1-21-72

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
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 BRIEF IN REPLY TO
MEMORANDUM SUBMITTED BY
THE CITIZENS COMMITTEE FOR THE PROTECTION
OF THE ENVIRONMENT

This brief is submitted in response to the memorandum submitted by the Citizens Committee for the Protection of the Environment ("CCPE") on January 11, 1972 with respect to the two questions certified to the Atomic Safety and Licensing Appeal Board in this proceeding. It supplements Applicant's brief dated January 11 on the same questions.

I. The interim criteria for emergency core cooling systems were validly promulgated.

The great bulk of intervenor's brief on this point

addresses itself to the question of the adequacy of the Commission's statement of the technical basis for the interim criteria. This question is not before the Atomic Safety and Licensing Appeal Board. The only issue is the adequacy of the Commission's justification for immediate effectiveness for the criteria without prior notice and public procedure. This issue has been fully addressed in our prior brief.[1/]

In the page or so which CCPE devotes to the correct issue,[2/] CCPE argues, citing no cases, that there is nothing to support the immediate effectiveness of the criteria. CCPE overlooks the fact that the interim criteria involved a tightening of safety requirements and that it would not have been in the public interest to postpone their application and permit licensing under the pre-existing requirements.

II. The interim criteria reflect full consideration by the Commission of the matters of fuel clad swelling and rupture and flow channel blockage in Westinghouse pressurized water reactors, and the Licensing Board need not consider these matters further in evaluating the performance of the emergency core cooling system for Unit No. 2.

1/ Nevertheless, because CCPE has dealt at length with the question of the adequacy of the Commission's stated technical basis for the regulation, we feel that it would be instructive for the Appeal Board to see that CCPE's arguments are not well founded. Therefore, we present our position on this point in Attachment A to this brief.

2/ CCPE memorandum dated January 11, 1972, page 11.

On this point as well CCPE misinterprets the certified question to its own advantage. On pages 14 through 27 of its memorandum CCPE presents a series of findings and references on the subject of rod swelling and bursting, for the express purpose (page 14) of demonstrating the technical invalidity of the criteria. No question of the technical validity of the criteria is before the Appeal Board. The second certified question is one of interpretation, not validity, of the criteria. In effect, CCPE is attempting to present to the Appeal Board a major portion of its Calvert Cliffs challenge to the technical validity of the criteria. Under the Commission's rules, such a question is not before the Appeal Board until the Licensing Board has found that a substantial question as to the validity of the regulation has been presented on the record. The Licensing Board has made no such determination concerning any question of technical validity. Furthermore, many of the documents referred to in this portion of the CCPE memorandum are not in evidence in the proceeding, and a question is now pending before the Licensing Board as to whether official notice should be taken of them. Therefore it would be premature in any event for

the Appeal Board to consider this matter.[3/]

Returning to the question of interpretation posed by the Licensing Board, CCPE argues that Criterion 1 is "an unequivocal statement that in a LOCA fuel rod temperature must not exceed 2300°F." This is not the case. Criterion 1 is an unequivocal statement that the calculated maximum fuel element cladding temperature does not exceed 2300°F. The policy statement goes on to identify approved calculational models, which include the Westinghouse evaluation model. With respect to Criterion 3, Applicant does not disagree that the question of flow channel blockage and fuel clad distortion should be considered somewhere. Applicant's point is that these subjects were thoroughly considered in the rulemaking process and that the Commission did not intend, nor is it necessary, that there be further consideration

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3/ Applicant does not concede the truth or accuracy of any of the assertions found at pages 14 through 27 of CCPE's memorandum in not replying to them in this brief.

before the Licensing Board in this proceeding.

Respectfully submitted,

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Dated: January 21, 1972

ATTACHMENT A

CCPE contends that in the promulgation of the interim criteria the Commission failed to meet the requirements of administrative law in that the stated basis for the interim criteria is inadequate. In various places in its memorandum CCPE argues that in the policy statement the Commission failed to make a "detailed statement of reasons" for the rule, or to make a "disclosure of evidence upon which the criteria were based," or to show that the rule is founded on a "consideration of all material factors." In this attachment it will be shown that the Commission's interim policy statement containing the criteria meets the requirements of law that a basis be stated.

