

September 16, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
THE DETROIT EDISON COMPANY	)	Docket No. 50-341
(Enrico Fermi Atomic Power Plant,	)	
Unit 2)	)	

NRC STAFF RESPONSE TO UNTIMELY PETITION  
TO INTERVENE BY MONROE COUNTY, MICHIGAN

I. INTRODUCTION

By petition dated August 27, 1982, the Board of Commissioners of Monroe County, Michigan (County) requested the Atomic Safety and Licensing Board to reopen the record in this proceeding and to grant the County leave to intervene pursuant to 10 CFR §§ 2.714 and 2.715 and to admit twelve contentions set out in the petition for litigation. The Staff opposes the County's petition for the reasons set out below.

II. BACKGROUND

Notice of opportunity for hearing in this operating license proceeding for the Enrico Fermi Atomic Power Plant, Unit 2 (Fermi 2) was published in the Federal Register on September 11, 1978. The Citizens for Employment and Energy (CEE) filed a petition to intervene in response to the notice and was admitted as a party in 1979. Eight contentions were admitted for litigation, and an evidentiary hearing was held in Monroe, Michigan March 31, April 1, and April 2, 1982. Evidence concerning

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two contentions<sup>1/</sup> was presented during the hearing by NRC Staff and a Federal Emergency Management Agency (FEMA) representative; by Detroit Edison Company (DECo or Applicant) and by CEE. The witness appearing on behalf of CEE, Mr. Frank Kuron, is a Monroe County Commissioner. Before and during the hearing, several persons made limited appearances pursuant to 10 CFR § 2.715(a). Tr. 220, 356, 515. Among these persons were another Monroe County Commissioner and the Director of the City-County Office of Civil Preparedness. The record of the proceeding was closed by Board Order of April 19, 1982. Proposed findings of fact and conclusions of law were filed by Applicant and Staff in May, 1982 but none were filed by CEE.

### III. DISCUSSION

#### A. The Petition

The County's petition alleges that it has good cause for the untimely filing because: (a) the County has been actively engaged in efforts to devise a County-wide offsite radiological emergency plan; (b) has endeavored to work closely with FEMA in formulating the plan; (c) County residents provided FEMA with information at the public hearing sponsored by FEMA on February 3, 1982 as well as public meetings held April 28 and June 16, 1982; (d) the County Commissioners have only

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<sup>1/</sup> CEE withdrew 5 contentions at the prehearing conference and one contention was dismissed by grant of summary disposition motions prior to hearing. The two contentions litigated alleged that the Applicant's QA-QC program was inadequate with resulting construction defects (Contention 4); and that the Pointe Aux Peaux Rd., the only possible evacuation route for Stony Pointe, Michigan residents near the plant, is not adequate. (Contention 8).

recently become aware that significant defects in emergency planning (listed as contentions in the petition) are not remediable by the County and should be addressed prior to issuance of an operating license for Fermi 2; and (e) the County's obligation to pursue resolution of the defects required the untimely petition. Petition, pp. 2-3.

The petition alleges that "No means other than intervention in this proceeding can guarantee that a Fermi 2 operating license will be issued only if an adequate offsite emergency plan is in place." Petition at 3. The petition goes on to state that the County can be of material assistance to the Board in developing a sound record; that no party has pursued all offsite emergency planning issues nor has protected the County's interest; and that only minor delay will be incurred by granting the petition since Fermi 2 is not scheduled for operation "until November, 1983" and that the limited appearance statement of the Monroe County Director of Civil Preparedness at the hearing reserved the "right to present testimony" to the Board. Petition at 3-4.

