



the latter category require the party raising the issue to move forward in some way with respect to that issue before the other parties are required to respond. See Consumers Power Co., ALAB-123, RAI-73-5 (p. 345).

It is quite clear that regardless of which party raises an issue or the method by which the issue is raised, once the issue is legitimately in the proceeding the Applicant carries the burden of proof with respect to that issue - i.e. the Applicant has the burden to prove that the issue does not require a denial of any license or the issuance of a license containing conditions other than those proposed by the Applicant. 5 U.S.C. § 556(d); Consumers Power Co., supra; 10 CFR § 2.732.

The general issue now under discussion is energy conservation as an alternative to the proposed action. The scope of the issue clearly encompasses the full range of contentions presented here by EDF and presented previously and again now by Ecology Action. In its Memorandum and Order dated November 6, 1972 the Commission stated (pp. 1-2)^{*/}:

^{*/} In the Order the Commission reversed the earlier ruling excluding evidence on the issue of energy conservation. While it referred to intervenors desire to present evidence it did not in any way imply that only the intervenor was to present evidence or that the intervenor had the burden of going forward on this issue. The Commission simply did not directly reach the question of burden of proof or burden of going forward.



This matter arises at a time of deep national concern over energy sources and supply -- a concern which this Commission fully shares. In view of our responsibilities under the National Environmental Policy Act, we cannot agree that the subject of energy conservation must be altogether ruled out of licensing proceedings. It is true that the parameters of our statutory power to compel conservation are not clear. But it does not follow that all evidence should therefore be barred at the threshold.

We believe this action by the Commission clearly placed energy conservation within the category of issues for which consideration is mandated by statute or regulation.^{*/} Thus with respect to this issue the Applicant has an affirmative duty to come forward with evidence on the energy conservation issue just as it had the obligation to present evidence on the alternatives of electric generation by a fossil fuel plant and alternative locations for any generating facility.^{**/}

^{*/} This action by the Commission is Commission judgment that energy conservation is an issue for which a prima facie showing of relevancy has already been made just as the Commission has previously determined by regulation that the environmental affects of water discharges that meet state water quality standards is prima facie, a relevant issue on which Applicant is required to present data. 10 CFR Part 50, Appendix D (Paragraph A-4).

^{**/} Obviously the Applicant's evidence may seek to establish that one or more possible energy conservation alternatives are inapplicable to this case regardless of their general feasibility. We are not here seeking to determine what energy conservation alternatives are available and which are not for this plant but rather to make clear that following the AEC Order it is now incumbent upon the Applicant to move forward just as it does with its Environmental Report.



The AEC regulations require the Applicant to produce data in its Environmental Report on alternatives to the proposed action. 10 CFR Part 50, Appendix D (Paragraphs A-1 and 2). The Commission has now ruled that energy conservation may not be altogether ruled out of a licensing proceeding. In fact the Commission Order followed the rule already laid down by the Federal Power Commission in its regulations establishing the content of an Applicant's environmental report. In Appendix A to Part 2 of 18 CFR the FPC requires all Applicants to (Paragraphs 8.2)^{*/}:

Discuss the potential for accomplishing the proposed objectives through energy conservation and the potential for using realistic energy alternatives such as natural and artificial gas, oil and coal.

See also 18 CFR Part 2, Appendix B (Paragraph 8.2). In addition, on November 13, 1973, the FPC added § 2.14 to 18 CFR Part 2 and thereby ordered all utilities regulated by it, which includes Applicant, to voluntarily adopt and publicly report policies for energy conservation. 38 Fed. Reg. 31963 et. seq. Each Applicant must annually provide detailed information on energy conservation measures and possibilities.^{**/}

^{*/} The Regulations were adopted on June 7, 1973, and appear at 38 Fed. Reg. 15944 et. seq.

^{**/} A copy of the information required is attached as Appendix A to this brief.



