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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'82 AGO 17 P4:39

Before the Commission

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
The Cincinnati Gas & Electric Company, <u>et al.</u>	)	Docket No. 50-358
	)	
(Wm. H. Zimmer Nuclear Power Station)	)	

APPLICANTS' ANSWER TO "MIAMI VALLEY POWER PROJECT  
PETITION TO DISQUALIFY STAFF ATTORNEY  
FROM LICENSING PROCEEDING FOR THE WM. H. ZIMMER PLANT"

Preliminary Statement

On July 30, 1982, the Miami Valley Power Project ("MVPP"), an intervenor in the captioned proceeding, through its counsel Government Accountability Project ("GAP") moved the Nuclear Regulatory Commission ("NRC" or "Commission") to disqualify the present NRC Staff counsel, Charles Barth, "from participation in these proceedings because of his alleged refusal to develop a full and fair record for the Board, his obvious bias in favor of the Applicants, and his inability to represent the agency's interest without conflict." 1/

A response by Applicants, The Cincinnati Gas & Electric Company, et al., ("Applicants") is appropriate here because of counsel's familiarity with record and to ensure that the

1/ Miami Valley Power Project's Petition to Disqualify Staff Attorney from Licensing Proceedings for the Zimmer Plant ("MVPP Petition to Disqualify") at 1.

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false charges made in the pleading by MVPP against Applicants are fully answered. Based upon the facts available to them from the public record, Applicants oppose the instant petition and submit that the Commission should not only deny the petition but also explicitly exonerate Mr. Barth of all the unfounded mischaracterizations by GAP. Similarly, the Commission should also, consistent with federal practice, take the added step of striking the MVPP pleading to ensure that what Applicants perceive, based upon the public record, to be unfounded, scandalous and scurrilous charges do not remain a part of the record and are not repeated by either MVPP or GAP. <sup>2/</sup>

Each of these steps is necessary to assure the continued integrity of the NRC licensing process and to act as fair notice that the Commission will not tolerate the use of reprehensible tactics by any party to its proceedings to besmirch the reputation of the NRC and its employees or, for that matter, any party to its proceedings. The actions of MVPP in this case also constitute an affront to the integrity of the Commission itself in that the attorneys for MVPP have apparently proffered information from a preliminary or draft investigation report by the

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<sup>2/</sup> See generally Fed. R. Civ. Proc. 12(f). On April 20, 1982, the previous lead attorney for MVPP noted his withdrawal as counsel, and Lynn Bernabei and Thomas Devine of the Government Accountability Project noted their substitution.

Commission's Office of Inspector and Auditor, which we understand not to have been otherwise publically released. (Presumably, the Commission is investigating this apparent leak of internal information.)

The charges by GAP are particularly unfortunate in view of the record of Mr. Barth's fully professional performance representing the Staff during the course of this long and involved proceeding since he entered his appearance on December 15, 1978. <sup>3/</sup> It is significant that the presiding Atomic Safety and Licensing Board ("Licensing Board") went out of its way in its Initial Decision to point out the aggressive representation of the Staff's position by Mr. Barth. <sup>4/</sup>

As will be demonstrated infra, the charges made by MVPP are totally unsupported by the public record. Even a minimal amount of investigation by GAP would have revealed their insubstantiality. GAP has therefore either failed to make any relevant inquiry or has callously ignored the truth. Considering the seriousness of the charges made, the actions by MVPP's attorneys are perilously close to a breach of their professional responsibility. For these reasons,

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<sup>3/</sup> This should not imply that Applicants have agreed with the Staff's positions as espoused by Mr. Barth during the course of the proceeding. A review of the hearing transcripts and other pleadings would quickly dispel such a notion.

