UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	:	
	:	
CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,	:	DOCKET NO. 50-358
(William H. Zimmer Nuclear Power Station)	:	

INTERVENOR ZAC-ZACK'S MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE LICENSING BOARD'S INITIAL DECISION DATED JUNE 21, 1982

The applicant in its discussion of this board's Initial Decision released June 21, 1982, fails to understand the import of the order. Applicant erroneously suggests that the decision dealing with 5% (low) rated power is ambigious and inconsistent. The decision is quite clear.

As perceived by this intervenor, the decision entitles applicant to proceed to operation not to exceed 5% of rated power and before applicant is entitled by license to proceed to full power, and thus potential hazard to the community, two supplemental factors must be achieved. Upon supplying those two supplemental factors applicant shall then — and only then — be permitted a license to proceed to full operation. Those two supplemental factors are as follows:

ONE. The license conditions have been met within the standard set forth and as specified in paragraphs one through five

of the License Conditions.(Decision, License Conditions, pp. 94-95). The standard applied requires submission to the parties of the final FEMA findings and the Staff's supplement to the Safety Evaluation Report that relate to the contentions admitted November 25, 1981, and the opportunity of the parties to assess the impact of both submissions on the admitted contentions and the Initial Decision. This standard provides the opportunity for the parties to address by appropriate motion to the board that "impact" which may necessitate further hearing if again there is the failure of the kind and character addressed by this board at pages 48 and 49 of its decision. (See Decision, p. 50).

TWO. Once emergency response plans for the involved schools of Clermont County, Ohio, and Campbell County, Kentucky, are complete and assumed to provide reasonable assurance that the involved school children can be protected in the event of a radiological accident at Zimmer, then hearing can be scheduled to address the sufficiency of those plans through an evidentiary hearing within the issues raised by the admitted contentions to determine upon the record whether such "revised" plan meets the requirements of 10 C.F.R.§50.47. (Decision, p. 48).

This intervenor construes "[f]urther proceedings are necessary on this [school plan] issue before we will authorize the issuance of a [full power] operating license" (Decision, p. 48) to mean the requirement that the subject contentions be litigated in the future once some semblance of planning has been developed and reviewed to correct the problems identified in the decision, and to prevent premature hearing occasioned by incomplete plans and superficial review, thereby observing the mandate of 10 C.F.R.§50.47(a)(2) that this intevenor is entitled to rebut FEMA's presumption of adequacy in the hearing process.

Applicant in its discussion of "FEMA Findings" is preoccupied

with the concept of "interim," applicant's consistent quest for speed without regard for sufficiency, and applicant's total disregard for any application of standard, entitlement of intervenors to hearing, and the safeguards to which due process subscribe.

Applicant asserts, page 7 of its motion, that this board's decision is totally inconsistent with the Commission's Statement of Policy on Conduct of Licensing Proceedings. 46 Fed. Reg. 28533 (May 27, 1981). That statement of policy necessitated by the delay in licensing proceedings resulting from the TMI accident, does not state, as applicant suggests, that licensing proceedings are to be dispatched with all speed and in disregard of other factors. The Commission qualifies its desire to avoid or reduce delays:"whenever measures are available that do not compromise the Commission's fundamental commitment to a fair and thorough hearing process." 46 Fed. Reg., at 28534. At page 28534, the Commission clearly states the governing principle:

> The Commission wishes to emphasize though that in expediting the hearings, the [Atomic Safety and Licensing] [B]oard should ensure that the hearings are fair, and produce a record which leads to high quality decisions that adequately protect the public health and safety and the environment.

Furthermore, the Commission makes it quite clear that while it supports an adjudication before the end of construction, that adjudication must be cognizant of the standard that it be "conducted in a thorough and fair manner." 46 Fed. Reg., at 28535.

This board has struck the balance between the competing interests of expediciency, protection of the public's health and safety, and a fair and thorough hearing. The priority of public safety and fair hearing must of necessity yield to expediciency. This board's requirement that the school plan issue be subjected to further hearing

and the potential for hearing on the "impact" of FEMA and Staff assessment of the license conditions if necessary conforms to the Commission's principle that its fundamental commitment to a fair and thorough hearing must not be compromised. This board's decision clearly ensures that the matters in issue receive a hearing which is fair and produces a record leading to a high quality decision for the adequate protection of the public's health and safety.

Applicant challenges this board's discretion of requiring that final FEMA findings be filed before it will further consider the issuance of an operating license. (Applicant's Motion, pp. 6-8). First, as noted in the Commission's Policy Statement: "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fullfil the obligations imposed by and in accordance with applicable law and Commission regulations." 46 Fed. Reg., at 28534.

