UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

Administrative Judges

Alan S. Rosenthal, Chairman
Stephen F. Eilperin
Howard A. Wilber

In the Matter of	)	
The Cincinnati Gas & Electric Company, et al.	)	Docket No. 50-358
(Wm. H. Zimmer Nuclear Power Station)	)	

REPLY BRIEF OF INTERVENOR CITY OF MENTOR

November 3, 1982

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INTRODUCTION

This is an appeal from the Initial Decision rendered by the Atomic Safety and Licensing Board.

The Honorable John H. Frye, III, Frank F. Hooper and M. Stanley Livingston presided over this case. The Atomic Safety and Licensing Board found that the state of offsite emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. (Initial Decision, hereinafter I.D., p. 96).

Applicants appeal from this portion of the Initial Decision, Intervenor City of Mentor is now filing this brief in support of the Initial Decision of the Atomic Safety and Licensing Board entered on June 21, 1982, denying an operating license at power levels in excess of 5% rated power for the Zimmer Nuclear Power Station.

STATEMENT OF THE CASE

This is an appeal from the Initial Decision rendered by the Atomic Safety and Licensing Board, the Honorable John H. Frye, III, Frank F. Hooper and M. Stanley Livingston presiding.

The Initial Decision dealt with seven distinct contested issues. The portion of the initial decision appealed from concerns emergency preparedness planning. Evidentiary hearings were held on offsite emergency planning contentions during the weeks of January 25-29, February 2-5 and March 1-4, 1982.

On June 21, 1982, the Atomic Safety and Licensing Board entered findings of fact and conclusions of law on the application for an operating license filed by Cincinnati Gas and Electric Company,

The Atomic Safety and Licensing Board found:

(1) The requirements of 10 CFR Part 51 have been met;

(2) The requirements of Section 102(2)(A), (C) and (E) of the National Environmental Policy Act have been met;

(3) Control rods as manufactured and installed are capable of adequately performing their intended function;

(4) Cable trays as manufactured and installed are capable of adequately performing their intended function;

(5) Cable trays for which additional fire protection is required have been wrapped in a material which was qualified to perform its intended function;

(6) The state of offsite emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency;

(7) Offsite emergency response plans are not invalid by virtue of this incorporation by reference of Standard Operating Procedures.

With respect to Conclusion of Law number 6 the Board imposed five license conditions. (I.D., p. 94). In addition the Board found that further proceedings are necessary with respect to evacuation plans for the Clermont and Campbell County Schools.

(I.D., p. 48). The Board further ordered that the final FEMA findings which relate to the contentions admitted on November 25, 1981, and the Staff's supplement to the Safety Evaluation Report (hereinafter SER) related to said findings be filed and served on all parties. The parties are then to be given an opportunity to assess those documents before a full power license would be issued. (I.D., p. 50).

The Board did authorize a license for low power operation at levels not to exceed 5% of rated power. While the Board recognized that 10 CFR §50.47(a)(1) requires that no license shall issue in the absence of a finding that there is a reasonable assurance that adequate and protective measures can and will be taken in the event of an emergency, the Board did allow the low level license pursuant to 10 CFR §50.47(c)(1).

The Board further found that imposing a licensing condition with respect to the school evacuation issues was not an acceptable approach as there was not a clear course of corrective action in that regard. The Board noted that the problem was a complex one and demanded the involvement of local officials.

The Board also found that this case had come to hearing in advance of FEMA's final findings so as to accomodate the Applicants. The Initial Decision further reflects FEMA's inability to address the contentions and confirms the statement by counsel for Applicants that upon new, significant developments a resumption of the hearings might be appropriate. After issuance of the Initial Decision Applicants filed a Motion for Clarification and Reconsideration of the Board's Order. On August 24, 1982, the Board issued a Memorandum and Order in response to Applicants' motion. That Order denied the relief requested by Applicants and further explains the Board's position with regard to final FEMA findings.

STATEMENT OF ISSUES

This case presents three issues for review:

1) Whether the Atomic Safety and Licensing Board finding that the state of offsite emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency is supported by the evidence. (Exceptions 1-9).

2) Whether the Board abused its discretion by findings that further proceedings on the record were necessary on school evacuation. (Exception 10, 11, 15 & 16).

