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 CONSOLIDATED REPLY TO ANSWERS TO MOTION FOR FUEL LOADING, SUBCRITICAL AND LOW-POWER TESTING, AND LIMITED OPERATING LICENSE

By pleadings filed on August 5, August 12, and September 16, 1974, respectively, Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS") jointly, the Attorney General of the State of New York, and the Regulatory Staff of the Atomic Energy Commission, have submitted answers to Applicant's July 24, 1974 motion under section 50.57(c) for a fuel loading, subcritical and low-power testing, and limited operating license. In this consolidated reply, Applicant will respond to the various points raised by the other parties.

I.

THE § 50.57(c) MOTION CAN BE CONSIDERED AND GRANTED PRIOR TO ISSUANCE OF THE FINAL ENVIRONMENTAL STATEMENT BY THE REGULATORY STAFF

As noted in Applicant's response of September 12, 1974, to the Atomic Safety and Licensing Board's letter of August 7, 1974, to the parties, there can be no question that the Board is authorized to proceed with its consideration of and action on the motion under section 50.57(c) of the Commission's regulations.

This is a case to which the saving clause of Part 51 of the regulations applies, 10 C.F.R. § 51.56, 39 Fed. Reg. 26279, 26285 (1974), since the Notice of Hearing was issued prior to August 19, 1974. 38 Fed. Reg. 6094 (1973). Thus, the case, as we pointed out in our motion, falls within former Appendix D to Part 50. More precisely, under the Notice, the case is governed by paragraph C.3 of Appendix D.

Subparagraph C.3(a) refers to paragraphs D.2 and D.3. Paragraph D.2 provides that the applicant may make a written section 50.57(c) motion, and that the Board may grant the motion upon finding that the "proposed licensing action will not have a significant, adverse impact on the quality

of the environment," or upon "considering and balancing" various NEPA-related factors. Paragraph D.2(a) specifically applies in the case "where the final detailed statement . . . has not been completed." It follows that the Commission's NEPA regulations permit the Board to proceed with Applicant's motion. Inexplicably, the Staff's answer completely overlooks this dispositive regulation. Reg. Staff Ans. at 2-3. Contrary to the Staff's representation, it is manifest that there are times when it must be able to take a position without the formal FES in hand in order to comply with the regulations.

HRFA and SOS and the Attorney General go beyond this, however, and seek to persuade the Board to disregard this squarely applicable regulation on the ground of repugnance to NEPA. Such an attack cannot be sustained in light of the provisions of section 2.758 of the Rules of Practice. 10 C.F.R. § 2.758 (1974). This Board cannot grant a waiver of the Commission's regulations; all it may do is certify the issue directly to the Commission--and it can do that only in strictly limited circumstances. There must be a prima facie particularized showing, supported by affidavit "that special

circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." Obviously, there has been no compliance whatever with the terms of this regulation, and accordingly, the Board can neither waive paragraph D.2 nor certify the matter to the Commissioners. See, e.g., Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant), LBP-74-41, RAI-74-6 1015, 1020 (June 11, 1974).

II.

APPLICANT'S FINANCIAL QUALIFICATIONS ARE NOT IN ISSUE BEFORE THIS LICENSING BOARD, AND IN ANY EVENT APPLICANT IS FINANCIALLY QUALIFIED TO CONDUCT THE ACTIVITIES FOR WHICH AUTHORIZATION IS SOUGHT

HRFA, SOS and the State Attorney General have suggested in their answers that Con Edison's financial qualifications should be considered in the proceedings on the section 50.57(c) motion. None of these parties has properly raised a contention that Con Edison lacks the financial qualifications to receive a full-term, full-power operating license in the manner provided by section 2.714 of the Com-

mission's Rules of Practice. 10 C.F.R. § 2.714 (1974). For example, all that HRFA and SOS contend is that Con Edison's financial qualifications are under review by the Staff. HRFA-SOS Ans. at 2, 11-12. This approach is entirely inadequate under the regulations. Without the requisite particularity of statement and a detailed showing of good cause for this untimely insertion of a new issue, the Board should disallow these arguments. A showing of good cause should especially be required in view of the fact that these parties have been on notice of the Regulatory Staff's inquiry into Con Edison's financial qualifications since last Spring. Messrs. Lefkowitz, Robinson, and Macbeth were recipients of the Staff's May 15, 1974 letter to Applicant requesting information on this subject.

