UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Dr. M. Stanley Livingston
Dr. Frank F. Hooper

In the Matter of THE CINCINNATI GAS & ELECTRIC COMPANY, et al. (Wm. H. Zimmer Nuclear Power Station, Unit 1)	Docket No. 50-358-OL August 24, 1982

MEMORANDUM AND ORDER
(Ruling on Applicants' Motion for Reconsideration and Clarification of the Licensing Board's Initial Decision Dated June 21, 1982)

Applicants have moved for reconsideration and clarification of this Board's June 21 Initial Decision. Both Staff and ZAC have responded.

The first point raised by Applicants concerns a perceived ambiguity in the Initial Decision. Applicants believe that the decision is unclear regarding the circumstances under which fuel loading and low power operation (at not more than 5% of rated power) can be undertaken. Staff supports Applicants' request for clarification of this point, while ZAC finds the decision "quite clear."

In order to eliminate any confusion, we wish to point out that in the first paragraph under the heading "Relief" on p. 45 of the Initial Decision, we indicated that the deficiencies in offsite emergency

planning needed to be corrected ". . . prior to operation of the station at power levels in excess of 5% of rated power." This applies to all deficiencies, and, to the extent there is a conflict, overrides any other language to the contrary, including the language concerning the filing of the final FEMA findings and the Staff's SER evaluating them. In short, as we indicated in the Initial Decision, ". . . the deficiencies identified in [the] record are not significant in the context of low power operation at levels not in excess of 5% of rated power" (Initial Decision, p. 45.)[1/]

Applicants also request that the decision should be clarified to specifically authorize the issuance of such a license by Staff. Staff, citing the fact that no such license had been requested pursuant to 10 CFR § 50.57(c) and the pendency (at that time) of eight safety-related contentions admitted as Board questions, opposed this request. ZAC raises no objection.

Staff correctly states the reasons why no such authorization was incorporated in the Initial Decision. It would indeed have been inappropriate to have issued such an authorization in light of the pendency of the eight safety-related issues, which, subsequent to the Initial Decision, were admitted as Board issues. (LBP-82-54, 16 NRC ____.) So long as those issues were pending, the appropriate

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1/ Following issuance of the Initial Decision, the Commission amended its rules to make it clear that fuel loading and low-power operation (up to 5% of rated power) could be undertaken prior to NRC and FEMA review of offsite emergency preparedness. 47 FR 30232, July 13, 1982.

means of raising the question of low-power operation was a motion pursuant to 10 CFR § 50.57(c).

However, those issues are no longer pending. On July 30, 1982, the Commission reversed this Board's action admitting the eight contentions (CLI-82-20, 16 NRC ____), and on August 2, this Board in an unpublished Memorandum and Order carried out the Commission's instructions to dismiss these contentions. Consequently, we perceive no bar to now authorizing the Director of Nuclear Reactor Regulation, upon making the findings prerequisite thereto, to issue a license authorizing fuel loading and low-power operations not in excess of 5% of rated power.

This authorization is, however, subject to one condition. We note that Miami Valley Power Project (MVPP), the sponsor of the eight contentions, on August 6 sought reconsideration of the Commission's order. In the event the Commission reconsiders and reverses its earlier ruling, this authorization is revoked.

Next, Applicants seek deletion of the requirement which we imposed with respect to the final FEMA findings.

Staff states:

> . . . it is not appropriate to have the parties review those contentions upon which the Licensing Board has made its final adjudication in the absence of a properly filed motion for reconsideration or a motion to reopen the record. However, as to those matters which the Board has specifically identified [that] are to be the subject of further proceedings (school evacuation), it would be appropriate for FEMA to submit additional interim findings directed to the substance of the matters remaining in controversy and for all the other parties to review those interim findings and provide comments by way of testimony. (Staff Response, p. 6)

ZAC's principal position seems to be that the Commission's regulations require that the final FEMA findings be presented on the record before the Board may authorize full-power operation.

