

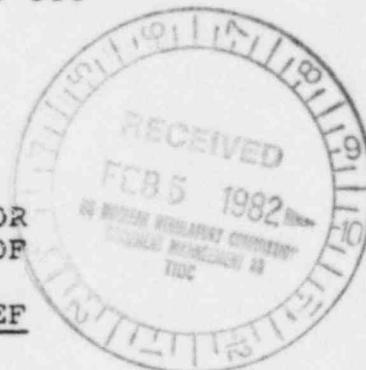
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC  
'82 FEB -3 P12:29

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

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Docket No. 50-358



ANSWER BY APPLICANT TO MOTION BY INTERVENOR  
ZIMMER AREA CITIZENS/ZIMMER AREA CITIZENS OF  
KENTUCKY TO ISSUE AN ORDER COMPELLING  
DISCOVERY AND FOR SANCTIONS AND OTHER RELIEF

Preliminary Statement

By motion dated January 19, 1982, counsel for Zimmer Area Citizens/Zimmer Area Citizens of Kentucky ("ZAC/ZACK") has sought certain sanctions and relief regarding a deposition of three individuals designated by ZAC/ZACK as witnesses. Counsel for the Applicant, The Cincinnati Gas & Electric Company, et al., received a telecopy of the motion from Washington, D.C. on January 22 but did not see the full motion until the opening day of the present proceeding, January 25, 1982. The motion involves an attempt by counsel for ZAC/ZACK to use the Applicants' discovery process for purposes of his own rather than to follow the Commission's rules. Specifically, he attempted to expand the scope of a deposition by Applicants so as to enable him to prepare three witnesses he had called for examination at the hearing.

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In this connection, he wholly failed to observe the requirements of the Commission's regulations in 10 C.F.R. §2.740a(d), which specifies that "[e]xamination and cross-examination shall proceed as at a hearing." In other words, counsel for ZAC/ZACK was not entitled on cross-examination to go beyond the scope of the questions asked by Applicants on direct examination at the deposition. As discussed below, a review of the background of the situation created by ZAC/ZACK is necessary to an understanding of the procedural issue which arose.

Counsel for ZAC/ZACK did not observe the provisions of the Commission's regulations which he should have followed, i.e., by subpoenaing witnesses for his own depositions. Moreover, he made no effort to resolve the problem he created by obtaining a prompt telephone ruling from the Chairman of the Atomic Safety and Licensing Board ("Licensing Board"). It may be noted that ZAC/ZACK amended its motion at the proceeding on January 26, 1982 by stating it would examine its three subpoenaed witnesses without preliminary preparation. The request for other relief sought by ZAC/ZACK is entirely without basis because it is not cognizable under the Commission's rules and would be inappropriate under the circumstances of this proceeding in any event. The motion is therefore wholly without merit and should be denied.

Background

While the Board is presumably familiar with the facts underlying ZAC/ZACK's motion, a short restatement of the matter appears appropriate. Contrary to the Board's Order for proceeding in this matter, ZAC/ZACK did not furnish the list of its witnesses and the scope of their proposed testimony as originally contemplated. Because the Applicant therefore did not know what evidence these individuals would offer, it obtained subpoenas from the Board for the last week in December 1981. However, in a conference call, ZAC/ZACK took the position, which was agreed to by the Board, that taking depositions at that time would delay the evidentiary hearing. Because of this threat, the Applicant was forced to delay taking the depositions until January 12, 1982.

On January 8, 1982, the due date for the submission of intervenor's prepared testimony, counsel for ZAC/ZACK submitted, in lieu of the testimony of the three witnesses in question, a statement in which he stated that these three witnesses were precluded from discussing the testimony he proposed to elicit by action of their employer, the New Richmond School District. He nevertheless stated that he would subpoena them for the evidentiary hearing.

In the circumstances, Applicant had no choice but to take the depositions of the three individuals on January 12, 1982. Deposition fees were paid and the individuals appeared. They were asked basic questions about their proposed testimony. As will be observed from a copy of the deposition heretofore furnished to the Board, counsel for ZAC/ZACK thereafter began to ask questions beyond the scope of anything asked by Applicant of these witnesses. <sup>1/</sup> The purpose of stopping the deposition was two-fold. First, ZAC/ZACK was improperly attempting to go beyond the scope of Applicants' examination. Secondly, because the information sought by ZAC/ZACK was beyond the scope of the deposition taken by the Applicant, it was therefore beyond the scope of the subpoenas. <sup>2/</sup> As stated in the transcript of the deposition, the Applicant had no wish to involve the three individuals with any problems with their school district on this basis. <sup>3/</sup>

Counsel for ZAC/ZACK made no effort to obtain a telephone ruling from the Board nor did he, at this point,

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<sup>1/</sup> On this point, it is necessary to examine the entire transcript because ZAC/ZACK attached only the last pages to its motion.

