ADJUDICATORY ISSUE

February 4, 1983 (NEGATIVE CONSENT) SECY-83-53

COMMISSION LEVEL
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For: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-709
(IN THE MATTER OF THE DETROIT EDISON COMPANY)

Facility: Enrico Fermi Atomic Power Plant, Unit No. 2

Petition For Review: None

Review Time Expires: February ~~15~~ 14, 1983

Purpose: To inform the Commission of an Appeal Board decision withdrawing its Order to Show Cause and reinstating intervenor's appeal from the Licensing Board's decision and to recommend that

EX 5

Discussion:

Summary

In ALAB-709, the Appeal Board held that a party's appeal of a Licensing Board decision could not be precluded for failure to file findings of fact and conclusions of law if such findings were not required by the Licensing Board. 2/

EX 5

2/ On the other hand, if such findings were required, and the party fails to comply, then the Appeal Board has the discretion to deny the non-cooperating party's appeal.

CONTACT:
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Background

This matter arose when intervenor Citizens for Energy and the Environment (CEE) sought to appeal the Licensing Board's initial decision authorizing the issuance of a full power operating license for Fermi 2. CEE had purposefully, and on notice to the other parties and Licensing Board, declined to file proposed findings of fact and conclusions of law ("proposed findings"). 3/ Because CEE had not filed proposed findings, the Appeal Board ordered CEE to show cause why its appeal should not be dismissed as contrary to NRC practice. In the Appeal Board's tentative view, NRC practice requires a party to file proposed findings to preserve its opportunity to appeal the Licensing Board's decision. "This is because [the Appeal Board] will not entertain arguments that a licensing board has no opportunity to address and that are raised for the first time on appeal, absent a compelling reason to do so." 4/

In response to the Order, CEE argued that the Rules of Practice do not require all parties to file findings of fact and conclusions of law, and thus,

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3/ See LBP-82-96, 16 NRC ___, (Oct. 29, 1982).

4/ Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC ___, (Sept. 28, 1982) (slip opinion at 5); and Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1, ALAB-650, 14 NRC 43, 49 (1981)).

the failure to file cannot bar an appeal. 10 CFR § 2.754 gives any party other than the applicant the option of filing proposed findings unless directed to do so by the Licensing Board. 5/ The Licensing Board had not so directed CEE in this case, and even if it had issued such an order, CEE noted that the remedy of default before the Licensing Board would be only optional. 10 CFR 2.754(b). In view of these circumstances, CEE argued that it should not be defaulted by the Appeal Board for three reasons. First, the applicant and staff waived their rights to request a default since neither of them objected to CEE's statement to the Licensing Board that it would not file any proposed findings. Second, although issues may not be raised for the first time on appeal, the filing of proposed findings should not be required as a predicate for appeal where the record clearly shows that the issues on appeal

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5/ 10 CFR § 2.754 states in pertinent part:

> (a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law ... within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:
>
> > (1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law ...
> >
> > (2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed. However, the staff may file such proposed findings within fifty (50) days after the record is closed.
>
> (b) Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

were fully litigated below. 6/ Third, it would be unfair to default CEE at the appeal stage after its long and responsible participation in the hearing process.

Applicant's opposition to CEE followed the reasoning in the Appeal Board's Show Cause Order. Applicant also argued that the default provision of § 2.754(b) is not relevant here, since that section only pertains to defaults before the Licensing Board while this case involves the propriety of an appeal before the Appeal Board. In Applicant's view, CEE was estopped from complaining to the Appeal Board because CEE failed to structure its participation meaningfully by not providing its views to the Licensing Board. 7/

Staff's opposition to CEE was based on its belief that under established NRC practice arguments as well as issues cannot be raised for the first time on appeal. 8/ Since CEE did not provide

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6/ Although Salem, supra, note 2, and Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 349 (1978), contain statements that proposed findings are a prerequisite for appeal, CEE distinguished those cases on the ground that in them the intervenors lost their rights to appeal for more than simply failing to file proposed findings.

7/ Applicant also stated that the Licensing Board effectively had directed CEE to file proposed findings of fact and conclusions of law when it adopted a schedule for filings which had been agreed upon by the parties. The Appeal Board found that the establishment of a timetable is not tantamount to ordering the parties to file proposed findings.

