BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

3-10-72.

In the Matter of

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

CITIZENS COMMITTEE FOR THE PROTECTION OF THE ENVIRONMENT

RESPONSE TO

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE OTHER PARTIES

I. INTRODUCTION

This documents includes the Citizen Committee for Protection of Environment oppqsition to the proposed findings of facts of the Staff, opposition to Part II of Applicant's proposed findings of fact and responses to comments made by Applicant in several letters relating to official notice.

II. THE REGULATORY STAFF REVIEW OF THE APPLICATION FOR INDIAN POINT, UNIT NO. 2 WAS INADEQUATE (FURTHER DOCUMENTATION)

The dereliction of the Staff in the performance of its duty has been discussed at considerable length in the Intervenor's Brief in Support of Findings of Fact and Conclusions of Law, p. 116. In that discussion we pointed out that the duty of the Regulatory Staff is to insure that all of the information relevant to the particular issue at hand is included in the record. (see Scenic Hudson Preservation Conference v. FPC, 354 F 2d 608 (1965)) This duty contemplates that the Staff will assume an objective, but affirmative role throughout the proceeding. Without such a continuing role the record cannot be complete, and any decision based on an incomplete record must be set aside (Shannon v. U. S. Dept. of Housing and Urban Development 436 F. 2d 819 (1972))

The Staff's first obligation is to conduct an "adequate review" of the license application (10 CFR Part 2, 2.104). What is meant by an adequate review is considered in our brief at p. 116. To summarize, it requires that the Staff undertake an independent study of the application, evaluating the information supplied by the parties and supplementing this with data from its own sources. The Staff must then bring all this material forward so that the public knows, from the record, that "no stone has been left unturned" (Scenic Hudson Preservation Conference v. FPC,

supra at 621.

The staff's work does not end with its review of the application. It does not then become an umpire permitting the parties to battle it out, each bent on establishing its own view of the facts. As the cases make clear, the staff continues to have a responsibility to marshall all of the relevant Facts, and to direct the attention of the Board to the advantages and disadvantages of the points of view of both the Applicant and the Intervenor. (see Scenic Hudson Preservation Conference v. FPC, supra, Office of Communication, United Church of Christ v. FCC, 359 F 2d 994 (1966), and Isbrandtsen Co. v. U. S., 96 F. Supp. 883 (1951))

The Staff responded to the submission of Proposed Findings of Fact and Conclusions of Law by Applicant with a letter agreeing "with the substance" of the Applicant's Finding.

This response is not adequate. The Staff must submit an independent statement of its findings and conclusions, an objective presentation taking into account the information and contentions of the Applicant. The record cannot be complete otherwise. By merely accepting the Applicant's Proposed Findings, in essence substituting them for its own work, the Staff has abdicated a significant part of its ongoing responsibility. (Green County Planning Board v. Atomic Energy Commission, _____ F 2d ____, (C. A. 2nd, Nos. 71-1991, 71-1996) decided Jan. 17, 1972, slip. op. 1395.

In the Green County case, supra, the Court held that it was not proper for the FPC to substitute the environmental statement supplied by the Power Authority of the State of New York (PASNY)

for its own at the hearing stage of a proceeding to determine whether or not certain power transmission lines hould be built. It was the Commission's position that PASNY's statement, which had been reviewed, sufficed for purposes of Sec. 102(c) of NEPA until such time as a final decision was filed.

The Court held that it did not suffice, and that the FPC had a "primary and non-delegable" duty to prepare an independent analysis for use during the hearings and the review process. Relying on the work of the Applicant was improper because of "the potential, if not /the/ likelihood that the Applicant's statement will be based on self serving assumptions . . . . " (Green County Planning Board v. FPC, supra, at p. 1407)

We have an analagous situation here. The Staff has substituted the Proposed Findings of the Applicant, reflecting the Applicants' point of view, rather than objectively reviewing both sides and preparing an independent statement to aid the Board in its decision.

It does not matter that the Regulatory staff has concluded that the applicant should or should not be granted a license. Just as the staff is not to act as an umpire, it is likewise not to go to bat for either side to see its conclusion carried out.

Unfortunately, the failure to submit adequate Findings of Fact is not the only instance of the Staff's poor attention to its responsibilities.

Early in December the Florida Power and Light Company suffered "catastrophic damage" to two safety valve stub headers at its Turkey Point #3 reactor. (Florida Power and Light Co. Docket No. 50-250 Correspondence File) Although complete information on this failure and its causes was provided to the Staff, and in turn by the Staff to Regional Offices and power reactor licensees, including the Consolidated Edison Co., the Staff neglected to make this information available to the Board and to the parties to this proceedings. There has been ample time for it to do so and it certainly is relevant to the proceedings. As the letter of January 18, 1972 from Lawrence D. Low, Director of the Division of Compliance to Gustav Schwab, Vice President and General Manager, Pipe Fabrication Division of the Dravo Corporation (manufacturers of the failed stub headers) stated "a safety problem has been identified ... /that/ might exist at other plants". Indeed, a telegram was sent to power reactor licensee requesting that they provide information within 10 day concerning headers such as those which failed.

