UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' BRIEF IN OPPOSITION TO EXCEPTIONS

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The Detroit Edison Company ("Detroit Edison") and Wolverine Power Supply Cooperative, Inc.[1/] ("Applicants") hereby submit their Brief in Opposition to the Exceptions, dated November 8, 1982, and the Brief on Appeal, dated February 9, 1983, of the Citizens for Employment and Energy ("CEE"), the only intervenor in this proceeding. CEE's Exceptions are taken to the October 29, 1982 Initial Decision of the Atomic Safety and Licensing Board, which rejected the contentions asserted by CEE and authorized the issuance of an operating license for Fermi 2.

1/ Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc. were co-applicants for the operating license. Effective December 31, 1982, the two cooperatives consumated a statutory merger under Michigan law. The surviving corporation changed its name to Wolverine Power Supply Cooperative, Inc.

Introduction

CEE's Brief on Appeal sadly confirms Applicants' expectation that only a further waste of the time and resources of the Atomic Safety and Licensing Appeal Board, the Commission's Staff, and Applicants would result from the Appeal Board's January 4, 1983 Memorandum and Order (ALAB-709) authorizing CEE to proceed with its appeal of the Initial Decision despite CEE's failure to file proposed findings of fact or conclusions of law following the evidentiary hearing and otherwise responsibly pursue its position in this matter.

CEE's position is manifestly without merit. Its meager Brief on Appeal consists of (1) an objection to the Licensing Board's finding that Monroe County has a "completed version" of its emergency response plan that would appear to be moot following the Appeal Board's December 31, 1982 Decision (ALAB-707); (2) a disingenuous claim that CEE did not voluntarily limit the scope of its Contention 8 for hearing below; and (3) an attack on the Licensing Board's findings respecting the adequacy of the Stony Point evacuation route that mischaracterizes or ignores the substantial record evidence supporting those findings.

It should also be noted that CEE's Brief on Appeal can be fairly said to address, even in the inadequate

manner just described, only 17 of the 34 exceptions to the Initial Decision enumerated in CEE's November 8, 1982 pleading. The other 17 exceptions relate to CEE's Contention 4, which alleged structural, quality assurance, and security deficiencies during construction at Fermi 2. CEE's Brief on Appeal makes no attempt whatever to address those issues. Therefore, CEE must be held to have waived any remaining right to pursue those exceptions, and they should be disregarded. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 203 n.66 (1978); Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-270, 1 NRC 473 (1975); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976).

Argument

I.

CEE's ASSERTIONS REGARDING MONROE COUNTY'S EMERGENCY PLAN ARE MOOT.

The first section of CEE's Brief on Appeal asserts that the Monroe County emergency response plan, which the Michigan State Police presented to FEMA for review, has not been "formally" approved by the Monroe County Board of Commissioners ("Monroe County"). CEE Brief

at 1-2. It is not clear whether by this CEE seeks to challenge the Licensing Board's denial of Monroe County's intervention. If it is intended to be an objection to that ruling, it is clear that CEE has no new information to bring to the question--indeed, it is not qualified to speak for Monroe County on the formalities of plan approval--and the issue has been addressed thoroughly by this Appeal Board in its December 31, 1982 Decision (ALAB-707). Moreover, the time in which the Commission was permitted to review ALAB-707 expired on March 4, 1983. Accordingly, that decision became a final agency action, and further recourse to this Appeal Board on the question is inappropriate.

Alternatively, Section I of CEE's Brief on Appeal may be viewed simply as an attack on Paragraph 63 of the Initial Decision, which found that Monroe County had developed an emergency plan and had submitted it for Federal Emergency Management Agency ("FEMA") review in 1981. CEE's Exceptions did not specify Paragraph 63 of the Initial Decision or take any exception to the Licensing Board's finding that "a completed version of the [Monroe County emergency] plan" was submitted to FEMA. I.D. ¶ 56. Therefore, CEE is barred now from raising the question on brief. 10 C.F.R. § 2.762(a); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B),

ALAB-367, 5 NRC 92 (1977). In any event, the Licensing Board's finding that the Monroe County plan was "completed" is amply supported by the record. The plan was the subject of a full-scale exercise on February 2, 1982, in which Monroe County actively participated. I.D. ¶ 64. Obviously, the plan was sufficiently developed to support its use as a basis for the full-scale exercise and to enable FEMA to evaluate it. Id. CEE therefore has failed to show any error in the Licensing Board's findings.

