8-31-73

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

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

APPLICANT'S ANSWER IN OPPOSITION TO THE MOTION FOR RECONSIDERATION FILED BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

On August 13, 1973 the Attorney General of the State of New York ("Attorney General") filed a motion requesting the Atomic Safety and Licensing Board ("the Board") to reconsider its Initial Decision of August 9, 1973 authorizing the issuance of a license for the limited operation of Indian Point 2. The Attorney General bases his motion on the allegation that Applicant has failed to provide the Board with the necessary certification pursuant to Section 401(a)(1) of the Federal Water Pollution Control Act Amendments of 1972 ("1972 Amendments").[1/] Applicant opposes the Attorney

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1/ 33 U.S.C. 1151 et seq. In its motion the Attorney General alleged formally for the first time that it is the "official position of the State of New York" that the Section 21(b) certification issued to Applicant on December 7, 1970 is invalid. At 4. The Attorney General further alleged for the first time that "there is no provision in the 1972 Act for waiver of the required § 401 certification upon the presentation of a § 21(b) water quality certificate issued pursuant to the 1970 Act." At 5.

General's motion on the grounds that it is improper, tardy, unsubstantiated and not in accordance with law.

I.

The Attorney General's Motion for Reconsideration is Tardy and Improper and Should be Denied

The Rules of Practice of the Atomic Energy Commission ("the Commission") provide that the proper procedure for review of the Board's August 9, 1973 Initial Decision is the filing of exceptions in accordance with 10 C.F.R. Section 2.762. The Attorney General has chosen not to file such exceptions but rather to file a motion which is not contemplated by the Commission's Rules.

The Attorney General is clearly guilty of laches. Although all parties were on notice of the expedited proceedings by virtue of the Board's telegrams of July 27 and August 2 and the Board's letter to Applicant of August 1, 1973, the Attorney General delayed this eleventh-hour submission. Although the New York State Department of Environmental Conservation issued a Section 21(b) certification

on December 7, 1970, the Attorney General has chosen to remain silent on this issue until this time.

In any event, the Attorney General may not raise this allegation at this time in this proceeding.[2/] The Attorney General's argument that "the applicant has never referred to said certification [Section 21(b) certification] in any of its applications for the operation of its facility at steady state levels or for testing purposes"[3/] simply circumvents the issue. Since at least December 30, 1971 the Staff, in supporting Applicant's request for interim operating authorization, has stated that a Section 21(b)

2/ See United States v. Elof Hansson, Inc., 296 F.2d 779 (C.C.P.A. 1960), cert. denied, 368 U.S. 899 (1961).

3/ Attorney General's Motion at 4. The Attorney General continued: "It should be noted further that in support of its application for an order permitting it to operate its plant at up to 50 percent of full power for testing purposes, the applicant submitted a § 401 certification from the State of New York dated April 24, 1973." Id. This statement is incorrect.

certification had been issued by the State of New York.[4/] Despite reliance on such declarations, however, the Attorney General did not raise an allegation that the Section 21(b) certification was defective in any way prior to his letter of August 8, 1973.

4/ Discussion and Conclusions by the Division of Reactor Licensing, U.S. Atomic Energy Commission, Pursuant to Appendix D to 10 C.F.R. Part 50 Supporting the Issuance of a License to Consolidated Edison Company of New York, Inc. Authorizing Limited Operation of Indian Point Unit No. 2, Docket No. 50-247, Dec. 30, 1971 (follows Tr. 4412) at 23. See also Environmental Report Supplement, Appendix I (Applicant's Exh. 3-B); Draft Detailed Statement on the Environmental Considerations Related to the Proposed Issuance of an Operating License to the Consolidated Edison Company of New York, Inc. for the Indian Point Unit No. 2 Nuclear Generating Plant, April 13, 1972 at I-7; Final Environmental Statement Related to Operation of Indian Point Nuclear Generating Plant Unit No. 2, Sept. 1972 (follows Tr. 6271).

II.

A New Section 401 Certification Is Not Required for The Further Operation of Indian Point 2

As stated above, the evidentiary record in this proceeding demonstrates that the Applicant has submitted to the Commission a proper certification pursuant to Section 21(b). This certification was submitted as required by the Federal Water Pollution Control Act, as amended,[5/] prior to the enactment of the 1972 Amendments. Section 4(b) of the 1972 Amendments operates to continue in full force and effect the Section 21(b) certification previously supplied.[6/]

Although on page 9 of his motion the Attorney General states that "[i]t is the official position of the

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5/ Pub. L. No. 91-224, 84 Stat. 91.

6/ On page 5 of his motion the Attorney General incorrectly interprets Federal law. The Attorney General's argument that Section 4(b) of the 1972 Amendments means only "that any federal agencies which have issued licenses pursuant to such § 21(b) certification need not seek additional § 401 certification" is contrary to the opinion of the United States Environmental Protection Agency as set forth in a letter from Mr. Kirk, EPA Acting Assistant Administrator for Enforcement and General Counsel to Mr. Shapar, June 18, 1973, attached hereto.

State of New York that the aforementioned § 21(b) certificate is invalid . . .", the Attorney General fails to support his conclusion by any documentation from the State agency responsible for the issuance of such certifications. Contrary to the assertion by the Attorney General, there has been no determination by the responsible agency of the State of New York that such certification is invalid. The letter from the Department of Environmental Conservation to the Applicant dated August 10, 1973, cited by the Attorney General[7/] does not so state. Certainly the Attorney General's opinions on the interpretation of a Federal statute are entitled to no special consideration or weight.

