

BEFORE THE COMMISSION

Docket No. 50-341

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DETROIT EDISON COMPANY

(Enrico Fermi Atomic Power Plant,
Unit 2)

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Docket No. 50-341

NRC STAFF RESPONSE IN OPPOSITION
TO THE PETITION FOR REVIEW BY
CITIZENS FOR EMPLOYMENT AND ENERGY

Colleen P. Woodhead
Counsel for NRC Staff

July 7, 1983

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I. INTRODUCTION

On June 22, 1983 the Intervenor in this operating license proceeding, Citizens for Employment and Energy (CEE), timely filed a petition for Commission review of the Atomic Safety and Licensing Appeal Board (Appeal Board) decision (ALAB-730) issued June 2, 1983,^{1/} which affirmed the Initial Decision of the Atomic Safety and Licensing Board (Licensing Board). LBP-82-96, 16 NRC ___, October 29, 1982.

Because CEE fails to raise an important matter of law or policy or to demonstrate that the Appeal Board resolved factual issues contrary to the resolution of such issues by the Licensing Board (10 CFR § 2.786(b)(4)), the NRC Staff herewith opposes CEE's petition for Commission review of the Appeal Board's decision.

^{1/} Detroit Edison Company et al. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC ___, June 2, 1983.

II. BACKGROUND

Two contentions sponsored by CEE were litigated at hearing March 31-April 2, 1982. These contentions concerned certain alleged construction defects and the feasibility of an evacuation route for a small residential community near the Fermi-2 site. The sole CEE witness was a Monroe County, Michigan Commissioner. Five months after completion of hearing, in August, 1982, the Monroe County, Michigan Board of Commissioners filed a petition to intervene with the Licensing Board, claiming recently discovered defects in the County's emergency plan. Concurrently, CEE filed a motion to reopen the record to litigate the emergency plan issues which the County sought to raise. On October 29, 1982 the Licensing Board issued its Initial Decision on the issues litigated and denied both the County's late petition to intervene and the CEE motion to reopen, for failure to show good cause for untimeliness or new information which would affect the decision. LBP-82-96, supra, slip op. 37-50. The County appealed and the Appeal Board affirmed the Licensing Board's decision but referred the County's petition to the Director of Nuclear Reactor Regulation for consideration as a request under 10 CFR § 2.206. ALAB-707, 16 NRC ____ (December 21, 1982). CEE appealed both the Initial Decision and the denial of its motion to reopen the record.

III. DISCUSSION

A. Summary of the Decision for Which Review is Sought

Before the Appeal Board, CEE raised three issues which CEE asserted to involve error by the Licensing Board. The errors claimed by CEE were: (1) the Licensing Board's finding that the Monroe County, Michigan

radiological emergency plan was complete; (2) the Licensing Board's rejection of a portion of CEE contention 8;^{2/} and (3) the Licensing Board's decision on Contention 8 which CEE claimed to be unsupported by the evidentiary record. The bases provided for these claims of error by CEE were that (1) emergency plan issues are not ripe for adjudication until final offsite emergency plans are developed, that, (2) consequently, the rejected portion of Contention 8 should have been retained until adoption of a final plan by Monroe County, Michigan, and (3) in considering the adequacy of the evacuation route at issue in Contention 8, the Licensing Board inappropriately relied on the County's draft emergency plan and did not account for effects of weather and traffic accidents on evacuation time.^{3/}

The Appeal Board found that the lack of a final County emergency plan did not invalidate the Licensing Board's decisions, did not warrant deferral of the evidentiary hearing, and did not preclude licensing. The Appeal Board pointed out that the issue of the incompleteness of offsite emergency plans has been addressed in other cases and determined not to preclude hearings or licensing. Based on these prior decisions, the Appeal Board explained that licensing decisions may be made when

^{2/} The portion of Contention 8, rejected in 1979 by the Licensing Board Order ruling on contentions, alleged that an emergency plan covering a 100 mile radius should be required for the Fermi-2 site.

^{3/} ALAB-730 at 2.

emergency plans are sufficiently developed to support a "reasonable assurance" conclusion.^{4/}

In addition, the Appeal Board found that the alleged emergency plan defects could have and should have been known by the County at least by the time of the February 2, 1982 full scale exercise of onsite and offsite plans in which the County participated.^{5/} In turn, the same knowledge of alleged plan defects could be imputed to CEE, since the CEE witness at hearing, who had been a CEE member since 1978, was a Monroe County Commissioner.^{6/} Since the Monroe County plan had been tested during a full scale exercise and FEMA had issued findings on the County's plan prior to hearing, the Appeal Board concluded that CEE's claim of premature adjudication was without merit.^{7/}

In addressing the CEE assertion that a portion of Contention 8 was improperly rejected prior to development of offsite emergency plans, the Appeal Board noted that CEE was provided several opportunities to raise emergency plan issues which CEE both failed to use and expressly

^{4/} ALAB-730, at 12-13, citing Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC _____, (March 4, 1983) and Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC _____ (May 2, 1983). The Appeal Board's ruling was based on the Commission's emergency planning regulations which require a finding of reasonable assurance that adequate onsite and offsite protective actions will be taken prior to issuance of reactor operating licenses. ALAB-730, at 8-9.

^{5/} ALAB-730, at 12.

^{6/} ALAB-730, at 11.

