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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.

(Indian Point Nuclear Generating  
Unit No. 2)

*3-27-72*

Docket No. 50-247

RESPONSE OF AEC REGULATORY STAFF TO MOTION OF CITIZENS COMMITTEE  
FOR THE PROTECTION OF THE ENVIRONMENT FOR RECONSIDERATION AND  
ALTERNATIVELY TO CERTIFY QUESTIONS INVOLVED TO THE COMMISSION

On March 15, the Citizens Committee for the Protection of the Environment (Citizens Committee) moved the Appeal Board to reconsider its memorandum of March 10, 1972 which decided the two questions certified by the presiding Atomic Safety & Licensing Board relative to the Interim Criteria for Emergency Core Cooling Systems (ECCS) and in the alternative to certify the questions to the Commission.

In its motion, the Citizens Committee relies almost exclusively on a recent decision of the United States Court of Appeals for the D. C. Circuit (Kennecott Copper v. EPA \_\_\_\_\_ F 2d \_\_\_\_\_ 3 ERC 1682) as a basis for its request to the Appeal Board to reconsider its decision of March 10, 1972. The cited case however does not support the Citizens Committee contention with respect to the issuance of the Criteria by the Commission which is governed by the rulemaking provisions of Section 4 of the Administrative Procedure Act, as amended, 5 USC 553. As the Appeal Board clearly stated in its March 10 decision;

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"In essence, the Commission by this notice found that application of the revised Interim Criteria which constituted a tightening of safety requirements not only for facilities involved in pending or future licensing proceedings but also for operating facilities, was necessary in the interest of the public health and safety and that delay would compromise the public health and safety."

The Appeal Board went on to find that the notice was sufficient to satisfy the requirements of 5 USC § 553(b) for a finding of good cause and brief statement of reasons for dispensing with notice of proposed rulemaking and the requirements of 5 USC § 553(d)(3) for a finding of good cause and the immediate effectiveness of the rule. The Citizens Committee concedes in its motion that the Court in the Kennecott Copper case held that "the same thorough statement required for an adjudicatory proceeding is not required for an informal rule-making." In fact, the court held that EPA's rulemaking promulgation in question did in fact comply with the requirement of Section 4 of the Administrative Procedure Act, but that it needed additional information from EPA to enable the Court to decide whether the regulation was valid. The Appeal Board, in its decision noted that the Commission "gave opportunity for additional comments to be submitted, and is also engaged in extensive additional public rulemaking procedures on the subject." In summary, the reasonings and explanation given by the Commission for avoiding the delay of protracted rulemaking and in the interest of public health and safety are within statutorily permitted discretion and the Kennecott decision does not alter the fact that the Appeal Board was correct in its decision of March 10, 1972.

With respect to the Citizens Committee alternative motion for certification to the Commission, the staff urges the Appeal Board that no valid

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argument has been submitted by the Citizens Committee for such certification. The intervenor has utilized the present ECCS rulemaking hearings to support its contention that the Commission should now rule on the ECCS questions certified by the Licensing Board and decided by the Appeal Board. The Commission has declared that licensing cases in being are to "proceed expeditiously with the aspects of the application related to the Commission's licensing requirements under the Atomic Energy Act...." (Appendix D of 10 CFR Part 50). The rule cited for such certification (10 CFR 2.758(d)) requires more than a formal recital of the fact that "the questions raised by this proceeding and in this Petition for Reconsideration appear to fall within the area of major ... questions of ... law or procedure." The intervenor herein relies heavily on the fact that there may be much time lost in the licensing of plants as a result of some future litigation, but the Appeal Board must make its decision on this motion not on the basis of implied, future legal action, but on the merits of the contentions before it.

In view of the foregoing, the regulatory staff urges the Appeal Board to deny the Motion for Reconsideration and decline to certify the questions involved to the Commission.

Respectfully submitted,

Myron Karman  
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland  
this 27th day of March, 1972.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Response of AEC Regulatory Staff to Motion of Citizens Committee for the Protection of the Environment for Reconsideration and Alternatively to Certify Questions Involved to the Commission," dated March 27, 1972, in the captioned matter, have been served on the following by deposit in the United States mail, first class or airmail, this 27th day of March, 1972:

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