Thus the federal agency most knowledgeable in the area of electric power generation and use has decreed that energy conservation is clearly an issue which must be considered in deciding whether to approve a proposal to create more electric generating capacity. If the AEC's Order did not explicitly reach this conclusion it should have and a failure to so interpret the Order will place the Commission in conflict with the legal requirements of NEPA and with the authoritative position of the FPC.

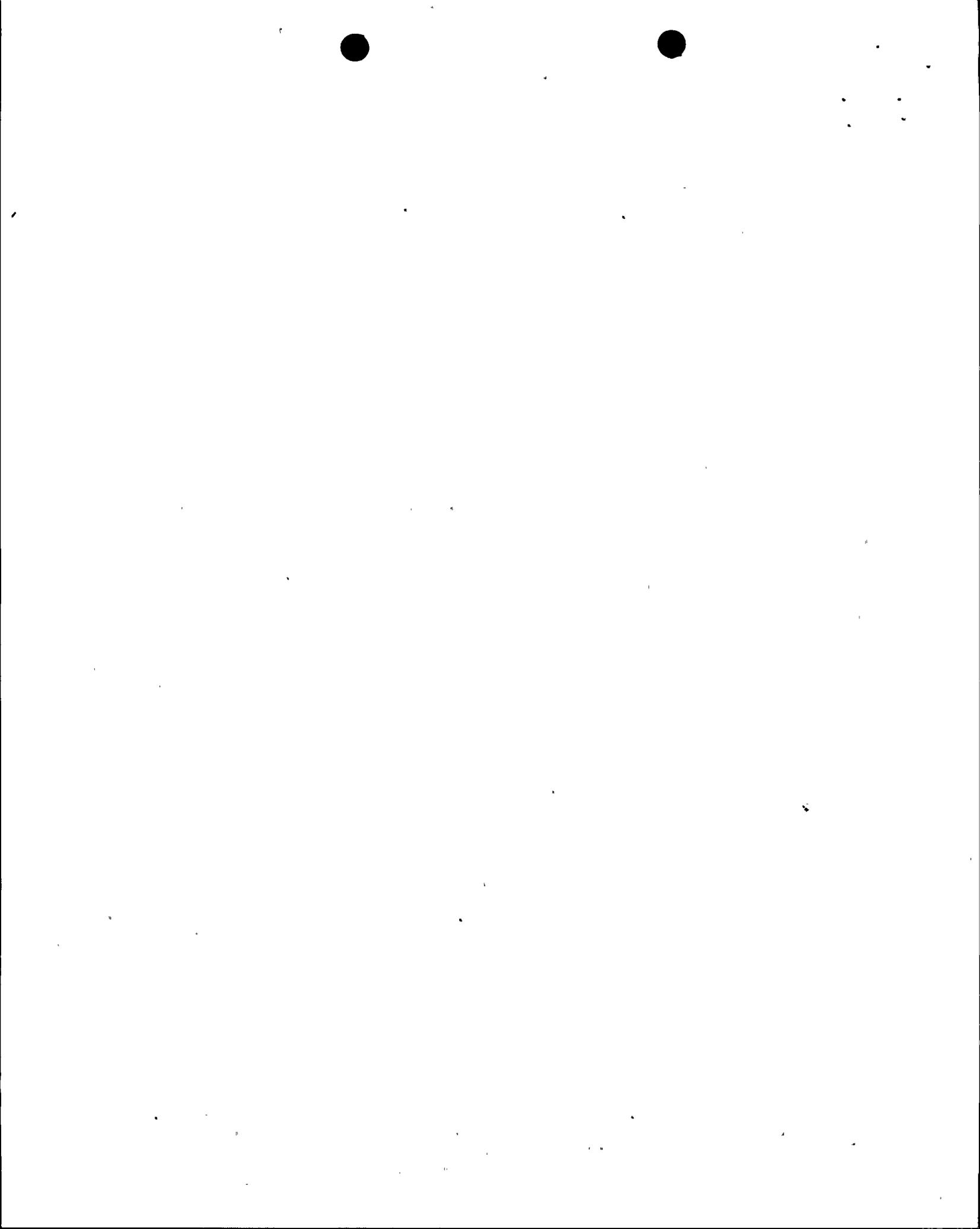
We anticipate that the Applicant and the Staff will devote substantial time to Natural Resources Defense Council v. Morton, 458 F.2d 827 (CADDC, 1972) and the discussion of reasonable alternatives contained there. As we have noted the Commission Order and the FPC's action have placed energy conservation clearly within the ambit of what is reasonable. Energy conservation has in fact become a national objective articulated by President Nixon in his most recent energy message and implemented by agencies such as the AEC and the FPC. None of the remote and speculative characteristics discussed in the Morton case are today applicable to energy conservation. It may be that when this Board issued its original pre-hearing order on January 26, 1973, the need to seek policy changes to implement