<sup>4/</sup> The Cincinnati Gas & Electric Company ( Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC (June 21, 1982) (slip op. at 25).

the petition should not only be denied, it should be stricken. This action will remove any question concerning the Applicants' actions regarding statements made before the ACRS and reaffirm the Commission's reposal of confidence in Mr. Barth, its attorneys, both in the Office of the Executive Legal Director and the Office of the General Counsel and, for that matter, all of the Commission's employees.

Discussion

I. Mr. Barth Did Not Withhold Important Information

MVPP alleges that Mr. Barth "personally called the Chairman of the Licensing Board to ask him to discard important and relevant information about the applicant's representations to the NRC forwarded by James G. Keppler, Director of Region III." <sup>5/</sup> This charge relates to some alleged inaccuracy with regard to Applicants' statements before the Advisory Committee on Reactor Safeguards ("ACRS") in 1979. It is notable that, in its overzealous attempt to remove Mr. Barth from this proceeding, GAP has chosen to treat the allegations against him as true even though it expressly concedes that the purported source of these charges has denied making them. <sup>6/</sup>

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<sup>5/</sup> MVPP Petition to Disqualify at 5.

<sup>6/</sup> Id. at 5 n.1.

Furthermore, whether deliberately or not, GAP has not even faithfully recounted the information from the only source that it quoted (whatever its reliability, if any), a purported "draft" of a report written by the NRC's Office of Inspection and Audit ("OIA") (Attachment A to MVPP's pleading). It claims that Mr. Barth "attempted affirmatively to remove [information concerning Applicant's statements to the ACRS] from consideration by the Licensing Board." However, Attachment A addresses only a purported conversation with Mr. James Yore, who obviously never served on the Licensing Board in this proceeding. MVPP, "an intervenor of long standing in the Zimmer proceeding," <sup>7/</sup> and their attorneys were certainly aware of this fact. Surely, a greater familiarity with the facts was owed Mr. Barth prior to GAP's leveling serious charges of misconduct against him.

In support of its assertion that a "deliberate attempt to withhold important relevant information from the Licensing Board" occurred, GAP merely cites the various Commission decisions holding that new and relevant information should be transmitted to the Licensing Board. It then charges that "not only did Mr. Barth neglect to disclose important information about the falsity of Applicant's statements to the ACRS, he attempted

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<sup>7/</sup> Id. at 10. The pages of Attachment A are unnumbered. The accusation is contained on the fifth page.

affirmatively to remove it from consideration by the Licensing Board." <sup>8/</sup> However, as discussed below, a review of the evidence in the public record demonstrates conclusively that Mr. Barth not only fulfilled all his requirements as Staff counsel, but, indeed, encouraged the Commission's investigatory arm in pursuing questions concerning possible misstatements before the ACRS. Even a cursory investigation by the involved MVPP attorneys prior to making these charges would have revealed their utter lack of basis.

Initially, in a memorandum dated May 2, 1979 from James G. Keppler, Director, Region III to Dudley Thompson, Executive Officer for Operations Support, I&E, entitled "Apparent False Statements by Applicants at Zimmer ACRS Subcommittee Meeting (AITS F3048H6)," the question of an investigation of the alleged misstatement was discussed. The following paragraph from that memorandum, reproduced in its entirety, demonstrates that Mr. Barth conscientiously and without reservation fulfilled all his duties under NRC regulations as well as all governing ethical and disciplinary rules of professional conduct applicable to the NRC and the bar at large.

The foregoing was discussed with Mr. Charles A. Barth, Attorney, Hearing Division, ELD on April 30, 1979 who has been involved with the licensing hearings regarding Zimmer. Mr. Barth

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8/ Id.



feels that an investigation of this matter is clearly warranted. Barth pointed out that not only does it raise some question regarding the accuracy of information provided NRC by the applicant, but that the issue involved - the general topic of operator qualification - is of particular interest to the NRC. He further recommended that ASLB, ACRS and NRR be advised both of the content of your memorandum and receive copies of your report of investigation. This matter was also discussed with Mr. Roger Fortuna, OIA, on April 30, 1979, who indicated that his Office would review your report for possible evidence of criminality such as violation of 18 USC 1001.