FEMA, a participant, is charged with the obligation "for making findings and determinations as to the adequacy and capability of implementing State and local plans, and to make those findings and determinations available to NRC." Memorandum of Understanding between NRC and FEMA relating to Radiological Emergency Planning and Preparedness, 45 Fed. Reg. 82713 (December 16, 1980). NRC, a participant, in turn is charged with the obligation of making determinations on the overall state of emergency preparedness for issuance of an operating license. 45 Fed. Reg., at 82713. FEMA's duty is quite clear, it is to take the lead in offsite emergency planning and the review and assessment of state and local plans for adequacy, and that agency is specifically charged to complete, as soon as possible, review of state and local plans in the states affected by plants scheduled for operation in the near future and "to make findings and determinations

as to whether State and local emergency plans are adqeuate and capable of implementation (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications and qualifications and equipment adequacy)." 45 Fed. Reg., at 82713-14.

The proposed rule (44 C.F.R., Part 350) is being created to establish policy and procedures for review and approval by FEMA of state and local emergency plans and preparedness for coping with the offsite effects of radiological emergencies which may occur at nuclear power facilities. 45 Fed. Reg. 42341 (June 24, 1980). "The rule sets out criteria which will be used by FEMA in reviewing, assessing and evaluating these plans and preparedness; * * *; it describes certain of the processes by which FEMA makes findings and determinations as to the adequacy of State and local plans and the capability of State and local government to effectively implement these plans and preparedness measures for specific sites. Such findings and determinations and, where appropriate, plan approvals are to be submitted to the Governors of the affected States and to the NRC for use in licensing proceedings of the NRC." 45 Fed. Reg., at 42341 (Emphasis supplied by writer). It is further provided that "[p]ending adoption of the final rule, FEMA intends to use generally the process described herein in 'approval' of any plan which might be submitted to it before the rule becomes final." 45 Fed. Reg., at 42343. 44 C.F.R. §350.1 (Proposed) sets out in the purpose that the review of offsite plans "involves preparation of findings and determinations with respect to the adequacy of the plans and the capabilities of State and local governments effectively to implement the plans." Notwithstanding applicant's comments to the contrary (Applicant's Motion,

p. 6, n 12), the record is clear that FEMA addressed the offsite plans from the criteria of the proposed rule during the January-March hearings, and it is most clear that FEMA is required to address the contentions once the matter returns to hearing; otherwise, there is absolutely no standard for judgment by that agency: the statement contained in 45 Fed. Reg., at 42341 that its findings and determinations based upon the standard of proposed 44 C.F.R., Part 350 must be rendered false and of no effect as to its clear application for use in a licensing proceeding; and the licensing proceeding must likewise be rendered a nullity.

Second, applicant's obligations as a participant can not be disregarded. In order to receive an operating license applicant is "required to submit its emergency plans, as well as State and local governmental emergency response plans, to NRC." 45 Fed. Reg. 55402 (August 19, 1980). (Emphasis supplied by writer). As to the capabilities of offsite plans and their implementation, those "issues may be raised in NRC operating license hearings, but a FEMA finding will constitute a rebuttable presumption on the question of adequacy." 45 Fed. Reg., at 55402. Concerning inadequate State and local plans, while there is no requirement for the applicant to provide funds, the view taken in formuating the revised 10 C.F.R., Part 50, effective November 3, 1980, was that "a utility may have an incentive, based on its own self interest as well as its responsibility to provide power, to assist in providing manpower, items of equipment, or other resources that the State and local governments may need but are themselves unable to provide." 45 Fed. Reg., at 55408.

It is the applicant which seeks the operating license and in its quest it is applicant which must submit adequate offsite plans.

10 C.F.R.§50.33(g), provides, in pertinent part:

> If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ) * * * * (Emphasis supplied by writter).

10 C.F.R.§47, which must be read in pari materia with §50.33(g), provides that no operating license will be issued unless a finding is made 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. Thus, the case can not be that the applicant points to other participants in an operating license hearing as creating delay or being ineffective, or that the board is abusing its discretion in requiring further hearings, where the nondelegable duty rests solely with applicant to provides assurances that its operation of a nuclear facility can be conducted with both onsite and offsite emergency preparedness plans which provide reasonable assurances that those plans are adequate and capable of being implemented. 10 C.F.R.§50.47(a).

