

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

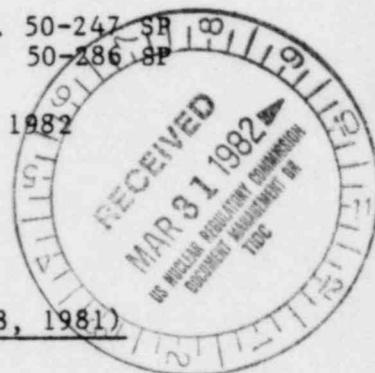
Before Administrative Judges:
Louis J. Carter, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

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In the Matter of:)
)
CONSOLIDATED EDISON COMPANY OF)
NEW YORK (Indian Point, Unit 2))
)
POWER AUTHORITY OF THE STATE OF)
NEW YORK (Indian Point, Unit 3))

Docket Nos. 50-247 SR
50-286 SR

March 29, 1982



MEMORANDUM AND ORDER

(Ruling on Licensees' Motion for Stay of
Commission's Orders of January 8, 1981 and September 18, 1981)

On November 25, 1981, Consolidated Edison Company of New York Inc. and the Power Authority of the State of New York, Licensees of Indian Point Units 2 and 3 respectively, (hereinafter Licensees) filed "Licensees' Motion For a Stay Of Commission's Orders Of January 8, 1981 And September 18, 1981 Or For Dismissal Of This Proceeding Or, In the Alternative, For Certification To The Commission."^{1/} Responses to that motion were

^{1/} Licensee also filed a memorandum of Law in support of their motion. The latter contained 5 pages, the former 61 pages. Had this been an application for a stay after a decision of this Board it would have been limited to ten (10) pages exclusive of affidavits, 10 C.F.R. § 2.788(b). "Praised be he who can state a cause in clear, simple manner, and then stop." Belt J., Jungewirth v. Jungewirth, 115 Or. 668, 672 (1925).

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filed by Robert Abrams, Attorney General of the State of New York, the Union of Concerned Scientists (UCS) and New York Public Interest Research Group (NYPIRG), and the NRC Staff.

We hold that the motion is denied and that the issue is not certified to the Commission.

I

Movants argue that commencement of an adjudicatory proceeding prior to completion of ongoing proceedings to establish generic standards constitutes a denial to Licensees of procedural due process. In support of this, Licensees argue:

(1) that Congress in the NRC Appropriation Act of 1980 directed the NRC to proceed with the establishment of a comprehensive plan to set standards for the evaluation of the safety of all operating nuclear plants;

(2) that agencies should use their rulemaking powers in lieu of adjudication;

(3) that Licensees have been given no notice of what new level of safety will be acceptable for Indian Point or "fair notice or warning" of what is acceptable so they may act accordingly; and

(4) that the proposed proceeding "permits and encourages an arbitrary and discriminatory enforcement of the law".

The Attorney General and Staff correctly assert that many of these arguments were raised with the Commission in 1979 and reasserted again in 1980 but to no avail, all having been rejected by the Commission.^{2/}

II

Staff and the Attorney General argue that the Board does not have the power to order a stay of the Commission's orders or a dismissal of this proceeding where to do so would fly in the face of the clear intent of the Commission. This position is likewise advanced by Staff and UCS arguing further that "licensing boards are delegates of the Commission and exercise only those powers which the Commission has given them" citing Public Service Co. of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976), Northern Indiana Public Service Co. (Bailly Generating Station Nuclear 1), ALAB-249, 8 AEC 980, 987 (1974). Houston Light and Power (South Texas Units 1 and 2), ALAB-381, 5 NRC 582 (1977). Thus, the entire case cannot be disposed of by the Board when it has been instructed not to make an initial decision, but instead to formulate recommendations to the Commission.

^{2/} Consolidated Edison Company of New York (Indian Point, Unit 2) and Power Authority of the State of New York (Indian Point, Unit 3) CLI-81-1, 13 NRC I (1981). Commission Memorandum and Order of September 18, 1981, CLI-81-23, 14 NRC ____.