3) Whether the Board abused its discretion by requiring final FEMA findings and the Staff's supplement to the SER to be filed and served on the parties and giving the parties an opportunity to assess those documents as they relate to the admitted contentions before authorizing a full power license. (Exceptions 12, 13 & 14).

STATEMENT OF FACTS

The Cincinnati Gas and Electric Company (hereinafter Applicants), a public utility in the state of Ohio, applied for an operating license for the William H. Zimmer Power Station (hereinafter Zimmer) for itself and as an agent for Columbus and Southern Ohio Electric Company and The Dayton Power and Light Company on September 10, 1975, from the NRC. Appellee, Intervenor The City of Mentor (hereinafter Mentor) is a small town in Kentucky directly across the river from the Zimmer site. Mentor intervened in the licensing proceeding on January 29, 1980, by virtue of 10 CFR §2.715(c). Mentor submitted several contentions regarding the sufficiency of offsite emergency preparedness plans. All but four of Mentor's contentions were later consolidated with the Intervenor Zimmer Area Citizens-Zimmer Area Citizens of Kentucky (hereinafter ZAC-ZACK) contentions.

At evidentiary hearings held during the winter of 1982 the intervenors, Applicants, FEMA and NRC staff were all represented by counsel. Applicants are responsible for submitting offsite emergency plans as a part of their application.

Applicants hired the consulting firm of Stone & Webster who was closely involved with the development of the offsite emergency plans. Yet, Applicants consistently took the position that the emergency plans were a creature not in their control.

All of the parties to the proceedings submitted pre-filed testimony and the hearing was held primarily for the purpose of cross examination rather than introduction of direct testimony. The plans, however, were introduced during the hearings, as "interim" plans and sponsored as Board exhibits.

FEMA testified at length regarding their review of the offsite plans. With few exceptions FEMA was unable to state any basis or underlying facts to support their "interim" findings.

Throughout the course of the proceedings many changes were made in the plans

in response to problems raised by intervenors. Some of these changes were incorporated into the Board's Initial Decision as license conditions.

With respect to the school evacuation issue the Board made extensive findings of fact which are well documented. (I.D., pp. 67-76).

ARGUMENT OF LAW

I. THE ATOMIC SAFETY AND LICENSING BOARD FINDING THAT THE STATE OF OFFSITE EMERGENCY PREPAREDNESS DOES NOT PROVIDE REASONABLE ASSURANCE THAT ADEQUATE PROTECTIVE MEASURES CAN AND WILL BE TAKEN IN THE EVENT OF A RADIOLOGICAL EMERGENCY IS SUPPORTED BY THE EVIDENCE.

Exceptions 2 through 8[1] allege that the Board made various errors in its findings related to the evacuation of schools within the 10-mile EPZ. Much of Applicants' discussion of these exceptions is a rambling and tiresome repetition of background, testimony and arguments that the Board recognized, heard and duly considered in its Initial Decision and does nothing to support or illuminate the exceptions.[2] That which attempts to address the exceptions directly is unconvincing. It must be emphasized that the record does not show that either the basic emergency plans for the schools or any implementing procedures have at any time been approved by Campbell County School officials. Although Applicants derive from Mr. Monroe's testimony that a final review of the plans was imminent and there should be "...no problem in finalizing school procedures..."[3]; Superintendent Sell, Deputy Superintendent Reinhardt and Principal Voelker testified that "[w]e are not convinced that the Campbell County Radiological Emergency Plan is capable of implementation as far as our school district is concerned..." and "...the draft Standard Operating Procedures we have reviewed do not address any of the concerns which we have raised in our testimony". (See Direct testimony of Sell, Reinhardt & Voelker, p. 4-5 Tr. 6371-6372). It must also be emphasized that Applicants' counsel has a proclivity towards interjecting unsworn testimony into the Appeal Brief. For examples see: "Applicants in fact are working..." (p. 26), "Applicants noted..." (footnote 77, p. 36), "The two nearest schools..." (p.41), "The Applicants are continuing..." (footnote 86, p.41), "Radio communications could be established..." (footnote 87,

1 Applicants' Brief at 24, 25.
2 See, for example, Applicants' Brief at 27-35 and 42-45.
3 Applicants' Brief at 35-36, footnote 77.

p. 42), "While the planners are making arrangements..." (p. 43), "Applicants do not believe..." (p. 49). This Board has previously commented on this tendency of Applicants to attempt to introduce evidence ex parte. (Memorandum and Order, August 24, 1982).

