UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S BRIEF IN
SUPPORT OF EXCEPTIONS

On June 12, 1975, the Atomic Safety and Licensing Board ("the Licensing Board") entered a Memorandum and Order Approving Stipulation for Settlement Proposed by Parties and Decision Respecting Concerns Related to the Authorization of a Full-Term, Full-Power Operating License. Consolidated Edison Company of New York, Inc. ("Con Edison"), as Applicant in the above-captioned proceeding, has this date filed Exceptions to the Memorandum and Order, and submits the instant brief in support of those Exceptions.

Exception No. 1

THE LICENSING BOARD ERRED IN INDICATING THAT CON EDISON APPLIED FOR LICENSES UNDER § 103 OF THE ATOMIC ENERGY ACT.

In footnote 2 on page 3 of the slip opinion of the Licensing Board's June 12 Memorandum and Order,

the Board remarked that the Con Edison "[a]pplication was amended in April 1973 to request licenses provided by the amended Section 103 of The Atomic Energy Act." The reference in this footnote should have been to § 104 of the Atomic Energy Act, since the Amended and Substituted Application for Licenses filed with the Commission on April 16, 1973 expressly requested issuance of a class 104 operating license. See Amended and Substituted Application for Licenses at 1. That document also expressly referred, in the prayer for relief, to licenses "to authorize Applicant to engage in . . . [t]he possession, use, and operation of the facility, as a utilization facility, in accordance with Section 102b and Section 104b of the Act . . . ." Id. at 19.

Moreover, the original Application for Licenses had been filed under § 104b of the Atomic Energy Act, and the construction permit (CPPR-62) was a class 104 permit. 4 AEC 246, 262 (1969). Since that permit was issued on August 13, 1969, a date prior to December 19, 1970, Con Edison properly sought and is entitled to receive a class 104 operating license. 10 C.F.R. § 50.21 (b)(1) (1975).

Exception No. 2

THE LICENSING BOARD ERRED IN IMPOSING A SEISMIC CONDITION IN ITS AUTHORIZATION OF THE ISSUANCE OF A FULL-TERM, FULL-POWER OPERATING LICENSE.

In its Memorandum and Order dated June 12, 1975, the Licensing Board authorized the Director of Nuclear Reactor Regulation, "subject to the determination by the Commission respecting the pending seismic contentions," slip opinion at 22, "to make appropriate findings in accordance with the regulations of the Commission and for the protection of the environment, and to issue a license for the full-term and full-power operations sought by the application, as amended." Id. In a subsequent order denying Con Edison's June 23, 1975 Motion for Clarification of the June 12, 1975 Memorandum and Order, the Licensing Board has indicated that the intent of the language quoted above was to impose a seismic precondition to the issuance of an operating license by the Director of Nuclear Reactor Regulation.

Con Edison has already addressed this matter in its response to the Atomic Safety and Licensing Appeal Board's Order of June 20, 1975, ALAB-278, NRCI-75/6 (June 20, 1975), and respectfully incorporates herein by reference the document entitled

Applicant's Memorandum in Response to Order of June 20, 1975.

As was pointed out in that submittal, the June 12, 1975 Memorandum and Order, in our view, did not create a seismic condition precedent to the issuance of a full-term, full-power operating license. It was argued that in any event no such condition was appropriate because (1) the record lacks the evidentiary basis to support such a condition, and (2) the Licensing Board was without jurisdiction to impose such a condition on the ground that the seismic questions are before the Commissioners at the request of both the New York State Atomic Energy Council ("the Council") and the Citizens Committee for the Protection of the Environment ("CCPE"). (The former is a party to this proceeding, while the latter has moved for leave to file an amicus brief before this Board.)

These factors militate against the imposition of a seismic condition precedent. Under the Administrative Procedure Act and the Commission's Rules of Practice, an initial decision must be "supported by reliable, probative, and substantial evidence." 5 U.S.C. § 556(d) (1970); 10 C.F.R. § 2.760(c) (1975). Here there is no such evidence. The Regulatory Staff of the Commission,

in response to a contention belatedly expressed (and subsequently withdrawn) by the Council, offered a panel of expert witnesses. Tr. 379. The Council cross-examined these witnesses, Tr. 390-426, but no evidence at all was offered by the Council. Instead, as indicated, the Council (over Con Edison's objection) withdrew its request to present evidence, and, in a letter to the Licensing Board, expressly consented to the issuance of an operating license.

No proposed findings and conclusions with respect to seismicity were advanced by any party, nor did the Licensing Board direct their submittal.

Of course, if the testimony taken by the Licensing Board supported a condition, that would be an end to the matter. This, however, is not the case. Indeed, the Staff has affirmatively concluded that the facility may be licensed. See Safety Evaluation (Supp. No. 1, Jan. 16, 1975), App. C, at 1-6, following Tr. 388A. At the evidentiary hearing the Staff continued to support that conclusion.

In addition to the lack of evidence, there are strong policy reasons against a seismic precondition

to the issuance of an operating license. As previously indicated to the Appeal Board, there are now pending before the Commission requests for seismic inquiries from both CCPE and the Council. These requests relate to all three facilities at the Indian Point site. There is also pending a petition for clarification or rule-making with respect to Appendix A to Part 100 of the Commission's regulations. In re New England Coalition Against Nuclear Pollution, 40 Fed. Reg. 20983 (1975).

