ADJUDICATORY ISSUE

(Notation Vote)

September 9, 1983 SECY-83-372

COMMISSION LEVEL
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For: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-730 (DETROIT EDISON COMPANY - ET. AL.)

Facility: Enrico Fermi Atomic Power Plant, Unit 2

Petition for Review: Citizens for Employment of Energy, Intervenor

Review Time Expires: September 23, 1983, as extended

Purpose: To inform the Commission of an Appeal Board decision which, in our opinion,

Discussion:

Summary

In ALAB-730, the Appeal Board affirmed the Initial Decision of the Licensing Board, LBP-82-96, 16 NRC 1408, authorizing issuance of an operating license for the Enrico Fermi Atomic Power Plant, Unit 2 (the facility). In its decision, the Appeal Board considered and rejected three emergency planning issues of the intervenor, Citizens for Employment of Energy, (CEE): the lack of a final county

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emergency plan, the striking of a portion of the emergency planning contention, and the finding that residents of Stony Point could be evacuated in an emergency.

CEE's petition seeks review of two of these issues. It contends that Commission review is warranted because Monroe County does not have a validly approved radiological emergency plan and that the Appeal Board improperly refused to reopen the record to admit general emergency planning issues. CEE, however, does not seek review of the Appeal Board finding that there is substantial evidence on the record to support the Licensing Board's determination that there is a feasible escape route for the residents of the Stony Point Area.

Background

The issues in this petition relate to CEE's attempt to expand the scope of contention 8, which reads as follows:

> "CEE is concerned over whether there is a feasible escape route for the residents of the Stony Point area which is adjacent to the Fermi-2 site. The only road leading to and from the area, Pointe Aux Paux Road, 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.

The Licensing Board viewed this contention as presenting the sole emergency planning issue in this proceeding.

EX. 5

CEE had, however, attempted to litigate a broader emergency planning contention. As originally submitted, contention 8 also challenged the fact that emergency plans had "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 admitting contention 8, the Licensing Board struck this portion of the contention for noncompliance with the basis and specificity requirements of 10 CFR §2.714(b).

In a prehearing conference, held July 22, 1981, the Licensing Board again addressed the scope of the contentions. At this time, CEE noted that it wished to retain contention 8 which "related to the evacuation of residents toward the plant from one particular geographic area." Tr. 193. In response to the applicants' assertion that the general adequacy of the emergency plan was not an issue and "[t]he sole matter in controversy is the evacuation route from Stony Point" (Tr. 207), CEE responded (Tr. 208):

> Speaking on behalf of the Intervenor, the contention that was submitted is very specific. . . . We have major reservations about the Applicant's emergency evacuation plans. We can deal with that in other forums. We are not going to try to expand our contentions.

Meanwhile, a working draft of the Monroe County plan had been produced in March 1981 and released for public comment in April 1981. This version was the subject of extensive review both by Monroe County officials and by responsible State planning representatives. A completed version of the Monroe County plan was produced in November 1981. Michigan officials forwarded the State

and county plans (Monroe and Wayne Counties) to the FEMA Regional Assistance Committee for informal review and comment on November 19, 1981.

A full-scale exercise of emergency response capabilities around Fermi 2, involving applicants, the State of Michigan, and Monroe and Wayne Counties, was held on February 2, 1982. The following day FEMA and the NRC Staff held a public critique of the exercise. On the evening of February 3, 1982, the State of Michigan conducted a public hearing on the adequacy of offsite emergency planning around Fermi 2. Participating on the panel were representatives from Michigan, Monroe and Wayne Counties, Applicants and FEMA.

The evidentiary hearing in this proceeding was held in Monroe, Michigan from March 31 to April 2, 1982. Among the matters covered in the hearing was Contention 8 dealing with Stony Point evacuation feasibility. CEE presented evidence on this matter, consisting of the testimony of Mr. Frank Kuron, a Monroe County Commissioner at the time.

On August 27, 1982, more than four months after the evidentiary record was closed, the Monroe County Commissioners petitioned for leave to intervene in this operating license proceeding and for the record to be reopened to receive Monroe County's concerns regarding specific defects in their emergency plan for a radiological emergency at Fermi 2. The County contended that good cause for its untimely filing was provided by recent developments which had only recently made the County aware that significant defects in its emergency plan are not remediable by the

County Commissioners themselves.[2] CEE supported the County's petition and itself requested the reopening of the record to litigate "Amended contentions 8 and 9."[3]

Licensing Board Decision

In its initial decision, the Licensing Board held that CEE voluntarily relinquished its right to litigate contentions 8 and 9. With respect to CEE's motion to reopen the record the Licensing Board held that CEE had not provided new and significant information which would materially affect the decision. Accordingly, the Licensing Board denied CEE's petition for failure to satisfy the requirements for reopening of the record. 16 NRC at 1436.

Appeal Board Decision

Before the Appeal Board, CEE argued that the Licensing Board erred in not granting CEE's motion to reopen the record to consider the deficiencies to the emergency plan noted by Monroe County. In this regard, CEE contended that Monroe County's delay could not be attributed to CEE and that CEE made a timely petition for reopening upon learning of Monroe County's allegations of specific deficiencies. As additional grounds for reopening the record, CEE pointed out that Monroe County's radiological emergency plan was not complete and that it is violative of CEE's procedural rights to a fair hearing for the

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[2] In ALAB-707 the Appeal Board affirmed the Licensing Board's rejection of Monroe County's petitition. See SECY-83-48

[3] Contention 9, which refered to medical treatment of radiation injuries had been withdrawn by CEE during the July 22, 1981 prehearing conference.

Licensing Board to litigate and decide emergency planning issues in the absence of a final plan.

The Appeal Board dismissed the first argument by noting that CEE stood in no better position than Monroe County did in its earlier appeal. According to the Appeal Board, CEE was in as good a position as Monroe County to question the completeness and adequacy of the emergency plan, yet did not do so until the evidentiary hearing was long over. The Appeal Board based this finding on the fact that CEE's principal witness at the hearing, Mr. Frank Kuron, was also a County Commissioner and that in view of CEE's limited organization, it was fair to impute Mr. Kuron's knowledge to CEE.

The Appeal Board further reasoned that CEE's offering did not consist of "new" facts; rather it consisted of the County's reevaluation of already existing facts.

> "There is no substantial reason why the asserted significance of the basic facts long available to both Monroe County and CEE should not have been appreciated earlier and raised in a timely fashion." Slip op. at 12.

The Appeal Board also dismissed CEE's complaint that the plan must be complete by noting that although the plan is not yet final, all that is required by the Commission is that it be sufficiently developed to support a conclusion that the state of emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of the radiological emergency. Commission regulations and precedents do not require a complete final plan prior to conclusion of the adjudicatory process.

Similarly, the Appeal Board held that CEE's procedural rights to a fair hearing had not been violated. Relying on Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC___, August 19, 1982, the Appeal Board concluded that CEE did have sufficient information available at the time it would have been required to point out specific deficiencies, that is, no later than February 1982, when the plan did exist and the emergency planning exercise was conducted.

Finally, the Appeal Board addressed CEE's claim that the Licensing Board erred in striking that part of its original contention 8 that challenged the adequacy of the emergency plans then under development. The Appeal Board concurred with the Licensing Board's view that CEE waived any right to advance such generalized issues at the July 22, 1981 prehearing conference.

Analysis:

For these reasons we believe that

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Attachment: ALAE-730
Petition for Review
NRC Staff Response
Applicant's Response

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, September 23, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, September 16, 1983, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ATTACHMENT 1

Release

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

SERVED JUN 03 1983

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 and L. Charles Landgraf, Washington, D.C., for the applicants, Detroit Edison Company, et al.

Colleen P. Woodhead for the Nuclear Regulatory Commission staff.

DECISION

June 2, 1983

(ALAB-730)

On October 29, 1982, the Licensing Board issued its initial decision authorizing an operating license for the Enrico Fermi Atomic Power Plant, Unit 2. See LBP-82-96, 16 NRC __. The reactor is located on the western shore of Lake Erie in Frenchtown Township, Monroe County, Michigan.

We have before us the appeal of the sole intervenor in the operating license proceeding, Citizens for Employment and Energy (CEE). CEE raises three issues for our

consideration. First, CEE claims that the Licensing Board erred in finding that Monroe County's emergency plan is complete. It is intervenor's position that absent a final local plan, emergency planning issues are not even ripe for an administrative hearing, let alone for decision. Second, CEE claims that the Licensing Board erred in striking that part of its original contention 8 that challenged the adequacy of the emergency plans then under development. Again, CEE argues that the issue raised by that contention should be litigated at such time as Monroe County adopts a final emergency plan. Lastly, CEE asserts that the Licensing Board erred in finding that there is a feasible evacuation route for residents of the Stony Point area. That community is quite close to Fermi 2, and the sole evacuation route for its residents initially leads toward the reactor.