The silence on the part of the Staff is the more shocking since this incident is similar to the rupture of a steam pipe at the H. B. Robinson Plant. The Robinson incident was raised at the hearing, by the Board as well as the Intervenors. As we have noted in our Proposed Findings of Fact and Conclusions of Law, (Finding 9.i.4.) there is no explanation for the cause of the H. B. Robinson

break. The Turkey Point incident underscores the folly of continuing to license plants before known problems are solved, an issue very much in the forefront of the Indian Point #2 case.

Another example of the Staff's failure to fulfill its obligation to gather and bring forward onto the record all relevant material relates to the problem of the emergency core cooling system (ECCS). Various internal memoranda of the Staff which are part of the documents in the National Hearings on the ECCS indicate that there is substantial disagreement among members of the staff about the ECCS and its problems. Nowhere in the Indian Point record is this difference of opinion reflected; indeed, no mention is made of it at all.

Two illustrations should serve to make the point. In a letter of June 1, 1971 to the ECCS Task Force, Morris Rosen and Robert Colmar, both members of the Staff, state that "We believe that the consummate message in the accumulated code output is that system performance cannot be defined with sufficient assurance to provide a clear basis for licensing" (p. 2, Ex. 715 ECCS Hearings)

The second illustration comes from the Water Reactor Safety Program - Augmentation Plan, prepared by the Division of Reactor Development and Technology, Nov., 1971. In this document are two startling conclusions: "Present experimental data and analysis techniques are not now sufficient to provide the degree of ECC assurance deemed necessary by the Atomic Energy Commission" (p. 7)

and "To date, evolution of the codes has not kept pace with the development of ECC systems. As reactor designs and their operating characteristics changed, the analysis methods were patched up, rather than redeveloped, with the net result that, overall, existing methods are inefficient, inflexible and do not adequately represent the physical phenonmena intended." (p. 8)

The Board and the parties are entitled to know of the existence of disagreement among members of the Staff over such relevant and vital matters. They are entitled to any reports or papers which discuss these.

It is the Staff's responsibility to bring such materials and issues forward to produce a complete record. The Staff's performance to date falls far short of this goal.

III. OPPOSITION TO APPLICANT PROPOSED FINDINGS OF FACT (PART II)

In our initial Proposed Findings of Fact we stated our views with respect to several aspects of the cost-benefit analysis pursuant to Appendix D. See pp. 140-145 and Proposed Finding No. 20 of Citizen Committee for Protection of Environment Proposed Findings of Fact and Conclusions of Law. Those comments are directly relevant to applicants Proposed Findings of Fact (Part II) and are incorporated herein by reference.

IV. PROCEDURES UNDER PARAGRAPH D. 2 OF APPENDIX D

In its Proposed Findings No. 8 (Part II) the Applicant proposes that the entire cost-benefit analysis required pursuant to that section be conducted by the Commission and that this Board be forbidden to consider that balancing. This suggestion by Applicant is in direct violation of the Supplemental Notice of Hearing and of Paragraph D. 2 of Appendix D. On pages 4-5 of the Supplemental Notice the Commission sets forth the relevant standards:

> In addition, the Board may grant a motion, pursuant to §50.57(c) of 10 CFR Part 50, upon satisfaction of the requirements of that paragraph, after consideration and balancing of the following factors:
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> ***
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> Operation beyond twenty per cent (20%) of full power will not be authorized except on specific approval of the Commission, upon the Commission's finding that an emergency situation or other situation requiring such operation in the public interest exists.
>
> Prior to taking any action on a motion pursuant to §50.57(c) the Board shall make findings on the factors specified above. If the license is one which requires the specific approval of the Commission the Board will certify directly to the Commission, for determination, without ruling thereon, the matter of whether opeation beyond twenty per cent (20%) of full power should be authorized. (Emphasis added)

The above language could not be clearer and requires this Board to conduct the balancing of factors for that portion of the requested authorization up to 20% of full power. The Commission will only look at the request beyond 20%.

This procedure is not only clearly mandated but, contrary to applicant's claim, it is the most reasonable approach. This Board can obviously render a decision more quickly than the Commission because it is already familiar with the record and the major contentions. Thus, if a favorable ruling is forthcoming, the applicant can, barring a stay of the Board's order, commence testing up to 20% of power while the Commission is considering the record. Also, if the Board denies the request for 20% power the Commission will be relieved of the need to go on to consider higher power levels. Finally, the Board's familiarity with the subject will enable it to render an opinion on the cost-benefit analysis at 20% which will help the Commission focus on the major issues.