Where such requests are pending before the Commissioners, it is inappropriate for a Licensing Board to take action that has the effect of pre-empting the Commissioners. The Licensing Board recognized this in its June 12, 1975 Memorandum and Order, where it stated it was expressing "no conclusion on this matter since to do so would appear to prejudge the matter for the Commission." Slip opinion at 19. This, however, is precisely what the Licensing Board did by attempting (as now appears from the Order denying the Con Edison Motion for Clarification) to impose a condition precedent.

In this regard it is pertinent to note that, unless otherwise directed, Commission attention to a generic matter removes the problem from consideration by individual licensing boards. See, e.g., Vermont

Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972); ALAB-179, RAI-74-2, 159, 161-64 (Feb. 28, 1974). The rule vindicates the public interest in the orderly conduct of Commission business and should apply here to bar a seismic condition precedent.

Exception No. 3

THE LICENSING BOARD ERRED IN FINDING THAT CON EDISON HAS CONCEDED THAT THE SALT SPRAY DEPOSITION FROM A COOLING TOWER OPERATION WOULD BE APPROXIMATELY EQUAL TO THE BACKGROUND DEPOSITION.

In footnote 9 on page 9 of the June 12, 1975 Memorandum and Order, the Licensing Board found that Con Edison had conceded that the salt spray deposition from a cooling tower operation would be approximately equal to the background deposition. Con Edison did not make such a concession. Rather on page 2 of the document entitled Applicant's Supplemental Responses to Certain Inquiries of the Atomic Safety and Licensing Board Raised at the April 1-2, 1975 Evidentiary Hearing, filed on April 21, 1975, Con Edison stated in pertinent part as follows:

> "Operation of the natural draft wet cooling tower would be additive to the natural background salt deposition.

> Analytical results indicate that the peak annual average salt deposition from the tower would be 896 KG/KM^2/MO (Volume 1, pages 6-15, and Volume 2 Appendix B, Table 3-1 of the aforementioned Consolidated Edison report [Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point Unit No. 2, December 1974]). Added to the background value of 160 KG/KM^2/MO, the total salt deposition would be 1056 KG/KM^2/MO, which is well above the minimum value for potential botanical injury to hemlocks, white ash, and dogwood plants. (See Volume 3, Appendix B. Table 15 of the Consolidated Edison report)."

As a result, the indicated portion of the June 12, 1975 Memorandum and Order should be deleted. Cf. Pennsylvania Power and Light Co. (Susquehanna Steam Elec. Station, Units 1 & 2), ALAB-163, RAI-73-12, 1141-42 (Dec. 11, 1973).

Exception No. 4

> THE LICENSING BOARD ERRED IN STATING THAT "CONVINCING EVIDENCE" MUST BE PRESENTED THAT THE ADVERSE IMPACT OF ONCE-THROUGH COOLING IS NOT SERIOUS, OR THAT THE MOST ACCEPTABLE ALTERNATIVE WILL HAVE A MORE SERIOUSLY ADVERSE IMPACT, IN ORDER TO HAVE THE LICENSE CONDITION REQUIRING TERMINATION OF ONCE-THROUGH COOLING VACATED BY THE COMMISSION.

As pointed out in footnote 3 on page 16 of Con Edison's memorandum in response to ALAB-278, the Licensing Board's June 12, 1975 Memorandum and Order incorrectly

stated the standard of proof that will govern any application Con Edison may make with a view to obtaining a vacation of the stipulated license condition requiring closed-cycle cooling after the interim operation period. The Appeal Board had occasion to discuss the burden of proof issue in the Indian Point Unit No. 2 case, where it held that

> "With regard to whether an applicant has sustained its burden of proof on contested issues, the quantum of proof which must be adduced is a preponderence of the evidence." ALAB-188, RAI-74-4, 323, 357 & n.143 (Apr. 4, 1974), citing Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (D.C. Cir. 1973); Kent v. Hardin, 425 F.2d 1346, 1349 (5th Cir. 1970); Jaffe, Administrative Law: Burden of Proof and Scope of Review, 79 Harv. L. Rev. 914 (1966).

Reference to the preponderance standard is correct, and the Licensing Board's invocation of the convincing evidence standard should accordingly be disapproved.

Conclusion

For the foregoing reasons, the Memorandum and Order dated June 12, 1975 should be affirmed to the extent that it authorizes issuance of a full-term, full-power operating license, revised to the extent that it unlawfully imposes a seismic condition precedent

to the issuance of such a license, and modified in the other respects noted in Exceptions 1, 3 and 4, supra.

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July 7, 1975

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 1975, served the foregoing documents entitled "Applicant's Exceptions to Memorandum and Order Approving Stipulation for Settlement Proposed by Parties and Decision Respecting Concerns Related to the Authorization of a Full-Term, Full-Power Operating License" and "Applicant's Brief in Support of Exceptions" by mailing copies thereof first class postage prepaid, and properly addressed, or by hand delivery, to the following persons:

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