

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))

BEFORE THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

APPLICANT'S REPLY TO THE EXCEPTIONS FILED
BY THE CITIZEN'S COMMITTEE FOR THE
PROTECTION OF THE ENVIRONMENT

On August 4, 1972, the Citizen's Committee for the Protection of the Environment ("CCPE") filed a document with the Atomic Safety and Licensing Appeal Board ("Appeal Board") setting forth "exceptions" to the Initial Decision issued by the Atomic Safety and Licensing Board ("Licensing Board") on July 14, 1972. In this document CCPE requested that the Appeal Board stay the issuance of the license for Unit No. 2 authorizing operation for testing purposes and order the Licensing Board to re-open the hearing to receive further evidence. Applicant opposes each of these perfunctory procedural requests on the grounds set forth below and urges

that the Appeal Board deny CCPE's exceptions to the Licensing Board's Initial Decision in their entirety.

I.

CCPE's "Exceptions" Must Be Denied Because
They are Vague, Uncertain and
Legally Deficient

Although CCPE states initially that its action is taken pursuant to Section 2.762 of the Rules of Practice of the Atomic Energy Commission, CCPE flouts the express language of the very rule which it cites.^{1/} In all respects CCPE's "exceptions" to the Initial Decision are deficient. Even in CCPE's attempt to reserve its right to raise, in subsequent licensing actions, any issues not made a part of the exceptions CCPE is in contravention of the regulations of the Commission. CCPE has not separately numbered each exception, has not identified any part of the Initial Decision to which it objects, has not attempted to indicate any portion of the record upon which it relies and has not cited any supporting

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"Sec. 2.762. Exceptions to initial decision and briefs to the Commission.--(a) *** Each exception shall be separately numbered, shall identify the part of the initial decision to which objection is made; shall specify precisely the portions of the record relied upon; and shall state the grounds for the exception including the citation of authorities in support thereof. Any objection to a ruling, finding, or conclusion which is not made a part of the exceptions will be deemed to be waived."

authorities for the procedures or actions which it has taken.

Moreover, CCPE has not made any attempt to set forth specific exceptions to the Initial Decision, but rather makes the sweeping statement that it "excepts to the issuance of a facility operating license for Indian Point No. 2" on the basis that "recently discovered data regarding the integrity of fuel rods in Westinghouse pressurized water reactors raises new questions about the safety of this plant." Rather than presenting to the Appeal Board specific indications as to the alleged error or errors of the Initial Decision by the Licensing Board with regard to a matter of fact, law or procedure, CCPE has presented general conclusory statements which CCPE somehow considers sufficient to meet the requirements of the regulations of the Commission and the fundamental tenets of administrative law.

In its zeal to effectuate an objection to a valid Initial Decision of the Licensing Board, CCPE has presented the Appeal Board with a flurry of misplaced procedural requests based upon vague and uncertain allegations. Fortunately, the Commission's rules provide against such dilatory tactics. The Commission's provisions for the filing of exceptions are not mere technicalities, but rather have been promulgated

for the reasoned purpose of providing "the Commission an adequate basis on which to review the exceptions of a party and to insure that such review shall fairly include all the material points which the excepting party wishes to make"^{2/} as well as providing a minimum safeguard against attempts to invalidate an Initial Decision without having any basis at the time for such result. The Atomic Energy Commission has stated that "[t]he practice of submitting exceptions without record references and citations of authorities cannot be condoned by the Commission."^{3/}

Other administrative agencies have refused to consider exceptions which are not in compliance with their regulations. The NLRB, after stating that exceptions must designate those portions of the record upon which a party relies, rejected as exceptions a brief claimed to be properly drawn exceptions which referred to documents outside the record.^{4/} In another NLRB case the submitted exceptions were stricken on the ground that the "so-called exceptions [did] not state the questions of procedure, fact, law or

^{2/}

Power Reactor Development Co., 1 A.E.C. 128, 159 (1959).

^{3/}

Id. at 159-60.

^{4/}

Kings Electronics Co., 4 Ad. L. 2d 557 (NLRB, 1954).

policy to which exception [was] taken; they [did] not cite the precise parts, or any part, of the record relied upon; and they [did] not state grounds or cite authorities. Neither [was] there a brief that would either aid in construing them, or explain the basis of respondent's request for oral argument."^{5/}

II.

CCPE Has Not Presented Facts Which Would Justify Reopening the Hearing With Respect to the Testing License for Unit No. 2

In addition to the obvious verity that the vague and uncertain remarks designated as exceptions by CCPE do not conform to the requirements of the Commission's Rules of Practice, CCPE has failed to state any facts upon which an exception might be based or which would justify reopening the hearing on the testing license. CCPE does not clarify at any time its specific contentions relating to the safety of Unit No. 2. CCPE does cite a portion of the Staff Safety Evaluation which sets forth that the initial core for Unit No. 2 is substantially the same as the fuel that has been used in the Ginna reactor and then baldly concludes that the

^{5/}

Pat Izzi Trucking Co., 16 Ad. L. 2d 420 (NLRB, 1964).