I.

FACTUAL BACKGROUND

On October 9, 1978, CEE filed its petition for leave to intervene in this proceeding. Its amended petition, filed shortly thereafter, included among the 11 contentions CEE proposed to litigate only one directed to emergency planning that is of consequence to this appeal. Contention 8 read as follows:

> 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 Point area which is adjacent to the Fermi 2 site. The only road leading to and from the area, Pointe Aux Peaux, 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.

CEE Amended Petition to Intervene (Dec. 4, 1978) at 4.

In granting CEE's petition for leave to intervene, the Licensing Board struck the first sentence of contention 8 for noncompliance with the basis and specificity requirements of the Commission's rules. LBP-79-1, 9 NRC 73 (1979). See 10 CFR § 2.714(b). The Board was of the view that the "introductory sentence challenging the lack of emergency plans and procedures for all towns within a 100-mile radius of the plant, including Detroit, is too broadly written, and not supported by any information which would warrant a conclusion that such plans are necessary." 9 NRC at 80. As to CEE's remaining contentions, the Board admitted some, rejected others, and asked the parties to meet in an attempt to reach an agreement on the rest. Id. at 87. The attempt was successful, and on March 5, 1979, intervenor, applicants and the NRC staff entered into a stipulation, accepted by the Licensing Board, that set out the scope of the contentions for hearing. See Order of March 21, 1979 (unpublished).

Thereafter construction of Fermi 2 slowed and the licensing proceeding slowed with it. The next prehearing conference was not held for another two years. In the interim, the TMI-2 accident occurred, leading the Commission to a heightened awareness of the importance of emergency planning for nuclear accidents. The increased emphasis in that area is manifest in a new set of regulatory requirements that we briefly discuss in Part II of this opinion. See pp. 7-9, infra.

In view of the new regulatory requirements and the passage of time, the July 1981 prehearing conference again took up the scope of contentions for hearing and also inquired into the status of emergency planning. Tr. 184-85, 186-88, 195-97. As to the scope of contentions, CEE's counsel explained that it wished to withdraw some contentions that had previously been admitted so as to "really narrow it to the things that we are interested in and just proceed on those. I think that makes the best use of our very, very limited resources." Tr. 192. CEE noted that it wished to retain contention 8 which "relate[d] to the evacuation of residents towards the plant from one particular geographic area." Tr. 193.[1] Similarly, in

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[1] CEE also retained two other contentions for the hearing, but they are not at issue on appeal.

response to the applicants' assertion that the general adequacy of the emergency plan was not an issue and "[t]he sole matter in controversy is the evacuation route from Stony Point" (Tr. 207), CEE responded (Tr. 208):

> Speaking on behalf of the Intervenor, the contention that was submitted is very specific. . . . We have major reservations about the Applicant's emergency evacuation plans. We can deal with that in other forums. We are not going to try to expand our contentions.

With regard to emergency planning, the Board was informed that an emergency planning exercise was set for February 1982, some seven months away.[2]

Meanwhile, on November 19, 1981, Michigan officials submitted an emergency plan for Monroe County to the regional office of the Federal Emergency Management Agency (FEMA) for review and comment. That plan, along with those developed by the State of Michigan and Wayne County (the other county near the reactor), was tested, as scheduled, in a full-scale exercise in which Monroe County participated, on February 1-2, 1982. See pp. 13-14, infra. See generally ALAB-707, 16 NRC __, __ (Dec. 21, 1982) (slip opinion at

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[2] The parties agreed that for purposes of scheduling the evidentiary hearing the only contention that would be affected by the exercise was contention 8 dealing with the feasibility of the Stony Point evacuation route. Tr. 187-88. CEE did not advance any more general emergency planning claim.

4-5). The evidentiary hearing in this licensing proceeding was held from March 31 to April 2, 1982.

Nearly five months after the close of evidentiary hearings, but before the Board's initial decision, Monroe County filed a petition for leave to intervene and to reopen the record, contending generally that its emergency plan was incomplete and that it lacked the resources to implement an effective one. See Monroe County Petition (Aug. 27, 1982). CEE supported the County's motion. Answer of Intervenor CEE (Sept. 6, 1982). The Licensing Board denied the motions in its initial decision. See LBP-82-96, supra, 16 NRC at __ (slip opinion at 37-50).[3]

On the County's appeal, we affirmed the Board but asked the Director of Nuclear Reactor Regulation (NRR) to treat the County's petition as a request under 10 CFR § 2.206. ALAB-707, supra, 16 NRC at __ (slip opinion at __). That section allows any person seeking to raise health, safety, or environmental concerns regarding a licensing action to file a request asking the Director to institute a proceeding to address those concerns. In our view, the extreme lateness of the County's filing on matters it should have been aware of years earlier made it inappropriate to reopen

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[3] The Licensing Board treated CEE's Answer as an independently filed motion to reopen the proceeding. LBP-82-96, supra, 16 NRC at __ (slip opinion at 48).

the formal operating license proceeding. Given the importance of Monroe County's emergency planning concerns, however, we concluded that the best disposition was to refer the matter to the Director for his action. Id. at __ (slip opinion at 14-15).[4] Those concerns are currently being analyzed by FEMA, the State of Michigan, and the NRC staff, in consultation with Monroe County.[5]

II.

REGULATORY SCHEME FOR EMERGENCY PLANNING

We recently had occasion to outline the regulatory scheme for emergency planning issues in Cincinnati Gas &

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[4] Thus, we said:

> At bottom, Monroe County claims that the Fermi 2 emergency plan cannot work. The claim is obviously one that must not be ignored, but it is pressed so late that it cannot easily fit into the adjudicatory process.

ALAB-707, supra, 16 NRC at __ (slip opinion at 12) (footnote omitted).

[5] At oral argument we asked the parties to submit copies of letters or memoranda detailing the status of discussions relating to the Monroe County plan. In response, we were provided with (1) an April 20, 1983 internal FEMA memorandum with attachments, (2) a letter of March 18, 1983 with attachments from Jon Eckert, Monroe County Civil Preparedness Coordinator to Arden T. Westover, Chairman, Monroe County Board of Commissioners, and (3) a letter of April 8, 1983 from Lt. James M. Tyler, Michigan State Police, to Mr. Westover. See attachments to letter from applicants' counsel to Appeal Board (May 5, 1983). These documents indicate the action that has been taken in response to our referral of the County's petition to the Director.

Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC ___ (May 2, 1983). It is useful to set forth an abbreviated discussion of that here (id. at ___ (slip opinion at 3-5) (footnotes omitted in part)):

> Under Commission regulations, no operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be taken in the event of a radiological emergency. 10 CFR 50.47(a)(1). With regard to the adequacy of offsite emergency measures, the NRC must "base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented." 10 CFR 50.47(a)(2).[3/]
>
> 3/ Section 50.47(a)(2) reads in full as follows:
>
> (2) The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented. A FEMA finding will primarily be based on a review of the plans. Any other information already available to FEMA may be considered in assessing whether there is reasonable assurance that the plans can be implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability. Emergency preparedness exercises (required by paragraph (b)(14) of this section and Appendix E, Section F of this part) are part of the operational inspection process and are not required for any initial licensing decision.
>
> Central to the development of offsite emergency response plans is the concept of emergency planning zones (EPZ). The regulatory scheme contemplates the establishment, for planning purposes, of two such

zones: a plume exposure pathway (plume) EPZ, a more or less circular area extending approximately ten miles from the plant, and an ingestion exposure pathway (ingestion) EPZ, a similarly shaped area with a fifty mile radius. The plume EPZ is concerned principally with the avoidance in the event of a nuclear facility accident of possible (1) whole body external exposure to gamma radiation from the plume and from deposited materials and (2) inhalation exposure from the passing radioactive plume. The duration of those exposures could vary in length from hours to days. The ingestion EPZ is established primarily for the purpose of avoiding exposures traceable to contaminated water or foods (such as milk or fresh vegetables), a potential exposure source that could vary in duration from hours to months.

III.

