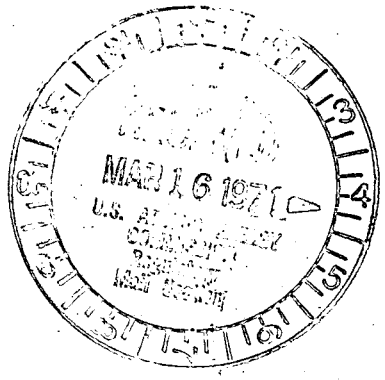


Before the
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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| In the Matter of<br><br>CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.<br>(Indian Point Unit No. 2) | ) | Docket No. 50-247<br><br>3-12-71 |

REPLY BY INTERVENOR ENVIRONMENTAL DEFENSE FUND, INC., TO THE ANSWERS OF APPLICANT AND THE STAFF TO THE MOTION FOR DETERMINATION OF ENVIRONMENTAL ISSUES

In its answer to the Motion by Environmental Defense Fund, Applicant devotes several pages to a discussion of administrative law and the fact that hearing boards are strictly limited to the functions delegated to them by their agency. Applicant thus argues that the Board here does not possess an inherent power to act or to refuse to act on the basis of what it believes are the requirements of the governing statute but must, despite its clear conviction of the legal invalidity of its actions, slavishly adhere to an illegal rule of the AEC. The philosophical problems raised by such a view of administrative law are fortunately not involved in this motion.

The AEC has delegated to this Board the authority and responsibility in certain cases to make an initial decision on the

validity of an AEC regulation.[1/] This authority was detailed in the Calvert Cliffs memorandum to which Applicant gives little notice. Instead, Applicant pounces upon the descriptive phrase "if the contested regulation relates to an issue in the proceeding" (a phrase which merely relates the general standard to the specific case) and asserts without support that it is a limit upon the authority of the Board to act. 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 and one which the Board is at least as capable of deciding as the Commission.

Furthermore the applicability of NEPA to this hearing is an issue in this proceeding and the validity of certain portions of Appendix D is obviously related to that issue. Also Section 2.718 directs the Board to conduct the hearing "according to law" and obviously the Board must decide what is the law in order to perform

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1/ The suggestion by the Staff that the Board should only make a determination that there is a substantial question and need not make a direct finding of invalidity is in our view a seumantic rather than a substantive disagreement. The Board in expressing the belief that there is a substantial question of validity of a Commission regulation will have done all but state its personal judgment on the outcome, a statement which the AEC should want because of the Board's far deeper knowledge of the hearing process and how the issue affects that process.

its duties. Applicant would make the Board the servant of the regulations when in fact it is a servant of the law. It was obviously with this distinction in mind that the AEC in the Calvert Cliff's Memorandum reaffirmed the Board's ability to question regulations which exceed the Commission's authority, i.e. are not in accordance with law.

With respect to the merits of the challenge the Staff has deferred its response until March 22 and the Applicant has chosen to defend only that portion of Appendix D which excludes consideration of the environmental issues under Section 11a of Appendix D from hearings noticed before March 4, 1971.

The Applicant's defense rests upon the phrase "to the fullest extent possible" in Section 102 of NEPA and from this phase Applicant develops the argument that the AEC could do no better than to comply with NEPA by March 4, 1971. Applicant contends that by operation of this phrase the AEC was excused from compliance with NEPA if its statute or its regulations prevented compliance. Obviously its statute did not prevent compliance because Appendix D now recognizes that the AEC has authority to consider non-radiological environmental factors, a conclusion which the AEC acknowledged as early as October 2, 1970. See attached copy of a letter from Chairman Seaborg to

to Russell E. Train, Chairman of the Council On Environmental Quality. 2/

Applicant, aware of the inherent weakness of this argument, asserts that the language "to the fullest extent possible" also excuses a failure to comply with NEPA where agency regulations need to be damaged. That assertion is totally without support in the statute, the legislative history or in Applicants memorandum. In adopting the language "to the fullest extent possible" Congress was aware of the possibility that federal agencies might use the language as an excuse for foot-dragging and thus made explicit the limited role of that phrase (H. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (115 Cong. Rec. (daily Ed.) H. 12635)):

