

'82 DEC -7 P2:17

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
FOR RECORDS AND SERVICE
SEARCH

Before the Nuclear Regulatory Commission

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

APPLICANTS' ANSWER TO ZIMMER AREA CITIZENS/ZIMMER
AREA CITIZENS OF KENTUCKY "PETITION FOR THE APPOINTMENT
OF A CONSULTING FIRM NOMINATED BY INTERVENORS
TO REVIEW AND MONITOR THE THIRD PARTY AUDIT. . . ."

On November 19, 1982, Zimmer Area Citizens/Zimmer Area
Citizens of Kentucky ("ZAC/ZACK") and the City of Mentor,
Kentucky petitioned the Nuclear Regulatory Commission
("NRC" or "Commission"):

. . . to appoint a consulting firm to be
nominated by petitioners to review and
monitor the independent review third
party audit, of the safety-related
construction deficiencies, the review of
the management of the William H. Zimmer
Nuclear Power Station, including the
quality assurance and quality
verification programs, and a
comprehensive plan for verification of
the quality of construction at the
Zimmer facility, as the same has been
set forth and ordered by this Commission
in its November 12, 1982 Order
suspending construction of safety
related construction activities at the
Zimmer facility." 1/

1/ Petition at 1. Applicants do not agree that
petitioners' characterization of the requirements of

(Footnote 1/ continued on next page)

DS03

ZAC/ZACK is an intervenor and the City of Mentor, Kentucky is a participant in the Zimmer operating license proceeding. Applicants, the Cincinnati Gas & Electric Company, et al., strongly oppose the granting of the petition. 2/

The bases for the petition are largely the very reasons for the Commission's issuing the Order to Show Cause and Order Immediately Suspending Construction (CLI-82-33) ("Order to Show Cause") as set forth stated in Sections II and III therein. Therefore, it is quite apparent that the Commission has already considered the same grounds in establishing the series of actions mandated by its Order to Show Cause, which do not include the additional step of hiring a "consulting firm" to oversee the NRC's actions as urged by petitioners. Moreover, the Applicants have

1/ (continued)

the November 12, 1982 Order to Show Cause as a "third party audit" is correct. The audit function of the independent reviewer is not a significant part of the entire task under Section IV.B. Once the NRC accepts the Applicants' "updated comprehensive plan" for the continuation of construction, there is no continuing requirement for independence between the two organizations.

2/ As authority for the submission of the petition, the "supervisory powers exercised over the [Zimmer Station]" are cited. 10 C.F.R. Part 2, Subpart B is cited in the alternative as permitting the filing of the instant petition. This answer is being submitted to the Commission in the first instance; if the Commission decides that the appropriate staff office should consider this matter pursuant to 10 C.F.R. §2.202, this answer should be referred to the appropriate decisional body.

already stated publicly that they will not contest the November 12, 1982 Order to Show Cause and will comply with provisions of Section IV.B. thereof. ^{3/}

Petitioners have not shown any error in the action which the Commission has taken. Upon examination, petitioners' arguments are merely an attempt to project their own skepticism and distrust to the public at large. They would appoint themselves to pick the "consulting firm" which would "directly represent the interest of this and other intervenors and the public" ^{4/} In effect, petitioners would set up a new hierarchy in lieu of that set by the NRC in its Order to Show Cause. However, the Commission has shown itself to be satisfied that its actions will assure that its mandate to protect the health and safety of the public is carried out completely; no reason is given which would require reconsideration of the Commission's action.

Granting the petition would have the effect of placing additional burdens upon the Applicants' and complicating their compliance with the Order to Show Cause to which they have already consented. To grant the relief requested by petitioners would subvert the Commission's policy of

^{3/} Of course, Applicants have already complied with the requirement of Section IV.A. that safety-related construction activities be immediately suspended.

^{4/} Petition at 6.

encouraging consent to Commission orders and would also be totally unfair to Applicants.

Having foregone their opportunity to litigate the appropriateness and necessity of the proposed NRC conditions in a hearing, Commission policy strongly dictates that Applicants not be exposed to further requirements by way of the petition. In the Marble Hill proceeding, the Commission denied an intervenor's request for a hearing on an order by the Director of the Office of Inspection and Enforcement suspending construction at the site, where the licensee did not challenge the Director's Order. ^{5/} The Commission determined that it could lawfully preclude litigation of the matters resolved by the licensee's consent to the Director's order and explained its rationale as follows:

We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions. Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions. Rather than consent and risk a hearing on whether more drastic relief was called for,

^{5/} Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).

licensees would, to protect their own interests, call for a hearing on each enforcement order to ensure that the possibility of less severe action would also be considered. The end result would be a major diversion of agency resources from project inspections and engineering investigations to the conduct of hearings. 6/

Thus, the Commission should refuse to saddle Applicants with the additional requirements proposed by petitioners when it gave Applicants the opportunity to accept the proposed conditions in the Order to Show Cause and they relinquished their opportunity to contest the appropriateness and adequacy of the proposed NRC requirements. The grant of the petition by the Commission would result in the same evil perceived by it in Marble Hill.

Under their proposals, petitioners would themselves nominate a "consulting firm" to "directly represent the interest of this and other intervenors and the public" 7/ These petitioners have shown no expertise or qualifications which would in any way qualify them to choose a "consulting firm." Nor have they shown any basis in fact or law for assuming the role of private attorneys general representing the public at large. 8/

6/ 11 NRC at 441-42 (emphasis added).

7/ Petition at 6.

8/ It should be noted that the City of Mentor has a population of less than 300 people (Transcript of Atomic Safety and Licensing Board proceedings at 4819).

The scheme proposed by petitioners would have the effect of unlawfully delegating to a private party the functions entrusted solely to the Commission by the Atomic Energy Act of 1954, as amended. Petitioners have stated no reason why the NRC Staff is incapable of performing its regulatory functions in this instance. Especially in the absence of any showing that the agency entrusted by Congress is incapable of carrying out its mission, the petition must be denied.

Another significant reason requiring denial of the petition is the lack of any showing that the additional layer of bureaucracy which would result if the petition were granted would serve any useful purpose whatsoever. The Order to Show Cause carefully delineates the responsibility of the Staff in handling the matter. Moreover, in this case the Commission has already expressed its commitment to oversee this matter. 9/

Inherent in the filing of the petition is the view that the NRC Staff is incapable of monitoring the activities of the Applicants and carrying out the assignment given to it by the Commission in the Order to Show Cause. There is no basis for such an assertion. The Commission obviously has

9/ In the additional views of Commissioners Ahearne and Roberts supporting the Commission's July 30, 1982 Order (CLI-82-20) at page 4 dismissing eight new contentions, it is stated that "[t]he Commission itself has become heavily involved, receiving numerous briefings on the case and providing substantive guidance to the Region." This involvement has continued.

trust in its Staff, particularly its Regional Administrator to whom it delegated much responsibility for implementing and reviewing the actions under the Order to Show Cause. Moreover, the Commission has stated that it would continue its own close scrutiny of this matter. Therefore, there is no reason to appoint yet another "independent" auditor.

Petitioners assert that the independent reviewer selection process is under way and that the "public is currently denied any productivity in the selection of the third party auditor, the degree of investigation and the resolution of the pronounced defects" ^{10/} This statement is not correct. The Regional Administrator has already solicited the comments of a number of outside individuals and groups, including petitioners herein, regarding the independence of the reviewer which the Applicants have nominated. ^{11/} Members of the public will have until December 15, 1982 to submit such comments. Information on the independent reviewer proposed by Applicants has been similarly circulated. Applicants further understand that the NRC is firmly committed to

^{10/} Petition at 5. Also at page 7, petitioners request the Commission to entertain the views of the intervenors as to the selection of the "third party auditor" and request that certain information be disclosed.

^{11/} See letter dated December 1, 1982 from James G. Keppler, Regional Administrator to John D. Woliver, Esq.

carrying out its functions under the Commission's Order to Show Cause in full public light.

The terms of the Commission's Order require that the independent organization's recommendations and all exchanges of correspondence, including drafts, between the independent organization and CG&E shall be submitted to the Regional Administrator at the same time as they are submitted to the licensee. ^{12/} Inasmuch as the NRC will undoubtedly make such material public in short order, there is every reason to believe that the public, including petitioners, will be fully and timely informed of all developments.

Petitioners would have the NRC pay the expenses and consultation fees incurred "to be paid from the NRC research funds, other funds, or assessed by the Commission to the utility" ^{13/} Such suggestion fails to recognize the limitations upon the NRC in the disbursement of appropriated funds. The requested relief would constitute, in effect, a prohibited subsidy to intervenors. ^{14/} The NRC is also

^{12/} Order to Show Cause at 15.

^{13/} Petition at 6.

^{14/} See, e.g., Houston Light & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-625, 13 NRC 13, 14 (1981).

prohibited from attempting to recover such costs from Applicants via the imposition of a license fee. ^{15/}

Finally, petitioners would have the Commission "stay the progress and decision of the Region III Administrator"^{16/} regarding the selection of the independent reviewer until a ruling on its petition has been made, and, if favorable to them, until the third party auditor had been selected and its program operational. Such request, if granted, would introduce substantial delay in implementing the various measures required under the Order to Show Cause. The selection process for the selected "consulting firm" would likely be time consuming. Moreover, the process of educating this organization as to the status of the Zimmer Station and the conduct of its proposed functions which are redundant to those of the Staff would substantially delay all required actions. It would be entirely unfair to place this substantial burden of time and expense upon Applicants given this consent to the Order to Show Cause based solely upon the Commission directives contained therein.

^{15/} In this regard see Proposed Revision of License Fee Schedules, 10 C.F.R. Part 170, 47 Fed. Reg. 52454 (November 22, 1982) at 52455 wherein it was stated that "[o]nly NRC services providing special benefits were included in the computation of fees." The appointment of the consulting firm could hardly meet the requirements for inclusion within a license fee to be charged to these Applicants.

^{16/} Petition at 7.

Conclusion

For the reasons stated above, the petition filed by ZAC/ZACK and City of Mentor should be denied.

Respectfully submitted,
CONNER & WETTERHAHN, P.C.

Mark J. Wetterhahn / RW

Mark J. Wetterhahn
Counsel for the Applicants

December 6, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Zimmer Area Citizens/Zimmer Area Citizens of Kentucky 'Petition for the Appointment of a Consulting Firm Nominated by Intervenors to Review and Monitor the Third Party Audit" dated December 6, 1982, in the captioned matter, have been served upon the following by deposit in the United States mail this 6th day of December, 1982:

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Stephen F. Eilperin
Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Howard A. Wilber
Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Judge John H. Frye, III
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Frank F. Hooper
Chairman of Resource
Ecology Program
School of Natural
Resources
University of Michigan
Ann Arbor, MI 48104

Dr. M. Stanley Livingston
Administrative Judge
1005 Calle Largo
Sante Fe, NM 87501

Chairman, Atomic Safety
and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman, Atomic Safety
and Licensing Board
Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Charles A. Barth, Esq.
Counsel for the NRC Staff
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Deborah Faber Webb, Esq.
7967 Alexandria Pike
Alexandria, Kentucky 41001

Andrew B. Dennison, Esq.
Attorney at Law
200 Main Street
Batavia, Ohio 45103

Lynne Bernabei, Esq.
Government Accountability
Project/IPS
1901 Q Street, N.W.
Washington, D.C. 20009

John D. Woliver, Esq.
Clermont County
Community Council
Box 181
Batavia, Ohio 45103

Brian Cassidy, Esq.
Regional Counsel
Federal Emergency
Management Agency
Region I
John W. McCormick POCH
Boston, MA 02109

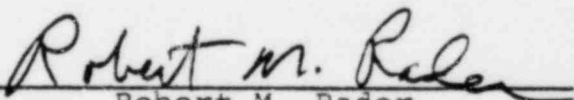
David K. Martin, Esq.
Assistant Attorney General
Acting Director
Division of
Environmental Law
Office of Attorney General
209 St. Clair Street
Frankfort, Kentucky 40601

George E. Pattison, Esq.
Prosecuting Attorney of
Clermont County, Ohio
462 Main Street
Batavia, Ohio 45103

William J. Moran, Esq.
Vice President and
General Counsel
The Cincinnati Gas &
Electric Company
P.O. Box 960
Cincinnati, Ohio 45201

Docketing and Service
Branch Office of the
Secretary U.S. Nuclear
Regulatory
Commission
Washington, D.C. 20555

Stephen H. Lewis, Esq.
U.S. Nuclear Regulatory
Commission
Region III
799 Roosevelt Road
Glen Ellyn, Illinois 60137


Robert M. Rader

cc: Robert F. Warnick
Director, Enforcement
and Investigation
NRC Region III
799 Roosevelt Road
Glen Ellyn, Illinois 60137