

Hearing file
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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)
)
(Indian Point Nuclear)
Generating Station Unit)
No. 2))

(Answer)

Docket No. 50-247

10-31-66

STAFF'S ANSWER TO THE CONSERVATION CENTER'S "APPEAL
FROM INITIAL DECISION, EXCEPTIONS AND
BRIEF IN SUPPORT THEREOF"

Summary

The Conservation Center (Center) sought to intervene in this proceeding. Its petition to intervene was denied by the Atomic Safety and Licensing Board (ASLB). This ruling has been appealed by the Center. In its appeal, the Center requests the Commission to consider additional allegations which were never presented to the ASLB in the proceeding.

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The appeal should be dismissed for the following reasons:

1. Even if the petition to intervene had been timely filed, it should have been denied because it does not meet the requirements of the Commission's Regulations. The additional matters alleged in the appeal in support of the petition do not cure the defect.

2. No justification for the late filing of the petition to intervene has ever been provided by the Center.

3. The exceptions to the substantive findings by the ASLB are not properly before the Commission and, in any event, are without merit.

I.

STATEMENT OF THE CASE

On July 29, 1966, the Commission published a notice in the Federal Register that a hearing would be held before an ASLB to consider the issuance of a provisional construction permit to the Consolidated Edison Company of New York, Inc.,

for the construction of a nuclear reactor at Indian Point. The notice provided that the hearing would commence on August 31, 1966, in Buchanan, New York, and that a pre-hearing conference would be held at the same location on August 17, 1966.

The notice specified that:

"Petitions for leave to intervene, pursuant to the provisions of § 2.714 of the Commission's 'Rules of Practice,' must be received in the Office of the Secretary, United States Atomic Energy Commission, Germantown, Maryland, or in the Commission's Public Document Room, 1717 H Street, N. W., Washington, D. C., not later than August 17, 1966, or, in the event of a postponement of the hearing date specified, at such time as the Board may specify."

The notice also provided for limited appearances in accordance with § 2.715, 10 CFR 2, of the Commission's "Rules of Practice." Following the prehearing conference on August 17, 1966, the ASLB, in an order dated August 19, 1966, postponed the hearing until September 14, 1966, and scheduled another prehearing conference for September 13, 1966.

In response to the notice of hearing, the Conservation Center wrote a letter to the Commission dated August 13, 1966, (Appendix A hereto) requesting a delay in the proceedings and indicating a possible desire to participate.

The regulatory staff responded to the Center's letter on August 25, 1966, (Appendix B) noting that the hearing had already been postponed by the ASLB. The staff's letter provided the Center with a copy of the "Rules of Practice" and specifically advised the Center that any request to appear in the proceeding should be filed in accordance with the provisions of the "Rules of Practice." The Center was also provided the pamphlet, "Licensing of Power Reactors," which describes the Commission's procedures for the evaluation of the safety of a proposed power reactor and the presentation of such evaluation in a public hearing.

In a letter dated September 8, 1966, (Appendix C) the Center requested permission to intervene. Because the letter was not received in time for the parties to make formal reply prior to the hearing, the staff counsel telephoned Larry Bogart, Director of the Center, to suggest that he attend

the prehearing conference so that the matter could be determined on that occasion (Tr. 78 - 79). However, at the prehearing conference the determination of the Center's petition to intervene was deferred because the Center's counsel was not available. In response to a question from the ASLB, Mr. Bogart confirmed that he had been provided a copy of the Commission's "Rules of Practice" and indicated it had been furnished to his attorney (Tr. 77). During the prehearing conference, the Chairman of the ASLB and staff counsel outlined the requirements of § 2.714 of the Commission's rules to Mr. Bogart and pointed out why the Center's letter of September 8, 1966, did not meet these requirements.

The Center's counsel confirmed that he understood the requirements for filing a petition to intervene as contemplated by the Commission's rules and indicated that he would file such a document for the ASLB's consideration (Tr. 125 - 126). On the second and last day of the evidentiary hearing, September 15, 1966, the Center presented a document entitled, "Petition to Intervene by the Conservation Center, Inc.", which was filed in

the record of the proceeding.^{1/} The staff, the applicant, and the State of New York each objected to the granting of the petition to intervene on the grounds that it was defective under the Commission's rules (Tr. 427 - 446). After further argument by the Center, the ASLB ruled:

"It is the considered opinion of the Board that the petition is and shall be hereby denied for lack of conformity with the rules of practice of the Atomic Energy Commission." (Tr. 450)

II.

