9-4-73

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

REPLY OF THE STATE OF NEW YORK TO THE ANSWER OF THE APPLICANT TO THE MOTION OF THE STATE OF NEW YORK FOR RECONSIDERATION

This reply is submitted by the Attorney General of the State of New York in response to the Answer of applicant Consolidated Edison Company of New York, Inc. ("Con Edison") dated August 31, 1973, to the motion of the State of New York requesting the Atomic Safety and Licensing Board ("Board") to reconsider its Initial Decision dated August 9, 1973, authorizing the issuance of a license for the limited operation of Indian Point 2.

The motion of the State of New York asserts that the Initial Decision of the Board was issued without the necessary water quality certification required by §401 of the Federal Water Quality Act Amendments of 1972 ("1972 Act"). Because the position of the State of New York was based upon information not available to the Board at the time it issued its Decision, the Attorney General chose to

proceed by way of motion rather than by merely filing exceptions to the Board's Decision. It is to be noted that the Atomic Safety and Licensing Appeal Board has urged the Board to act on the substance of the motion expeditiously and has granted the parties permission to file exceptions to the Initial Decision of the Board within seven days after its action on said motion with respect to water quality matters (Memorandum and Order dated August 23, 1973).

The applicant's assertion that the State of New York "delayed this eleventh-hour submission" must be contrasted with the fact that the Answer of the State of New York to the applicant's initial motion for the issuance of a license authorizing limited operation was dated August 1, 1973 and served by mail on the same day, two days after the State of New York was served with the applicant's motion, and that the letter of the State of New York to the Board reiterating its position was dated August 8, 1973, two days after the applicant submitted its proposed Initial Decision and Order dated August 6, 1973.

If any party must be accused of eleventh-hour submissions, it is the applicant. Despite its ingenuous assertions that this Board was relying on the §21(b) certificate issued on December 7, 1970 until the invalidity of said certificate was raised at the last minute by the State of New York, the

applicant cannot escape the fact that it knew that the State of New York did not consider said certification to be valid, and that it had been proceeding under the provisions of the 1972 Act since its enactment not because of "legal prudence", but because of the requirements of the Department of Environmental Conservation of the State of New York. Because the applicant gave it every reason to expect that it would follow the dictates of §401 in this proceeding, (as in fact did until July 1973), the State of New York saw no need to raise the questions of the valididy of the §21(b) certificate filed by the applicant in this proceeding, a question it considered moot.

Con Edison argues that the State of New York cannot now assert the invalidity of the §21(b) certificate because of the "reliance" of the Board and the AEC Regulatory Staff as of December 30, 1971. But there was in fact no such reliance until this Board's recent Initial Decision and Order. Con Edison's license authorizing testing at up to 50 percent of full power was not based on reliance on the §21(b) certificate, but upon a §401 certificate issued by the State of New York on April 24, 1973 and forwarded to the Director of Regulation of the U.S. Atomic Energy Commission.

It is clear that Con Edison did not intend to rely on the §21(b) certificate after the passage of the 1972 Act. It was not unitl it received a letter from the U.S. Environmental

Protection Agency dated June 18, 1973, that it reverted to its reliance on the §21(b) certificate, without informing the State of New York of its altered position. In fact, the applicant continued its request for §401 certification.

The applicant argues that §401 certification is not needed here, citing its §21(b) certification and the annexed opinion of Alan G. Kirk, III, EPA Acting Assistant Administrator for Enforcement and General Counsel. While the opinion of the regulatory agency responsible for administrating the 1972 Act is entitled to weight, it is to be noted that the question presented here is purely a legal one involving statutory interpretation and that Mr. Kirk's opinion cites no supporting references. Section 401 contains no reference at all to certification under §21(b) of the Water Quality Improvement Act of 1970 ("1970 Act") and, as Mr. Kirk notes, the two sections do contain somewhat different requirements.

In addition, it must be noted that Mr. Kirk's opinion that a §21(b) certification was sufficient to support the issuance of a federal permit after that date contained the proviso that "the certification was legally valid when issued." This priviso makes the opinion of Mr. Kirk moot here, for the §21(b) certificate presented by Con Edison was not legally valid when issued, for the reasons set forth by the State of New York

in its letter to the Board dated August 8, 1973. It is to be noted that no where in its Answer does the applicant continue to assert the validity of the §21(b) certificate. Instead, the applicant argues that, despite the unqualified assertion by the Attorney General of the State of New York that "it is the official position of the State of New York that the aforementioned §21(b) certificate is invalid," since no documentation of this statement was provided by the State Agency responsible for its issuance, the assertion of the Attorney General should be disregarded.

