UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
CONSOLIDATED EDISON COMPANY OF NEW YORK	)	Docket No. 50-247
	)	
	)	
(Indian Point, Unit No. 2)	)	

CITIZENS COMMITTEE FOR PROTECTION
OF THE ENVIRONMENT
REQUEST FOR REIMBURSEMENT OF COSTS

On November 20, 1974, the Atomic Safety and Licensing Appeal Board resolved the final issue in this lengthy proceeding. In accepting the adequacy of the Applicant's security plan the Appeal Board stated (Consolidated Edison Co. (Indian Point No. 2) ALAB-243, RAI-74-11 (Slip Op. pp. 9-10)):

> Our denial of this exception should not, however, leave the impression that CCPE's long challenge to the adequacy of the applicant's security plan has been to no avail. We have in an earlier memorandum stated our opinion that the development of plant security requirements were influenced considerably by the probing questions of CCPE's counsel (ALAB-177, RAI-74-2 153, 154, February 26, 1974). We continue to adhere to that opinion. The responses of the applicant's witnesses to that counsel's examination at the November 13, 1974 hearing, together with their responses to our questions, are one of the foundations for our conclusion that the plan is adequate. This constructive participation on an important issue has, in our judgment, contributed to the improvement of the regulatory process, both as an aid to the adjudication of the security issues and in the development of the overall regulatory requirements in an evolving area.

This was not the only time CCPE was commended for its substantial contribution to plant safety. The Licensing Board in its initial decision found with respect to plant security, "reason for some of the questions and concerns of the Citizens Committee". July 14, 1972, Initial Decision, TID-26300 43, 53.

Nor was the CCPE presentation only of value with respect to development of security issues. During his final appearance before the Joint Committee on Atomic Energy, then AEC Chairman Schlesinger singled out CCPE for its contribution to the safety of Indian Point No. 2 and particularly the quality assurance program (Testimony before the Joint Committee on Atomic Energy, January 23,1973):

> We had quality assurance problems at Indian Point. The intervenors picked those up. We say all power to them, if there are problems let them be heard.

CCPE also raised the question of the integrity of the reactor pressure vessel. This contention was vigorously pursued and so troubled the licensing board that it certified an important question to the Commission which ultimately resulted in a major statement of policy by the Commission regarding consideration of pressure vessel rupture in individual licensing proceedings. See Consolidated Edison Co., ALAB-71, WASH-1218 (Supp. I) p. 488 and Commission Memorandum and Order, October 26, 1972.

CCPE raised serious questions about the adequacy of the Emergency Core Cooling System. These concerns were expressed in its original detailed Statement of Contentions (filed June 4, 1971) which preceded the Commission's Interim Policy Statement on Emergency Core Cooling System Criteria and raised many of the issues which became the center of the controversy on the adequacy of the Emergency Core Cooling System. In its Initial Decision, July 14, 1972, TID-26300 the Licensing Board stated:

> The cross-examination by the Citizens Committee provides a substantive basis for questioning the adequacy of the Interim Criteria, the analysis of the performance of the ECCS, and the research and development results that provide the basis for the criteria and the analysis.

The issues raised by CCPE were part of the issues which persuaded the Commission to impose ECCS Criteria more stringent than the Interim Policy Statement and with which Indian Point No. 2 must comply.

CCPE raised serious questions about the assumptions used for calculating the quantity of iodine released to the environment. The Licensing Board devoted several pages to discussing the issue and while disagreeing with CCPE's contention nonetheless concluded (Initial Decision, July 14, 1972,TID-23600):

> In view of the large amount of research and development that has been done, the Board believes that the Staff must soon develop a more adequately supported selection of release rate and plateout factor to replace the assumptions that appeared in TID-14844 in 1962. Lack of a clear explanation of and well documented justification for many of the basic numbers used by the Applicant and the Staff in the analyses of the performance of iodine removal systems appears to have contributed substantially to the raising of the iodine issue and the effort spent on that issue in these proceedings.

