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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 50-247

AEC REGULATORY STAFF ANSWER TO MOTION OF ENVIRONMENTAL
DEFENSE FUND, INC. FOR DETERMINATION OF ENVIRONMENTAL ISSUES

Introduction

On February 26, 1971, an intervenor in the proceeding, Environmental Defense Fund, Inc. (EDF), filed a "Motion for Determination of Environmental Issues," and a supporting memorandum. The motion requested in essence that the presiding atomic safety and licensing board (board) include consideration of all environmental issues in the subject hearing regardless of whether these issues are raised by intervenors and regardless of whether federal, state or regional environmental compliance certificates have been submitted by Consolidated Edison Company of New York, Inc. (applicant). In addition, EDF requested that if the board "denies all other aspects of this motion, it will schedule a conference type hearing no less than 30 days after action on this motion at which hearing intervenors, EDF, will identify in detail the radiological environmental issues it intends to raise in this proceeding and the additional legal issues

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it intends to raise related to compliance by applicant and the Commission with all aspects of Appendix D other than paragraph 11(a).

In the memorandum in support of its motion EDF identifies two questions for decision by the board: 1) "Does the board have authority to review the validity of Appendix D of 10 CFR, Part 50?" and 2) "If so, what parts if any of Appendix D are invalid?" In response to the first question EDF contends that the board has authority under the Commission's Memorandum in the Calvert Cliffs proceeding ^{1/} to challenge the validity of Appendix D of 10 CFR Part 50 since, as EDF alleges, the Commission has failed, in implementing Appendix D, to comply with the requirements of the National Environmental Policy Act of 1969 (NEPA). According to EDF, the response to the second question depends upon an analysis of NEPA as applied to the Commission contained in the brief for petitioners in the case of Calvert Cliffs Coordinating Committee v. AEC (CA D.C. No. 24,871) now pending before the United States Court of Appeals for the District of Columbia Circuit.

Discussion

A. Authority to Challenge a Commission Regulation

In a Memorandum issued by the Commission on August 8, 1969, at the conclusion of its review of an Initial Decision in the Calvert Cliffs proceeding ^{1/} the Commission pointed out that the Commission's licensing

^{1/} In the Matter of Baltimore Gas and Electric Company (Calvert Cliffs) Nuclear Power Plant, Units I and 2, Docket Nos. 50-317 and 318.
2 CCH Atomic Energy Law Reporter (AELR) Par 11,578 (1969)

regulations, which are general in their application and which are considered and adopted in public rule making proceedings, are not subject to amendment by atomic safety and licensing boards in individual cases. The Commission did, however, recognize in this Memorandum that a challenge could be made in a licensing proceeding to the validity of a Commission regulation on limited grounds. In the Calvert Cliffs proceeding, the question of a challenge to a Commission regulation arose in connection with 10 CFR Part 20. The Commission defined these limited grounds as follows:

"By limited grounds, we mean, whether the regulation was within the Commission's authority; whether it was promulgated in accordance with applicable procedural requirements; and as respects the Commission's radiological safety standards, whether the standards established are a reasonable exercise of the broad discretion given to the Commission by the Atomic Energy Act for implementation of the statutes radiological safety objectives."

Although the Commission's Memorandum in Calvert Cliffs dealt specifically with the matter of challenging the validity of 10 CFR Part 20, the general guidelines set forth in the Memorandum must be considered equally applicable to a challenge of the validity of any relevant Commission regulation, including Appendix D to 10 CFR Part 50.

It is clear from Calvert Cliffs that an atomic safety and licensing board cannot itself amend the Commission's regulations or determine

the validity of a challenged regulation. As the Commission stated in

Calvert Cliffs:

"It bears statement at the outset, and the board itself recognized, that the Commission's licensing regulations establish the standards for reactor construction permit determinations; and that the findings in proceedings such as the instant one must be made in accordance with those regulations. Further, it should be clear that our licensing regulations - which are general in their application and which are considered and adopted in public rule making proceedings wherein the Commission can draw on the views of all interested persons - are not subject to amendment by boards in individual adjudicatory proceedings.

