UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety Licensing Board

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

APPLICANTS' ANSWER TO THE LATE-FILED PETITION FOR LEAVE TO INTERVENE OF DOUG GILLMAN

Introduction

By letter dated March 4, 1983, the Nuclear Regulatory Commission ("NRC") Staff transmitted to the presiding Atomic Safety and Licensing Appeal Board ("Appeal Board") and Atomic Safety and Licensing Board ("Licensing Board") a copy of an undated filing by Doug Gillman proposing five new contentions. Applicants, The Cincinnati Gas & Electric Company, et al., submit that, even giving due consideration to the fact that Mr. Gillman is not an attorney, the petition for leave to intervene should be summarily rejected.1/

1/ In Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), the Appeal Board held that while a pro se petitioner should not be held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere, a totally deficient

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While liberally laced with technical phraseology apparently gleaned from a number of technical papers, the proposed contentions lack discernible meaning and coherency. Furthermore, Mr. Gillman fails to make a coherent presentation regarding the interest requirements of the Commission's regulations governing intervention, 10 C.F.R. §2.714, the tests for admission of late-filed contentions or reopening of the record.[2/]

I. Jurisdiction Over The Petition Lies With The Appeal Board.

In its letter transmitting the petition to the Licensing and Appeal Boards, the Staff expressed some doubt as to which tribunal has jurisdiction over the matter, citing Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC ___ (October 27, 1982). On March 10, 1983, without having heard the views of the Applicants,[3/] the Licensing Board issued a Memorandum and Order in which it determined that it had jurisdiction to

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pleading may not be justified simply on the basis that it was prepared by a layman.

2/ On March 24, 1983, Applicants received from NRC Staff Counsel a letter from Mr. Gillman which claimed to be an addendum to the five contentions which he had proffered. While he purported to address deficiencies noted by the Staff, our review of this document indicates it adds nothing of substance to the original filing.

3/ Under the Commission's rules, the time for response to Mr. Gillman's filing had not expired when the Board's Memorandum and Order was issued.

consider the admissibility of Mr. Gillman's contentions. Applicants submit that the Licensing Board's disposition of the jurisdiction question was incorrect and ask it to reconsider.[4/]

Applicants submit that when the Licensing Board issued its Initial Decision on June 21, 1983 on all issues pending before it, and when an appeal was taken, the Board lost jurisdiction to consider any matter.[5/] The Board analysis hinged upon the fact that because none of the five contentions appear to be related to any matter pending before the Appeal Board, the holding in Three Mile Island was distinguishable. Our review of ALAB-699 has failed to reveal any indication that the fact that the request to reopen possibly related to a matter which was pending before it played any part in the Appeal Board's analysis. The critical factor there, as here, is that the Board had disposed of all issues before it.

In ALAB-699, after reviewing the applicable regulations the Appeal Board found that "a licensing board is empowered

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4/ Applicants also wish to place their views on the record so that it is beyond question that the point is preserved for appeal should any of the contentions be granted.

5/ This is clearly distinguishable from the situation where a licensing board is issuing a series of partial initial decisions in which case it has plenary jurisdiction except over those matters under review by the Appeal Board.

to reopen a proceeding at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or an appeal board can exercise its right to review the record."[6/] The Appeal Board noted that its decisions were consistent with this view. Thus, inasmuch as exceptions have been filed, briefed and argued, only the Appeal Board has jurisdiction to consider the new contentions.

The Licensing Board's familiarity with the record of the proceeding and its assertion that it is in the best position to judge this matter is totally irrelevant to the question of jurisdiction.[7/] As pointed out by the Appeal Board in ALAB-699, it has the option of being the decision-making tribunal should it determine that further proceedings are necessary.[8/] Thus, contrary to the Board's assumption, it would not automatically consider Mr. Gillman's contentions further even if they were to be

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6/ Three Mile Island, ALAB-699, supra, slip op. at 4-5. The Applicants' appeal encompassed the matters related to emergency planning for which the Board had retained jurisdiction. Thus, until the Appeal Board has acted, the Board can take no action regarding these matters.

