BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

5-1-72.

In the Matter of	)	
	)	
Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2)	)	Docket No. 50-247

APPLICANT'S REPLY TO INTERVENORS' ANSWER AND MEMORANDUM OPPOSING APPLICANT'S MOTION FOR ISSUANCE OF A LICENSE FOR LIMITED OPERATION

In its motion dated September 24, 1971 Consolidated Edison Company of New York, Inc., Applicant in the above-captioned proceeding requested, pursuant to Section D.2 of Appendix D to 10 CFR Part 50, a license for limited operation of Unit No. 2 at a steady state power level of 2482 megawatts or such other power level short of full operation as justified by the record of the proceeding. In their answer and memorandum dated April 3, 1972 and filed April 5, 1972 Hudson River Fishermen's Association ("HRFA") and the Environmental Defense Fund ("EDF") opposed the issuance of a 90 percent operating license for Unit No. 2 on the ground that operation of Unit No. 2 during the period of the ongoing NEPA review is

unwarranted. HRFA and EDF also contend there are several legal bars to the granting of Applicant's motion. Applicant at the April 5, 1972 hearing session responded on the record to this answer and memorandum. (Tr. 4955-58). Applicant reiterates at this time that the legal contentions presented by HRFA and EDF are unfounded. These contentions reflect not only a misinterpretation but also a total disregard for Section D.2 of Appendix D. Applicant does not address in detail the factual contentions of HRFA and EDF concerning the merits of Applicant's motion in this reply as this is a proper subject for consideration at the forthcoming evidentiary hearings before the Board.

I.
Neither Comments by Other Federal and State Agencies nor Consideration of Alternative Cooling Methods Is Required in Determining a License for Limited Operation Pursuant to Section D.2 of Appendix D to Part 50

By promulgating Appendix D to 10 CFR Part 50 on September 9, 1971 the Atomic Energy Commission bound itself to a thorough and intensive application of NEPA as interpreted by the court in the Calvert Cliffs decision. Included in Appendix D are provisions for the "partial, temporary and redressable act" of interim licensing. In support of these

provisions the Commission has stated that when coupled with appropriate environmental review interim licensing provides for the "practical workability of NEPA" while at the same time benefits the public by alleviating serious adverse consequences "to the public interest, including detriment to the environment" which might result from a delay in the production of power. 1/

The Commission further verified the validity and the reasonableness of these provisions in its "Memorandum and Order" dated March 10, 1972. Authorizing the Director of Regulation to permit limited operation of the Palisades Plant at power levels not to exceed 60 percent of full power, the Commission stated:

> "Section D.2 provides that, during the course of this ongoing supplemental NEPA review for a final, full power, operating license, limited interim operation may be authorized in specified circumstances, 'consistent with appropriate regard for environmental values'. This may be done either (1) when the proposed operational activities would not result in a significant adverse environmental impact, or (2) in those instances where an impact may occur,

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1/ See Brief for Federal Appellants at 19-37, Izaak Walton League v. Schlesinger, Civil Nos. 72-1057, 72-1058, D.C. Cir., 1972; Reply Brief for Federal Appellants at 5-7, Izaak Walton League v. Schlesinger, supra.

> 'after consideration and balancing' of specified environmental and public interest factors (supra). Operation beyond twenty percent of full power requires the specific prior approval of the Commissioners.
>
> "Like Section D.3 of Appendix D, which pertains to certain operating license proceedings in which no request for a public hearing is received, Section D.2 contemplates that authorization beyond 20 percent of full power will be given only in emergency situations or other situations where the public interest so requires. Any license issued under Section D.2 is to be without prejudice to such subsequent licensing action as may be taken by the Commission following completion of the ongoing full NEPA review for the facility."2/

HRFA and EDF incorrectly characterize Applicant's motion as one requesting the issuance of a license to operate Unit No. 2 "at 90% of full power for an indeterminate period." Applicant has asked only that for which the regulations explicitly provide, a license during the period of the ongoing NEPA environmental review. If with the cooperation of all concerned the review is short, as Applicant sincerely hopes it will be, then the period of any license granted in response to Applicant's motion will be of the same duration.

2/ In the Matter of Consumers Power Co. (Palisades Plant), AEC Dkt. No. 50-255, Memorandum and Order, March 10, 1972, at 5-6 [footnote deleted].

