6-30-75

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	)	Docket No. 50-286
	)	
(Indian Point, Unit No. 3)	)	

MOTION FOR APPOINTMENT
OF A SPECIAL COUNSEL

In its initial decision in this proceeding the licensing board imposed a condition on its authorization for an operating license for Indian Point #3 that will not likely have the support of any party to the proceeding. With the exception of the New York State Atomic Energy Council no intervenor raised any safety issues. While the Council did raise the seismic issue it withdrew the issue and indicated its agreement that the license be issued without any further consideration of the seismic issue in this proceeding. The Staff and the Applicant have supported an unconditional authorization for an operating license.

Yet the ASLB obviously had given the seismic problem much thought and concluded, on the record before it, that the issuance of a license to operate Indian Point #3 should be conditioned upon resolution of this important issue. Of particular significance is that one of the ASLB members, Dr. Briggs, is an extremely well-qualified nuclear expert and that the ASLB judgment on this matter obviously reflects the application of Dr. Brigg's expertise.

The Appeal Board in ALAB-278 has now raised several important questions about the ASLB action. In the context of an adversary system, the Appeal Board must in the first instance rely upon the parties to present the varying views from which a proper judgment can be reached. Where for some reason no party supports the ASLB decision, some mechanism must be provided to assure a vigorous advocacy of the ASLB position. In fact, in similar cases in the Federal Court system, appellate courts appoint special counsel. See for instance, United States v. Ammidown, 497 F. 2d 615 (D.C. Cir., 1973) rehearing denied 497 F. 2d 625 (D.C. Cir., 1974) where the defendant appealled a first degree murder conviction on the ground that the trial court improperly rejected the proferred plea bargain of second degree murder and because the United States Attorney supported the appeal the Court of Appeals appointed a special counsel to present the position of the trial court judge.

In this case the request for filing an amicus brief by Citizens Committee for Protection of the Environment, an organization antagonistic to the issuance of the operating license, does not obviate the need for a special counsel. The same financial constraint which prevented CCPE from becoming a party in the case also restrains its ability to thoroughly brief or defend the ASLB decision. In addition, CCPE can not develop the ASLB responses to the Appeal Board questions particularly because of its

unfamiliarity with the record of this case. An issue developed in the course of a hearing by opposing parties acquires a patina which allows those parties on appeal to expose the underlying reasoning for a decision. Where the issue emerges as the result of a sua sponte review by the ASLB, an amicus can not hope to find enough in the record to properly articulate answers to the probing questions of an Appeal Board. Only counsel who is free to consult with the ASLB can provide the necessary perspective.

For all of these reasons we urge that the Appeal Board 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.

Respectfully submitted,

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Dated: June 30, 1975

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CITIZENS COMMITTEE FOR
PROTECTION OF THE ENVIRONMENT
BRIEF AMICUS CURIAE IN SUPPORT OF
INITIAL DECISION IN INDIAN POINT #3

In this case, the ASLB, displaying the independence and concern with safety intended by the Atomic Energy Act, determined that important seismic questions remained unresolved and that their resolution should precede authorization of full-power operation of Indian Point #3. The ASLB never did authorize unlimited operation of the plant at 91% of power. Instead, responding to a request from the Applicant it authorized fuel loading, subcritical testing and further testing up to 91% of power. The Applicant's request was for this authority through June 30, 1975. In fact no license has yet been issued for fuel loading, subcritical testing or operation up to 91% of power for testing.*/ Thus,

*/ Apparently Indian Point #3 is not yet ready to use any license if one had been issued. In addition the Staff review of ECCS has not been completed and until this issue is satisfactorily resolved, testing above 1% of power will probably not be allowed. Moreover, as the record for Indian Point #2 with reference to issuance of a 50% testing license indicates, a period of several months are needed to complete fuel loading, subcritical testing and 1% testing. Thus as a practical matter there is no immediate need to determine if the Applicant can receive a full-power license for Indian Point #3. Undoubtedly, long before it needs such a license, the Commission will have resolved the seismic question or at least established a mechanism

(cont'd on page 2)

ALAB-278 begins from the erroneous premise that the ASLB had incongruously authorized 91% steady-state power operation in April without seismic conditions but refused to unconditionally approve 100% steady-state operation. The questions posed are therefore not directly relevant to the facts of the case. The issue is whether testing licensees differ from steady-state operating licenses.

