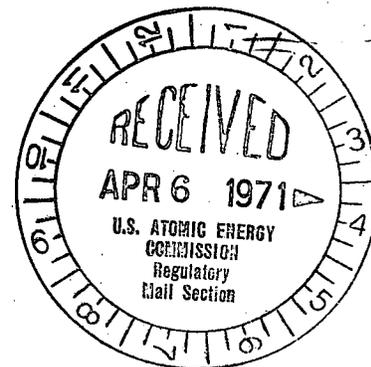


BEFORE THE UNITED STATES
ATOMIC ENERGY COMMISSION



In the Matter of)
Consolidated Edison Company)
of New York, Inc.)
(Indian Point Unit No. 2))

Docket No. 50-247

ANSWER OF APPLICANT IN OPPOSITION TO MOTION OF
HUDSON RIVER FISHERMEN'S ASSOCIATION
AND ENVIRONMENTAL DEFENSE FUND, INC.

On March 27, 1971 Applicant received a copy of a motion by the Hudson River Fishermen's Association ("HRFA") and the Environmental Defense Fund, Inc. ("EDF") in the form of a telegram, in which these intervenors requested that they be permitted to take certain additional steps in challenging Appendix D of Part 50 ("Appendix D") of the Commission's regulations.

This motion is a result of the suggestion by the Chairman of the Atomic Safety and Licensing Board at the hearing on March 24, 1971 that these intervenors consider supplementing their existing challenge to the validity of the March 4 transition date contained in paragraph 11(a) of Appendix D, and other aspects of this Appendix, by introducing evidence in this proceeding. HRFA and EDF have accordingly requested an order allowing them to address

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interrogatories to the AEC, for the production of AEC documents, and for the taking of depositions of AEC employees with respect to the factual basis for the March 4 date and other aspects of Appendix D. They have further asserted that they may wish to introduce into the proceeding written or oral evidence from these or other sources.

It is Applicant's position that such procedure is neither necessary nor proper for this proceeding and that, even if it were, its commencement at this point in the proceeding would be untimely. Applicant requests that the motion be denied in all respects.

Applicant's position is that this Board has not been delegated the authority to entertain a challenge to the adequacy of AEC regulations except as outlined in the Commission's Calvert Cliffs Memorandum dated August 8, 1969.^{1/} That decision permitted such a challenge on limited grounds in cases where the regulation in question related to an issue in the proceeding. This exception is a logical adjunct to the Board's delegated authority to decide the issues specified in the Notice of Hearing. In the present proceeding, the contested regulation relates not to an issue in

^{1/} Baltimore Gas & Electric Co., 2 CCH Atom.En.L. Rep. ¶11,578.02 (Memorandum issued Aug. 8, 1969).

the proceeding but rather to issues which the intervenors wish were in the proceeding, and consideration of a challenge of Appendix D is not necessary for the Board to carry out its mandate.

Even if it were conceded that the Board's authority does extend to this situation, however, it does not follow that the manner of challenge which the intervenors now propose is proper for this proceeding. In the Calvert Cliffs Memorandum the Commission stated:

"We would couple the above comments with the enjoinder that, if a board believes there is a substantial question presented on the record as to the validity of a challenged regulation, the board should certify that question to the Commission for guidance prior to rendering an initial decision."

Nothing in the Memorandum indicates that the "substantial question" must be a factual question rather than a legal question. The contrary is suggested by the use of the word "validity" which has the connotation of legal soundness or force. In the light of this, Applicant strongly objects to the course of action now adopted by HRFA and EDF at the suggestion of the Chairman of the Board, a course of action not previously contemplated as necessary by any of the parties and one which may well unnecessarily prolong and complicate the proceeding.

At the outset of this proceeding, in November and December 1970, the parties engaged in discussions to determine

the nature of the cases of each of the parties, with a view to preparing in such a manner as to achieve the most expeditious hearing process possible. At that time it was clear that the Citizens Committee for the Protection of the Environment ("Citizens Committee") would have a case involving factual issues and as a result the Applicant, the AEC Regulatory Staff and the Citizens Committee have engaged in several months of extensive questions, answers, and production of documents on an informal basis. A similar procedure was adopted among Applicant, the AEC Regulatory Staff and HRFA commencing in January 1971 (when HRFA was first represented by counsel) and culminating in HRFA's decision not to present evidence on radiological health and safety issues.

