

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

6/ 24/74

BEFORE THE COMMISSION

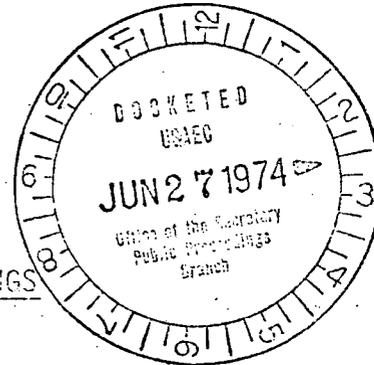
In the Matter of )

CONSOLIDATED EDISON COMPANY OF )  
NEW YORK, INC. )

(Indian Point Nuclear Generating Station, )  
Unit No. 3) )

Docket No. 50-286

SUPPLEMENT TO REGULATORY STAFF BRIEF,  
DATED APRIL 25, 1974, ON THE TREATMENT OF  
UNCONTESTED ISSUES IN OPERATING LICENSE PROCEEDINGS



Introduction

On April 25, 1974, the regulatory staff filed its brief on three questions, relating to the role of Atomic Safety and Licensing Boards and Atomic Safety and Licensing Appeal Boards with respect to treatment of uncontested matters in operating license proceedings, posed by the Commission in its letter dated April 12, 1974 to the parties. On June 10, 1974, the United States Court of Appeals for the District of Columbia Circuit rendered a decision in Union of Concerned Scientists v. Atomic Energy Commission, et.al. <sup>1/</sup> This case resulted from an appeal by Union of Concerned Scientists (UCS) from the decision of an Atomic Safety and Licensing Board (ASLB) authorizing issuance of an operating

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<sup>1/</sup> Civil Action No. 73-1099 (D.C. Cir., June 10, 1974), Slip. Op.

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license in the Pilgrim proceeding <sup>2/</sup> and from the decision of the Atomic Safety and Licensing Appeal Board sustaining the decision of the ASLB <sup>3/</sup>. The Court's decision deals, in part, with the assertion by the UCS that "the ASLB must, despite the absence of controversy, review de novo and independently evaluate the evidence to determine whether the issuance of an operating license is consistent with the health and safety of the public." <sup>4/</sup>

In holding for the Commission with respect to this issue, the Court discussed the background of the Commission's licensing process as it relates to the role of Atomic Safety and Licensing Boards, and the Court's holding bears upon the questions posed by the Commission's letter of April 12, 1974, in the captioned proceeding.

Discussion of Union of Concerned Scientists v. AEC et.al.

The Commission's Rules of Practice applicable to the Pilgrim proceeding <sup>5/</sup> provided that the ASLB "will determine controverted matters

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<sup>2/</sup> Initial Decision, Boston Edison Company (Pilgrim Nuclear Power Station); Docket No. 50-293; LPB-72-25, TID-26300, September 13, 1972, p. 103.

<sup>3/</sup> Boston Edison Company (Pilgrim Nuclear Power Station) ALAB-83, WASH-1218 (Supp. 1.), December 4, 1972, p. 552.

<sup>4/</sup> Supra n. 1, at 6.

<sup>5/</sup> 10 CFR Part 2, App. A. Statement of General Policy; VI(d), as added September 23, 1966 (31 F.R. 12774).

as well as decide whether the findings required by the Act and the Commission's regulations should be made ... As to matters which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the regulatory staff and the ACRS ..."<sup>6/</sup>

The Court took note of the fact that the Commission had amended its rules to specifically provide that in operating license proceedings, the board will determine only the matters in controversy among the parties.<sup>7/</sup> The amended rule is the provision applicable to the Indian Point Unit 3 proceeding, to which the Commission's questions relate. There are aspects of the decision which relate to the additional requirement under the old rules that the Board decide "whether the findings required by the Act and the Commission's regulations, should be made."<sup>8/</sup> However, the

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<sup>6/</sup> Id. at 7; emphasis in original.

<sup>7/</sup> Id. at 7.