The Attorney General has never attacked the Section 21(b) certification issued on December 7, 1970 outside this proceeding. Now, the Attorney General assumes the role of the issuing agency and attacks that very certification which that agency issued. Rather than attack the 21(b) certification in a proceeding with respect to such authorization, the Attorney General attempts to attack collaterally the validity of the 21(b) certification in this proceeding. This the Attorney

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7/ Attorney General's Motion at 5.

General cannot do.[8/]

Applicant's request for a Section 401 certification pursuant to the 1972 Amendments does not demonstrate, as noted by the Attorney General,[9/] that the Applicant considered the Section 21(b) certification for Indian Point 2 to be irrelevant to this proceeding. Appreciating the differences of opinion as to the relationships between the requirements of Section 401 and Section 21(b), Applicant proceeded upon a prudent course and, indeed continues to prosecute its application for a Section 401

8/ Callanan Road Improvement Co. v. United States, 345 U.S. 507 (1953). The foregoing discussion assumes that the Section 21(b) certification issued on December 7, 1970 is necessary to support the issuance of a license for further operation of Indian Point 2. Even if such certification were disregarded, and a Section 401 certification were not submitted, issuance of a license for further operation would be consistent with applicable requirements. Section 21(b)(1) of the Water Quality Improvement Act of 1970 (Pub. L. No. 91-224, 84 Stat. 91) provided for a waiver of certification requirements if the State did not act on a request within a reasonable time and, in any event, not more than one year. Accordingly, the certification requirements of Section 21(b) of the Water Quality Improvement Act of 1970 were also satisfied on the alternative grounds set forth in that section, and by virtue of Section 4(b) of the Federal Water Pollution Control Act Amendments of 1972, there is no need for further certification under Section 401(a)(1) of that statute. Moreover, under Section 21(b)(7) of that Act, no certification was necessary for the issuance of Facility Operating License No. DPR-26 on October 19, 1971.

9/ Letter from the Attorney General to Chairman Jensch, August 8, 1973 at 3.

certification which was filed on January 31, 1973.[10/] Moreover, Applicant has requested that such certification be applicable to all activities up to and including full-power operation. Such prudence, however, brings neither legal consequences nor causes any defect in the Section 21(b) certification.

The New York State Department of Environmental Conservation has not issued a certification pursuant to Section 401(a)(1) of the 1972 Amendments as requested by The Applicant on January 31, 1973.[11/] Thus, even if any

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10/ Indeed, on August 28, 1973 appropriate notice pursuant to Section 401 of the 1972 Amendments was published in The New York Times. This notice provides until September 19, 1973 for the submission of comments by the public on the issuance of a Section 401 certification for a full-term, full-power operating license for Indian Point 2.

11/ It should be emphasized that Applicant's request transmitted to the New York State Department of Environmental Conservation on January 31, 1973 for a § 401 certification was not limited to interim operation of Indian Point 2. That Department issued a Notice on Application for Certification Under Provisions of Federal Water Pollution Control Act Amendments of 1972 on March 20, 1973. This notice did not in any manner indicate that the certification requested was for any license less than a full-term, full-power operating license for Indian Point 2 as contemplated by Section 401(a)(1) of the Amendments of 1972. The New York State Department of Environmental Conservation did issue on April 24, 1973 a "conditonal response" to Applicant's request for certification, limited to 50% testing operation.

certification were required as a matter of law, the failure of the State to issue a certification would actuate the waiver provisions of Section 401(a)(1) of the 1972 Amendments. Actuation of the waiver provisions would then eliminate the necessity for a new Section 401 certification. Eight months have elapsed since Applicant's January 31, 1973 request for certification. Certainly this is a reasonable period of time for consideration of Applicant's request. Indeed, the regulations of the Environmental Protection Agency cited by the Attorney General, although not controlling, support Applicant's position.12/

12/ The regulations cited by the Attorney General on page 1 of his August 8, 1973 letter include the provision that "three months shall generally be considered a reasonable period of time." The Attorney General's suggestion that the State could not have acted more swiftly because, among other things, Indian Point 2 "has been the subject of continued controversy" and "additional relevant data is consistently being developed" is unreasonable. Letter of August 8 at 2. Furthermore, the fact that new thermal criteria have simply been proposed should not delay the issuance of a Section 401 certification. Id. In fact, based on the assurances of the Attorney General to the effect that he would attempt expedited consideration of Applicant's requests for State permits and authorizations for a closed-cycle cooling system, Applicant would have expected that the Attorney General would have urged a period of time less than three months for State action on Applicant's request for certification as is also permitted by 40 C.F.R. Section 125.15(a). See State of New York's Memorandum of Law in Support of Its Proposed Findings of Fact, June 11, 1973.

III.

Conclusion

The Attorney General's motion for reconsideration of the Board's Initial Decision is improper, tardy, unsubstantiated and contrary to law. On the basis of the Commission's Rules and the Federal Water Pollution Control Act Amendments of 1972 the Attorney General's motion should be denied.

Very truly yours,

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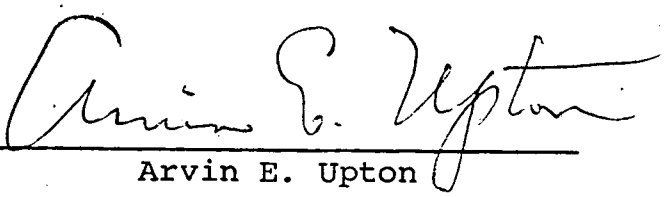
By 
Arvin E. Upton

Dated: August 31, 1973