ANALYSIS

A. Lack of a Final Plan

CEE's central argument is that the Monroe County emergency plan is not yet complete; that, in fact, the Monroe County Board of Commissioners thinks the existing plan cannot be implemented; and that it is violative of CEE's procedural rights to a fair hearing for the Licensing Board to litigate and decide emergency planning issues at such a preliminary stage.

CEE's argument is not persuasive. In ALAB-707, supra, we ruled that Monroe County did not have good cause to defer questioning the completeness or adequacy of the County emergency plan until the evidentiary hearings were over. We reasoned that the matters bearing on the plan's inadequacy and incompleteness that the county sought to raise -- e.g., the condition of the roads in the vicinity of the Fermi 2

plant, the effect of winter weather, the number of buses available for transportation, the availability of emergency workers and the adequacy of their training -- were well within the understanding of a local governmental body. They could have, and should have, been raised earlier. ALAB-707, supra, 16 NRC at __ (slip opinion at 7). Consequently, after consideration of the other factors bearing upon late intervention, we denied the County's petition.[6] Our opinion also noted that we

> would not allow a party to the proceeding to press a newly recognized contention after the evidentiary hearing was concluded unless the party could satisfy an objective test of good cause. Among other things, our standard requires that the party seeking to reopen must show that the issue it now seeks to raise could not have been raised earlier. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

Id. at __ (emphasis in original; footnote omitted) (slip opinion at 6-7).[7]

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[6] As indicated above, we submitted Monroe County's petition and its underlying documentation to the Director of NRR to treat as a 10 CFR § 2.206 petition. It is now under active consideration. See p. 6 and n.5, supra.

[7] In order to justify reopening a proceeding, a party must show that the matter it wishes to have considered is

> (1) timely presented, (2) addressed to a significant issue, and (3) susceptible of altering the result previously reached. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-65 (1981); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

CEE here stands in no better position than Monroe County did in its earlier appeal. CEE was in as good a position as Monroe County to question the completeness and adequacy of the County emergency plan, yet did not do so until the evidentiary hearings were long over. One of CEE's members, its principal witness on emergency planning and an active participant in the proceeding since the December 1978 prehearing conference, was Frank Kuron -- himself a member of the Monroe County Board of Commissioners since January 1981. See Tr. 6-14, 28, 501-03. In view of the limited nature of CEE's organization, we think it fair to impute Mr. Kuron's knowledge to CEE.[8] Even if we did not, it is plain that the kinds of emergency preparedness failings CEE advances do not constitute "new" information that would excuse intervenor's delay in not raising the issue earlier.[9] There is no allegation that the number of emergency workers or buses available to the county has just

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ALAB-707, supra, 16 NRC at __ n.4 (slip opinion at 7 n.4).

[8] CEE is an unincorporated association. Its members do not pay dues, do not hold formal meetings, and are scattered throughout Michigan. It is unclear whether the organization operates under any charter or bylaws. CEE has only one officer, the position of Director, which stood empty at the time of the December 1978 prehearing conference. Tr. 29, 35-37; CEE Petition (Oct. 9, 1978); CEE Amended Petition (Dec. 4, 1978).

[9] See n.7, supra.

decreased, or that the roads to be used in an evacuation have suddenly fallen into irreparable disrepair. Nor is there a showing that Monroe County has abandoned its efforts to assist in emergency planning. CEE does not offer us new facts; rather, its argument for a reopened hearing relies upon the County's reevaluation of already existing circumstances. This showing does not assist CEE any more than it satisfied Monroe County's burden on the appeal that was before us earlier. See pp. 9-10, supra. There is no substantial reason why the asserted significance of the basic facts long available to both Monroe County and CEE should not have been appreciated earlier and raised in a timely fashion.

Nor does the lack of completeness of the Monroe County plan, standing alone, preclude issuance of a full power operating license. We recently canvassed that issue in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC ___ (Mar. 4, 1983) and in Zimmer, supra. Those cases explained "that the Commission expects licensing decisions on emergency preparedness to be made on the basis of the best available current information." San Onofre, supra, 17 NRC at ___ (slip opinion at 66). But that general principle does not mandate either a final local government emergency plan or a final evaluation of offsite preparedness by FEMA, the agency that has the principal responsibility to conduct

such an evaluation. The regulatory scheme set forth by the Commission, we ruled, contemplates that "hearings may properly be held [and a decision on a full power operating license reached] at such time as the plans are sufficiently developed to support a conclusion that the state of emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken . . . in the event of a radiological emergency." Zimmer, supra, 17 NRC at __ (slip opinion at 26). While we could not draw a bright line respecting how much plan development would be enough for that purpose, it is plain from the Commission's regulatory requirements that offsite plans need not be complete, nor finally evaluated by FEMA prior to conclusion of the adjudicatory process. San Onofre, supra, 17 NRC at __ & n.57 (slip opinion at 65-66 & n.57); Zimmer, supra, 17 NRC at __ (slip opinion at 25). See 47 Fed. Reg. 30232 (July 13, 1982), petition for review pending sub nom. Union of Concerned Scientists v. NRC, No. 82-2053 (D.C. Cir. filed September 10, 1982); 45 Fed. Reg. 82713 (Dec. 16, 1980). See also 10 CFR § 50.47(c)(1).

Here, Monroe County's emergency plan, while not final, has already been the subject of the emergency preparedness exercise that the Commission regulations provide need not be conducted prior to an operating license decision by the

adjudicatory boards.[10] The Monroe County plan has also been the subject of a so-called "final FEMA finding."[11] It is apparent that CEE's bare bones claim that the Licensing Board erred by issuing a decision favorable to the applicants in the absence of a final Monroe County plan must be rejected.

Lastly, CEE argues that it is violative of intervenor's procedural rights to a fair hearing for the Licensing Board to litigate and decide emergency planning issues in the absence of a final plan. In San Onofre, supra, we cautioned that there are procedural as well as substantive limits to deferring emergency planning issues until after the close of the evidentiary hearing. We explained:

> Procedurally, the limits are established by Section 189 of the Atomic Energy Act, as amended, 42 U.S.C. § 2239, which entitles interested persons to an adjudicatory hearing on the issuance of a construction permit or operating license. This means that an intervenor must have the opportunity to litigate the substantive question whether there is reasonable assurance that

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[10] Emergency preparedness exercises are not required for a nuclear power plant operating license decision, but must be completed prior to operation above 5% of rated power. 47 Fed. Reg. 30232, supra. The emergency preparedness exercise at Fermi 2, was conducted on February 1 and 2, 1982 -- before the initial decision.

[11] FEMA's report was the subject of a May 19, 1982 Board Notification that was served upon the intervenor. See Board Notification BN-82-50, Enclosure 1. As noted supra n.5, FEMA is again evaluating Monroe County's emergency preparedness.

> adequate protective measures can and will be taken in the event of a radiological emergency.

17 NRC at __ n.57 (slip opinion at 66 n.57). That limit was not breached here. Not only had the Monroe County plan been drafted, it had already been the subject of an extensive emergency planning exercise before the hearing was held in this case. And as explained below (see pp. 17-18, infra), CEE raised no objection to the Licensing Board's going forward with the hearing when it did. Plainly, intervenor had an opportunity (which it forsook) to contest whether Monroe County's draft emergency plan could be implemented.

To the extent that CEE is claiming that it could not fairly be required to formulate an emergency planning contention in 1978 at the very outset of the Fermi 2 proceeding prior to development of the County plan, its argument runs afoul of our decision in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC __ (Aug. 19, 1982). There we explained that

> in order to put forth a specific contention respecting, for example, the adequacy of an environmental impact statement or an emergency plan, one must have had the opportunity to examine the statement or plan. Indeed, without that opportunity, it is not possible for a petitioner even to determine whether there is warrant for a contention on the subject -- i.e., whether the impact statement or emergency plan is open to a claim of insufficiency on some colorable ground.

Id. at __ (emphasis in original) (slip opinion at 13-14). For that reason we held that a late-filed contention would always be admissible where "the nonexistence or public

unavailability of relevant documents made it impossible for a sufficiently specific contention to have been asserted at an earlier date." Id. at __ (slip opinion at 17). The difficulty with this leg of CEE's argument then, is that its argument is based on an erroneous premise. As our Catawba decision indicates, CEE was not obligated to file a detailed contention asserting the inadequacy of the Monroe County emergency plan in 1978 before the plan was formulated. CEE was obliged, however, to file such a contention surely no later than February 1982, when a draft of that plan did exist and a full-scale exercise was held to test the Fermi 2 emergency plans. As the Licensing Board said of Monroe County in words equally applicable to CEE:

> By February of 1982, when the full-scale exercise was carried out, the County was aware not only of what its emergency plan contained, but was aware of how the plan fared in the exercise. The County must have been aware, at this point at the very latest, of the issues posed by emergency planning and response for Fermi 2. February 2-3, the days of the exercise and its critique, were still eight weeks before the beginning of the evidentiary hearing. It is impossible to believe that the County did not possess sufficient knowledge to intervene at that time.