HRFA and EDF also disingenuously neglect to present the issue in the context of the actual situation. In arguing "practical common sense" they disregard the full NEPA review which is underway and declare noncompliance with NEPA and Calvert Cliffs by presenting Applicant's motion as a means of circumventing the mandates of NEPA.

The fact is that Appendix D does require a full NEPA review for Unit No. 2 prior to the issuance of a full-term operating license. This full NEPA review encompasses the preparation and issuance of a detailed environmental statement reflecting the review and comment of other Federal and State agencies as well as containing a full consideration of alternatives to the proposed action. At this time the Commission has issued its draft Detailed Statement for Unit No. 2. This environmental statement dated April 13, 1972 has been circulated to other Federal and State agencies for their review and comment. The notice of the availability of Applicant's Environmental Report and the draft Detailed Statement was published in the Federal Register on April 20, 1972 with comments requested within thirty days. Pursuant to Appendix D, a valid and binding regulation of the Commission, the "strict procedural requirements of NEPA" are being fulfilled.

The full NEPA review must and will include a final Detailed Statement, consultation with other agencies and a full consideration of alternatives.[3/]

But Section D.2 of Appendix D does not require a duplication of a full NEPA review. Rather it sets forth procedures to be utilized during the period of this ongoing review in determining whether operation is permissible. If the proposed operation may have a significant, adverse impact on the quality of the environment, these procedures include consideration and balancing of three factors in order to determine whether interim operation of Unit No. 2 is "justified without prejudice to the ends of environmental protection."

3/ The intervenors' attempt to utilize the proceeding before the New York State Department of Environmental Conservation in support of their position is without merit. In the first place, any comments of the Department of Environmental Conservation on the pending motion can be made through the Department's representative which is a party to this proceeding, i.e., the Atomic Energy Council of the State of New York. Secondly, the intervenors' answer contains incorrect legal and factual assertions. Applicant denies that a violation of New York State law occurred in January or February of this year or will occur if the requested license is granted. Applicant testified at the hearing ordered by the Department of Environmental Conservation on March 9, 1972, as discussed in the letter from Applicant's counsel to the Board dated March 10, 1972. The Commissioner of Environmental Conservation has not issued a final order as a result of this hearing. We understand that the Commissioner is considering issuing an order which will permit operation of the circulating water pumps for Unit No. 2 under specified conditions and limitations and Applicant will have to comply with any valid order of the Department concerning application of State law.

Section D.2 permits interim licensing if the public benefit for such licensing exists and if such licensing will not nullify the full NEPA review which is underway. To demand duplication of the full NEPA review for an interim license would be contrary to the regulations of the Commission which govern this proceeding.

Section D.2 does not require consideration of alternatives to once-through cooling at this time but rather requires consideration only whether they may be foreclosed. Factor (b) under Section D.2 requires that the Board and the Commission consider and balance whether "alternatives in facility design or operation of the type that could result from the ongoing NEPA review" would be foreclosed. For this reason Applicant has not presented evidence on the merits of alternative cooling methods in support of its motion for limited operation.[4/] The statement by HRFA and EDF that Applicant has not presented evidence on such matters "on the ground that only those alternatives which can be completed during the period for which the plant would be licensed are

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4/ Applicant has, of course, discussed such alternatives in Supplement 3 of its Environmental Report which will be offered in evidence in support of the full-term, full power license for Unit No. 2.

relevant" is clearly erroneous.

HRFA and EDF further discuss the practical considerations resulting from the issuance of a license for limited operation. They contend that if this license is issued without considering alternative cooling methods the result would be not only "a substantial adverse impact" during the period of the license, but also a longer period of operation at full power without the required modifications. These hypothetical considerations are contemplated by Section D.2. Factor (a) of Section D.2 requires consideration and balancing of any "significant, adverse impact on the environment" and whether any such impact could be redressed "should modification or termination of the limited license result from the ongoing NEPA environmental review." Section D.2 also provides that the issuance of an interim license shall be without prejudice to subsequent licensing actions.

It should be noted that consideration and granting of Applicant's motion will in no way delay the hearing on the full-term, full power license or the construction of an alternative cooling system if this is determined to be necessary as the result of the full NEPA environmental review. Applicant is requesting a license only during the pendency of

that review. The hearing on the full-term, full power license will not be concluded until after the Staff's final Detailed Statement has been published. In order to help assure that the full environmental hearing may begin without delay and without any interference from the hearing on an interim operating license, Applicant on April 10, 1972 filed a motion to prescribe the time "as soon as possible hereafter" for the completion of the hearing on its motion for limited operation. HRFA and EDF have not yet filed a formal response to Applicant's motion.

