

3-13-74
REX CONES
50-286

LAW OFFICES OF
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N. STREET, N.W.
WASHINGTON, D.C. 20036

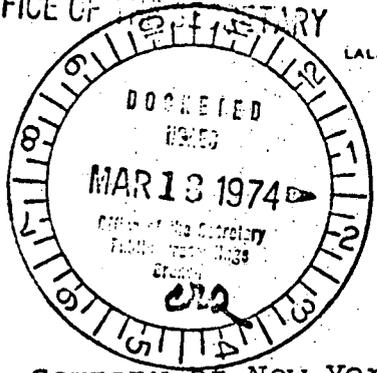
COUNTY NUMBER
REC'D. & U.S. DEPT. OF COMMERCE
ONE CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005

RECEIVED
March 13, 1974 MAR 15 PM 2:57

WASHINGTON TELEPHONE
202-672-8568
CABLE ADDRESS
LALALU, WASHINGTON D.C.

IRVIN E. UPTON
UGENE B. THOMAS, JR.
EDWARD M. TROSTEN
HARRY H. VOIGT
EX K. LARSON
WASHINGTON PARTNERS

OFFICE OF THE SECRETARY



Samuel W. Jensch, Esq.
Chairman
Atomic Safety and Licensing Board
U.S. Atomic Energy Commission
Washington, D.C. 20545

In re: Consolidated Edison Company of New York, Inc.
(Indian Point Unit 3)
Docket No. 50-286

Dear Mr. Chairman:

This is in response to your letter of March 11, 1974, raising further questions with regard to the function of the Licensing Board in the Indian Point Unit 3 operating license proceeding.

The short answer to each of the two specific questions set forth in the second paragraph of your letter is that the Board in this case is forbidden to require any party to answer questions or produce evidence on radiological safety and other uncontested matters. This is pellucid under the Commission's Rules of Practice applicable to this proceeding. As we have already pointed out, the Administrative Procedure Act simply reinforces the Commission's Rules in this regard. The Board is limited to inquiry into the matters put in controversy by the parties, and the record developed in the hearing must be confined to those matters.

The Board in this proceeding exercises only those powers delegated to it by the Commission. The Commission has instructed the Board to try the issues presented by the parties, and only those issues. If the Commission desired that a record be developed on quality assurance,

8111020392 740313
PDR ADDCK 05000286
G PDR

fuel densification, or any other uncontested matter, it would have so directed. The Commission has not done so.

We have examined the two pre-Administrative Procedure Act cases noted in the Board's letter, and neither of them casts the slightest doubt on the conclusions stated above and in our March 7, 1974 Memorandum of Law. Both cases, Bethlehem Steel Co. v. NLRB, 120 F.2d 641 (D.C. Cir. 1941), and NLRB v. Franks Bros. Co., 137 F.2d 989 (1st Cir. 1943), aff'd, 321 U.S. 702 (1944), state that it is the presiding officer's function "to see that facts are clearly and fully developed." 120 F.2d at 652, 137 F.2d at 991. With that proposition we are in full agreement. But that function is limited to the development of a clear record on the issues contested by the parties. Nothing in either decision cited sanctions a departure from those issues by the trial examiner.

With regard to the question posed in the third paragraph of the Board's letter, it is felt that this matter is fully addressed in our Memorandum of Law. We know of no authority for the proposition that the Board may conduct its own inquiry for the purpose of developing a record to support an expression of its concerns on uncontested issues. Any attempted distinction between those matters on which findings are to be entered and "concerns, not requiring determinations" by the Board would violate the Commission's express direction that "if radiation safety matters [are] not put in issue, they [will] not be considered at the hearing." 37 Fed. Reg. 15127, 15129 (1972).

The regulatory program of the Commission provides other means for the development and communication of matters on which the Commissioners may make "policy determinations." Those means include rulemaking (both internally generated and on petition by interested parties), ongoing studies and compliance activities of the Regulatory Staff, and studies and reports transmitted by the Advisory Committee on Reactor Safeguards.

Samuel W. Jensch, Esq.
March 13, 1974
Page 3

Given what we deem to be a total lack of authority for the procedure proposed by the Board, we strongly urge that this issue be certified to the Appeal Board for determination.

Finally, we wish to make one modification to page 20 of our Memorandum of Law. It is our understanding that the applicability of Section 2.760a to the Zion proceeding is currently in question before the Appeal Board. However, since the quality assurance issue there was raised in the first instance by a party, the case is in any event consistent with the position we have taken.

Very truly yours,

Harry H. Voigt

cc: Mr. R. B. Briggs
Dr. Franklin C. Daiber
Myron Karman, Esq.
Angus Macbeth, Esq.
Nicholas A. Robinson, Esq.
J. Bruce MacDonald, Esq.
James P. Corcoran, Esq.
Secretary, USAEC
Edward J. Sack, Esq.