<sup>8/</sup> See, e.g. Discussion on p. 11, 12 relating to board's responsibility with respect to uncontested matters not to make the findings itself but to determine whether the application and the record contain sufficient information and the review of the application by the regulatory staff has been adequate, to support the findings proposed to be made by the Director of Regulation; Discussion on p. 13 of allegation that reliance on staff analysis as to uncontested matters vest decisional authority in an adversary party; Discussion on p. 14 distinction between Pilgrim proceeding and FCC proceeding involved in Office of Communication, United Church of Christ v. FCC, infra n. 12.

overall aspect of the Court's determination that an ASLB presiding in an operating license proceeding is not required to determine radiological matters beyond those placed in controversy, is relevant to the questions posed in the Commission's letter of April 12, 1974.

In the decision, the Court traced the history of hearing requirements of the Atomic Energy Act and especially the 1962 amendments,<sup>9/</sup> which eliminated the requirements for mandatory hearing at the operating license stage and provided for the establishment of ASLB's.<sup>10/</sup> Based on this background, the Court indicates that

Of first importance in this respect is the primary purpose of the 1962 amendments, namely, to unburden the Commission by authorizing it to delegate decisional authority and removing the necessity of holding unnecessary and duplicative hearings. The Staff's safety analysis, aided by the ACRS, is reviewed prior to issuance of the construction permit, which the Joint Committee identified as 'the critical point in reactor licensing.' No second hearing need be held at all 'in the absence of bona fide intervention.' Yet it is contended that the mere assertion of a need--even a mere desire--for a further hearing by any of the many persons whose interests may be affected necessitates a second 'independent evaluation' of all the evidence on safety considerations rather than only the matters put in issue. If this were the meaning of the 1962 amendments, one wonders why Congress would have bothered at all to relax the two-hearing requirement."<sup>11/</sup>

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<sup>9/</sup> P. L. 87-615 (76 Stat. 409) (1962)

<sup>10/</sup> Supra n. 1, at 8-11.

<sup>11/</sup> Id. at 12.

The Court also addressed certain cases cited by UCS purporting to require independent Board review, and distinguished those cases from the Pilgrim proceeding.

In discussing Office of Communication, United Church of Christ v. F.C.C. <sup>12/</sup> the Court noted that, even in a case like Pilgrim, where the ASLB was to "review the record" with respect to uncontested issues,

"The role of the ASLB is not to compile a record; it is to review a record already compiled by the Staff and ACRS, who have responsibility for the sufficiency of that record. In the Federal Communications Act, Congress provided for public participation in the development of the record. In the Atomic Energy Act, owing to the different nature of the issues involved, it excluded the public at that stage, but in the interest of public confidence in the thoroughness of the review process, S. Rep. No. 1677, supra p. 10, at 9, invited public scrutiny at the later stage. ..." <sup>13/</sup>

With respect to the Calvert Cliffs <sup>14/</sup> case, the Court points out that it was "This singling out of environmental factors, where the ASLB automatically considers nonenvironmental matters", that the Court had held to be inconsistent with NEPA requirements <sup>15/</sup>. It went on to indicate that in Pilgrim the grievance was the "mirror image" of that in Calvert Cliffs--that radiological and safety matters

<sup>12/</sup> 425 F.2d 543, (D.C. Cir. 1969).

<sup>13/</sup> Supra n. 1., at 14.

<sup>14/</sup> Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, (D.C. Cir. 1971).

<sup>15/</sup> Supra n. 1., at 16.

were singled out for laxer review than given to environmental ones. But this, the Court notes, is an accident of timing, involving an operating license proceeding in a case where there had been no environmental review at the construction permit stage. The Court goes on to note that

"UCS is simply wrong if it conceives that the environmental phase of operating license proceedings will continue to involve a standard of review different from that in safety matters once the backlog of reactors issued construction permits before Calvert Cliffs is exhausted. We expressly said in that opinion that full NEPA consideration 'need not be duplicated, absent new information or new developments, at the operating stage.' 449 F.2d at 1128. To the extent there are new matters, such as alterations in the plans as evaluated at the construction stage, full NEPA consideration will of course be demanded." 16/

#### Relationship of Decision to Questions Posed by Commission

The questions posed by the Commission's letter of April 12, 1974, are cast in terms of whether a licensing board in an operating license proceeding may "ventilate" matters not in controversy. However, since the explicit provisions of 10 CFR 2.760a restrict a licensing board's decisional role to matters put into controversy by the parties, the principal focus of legal analysis is on whether such restriction is inconsistent with the requirements of law.

