BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

12-27-71

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

ANSWER OF HUDSON RIVER FISHERMEN'S ASSOCIATION TO REQUEST FOR OFFICIAL NOTICE MADE BY CITIZENS COMMITTEE FOR THE PROTECTION OF THE ENVIRONMENT

STATEMENT OF THE ISSUE

During the oral argument at the hearing held in this proceeding on December 14, 1971, it became evident that CCPE's motion to take official notice of certain documents raised the fundamental question of what appropriate mechanism could be devised to assure that the Atomic Safety and Licensing Board has before it, in the record, a full presentation of the facts and opinions on which it can reach an informed and balanced decision on whether or not the emergency core-cooling system ("ECCS") proposed for Indian Point Unit No. 2 meets the requirements of the regulations and statutes by which the Atomic Energy Commission licenses nuclear reactors.

The counsel for CCPE made it clear during the argument that he would have preferred to call the authors of the documents to testify, but that the limited

hearing

resources of his clients made it impossible to do so. Such live testimony would meet the serious objections which Con Edison has raised to CCPE's motion to take official notice. It would provide an opportunity for cross-examination and it would doubtless provide a fuller and more detailed analysis of the ECCS problem to both the Board and the parties. It would allow the resolution of ECCS issue by the procedure most usually followed in courts and before administrative agencies.

The issue of how the doctrine of official notice is to be interpreted is basically secondary to the problem of how the Board and the parties can assure a full and fair hearing on the crucial issue of the ECCS.

ARGUMENT

We face a problem in this proceeding which recurs frequently in administrative hearings in which the agency must adjudicate the granting of a license or a permit to an applicant. The agency hearing must accomodate two somewhat differing notions of the structure of the procedure. First, there is the adversary process in which the applicant puts forward a case which is opposed or supported by the other parties. This is a time-honored method for testing the soundness of the applicant's position and assuring that if the application is granted it coincides with the public interest in those areas in which it has been examined and debated before

a hearing board. The adversary proceeding is an important procedure and one that is encouraged by administrative law. See, United Church of Christ v FCC, 359 F2d 994 (D.C. Cir. 1966).

The second notion of the structure of the administrative proceeding focuses on the agency as the center of the proceeding, putting on it the burden of developing a full record of facts and the duty of considering all relevant factors. Scenic Hudson Preservation Conference v FPC, 354 F2d 608 (2d Cir. 1965) cert. denied 384 US 941 (1966); ("[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."), Moss v CAB, 430 F2d 891 (D.C. Cir. 1970); Greater Boston Television Corp. v FCC, - F2d -, 20 RR 2d 2055 (D.C. Cir. 1970). ("The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues." 20 RR 2d at 2064). EDF v Ruckelshaus, - F2d -, 2 ERC 1114 (D.C. Cir. 1971). These requirements of the administrative process take account of two very practical considerations. They recognize that the agencies have an expertise and that the public interest will be best served if the agency is required to exercise that expertise regardless of the abilities or concerns of the

parties in a particular proceeding. It also recognizes that the resources available to intervenors and applicants may often turn an administrative hearing into a contest between David and Goliath if they are conducted strictly on the model of traditional litigation. See, Sive, Securing, Examining, and Cross-Examining Expert Witness in Environmental Cases, 68 Michigan L. Rev. 1175 (1970).

An administrative adjudicatory hearing thus has a complex nature. It contains the traditional structure of litigation, but it has added to it the extra duty of the agency to protect the public interest by independently assuring that all relevant factors touching on the issues before it have been considered and that there has been a full and fair hearing.

CCPE's request to take official notice must be seen in this context. Further it must be borne in mind that the ECCS question involved is one of the utmost importance. The Commission has recognized that fact by the immediately effective publication of the interim acceptance criteria for ECCS, 36 Fed. Reg. 12247 (1971), and by convening a public rule-making hearing to consider the questions involved, 36 Fed. Reg. 22774 (1971). This Board has recognized the importance and difficulty of the questions presented by CCPE by certifying some of the issues raised to the Atomic Safety and Licensing Appeals Board, Board's order of December 7 , 1971.

