

7-19-73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

Docket No. 50-286

APPLICANT'S MOTION FOR PROTECTIVE ORDER

On July 2, 1973, Intervenors Hudson River Fishermen's Association ("HREA") and Save Our Stripers ("SOS") served on Consolidated Edison Company of New York, Inc. ("Applicant"), by mail, a ten-page set of interrogatories in the above-captioned proceeding. The document requested a response on or before August 31, 1973. Since the interrogatories appear not to have been served on the members of the Atomic Safety and Licensing Board ("the Board"), a copy of the document is attached hereto as Exhibit A.

Applicant has objections to several of the questions on grounds of irrelevance to the instant proceeding. In particular, the portions of the interrogatories that deal with the

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Lovett, Bowline Point, Roseton, and Danskammer fossil-fueled generating stations clearly exceed the proper scope of the Board's inquiry. See Interrogatory 19 et seq. Applicant intends, however, to respond to these matters while reserving its objection to the relevance of the data thus provided, for ultimate ruling on relevance by the Board at the hearing.

The interrogatories go even further afield by seeking information regarding Applicant's proposed Cornwall Pumped Storage Project to be located at Cornwall, New York. See Interrogatory 19 et seq. This feature of the interrogatories Applicant considers highly objectionable, and, for the reasons stated below, hereby moves the Board for a protective order, pursuant to Section 2.740(c)(4) of the Rules of Practice of the Atomic Energy Commission ("the Commission"), deleting from the interrogatories all reference to the Cornwall Project. 10 C.F.R. § 2.740(c)(4)(1973).

As a pumped storage project, Cornwall falls under the jurisdiction of the Federal Power Commission ("FPC"). Federal Power Act § 4(e), 16 U.S.C. § 797e (1970). That agency has conducted a full review of the environmental effects of the project, and has granted the necessary license. Matter of Consolidated Edison Company of New York, Inc., 44 FPC 350 (1970). That proceeding was before the FPC for over nine years. In

particular, the effects of the project on the Hudson River fishery have been studied with care, and further fishery studies are being required and will be reviewed by the FPC. See, e.g., Order Denying Petitions to Reopen and For Further Hearings in this Proceeding, FPC Project No. 2338 (May 31, 1973), at 10 (copy attached as Exhibit B); 33 FPC 428, 457 (1965); 35 FPC 151, 152 (1966); 44 FPC 350, 434-35 (1970). The FPC's environmental findings and the adequacy of its review under the National Environmental Policy Act have been expressly approved on judicial review. Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972); see also DeRham v. Diamond, - N.Y.2d -, 5 ERC 1113 (1973).

Since Cornwall has already received full environmental review, the receipt by the Board of the data sought by HRFA and SOS in respect of Cornwall would violate the Congressional policy against "needless duplication" of effort as manifested in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, § 101(f), 86 Stat. 817 (1972). The respect due to this policy and to the Federal Power Commission as a sister agency of the Atomic Energy Commission strongly militates against any consideration by this Board of matters reviewed by the FPC as "lead agency" for the Cornwall Project.

To the extent that the Board finds that the impact of the Cornwall Plant is relevant to the Indian Point 3 proceeding, it should accept that impact as found by the FPC rather than conduct its own investigation. The alternative invites a repetition of a nine-year-long case.

HRFA was an intervenor in the FPC license proceedings for the Cornwall Project, but the FPC rejected its environmental contentions and found there would be only a negligible impact on the fishery from operation of the pumped storage project. More recently, HRFA moved to reopen the licensing proceeding for purposes of obtaining an order "forbidding operation of the project during the months of May, June and July of each year in order to preserve striped bass eggs, larvae, and young from the assumed effects of this as yet unconstructed project." Order Denying Petitions to Reopen and For Further Hearings in This Proceeding, FPC Project No. 2338 (May 31, 1973), at 2 n.6. That request has been denied by the FPC. Id. Under these circumstances, it appears that HRFA and SOS are attempting in the instant docket to relitigate matters as to which HRFA was unsuccessful before the Federal Power Commission. The Board should not countenance this kind of collateral attack on proceedings of a coordinate agency of government.

In this connection, Applicant further notes that the interrogatories' reference to Cornwall represents a clear

departure by HRFA from the position it adopted in Indian Point 2, where their counsel, Mr. Macbeth, specifically told the Board that HRFA "was not asking the Board to take into account, you know, speculative things in the future, Storm King Plant, if the Storm King Plant should be built." Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), AEC Docket No. 50-247, Tr. 6146 (Nov. 22, 1972). HRFA's effort to obtain consideration of other plants in Indian Point 2 was based on the premise that the other plants would be in operation either before or at about the same time as the Indian Point units. That argument clearly does not apply to Cornwall, which (assuming no further legal delays) will not be operable until 1979 at the earliest.

In summary, HRFA and SOS, by the reference in their interrogatories to Cornwall, would have the Board go back over ground already covered by the FPC. Their request for information is, in substance, a collateral attack on the FPC's May 31, 1973 Order denying HRFA's motion, and involves an unexplained change of position from that put before the Board by HRFA in Docket No. 50-247. As a result, Applicant considers that the interrogatories in question create for it an "undue burden or expense" within the meaning of the Commission's Rules of Practice, 10 C.F.R. § 2.740(c), from which relief should be granted.

WHEREFORE, Applicant moves for a protective order excluding from the attached intervenors' interrogatories any and all reference to the Cornwall Pumped Storage Project and its environmental effects.

Respectfully submitted,

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