Applicant further contends that final FEMA findings are not required before hearing before this board to determine the sufficiency of this intervenor's contentions. Applicant's position is simply unfounded where one is required to juxtapose it before the clear regulation that "[i]n any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy." 10 C.F.R.§50.47(a)(2). The only construction that can be placed on the quoted regulation is that an intervenor is entitled to rebut the presumption of adequacy within the hearing process before this board, which must be accorded meaning within the phrase "any NRC licensing

proceeding." 10 C.F.R.§50.47(a)(2).

The applicant in its bold charge that this board has abused its discretion and that it "may neither ride roughshod over the parties nor dance attendance on them" fails to pervieve this board's commitment to the fair hearing process. (Applicant's Motion, p. 7). Following the quote from Offshore Power Systems (Floating Nuclear Power Plants),ALAB-489, 8 NRC 194, 206 (1978), cited above, the appeal board sets forth this board's duty as follows:

> Their [the board's] obligation is to tread a middle ground in order to be able to issue 'sound and timely' decisions that have the public interest in mind. To this end, the boards have broad and strong discretionary authority to 'conduct their functions with efficiency and economy.' However, they must exercise it with 'fairness to all the parties' (10 C.F.R. Part 2, Appendix A).

Applicant construes this board's decision as requiring formal FEMA findings to be considered by Staff before the issuance of the Staff's Safety Evaluation Report relating to emergency planning, all of which must occur before the issuance of an operating license and that such a procedure is not contemplated by 10 C.F.R. §50.47 or 10 C.F.R., Part 50, Appendix E and is "totally inconsistent" with the Commission's Statement on Policy. (Applicant's Motion, p. 7). As previously addressed, this board's decision is consistent with both the regulations cited and the Commission's policy as stated herein. Furthermore, the board's decision does not create an adjunct to the record equivalent to calling its own witnesses and South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Power Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981) is simply not in point. (Cf. Applicant's Motion, pp. 7-8).

In a rather strange manner, applicant's urges that the burden is placed upon this intervenor to justify further consideration based

upon strict standards and citing in support of its proposition its Answer to Motion by Miami Valley Power Project for Leave to File New Contentions (June 2, 1982). (Applicant's Motion, pp. 8-9, 10, n. 17). Staff in its Response to Miami Valley Power Project Motion for Leave to File Contentions (June 11, 1982), at page 4, cites Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978), wherein it is held that the movant must demonstrate that the motion is timely, is directed to a significant safety or enviromental issue, and a different result would have been reached initially had the material submitted in support of the motion been considered.

Perhaps the issue would be more direct if this board, in applicant's request for clarification, simply orders that the license is denied and if and when upon some date in the future applicant has justification to believe that the matter of offsite emergency preparedness and planning does for the first time provide some reasonable assurance that the health and safety of the public can be protected, then applicant can move for a reopening of the record and suggest that it can now demonstrate that the public is protected. Under that circumstance, then applicant can discharge the burden of showing that its motion is timely, after having involved this board and these intervenors in a hearing held to determine the adequacy of offsite plans; demonstrate that the issue involves a significant safety issue: the protection of the public through adequate offsite planning; and the further necessity to this board that a different result would have been reached initially had the new plans and the new considerations been submitted in the first place and subjected to consideration. This counsel is awed by the crassness of applicant

urging that where it is applicant that fails to demonstrate the adequacy of safety planning for the public's benefit — and who sought hearing with full knowledge of the sufficiency of the offsite plans — turns the proposition from its burden to demonstrate adequacy to an urging that this intervenor must seek further hearing under a heavy burden accompanied by strict standards.

Applicant suggests that this board has given no reason why the deficiencies discussed in its decision relating to evacuation of the affected schools cannot be considered earlier. (Applicant's Motion, p. 8). This board can, given the prior performance, require that the issue of school planning come to hearing once again, but postured from the position that the deficiencies have been arguably corrected and satisfied. This board has no duty to hold endless hearings as practice and training grounds seeking endless decisions essentially asking:"well, how do you think the plans look now?" The obligations of the participants have been previously discussed and that discussion clearly announces that the applicant undertakes the obligation to oversee the offsite plans and at a point where those plans are arguably sufficient to then place the matter for hearing and not before. Given the state of this record, this board has the right to require formal findings from FEMA and Staff's assessment before permitting the issues to be address by hearing with due regard for fairness to all parties through a hearing that is fair and which produces a record leading to a high quality decision that adequately protects the public's health and safety; and to require that FEMA discharges the duty to which it has been intrusted by providing in its assessment findings and determinations to support its conclusions.

