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

5-11-71

RESPONSE OF APPLICANT
TO
INTERVENORS' REPLY BRIEF, DATED MAY 6, 1971

In his letter to counsel for intervenors Hudson River Fishermen's Association ("HRFA") and Environmental Defense Fund, Inc. ("EDF"), dated April 27, 1971, the Chairman of the Atomic Safety and Licensing Board ("Board") has invited further briefing from the parties concerning the scope of the authority extended by the Commission in the Calvert Cliffs Memorandum[1] to permit a challenge to a regulation by a record of evidence. Intervenors have responded in their reply brief dated May 6, 1971. This document responds to the Chairman's request and to the intervenors' reply brief.

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

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hearing

I. The Board Should Certify the Question at Issue

Intervenors made their request to be permitted to present evidence and to have discovery of the Commission on March 27, 1971. In its original answer to this request dated April 1, 1971, Applicant opposed it on the ground that it was inconsistent with the intervenors' previous concept of the nature of their challenge to 10 CFR 50 Appendix D, and that any such request if proper at all was untimely and should have been made three or four months earlier.

In the event the Board considered that an evidentiary record should be prepared with respect to the validity of 10 CFR 50 Appendix D, Applicant also requested immediate certification to the Atomic Safety and Licensing Appeal Board ("ASLAB") of the threshold question whether the existing record, consisting of a legal challenge to the validity of 10 CFR 50 Appendix D, adequately presented a substantial question calling for certification within the meaning of the Commission's Calvert Cliffs Memorandum.[2/]

[2/] Applicant considers that this question raises essentially the same issue as the one posed by the Chairman in his April 27, 1971 letter, i.e., " ... what is ... the scope of the authority extended by the Commission in the Calvert Cliffs case to permit a preparation of a record of evidence, and of what kind, to be submitted to the Commission to consider whether the validity and application of Appendix D should be reexamined in the light of additional evidence developed in a particular proceeding."

Applicant further requested that the principal Appendix D questions be simultaneously certified, with their consideration contingent on the ASLAB's ruling on the first certified question. Applicant argued that this was necessary to avoid undue delay and serious prejudice to the interest of Applicant because otherwise the purposes of the March 4 date in 10 CFR 50 Appendix D would be defeated even in the event that the Applicant ultimately were to prevail before the ASLAB.

If there were any doubt about whether the threshold question should be certified then there is surely none now. Another six weeks have gone by, and the intervenors' reply brief now proposes an evidentiary record and associated discovery of sweeping proportions. For example, intervenors desire to conduct extensive discovery and present evidence of the nonradiological effects on fish life of Indian Point Unit No. 1, as well as the anticipated effects on fish of Unit No. 2. In effect, intervenors are trying to use the device of developing an evidentiary record on the validity of 10 CFR 50 Appendix D to put on all or most of the case which intervenors plan to introduce in the event that they prevail in establishing the invalidity of this regulation.

If the Board were to permit the development of such an evidentiary record prior to reaching the merits of the validity of the regulation and the ASLAB were to rule subsequently that such a procedure was not necessary or proper, or was untimely, the purpose of the March 4 transition date would have been defeated because of the unnecessary development of a record which would resemble strikingly in scope and content the record which would be required had there been no March 4 date in the regulation.

Applicant therefore reiterates its request for immediate certification of the first question referred to above. An additional reason for certification is the recent order of the Atomic Safety and Licensing Board in the Midland case[3/] ruling against the position of intervenors on essentially the same issues, which raises the possibility of conflicting decisions.

[3/] Matter of Consumers Power Company, AEC Docket Nos. 50-329 and 50-330, Order of Atomic Safety and Licensing Board dated April 27, 1971.

however, as is reaffirmed by the Commission's recently proposed revision of 10 CFR 2 Appendix A[5] the third ground of Calvert Cliffs is limited to regulations concerning radiological safety standards and hence does not apply to 10 CFR 50 Appendix D. Therefore, intervenors' challenge in this proceeding must rest wholly upon the first of the three grounds, that concerning the authority of the Commission. Questions of the authority of the Commission are inherently legal in nature. These questions certainly would not involve the extensive introduction of evidence on such matters as intervenors propose.

The actions permitted intervenors before the Board under the Calvert Cliffs Memorandum are permitted as a matter of convenience of the Commission. Applicant considers that to the extent that the Calvert Cliffs Memorandum permits an evidentiary challenge to a Commission regulation it is for the purpose of permitting the Commission to be informed of new evidence which intervenors might have to offer which might lead the Commission to reconsider the regulation.

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[5] 36 Fed. Reg. 8379, at 8381, subpar. (h)(5) (May 5, 1971).

It is not to permit intervenors to obtain discovery about and introduce evidence on matters which may reasonably be assumed to have been within the cognizance of the Commission at the time of adoption of the challenged regulation.[6/] Neither is it to defeat the distinction between rule making and adjudication by requiring Commission justification of a rule, or by giving intervenors a right to be heard and present evidence, which is the equivalent of that required for adjudication.

Furthermore, nothing in the Calvert Cliffs Memorandum authorizes the Board to allow, as intervenors suggest, the development of a record on whether 10 CFR 50 Appendix D should or should not be applied in a particular case. The Commission has recently confirmed in its proposed revision of 10 CFR 2 Appendix A that the March 4 transition date will apply in all cases unless otherwise specified in the Notice

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6/ See Toledo Edison Co. and Cleveland Electric Illuminating Co., 2 CCH Atom. En. L. Rep. ¶11,594.01, at p. 17,735-11 (Initial Decision issued Mar. 23, 1971); Matter of Consumers Power Co., AEC Docket Nos. 50-329 and 50-330, Order of Atomic Safety and Licensing Board, dated April 27, 1971, at page 4. The rule making proceeding which resulted in the promulgation of 10 CFR 50 Appendix D was pending at the time the Notice of Hearing in the Indian Point 2 proceeding was published. Both intervenors participated in that rule making proceeding and the same counsel are now challenging the validity of the regulation before the U.S. Court of Appeals for the District of Columbia Circuit.

of Hearing.[7/] The Calvert Cliffs Memorandum itself states:

> "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."

Therefore, intervenors' proposed course of action offers nothing which would be useful to the ASLAB or the Commission in reassessing the validity of the regulation.

III. Intervenors Misconstrue the Requirements of Administrative Law That a Basis Be Stated for 10 CFR 50 Appendix D

In Point II of their reply brief intervenors construct a new and tortured argument that the stated basis for Appendix D is inadequate. Briefly stated, they argue that it is the future effect of a rule that differentiates it from an adjudication; that the March 4 date in Appendix D in effect is like an adjudication because it determined issues in pending proceedings; that the more a rule is like

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7/ 36 Fed. Reg. 8379, at 8380, ftn. 3 (May 5, 1971).

an adjudication the greater the requirement of explanation; and that therefore the Commission's explanation of Appendix D is inadequate.

There is nothing right about this argument. First, the question what is a rule is not determined by the test intervenors suggest. More important, the March 4 date in Appendix D is not in any sense a retroactive rule as intervenors suggest because for the cases it covers it does not change the situation appreciably from the prior rule. Intervenors' argument amounts to saying that because issues had been raised in proceedings concerning the implementation of NEPA, the Commission was prohibited or restricted in some way in its power to implement NEPA by rule. Finally, intervenors' suggestion that the obligation of the Commission to explain a rule varies depending upon how much it resembles an adjudication is spun from thin air and has no basis in law. Applicant has shown in its previous memorandum the adequacy of the Commission's statement under the procedures applicable to rule making.

Respectfully submitted,

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Dated: May 11, 1971