February 7, 1983

Lawrence Brenner, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James L. Carpenter
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
Long Island Lighting Company
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322 (OL)

Dear Administrative Judges:

Reference is made to my letter to the Board dated February 4, 1983, regarding SOC's adoption of the County's proposed findings.

In reviewing the Licensing Board's last discussion of schedules for proposed findings (Tr. 14,789-792), the Staff notes that the Board did not expressly order the parties to file proposed findings. Accordingly, my letter should be modified to include a reference to the recent Appeal Board decision in the matter of The Detroit Edison Company et al. (Enrico Fermi Atomic Power Plant), ALAB-709 (January 4, 1983). A copy of the slip opinion in Fermi is attached for the ready reference of the Board and parties.

The Staff also notes that it anticipates SOC, at the appropriate time, would most likely simply seek to adopt the County's exceptions before the Appeal Board. As was the case with the proposed findings before this Board, the Staff would not object to such a procedure.

Sincerely,

Bernard M. Bordenick
Counsel for NRC Staff

Enclosure: As Stated

cc: See Page 2

cc: (w/enclosure)

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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<br>THE DETROIT EDISON COMPANY ET AL.<br>(Enrico Fermi Atomic Power Plant, Unit 2) | ) | Docket No. 50-341 OL |

John R. Minock, Ann Arbor, Michigan, for the intervenor Citizens for Employment and Energy.

Harry H. Voigt, Washington, D.C., for the applicants, Detroit Edison Company, et al.

Colleen P. Woodhead for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

January 4, 1983

(ALAB-709)

This memorandum authorizes Citizens for Energy and the Environment (CEE) to proceed with its appeal of the Licensing Board's October 29, 1982 initial decision. LBP-82-96, 16 NRC __. That decision authorized the issuance of a full power operating license for Fermi 2. Because CEE did not file proposed findings of fact and conclusions of law with the Board, we initially questioned whether CEE's

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appeal was proper. See Order to Show Cause (Nov. 12, 1982). CEE's answer to our order to show cause has convinced us that, absent a board order requiring the submission of proposed findings, an intervenor that does not make such a filing is free to pursue on appeal all issues it litigated below.

Our order that CEE show cause why its appeal should not be dismissed for failure to file proposed findings of fact and conclusions of law relied upon a series of decisions to the effect that a party's appellate brief must relate to its exceptions: in turn, a party can except only to a board finding that rejected that party's proposal. See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC __, __ (Sept. 28, 1982) (slip opinion at 5); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). Seemingly, absent proposed findings, there could be no exceptions, no brief, and hence no appeal. As we explain below, however, a closer reading of the cases and underlying regulations leads us to conclude that that result can obtain only if a licensing board directs the parties to file proposed findings. Here, the licensing Board established a timetable for the submission of proposed findings but issued no direction for such a filing. The

distinction is important,[1] and CEE's appeal is properly before us.

I

In civil cases tried in federal court without a jury, the obligation of making findings of fact rests with the court. The litigants need not request them of the court or propose findings of their own. Fed. R. Civ. P. 52(a). This does not mean that proposed findings serve no purpose. As one court explained (Hodgson v. Humphries, 454 F.2d 1279, 1282 (10th Cir. 1972)):

> It is, to be sure, good practice and effective advocacy to submit proposed findings and conclusions when requested to do so. And it is prudent to receive them, especially in complicated cases. They serve as a useful aid to the trial court's understanding of each party's theory of the lawsuit based upon their respective versions of the law and facts. There is nothing in the rules of procedure, however, requiring their submission, and it is certainly not error for the trial court to proceed without them. . . .

See generally 5A Moore's Federal Practice, ¶ 52.06 (2d ed. 1981); 9 Wright & Miller, Federal Practice and Procedure, §§ 2574-81 (1971).

