8-6-73

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 PROPOSED INITIAL DECISION AND ORDER WITH RESPECT TO APPLICANT'S MOTION FOR ISSUANCE OF A LICENSE AUTHORIZING LIMITED OPERATION

1. The evidentiary hearings on the application for an operating license for the Indian Point No. 2 facility ("Indian Point 2"), covering both radiological safety and environmental matters related to the Final Environmental Statement prepared by the Staff in September 1972, concluded on April 26, 1973. Applicant filed its proposed findings of fact and conclusions of law on May 17, 1973 and all proposed findings, conclusions and briefs have since been filed. Proposed technical specifications are expected to be filed very shortly by the Staff.

2. On July 27, 1973 Consolidated Edison Company of New York, Inc. ("Applicant") filed a motion pursuant to 10 CFR 2.730, 50.57(c) and Part 50, Appendix D, section A.12 requesting the Atomic Safety and Licensing Board ("Board") to consider the evidence heretofore adduced in this proceeding together with the affidavits of Carl L. Newman, Bertram Schwartz and Harry G. Woodbury, Jr. attached to the motion and thereafter, in the alternative:

(a) Authorize the Director of Regulation to issue a further amendment to Facility Operating License No. DPR-26, Amendment No. 2, dated April 27, 1973, which would permit Applicant to operate Indian Point 2 at steady-state reactor core power levels not in excess of 1379 megawatts thermal (50 percent of the rated power level of the facility) and to operate the facility for testing purposes at reactor core power levels not in excess of 2758 megawatts thermal (100 percent of the rated power level of the facility); or

(b) Authorize the Director of Regulation to issue a further amendment to Facility Operating License No. DPR-26, Amendment No. 2, dated April 27, 1973, which would permit Applicant to operate Indian Point 2 at steady-state reactor core power levels not in excess of 1379 megawatts thermal (50 percent of the rated power level of the facility).

Applicant further requested that any such amendment to Operating License No. DPR-26 be authorized for a term ending with the issuance of an amendment to the license in accordance with an Initial Decision by the Board in this proceeding.

3. The Hudson River Fishermen's Association - Environmental Defense Fund ("HRFA-EDF") and the Citizens Committee for the Protection of the Environment ("CCPE") filed answers in opposition to the Applicant's motion, dated July 31, 1973 and August 1, 1973, respectively. The Regulatory Staff answered on August 1, 1973 that it had no objection to the motion. The Attorney General of the State of New York ("Attorney General") provided the Board with several "observations" in an answer dated August 1, 1973.

4. Since this motion is opposed by CCPE on the same grounds stated in CCPE's opposition to the full-term, full-power operating license for Indian Point 2 (CCPE Answer, p. 3), the Board is making findings on the radiological safety matters specified in the notice of hearing in this proceeding dated November 30, 1970. The basis for the Board's ultimate findings on these issues are set forth in the proposed findings and conclusions filed by the Applicant on May 17, 1973 and by the Staff on June 11, 1973 and the Board adopts the Applicant's proposed findings and conclusions as its own for the limited purpose of its ruling on this motion.

5. With respect to HRFA-EDF and the Attorney General, the Board is limiting its findings and conclusions to those matters in controversy, as identified in the parties' answers to Applicant's motion. HRFA-EDF and the Attorney General did not controvert any specific factual matters. Instead, their essential argument is that Applicant's motion is unauthorized as a matter of law since, in their view, the requested amendment to Operating License No. DPR-26 may only be granted under section 192 of the Atomic Energy Act of 1954, as amended, and 10 CFR 50.57(d).[1/]

1/ CCPE makes the same argument (CCPE Answer, pp. 1-2) and the Board's ruling is, accordingly, addressed to CCPE's contention as well. Like HRFA-EDF, CCPE did not controvert the facts presented by Applicant but argued that the supporting affidavits and the record of the case did not justify the granting of the motion.

