8-28-73

BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK (Indian Point, Unit No. 2)	)))	Docket No. 50-247

CITIZENS COMMITTEE FOR PROTECTION
OF THE ENVIRONMENT
RESPONSE TO APPLICANT'S
EXCEPTION TO INITIAL
DECISION DATED AUGUST 9, 1973

Applicant's exception should be denied because the issue raised by the exception is not properly before this Appeal Board. A pre-requisite to review of an issue by the Appeal Board is that there be a decision adverse to the Applicant. */ Applicant asked for and obtained a license to operate the plant at 50% steady-state power. **/ The Licensing Board's denial of the

*/ In special cases an issue may be certified for review without an adverse decision. Applicant admits that such a procedure is appropriate here by requesting certification in its August 9th Motion. Certification was denied in the Licensing Board's August 10th Order (p. 3) and no exception was taken to that determination.

**/ Applicant requested an open-ended time limit on the license for steady-state operation but this was denied. No exception was taken to that denial.

alternative request for a 100% (or 99%) testing and 50% steady-state operation license was merely dicta. In effect, Applicant asked for A or B and it got A or B; i.e. it got B.

A reading of the Applicant's original request for a license under Section 50.57(c) indicates clearly that the Applicant not only would be fully satisfied with a 50% steady-state license but in fact that was all the Applicant sought. The Affidavits of Schwartz (paragraphs 4, 6, 7-9) and Newman (paragraph 9) refer only to the advantages of 50% steady-state operation. No allegations regarding the need for Indian Point #2 to be able to operate above 50% power at any time in the Fall of 1973 are given.

This deficiency in the Applicant's case is also a further basis for sustaining the Licensing Board's decision because with respect to the requested testing operations, Applicant does not meet the requirements of 10 CFR Part 50, Appendix D in that it presents no data to establish the benefits of testing operations above 50% to offset the admitted adverse impact on the environment of such operation. (Woodbury Affidavit, paragraph 12) In addition the Licensing Board's decision finds that steady-state operation at 50% will be beneficial by allowing the conduct of certain thermal modelling which could not be done if testing operations in excess of 50% were allowed.

With respect to the merits of the Applicant's exception, we believe the Applicant misreads the regulation. A request to test a plant must be for 1% and no more. An application to test and operate a plant may be for more than 1%. The term "operation" includes both testing and operation but as inseparable elements.

The administrative history of Section 50.57(c) consistently distinguishes between low-power testing - which all parties must concede is 1% testing - and "operation below full power but going beyond low-power testing". 36 Fed. Reg. 8861. If, as the Applicant argues, operation meant testing only then the Commission would have had no reason to retain the "low-power testing" language. Furthermore, the requirement that a request to test above 1% power must include a request for authority to operate assures that full consideration is given to the important safety and environmental matters associated with operation above 1% power. A testing program above 1% involves operation at various power levels for only a few hours.*/ Consideration of the environmental or safety impact of such programs is extremely difficult. However, if steady operation at a specified

*/ On the other hand 1% testing requires operation at that level for an extended period.

level and for a specified time is included in the request then it is possible to focus on that level and time limit for setting the outer limits of safety and environmental harm.*/

Such a reading of Section 50.57(c) also eliminates the kind of piecemeal nibbling procedures which the Applicant has used here. Requests for authorization to test subcritically and at 50%, at 90%, at 99% and at 100% have been filed by the Applicant. This play to avoid facing serious issues of safety and environmental harm is nothing but legal nonsense which Section 50.57(c) was designed to prevent.

Prior cases in which testing only was authorized above 1% are not weighty precedents. Even if the lack of a contest in those cases is not a legal distinction it at least must be considered in weighing the precedent. No Board has faced the precise issue here nor had this issue briefed to it. The fact that its decision assumed the answer to the question does not mean that the answer was the result of a studied analysis. This Board faced with the issue for the first time should decide it unfettered by prior decisions where no consideration was given to the issue.

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*/ This applies equally to focusing on the benefits of operation. A program to test, without any operation has no discernible benefits except future operation. By requiring that future operation be requested with the testing license a specific limit is placed on the benefit alleged.

If this Board determines that the Applicant's exception should be granted we feel that in light of the paucity of material seeking to justify authority to test in excess of 50% the Applicant should be directed to make further submittals to which answers could be made prior to convening of a hearing by the Licensing Board on the request.

Respectfully submitted,

Anthony Z. Roisman
Counsel for Citizens Committee
for Protection of the
Environment

Dated: August 28, 1973