"relevance of events at Ginna to the safety of IP #2 is thus clearly established." But CCPE does not even attempt to demonstrate in the most superficial manner that data concerning the Ginna fuel show that the safe operation of Unit No. 2 during the proposed testing operations would be compromised.^{6/}

It goes without saying that a reference to a magazine article and an "incorporation by reference" of unspecified "data" contained in another licensing docket cannot be the basis for an exception to the Initial Decision, nor can these observations justify the reopening of the hearing on the testing license.^{7/}

6/

We note in passing that if CCPE actually believed that the Ginna fuel experience constituted a safety consideration relative to the testing activities at Unit No. 2 it certainly should have raised the issue prior to the issuance of the Initial Decision. Details concerning the conditions observed in the fuel recently removed from the Ginna facility were publicly available in June.

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Of course, if CCPE's filing is intended as a request that the Appeal Board order the Licensing Board to take evidence at some future stage of this proceeding for the issuance of an operating license for Unit No. 2, it is an obvious attempt to circumvent the authority of the Licensing Board and must be denied summarily.

III.

Observed Fuel Conditions at Other Facilities
Do Not Affect Safe Operation of Unit No. 2
Under the Requested Testing License

Applicant is well aware of the experience with fuel at other facilities which is generally adverted to by CCPE. For the information of the Appeal Board there is enclosed a copy of a letter from Applicant to the Regulatory Staff dated August 17, 1972 transmitting a document entitled "Summary Report of Fuel Rod Anomalies and Their Impact on the Operation of Indian Point Unit No. 2 During 50% Testing Operations." This document concludes as follows:

"The investigation and evaluation of the fuel rod anomalies disclosed recently at several other plants, as they relate to the operation of Indian Point Unit No. 2 during the period of 50% testing operations, has been completed.

"Of the anomalies disclosed, only fuel densification is expected to occur, but it will not limit or affect operation under the testing license. For the power level which will be limited to 50% of full power under the testing license, safety requirements would be satisfied. All of the requirements of the Interim Acceptance Criteria, including Criterion 3, would be satisfied.

"It is concluded, therefore, that the fuel rod anomalies disclosed at certain other reactors will not adversely affect the safety of Indian Point Unit No. 2 during the period of the 50% testing operations."

IV.

CCPE's Request for the Issuance
of a Stay Should Be Denied on the
Ground That Good Cause Has Not
Been Demonstrated

The Licensing Board's July 14, 1972 Initial Decision authorizing the issuance of a testing license for Unit No. 2 was effective immediately upon issuance, subject to the Licensing Board's determination that a party had demonstrated "good cause" for the issuance of a stay of immediate effective-^{8/}ness. Therefore, CCPE's request to the Appeal Board to "stay the issuance of an operating license for IP #2" should be denied as unauthorized and inconsistent with the Commission's regulations, particularly 10 CFR § 2.764.

In any event, the imposition of such an extraordinary or emergency measure as a stay is an exercise of reasoned discretion based upon established standards. The Appeal Board in its Memorandum and Order, dated June 20, 1972^{9/} has defined the standards by which "good cause" may be determined. These standards are in accord with those set forth in the Virginia^{10/}Petroleum case and followed in the Federal courts:

^{8/}
10 CFR § 2.764.

^{9/}
Wisconsin Elec. Power Co. (Point Beach Nuclear Plant Unit 2), AEC Dkt. No. 50-301.

^{10/}
Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
2. Has the petitioner shown that without such relief, it will be irreparably injured?
3. Would the issuance of a stay substantially harm other parties interested in the proceedings?
4. Where lies the public interest?
5. Has there been a major procedural defect in the proceedings concerning an issue central to the decision rendered which would be fundamental to the validity of that decision?

CCPE has not demonstrated that the standards for a stay as set forth by the Appeal Board have been met. The basis for CCPE's request is simply that "[i]n light of these new developments" a stay should be granted. Moreover, the record in this proceeding demonstrates that the issuance of a stay would be improper in that, among other things, Applicant would be harmed by the issuance of a stay and that such action would be contrary to the public interest. Since CCPE has not satisfied its burden to demonstrate that good cause exists for the issuance of a stay, its request must be denied.

V.
Conclusion

For the reasons stated above, Applicant requests that the Appeal Board deny CCPE's exceptions to the Licensing Board's Initial Decision, as well as its request for an order reopening the hearing and its request for the issuance of a stay.

Respectfully submitted,

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By

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