UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the
ATOMIC SAFETY AND
LICENSING BOARD

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In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

(Indian Point Nuclear Generating Unit No. 2)

Index No. 50-247

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MEMORANDUM OF LAW OF INTERVENORS HUDSON RIVER FISHERMENS' ASSOCIATION AND ENVIRONMENTAL DEFENSE FUND ON QUESTIONS RAISED BY ATOMIC SAFETY AND LICENSING BOARD.

The Atomic Safety and Licensing Board, by a letter dated March 30, 1971, has asked intervenors in this matter to submit a brief of the law on the following questions:

1. Is it permissible and proper to make an interrogation concerning the decisional process undertaken by a regulatory Commission in the adoption of a rule?

2. What extent and scope, including the extent of the public record, is required in a rule-making procedure?

3. Must the proposed rule, submitted for comment, and the adopted rule be similar in scope and content?

4. Is the present record in this matter adequate for ruling on the issues raised by Intervenors?

This memorandum of law is submitted in response to the questions posed by the Board.

POINT I

IS IT PERMISSABLE AND PROPER TO MAKE AN INTERROGATION OF THE DECISIONAL PROCESS UNDERTAKEN BY A REGULATORY COMMISSION IN THE ADOPTION OF A RULE?

Intervenors have attempted to answer this question in the memorandum submitted on April 2, 1971, in support of their motions for discovery.

Since the submission of that memorandum, Citizens to Preserve Overton Park, Inc. v. Volpe, ___ U. S.____ , 39 L. W. 4287 (March 2, 1971), has come to the attention of Intervenors. In that case the petitioners sought to have the Court set aside a decision of the Secretary of Transportation contending

that the Secretary had failed to comply with the terms of the Administrative Procedure Act in reaching his decision under the federal highway statutes. The Supreme Court held that in order to set aside the Secretary's determination a reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 39 L. W. at 4291-4292. The Court found that the record in the case before it was insufficient and remanded the matter to the lower court.

The opinion then goes on to consider the courses open to the lower court and says:

> "The Court may require the administrative officials who participated in the decision to give testimony explaining that action. Of course, such inquiry into the mental processes of administrative decision makers 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 an inquiry can 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 decision makers themselves. See Shaughnessy v. Accardi, 349 U.S. 280 (1955)." 39 L. W. at 4293.

Overton Park is not on all fours with the matter presently before this Board. In Overton Park

a particular funding decision about a single highway route was at issue. Here Intervenors challenge a more generalized rule which results from the administrative rule-making procedure. In addition, Intervenors contend that the National Environmental Policy Act leaves even less room for agency discretion than the statute construed in Overton Park. Nevertheless, Overton Park is relevant to this matter. In Point II below Intervenors develop their argument that the requirement of a fully articulated and reasoned statement to support administrative action applies more forcefully in rule-making than in decisions for the granting of funds. The Administrative Procedure Act requires an agency to provide a statement of reasons in a rule-making procedure (5 U.S.C. § 553(c)): Such a statement is not required for the granting of funds which was at issue in Overton Park (5 U.S.C. § 553(a)(2)).

There is no doubt that Overton Park stands for the proposition that in appropriate circumstances there is no legal bar to taking evidence from administrative decision makers concerning their mental processes and the factual background agsinst which their decision

was made. Both U. S. v. Morgan and Shaughnessy v. Accardi cited by the Court in Overton Park, involved situations in which the administrator who had been questioned in court had made his decision while acting in a quasi-judicial role. It was the questioning of quasi-judicial officers which was most strenuously objected to. Shaughnessy v. Accardi, 349 U.S. at 290 (dissenting opinion of Justice Black). In the matter before this Board, the promulgation of Appendix D, the Commission has not acted as in a judicial capacity, but in one closer to that described in Toilet Goods (see brief of April 2, 1971) and Overton Park. Thus the rationale of Morgan and Shaughnessy should not apply here and there should be no bar to taking evidence of the employees and officers of the Commission.

As stated in their brief of April 2, 1971, and developed more fully in Point II below, Intervenors contend that the statement of reasons for the Commission's action which accompanied Appendix D to 10 C.F.R. Part 50 in the Federal Register publication of December 4, 1970 is insufficient and inadequate to justify Appendix D's deviation from the clear statutory

command of NEPA. Therefore, if the burden of further development of the evidentiary record falls on Intervenors, it is appropriate for them, under the ruling in Overton Park, to address questions to and demand discovery of the Commission's officers and employees. Faced with the failings of the December 4th publication there is no more logical or expeditious way to establish a fuller evidentiary record.

