

BEFORE THE UNITED STATES
ATOMIC ENERGY COMMISSION

3-8-73

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.) Docket No. 50-286
)
(Indian Point Station, Unit)
No. 3))

MOTION FOR RECONSIDERATION

To: Mrs. Elizabeth S. Bowers, Chairman
John B. Farmakides, Esq.
Dr. Marvin M. Mann

On February 28, 1973, the special Atomic Safety and Licensing Board designated to rule on petitions to intervene in the above-captioned matter ("Intervention Board") issued a Memorandum and Order pursuant to the Atomic Safety and Licensing Board Panel ("Board Panel") Order of February 9, 1973. Consolidated Edison Company of New York, Inc. ("Applicant") hereby moves that the Intervention Board reconsider its Memorandum and Order insofar as it purports to extend to (1) two petitioners for intervention the opportunity to re-plead before the Licensing Board, and (2) all admitted parties the opportunity to respond to a motion to consolidate this proceeding with another. It is Applicant's position that the Intervention Board should have denied outright the

8111090113 730308
PDR ADOCK 05000286
G PDR

petitions to intervene filed by Cortlandt Conservation Association, Inc. ("CCA") and Mary Hays Weik ("Weik"), and was without jurisdiction either to delegate the power to rule finally thereon to the Licensing Board, or to extend the time for responses to the motion to consolidate currently before the Commission.

I.

Under the Board Panel Order of February 9, 1973, the Intervention Board was directed "to rule on petitions and/or requests for leave to intervene" in four facility operating license cases, including the instant proceeding. Pursuant to that Order, the Intervention Board admitted three petitioners as parties. As to two other petitioners, CCA and Weik, the Intervention Board denied the petitions "unless, within 20 days, amended petitions are received which, in the opinion of the Licensing Board, remedy the deficiencies outlined [in the Memorandum and Order] and otherwise satisfy the requirements of 10 CFR § 2.714."

The CCA and Weik petitions failed to comply with the Rules of Practice and accordingly were properly denied. In the months since these petitions and the answers thereto were first submitted, petitioners made no effort to meet the objections raised by Applicant and the Regulatory Staff.

Neither the Commission's Rules of Practice nor the October 19, 1972 Notice, 37 Fed. Reg. 22816 (1972), provide for repleading as the Intervention Board has here authorized. Further, the Intervention Board was not given the authority to grant exceptions to the time limit for petitions set in that Notice.

Even if repleading may be allowed, Applicant submits that some basis must be shown for extending to petitioners CCA and Weik additional time in which to perfect their pleadings.* In essence, the Intervention Board has authorized the submission of untimely filings without the requisite "substantial showing of good cause." 10 CFR § 2.714(a) (1972). Whether the Licensing Board or (as Applicant contends) the Intervention Board has jurisdiction over the two conditionally denied petitions, the lack of any threshold showing of good cause for the flaws in these petitions mandates that the denial order be made absolute. Any other result would wreak havoc with the orderliness of proceedings contemplated by the "restructured" Rules of Practice. See 37 Fed. Reg. 15127, 15128 (1972).

* As to petitioner Weik in particular, no relaxation of Commission Rules is merited. See Consolidated Edison Co. (Indian Point Unit No. 3), Dkt. No. 50-286, Commission Memorandum and Order (June 14, 1972), at 4 & n.2. Similarly, a corporation such as petitioner CCA, which can draw on the skills of its 300 members, and is required under the laws of New York to appear in the courts of that state only by an attorney, N.Y. Civ. Prac. Law § 321(a) (McKinney 1972), should be held to the Commission's ordinary standards of pleading.

In addition to the foregoing, Applicant notes that the Board Panel Order creating the Intervention Board made no provision for delegation by the Intervention Board of any of its functions to the Licensing Board. Manifestly, however, this is precisely what the Intervention Board has done by its conditional action with respect to petitioners CCA and Weik. The Intervention Board both failed to exercise its proper jurisdiction by making a definitive ruling, and acted ultra vires by its purported delegation to the Licensing Board. The Intervention Board should exercise this responsibility itself, for otherwise the salutary purpose sought to be achieved by the Board Panel Order -- removing from the shoulders of the Licensing Board the burden of ruling on the sufficiency of petitions to intervene -- will have been frustrated.

II.

In its Memorandum and Order, the Intervention Board adverted to the Hudson River Fishermen's Association and Save Our Stripers January 2, 1973 motion to consolidate the Indian Point 2 proceeding, Docket No. 50-247, with the instant proceeding. Memorandum and Order, at 3. Correctly noting that it was without jurisdiction to rule on the motion under the limited power delegated to it, the Intervention

Board nevertheless "invited" all parties admitted to the instant proceeding "to respond to the Motion." Id.

This "invitation" to the admitted parties is obiter dictum, in view of the Intervention Board's conceded lack of jurisdiction, and the Board should have omitted it entirely. Cf. Arkansas Power & Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94 (January 18, 1973), at 22. Any pleadings now submitted to the Commission by the newly-admitted parties in response to the motion to consolidate would be untimely under the Rules of Practice. 10 CFR § 2.730(c) (1972). Of course, any enlargement of the period prescribed by the Rules must come from the Commission itself, not from an Intervention Board wholly without power to rule on the motion. Hence, it is respectfully submitted that the Intervention Board's "invitation" should be withdrawn.

In view of the rather extensive pleadings which have already been laid before the Commission regarding that motion, and the expressed and appropriate desire of the movants "to avoid burdening the Commission with unnecessary papers," Request of Petitioners and Movants HRFA and SOS for Extension of Time and Leave to File Consolidated Reply (January 29, 1973), at 1, Applicant sees no need for the submission of further pleadings on this issue.

WHEREFORE, Applicant prays that the Intervention Board reconsider and amend its February 28, 1973 Memorandum and Order and the Notice of Hearing, 38 Fed. Reg. 6094 (1973), to (a) make absolute the denial of the petitions to intervene submitted by Cortlandt Conservation Association, Inc. and Mary Hays Weik, and (b) delete the last sentence on page 3 of the Memorandum and Order.

Respectfully submitted,

LEBOEUF, LAMB, LEIBY & MACRAE

By Harry H. Voigt
Partner

Attorneys for Consolidated Edison
Company of New York, Inc.
1821 Jefferson Place, N. W.
Washington, D. C. 20036

EUGENE R. FIDELL,

Of Counsel.

March 8, 1973