8/ The cases which staff cited are: Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 333 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974), reconsideration denied, ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit

[Footnote 8 continues on following page.]

the Licensing Board with its views as to how the evidence presented should be interpreted, staff contended that CEE impermissibly was raising new arguments by expressing its view of the evidence for the first time on appeal. As for CEE's waiver argument, staff responded that an opposing party's failure to object cannot constitute a waiver because the default arises automatically from the party's failure to present its viewpoint. The Licensing Board's failure to adopt CEE's proposed conclusions cannot be appealable error if the Licensing Board was not given the opportunity to consider those conclusions through the filing of proposed findings. Finally, staff found no exceptional circumstances to justify the Appeal Board's consideration of CEE's appeal.

II. Appeal Board Decision

The Appeal Board vacated its Order to Show Cause and authorized CEE to pursue its appeal, holding that since the filing of proposed findings was optional under § 2.754, ". . . no default can attach to the intervenor's decision not to file proposed findings, and its appeal would seem properly before us." (Slip op. at 5). 9/

The Appeal Board rejected the argument that Susquehanna and Salem established proposed findings as a prerequisite for an appeal by noting that neither of

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8/ [Footnote 8 continues from previous page.]

No. 2), ALAB-280, 2 NRC 3, 4 n. 2, Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978); Salem, supra at 49; Susquehanna, supra (slip op. at 5). In our view, these cases are all distinguishable or inapposite.

9/ In reaching this result, the Appeal Board was guided in part by the Federal Rules of Civil Procedure which are a model for many of the NRC's procedural rules. In Federal Court, proposed findings are optional, Fed. R. Civ. P. 52(a), and are not a prerequisite for appeal.

those cases discussed the possible sanctions for failure to file. The Appeal Board repeatedly dismissed the proposition that it could attach a sanction to an act which the rules make permissive. The Appeal Board acknowledged that although there are a number of NRC cases that "hint" at the power of an Appeal Board to sanction the failure to file proposed findings, "the failure to file proposed findings has met with sanctions only in those instances where a Licensing Board directed such findings to be filed." (Slip op. at 10.) 10/

The Board also tentatively found that CEE was not attempting to raise new issues on appeal but had limited itself to the evidentiary case it had presented to the Licensing Board. 11/ Moreover, the Appeal Board tentatively concluded that the Licensing Board knew CEE's views sufficiently to address them in its decision and for that reason had not ordered CEE to file proposed findings. Accordingly, the Appeal Board withdrew its November 12, 1982 Order and reinstated CEE's appeal.

III. Analysis

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we believe

that

10/ The Appeal Board cited Midland, supra at 332-33; Northern States, supra 8 AEC at 864, St. Lucie, supra at 4 n.2, and Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC ___, (Sept. 9, 1982) (slip op. at 8-13).

11/ However, the Board will entertain arguments that CEE was trying to raise new issues after CEE explicitly states its arguments in its brief. The Board also declined to reach the question of the minimal participation necessary to preserve a party's appellate rights.

we EX.5

believe that

For all these reasons, we recommend

Sheldon L. Trubatch
Acting Assistant General
Counsel

Attachment: ALAB-709

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Friday, February 18, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Stephen F. Eilperin, Chairman
Thomas S. Moore
Dr. Reginald L. Gotchy

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

John R. Minock, Ann Arbor, Michigan, for the intervenor Citizens for Employment and Energy.

Harry H. Voigt, Washington, D.C., for the applicants, Detroit Edison Company, et al.

Colleen P. Woodhead for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

January 4, 1983

(ALAB-709)

This memorandum authorizes Citizens for Energy and the Environment (CEE) to proceed with its appeal of the Licensing Board's October 29, 1982 initial decision. LBP-82-96, 16 NRC __. That decision authorized the issuance of a full power operating license for Fermi 2. Because CEE did not file proposed findings of fact and conclusions of law with the Board, we initially questioned whether CEE's

appeal was proper. See Order to Show Cause (Nov. 12, 1982). CEE's answer to our order to show cause has convinced us that, absent a board order requiring the submission of proposed findings, an intervenor that does not make such a filing is free to pursue on appeal all issues it litigated below.

Our order that CEE show cause why its appeal should not be dismissed for failure to file proposed findings of fact and conclusions of law relied upon a series of decisions to the effect that a party's appellate brief must relate to its exceptions: in turn, a party can except only to a board finding that rejected that party's proposal. See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC __, __ (Sept. 28, 1982) (slip opinion at 5); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). Seemingly, absent proposed findings, there could be no exceptions, no brief, and hence no appeal. As we explain below, however, a closer reading of the cases and underlying regulations leads us to conclude that that result can obtain only if a licensing board directs the parties to file proposed findings. Here, the Licensing Board established a timetable for the submission of proposed findings but issued no direction for such a filing. The

distinction is important,[1/] and CEE's appeal is properly before us.

