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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

8/23/73

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point Station, Unit No. 2)	)	Docket No. 50-247

AEC REGULATORY STAFF'S BRIEF IN SUPPORT OF APPLICANT'S EXCEPTION TO INITIAL DECISION ISSUED BY THE LICENSING BOARD ON AUGUST 9, 1973

I.

BACKGROUND

By motion dated July 27, 1973, Consolidated Edison Company of New York, Inc. (applicant) filed a motion seeking license authority to operate its Indian Point No. 2 facility at a steady state power level of 50% and to operate the facility for testing purposes at 100% of rated power. On August 9, 1973, the Atomic Safety and Licensing Board (Licensing Board) issued an "Initial Decision Authorizing Continued Testing and Steady State Power Operation at 50 Percent of Full Power Through September 30, 1973" (Initial Decision). The Initial Decision authorized the issuance of a license providing for a portion of the authority requested by applicant's motion, dated July 27, 1973,

pursuant to 10 CFR §2.730, 50.57(c) and Appendix D, Section A.12 of Part 50. Also on August 9, 1973, applicant requested that its motion of July 27, 1973, be amended nunc pro tunc to request authorization to operate the reactor for testing purposes at 99% of rated power, rather than at 100% of rated power.

On August 10, 1973, the Licensing Board denied applicant's motion of August 9, 1973. In its Order of August 10, 1973, the Licensing Board amplified its reasons for denying the request for testing authority in excess of 50% of rated power.

On August 16, 1973, the applicant filed an Exception to that aspect of the Initial Decision which held that "Section 50.57(c) does not authorize testing operations up to full power..." In its request for relief, the applicant has requested the Appeal Board to reverse that aspect of the Initial Decision denying applicant's motion for additional testing authorization, to remand to the Licensing Board and to order the issuance of a Supplemental Initial Decision within three days after date of issuance of such an Appeal Board order.

The basis for the Board's determination to reject applicant's request for testing at power levels in excess of 50% is not entirely clear. On page 2 of its August 10, 1973 Order, the Licensing Board

indicates that it held that the terms of §50.57(c) were a "limitation on the authority of the Board in that testing operations could be authorized only to the extent of 1 percent of total rated power level." The Board indicated that the phrase "further operations short of full power" in §50.57(c) has been under Commission precedents restricted to "steady state operations". It also indicated that since applicant had here clearly distinguished between two types of authority desired [steady state operation at 50% and testing at 100% subsequently amended to 99%], "Section 50.57(c) could be specifically applied to the Applicant's requests."

On the other hand, the Board indicates (p. 3 and 4) three additional factors that it had considered: that previously authorized testing had not yet been completed; that recommended testing of applicant's thermal plume model could be undertaken during some steady state operations which had been authorized by its August 9, 1973 Order; and that some continued operation at 50% may be desirable before testing at higher power should be undertaken.

While these additional factors may have been part of the Board's determination not to authorize testing operation at power levels in excess of 50%, it is clear that a principal element of the

Board's determination was the Board's conclusion that under §50.57(c), "testing operations could be authorized only to the extent of 1 percent of total rated power level."

It is to this holding that applicant's Exception is directed. The staff supports applicant's Exception.

II.

THE LICENSING BOARD ERRONEOUSLY CONSTRUES SECTION 50.57(c) TO LIMIT TESTING AUTHORITY TO 1 PERCENT

In order to reach its conclusion erroneously limiting the scope of §50.57(c), the Board reads such section as creating a dichotomy between "low power testing" and "further operations short of full power", such that "further operations short of full power" does not include authority to conduct tests at power levels in excess of 1%. Such holding by the Board is at odds with Commission practice, the language of the regulation as discussed in the Commission's Statements of Consideration accompanying the promulgation of this section, and it is contrary to the guidance as to the purpose of this section provided by the Commission in its Memorandum and Order, dated March 10, 1972, in the Palisades Case, Docket No. 50-255.

Precedents

The Board either disregards practice as represented by cases, including Pilgrim[1/] and Prairie Island,[2/] in which the presiding Licensing Board authorized the Director of Regulation to make the appropriate findings and to issue requested licenses, which specifically requested "testing" operations at power levels in excess of 1%, or distinguishes those instances as uncontested with respect to the §50.57(c) motion. Other instances of Commission practice, such as that represented by Kewaunee[3/] and Zion,[4/] are either disregarded, distinguished on the grounds that the motions were uncontested or were considered as not pertinent since they had not clearly distinguished between testing and steady state operation.

In distinguishing "Commission precedents" on the basis that they have been based largely on the stipulations reached by the parties

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1/ Boston Edison Co. (Pilgrim Nuclear Power Station) Docket No. 50-293, Order of ASLB, dated June 1, 1972.

2/ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Unit 1), Memorandum and Order of ASLB, dated July 11, 1973.

3/ Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant) Docket No. 50-305, Memorandum and Order of ASLB, dated June 5, 1973.

4/ Commonwealth Edison Company (Zion Station, Unit 1) Docket No. 50-295, Order of ASLB, dated July 24, 1973.

(i.e., they were uncontested), the Board fails to appropriately consider the provisions of §50.57(c). The scope of authority covered by this section is the same whether the motion is contested or not. Accordingly, an attempted distinction between contested and uncontested motions, under this section, is not applicable to the matter of the scope of licensing authority which may be granted under §50.57(c).