The petition lists 12 contentions which the County considers to be defects in the offsite emergency plan. These are (1) inadequate buses to transport persons without automobiles who reside in the EPZ; (2) the likelihood that the County's volunteer firemen will be unwilling or unable to handle evacuation and decontamination responsibilities; (3) the lack of expertise, equipment, and funds in the County to provide recovery and reentry services; (4) the inadequate roads from the beach areas around Frenchtown Township (near the Fermi 2 plant); (5) the lack of funds in the County to provide training and interagency coordination

necessary for a radiological emergency response; (6) an inadequate number of County personnel to staff the five County decontamination/reception centers; (7) lack of provision for testing evacuating vehicles for contamination and inadequate evacuation roads to allow monitoring; (8) control of potassium iodide by the Michigan Department of Public Health and its plan for distribution after an emergency begins; (9) inadequate State radiological monitoring; (10) conflicts of local law enforcement, fire, health, school and hospital personnel between their obligations to their families and the public in the event of emergency; (11) ill-equipped volunteer fire departments responsible for vehicle decontamination; (12) no provision for speedy response by County officials. Petition, 4-7.

B. Legal Standard for Untimely Petitions

Since the notice of opportunity for hearing in this proceeding was published four years ago, it is clear that the County's petition is exceedingly late. Nontimely petitions to intervene are governed by the Commission's Rule of Practice 10 C.F.R. §2.714 which states as follows:

Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted

based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:<sup>2/</sup>

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Staff will discuss the five factors to be weighed in the County's petition seriatim.

- (i) Good cause, if any, for failure to file on time.

The Commission, in application of this rule, has stated that "Late petitioners properly have a substantial burden in justifying their tardiness. And the burden of justifying intervention on the basis of the

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<sup>2/</sup> 10 CFR § 2.714(d) states:

The Commission, the presiding officer or the atomic safety and licensing board designated to rule on petitions to intervene and/or request for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

- (1) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

other factors in the rule is considerably greater where the latecomer has no good excuse."<sup>3/</sup> In accord with this guidance, the Appeal Board has noted that "if petitioners inexcusably miss the filing deadline by several years, they have an 'enormously heavy burden' to meet".<sup>4/</sup> In the Staff's opinion the following facts indicate that the County has not met this heavy burden.

The first person to make a limited appearance prior to start of the hearing in Monroe, on March 31, 1982 was Mr. John R. Eckhardt, Director-Coordinator for the Monroe City-County Office of Civil Preparedness.<sup>5/</sup> Mr. Eckhardt commented on the siren system proposed by DECo; traffic surveys by DECo; and offered his opinion that DECo should provide funds to Monroe County for emergency response expenses. A Monroe County Commissioner, Mrs. Bailey, also made a limited appearance statement concerning nuclear plant safety.<sup>6/</sup>

Both Applicant and Staff presented testimony at the hearing concerning evacuation time estimates and discussed appropriate actions to be taken

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<sup>3/</sup> Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975) Cf. Virginia Electric and Power Co. (North Anna Station, Units 1 & 2), ALAB-289, 2 NRC 395, 398 (1975); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389 (1976); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 615 (1977); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977).

<sup>4/</sup> Puget Sound Power and Light Co. (Skagit Nuclear Power Plant, Units 1 and 2), ALAB-559, 10 NRC 152, 172 (1979).

<sup>5/</sup> Tr. 221.

<sup>6/</sup> Tr. 358-361, 519.

in event of radiological emergency.<sup>7/</sup> The Staff also provided testimony by an Emergency Management Specialist from FEMA who stated that he had investigated the means of evacuation of the nearby residents, referencing the Monroe County Radiological Emergency Response Plan.<sup>8/</sup> In response to Board questions, a Staff witness testified concerning the procedures used by NRC and FEMA for evaluating onsite and offsite emergency plans as well as the objectives of the NRC emergency plan regulations.<sup>9/</sup> The witness testifying for CEE at the hearing concerning the emergency evacuation contention, Mr. Frank Kuron, is a Monroe County Commissioner and member of the County Civil Preparedness Board.<sup>10/</sup> Mr. Kuron discussed during direct examination the siren system to be installed by DECo, the volunteer fire department in Stony Pointe, and his opinion that the Monroe County emergency plan is inadequate.<sup>11/</sup>

Questions concerning emergency responses raised by Mr. Eckhardt and other limited appearers were addressed by Applicant's witnesses during the hearing.<sup>12/</sup> On cross-examination, Applicant's witnesses discussed possible means of notification and evacuation of handicapped persons by local officials; the responsibility of State and local governments for offsite emergency actions; estimates of the number of residents working

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<sup>7/</sup> Tr. ff 406 and 533. See p. 4 ff 406.