* * *

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. In the subject proceeding, as the initial decision makes clear, the record did not present such a substantial question.

The board is required, however, to determine whether "there is a substantial question presented on the record as to the validity of a challenged regulation." We believe that such a determination should be made on the basis of the entire record after all the evidence with respect to the challenged regulation has been received from all of the parties. If the board finds upon a review of the entire record that a "substantial question" is presented, then it is required under Calvert Cliffs to certify that question to the Atomic Safety and Licensing Appeal Board for guidance prior to rendering any initial

decision.^{2/} If the board finds on the basis of a review of the entire record that no "substantial question" is presented, it must consider itself bound by the regulation in reaching any decision. In deciding the issue whether a "substantial question" is presented, we believe that the board should be mindful that "(t)he law provides a strong presumption of validity and regularity when administrative officials decide weighty issues within the specific area of their authority and the burden is on the plaintiffs to overcome this presumption."^{3/}

In the memorandum in support of its motion EDF is mistaken in its interpretation of the Calvert Cliffs' Memorandum in that it appears to assume that the board has been vested with the authority to challenge the validity of a Commission regulation. As the above discussion makes clear this is not correct. Any challenge to the validity of Appendix D to 10 CFR Part 50 must be made by the proponent of the contention that Appendix D is invalid. Furthermore, any such challenge must be made pursuant to the guidelines specified in the Calvert Cliffs Memorandum.

^{2/} Calvert Cliffs refers to certification to the Commission itself because no Atomic Safety and Licensing Appeal Board had been designated in that proceeding.

^{3/} Crowther v. Seaborg, 1 AELR Par 4088 (D.C. Colo. 1970). (See also NLRB v. Erie Resistor Corp., 373 US 221 (1963); Board of Trade v. U.S. 314 U.S. 534 (1942); NLRB v. Standard Oil Co., 138 F. 2d 885 (2d Cir. 1943)

B. Intervenor's Challenge of the Validity of Appendix D to 10 CFR

Part 50

In support of its allegation that Appendix D to 10 CFR Part 50 is in whole or in part invalid EDF relies upon the arguments presented by the petitioners in Calvert Cliffs Coordinating Committee v. AEC (CA D.C. No. 24,871). In our opinion the arguments presented in that brief in support of the EDF contention have no merit.

As the named defendant in the above referenced case, the Commission and the Department of Justice are presently completing the preparation of the reply brief. It is anticipated that this brief, which will present the Government's views with respect to the adequacy of the Commission's implementation of NEPA, will be filed on or about March 22, 1971.

Since EDF has elected to incorporate by reference its brief in the above cited judicial proceeding in this proceeding, we believe it appropriate to incorporate the Government's reply brief in the court proceeding into this answer. Accordingly, the AEC regulatory staff will provide to the board and parties to this proceeding as part of its answer to the EDF motion the Government's reply brief as soon as possible after it is filed with the court.

C. Further Scheduling

EDF has asked that "if the board denies all other aspects of this motion, it will schedule a conference type hearing no less than 30 days after action on this motion at which hearing intervenors, EDF, will identify in detail the radiological environmental issues it intends to raise in this proceeding...".

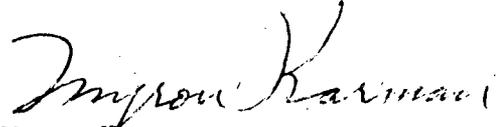
The hearing has been advancing at an agreed pace and an agreed time schedule for informal discovery. We are scheduled to resume hearing on March 24, 1971 and to commence full evidentiary hearing, leading to the completion of the case, in April, 1971. EDF had sufficient time to join the other client of EDF's counsel, the Citizens Committee for Protection of the Environment (CCPE), in promulgating questions and requests for documents commencing in December 1970. Granting of this request would lead only to a protracted delay and would serve no useful purpose in determining the issues to be decided in the case.

Conclusion

For the reasons stated above, and included in the Government's reply brief in the above cited case which will soon be provided to the board and parties, we are opposed to all portions of the EDF motion identified therein as paragraphs 1), 2), 3) and 4) and request that the motion be

denied in all respects.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Myron Harman".

Myron Harman
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 10th day of March, 1971