50-247

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

4-21-71.

In the Matter of	)	
	)	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	)	Docket No. 50-247
	)	
(Indian Point Station Unit No. 2)	)	

AEC REGULATORY STAFF ANSWER TO MOTION OF HUDSON RIVER FISHERMEN'S ASSOCIATION AND ENVIRONMENTAL DEFENSE FUND, INC. FOR THE TAKING OF INTERROGATORIES, PRODUCTION AND COPYING OF DOCUMENTS AND TAKING OF DEPOSITIONS

Introduction

On April 2, 1971 intervenors in this proceeding, Hudson River Fishermen's Association (Association) and Environmental Defense Fund, Inc. (EDF) filed a motion for "The Taking of Interrogatories, Production and Copying of Documents and Taking of Depositions," and a supporting memorandum. The motion in essence requested the board to order:

1. Interrogatories addressed to the Atomic Energy Commission for discovery of persons involved in and documents related to the promulgation of Appendix D to 10 CFR Part 50.

2. Production and copying of documents related to promulgation of Appendix D.

3. Depositions of Commission officers or employees identified from the interrogatories "as responsible for the decision to apply Appendix D only to hearings noticed after March 4 and to limit the scope of issues under Appendix D in the manner challenged by the intervenors in the motions on environmental issues."

The Chairman of the presiding Atomic Safety and Licensing Board (Board) on March 30, 1971 requested counsel for EDF and Association to "submit a brief of the law, with answers later from other parties, concerning the authority, if any, for any interrogation to be made respecting decisional process undertaken by a regulatory Commission in adoption of a rule."

Counsel for Association in his letter to the Board dated April 2, 1971 forwarding subject motion advised the Board that he would file a brief in response to Board's request. On April 5, 1971 counsel for EDF forwarded to the Board and parties a copy of the EDF reply brief filed in the Calvert Cliffs Coordinating Committee, Inc. et al v. U. S. Atomic Energy Commission case in the U. S. Court of Appeals, D.C Circuit. In the forwarding letter to the Board, EDF counsel stated that "a brief on the subjects mentioned in your letter of March 30, 1971 should be filed this week by Mr. Macbeth, and the substance of which will be adopted by EDF." Said brief was served by the intervenors on April 9, 1971.

The AEC regulatory staff in our Answer to the Motion of EDF for a Determination of Environmental Issues dated March 10, 1971, took the position that the intervenors' arguments in support of its challenge to the validity of Appendix D to 10 CFR Part 50 were without merit. The intervenors incorporated its brief in the Calvert Cliffs case as

part of its motion, and we incorporated the Government's reply brief in the same case as part of our Answer in this proceeding. We feel it unnecessary to recapitulate our position with respect to the validity of Appendix D, and request that the arguments submitted in our Answer and the supplemental Government brief be incorporated by reference in this Answer.

We will address ourselves to the specific requests of the intervenors for relief herein.

Interrogatories

It is our position that Appendix D was properly promulgated. The Commission issued Appendix D to 10 CFR Part 50 with an initial policy statement regarding implementation of NEPA on March 31, 1970 (35 F.R. 5463 April 2, 1970) explaining the Commission's position in that regard. On June 3, 1970 (35 F.R. 8594) the Commission published for comment and as interim guidance proposed amendments to its Appendix D, taking into consideration the implementation guidelines issued by the Council on Environmental Quality since the April 1970 Appendix D issuance of the Water Quality Improvement Act of 1970 which became effective April 3, 1970. The June 3, 1970 rule making proceeding brought forth comments from federal and state agencies, conservation groups, industry organization and the general public. All of the comments were routinely placed in the Commission's Public Document Room as received, and have

since been available for public inspection. The Commission has kept the public informed at each stage of its deliberations in the formulation of the NEPA implementing rule.