The applicable requirement is that the notice of adoption of a regulation be accompanied by a concise general statement of the basis and purpose of the rule being adopted. This requirement is contained in both the Administrative

Procedure Act (APA) and the Commission's Rules.[1/]

The requirement that a concise basis be stated for a regulation is not the equivalent of the findings based upon record evidence which are required in adjudications. This distinction is no accident but pervades the very structure of the APA. As the United States Court of Appeals for the District of Columbia Circuit has stated:

> "... rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and ... such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making."[2/]

1/ Section 4 of the APA states in part:

> "(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C.A. § 553.

The Commission's rules and regulations at 10 CFR Section 2.806 read:

> "Sec. 2.806. Commission action.-The Commission will incorporate in the notice of adoption of a regulation a concise general statement of its basis and purpose, and will cause the notice and regulation to be published in the Federal Register or served upon affected persons."

2/ American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966).

The court then went on to say that the requirements of Section 4 of the APA are limited requirements geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. It quoted from the Attorney General's Manual on the Administrative Procedure Act to the effect that the typical issues in a rule making proceeding relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts and that the object of rule making is the implementation or prescription of law or policy for the future. The court also quoted from the Attorney General's manual that "[n]ot only were the draftsmen and proponents of the bill aware of [a] realistic distinction between rule making and adjudication, but they shaped the entire Act around it."[3/]

Another expression as to the nature and scope of the rule making process was presented in Flying Tiger Line, Inc. v. Boyd, where the court stated:

3/ Id. at 629-30.

> "The final contention advanced in behalf of the plaintiff is that the record of the hearings before the Board does not sustain the validity of the regulation or the need therefor. This contention seems to be based on a misconception of the nature of a rule-making proceeding. Rule making is a legislative process. It is neither judicial, administrative, nor quasi-judicial. An agency performing a legislative function need not proceed on evidence formally presented at hearings. It may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions. The regulation ultimately promulgated need not be sustained by evidence. The purposes of rule-making hearings are to give an opportunity to interested parties to submit data and facts, and to present their views. Consequently, the Court does not review a record of such hearings as it does records in judicial or quasi-judicial proceedings. Such hearings are analogous to hearings conducted by Congressional Committees. An Act of Congress need not be supported by formal evidence introduced at hearings."4/

The courts have ruled specifically on the adequacy of concise general statements. Automotive Parts & Accessories v. Boyd5/ involved the validity of regulations promulgated under the National Traffic and Motor Vehicle Safety Act

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4/ 244 F.Supp. 889, 892 (D.D.C. 1965). See also Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir. 1965); 1 K.C. Davis, Administrative Law Treatise 285 (1958).

5/ 407 F.2d 330 (D.C. Cir. 1968).

concerning the requirement for head restraints in newly manufactured automobiles. The court stated that there was no need for detailed findings but that the APA required a concise general statement of the basis and purpose of the regulation. It cautioned against an overly literal reading of the statutory terms "concise" and "general" and stated that it expected that the statement "... will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." In addition the court held that "[t]he paramount objective [of judicial review] is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."[6/] The statement in support of these regulations which qualified under the court's decision as a "concise general statement" under Section 4 of the APA reads as follows:

6/ Id. at 338.

> "This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions."7/

Another holding on the concise, general statement of basis and purpose required by the APA appears in Foreign Freight Forwarders & Brokers Association v. FMC,8/ where the court was asked to determine whether this requirement had been complied with by the Federal Maritime Commission when it noticed the adoption of proposed rules in the Federal Register. The Court's comment on the contention that the general statement was inadequate was as follows:

> "But the order promulgating the rules meets the statutory requirement in stating that they implement the 1961 Law 'and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and ocean-going common carriers in the conduct of their business affairs.'"9/

In the face of such rulings CCPE's assertions that the interim policy statement does not meet the requirements of administrative law are without merit. That statement

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7/ Id. at 338 n. 12.