Many of the Nuclear Regulatory Commission's rules of practice are modeled upon the Federal Rules of Civil Procedure. See, e.g., 10 CFR Part 2, App. A, IV(c). The

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1/ Cf. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1418 (1982) (sanction for failure to answer interrogatories is proper only where a board order unequivocally imposes an obligation to answer).

provision governing submission of proposed findings to the licensing board, 10 CFR § 2.754, embodies the same general philosophy as the comparable federal rule. The controlling NRC regulation, reads in pertinent 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 . . . within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:
>
> (1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law. . . .
>
> (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.
>
> * * *
>
> (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.

The text of that rule is plain enough. The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise. 2/ The presiding officer is

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2/ There is some ambiguity in the rule as to whether the party that has the burden of proof is obliged to file proposed findings. As a practical matter, the issue is unlikely ever to arise because applicants bear the burden of proof in licensing proceedings and invariably make such filings.

also empowered to take a party's failure to file proposed findings, when directed to do so, as a default. In the case at hand, the Licensing Board did not direct the parties to file proposed findings, but only approved a filing schedule to which the parties had agreed among themselves. Tr. 576-77. That action of the Board falls short of an explicit direction. Accordingly, no default can attach to the intervenor's decision not to file proposed findings, and its appeal would seem properly before us.

II

Applicants argue that, while 10 CFR § 2.754 may not empower a licensing board to default a party absent an unheeded direction to file proposed findings, nonetheless the recalcitrant party is not entitled to appeal the licensing board's decision. This, we are told, follows from the proposition stated in the cases upon which we relied in our order to show cause -- i.e., that a party's appellate brief must relate to its proposed findings. 3/ The NRC

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3/ Applicants' Response to CEE's Answer to Order to Show Cause (Dec. 22, 1982) at 5-6. Applicants also argue that the Licensing Board, in fact, directed the parties to submit proposed findings. Id. at 4-5. As noted in text, we think that the setting of a timetable for the submission of proposed findings falls short of a requirement, especially given the language of 10 CFR § 2.754 which distinguishes between permissive filings and mandatory ones.

staff also argues that CEE's appeal should be dismissed on this basis. 4/

While it is true that the cases we relied upon noted the proposition applicants and the staff remind us of, neither Susquehanna nor Salem explicitly addressed what sanction, if any, may be imposed for a failure to file proposed findings. 5/ The major difficulty with the applicants' and the staff's argument for dismissal is that it attaches a sanction to an act which our rules explicitly make permissive -- it treats the choice not to file proposed findings as a waiver of the right to appeal the Licensing Board's decision. The peculiarity of that result makes their argument manifestly unacceptable as an interpretation

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4/ NRC Staff Response to CEE Answer to Order to Show Cause (Dec. 23, 1982).

5/ Susquehanna held that a party's appeal could be dismissed where its appellate brief was so inadequate that it was equivalent to no brief at all having been filed. 16 NRC at __ (slip opinion at 8). In Salem, what we said was in the context of explaining the indicia of an acceptable brief, and the limitations that intervenors' briefs had placed on our appellate review. 14 NRC at 49-51.

of our rules of practice. 6/

Moreover, our statements in Susquehanna and Salem regarding proposed findings were based on the more general proposition that "we will not ordinarily entertain arguments raised for the first time on appeal." Susquehanna, supra, 16 NRC at __ (slip opinion at 5, n.6). See also Salem, supra, 14 NRC at 49; Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 348 (1978). We adhere to that fundamental principle of appellate practice. However, here, at least at this juncture, it does not appear that CEE is pressing arguments raised for the first time on appeal. Rather, on its face, its appeal is limited to the evidentiary case it presented (through its witness and cross-examination) to the Licensing

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6/ Additionally, the applicants' argument, if accepted, would place the Board in the unusual position of deciding the merits of issues that, for purposes of appeal, are uncontested. This result runs counter to the Commission regulation that in most instances restricts the boards in operating license proceedings to deciding only contested issues. 10 CFR 2.760a.