energy conservation placed its present availability in doubt. But as the Commission notes in its Order at this "time of deep national concern over energy sources and supply" energy conservation must be viewed in a different light. See Natural Resources Defense Council v. Morton, supra at p. 837 discussing how the passage of time may make an alternative which was originally speculative a reasonable alternative at a later date.

The obligation on the Applicant to go forward at this time may be viewed by the Applicant as an unreasonable burden. But as Appendix A to this brief demonstrates, Applicant is already obligated by the FPC to compile data on energy conservation including the possibilities for future action and their impact on the Applicant's projected demand. It is also important to realize that although EDF and Ecology Action are not submitting data on every aspect of energy conservation they are each making a substantial direct case presentation on a broad spectrum of contentions related to the energy conservation issue. ^{*/} It is our position that the Applicant may not legally confine its direct evidence presentation to those contentions for which Intervenors present direct testimony but is obligated to discuss all energy conservation alternatives or to disclose

*/ In the two Church of Christ cases (Office of Communications of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (CADC, 1966) and 425 F.2d 543 (CADC, 1969)) the ability and willingness of an Intervenor to produce some evidence is viewed as an important factor in determining the obligation of all other and better financed parties, to come forward with all information available to them. See particularly 359 F.2d at 1004-06 and 425 F.2d at 546-60.



the basis for its belief that a particular alternative is not reasonable.^{*/} In fact the data required to be supplied here would appear to be covered by the FPC reporting requirement (Appendix A to this brief) and the FPC general regulations on the subject 18 CFR Part. 2, § 2.14 (38 Fed. Reg. 31963 et. seq.) and should be easily provided by the Applicant.

II. Staff Obligations

If the Applicant has the obligation to present data on an issue, clearly the Regulatory Staff has a similar, if not greater, obligation. Its discussion of alternatives in the FES is dictated not only by AEC Regulations (10 CFR Part 50, Appendix D, Paragraph A-8) but also by NEPA. 42 U.S.C. §§ 4332(2)(C)(iii) and (2)(D). In addition, its obligation extends to presenting data on all relevant issues in the proceeding. Udall v. Federal Power Commission, 387 US 428, 450 (1967); Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (2nd Cir., 1965) cert. denied 384 US 941; Office of Communication of the United Church of Christ v. Federal Communication Commission, 425 F.2d 543, 546 (CADC, 1969); Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 419-20 (2nd Cir., 1972).

^{*/} Once the whole range of energy conservation alternatives are at issue, the Applicant has the burden to demonstrate that none of these alternatives warrant a denial or modification of its license. It cannot shift the burden of going forward to the Intervenor and depend upon their limited resources to explore energy conservation alternatives better known to the Applicant. The present guide for Applicant's environmental reports requires a discussion of alternate means for generating electricity and imposes on the Applicant, the duty to go forward without any presentation by an Intervenor. Paragraph 9.2 of Regulatory Guide 4.2.

