1-9-74

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Niagara Mohawk Power Corporation	)	Docket No. 50-410
(Nine Mile Point Unit 2)	)	

BRIEF OF APPLICANT
ON BURDEN OF PROOF IN RELATION TO
INTERVENORS' ENERGY CONSERVATION CONTENTION

Intervenors in their "Affidavit in Support of Petition to Intervene" contended, *inter alia*, that the Atomic Energy Commission (Commission) in its Notice of Hearing 1/ made unsupported findings in that the Notice did not present "evidence of a sufficiently broad or detailed consideration of alternatives to the proposed action" and did not indicate "adequate consideration" of various energy conservation measures. *Id.* at 5-6. This Licensing Board (the Board) in its "Prehearing Conference Order" of January 26, 1973 excluded this contention as an issue in

1/ 37 Fed. Reg. 20089 (September 23, 1972).

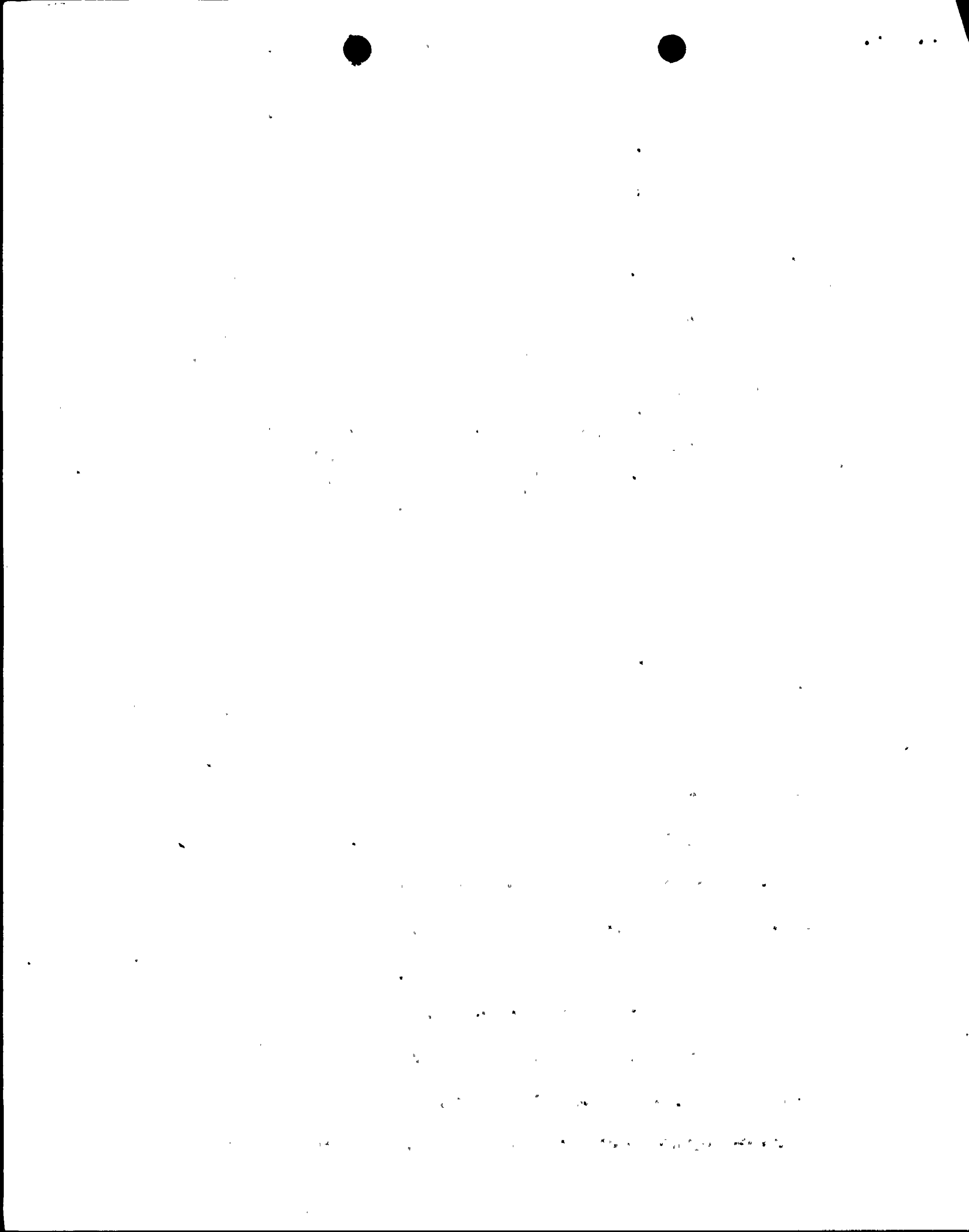
controversy in this proceeding "on the basis that such issues are outside the jurisdiction of the Board and are appropriate for consideration and determination by State and Federal agencies having jurisdiction over those issues." Id. at 8. The Board affirmed its rejection of this contention in an Order issued April 12, 1973.[2/]