The Attorney General represents the State of New York in this proceeding. It was on behalf of the State of New York that intervention was sought and granted. New York Executive Law §63 provides that the Attorney General is the official legal representative of the State of New York in all actions and proceedings. In that official capacity, the Attorney General of the State of New York, on behalf of the State, has informed the Board that a §21(b) certificate issued by the State, was invalidly issued.

If the applicant wishes to continue its amazing assertion that this position is not in fact the official position of the State of New York, it is welcome to pursue that line of argument to its inevitable conclusion. Despite its assertion that "there has been no determination by the responsible agency of the State of New York that such certification is invalid", the Attorney General was informed of the

fact of its invalidity by the "responsible agency of the State on New York" --- its Department of Environmental Conservation --- and included this "official" position in its August 8, 1973 letter at the specific direction of said department. So that there can be no more dispute on this matter, let it be stated once again: as the official legal representative of the State of New York, as its representative in the proceeding, and on the instructions of the Department of Environmental Conservation of the State of New York, the Attorney General of the State of New York hereby informs this Board that said §21(b) certificate, issued without the mandatory public notice, was and is invalid.

The §21(b) certification was never "attacked" elsewhere because its issuance was considered mooted by the passage of the 1972 Act. Further, inasmuch as Con Edison does not dispute the substance of the assertion by the State of New York --- that the §21(b) certificate is in fact invalid --- it would seem senseless and foolhardy for the applicant to attempt to justify further reliance on said certificate, a path that would inevitably lead to litigation, if not by the State of New York, then by other interested parties.

The applicant attempts to argue (note 8, p. 7) that, even if the §21(b) certification were to be disregarded, the waiver provisions of that section would apply, and that, pursuant

to §4(b) of the 1972 Act, no §401 certification would be required. Section 4(b) continues in full force and effect "[a]ll rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made or taken" under the 1970 Act. Any alleged waiver under §21(b) would clearly not comply with §4(b) of the 1972 Act.

The applicant goes further and alleges that since the State of New York has not acted upon Con Edison's January 31, 1973 request for certification pursuant to §401, the requirements of said section have been waived. Section 401 provides for waiver of the requirements of that section if, within a reasonable period of time after the receipt of a request for certification, not be exceed one year, the State "fails, or refuses to act" on said request for certification. As the applicant noted, a request for certification was made to the State of New York on January 31, 1973. The State acted on this request by forwarding a proposed Notice of Application to the applicant, which Con Edison published on March 20, 1973. The State of New York acted further, pursuant to said request of Jauary 31, by issuing a limited certification for testing at up to 50 percent of full power. It was the position of the State of New York that upon the issuance of said limited certification the proceeding commenced by the January 31, 1973 request of Con Edison was terminated, and that prior to any

further certification a new request or application would have to be made. This position was communicated to the applicant, which renewed its original request by letter to the Department of Environmental Conservation dated July 17, 1973. As the applicant noted (note 10, p. 8), on August 28, 1973 appropriate notice was published of its request, with comments to be submitted by September 19, 1973.

It is thus the position of the State of New York that action has been taken on the applicant's January 31, 1973 request, and that the waiver provision of §401 is therefore inapplicable. Furthermore, the State of New York contends that, in light of the seriousness of the request, and the fact that the procedural requirements of §401 have not yet been clearly spelled out, any delays in the issuance of the requested certification must be considered reasonable. Reference should be made to the letter to the Board from the State of New York of August 8, 1973, which details further the basis of the "reasonable" delays herein.

Section 401 certification under the 1972 Act is the foundation of the new law. Waiver of its requirements should not be imposed lightly. Action on Con Edison's original request was taken within less than three months, and action on its July 17, 1973 request will be taken shortly. Throughout the past several months the applicant has tried to instill these proceedings with an atmosphere of crisis, attempting to achieve

a hasty resolution of legitmate questions of admisistration involving a newly enacted law. The State of New York is fully aware of the power needs of its citizens, but it also has a responsibility to fulfill its duties under federal and State law so that its actions will not be open to question by others in the future. Final action on Con Edison's §401 request is contemplated during this month.

For these reasons, it is the position of the State of New York that the Board should reconsider its authorization of the issuance of a license for the limited operation of Indian Point 2, and hold its final decision in abeyance pending the receipt of appropriate §401 certification by the State of New York.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

PAUL S. SHEMIN
Assistant Attorney General

Dated: New York, New York
September 4, 1973

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that I have served the document entitled "Reply of the State of New York to the Answer of The Applicant to the Motion of the State of New York for Reconsideration" by mailing copies thereof first class and postage prepaid to each of the following persons this 4th day of September, 1973:

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