Board.[7] The applicant and the staff may seek to persuade us to the contrary after CEE's brief has been filed and the issues in controversy have been made explicit. But, at least at this stage of our review, it seems as if the Board did have the benefit of CEE's views and was in a position to address CEE's arguments. If the Board was unclear as to where CEE stood, it could have directed CEE to file proposed findings.[8]

On earlier occasions we have recognized that the failure to file proposed findings may be the cause for default or other sanctions where the presiding officer has directed the parties to submit proposed findings. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-33 (1973), we commented that "10

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7/ One aspect of CEE's appeal, exceptions 25-28, contests that part of the Licensing Board's initial decision that denied Monroe County's late-filed petition to intervene. CEE cannot press that aspect of its appeal because 10 CFR § 2.714a(b) allows only the petitioner that was denied leave to intervene to appeal such an order. In addition, we have already disposed of Monroe County's appeal. See ALAB-707, 16 NRC ___ (Dec. 21, 1982).

8/ We need not, and do not, now reach the question of what constitutes the minimal participation necessary to preserve a party's appellate rights. We note, however, that the situation at bar is patently stronger than the case of an intervenor that seeks to appeal a licensing board's disposition of another party's contentions but has not put on its own evidentiary case.

CFR § 2.754 gives a party the right to file proposed findings and conclusions, and also provides that a board may require that they be filed". (emphasis added).[9/] We also noted that, even when a licensing board order requesting the submission of proposed findings has been disregarded, "the Commission's Rules of Practice [do] not mandate a sanction," and a licensing board acts within its discretion in treating as contested those issues of fact as to which the intervenors had introduced affirmative evidence or engaged in substantial cross-examination. Id. at 333. See

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9/ Because the intervenors in Midland did not comply with the Board's order to file proposed findings, it greatly complicated the Board's task of determining whether particular issues were, in fact, still contested. The failure of intervenors to file proposed findings, as directed, was one of the practices specifically disapproved of by the Supreme Court in its review of certain aspects of the case.

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

also Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 864 (1974), reconsideration denied, ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1 (1975) (party that failed to submit proposed findings when directed to do so is scarcely in a position, legally or equitably, to protest the Licensing Board's determinations). When another aspect of Midland was recently before us, we dismissed the intervenor's appeal where the Licensing Board had specifically ordered the intervenor, to no avail, to file a brief and proposed findings. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC __, __ - __ (Sept. 9, 1982) (slip opinion at 8-13). Compare Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-280, 2 NRC 3, 4 n.2 (1975) (finding intervenor in default for failing to file proposed findings as directed, but questioning whether even absent such an order an appeal would be entertained).

In sum, while our cases may hint at a broader authority to impose sanctions (see St. Lucie, supra), the failure to file proposed findings has met with sanctions only in those instances where a Licensing Board directed such findings to be filed. That is consistent with the Commission's rules, and is the extent of the adjudicatory boards' enforcement powers under 10 § CFR 2.754.

It is worth reiterating that 10 CFR § 2.754 empowers a licensing board to direct the parties to file proposed

findings. And that is plainly the better practice. Our earlier Midland decision is again apt:

> the rule recognizes that the filing of proposed findings and conclusions by parties is likely to be of substantial benefit to a licensing board in resolving various questions which are at issue in a proceeding -- particularly one such as this which involves complex factual questions and a lengthy record which includes a variety of expressed opinions on the various facets of reactor operation. If nothing else, such proposed findings will assist a board in determining what issues in fact exist between the parties, and what issues are either not actually in dispute or not relevant to the eventual decision which must be rendered.

6 AEC at 333. In the case at bar, the Licensing Board proceeded to decision without mandating the filing of proposed findings. Perhaps, given the relatively condensed hearing -- three days -- the Board did not insist because it felt it had a firmer grasp of the parties' positions and the contested facts than it has in the more usual reactor licensing case. But it would be best if this manner of proceeding were the exception and the licensing boards routinely directed the filing of proposed findings.

For the foregoing reasons, our November 12, 1982 Order to Show Cause is withdrawn, and CEE's appeal from the Licensing Board's October 29, 1982 decision is reinstated. Its brief shall be filed within thirty-five days of service of this decision.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board