On November 6, 1973, the Commission, acting *sua sponte*, reversed the Board's Orders of January 26 and April 12, 1973 "insofar as the ... prehearing conference orders preclude the presentation of evidence on energy conservation." Niagara Mohawk Power Corporation (Nine Mile Point, Unit 2) Docket 50-410, Memorandum and Order, CLI-73-28, RAI-73-11, 995, Nov. 6, 1973. The Commission in its Memorandum and Order further stated that:

> The Licensing Board is directed to schedule a prehearing conference on the contentions regarding energy conservation alternatives framed earlier by intervenors. At that conference, intervenors will identify their witnesses who will address these alternatives, specifying the substance of the testimony to be offered. In addition, the Board will fix a schedule for the presentation of this evidence.

Id.

2/ The Board stated that "the alternatives suggested in the excluded contention are too speculative to make it reasonable for the Board to consider them in this individual plant licensing proceeding." Order Ruling on Intervenors' Objections to "Prehearing Conference Order" Dated January 26, 1973, at 7.



Both at the prehearing conference held on December 19, 1973 and in its "Fourth Prehearing Conference Order", dated December 28, 1973, the Board directed that briefs be submitted by all parties on or before January 9, 1974 with respect to:

> (a) which party has the burden of proof on contentions made by intervenors and (b) whether there is an affirmative responsibility under the National Environmental Policy Act of 1969 for the AEC Regulatory Staff to consider energy conservation measures as an alternative to the proposed action in an individual licensing proceeding.

Id. at 4.

Applicant has concluded that the concept of burden of proof is inapplicable to a proceeding which serves as the forum in which the Board and the Staff, acting as representatives of the Commission pursuant to Appendix D to 10 C.F.R. Part 50, fulfill their duties under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. (1970). In a NEPA proceeding, there is no burden on any private party. Rather, the federal agency bears the duty of affirmatively demonstrating compliance with that stutute's procedural mandates.

The phrase "burden of proof" has two distinct but often confused meanings. By one is meant the duty of establishing the truth of a given proposition or issue by whatever quantum of evidence the law demands in the case

in which the issue arises; by the other is meant the duty of producing evidence at any particular stage of a trial or proceeding in order to make or meet a prima facie case. The former rests throughout the proceeding upon the party asserting the affirmative of the issue; the latter may shift from party to party. See, 31A C.J.S. Evidence § 103 (1964); 9 Wigmore, Evidence §§ 2485-2487 (3d ed. 1940).

This basic rule of evidence in civil and criminal proceedings has been imported into the administrative process. The Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. (1970), makes clear that the burden of proof in an administrative proceeding, absent any statutory directive to the contrary, is on the proponent of a rule or order. 5 U.S.C. § 556(d) (1970). Similarly, the traditional allocation of the burden of going forward with the evidence has not been disturbed. National Labor Relations Board v. Mastro Plastics Corp., 354 F.2d 170, 176 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).[3/]

3/ The legislative comment on section 556(d) (§ 7(c)) states:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has a general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.

S. Rep. No. 752, 79th Cong., 1st Sess. (1945).

There are two basic reasons why the concept of burden of proof is inapplicable to any agency action pursuant to NEPA.

First, the section of the APA which imposes the burden of proof on the proponent of a rule or order is limited by its own terms to "hearings required by sections 553 or 554 of this title to be conducted in accordance with this section." 5 U.S.C. § 556(a) (1970).[4/] In short, section 556 applies only when hearings are required by the statute under which they are conducted to be made on the record with opportunity for agency hearing. American Trucking Ass'ns v. United States, 344 U.S. 298, 319 (1953).

4/ Section 553 of the APA states:

> When rules are required by statute to be made on the record after opportunity for agency hearing, sections 556 and 557 of this title apply instead of this subsection.

5 U.S.C. § 553(c) (1970). Section 554, which sets forth procedures for adjudicatory proceedings, states that:

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing....

5 U.S.C. § 554(a) (1970).

There is no requirement in NEPA for agency hearings prior to agency action.[5/]

Second, the entire idealogical basis of NEPA is fundamentally different from that of those statutes to which the concept of burden of proof is applicable. NEPA is truly non pari materia with the organic statutes of regulatory agencies in that it establishes no framework whereby particular industries, or particular members of those industries, are regulated, controlled or licensed. Rather, NEPA imposes duties on the federal agencies themselves and those duties are nontransferable. See, Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972). NEPA's purpose is to insure that federal agencies, not private citizens, make the consideration of environmental amenities and values a part of their decisional processes.

