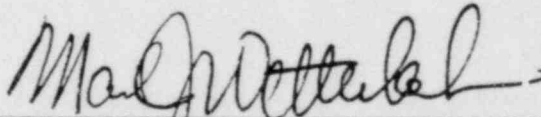
James R. Feldman, Jr., Esq.  
216 East Ninth Street  
Cincinnati, Ohio 45202

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

George E. Pattison, Esq.  
Prosecuting Attorney of  
Clermont County, Ohio  
462 Main Street  
Batavia, Ohio 45103

William J. Moran, Esq.  
General Counsel  
The Cincinnati Gas &  
Electric Company  
P. O. Box 960  
Cincinnati, Ohio 45201

---

Mark J. Wetterhahn