6. The Board has concluded that the intervenors' argument is invalid and that the Board has the authority to grant Applicant's motion under the provisions of 10 CFR 50.57 (c). The intervenors' argument constitutes an attack upon the Commission's regulations, contrary to the provisions of 10 CFR 2.758. Nothing in the language of 10 CFR 50.57(c) limits that section's applicability to situations which are not subject to 10 CFR 50.57(d) and section 192 of the Atomic Energy Act of 1954. The statement of considerations published at the time of adoption of regulations implementing section 192 of the Atomic Energy Act of 1954, as amended, emphasizes the continued effectiveness of 10 CFR 50.57(c) notwithstanding the new procedures for seeking temporary operating licenses. (37 Fed. Reg. 11871, June 15, 1972) The Notice stated:

> "The availability of expedited procedures for a temporary operating license does not preclude an applicant from making a motion for a license for limited operation pursuant to the Commission's present regulations in Part 50 and, if the motion is opposed, the issuance of such a license after compliance with the provisions of Subpart G of Part 2. Moreover, atomic safety and licensing boards are expected to avoid unnecessary duplication in situations where an applicant, who has previously filed such a motion for limited operation, elects to file a new motion under the expedited procedures now provided."

There is nothing in the language of section 192 which limits the Commission's right to continue in force the provisions of 10 CFR 50.57(c) and the legislative history is clear that the statute

supplemented the existing authority of the Commission under the Atomic Energy Act of 1954 and did not limit that authority in any way (H.R. Rep. No. 92-1027, 92nd Cong., 2d Sess. 6, 10 (1972)).

7. HRFA-EDF also oppose the motion on the ground that the term of the license sought is uncertain. The Board does not consider that this is an adequate ground for denying the motion, particularly in light of paragraph number 3 thereof. In any event, under the Board's order, unless extended for good cause shown the operating authority granted hereunder would expire upon the issuance of a further amendment to License No. DPR-26 pursuant to an Initial Decision by the Atomic Safety and Licensing Board in this proceeding on the application for a full-term, full-power operating license, or September 30, 1973, whichever occurred first.

8. With respect to the intervenors' assertions concerning the evidentiary basis for the granting of Applicant's motion, in addition to the Applicant's affidavits there are, of course, the voluminous data in the record concerning the need for power from Indian Point 2 during the period through September 30, 1973, (e.g., Final Environmental Statement, Volume I, page X-12) and the lack of likelihood of substantial damage to the Hudson River fish population during periods extending far beyond September 30, 1973. (E.g., evidence cited

in Applicant's proposed finding D2) No party has offered evidence in this proceeding that operation during the period through September 30, 1973 will have an irreversible or even a significant adverse impact on the environment. None of the proposed findings and conclusions submitted to the Board suggests, on non-radiological safety grounds, that Indian Point 2 should not be authorized to start operations immediately and operate with its present cooling system for a period far in excess of the term of the operating license considered herein.

9. The Attorney General also asserted (page 3 of Answer) that the Applicant "must present this Board with a new § 401(a)(1) [of the Federal Water Pollution Control Act Amendments of 1972 "FWPCAA"] certificate from the State of New York before approval of its application can be granted." No citations in support of this assertion were given. The Board notes that Applicant has heretofore submitted to the Atomic Energy Commission a certification pursuant to section 21(b) of the Water Quality Improvement Act of 1970 (P.L. 91-224) (Final Environmental Statement, Volume I, page I-9). This certification was submitted as required by the Federal Water Pollution Control Act, as amended, prior to enactment of the FWPCAA. (Public Law 92-500; 33 U.S.C. § 1151 et seq.) Section 4(b) of the FWPCAA operates to continue in full force and effect the section

21(b) certification previously supplied. Accordingly, it is not necessary that the Applicant present a certification under section 401(a)(1) of the FWPCAA to this Board.