Some comment in warranted arising from applicant's discussion at pages 9 through 11 of its motion. First, whatever may have been

the case before other boards considering "'interim findings' such as contained in testimony filed by FEMA in this case," this board found FEMA's presentation terribly wanting and this writer would not be so charitable as to characterize that testimony as "weak" (Applicant's Motion, pp. 5-6). (Applicant's Motion, p. 9). Furthermore, applicant's point that the procedure of considering "interim findings" is consistent with the rights of all parties, given the rights of cross-examination and building of a record, and therefore this intervenor has been accorded its rights under the Act and Commission precedents, does not pass muster when viewed from the discussion heretofore presented dealing with both the obligations of the participants and the concepts of fair hearing. (Applicant's Motion, pp. 9-10). Additionally, applicant argues that far too much weight has been accorded to FEMA's role and its clear duty as a participant in the issues before this board in the January-March hearing. (Applicant's Motion, pp. 10-11).

Applicant has ingored this board's findings of fact. It has ignored the significance of the safety issue involved in the public's, and the school children's, safety interest to be respected in determining the sufficiency of offsite emergency preparedness. That issue must be addressed at a future hearing to accord the fairness of hearing which is mandated by the authorities set forth herein.

The applicant apparently has no conception of the due process concept present in the right to hearing on issues posed before an administrative process, which, indeed, deals not only with the concept of the Commission's policy that its fundamental commitment to a fair and thorough hearing not be compromised, but to constitutional considerations of due process. As early as Chicago, M. & St. P. Ry. Co. v Minnesota, 10 S.Ct. 462, 467 (1890), the Supreme Court recognized

in administrative proceedings involving the element of reasonableness as to both the company and the public that the question of reasonableness is eminently a question for judicial investigation requiring due process of law for its determination and due process is denied where no hearing is provided. While Chicago, M. & St. P. Ry. Co. involved the reasonableness of a rate of charge for transportation and this proceeding involves the reasonableness of offsite planning, the principle remains the same and the distinction is without a difference.

In Southern Ry. Co. v. Virginia, 290 U.S. 190, 195 (1933), the Court considered the right of an administrative officer to make final determinations in respect of facts involving the character of a grade crossing and the public's safety without hearing, evidence, notice or otherwise, upon an ex parte basis not subject to general review. The Court noted that in all prior cases such a power existed only after right to hearing and review by some court. Southern Ry. Co., 290 U.S., at 198. From that consideration the Court held that the infirmities would not be relieved by an independent right of review and that those involved were entitled to a fair hearing upon fundamental facts. 290 U.S., at 199. In Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 182 (1938), considering the right to hearing in an administrative setting, the Court announced the following:

> The Commission is to 'determine.' The Commission must determine 'after hearing.' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is 'the hearing of evidence and argument.' Morgan v. United States, 298 U.S. 468, 480 [parallel citation omitted]. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist, [citation omitted].

> The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. (Emphasis by the Court).

In Morgan, cited in Shields, the Court states: "[i]t is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such." Morgan v. United States, 298 U.S. 468, 480 (1936). "A fundamental requirement of due process is 'the opportunity to be heard.' [Citation omitted]. It is an opportunity which must be granted at a meaninful time and in a meaningful manner." Armstrong v. Minzo, 380 U.S. 545, 552 (1965).

To the holdings of the Supreme Court of the United States; to the statements of the Commission; and to the Code of Federal Regulations; all of which entitle this intervenor to hearing on its contentions; and after applicant has received an adverse decision, that applicant attempts to argue that this intervenor has no right to hearing on the school plan issue yet outstanding:

> The procedure of considering emergency planning based upon the 'interim findings' is consistent with the rights of all parties to the proceeding whom by virtue of their ability to cross-examine and build a record, have been accorded their rights under the Atomic Energy Act and under all Commission precedents. This procedure also accords with the position of Applicants as presented in the statement of counsel quoted on page 50 of the Initial Decision. There is no doubt intervenors have a right to be informed of significant new developments and request consideration of significant new matters by the licensing board within the scope of their contentions at any time in the licensing process. However, this falls far short of any right, in effect, to have the proceeding stopped dead in its tracks and have the record remain open to allow them to comment upon formal FEMA findings being presented to the NRC and thereafter to litigate the matter. The Board has not raised any reasonable expectation that anything new will be contained in such formal findings. (Applicant's Motion, pp. 9-10).

