UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CEE'S BRIEF ON APPEAL

Citizens For Employment and Energy was admitted as a intervenor in this proceedings on January 2, 1979. CEE participated in an adjudicatory hearing before the Licensing Board on March 31, April 1, and April 2, 1982. The Initial Decision was issued on October 29, 1982. CEE timely appealed that Decision and filed Exceptions to the Initial Decision on November 8, 1982.

I. Monroe County Has Not Adopted An Emergency Evacuation Plan.

Monroe County sought leave to intervene on these proceedings and was denied that permission by the Licensing Board on October 29, 1982. CEE's Answer supported the County. The County's intervention petition was related to a number of emergency planning problems outside of the County's control. The decision of the Licensing Board was affirmed in part and modified by the Appeal Board on December 31, 1982. The Appeal Board referred the County's petition to the Director of Nuclear Reactor Regulation to be treated as a 10 CFR 2.206 petition.

In its appeal, the County pointed out that the Licensing Board was in error when it found in the Initial Decision, paragraph 63, p. 40, that the County has "a completed version of the plan." A draft version of the plan



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was submitted to FEMA in November of 1981, for informal review. The County has never adopted a final version of the plan. However, in a letter dated March 22, 1982, but not received by FEMA until September 15, 1982, the Michigan State Police requested formal review of the plan by FEMA. 47 Federal Register 47321, October 25, 1982. In violation of Michigan law, MCLA 30.401 ff., the State Police forwarded the plan as though it had been approved by the County. On the contrary, the County has not done so to this date.

If the Appeal Board has any doubts about this question, verification can be obtained from the County.

The significance of this error in the Licensing Board's Initial Decision will be discussed infra.

II. The Licensing Board Erroneously Struck CEE'S Contention Relating To Emergency Planning And Evacuation.

In its Amended Petition to Intervene, CEE's Contention #8 raised the broad issue of emergency planning. The Contention read as follows:

> 8. Emergency plans and procedures have not been adequately developed or entirely conceived with respect to an accident which could require immediate evacuations of entire towns within a 100-mile radius of the Fermi 2 plant, including Detroit. In particular, CEE is concerned over whether there is a feasible escape route for the residents of the Stony Pointe area which is adjacent to the Fermi 2 site. The only road leading to and from the area, Pointe Aux Peauz, lies very close to the reactor site. In case of an accident the residents would have to travel towards the accident before they could move away from it.

On January 2, 1979 the Licensing Board struck all of Contention #8, except the portion related to Stony Point, because it was "too broadly written and not supported by any information which would warrant a conclusion that such plans are necessary." 9 NRC 73, 80-81 (1979).

In the Initial Decision, paragraphs 80-81, pp. 49-50, the Board said, in answering CEE's Motion to Reopen the Record, that CEE had voluntarily relinquished its right to litigate Contention #8. In light of the Board's adverse ruling on January 2, 1979, the fact that CEE did not seek to resurrect the broad issue of emergency planning in the stipulated contentions of March 5, 1979 or in the second prehearing conference on July 22, 1981, does not lead to the conclusion that CEE relinquished anything. CEE was simply abiding by the Board's ruling of January 2, 1979. That ruling was not appealable in an interlocutory manner, and could only be appealed after the issuance of the Initial Decision. 10 CFR 2.730(f); 2.760; 2.762. Pennsylvania Power and Light Company, ALAB-641, 13 NRC 550 (1981); Cincinnati Gas and Electric Co., ALAB 633, 13 NRC 94 (1981). The ruling dismissing most of Contention #8 was erroneous.

Generally, reasonable specificity is required of intervenors' contentions. 10 CFR 2.714(b). However, the adequacy of off-site emergency plans for units of local government are appropriate issues for a Licensing Board adjudicatory hearing. 10 CFR 50.47(a). Since the emergency evacuation plans were not yet written, it was error for the Board to severely limit Contention #8. Instead, the Board should have allowed the contention conditionally, subject to further clarification when the off-site plans were written.

In Duke Power Company, LBP 82-16, 15 NRC 566 (1982), another Licensing Board faced this very same issue. Instead of outright dismissal of the contentions there, the Board admitted conditionally. As the Board said in rejecting the Applicants' and Staff's arguments regarding specificity:

> Apparently in recognition of the unfairness in such a squeeze play, it has not been uncommon for licensing boards to admit vague contentions conditionally, subject to later specification, or to defer rulings on some contentions until the necessary documentation is available. 15 NRC at 572.

The Board went on to explain a number of reasons why specificity in these circumstances, before an off-site plan was even written, was unreasonable.

> There are several practical reasons to reject this argument. In the first place, it is very difficult to express concrete concerns about emergency planning in the abstract, without reference to specific emergency plans. It is probably a waste of time for all concerned, including this Board, for intervenors to develope 'concerns' that emergency planners, working independently, may be fully addressing. The sensible approach is for a potential intervenor first to study proposed emergency plans, and then to decide whether he finds flaws in them which he may wish to contest.
>
> Moreover, forcing intervenors to shoot in the dark may encourage fabrication of artificial, frivolous and perhaps even spurious contentions, because by necessity they are based on little more than imagination. 15 NRC at 573.