LBP-82-96, supra, 16 NRC at __ (slip opinion at 43) (emphasis in original).

B. Contention 8

CEE argues that the Licensing Board erred in striking that part of its original contention 8 that challenged the adequacy of the emergency plans then under development.

That struck sentence reads: "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." See pp. 2-3, supra. It is CEE's position that the issue raised by that contention should be litigated at such time as Monroe County adopts a final emergency plan.

The factual background bearing on this claim has been set out in Part I of this opinion. See pp. 2-5, supra. To the extent that the issue is viewed as anything more than a variant of the "final plan" argument just disposed of, we find that it has been waived. Further, the discussion among counsel and the Licensing Board at the July 1981 prehearing conference is open to no interpretation other than waiver. Repeatedly, CEE's counsel explained that intervenor had limited resources, that it would use those resources to litigate a few narrow areas, and that CEE's more general emergency planning concerns would be pressed in other fora. See pp. 4-5, supra. It is wholly inconsistent with the tenor of that discussion to claim that intervenor intended to preserve for appellate review a Licensing Board ruling rendered two and one-half years earlier that had struck a

broadly generalized claim of inadequate emergency planning.[12]

C. Evacuation of Stony Point.

The final question before us is one of substantial evidence -- whether the record supports the Licensing Board's finding that Pointe Aux Peaux Road is a feasible evacuation route for residents of the Stony Point area. The Licensing Board concluded that even in the "worst case" -- where all Fermi 2 workers and all residents of Stony Point arrived simultaneously at the intersection of Pointe Aux Peaux Road and the main evacuation route, North Dixie Highway -- evacuation of Stony Point was possible within two and one-half hours. LBP-82-96, supra, 16 NRC at __ (slip opinion at 29-30). CEE challenges the Board's finding based on what it claims is the Board's erroneous reliance on the draft Monroe County emergency plan, and its failure to take into account the effects of essentially four factors:

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[12] We should also add that the struck portion of CEE's original contention 8 had no basis in either then-effective or proposed emergency planning regulations. And under the Commission's present emergency planning scheme adopted in 1980, emergency evacuation plans must be developed only for the plume exposure pathway EPZ, an area covering typically 10 miles around a nuclear facility, not the 100-mile radius that CEE's original contention sought to put in issue. See 10 CFR § 50.47(b)(10), (c)(2); 10 CFR Part 50, Appendix E, § I n.2. See generally NUREG-0396, "Planning Basis for the Development of State and Local Government Radiological Response Plans in Support of Light Water Nuclear Power Plants" (December 1978).

(1) accidents, (2) weather, (3) the time needed for residents who work outside the Stony Point area to return home to collect their families, and (4) the time needed for buses to enter Stony Point to provide transportation for the handicapped and others without access to vehicles.[13] CEE presented no witnesses of its own on these issues.

On appellate review, we give a licensing board's factual findings the deference that their probative force intrinsically commands. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975). Stony Point lies approximately one mile south of the reactor. Some 1400 people live in the community. LBP-82-96, supra, 16 NRC at __ (slip opinion at 25). In order for the residents to evacuate that area they must

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[13] CEE does not question the Board's determination that the two and one half-hour upper limit on evacuation time is reasonable. Indeed, the Commission's emergency planning regulations do not specify the time within which the plume EPZ must be evacuated in the event of a nuclear emergency. 10 CFR Part 50, Appendix E, § IV, requires only that applicants provide

> an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway EPZ for transient and permanent populations.

See also NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," Rev. 1 (November 1980), at 61 and Appendix 4. See generally Zimmer, supra, 17 NRC at __ (slip opinion at 15-17).

drive approximately 3/4 of a mile to Pointe Aux Peaux Road, then take that road two and one-half miles to its intersection with North Dixie Highway, the main evacuation route. Kantor, fol. Tr. 533, at 2; Madsen, fol. Tr. 406, Figs. 1, 4. The Pointe Aux Peaux Road extends a short distance, about 1/4 mile, toward the reactor during its two and one-half mile course. Tr. 559. The Licensing Board set the context for the issue now before us:

> There was no dispute as to whether [the two lane] 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.

LBP-82-96, supra 16 NRC at __ (slip opinion at 24). As noted earlier, the Board examined that issue in factual findings that cover some 12 pages. Id. at __ (slip opinion at 24-37). The findings are amply supported by the evidence and we need go over them only in brief outline. In essence, the Board found that the testimony presented by the applicants and staff established that vehicles departing Stony Point during an evacuation can be accommodated by Pointe Aux Peaux Road. The fact that residents must travel toward Fermi 2 for a short distance does not impair the

feasibility of that road as an evacuation route. Id. at __ (slip opinion at 36-37).[14]

CEE's quarrel with those findings is wide of the mark. CEE objects to the witnesses' reliance on the Monroe County emergency plan for the propositions that a policeman would be available for traffic control and that an accident on the road could be cleared without undue delay. See CEE Brief (Feb. 9, 1983) at 6-7. The availability of a police officer or two to direct traffic and of a tow truck or wrecker to clear an accident are permissible inferences for the Board to draw, especially given Monroe County's willingness to work with other government agencies to assure a workable emergency evacuation plan. See note 5, supra.

Nor are CEE's other criticisms of the Board's factfinding well-founded. CEE claims the evacuation time estimates fail to comprehend the time necessary for persons

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[14] Evelyn F. Madsen, an environmental engineer with Detroit Edison Company, testified for the applicants. She was accompanied by Herbert Eugene Hungerford, Professor of Nuclear Engineering at Purdue University; Andrew C. Kanen, a Vice President of the consulting firm PRC Voorhees; and Roger A Nelson, a professional meteorologist. See generally, fol. Tr. 406.

The staff's testimony on Contention 8 was presented by Rick J. Anthony, an emergency management specialist with the Federal Emergency Management Agency; Thomas Urbanik, II, a transportation engineer with Texas Transportation Institute at Texas A&M University; and Falk Kantor, an Emergency Preparedness Analyst with the NRC Office of Inspection and Enforcement. See generally, fol. Tr. 533.

working outside the Stony Point area to return home to collect their families. We disagree. On cross-examination by the staff, applicants' witness Kanen stated explicitly that allowance was made in the time estimates for this purpose. Tr. 439-40.[15]

CEE asserts that none of the witnesses estimated possible delays due to reduced visibility and the increased likelihood of accidents in heavy rain, snow, or fog. CEE Brief at 8. The Board found, as the applicants' witnesses testified, that during "adverse" weather (i.e., snow or icy road conditions), there would be an increase in the level of congestion at certain intersections along Pointe Aux Peaux Road and along its principal "feeder" street, Dewey Drive. At a maximum, however, the increase in travel time to exit from Stony Point would be only five to seven minutes, depending on whether the evacuation took place during the week or on a weekend. 16 NRC at __ (slip opinion at 26-27); Madsen, fol. Tr. 406, at 6-8 and Table 2.

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[15] Applicants estimated that about 30 percent of the residents of Stony Point work outside Monroe County. Tr. 420. Mr. Kanen assumed the nuclear emergency would occur on a weekday and that families would attempt to find one another before evacuations. Tr. 439. Mr. Kanen testified that, by comparison, the shorter evacuation time estimate calculated for Sundays is a result of not allowing time for workers to return to their homes. Tr. 440.

The staff distinguished between "adverse" (rain or light snow) and "severe" (heavy snow) weather. Adverse weather would increase the time needed to evacuate Stony Point by 20 percent; severe weather would increase that by the time it takes to clear the road. Urbanik, fol. Tr. 533 at 3-4. While the staff did not estimate the time it would take to clear Pointe Aux Peaux Road of snow, it is apparent that that area experiences and has handled heavy snowfalls. The staff witness, Mr. Kantor, noted that the roads were well maintained and open in February 1982 -- at the time of the emergency preparedness exercise, when 20 inches of snow fell over a four-day period. Tr. 569.