Exceptions 4 and 6 maintain that the Board found that the capability of simultaneous evacuation of school children and certain two-way communications are required or necessary under NRC regulations and NUREG-0654. The Board did nothing of the sort. The Board noted a number of facts about school locations, populations and bus resources in Clermont and Campbell counties. (I.D., pp. 72-75). Among these was the fact that "[t]he New Richmond school district does not possess a sufficient number of buses to simultaneously evacuate all students at the New Richmond and Monroe sites". (I.D., p. 73; see also I.D., p. 33). Likewise, the Board noted a number of facts about communications generally and also specifically as related to the schools of the two counties. (I.D., pp. 67-72). Obviously, inadequacies in bus resources or allocations, communications systems and related planning were large factors in the Board's decision, but nowhere did the Board find that specific evacuation procedures or communications systems are required or necessary under NRC regulations and NUREG-0654. On the contrary, the Board refused to be involved in these specifics, saying, "We are charged with making findings with respect to the adequacy of plans, not writing plans." (I.D., p. 48). The Board found that there are problems associated with school evacuation and school communications systems and that these problems are of sufficient magnitude to declare that the plans are inadequate and incapable of implementation; it did not give any direction toward solutions of the problems nor did it declare or suggest any requirements in this respect under NRC regulations or NUREG-0654. (I.D., pp. 31-33).

In Exception 1 Applicants claim that "[t]he Board erred in finding that 'all of the population within 5 miles of the Station is to be notified within 15 minutes

of the declaration of a site emergency' ".[4] They argue that the Board "...is totally incorrect in stating that public notification would be required"[5] during a site emergency (or site area emergency). Appendix 1 of NUREG-0654 establishes and defines four classes of emergency action levels, one of which is the site area emergency. Page 1-12 of Appendix 1 gives a general description of the site area emergency, states the purpose of the site area emergency declaration and lists actions to be taken by the licensee and by offsite authorities to fulfill the purpose of a site area emergency declaration. Part of the stated purpose of the site area emergency is to "provide updates for the public through offsite authorities" (emphasis added). One of the licensee actions is to "[d]edicate an individual for plant status updates to offsite authorities and periodic pressure (sic) briefings (perhaps joint with offsite authorities)". Actions by state and/or local offsite authorities include the following: "Provide public within at least about 10 miles periodic updates on emergency status" and "Provide press briefings, perhaps with licansee" as well as "Recommend placing milk animals within 2 miles on stored feed...." Thus, public notification is clearly an unqualified requirement during a site area emergency. Applicants also assert that "[t]here are a number of examples of the 'site emergency' classification which involve no imminent or actual release of radioactivity which would require public notification".[6] Applicants understandably do not offer any such examples because none exist; the declaration of a site area emergency explicitly requires that the public be informed as to the conditions of the emergency.

In Exception 2, Applicants claim that "[t]he Board erred in finding that 'plans have not been developed to mobilize school bus drivers and buses and other school personnel if telephone service is curtailed or eliminated' ".[7] Applicants state

4 Applicants' Brief at 24, 37.
5 Applicants' Brief at 38.
6 Applicants' Brief at 38.
7 Applicants' Brief at 24.

that "...the primary method of communications to bus drivers will be by telephone from the various school systems" with the Prompt Notification Systems as a backup.[8] The difficulty here, of course, is that the Prompt Notification System is also a public notification system and public notification will nullify school evacuation procedures, which are predicated on the assumption that school systems will be notified of an emergency (and presumably begin their emergency response) prior to public notification.[9] Also, the possibility that "...public officials could choose to delay public notification in order to assure the orderly notification of the schools"[10] would further assure that bus drivers, if they are dependant upon public notification for their notification, would be delayed even longer and probably defeated in their emergency response efforts. The possibility that bus drivers may not be accessible during non-driving school hours was noted by the Board but not considered by Applicants. (I.D., p.72). Thus the Board's finding was completely appropriate within the context of the planning assumptions.