The Board also found that precluding off-site emergency planning issues from the adjudicatory hearing process would violate the Atomic Energy Act. Congress did not intend to limit the right of the public to litigate health and safety issues under the Atomic Energy Act. The Act unequivocally requires that in any proceeding for the issuance of a license, the Commission must grant a hearing to any party whose interest may be affected by the proceeding. 42 U.S.C. 2239(a). Under long-established Commission practice, those hearings must be formal adjudications in conformance with the Administrative Procedure Act. Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (D.C. Cir., 1968). The scope of the hearing offered must include "all relevant matters" [Siegel, supra, at 785], and a hearing can be avoided only where "there are no material facts in dispute." Public Service Company of New Hampshire v. FERC, 600 F.2d 944, 955 (D.C. Cir., 1979). The sufficiency of offsite emergency planning is highly relevant to the determination which must be made before a license can issue that such a license will not be inimical

to the public health and safety. 42 U.S.C. 2113(d). The evaluation of off-site plans involves material factual issues which intervenors are entitled to dispute under the Administrative Procedure Act. Therefore, to withdraw off-site planning from licensing adjudications and allow their resolution by the Staff, as this decision permits, would constitute a blatant violation of §189a and the Administrative Procedure Act, and would deny CEE due process in the litigation of license conditions. Moreover, licensing boards may not delegate contested matters to the Staff for posthearing resolution. See Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Unit No. 1), ALAB-461, 7 NRC 313, 318 (1978); Metropolitan Edison Co. (Three Mile Island Units 1 and 2), LBP-81-59, 14 NRC 12 (1981). The decision in effect allows a full power license to be issued by the Staff, in violation of the Commission's requirement that licensing boards

> resolve [contested licensing issues] openly and on the record after giving the parties . . . an opportunity to comment or otherwise be hard.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LAAB-298, 2 NRC 730, 736-7 (1976).

Here, as in Duke Power, CEE Contention #8 relating to off-site planning should have been admitted conditionally and the hearing on it deferred until such time as Monroe County adopts a plan. Since the County has not yet done so, the issue is not even ripe for hearing. Such a bifurcated adjudicatory hearing is not an unreasonable burden on the Licensing Board or the parties in light of the significance of safety planning issues and the right to litigate them. The Boards could simply hold the record open on off-site planning until the plan was produced and decide any other issues in the meantime. See also Union of Concerned Scientists Petition For Rulemaking Re: 10 CFR 50.47, 47 FR 51889, November 18, 1982, and supporting documentation.

The decision of the Licensing Board of January 2, 1979, dismissing CEE's Contention #8 should be reversed, and the case should be remanded to the Licensing Board for a hearing on off-site emergency planning issues to be held after Monroe County approves a plan.

## III. The Licensing Board Erred In Finding That There Was A Feasible Escape Route For The Residents of Stony Point.

In Paragraphs 41-57, pp. 25-37, of the Initial Decision, the Licensing Board detailed the testimony regarding the evacuation of Stony Point. CEE took exceptions, Numbers 16-24, to those findings. As the Board said at Paragraph 41, p.24:

> The parties viewed this Contention as alleging that Pointe Aux Peaux Road is not an adequate evacuation route for the residents of Stony Point. There was no dispute as to whether Pointe Aux Peaux Road lies close to the reactor - it clearly does - or whether it is the sole evacuation route from Stony Point - it clearly is - or whether in using the Road the residents of Stony Point would be forced to move toward the reactor before moving away from the reactor - they clearly would. The sole issue was whether, given these facts, the road is a feasible evacuation route.

The Board found that nothing about Pointe Aux Peaux Road itself made it unique so that it was infeasible as an evacuation route. Paragraphs 49-50, pp. 30-31. The Board discounted the significances of accidents or weather. Id. The Board also found that evacuation along the road could be accomplished within 1½ to 2½ hours which was reasonable. Paragraphs 44-48, pp. 25-30. The Board also found that travelling on the direction of the reactor did not render the evacuation route infeasible. Paragraph 57, pp. 36-37.

The finding that Stony Point could be evacuated within 2½ hours was erroneous. Pointe Aux Peaux Road is the only way in and out of Stony Point. An accident blocking the road would bring the evacuation to a halt for as long as it took to clear it.

There are no alternate routes. The Applicant's witnesses, Ms. Madsen and Mr. Kanen, relied upon the Monroe County Emergency Plan as the basis for their conclusion that an accident would not block the road for long. Tr. 420-423.

However, in its findings the Board concluded that emergency evacuation plan issues were outside the scope of the contention. How this could be so when the witnesses, whose conclusions the Board accepted, relied on a plan in draft form escapes a rational analysis. The witnesses did not consider the availability of police and equipment in reaching their conclusions about the time needed for evacuation, but relied upon the adequacy of the County's plan. (Tr. 423-424). As was pointed out above, the plan is only in draft form and if full of problems, some of which the County noted in its intervention pleadings.

