BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	3-20-72.
	)	
Consolidated Edison Company	)	Docket No. 50-247
of New York, Inc.	)	
(Indian Point Station, Unit No. 2)	)	

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

APPLICANT'S REPLY TO CCPE'S
MOTION FOR RECONSIDERATION
AND ALTERNATIVELY TO
CERTIFY QUESTIONS INVOLVED
TO THE COMMISSION

Applicant received on March 16, 1972 a copy of the "Motion for Reconsideration and Alternatively to Certify Questions Involved to the Commission," filed by the Citizens Committee for the Protection of the Environment (CCPE). For the reasons stated herein, the motion should be denied.

At the outset, there is no basis in the AEC's Rules of Practice for the filing of a motion for reconsideration of the type of Appeal Board rulings involved here, and summary denial would therefore be appropriate. Furthermore,

CCPE has presented nothing new to the Appeal Board which would justify either reconsideration of the Appeal Board's decision or certification to the Commission of any of the questions dealt with therein. Applicant's specific response to CCPE's contentions is set forth below.

I.

CCPE, citing the recent case of Kennecott Copper v. EPA,[1/] attempts to show that the Appeal Board misconstrued the requirements of the Administrative Procedure Act ("APA") in determining that the Commission's June 29, 1971 Federal Register Notice adequately supported the immediate effectiveness of the Interim Acceptance Criteria without prior notice or opportunity for public comment. But the Kennecott Copper case explicitly held the promulgation of the EPA air quality standard in question to comply with the "concise general statement" requirement of Section 4(c) of the APA. The Court went on to state that there may be particular contexts in which meeting those statutory requirements may not be sufficient to enable the Court to determine whether or not the agency

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1/ 3 ERC 1682, ___ F.2d ____ (No. 71-1410, D.C. Cir., February 18, 1972).

abused its discretion in enacting the regulation. It found such special circumstances in that case and ordered the agency to supply an implementing statement in order to enlighten the Court as to the basis for the standard in question.[2/] In doing so the Court provided (1) that the ongoing proceedings for State adoption of implementation plans to meet the standard would not be altered or delayed and (2) that the standard in question would remain in effect pending amplification of its basis and further review by the Court. The Court also went out of its way to say that as a general matter more than the statutory minimum would not be required in environmental cases.[3/]

Applied to our situation, this case means at most that at some future stage of the proceeding involving judicial review a Court would be entitled, if it finds it appropriate in aid of the judicial function, to request and receive from

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2/ Of particular importance to the Court in reaching this conclusion was the fact that the air quality standard under attack was required by Section 109 of the Clean Air Act to be "based on" specified air quality criteria. Id. at 1683.

3/ Id. at 1685, fn.18.

the agency a further statement of reasons for the immediate effectiveness of the regulation.[4/] The case in no way indicates error in the ruling of the Appeal Board on this point.

CCPE's argument continues to be founded on an erroneous premise. CCPE states "until those plants begin operating there is no safety problem and the Commission fails to disclose any basis for concluding that licensing of those plants should not have been delayed ..."[5/] CCPE refuses to recognize that if the Interim Acceptance Criteria had not been promulgated on an emergency basis the situation which would have existed would have been not a moratorium on licensing but rather a high probability of continued licensing of nuclear power plants under the older, less stringent regulations. Moreover, the Commission is not obligated to justify a refusal

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4/ Applicant does not believe that this will happen because as shown in its prior brief dated January 11, 1972 the reasons for immediate effectiveness have been adequately spelled out by the Commission.

5/ CCPE further points out that no full power operating licenses have been issued for commercial light water reactors since promulgation of the Criteria. There has, however, been partial power licensing under the Criteria. Since their promulgation the Palisades nuclear power plant has been authorized to operate at up to 20% of full power (440 Mwt) and later at up to 60% of full power (1320 Mwt).

to impose a moratorium on licensing of nuclear power plants as CCPE suggests. On the contrary, such a moratorium would have been a drastic move requiring a much greater justification, being a more sweeping change from the preexisting regulatory situation.

Applicant therefore requests the Appeal Board to conclude that CCPE's arguments do not warrant reconsideration or, in the alternative, are without merit.

II.

CCPE has not heretofore suggested that "major or novel questions of policy, law or procedure" are involved here which would justify certification, prior to a decision, under 10 CFR 2.785(d). Now, however, faced with an adverse decision by the Appeal Board CCPE proposes for the first time that the Appeal Board certify some unspecified question or questions to the Commission. This suggestion is clearly without merit.

Surely the questions certified to the Appeal Board by the Atomic Safety and Licensing Board fall squarely within the Commission's delegation of authority to the Appeal Board. The Appeal Board's decision is fully justified by the

Commission's regulations, the applicable case law and the facts, as evidenced by this reply and all the briefs filed herein. Of course, the Commission has the right, on its own motion, to review the Appeal Board's decision pursuant to 10 CFR 2.786.

What CCPE apparently now seeks is the indefinite postponement of the licensing of the Indian Point 2 facility, and other nuclear power plants, while the Commission's rulemaking proceeding on emergency core cooling systems continues through the various phases of direct testimony, cross-examination and rebuttal testimony by all participants. 6/

Obviously, this is not what the Commission had in mind in its various notices and orders pertaining to the rulemaking hearings. In any event, the rulemaking record developed to date does not support CCPE's allegations of inadequacy of the Interim Acceptance Criteria or lack of consideration of relevant data.

6/ Depending on which point it is trying to make at the time, CCPE argues either that the record of the rulemaking proceeding is relevant or that the Appeal Board should ignore it (see pp. 5-6 of CCPE's reply brief to the Appeal Board, dated January 21, 1972).

Accordingly, Applicant urges the Appeal Board to deny CCPE's motion in its entirety.

Respectfully submitted,

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Dated: March 20, 1972