10. Upon the basis of consideration of the entire record in this proceeding and in light of the foregoing which constitutes findings of fact and conclusions of law, the Board summarizes its findings and conclusions as follows, solely with respect to the issuance of a license to operate Indian Point 2 for testing purposes up to 100% of full power (2758 megawatts thermal) and at steady-state levels up to 50% of full power (1379 megawatts thermal) as requested in Applicant's motion dated July 27, 1973.

11. Pertaining to the requirements of the Atomic Energy Act of 1954, as amended, and the rules and regulations of the Commission relating to radiological health and safety and the common defense and security:

(a) Construction of Indian Point 2 has been substantially completed, in conformity with Construction Permit No. CPPR-21, the application as amended, the provisions of the Act and the rules and regulations of the Commission;

(b) Indian Point 2 will operate in conformity with the application as amended, the provisions of the Act, and the regulations of the Commission;

(c) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations of the Commission;

(d) Applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations of the Commission;

(e) The applicable provisions of 10 CFR Part 140 have been satisfied; and

(f) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

12. Pertaining to the requirements of the Atomic Energy Act, the rules and regulations of the Commission and other pertinent statutes relating to environmental subjects and having determined the matters in controversy among the parties with respect to these matters as they pertain to Applicant's motion dated July 27, 1973:

(a) This Board has the authority to grant the motion pursuant to 10 CFR 2.730, 50.57(c) and Part 50, Appendix D, section A. 12; and

(b) The proposed licensing action will not have a significant adverse impact on the quality of the environment.

13. WHEREFORE it is ordered in accordance with the foregoing this day of August, 1973 that:

(a) The Director of Regulation is authorized in accordance with this Initial Decision to issue to the Applicant an amendment to its Operating License No. DPR-26, together with appropriate Technical Specifications, authorizing Applicant to operate Indian Point 2 at steady-state

reactor core power levels not in excess of 1379 megawatts thermal (50 percent of the rated power level of the facility) and to operate the facility for testing purposes at reactor core power levels not in excess of 2758 megawatts thermal (100 percent of the rated power level of the facility), the amendment to be substantially in the form of Appendix A attached hereto.

(b) Unless extended for good cause shown, the authority granted by such amendment to License DPR-26 shall expire on September 30, 1973, or on the date License DPR-26 shall have been amended pursuant to an Initial Decision by this Board on the application for a full-term, full-power license for Indian Point 2, whichever occurs first.

14. IT IS FURTHER ORDERED, in accordance with Sections 2.760, 2.762, 2.764, 2.785 and 2.786 of the Commission's

Rules of Practice, that this Initial Decision shall be effective immediately and shall constitute the final action of the Commission forty-five (45) days after the issuance hereof, subject to any review pursuant to the Commission's Rules of Practice. Exceptions to this Initial Decision may be filed by any party within seven (7) days after service of this Initial Decision. Within fifteen (15) days thereafter (20 days in the case of the Regulatory Staff) any party filing such exceptions shall file a brief in support of such exceptions. Within fifteen (15) days after service of such briefs (20 days in the case of the Regulatory Staff) any other party may file briefs in support of or in opposition to such exceptions.

Respectfully submitted,

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Attorneys for Applicant

By Leonard M. Trosten
Leonard M. Trosten
Partner

Dated: August 6, 1973

APPENDIX A

Amendment to Section 3A of Operating License No. DPR-26

Delete the present language and substitute the following:

"A. Maximum Power Level

The Licensee is authorized to operate the facility for testing purposes at reactor core power levels not in excess of 1379 megawatts thermal (50 percent of the rated power level of the facility).

Effective August , 1973 the Licensee is further authorized to operate the facility for testing purposes at reactor core power levels not in excess of 2758 megawatts thermal (100 percent of the rated power level of the facility) and to operate the facility at steady-state reactor core power levels not in excess of 1379 megawatts thermal (50 percent of the rated power level of the facility), provided that unless extended for good cause shown, this additional authority shall expire at midnight September 30, 1973 or upon the earlier issuance of a subsequent licensing action."