I

In civil cases tried in federal court without a jury, the obligation of making findings of fact rests with the court. The litigants need not request them of the court or propose findings of their own. Fed. R. Civ. P. 52(a). This does not mean that proposed findings serve no purpose. As one court explained (Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972)):

> It is, to be sure, good practice and effective advocacy to submit proposed findings and conclusions when requested to do so. And it is prudent to receive them, especially in complicated cases. They serve as a useful aid to the trial court's understanding of each party's theory of the lawsuit based upon their respective versions of the law and facts. There is nothing in the rules of procedure, however, requiring their submission, and it is certainly not error for the trial court to proceed without them. . . .

See generally 5A Moore's Federal Practice, ¶ 52.06 (2d ed. 1981); 9 Wright & Miller, Federal Practice and Procedure, §§ 2574-81 (1971).

Many of the Nuclear Regulatory Commission's rules of practice are modeled upon the Federal Rules of Civil Procedure. See, e.g., 10 CFR Part 2, App. A, IV(c). The

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1/ Cf. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1418 (1982) (sanction for failure to answer interrogatories is proper only where a board order unequivocally imposes an obligation to answer).

provision governing submission of proposed findings to the licensing board, 10 CFR § 2.754, embodies the same general philosophy as the comparable federal rule. The controlling NRC regulation, reads in pertinent part as follows:

> (a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law . . . within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:
>
> > (1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law. . . .
> >
> > (2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed. However, the staff may file such proposed findings, conclusions of law and briefs within fifty (50) days after the record is closed.
>
> * * *
>
> (b) Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

The text of that rule is plain enough. The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise. 2/ The presiding officer is

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2/ There is some ambiguity in the rule as to whether the party that has the burden of proof is obliged to file proposed findings. As a practical matter, the issue is unlikely ever to arise because applicants bear the burden of proof in licensing proceedings and invariably make such filings.

also empowered to take a party's failure to file proposed findings, when directed to do so, as a default. In the case at hand, the Licensing Board did not direct the parties to file proposed findings, but only approved a filing schedule to which the parties had agreed among themselves. Tr. 576-77. That action of the Board falls short of an explicit direction. Accordingly, no default can attach to the intervenor's decision not to file proposed findings, and its appeal would seem properly before us.

II

Applicants argue that, while 10 CFR § 2.754 may not empower a licensing board to default a party absent an unheeded direction to file proposed findings, nonetheless the recalcitrant party is not entitled to appeal the licensing board's decision. This, we are told, follows from the proposition stated in the cases upon which we relied in our order to show cause -- i.e., that a party's appellate brief must relate to its proposed findings. 3/ The NRC

3/ Applicants' Response to CEE's Answer to Order to Show Cause (Dec. 22, 1982) at 5-6. Applicants also argue that the Licensing Board, in fact, directed the parties to submit proposed findings. Id. at 4-5. As noted in text, we think that the setting of a timetable for the submission of proposed findings falls short of a requirement, especially given the language of 10 CFR § 2.754 which distinguishes between permissive filings and mandatory ones.

staff also argues that CEE's appeal should be dismissed on this basis. 4/

While it is true that the cases we relied upon noted the proposition applicants and the staff remind us of, neither Susquehanna nor Salem explicitly addressed what sanction, if any, may be imposed for a failure to file proposed findings. 5/ The major difficulty with the applicants' and the staff's argument for dismissal is that it attaches a sanction to an act which our rules explicitly make permissive -- it treats the choice not to file proposed findings as a waiver of the right to appeal the Licensing Board's decision. The peculiarity of that result makes their argument manifestly unacceptable as an interpretation

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4/ NRC Staff Response to CEE Answer to Order to Show Cause (Dec. 23, 1982).

5/ Susquehanna held that a party's appeal could be dismissed where its appellate brief was so inadequate that it was equivalent to no brief at all having been filed. 16 NRC at __ (slip opinion at 8). In Salem, what we said was in the context of explaining the indicia of an acceptable brief, and the limitations that intervenors' briefs had placed on our appellate review. 14 NRC at 49-51.

of our rules of practice. 6/

Moreover, our statements in Susquehanna and Salem regarding proposed findings were based on the more general proposition that "we will not ordinarily entertain arguments raised for the first time on appeal." Susquehanna, supra, 16 NRC at __ (slip opinion at 5, n.6). See also Salem, supra, 14 NRC at 49; Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). We adhere to that fundamental principle of appellate practice. However, here, at least at this juncture, it does not appear that CEE is pressing arguments raised for the first time on appeal. Rather, on its face, its appeal is limited to the evidentiary case it presented (through its witness and cross-examination) to the Licensing

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6/ Additionally, the applicants' argument, if accepted, would place the Board in the unusual position of deciding the merits of issues that, for purposes of appeal, are uncontested. This result runs counter to the Commission regulation that in most instances restricts the boards in operating license proceedings to deciding only contested issues. 10 CFR 2.760a.