Also in December and January, the parties established that EDF and HRFA would brief the issues arising under the National Environmental Policy Act of 1969 ("NEPA") such briefs to be filed on or about March 1, 1971, and that these issues were entirely legal in nature.^{2/} This approach has been confirmed periodically throughout the proceeding before the Board, as recently as March 12, as shown by the following

^{2/} It was understood, of course, that if EDF and HRFA ultimately prevailed on the legal issues, they would subsequently be permitted to adduce evidence on non-radiological environmental matters.

quotation from page 2 of EDF's reply to the answers to its motion for determination of environmental issues:

"...We cannot see any rational distinction between the sanctity of 10 CFR, Part 20 radiation standards and the sanctity of an AEC regulation defining the date on which Boards may consider specific issues. In fact the former seems more protected by agency expertise than the latter which involves a purely legal decision..." (emphasis added).

As the result of the efforts of the parties, with the assistance of the Board, very substantial progress has been made in this proceeding to narrow the legal and factual issues in dispute and to permit a continuous session of evidentiary hearings to commence in the near future. The progress to date was summarized by Applicant's counsel at the conclusion of the March 24, 1971 hearing. If EDF or HRFA, rather than the Chairman of the Board, had suggested for the first time on March 24, 1971 that it wished to take such an evidentiary approach to its challenge to Appendix D, the Applicant would have objected on the grounds that it had been misled as to the intervenors' intentions and that it was far too late in the proceeding to allow such a basic change in approach. Assuming that such an approach were a part of intervenors' case, it should have been initiated months ago so that the discovery requested

by intervenors, if proper, could have commenced on a time schedule reasonably consistent with the other evidentiary aspects of this proceeding. The fact that the Chairman of the Board rather than a party has suggested this possibility in the first instance makes the time no less unreasonable and the disruptive effect on the proceeding no less great.

There have now been filed with the Board in this proceeding the motions of EDF and HRFA for determination of environmental issues with supporting memoranda, Applicant's and the AEC Regulatory Staff's answers and supporting memoranda and EDF's reply to such answers. There have also been filed the briefs by petitioners, by respondents and by Applicant as amicus curiae in the pending suit in the U.S. Court of Appeals for the District of Columbia Circuit in which the validity of Appendix D is being challenged. If the Board determines that a challenge to Appendix D will be permitted in this proceeding, the Board's duty is to certify the question to the Atomic Safety and Licensing Appeal Board ("ASLAB") when a "substantial question" has been presented on the record as to the validity of the regulation. If the Board does not adopt Applicant's view of the meaning of the Calvert Cliffs Memorandum, it is Applicant's

view that a substantial question as to the validity of Appendix D, which is a legal question, has already been presented on the record by virtue of the above-mentioned motions, answers, and supporting papers, and that therefore it is the Board's duty immediately to certify this question to the ASLAB. Development of a factual record is not necessary before there is a substantial question.

If the Board is not persuaded that the present record presents a substantial question calling for immediate certification of the Appendix D questions, Applicant requests the Board, in accordance with 10 CFR Part 2 and in order to avoid undue delay and serious prejudice to the interest of Applicant, immediately to certify the question whether the present record adequately presents a substantial question calling for certification within the meaning of the Commission's Calvert Cliffs Memorandum. Applicant further requests that the principal Appendix D questions be simultaneously certified, with their consideration contingent on the ASLAB's ruling on the first certified question.

The basis for this request is that development of a factual record on the validity of the regulation could involve introduction of evidence similar in some respects to that

which the March 4 date was intended to preclude, and that the time consumed by such a process could defeat the purpose of the March 4 date in the regulation even if the regulation is ultimately upheld as valid. Certification of both questions at once in this manner is the best available means to assure that the purposes of the March 4 date would not be defeated in the event that Applicant prevails. In addition, the ASLAB would be in a position immediately to consider and rule upon the principal Appendix D issues if it ruled that the development of a factual record in the proceeding was not appropriate.

Applicant has filed this answer before receipt of the formal motion by HRFA and EDF due on April 2 in order to present its views on the above matters to the Board as soon as possible. Applicant will wish, following receipt of the formal motion and within the time permitted by the Commission's rules, to supplement this answer, particularly with respect to the propriety of the discovery sought by HRFA and EDF.

Respectfully submitted,

LeBoeuf, Lamb, Leiby & MacRae
Attorneys for Applicant

By:

Leonard M. Trosten

Leonard M. Trosten
Partner

Dated: April 1, 1971

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ATOMIC ENERGY COMMISSION

In the Matter of)

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CERTIFICATE OF SERVICE

I hereby certify that I have served the attached document entitled "Answer of Applicant in Opposition to Motion of Hudson River Fishermen's Association and Environmental Defense Fund, Inc." by mailing copies thereof first class and postage prepaid, to each of the following persons this 1st day of April, 1971:

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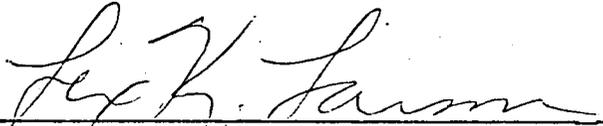
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