

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

MOTION FOR CLARIFICATION OF  
MEMORANDUM AND ORDER OF JUNE 12, 1975

Introduction

On June 12, 1975, the Atomic Safety and Licensing Board ("the Licensing Board") issued 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" in the above-captioned proceeding. The Memorandum and Order was docketed with the Office of the Secretary on June 13, 1975. In that Memorandum and Decision, the Licensing Board approved the Stipulation among the parties dated January 13, 1975, and referred the same to the Atomic Safety and Licensing Appeal Board ("the Appeal Board"). The Licensing Board authorized the Director of Nuclear Reactor Regulation "to make appropriate

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findings in accordance with the regulations of the [Nuclear Regulatory] 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."

The Licensing Board ruled that the action of the Director of Nuclear Reactor Regulation would be "subject to the approval of the Appeal Board of the stipulation presented by the parties, and further subject to the determination by the Commission respecting the pending seismic contentions . . . ." Slip Opinion at 22. Concerns regarding the seismic conditions at the Indian Point site have been raised before the Nuclear Regulatory Commission ("the Commission") by the Citizens Committee for the Protection of the Environment, which is not a party to this proceeding, and before both the Licensing Board and the Commission by the Atomic Energy Council of the State of New York, which is a party to this proceeding.

On June 20, 1975, the Appeal Board entered an interlocutory order directing the parties to this

proceeding to address themselves, inter alia, to the following questions:

1. Considering the seismic condition imposed by the Licensing Board on the authorization for a full power license, what is the difference in the risk to the public health and safety between operation at 91% of full power and operation at full power?
2. If there is no significant difference in the risk to the public health and safety between operation at 91% of full power and at 100% of full power, should not authorizations for operation at these levels be consistent?
3. If there is a significant difference, then is it significant enough to justify the authorization permitting operation at 91% of full power without any seismic condition? If not, what condition(s) should be imposed?

Since the Licensing Board has not yet lost its jurisdiction over the matter, 10 C.F.R. § 2.717(a) (1975), and since it is believed that it would be helpful to the Appeal Board to have a statement of the intent of the Licensing Board in fashioning the ordering paragraphs of the June 12 Memorandum and Order, Consolidated Edison Company of New York, Inc. ("Applicant") hereby moves the Licensing Board for a clarification of that Memorandum and Order.

Discussion

In Applicant's view, the Appeal Board's concern regarding the divergence between the Licensing Board's Order Authorizing Issuance of Limited Operating License dated April 8, 1975 and its June 12 Memorandum and Order, while understandable, is misplaced. It is true that the order authorizing issuance of a 91% operating license contains no suggestion that seismic questions are outstanding before the Commissioners, while the 100% order does refer to those questions. A careful reading of the June 12 Memorandum and Order shows, however, that the Licensing Board has not, in fact, interposed a seismic condition precedent to the action of the Director of Nuclear Reactor Regulation, but has merely recognized the independent legal reality that action to be taken by the Nuclear Regulatory Commission with respect to the pending seismic requests before it could lead to a Commission order modifying any license issued for operation of the Indian Point Unit No. 3 facility. See 10 C.F.R. § 2.204 (1975). Thus, the Licensing Board has simply

provided explicit recognition of a condition subsequent to the issuance of an operating license. This condition subsequent would exist even if it had not been expressed in haec verba by the Licensing Board. In this respect, although the language is different, it is noteworthy that the Licensing Board's April 8 Order also recognized the possibility of subsequent modification of an issued license. See Order Authorizing Issuance of Limited Operating License, April 8, 1975, slip op. at 2.

This analysis finds strong support in the Licensing Board's June 12 action on pages 19-20 of the slip opinion. The opinion states:

Whether the contentions are to become issues in a proceeding involving Unit No. 3 will be decided by the Commission and the decision resulting from any such proceeding will apply to any operating license authorized for Unit No. 3 by this order. The Licensing Board therefore expresses no conclusion on this matter since to do so would appear to prejudge the matter for the Commission . . . .

We construe this language to indicate that the Atomic Energy Council's seismic contentions did not "become issues in a proceeding involving Unit No. 3," although

they might become such in the future, by order of the Commission. The contentions not having become "issues", and the Licensing Board having permitted the Atomic Energy Council (over Applicant's objection) to withdraw its contentions as to seismology and geology, it is submitted that the record lacks the substantial evidence that would be necessary to support a condition precedent on seismic grounds.

The seismic questions are before the Commission, and now rest solely within that body's jurisdiction. This fact does not prevent the Licensing Board from authorizing issuance of an operating license, nor does it permit the Licensing Board to attach a seismic condition precedent to the order absent the evidence necessary to support such a condition.

The Commission could have, but did not, suspend the instant proceeding or take other action to preserve the status quo with respect to the licensing of any of the Indian Point facilities. Such action would be within that body's supervisory jurisdiction, and any effort by the Licensing Board to perform the Commission's function

in this regard would be beyond its competence. We believe the language quoted above reflects this and the June 12 Memorandum and Order should be construed accordingly.

#### Conclusion

For the foregoing reasons, Applicant respectfully moves the Atomic Safety and Licensing Board for a Supplemental Order clarifying the purpose and effect of the phrase "and further subject to the determination by the Commission respecting the pending seismic contentions" as it appears on page 22 of the Licensing Board's Memorandum and Order of June 12, 1975. The Atomic Safety and Licensing Appeal Board having directed the filing of written submittals on or before June 30, 1975, and oral argument on July 9, 1975, Applicant further moves the Licensing Board for expedited consideration of the instant motion.

Respectfully submitted,

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Dated: June 23, 1975

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document entitled "Motion for Clarification of Memorandum and Order of June 12, 1975" by mailing copies thereof, first class postage prepaid and properly addressed, or by hand delivery this 23rd day of June 1975 to the following persons:

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