UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

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

ANSWER TO ORDER TO SHOW CAUSE

Now comes intervenor Citizens for Employment and Energy (CEE), by their attorney, John R. Minock, and answers the Order to Show Cause issued November 12, 1982, as follows:

Under 10 CFR 2.754, once the record of an Atomic Safety and Licensing Board (ASLB) hearing is closed, unless ordered to do so by the presiding officer, a party other than the applicant has the option of filing proposed findings of fact and conclusions of law. Duquesne Light Co., 7 NRC 811 (1978). 10 CFR 2.754 reads in part as follows:

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

Not only is the filing of proposed findings optional, the remedy of default is also optional and is within the authority of the presiding officer of the panel which tries the case, prior to the issuance of the initial decision. That remedy should not be invoked here at this stage of the proceedings for a number of reasons.

All parties were served with a copy of the May 28, 1982, letter to the ASLB from CEE's prior attorney, David Howell. No party made any objection to the notice that CEE was not going to file proposed findings. No party requested that a default judgment be entered. The presiding officer of the trial panel did not direct CEE to file proposed findings or face default. In fact, in its Initial Decision, the licensing panel did not even mention CEE's lack of proposed findings, and said near the conclusion of the decision that:

> All issues, arguments, or proposed findings presented by the parties, but not addressed in this decision, have been found to be without merit or unnecessary to our decision.
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> ¶84, p 51.
> (Emphasis added)

Where no one objected to CEE's overtly stated intentions, their silence can only be read as an acquiescence that there was no apparent prejudice to any party or difficulty posed for the decision making process. This was doubtless because the parties and panel clearly understood CEE's position on the limited issues which were actually litigated. Detroit Edison and the NRC staff should be held to have waived their right to request a default against CEE for their failure to do so in a timely fashion.

The Appeal Board in its Order to Show Cause states in effect that filing proposed findings of fact is an absolute prerequisite for preserving appellate rights. Public Service Electric and Gas Co., 14 NRC 43 (1981), is cited as authority for that proposition. The relevant portion of that decision reads:

> The exceptions which are to specify errors in the decision below, must in turn relate to matters raised in the party's proposed findings of fact and conclusions of law. This is because we will not entertain agruments that a licensing board had no opportunity to address and that are raised for the first time on appeal -- absent a "serious substantive issue."

However, the intervenors in that case were being taken to task for unclear pleadings and briefs. The statement that exceptions can only be based on proposed findings was unnecessary to the issue being discussed, and as such should be nonbinding dicta. Furthermore, that statement is an unwarranted extension of the case upon which it relies, Tennessee Valley Authority, 7 NRC 341, 348 (1978). There the intervenors argued in their brief on appeal matters which were not raised in any

form at all below, neither on the record, nor in proposed findings, nor in exceptions. As the Appeal Board said at 348:

> This alleged error was not specified in the intervenors' exceptions to the decision below. Moreover, the validity of the Regulatory Guide 1.109 model was not raised in the proposed findings of fact and conclusions of law submitted to the Licensing Baord by intervenors. Intervenors' brief to us does not indicate any other way in which the point was raised below. No[r] do intervenors suggest any reason as to why the model in Regulatory Guide 1.109 may not be acceptable.

Correctly stated then, the principle is that issues should not be raised for the first time on appeal unless that is unavoidable or unless there is a "serious substantive issue" that was overlooked and might have a determinative effect on the final decision. The above quoted statement in Public Service, supra, does not follow then from the principle announced in Tennessee Valley Authority. Just because proposed findings were not filed here does not mean that the issues raised in CEE's exceptions were not fully raised and addressed below. To the extent that Public Service announces a blanket rule, it is an unnecessary and erroneous extension of the principle as stated in Tennessee Valley Authority. The instant case is a prime example of why that is so, because CEE's exceptions relate to issues which were either 1) fully litigated below and addressed thoroughly in the Initial Decision or 2) not developed until after the closing of the record and could not have properly been the subject of proposed findings in any event.

In the Initial Decision, the ASLB spent twenty-two pages addressing CEE's Contention #4. The Contention itself is lengthy and quite specific, alleging certain construction flaws. Thirteen pages of the Initial Decision are devoted to CEE's

Contention #8 concerning evacuation of a residential area near the plant. The transcript of the hearings on these contentions is also quite lengthy. CEE has taken exception to the ASLB findings on those contentions. To say now that CEE should be found in default because these issues are now being raised for the first time on appeal and that the licensing panel had no opportunity to address them is belied by the record. All that can be said is that on these points CEE did not exercise its option to file proposed findings.