Busing procedures and related communications are also the subject of Exception 3, which states, "The Board erred in finding that plans have not been developed to deal with the problems presented if buses are in the process of transporting students when the decision to evacuate is made."[11] Applicants propose two possible ways that drivers can learn of an emergency if one is declared while buses are en route, by hearing the Prompt Notification sirens or by "...being notified of the situation by a parent or other person en route...."[12] Each of these methods presents essentially the same problems discussed in relation to Exception 2; activation of the Prompt Notification sirens would not allow the head start for schools anticipated in the plans and would make impossible the prompt and orderly evacuation of school children and notification of drivers by residents along the bus routes presupposes a number of favorable chance factors, among which are the availability

8 Applicants' Brief at 42.
9 Applicants' Brief at 37.
10 Applicants' Brief at 40.
11 Applicants' Brief at 24.
12 Applicants' Brief at 45.

of usable telephone lines and that residents are at home and able to perform the notification of drivers. In addition, Applicants have ignored the effects of the time involved in completing a large number of telephone calls and the fact that such calls amount to a public notification of an emergency that could result in a telephone overload that would preclude notification of all drivers by this method. In short, the simplism of Applicants' "plans" reduces them to an obvious absurdity and the Board had ample reasons for its finding.

Exception 5, in which Applicants claim that "[t]he Board erred in finding that sufficient buses are not available to evacuate all the students in the New Richmond School District within the EPZ 'simultaneously'"[13] is somewhat related to Exception 4, discussed above. Applicants do not say here that the Board in any sense required simultaneous evacuation of these school children but seem to be saying that it has been shown that both the number of buses available and the circumstances of their availability are such that neither is a limiting factor if school authorities should choose simultaneous evacuation as a protective action for school children. Applicants do not attempt to dispute the Board's finding that all of New Richmond School District's buses "...would be able to evacuate less than three-quarters of the district's students in the EPZ at one time". (I.D., p.73). Applicants, instead, prefer to say that the district has sufficient buses to evacuate one school[14] and that "[t]he school systems requiring additional resources have contacted other school systems to assure the availability of additional buses to respond to the schools if needed" (emphasis added). The Board found that "...the number of buses and specific arrangements with West Clermont are unclear", that despite Applicants' testimony "...that 17 buses are avilable from West Clermont; the New Richmond school officials had no direct knowledge of the number available" and that "...these buses could not be of assistance during busing periods". (I.D.,

13 Applicants' Brief at 24.
14 Applicants' Brief at 43.

p. 73). Applicants merely discuss the possibility of using outside resources to effect an evacuation of schools without double runs[15] but neglect a time delay factor which could be inherent in the logistics of bringing buses in from outside the school district and which could preclude the simultaneous evacuation of school children to which this exception alludes. The Board found that there are not enough buses in the New Richmond district to evacuate its school children simultaneously, not that there are not enough buses somewhere, and, without mentioning simultaneity, notes that time is a factor in an evacuation, that it takes time for buses to travel from other districts to the New Richmond district and that "[w]hile... at least some consideration has been given to this problem, there is no plan provision or letter of agreement dealing with it". (I.D., p.73).

In Exception 7 Applicants allege that "...[t]he Board erred in finding that two-way communication among school officers and personnel during a Zimmer emergency is presently limited to the use of commercial telephones."[16] Applicants state that "[t]he use of commercial telephone is the primary communication method relied upon for implementation of school emergency procedures..."[17] and have nothing substantive to say about alternate communications systems to support their allegation. Although Mr. Badger's Secret System was considered and rejected by the Board, Applicants drag it out again and insist that it will work.[18] (I.D., pp. 67-68). No matter, because it is merely something Applicants have proposed[19]; there is no evidence that the Secret System is installed, in use, and provides an alternative to the present limitation. Similarly Applicants' suggestions that "[v]olunteer radio personnel may be available...(and)...[r]adio communications could be established...by police car..." (emphasis added)[20] are paper proposals. The Board questioned the effectiveness of the former. (I.D., p. 69). The possibility of the latter, given the load of other assignments of police personnel during an

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15 Applicants' Brief at 43.
16 Applicants' Brief at 25.
17 Applicants' Brief at 37.
18 Applicants' Brief at 40-41.
19 Applicants' Brief at 40.
20 Applicants' Brief at 42, footnote 87.

emergency, has never been established.