EVEN IF THE PETITION TO INTERVENE HAD BEEN TIMELY FILED,
IT SHOULD HAVE BEEN DENIED
BECAUSE IT DOES NOT MEET THE REQUIREMENTS
OF THE COMMISSION'S REGULATIONS.
THE ADDITIONAL MATTERS ALLEGED IN THE APPEAL
IN SUPPORT OF THE PETITION DO NOT CURE THE DEFECT.

Section 2.714(a) of the Commission's "Rules of Practice," 10 CFR 2, sets forth the requirements which govern intervention in any Commission proceeding and provides in pertinent part:

^{1/} An examination of this document reflects that, except for the first page and the verification, its contents are identical to Appendix C. This point was confirmed by Mr. Bogart (Tr. 427).

"§ 2.714 Intervention.

(a) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition under oath or affirmation for leave to intervene not later than seven (7) days before the commencement of the hearing or within such other time as may be specified in the notice, or as permitted by the presiding officer. The petition shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by Commission action, and the contentions of the petitioner."

The general rule followed by the Commission concerning the granting of petitions to intervene was enunciated in the Matter of Walker Trucking Company, 1 AEC 103. In denying the petition of one Elliott Earl, the Commission held

"13. The Commission's Rules of Practice require that a person in order to intervene in an adjudicatory proceeding, must demonstrate an interest which may be affected by the proceeding. Without any detailed explanation thereof, the interest or interests alleged by Mr. Earl in this proceeding involved (1) his status as an access permittee of the Commission; (2) the interests of the Institute of Nuclear Serology in developing a curriculum and conducting research in the atomic energy field; (3) the fact that he lived with his family within 500 yards of a road which may be used for the transportation of waste materials by the licensee; (4) the statement that his family 'goes down the west side of the river, going

to bathe in the summertime' and that he 'would have to change my route if I felt there was a hazard in taking my children by this proposed plant'; and (5) his 'rights as a citizen and taxpayer and elector of Manchester, Conn., a resident of the area in which Walker Trucking may operate, and a person and body politic who has "substantial" interests in this matter.'

"14. Neither one nor all of the interests ... stated, as presented by Mr. Earl, gave the latter standing to intervene in this proceeding. The law is clear that a member of the public, who may have only an academic or technical interest in a proceeding or a common concern for obedience to the law, has not such an immediate and substantive interest as to justify standing to intervene.^{2/} Mr. Earl's vague statements concerning claimed danger to himself and his family also do not present such an immediate and substantive interest, even in a field where the public health and safety is of paramount importance and where each proposed intervention usually must be judged on its own facts.

"^{2/} Capital Broadcasting Co., 2 Ad. L. (2d) 704, 706-707 (F.C.C. 1952); Kansas State College of Agriculture, 2 Ad. L. (2d) 738, 739 (F.C.C. 1952); Houston Texas Oil & Gas Corp., 15 F.P.C. 1570, 6 Ad. L. (2d) 590 (1956); The Good Music Station, 6 Ad. L. (2d) 930, 931-932 (F.C.C. 1957); accord, Singer & Sons v. Union Pacific R. R. Co., 311 U. S. 295, 303-304 (1940)."

This rule was followed in Matter of Elk River Power Demonstration Reactor Program Project, 1 AEC 245; Matter of Yankee Atomic Electric Company, 1 AEC 296; 1 AEC 326; Matter of Pacific Gas & Electric Company, 2 AEC 173; Matter of Philadelphia Electric Company, 2 AEC 54, Goldberg v. United States, appeal dismissed June 5, 1962 (3rd Cir.), cert.denied 371 U. S. 902; Matter of Atcor, Inc., 3 AEC _____, Order dated June 17, 1966.^{2/} See also Matter of Consolidated Edison Company, Docket No. 50-3, "Memorandum and Order," dated November 24, 1965, 3 AEC _____; Matter of Nuclear Fuel Service, et al., 2 AEC 305, 306.

2/ Cf. Office of Communication of the United Church of Christ et al. v. F.C.C. and Lamar Life Broadcasting Co., 38 U.S.L.W. (C.A.D.C., March 25, 1966), which held that representative members of the "listening public" should be permitted to intervene in Federal Communications Commission television licensing cases. This case is inapposite because the Commission's jurisdiction, unlike that of the F.C.C. which is broadly based on the standard of "public interest," is limited essentially to questions of radiological safety and the common defense and security. Matter of Consolidated Edison Company of New York, Inc., Docket No. 50-3, "Memorandum and Order," dated November 24, 1965, 3 AEC _____.