CEE's final argument is that Pointe Aux Peaux Road is not a feasible escape route for Stony Point because the residents must travel in the direction of the Fermi plant in order to evacuate. CEE Brief at 8. It is undisputed that use of Pointe Aux Peaux Road to evacuate Stony Point entails traveling toward the reactor. At its closest point, the road is 0.9 miles from the reactor. According to the staff, Stony Point evacuees would spend between six and ten minutes driving toward the reactor. LBP-82-96, supra, 16 NRC at ___, ___ (slip opinion at 32, 35); Tr. 563. Staff witness Kantor admitted, under certain conditions, that the evacuees might receive a slight increase in dose as they traveled along Pointe Aux Peaux Road towards the reactor, but testified that the incremental increase would be insignificant, even

as to that small segment of the road that bends toward the reactor over its 2.5-mile course. Tr. 548, 559, 567-68, 569-70. The phenomenon of driving toward the reactor before driving away from it, the staff testified, was "not a limiting factor [for emergency planning purposes] and probably not unique in the ten-mile emergency [planning] zone." Tr. 548. See also Kantor, fol. Tr. 533, at 4-5. The Board found this "accurate and convincing" and concluded that the need to drive toward the reactor did not render Pointe Aux Peaux road infeasible as an evacuation route. LBP-82-96, supra, 16 NRC at __ (slip opinion at 33).[16]

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[16] As CEE points out (Brief at 8), nearly a decade ago we had occasion to question the workability of an emergency plan that provided for public evacuation in the direction of a nuclear reactor. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-248, 8 AEC 957, 962-63 (1974). In San Onofre, we assumed that evacuees would reject travelling towards a reactor during evacuation; that for purely psychological reasons they simply would not utilize an evacuation route involving travel towards the reactor. On this record, however, there is nothing to indicate that residents of Stony Point, aware they would have to travel towards the Fermi reactor for a short period of time, would not evacuate using Pointe Aux Peaux Road. (CEE's intervenor, Mr. Kuron, presented no testimony to that effect). Pointe Aux Peaux road is the regularly used entrance and exit road for Stony Point residents; applicants selected it as the appropriate evacuation route because it is the "natural" route residents would ordinarily select in leaving the area. See Madsen, fol. Tr. 406, at 3-4 and Fig. 6. This is in direct contrast to the partially abandoned route looked upon with doubt in San Onofre. 8 AEC at 963. Moreover, in Fermi we are looking primarily at evacuation of a stable residential population, rather than a predominately transient beach and park population as was involved in San Onofre. See ibid.

Substantial evidence in the record, just outlined, supports the Board's conclusion. In accordance with our customary practice we have also reviewed those portions of the initial decision and underlying record that are not encompassed by the appeal, and find no error that warrants corrective action.

For the foregoing reasons, the Licensing Board's October 29, 1982 initial decision authorizing the issuance of a full power operating license for Fermi 2 is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

ATTACHMENT 2

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

THE DETROIT EDISON COMPANY, et al. Docket No. 50-341

(Enrico Fermi Atomic Power Plant
Unit 2)

/

INTERVENOR CEE'S PETITION FOR REVIEW

Citizens For Employment and Energy (CEE), the Intervenors, hereby request that the Commission review and reverse the decision of the Appeal Board of June 2, 1983 pursuant to 10 CFR 2.786.

I. SUMMARY OF APPEAL BOARD DECISION

On June 2, 1983, the Atomic Safety and Licensing Board affirmed the October 29, 1982 decision of the Licensing Board which authorized the issuance of a full power license. The Appeal Board considered all three issues raised by the Intervenor/Petitioner Citizens For Employment and Energy (CEE) and rejected all three arguments. The first issue was Monroe County's lack of Radiological Emergency Response Plan. That issue was presented to the Appeal Board both through the County's earlier appeal of a denial by the Licensing Board of a late Petition to Intervene, which the Appeal Board referred to the Director of Nuclear Reactor Regulation to treat as a petition under 10 CFR 2.206 (ALAB 707, 16 NRC __, Dec. 21, 1982), and through memoranda which were supplied to the Appeal Board at their request during oral argument (ALAB 730, June 2, 1983, slip opinion p.7, fn. 5). The Appeal Board decided that Monroe County need not have a RERP before the issuance of an operating license. Slip Opinion, 2-17.

The second issue was whether CEE had waived its right to litigate the issue of emergency planning before the Licensing Board. That issue was raised before the Licensing Board with CEE's initial Contention 8 which the Licensing Board dismissed in part on January 2, 1979, LBP 79-1, 9 NRC 73, 80-81 (1979), and also in CEE's Motion To Reopen the Record before the Licensing Board which was filed on September 4, 1982, in response to the County's Petition to Intervene and was denied in the Initial Decision, LBP 8 2-96, 16 NRC __, October 29, 1982. The Appeal Board held that CEE should have raised the issue of defects in the County plan sooner. Slip Opinion, pp. 2-17.

The final issue involved the remaining sentence of Contention 8, whether a subdivision close to the plant could be evacuated in an emergency. That issue was litigated at the adjudicatory hearing before the Licensing Board and raised before the Appeal Board on the record. The Appeal Board held that the Licensing Board's findings regarding Stony Point were not in error. Slip Opinion, 18-25.

II. THE DECISION OF THE APPEAL BOARD WAS ERRONEOUS

A. Lack of a County Emergency Plan

It is clear that Monroe County does not have an RERP and will not implement the draft version which has been developed. The County's Petition to Intervene; filed August 27, 1981, the materials submitted to the NRR under 10 CFR 2.206, and the memoranda submitted to the Appeal Board after oral argument all reflect that Monroe County is of the opinion that it cannot and will not implement the draft version of emergency plan. The letter of March 18, 1983, from John Eckert, the Director of the County Office of Civil Preparedness, to Mr. Westover, Chairman of the County Board of Commissioners,

states that only after the State of Michigan agrees to changes in its "Basic Plan" will the County rewrite all of the local annexes to the plan. The State has refused to make those changes in a letter of April 8, 1983, from State Police Lt. James M. Tyler to Mr. Westover.

The Commission thus has before it a unique case where prior to the issuance of a license it is unquestionably aware that the local body of government will not implement an emergency evacuation plan. The criteria of 10 CFR 50.47 clearly cannot be met with regard to this plant, and the decision of the Appeal Board to the contrary is erroneous. The Appeal Board apparently hopes that the stalemate will be resolved in time for the license, but completely ignores the lack of a local plan and relegates the heart of the issue to a footnote, p. 7 fn. 5. Operating licenses cannot be granted on hopes alone, however well-intentioned.

B. CEE Did Raise the Issue of Emergency Planning In A Timely Fashion.

In its Amended Petition to Intervene of December 4, 1978, at p. 4, 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 Stoney Pointe area which is adjacent to the Fermi 2 site. The only road leading to and from the area, Pointe Aux Peaux 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 aware from it.

On January 2, 1979 the Licensing Board struck all of Contention 8, except the portion related to Stoney 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 a prehearing conference over two years later, in July, 1981, CEE's prior attorney said in a discussion of Contention 8 (Tr. 208):

> Speaking on behalf of the Intervenor, the contention that was submitted is very specific. . . . We have major reservations about the Applicant's emergency evacuation plans. We can deal with that in other forums. We are not going to try to expand our contentions. (Emphases added).

Both the Licensing Board and the Appeal Board interpreted this ambiguous remark to be an irrevocable waiver of CEE's right to ever litigate emergency planning. That interpretation does not withstand scrutiny for two reasons. First of all, the remark was at best ambiguous and could as well be read to mean that CEE would appeal the January 2, 1979 decision. Commission rules do not permit interlocutory appeals, so CEE had no choice but to await the Initial Decision before appealing the striking of Contention 8. The lapse of time was no fault of CEE's. Secondly, the remark preceded the release of the draft plan by at least four months. While the contention may have been subject to striking in part for lack of specificity, the first part of the contention was correct and should have been admitted, namely that there was no emergency plan. Ironically, that is still true. The findings of the Licensing Board and the Appeal Board to the contrary are ridiculously erroneous.