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Id. at 17.

The decision of the Court of Appeals for the District of Columbia in Union of Concerned Scientists v. AEC et.al., specifically addresses the issue of whether an ASLB presiding in an Atomic Energy Commission operating license proceeding is required to determine matters beyond those placed in controversy and clearly holds such determination is not required by the Atomic Energy Act nor by a number of cases specifically discussed, including the Calvert Cliffs case-- the case which sets out the application of NEPA requirements to AEC licensing proceedings.

The same rationale--that neither the Atomic Energy Act nor the cited cases require a hearing in operating license proceedings on all issues, in the absence of controversy among the parties--applies to the scope of review of licensing board decisions by an Atomic Safety and Licensing Appeal Board in such proceedings. This, of course, is logically consistent with the review function of the Appeal Board. If the Appeal Board were authorized, on review of a licensing board decision, to undertake factual inquiry of matters beyond those of record before the ASLB, there would be the obvious potentation for the anomalous result of an Appeal Board remand to an ASLB to obtain evidence on a matter beyond the authority of the ASLB to decide pursuant to the Commission's regulations, 10 CFR 2.760a. 17

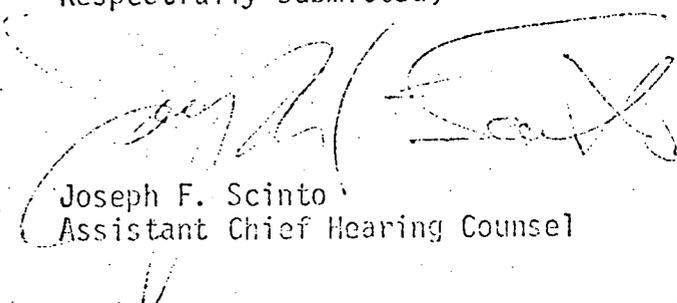
17/ The Appeal Board does not have the Commission's authority under §191 of the Act to establish an ASLB and to authorize it to conduct such hearings as the Commission may direct. See also 10 CFR 2.104(a). Her, of course, has the Appeal Board been delegated any rulemaking authority.

However, it is important to reiterate the initial point made in the staff pleading of April 25, 1974, that an Atomic Safety and Licensing Board or an Atomic Safety and Licensing Appeal Board would in no way be precluded from communicating to the Director of Regulation in an appropriate manner any concern its members may have with respect to matters beyond the scope of those before them for adjudication.

Matters not placed in controversy in an operating license proceeding are not disregarded in the Commission's regulatory process. On the contrary, the Commission's rules require complete and comprehensive safety and environmental assessment with respect to all aspects of reactor operations for each licensed facility and require that positive findings be made thereon by appropriate Commission officials. In a contested operating license proceeding the findings with respect to issues in controversy are made by the ASLB. The findings with respect to uncontested aspects of such proceedings are made by the Director of Regulation in the same manner as in cases in which no hearing has been requested. Moreover, the Director of Regulation has been provided by the Commission with both broad responsibilities and extensive resources including a highly expert experienced staff capable of comprehensive assessment and resolution of the most complex issues of science and engineering technology.

We believe that the relevant regulations have produced positive results in assuring resolution of safety and environmental issues relating to nuclear facility operation. Another layer of review by the ASLB or the Appeal Board of uncontested matters at the operating license stage is neither required by law nor by the Commission's regulations. Nor is it necessary or desirable from a policy standpoint.

Respectfully submitted,



Joseph F. Scinto  
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland,  
this 24th day of June, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "SUPPLEMENT TO REGULATORY STAFF BRIEF, DATED APRIL 25, 1974, ON THE TREATMENT OF UNCONTESTED ISSUES IN OPERATING LICENSE PROCEEDINGS", in the captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 24th day of June, 1974:

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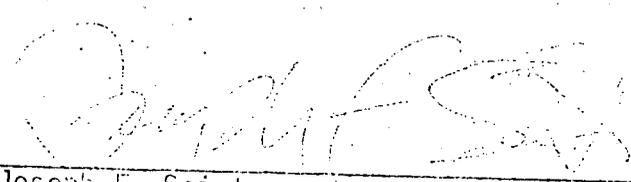
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