

BERLIN, ROISMAN AND KESSLER

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WASHINGTON, D. C. 20036

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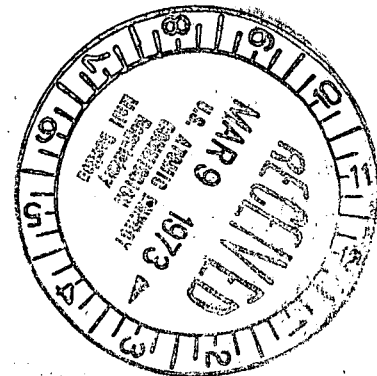
KARIN P. SHELDON

STUART M. BLUESTONE

AREA CODE 202

PHONE 833-9070

March 7, 1973



John F. O'Leary  
Director  
Directorate of Licensing  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Re: Consolidated Edison Company of  
New York (Indian Point Unit  
No. 2) -- Docket No. 50-247

Dear Mr. O'Leary:

We have just received the February 9, 1973 letter from the Applicant requesting a change in its Facility Operating License No. DPR - 26 to allow loading and subcritical testing of pre-pressurized fuel rods. We have also received your letter of February 22, 1973, granting the request. We write to urge you to reconsider your action.

If we had received prompt notice of the requested change, we would have opposed it. When Intervenor CCPE acquiesced in the granting of a license for fuel loading and subcritical testing, it was for loading of different fuel and at a time when the fuel densification phenomenon was unknown. Had the facts now known been known then we would have opposed the license on the ground that there should be a total examination of the fuel densification problem prior to any authorization to possess or load fuel rods.

As you know we are entitled to a full hearing on any licensing decision and would have been entitled to one prior to issuance of DPR - 26. See In the Matter of Wisconsin Electric Power Company (Point Beach No. 2) (Docket No. 50-301) ALAB-86 and Commission Memorandum, January 30, 1973. Where a license has been issued as the result of the waiver of the hearing right and at least while the hearing on the full term operating license is pending, no changes should be allowed to that license without affording all parties an opportunity for a hearing. Unless this protection is assured no party will ever consent to a waiver of hearing as to any sub-license for fear that the license will later be used, as here, as a vehicle by the Applicant to avoid public review of more significant safety issues.

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March 7, 1973  
page two

This is not the first time the Applicant here has sought to abuse the limited waiver of rights by parties to this proceeding. With respect to its license for operation of the plant up to 50% of power for testing, Applicant secured the consent of two parties to the proceeding to the license with the clear understanding that the testing would be for radiological purposes and would take a maximum of 100 days. After authorization for the license was granted the Applicant sought to expand the terms of the license without any further review by the ASLB or the parties, to include environmental testing and operation in excess of 100 days. See Motion To Amend The Atomic Safety and Licensing Board Initial Decision Authorizing A Testing License (February 21, 1973) and Letter from Chairman Jensch to the parties dated March 1, 1973, p. 2.

Your present action in authorizing the requested change rewards the Applicant for its attempt to avoid the hearing process and discourages amicable settlement of uncontested issues. Moreover, it partially commits Indian Point No. 2 to the pre-pressurized rods and creates the appearance that these rods do provide adequate resolution of the fuel densification problem. Of course, as you are aware the problem of fuel densification is in no way affected by the pressurization of the rods. Pre-pressurization at best may provide some protection against fuel rod collapse but even that is dependent upon a careful analysis of plant operating conditions and selection of the proper pre-pressurization level. See Staff Fuel Densification Report (November 14, 1972) p. 47. Of course, those issues would have been explored in a hearing on the proposed change if we had had one.