^{7/} ALAB-730, at 14.

rejected, and that, in any event, the rejected portion of the contention was not litigable.^{8/}

The Appeal Board found CEE's allegation that the Licensing Board erroneously relied on the "draft" Monroe County plan to be baseless, since the Licensing Board's reliance on the plan consisted of nothing more than a permissible inference that the County would provide one or two policemen and a tow truck, if needed, during evacuation.^{9/} The Appeal Board also determined that effects of traffic accidents and weather on evacuation time estimates were accounted for by the Licensing Board based on the evidentiary record which addressed these matters.^{10/} The Appeal Board concluded its decision by affirming the Initial Decision in its entirety, based on its review of the entire record.

B. The CEE Petition for Review

CEE merely repeats the arguments raised before the Appeal Board in the instant petition. Specifically CEE argues that Commission review is warranted because (1) Monroe County allegedly has no emergency plan and (2) the Appeal Board allegedly improperly precluded CEE from litigating emergency plan issues.

The identical claim presented below, concerning the fact that Monroe County as yet has no final emergency plan, is presented for review, based once again on the County's August, 1982 petition to intervene and certain

^{8/} ALAB-730 at 15-18.

^{9/} ALAB-730 at 21.

^{10/} ALAB-730 at 21-24.

County letters to government officials. Petition, p. 2-3. CEE's assertion that a "unique case" exists in which the local government "will not implement" its own plan is refuted by the evidence of record, which shows the County's ongoing efforts to revise the plan with the aid of FEMA and State officials, recited by the Appeal Board (ALAB-730, slip op. at 5-7, 13-15). CEE's assertion is contradicted by CEE's own reference to County-State correspondence concerning current revision of the plan. Petition, at 3.

Again, CEE asserts it was not untimely in raising emergency plan issues and that the express rejection of an opportunity to raise these issues by CEE counsel, who stated at a 1981 prehearing conference that CEE did not wish to raise emergency plan issues, was not actually a rejection. Petition, at 4. This argument is completely refuted in the Appeal Board's careful examination of the record (ALAB-730, 14-18) and the Appeal Board's wholly correct reasoning and determination in this regard need not be repeated here.

CEE unsuccessfully attempts to show that it should not be held responsible for knowledge of the Monroe County emergency plan despite the fact that its member and only witness at hearing is a Monroe County Commissioner. Specifically, CEE claims that it is unreasonable to assume that membership on the County Board of Commissioners provides knowledge of County operations which would affect the implementation of the County's emergency plan. Although normally one might expect that an individual County Commissioner would not be fully aware of the details of every County operation, such an expectation should not apply to this CEE member (and County Commissioner) with regard to County emergency planning matters. This particular CEE member served as CEE's expert

witness on the emergency preparedness contention. Having been proffered as CEE's witness on the local emergency preparedness issue, this County Commissioner must be deemed to be knowledgeable of local emergency preparedness. In turn, his knowledge of the status of Monroe County emergency preparedness as a County Commissioner and expert witness on the emergency preparedness issue is properly imputed to CEE.

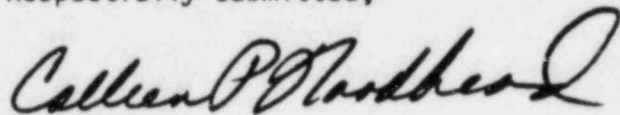
Finally, CEE presses its claim, rejected by the Appeal Board, that its right to a hearing on emergency planning issues has been violated by the Licensing Board's refusal to reopen the record to admit such issues. Referring to Section 189a of the Atomic Energy Act, as amended, to support its argument, CEE claims, in essence, that it has a right to a hearing regardless of the timeliness of any issues it wishes to litigate. Petition, at 5-6. However, it is well-established that Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission may, in fact, establish reasonable procedural requirements for intervention and on the proffering of contentions. BPI v. AEC, 502 F.2d 424 (D.C. Cir 1974); see Duke Power Co., et al. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, slip op. at 6-7 (June 30, 1983). Among those procedural requirements, the Commission has established reasonable rules as to the timeliness of raising issues in ongoing proceedings. Catawba supra. Pursuant to those rules, CEE was properly found to have been inexcusably late in raising emergency plan issues after having been provided, but rejecting, the opportunity for hearing on such issues earlier. ALAB-730, slip op. at 14-16. CEE has no unqualified right to a hearing on emergency plan issues and was not improperly denied such a hearing.

In sum, CEE raises the same issues before the Commission which were raised before the Appeal Board without any showing of error in ALAB-730. At bottom, CEE provides no basis for Commission review beyond its continuing disagreement with the findings and determinations of the Licensing Board which were affirmed by the Appeal Board. Both the Licensing Board and the Appeal Board were correct in those rulings. No important matter of law or policy warranting Commission review is presented by CEE's petition and that petition should be denied.

III. CONCLUSION

For the reasons stated above, the Commission should deny the CEE petition for review of ALAB-730 pursuant to 10 CFR § 2.786(b)(4).

Respectfully submitted,

A handwritten signature in cursive script, reading "Colleen P. Woodhead".

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of July, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO THE PETITION FOR REVIEW BY CITIZENS FOR EMPLOYMENT AND ENERGY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system this 7th day of July, 1983:

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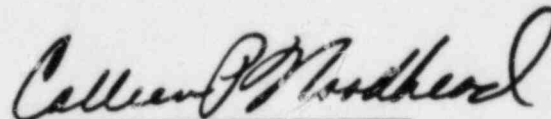
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