UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CEE RESPONSE TO THE MONROE COUNTY, MICHIGAN APPEAL OF THE DENIAL OF ITS PETITION TO INTERVENE

INTRODUCTION

On November 8, 1982, Monroe County sent a letter to the Nuclear Regulatory Commission stating that it wished to appeal the October 29, 1982, Licensing Board denial of its petition to intervene filed on August 27, 1982. Because of an ambiguity in the Initial Decision, in which the denial of intervention was included, the Appeal Board granted CEE an extension of time in which to file this reply brief. The decision of the Licensing Board denying the intervention should be reversed.

BACKGROUND

CEE hereby adopts the "BACKGROUND" statement contained in the NRC Staff Response to the Monroe County appeal for purposes of this brief.

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PROCEDURAL DEFECTS IN COUNTY APPEAL

The Staff has argued that the County's Appeal should be summarily denied because the County has failed to file a brief in support of the appeal and has failed to cite specific reference to the Licensing Board's Initial Decision. As was noted above, the document that the Appeal Board has decided to treat as the County's Appeal under 10 CFR 2.714a is a letter from the Chairperson of the County Board of Commissioners to the Licensing Board. While the letter includes several different types of relief, as a whole it can be read to substantially comply with 10 CFR 2.714a.

The letter, at paragraph 2, refers to the twenty paragraphs of the Initial Decision, 58-78, which deal with the County request of August 27, 1982, to intervene and reopen the record. Paragraph 2 of the letter goes on to allege that the Licensing Board decision is erroneous in its evaluation of the first three criteria of 10 CFR 2.714(a) regarding late filing. While the remaining enumerated paragraphs of the letter do not contain page and paragraph citations to the Initial Decision, the letter is clear that the County is addressing 2.714(a)(1)(i), (ii), and (iii). The lack of page and paragraph citations should not be fatal where the specific sections of the Initial Decision which are in dispute are so obvious.

The Staff argues that the letter should, despite its lengthy factual arguments, be considered only as the

Notice of Appeal under 2.714a and not also as the required brief. Such a strained construction is unwarranted. The letter presents substantial factual arguments which follow the outline of the Initial Decision and serve the purpose of the brief requirement. The fact that the letter does not contain case citations does not mean that it is not based in law as the Staff response suggests. The letter refers to the late intervention criteria at the beginning and then argues that those criteria were not properly applied to the facts. While strings of redundant case citations may appear impressive, they do not necessarily make a legal argument more weighty except in terms of paper. The County's letter substantially serve the functions of both the Notice of Appeal and brief and should be considered as such. The Appeal Board should address the County's appeal on the merits.

THE DENIAL OF THE PETITION TO INTERVENE SHOULD BE REVERSED

The County's late petition to intervene was filed on August 27, 1982, after the record before the Licensing Board was closed but before the Initial Decision was issued. In its Initial Decision the Licensing Board found against the County on four of the five criteria regarding late petitions, namely that the County had not shown good cause for lateness, paragraphs 61-69; that there were other means of protecting the County's interest, paragraphs 70-73; that there was no showing that the County's participation would assist in the

development of a sound record; paragraph 74; and that permitting the intervention would delay the proceedings, paragraphs 76-77. In its appeal, the County has challenged the first three criteria. See County letter, paragraph 2.

Before addressing each of the criteria in order, it should be pointed out that in its letter, the County has asserted that it has not adopted an emergency evacuation plan. Apparently the County considers the plan to be only in draft form. However, the Licensing Board erroneously found that the County has "a completed version of the plan". Initial Decision, paragraph 63. That issue is very significant, because without the adoption of a plan by the responsible unit of local government, the final operating license cannot be granted. The Applicant's Brief in Opposition to Appeal is presumptuous where, at page 6, fn. 4, it asserts that because a plan was developed and forwarded to FEMA, it is therefore final and not merely a draft. The Monroe County Board of Commissioners has not yet approved the plan, and they have the final responsibility for that.

GOOD CAUSE FOR LATENESS

The Licensing Board found that the County was in a position to seek intervention no later than February 3, 1982. Initial Decision, paragraph 67. That finding ignores the reality that the February 3, 1982, public criteria of the plan and exercise was rescheduled because of a blizzard.

There was a "hearing" held on February 3, 1982, but with the State Police "red alert" ordering citizens to not travel by car because of the blizzard, to call it "public" is a perversion. The first words from Mr. Jon Eckert, County Director of Emergency Preparedness, were a request for a rescheduling of the hearing because of the weather which met with a blunt refusal from the State Police, who ironically told the public not to travel. (Transcript of Public Meeting, p. 5). The Applicant, NRC Staff, and FEMA apparently all still consider the February 3, 1982, meeting as the only public critique.

Further public meetings were conducted on April 28, 1982, and June 16, 1982. It was at those meetings that the County became aware of the problems with the emergency plan. The County requested that the record of these proceedings be reopened to include the public comments received in those meetings in letters to FEMA and the Commission, dated July 16, and July 19, 1982, respectively. The Commission's response, dated August 23, 1982, did not address that request, and instead erroneously advised that FEMA was solely responsible for making findings on offsite emergency planning issues. FEMA's response, dated August 16, 1982, was in a similar vein, indicating that only administrative review would be conducted. As the County noted in paragraph 8 of its petition, through citizen input, the County had only recently become aware of the significant flaws in emergency planning which

were detailed in ints contentions. Once the Commission refused to include the public comments in these proceedings, the County had no choice but to seek intervention.