7/ As was the case in Three Mile Island, the Appeal Board familiarizes itself with the adequacy of the entire record as part of its review of the exceptions and the exercise of its sua sponte jurisdiction.

8/ Three Mile Island, ALAB-699, supra, slip op. at 6.

admitted. Accordingly, the Licensing Board does not have jurisdiction to decide the admissibility of these contentions.

II. The Petition Fails to Meet the Standards of 10 C.F.R. §2.714 for Consideration of Contentions in a Licensing Proceeding.

A. Standing

Petitioner has failed to comply with the requirements of 10 C.F.R. §2.714(a)(2) to set forth with particularity his interest in the proceeding and how that interest may be affected, and should be denied intervention on that basis. He has neither shown that the action being challenged could cause him injury in fact, nor that any such interest is arguably within the zone of interests protected by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011, et seq. Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In this regard, the only information provided is a mailing address.[9/]

B. Specificity and Bases

Each of the five contentions is completely lacking in specificity and bases. In fact, they are incomprehensible, and reflect no knowledge or understanding of the disciplines

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9/ Petitioner should likewise be denied discretionary intervention because he has not shown he could make any contribution to the proceeding. See Pebble Springs, supra, 4 NRC at 616-17.

to which they purportedly relate. The contentions lack any reference to alleged deficiencies in the Final Safety Analysis Report or NRC Staff Safety Evaluation, as supplemented, on file in this docket or, for that matter, to any deficiency in meeting any of the Commission's regulations.[10/] Aside from a general reference to nine papers published by the University of Cincinnati, no specific basis is denoted.

It is well settled that in order to be admitted into a licensing proceeding, a contention must set forth the matters to be litigated with reasonable specificity and must provide a factual basis for the contention.[11/] It is also

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10/ To the extent that the contentions may be construed to require additional safety features not required by the provisions of 10 C.F.R. Part 50, they constitute a prohibited challenge to the Commission's regulations. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-456, 7 NRC 63, 67 n.3 (1978); Northern States Power Company (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974).

11/ See 10 C.F.R. §2.714; Cleveland Electric Illuminating Company (Perry, Units 1 & 2), Docket Nos. 50-440 OL and 50-441 OL, "Special Prehearing Conference Memorandum and Order" (July 28, 1981) (slip op. at 11-14); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), Docket No. 50-387, "Memorandum and Order on Pending Motions and Requests" (July 7, 1981) (slip op. at 4); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-77-48, 6 NRC 249, 250 (1977); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209 (1976).

well established that general concerns about the nuclear industry or mere recitations of generic safety issues are not sufficiently specific to meet these criteria.[12/] Broad challenges which merely question the sufficiency of an applicant's program as stated in the application lack the requisite specificity.[13/]

Applicants do not wish to dignify this pleading by addressing each contention in detail. Suffice it to say, while Contention 1 is apparently related to the diesel generator "transmission gears," no specific deficiency is noted.[14/] Contention 2, which is apparently related to facility design, likewise states no deficiency. Contentions 3, 4 and 5 are, as a cursory review would indicate, likewise

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12/ Illinois Power Company (Clinton Power Station, Units 1 and 2), Docket Nos. 50-461-OL and 50-462-OL, "Memorandum and Order" (May 29, 1981) (slip op. at 6, 11-14); Browns Ferry, supra, 3 NRC at 212.

13/ Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), Docket Nos. STN 50-556CP and 50-557CP, "Memorandum and Order (Rejecting Intervenors' Proposed Hydrogen Control Contention)" (January 11, 1982) (slip op. at 3).

14/ The diesel generators for the Zimmer Station are direct coupled and contain no "transmission gears."

simply incomprehensible.[15/] Thus, the petition should be dismissed for want of an admissible contention.

