

11-26-73

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 BRIEF IN OPPOSITION TO THE
EXCEPTIONS TO THE INITIAL DECISION
FILED BY THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK

November 26, 1973

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On October 29, 1973 the Attorney General of the State of New York
("Attorney General") filed a brief ^{1/} in support of his two exceptions ^{2/} to the
Initial Decision issued by the Atomic Safety and Licensing Board on
September 25, 1973. Applicant opposes the exceptions filed by the Attorney
General on the grounds that such exceptions are not supported either by the

^{1/} Brief on Exceptions of the State of New York to the Initial Decision of the
Atomic Safety and Licensing Board Dated September 25, 1973, Oct. 29, 1973
("Attorney General's Brief").

^{2/} The State of New York's Exceptions to the Initial Decision of the Atomic
Safety and Licensing Board Dated September 25, 1973, Oct. 5, 1973
("Attorney General's Exceptions").

evidentiary record or the law.^{3/} Applicant requests the Atomic Safety and Licensing Appeal Board ("Appeal Board") to deny the Attorney General's exceptions.^{4/}

I.

Applicant's Response to the
Attorney General's Exception 2

Applicant's position in opposition to this exception is set forth in Applicant's Nov. 26 Brief^{5/} at pages 3-9. Furthermore, Applicant denies the Attorney General's irrelevant suggestion that the Federal Water Pollution Control Act Amendments of 1972^{6/} "will require the installation of the closed-cycle system, or at least the termination of the once-through cooling system" by July 1, 1977.^{7/} There is absolutely no evidence in the record to

^{3/} The Attorney General has also failed to comply with the requirements of 10 C.F.R. § 2.762(c).

^{4/} For the most part, the Attorney General's brief reiterates the arguments proffered by HRFA. Applicant, therefore, incorporates by reference appropriate portions of its brief in opposition to the exceptions filed by HRFA. Applicant's Brief in Opposition to HRFA's Exceptions to the Initial Decision, Nov. 26, 1973 ("Applicant's Nov. 26 Brief"). For example, Applicant opposes the Attorney General's suggestion at 2-3 of its brief that the Appeal Board limit its scope of review to "whether the Initial Decision of September 25, 1973, contains errors of law and whether the findings and conclusions of the ASLB are based upon substantial evidence in the record." See Applicant's Nov. 26 Brief at 1-3.

^{5/} See note 4 supra.

^{6/} Pub. L. 92-500, 86 Stat. 816 (1972).

^{7/} Attorney General's Brief at 8.

support the allegation that a closed-cycle cooling system is the "best practicable control technology [for] Indian Point 2 respecting effluent limitations by July 1, 1977."^{8/} The Attorney General's statement that "it is virtually certain that a closed-cycle cooling system will be deemed by the Environmental Protection Agency to be the best practicable as well as the best available technology to be employed at Indian Point 2"^{9/} not only is unsupported by any evidence herein but is also incorrect. The Environmental Protection Agency has not even proposed guidelines as to what should be considered "best practicable" or "best available" technology and indeed cannot promulgate such guidelines until after rulemaking proceedings have been completed.^{10/}

II.

Applicant's Response to
Attorney General's Exception 1

The argument of the Attorney General of the State of New York that the cost-benefit analysis for Indian Point 2 "should reflect the prospect of penalties which the applicant will likely incur unless and until a cooling tower

^{8/} Id.

^{9/} Id.

^{10/} The Attorney General's unsupported allegation that "a closed-cycle cooling system at Indian Point 2 will be necessary . . . to insure compliance with State thermal pollution standards" is also false. Id.

is constructed at Indian Point 2"^{11/} is without merit. The Attorney General has described a legal action relating to the operation of Indian Point 2 which had been brought against the Applicant. The Attorney General has failed, however, to support allegations that Applicant will violate New York State law by operating Indian Point 2 with the present once-through cooling system. An alleged "constant succession of legal actions" neither mandates "the imposition of fines between \$12.5 million . . . and \$65 million . . . every year"^{12/} nor establishes violation of any law. Indeed, developments to date in the action to which the Attorney General referred indicate the opposite conclusion.^{13/}

The Attorney General brought suit against Applicant alleging violation of the New York State Environmental Conservation law by the killing of approximately 160,000 fish as a result of the operation of the Indian Point 2 circulating water pumps in early 1972. Applicant, however, has denied and continues to deny any such violation. Although the Supreme Court, New York County, did grant the Attorney General's motion for summary judgment on November 9, 1972 and did direct that a hearing be held to assess the fine to be imposed for such violation, the Appellate Division, First

11/ Attorney General's Brief at 10.

12/ Attorney General's Brief at 12.

13/ See Applicant's Response to Memorandum of the Attorney General of the State of New York Regarding the Applicability of State Laws to the Operation of Indian Point Unit No. 2, May 17, 1973 at 3-6.

Department, on April 5, 1973, reversed the Supreme Court's decision. To prejudge or, indeed, even consider facts which have not been established and which Applicant believes will not be established would be mere speculation on the part of the Appeal Board.

Furthermore, while as indicated in the Attorney General's brief,^{14/} the New York State Department of Environmental Conservation issued an Order to Applicant on February 29, 1972^{15/} to cease testing operations of the Indian Point 2 cooling water circulators, this Order was rescinded by a subsequent Order issued by the Department of Environmental Conservation on April 28, 1972.^{16/} By the Order of April 28, the Applicant consented to operate Indian Point 2 in a manner specifically adapted to provide protection for the Hudson River environment. Since the issuance of that Order, the New York State Department of Environmental Conservation has not taken action to prevent operation of Indian Point 2 in any way.

14/ Attorney General's Brief at 13.

15/ Tr. 4832-34.

16/ Follows Tr. 5799.

III.

Conclusion

For the reasons set forth herein, Applicant requests the Appeal Board to deny the two exceptions to the Initial Decision filed by the Attorney General on October 5, 1973.

Respectfully submitted,

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Dated: November 26, 1973