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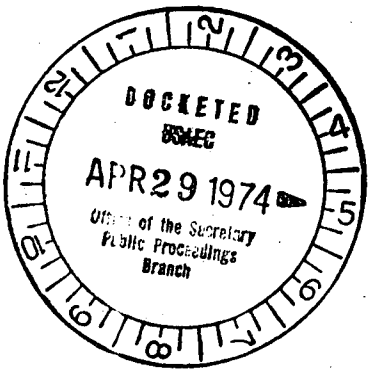
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



BEFORE THE COMMISSION

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

AEC REGULATORY STAFF'S BRIEF ON THE TREATMENT OF UNCONTESTED ISSUES IN OPERATING LICENSE PROCEEDINGS SUBJECT TO THE COMMISSION'S RESTRUCTURED RULES OF PRACTICE

In accordance with the Commission's letter-request of April 12, 1974, the AEC regulatory staff submits this brief detailing its views on the treatment of uncontested issues in operating license proceedings subject to the Commission's Rules of Practice, 10 CFR Part 2, as "restructured" by certain comprehensive amendments thereto published in the Federal Register on July 28, 1972 (37 F.R. 15127).

Introduction and Background

This proceeding, which was commenced by a notice of opportunity for hearing published on October 25, 1972 (37 F.R. 22816) is

governed by the "restructured" rules referred to above. One of the principal features of the procedural regime established by the restructured rules, discussed in the Statement of Considerations which accompanied the Amendment,[1/] is that "[a]t the operating license stage, where a hearing is required only upon the request of a person whose interest may be affected, the issues*** [are] limited to matters that are actually put in controversy by the parties." (37 F.R. 15128). By way of implementing this general policy, section 2.760a of the Commission's Rules of Practice specifically provides that:

1/ 37 F.R. 15127 - Other principal elements include provisions for: pre-docketing review of applications and early notice of opportunity for hearing; more expeditious discovery and for greater availability of AEC documents; revised requirements for intervention; special prehearing conferences; consolidation of parties; summary disposition on pleadings; challenges to AEC rules in hearings; encouraging stipulations and settlements.

See also Commission Information Release 0-214, November 19, 1971, "AEC Considering Extensive Changes to Reshape Regulatory Policies," to which reference is made in the Statement of Consideration.

> In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law only on the matters actually put into controversy by the parties to the proceeding and which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Depending on the resolution of those matters, the Director of Regulation, after making the requisite findings, will issue, deny, or appropriately condition the license. (emphasis added)

Against the backdrop of this regulation, the Licensing Board in this proceeding, on March 20, 1974, certified (to the Commission or, alternatively, to the Atomic Safety and Licensing Appeal Board) the question whether it is a Commission requirement that a licensing board which "includes two technical members having some concerns on radiological safety*** should not and must not make any inquiry or develop any record of facts concerning such safety matters for Commission or Appeal Board considerations and determinations [where no party to the proceeding has asserted a contention in regard to any such concern]." By Memorandum and Order dated March 26, 1974, ALAB-186, the Appeal Board acted on this certification pursuant to 10 CFR §2.785(d)(1) by certifying the Licensing Board's question to the Commission itself.[2/]

2/ As a basis for its discretionary certification pursuant to section 2.785(d)(1), the Appeal Board expressed a "belief that both a major and novel question of policy and procedure is involved."

We note here that although the Licensing Board's certified question related only to "concerns on radiological safety," the Appeal Board, in effect, expanded the certified question to include potential environmental concerns. Specifically, the Appeal Board stated that it was "seeking an express determination regarding the proper course for a licensing board to follow if, in its conduct of an operating license proceeding, that board perceives a potential safety or environmental problem which, even though not coming within the bounds of a contested issue, seems to the Board to merit further examination." ALAB-186, slip opinion at pp. 6, 7.

Subsequently, by letter dated April 12, 1974, the Commission requested the parties to file briefs on this matter addressed to the following three questions:

1. Should existing AEC regulations be construed to prevent a Licensing Board in an operating license proceeding from ventilating any relevant safety, environmental or other issue which the Board seeks to examine if the matter was not placed in controversy by the parties to the proceeding?