The intervenors have cited the case of Citizens to Preserve Overton Park Inc. v. Volpe - U.S. _____, 39 L.W. 4287 (March 2, 1971) as being relevant to this case. Of course intervenors admit Overton Park "is not on all fours with the matter presently before this Board." In the Overton Park case the Supreme Court remanded to the District Court for review an action by the Secretary of Transportation authorizing use of federal funds to finance construction of highways through public parks. The pertinent provisions of the enabling legislation (Department of Transportation Act of 1966 and Federal Highway Act of 1968) restricted the Secretary to the use of federal funds only if there is no "feasible and prudent" alternative route, and if no such route is available, then he may approve construction only if there has been "all possible planning to minimize harm" to the park. When the Secretary announced his decision authorizing a highway through a public park, he did not accompany such decision with factual findings. The Supreme Court considered that the litigation affidavits furnished the Court below did not constitute an adequate record for review. Still the Supreme Court did not remand to the Secretary but to the District Court for augmentation of the record as to the agency decision for review. In these circumstances, the Supreme Court went on to say:

> "The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. United States v. Morgan, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See Shaughnessy v. Accardi, 349 U.S. 280 (1955)."

There is nothing in Overton Park which holds, or even suggests that the record for a collateral attack on a rule making action such as the adoption of Appendix D to 10 CFR Part 50 is properly to be developed through a broad, sweeping discovery such as is being requested by intervenors.[1/] The record of comments considered by the Commission is available for public inspection, as noted above. Other comments considered by the Commission are noted in the statement of considerations accompanying the rule.[2/]

1/ Nor does Calvert Cliffs cited in our earlier brief even remotely suggest that a probing of the decisional processes of a rule making proceeding is required or even permissible. The rule making record speaks for itself.

2/ Comments received by Calvert Cliffs Coordinating Committee, National Wildlife Federation, Sierra Club Scenic Shoreline Preservation Conference Inc., Atomic Energy Council of New York, General Electric Company were specifically cited in the statement of consideration, along with statements by Chairman Nassikas of the Federal Power Commission, Chairman McCracken of the Council of Economic Advisers and General Lincoln, Director of the Office of Emergency Preparedness.

The cases cited by the intervenors clearly enunciate the principle that federal agencies should set forth reasons for agency action, and that it has considered all the material factors involved in the issues it has formulated and addressed itself to. The Commission has done this. The staff will appropriately assist the parties in this proceeding in obtaining the documents identified by the Commission as considered by it in its promulgation of Appendix D, including the documents not specified by name.

With respect to intervenors' request for interrogatories addressed to the Commission we oppose any such grant by virtue of the guideline set by the Supreme Court in the Morgan case cited with approval in Overton Park. There has been no "strong showing of bad faith or improper behavior" made by the intervenors which would override the rule and administrative findings made by the Commission in its promulgation of Appendix D. Under the circumstances of this proceeding, the rationale of United States v. Morgan as to the impropriety of probing the mental processes of administrative decision makers where the public record of decision is adequate, must be followed with respect to collateral attack on 10 CFR Part 50 Appendix D in this licensing proceeding.

Production and Copying

As indicated earlier in this reply the regulatory staff will assist the parties in obtaining certain documents which were referred to by the Commission in its promulgation of Appendix D.

Depositions

The regulatory staff opposes any order for the taking of depositions on the same ground as our opposition to the interrogatory motion of the intervenors. In addition, should the Board determine that such depositions are in order, then the provisions of 10 CFR Part 2 relating to the production of AEC records and documents must be complied with.

With respect to the intervenors citation of the Vermont Yankee case (AEC Docket 50-271) we adopt the position of the Government in the Calvert Cliffs brief (page 48) wherein it was noted that the notice of the operating license proceeding was issued between December 3, 1970 and March 4, 1971. The Government's brief states:

> "This notice, however, was issued several months in advance of (what under prior practice would be) the contemplated hearing date in implementation of the Commission's new practice of giving early notice as to proposed operating license actions in order to facilitate public participation in and timely conduct of the ensuing proceedings. In view of the early notice aspect, the Commission did not deem the exemption in paragraph 11(a) to be applicable."

Conclusion

For the reasons stated above, and to the extent set forth in this brief, the AEC regulatory staff opposes the motion of intervenors herein.

Respectfully submitted,

Myron Karman

Myron Karman
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 21st day of April, 1971