At least as partial authority for its position, applicant cites the B.J. Youngblood to E.A. Borgmann letter under date of June 23, 1982, that the Ohio and Kentucky plans are adequate to protect the public, "even though there are some deficiencies which should be corrected."(Applicant's Motion, p. 10,n.18).

This intervenor has a right to not trust FEMA findings as this board so correctly points to in its decision. This intervenor is mindful of the testimony of the state and local planners from both Ohio and Kentucky, who without reservation endorsed their respective plans, the product of their efforts. This intervenor notes with reservation Staff's endorsement of those plans as adequate in its submission of proposed findings of fact and conclusions of law. This intervenor observes the irony of the "Youngblood letter" two days after this board's decision.

This intervenor has good reason to believe that more of the same conduct upon the part of the other participants will be heaped upon it in the future. Intervenor's "right to be informed of significant new developments," (Applicant's Motion, p. 10) and more of the same "Youngblood letters" is a hollow right. The question is thus posed: "how can this intervenor test the sufficiency of FEMA and Staff determinations unless it is afforded a hearing on the matter?" History is a remarkable authority with the uncanny ability to unfortunately repeat itself. Listening to the testimony of state and local planners, reading the prefiled testimony of applicant, reading the prefiled testimony of FEMA and viewing the likes of the "Youngblood letter," one is compelled to conclude that the offsite plans prior to hearing were abundently adequate to protect the safety of the community in all regards and including the five categories of this board's "License Conditions" and the

protection of the school children in the affected areas.

If this proceeding must be stopped dead in its tracks to remove compromising the Commission's fundamental commitment to a fair and thorough hearing process and to safeguard the paramount interests of the public to protect itself, then so be it. It must be noted that these issues came to hearing when they did "[i]n order to accommodate Applicants' fuel load date." (Decision, p. 48). It must also be noted that it was counsel for applicant who said that as emphasized by him before and during hearing that if there were significant new developments that such developments would have to be brought to the attention of the board and the parties and that the intervenors 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. (Decision, p. 50, quoting from the transcript, pp. 7050-51). Well, it is difficult to think about anything more significant as a new development than a revision of the plans affecting the schools given the state of the record. It is also difficult to envision anything more significant and new, based upon this record, than information concerning the availability of volunteer personnel by time of day, existence of family commitment and interference with the ability or willingness of such personnel to respond to a radiological emergency at Zimmer and within the EPZ, and to account for portions of the community which may not follow instruction as influencing the number of personnel necessary to accomplish their assigned emergency role, and that there is a sufficient number of volunteer personnel to discharge their emergency responsibility role. In the future, as in the past, the foregoing issues will again be concluded to be adequate requiring again the

hearing process to test the correctness of the bureaucratic treatment that this intervenor and the affected community has received in the past.

This record must be held open for the review by intervenors of FEMA's final findings and the supplement to the Staff's Safety Evaluation Report discussing the FEMA findings after those documents have been served upon the parties and to thereafter proceed to a hearing on the affected contentions in order to remove the defective practices of the past and to accord this intervenor with the right of full hearing. If the point has not been made, it is made by applicant's discussion at pages 12 through 15 of its motion of just how important a subsequent hearing is to the attainment of a fair hearing and the protection of the public's interest in this licensing proceeding. Applicant submits matters to this board outside of the record and beyond examination by this intervenor as provided in the hearing process. This counsel will not tread into the forbidden path previously traveled by applicant's counsel and will only comment that the orderly and correct way of determining Superintendent Sell's position, the sufficiency of school plans in Ohio and Kentucky, and all of the attended matters is to provide all parties with the opportunity for inquiry in the hearing process governed by its safeguards.

For the reasons presented it is respectfully requested that applicant's motion be denied except and to the extent that clarification is warranted and deemed appropriate by the board.

Respectfully submitted,

July 23, 1982

ANDREW B. DENNISON
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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of foregoing document entitled "Intervenor ZAC-ZACK's Memorandum in Opposition to Applicant's Motion for Reconsideration and Clarification of the Licensing Board's Initial Decision Dated June 21, 1982" was served by ordinary U.S. Mail, postage prepaid, upon the following persons this 23rd day of July, 1982:

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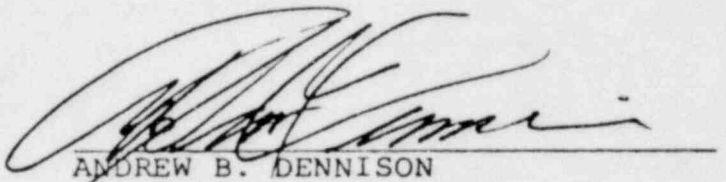

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