

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'82 DEC 22 P1:07

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' RESPONSE TO CEE'S
ANSWER TO ORDER TO SHOW CAUSE

Introduction

On November 22, 1982, the Atomic Safety and Licensing Appeal Board issued an Order to Show Cause directed to the intervenors in this proceeding, Citizens for Employment and Energy ("CEE"). The Appeal Board ordered CEE to show why its appeal from the Atomic Safety and Licensing Board's October 29, 1982 initial decision should not be summarily dismissed for failure to file proposed findings of fact or conclusions of law with the Licensing Board. On November 21, 1982, CEE filed an Answer to the Order to Show Cause.^{1/} The Detroit Edison Company

^{1/} CEE's Answer alleged that counsel representing CEE before the Licensing Board lacked authority to speak on CEE's behalf when he notified the Licensing Board that

(footnote continued on next page)

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("Edison"), Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc. (collectively, the "Applicants") submit that CEE has failed to show any cause why its appeal should not be dismissed. The Appeal Board correctly stated the applicable law in the Order to Show Cause. As shown below, CEE's Answer is predicated on a fundamental misinterpretation of the controlling regulations and precedent.

Argument

CONTROLLING COMMISSION PRECEDENT REQUIRES DISMISSAL OF CEE'S APPEAL.

As the Appeal Board has stated, it is a settled principle in Commission licensing proceedings that an appeal from an initial decision must relate to matters raised in the appealing party's proposed findings of fact

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proposed findings and conclusions would not be submitted and that he had failed to discuss with his client his decision not to submit. The Appeal Board directed the relevant individuals to file affidavits supporting or denying the allegations. The affidavits submitted on December 10, 1982 demonstrate that the allegations are without any basis. Therefore, CEE's present claim for special consideration "as a matter of fairness" is entitled to no weight. CEE should be held to the same standards as other parties. CEE's current representative is a lawyer, as are both of the affiants. Indeed, it can be inferred from the affidavits that CEE now consists exclusively of these members of the legal profession.

and conclusions of law. Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693 (slip op. at 5). This is because the Appeal Board will not entertain arguments that the Licensing Board had no opportunity to address, absent a compelling reason to do so.

Rather than attempt to show a compelling reason for exception, CEE instead chose to dispute the existence of the principle just stated. However, in doing so, CEE ignored the Appeal Board's latest and most direct statement of the rule, Pennsylvania Power & Light Co., supra. Since the Appeal Board itself cited that decision in the Order to Show Cause, CEE's deliberate failure to address that case in its effort to distinguish other precedent from the present situation should be construed as an admission that it is in fact controlling. Moreover, the factual similarity to the present case, which CEE claims is lacking in Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43 (1981), and other cases, clearly exists in Pennsylvania Power & Light Co.

CEE advances an interpretation of the Commission's Rules of Practice and Procedure which is simply wrong. CEE argues that 10 C.F.R. §2.754(a) makes the filing of proposed findings and conclusions permissive unless ordered by the

Licensing Board, and that under 10 C.F.R. § 2.754(b) failure to file will result in "default" only if the filing had been directed by the Licensing Board. From this reading, CEE argues that the Licensing Board in this proceeding did not "direct" the filing of proposed findings and conclusions, and leaps from that premise to the conclusion that it may not now be barred from appeal. CEE is wrong on both branches of the argument.

First, the Licensing Board effectively "directed" submission of proposed findings and conclusions by its order at the conclusion of the hearing that adopted the schedule for submission of transcript corrections and proposed findings and conclusions which had been agreed to by the parties, including CEE. CEE's active participation in that scheduling, followed by its explicit and "thoughtful" decision not to file, was tantamount to acceptance of a default judgment. The Licensing Board was under no obligation to thereafter issue a futile order "directing" a submission that CEE had no desire to make, or to warn CEE of the consequences of its actions. Parties, even where not represented by counsel, as was CEE, are under an "obligation to familiarize themselves with [the Commission's] rules." Pennsylvania Power & Light Co., supra at 7; Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979).

Second, CEE misinterprets the use of "default" in 10 C.F.R. § 2.754(b). Clearly, "default" is used in its normal sense to mean the entry of an adverse judgment without consideration of the merits by the trier of fact, in this case the Licensing Board. CEE, in fact, received the benefit of the doubt and was not subjected to default by the Licensing Board. Instead, the Licensing Board considered the merits of the matters presented at hearing and reached a decision on the merits as to all issues. Thus, any claim CEE might have had that it should not be subjected to default was obviated by the Licensing Board's thorough decision on the merits.

The question of default under 10 C.F.R. § 2.754(b) is not an issue here. By its terms, that regulation relates to the Licensing Board stage and CEE was not subjected to default by the Licensing Board. The issue here is whether CEE may complain of the decision reached by the Licensing Board on the merits of the issues as presented to it. Because CEE did not draw for the Licensing Board the findings and conclusions it might wish to advance, it is now properly estopped from complaining of the Licensing Board's initial decision on the merits.

Sound policy underlies this rule, as the Appeal Board recognized in Pennsylvania Power & Light Co., supra. The concern is not with technical pleading requirements, but

with the basic obligation of an intervenor to "structure [its] participation so that it is meaningful, so that it alerts the agency to [its] position and contentions."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). CEE cannot fairly rely on its limited direct testimony and meager cross-examination of Staff and Edison witnesses to contend that it offered the Licensing Board the benefit of its view on the specific findings and conclusions to be reached. Moreover, CEE's exceptions to the initial decision are merely a list of its dissatisfactions, rather than specifications of error. There is no indication that CEE can or will any more advance a "serious substantive issue" on appeal than it did at hearing.

In sum, there are no mitigating circumstances which would justify a departure from the Commission's well-established rule that a party is limited on appeal to the matters reflected in its proposed findings of fact and conclusions of law.

Conclusion

For the foregoing reasons, CEE's appeal should be dismissed forthwith.

Respectfully submitted,

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DEPT. OF SECRETARY
REGULATING & SERVICE
BRANCH

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CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of December, 1982, served the foregoing document, entitled Applicants' Response to CEE's Answer to Order to Show Cause, 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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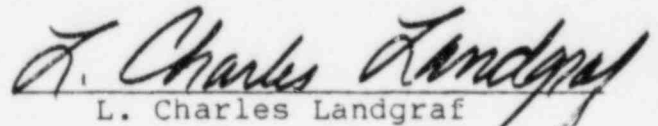
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