In Exception 8 Applicants state that the Board did not make specific findings to support its conclusion regarding the time factors involved in the evacuation of schools. (I.D., p. 32, p. 73, p. 75). One of the basic concepts in the planning for school evacuation, about which there is no disagreement, is that schools should be notified of an emergency and begin their emergency response before public notification. The Board found that, although school officials, planners and Applicants agree that it might be necessary in an emergency to bring outside buses into the New Richmond district, "...there is no plan provision or letter of agreement..." dealing with the logistics problem and that there is no indication in the record that the basic planning concept can be implemented in any meaningful way. (I.D., p.73). In Campbell County the Board found "...it will take one hour from initial notification to evacuate until the boarding of Jolly students on the buses." (I.D., p.75). On the basis of these findings and the requirements for public notification discussed in connection with Exception 1, the Board's statement that "[t]his leaves too little time to accomplish more than initial notification to the schools prior to public notification..." is completely justified. (I.D., p. 32).

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY FINDING THAT FURTHER PROCEEDINGS ON THE RECORD WERE NECESSARY ON SCHOOL EVACUATION ISSUES. (EXCEPTIONS 10, 11, 15 & 16).

The Atomic Safety and Licensing Board in this case was charged with the duty to make a finding on whether or not there is a reasonable assurance that adequate protective measures can and will be taken in the event of an emergency. 10 CFR §50.47(a)(1). Based on the present record the Board was unable to find that such measures could and would be taken. See generally I.D.

This duty charged to the Board goes beyond a mere checklist determination of whether the plan meets the criteria of 10 CFR §50.47(b). Southern California Edison Company(San Onofre Nuclear Generating Station, Units 2 and 3), LBP-81-36, 14 NRC 691, 698 (1981). As the Board noted in its Initial Decision at page 47:

> As a general proposition, issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution.... But the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license--including a reasonable assurance that the facility can be operated without endangering the health and safety of the public....In doubtful cases, the matter should be resolved in an adversary framework prior to issuance of licenses, reopening hearings if necessary. (Cites omitted).

10 CFR Part 2, Appendix A entitled STATEMENT OF GENERAL POLICY AND PROCEDURE: CONDUCT OF PROCEEDINGS FOR THE ISSUANCE OF...OPERATING LICENSES...further expands on the Board's powers and responsibilities. The Board is charged with the ultimate responsibility to:

> Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken. 10 CFR Part 2, Appendix A, VI (c)(3)(ii). See also 10 CFR Part 2, Appendix A, VIII (a).

Further:

> If, at the close of the hearing, the Board should have uncertainties with respect to the matters in controversy...and...the uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted in writing with opportunity for the other parties to reply or reopen the hearing for the taking of further evidence, as appropriate (emphasis added). 10 CFR Part 2, Appendix A, V (g)(1).

The lack of evidence with respect to the school issues was the lack of any

written plan and the serious deficiencies in the Applicants' "implementation concepts". (See I.D., Findings of Fact, pp. 67-76).

The Board's Findings of Fact are exhaustive and well-supported. The relief the Board fashioned for the school evacuation issues was warranted and well within its discretion. The Board in a well-reasoned decision clearly stated why further proceedings were necessary and why a license condition could not be satisfactorily imposed. (I.D., p.45).

Applicants contend that, since plans existed and since "concepts" were available for the implementation of those plans, nothing more is required. Applicants suggest that staff can review the plans and that a license condition to this effect could take the place of further hearings. What Applicants really suggest is that these issues be treated as if they were uncontested. See 10 CFR Part2, Appendix A, V (f)(2).

Such a suggestion is so far afield one can only wonder what the Applicants thought was the purpose of the hearing . Applicants' proposed solution ignores the Findings of Fact made by the Board, the duty the Board is charged with and the concepts of due process. Applicants,despite the regulations, do not understand that it bears the burden of proof in licensing hearings. 45 Fed. Reg. 55402 August 19, 1980).