<sup>2/</sup> Moreover, counsel for the Applicants noted that there were many depositions (17) to be taken on that date and suggested that counsel for ZAC/ZACK might wish to talk to the witnesses outside.  
Tr. 27.

<sup>3/</sup> Tr. 29, 31.

seek to obtain his own subpoenas for the deposition of these witnesses. It is noted that the specific questions sought to be asked of the three witnesses by counsel for ZAC/ZACK relating to the New Richmond schools<sup>4/</sup> are not the same as those to which he refers on page 30 of the transcript which refer to Monroe Elementary and other general issues.

Argument

It is important to note at the outset that ZAC/ZACK has had approximately two years to pursue discovery relating to its emergency planning contentions, but failed to seek subpoenas for deposing any witnesses proposing to give testimony in that area in the time permitted. Under the NRC's Rules of Practice, like the Federal Rules of Civil Procedure, no distinction is made in the susceptibility of favorable and adverse witnesses to the subpoena process. The NRC rules permit potential non-party witnesses to be subpoenaed to determine what their testimony would be. See generally 10 C.F.R. §2.720; Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683 (1979). A party may seek a subpoena of a favorable witness for deposition if it believes that the witness, for whatever reason, is unable or unwilling to discuss his testimony prior to the hearing.

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4/ Tr. 26-27.

The crux of this matter is that this procedure was not used by ZAC/ZACK here, despite its statement in Mr. Dennison's affidavit that potential witnesses were precluded from cooperating in the preparation of pre-filed testimony. Nevertheless, no subpoena was sought for three individuals, Carolyn McIntosh, James Fite and Dorothy Seiger, prior to their designation by ZAC/ZACK as witnesses, notwithstanding Mr. Dennison's representation that "such witnesses had been forbidden to speak with this counsel by the school superintendent, or school board, or both . . . ." <sup>5/</sup>

As the Licensing Board is aware, the limited purpose of the numerous depositions scheduled by Applicant was to determine the basis of the prefiled testimony of witnesses designated by ZAC/ZACK and the City of Mentor. The depositions were certainly not for the purpose of providing ZAC/ZACK counsel an opportunity to prepare the testimony of his own witnesses at the hearing. The failure of ZAC/ZACK to effectively prepare its own case <sup>6/</sup> does not justify an abuse of Applicants' prehearing

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5/ ZAC/ZACK Motion at p. 2.

6/ Even if witnesses had been forbidden to speak with counsel by their superiors, the witnesses obviously could not ignore a subpoena issued by the Licensing Board. The three witnesses in question have been subpoenaed for the hearing, and no showing has been made why they could not have been subpoenaed for depositions earlier.

discovery efforts by Mr. Dennison. Whether contrived or accidental, the situation created by ZAC/ZACK - designating witnesses without prepared testimony so as to require their deposition by one's adversary - is the kind of gamesmanship which the NRC rules do not indulge. Certainly, a party seeking discovery has no duty to permit its discovery efforts to be used as a means for assisting an opposing party in the development or presentation of its case in chief. Yet, this is the result apparently desired by ZAC/ZACK.

The only legal premise for ZAC/ZACK's motion is that a party is entitled to cross-examination at a deposition. The transcript of the deposition clearly shows that such cross-examination was permitted.<sup>7/</sup> Thus, the deposition of the panel of three witnesses was not "conducted ex parte with the denial to an attending party to examine the deponent."<sup>8/</sup> Rather, counsel for Applicant merely sought to limit cross-examination to matters within the scope of Applicants' examination. This material and controlling distinction has been ignored by ZAC/ZACK. Nothing in Section 2.740a permits Mr. Dennison to turn

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<sup>7/</sup> Tr. 21, et seq.

<sup>8/</sup> ZAC/ZACK Motion at p. 5.

the discovery deposition by Applicant into an unlimited witness preparation session for ZAC/ZACK, which had every opportunity to obtain a subpoena for discovery but elected not to do so. Rather than seek its own subpoenas with the tender of witness fees to the three deponents,<sup>9/</sup> ZAC/ZACK sought a "free ride" by waiting until the Applicant, of necessity, sought discovery of the three individuals listed as witnesses but for whom no testimony whatsoever had been filed. The representation by ZAC/ZACK counsel that the witnesses had been unable to discuss their prepared written direct testimony with him certainly did not relieve Applicants' counsel of their obligation to determine the scope and basis of the testimony by discovery.

