

11-16-72

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))

MOTION TO BAR APPLICANT FROM OFFERING
TESTIMONY, ADDUCING EVIDENCE, EXAMINING
AND CROSS-EXAMINING WITNESSES ON
ENVIRONMENTAL ISSUES.

Introduction

Intervenors, Hudson River Fishermen's Association and Environmental Defense Fund, move the Board pursuant to 10 CFR, §§2.718 and 2.757 to bar the Applicant, Con Edison, from offering testimony, adducing evidence, examining or cross-examining witnesses on environmental issues in this proceeding or, alternatively, to bar any further hearings for the offering of testimony, adducing of evidence, examination or cross-examination of witnesses until three weeks after the Applicant has served on the Board and the parties, (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, and to grant such further amendment to the schedule in this proceeding as may be necessary, just and proper.

Statement of Facts

A schedule for briefing, preparation and the taking of evidence in this proceeding was established by agreement between counsel for the Applicant and the Intervenors pursuant to the letter of counsel for the Hudson River Fishermen's Association of October 2, 1972. The Board implicitly approved that schedule through its Orders of October 16, 1972 and October 31, 1972. The schedule required that on October 30, 1972, "The parties will submit proposed testimony, the names of witnesses and their statements of factual contentions and matters in controversy," and that on November 13, 1972 "The parties will submit supplemental statements of contentions and matters in controversy based on the testimony submitted on October 30, 1972."

On October 16, 1972, (the date on which legal contentions were due under the schedule), Con Edison filed "Summary of Con Edison's Position Concerning Environmental Matters." That document ended by stating

This Board should conclude . . . that Indian Point 2 should be licensed to operate with its present once-through cooling system subject to the condition that Con Edison make the studies and prepare to take remedial actions, if necessary, as discussed above. Summary at 6.

Nowhere in the Summary are the terms of the proposed condition stated concisely, and it may be that Con Edison, in fact, never contended that any condition be imposed.

On October 30, 1972, Con Edison filed testimony and "Applicant's Statement of Key Issues in Controversy Concerning the Staff's Final Environmental Statement," but Con Edison did not file any specified factual contentions. Intervenors filed testimony, a statement of matters in controversy with the Staff and a ten page "Outline Summary of Intervenors' Factual Position."

On November 13, 1972, Con Edison filed documents controverting parts of Intervenors' factual position; Con Edison did not file any specific factual contentions. Intervenors' filed "Intervenors' Statement of Contentions and Matters in Controversy Concerning Environmental Issues."

Thus three weeks before the date on which hearings are scheduled to begin, the Applicant has not set forth what conditions to its license, if any, it now seeks. The Applicant has not provided the Board or the parties with any specified factual contentions in the areas in controversy which are related to the facts which Con Edison intends to rely on and

by which it will discharge its burden of proof in this proceeding.

Argument

The Atomic Energy Commission has promulgated regulations which seek to assure that the proceedings before its Licensing Boards will be focussed and orderly. A crucial element of this scheme has been the requirement that the contentions between the parties be particularized before the evidentiary hearings are commenced. Further, in order that the evidence on the various matters in controversy may be weighed properly against the contentions of the various parties, the burden of proof has been placed on the Applicant. 10 CFR §2.732; 10 CFR Part 2, App. A, V(d)(1) ("Pursuant to §2.732, the applicant has the burden of proof.").

The schedule adopted by the Applicant and the Intervenors in this proceeding was aimed at complying with the Commission's regulations by providing an orderly and timely scheme under which the contentions of the parties vis-a-vis each other and the Staff would be plainly laid out so that the evidentiary hearing would proceed in an orderly and coherent manner and allow the Board to judge whether the Applicant had discharged its burden of proof; whether the Final Environmental Statement was adequate or required amendment or supplement and on the

basis of those judgments to decide what conditions for the protection of the environment should be included in the license which the Applicant seeks.

Con Edison's failure to provide a clear and concise statement of the license conditions which it seeks and a particularized statement of its factual contentions make it impossible for the Board or the parties to judge or argue whether Con Edison has discharged its burden of proof since there is no statement of what it is Con Edison seeks to prove. The failure to file specified factual contentions make an orderly hearing impossible since there is no clear statement of what factual case the testimony is submitted in support of. This situation leaves the Intervenors no choice but to seek relief from the Board.

A few examples from the testimony submitted by Con Edison should suffice to demonstrate this point. Dr. Raney's testimony is prefaced by a Conclusion and General Summary Regarding Striped Bass. Dr. Raney's testimony begins with some predictions:

There will be no irreparable or irreversible damage to the striped bass population which is native to the Hudson River (Hudson River race) or those which occasionally overwinter in the Hudson River (Chesapeake Bay or Delaware Bay race) over a period of the next eight years. Raney at 8.

This statement might be taken to be one of the ultimate factual contentions which Con Edison will seek to prove. It would be

a relevant proposition if Con Edison is seeking an eight year license. If Con Edison is seeking an eight year license, it is high time the Board and the parties found out about it. If Con Edison is seeking some other license for which eight years is a significant period of time, then the Board and the parties must have spelled out for them what the terms of that license are.