<sup>8/</sup> Testimony of Rick J. Anthony, pp. 2-3, Tr. ff 533.

<sup>9/</sup> Tr. 542, 547, 549-553; 559-560.

<sup>10/</sup> Tr. 501.

<sup>11/</sup> Tr. 501-503.

<sup>12/</sup> Tr. 407-411.

outside the County; provisions of the Monroe County Emergency Plan; distribution of brochures containing emergency response information; assumptions used for evacuation time estimates; division of responsibilities for emergency actions between utilities and local and State governments and cooperation among them.<sup>13/</sup>

A joint emergency response exercise by DECo, State and local officials was held February 2, 1982 under the observation of NRC and FEMA representatives. On February 3, 1982 FEMA held a public meeting concerning offsite emergency plans. The FEMA findings on the State and local emergency plans, including Monroe County are scheduled for submission to NRC in March, 1983. The Applicant's estimated fuel load date is June, 1983.

In light of the failure by the County to seek intervention within the 4 years since the notice of opportunity for hearing was published and the involvement of Monroe County officials with FEMA since submission of the Monroe County emergency plan in 1981, and the active participation by a Monroe County Commissioner in NRC proceedings as a member of and witness for CEE since 1978, the County's assertion of good cause for untimely filing is unpersuasive.

By the County's own admission, it has been actively working on its radiological emergency plan with FEMA for some years and the County's assertion that it has only now become aware of defects in its emergency plan is insupportable. The participation of three County officials in the recent hearing, one of whom had participated since 1978, demonstrates that the County had ample opportunity to seek intervention as an interested

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<sup>13/</sup> Tr. 413-448.



County pursuant to 10 C.F.R. § 2.715(c) long before this date and that the adequacy of the Monroe County emergency facilities were a known concern to the County Commissioners prior to the close of the record. In short, the County is inexcusably late and has offered no credible reason to allow such untimely intervention. The County has not provided good cause for its exceedingly late petition and has not met the burden of justifying its tardiness as required by the Commission's rules of practice and case law set out above. Consideration of factor (i) provides no reason to grant the petition.

- (ii) The availability of other means whereby the petitioner's interest will be protected.

The County asserts that no means other than reopening the record and intervention in the adjudicatory proceeding concerning Fermi 2 can guarantee that an adequate offsite emergency plan is in place. Petition, at 3.

This assertion is mistaken. The Commission's emergency plan regulations require adequate offsite emergency plans prior to issuance of operating licenses.<sup>14/</sup> The review and approval of local and State

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<sup>14/</sup> 10 CFR § 50.47(a)(1) states

No operating license for a nuclear power reactor will be issued unless a finding is made by NRC 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.

10 CFR §§ 50.47 (a)(2) and (b)(8) provide that NRC will base its findings on FEMA determinations as to whether State and local emergency plans are adequate and capable of implementation; that offsite emergency facilities and equipment must be adequate to support emergency response.

