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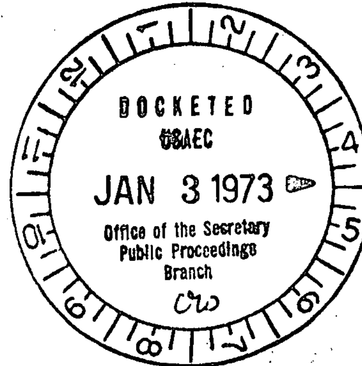

Samuel W. Jensch, Esq.
Chairman
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

Re: Consolidated Edison Company
of New York, Inc.
Indian Point Unit No. 2
AEC Docket No. 50-247

Dear Chairman Jensch:

Applicant has received your letter of December 18, 1972, dealing with the state of the law under the Supreme Court's decision in Field v. Clark, 193 U.S. 649 (1892).

Applicant is firmly of the opinion that Field v. Clark continues to be the ruling case with respect to the question you have raised regarding the Rules of the House of Representatives. As you will have noted from your review, Shepherd's United States Citations (cases), up to and including the November 1972 advance sheet edition, indicate that no reported opinion of any court has ever criticized, questioned, or limited -- much less overruled -- this case in the eighty years since it was decided by the Supreme Court.

There are some cases which indicate that a legislative committee must abide by its rules. E.g., Christoffel v. United States, 338 U.S. 84 (1949), Yellin v. United States, 374 U.S. 109 (1963), Gojack v. United States, 384 U.S. 702 (1966). These cases, however, dealt with criminal prosecutions for perjury before a Committee (Christoffel), or for contempt of Congress (Yellin and Gojack). As such, they deal with the special rights of the criminal accused or the individual who is subjected to legislative scrutiny.

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If these are the cases the Chairman has in mind, Applicant's position is that they are inapposite to the present inquiry, which in no sense involves the rights of the criminal accused or the role of the courts in preserving the freedom of the individual when the Congress deals with him as an individual.

Field v. *Clark* does not involve matters which are merely *ancillary to* the legislative process, but deals rather with the ultimate issue of the validity of an Act of Congress. On this issue, the Constitution provides a path which must be followed to ensure the intelligent enactment of laws. The teaching of *Field* v. *Clark* is that the inquiry into the validity of *Acts of* Congress ends once the requirements stated in the Constitution and 1 U.S.C. § 106a (1970) have been met. These solemn requirements provide the same protection for the populace as a whole in respect of a Public Law as does the intervention of the Federal Courts for accused contemnors of or perjurers before the Congress.

The arguments raised by the EDF-HRFA memorandum are without merit. Among other things, these arguments fail to recognize the continuing validity of the doctrine of separation of powers among the branches of the Federal Government. In *Baker* v. *Carr*, 369 U.S. 186 (1962), the fountainhead of modern law *on justiciability*, Mr. Justice Brennan, writing for the majority, listed the issue of "*Validity of enactments*" (emphasis in original) as one of the "threads that make up the political question doctrine." *Id.* at 211, 214-15. Matters involving the ratification of *a constitutional* amendment "were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp" (footnote omitted). So too, with regard to the enacting process, "'The respect due to coequal and independent departments,' and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities." *Id.*, *citing Field* v. *Clark* and Lesser v. Garnett, 258 U.S. 130, 137 (1922). Even while conceding that a court might delve into legislative journals to save a law by supplying an effective date, this part of the opinion concluded by stating that the political question doctrine "will not be so applied as to promote only disorder." 369 U.S. at 215.

Applicant submits that to pursue this inquiry further would only promote disorder. It is noteworthy that Section 511(c) is probably not the only provision of the Federal Water Pollution Control Act Amendments of 1972 which could be questioned if Field v. Clark is disregarded. It is arguable that Sections 303(d)(1)(B) and (D), 316(b) and 401(d) suffer from the same "infirmity" as has been diagnosed by the intervenors for Section 511(c). This very possibility, however, shows how the process suggested by the intervenors can turn into a kind of legislative snipe-hunt, with courts and agencies pencilling out a subsection here, a phrase there, in a tardy and misplaced effort to do the Congress' job for it. No clearer evidence exists to support Mr. Justice Brennan's characterization of the political question doctrine as "a tool for the maintenance of governmental order." 369 U.S. at 215.

Further, Applicant does not concede that Section 511(c) "was non-germane" as the intervenors assert. Although, as we indicated on page 15 of our memorandum of law, a point of order could have been made from the floor, the fact that it was not made, coupled with the fact that Section 511(c) was not listed by Representative Anderson in his memorandum is highly persuasive that a valid germaneness point of order did not lie. The difficulty of deciding the question of germaneness illustrates again the unwisdom of the inquiry which the intervenors would have the Board undertake.

If the Chairman has in mind some other specific case which he considers to cast doubt on Applicant's position, Applicant requests that it be so advised so that an appropriate response may be prepared.

Very truly yours,

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