The Appeal Board also that found that CEE's Motion to Reopen of September 4, 1982, was untimely. The Board found that CEE was inexcusably late because, as a party, it could have formed contentions on emergency

planning between the release of the plan in November, 1981, and the adjudicatory hearing in March, 1982. That view of the facts ignores that the basis for the Motion to Reopen was the new and significant information that the County could not implement the draft plan. The Appeal Board found that the County was inexcusably late in denying its appeal on the Petition to Intervene , ALAB 707, supra, and that CEE could also be charged with the County's lateness. However, the County's Petition to Intervene reflects that its decision that it could not implement the plan was based on the County's particular knowledge of its own resources and capabilities, something which is not evident from a review of the plan itself but only through the County's self-assessment. CEE should not be charged with the County's lateness in reaching that conclusion. The fact that one CEE member, Frank Kuron, became a County Commissioner during the pendency of the Licensing Board proceedings should not charge CEE's with the County's lateness. It makes no more sense to assume that a steelworker who is a member of a part time, small, rural county Board oversees the day to day operations of county departments than to assume that every member of Congress pays attention to or understands the day to day operations of the NRC. The County's late conclusion that it could and would not implement the draft plan was new and significant information which should have resulted in granting CEE's Motion to Reopen.

Furthermore, the effect of the decision is to unfairly preclude litigation of offsite emergency planning in the adjudicatory hearing process simply because the plans are late in developing. 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. 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 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 Section 189a and the Administrative Procedure Act, and would deny CEE due process in the litgation 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 Edision Co. (Three Mile Island Units 1 and 2), LBP-81-59, 14 NRC 1211 (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), ALAB-298, 2 NRC 730, 736-7 (1976).

CEE therefore respectfully requests that the Commission grant its Petition for Review, review the decisions of the Appeal Board and Licensing Board, and remand the case to the Licensing Board for an adjudicatory hearing on the adequacy of Monroe County's emergency plan at such time as the plan is approved and susceptible to the formulation of specific contentions.

Respectfully submitted,

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Dated: June 22, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

THE DETROIT EDISON CO. Docket No. 50-341

(Enrico Fermi Atomic Power Plant,
Unit 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of CEE's Petition for Review in the above captioined proceeding have been served on the following by deposit in the United States mail, first class, this 22d day of June, 1983:

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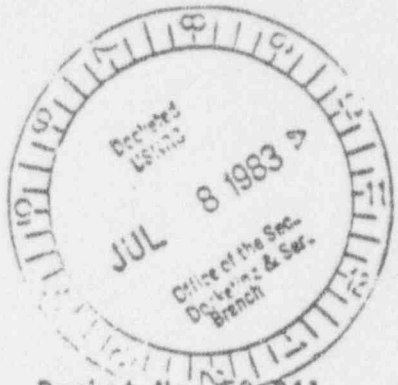
ATTACHMENT 3

Release



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

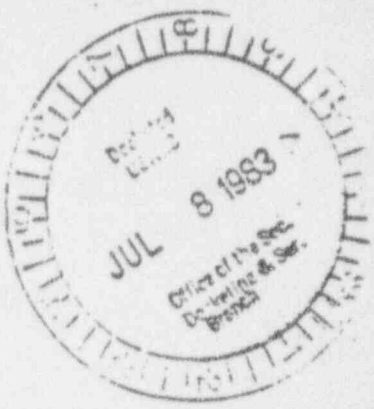
BEFORE THE COMMISSION

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

NRC STAFF RESPONSE IN OPPOSITION TO THE PETITION FOR REVIEW BY CITIZENS FOR EMPLOYMENT AND ENERGY

Colleen P. Woodhead
Counsel for NRC Staff

July 7, 1983



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE IN OPPOSITION
TO THE PETITION FOR REVIEW BY
CITIZENS FOR EMPLOYMENT AND ENERGY

I. INTRODUCTION

On June 22, 1983 the Intervenor in this operating license proceeding, Citizens for Employment and Energy (CEE), timely filed a petition for Commission review of the Atomic Safety and Licensing Appeal Board (Appeal Board) decision (ALAB-730) issued June 2, 1983,[1/] which affirmed the Initial Decision of the Atomic Safety and Licensing Board (Licensing Board). LBP-82-96, 16 NRC ___, October 29, 1982.

Because CEE fails to raise an important matter of law or policy or to demonstrate that the Appeal Board resolved factual issues contrary to the resolution of such issues by the Licensing Board (10 CFR § 2.786(b)(4)), the NRC Staff herewith opposes CEE's petition for Commission review of the Appeal Board's decision.

1/ Detroit Edison Company et al. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC ___, June 2, 1983.

II. BACKGROUND

Two contentions sponsored by CEE were litigated at hearing March 31-April 2, 1982. These contentions concerned certain alleged construction defects and the feasibility of an evacuation route for a small residential community near the Fermi-2 site. The sole CEE witness was a Monroe County, Michigan Commissioner. Five months after completion of hearing, in August, 1982, the Monroe County, Michigan Board of Commissioners filed a petition to intervene with the Licensing Board, claiming recently discovered defects in the County's emergency plan. Concurrently, CEE filed a motion to reopen the record to litigate the emergency plan issues which the County sought to raise. On October 29, 1982 the Licensing Board issued its Initial Decision on the issues litigated and denied both the County's late petition to intervene and the CEE motion to reopen, for failure to show good cause for untimeliness or new information which would affect the decision. LBP-82-96, supra, slip op. 37-50. The County appealed and the Appeal Board affirmed the Licensing Board's decision but referred the County's petition to the Director of Nuclear Reactor Regulation for consideration as a request under 10 CFR § 2.206. ALAB-707, 16 NRC ___ (December 21, 1982). CEE appealed both the Initial Decision and the denial of its motion to reopen the record.

III. DISCUSSION

A. Summary of the Decision for Which Review is Sought

Before the Appeal Board, CEE raised three issues which CEE asserted to involve error by the Licensing Board. The errors claimed by CEE were: (1) the Licensing Board's finding that the Monroe County, Michigan

radiological emergency plan was complete; (2) the Licensing Board's rejection of a portion of CEE contention 8;[2/] and (3) the Licensing Board's decision on Contention 8 which CEE claimed to be unsupported by the evidentiary record. The bases provided for these claims of error by CEE were that (1) emergency plan issues are not ripe for adjudication until final offsite emergency plans are developed, that, (2) consequently, the rejected portion of Contention 8 should have been retained until adoption of a final plan by Monroe County, Michigan, and (3) in considering the adequacy of the evacuation route at issue in Contention 8, the Licensing Board inappropriately relied on the County's draft emergency plan and did not account for effects of weather and traffic accidents on evacuation time.[3/]

The Appeal Board found that the lack of a final County emergency plan did not invalidate the Licensing Board's decisions, did not warrant deferral of the evidentiary hearing, and did not preclude licensing. The Appeal Board pointed out that the issue of the incompleteness of offsite emergency plans has been addressed in other cases and determined not to preclude hearings or licensing. Based on these prior decisions, the Appeal Board explained that licensing decisions may be made when

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2/ The portion of Contention 8, rejected in 1979 by the Licensing Board Order ruling on contentions, alleged that an emergency plan covering a 100 mile radius should be required for the Fermi-2 site.

3/ ALAB-730 at 2.

emergency plans are sufficiently developed to support a "reasonable assurance" conclusion.[4/]

In addition, the Appeal Board found that the alleged emergency plan defects could have and should have been known by the County at least by the time of the February 2, 1982 full scale exercise of onsite and offsite plans in which the County participated.[5/] In turn, the same knowledge of alleged plan defects could be imputed to CEE, since the CEE witness at hearing, who had been a CEE member since 1978, was a Monroe County Commissioner.[6/] Since the Monroe County plan had been tested during a full scale exercise and FEMA had issued findings on the County's plan prior to hearing, the Appeal Board concluded that CEE's claim of premature adjudication was without merit.[7/]

In addressing the CEE assertion that a portion of Contention 8 was improperly rejected prior to development of offsite emergency plans, the Appeal Board noted that CEE was provided several opportunities to raise emergency plan issues which CEE both failed to use and expressly

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4/ ALAB-730, at 12-13, citing Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC ___, (March 4, 1983) and Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC ___ (May 2, 1983). The Appeal Board's ruling was based on the Commission's emergency planning regulations which require a finding of reasonable assurance that adequate onsite and offsite protective actions will be taken prior to issuance of reactor operating licenses. ALAB-730, at 8-9.

5/ ALAB-730, at 12.

6/ ALAB-730, at 11.

7/ ALAB-730, at 14.

rejected, and that, in any event, the rejected portion of the contention was not litigable.[8/]

The Appeal Board found CEE's allegation that the Licensing Board erroneously relied on the "draft" Monroe County plan to be baseless, since the Licensing Board's reliance on the plan consisted of nothing more than a permissible inference that the County would provide one or two policemen and a tow truck, if needed, during evacuation.[9/] The Appeal Board also determined that effects of traffic accidents and weather on evacuation time estimates were accounted for by the Licensing Board based on the evidentiary record which addressed these matters.[10/] The Appeal Board concluded its decision by affirming the Initial Decision in its entirety, based on its review of the entire record.