At the outset, we wish to make it clear that our ruling with respect to the FEMA findings was intended to apply only to the facts of this case. It was based in part upon Applicants' commitment quoted on page 50 of the Initial Decision, in part upon the nature of FEMA's presentation on the contested issues, and in part upon the fact that the hearing proceeded on the basis of interim emergency plans which were subject to revision and FEMA approval after the close of the record.

Pursuant to 10 C.F.R. § 50.47(a)(1), the NRC must find, prior to the issuance of a license for the full-power operation of a nuclear power reactor, that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. In accordance with section 50.47(a)(2), the Commission is to base its finding on a review of FEMA's "findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented," and on a review of the NRC Staff assessment of Applicant's onsite emergency plans. Furthermore, "In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy."

During the course of this proceeding, however, we were informed by Counsel for the Staff that FEMA's testimony would be based on that agency's preliminary examination of offsite planning efforts, not the final formal FEMA findings which the Staff believed to be the

subject of section 50.47(a)(2). The Staff's position in this case, therefore, was that FEMA's testimony was not entitled to the rebuttable presumption prescribed by that section (Tr. 4748). 2/ Be that as it may, this Board is still charged with the obligation, pursuant to section 50.47(a)(2), to base our conclusions regarding the adequacy of offsite emergency preparedness as to those matters in controversy upon FEMA's review of the adequacy of state and local emergency preparedness, as presented to us through FEMA's testimony.

2/ The Board and parties proceeded on this interpretation of the Commission's regulations, so that it could properly be described as the law of the case.

The Board is aware that the Government has taken a contrary position in at least one other proceeding as to whether an interim FEMA finding is entitled to the rebuttable presumption spoken of in section 50.47. However, we note that FEMA's review in that case was considerably more complete than it is in this proceeding. See Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) LBP-82-39, 15 NRC ___ (May 14, 1982), slip. op. at 69, n. 33. We need not resolve this matter for our present purposes, however, as our evaluation of FEMA's testimony would be identical, whether or not such a presumption attaches. Furthermore, as another licensing board has noted in a somewhat similar context, a rebuttable presumption dissolves in the face of reliable and probative evidence to the contrary. This means that the practical effect of any rebuttable presumption created by section 50.47 would be of little moment with regards to contested aspects of FEMA's findings, Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1465 (1981), and we would thus be left to weigh the testimony of each party on its own merits.

At the urging of Applicants and Staff, and in accord with the practice followed in other licensing cases, we proceeded to hearing on the basis of interim state and local emergency plans. Although FEMA's review of these plans was far from complete, FEMA attempted to address, in its testimony, the substance of the contentions which were based on the interim plans. Its witnesses lacked the knowledge to do so.

FEMA proceeded to hearing in this case at probably the earliest moment which it considered possible. We note that on October 29, 1981, at our prehearing conference related to emergency planning matters, Staff Counsel informed us that FEMA would be able to proceed to hearing on February 1, 1982 (Tr. 4751); Staff stated that it had "backtracked" this date from Applicants' then-proposed July, 1982, fuel-loading date and had calculated that it would provide sufficient time for this Board to issue its initial decision before that date, provided that we used our authority to require that the parties submit their findings simultaneously (Tr. 4751-4752). Staff Counsel further stated, in response to Applicants' Counsel's suggestion that our hearings commence in mid-December, 1981, that FEMA was responsible for establishing its own schedule and that no FEMA testimony and no assessment by the Federal Government of the adequacy of the plans would be prepared at that time. (Tr. 4755-4756). Eventually, however, arrangements were made for the evidentiary phase of our proceeding to commence in late January, 1982. Very shortly after the completion of our hearings, Applicants postponed their proposed fuel-loading date to December of this year.

Obviously, FEMA proceeded to hearing in this matter prematurely. While it is possible that they did so to accommodate Applicants' then-proposed fuel-loading date, this does not justify FEMA's inability to respond to Intervenor's contentions.

