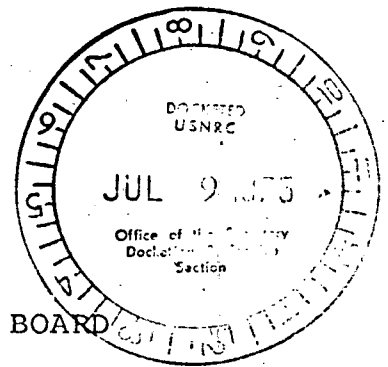


7-7-75

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S RESPONSE TO  
MOTION FOR APPOINTMENT OF A SPECIAL COUNSEL

By Motion dated June 30, 1975, the Citizens Committee for the Protection of the Environment ("CCPE") urged the Atomic Safety and Licensing Appeal Board ("the Appeal Board") to "appoint a special counsel from within or outside the Commission and postpone the time for resolution of the seismic issue until that counsel can consult with and submit a brief on behalf of the ASLB." A similar suggestion has been made by the Hudson River Fishermen's Association and Save Our Stripers. See Memorandum of the Hudson River Fishermen's Association and Save Our Stripers in Response to the Questions of the Appeal Board in its Order of June 20, 1975, at 2 (June 27, 1975). Pursuant to § 2.730(c) of the regulations of the Commission, Consolidated Edison Company of New York, Inc. ("Con Edison"), Applicant in the above-

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captioned proceeding hereby submits its response in opposition to that Motion, and urges that the Motion be denied for the following reasons:

1. There is no authority for the appointment of a "special counsel" by the Appeal Board. CCPE has failed to refer, in its Motion, to any pertinent statute or regulation authorizing the Appeal Board to appoint "special counsel" to represent the Atomic Safety and Licensing Board ("the Licensing Board") in proceedings to review the Memorandum and Order rendered on June 12, 1975. LBP-75-31, NRCI-75/6 (June 12, 1975).

The only legal authority cited by CCPE is an isolated decision by the United States Court of Appeals for the District of Columbia Circuit. United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973), rehearing denied, 497 F.2d 625 (1974). That case is entirely inapposite. There, the district court had refused to abide by a pretrial agreement entered into between a criminal accused and the United States Attorney's Office. Such a procedural setting in itself renders extremely suspect any attempt to apply the case to the administrative proceeding here on review. Moreover, it is not the case here that the trial-level tribunal has refused to approve an agreement reached by the parties to the

proceeding. Indeed, the case is precisely the opposite, for here the Licensing Board has expressly approved the stipulation among the parties dated January 13, 1975.

2. Appointment of a "special counsel" in this case is not necessary. Even assuming that a "special counsel" could be appointed in the manner suggested by CCPE, no showing has been made in this case that such an appointment is necessary. Perceiving the possibility that no party to the proceeding will support the decision of the Licensing Board apparently conditioning the issuance of a full-term, full-power license on the resolution of certain seismic questions, CCPE argues that a stranger to the proceeding must be brought in to speak for the Licensing Board. Here, however, the Licensing Board has spoken for itself, by responding to Con Edison's June 23, 1975 Motion for Clarification of the Memorandum and Order entered on June 13, 1975. On July 3, 1975, the Licensing Board entered an Order Denying Motion for Clarification, a copy of which is attached hereto. While the Order purports to deny the request for clarification of the June 13 Memorandum and Order, it in fact serves to clarify the Board's intention.

Moreover, the New York State Atomic Energy Council ("the Council"), which, unlike CCPE, is a party

to this proceeding, has yet to be heard from. Considering the manner in which the seismic issue has been raised in this proceeding, it is not unlikely that the Council will argue in support of what now appears to be the Licensing Board's intent in authorizing issuance of 91% and 100% operating licenses.

Furthermore, CCPE itself has sought leave to file a brief as amicus curiae in this case, tendering such a brief to the Appeal Board. Con Edison has no objection to CCPE's participation as an amicus, but fails to see the need for participation by yet another attorney as "special counsel". To the extent that CCPE wishes there to be an advocate for the Licensing Board's decision who has the benefit of the history of the entire proceeding, it is of course open to CCPE to examine the record of the case as available from the Office of the Secretary to the Commission.

The notion, advanced by CCPE, that a "special counsel" must be appointed who has untrammelled access to the Licensing Board, is an outrageous proposition over which the Appeal Board need not long tarry. Such access to the trier of fact has absolutely no precedent. The Licensing Board's position is that of a judge, not a party to the proceeding, and any move to make it a party would subvert the concept of the independence of

the administrative law judge that is central to the Administrative Procedure Act and the adjudicatory hearing concept of the Atomic Energy Act. The Licensing Board's ratio decidendi must appear in the Initial Decision or other rulings which augment and clarify it, and is not to be laid out, with the aid of its own separate counsel, after the fact, for consideration by higher authorities.

For the foregoing reasons, the Motion for Appointment of a Special Counsel should be denied.

Respectfully submitted,

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July 7, 1975

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 1975, served the foregoing document entitled "Applicant's Response to Motion for Appointment of a Special Counsel" by mailing copies thereof first class postage prepaid, and properly addressed, or by hand delivery, to the following persons:

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