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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the U.S. Nuclear Regulatory Commission

OFFICE OF SECRETARY  
& SERVICE  
BRANCH

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

APPLICANTS' MOTION TO STRIKE MIAMI  
VALLEY POWER PROJECT'S REPLY BRIEF

Preliminary Statement

On October 11, 1982, Miami Valley Power Project ("MVPP") served a reply brief in the captioned matter, purporting to supplement its initial Petition for Reconsideration of the Commission's Order of July 30, 1982 and reply to the NRC Staff's and Applicants' responses to its petition. The reply brief was attached to a motion seeking leave to file the brief.

Although the matters discussed in MVPP's reply brief lack merit and merely rehash points MVPP has previously made, the filing of a reply brief without previously having received permission to do so constitutes a flagrant violation of the Commission's Rules of Practice. The reply brief should therefore be stricken in its entirety.

Argument

Under the Rules of Practice established by the Commission, it is well settled that supplemental arguments

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beyond the briefs permitted by the Rules are impermissible and should be stricken. See generally Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981). The licensing boards have similarly stricken unauthorized reply briefs, <sup>1/</sup> The same rule applies even if the party is attempting to reply to a brief from a party asserting the same position. <sup>2/</sup>

A very significant aspect of this rule prohibits parties from acting presumptively in filing a reply brief along with the motion requesting permission to do so. As the Licensing Board stated in the Black Fox case, "the reply brief should not be attached to the motion but should only be submitted after permission to file is granted." <sup>3/</sup> Otherwise, parties would usurp the decisionmaking function of the Commission and its boards by dictating a fait accompli.

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- <sup>1/</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466 CP, "Memorandum and Order" (July 19, 1982) (slip op. at 3). Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), Docket No. 50-466 CP, "Memorandum and Order" (June 2, 1982) (slip op. at 6).
  - <sup>2/</sup> Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329 CP and 50-330 CP, ALAB "Order" (April 13, 1982).
  - <sup>3/</sup> Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), LBP-76-38, 4 NRC 435, 441 (1976) (emphasis added).

Although Applicants would presumably be entitled to respond to the unauthorized reply brief if the Commission were to consider it, nothing in the reply warrants a reopening of the proceeding or any change in the views of the Commission majority expressed in its Order of July 30, 1982. Despite disclaimers, MVPP's counsel, the Government Accountability Project ("GAP"), continues to denigrate the integrity and competence of the NRC Staff and at the same time attempts to manipulate Staff actions to its own advantage. Staff actions are lauded when MVPP is in agreement, but always cited as ineffective or "internally contradictory" when perceived by MVPP to be contrary to its position. GAP's insinuation that it and it alone is the only spokesman for the public interest presents a distorted view of the situation and discounts completely the role of the NRC. <sup>4/</sup>

MVPP continues to utilize the same tactics that it used in its initial pleading, e.g., using newspaper cartoons or articles to prove the truth of the facts contained therein, drawing completely unwarranted inferences from every action of the NRC or the Applicants, and using unsupported factual assertions in support of its argument. An example of such

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<sup>4/</sup> For example, GAP accuses the NRC as "having shown itself to be immobilized in making the hard decisions" and taking actions which "do not match the rhetoric." GAP also charges the NRC with "censorship" of relevant information. See MVPP's Motion for Leave to File Reply Brief at 11, 13 and 14.

tactics is MVPP's citation of the existence of the September 24, 1982 Demand for Information from Region III to the Applicants as authority for the proposition that the allegations in its petition have validity in order to bootstrap its arguments before the Commission. MVPP argues that its allegations are "important" and that the NRC must give them presumptive validity merely because a response has been requested. Even a brief perusal of Attachment C to MVPP's reply brief would lead to the conclusion that the NRC is treating MVPP's filing as constituting only "allegations" and the Staff is awaiting a response by the Applicants prior to formulating a position or taking any action on the request. Fundamental fairness requires this as a minimum.

Conclusion

For the reasons discussed above, the unauthorized reply brief filed by MVPP should be stricken.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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October 26, 1982

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Strike Miami Valley Power Project's Reply Brief" dated October 26, 1982, in the captioned matter, have been served upon the following by deposit in the United States mail this 26th day of October, 1982:

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