Until a properly documented motion under section 2.714 is filed, the Board should decline to consider Applicant's financial qualifications in connection with the pending motion.

III.

SECTION 401 OF THE FEDERAL WATER POLLUTION CONTROL ACT WILL BE COMPLIED WITH PRIOR TO THE ISSUANCE OF THE REQUESTED AUTHORIZATION BY THE DIRECTOR OF REGULATION

The argument of HRFA-SOS that Applicant is ineligible for the requested authorization because a section 401 certifi-

cation in accordance with the Federal Water Pollution Control Act ("FWPCA") has not yet been presented to the Commission is without merit. The argument as framed misconstrues that Act and the Commission's regulations.

Section 401(a)(1) of the FWPCA states:

> No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. 33 U.S.C. § 1341(a)(1) (Supp. II, 1973).

Under section 50.57(c), this Board merely makes findings on the matters specified in subparagraph (a) of that section, concerning which there is a controversy. These findings, in the form of an initial decision, are then submitted to the Director of Regulation, who, upon making the required additional findings, issues a license for the requested operation. Thus, it is not this Board which issues the requested license, but the Director of Regulation, and, accordingly, a section 401 certification is not required for this Board to act on Applicant's motion. Applicant applied for a certification by letter dated October 4, 1973, and anticipates that a certification will be issued by the New York State Department of Environmental Conservation in sufficient time to enable the Director of

Regulation to proceed in accordance with this Board's decision on the motion, and prior to the scheduled fuel-loading date.

The regulatory procedure discussed above has been followed by the Licensing Board in the Indian Point 2 proceeding. There the Board made findings of fact in relation to a full power request from Applicant, even though Applicant did not at that time possess a section 401 certification for operation beyond 50% of full power. Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), LBP-73-33, RAI-73-9, 751, 760-61 (Sept. 25, 1973). Consonant with that decision, Applicant will present the Indian Point 3 certification to the Director of Regulation when it is issued. If it is issued prior to the Board's ultimate ruling on the motion, it will be submitted to the Board.

IV.

POSSIBLE SALE OF THE FACILITY TO THE POWER AUTHORITY OF THE STATE OF NEW YORK IS IRRELEVANT TO THE § 50.57(c) MOTION

In various ways, the Attorney General, HRFA and SOS have attempted to insinuate the Power Authority of the State of New York ("PASNY") into the proceedings on the instant motion. The Attorney General goes furthest in this regard, seeking to learn PASNY's position on the matters in controversy among the parties in respect to the full-term, full-power

operating license, and casting a financial qualifications pall over the section 50.57(c) side of the case. N.Y. Ans. at 2-3. HRFA and SOS take a different tack, and argue that Con Edison's operating authority must be "co-terminous with [its] ownership and operation of Indian Point 3. Any consideration of operation by PASNY should be based on PASNY's representations as to the material facts and not Con Edison's." HRFA-SOS Ans. at 15.

These suggestions misconceive the nature of the proceedings under section 50.57(c) as well as the nature of the relationship between Con Edison and PASNY. Con Edison owns and controls Indian Point 3. There are no other legal or equitable interests outstanding. PASNY is not a party to the operating license proceeding, and of course is not a party to the section 50.57(c) proceeding. It is also not a permittee under the construction permit. Con Edison is fully aware that if, as, and when PASNY becomes an owner of Indian Point 3, the construction permit will have to be amended. If, as, and when PASNY assumes a role in the operation of the facility, then the operating license application, or the issued license, or the authorization under section 50.57(c), will have to be amended. None of these events has occurred, and accordingly, the questions as to PASNY's role (and such matters as the effect of PASNY's participation on the NEPA cost-benefit analysis) are entirely premature.

CONCLUSION

For the foregoing reasons, together with those previously set forth, Applicant's July 24, 1974 motion should be granted.

Respectfully submitted,

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