UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

THE DETROIT EDISON COMPANY, et al. Docket No. 50-341

(Enrico Fermi Atomic Power Plant
Unit 2)

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INTERVENOR CEE'S PETITION FOR REVIEW

Citizens For Employment and Energy (CEE), the Intervenors, hereby request that the Commission review and reverse the decision of the Appeal Board of June 2, 1983 pursuant to 10 CFR 2.786.

I. SUMMARY OF APPEAL BOARD DECISION

On June 2, 1983, the Atomic Safety and Licensing Board affirmed the October 29, 1982 decision of the Licensing Board which authorized the issuance of a full power license. The Appeal Board considered all three issues raised by the Intervenor/Petitioner Citizens For Employment and Energy (CEE) and rejected all three arguments. The first issue was Monroe County's lack of Radiological Emergency Response Plan. That issue was presented to the Appeal Board both through the County's earlier appeal of a denial by the Licensing Board of a late Petition to Intervene, which the Appeal Board referred to the Director of Nuclear Reactor Regulation to treat as a petition under 10 CFR 2.206 (ALAB 707, 16 NRC __, Dec. 21, 1982), and through memoranda which were supplied to the Appeal Board at their request during oral argument (ALAB 730, June 2, 1983, slip opinion p.7, fn. 5). The Appeal Board decided that Monroe County need not have a RERP before the issuance of an operating license. Slip Opinion, 2-17.

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The second issue was whether CEE had waived its right to litigate the issue of emergency planning before the Licensing Board. That issue was raised before the Licensing Board with CEE's initial Contention 8 which the Licensing Board dismissed in part on January 2, 1979, LBP 79-1, 9 NRC 73, 80-81 (1979), and also in CEE's Motion To Reopen the Record before the Licensing Board which was filed on September 4, 1982, in response to the County's Petition to Intervene and was denied in the Initial Decision, LBP 8 2-96, 16 NRC __, October 29, 1982. The Appeal Board held that CEE should have raised the issue of defects in the County plan sooner. Slip Opinion, pp. 2-17.

The final issue involved the remaining sentence of Contention 8, whether a subdivision close to the plant could be evacuated in an emergency. That issue was litigated at the adjudicatory hearing before the Licensing Board and raised before the Appeal Board on the record. The Appeal Board held that the Licensing Board's findings regarding Stony Point were not in error. Slip Opinion, 18-25.

II. THE DECISION OF THE APPEAL BOARD WAS ERRONEOUS

A. Lack of a County Emergency Plan

It is clear that Monroe County does not have an RERP and will not implement the draft version which has been developed. The County's Petition to Intervene; filed August 27, 1981, the materials submitted to the NRR under 10 CFR 2.206, and the memoranda submitted to the Appeal Board after oral argument all reflect that Monroe County is of the opinion that it cannot and will not implement the draft version of emergency plan. The letter of March 18, 1983, from John Eckert, the Director of the County Office of Civil Preparedness, to Mr. Westover, Chairman of the County Board of Commissioners,

states that only after the State of Michigan agrees to changes in its "Basic Plan" will the County rewrite all of the local annexes to the plan. The State has refused to make those changes in a letter of April 8, 1983, from State Police Lt. James M. Tyler to Mr. Westover.

The Commission thus has before it a unique case where prior to the issuance of a license it is unquestionably aware that the local body of government will not implement an emergency evacuation plan. The criteria of 10 CFR 50.47 clearly cannot be met with regard to this plant, and the decision of the Appeal Board to the contrary is erroneous. The Appeal Board apparently hopes that the stalemate will be resolved in time for the license, but completely ignores the lack of a local plan and relegates the heart of the issue to a footnote, p. 7 fn. 5. Operating licenses cannot be granted on hopes alone, however well-intentioned.

B. CEE Did Raise the Issue of Emergency Planning In A Timely Fashion.

In its Amended Petition to Intervene of December 4, 1978, at p. 4, CEE's Contention 8 raised the broad issue of emergency planning. The Contention read as follows:

> 8. Emergency plans and procedures have not been adequately developed or entirely conceived with respect to an accident which could require immediate evacuations of entire towns within a 100-mile radius of the Fermi 2 plant, including Detroit. In particular, CEE is concerned over whether there is a feasible escape route for the residents of the Stoney Pointe area which is adjacent to the Fermi 2 site. The only road leading to and from the area, Pointe Aux Peaux lies very close to the reactor site. In case of an accident the residents would have to travel towards the accident before they could move aware from it.