Emergency planning issues are still appropriately part of the licensing adjudicatory process. Not surprisingly, the planning process here lagged behind the adjudicatory process, as the Commission itself anticipated when it recently amended 10 CFR 50.47. See Commission response to proposed amendment, 47 F.R. at 30233-30235.

The Applicant asserts in its brief that the matters asserted in the County's August 27, 1982, petition are not something the public would have any knowledge about. This is an insult to the citizens of Monroe County. Certainly the neighbors of the plant have a much greater stake in the safe operation of the plant than Edison's stockholders. The later public meetings did shed considerable light on flaws in the draft plan, many of which are outside of the County's control.

For example, the citizens who testified at the latter two public meetings did not rely on the Voorhees Study, as Applicant implies in Appendix B of its Brief, to conclude that there were not enough buses to go around. All it took was a simple head count and common sense to determine that the school buses were expected to be in several places at the same time, as the County alleged in its petition of August 27, 1982, at paragraph 13.

For example, the question of the cooperation of volunteer firefighters in an evacuation only arose recently.

The volunteer fire departments, linked through a mutual aid pact, have not yet agreed to participate in an evacuation because of potential liability and safety problems and their concern for their own families. County Petition, paragraph 14. Prior to the public hearings, the County had simply assumed their cooperation.

For example, the public meetings pointed out that the plan does not provide for speedier response where the radiological emergency is immediate. Accidents rarely occur systematically. If there were a rapid release of radioactivity, the forty-five minutes that it took during the February 2, 1982, exercise for the governor to declare a state of emergency could prove fatal for many citizens. County Petition, paragraph 24.

The County's Petition to Intervene is terse but not as sparse as the Applicant, Staff, and Licensing Board have chosen to read it. The Initial Decision is in error for concluding that the County did not have good cause for the delay in filing.

Even if the County did not have good cause for lateness, two other factors should have been weighed in the County's favor.

OTHER MEANS OF PROTECTING PETITIONER'S INTEREST

As was argued above, only after FEMA and the Commission rebuffed the County on reopening the record to

include the results of the latter two public hearings did the County seek to intervene. The fact that FEMA, the Applicant, and Staff consider the February 3, 1982, meeting in the blizzard adequate for the public critique and the refusal to recognize the later two meetings standing alone is an indication why administrative review of emergency planning is not adequate to protect the public interest.

Furthermore, the right of the public to litigate emergency planning issues is eliminated by the rationale of the Initial Decision. 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 USC §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 F2d 778, 784 (D.C. Cir. 1968). The scope of the hearing offered must include "all relevant matters" [Siegel, supra, at 785], and a hearing can be avoided only where "there are no material facts in dispute." Public Service Company of New Hampshire v FERC, 600 F2d 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 USC

§2133(d). The evaluation of offsite plans involves material factual issues which intervenors are entitled to dispute under the Administrative Procedure Act. Therefore, to withdraw offsite planning from licensing adjudications and allow their resolution by the Staff, as this decision permits, would constitute a blatant violation of §189a and the Administrative Procedure Act, and would deny the County due process in the litigation 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 Edison 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 heard.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-298, 2 NRC 730, 736-7 (1976).

This factor should have been weighed in the County's favor, and the Initial Decision, paragraphs 70-73, is erroneous.

THE COUNTY'S ASSISTANCE IN DEVELOPING A SOUND RECORD

The Initial Decision is in error in concluding that the County did not provide factual support for this criteria.

Paragraph 74. Since the County is the body that sought the public input other governmental units and agencies ignored, its participation is crucial to the development of a sound record. As the case stands now, the emergency planning issues will never be litigated without County participation. CEE was not able to or was precluded from addressing the contentions the County has recently raised. The County did elaborate on this criteria at paragraph 10 of its Petition, arguing that "since the ASLB record to date contains little evidence and argument on the major critical issues related to offsite emergency planning," and the rest of the Petition explained why that was so. This factor should also have been weighed in the County's favor.

As far as reopening the record is concerned, permitting the County intervention would be meaningless without it. The issues here are of paramount significance for the public safety. The County did not, as the Staff Response to the appeal argues, ignore the criteria of 10 CFR 2.714(a). The County's letter demonstrates why the Licensing Board's decision constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Appeal Board should reverse the decision of the Licensing Board, permit the County

to intervene under 2.714 or 2.715, and order the record reopened for adjudicatory hearings before the Licensing Board on offsite emergency planning issues.

Respectfully submitted,

John R. Minock

John R. Minock
Attorney for CEE

Dated: December 10, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "CEE RESPONSE TO THE MONROE COUNTY APPEAL OF THE DENIAL OF ITS PETITION TO INTERVENE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 10th day of December, 1982:

Stephen F. Eilperin
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas S. Moore
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Reginald L. Gotchy
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Colleen Woodhead
Ofice of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Harry Voight
LeBoeuf, Lamb, Leiby, & MacRae
1333 New Hampshire Ave. NW
Suite 1100
Washington, DC 20036

Peter Marquardt
Detroit Edison CO.
2000 Second Ave.
Detroit, MI 48226

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commn.
Washington, DC 20555

Paul Braunlich
19 East First St.
Monroe, MI 48161

John R. Minock
Attorney for CEE