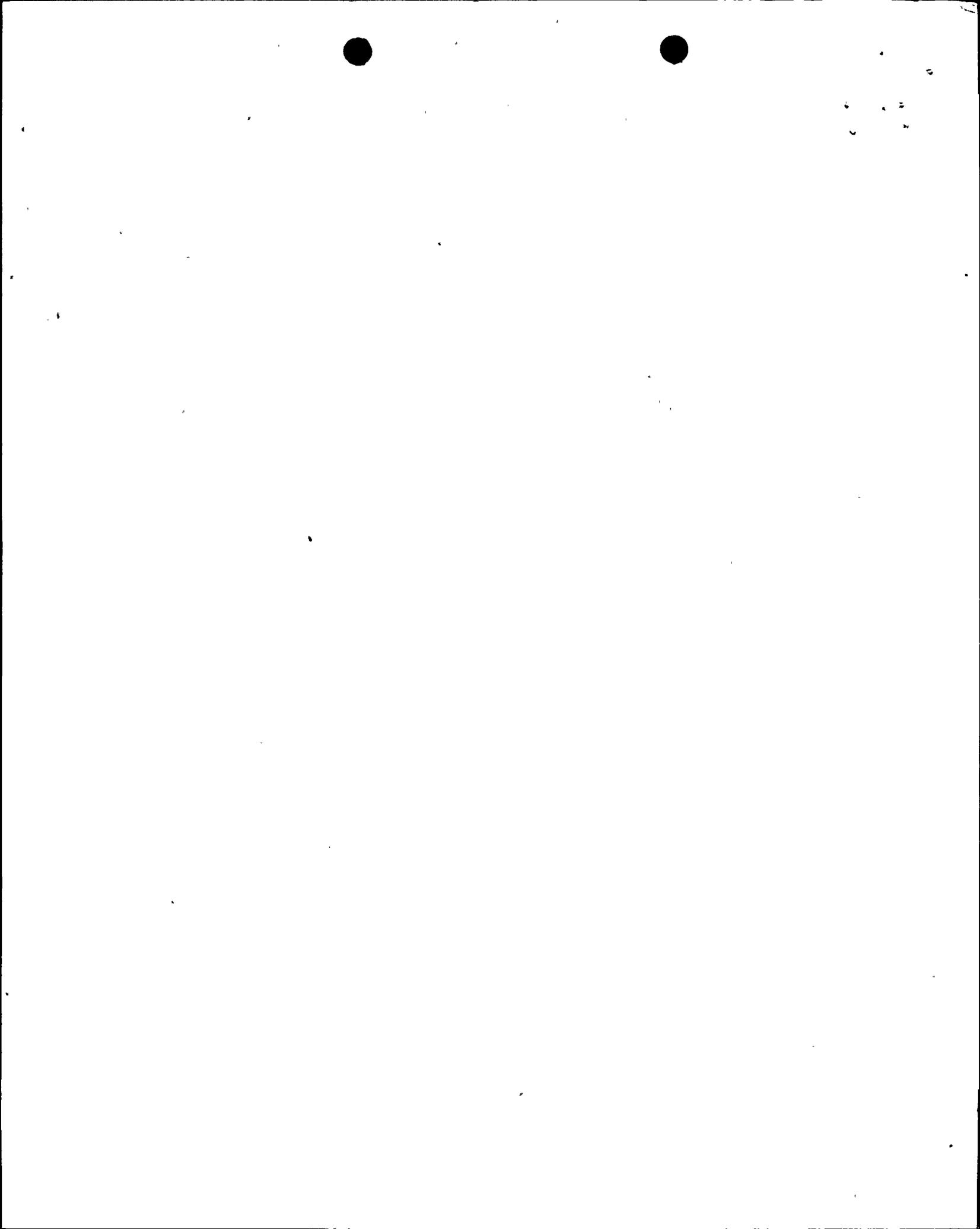


This obligation of the Staff applies to all those issues which are within the jurisdiction of the agency and are not limited to issues which the regulations or statute require be considered in the hearing. As the District Court in Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 759, (D.C. Ark, 1971) reaff. 342 F. Supp. 1211, aff. 470 F.2d 289 (8th Cir., 1972), held NEPA is an environmental full disclosure law and the obligation to make the full disclosure is clearly on the Staff.*