Board.[7] The applicant and the staff may seek to persuade us to the contrary after CEE's brief has been filed and the issues in controversy have been made explicit. But, at least at this stage of our review, it seems as if the Board did have the benefit of CEE's views and was in a position to address CEE's arguments. If the Board was unclear as to where CEE stood, it could have directed CEE to file proposed findings.[8]

On earlier occasions we have recognized that the failure to file proposed findings may be the cause for default or other sanctions where the presiding officer has directed the parties to submit proposed findings. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-33 (1973), we commented that "10

7/ One aspect of CEE's appeal, exceptions 25-28, contests that part of the Licensing Board's initial decision that denied Monroe County's late-filed petition to intervene. CEE cannot press that aspect of its appeal because 10 CFR § 2.714a(b) allows only the petitioner that was denied leave to intervene to appeal such an order. In addition, we have already disposed of Monroe County's appeal. See ALAB-707, 16 NRC ___ (Dec. 21, 1982).

8/ We need not, and do not, now reach the question of what constitutes the minimal participation necessary to preserve a party's appellate rights. We note, however, that the situation at bar is patently stronger than the case of an intervenor that seeks to appeal a licensing board's disposition of another party's contentions but has not put on its own evidentiary case.

CFR § 2.754 gives a party the right to file proposed findings and conclusions, and also provides that a board may require that they be filed" (emphasis added).[9/] We also noted that, even when a licensing board order requesting the submission of proposed findings has been disregarded, "the Commission's Rules of Practice [do] not mandate a sanction," and a licensing board acts within its discretion in treating as contested those issues of fact as to which the intervenors had introduced affirmative evidence or engaged in substantial cross-examination. Id. at 333. See

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9/ Because the intervenors in Midland did not comply with the Board's order to file proposed findings, it greatly complicated the Board's task of determining whether particular issues were, in fact, still contested. The failure of intervenors to file proposed findings, as directed, was one of the practices specifically disapproved of by the Supreme Court in its review of certain aspects of the case.

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

also Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974), reconsideration denied, ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975) (party that failed to submit proposed findings when directed to do so is scarcely in a position, legally or equitably, to protest the Licensing Board's determinations). When another aspect of Midland was recently before us, we dismissed the intervenor's appeal where the Licensing Board had specifically ordered the intervenor, to no avail, to file a brief and proposed findings. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC __, __ - __ (Sept. 9, 1982) (slip opinion at 8-13). Compare Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-280, 2 NRC 3, 4 n.2 (1975) (finding intervenor in default for failing to file proposed findings as directed, but questioning whether even absent such an order an appeal would be entertained).

In sum, while our cases may hint at a broader authority to impose sanctions (see St. Lucie, supra), the failure to file proposed findings has met with sanctions only in those instances where a Licensing Board directed such findings to be filed. That is consistent with the Commission's rules, and is the extent of the adjudicatory boards' enforcement powers under 10 § CFR 2.754.

It is worth reiterating that 10 CFR § 2.754 empowers a licensing board to direct the parties to file proposed

findings. And that is plainly the better practice. Our earlier Midland decision is again apt:

> the rule recognizes that the filing of proposed findings and conclusions by parties is likely to be of substantial benefit to a licensing board in resolving various questions which are at issue in a proceeding -- particularly one such as this which involves complex factual questions and a lengthy record which includes a variety of expressed opinions on the various facets of reactor operation. If nothing else, such proposed findings will assist a board in determining what issues in fact exist between the parties, and what issues are either not actually in dispute or not relevant to the eventual decision which must be rendered.

6 AEC at 333. In the case at bar, the Licensing Board proceeded to decision without mandating the filing of proposed findings. Perhaps, given the relatively condensed hearing -- three days -- the Board did not insist because it felt it had a firmer grasp of the parties' positions and the contested facts than it has in the more usual reactor licensing case. But it would be best if this manner of proceeding were the exception and the licensing boards routinely directed the filing of proposed findings.

For the foregoing reasons, our November 12, 1982 Order to Show Cause is withdrawn, and CEE's appeal from the Licensing Board's October 29, 1982 decision is reinstated. Its brief shall be filed within thirty-five days of service of this decision.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Joan Shoemaker
C. Joan Shoemaker
Secretary to the
Appeal Board