2. If the Board is so precluded, does the same bar apply to the Appeal Board and to the Commission itself? (Explain reasons.)

3. If the Licensing Board, the Appeal Board, or the Commission is so precluded, would the result be legally consistent with the agency's obligations as described in cases such as Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1116-1119 (C.A.D.C., 1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (C.A. 2, 1965), cert. denied, 384 U.S. 941; Aberdeen and Rockfish R. Co. v. United States, 270 F. Supp. 695, 710-712 (E.D. La. 1967), affirmed as modified, 393 U.S. 87 (1968)?

We turn now to a discussion of these questions.

Argument

1. The Commission's Restructured Rules of Practice preclude inquiry into uncontested matters by a licensing board presiding in an operating license proceeding.

At the outset, we note that the issue here involved is not whether the Commission's regulations in any way preclude a licensing board from communicating, in some appropriate manner,[3/] any legitimate environmental or radiological safety concern that its members may have as a result of their participation in a given proceeding. Surely, no defensible interpretation of the regulation would lead to a requirement that board members keep to themselves a potentially significant concern simply because no contention relating to that concern has been advanced by a party to the proceeding. The issue is, rather, one of the scope of a licensing board's authority to act on such a concern by initiating its own formal inquiry.

The authority of any licensing board is derived entirely by delegation from the Commission. This is made plain in section 191 of the Atomic Energy Act of 1954, as amended (Act), which authorizes the Commission to establish licensing boards "to [inter alia] conduct

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3/ In most cases such a communication would be addressed to the Director of Regulation who has both broad responsibility and extensive resources for evaluating the environmental and radiological safety aspects of power reactor licensing applications.

such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder" (emphasis added). Accordingly, the Commission's question No. 1 posed in the Commission's letter of April 12 reduces, in our view, to the question whether the Commission has or has not delegated to a licensing board presiding in an operating license proceeding the authority to investigate, on behalf of the Commission, matters not placed in controversy by the parties.

A fair reading of the pertinent regulations makes clear that no such delegation of authority has been made. As noted above, section 2.760a of the Rules of Practice specifically provides that "in any initial decision in a contested proceeding on an application for an operating license*** the presiding officer [licensing board] shall make findings of fact and conclusions of law only on matters actually put in controversy by the parties to the proceeding*** (emphasis added). See also, 10 CFR Part 2, App. A, § VIII(b), (c). To be sure, this provision, in terms, limits a licensing board's authority to decide rather than its power to investigate. However, as the Appeal Board aptly noted in connection with the certification here involved:4/

4/ ALAB-186, slip opinion, P. 4.

> As a general proposition at least, the power of an adjudicatory tribunal to inquire is thought to be co-extensive with its power to decide. If the tribunal is without jurisdiction to render a decision on a particular issue, it thus normally may not go into the issue at all.

This consideration by itself permits a strong inference that a licensing board in an operating license proceeding is without authority to investigate uncontested matters.[5/]

The inference is, moreover, strengthened upon consideration of the distinctly different functions performed by licensing boards at the construction permit and operating license stages, respectively. At the construction permit stage a hearing is held, as required by section 189 of the Act, whether or not a request for a hearing is made. In contrast, at the operating license stage, a hearing is required by statute and normally held only on request of a person whose interest might be affected by the proceeding.[6/] Licensing board review is, then, integrally involved in any construction permit proceeding but only fortuitously associated with an operating license proceeding. Furthermore, a licensing board's explicit mandate from the Commission is distinctly broader at the construction permit stage than at the operating license stage. At the

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5/ The Appeal Board in fact concluded on this basis that the Commission meant to foreclose an "open-ended inquiry into such matters." Id.

6/ In other cases, a hearing is held only if the Commission finds that a hearing is required in the public interest. See 10 CFR §2.104(a).

construction permit stage, a licensing board is called upon to consider the record with reference to the findings required pursuant to the Act and the National Environmental Policy Act of 1969 (NEPA) as a basis for the issuance of a construction permit. See 10 CFR § 2.104(b). Consistent with the nature of this mandate, licensing boards unquestionably have, at the construction permit stage, some latitude to inquire into matters not placed in controversy. However, no similar mandate exists at the operating license stage. Indeed, as noted above, a licensing board's explicit decisional mandate at the operating license stage is limited to matters specifically controverted. In sum, the limited licensing board function at the operating license stage, when compared to the broader licensing board function at the construction permit stage, implies a corresponding limitation on a licensing board's authority to initiate and conduct formal inquiries into matters not in controversy.