B. The CEE Petition for Review

CEE merely repeats the arguments raised before the Appeal Board in the instant petition. Specifically CEE argues that Commission review is warranted because (1) Monroe County allegedly has no emergency plan and (2) the Appeal Board allegedly improperly precluded CEE from litigating emergency plan issues.

The identical claim presented below, concerning the fact that Monroe County as yet has no final emergency plan, is presented for review, based once again on the County's August, 1982 petition to intervene and certain

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8/ ALAB-730 at 15-18.

9/ ALAB-730 at 21.

10/ ALAB-730 at 21-24.

County letters to government officials. Petition, p. 2-3. CEE's assertion that a "unique case" exists in which the local government "will not implement" its own plan is refuted by the evidence of record, which shows the County's ongoing efforts to revise the plan with the aid of FEMA and State officials, recited by the Appeal Board (ALAB-730, slip op. at 5-7, 13-15). CEE's assertion is contradicted by CEE's own reference to County-State correspondence concerning current revision of the plan. Petition, at 3.

Again, CEE asserts it was not untimely in raising emergency plan issues and that the express rejection of an opportunity to raise these issues by CEE counsel, who stated at a 1981 prehearing conference that CEE did not wish to raise emergency plan issues, was not actually a rejection. Petition, at 4. This argument is completely refuted in the Appeal Board's careful examination of the record (ALAB-730, 14-18) and the Appeal Board's wholly correct reasoning and determination in this regard need not be repeated here.

CEE unsuccessfully attempts to show that it should not be held responsible for knowledge of the Monroe County emergency plan despite the fact that its member and only witness at hearing is a Monroe County Commissioner. Specifically, CEE claims that it is unreasonable to assume that membership on the County Board of Commissioners provides knowledge of County operations which would affect the implementation of the County's emergency plan. Although normally one might expect that an individual County Commissioner would not be fully aware of the details of every County operation, such an expectation should not apply to this CEE member (and County Commissioner) with regard to County emergency planning matters. This particular CEE member served as CEE's expert

witness on the emergency preparedness contention. Having been proffered as CEE's witness on the local emergency preparedness issue, this County Commissioner must be deemed to be knowledgeable of local emergency preparedness. In turn, his knowledge of the status of Monroe County emergency preparedness as a County Commissioner and expert witness on the emergency preparedness issue is properly imputed to CEE.

Finally, CEE presses its claim, rejected by the Appeal Board, that its right to a hearing on emergency planning issues has been violated by the Licensing Board's refusal to reopen the record to admit such issues. Referring to Section 189a of the Atomic Energy Act, as amended, to support its argument, CEE claims, in essence, that it has a right to a hearing regardless of the timeliness of any issues it wishes to litigate. Petition, at 5-6. However, it is well-established that Section 189a of the Atomic Energy Act does not provide an unqualified right to a hearing. The Commission may, in fact, establish reasonable procedural requirements for intervention and on the proffering of contentions. BPI v. AEC, 502 F.2d 424 (D.C. Cir 1974); see Duke Power Co., et al. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, slip op. at 6-7 (June 30, 1983). Among those procedural requirements, the Commission has established reasonable rules as to the timeliness of raising issues in ongoing proceedings. Catawba supra. Pursuant to those rules, CEE was properly found to have been inexcusably late in raising emergency plan issues after having been provided, but rejecting, the opportunity for hearing on such issues earlier. ALAB-730, slip op. at 14-16. CEE has no unqualified right to a hearing on emergency plan issues and was not improperly denied such a hearing.

In sum, CEE raises the same issues before the Commission which were raised before the Appeal Board without any showing of error in ALAB-730. At bottom, CEE provides no basis for Commission review beyond its continuing disagreement with the findings and determinations of the Licensing Board which were affirmed by the Appeal Board. Both the Licensing Board and the Appeal Board were correct in those rulings. No important matter of law or policy warranting Commission review is presented by CEE's petition and that petition should be denied.

III. CONCLUSION

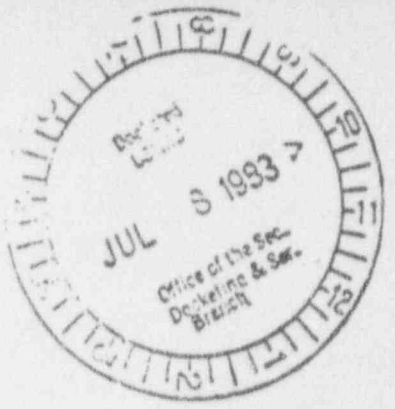
For the reasons stated above, the Commission should deny the CEE petition for review of ALAB-730 pursuant to 10 CFR § 2.786(b)(4).

Respectfully submitted,

Colleen P. Woodhead

Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of July, 1983



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 IN OPPOSITION TO THE PETITION FOR REVIEW BY CITIZENS FOR EMPLOYMENT AND ENERGY" 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, by deposit in the Nuclear Regulatory Commission's internal mail system this 7th day of July, 1983:

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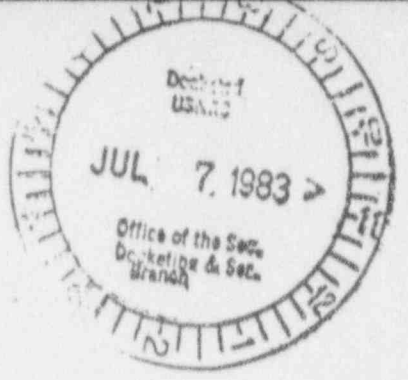
ATTACHMENT 4

Release



UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANTS' ANSWER OPPOSING CEE'S PETITION FOR REVIEW

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July 7, 1983

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UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANTS' ANSWER OPPOSING
CEE'S PETITION FOR REVIEW

The Detroit Edison Company ("Detroit Edison") and Wolverine Power Supply Cooperative, Inc. (collectively, the "Applicants"), pursuant to Section 2.786(b)(3) of the Commission's Rules of Practice and Procedure, hereby submit their Answer Opposing the Petition for Review, dated June 22, 1983, of Citizens for Employment and Energy ("CEE"), the only intervenor in this proceeding. CEE's Petition seeks review of the June 2, 1983 Decision of the Atomic Safety and Licensing Appeal Board, ALAB-730, which affirmed in all respects the October 29, 1982 Initial Decision ("I.D.") of the Atomic Safety and Licensing Board, LBP-82-96, 16 NRC _____, authorizing issuance of an operating license to Applicants for the Enrico Fermi Atomic Power Plant, Unit 2 ("Fermi 2").

Introduction

CEE seeks Commission review of two of the three general issues decided in ALAB-730, but its Petition grossly mischaracterizes the Appeal Board's holdings and the record evidence on both issues. First, CEE claims that the Appeal Board decided that Monroe County, where Fermi 2 is located, "need not have a [Radiological Emergency Response Plan] before issuance of an operating license." Petition at 1. The Appeal Board held no such thing. All that the Appeal Board decided was that "offsite plans need not be complete, nor finally evaluated by FEMA prior to conclusion of the adjudicatory process." ALAB-730, slip op. at 13 (emphasis added). The Appeal Board went on to reject CEE's untimely effort, five months after hearings were concluded, to reopen the record on emergency planning.

Second, CEE objects to the Appeal Board's affirmance of the Licensing Board's finding that CEE had waived its right to raise emergency planning issues. As the Appeal Board rightly concluded, the record "is open to no interpretation other than waiver." ALAB-730 at 17. CEE's conduct was unambiguous. Its present counsel apparently feels free to argue otherwise because he was not involved in the earlier phases of this proceeding. However, the present CEE representative(s) have standing now only because of CEE's earlier intervention, and they do not

have the luxury of creating a new theory of the organization's interests long after those have been defined and the evidentiary hearings have concluded.

The final matter decided in ALAB-730--that the record supports the Licensing Board's finding that there is a feasible evacuation route for residents of the Stony Point area, which lies within the 10-mile plume Emergency Planning Zone (EPZ)--is not addressed in CEE's Petition. Apparently, CEE finally has conceded that road leading away from Stony Point is an adequate route. Certainly, CEE has now waived any right to object to that conclusion. In any event, substantial evidence supports the Licensing Board's findings, and the Appeal Board properly affirmed. ALAB-730 at 18-25.

Argument

I.