CCPE raised the issue of whether Indian Point No. 2 was constructed in conformance with its construction permit and detailed several instances of alteration in the plant design from that originally approved at the construction permit hearing. The Licensing Board was also troubled by these changes and stated (Initial Decision, July 14, 1972, TID-23600):

> ...the Board finds reason for concern about the removal of safety features from a plant design after the construction permit has been issued and without public disclosure until the plant has been substantially completed.
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> * * *
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> It appears to the Board that procedures which permit the Applicant to remove a safety feature between the time that a construction permit has been granted and construction of the plant nears completion and without public notice of the change and of concurrence by the Staff 11/ and the ACRS tend to compromise the licensing processs

11/ There is no evidence that an order was issued by the Director of Regulation approving the change.

In addition to these important substantive issues it is clear that the Indian Point proceeding has been an important testing ground on many legal and technical issues as evidenced by the substantial number of Appeal Board and Commission decisions. On each of these decisions the CCPE contribution in the form of legal memoranda have assisted the Appeal Board and the Commission focus on the issues and see all sides of the controversy as an aid to deciding the issues presented. Procedures developed by CCPE for the presentation of contentions and proposed cross-examination prior to the conduct of hearings were and still are great advances in the practice before the Commission and have aided in the development of better pre-trial procedures.

Whenever courts have considered granting fees and costs to parties in a proceeding they have looked to the benefit conferred by the party. That benefit has been considered whether direct or indirect. For instance, if the party's actions in the proceeding were a catalyst for other beneficial action the party is entitled to treat that benefit as part of its contribution. Wilderness Society v. Morton, 495 F.2d 1026, 1034 (D.C. Cir., 1974) cert. granted, 43 LW 3208 (1974).

In this case the participation of CCPE has not only directly contributed to the health and safety of the public and to the development of the record in this proceeding but has been instrumental in the development or initiation of development of generic safety and procedural rules. There cannot be any doubt that CCPE has conferred a substantial benefit on the Commission, the Applicant and the public.

In AEC proceedings all parties win when safety problems are brought to light and resolved. An Applicant which obtains a license in the face of a serious but unexplored safety issue is not only endangering the health and safety of the public and its own employees, but is also endangering its own corporate existence and its customers. The undetected safety problem may well manifest itself in an accident which can cause substantial economic damage to an Applicant and a substantial interruption in the power supply to its customers. Even if no accident occurs, because of the backfitting requirements of 10 CFR § 50.109 and the general authority in 10 CFR § 50.100, a problem not detected early can, when it is detected, require substantial additional expense and interruption in the power supply.

As the attached affidavit of Irene Dickinson demonstrates, the CCPE contribution to this case was made for less than $30,000. Nonetheless that $30,000, of which more than $12,000 is yet unpaid, represented an enormous commitment for CCPE and has virtually put CCPE out of business. Although a number of important safety issues have been raised during the operating license hearing for Indian Point No. 3 (see transcript of prehearing conference for November 26, 1974), CCPE has been unable to participate to pursue these important issues. In its decision in 1972 the Licensing Board made clear that improvement in the analysis of post-accident iodine releases and in in-core surveillance must be developed. Indian Point No. 3 could have been the forum to see if those improvements have been made but the absence of CCPE makes the forum far less effective than it should be.

CCPE has also been unable to pursue a vigorous post-licensing surveillance of Indian Point No. 2 because of its dire financial situation. Thus, although CCPE has raised issues regarding seismic design, financial qualifications and population density, CCPE was only able to raise these issues and not pursue them vigorously. This should be contrasted to the Applicants' extensive meetings and filings with respect to these issues.

Just as CCPE's vigorous pursuit of issues in the proceeding helped to develop the record and improve safety, so too would its vigorous pursuit of issues now greatly improve the decisional process.

CCPE's specific requests for funds could be based on numerous theories. For instance, the value of the services rendered in improving the security of the plant is certainly worth far more than the total $30,000 spent in this proceeding by CCPE. Applicant must have spent more than this in developing its plan over the years. CCPE could be compensated for the services rendered to it not on the basis of the $30 per hour charged for legal services but on the prevailing rate for legal services which would be at least $75-$100 per hour. Wilderness Society v. Morton, supra. CCPE has decided to take the conservative approach and to request no more than the costs which it has incurred -- $29,346.92.*/ This will enable CCPE to pay its outstanding debts and to have funds returned to it to be recycled into further efforts to improve the safety of nuclear reactors, particularly at Indian Point, and to educate the public about the dangers of nuclear reactors.

