



STATE OF NEW YORK

DEPARTMENT OF LAW

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August 8, 1973

Samuel W. Jensch, Esq.  
Chairman  
Atomic Safety & Licensing Board  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Re: Consolidated Edison Company  
of New York, Inc.  
Indian Point Unit No. 2  
AEC Docket No. 50-247

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Dear Mr. Chairman:

By letter dated August 6, 1973, the applicant replied to the answer of the State of New York to the applicant's motion for the issuance of a license authorizing limited operation of Indian Point Unit No. 2.

With respect to the observation of the State of New York that the applicant could not obtain such a license from the Board without first presenting it with the State certification required by § 401(a)(1) of the Federal Water Quality Act Amendments of 1972, the applicant adopted two approaches. In its cover letter enclosing a copy of a proposed Initial Decision and Order, the applicant states that the requirement for such certification has been waived by virtue of inaction of the State of New York on applicant's request, dated January 31, 1973, for the certification.

Section 401(a)(1) of the F.W.P.C.A.A. states that the certification requirements of said subsection shall be waived if the certifying agency, here the State of New York, fails or refuses to act within a reasonable period of time, not to exceed one year. The regulations of the Environmental Protection Agency, contained in 40 C.F.R. Ch. 1, Subch. D, Part 125.15, state that three months shall generally be considered to be a reasonable period of time. The regulations provide further that if it appears that circumstances may reasonably require a period of time longer than three months, the Regional Administrator may afford the certifying agency up to one year to provide the required certification before determining that a waiver has occurred.

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A period of less than seven months has elapsed since the January 31, 1973 request for certification referred to by the applicant. It is clear that the instant request for certification presents a classic instance where a period of time greater than three months should be considered appropriate for consideration of the applicant's request. The facility for which a license is being sought is a huge power plant located on an invaluable resource of the State, and has been the subject of continued controversy, in this proceeding and elsewhere. Testimony presented in this proceeding has raised serious questions as to whether the State's water quality standards will be violated by the proposed discharge, particularly with reference to thermal discharges. Evidence presented to this Board has convincingly demonstrated that the Hudson River ecosystem in the area of Indian Point is an intricate and complex mechanism which is not yet completely understood by experts in the field, and about which additional relevant data is constantly being developed. The testimony submitted by the Atomic Energy Commission Regulatory Staff and others relating to thermal discharges has cast serious doubt upon the applicant's predictions as to the effect of its discharge upon the Hudson River, and it would have been highly irresponsible for the State of New York to have acted with undue haste during the suggested three month period specified in the Environmental Protection Agency regulations, when a statutory period of one year has been provided.

In addition, it should be noted that both the State of New York and the Environmental Protection Agency have proposed new thermal criteria applicable to the Hudson River which may well be violated by the present Indian Point proposed discharge. These proposed regulations are now in the public hearing stage, and should be promulgated well before the January 31, 1974 one year deadline. In view of this, it is entirely reasonable for the State of New York to withhold action on the applicant's request for certification pending analysis of the latest data and mathematical models and promulgation of the new water quality standards.

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In its proposed Initial Decision and Order, the applicant suggest (p. 7) that a certificate from the State submitted by it pursuant to § 21(b) of the Federal Water Quality Improvement Act of 1970 has satisfied the federal requirement that the State must provide the licensing agency with an assurance that its water quality standards will not be violated. This certificate was issued by the State of New York shortly after its Department of Environmental Conservation was established by State law, and before the Department had promulgated adequate regulations to fulfill a number of its statutory responsibilities. In response to a letter from the Chairman of the New York Water Resources Commission of the Conservation Department, the Assistant Secretary of the Interior informed New York in a September 3, 1970 letter that the Federal Water Quality Improvement Act "clearly requires public notice in all cases before a State can certify as to compliance with water quality standards", and that "Section 21(b) also provides that where a State has no authority to certify, certification shall be issued by the Secretary of the Interior."

Inasmuch as the § 21(b) certificate issued to the applicant was not preceded by the requisite public notice, this Board should consider that certificate invalid. Therefore, despite § 4(b) of the F.W.P.C.A.A., cited by the applicant, this Board must still be presented with a § 401(a)(1) certificate before it can issue a license to Con Edison for Indian Point Unit No. 2.

It should be noted at this point that at the time the applicant requested a license from this Board for up to 50% testing, several months ago, it did not consider the § 21(b) certification to be relevant to this proceeding, inasmuch as it specifically requested a § 401(a)(1) certificate from the State of New York for testing purposes, which certificate was issued to the applicant on April 24, 1973.

The State of New York is proceeding diligently in fulfillment of its statutory responsibility to determine whether the applicant's Indian Point Unit No. 2 will meet New York's water quality standards. While the applicant's request for a

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water quality assurance certificate for the operation of Indian Point Unit No. 2 at steady state full power is under consideration, the applicant can apply for the necessary certificate for operation of its plant at steady state levels up to 50% and for testing purposes at 100%. Such application, which is of considerably less consequence than the final certification sought by Con Edison, will be acted upon expeditiously, with full consideration of the Hudson River ecosystem and the power needs of the public.

Very truly yours,

LOUIS J. LEFKOWITZ  
Attorney General

By



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