Applicant's February 8 letter accompanying the Proposed Findings (Part II) requests the Board to certify this procedural issue to the Commission. But Applicant has made no showing, on or off the record, that there is a substantial question of the validity of the provisions of Appendix D, Paragraph D. 2 or the Supplemental Notice of Hearing. Absent such a showing certification is obviously inappropriate.

V. OFFICIAL NOTICE

In its response to our reference to a ruling of the National ECCS Hearing Board which is relevant to the question of Official Notice, Applicant took the novel view that this Board should totally ignore the ruling made at the National ECCS Hearing. Such a view is totally without merit and unsupportable.[1/] This Board, as it has confirmed frequently, is bound by the law. Part of that law is the ruling of any other hearing board or the Commission or a court. A ruling of the National ECCS Hearing Board is obviously pertinent if not binding on this Board.

As to the merits of the matter we believe Applicant has failed to comprehend the ruling. The Commission has issued an order in which it agreed to release certain documents which would otherwise be subject to the provisions of 10 CFR Part 9. The scope of the

1/ Our view, consistent with that Supplemental Notice of Hearing for the ECCS Hearing is that this Board is not required to await the outcome of that hearing before resolving this case. But, the Board does retain the discretion to provide for the "orderly resolution" of this hearing which may include a determination by this Board to await the final rule in the ECCS Hearing or to await the conclusion of the evidentiary hearing or to await the conclusion of the cross-examination of all Commission personnel including contractor employees or to merely utilize through official notice (particularly appropriate inasmuch as the main protagonists here are also parties to the ECCS Hearing) the data developed at that hearing as of the time this Board is ready to decide the ECCS issue or any other orderly resolution of the pending hearing. Applicant is totally incorrect in its reading of the Supplemental Notice as depriving this Board of the discretion to conduct this hearing as it sees best. Such ruling by the Commission without an opportunity for all parties to this proceeding to be heard formally on the matter would be clearly illegal and would constitute an amendment of the Commission regulations without prior public notice.

waiver specifically excluded "drafts and working notes of its /the Commission's/ personnel" (emphasis and brackets added). It was that language which was the subject of the Hearing Board's ruling and it was that ruling which held that the fact that contractor personnel are treated like Commission personnel under 10 CFR Part 9 also means that they should be considered to be Commission personnel for the purpose of the Commission ruling on working drafts of ECCS papers. (See ECCS Transcript p. 1665.) It is our view that both the treatment in 10 CFR Part 9 and the ECCS Hearing Board Ruling are persuasive authority for the position that contractor personnel are to be considered Commission employees for the purposes of official notice as well as for the purpose of considering whether the Staff fulfilled its responsibilities when it failed to offer into evidence in this proceeding data contrary to the SSE which is in the possession of the Staff as represented by the views of Commission personnel. There is no logic in permitting the Commission to extend the cloak of the Freedom of Information exceptions to persons who are employed by AEC contractors unless those whose draft documents are protected by the Commission are to be considered Commission employees with respect to the final document. The exception in the Freedom of Information Act for internal draft papers of technical personnel is designed to protect free exchange of ideas within an agency so that a better quality final document will be produced. It is in-

credible that the Staff and the Applicant should now argue that these final documents have no place in this hearing.

Applicant also continues to fail to comprehend (or else comprehends all too well and is seeking to obfuscate the issue) the relevance of the business records exception. See Applicant's letter to the Board dated February 14, 1972. The business records exception allows this Board to receive in evidence all of the documents for which official notice has been sought without the necessity of requiring a witness to come forward to support the document. Cases such as Richardson v. Perales, 91 S. Ct. 1420 (1971) demonstrate that even technical reports (such as medical reports) are subject to the business records exceptions if prepared in the ordinary course of business. These medical reports include not only recording the observations of empirical events but also opinions about the significance of those observations. Thus they are virtually identical to the documents for which official notice is sought here. There is no dispute that these documents were prepared in the ordinary course of the business of the National Laboratories.

We have stressed the relevance of the business records exception because we see little practical difference between official notice and the business records exception. In both cases the doments come into evidence subject to the Applicant's right to controvert. Because the Applicant has the burden of proof in this

proceeding, there is no shift of that burden by official notice being taken of the document or it being received in evidence under the business records exception. In either event the facts reported in the document remain valid unless and until controverted by the Applicant. The opinions in the document remain evidence of the disagreement on major matters of safety between competent experts unless and until controverted by the Applicant. We see little practical difference between the two mechanisms for bringing the data before this Board. We still believe that if the Staff had fulfilled its responsibility from the outset, the data would have been included in the record long ago and Applicant would have been able to controvert it. Because of the Staff's misconception of its responsibility, it has only presented data to support its position rather than presenting all of the relevant data so that the Board can render a decision with all data before it.

Respectfully submitted,

Anthony Z. Roisman
Counsel for Citizen Committee for
Protection of Environment

Karin P. Sheldon
Counsel for Citizen Committee for
Protection of Environment

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