It is important also to note that the rule has worked well since its adoption, and along with the Commission's encouragement of settlements, has, in a number of proceedings, served to eliminate the steps involved in the operating license hearing process

when the case has been settled or intervention has otherwise been withdrawn. 7/ Similarly, in cases in which hearings have been held, the rule has helped to assure that the hearing process focuses on the resolution of the disputed matters which gave rise to the hearing in the first place. We believe that experience has demonstrated the efficacy of the rule and the sound Commission policy underlying it.

7/ Baltimore Gas and Electric Company (Calvert Cliffs' Nuclear Power Plant, Units 1 and 2), LBP-73-15, RAI-73-5, at 375 (May 10, 1973); Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, 50-289 Unit 1), Order Dismissing Proceeding (November 16, 1973);
Wisconsin Electric Power Company and Wisconsin-Michigan Power Company (Point Beach Nuclear Plant, Unit 1), Order Dismissing Proceeding (October 24, 1973);
Wisconsin Public Service Corporation, Wisconsin Power and Light Company, and Madison Gas and Electric Company (Kewaunee Nuclear Power Plant), Memorandum and Order (October 23, 1973);
Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), LBP-73-43, RAI-73-11, at 1062 (November 27, 1973);
Toledo Edison Company and The Cleveland Electric Illumination Company (Davis-Besse Nuclear Power Station), Memorandum and Order (November 1, 1973);
Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), Memorandum and Order (December 11, 1973); and
Indiana and Michigan Electric Company and Indiana and Michigan Power Company (Donald C. Cook Nuclear Plant, Units 1 and 2), Memorandum and Order (February 13, 1974).

2. The Appeal Board, but not the Commission, is similarly barred from inquiring into matters not placed in controversy.

The Commission itself, obviously, has full authority to consider, investigate, hear and determine all matters relating to the public health and safety and common defense and security under the Act.[8/] The Commission's authority under NEPA to consider environmental aspects is clear from Calvert Cliffs v. AEC.[9/] Accordingly, there is no question of the Commission's authority to consider, investigate, hear and determine any matter under the Act or NEPA whether or not raised by a party.

8/ Sections 103.d., 161, 182, 189.a, of the Act.

9/ Calvert Cliffs Cordinating Committee v. AEC, 449 F.2d 1109, (C.A.D.C. 1971).

Section 2.760a does not purport to limit the Commission in the exercise of this authority; nor does any other provision of the regulations do so.[10/]

An appeal board is in a different position. It does not have the plenary authority of the Commission. Its authority, like that of a licensing board, is derived entirely by specific delegation from the Commission. The Commission has established appeal boards to exercise the authority and perform the review functions which would otherwise have been performed by the Commission for, inter alia, proceedings on applications for licenses under 10 CFR Part 50. 10 CFR § 2.785(a). But nowhere do the Commission's rules confer upon an appeal board a review function which is larger in scope than the proceeding under review. With respect to an operating license proceeding, as discussed above, the scope of the proceeding is limited to "matters actually put in controversy by the parties" and, we submit, the scope of an appeal board's review function is limited accordingly.

10/ Because this is not a case in which the Commission is financially interested, there is no need to comment here, on the effect of 10 CFR § 2.785(d)(2), which restrict the Commission's power in such cases.

The Appeal Board, as noted in ALAB-186 at pp. 1, 2, has acknowledged, in several of its recent decisions, the thrust of the Commission's rule, 10 CFR § 2.760a, limiting the scope of an operating licensing proceeding to the issues in controversy. Section 2.760a effectively limits the scope of an operating license proceeding not only before a licensing board in the first instance but before an appeal board on review.

For the foregoing reasons, the Commission should conclude that the Appeal Board lacks authority to initiate a formal inquiry into uncontested matters in operating license proceedings.