To be more blunt, what Applicants really argue is that they lost, that somehow this is unfair and therefore the Board erred.[21] As at least one Appeal Board has had occasion to note:

> The resolution of issues of fact in favor of one side suggests neither bias nor error on the tribunal's part; without more, the appropriate inference is that the evidence of the prevailing party was more persuasive. Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981).

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21 Applicants' Brief at 15.

III. THE BOARD DID NOT ABUSE ITS DISCRETION IN REQUIRING THAT FEMA FINDINGS AS WELL AS THE STAFF SUPPLEMENT TO THE SAFETY EVALUATION REPORT BE FILED AND SERVED AND THAT THE PARTIES BE GIVEN A REASONABLE TIME TO ASSESS THOSE DOCUMENTS AS THEY RELATE TO THE ADMITTED CONTENTIONS. (EXCEPTIONS 12, 13 & 14).

As previously discussed, the Board is charged with the duty of making a finding of whether there is a reasonable assurance that protective measures are adequate and capable of being implemented. 10 CFR §50.47 (a)(1). The Board is in part to base its findings on a review of FEMA's findings as to whether state and local plans are adequate and capable of implementation. 10 CFR §50.47 (a)(2). Furthermore, FEMA findings merely constitute a rebuttable presumption in NRC proceedings. id.

Applicants challenge the Board's authority to require final findings of FEMA before it will issue an operating license. The Commission noted in their Policy Statement that "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulation." 46 Fed. Reg., p. 28534 (May 27, 1981).

FEMA, as a participant, is charged with the obligation "for making findings and determinations as to the adequacy and capability of implementing State and local plans, and to make those findings and determinations available to NRC." Memorandum of Understanding between NRC and FEMA relating to Radiological Emergency Planning and Preparedness, 45 Fed. Reg., p. 82713 (December 16, 1980). NRC, a participant in turn is charged with the obligation of making determinations on the overall state of emergency preparedness for issuance of an operating license. 45 Fed. Reg., p. 82713 (December 16, 1980). Such findings and determinations and, where appropriate, plan approvals are to be submitted to the Governors of the affected States and to the NRC <u>for use in licensing proceedings</u> of the NRC" (emphasis added). 45 Fed. Reg., p. 42341 (June 24, 1980).

Since FEMA with few exceptions could not offer expert testimony on the admitted contentions and since FEMA had not made final findings, the Board had

nothing on which to base its review. As previously discussed, the Atomic Safety and Licensing Board is afforded some latitude of discretion and flexibility in licensing procedures. Obviously this is the legal basis for the Board's decision that final FEMA findings must be filed and served upon the parties.

Applicants again would treat this case as if it were uncontested and no contentions existed. They argue in effect that a licensing board does not even have the duty to consider FEMA findings.[22] Quite to the contrary, the Licensing Board has a nondelegable duty to do so. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1419 (1981). One cannot help but wonder again if Applicants understand what due process means and what Applicants thought was the purpose of having FEMA testify. As was asked repeatedly by Intervenors' counsel at the hearings, "Where, other than a hearing before Atomic Safety and Licensing Board may any party be in a position to rebut that presumption of adequacy found by FEMA?" (Tr., p. 7402; see also p.7401, p. 7403, p. 7406).

Applicants' next argument alleges that by virtue of the amended 10 CFR §50,47 (a)(2) effective July 13, 1982, that NRC may make licensing decisions prior to FEMA findings. Since the effective date of the amended regulations is after the rendering of the initial decision the commission may choose to ignore Applicants' argument in this regard in its entirety. The change in the regulations merely states that FEMA is not required to make findings before issuance of a low power (5% of rated power) license and that emergency preparedness exercises are not required before authorizing a low power license. 47 Fed. Reg., p. 30232 (July 13, 1982). The Commission in so adopting the final rule was careful to point out:

> ...the Commission does not alter the high standards applicable to the review of emergency preparedness at full power.... The substantive emergency planning issues now being litigated in license hearings are largely focused on the 16 planning standards found in 10 CFR 50.47(b). These planning standards are unchanged by the rule changes and do not, in themselves, require a successful exercise. 47 Fed. Reg. 30232,30233 (1982).