*/ An additional sum for costs of approximately $400 for October and November, 1974 will be included in the CCPE claim.

As noted above, the benefits conferred by CCPE flow not only to the public and the AEC but also to the Applicant. Clearly the benefits conferred on the Applicant in making its plant safer exceed the $30,000 expended. Thus there is no impediment to utilizing the authority in 31 U.S.C. § 483a to obtain the $30,000 from the Applicant directly. If the Commission chooses not to do this,it of course has the authority to make the payment directly from its own funds as it has essentially recognized in its November 21, 1974 Memorandum and Order in Docket Nos. 50-155, 50-271, 50-443 and 50-444, Slip Op. p. 5.

In its November 21 Order the Commission deferred ruling definitely on the issue of payment of intervenors' costs except insofar as the costs were incurred prior to November 21, 1974. Slip Op. p. 9, fn. 6.*/ It ruled that costs incurred prior to November 21, 1974 would never be reimbursable. We respectfully submit that the decision is arbitrary and capricious. First,

*/ The footnote could be read to preclude reimbursement for costs incurred prior to adoption of a final rule because the phrase "this decision" could refer to the decision on the rule rather than the November 21 decision. This interpretation seems a little strained and we assume that November 21, 1974 is the cut off. Either date has the same impact on CCPE.

the entire Order presupposes that more study needs to be made before a definite rule can be adopted. How then could the Commission so confidently reject totally applications for previously incurred costs?

Second, the stated reason given is unpersuasive. If any party has been unjustly enriched it is the AEC and the Applicant who have received the benefit of CCPE's efforts but have not paid for them. CCPE can receive no economic gain from its participation. The right to intervene is premised on the usefulness of the intervention and implicit in that is the responsibility to pay for the benefit conferred. In addition CCPE's future ability to function is directly related to its ability to be reimbursed for the costs it has already incurred. The fact that CCPE performed its services without expectation of reimbursement only underscores the high purpose of the organization. The rule now announced by the Commission would discourage any public group from participating in any proceeding unless it could be reimbursed for its costs thus reducing the number of groups willing to come forward and punishing those which did so in the past.*/ We urge the Commission to reverse

*/ In Docket Nos. 50-443 and 50-444 the Intervenor New England Coalition on Nuclear Pollution requested financial assistance at the outset of the hearing and has incurred substantial costs since that time. Its expectation was that reimbursement would be forthcoming but even without a certainty that the right to reimbursement would be recognized it incurred costs of $25,000. The rule announced in the November 21 Order cannot be squared with the facts in that case. NECNP, like CCPE, deemed the safety and other issues to be so important that even though there was no precedent for reimbursement, both groups proceeded with their cases. Surely a policy which penalizes such devotion to the public interest cannot stand.

the decision to preclude all expenses incurred prior to November 21, 1974.

The CCPE request is simple. It does not raise the policy questions which trouble the Commission in its November 21 Order. First, the authority to reimburse costs has been thoroughly briefed in at least five cases before the agency, two court cases and in connectionwith Title V to S. 2744.*/ Further study is unwarranted. Second, whatever standards are adopted they will clearly authorize reimbursement where the AEC, the public and Applicant have been directly benefited and the existence of that benefit will at least be conceded where it has been attested to by the Chairman of the AEC, the Licensing Board and the Appeal Board. Third, where, as here, the value of the contribution clearly exceeds the cost of providing no difficult valuation is required.

*/ Metropolitan Edison Co. (Three Mile Island), RAI-73-2-4, petition for review dismissed sub. nom. Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (CA 3, 1974); Philadelphia Electric Co. (Peach Bottom), RAI-73-2-46; Consumers Power Co. (Big Rock) Docket No. 50-155; WMEAC v. AEC, W.D. Mich., No. G 5873 decided June 19, 1974; Vermont Yankee Nuclear Power Corporation, Docket No. 50-271; Public Service Company of New Hampshire (Seabrook) Docket Nos. 50-443 and 50-444; Congressional Record (Daily Ed.) October 10, 1974, S. 18721-752; Hearings before Joint Committee on Atomic Energy and Senate Government Operations Subcommittee on Reorganization in 1974.

