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December 23, 1974

Mr. Gordon M. Grant
Secretary
U.S. Atomic Energy Commission
Washington, D.C. 20545

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

Dear Mr. Grant:

On December 10 and 13, 1974, respectively, the Citizens Committee for the Protection of the Environment (CCPE) and Hudson River Fishermen's Association (HRFA) filed with the Commission documents requesting reimbursement for witness and attorneys' fees incurred in connection with their participation as intervenors in the referenced case. By letter dated December 16, 1974, counsel for CCPE, acting now as counsel for the Environmental Defense Fund (EDF) endorsed the HRFA application. Since these documents are not provided for under the Commission's Rules of Practice, we consider that we are under no obligation to respond. Because they include so many errors of law and of fact, and because, if credited, they could lead the Commission into serious error, we are taking this opportunity to comment briefly on them.

In summary, these requests should be held without action pending completion of the Commission's rulemaking proceeding on the subject of reimbursement of intervenors' expenses. Since these requests involve generic issues of law and policy, their resolution in a legislative-type forum will be more appropriate than an ad hoc determination.

However, if the Commission declines to defer action in this fashion, then the requests should be denied since the relief requested is beyond the Commission's statutory powers and since in any event there is not the necessary showing that would, on any view, entitle CCPE and HRFA to reimbursement.

Under the Constitution only the Congress may appropriate funds or make provision for the disposition of federal property. Thus, the inquiry must necessarily be whether the Act authorizes the payments and not whether it precludes them. The Atomic Energy Act is silent and the power is not conferred by other legislation. We are well aware of the statement made on behalf of the Conference Committee in connection with the enactment of the Energy Reorganization Act of 1974, Pub. L. No. 93-438, that nothing in the Atomic Energy Act prohibits the Commission from making reimbursement. This statement, however, begs the question and in any event cannot be a substitute for the process of legislation outlined in the Constitution.

Assuming, arguendo, that the Commission has the power to grant the reimbursements sought, that power should certainly not be exercised in this case in light of the inaccuracy of the CCPE and HRFA claims of public benefit, the distortions of the record of the proceedings and the importation of extraneous and irrelevant matters involving not only other power plants, but other agencies as well.

To cite some illustrations, the effort has been made to take credit in this case for developments in the Indian Point 3 licensing, the Cornwall Pumped Storage Project and the licensing of power plants at Bowline Point and Roseton, New York, the latter three being entirely beyond this body's jurisdiction.

The mischief such arguments work is obvious. To allow reimbursement based on claims such as these would put this agency in the position of ruling on the performance of the parties to proceedings before other agencies and, for that matter, setting itself up to oversee the work of those other agencies and to test their work against its own (or CCPE's and HRFA's) notion of "public benefit."

There is no authority whatsoever for the AEC thus to transform itself into an administrative combination of the General Accounting Office and the Office of Management and Budget.

It would serve no useful purpose to make a detailed rebuttal here of the extravagant claims of benefit to the public which are said to have flowed from participation in this proceeding by HRFA and CCPE. However, it is simply untrue as asserted, in effect, by these parties that through HRFA's efforts the record in this proceeding supports a requirement for closed-cycle cooling for Indian Point 2; and that but for CCPE's participation the plant would not be as safe as it is. The statement on page 2 of HRFA's application, that "...at the end of the hearing process, [Consolidated Edison] also conceded in its proposed license condition" that the record of the proceeding supported the requirement of closed-cycle cooling, is also false. Consolidated Edison may wish to make a detailed submittal later to the Commission with regard to whether either of these groups substantially benefited the public in the Indian Point 2 proceeding.

For the foregoing reasons, Consolidated Edison respectfully urges that the requests be held in abeyance until resolved incident to the promised rulemaking. If they are not so held in abeyance, then the Commission should dismiss or deny the HRFA and CCPE submittals for lack of jurisdiction and on the merits.

Further, as to the suggestion by CCPE that the Commission may have the power under 31 U.S.C. §483a (1970) to assess against an applicant or licensee the funds it disburses to an intervenor, such a notion would fly in the face of the very recent pronouncements of the Supreme Court of the United States in The Agency Fee Cases. Manifestly, if an intervenor qualified for reimbursement on a "public benefit" theory, the AEC would be precluded from taxing those costs to an applicant on a "private benefit" theory. This is, of course, only one of several reasons why there is no valid basis for CCPE's position.

In conclusion, we wish to emphasize that even though the path of the present issues has perhaps become temporarily lost in the corridors of Capitol Hill, the problem remains essentially one for the legislature, and the Commission should not mistake the vagaries of the legislative process for a constitutional warrant to step beyond its statutory powers.

Very truly yours,

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