Thus, contrary to the picture painted by MVPP, Mr. Barth clearly indicated that an investigation was warranted and that he himself had some questions regarding the accuracy of certain information. Further, he specifically recommended that the Licensing Board be advised of the content of the memorandum and receive copies of the report of the investigation. <sup>9/</sup> These facts are diametrically opposed to any inference that Mr. Barth attempted to suppress any investigation. Indeed, as shown, he actively sought to initiate it. The fact that he encouraged the investigation clearly refutes the charge that Mr. Barth had an "obvious bias in favor of the Applicants." <sup>10/</sup>

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<sup>9/</sup> Aside from Mr. Barth and Mr. Yore, there were six other copies of the memorandum indicated. Seemingly, there could not have been anything possibly gained by Mr. Barth requesting any one individual to destroy a copy of this memorandum.

<sup>10/</sup> MVPP Petition to Disqualify at 1.

Even more significant is a followup letter to the presiding Licensing Board proceeding written by Mr. Barth on September 26, 1979. Therein, Mr. Barth transmitted to the Licensing Board the report of the Office of Inspection and Enforcement which investigated this matter. Listed as a recipient of a copy of this letter is Leah Kosik, then counsel of MVPP. Without question, therefore, the record clearly indicates that Mr. Barth completely fulfilled his duty as an attorney with the Office of the Executive Legal Director. Inasmuch as MVPP was sent a copy of correspondence relating to the allegations and the report clearing the Applicants of any wrongdoing, it is clearly charged with knowledge of its content. Even a quick review by the new counsel, GAP, of their files or the files of the Public Document Room located in Washington, D.C. would have immediately indicated the total falsity of the allegation that Mr. Barth withheld information from the Licensing Board.

Inasmuch as MVPP raises anew the same discredited charges against them, Applicants are compelled to restate for the record the conclusion of the report of the Office of Inspection and Enforcement. In the final sentence of the summary of the investigation report which was it to the Board and parties in 1979, it is stated that "no information was developed to show that there was any intent on the part of the Licensee to mislead the ACRS with regard to staffing



of the Zimmer plant." Applicants considered this matter to have been disposed of three years ago.

II. The Alleged "Conflict Of Interest" On  
The Part Of Mr. Barth Does Not Exist  
And Nothing Prevents Him From  
Effectively Representing the NRC."

Counsel for MVPP alleges two instances of alleged conflict of interest and bias by Mr. Barth. Initially, GAP alleges that on June 7, 1982, Mr. Barth "reported falsely to the Board that he was unable to contact intervenor's counsel when both attorneys' business and home phone numbers were accessible." While Applicants are not privy to the facts concerning this matter, Applicants find it extremely surprising that counsel for MVPP have waited until now to bring this incident to light although the alleged misstatement occurred in a pleading dated June 7, 1982. If MVPP attorneys believed that misconduct were involved, they should have brought the matter to the attention of the presiding Licensing Board immediately.

In any event, the charge is not in the least credible. GAP has not explained any purpose that could possibly have been served by any misstatement by Mr. Barth in his motion to the Licensing Board. The motion in question was not substantive in nature and merely sought a four-day extension of time. As discussed in the motion, Applicants had already opposed the grant of additional time.

The second incident involves Mr. Barth's alleged "refusal to sign a pleading for the NRC when he disagreed

with the agency's position" concerning reopening the proceeding. <sup>11/</sup> Preliminarily, Applicants believe that, if true, this is a matter between Mr. Barth and his superiors. Applicants would also note that the allegation is predicated upon hearsay, to wit, a newspaper article which appeared in the June 14, 1982 edition of The Cincinnati Post. Therein, he is quoted as simply stating that CG&E's position was "very persuasive." There was certainly nothing sinister in this remark, which only expressed a view also expressed by the Licensing Board and subsequently by the Commission in their decisions on reopening. Moreover, the final document filed by the Staff agreed with Applicants' position that MVPP had made no showing under the Commission's rules justifying reopening. The Staff favored reopening on other grounds.