> The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency,

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2/ Applicant asserts that the AEC was entitled to take nine months to reach this decision. We reject that assertion. The Joint Committee on Atomic Energy as early as April 14, 1970 (Hearings on Prelicensing Antitrust Review of Nuclear Power Plants, Part 2, pages 317-319) recognized that the AEC possessed authority over the non-radiological environmental impact of nuclear reactors, a view which they reconfirmed in the final committee report in September 1970 (S. Rep. No. 91-1247, 91st Cong., 2nd Sess., p. 4). Surely the AEC did not need nine months to decide that NEPA was passed in part as a means of requiring the AEC to consider non-radiological environmental factors in its proceedings. See S. Rep. No. 91-296, 91st Cong., 1st Sess., pp. 4, 8, 9, 14. Its reluctance to accept this fact should not be elevated to a legitimate excuse for delaying its compliance with NEPA.

> compliance is required. Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said sectin "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

That definitive statement of legislative intent was all but written with the AEC and its Appendix D in mind. Significantly, the only excuse for a failure to comply "immediately" is a defect in the "existing law applicable" (emphasis added) to the agency's action.

In its Interim Guidelines (35 Fed. Reg. 7390, May 12, 1970) the Council on Environmental Quality set June 1, 1970, as the date on which all federal agencies must adopt procedures to implement NEPA. Thus, it was on that date, at the very latest, that the AEC was required to conform its regulations to the requirements of NEPA. The erroneous interpretation of the otherwise clear mandate of NEPA cannot be a valid excuse for extending the date.

Applicant makes much of the delay which it asserts would occur if on December 4, 1970 the AEC had required that this hearing include non-radiological environmental issues. The basis for this argument (Applicants Memorandum, pp. 18-19) are 1) the need to renotice the hearing and the possible need to reconstitute the Board (a delay of 20 days at most) and 2) the Staff and the Applicant might need to more thoroughly examine the environmental impact of the plant. This

latter point is a shocking admission inasmuch as the Applicant had by August 6, 1970 completed preparation of its Environmental Report and the Staff had by November 20, 1970 completed preparation of its Detailed Environmental Statement both documents purporting to comply with the June 3 Appendix D and NEPA and thus both documents purportedly reflected a thorough analysis of the environmental impact of the plant. In an updated Environmental Impact Statement released on December 17, 1970, Applicant stated (p. 1):

> This document hs been prepared to inform the public of the extensive work which has been and will be done to insure that the Indian Point Plant will not have an adverse effect on the environment.

We assume it was and is ready to defend that statement.

Applicant then argues that this assumed delay will be disastrous because of an alleged and unproven need for electric power. We wholeheartedly desire to have an opportunity to explore that question in this hearing. If sufficient evidence were offered on the unavoidable need for electricity and the ability of this nuclear power plant to reliably meet that need, there might be a basis for expediting the hearing. No such evidence has been offered nor is Applicant even prepared to concede its relevance. We are not willing to accept press releases, advertisements and political outcries as a substitute for evidence, cross-examination and impartial decision on this crucial issue. Nor does the AEC assertion in the preamble to Appendix D regarding a national power need answer the question of whether the area served by Con Ed must have this power

demand and the question of whether this nuclear plant, at this location, with this design and operating criteria will meet the alleged unavoidable needs of Con Ed's customers. Indeed the erratic operation of Indian Point Unit No. 1, which was unavailable throughout the Summer of 1970 and much of the Winter, raises substantial questions about the reliability of nuclear power and the wisdom of placing primary emphasis upon such power by Con Ed.

As we have contended throughout this hearing, these questions relating to the demand for power, the legitimate need to meet that demand and the ability of nuclear power to meet that need, observe thorough examination. This hearing is the place where such an examination can and should occur in the context of an examination of the environmental impact of the plant and alternatives to the plant all as required by NEPA.

Respectfully submitted,

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March 12, 1971