emergency plans is the responsibility of FEMA which, as noted previously, has not yet completed its review nor given its approval of the offsite emergency plans concerning Fermi 2. There not only are other means available to the County for assuring an adequate offsite emergency plan, but a more effective means. The County's concerns about bus shortages, volunteer firefighters, equipment, training, and evacuation routes are precisely the concerns of FEMA in reviewing the County's plan. The proper authority with which the concerns should be raised is FEMA. Since the FEMA review is presently incomplete, and since no final determination of the adequacy of the County's facilities has been made, and since no operating license may issue for Fermi 2 until FEMA and NRC have made findings of adequacy of onsite and offsite emergency plans, the County should continue to seek assistance from FEMA. In sum, the Staff submits that the proper means to assure that an adequate offsite emergency plan is developed for Monro County prior to plant licensing is continued discussions with and guidance from FEMA and that prior to a final determination by FEMA, litigation at hearing is not the best available means for addressing the County's concerns. Consideration of factor (ii) weighs against granting the petition.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

The County asserts that it can be of assistance to the Board in developing a sound record since there is little evidence in the adjudicatory proceeding on major critical issues related to offsite planning.

The County apparently believes that the Fermi 2 hearing record must contain evidence on all matters concerning compliance with the Commission's regulations for operating license applicants. Such is not the case.

10 CFR § 2.760a states

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the license.

In accord with and explanation of this rule it was recently pointed out in the Zimmer<sup>15/</sup> proceeding that:

We believe the primary role of the Board is to adjudicate issues in dispute raised in the hearing process. We do not believe the role of the Board is to address as a technical review body every potential problem. The large technical staff of the NRC is charged with reviewing, monitoring, inspecting and enforcing actions for nuclear power reactors. The taxpayer provides a very large amount of funds (over \$450 million per year) to support over 3000 staff members of the NRC whose primary function is to insure that the health and safety of the public are protected in the use of commercial nuclear power.<sup>16/</sup>

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<sup>15/</sup> Cincinnati Gas and Electric Co. et al. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, slip op July 30, 1982; Separate views of Commissioners served August 6, 1982.

<sup>16/</sup> Id. Additional Views of Commissioners Ahearne and Roberts, slip op, August 6, 1982, pp 3-4.

The issues put into controversy in this proceeding were litigated during the evidentiary hearing. No issue was raised on the Board's own motion. The record for the evidentiary hearing is a sound one for those issues in controversy and need not and should not include other, uncontested licensing matters related to offsite emergency plans. As noted previously, no license for Fermi 2 may issue until the NRC finds that both the onsite and offsite emergency plans are adequate according to the Commission's regulations. Thus, the NRC and FEMA Staff are the responsible persons with whom the County should raise its concerns.

Additionally, the County points out its lack of expertise in radiological emergency planning. Petition, at 5-7. Whereas, when a late petitioner asserts it can be of assistance in developing a record, it falls upon the petitioner to demonstrate the claim where this factor is dispositive.<sup>17/</sup> The County merely alleges that it can be of assistance but evidently would simply testify to its lack of expertise and facilities. It would fall upon the experts in radiological emergency planning in FEMA and NRC to provide the Board with essential information. These facts point even more clearly to the necessity for the County to seek assistance from FEMA and NRC staff experts rather than through litigation.

In short, the Staff submits that the County could not provide expert assistance in assessing the necessary provisions for an adequate radiological emergency plan, and that the hearing record need not contain

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<sup>17/</sup> Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-476, 7 NRC 759 (1978).

additional information concerning the matters described in the petition. Factor (iii) provides no reason to grant the petition.

- (iv) The extent to which the petitioner's interest will be represented by existing parties.

The County asserts that no existing party to the adjudicatory proceeding pursued the full range of offsite emergency planning issues "and no party has the legal capacity to protect the County's interest." Petition, at 3.

While it is true that no party protected the County's interest in the proceeding per se, it is important to note that a Monroe County Commissioner has been a participant in the proceeding since 1978 as a member of CEE and as the CEE witness for the contention concerning evacuation of a nearby residential area in case of a plant emergency. The testimony of the three parties, as previously indicated, went far beyond the limited issue of the contention and provided evidence of many other general factors in emergency response actions. Mr. Kuron had ample opportunity to seek expansion of the contention dealing with offsite emergency response at the time contentions were negotiated among the parties or anytime prior to the hearing in April, 1982. Although Mr. Kuron did not appear at the hearing on behalf of the County, it would seem that a County Commissioner who participated actively in the development and presentation of the Intervenor's case at hearing had an obligation to the County as well as the Intervenor on emergency plan matters. The presence of two County officials at hearing shows that the County had opportunity to present its views through limited appearance statements.