The legal authority relied upon by ZAC/ZACK is inapposite to the circumstances here and does not even purport to address the scope of proper cross-examination at a deposition. Rather, the cases deal with the proper scope of pretrial discovery as against objections of relevancy and work product. For example, in the case principally relied

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<sup>9/</sup> ZAC/ZACK has sought subpoenas and, we assume, tendered witness fees for the attendance of these individuals at the hearing, but all subpoenas with respect to the January 12, 1982 depositions were obtained at the request of Applicant for its discovery.

upon, Ralston Purina Co. v. McIntosh, 550 F.2d 967 (4th Cir. 1977), plaintiff's counsel instructed the deponent, plaintiff's employee and principal witness at trial, not to answer questions put to him on direct examination by counsel for defendant, apparently on grounds of relevancy. This is a far cry from the situation here, where Applicants' counsel was deposing a non-party who had been listed as a witness by an opposing party and where the objection went to the scope of the direct examination and hence the subpoenas, i.e., not merely an evidentiary objection.

In any event, ZAC/ZACK has shown no prejudice to its case by any action in limiting the scope of the deposition to matters addressed on direct examination. As noted, ZAC/ZACK has had abundant opportunity to depose the individuals previously. Also, counsel could have sought an immediate ruling from the Licensing Board by telephone, but chose not to do so. It is noted that the recent Statement of Policy by the Commission in this regard encourages the earliest possible disposition of procedural matters. It states:

Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question. Rulings on procedural matters to regulate the course of the hearing should also be rendered early. 10/

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10/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (May 20, 1981).

Despite not having sought a prompt Board ruling, ZAC/ZACK now seeks to stay the presentation of evidence and re-schedule the hearing, all for the evident purpose of incurring further delay.

The other requests for relief are also without merit. The NRC Licensing Board lacks authority to assess costs. See Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329 and 50-330, "Order" (slip op. at 4-5). Since ZAC/ZACK had already sought subpoenas for the witnesses' attendance at the hearing prior to the depositions, ZAC/ZACK is under no circumstances entitled to witness fees for attendance at the hearing. Finally, the Licensing Board lacks authority to grant an award of attorney's fees. The Commission has consistently held that funding for intervenors, including an award of attorney's fees and similar reimbursement, lies beyond its statutory authority and would not, in any event, be granted as a matter of agency discretion. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-19, 11 NRC 700 (1980); Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976). In any event, Mr. Dennison chose to be present for the depositions of these three and other witnesses on January 12, 1982.

Conclusion

No basis for sanctions, a stay of the hearing or other relief has been shown. The motion should therefore be denied in all respects.

Respectfully submitted,

CONNER & WETTERHAHN

*Troy B. Conner, Jr.*  
Troy B. Conner, Jr.  
Counsel for Applicants

January 28, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNR

In the Matter of )  
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DOCKETING & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer by Applicant to Motion by Intervenor Zimmer Area Citizens/ Zimmer Area Citizens of Kentucky to Issue an Order Compelling Discovery and for Sanctions and Other Relief" dated January 28, 1982, in the captioned matter, have been served upon the following by deposit in the United States mail this 3rd day of February, 1982:

- |   |   |
|---|---|
| * Judge John H. Frye, III<br>Chairman, Atomic Safety and<br>Licensing Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                              | Chairman, Atomic Safety<br>and Licensing Board<br>Panel<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555  |
| * Dr. Frank F. Hooper<br>Administrative Judge<br>Atomic Safety and Licensing<br>Board<br>School of Natural Resources<br>University of Michigan<br>Ann Arbor, Michigan 48109 | * Charles A. Barth, Esq.<br>Counsel for the NRC Staff<br>Office of the Executive<br>Legal Director<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555 |
| * Dr. M. Stanley Livingston<br>Administrative Judge<br>1005 Calle Largo<br>Sante Fe, New Mexico 87501   | Mr. Chase R. Stephens<br>Docketing and Service<br>Branch<br>Office of the Secretary<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                |
| Dr. Lawrence R. Quarles<br>Atomic Safety and Licensing<br>Appeal Board<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                                   | Chairman, Atomic Safety<br>and Licensing Appeal<br>Board Panel<br>U.S. Nuclear Regulatory<br>Commission<br>Washington, D.C. 20555                                     |

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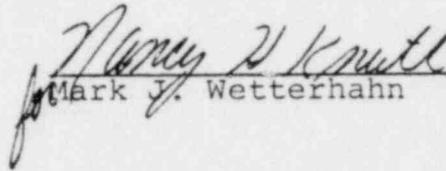
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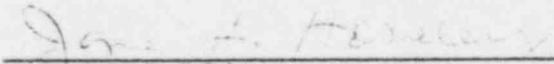
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\* These individuals were hand delivered a copy of the above referenced motion at the hearing before the Atomic Safety and Licensing Board on January 28, 1982.

Sworn and subscribed to before me this 3rd day of February, 1982.

  
Notary Public

My Commission Expires: 4-12-86