Conclusion

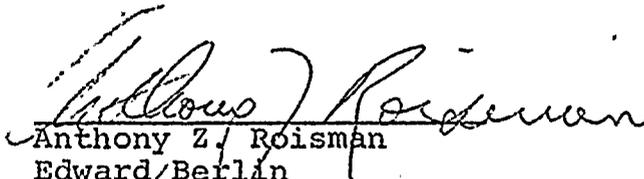
It can no longer be doubted that energy conservation is a reasonable alternative to building and operating new generating capacity. Some programs for energy conservation may not be feasible for implementation by 1980 but certainly over the expected 40 year life of this facility the alternatives are feasible. At issue in this proceeding is not merely whether to allow Applicant to construct this plant but alternatively whether to impose conditions on the issuance of a construction permit, including steps which will lead to a

*/ We do not reach here the question of whether Appendix D and the Guide for preparation of environmental reports are intended to make the Applicant's obligations to produce data co-extensive with the Staff obligation. It is clear here that the Applicant must provide data on all reasonable alternatives and energy conservation is clearly such an alternative.



conservation of energy over the lifetime of the facility. As with any issue which is properly in the hearing, the Applicant has a burden to come forward with evidence on the issue and to carry the burden of proving that the issue does not warrant denial or modification of the license. As with any issue that is relevant to the proposed action the Staff has the obligation to provide all evidence relevant to that issue.

Respectfully submitted,


Anthony Z. Roisman
Edward Berlin

Counsel for Environmental Defense
Fund

January 9, 1974



11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

APPENDIX A

APPENDIX I—INFORMATION TO BE SUPPLIED BY ALL ELECTRIC UTILITIES, INVESTOR OWNED, PUBLICLY OWNED, INCLUDING FEDERALLY OWNED, AND COOPERATIVELY OWNED, ON MEASURES TO IMPLEMENT CONSERVATION OF NATURAL RESOURCES

Information To Be Reported Annually
Should Include The Following:

1. A narrative description of the electric utility's program for the conservation and efficient utilization of natural resources as it relates to electric power production and consumption. The information to be reported should include a fully descriptive statement detailing the utility's conservation policies, its program of research and development as the latter relates to conservation of natural resources, and the utility's general implementation plan to achieve increasing efficiencies in the generation, transmission, distribution and consumption of electric energy.
2. An identification of anticipated electric supply savings arising from the conservation and efficient utilization of natural resources by the utility, including physical changes in utility system facilities, generation, heat rates, transmission and distribution losses, monthly and annual peak loads, and monthly and annual system load factors. The information to be reported should quantify these anticipated savings by sources and in terms of Btu equivalents of an identified fuel source, wherever possible.
3. An identification, wherever possible, of anticipated consumption savings arising from the conservation and efficient utilization of natural resources, including changes in ultimate consumer energy use patterns, the substitution of different electric energy consuming devices, design changes in equipment, buildings, industrial and commercial operations and processes and the substitution of other energy forms for electric energy. The information to be reported should quantify these anticipated savings by sources and in terms of Btu equivalents of an identified fuel source, wherever possible.
4. An identification of significant actions or programs initiated by the utility during the year to educate its utility consumers in improved efficiencies which are realizable in respect to the utilization of electric energy. The information to be reported should include copies of the utility's publications or communications with its consumers, governmental authorities or others, explaining these programs.

[FR Doc. 73-24656 Filed 11-16-73; 8:45 am]



11
12
13
14
15

16

17