8/ 337 F.2d 289 (2d Cir. 1964).

9/ Id. at 296; see also Van Curler Broadcasting Corp. v. United States, 236 F.2d 727, 730 (D.C. Cir. 1956).

occupied four pages of the Federal Register and contained an extensive discussion of the background leading to the promulgation of the criteria. Reference was made to the large amount of information newly available in the area of emergency core cooling, and specific mention was made of the LOFT semi-scale blowdown tests which led to the need for a re-evaluation of the codes and analyses then in use to predict the effectiveness of emergency core cooling systems. The basis for particular aspects of the criteria are also given. For example, Section III explains the use of conservative assumptions and procedures in areas where knowledge is not complete. Another example is the following statement of basis for the choice of the 2300°F limit on the calculated maximum fuel element cladding temperature:

> "This limit has been chosen on the basis of available data on embrittlement and possible subsequent shattering of the cladding. The results of further detailed experiments could be the basis for further revision of this limit."

CCPE at page 4 of its memorandum states: "Rule making without a full and complete statement of the reasons for the rule is a clear violation of the Administrative

Procedure Act (5 U.S.C. §553(c)) and has been repeatedly condemned by reviewing courts." CCPE follows this statement with a string of cases, none of which involve rule making. In fact, CCPE has been unable to cite a single case in which a rule was invalidated or remanded for failure to state a sufficient basis for the rule. The cases it does cite include other types of agency action where there are independent reasons for requiring the agency to supply a more extensive basis for the action.[10/] Recognizing this fact, CCPE attempts to argue by analogy that the necessity of a developed record and of a reasoned decision is even more important in

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10/ Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d. Cir. 1965); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) and Public Service Comm'n. v. FPC, 436 F.2d 904 (D.C. Cir. 1970) involved judicial review of administrative adjudications for which hearings, detailed findings, and supporting evidence were required. In Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), contrary to the implication to be drawn from intervenors' memorandum, the requirement that the Board consider all relevant factors rested upon the fact that such factors were required to be considered by a relevant statute and not upon any characterization of this particular rate-making action as rule making. EDF v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) and Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970) involved proceedings for which there was no basis given in support of the administrative determination which could permit effective judicial review. In EDF v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the Court observed that no regulations of general applicability were formulated, and statements of the Court imply that if regulations had been promulgated it would not have been necessary to make detailed findings.

rule making than in cases of contested adversary proceedings. CCPE is in effect construing the "concise general statement" requirement of the APA as involving the same kind of findings and supporting evidence as is required for adjudications. As we have shown, it is well established that this is not the case.[11/]

Nor is review of a rule impossible without a more extensive statement, as CCPE suggests. There is no requirement that an agency rule be supported by a preponderance of the evidence. Rather, the test is whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[12/] The type of supporting statement called for by the APA in cases of rule making is appropriate for this standard of review, since the review function is to determine whether a rational basis exists for the agency's conclusions.

11/ Cases cited notes 2, 4 and 5 supra; see also Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954).

12/ California Citizens Band Association, Inc. v. United States, 375 F.2d 43 (9th Cir. 1967); Tidewater Express Lines, Inc. v. United States, 281 F.Supp. 995 (D. Md. 1968); Borden v. Freeman, 256 F.Supp. 592 (D. N.J. 1966).

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CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled "Applicant's Brief in Reply to Memorandum Submitted by The Citizens Committee for the Protection of the Environment" by mailing copies thereof first class and postage prepaid, to each of the following persons this 21st day of January, 1972:

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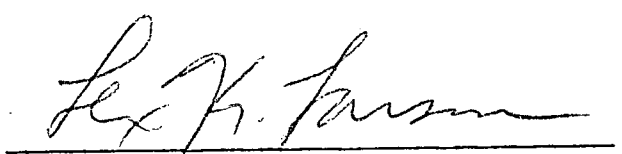

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