In addition, the license change involves a substantial expenditure of time and money for the loading and testing. If the rods are ultimately determined to be less safe than other rods the time and money already committed and the subsequent time delay in replacing and retesting the safer rods will inhibit the decision to select the safer rods. Because the AEC safety standards are minimums, the rods now being loaded and tested may meet those standards but still not be the safest. However, under the National Environmental Policy Act, the Applicant is bound to select the best alternative for fuel rods, including the safest rods if that is consistent with economic and other costs. Thus the decision under NEPA is frustrated by this early and publicly unreviewed decision to authorize a change in the Applicant's license. The Applicant should not be allowed to escape the

March 7, 1973  
page three

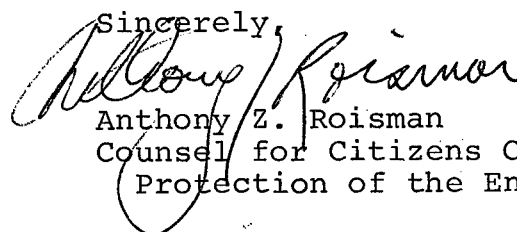
reach of NEPA by fragmenting one action - the decision to load and operate the plant with the pre-pressurized rods - into small seemingly innocuous segments. See Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F 2d 1013, 1023, (CA 5th, 1971)

Finally, as you are also aware the resolution of the fuel densification problem is not complete and the present answers are at best tentative. See Staff Motion for Summary Disposition In the Matter of Wisconsin Electric Company (Point Beach No. 2) (Docket No. 50-301) limiting operating time for fuel rods. In the last analysis, the application of NEPA will require a finely tuned cost-benefit analysis in which the hearing board will consider rejection of the license because, inter alia, of the level of uncertainty in the resolution of the fuel densification problem. The costs now incurred to load and subcritically test this new fuel will be costs which will discourage the hearing board from deciding to deny a license. Thus, it is our view that all aspects of the fuel densification problem should be resolved at one time during the hearing to be held on this matter in the near future.

In your letter of February 22, you acknowledge the fact that the safety review relevant to the proposed rods has not been completed. We believe it is particularly inappropriate for your office to authorize this change if the safety review with respect to the ultimate purpose for which the change has been made has not been completed. Clearly your office is not here authorizing the loading and subcritical testing as ends in themselves but only as means to an end. That action should not be taken (at least where it is opposed by any party) without an opportunity for a hearing where, as here, the ultimate use to which the change will be put, has not been approved as safe by the Staff.

For all of these reasons we urge you to reconsider the license change issued and to ultimately conclude not to issue it until hearings on the proposed change have been concluded.

Sincerely,



Anthony Z. Roisman  
Counsel for Citizens Committee for  
Protection of the Environment

AZR/pq  
cc: All parties of record.

FROM

CONTROL NUMBER

FILE LOCATION

Anthony Z. Reichen, Counsel for Citizens  
Comm. for Protection of the Environment

5384

DATE OF DOCUMENT

3/7/73

ACTION COMPLETION DEADLINE

3/23/73

TO

ACTION PROCESSING DATES

PREPARE FOR SIGNATURE OF:

John F. O'Leary

Acknowledged \_\_\_\_\_

\_\_\_\_\_  
Chairman

Interim Report \_\_\_\_\_

\_\_\_\_\_  
Director of Regulation

Final \_\_\_\_\_

3 O'Leary

DESCRIPTION 132

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REMARKS

Req reconsideration of change in Facility Operating License,  
Indian Point 2, to allow handling and substitution testing of  
pre-prescribed fuel rods and that change not be issued  
until hearings on the proposed change have been concluded

REFERRED TO

DATE

IS NOTIFICATION TO THE JCAE

RECOMMENDED? \_\_\_\_\_

Change 1/Action

3/9/73

3/12/73

Cys:

Kingsley

Black

O'Leary

Shaper

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LW

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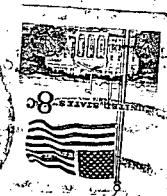
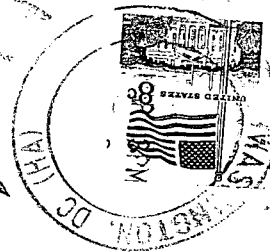
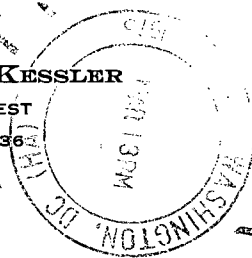
DIRECTOR OF REGULATION  
COMMUNICATIONS CONTROL

Form HQ-32 (6-70)  
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Mr. J.F. O'Leary, Director  
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