More significantly, in the instant proceeding, the Appeal Board, by Memorandum and Order, dated April 24, 1973 (ALAB-119), RAI-73-4, p. 265, approved applicant's prior request for temporary testing operations up to 50% of full power which had been referred to the Commission by the Licensing Board's Decision of July 14, 1972. Such action supports, and we believe authoritatively determines, the proposition that "testing" in excess of 1% may be authorized upon motion made pursuant to 10 CFR §50.57(c).

The Provisions of §50.57(c) and The Commission's Statements of Considerations

The Licensing Board's ruling is based on a conclusion that "further operations short of full power" as used in §50.57(c) refers to

operations which are of a different kind and character from "testing". This is at odds with the provisions of the section itself, and with the intent reflected in the Commission's Statements of Considerations published in connection with the adoption of §50.57(c).

Section 50.57(c) provides for motions for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing), and further operations short of full power. Nothing in the language remotely suggests that higher power testing cannot be encompassed within the term "further operations". Indeed, the section, in the parenthetical phrase, identifies "low-power testing" as "operation". Higher power testing clearly falls within the ambit of "further operations".

This is again reflected in the Statements of Considerations published in connection with the proposed regulation (35 FR 16687) and published in connection with the regulation as adopted (36 FR 8861). The proposed regulation, published October 28, 1970, related only to "low-power testing" (defined as in the current section). The Statements of Considerations (35 FR 16687) noted, however, that "while the proposed amendment deals specifically with low-power testing, it would not preclude authorization of further operation beyond

low-power testing, subject to the same requirements...the Boards have had authority to grant such authorizations in the past."

Subsequently, in the regulation as promulgated May 14, 1971, the Commission added the present language providing for authorization of "further operations short of full power", in order to clarify the existing authority of the Board (36 FR 8861). The change was described as providing "specifically for authority for operation below full power but going beyond low-power testing, defined as operation at not more than 1 percent of full power..." In both instances, in describing the authority of the Board with respect to authorization of further operations, the Commission characterizes such operation as going "beyond low-power testing".

The Licensing Board's conclusion is clearly at odds with this guidance by the Commission as to the purpose served by interim licensing authorization under 10 CFR §50.57(c) and 10 CFR Part 50, App. D.

This description, and the language actually used in the section, clearly indicate that "further operations" covers, and was intended to cover, activities beyond, or additional to, 1 percent power testing -- and was not restricted only to activities of a different kind and character.

Specific Commission Guidance

In addition to the foregoing, the Commission has had the opportunity to consider motions filed under §50.57(c) which were referred to it for authorization in accordance with the provisions of 10 CFR Part 50, App. D, Section D.2. In the Palisades[1/] proceeding, the applicant filed a motion requesting authorization to operate at 60% of full power. In accordance with the Commission's rules, authorization to operate in excess of 20% of full power was referred to the Commission.

In reviewing the requested authorization, the Commission provided important guidance as to the purpose served by interim licensing authorizing the conduct of activities at less than full power:

> "A brief exposition of the steps necessary to bring a completed nuclear power plant to full operational status will contribute to an understanding of the time it takes to achieve that status and of the purpose which interim licensing to conduct activities at less than full power levels serves. These sequential steps, which cover a several-month period, begin with fuel loading and continue as follows: achievement of criticality; core physics testing and confirmation of safety and protective systems; low power (1% plus) testing; integrated testing of engineered safety features and normal plant operating equipment; power ascension to confirm design performance; warranty run or equivalent by the plant supplier; operation at levels up to full power; and normal commercial operation." (Commission's Memorandum and Order, dated March 10, 1972, p. 6).

1/ In the Matter of Consumers Power Company, Docket No. 50-255.

The Licensing Board's conclusion is clearly at odds with this guidance by the Commission as to the purpose served by interim licensing authorization under 10 CFR §50.57(c) and 10 CFR Part 50, App. D.

III.

CONCLUSION

For the foregoing reasons, the staff believes that the Licensing Board's ruling that under §50.57(c) "testing operations could be authorized only to the extent of 1 percent of total rated power level" is erroneous. The staff supports applicant's Exception and applicant's request that the Appeal Board reverse such ruling and remand the proceeding to the Licensing Board for further consideration of applicant's Motions of July 27, 1973, and August 9, 1973. The staff does not, however, fully support that portion of applicant's request for relief which asks that the Appeal Board direct the Licensing Board to issue a Supplemental Initial Decision, effective as of August 9, 1973, consistent with the Appeal Board's Order "not later than three days after the date of issuance of such order".

Upon remand, the Licensing Board will be obliged to give further consideration to a number of issues in connection with the authorization of operation at power levels in excess of 50% of steady state

power. These are described in the staff's Answer of August 21, 1973, to applicant's Motion to Reduce Time for Filing Briefs on Applicant's Exception (p. 3).

In view of this scope of further consideration by the Licensing Board, we believe that the applicant's proposed limit for the Licensing Board of three days is inappropriate. Rather, we believe that more general guidance should be provided; e.g., that the Licensing Board should promptly determine the applicant's motion for testing operations beyond 50%.

Respectfully submitted,

Thomas F. Engelhardt

Thomas F. Engelhardt
Chief Hearing Counsel

Dated at Bethesda, Maryland,
this 23rd day of August, 1973.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "AEC Regulatory Staff's Brief in Support of Applicant's Exception to Initial Decision Issued by the Licensing Board on August 9, 1973," dated August 23, 1973, in the captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 23rd day of August, 1973:

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