3. The foregoing results are not inconsistent with the case law cited.

The foregoing analysis is in no way inconsistent with an agency's obligations as described in the decisions cited in the Commission's letter of April 12, 1974. The burden of the Calvert Cliffs' decision, as we understand it in this context, is that agencies must "consider environmental issues just as they consider other matters within their mandates." 449 F.2d at 1112 (emphasis in originia) The issue here, however, involves not even an arguable discrimination against environmental

issues. The Commission's regulations limiting the scope of operating license proceeding apply no less to radiological safety issues than to environmental issues within the purview of NEPA.

True, the court in Calvert Cliffs' said that compliance with NEPA requires that "environmental issues be considered at every important stage in the decisionmaking process concerning a particular action," and that, while "consideration which is entirely duplicative is not necessarily required, *** independent review of staff proposals by hearing boards is hardly a duplicative function." 449 F.2d at 1118. The court then concluded that the hearing process "is an appropriate stage at which to balance conflicting factors against one another". Id. However, in context it is clear that this conclusion was premised upon the assumption of a proceeding, such as a construction permit proceeding, where the licensing board's function is not limited to consideration of contested matters. Indeed, the sentence immediately preceding the statement of the courts conclusion reflects the court's understanding that "hearing boards automatically consider nonenvironmental factors, even though they have been previously studied by the staff." This, of course, is accurate with respect to construction proceedings but not as to operating license proceeding. In any case,

the statutory language in point requires only that the detailed statement required by section 102(2)(C) "accompany the proposal through the existing agency review process." (emphasis added) NEPA does not require the establishment of additional agency review processes for consideration of matters within its purview (See Jicarilla Apache Tribe v. Morton, 4 ERC 1933, (9th Cir. 1973).

Likewise, neither Scenic Hudson [11] nor Aberdeen and Rockfish R. Co. [12] compels the conclusion that licensing boards should have authority in all cases to inquire into uncontroverted matters. These decisions do stand for the proposition that an agency has an affirmative obligation to inquire into and consider all relevant facts. However, the issue here is not whether the Commission has such an obligation but, rather, which component of the Commission (an adjudicatory tribunal or the Director of Regulation) has the authority and responsibility for meeting that obligation as to uncontested matters in an operating license proceeding. The Director of Regulation has that authority and responsibility with respect to all operating license applications on which hearings are not held. In addition, under the "restructured" rules, as we understand them, the Director of Regulation has similar authority and responsibility with respect to the uncontested aspects of an operating license proceeding

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11/ Scenic Hudson Preservation Conference v. FPC, 354, F.2d 608, 620 (C.A. 2, 1965), cert. denied, 384 U.S. 941.

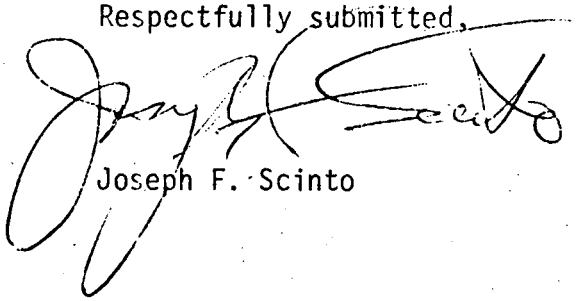
12/ Aberdeen and Rockfish R. Co. v. United States, 270 F. Supp. 695 710-712 (E.D. La. 1967), affirmed as modified, 393 U.S. 87 (1968).

in which a hearing is held. In any event, with respect to all matters properly within their purview, licensing boards and appeal boards have ample authority to meet the affirmative obligations established in such cases as Scenic Hudson.

CONCLUSION

The Commission's regulations clearly, and properly, preclude a licensing board or an appeal board, though not the Commission itself, from initiating an inquiry into uncontroverted matters in an operating license proceeding.

Respectfully submitted,



Joseph F. Scinto

Dated at Bethesda, Maryland,
this 25th day of April, 1974.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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

Docket No. 50-286

CERTIFICATE OF SERVICE

I hereby certify that copies of "AEC Regulatory Staff's Brief on the Treatment of Uncontested Issues in Operating License Proceedings Subject to the Commission's Restructured Rules of Practice," dated April 25, 1974, in the captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of April, 1974:

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