THE APPEAL BOARD PROPERLY CONCLUDED THAT MONROE COUNTY'S EMERGENCY PLAN WAS SUFFICIENTLY DEVELOPED TO PERMIT CEE TO FORMULATE CONTENTIONS BEFORE HEARING.

CEE's position on the state of Monroe County's emergency planning has become progressively more strident and disingenuous. CEE has moved from contending in its appeal from the Initial Decision that Monroe County had not "formally approved" its emergency plan (CEE Brief on Exceptions at 1) to its present position that Monroe County

"does not have [a plan] and will not implement the draft version which has been developed." Petition at 2.

CEE's current statement can most charitably be characterized as a play on words. Monroe County, of course, has an emergency response plan. The record establishes that Monroe County has been involved in radiological emergency planning at least since early 1980. The County itself forwarded the plan to the Michigan State Police for review and approval in November 1981. Indeed, the plan was sufficiently developed by that time to allow its evaluation by the Federal Emergency Management Agency ("FEMA"). Moreover, Monroe County participated actively in a full-scale exercise of the plan in February 1982, two months before the hearing in this proceeding. I.D. ¶¶ 63,64. There is no evidence that Monroe County will refuse to "implement" the plan, and it is irresponsible for CEE to suggest otherwise.

The status of the Monroe County plan is relevant at this stage only to the extent CEE suggests it could not have earlier expressed its recent concerns because the plan was insufficiently developed. In ALAB-707, 16 NRC ____ (Dec. 21, 1982), the Appeal Board upheld the Initial Decision's denial of Monroe County's attempt to intervene in this proceeding in August 1982, long after the completion of the evidentiary hearing. The Appeal Board

ruled that Monroe County did not have good cause to defer questioning the completeness or adequacy of its emergency plan until the hearings were over, reasoning that the matters which the County sought to raise regarding the plan's alleged inadequacy and incompleteness--e.g., condition of the roads in the plan's vicinity, effect of winter weather, availability of buses and emergency workers--were well within the understanding of a local government unit and could have, and should have, been raised before the hearing. ALAB-707, supra, 16 NRC at _____, (slip op. at 7).1/

In ALAB-730, which is under attack here, the Appeal Board did not hold that a County emergency plan was not required. The Appeal Board merely held (1) that CEE stood in no better position than Monroe County did in the latter's appeal, and that (2) any "lack of completeness" of the Monroe County plan, standing alone, did not preclude issuance of a full power operating license. CEE's mischaracterization of ALAB-730 ignores the Appeal Board's discussion of its earlier decisions in Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No.

1/ The Appeal Board nevertheless found that some of Monroe County's concerns might merit attention and referred its petition to the NRR Director to treat as a 10 C.F.R. § 2.206 petition. The record establishes that it is under active consideration by NRR and FEMA, and that any deficiencies are being addressed in a cooperative manner. See ALAB-730 at 6, n. 5.

1), ALAB-727, 17 NRC ____ (May 2, 1983) and Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC ____ (Mar. 4, 1983). "[H]earings may properly be held [and a decision on a full power operating license reached] at such time as the plans are sufficiently developed to support a conclusion that the state of emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken . . . ." Zimmer, supra, 17 NRC at ___ (slip op. at 26). It is plain from the Commission's regulatory requirements that offsite plans need not be complete, nor finally evaluated by FEMA, prior to conclusion of the adjudicatory process. San Onofre, supra, 17 NRC at ____ (slip op. at 65-66 & n.57); Zimmer, supra, 17 NRC at ____ (slip op. at 25). See 47 Fed. Reg. 30232 (July 13, 1982), petition for review pending sub nom. Union of Concerned Scientists v. NRC, No. 82-2053 (D.C. Cir., filed September 10, 1982); 45 Fed. Reg. 82713 (Dec. 16, 1980). See also 10 CFR § 50.47(c)(1).

As the Appeal Board pointed out, Monroe County's emergency plan, whether or not "final", before the hearing had already been the subject of the emergency preparedness exercise which, under the Commission's regulations, need not even be conducted prior to an operating license decision by the adjudicatory boards. Moreover, the Monroe County plan

had also been the subject of a final FEMA finding.[2/] CEE's claim that Monroe County does not have a plan, and that the Appeal Board and Licensing Board thereby erred in issuing decisions favorable to the Applicants, must be rejected.

Finally, no procedural rights of CEE were violated. CEE raised no objections to the Licensing Board's going forward with the hearing when it did. CEE had an opportunity, which it forsook, to contest whether the plan was adequate or could be implemented. ALAB-730 at 15. Indeed, as we show below, CEE had no intention of raising the adequacy of the emergency plan as an issue until long after the hearings were complete.

II.

THE APPEAL BOARD PROPERLY UPHELD THE LICENSING BOARD'S RULING THAT CEE WAIVED ANY RIGHT TO LITIGATE EMERGENCY PLANNING ISSUES.

The Appeal Board recounted at length the actions and statements of CEE's previous counsel, which show that CEE voluntarily relinquished in advance of the evidentiary hearing any right to litigate emergency planning issues other than the feasibility of the Stony Point area evacuation route. ALAB-730 at 2-5, 16-18.

As the Appeal Board further pointed out (at 17), it is wholly inconsistent with the tenor of the record for

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2/ FEMA's report was the subject of a May 19, 1982 Board Notification that was served upon CEE. See Board Notification BN-82-50, Enclosure 1.

CEE's present counsel to contend that CEE intended to preserve for appellate review the Licensing Board's ruling 2-1/2 years earlier which struck a broadly generalized contention on inadequate emergency planning. There was no ambiguity in the statements made by CEE's counsel at the July 22, 1981 prehearing conference. Tr. 192, 193, 208. CEE's Petition shows no reasonable alternative interpretation. Moreover, as the Appeal Board added, the struck portion of CEE's original contention had no basis in either the then-effective or proposed emergency planning regulations. Even under the current rules adopted in 1980, evacuation plans must be developed only for an area within a 10-mile radius, not the 100-mile radius that CEE's original contention sought to put in issue. See 10 C.F.R. § 50.47(b)(10) & (c)(2); 10 C.F.R. Part 50, Appendix E, § I n.2.

CEE's Petition seems to suggest (at 5) that CEE was surprised by Monroe County's "revelation" in the latter's untimely Motion to Intervene in August 1982 that the County considered its plan inadequate, and that this "new and significant information" gave CEE a basis for its subsequent Motion to Reopen the Record. As shown above, the County was found to be inexcusably late in seeking to raise the emergency planning issues long after hearing. That matter was disposed of in ALAB-707, which has become a final Commission action not open to collateral attack by CEE.

Moreover, as the Appeal Board (and the Licensing Board) found, the County's knowledge was properly imputed to CEE. The plan "deficiencies" that each sought to raise after hearing obviously were matters that either could have observed well before the hearing. More important, Frank Kuron, CEE's only witness at hearing and the organization's only apparent member throughout this proceeding (other than its series of legal counsel), has been a member of the Monroe County Board of Commissioners since January 1981--more than a year before the hearing. The record in this proceeding shows that for more than a decade Mr. Kuron has devoted considerable efforts to opposing construction and operation of Fermi 2. His opposition to Fermi 2 appears to be the sole motivating force behind CEE. It is inconceivable that, as a Monroe County Commissioner, he would have been unaware of the County's planning with respect to a project of such consuming interest to him. The suggestion in CEE's Petition that imputing knowledge of the County's emergency planning to Mr. Kuron (and therefore to CEE) in 1981 or early 1982 is analogous to assuming each member of Congress is familiar with "day to day operations of the NRC" (Petition at 5) is patently absurd. CEE's Motion to Reopen in September 1982, five months after hearing, on the pretext that the County's equally late attempt to intervene revealed

information new to CEE, was rank opportunism, and was properly denied by the Licensing Board and upheld by the Appeal Board.

* * *

Contrary to CEE's suggestion, no important questions of law, policy, or fact are raised by its latest pleading. CEE has had full access to the adjudicatory process, has occasioned an otherwise unnecessary hearing, and has repeatedly failed to live up to its concommitant responsibilities, as demonstrated by its bare-bones testimony, meager cross-examination at hearing, and failure to submit proposed findings and conclusions thereafter.

Conclusion

For the foregoing reasons, CEE's Petition for Review must be denied.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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July 7, 1983

UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 1983, served the foregoing document, entitled Applicants' Answer Opposing CEE's Petition for Review, by mailing copies thereof, first class mail, postage prepaid, and properly addressed, or by personal delivery where indicated, to the following persons:

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