POINT II

WHAT EXTENT AND SCOPE, INCLUDING THE EXTENT OF THE PUBLIC RECORD, IS REQUIRED IN A RULE-MAKING PROCEDURE?

The Court of Appeals for the District of Columbia Circuit is the court which most frequently deals with the review of the decisions and procedures of administrative agencies. In recent months that Court

has addressed itself on a number of occasions, and in the posture of reviewing a variety of administrative decisions, to the general topic which the Board raises in this question.

This body of law builds on and develops the principles set forth in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), by the Second Circuit Court of Appeals. Through the District of Columbia Circuit cases there has emerged, more clearly than ever, the doctrine that in reaching formal positions administrative agencies must demonstrate that they have considered all the material factors involved in a manner free from prejudice, and on that basis the agency must produce an articulate and reasoned decision which relates its general conclusions to the evidentiary record before it.

This rule of law is based on a number of considerations, most of which are set out in the comprehensive opinion of Judge Leventhal in Greater Boston Television Corp. v. FCC, _____ F.2d _____, 20 RR 2d 2055 (D.C. Cir., November 13, 1970). Greater Boston involved a comparative licensing hearing before the Federal Communications

Commission and the court took it as an opportunity to review and articulate the supervisory function which it serves in relation to administrative agencies. Two statements in that case lay out the crucial standards which the court expects agencies to meet in reaching their policy decisions:

> "The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." 20 RR 2d at 2064.

> "Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers." 20 RR 2d at 2065.

Thus articulated and reasoned statements allow the court to see whether all material factors have been considered; to identify the crucial elements of the evidentiary record; and to be assured that the public interest, rather than prejudice or unconscious preference, is served.

These requirements of administrative law have been repeated by the Court of Appeals for the District of Columbia Circuit in a number of recent decisions. They were put most forcefully by Chief Judge Bazelon in EDF v. Ruckelshaus, _____ F.2d _____, 2 E.R.C. 1114 (D. C. Cir., January 7, 1971). In that case the petitioner sought review of an order of the Secretary of Agriculture which refused to suspend federal registration of DDT or to commence formal administrative proceedings that could terminate registration. The Court remanded the matter to the Secretary and went to some lengths to lay out the standards by which the Secretary was to act:

> "[H]e has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion." 2 E.R.C. at 1121.

The Secretary is to reach a decision, "identifying the factors relevant to [his] determination, and relating the evidence to those factors in a statement of the reasons for his decision." 2 E.R.C. at 1121.

Finally, speaking generally, the opinion

stated that

> "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." 2 E.R.C. at 1122.

The precepts and principles of articulated and reasoned decision-making and consideration of all material factors which are set out at length in Greater Boston and EDF v. Ruckelshaus are threaded through a powerful corpus of administrative law. EDF v. Hardin, 428 F.2d 1093 (D. C. Cir. 1970) (per Bazelon, C.J.) deals with the administrative process by which the Federal Government controls the shipment and labeling of pesticides under FIFRA and was a precursor of EDF v. Ruckelshaus. In remanding the matter to the Secretary of Agriculture the Court stated that "the basis for [his] decision should appear clearly in the record, not in conclusory terms, but in sufficient detail to permit prompt and effective review." 428 F.2d at 1100.

That language was repeated by Judge Tamm in Medical Committee for Human Rights v. SEC., 432 F.2d 659 (D. C. Cir. 1970), as the standard to be followed by the Securities and Exchange Commission

on a matter remanded to that Commission.

In Moss v. CAB, 430 F.2d 891 (D. C. Cir. 1970), a case involving the rule-making procedures of the Civil Aeronautics Board, Judge Wright repeated the requirement of considering all relevant factors:

> "Board action...must always be based on an assessment of the relevant available data, with due consideration given to all factors enumerated in the statute, which factors taken together make up the public interest." 430 F.2d at 902.

In Public Service Commission of New York v. FPC, 436 F.2d 904 (D. C. Cir. 1970), Judge Wilkey returned to the problem of articulation in a suit where the petitioners were contesting a certificate of public convenience and necessity issued under the Natural Gas Act:

> "The Commission's decision and the rationale supporting it may be entirely valid, but the Commission cannot take refuge in its alleged expertise in this field, when it does not set forth convincing reasons for its determination in sufficient detail to allow the validity of those reasons to be critically examined by the parties adversely affected and to allow this Court to pass on the reasonableness of the Commission's conclusions." 436 F.2d at 907.