Several other minor issues are raised in the Commission's November 21 Order but these are also not relevant here (Slip Op. pp. 6-7):

1. CCPE's request comes after its participation.

2. CCPE has prevailed on its contention in the sense that its presentation has improved the quality of the review and plant safety.

3. CCPE is the only intervenor seeking reimbursement with respect to safety issues.

4. The payments sought by CCPE fall well below any comparable payments for similar outside assistance.

In short CCPE's request for assistance is ripe and should be granted.

Of particular importance in weighing CCPE's request is the fact that without the reimbursement sought here, CCPE will be virtually crippled and will be unable to provide similar benefits in other AEC proceedings. In effect the payment to CCPE will enable a recycling of these funds to the benefit of the AEC and the public. If the Commission were to view CCPE as a valuable consultant, which it has proven to be, it would see the necessity of providing the reimbursement sought even though some philosophical questions involving broad scale application of cost reimbursement remain but are not raised here. When the Commission noticed its rule-making hearings for ECCS Criteria (RM 50-1) and ALAP (RM 50-2) it instituted on an experimental basis quasi-adjudicatory hearing procedures. It has never made such procedures standard practice

but it was willing to experiment. The CCPE request is a far less expensive experiment with cost reimbursement.*/ When the Committee on Agency Organization and Procedure of the Administrative Conference recommended that agencies provide cost reimbursement to public participants it urged that the agency experiment. The AEC approach in its November 21 Order is inconsistent with that approach.**/ There will be no better way to test cost reimbursement than to try it.

RELIEF SOUGHT

CCPE is aware that the present Commission position as expressed in the November 21 Order is that CCPE is ineligible for cost reimbursement. If the Commission intends to persist in this view we seek a response to this request within two weeks and will assume that unless a response is received within two weeks the Commission has decided to treat the CCPE request on the merits and will not apply the rule announced on p. 9, fn. 6 of the November 21 Order.

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*/ The cost of a broad scale reimbursement program for three years was estimated to be approximately $4 million assuming $100,000 per hearing and 13 eligible hearings per year. Of course the real cost would be far less just in terms of saving the Staff the effort of developing facts and issues for underfunded intervenors which have raised important questions. If the benefit conferred, i.e. the contribution to the hearing record and safety are considered, the program will produce a profit.

**/ Recommendation 28 Public Participation In Administrative Hearings, Paragraph D.4 adopted by full Conference as Recommendation 71-6, December 7, 1971 without Paragraph D.4.

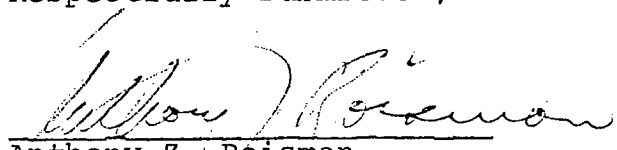
If the Commission does determine to respond to the CCPE request on the merits without application of the fn.6 rule, we seek a response within thirty days. If we do not receive a response within thirty days, we will assume the Commission has refused our request.

In Docket No. 50-155, WMEAC has filed a request that the rulemaking be concluded by January 31, 1975. Failing a favorable response to CCPE's request for immediate cost reimbursement, we join in this request for a prompt resolution of the entire matter.

CONCLUSION

The Commission has virtually conceded that the Atomic Energy Act of 1954 authorizes it to provide cost reimbursement to public participants. This conclusion is twenty years late already and further delay in implementing this authority seriously impedes the Commission's ability to carry out its regulatory responsibilities. The undeniable fact is that but for CCPE the Indian Point No. 2 reactor would be substantially more dangerous. Other reactors are being considered for licenses and are operating where public participation could provide an important contribution to safety. The Commission cannot afford to wait any longer.

Respectfully submitted,



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