FEMA should not have agreed to proceed to hearing until such time as its witnesses were able to demonstrate that there existed some reasonable bases for their conclusion that these plans are adequate and capable of implementation. The absence of any bases for the FEMA witnesses' opinions led this Board to discount FEMA's testimony in its Initial Decision and for us to conclude that we would not issue an operating license until its final findings related to the contentions had been filed and reviewed.

Had FEMA effectively dealt with the contentions by providing a reasonable basis on which to conclude that they were unfounded, we could have let the matter rest, with little likelihood that it might become necessary to reopen the record to take up significant new matters. In those circumstances, we would have had reliable and probative evidence of the Government's answer to the problems raised by the contentions. Had only portions of the FEMA response been inadequate, the matter, appropriately limited to specific facts, could have been addressed through license conditions or further proceedings. In short, this Board would have had before it an adequate record upon which it could judge the Government's reaction to the contentions.

Such was not the case in this proceeding. As we read section 50.47(a)(2), we must base our finding as to the adequacy of those

portions of the State and local plans related to the contentions on FEMA's testimony as to its review of those plans, viewed in light of other testimony which was adduced at hearing. Agreeing to accept preliminary FEMA findings, however, does not mean that this Board must be satisfied with testimony which is so preliminary and conclusory as to fail to meet the standards which the Commission expects of other testimony. To do so would deprive both the other parties and this Board of any opportunity to cross-examine FEMA witnesses as to the bases for the Government's conclusions.

While we are certain that FEMA, Staff, Applicants, and their respective counsel have no such intention, to permit this matter to be closed without the filing of the final FEMA findings and Staff review related to the contentions would allow the Government to ignore the results reached in the hearing process. Those results were in large part based on the testimony of the state and local planners. It was well understood when that testimony was given that the work product of those planners was subject to review and approval by FEMA. FEMA thus has the authority to change the factual underpinning of the Initial Decision. But there is nothing in the record to indicate how FEMA might (or might not) do so. The FEMA witnesses addressing the specific contentions simply had insufficient knowledge.

This situation is clearly contrary to the requirements of § 189 of the Atomic Energy Act that a hearing be held on issues placed into controversy in an operating license proceeding. We cannot delegate to the Staff, or to FEMA, our obligation to decide such issues, however

conscientiously they may pursue their work. See Cleveland Electric Illuminating Company, et al., (Perry Nuclear Power Plant, Units 1 and 2) ALAB-298, 2 NRC 730, 736-737 (1975); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-461, 7 NRC 313, 318 (1978); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1) LBP-81-59; 14 NRC 1211, 1419 (1981). Leaving the Government free to follow whatever course it pleases regardless of the outcome of the hearing renders that hearing a nullity. Therefore it cannot be tolerated.

What we require does not differ greatly from what the Applicants voluntarily agreed to before and during the hearing. As we have indicated, we are concerned that the FEMA review of the interim plans could result in significant new developments impinging on the contentions and our findings. We have no basis in the present record on which to reach an informed conclusion with regard to the FEMA review. Consequently we require that the results of the FEMA review be served on the Board and the parties so that, in the words of Applicants' counsel, ". . . Mr. Dennison and his clients and Mrs. Webb and her client would be given the opportunity to make appropriate motions with regard to the resumption of these hearings as these significant changes might affect their contentions in this proceeding." (Tr. 7050-51.)

The only difference we perceive between what we are requiring and what Applicants agreed to is the burden which would have to be met to successfully make an "appropriate motion." Applicants believe that a successful motion should meet the standards for reopening records. In

the circumstances of this case, we view that standard as entirely too stringent. Given some basis upon which to reach an informed conclusion concerning the FEMA review, that standard might be worthy of consideration. Lacking such a basis, it clearly cannot be imposed. Nor do we believe that the standard we adopt differs greatly from that adopted by other boards. We note, for example, that in closing the record on emergency planning subject to the submission of three future documents, a board noted that on receipt of one of the documents, FEMA findings, a party might seek to reopen the record on a showing of good cause. "Such a showing," that board stated, "shall be based upon particular parts of the FEMA findings and demonstrate that an opportunity for cross-examination (as distinguished, for example, from an opportunity for further written comment) is required for a full and true disclosure of the facts." Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) unpublished order of October 6, 1981.