This recent and extensive body of administrative law covers the typical forms of agency action from those closest to adjudication (the comparative licensing hearing in Greater Boston) to petitioning for agency action in specified areas (EDF v. Hardin and EDF v. Ruckelshaus) to promulgation of broader agency schemes (rate-making in Moss v. CAB). In an adjudicatory proceeding where the agency has a role comparable to a district court, the necessity of a developed record and of reasoned decision is obvious enough. But the importance of considering all material factors and procuding articulated and reasoned determinations is perhaps even more important in rule-making than in cases of contested adversary proceedings. First, substantive rules govern a larger number of cases and control a broader field of action. Thus the importance of general rules being clearly founded on a consideration of all material factors and being a reasoned exercise of discretion is

Adverse interests cannot be as concretely formulated as when adjudication is taking place. The nature and content of hearings frequently varies depending on the nature of the issue being considered. These characteristics of the rule-making process put a heavier burden on the agency to demonstrate in its final promulgation that it has considered all the material factors involved in the issues it has formulated and addressed itself to. This will frequently mean that the agency must identify and discuss considerations and evidence which arise out of the expert knowledge of the agency itself and which would otherwise remain unknown to the public, the regulated parties and the courts. Such evidence and considerations must also be related to the rule promulgated. As Judge Leventhal pointed out, only by this method can the agency be released from "the clutch of unconscious preference and irrelevant prejudice."

the reasons for the promulgated rules, relating their findings to the governing law and demonstrating that all material factors have been considered and weighed.

The extent of the public record will vary from one situation to another, but it must certainly contain all the material and documents on which the agency relied in reaching its determination. If it does not, it is impossible for those contesting a regulation or for a court reviewing a regulation to determine whether the agency has properly weighed and balanced the material before it without prejudice or improper preference and to decide whether all the material factors have been considered.

In earlier briefs, Intervenors have contended that the Atomic Energy Commission has failed to meet these standards in the promulgation of Appendix D. Intervenors contend first that the National Environmental Policy Act does not allow for deviation from its clear directives. Secondly, if deviation is allowed, Intervenors contend that the Commission has not provided a reasoned and articulated justification of its course of action and that it has not provided a public record which supports its position. There is no need to repeat those arguments in more than synopsis form.

The Commission has imposed the March 4th date on two grounds: the need for a period of orderly transition and the need for electric power. The need for a period of orderly transition is not supported by a reasoned explanation. The need for electric power is supported by reference to three specific statements and reports, but there is further reference to "Various authoritative statements and reports". 35 Fed. Reg. 18472. Intervenors have been unable to identify those statements and reports among the various letters and comments in the public docket kept by the Commission on this matter. There is no reasoned discussion in the December 4th publication of the environmental matters which should have been the most material factors in the Commission's consideration of its implementation of NEPA. There is no articulate or reasoned statement which explains making the hearing in Vermont Yankee an exception to the March 4th regulation.

In ruling that it would defer to Federal, State and regional environmental standards the Commission relies on traditions and beliefs which it does not explicate or elucidate. It points to no part of the public record to support this position.

Thus in the promulgation of the challenged regulations, Intervenors contend that the Commission has failed to meet the requirements of administrative law. There is no showing that the Commission has considered all material factors. There is very little in the way of reasoned and articulated statements setting out the basis for Appendix D. The Commission has not met the burden of relating its conclusory determinations to the record, and the public record supplies little if any support for the positions taken by the Commission in its December 4th publication.

POINT III

MUST THE PROPOSED RULE, SUBMITTED FOR COMMENTS, AND THE ADOPTED RULE BE SIMILAR IN SCOPE AND CONTENT?

This issue of rule-making procedure is governed by the Administrative Procedure Act under which a notice of a proposed rule must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3) (1966).

The Courts have tested various final rules against the notice of the proposed rule by the standards of this section. Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D. C. Cir. 1967), California Citizens Band Association, Inc. v. U. S., 375 F.2d 43 (9th Cir. 1967) cert. denied 389 U.S. 844, (1967); Wilson & Co., Inc. v. U.S., 335 F.2d 788 (7th Cir. 1964), remanded, 382 U.S. 454 (1966); Willapoint Oysters, Inc. v. Ewing, 174 F2d 676 (9th Cir. 1949) cert. denied 338 U.S. 860 (1949). The cases do not develop and elucidate the rule much beyond citing the statutory language. Instead the courts have engaged

in a pragmatic test comparing the proposed rule and the final rule and deciding on a case by case basis whether the standard of the statute has been met.