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22 Applicants' Brief at 11.

Moreover, exercises are still required before a full power license is issued. 47 Fed. Reg., p. 30233 (July 13, 1982).

Therefore, this intervenor fails to understand any substantive conflict in these regulations. Pursuant to commission precedent, regulations, like statutes, may neither be read in isolation nor interpreted piecemeal. Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 904-95 (1981). To give all the regulation's effect and a reasonable interpretation in this context is not an insurmountable task as Applicants suggest.

The new regulation does not change the Board's duty or the process in which the Board discharges its duty or the obligation of FEMA to make findings. The new regulation does not change the rebuttable presumption given to FEMA findings. It does not change the requirement of an exercise before issuance of a full power license. It merely allows for issuance of a low power license without FEMA findings or an exercise.

The rest of Applicants' argument in support of Exceptions 12, 13 and 14 again shows a misunderstanding of where the burden of proof lies and the fundamental function of the Board as a trier of fact. Applicants correctly deduce that FEMA failed utterly in that role. Applicants then characterize their own testimony, that of Staff and that of state and local planners as independently persuasive. Obviously such testimony was not independently persuasive. Applicants do not mention the testimony of intervenors' witnesses; Gene Sell, Superintendent of Campbell County Schools, Richard McCormick, Eastern Campbell County Volunteer Fire Department Fire Chief, et al. In short, Applicants argue that because FEMA could not support its conclusions, the Board imposed an additional burden on the Applicants. The Applicants have always had the burden of showing by a preponderance of evidence that there was a reasonable assurance that adequate and protective measures can and will be taken in the event of a radiological emergency. FEMA

does not want a license; the Applicants do. FEMA is not required to submit off-site emergency plans as part of an application, but Applicants are so required. 45 Fed. Reg. 55402 (August 19, 1980); 10 CFR §50.33(g). Applicants simply did not meet their burden of proof.

Applicants next argue in a somewhat strange manner that the Board improperly elimina[illegible] the legal requirements for reopening the record by allowing the parties an opportunity to comment on the final FEMA findings and assess those findings as they relate to the admitted contentions.

Since the Applicants were denied an operating license it would be logical that if and when upon some date in the future Applicants have justification to believe that the matter of offsite emergency preparedness and planning does provide some reasonable assurance that the health and safety of the public can be protected, then Applicants can move for a reopening of the record and suggest that they can then demonstrate that the public is protected. Under that circumstance, then Applicants can discharge the burden of showing that their motion is timely, after having involved the Atomic Safety and Licensing Board and the intervenors in a hearing held to determine the adequacy of offsite plans; demonstrate that the issue involves a significant safety issue, the protection of the public through adequate offsite planning; and the further necessity to the Atomic Safety and Licensing Board that a different result would have been reached initially had the new plans and the new considerations been submitted in the first place and subjected to consideration. However, this is not what Applicants suggest. Rather Applicants urge that the the intervenors must seek further hearings under the strict standard applicable to Motions to Reopen. The logic of this argument escapes this intervenor as it was Applicants who failed to meet their burden of proof and Applicants who sought an early hearing in order to accomodate their fuel load date. (I.D., p. 48). Moreover, it was counsel for Applicant who emphasized before and during the hearing that if there were significant new developments it would be proper to

reopen the hearings. (Tr. pp. 7050-51).

As has been previously noted, if at the close of the hearing the Board feels that the record is deficient because of a lack of information the Board may require further evidence to be submitted in writing allowing all the parties an opportunity to reply. The Board my also reopen the hearings. 10 CFR Part 2, Appendix A, V (g)(1). This is exactly what the Board did when fashioning the relief in this case. The Applicants simply do not like the result. For the foregoing reasons the exceptions should be denied.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BRANCH

In the Matter of

CINCINNATI GAS & ELECTRIC COMPANY, et al. (William H. Zimmer Nuclear Power Station)

DOCKET NO. 50-358

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF INTERVENOR CITY OF MENTOR in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by asterisk, hand delivered on November 3, 1982.

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CONCLUSION

For the foregoing reasons, the Board's Initial Decision should be affirmed in its entirety.

November 3, 1982

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