C. Lateness

A party petitioning for the admission of late-filed contentions must demonstrate that, on balance, the five factors set out in 10 C.F.R. §2.714(a)(1)(i-v) favor late admission to the proceeding.[16/] Petitioner has totally failed to show any good cause for the extreme lateness of his petition. The notice of opportunity for hearing was issued in 1975, some eight years prior to the filing date. Mr. Gillman is no stranger to this proceeding; he assisted an intervenor and interrogated witnesses during the evidentiary hearing in 1979, some four years ago (see Tr.

15/ This situation is readily distinguishable from that in Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980), where the Appeal Board reversed a licensing board's denial of an intervention petition stating that all that was required of petitioner "was to state his reasons (i.e., the basis for his contention . . . ." Id. at 548. However, the Appeal Board was quick to point out that although drafted by a layman, "the intended thrust of [the] contention . . . is not difficult to perceive." Id. at 546. Here, in contrast, the five contentions are incomprehensible.

16/ Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC ___ (December 8, 1982) (slip op. at 9); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 885-86 (1981), aff'd sub. nom, Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C. Cir. 1981); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

3397, et seq.). While impossible to discern the thrust of the contention, it is apparent that each of these issues could have been raised earlier. The diesel generator, the suppression pool, boiling water transport processes, and the ion exchange resin system are all discussed in the application for an operating license which was filed in 1975 and in the Staff's evaluations of the facility which were issued beginning in 1979.

In failing to show good cause for late admission as required by §2.714(a)(1)(i), the burden of justifying intervention on the basis of the remaining factors is considered even greater.[17/] The second factor in the balancing test, "other means whereby the petitioner's interest will be protected," is of relatively minor importance in the overall balance.[18/] Petitioner's lack of diligence in protecting his own interest precludes giving weight to this factor, as well as the fourth factor relating to the extent to which the petitioner's interest will be represented by existing parties.[19/]

17/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975), cited with approval in, Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707 (December 21, 1982) (slip op. at 8).

18/ Enrico Fermi, supra, ALAB-707 (slip op. at 11-12).

19/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513-14 (1982).

Petitioner has likewise failed to demonstrate that his participation will "make a significant contribution to the development of a sound record on that issue."[20/] Inasmuch as the record is closed, late contentions will serve only to delay the proceeding and broaden the issues without purpose or benefit. The balance against late admission is even stronger where, as here, the evidentiary hearing has already been held.[21/] Weighing all factors, it is clear that these late-filed contentions should be rejected.

D. Reopening the Record

Inasmuch as the record in this proceeding is closed, petitioner must also satisfy the "heavy burden" for reopening the record established by appeal board precedent.[22/] The controlling legal standard has not been met in that the motion is untimely, fails to address significant safety or environmental issues and has not established that a different result would have been reached had the material been submitted initially.[23/] Furthermore, it has been held

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20/ Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Unit 1), ALAB-526, 9 NRC 122, 124 (1979).

21/ Allens Creek, supra, 15 NRC at 511.

22/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976).

23/ Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978), cited with approval in, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and

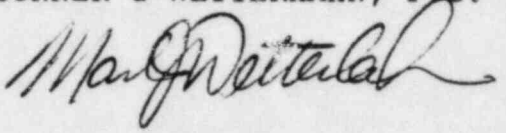
that the heavy burden imposed upon the proponent of a motion to reopen is significantly greater where, as here, the lateness is unjustified.[24/]

Conclusion

For the foregoing reasons, the late-filed petition of Doug Gillman should be denied.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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March 24, 1983

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2), CLI-81-5, 13 NRC 361, 362-63 (1981).

24/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 21 (1978).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to the Late-Filed Petition for Leave to Intervene of Doug Gillman" dated March 24, 1983, in the captioned matter, have been served upon the following by deposit in the United States mail this 24th day of March, 1983:

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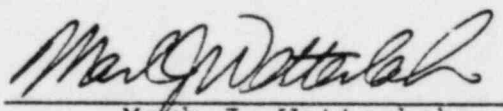

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