The proposed rule-making notice for Appendix D was published in the Federal Register on June 3, 1970, 35 Fed. Reg. 8594. It did not mention the March 4th date or propose precisely the complete deference to Federal, State and regional environmental standards which the final rule embodies. No doubt the public record developed before the promulgation of the final rule would have been fuller and more pointed had the challenged provisions been spelled out. Nevertheless, it was clear from the publication of the proposed rule that the Commission was considering the implementation of NEPA. Intervenors do not contend that there was so great a disparity between the proposed rule of June 3 and the published rule of December 4 that the December 4th promulgation was void for lack of notice.

POINT IV

IS THE PRESENT RECORD IN THIS MATTER ADEQUATE FOR RULING ON THE ISSUES RAISED BY INTERVENORS?

Intervenors maintain their position that they have presented the Board with an essentially legal question: the clear language and intent of NEPA required the Commission to comply fully with the terms of the Act from the date of its enactment; the challenged regulations in Appendix D do not comply with NEPA; therefore the challenged regulations should be set aside, non-radiological environmental evidence should be heard in this proceeding and Federal, State, and regional standards should not be dispositive on the question of whether sufficient environmental protection has been achieved. The burden of justifying any other course should fall on the Commission.

If the issue before the Board is considered to be a strictly legal one, the present record should be adequate for a ruling since Appendix D need only be measured against NEPA, a statute which leaves little room for agency discretion.

The Board has made it clear that particularly in light of the Commission's memorandum in Calvert Cliffs, regularity in the Commission's regulations will be presumed and the burden of any evidentiary showing of irregularity, arbitrariness or illegality in Appendix D falls on Intervenors.

In this situation, Intervenors could rest on their legal arguments and await the outcome of the Commission's decision and court review, if it is necessary to pursue the matter that far. Intervenors would contend that the Commission has failed to develop a sufficient record considering all material factors and culminating in the kind of articulated and reasoned decision which will persuade a court to uphold the challenged portions of Appendix D.

If Intervenors are correct in that contention, at least two courses would then be open to a court which did not immediately grant Intervenors the relief sought in their March 1st motions: remand to the Commission for consideration and promulgation of new rules (similar to the action taken in EDF v. Hardin and EDF v. Ruckelshaus) or a remand to a fact-finding body to explore and develop the basis of the original promulgation of Appendix D (similar to the course followed in Overton Park).

If either of these courses were taken, the Commission would have to develop a fuller record and clearer statement of its reasons for promulgating Appendix D. All of this would take place sometime in the future when memories of the factual situation surrounding the promulgation of Appendix D will have faded at least partially and at a time when discussion of the March 4th date will be largely academic. Moreover, if the procedure laid out in Overton Park were pursued, the factual investigation would take place before a body much like this Board and in a manner much like that suggested by Intervenors.

Expeditions procedure was an important consideration to the Court in considering courses of action in Overton Park, 39 L.W. at 4293. In the matter before this Board, Intervenors believe that the most expeditious method of resolving the controversy before the Board will be to grant the motions for discovery and the taking of depositions. This will allow the immediate presentation of the factual evidence on the promulgating of Appendix D and it will allow the development of a full record and statement of the reasons for the promulgation of Appendix D which might otherwise be required by a reviewing court in the future.

Intervenors wish to state again to the Board

that their intent is to elucidate and develop the factual situation surrounding the December 4th promulgation of Appendix D. They do not wish to have the Commission produce new reasons, documents or justifications for the promulgation of Appendix D, but simply to develop a full record on the events and decisions which have already taken place.

On the basis of that evidentiary record, Intervenors contend that, in addition to the legal basis for their challenge to Appendix D, they will have an argument that factually the Commissions' action was impermisible under NEPA and applicable administrative law.

If evidentiary issues and the Commission's justifications of Appendix D are to be taken into account, a reviewing court would find the present record in this matter inadequate. Greater Boston Television Corp. v. FCC, 20 R.R. 2d 2055 (D.C. Cir. Nov. 13, 1970); EDF v. Ruckelshaus, 2 E.R.C. 1114 (D.C. Cir. Jan. 7, 1971) and other cases discussed in Point II above. The most expeditious way in which to develop the record is to do it now, before this Board, and in the manner proposed by Intervenors in their motions of April 2, 1971.

CONCLUSION

Intervenors' motions should be granted in their entirety.

Respectfully submitted,

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Dated: New York, New York
April 8, 1971

Before the
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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In the Matter of :

CONSOLIDATED EDISON COMPANY of NEW YORK, INC. (Indian Point Unit No. 2) : Docket No. 50-247

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Memorandum of Law of Intervenors Hudson River Fishermens' Association and Environmental Defense Fund on Questions Raised by Atomic Safety and Licensing Board in the captioned matter were served this 9th day of April, 1971 by deposit in the United States Mail (first class) on the following:

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