

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
CINCINNATI GAS AND ELECTRIC)
COMPANY, ET AL.)
(Wm. H. Zimmer Nuclear Power)
Station, Unit 1))

Docket No. 50-358



MVPP'S MOTION TO ATOMIC SAFETY AND LICENSING APPEAL BOARD
TO REOPEN THE RECORD FOR ADMISSION OF EIGHT CONTENTIONS
ON QUALITY ASSURANCE AND CHARACTER AND COMPETENCE

I. INTRODUCTION.

On June 3, 1983 the Miami Valley Power Project (MVPP) filed with the Atomic Safety and Licensing Board MVPP'S MOTION TO REOPEN THE RECORD FOR ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND COMPETENCE. In response to opposition from the applicants and the NRC staff, MVPP has today filed, with Licensing Board approval, its REPLY BRIEF BY MIAMI VALLEY POWER PROJECT IN SUPPORT OF MOTION TO REOPEN THE RECORD FOR ADMISSION OF EIGHT CONTENTIONS ON QUALITY ASSURANCE AND CHARACTER AND COMPETENCE; AND MOTION TO COMPEL DISCOVERY ON THOSE CONTENTIONS. Both of these documents are attached hereto and incorporated by reference.

In their briefs in opposition to MVPP's June 3, 1983 motion, staff and applicants claimed, inter alia, that the Licensing Board was without jurisdiction to reopen the record. MVPP believes that the law is clear that the Licensing Board has jurisdiction to reopen the record as long as the motion is filed before the case becomes final. If, however, the Licensing Board were to disagree, its ruling might not come before such

time as finality had attached to the case, thereby foreclosing a motion to the Appeal Board at that time. This case could become final on July 13, 1983, unless the Commission acts to extend the time during which it can act to review ALAB-727, this Appeal Board's May 2, 1983 opinion in the above-entitled case.

Therefore, as a protective measure, to retain jurisdiction before this Appeal Board in the event that the Licensing Board decides it does not have jurisdiction, MVPP hereby respectfully moves this Atomic Safety and Licensing Appeal Board to reopen the record in this case to admit the eight important contentions described in the attached June 3, 1983 motion to the Licensing Board. The Appeal Board may wish to defer action on this motion until the Licensing Board has ruled on the June 3, 1983 motion before it.

II. DISCUSSION.

Most of the basis for the instant motion is found in the June 3 motion, and the July 12 reply brief, which are incorporated herein. The description of MVPP's eight contentions is contained in the incorporated documents, as is a discussion of the new facts which support the reopening of the record to admit these contentions, and a discussion of why MVPP's request fully meets the criteria for reopening the record and the separate criteria for admitting late contentions. MVPP commends the discussion in the two incorporated documents to the Appeal Board's attention and careful consideration.

The sole aspect of this motion which needs to be specifically addressed in this brief is the jurisdiction of the Appeal Board to reopen the record to admit these contentions.

As is discussed more fully in MVPP's Reply Brief filed with the

Licensing Board, the jurisdiction of adjudicatory boards turns upon the question of whether the case is final. Therefore, the threshold question which this Appeal Board must address is whether this case is final.

It is clear that it is not yet final, nor is any part of it yet final. Although only certain of the issues which the Licensing Board addressed in its Initial Decision were appealed to the Appeal Board, the Appeal Board acted sua sponte to review the entire record. Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC ____, ____, n. 24, slip op. at 28 n. 24 (May 2, 1983). Similarly, the Commission itself "will ordinarily consider the whole record on review" 10 CFR § 2.770(a). By Order dated June 13, 1983, the Commission extended until July 13, 1983 the time during which it could act to review ALAB-727.

Thus, until the Commission either declines to review this case, or reaches a final decision pursuant to 10 CFR § 2.770, finality will not have attached to any of the issues of this proceeding. Similarly, courts do not consider an initial decision to be final agency action when it is still pending before the head of the agency. E.g., Uniroyal, Inc. v. Marshall, 579 F.2d 1060 (7th Cir. 1978).

It is well-established under these principles that the jurisdiction of the Appeal Board extends until agency action is final. Thus, in Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 708 (1979) the Appeal Board said:

By virtue of ALAB-491 (and the lack of any further review of it by Commission or court), the finality curtain has dropped on most of the issues which were raised in the proceeding.

(emphasis added).

Similarly, in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695 (1978), the Appeal Board dismissed a motion to reopen for want of jurisdiction based on the finality

doctrine:

We are constrained to dismiss the motion for lack of jurisdiction The financial qualifications issue was determined favorably to the applicants in the Licensing Board's ... initial decision On the appeal ... we affirmed. ... Our decision was first affirmed by the Commission and then by the Court of Appeals for the First Circuit. No petition for certiorari having been filed in the Supreme Court within the prescribed period for doing so, finality has now attached to the resolution of the question in this proceeding. Accordingly, we have no authority to reopen it.

Many other cases, including cases cited by applicants and staff in opposing Licensing Board jurisdiction, apply the same analysis. E.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC ____ (October 27, 1982).

Therefore, since the instant motion to reopen was filed with this Appeal Board before the time when this case might have become final, the Appeal Board has jurisdiction to reopen the record in this case.

Nor does the analysis differ if the issue on which reopening is sought is one which has not been considered below. The cases are clear that an Appeal Board may raise issues sua sponte that were neither presented to nor considered by the Licensing Board, North Anna, supra, at 707, at least where there are serious safety, environmental or common defense and security issues involved. Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 309 (1980).

Indeed, the Appeal Board can even, in lieu of remand to the Licensing Board on such sua sponte issues, conduct hearings and take evidence itself. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-578, 11 NRC 189 (1980); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-530, 11 NRC 227, 231 (1980).

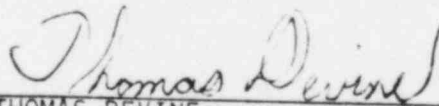
III. CONCLUSION.

For these reasons, it is clear that regardless of whether the Licensing Board has the necessary jurisdiction to reopen the record in this matter, the Appeal Board does. Therefore, MVPP, for the substantive reasons articulated in the attached documents, respectfully moves the Atomic Safety and Licensing Appeal Board, after such deference to the decision-making process of the Licensing Board as it may feel appropriate, to reopen the record in this proceeding to admit MVPP's eight contentions.

Furthermore, if the Appeal Board concludes that it has jurisdiction, but somehow feels that the factual basis for granting the motion does not rise to the required level, MVPP respectfully moves the Appeal Board pursuant to 10 CFR § 2.749(c) for discovery before hearings are denied, for the reasons set out more fully in MVPP's Reply Brief at p. 31 et seq.

Finally, in the unlikely event that the Appeal Board is concerned that it may not have jurisdiction to decide whether to reopen the record, MVPP respectfully moves the Appeal Board to certify the question of its jurisdiction to the Commission under 10 CFR § 2.785(d).

Respectfully submitted,


THOMAS DEVINE
Counsel for Intervenor
Miami Valley Power Project

Government Accountability Project
of the Institute for Policy Studies
1901 Que Street, N.W.
Washington, D.C. 20009
(202) 234-9382

Of Counsel: JOHN CLEWETT

DATED: July 12, 1983.