

03/16/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CINCINNATI GAS AND ELECTRIC)	Docket No. 50-358
COMPANY, <u>et al.</u>)	
)	
(Wm. H. Zimmer Nuclear Power)	
Station, Unit No. 1))	

NRC STAFF RESPONSE TO CONTENTIONS
PROFFERED BY DOUG GILLMAN

Preliminary Statement

On Monday, February 28, 1983, the Staff received from the Office of the Secretary five new contentions proffered by Doug Gillman, a resident of Cincinnati, Ohio. The Staff, by letter to the Appeal Board and Licensing Board served Mr. Gillman's contentions on all parties and stated that we would respond initially to the Licensing Board. This is the Staff's response.

Background

The Notice of Opportunity for Hearing for the Zimmer facility was published in the Federal Register September 24, 1975 and provided, inter alia, that petitions to intervene must be filed before October 24, 1975 (40 Fed. Reg. 43959). Several individuals and organizations, Miami Valley Power Project among them, filed petitions to intervene in response to the notice. The petitioners were admitted as parties and certain contentions were identified as issues in controversy. Hearings were held and an Initial Decision was issued on June 21, 1982, 15 NRC 1538. Exceptions by the Applicants are now pending before the Appeal Board. Mr. Doug Gillman now, some seven and a third years late, seeks to have five alleged contentions made a part of this proceeding.

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Starting in July 1979 Mr. Gillman has written at least 9 letters to the Staff on Zimmer, covering such matters as Table S-3, the Mark II containment and FSAR Table 8.3-18. In March 1980 he wrote stating that he represented Miami Valley Power Project and sought information on subpoenaing NRC personnel. In August and November 1981 he wrote opposing the licensing of Zimmer. And in June 1982 he wrote again concerning the Mark II containment. On November 15, 1979, Mr. Gillman was permitted by the Licensing Board to be a technical cross-examiner on behalf of Miami Valley Power Project. Although not a party to the Zimmer proceeding, Mr. Gillman has long been intimately familiar with the proceedings.

Discussion

10 C.F.R. § 2.714(a)(1) sets forth the Commission's legal requirements for standing and for non-timely filings and Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1979) sets forth the legal requirements for reopening the record. See also Public Service Company of Oklahoma, Et Al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979). The Appeal Board, in a factual circumstance very similar to the case at bar addressed late intervention in a four-page decision that is a model of clarity and succinctness. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350 (1980), hereinafter Perkins. In Perkins a non-party person, David Springer, who was familiar with the proceeding and who appeared as attorney for an intervenor filed contentions two months after issuance of the Initial Decision. Here in Zimmer, Mr. Gillman has been familiar with the Zimmer proceeding, participated in the Zimmer proceeding and filed contentions 7 months after the Initial

Decision was issued. In Perkins Mr. Springer did not address standing, i.e., his interest, or the five criteria of 10 C.F.R. § 2.714(a) by which late intervention is to be judged. In Perkins the Appeal Board stated:

Not long ago, we took the "occasion to stress anew the imperative necessity that all participants in NRC adjudicatory proceedings -- whether lawyers or laymen representing themselves or organizations to which they belong -- familiarize themselves at the outset with" the Commission's Rules of Practice. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 37, 38 fn. 1 (August 25, 1980). "By doing so", we went on to observe, "participants will both (1) enhance their ability to protect adequately the rights of those they represent; and (2) avoid the waste of time and resources which inevitably accompanies the taking of action forbidden by the Rules". Ibid. The papers filed by Mr. Springer graphically illustrate the point.

The Rules of Practice are most explicit in establishing the criteria by which late intervention petitions must be judged. Section 2.714(a), 10 CFR 2.714(a), provides that such a petition "will not be entertained absent a determination by the Licensing Board that [it] should be granted based upon a balancing of the following factors...."

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Needless to say, the late petitioner must address each of those five factors and affirmatively demonstrate that, on balance, they favor permitting his tardy admission to the proceeding. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273,

275 (1975), Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 241-42 (1980); Virginia Electric and Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC [12 NRC 252] 395, 398 (1975); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 388-89 (1976). Yet, as the Licensing Board noted, Mr. Springer made no endeavor to shoulder that burden. Indeed, his petition was devoid of the slightest hint of a recognition that its fate hinged upon the Section 2.714(a) factors. [12 NRC 353] [footnote omitted]

Here, Mr. Gillman's filing is devoid of any discussion of the five late-filed-contentions requirements of 10 CFR 2.714(a) and his petition should summarily be denied.

There is, in addition to the foregoing, the matter of standing to intervene (not discussed in Perkins). In Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976), the Commission discussed the matter of standing to intervene.

The Commission stated at 4 NRC 613:

"To have 'standing' in court, one must satisfy two tests. First, one must allege some injury that has occurred or will probably result from the action involved. Under this 'injury in fact test' a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing. One must, in addition, allege an interest 'arguably within the zone of interest' protected by the statute.

* * * *

Accordingly, in determining whether a petitioner for intervention in NRC domestic licensing proceedings has alleged an 'interest [which] may be affected [4 NRC 614] by the proceeding' within the meaning of Section 189a. of the Atomic Energy Act Section 2.714(a) of NRC's Rules of Practice, contemporaneous judicial concepts of standing should be used. . . ." [footnote omitted]

Here, Mr. Gillman has not identified who he is beyond being a male residing in Cincinnati, Ohio. He has set forth no interest which could, in fact, be adversely affected by the operation of the Zimmer facility. Nor has he shown an interest which could be protected by the National Environmental Policy Act or the Atomic Energy Act. Based upon lack of standing to intervene, Mr. Gillman's contentions should be denied.

There is one further final matter. As stated earlier, standards for reopening the record are set forth in Wolf Creek and Black Fox cited supra. There the Appeal Board stated that the proponent of a motion to reopen the record bears a heavy burden. The movant must demonstrate that: (1) the motion is timely, (2) the motion is directed to a significant safety or environmental issue, and (3) a different result would have been reached initially had the material submitted in support of the motion been considered. Here, Mr. Gillman does not even feign to address the legal standards for reopening the record, and for this reason his contentions must be denied.

We conclude by referring to a recent decision, The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 15 NRC ____, December 21, 1982, slip. op. page 6 where the Appeal Board stated:

"Among other things, our standard requires that the party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 [7] 1973.4/

* * * *

4/ A participant that seeks to reopen a proceeding must show that the matter it wishes to have considered is (1) timely presented, (2) addressed to a significant

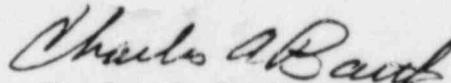
issue, and (3) susceptible of altering the result previously reached. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-65 (1981); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

Again, Mr. Gillman's filing does not even purport to address whether his contentions could have been raised earlier in the proceeding. Our review sheds no light on this matter. The Staff has reviewed the five proffered contentions and has come to the conclusion that, as submitted, they are not meaningfully susceptible to understanding as proper subjects for litigation.

Conclusion

For all of the above reasons, the Staff urges that Mr. Gillman's proffered contentions be denied.

Respectfully submitted,



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Dated at Bethesda, Maryland
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