In previous Commission cases attempted intervention by an organization, such as the Center, has been denied because of the failure of the petitioner to demonstrate that the Committee or corporate entity had an interest which could be affected by the outcome of the licensing action. In the Matter of Southern California Edison, et al., 2 AEC 366, a petition to intervene was submitted by an organization identified as the "Ad Hoc Committee" whose functions, inter alia, included the following:

"... to maintain our country free from industrial radioactive contamination and to protect and preserve the military training potential, the natural recreational values and the scenic beauty of Camp Pendleton in the County of San Diego, State of California and its ocean waters against commercial and industrial intrusion."

Upon objections by the parties that the Committee had made no showing of substantive interest which might be affected by the proceeding, the Board denied its petition to intervene (Matter of Southern California Edison, Docket No. 50-206, Tr. 25 - 28).

A similar petition to intervene was filed by the Islip Town Democratic Committee in Matter of Long Island Nuclear

Service Corporation, 2 AEC 55. The petition alleged that members of the Committee resided on, or near, or in close proximity to the public roads proposed to be used by the applicant, and feared that their health, welfare, life and property might be in jeopardy and in danger in the event the proposed waste disposal facilities were licensed.

In denying the petition to intervene by the Committee, the presiding officer held that:

"Good cause has not been shown to permit the intervention in a representative capacity of William E. Stochl as Chairman of the Democratic Committee in this proceeding, since the interests of the several members have not been established, nor has the position of the Committee and its interest as an organization been shown to likely be affected by the outcome or determination of this proceeding." (Docket No. 27-35, Order dated January 11, 1962, not reported in AEC Reports.)

In the instant proceeding, the Center's petition to intervene filed during the proceeding alleges only that the Center "was organized in an effort to help protect the health, welfare and safety of the public in the Hudson River Valley Basin as well

as in other areas of Eastern United States, where blight and pollution are present dangers." (p. 1) The petition indicates that reasons supporting its position are set forth in the following ten pages of the petition. However, an examination of this material reflects that it contains no facts demonstrating how the interest of the Center, as such, would be affected by the proceeding.

The Center's "Appeal", even with the additional allegations concerning its membership (see "Appeal", p. 3 and attached affidavit and list of members), which were not presented to the ASLB, does not meet the requirements of § 2.714. Essentially, these additional allegations, presented for the first time on appeal, are to the affect that some of petitioner's members reside in the "immediate area of the proposed site" and include a list of some members. Even if these allegations had been made to the ASLB at the appropriate time, the petition would still not demonstrate that the interest of the Center, as such, is affected by the proceeding and the petition would be deficient under the Commission's authorities cited above.

The only authority cited by the Center to support its intervention is Matter of Power Reactor Development Company, 1 AEC 1. It is not clear from a reading of that decision, which involved petitions to intervene from national unions, local unions and members thereof as individuals, whether the Commission considered that it was permitting intervention as an exercise of discretion or was granting it as a matter of right, 1 AEC 1. (p. 3) In any event, since the PRDC case, the Commission has developed the body of law discussed above which requires that a petitioner demonstrate how his interest will be affected before he will be permitted to intervene in a proceeding.

It may be noted that in proposing new amendments to the "Rules of Practice" to implement the recommendations of its Regulatory Review Panel, the Commission published in the Federal Register on January 21, 1966, a "Statement of General Policy" (31 F.R. 832) to serve as interim guidance,^{3/} in which it stated in pertinent part:

3/ The Statement of General Policy was formally adopted by the Commission without change in the portion of the Statement quoted below, and published in the Federal Register on September 30, 1966 (31 F.R. 12774). The Statement became effective thirty (30) days after publication.

"It is the Commission's view that the rules governing intervention and limited appearances are necessary in the interest of orderly proceedings. The Commission also believes that through these two methods of public participation all members of the public are assured of the right to participate by a method appropriate to their interest in the matter. This should be fully explained at the beginning of the hearing. In some cases the board may feel that it must deny an application to intervene but that it can still accommodate the desire of the person involved by allowing him to make a statement and raise questions under the limited appearance rule." (p. 835)^{4/}

III.