5/ Section 2.732 of the Commission's regulations imposes the burden of proof in a proceeding for licenses on the applicant for a license. This regulation is entirely consistent with the APA provision since the Atomic Energy Act requires a hearing prior to the issuance of a construction permit, 42 U.S.C. § 2239(a) (1970), and the Commission's determination of whether to issue a permit is based on the record developed in that proceeding. However, any argument that 10 C.F.R. § 2.732 requires that parties raising challenges to the adequacy of the Commission's NEPA review have the burden of proving that such is the case would ignore the entirely different natures of the Atomic Energy Act and NEPA. See text 5.7 supra.

Calvert Cliffs Coordinating Comm'n v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1972).

Much of the confusion about burden of proof results from the unique fashion in which the Commission fulfills its duties under NEPA. What the Commission has done is to develop hearing procedures in furtherance of its environmental responsibilities which parallel its preexisting hearing procedures under the Atomic Energy Act. While in some cases the use of similar nonsubstantive aspects in these parallel procedures is justified, in others it is not. Under the Atomic Energy Act the applicant is the proponent of a Commission order directing issuance of a license, but under NEPA neither the applicant nor any intervening party is the proponent of any rule or order.

Rather, it is the Commission, itself, as the responsible federal agency, which must, to the fullest extent possible:

> (A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment;
>
> * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

* * *

(iii) alternatives to the proposed action

* * *

(D) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources.

42 U.S.C. 4332 (1970). There is, therefore, a "burden" under NEPA. But it is not a burden of proof as that term is generally employed. Instead, it is a burden of responsibility on the agency of strict procedural compliance with NEPA's mandate and an affirmative duty to show that compliance by an adequate NEPA review and environmental impact statement.

Thus, the concept of burden of proof is irrelevant and inapplicable to a hearing held pursuant to the Commission's authority and duty under NEPA. That conclusion is not dispositive, however, of the more narrow question of who must present or come forward with evidence when a particular challenge is made to the adequacy of agency compliance with NEPA.

In its Memorandum and Order of November 6, 1973,[6/] the Commission directed that the Board provide the opportunity for submission of evidence on energy conservation alternatives, alternatives which the Commission itself lacks jurisdiction to implement.[7/] The Commission's Memorandum and Order did not, however, go so far as to determine whether energy conservation measures were indeed "reasonable" or appropriate alternatives. By not having done so the Commission has not determined if these alternatives are meritorious of more than threshold consideration by the Licensing Board. Considered in this context, the most reasonable interpretation of the Commission's Memorandum and Order is that a decision on whether to exclude energy conservation measures as alternatives to the proposed action should not

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6/ See text 2-3 supra.

7/ There is, of course, a question as to whether Judge Leventhal's language in NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) actually requires that all agencies consider alternatives to proposed actions which are beyond their statutory jurisdiction to enforce or implement or whether the facts in Morton presented a special case deserving of a more broad scale approach than that which is normally required.

be made without submission of evidence and the compilation of a record on those alternatives.

The duty which the Commission's Order has imposed on the Licensing Board is analogous to that which the U.S. Court of Appeals for the Second Circuit imposed upon the General Services Administration (GSA) in Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972). There the Second Circuit held that prior to making a determination as to whether an impact statement need be prepared before commencement of construction of a new correctional institute in lower Manhattan, the GSA must give "full consideration" to "all relevant factors." Id. at 648. Thus, before making a threshold determination, the GSA was required to gather evidence on the environmental effects of the proposed action and compile a record as a basis for its decision. While the Court in Hanley was concerned with a determination that a NEPA impact statement was unnecessary, and here the Board is faced with the necessity of making a determination of whether energy conservation measures deserve analysis as possible alternatives to the issuance of a construction permit for the Nine Mile Point Unit 2 facility, the legal reasoning upon which Hanley is based is directly applicable.

As the Second Circuit in Hanley recognized, there are some situations in which an impact statement is unnecessary, and after careful consideration of relevant factors it is within the purview of the agency to make that determination. Here, too, it is both logical and consistent with the statutory framework of NEPA that this Board (acting as the representative of the Commission) be allowed to impose, after careful consideration of the relevant environmental factors and available evidence, some limit on the range of possible alternatives to the proposed action which it will analyze and discuss in its Initial Decision. Implicit support for this proposition is found in NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972):

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies--making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the timeframe of the needs to which the underlying proposal is addressed.