Applicant therefore urges the Board to proceed in accordance with the valid and binding regulations of the Commission and consider Applicant's motion for limited operation as soon as possible. Applicant further requests that the Board disregard the inappropriate contentions for which HRFA and EDF oppose Applicant's motion and proceed to balance those factors applicable to the pending motion as set forth in Section D.2.

II.
Issuance of a License for Limited Operation in Accordance with Applicant's Motion Is Consistent with the Regulations of the Commission

Applicant's motion requesting a license for limited operation is consistent with the intent and plain meaning of

Appendix D, Section D.2 to Part 50. Section D.2 provides that an applicant may make a motion for a license authorizing limited operation within the scope of Section 50.57(c) of the Commission's regulations. Section 50.57(c) embraces not only low power testing (which is defined as "operation at not more than 1 percent of full power ...") but also "further operations short of full power operation." To suggest that the phrase "further operations short of full power operation" does not include operation at up to 90 percent of full power is specious. The recent order by the Commission authorizing limited operation of the Palisades Plant at power levels up to 60 percent of full power indicates that much higher levels of operation than 20 percent are permissible in proper cases, with Commission approval.

"Limited operation" as contemplated by Section D.2 is not defined simply by a particular power level but rather is approached as that power level of operation which for the period of the ongoing NEPA review may be justified "without prejudice to the ends of environmental protection." It is the consideration and balancing of all the evidence in the record which shall determine whether Applicant may operate Unit No. 2 on an interim basis. It is this same

evidence which will determine the power level for such authorization. Consideration of Applicant's motion, therefore, will involve the merits of operating Unit No. 2 at a particular power level during the ongoing NEPA review. If by characterizing this time period as "indeterminate" HRFA and EDF are suggesting that the NEPA review is expected to extend over an interminable period, Applicant's motion for a limited operation license becomes more compelling.

III.
The Effects of Delay in Operating Unit No. 2 Upon the Public Interest Support Applicant's Motion

HRFA and EDF contend that Applicant's motion is moot and therefore should be denied on the ground that the most conservative testing schedule as presented by the Applicant in its October 19, 1971 testimony (follows Tr. 4013) contemplates that the entire testing program would be complete after 126 days or in the latter part of October. This position is untenable.

The merits of Applicant's motion cannot be determined by HRFA's or EDF's incorrect interpretation of Applicant's evidence in support of its motion, but must be considered and balanced on the record in accordance with the requirements of Section D.2. The factors therein

include not only any significant, adverse effects, foreclosure of alternatives and need for power, but also the financial and environmental costs resulting from a delay in operation.

In any event Applicant's evidence relating to factor (c) of Section D.2 does not indicate that which HRFA and EDF contend. The evidence demonstrates that the entire testing program may be complete within 63 days after criticality. If this schedule is maintained, operation at 90 percent of full power could be realized toward the end of the summer peak period. Applicant's testimony shows that a peak can occur in September, and Applicant's only load disconnection because of limited generation occurred in September. As the testing schedule continues and as authorized by the Board and Commission, Unit No. 2 could generate that level of power for which it has been tested and verified, i.e., significant power could be produced prior to attempting 90 percent of full power. This means that not only might Applicant's service area benefit during the testing period but also that it might have the advantage of steady state operation at 90 percent of full power during the summer peak period.

If the more realistic schedule for completion of testing is considered, 90 percent of full power operation would not be attained until after the summer peak. However, HRFA and EDF ignore the need for testing and operation of Unit No. 2 during the fall and winter months. To contend that Unit No. 2 is needed only for the summer of 1972 flies in the face of the record of the proceeding.

Respectfully submitted,

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By _____
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Dated: May 1, 1972

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ATOMIC ENERGY COMMISSION

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I hereby certify that I have served a document entitled "Applicant's Reply to Intervenors' Answer and Memorandum Opposing Applicant's Motion for Issuance of a License for Limited Operation" dated May 1, 1972 by mailing copies thereof first class and postage prepaid, to each of the following persons this 1st day of May 1972:

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