II.

CEE VOLUNTARILY RELINQUISHED THOSE PORTIONS OF ITS EARLIER CONTENTION 8 RELATING TO ISSUES OTHER THAN STONY POINT EVACUATION.

CEE excepted to Paragraphs 80 and 81 of the Initial Decision, which denied CEE's Motion to Reopen the Record to consider off-site emergency planning issues. CEE demands a hearing on such issues at some indefinite time in the future, presumably after CEE decides that Monroe County has "approved a plan." CEE Brief at 6. CEE advances a thoroughly disingenuous argument in support of its claim of right to such a hearing. CEE now claims for the first time that the Licensing Board's January 2, 1979 Prehearing Conference Order erred in ruling that Contention 8 of CEE's December 4, 1978 Amended Petition to Intervene was acceptable

only insofar as it referred to the evacuation route from Stony Point, and that the balance of Contention 8, which appeared to concern the evacuation of the City of Detroit, lacked specificity.

CEE explains its failure "to seek to resurrect the broad issue of emergency planning" from January 2, 1979 until now--that is, its silence throughout the entire course of this proceeding before the Licensing Board--as "simply abiding by the Board's ruling" until an appropriate time for appeal. CEE Brief at 3. CEE's position is incredible.

Applicants recognize that licensing board rulings that modify or only partially dismiss intervenor contentions at the prehearing conference stage are generally not appealable on an interlocutory basis. See, e.g., Puget Sound Power and Light Company (Skagit/Hanford Nuclear Power Project), ALAB-683 (July 27, 1982). However, the record in these proceedings demonstrates unequivocally that, rather than merely waiting out an opportunity to appeal the Licensing Board's modification of its contentions, CEE freely and intentionally gave up its right to pursue issues related to emergency planning other than the specific question of the Stony Point evacuation route.

CEE did not request reconsideration or even note an objection to Licensing Board's January 2, 1979

determination to narrow the scope of Contention 8, nor did it request certification of the question to the Appeal Board or the Commission, options clearly available to it under the Commission's Rules of Practice and Procedure.

More importantly, CEE voluntarily entered into a March 5, 1979 stipulation (the "Stipulation") with Detroit Edison and the Commission's Staff as to the scope of contentions for hearing. The Stipulation included a revised version of Contention 8 that was limited to the feasibility of the Point Aux Peaux Road as an evacuation route for Stony Point residents. CEE's representative signed the Stipulation without reserving any right to pursue a broader set of contentions following appeal or noting any dissatisfaction with the wording of the jointly re-drafted contentions. The Stipulation was adopted by the Licensing Board as the agenda for hearing.

After voluntarily agreeing in writing on the scope of the issues for hearing, on May 25, 1979 CEE served Detroit Edison with interrogatories and document requests. Interrogatory 10 read as follows:

> Provide all documents related to an evacuation plan for residents of Southeast Michigan and Ohio in case of an accident at the plant. Is there an evacuation plan that has been approved by Michigan or Federal authorities. If so, provide a copy of such plan. If not, explain why such a plan does not exist or has not been formally approved and

> provide copies of all draft plans and communications with federal and state authorities. Also provide an explanation and copies of any documents related to the question of whether any individuals residing in the Stony Point area or other areas within a ten mile radius of the plant would be exposed to more radiation and danger because of the lack of an adequate evacuation route for such individuals. In particular, will any individual residing near the plant be forced to travel closer to the plant site in order to evacuate the area? If the Applicant believes that no individuals will be placed in such a situation as described in the preceding sentence, explain why and indicate alternate evacuation routes for such individuals, particularly those living in the Stony Point area.

Detroit Edison filed objections to CEE's requests on June 25, 1979. With respect to Interrogatory 10, Detroit Edison pointed out that the stipulated Contention 8 only addressed the Stony Point evacuation route and objected to any discovery related to evacuation of "Southeast Michigan and Ohio." On June 29, 1979, Detroit Edison submitted responses to CEE's interrogatories, and its response to Interrogatory 10 was limited to the Stony Point evacuation route.

On August 2, 1979, CEE requested additional time to conduct further discovery ostensibly for the purpose of reviewing "literally thousands of quality assurance and quality control documents relating to Contention 4." CEE did not mention emergency planning "issues" or object to the extent of the information provided by Detroit Edison on Stony Point evacuation.

