8-10-73

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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

APPLICANT'S MEMORANDUM
IN SUPPORT OF MOTION FOR
AUTHORIZATION OF ADDITIONAL TESTING

I.

This memorandum is submitted in support of "Applicant's Motion for Issuance of a License Authorizing 99% Testing Operation," dated August 9, 1973.

The Initial Decision by the Atomic Safety and Licensing Board ("Board") states (page 8):

> "The Indian Point No. 2 facility has been tested only to the extent of 50 percent of power pursuant to stipulation of the parties. Section 50.57(c) does not authorize testing operations up to full power, but that section does authorize steady state operations at the requested 50 percent of full power."

Thus, the Board has concluded that testing up to 100% of full power is not permissible under 10 CFR 50.57(c), but it

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is not clear whether the Board believes that testing at some level in excess of 1% but short of 100% of full power could have been authorized by the Board in its Initial Decision.

The plain meaning of 10 CFR 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.

The sentence in question provides:

> "An applicant may, in a case where a hearing is held in connection with a pending 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 CFR 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 CFR 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 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 CFR 50.57(c) because of a stipulation of the parties. No stipulation could authorize the Board to issue the license if 10 CFR 50.57(c) did not permit the action. Moreover, the 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 Board has authority to issue a testing license beyond one percent of full power and short of full power.

There remains the question of the percentage of full power operations for testing purposes which may be authorized by the Board pursuant to 10 CFR 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 (and on the same legal basis which supports the issuance of the present 50% testing license). See Northern States Power Co. (Prairie Island Unit 1), Docket No. 50-282, Memorandum and Order (ASLB July 11, 1973).

II.

Applicant's motion dated July 27, 1973 was couched in terms of a request for 100% testing authorization. It clearly encompassed a motion for testing at 99% of full power. Since the Board may authorize a license for testing purposes up to 99% of full power, Applicant requests that the Board look to the substance of Applicant's motion, dated July 27, 1973, consider it amended nunc pro tunc and treat it as one for authority to test up to 99% of full power.[1/] The need and support for the additional testing authorization, i.e., from 50% up to 99% of full power, are stated in Applicant's motion dated July 27, 1973 and accompanying affidavits. It would be the sheerest triumph of form over substance to require Applicant to refile its motion of July 27, 1973 when the issues are clearly before the Board at the present time and the positions of the parties are clearly on record. There is no need to start the entire process again under these circumstances.

The course advocated herein would allow the continuation of the testing program without interruption due solely

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1/ Cf. Northern States Power Co., supra.

to administrative wheel-spinning. The information from the testing program will thereby be forthcoming at the earliest time consistent with plant readiness. Assuming eventual issuance of the full-term, full-power license, the plant will be available to meet the power needs of the people of metropolitan New York without undue delay attributable to a late start of testing. Furthermore, not only would requiring the refiling of Applicant's motion be a useless exercise, it could also impose a substantial and unwarranted financial penalty on Applicant due to the coincidence of the amendment of the licensing fee schedule in 10 CFR Part 170.

III.

As an alternative to issuing an order which would authorize the amendment of Applicant's license in accordance with Applicant's August 9 motion to permit further testing of the Indian Point 2 facility, Applicant moves the Board to certify the following question to the Atomic Safety and Licensing Appeal Board:

> What is the highest power level at which the Indian Point 2 facility may be authorized under 10 CFR 50.57(c) to operate for testing purposes pursuant to Applicant's motion dated July 27, 1973?

Depending upon the answer to the certified question, Applicant requests the Board to authorize the further amendment of Operating License No. DPR-26 to permit testing of the Indian Point 2 facility at the highest power level determined to be permissible by the Appeal Board, such amendment to date from the Initial Decision of August 9.

Respectfully submitted,

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Dated: August 10, 1973