In a previous Indian Point case (Indian Point #2, Docket No. 50-247, Initial Decision, July 14, 1972, Slip Op., e.g., pp. 15, 17, 22) the licensing board noted significant safety differences between testing and steady-state operation of a reactor. Thus, approving testing even up to 100% of power, is a substantially different decision than approving steady-state operation. In 10 CFR § 50.57(c) the difference between testing and steady-state operation is recognized. Testing authority is obviously more easily obtained and therefore presumably raises fewer safety questions.

While ALAB-278 does not specifically seek discussion on the correctness of the ASLB decision to await the resolution of the seismic issue prior to authorizing Indian Point #3 operation, the parties will undoubtedly address the point and so shall we. First,

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*/ (cont'd from page 1)

to do so and laid down interim guidance for plant operation. In such a case the Appeal Board should be wary about rushing to reach a decision on expedited schedules when a more leisurely pace would improve the quality of the review and where a higher authority, the Commission, will act before the Appeal Board's or the ASLB's decision can have any practical affect.

pursuant to 10 CFR Part 100 and Appendix A thereto, specific questions regarding seismicity must be resolved including the capability of faults in the vicinity of the site (10 CFR Part 100 App. A, § V(b)), the intensity of the safe shutdown earthquake (10 CFR Part 100 App. A, § V(A)(1)) and the ground acceleration associated with the safe shutdown earthquake (10 CFR Part 100, App. A, § V(a)(1)(I)). It is by now axiomatic that compliance with Commission regulations, including these, must be found prior to authorizing operation of a reactor. Nader v. Nuclear Regulatory Commission, ____ F. 2d ____ (D.C. Cir., No. 73-1872, decided May 30, 1975) Slip Op. p. 574; Vermont Yankee Nuclear Power Corporation, ALAB-138, RAI-73-5, pp. 520, 528, 530. See also Vermont Yankee Nuclear Power Corporation, ALAB-179, RAI-74-2, pp. 159, 185-86 criticizing a licensing board for issuing a license where an unresolved safety item exists.*/ The ASLB was aware of the serious concerns of competent geologists for the New York State Geological Survey that in their opinion either the seismic questions raised by the regulations could not be answered or that the answers given by the Staff and the Applicant were erroneous. It would have been gross error if the ASLB had authorized a full-power, full-term license for this plant without having a resolution of those issues.

*/ Unlike ALAB-179, here there is a mechanism for resolution of the safety question. The ASLB here correctly defers to that tribunal -- i.e. the Commission.

However, the ASLB could not hope to adequately resolve the issue in this proceeding. Neither CCPE nor the State of New York were prepared to pursue the issues in this proceeding. Only by subpoena would the ASLB have been able to force the New York State experts to testify. There was not even that mechanism to compel the impoverished CCPE to participate. Perhaps if the Indian Point #3 hearing were the only forum for resolution of the issue the ASLB would have had no choice. But, the matter is pending before the full Commission in a proceeding in which all parties are represented, in which CCPE and New York State are eager to participate, and in which the seismic issue as it affects all three Indian Point plants can be resolved at once. The ASLB took the fully defensible position of deferring to the higher authority in the fuller and more adequately represented proceeding.

In short the ASLB identified a serious unresolved safety issue that relates specifically to the long term safety of the plant and refused to authorize long-term operation until the issue was resolved. With the Commission on the verge of deciding the mechanism to be used for resolving the issue and the ASLB deprived of any party to pursue the issue before it in opposition to the Applicant, it followed the only rational course of action -- it deferred to the Commission. The decision of the ASLB to condition the issuance of a full-term license on resolution of the seismic issue by the

Commission (Slip Op. p. 22) should be affirmed.*/

Respectfully submitted,

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*/ Clearly the ASLB did not merely state that the license be issued but be subject to change if the Commission should order a change. That is axiomatic and would not require 3 pages of an initial decision to explain that the license would be issued conditioned upon any future action of the Commission.