At the July 22, 1981 prehearing conference, CEE was represented by Kim Siegfried, the same lawyer who had filed CEE's discovery requests and responses in 1979. His explicit statements regarding discovery and the scope of contentions for hearing demonstrate that CEE had no means or wish to pursue the emergency planning matters now claimed by CEE's present counsel. In particular, it should be noted that not only did CEE once again voluntarily limit Contention 8 to Stony Point evacuation (and implicitly waive the earlier broader discovery requests), CEE also withdrew Contention 9 relating to emergency response facilities, which the March 5, 1979 Stipulation had provisionally reserved pending refinement by CEE. This demonstrates that, far from being limited by the Licensing Board, CEE simply chose not to go forward with the issues that it now seeks to "resurrect".

To further illustrate that CEE voluntarily relinquished any right to litigate its emergency planning concerns, Applicants quote at some length the relevant portions of the prehearing transcript (Tr. 192-196):

> MR. SIEGFRIED: [Speaking to the Licensing Board] In your original order and in subsequent orders you had left some areas open as far as the Intervenor perhaps adding to some of its contentions, refining them. At least our understanding, looking at this latest order, was that is what it was related to. However, in discussions that I

had yesterday evening with Mr. Howell [also counsel for CEE and the lawyer who represented CEE at the evidentiary hearings] and representatives of CEE, what we would like to do I think at this point is withdraw a couple of the contentions that we have had previously and 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.

Specifically, we wish to retain Contention 4 which relates to our concerns about the employer's quality assurance/quality control program, and we believe that contentions is very specific.

We would retain Contention 5 which relates to the lawyers [sic]--the Applicant's proposed monitoring program.

We would like to withdraw Contention 6A, B, and C at this time.

* * *

Contention 8 we clearly wish to retain. This relates to the evacuation of residents towards the plant from one particular geographic area.

Contention 11, we had previously indicated that we were willing to withdraw it, and the Applicant, of course, wanted us to withdraw it, but because of the TMI and other problems, the Board never really ruled on that issue. But 11 we would state again today we are willing to withdraw.

And finally 14A, which has also been the subject of some discussions with the NRC Staff we would also like to withdraw.

I am not sure what else was left. Loading. I think there was something about hospitals in the evacuation plan. We do not want to proceed on that. And there were some generic issues.

Frankly, it has been two years. I frankly cannot even recall the generic issues.

CHAIRMAN MILHOLLIN: We are talking about Contention 14, now, is that right?

Mr. VOIGT: No, Your Honor, 9 and 10 were the two unspecified contentions.

CHAIRMAN MILHOLLIN: All right, yes.

MR. VOIGT: They were given further time to refine them, and as I understand it, he is now stating that he wishes to withdraw 9 and 10.

CHAIRMAN MILHOLLIN: Okay.

MR. SIEGFRIED: First I have to find them.

CHAIRMAN MILHOLLIN: Yes, we are familiar with them.

Those are the ones which the Board ruled could be supplemented by further pleadings after the staff's documents were published, and you wish to withdraw both of those.

* * *

MS. WOODHEAD: . . . The stipulation in Paragraph II agrees that CEE will have an opportunity to formulate contentions out of their original Paragraphs 9 and 10 which dealt with emergency facilities and unresolved generic issues.

MR. SIEGFRIED: Nine is actually the hospital contention, and that there is clearly no problem with. And No. 10 is the generic safety problems for BwR's.

CHAIRMAN MILHOLLIN: Very well. So you are withdrawing 9 and 10 in their entirety.

MR. SIEGFRIED: Yes, again on the basis, not that we do not have these concerns, but if we are not going to be able to provide expert witnesses and we are not going to be able to proceed, I do not see any sense in keeping them on the table.

CHAIRMAN MILHOLLIN: So we are left with No. 8, No. 5 and No. 4.

MR. SIEGFRIED: Yes.

CHAIRMAN MILHOLLIN: In light of that, perhaps, unless there is--is there any discussion about the contentions, their form, refinement and so forth?

MR. VOIGT: We had previously stipulated to the statements of the contentions 4, 5, and 8, and the Board had approved that statement in the stipulation. We have no desire or intent to depart from the stipulation. We have agreed that they are suitably framed for hearing, and we are prepared to go forward on that basis.

CHAIRMAN MILHOLLIN: Very Well.
So that takes care of another item on our agenda.