There are two other practical problems to be considered in the present context. The documents, or parts of them, have been referred to or relied on in various parts of this hearing. The Board is aware of their relevance to the issue it must decide. It would be both illogical and improper for the Board to attempt to blot all of this material out of its mind in reaching its decision on the ECCS issue. That would in no way serve the public interest. On the other hand, fairness to the applicant requires that it be given a reasonable opportunity to dispute the facts and opinions in the documents.

In these circumstances, I think the Board can best discharge its duty to consider all relevant factors by taking one of two courses. The first would be to provide CCPE with the resources and capability to bring the witnesses to the hearing so that its case can be fully made. This would treat the hearing as taking place in the litigation mode, but would assure that the litigation provided the Board with the full record which it must have to decide the issue before it. The second course would be for the Board to call directly all the witnesses who could be examined or cross-examined on those aspects of the applicant's case as to which the Board has serious questions which should not be resolved without further investigation. This course would emphasize the independent duties of the Board to develop all the facts relevant to

its determination.

Providing CCPE with the resources to put on its own witnesses is a course suggested by the opinion of the Supreme Court in Mills v Electric Auto-Life Co., 396 U.S. 375 (1970). In the Mills suit minority stockholders sued derivatively and on behalf of minority stockholders as a class to set aside a merger which was claimed to have proceeded from a misleading proxy statement issued in violation of §14(a) of the Securities Exchange Act of 1934. The Court held that petitioners who established a violation of the securities law should be reimbursed by the corporation for the costs of the lawsuit, including attorneys fees. The Court viewed the awarding of costs and attorneys fees as an exercise of its fundamental equitable power and gave two rationales for the award. One rationale was based on the fact that the plaintiffs were aiding the enforcement of a Congressional policy:

> [T]he stress placed by Congress on the importance of fair and informed corporate sufferage leads to the conclusion that in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders 396 U.S. at 396.

The second rationale was that those who benefit from a suit should share the burden of the litigation expenses rather than profiting without effort or expense from the activities of the plaintiff.

This second rationale was somewhat strained in the context of the Mills case and one commentator at least

is convinced that the Court's reasoning is based only on the vindication of Congressional policy:

> [T]he Mills Court legitimized a stockholders suit fee exception based solely on law enforcement policy considerations. The Court was concerned not with the benefit of this type of suit to these shareholders, but with the benefit of this type of suit to the public interest....Reimbursement for attorney's fees is a means of enforcing the law. In short, the Court granted an award for acting as a private attorney general. Note, "The Allocation of Attorney's Fees After Mills v Electric Auto-Lite Co.," 38 U. Chic. L. Rev. 316, 327 (1971)

This interpretation of the decision in Mills has been followed in Lee v Southern Home Sites Corp., 444 F2d 143 (5th Cir. 1971), an action alleging private racial discrimination in the sale of housing in violation of 42 U.S.C.§ 1982. The court made an award of costs and attorney's fees and stated that it had exercised its equitable power "[t]o insure that individual litigants are willing to act as'private attorneys general' to execute the public purposes of the statute...." 444 F2d at 148. The Eighth Circuit has taken similar action in awarding a losing plaintiff costs and fees because he "performed a valuable public service in bringing this action." Parham v. Southwestern Bell Telephone, 433 F2d 421, 429-30 (8th Cir. 1970).

The Mills decision is recent law and is a marked departure from the interpretation found in Fleischmann Corp. v. Maier Brewing Corp., 386 U.S. 714 (1967). Only Justice Black dissented from Justice Harlan's majority opinion. Thus the case is a powerful indication

of the movement of our fundamental law.

In the present hearing we are faced with a situation that is a direct extension of the Mills situation. There is a strong and oft-repeated Congressional policy aimed at insuring that nuclear facilities are licensed only when the safety and health of the public are assured. 42 USC § 2012(d), (e); § 2013(d); § 2201(b). The governing statute establishes the Atomic Safety and Licensing Boards and the hearing processes which strive to assure that those ends of the Act are achieved.42 USC §§ 2239, 2241. The intervenor, CCPE, has played the role of private attorney general and contributed to the fulfillment of the pruposes of the Act, identifying and exploring crucial questions of public health and safety.