NO JUSTIFICATION FOR THE LATE FILING OF THE PETITION
TO INTERVENE HAS EVER BEEN PROVIDED
BY THE CENTER.

Even if the petition to intervene met other requirements of the regulations, it was properly denied by the ASLB as being filed too late, without any showing to excuse the lateness. A fortiori, intervention should not be permitted now.

^{4/} The ASLB and the staff fully explained the difference between intervention and a limited appearance during the proceedings. None of the parties objected to the Center making a limited appearance and, in fact, suggested that such a course of action be followed (Tr. 449 - 450).

Section 2.714(a) of the "Rules of Practice" also specifies:

"... A petition for leave to intervene which is not timely filed will be dismissed unless the petitioner shows good cause for failure to file it on time."

The notice of hearing in this proceeding specified that any petition to intervene in the proceeding must be received not later than August 17, 1966, unless the time were extended by the ASLB.

Following its usual procedures, the Commission published the notice of hearing in the Federal Register (31 F.R. 10331) and distributed it to the press in the general vicinity of the proposed facility in New York. As shown in the Statement of the Case above, the Center's first communication to the Commission demonstrated its awareness of the notice of hearing. (Appendix A) The staff advised Mr. Bogart, the Center Director, of the general procedures for reactor licensing and that, if he wished to appear in the proceeding, the request for any appearance

must be made in accordance with the "Rules of Practice."
Mr. Bogart, in fact, appeared at the second prehearing conference and was advised by the ASLB that the Center must submit its petition in accordance with the requirements of § 2.714. Mr. Bogart appeared with counsel the following day and participated in further discussions concerning the requirements for a petition to intervene.

During the discussions with the ASLB during the second prehearing conference and during the hearing itself, the Center was informed that under the Commission's rules, no late petition to intervene could be considered unless justification for late filing was provided (Tr. 78 - 84). When the petition to intervene was filed at the evidentiary hearing, the applicant, the regulatory staff, and the State of New York all objected to the granting of the petition (Tr. 428 - 450).

The leading case in the Atomic Energy Commission on the subject of late intervention is Matter of Philadelphia Electric Company, supra. In that case, a petitioner sought to intervene after the issuance of an initial decision. The Commission held that:

"His present motion is not timely, and he has offered no explanation of his delay in moving for leave to intervene... He requests leave to intervene simply as a member of the public, without any showing of such a special interest as would give him standing to intervene. There was adequate evidence to support the Hearing Examiner's conclusion that construction of the proposed reactor will not be inimical to the common defense and security or to the health and safety of the public. In the absence of the assertion of any facts which would justify granting leave to intervene, and after such an unexplained extended delay, to allow intervention and further delay would be an abuse of discretion."

This rule was followed by the Commission in Matter of Elk River Power Demonstration Reactor Program Project, 2 AEC 245 and

Matter of Pacific Gas & Electric Company, 2 AEC 172, 2 AEC 173.

The question of late intervention was most recently considered by the Commission in Matter of Nuclear Fuel Service, et al.,

2 AEC 305. In that proceeding, representatives of the

photography industry, including one from the Eastman Kodak Company, participated in the proceedings through limited

appearances. At one point in the proceeding, the ASLB advised

that "although the Commission's Rules set a time limit on

petitions to intervene, the Board would entertain a petition at that

time and in its discretion would grant it for good cause shown." (2 AEC 305, at 306) The invitation was not accepted.

Despite these facts, Eastman Kodak Company sought to intervene following a month's recess of the hearing. The ASLB held:

"In view of these facts, the Board feels that it gave every opportunity to the photographic industry to develop evidence with respect to the effect of the facility on the industry. Matters of this sort must be brought to some repose. A great deal of monies and effort have been expended in trying to make a concrete reality of this undertaking. It must have been a matter of public knowledge for at least a year before the present proceedings began. Under these circumstances, the Board feels it would be extremely unfair at this late date to permit people who have had ample opportunity to prepare and present evidence to enter now into a procedure which would disturb materially the carefully planned time schedule and the fruition of year of work." (Emphasis supplied.)

The situation in the instant proceeding falls within the rule enunciated in the precedents discussed above. Despite knowledge of the need to comply with § 2.714, the Center did not justify the lateness of its petition to intervene. Even at this late date, no facts have been alleged by the Center to justify its attempted late intervention.

IV.