The state of the record in this case is distinctly different than that in Tennessee Valley or Public Service. In Tennessee Valley, the intervenors did not litigate the issue which the Appeal Board refused to entertain, did not take exception to it, and raised it for the first time in their appellate brief. The intervenors in Public Service were criticised, **but not defaulted**, for imprecision and confusion in their pleadings generally, and not for raising issues for the first time on appeal.

In summary up to this point then, the rule regarding the filing of proposed findings is permissive for an intervenor, as is the exercise of the remedy of default. After adequate notice, neither any party nor the panel sought to exercise the remedy. The complaint of the Appeal Board is procedural only and not substantive. It is also legally erroneous. The precedents cited do not lead to the inflexible rule announced here. The precedents stand only for the general principle that issues should not be raised for the first time on appeal. That principle was not violated here, since CEE's exceptions raised to ¶¶4-57 are not issues being raised for the first time on appeal but are rather the subjects of specific contentions, lengthy

litigation, and extensive analysis in the Initial Decision. CEE's position on those contentions has been clear throughout the case. This case is clearly distinguishable on the pertinent facts surrounding this issue from Public Services and Tennessee Valley, supra.

There is conceptually another set of exceptions filed by CEE which relate to the licensing panel's denial of intervenor status to Monroe County and refusal to reopen the record. Initial Decision, ¶¶57-82. As far as exceptions to these issues in the decision are concerned, CEE cannot be defaulted and precluded from appealing. Those issues were not part of the hearing record and thus not subject to 10 CFR 2.754. CEE cannot be held to have been responsible to file proposed findings on those emergency planning issues under any rationale this counsel can divine from the applicable provisions of the CFR. Furthermore, those issues developed later than the licensing adjudication and did not ripen until August 27, 1982, when the County petitioned late to intervene. The licensing panel included the denial of intervenor status and declined to reopen the record as part of the Initial Decision rather than in a separate order. Both CEE and the County[1] have presumed that the appellate path on those issues is under 10 CFR 2.762, although the applicability of 10 CFR 2.714a is unclear. Just because the licensing panel covered those issues in the Initial Decision does not mean that those issues are ex post facto subject to the rules applicable to issues actually litigated in a licensing adjudictory hearing. Default is not a legally available remedy on those issues and is extremely inappropriate

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1. See the County's Motion for Extension of Time on the filing of appellate pleadings, filed November 8, 1982.

too because of the time frame. CEE clearly retians the right to appellate review on exceptions 25-30.

Also as a matter of fairness, CEE should not be defaulted. CEE has participated responsibly in this heairng process for a period of years. The issues raised in CEE's exceptions were fully litigated and are not being raised inappropriately for the first time on appeal. In addition, CEE's attorney who reached the decision not to file proposed findings did so without consulting the client intervenors. He also did not inform his co-counsel and predecessor in the case, Kim Siegfried, of his decision not to file proposed findings. It is ludicrous to conclude that at that late stage of the proceedings, CEE and its attorney decided to throw in the towel. Apparently, David Howell did not anticipate that failure to file proposed findings would waive any future rights. This is not surprising at all, since the rule is permissive and no one objected. While as the Appeal Board said, CEE's decision not to file proposed findings was intentional. However, from that it cannot be concluded that CEE intended to relinquish any appellate rights. As pointed out above, the Appeal Board's application of the rule here is not supported by the language of the rule nor by the principles announced in the precedents. Even if Mr. Howell analyzed the possible consequences of failure to file proposed findings thoroughly, the Order of the Appeal Board would still be a surprise, to put it mildly, because failure to file proposed findings does not necessarily mean that the issues were not raised before the Licensing Board. If the Commission desires to modify the rule, it should do so through the rule change process and not dicta.

Finally, CEE maintains that although the Applicant and Staff have of course been given an opportunity to respond, that response must be limited in scope in that by their failure to request in a timely fashion that the default remedy be exercised before the Intial Decision was issued, they should be found to have waived irrevocably any right to request that remedy now. Detroit Edison has also been granted a request that they receive CEE's Answer within the same time limit as for the Appeal Board to receive it. CEE presumes that the granting of that request is of course reciprocal.

Wherefore, CEE requests that the Appeal Board not dismiss CEE's appeal and not find CEE in default.

Respectfully submitted,

John R. Minock

Dated: November 21, 1982

John R. Minock, Esq.
Attorney for CEE
305 Maple Ridge
Ann Arbor, Michigan 48103