This is a situation in which the Commission would be fully justified in exercising its equitable powers to provide the intervenor with the resources to call the witnesses necessary to a full presentation of its case. The courts have made it clear that administrative agencies like the AEC possess an equitable jurisdiction which they should exercise:

> The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. Niagara Mohawk Power Corp. v FPC, 379 F2d 153, 160 (D.C. Cir. 1967)

Extension of the Mills doctrine into the environmental field is clearly foreseeable and has recently been

commented on in the University of Chicago Law Review:

> "This kind of suit [in the area of environmental protection] offers an excellent opportunity for an expansive Mills effect. It comes to the court fused with the clear public policy imperatives of a statutory regulation. In addition, the relationship of the parties is reflective of the Mills factual situation, since the government may be said to stand in the same relation to the citizen as the corporation to the stockholder. Forcing the government to pay fees is a method of spreading the burden of enforcement among all the taxpayers, who are the beneficiaries of that enforcement. Such a result falls easily within the Mills language of benefit 'to the members of an ascertainable class,' and an award 'that will operate to spread the costs proportionately among them.' [citations omitted] Note, The Allocation of Attorneys Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 329-30 (1971).

The fact that intervenors must know of the availability of funds for the essential costs of litigation during the course of a proceeding should not pose an insurmountable problem. The decision in Mills was made well before the conclusion of the litigation. A claim of the sort urged here is presently being considered by the Second Circuit Court of Appeals in Town of Durham, New York v FPC, No. 71-1996 (2d Cir.).Equity jurisdiction should be exercised so as to be effective. In this case, the intervenor needs access to resources at the present time and, on the basis of the Mills case, those resources can properly be made available.

The second course open to the Board is to call those witnesses whom it thinks would be helpful in resolving the questions raised by CCPE. From a practical point of view, this might be a more convenient course to follow and one which would equally fulfill the Board's duty to

consider all relevant factors on the issues of the health and safety of the public.

Under the regulations of the Atomic Energy Commission the Atomic Safety and Licensing Board exercises the powers of a presiding officer. 10 C.F.R. § 2.721(d). The duties of a presiding officer are broad both in terms of the public interests with which it is concerned under the Atomic Energy Act and the National Environmental Policy Act, 42 U.S.C. §§2012, 2013, 4321 et seq., and in terms of its obligations under the law of the administrative process, Scenic Hudson Preservation Conference v FPC, supra; Moss v CAB, supra; EDF v Ruckelshaus, supra; Greater Boston Television Corp. v FCC, supra. The powers granted the ASLB to fulfill those duties are also broad:

> A presiding officer has the duty to conduct a fair and impartial hearing accoridng to law, to take appropriate action to avoid delay, and to maintain order. He has all the powers necessary to those ends, including the powers to:....
> (b) Issue subpoenas authorized by law....
> (d) Order depositions to be taken....
> (g) Examine witnesses....
> (l) Take any other action consistent with the Act, this chapter, and sections 551-558 of title 5 of the United States Code (5 U.S.C. 551-558). 10 C.F.R. § 2.718 (emphasis supplied).

In the circumstances of the present case, it would be fully appropriate for the Board to call before those witnesses whom it felt could aid in producing the full record which would assure a fair and impratial hearing. This would insure that the Board could discharge its duty to consider all relevant factors which involve the fundamental public issues of health and safety. Through

examination and cross-examination it would assure that the policy expressed in Mills of encouraging valuable and thorough contributions from 'private attorneys general' who seek to vindicate Congressional policy would be met. Likewise, it would secure to the applicant the right to cross-examine and the assurance that its case could be judged on a full exploration of the facts.

CONCLUSION

The Board has a duty to develop a full record touching on all relevant factors in the course of a fair and impartial hearing. In order to develop such a record on the issues concerning the emergency core-cooling system, while protecting the rights of the parties, the Board may well determine that live testimony from the authors of reports and studies relied on or discussed in the hearing would be advisable It would be appropriate for the Board to obtain such testimony either (a) by an exercise of the Commission's equitable jurisdiction which would make available to CCPE the resources necessary to put on sufficient testimony for its case, or (b) by exercising the powers of the Board under the law and the regulations of the AEC to call the necessary witnesses to the hearing in the Board's name.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled "Answer of Hudson River Fishermen's Association to Request for Official Notice Made by Citizens Committee for the Protection of the Environment" by mailing copies thereof first class and postage prepaid to each of the following persons this 27th day of December, 1971:

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