Again, GAP has waited an inordinately long time, six weeks, to bring this matter to anyone's attention. Even accepting arguendo that Mr. Barth did not concur in the Staff's position, his disagreement does not require him to disqualify himself since he is, from all appearances, fully able to represent the agency's interests in this proceeding. There has been nothing proffered that would indicate the contrary. GAP is stretching its imagination to see an "appearance of conflict" in his actions. Aside from

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<sup>11/</sup> MVPP Petition to Disqualify at 11.

rhetoric, there is absolutely no basis given for the assertion that public confidence in the NRC, the judicial system or the legal profession has been or could be affected.

Response to Relief Requested

MVPP asks that the Commission disqualify Mr. Barth as NRC Staff counsel from any further participation in the Zimmer licensing proceedings. As previously discussed, a review of the record in the proceeding shows that the request has no merit and should be denied.

Second, MVPP asks for an investigation into Mr. Barth's "deliberate attempt to withhold important information." This request should also be denied since no such attempt was made. Third, MVPP asks for an investigation into the Applicants' conduct concerning this incident. As previously discussed, the individual who allegedly made the accusation in questions has since stated, as MVPP acknowledges, that he "disagrees with a part of this interview." <sup>12/</sup> Therefore, the Commission should likewise deny this final request.

Other Matters

In its "Statement of the Facts," GAP relates that it obtained the interview with Mr. Harpster "under conditions that indicate with great reliability that it was contained in draft version of the OIA Report." <sup>13/</sup> Applicants have

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<sup>12/</sup> MVPP Petition to Disqualify at 5 n.1.

<sup>13/</sup> MVPP Petition to Disqualify at 5.

reviewed their files and determined that they possess no such draft nor, for that matter, any document from OIA containing similar information. GAP is not forthcoming as to the manner in which it obtained this draft version of the OIA report. If such document were obtained from the NRC through other than legitimate channels, the Commissioners should immediately institute an investigation. The functioning of the Commission's investigatory process depends upon the integrity of its employees in safeguarding confidential investigations and investigatory material. Otherwise, a potential informant could not be assured that information provided to an NRC employee would not be released other than in accordance with his original understanding. The integrity of the entire Commission and its ability to perform its regulatory function and assure the national security under the Atomic Energy Act may be open to serious question and even severely jeopardized if matters such as this are not satisfactorily resolved.

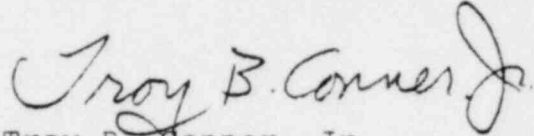
On a different level, the draft report notes many unfounded accusations involving matters unrelated to Mr. Barth and raises unsupported charges against individuals who have no effective avenue to refute the charges. Furthermore, the leak of this investigative report will undermine the morale of the Commission. Applicants urge the Commission to make every effort to determine whether any individual or individuals, acting on their own volition, released this document.

Conclusion

For the above stated reasons, the petition should be denied and stricken, and the Commission should direct that a complete investigation and report be made to it regarding the release of Appendix A to the MVPP motion.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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Counsel for the Applicants

August 16, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Docket No. 50-358

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to "Miami Valley Power Project Petition to Disqualify Staff Attorney from Licensing Proceeding for the Wm. H. Zimmer Plant" dated August 16, 1982, in the captioned matter, have been served upon the following by deposit in the United States mail this 16th day of August, 1982:

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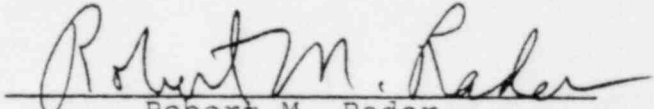
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