Id. at 837-838. This Board must, therefore, make a

"threshold" determination of the reasonableness of energy conservation as an alternative.

The question of which party must come forward with evidence at the forthcoming hearing is at present academic, since the Applicant, the Staff and the Intervenors, have all agreed to submit both written and oral testimony. Although the precise legal question is academic in this proceeding, it deserves some consideration because while all parties have agreed to come forward with evidence not all are obligated to do so.

Under NEPA, the federal agency is under an affirmative duty to comply with the requirements of section 102 to the fullest extent possible. One of the requirements of section 102 is that "alternatives" to the proposed action be considered and discussed. While in the ordinary case the burden of going forward with evidence falls on the party having knowledge of the facts, _see_, _United States v. New York, N.H. & H. R.R. Co._, 355 U.S. 253, 256 n.5 (1957), under NEPA the Commission as the responsible federal agency always carries the duty of affirmative compliance. Thus, it is the Commission's

duty to meet a challenge to the adequacy of that compliance by showing that due consideration was given to all relevant environmental factors during the agency review process. In the instant proceeding, the Board, acting as the Commission's representative, is under the same obligation to come forward with a record and an Initial Decision which shows the required consideration and analysis of those factors.

The importance of this duty was emphasized by the Second Circuit in its decision in <u>Scenic Hudson Preservation Conference v. FPC</u>, 354 F.2d 608 (2d Cir. 1965), which involved licensing action by the FPC under the Federal Power Act. Section 10(a) of that Act requires that alternatives to the project which the FPC proposes to license be examined in order to determine if the proposed project is the one "best adapted" to those purposes set forth in the Federal Power Act. 16 U.S.C. § 803(a) (1970). The Court rejected the FPC's argument that by raising an issue as to lack of adequate consideration of alternatives, intervenors in the proceeding "cannot impose an affirmative burden on the Commission." Instead, the Court declared that the Federal Power Act imposes on the FPC a specific

responsibility to consider alternatives and that "the right of the public must receive active and affirmative protection at the hands of the Commission." Id. at 620. The Court, quoting from Judge Frank's opinion in Isbrandtsen Co. v. United States,[8/] wrote:

> The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in .... The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts....

354 F.2d at 621.

Those expressions by the Second Circuit in Scenic Hudson are directly applicable to the Commission's role under NEPA. The Commission bears the burden of compliance with NEPA and the Board as the Commission's representative has the affirmative duty to develop an adequate record regardless of whether any party comes forward.

8/ 96 F. Supp. 883, 892 (S.D. N.Y. 1951), aff'd by an equally divided Court sub nom Rederi v. Isbrandtsen Co., 342 U.S. 950 (1952).

After evidence on the various energy conservation measures is submitted, this Board must then make a threshold determination as to whether those energy conservation measures are too "speculative" and their effects too illusive to be "readily ascertained" [9/] and hence not meritorious of further analysis as alternatives. If, on the other hand, the Board determines that one or more of those energy conservation measures are "reasonable", then those deemed reasonable must be fully analyzed and discussed by the Board in its Initial Decision. [10/] To

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9/ See NRDC v. Morton, 458 F.2d at 837, 838; text 13 supra.

10/ The Board has the authority to modify the Staff's final environmental statement should such modification be deemed necessary. 10 C.F.R. Part 50, Appendix D, para. 11. A discussion of various energy conservation measures as alternatives to the proposed action would be such a modification. The question of whether any formal Staff amendment to the final statement would be necessary in such a situation is not addressed in this memorandum. However, at least one court is of the opinion that lack of discussion of energy conservation measures in a final detailed statement does not invalidate that statement:

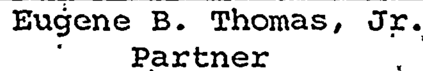
> Other of plaintiff's alternatives such as discouraging the use of electrical power through use of advertising campaigns or changing electrical power rates are certainly not the type of alternatives to invalidate a final impact statement.

Natural Resources Defense Council v. TVA, No. 8062 (E.D. Tenn. July 24, 1973).

the extent that the Board needs information, the Staff has the burden of complying with the Board's requests to obtain, develop and set forth the required information.[11/]

Respectfully submitted,

LEBOEUF, LAMB, LEIBY & MACRAE

By 
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Dated: January 9, 1974

11/ This is not to say that the Applicant is under no obligation to supply to the Staff information reasonably requested. It is the Staff, however, which also acts as representative of the Commission and not the Applicant or any other party which has the affirmative duty of developing and supplying the Board with information sufficient to fulfill the requirements of NEPA that "alternatives" to the proposed action be described and considered by the Commission.