In his "General Summary Regarding Striped Bass", Dr. Raney prefaces his conclusions by stating that "[t]he following inferences can be supported from the vast amount of work done over the last 35 years." If Applicant is suggesting by this statement that its case is sufficiently proven by presenting evidence one strand of which, but not the preponderance of which, supports its position, then the Applicant has utterly misjudged the burden which it must discharge in this proceeding. It has confused the substantial evidence test by which courts review administrative agency decisions with the preponderance of the evidence test which it must meet in this proceeding.

The Board and the parties are left to pick their way through the voluminous evidence Con Edison has presented in an effort to piece together the outline of the factual case which Con Edison intends to present and prove in this proceeding. This is the equivalent of a civil plaintiff going before a court with a mass of testimony, but no well-defined prayer

for relief and no complaint which details its position on the factual issues. It is in clear violation of the regulations by which AEC seeks to conduct its proceedings.

The Commission and the Appeals Board have on at least three occasions addressed the problem of specification of contentions in proceedings. The question has arisen in terms of how a petitioner for intervention must specify his contentions, but the standards must also apply in the case of applicants where, as here, there are matters in controversy between the applicant and the Regulatory Staff and the intervenors.

In its Memorandum and Order in Wisconsin Electric Power Co. and Wisconsin-Michigan Power Co. (Point Beach Unit No. 2), AEC Dkt 50-301 (May 6, 1971), the Commission set forth the ends of specificity which should be achieved before the hearing begins:

A cardinal prehearing objective of the presiding Atomic Safety and Licensing Board will be to establish, on as timely a basis as possible, a clear and particularized identification of those matters related to the issues in this proceeding which are in controversy. At 3-4.

In its Memorandum and Order in Boston Edison Co. (Pilgrim Nuclear Power Station), AEC Dkt 50-293 (July 12, 1971), the Commission again discussed the need to specify contentions and issues and set the requirement in the context of the hearing process:

In the Commission's view, the course [of specification] outlined above is central to the proper focus and orderly conduct of the prehearing process, including the scope of appropriate discovery, and of the later hearing itself. At 5.

Later in the Wisconsin Electric case the Appeals Board ruled on a motion to strike contentions of the petitioners which the Licensing Board had found to be insufficiently particular. The Appeals Board upheld the decision of the Licensing Board, allowing five contentions, but striking 38 and allowing no discovery, submission of evidence, direct or cross examination on those contentions which the petitioners had failed to make reasonably specific. Memorandum and Order of Appeals Board in Wisconsin Electric Co. and Wisconsin-Michigan Power Co. (Point Beach Unit No. 2) AEC Dkt 50-301 (August 18, 1971).

In the present case the Board and the parties are not even presented with vague or general factual contentions, there has simply been no submission of contentions at all. The relief granted in Wisconsin Electric should be granted here. Con Edison should be barred from submitting testimony, adducing evidence, examining or cross-examining witnesses on the environmental issues on which they failed to provide a statement of their factual contentions.

At a minimum, Con Edison should be required to provide to the parties a concise statement of what conditions for the protection of the environment it seeks to have incorporated in the license, a statement which sets forth Con Edison's factual contentions with particularity and a statement which sets forth with particularity the factual contentions on which Con Edison relies to controvert or disprove the contentions of the other

parties and the Staff. In accordance with the schedule in the proceeding, statements of this nature should have been provided to the parties on October 30th and November 13th five and three weeks before the beginning of the evidentiary hearing. The parties should be given at least three weeks with these statements before the commencement of testimony from or cross-examination by Con Edison, so that they may be prepared for a coherent and focussed proceeding. Con Edison's statements to meet this requirement must be clear and appropriate documents, not a melange of bits and pieces extracted from their witnesses.

Conclusion

For the foregoing reasons, the motion of the Hudson River Fishermen's Association and the Environmental Defense Fund should be granted in its entirety and full relief afforded the moving parties.

Anthony Z. Roisman authorizes me to state that he joins me in this submission on behalf of the Environmental Defense Fund.

Respectfully submitted,



Angus Macbeth
Attorney for Hudson River
Fishermen's Association

Dated: New York, New York
November 16, 1972

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CERTIFICATE OF SERVICE

I hereby certify that I have served documents entitled:
"Intervenor's Reply to Regulatory Staff and Applicant's
Answer On Motion to Rule Final Environmental Statement On
Indian Point No.2 Inadequate In Certain Respects" and
"Motion to Bar Applicant From Offering Testimony, Adducing
Evidence, Examining and Cross-Examining Witnesses On Environ-
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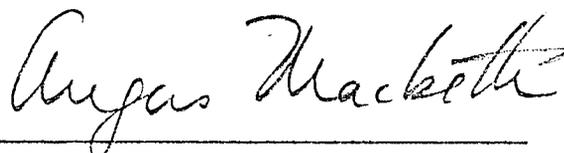
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