

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ADMINISTRATIVE & SERVICE
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COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

SERVED NOV 24 1982

In the Matter of)
)
)

CINCINNATI GAS AND ELECTRIC)
COMPANY, et al.)
)

Docket No. 50-358

(William H. Zimmer Nuclear Power)
Station, Unit No. 1))
)

ORDER
(CLI-82-36)

On July 20, 1982 Miami Valley Power Project (MVPP), an intervenor in the captioned operating licensing proceeding, petitioned the Commission to disqualify a specified NRC Staff attorney from further participation in these proceedings. Both the Applicant, Cincinnati Gas & Electric Co., et al., and the Staff responded in opposition to MVPP's petition; MVPP then replied. ^{1/} On consideration of all the pleadings, the

^{1/} The Commission's procedures generally do not provide for a reply. In this instance, however, the Staff, in a departure from normal pleading practice, incorporated into its response a motion to have the Licensing Board review the propriety of MVPP's counsel's conduct in filing the instant petition to disqualify. This opened the door to further

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Commission dismisses MVPP's petition for the reasons set forth briefly below.

In essence, MVPP brings two complaints. First, MVPP alleges that the specified Staff attorney acted to prevent compilation of a complete record in the Zimmer proceeding by advising the Chairman of the Atomic Safety and Licensing Board to throw away a notification regarding allegedly false representations made by Applicants to the Advisory Committee on Reactor Safety. Second MVPP complains that the specified Staff attorney was biased in favor of the applicant and thus had a conflict of interest which caused him improperly to discharge his duties to the disadvantage of MVPP. MVPP claims that the bias was exhibited by the attorney's refusal to sign a pleading where Staff supported MVPP's motion to reopen to admit new contentions. They also

1/ (Continued from preceding page)

pleading by MVPP. We have thus considered MVPP's reply even though arguably any part of it not responding to Staff's motion was unauthorized by our rules.

We want to stress that petitions of this sort which raise questions about the ethics and reputation of another member of the Bar should only be filed after careful research and deliberation. Moreover, we take this occasion to note that, understandably, ill feeling results from any petition for disciplinary action, but that retaliation in kind should not be the routine response. As we pointed out when the rules on attorney conduct in our adjudicatory proceedings, 10 CFR 2.713, were last amended, "The Commission has no interest in general matters of attorney discipline and chooses to focus instead on the means necessary to keep its adjudicatory proceedings orderly and to avoid unnecessary delays." 45 Fed.Reg. 3594 (1980).

claim that the attorney falsely advised the Licensing Board that he was unable to contact MVPP's counsel regarding an extension of time that Staff sought in which to respond to MVPP's motion to admit new contentions.

MVPP says that it appropriately brought these complaints to the Commission because the Commission has inherent supervisory authority over all agency personnel and proceedings. While it may be true that the Commission is empowered to decide all such matters, it does not mean that it is appropriate to bring any and all matters to the Commission in the first instance, and moreover, our rules provide otherwise. See 10 CFR 2.713. Here, MVPP's first complaint relates directly to the specified attorney's actions in the proceeding before the Licensing Board and should have been brought to that Board in the first instance if correction was necessary for the integrity of the proceedings. See 45 Fed.Reg. 3594. We would refer it there for consideration were it not apparent from uncontroverted facts of record that the Staff attorney's behavior does not merit disciplinary action. While the attorney's conversation with the then chairman of the Licensing Board Panel may have understandably evoked some concern on the part of MVPP, we detect no intent to withhold information regarding a staff investigation from the record. This is evident in that the attorney advised the Chairman of the Zimmer Licensing Board on the record and with reasonable promptness that an

investigation had been initiated ^{2/} and subsequently provided the investigation report for the record of that proceeding. See Letter to Licensing Board members, September 26, 1979 (attaching Region III Report No. 50-358/79-21). Moreover, it is clear from the record that the Staff attorney was instrumental in initiating the investigation, a role which is not at all consistent with the charge of cover-up. Accordingly, we will ourselves dismiss this charge. See United States Department of Energy Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), Docket No. 50-537, August 12, 1982.

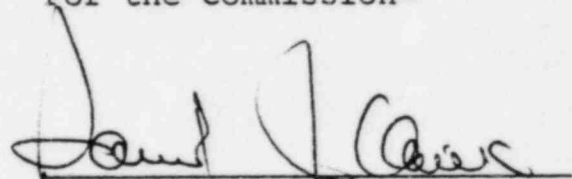
Regarding MVPP's second complaint, we note first that while MVPP characterizes the attorney's allegedly offending behavior as a conflict of interest, MVPP does not use that term in any accepted legal meaning, but rather refers to a perceived bias in the attorney's view of the proceedings. This is distinguished from a situation where an attorney had a conflict of interest of a type recognized in law to compromise counsel's ability to represent his client, e.g. that he had previously represented another party in the proceeding, or had financial interests in common with another party, or the like. Given the nature of

^{2/} See Hearing Transcript at 471 (May 23, 1979). Contrast with Virginia Electric & Power Company (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480, 491-92, n. 11 (1976), affirmed sub nom, Virginia Electric Power Co. v. N.R.C., 571 F.2d 1289 (4th Cir. 1978). The matter was unfortunately referred to as a "small housekeeping thing" but the disclosure was that Staff was checking out "allegations of some misinformation on behalf of the applicant," and we believe that the substance of this disclosure was sufficient to call to the Board's and parties' attention the potential seriousness of the matter.

MVPP's complaint, ^{3/} we agree with Staff's response for the reasons there set forth that the matter would be appropriately considered by the Executive Director of Operations outside the bounds of this proceeding. Accordingly we express no view on the matter. Commissioner Gilinsky dissents from this decision.

The petition is DENIED.

For the Commission^{4/}


 SAMUEL J. CHILK
 Secretary of the Commission



Dated at Washington, D.C.

the 24th day of November, 1982.

^{3/} MVPP's complaint that the Staff attorney wrongly stated that he had been unable to reach MVPP strikes us as trivial and will not be discussed further. We also decline to act on Staff's request for disciplinary action against MVPP's attorney for filing the instant petition.

^{4/} Commissioner Gilinsky was not present when this Order was approved but had previously indicated that he would disapprove.