In short, there must be some basis upon which the Board may reach an informed conclusion with respect to the Government's position on the offsite emergency preparedness aspects of this application. In this case, that basis does not exist. We know of no other way in which to acquire that basis than to require that the final FEMA findings related to the admitted contentions, and the Staff's supplement to its Safety Evaluation Report, a document which the Staff must issue to comply with 10 C.F.R. § 50.47(a) prior to issuing an operating license, be filed herein and served on the parties. The parties shall have a reasonable

opportunity to assess the impact of these documents on the admitted contentions and the Initial Decision.

We wish to emphasize again that our holding is limited to the facts of this case which, we believe, are significantly different from other emergency planning proceedings. These differences are the nature of the FEMA presentation and the detailed, sharply focused nature of the contentions. We have no reason to believe that the FEMA presentations in other cases are such that there, as here, they leave the Government room to ignore the results of the hearing process contrary to § 189 of the Atomic Energy Act.

Finally, Applicants wish ". . . the Board to reconsider its findings related to alleged inadequacies in school communications and, as a license condition, to require the completed school procedures to be submitted to the NRC Staff." (Motion, p. 14.) Applicants argue that their position is consistent with the results of other licensing proceedings, that the local officials had already approved certain plans covering evacuation of the Clermont and Campbell County schools, and that the Staff had requested FEMA to carry out a field verification of procedures and communications so approved.

Staff appears to agree with Applicants but suggests the presentation of further evidence in light of the fact that the record has been reopened. Because Staff replied to the Applicants' Motion prior to the issuance of CLI-82-20, we do not know its present position. ZAC opposes Applicants' Motion.

While Applicants may well be correct with respect to the disposition of other licensing cases, this record speaks for itself. Applicants have advanced no reason which would justify a departure from the findings made in the Initial Decision, and consequently no reason to alter the relief there awarded. See 10 C.F.R. § 2.771; see also Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384 (D.P.R. 1981). Applicants do not assert that the Board erred in making those findings, only that the findings have had an unintended result. If reasons now exist justifying a different result, they must be presented on the record, not in the form of an unsworn memorandum of law from Applicant's counsel which is not evidence. See Frito-Lay, supra; Lacey v. Lumber Mutual Fire Insurance Co., 554 F.2d 1204 (1st Cir. 1977) Consequently we deny Applicants' Motion in this respect, and await the advice of the parties as to when they wish to proceed. In this connection, the Board is most anxious to hear FEMA's conclusions based on their field verification.

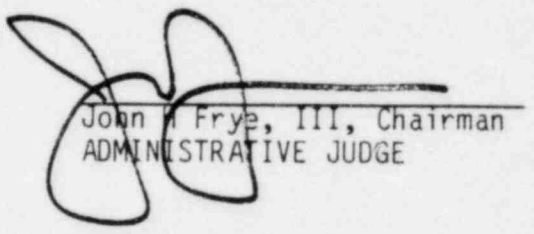
In consideration of the foregoing, it is this 24th day of August, 1982, ORDERED

1. Upon making the necessary findings on issues not in controversy, the Director of Nuclear Reactor Regulation is authorized to issue a license to Applicants permitting fuel loading, low power testing, and operation of this facility at power levels not in excess of 5% of rated power, subject to the condition, however, that should the Commission reconsider and reverse its decision herein (CLI-82-20), this authorization is revoked.

2. Except as indicated in paragraph 1 above, Applicants' motion for reconsideration and clarification is denied.

Judges Hooper and Livingston concur but were unavailable to sign this Memorandum and Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD



John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

August 24, 1982