The County's claim that its interest was not represented at hearing should not be viewed with favor under the circumstances described above. The Staff submits that the County did have an avenue of representation at the hearing through the participation of one County Commissioner as an Intervenor and witness and that its interest in pursuing all offsite emergency plan matters could have been accommodated before the hearing by timely intervention. Consideration of factor (iv) weighs against the County's petition.

- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The County asserts that only minor delay will occur by grant of its petition since it alleges that the Applicant does not intend to begin operation of the Fermi 2 plant until November, 1983. It is further stated that the limited appearance statement of Mr. Eckhardt reserved the "right" of the County to present "further testimony." Petition, 3-4.

Although it is true that the Applicant's projected fuel load date is June, 1983 (which is the significant date, since a license is required prior to fuel load) it is not necessarily true that grant of this late intervention petition would cause only minor delay. As noted before, FEMA is scheduled to send its findings on the Monroe County offsite emergency plan to NRC in March, 1983. The NRC Staff cannot issue the supplement to the safety evaluation report concerning onsite and offsite emergency plans until receipt of FEMA's findings. Therefore, it is anticipated that the SER Supplement will not issue until Spring of 1983. Even if intervention by the County were granted immediately, the time

necessary to consider submitted contentions, engage in discovery, prepare for and hold hearing and allow time under the Commission's rules for proposed findings by the parties and the Board's decision, could extend past the projected fuel load date.

- The County did not address the matter of broadening the issues to be considered in this factor, but clearly, the County's twelve proposed contentions would greatly broaden the two issues litigated. As correctly pointed out by the County, none of the matters described in any of its provided contentions was specifically addressed during the hearing. It is obvious that the enlargement of the number of issues from 2 to 14 is significant and would expand the present record a great deal. Finally, a limited appearer may not reserve a "right to testify." Persons making limited appearance statements are not parties. 10 CFR § 2.715(a).

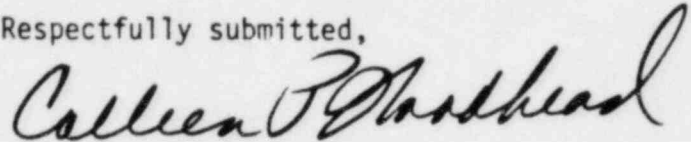
The Staff submits that the County's late intervention would significantly broaden the issues litigated in this proceeding, and might delay the proceeding so as to affect the projected date for issuance of the operating license. Factor (v) provides no reason for granting the County's petition.

In summary of the facts set out above, the Staff believes that a balancing of the five factors to be considered in regard to an untimely petition weighs in every respect against the County and that the petition must be denied.

IV. CONCLUSION

For the reasons set out above, the Staff believes that petition of the Board of Commissioners of Monroe County, Michigan should be denied.

Respectfully submitted,

A handwritten signature in cursive script that reads "Colleen P. Woodhead". The signature is written in black ink and is positioned below the typed name.

Colleen P. Woodhead  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 16th day of September, 1982



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
DETROIT EDISON COMPANY ) Docket No. 50-341  
(Enrico Fermi Atomic Power Plant, )  
Unit 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO UNTIMELY PETITION TO INTERVENE BY MONROE COUNTY, MICHIGAN" 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of September, 1982:

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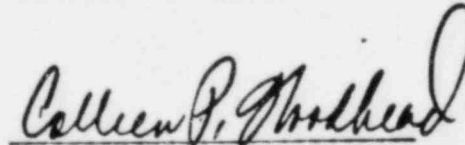
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