THE "EXCEPTIONS" TO THE SUBSTANTIVE FINDINGS
ARE NOT PROPERLY BEFORE THE COMMISSION
AND, IN ANY EVENT,
PROVIDE NO JUSTIFICATION FOR INTERVENTION

In its "Appeal," the applicant also lists four exceptions (Items 4 - 7) which it claims are errors by the ASLB. The four points relate to the findings of the ASLB concerning the sufficiency of the evidence presented to justify the issuance of a construction permit.

Inasmuch as the Center has not demonstrated that it should be permitted to intervene as a party in accordance with § 2.714, it may not now file exceptions to such findings of the ASLB. Matter of Pacific Gas & Electric Company, 2 AEC 172 and 2 AEC 173; Matter of Elk River Power Demonstration Reactor Program Project, 2 AEC 245.

Moreover, the "exceptions" raised by the Center do not reflect any errors on the part of the ASLB. Basically, the "Appeal" fails to take into account the two-stage regulatory scheme established by Congress for the licensing of reactors

and the Commission's rules in implementation thereof. Part 50 of the Commission's regulations distinguishes between the scope of information required for a construction permit and for an operating license. The regulation governing the issuance of provisional construction permits is § 50.35. It clearly recognizes that design details need not be provided for a provisional construction permit if there is reasonable assurance that the data will be provided at the operating license stage.

Exceptions 4 - 7 of the "Appeal" reflect a possible misunderstanding of the requirements for the issuance of a provisional construction permit. The Center argues that the ASLB erred in finding that the report of the Advisory Committee on Reactor Safeguards (ACRS) concluded that there is reasonable assurance that the proposed facility can be constructed and operated without undue risk to the health and safety of the public (Joint Ex. A, Appendix A). However, an examination of the ACRS report shows that while the ACRS considered that the development of the final design will require particular

attention for improving and supplementing protective features of the plant, it believed that these matters can be resolved during construction and that the reactor can be constructed at the Indian Point site with reasonable assurance that it can be operated without undue risk to the health and safety of the public. (Joint Ex. A, Appendix A). The other three exceptions also involve this same basic point. The Center argues that (1) the ASLB should not have found that sufficient information was presented to authorize the issuance of the permit, and (2) the architectural and engineering details can be developed during construction. As noted above, § 50.35 permits technical information to be developed and supplied during construction of the facility and recognizes that, if necessary, a research and development program can be conducted to obtain necessary information.

In its supporting brief, the applicant argues ("Appeal", p. 9) that the ASLB abdicated its function in not requiring its own review of the design detail to be developed in the future. This point misconceives the role assigned to atomic safety and licensing boards by the Commission. That role has been described by the Commission as follows:

"The board's role in cases such as this is derived from 10 CFR § 50.35, which prescribes the findings for a provisional construction permit. It must be found that the applicant has described the proposed design of the facility, including but not limited to the principal architectural and engineering criteria for the design, and has identified the major features on which further technical information is required; that this technical information will be supplied; and that the applicant has proposed and will conduct a research and development program reasonably designed to resolve any safety questions requiring research and development. It must also be found that on the basis of these findings there is reasonable assurance that the safety questions will be satisfactorily resolved and that the proposed facility can be constructed and operated at the site selected without undue risk to public health and safety. It is thus apparent that Section 50.35 does not require that all design details of the facility must be supplied, nor that at the construction permit stage every safety question shall actually have been satisfactorily resolved.

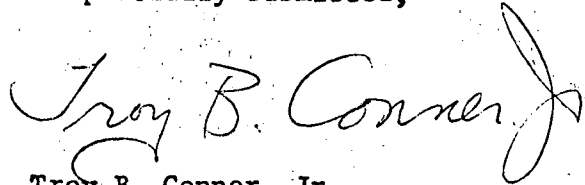
"The board considers the expert analyses, notes any safety questions that remain unresolved, evaluates the research and development program proposed to resolve them, and thereupon comes to an over-all judgment as to whether there is reasonable assurance that the safety issues will be resolved and the proposed facility can be constructed and operated safely." Matter of Jersey Central Power & Light Company, 3 AEC _____, Decision, May 6, 1965.
(Emphasis supplied)

The ASLB's decision is fully consistent with the foregoing.

CONCLUSION

The "Appeal" of the Conservation Center should be dismissed.

Respectfully submitted,



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Of Counsel:

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Dated at Bethesda, Maryland,
this 31st day of October, 1966.