We have canvassed the cases cited and agree that their holdings are controlling. See also Carolina P&L Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 at n. 6 (1979).

Staff believes that the Commission's order is clear: that the only direction this Board was given was to formulate recommendations on the questions posed in its order of September 18, 1981, CLI-81-1, as revised, at 5 n. 4 and 8.

We hold that the Commission did not delegate to this Board the power to issue a stay.^{3/}

Staff also asserts that the Commission alone is the proper forum for a request for a stay, citing 10 C.F.R. § 2.788(f)^{4/} and statements of consideration to Part 2 entitled "Commission Review of Appeal Board Decisions and Procedure for Requests for

^{3/} A Licensing Board has the power, in the first instance, to rule on the scope of its jurisdiction, see Kansas Gas and Electric Co., (Wolf Creek Nuclear Generation Station, Unit I), ALAB-321, 3 NRC 293, 298 (1976), aff'd CLI-77-1, 5 NRC 1 (1977).

^{4/} 10 C.F.R. § 2.788(f) provides:

- (f) An application to the Commission for a stay of a decision or action by an Atomic Safety and Licensing Appeal Board will be denied if a stay was not, but could have been, sought before the Appeal Board. An application for a stay of a decision or action of a presiding officer may be filed before either the Atomic Safety and Licensing Appeal Board or the presiding officer, but not both at the same time.

Stays", 42 Fed. Reg. 22128 (May 2, 1977). Staff argues that the issue of a stay must be presented to the "deciding body", viz., the Commission which initiated this proceeding. In this case, the proper forum for this application is the Commission.

It is absurd to suggest that a Board could reverse a prior decision of the Commission made in the same case on virtually the same motion. Such a result would make a mockery of the Board's obligation to follow Commission precedent. See Virginia Electric and Power Company, (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 465 (1980).

III

On the question of our power to certify this issue to the Commission we find that though we have the power to do so, 10 C.F.R. § 2.718(i), we shall not. The power is discretionary and is to be exercised sparingly. Though Part 2 rules do not specifically articulate any standard for Licensing Boards, Appendix A, Part V(f)(4) restates the standard applicable to the Appeal Board in § 2.785(d). The Statement of Policy provides that a Licensing Board may in its discretion certify to the Commission for its determination "major or novel questions of policy law or procedure." We find none present here.

Nor does there appear to be any compelling reason^{5/} in this case for certification. In fact, as Staff asserts there exists a compelling interest for this Board to proceed with the

^{5/} See Vermont Yankee Nuclear Power Corporation, (Vermont Yankee Nuclear Power Station), 7 AEC 982, 984 (1974).

development of the record to enable it to meet the September 18, 1982 date for this Board's recommendations.

IV

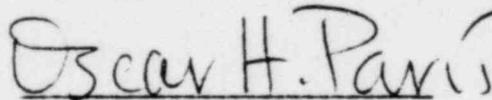
We have considered all other arguments of the Licensees and find they are without merit.

It is, this 29th day of March, 1982

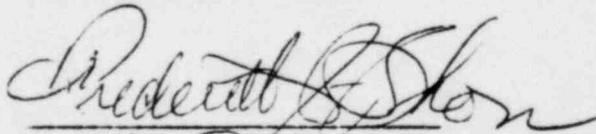
ORDERED

That Licensees' Motion for a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or For Dismissal of this Proceeding or, in the Alternative for Certification to the Commission is denied.

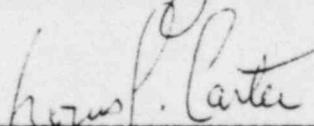
FOR THE ATOMIC SAFETY AND
LICENSING BOARD



Oscar H. Paris
ADMINISTRATIVE JUDGE



Frederick J. Shon
ADMINISTRATIVE JUDGE



Louis J. Carter, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland