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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBefore the 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 MIAMI VALLEY POWER PROJECT'S  
SUPPLEMENTAL MEMORANDUM AND MOTION FOR NOTIFICATION  
OF FUTURE COMMUNICATIONS AND PROHIBITION OF  
FURTHER "IMPROPER EX PARTE CONTACTS"

On December 23, 1982, the Miami Valley Power Project ("MVPP") submitted a supplemental memorandum in support of a petition for reconsideration filed on August 20, 1982 to reopen the record in the captioned proceeding to consider eight new contentions related to quality assurance. The instant pleading was entitled Supplemental Memorandum In Support Of Miami Valley Power Project's Petition For Reconsideration Of Commission Order Of July 30, 1982, And Motion For Notification Of All Future Communications Regarding The Third-Party Program, As Well As A Prohibition Of Further Improper Ex Parte Contacts ("MVPP Supplemental Memorandum"). MVPP argues that a number of unrelated matters, including the Commission's Order to Show Cause and Order Immediately Suspending Construction (CLI-82-33 (November 12, 1982)) ("Order to Show Cause"), an allegation

that the Office of Inspection and Enforcement is unable to carry out adequately its functions at the Wm. H. Zimmer Nuclear Power Station ("Zimmer Station"), that the Commission's denial of another intervenor's motion regarding a proposed extra layer of review of NRC actions under the Order to Show Cause and a meeting held between The Cincinnati Gas & Electric Company, et al. ("Applicant" or "CG&E") and Region III to discuss implementation of the Order to Show Cause which is argued to be an impermissible ex parte contact, support its motion to reopen the operating license proceeding. Applicants oppose the motion as groundless. Applicants also submit that, under the standards established by the Nuclear Regulatory Commission ("NRC" or "Commission"), MVPP counsel has failed to live up to the standards of candor required of attorneys appearing before the Commission.

MVPP has failed to submit any authority for filing this supplement to its motion for reconsideration nor sought leave of the Commission to do so. Applicants submit that, under the NRC Rules of Practice it is a prohibited filing and should be stricken.<sup>1/</sup> When viewed in its totality, the

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<sup>1/</sup> It is well-settled that supplemental arguments beyond the pleadings permitted by the Rules are impermissible and should be stricken. Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 321-22 (1981); 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).

present petition represents merely a vehicle to bring to the Commission complaints that MVPP might have with regard to actions taken by the Staff in the Zimmer docket in the manner directed by the Commission or to reargue matters, both procedural and substantive, which have already been fully considered and disposed of. In any event, were the Commission to consider the petition and motion, they are without merit and should be denied.

Initially, MVPP relies upon the statements made by the Commission in its Order to Show Cause which supported its actions specified therein as a basis for further evidentiary hearing in the docket. This argument is specious. The remedies warranted by the factual situation before the Commission have already been set by it in Section IV of the Order to Show Cause. These steps, if properly implemented, have been determined by the Commission to be satisfactory to respond to the problems perceived by the NRC as described in the Order to Show Cause. The Commission has, inter alia, suspended safety-related construction and required a systematic reappraisal of construction management and required an overall plan for resumption of safety-related construction. The steps mandated by the Commission approach the relief previously requested by MVPP, but yet it continues to press for evidentiary hearings on matters which have been largely mooted by the recent Commission action, i.e., litigating the validity of the Commission's basis for imposing this Order.

In order to concentrate on the completion of the Zimmer Station, Applicants have chosen not to contest the Order to Show Cause and to comply with its provisions. <sup>2/</sup> The first steps in that effort have already been undertaken. In these circumstances, Applicants can see no responsible basis for litigating in an adjudicatory proceeding the historical basis for such Commission action. Moreover, inasmuch as the Commission has repeatedly stated that it wishes to be kept fully informed of the situation at Zimmer in order that it can provide guidance and direction when needed, the Commission's recent intervention demonstrates that it is fully aware of all developments and an adjudicatory hearing would serve no purpose.

Moreover, the Commission has held that where a licensee consents to enforcement action, a hearing is not only unnecessary but is contrary to Commission policy. Thus, in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980), 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. The Commission determined that it could lawfully preclude litigation of the matters resolved by the

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<sup>2/</sup> Applicants' Answer to Show Cause Order and Order Immediately Suspending Construction (December 7, 1982).

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, licensees would, to protect their own interests, call for a hearing on each enforcement order in 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. Id. at 441-42. (Emphasis supplied.)

The Commission should refuse to require Applicants to adjudicate at a hearing precisely those issues which it has resolved without a hearing by consent to the Show Cause Order.

MVPP raises the matter of welder qualification as providing a basis for its petition, citing as authority a July 17, 1982 newspaper article appearing in the Cincinnati Enquirer. Initially the quoted article was written July 17, 1982. As admitted by MVPP, this matter was considered by the Commission prior to formulating the relief contained in

its Order to Show Cause.<sup>3/</sup> Therefore, for the reasons discussed previously, it cannot be supportive of further hearings. Moreover, Region III is already proceeding with a full investigation of the matter.<sup>4/</sup> No useful purpose to be derived from considering this matter in an adjudicatory hearing has been shown.

The second assigned ground relates to the statements made by representatives of Region III to the Commission at an October 28, 1982 briefing which led to its November 12, 1982 Order. As discussed previously, the response of the Commission to these statements is set forth in its Order to Show Cause. An adjudicatory hearing as requested by MVPP would divert Staff resources from the responsibilities assigned by the Commission. The hiatus in construction activities should give the Staff an opportunity to "catch up" with its various on-going tasks at the Zimmer Station. Moreover, the Commission has pledged to augment the Staff's resources in order to assure compliance with its regulatory function.<sup>5/</sup> Thus, these statements of the Staff which are

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3/ MVPP Supplemental Memorandum at 3.

4/ In a letter dated October 27, 1982, the Region III Administrator directed CG&E to provide certain documentation concerning qualification of welders. On November 15, 1982, CG&E responded to this request stating that all relevant documentation had already been provided to Region III. CG&E attached to its letter a list of the relevant documents.

5/ Public Meeting, Status of Zimmer Investigation, October 28, 1982, Tr. at 98.

taken out of the context of subsequent Commission action cannot support the petition. No adjudicatory hearing is warranted based upon this matter.

MVPP next attempts to reargue the merits of a motion decided by the Commission in its Order dated December 23, 1982 (CLI-82-40). MVPP has already been heard by the Commission on this matter. MVPP submitted a brief in support of the relief requested. <sup>6/</sup> The Commission denied the motion and found the provisions for public participation instituted by Region III ensures consideration of public views and is consistent with Commission precedent. <sup>7/</sup> The Plan of Action sent by Region III to interested commentors, including the attorney of record for MVPP, and the conduct of a January 5, 1983 meeting to discuss comments received regarding the proposed selection of the independent entity to review CG&E's management of the Zimmer project totally refute MVPP's arguments.

The next reason cited for support for the requested relief is the conduct of a November 17, 1982 meeting between Applicants and Region III regarding the details of the implementation of the Commission's Order to Show Cause. The

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6/ Miami Valley Power Project's Response in Support of Zimmer Area Citizens-Zimmer Area Citizens of Kentucky and the City of Mentor Petition for Appointment of a Consultant to Monitor the Third Party Audit and Petition to Establish a Detailed Structure for Public Participation Throughout the Audit (November 30, 1982).

7/ Order of December 23, 1982 (CLI-82-40), slip op. at 3.

meeting was neither improper under the Commission's rules or the Administrative Procedure Act nor otherwise sinister. The NRC has never tried to keep the subject matter of the meeting secret from MVPP. In fact, the NRC Staff's minutes of the meeting are appended to the MVPP pleading.

MVPP alleges that this meeting which took place between the NRC Staff and representative of CG&E and the Bechtel Corporation's Ann Arbor Power Division ("AAPD") represents an illegal ex parte communication under both the Administrative Procedure Act and the Commission's Rules.<sup>8/</sup> In fact, the plain language of the Commission's rule dealing with ex parte communications, 10 C.F.R. §2.780, and the cases applying that rule establish that this meeting was not prohibited. Moreover, MVPP's quotation of the Commission's regulation omits significant portions of its text which results in a serious mischaracterization of the regulation. The Commission has held that this type of mischaracterization by attorneys will not be tolerated in its proceedings.

The Commission's regulation regarding ex parte communications, 10 C.F.R. §2.780, provides:

(a) Except as provided in paragraph (e) of this section, neither (1) Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their

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<sup>8/</sup> MVPP Supplemental Memorandum at p. 9.

quasi-judicial functions will request or entertain off the record except from each other, nor (2) any party to a proceeding for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit, or any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof, shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the NRC" shall include any application or matter which has been noticed for hearing or concerning which a hearing has been requested pursuant to this part.

As the plain language of this regulation establishes, the contacts prohibited by this rule are those between a party to a proceeding and "Commissioners, members of their immediate staffs, or other NRC officials who advise the Commissioners in the exercise of their quasi-judicial functions." The rule prohibits ex parte communications to members of the Commission and its employees involved in the decision-making process; it clearly does not prohibit a communication between the Applicants and members of the Commission's regulatory Staff.

The Commission has consistently held that communications involving the Staff are not within the scope

of the ex parte prohibition. For example, in Public Service Electric Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253 (1978), intervenors alleged that they had been prejudiced by ex parte communications between the Applicant and the Staff. In rejecting the intervenors' argument, the Board stated:

The short answer is, of course, that the communications intervenor decries are permissible. Litigants may confer and cooperate with one another; what is proscribed (in the absence of all interested parties) is their discussing matters in litigation with members of the Board. See 10 C.F.R. §2.780. Id. at 269 (emphasis in original).

Similarly, in an order issued October 5, 1978 in General Electric Company (Vallecitos Nuclear Center - General Electric Test Reactor), Dockets 50-70 and 70-754, the Atomic Safety and Licensing Board found that the Commission's rule against ex parte communications did not apply to meetings between representatives of the Licensee and the Staff. The Board stated:

As we understand it, 10 C.F.R. §2.780 prohibits ex parte contacts with the Commissioners, members of their immediate staffs, or other agency employees who advise the Commissioners in the exercise of their quasi-judicial functions. Nothing before us indicates that any of the communications complained of was with Commissioners, members of their immediate staffs, or with any persons who advise the Commissioners in the exercise of their quasi-judicial functions. It appears to us that all of these contacts have been between the Licensee and the Commission's Regulatory Staff (a party to this proceeding, and in no way

involved in advising the Commissioners "in the exercise of their quasi-judicial functions"). Slip op. at 1-2 (emphasis in original).

Further, in an order issued July 12, 1979 in Puget Sound Power & Light Company et al. (Skagit Nuclear Power Project, Units 1 and 2), Dockets 50-522 and 50-523, the Atomic Safety and Licensing Board found that certain meetings and conferences between the Staff and applicant did not constitute ex parte communications. As the Board stated:

Under the Commission's prohibition against ex parte communications at 10 CFR §2.780, a prohibited ex parte communication must relate to the exercise of a quasi-judicial function -- a function which does not belong to the Staff to whom the applicants are communicating. Slip op. at 2.

Thus, in order to fall within the scope of the Commission's rule prohibiting ex parte communications, the discussion must be between a party and a member of the Board, or a Commission official engaged in a quasi-judicial function. Here, the discussions involved the Applicant and members of the Commission's regulatory Staff. <sup>9/</sup> Thus,

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<sup>9/</sup> MVPP has suggested the Commission's Order of November 12, 1982 delegated certain authority to the Region III Administrator and that this delegation has given the Administrator the role of a "decisionmaker." MVPP Supplemental Memorandum at 13. It is well established that the duties and functions of the regulatory Staff and the decisionmakers are independent of each other. Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC

(Footnote <sup>9/</sup> continued on next page)

under the plain language of the regulation and the Commission's decisions interpreting it, the discussions between the Commission's Region III and representatives of CG&E and AAPD do not fall within the scope of the prohibition against ex parte communications.<sup>10/</sup>

MVPP has attempted to obscure this by existing a part of the relevant language of the regulation. MVPP's quotation omits a significant portion of the regulation.<sup>11/</sup> Specifically, it has deleted the portion of the regulation which states that it applies only to "Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions." The cases discussed above make clear that this is key language in determining the scope of the rule.

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9/ (Continued)

730, 737 (1975); New England Power Company, et al., (NEP Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978). These Staff functions are regulatory and not quasi-judicial in nature. Id. Further, the Applicants consent to the provisions of the order eliminated the necessity or possibility of any quasi-judicial proceeding. See pp. 4-5, supra. The rule against ex parte communications does not apply.

10/ The language of the Administrative Procedure Act provisions prohibiting ex parte communications also limits the scope of rule to "a member of the body comprising the agency, administrative law judge, or other employee who is or may be expected to be involved in the decisional process. . . ." 5 U.S.C. §557(d).

11/ MVPP Supplemental Memorandum at 11-12.

By deleting this portion of 10 C.F.R. §2.780(a), MVPP has attempted to create the erroneous impression that the rule applies to all staff communications. The Commission has indicated that it will not tolerate such attempts to mischaracterize regulations by selective quotation. In Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391 (1977), a party quoted a portion of a Commission regulation and substituted asterisks for crucial words in the middle of the quotation. In chastising that party, the Board stated:

By reason of this deletion, the entirely incorrect impression was conveyed that the terms of the section are consistent with TVA's argument . . . .

An administrative adjudicatory body, no less than a court, has every right to expect total abstinence from such practices upon the part of those who appear before it. Put another way, we should be free to assume that, in a brief or other submission, nothing will be excised from a quoted passage unless its lack of relevance to the question under discussion is beyond substantial dispute. . . .

The line between zealous advocacy and overreaching harassment is a narrow one. TVA's counsel have plainly reached that line in their submission now before us. They should take care that it not be overstepped in the future. Id. at 1395-96. (Footnotes omitted, emphasis supplied)

MVPP has likewise attempted to create the entirely incorrect impression that its allegation of ex parte

communications is supported by the Commission's regulation by deleting significant language contained in the regulation. The Commission, of course, is fully aware of the language of the Commission's Rules of Practice and could not be led to an erroneous conclusion by such a transparent ploy. This, however, does not excuse MVPP's behavior. <sup>12/</sup>

The mere fact that representatives of the Bechtel Power Corporation attended a portion of the meeting in order that they might directly discuss implementation of the order is certainly not improper in any way nor grounds for the relief requested.<sup>13/</sup> MVPP has taken parts of the discussions completely out of context. MVPP implies that a part of the discussion dealing with Bechtel's relationship with the utility is improper under the Order to Show Cause. A review of that Order would quickly indicate that once the independent reviewer had been chosen and its recommendations

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<sup>12/</sup> In the Hartsville decision, the Board characterized Applicant's submission as "an artless attempt to conceal pertinent matter" and noted that the Board was fully familiar with the Commission's Rules of Practice. The fact that there was no possibility that this omission would go undetected, the Board stated, does not, however, excuse the omission. 5 NRC at 1396, n.6.

<sup>13/</sup> The fact that Region III requested Bechtel to address its performance at another project as part of its presentation should not be startling. In fact, it is surprising that the attorneys for MVPP would find this other than a requirement in that they chose to comment on this aspect of Bechtel's qualifications to assume the tasks under the Order to Show Cause. (See letter dated December 15, 1982 to Mr. Keppler, Regional Administrator, Region III from GAP on behalf of MVPP at pp. 11-29.)

submitted and acted upon, there is no need for total separation between it and Applicants. This is particularly true if Bechtel becomes the experienced outside organization chosen to assist CG&E in the completion of the facility. <sup>14/</sup> Applicants would note that MVPP's attorneys have already raised this very same issue with Region III. The letter from Region III, a copy of which is attached, discusses the charges made in greater detail and places the matter in perspective. Again, this appears to be an attempt to have the Commission consider matters it has delegated to its Staff.

Conclusion

For the foregoing reasons, the requested relief should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Mark J. Wetterhahn  
Counsel for Applicants

January 7, 1982

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<sup>14/</sup> MVPP also alleges that an invitation for Bechtel to communicate directly with the NRC violates a "key provision" of the Order to Show Cause which requires that all exchange of correspondence between it and CG&E be sent to the NRC. By its own terms, there is no prohibition against contacts with the NRC. Neither is there any warrant for MVPP's charges of "collusion" by Region III in an attempt to circumvent the Commission's will. Such scandalous charges made without a semblance of foundation should be stricken.

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
REGION III  
799 ROOSEVELT ROAD  
GLEN ELLYN, ILLINOIS 60137

DEC 30 1982

Docket No. 50-358

Government Accountability Project  
ATTN: Thomas Devine, Esq.  
Institute for Policy Studies  
1901 Que Street, N.W.  
Washington, D.C. 20009

Dear Mr. Devine:

This is in response to your letter to me of December 21, 1982 regarding the November 24, 1982 Memorandum for Region III Files prepared by Stephen H. Lewis, Region III Counsel, on the November 17, 1982 meetings between Region III and Cincinnati Gas and Electric Company (CG&E) and among Region III, CG&E and the Ann Arbor Power Division of the Bechtel Power Corporation (Bechtel). Your letter requests an explanation of how you were "so severely misled" by Mr. A. Bert Davis, Deputy Regional Administrator, about the matters that would be covered in the November 17 meeting.

Mr. Davis had advised you in telephone conversations that the purpose of the meeting with CG&E was to explain the Commission's November 12, 1982 order and to provide technical clarifications, as necessary. The NRC staff felt that such a meeting was important in order to assure that CG&E fully understood the significance of the order, the rationale behind it and the matters that should be addressed in its plans for implementing the order.

An afternoon meeting among CG&E, Bechtel, and Region III was also scheduled, since CG&E had advised the Commission by letter dated November 10, 1982 that it had arranged for Bechtel to "become a joint manager with CG&E (licensee)

of the project until its successful completion." In that letter, CG&E had stated that Bechtel would make "an initial assessment of the project which will take approximately three weeks, during which Bechtel senior people will assess the project's problems and design an approach and staffing plan for resolving the problem and completing the project." The purpose of Bechtel's inclusion in the afternoon meeting was for the staff to gain an understanding of Bechtel's proposed role and how that role fit into the requirements of the order and to impress upon Bechtel and CG&E the "competence" and "independence" standards which Bechtel would have to meet in order to be approved as an independent reviewer of CG&E's management of Zimmer under Section IV.B(1) of the Commission order. The staff specifically wanted Bechtel and CG&E to understand that their submittal would have to address whether deficiencies which the NRC staff has identified with Bechtel's performance at Midland argue against a finding of their capability to assess effectively CG&E's management.

I believe that Mr. Davis' statements as to the purpose and scope of the meeting were consistent with what was covered at the meeting, as reflected in the Memorandum and the above discussion. I cannot, therefore, agree with your assertion that you were misled by Mr. Davis as to the purpose or scope of the November 17, 1982 meeting.

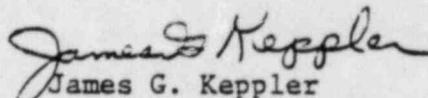
You also question whether Bechtel's statement that

If...[Bechtel] is retained to assist CG&E in management of construction of the facility, ... [it] would normally expect to discuss its findings with CG&E before bringing them to NRC's attention. (Memorandum at 4) indicated an inconsistency with the above-cited provision of the Commission's order. The staff understood Bechtel to be referring to its role as "joint manager" of the project, rather than its role as independent reviewer of CG&E's management, and did not offer any comment at the meeting in response to Bechtel's statement. In any event, under the Commission's order any recommendations or other correspondence between the independent management reviewer and CG&E would have to be provided simultaneously to the NRC staff. We view the Order to be applicable to written and not oral exchanges between CG&E and the independent reviewer(s).

In summary, I disagree with your assertion or implication that there was anything improper about the November 17, 1982 meeting. Although it is apparently GAP's opinion that the meeting should have been open to the public, I believe that circumstances will justify at certain times, and did justify in this case, the holding of closed enforcement meetings between the NRC, staff and a licensee.

The NRC staff does plan to offer opportunity for public comment on the critical CG&E submittals under the November 12, 1982 order and to entertain questions from the public following meetings among CG&E, the independent reviewer(s), and the staff (see Zimmer Plan of Action, attached to my December 22, 1982 letter to you and others). I believe that these procedures will offer adequate opportunity for public comment on CG&E's submittals.

Sincerely,

  
James G. Keppler  
Regional Administrator

cc w/ltr dtd 12/21/82:

E. A. Borgmann, Senior Vice  
President, Engineering Services  
and Electric Production  
J. R. Schott, Plant Superintendent  
J. D. Flynn, Manager, Licensing  
Environmental Affairs Department  
DMB/Document Control Desk (RIDS)  
Resident Inspector, RIII  
Harold W. Kohn, Power Siting  
Commission  
Citizens Against a Radioactive  
Environment  
Helen W. Evans, State of Ohio  
Robert M. Quillin, Ohio  
Department of Health  
Thomas Applegate  
Dave Martin, Office of  
Attorney General  
Mark Wetterhahn, Esq.  
Jerome A. Vennemann, Esq.  
Gretchen Hummel, Ohio  
Consumers' Counsel  
James R. Williams, State  
Liaison Officer, Ohio  
Disaster Services Agency

JAN 3 1983

**GOVERNMENT ACCOUNTABILITY PROJECT**

Institute for Policy Studies

1901 Que Street, N.W., Washington, D.C. 20009

(202) 234-9382

December 21, 1982

Mr. James G. Keppler  
Regional Administrator  
United States Nuclear  
Regulatory Commission  
Region III  
799 Roosevelt Road  
Glen Ellyn, Illinois 60137

Dear Mr. Keppler:

I am writing to seek your explanation for the contents of the enclosed November 24, 1982 memorandum from Stephen H. Lewis for the Region III files. The memorandum summarizes a November 17, 1982 meeting between Region III, Cincinnati Gas and Electric ("CG&E") and the Bechtel Ann Arbor Power Division ("AAPD"). The contents of this memorandum deeply disturbed me, in light of previous conversations with Mr. Davis of your staff. It raised serious questions in my mind whether your office has been communicating in good faith with the Government Accountability Project ("GAP").

The background for my concerns are as follows: On November 15, 1982 I learned of an upcoming meeting between the NRC staff and CG&E, to discuss the Commission's November 12 shutdown order. I immediately contacted your office to seek permission for the public to observe this meeting. As you recall, previously on October 19, you had permitted the general public to attend an enforcement meeting in order to honor the Commission's pledge for informed public oversight in the absence of reopened licensing hearings.

After first being told you were in a meeting, I called again and was informed that you had just left town but would call when you returned to Chicago. When I persisted, Mr. Davis took the call. He denied my request for public attendance but promised to consult with you personally when I protested. Mr. Davis emphasized that

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contrary to GAP's previous suspicions, this was not a "backroom meeting" to make any "secret deals" or arrangements of which the public should be informed. The next day Mr. Davis reaffirmed your decision to exclude the public from the meeting. He stated that the meeting had to be closed for you to frankly and without inhibition explain the Commission's November 12 shutdown of Zimmer. He added that the meeting would provide technical clarification of the terms in the Commission's November 12 Order.

I took Mr. Davis at his word and defended your decision as reasonable to media and other public representatives who were concerned. After receiving the November 24 memorandum it is clear that I was mistaken. The memorandum states that representative of Bechtel's AAPD attended the afternoon portion of the November meeting. According to the memorandum, at the meeting Region III advised, inter alia, that in any proposal for AAPD to assume third-party oversight duties at Zimmer, CG&E should explain AAPD's own management capabilities in light of its performance at the Midland station. (In less than two weeks 1,000 Bechtel AAPD employees would be laid off at Midland due to a QA breakdown strikingly similar to the disaster CG&E wanted it to audit at Zimmer.) Further, the NRC advised AAPD that if selected it should feel free to discuss issues directly with the NRC without going through CG&E. AAPD responded that if selected to help CG&E manage construction of Zimmer, the third party normally would bring its findings first to the utility. The memorandum does not disclose any NRC objection to AAPD's intention. (November 24 Memorandum, at 3-4.)

In our opinion, this memorandum indicates that Mr. Davis' reassurances were inaccurate in the end. In effect, the NRC staff counseled CG&E on how to obtain approval of Bechtel's competence before the utility even submitted the choice. It is hard to imagine Region III rejecting CG&E's proposal if it is tailor-made to the specifics of your suggestions.

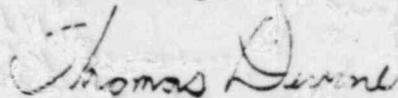
Further, the Region III position that AAPD should "feel free" to communicate with the NRC before CG&E, either relaxes the terms of the Commission's November 12 Order or at best outlines to CG&E a way to circumvent a key provision. Section IV.B.(1)(a) of the November 12 Order requires that "a copy of 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."

December 21, 1982

In our opinion, there is little question that "correspondence" covers oral discussion as well as written communication. Even if Region III's advice were linguistically correct, however, the NRC suggestion-- and silence when Bechtel tentatively declined the advice-- infers an acceptable method to circumvent the intent of the November 12 Order by transforming the "independent" review to a cooperative partnership. (Bechtel's announcement that it would reject the NRC's advice if it assumed construction responsibilities also underscores the conflict-of-interest concerns we raised in our December 15 comments, if the same organization manages both quality verification and subsequent rework/construction.)

Mr. Keppler, it appears that Region III is participating in a process that will introduce a new definition to the English language--one where "independence" is synonymous with "collusion." It is understandable why the process is being conducted in secret. We at GAP implore you to open up the third-party reform to the public that must live with its consequences. Further, for GAP to take future Region III reassurances at face value, it is essential that you explain how I was so severely misled if your office dealt with me in good faith.

Sincerely,



Thomas Devine  
Legal Director



UNITED STATES  
 NUCLEAR REGULATORY COMMISSION  
 REGION III  
 752 ROOSEVELT ROAD  
 GLEN ELLYN, ILLINOIS 60137

November 24, 1982

MEMORANDUM FOR: Region III Files

FROM: Stephen H. Lewis, Regional Counsel, Region III

SUBJECT: NOVEMBER 17, 1982 MEETING OF REGION III WITH CINCINNATI GAS & ELECTRIC AND BECHTEL REGARDING CLI-82-33, "ORDER TO SHOW CAUSE AND ORDER IMMEDIATELY SUSPENDING CONSTRUCTION"

Following the Commission's November 12, 1982 order suspending safety-related construction at the Zimmer plant and directing Cincinnati Gas & Electric Company (CG&E) to undertake certain actions prior to NRC consideration of resumption of safety-related construction, meetings were held on November 17, 1982 in Cincinnati between NRC Region III and CG&E and among Region III, CG&E and the Bechtel Ann Arbor Power Division (AAPD). The purposes of the meetings were to explain the order and discuss CG&E's planning for implementation. The Region met with CG&E alone in the morning and with CG&E and AAPD together in the afternoon. Participants in the morning meeting were:

CG&E

William Dickhoner, President  
 Earl Borgmann, Vice President  
 William Moran, General Counsel  
 Mark Wetterhahn, Outside Counsel

NRC, Region III

James Keppler, Regional Administrator  
 Robert Warnick, Director, Office of Special Cases  
 Dorwin Hunter, Section Leader, Zimmer Section, Office of Special Cases  
 Stephen Lewis, Regional Counsel

Joining the above participants for the afternoon meeting were:

Howard Wahl, Vice President and General Manager, AAPD  
 Bill Henry, Vice President and Deputy General Manager, AAPD  
 George Jones, proposed Project Manager for AAPD work at Zimmer

Mr. Keppler opened the meeting with a discussion of the considerations which led to the issuance of the Commission order. He noted that the Commission and staff were particularly concerned about rework growing out of the Quality Confirmation Program (QCP) being undertaken prior to completion of all of the relevant QCP Tasks.

Mr. Dickhoner described steps that had been undertaken by CG&E, both before and after the order, with respect to Zimmer construction. He stated that personnel at the site had been further cut back, and that there were now approximately 700 people at the site, of whom 200 were craftspeople. The QCP is, however, continuing. He advised that the CG&E Board of Directors would be meeting on November 18, 1982. He complained that CG&E has not always been provided copies of allegations sent by GAP to the NRC.

NRC participants stated that CG&E would have to receive the Regional Administrator's approval of the independent entity selected to conduct the review of CG&E's management of the Zimmer project (Paragraph IV.B(1) of the order). CG&E advised NRC that prior to the order it had already arranged for AAPD to conduct a review of CG&E's management of the project and that AAPD had commenced its review. NRC advised CG&E that we would not prevent AAPD from continuing with this review, but that CG&E was proceeding at its own risk until the Regional Administrator has approved the selection of AAPD. That approval determination would be based upon a written submission from CG&E to the Regional Administrator setting forth: (1) AAPD's capabilities to perform the management review, (2) whether AAPD (and Bechtel, generally) has the necessary independence of CG&E (e.g., whether Bechtel has performed work, and if so of what type, for CG&E), and (3) the nature of the review that AAPD would undertake under Paragraph IV.B(1).

Paragraph IV.B(2) of the order was discussed. NRC emphasized that the quality verification plan could be submitted only after the Regional Administrator had approved the CG&E recommendations regarding management of the Zimmer project (Paragraph IV.B(1)(b)). NRC clarified that we would expect CG&E to use an outside entity (e.g., AAPD) in preparing the plan for verification of plant quality. That outside entity should be free to conclude that the QCP is insufficient to verify the quality of construction of the plant. CG&E indicated that it was their present intention to use the services of AAPD in the preparation of the comprehensive quality verification plan (and in the construction management of the facility). The staff stated that the order did not preclude the use of the same outside party to perform the management review and to assist in the preparation of the quality verification plan. CG&E also inquired whether the order would preclude the use of AAPD as the entity performing the audit to verify the quality of construction (Paragraph IV.B(2)(a)). The NRC stated that the order would not preclude the use of AAPD as the auditor, inasmuch as AAPD "did not perform the activities being audited."

The NRC agreed that the review under paragraph IV.B(1) was to be focused on management of the Zimmer project including its QA program and quality verification program, and was not intended to be a review of the content of the QCP. The review of the content of the QCP was to be part of the preparation of the comprehensive plan under Paragraph IV.B(2)(a).

The NRC advised CG&E that the quality verification audit under Paragraph IV.B(2)(a) was not to be confused with the independent verification of design adequacy (typically conducted by reviewing a "vertical slice" of the plant), which would be required of CG&E at some later date prior to any issuance of an operating license for the facility.

Paragraph IV.B(3) of the order was discussed. NRC stated that if CG&E sought to have the order "relaxed" to permit the resumption of certain safety-related construction activities, it would have to demonstrate to the Regional Administrator that any work sought to be permitted: (1) is not related to any quality verification concerns which have been raised and (2) will include adequate controls.

The NRC stated that if CG&E should determine that the facility will not be able to meet any applicable codes and standards, it should proceed promptly to propose to the NRC alternative engineering bases for demonstrating acceptability. Any consideration of deviations from the ASME Code would have to involve the cognizant Code Committees and the National Board of Boiler and Pressure Vessel Inspectors.

Mr. Dickhoner requested that the NRC be prepared to act promptly on any request CG&E might file for permission to proceed with identified construction activities. Mr. Keppler indicated that NRC would give high priority to any such request and would seek to act on it as promptly as possible.

CG&E asked for an early meeting with Region III on the September 24, 1982, "Demand for Information" issued under 10 CFR §50.54(f) with respect to "Miami Valley Power Project's Petition to Suspend Construction of the Zimmer Station," dated August 20, 1982. The purpose of the meeting would be to clarify the "Demand." [The requested meeting was held on November 22, 1982.]

CG&E advised the NRC that it will shortly send the NRC a letter advising of certain activities which it believes are not proscribed by the order and asking for the Regional Administrator's concurrence that CG&E may continue with those activities. [A letter was sent on November 18, 1982 and a revised letter on November 22, 1982.]

In the afternoon, AAPD joined CG&E and the NRC for discussions. The focus of the meeting was on the following areas:

1. CG&E should be sensitive to NRC's concerns with AAPD's performance at Midland and should reflect in the document submitted with respect to approval of AAPD the capabilities of AAPD to assess effectively CG&E's management.

November 24, 1982

2. The NRC advised AAPD that, if selected to conduct the review of CG&E management, it should feel free to discuss matters with respect to this review directly with NRC, without having to go through CG&E.
3. The NRC emphasized that AAPD, if selected, should consult with the Authorized Nuclear Inspector, the National Board of Boiler and Pressure Vessel Inspectors and other entities involved in assessing the adequacy of construction of the Zimmer facility.

AAPD emphasized to the NRC that it would strive for open communication among itself, NRC, and CG&E. If AAPD is retained to assist CG&E in management of construction of the facility, AAPD would normally expect to discuss its findings with CG&E before bringing them to NRC's attention.

AAPD hopes to complete its initial assessment of CG&E's management and to make recommendations to CG&E within three weeks. It is already on site and has begun its review.

Mr. Keppler stated that the NRC intends to hold meetings that would be open to the public at appropriate stages in the implementation of the order.

*Stephen H. Lewis*  
Stephen H. Lewis  
Regional Counsel

cc: W. Dircks, EDO  
H. Danton, NRR  
R. DeYoung, IE  
G. Cunningham, ELD

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 Miami Valley Power Project's Supplemental Memorandum and Motion for Notification of Future Communications and Prohibition of Further 'Improper Ex Parte Contacts " dated January 7, 1983, in the captioned matter, have been served upon the following by deposit in the United States mail this 7th day of January, 1983:

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

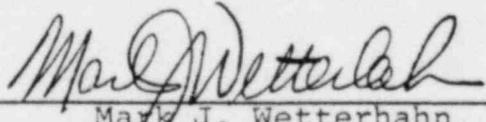
David K. Martin, Esq.  
Assistant Attorney General  
Acting Director  
Division of  
Environmental Law  
Office of Attorney General  
209 St. Clair Street  
Frankfort, Kentucky 40601

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

  
Mark J. Wetterhahn

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