8-17-73

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 SUPPORT OF
APPLICANT'S EXCEPTION TO THE
LICENSING BOARD'S INITIAL DECISION

On August 16, 1973 Applicant filed pursuant to 10 C.F.R. Section 2.762 its exception to the Initial Decision issued by the Atomic Safety and Licensing Board ("Licensing Board") on August 9, 1973 authorizing continued testing and steady-state power operation at 50 percent of full power through September 30, 1973. Specifically, Applicant appealed by taking exception to the Licensing Board's incorrect holding that 10 C.F.R. Section 50.57(c) permits the Licensing Board to authorize testing operations only to

the extent of 1 percent of total rated power.[1] This brief is submitted in support of Applicant's exception.

I.

The Licensing Board Has Authority to Authorize Operation of Indian Point 2 for Testing Purposes Above 1 Percent of Rated Power

The plain meaning of 10 C.F.R. Section 50.57(c) and consideration of its apparent purpose lead to the conclusion that although steady-state operation at full power may not be authorized thereunder, steady-state operation of a facility at any power level short of full power may be authorized.[2]

The sentence in question provides:

> "An applicant may, in a case where a hearing is held in connection with a pending

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[1] The Licensing Board clarified its holding in the document entitled "Order Denying Applicant's Motion for Issuance of License Authorizing 99 Percent Testing Operations," Aug. 10, 1973 at 2.

[2] See, e.g., Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant), Docket No. 50-305, Memorandum and Order (ASLB June 5, 1973); Omaha Public Power District (Fort Calhoun Station, Unit 1), Docket No. 50-285, Memorandum and Order (ASLB April 5, 1973); Commonwealth Edison Co. (Zion Station, Unit 1), Docket No. 50-295, Order (ASLB Feb. 7, 1973).

> proceeding under this section, make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation."

It is necessary as a matter of sound engineering practice, which is clearly reflected in the Atomic Energy Commission's regulatory requirements (see 10 C.F.R. Section 50.34(b)(6)(iii)), to test nuclear facilities at ascending power levels prior to their steady-state operation. As the Joint Committee on Atomic Energy stated in its report on the legislation to authorize temporary operating licenses:

> "The conduct of these tests and a deliberate power ascension program are essential to nuclear safety. Under present procedures many of the questions which are being raised in contested hearings on the full-term license can best be answered by permitting the plant to operate so that tests can be conducted which would supply information needed to resolve the contest." (Emphasis added)
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> (H.R. Rep. No. 92-1027, 92nd Cong., 2d Sess., 6 (1972))

Since testing is an integral part of operational start-up, it is reasonable to conclude that testing operations at any power level short of full power, for the specific

purpose of demonstrating fitness for steady-state operation, are permissible under 10 C.F.R. Section 50.57(c). Such testing provides vitally needed information concerning the safety and reliability of the facility, and must be performed in order to place the facility in a state of readiness to operate when the Commission acts on the full-term, full-power license.

It is true that the regulation specifically refers to authorization of "low power testing," but this does not exclude the authorization of testing at higher levels from the ambit of the "further operations" clause that follows. Nor does the regulation compel a board to authorize testing operations at higher power levels only as an adjunct to steady-state operation at such levels. The regulation contemplates a flexible approach by a licensing board and authorizes boards to tailor the relief granted to the demonstrated needs in a particular case.

The language on page 7 of the Licensing Board's Initial Decision seems to suggest that the present operating license for Indian Point 2 (No. DPR-26), which authorizes

operation for testing purposes up to 50% of full power, was authorized under 10 C.F.R. Section 50.57(c) because of a stipulation of the parties. No stipulation could authorize the Licensing Board to issue the license if 10 C.F.R. 50.57(c) did not permit the action. Moreover, the Licensing Board's action in authorizing the 50% testing license (notwithstanding the opposition by one party) has been confirmed by action of the Atomic Safety and Licensing Appeal Board (ALAB-119, RAI-73-4 (April 24, 1973)) and, by implication, by the Commission itself. It has thus been established that the Licensing Board has authority to issue a testing license beyond one percent of full power.[3/]

3/ Licenses for testing purposes at power levels above one percent have also been authorized under 10 C.F.R. Section 50.57(c) for other facilities. Commonwealth Edison Co. (Zion Station, Unit 1), Docket No. 50-295, Order (ASLB July 24, 1973) [authorized testing up to 75%]; Northern States Power Co. (Prairie Island Nuclear Generating Plant, Unit 1), Memorandum and Order (ASLB July 11, 1973) [authorized testing up to 90%]; Boston Edison Co. (Pilgrim Nuclear Power Station), Docket No. 50-293, Order (ASLB June 1, 1972) [authorized fuel loading and operation at up to 20% for the purpose of testing]. In the Pilgrim case the Licensing Board stated: "The Board would observe that low-power testing is defined in the Commission's regulations as 'operation at not more than one percent of full power for the purpose of testing the facility.' Twenty percent of full power would come within the term 'further operations short of full power operation.'" At 1. Although it appears that several of the cases cited were uncontested, whether a motion filed pursuant to 10 C.F.R. Section 50.57(c) is contested does not govern the interpretation of such regulation. Section 50.57(c) does, however, provide for different procedures based upon whether a motion is contested.

There remains the question of the percentage of full power operation for testing purposes which may be authorized by the Licensing Board pursuant to 10 C.F.R. Section 50.57(c). No limit is set in the Commission's regulations. A license for testing purposes up to 99% of full power therefore could be authorized under the plain meaning of the regulation.

II.

Applicant's Request for Relief

Applicant reiterates its request for the Appeal Board to reverse summarily that portion of the Licensing Board's Initial Decision of August 9, 1973 denying Applicant's motion for additional testing authorization. Applicant further requests the Appeal Board to determine that 10 C.F.R. 50.57(c) permits the Licensing Board to authorize the issuance of a license for Indian Point 2 for testing purposes up to 99% of full power (or such other power level as is determined by the Appeal Board) and remand to the Licensing Board with directions (a) to reconsider Applicant's motions of July 27, 1973 and August 9, 1973 forthwith and (b) to issue a supplemental Initial Decision effective as of

August 9, 1973[4/] consistent with the Appeal Board's order not later than three days after the date of issuance of such order.

Respectfully submitted,

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Dated: August 17, 1973

4/ Effectiveness of a supplemental Initial Decision subsequent to such date would impose a substantial and unwarranted financial penalty on Applicant due to the coincidence of the amendment to the licensing fee schedule in 10 C.F.R. Part 170.