(Emphasis added.)

Later at that conference counsel for Detroit Edison reiterated that the general adequacy of the emergency plan was not an issue in controversy and that the "sole matter in controversy [was] the evacuation route from Stony Point." Tr. 207. In response, counsel for CFE stated:

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

Id. at 208 (emphasis added).

In sum, it is clear that CEE, orally, in writing, and by silence and inaction, knowingly and voluntarily, by and through two members of the Michigan Bar, forwent any right to pursue emergency response issues beyond those set forth in Contention 8 in the Stipulation. CEE's current position is simply an invention of new counsel designed to forestall final resolution of this proceeding by attempting to resurrect issues that CEE long ago relinquished.

III.

THE LICENSING BOARD'S FINDING THAT THERE IS A FEASIBLE ESCAPE ROUTE FOR STONY POINT RESIDENTS IS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE AND SHOULD BE UPHELD.

CEE's presentation of evidence in support of its Contention 8 at the hearing consisted of a few sentences of conclusionary testimony by its sole witness, Tr. 368 (Exhibit at 9-10), and some wide-ranging cross-examination by its then-attorney, Mr. Howell, Tr. 411-438, 534-38. Of course, CEE filed no proposed findings and conclusions on Contention 8.

CEE's belated analysis of the record before the Licensing Board on the issue of a Stony Point evacuation route mischaracterizes or ignores most of the evidence, and its arguments on brief provide no basis for overturning the Licensing Board's findings and conclusions, which, though not absolutely binding on the Appeal Board, are certainly

entitled to a presumption of validity. See e.g., Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975); Pacific Gas & Electric Co., (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-88 (1975).

The gravamen of CEE's argument is that neither the Detroit Edison and Staff witnesses, nor the Licensing Board could rationally rely on the Monroe County emergency response plan which was not "final" and which Monroe County did not consider adequate. However, CEE fails to point to any specific reliance by the Licensing Board that is improper because of the asserted "draft" nature of the Monroe County plan. For the limited extent to which the Monroe County plan was relevant to the Licensing Board's findings, the Licensing Board obviously concluded that it was sufficiently developed to provide the needed guidance.

CEE also attacks the evacuation time estimates of the expert witnesses of Detroit Edison and the Commission Staff. CEE's dissatisfaction with their conclusions, however, does not rise to the level of evidence or show that the Licensing Board could not rationally conclude the route was adequate. CEE also ignores the fact that, as the Licensing Board independently found, the "only imaginable" combination of accident and meterological conditions that

would make the toward-the-reactor evacuation route of possible significance in terms of radiation exposure did not justify building an alternative route. I.D. ¶ 56.[3/]

CEE tries to exploit the snow storm that occurred on February 3, 1982, the night of the public hearing on the Fermi 2 emergency response exercise as further evidence of the inadequacy of the Stony Point evacuation route. However, CEE ignores the testimony of Staff's expert witness, who drove over the evacuation route during that snow emergency and observed that the roads were well-maintained and open. Thus, he was able to conclude based on first-hand experience that the snow storm did not alter his view as to the road's adequacy for the purpose. Tr. 569.

CEE also fails to point out that, at the conclusion of the July 22, 1981 prehearing conference, the members of the Licensing Board were given a tour of the entire Stony

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3/ CEE quotes a statement by the Appeal Board in Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-248, 8 AEC 957 (1974) in an effort to suggest that evacuation travel toward the reactor is per se unacceptable. The facts in that case were different. There the evacuees were required to cross to the opposite side of the reactor, not merely move for a short distance in its direction. More importantly, even in that case the Appeal Board found that the licensing board's conclusions in favor of the applicant were appropriate.

Point area and the evacuation route. CEE's witness accompanied the Licensing Board on this survey, as did Commission and Detroit Edison personnel. Tr. 203-204, 210.

In short, while CEE continues to complain about the inadequacy of the Pointe Aux Peaux Road, it cannot properly complain that the Licensing Board did not have a substantial basis for its decision.

* * *

There is no merit to CEE's appeal, which should have been dismissed in ALAB-709. Oral argument is not warranted. The appeal should be summarily dismissed.

Conclusion

For the foregoing reasons, the Appeal Board should deny CEE's appeal and affirm the Initial Decision in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of March, 1983, served the foregoing document, entitled Applicants' Brief in Opposition to Exceptions, 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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