If only one lane was blocked, the route becomes inadequate because workers returning home, vehicles to transport handicapped persons and those without transportation cannot enter Stony Point. For Pointe Aux Peaux Road to be considered "feasible" it must be available to traffic leaving and entering Stony Point. A simple road repair closing one lane would render the Pointe Aux Peaux Road not feasible for evacuation.

Workers returning to Stony Point to secure their homes and evacuate their families, buses to transport those without private vehicles and special transport for the handicapped becomes significant for another reason. To insure a timely evacuation with the 2½ hour limit accepted by Board, it would be necessary to establish the time needed for the workers to return home, buses to enter Stony Point and handicapped persons safely transported. The Madsen and Kanen testimony failed to take all of these factors into their studies of time estimates.

Kanen states that no demographics have been done to establish where residients are employed p. 420. Madsen states she has no knowledge of handicapped persons in Stony Point. P. 409. Kanen also shows no knowledge of handicapped persons (p. 413). Kanen estimates that 50 to 70 people would need public transportation in order to evacuate (p. 413). Yet there is no estimate of the time frame necessary to provide this transportation.

The Staff's witnesses, Mr. Urbanek and Mr. Kantor echoed the reasonableness of the 2½ hours time estimate. Mr. Urbanek considered the problem of weather, but like the other witnesses did so inadequately. Urbanek. ff. Tr. 533. None of the witnesses estimated the possible additional delays due to reduced visibility and the increased likelihood of accidents in heavy rain, snow, or fog. With only one road in and out, the signficance of those problems is magnified greatly, at least for the citizens of Stony Point if not for Edison and Staff. Ironically, on the night of the public hearing on the controlled exercise of the draft plan, February 3, 1982, there was a snowstorm. The State Police, who conducted the hearing and refused the County's request to adjourn it, ironically also issued a "red alert", ordering all but emergency vehicles off the roads. Situations like that would wreak havoc on the rosy evacuation time estimates the Board erroneously adopted.

In addition, the residents of Stony Point must travel in the direction of the reactor in order to evacuate. Id., Paragraph 51, p. 31. As the Appeals Board said in Southern California Edison Company, ALAB-248, 8 AEC 957, 963 (1974):

> It strains credulity to expect that people will drive closer to a reactor in order to escape from an emergency generated by the reactor. In the veracular, it might appear to them that they were jumping from the frying pan into the fire.

Mr. Kantor testified that travelling in the direction of the reactor would not significantly increase an evacuee's radiation dose. (Tr. 559). The Board found however that under certain circumstances travel in the direction of the reactor could increase the dose. Paragraph 54, p. 33. The Board found that risk to be negligible because it found a low probability for the occurrence, and because the increase in dosage was still within so-called "safe limits". Paragraphs 55-56, pp. 35-36. Those finding are based on two erroneous assumptions.

First of all, the accidents postulated by the witnesses and the Board were within the range that would ensure that the releases were controlled by the utility. (TR 450-451). Secondly, the accident postulated is characterized as "serious." Paragraph 55, p. 35, but definitely not a worst case scenario.

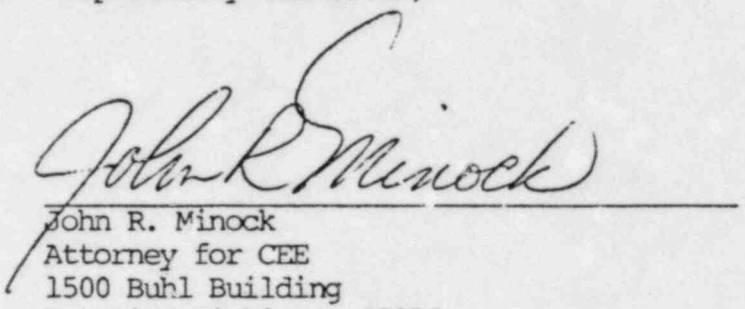
The Board had great difficulty accepting the conclusions of the Applicant's witnesses. (TR. 519-520; 524). Given some of the questions from the Board and answers given by Mr. Hungerford, this is not very surprising. See, e.g., TR. 492-497. Just what changed the Board's minds about the problem of dose calculations is unclear, for the only witnesses who testified subsequently were those of the Staff, and their primary reassurance on this point was that the Stony Point situation was not unique. (TR. 548).

The Staff witnesses, Mr. Kantor and Mr. Anthony, relied in their testimony on the adequacy of the draft County plan, according to Staff counsel. (TR. 520).

How the Board can logically accept the conclusions of witnesses who in turn rely on their assessment of the adequacy of the draft County plan which the County does not feel is adequate in many respects is beyond analysis. The Board's finding that there is a feasible escape route for Stony Point presupposes an adequate local plan. That plan has not been finalized, and the Board's conclusion is therefore premature. In addition, the Board's acceptance of the optimistic time

estimates for evacuation of Stony Point was erroneous which in turn costs serious doubt upon the does calculations. The findings of the Licensing Board on CEE Contention #8 are erroneous and should be reversed.

Respectfully submitted,



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Dated: February 9, 1983

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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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Thomas S. Moore
Dr. Reginald L. Gotchy

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CERTIFICATE OF SERVICE

I hereby certify that copies of CEE's Brief On Appeal in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 9th day of February, 1983:

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