On January 2, 1979 the Licensing Board struck all of Contention 8, except the portion related to Stoney Point, because it was "too broadly written and not supported by any information which would warrant a conclusion that such plans are necessary". 9 NRC 73, 80-81 (1979).

In a prehearing conference over two years later, in July, 1981, CEE's prior attorney said in a discussion of Contention 8 (Tr. 208):

> Speaking on behalf of the Intervenor, the contention that was submitted is very specific. . . . We have major reservations about the Applicant's emergency evacuation plans. We can deal with that in other forums. We are not going to try to expand our contentions. (Emphases added).

Both the Licensing Board and the Appeal Board interpreted this ambiguous remark to be an irrevocable waiver of CEE's right to ever litigate emergency planning. That interpretation does not withstand scrutiny for two reasons. First of all, the remark was at best ambiguous and could as well be read to mean that CEE would appeal the January 2, 1979 decision. Commission rules do not permit interlocutory appeals, so CEE had no choice but to await the Initial Decision before appealing the striking of Contention 8. The lapse of time was no fault of CEE's. Secondly, the remark preceded the release of the draft plan by at least four months. While the contention may have been subject to striking in part for lack of specificity, the first part of the contention was correct and should have been admitted, namely that there was no emergency plan. Ironically, that is still true. The findings of the Licensing Board and the Appeal Board to the contrary are ridiculously erroneous.

The Appeal Board also that found that CEE's Motion to Reopen of September 4, 1982, was untimely. The Board found that CEE was inexcusably late because, as a party, it could have formed contentions on emergency

planning between the release of the plan in November, 1981, and the adjudicatory hearing in March, 1982. That view of the facts ignores that the basis for the Motion to Reopen was the new and significant information that the County could not implement the draft plan. The Appeal Board found that the County was inexcusably late in denying its appeal on the Petition to Intervene , ALAB 707, supra, and that CEE could also be charged with the County's lateness. However, the County's Petition to Intervene reflects that its decision that it could not implement the plan was based on the County's particular knowledge of its own resources and capabilities, something which is not evident from a review of the plan itself but only through the County's self-assessment. CEE should not be charged with the County's lateness in reaching that conclusion. The fact that one CEE member, Frank Kuron, became a County Commissioner during the pendency of the Licensing Board proceedings should not charge CEE's with the County's lateness. It makes no more sense to assume that a steelworker who is a member of a part time, small, rural county Board oversees the day to day operations of county departments than to assume that every member of Congress pays attention to or understands the day to day operations of the NRC. The County's late conclusion that it could and would not implement the draft plan was new and significant information which should have resulted in granting CEE's Motion to Reopen.

Furthermore, the effect of the decision is to unfairly preclude litigation of offsite emergency planning in the adjudicatory hearing process simply because the plans are late in developing. 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

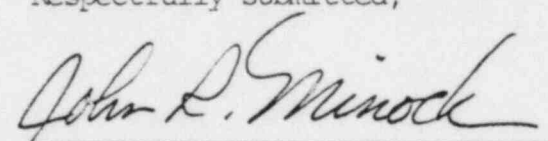
for the issuance of a license, the Commission must grant a hearing to any party whose interest may be affected by the proceeding. 42 U.S. 2239(a). Under long-established Commission practice, those hearings must be formal adjudications in conformance with the Administrative Procedure Act. Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (D.C. Cir., 1968). The scope of the hearing can be avoided only where "there are no material facts in dispute". Public Service Company of New Hampshire v. FERC, 600 F.2d 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 U.S.C. 2113(d). The evaluation of off-site plans involves material factual issues which intervenors are entitled to dispute under the Administrative Procedure Act. Therefore, to withdraw off-site planning from licensing adjudications and allow their resolution by the Staff, as this decision permits, would constitute a blatant violation of Section 189a and the Administrative Procedure Act, and would deny CEE due process in the litgation 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 Edision 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 hard.

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

CEE therefore respectfully requests that the Commission grant its Petition for Review, review the decisions of the Appeal Board and Licensing Board, and remand the case to the Licensing Board for an adjudicatory hearing on the adequacy of Monroe County's emergency plan at such time as the plan is approved and susceptible to the formulation of specific contentions.

Respectfully submitted,



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Dated: June 22, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of CEE's Petition for Review in the above captioined proceeding have been served on the following by deposit in the United States mail, first class, this 22d day of June, 1983:

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