11/21/72

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

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

APPLICANT'S ANSWER TO MOTION OF HRFA-EDF TO BAR APPLICANT FROM OFFERING TESTIMONY, ADDUCING EVIDENCE, EXAMINING AND CROSS-EXAMINING WITNESSES ON ENVIRONMENTAL ISSUES

Introduction

On November 16, 1972 the Hudson River Fishermen's Association and Environmental Defense Fund ("HRFA-EDF") filed a motion with the Board asking that the hearings scheduled to commence on December 4, 1972 be postponed until Applicant has taken several actions. Applicant urges the Board to deny the motion on the grounds that it is dilatory and that the actions demanded are neither required by the Atomic Energy Commission's regulations, nor necessary in order to facilitate an orderly hearing, nor called for under any agreement among the parties.

I. The Commission's Regulations Nowhere Require an Applicant to Take the Actions Sought by the Intervenors

The intervenors demand that Applicant file:

> ". . . (1) a concise statement of what conditions, if any, for the protection of the environment Applicant seeks to have incorporated in its license, (2) a statement which with particularity sets forth the factual contentions on which Applicant relies to support its license application on those matters and issues which are in controversy between the Applicant and the Staff or the Intervenors, (3) a statement which with particularity sets forth the factual contentions on which Applicant relies to controvert or disprove the contentions of the Staff or the intervenors. . . ."

HRFA-EDF do not cite any specific provision in the Commission's regulations which supports their motion for the good reason that none exists. The intervenors are simply seeking to twist the regulations which have been developed to determine the scope and manner of an intervenor's participation in an operating license proceeding in order to serve their own tactical objectives.

The Commission's Rules of Practice contain a number of specific requirements that intervenors identify their "contentions"; (e.g., 10 CFR § 2.714(a), (b); 10

CFR Part 2, App. A, section III). The obvious purpose of these rules is to eliminate from the hearing process irrelevant or insufficiently particularized subjects which may be raised by persons who seek to participate in the hearing. That is also the clear meaning of the Appeal Board's decisions to which the intervenors refer.

No parallel requirement applicable to the Applicant nor, for that matter, to the Regulatory Staff exists. Indeed, the requirement that formerly existed in 10 CFR Part 2, Appendix A for the Applicant to prepare a summary of its application has been deleted in the Commission's restructured Rules of Practice promulgated in August of this year. The Applicant has already submitted a considerable amount of direct testimony in this proceeding in support of the issuance of the operating license for which Applicant has applied. The facts upon which Applicant relies to support its position on matters in controversy are stated in this direct testimony. It is no more necessary for the Applicant to go beyond what it has already done and specify "factual contentions" in the sense the intervenors seek here than it was for the

Applicant to have done so with respect to the radiological issues which have occupied the hearing thus far, or for the Staff to do so now.

The intervenors' assertion that somehow Applicant is required to take these actions because it has the "burden of proof" is utterly beside the point. In the first place, the regulation in question provides that "unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof." (10 CFR § 2.732) This section does not support the intervenors' position, since it is the intervenors, as the proponents of an order requiring a license condition, who have the burden of proof here. This regulation certainly is not susceptible to the contorted interpretation put forth by HRFA-EDF.

II. Applicant Has Sufficiently Identified Its Legal and Factual Position So That the Hearing Can Proceed in an Orderly Fashion

For the convenience of the Board, there are attached hereto the three documents which Applicant has already filed in this proceeding dealing with the factual matters in controversy among the parties. Applicant

submits to the Board that these documents are more than adequate to permit a focused and orderly hearing to take place in December as scheduled.

HRFA-EDF's argument that Applicant has failed "to provide a clear and concise statement of the license conditions which it seeks" is absurd. Applicant has applied for a license to operate the Indian Point 2 facility as presently designed for the 40-year period authorized by the Atomic Energy Act of 1954, as amended. Applicant has repeatedly testified concerning the actions which it proposes to take in order that the environment will be properly protected during operation of the facility (See e.g., Chlorination at Indian Point (follows Tr. 6052), document entitled "Scope of Work for Ecological Studies at Indian Point," to be offered in evidence on December 4, 1972 under the sponsorship of Mr. Woodbury and testimony of Mr. Newman on Alternative Closed-Cycle Cooling Systems at Indian Point 2, to be offered in evidence on December 4, 1972). Whatever other parties may think, the Applicant does not consider

it necessary to ask that its operating license be conditioned to require that the Applicant do what the Applicant states it will do.

In any event, the Staff has proposed conditions and Technical Specifications to be included in Applicant's license. It is obvious from the Applicant's attached Statement of Position Concerning Environmental Issues dated October 16, 1972 that Applicant is opposing in this hearing the conditions proposed by the Staff (Final Environmental Statement, page vii) insofar as they require that a closed-cycle cooling system shall be required and in operation no later than January 1, 1978 and that an evaluation of the environmental and economic impacts of an alternative closed cycle system be submitted to the AEC for review by July 1, 1973. It is also obvious that the Applicant opposes in this hearing the license conditions proposed by HRFA-EDF in their November 12, 1972 submission entitled "Intervenors' Statement of Contention and Matters in Controversy Concerning Environment [sic] Issues." The Commission's regulations provide that in a contested operating license proceeding, the Board ". . . will make findings only on the matters in controversy.

Depending on the resolution of those matters, the Director of Regulation would issue, deny, or appropriately condition the operating license." (10 CFR Part 2, App. A, section VIII(c); see also 10 CFR § 2.104(c) and 10 CFR Part 50, App. D, section A.11) The Applicant need not further identify matters in controversy concerning the proposed license conditions.

In response to HRFA-EDF's confused and misplaced arguments in its motion and letter of November 12, 1972 about the necessity for Applicant to state "factual contentions" in support of the license application and to controvert the position of other parties, Applicant simply calls the Board's attention again to the attached submissions which Applicant has already made and to Applicant's evidence in this proceeding. Applicant refers the Board particularly to the summary statements contained in the testimony of Dr. Lauer, Dr. Lawler, Dr. McFadden and Dr. Raney which was submitted on October 30, 1972. This testimony was prepared and submitted in accordance with the agreed-upon schedule in order that this hearing might proceed in a timely and orderly fashion.

It is particularly inappropriate for the intervenors to criticize Applicant's statement of matters in controversy with the Staff. The Staff has not found fault with the Applicant's submissions, nor is there reason for it to do so. Insofar as the matters in controversy between Applicant and the intervenors are concerned, there patently is no reason for Applicant to state explicitly the mirror image of HRFA-EDF's "Outline Summary of Intervenors' Factual Position" in view of the already clear identification of controverted factual matters contained in Applicant's attached submission of November 13, 1972. The intervenors are not insisting that the Staff file any such document and, indeed, to do so would be ridiculous.

Conclusion

Applicant submits that, for reasons best known to themselves, the intervenors have decided that they are not willing to proceed with the hearings in December as previously agreed upon -- hence the flurry of requests and objections that have arisen in the last ten days. Applicant is confident the Board will not be put off by such harassing tactics. For the reasons discussed, the motion of HRFA-EDF should be denied in its entirety.

Respectfully submitted,

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