GT Files

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 20545

Date March 16, 1972

NOTE FOR THE COMMISSIONERS

Re: CONSOLIDATED EDISON CO.
(Indian Point #2)

Docket No: 50-247

The attached filing is for your information. The matter is presently before the Atomic Safety and Licensing Board.

W. B. McCool
Secretary of the Commission

Attachment

BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON CO.) Docket No. 50-247
OF N. Y. (Indian Point,)
Unit No. 2))

ATOMIC SAFETY AND LICENSING APPEAL BOARD:

Algie A. Wells, Chairman
Dr. John H. Buck
Dr. Lawrence R. Quarles

MOTION FOR RECONSIDERATION
AND ALTERNATIVELY TO CERTIFY
QUESTIONS INVOLVED
TO THE COMMISSION

I.

On March 10, 1972, the Appeals Board issued a memorandum deciding two questions previously certified to it by the ASLB in this proceeding. The first question involved a "Calvert Cliffs" challenge to the procedural validity of that portion of the ECCS Interim Criteria which declared that the Criteria should become effective immediately with respect to nuclear power plants for which license applications were pending. The Appeals Board concluded that the recitation in the statement accompanying the Interim Criteria of facts related to the history of the ECCS analysis and the recent LOFT Semi-scale Tests represented "a brief statement of reasons" (5 U.S.C. Section 553(b)(B)) to justify the finding that the "no

notice of proposed rule making or public procedures" was required and that there was "'good cause' for immediate effectiveness of the rule". Appeals Board Memorandum, p. 5.

In reaching this conclusion the Appeals Board placed primary reliance upon the conclusion that cases requiring a full exposition of the reasons for an agency decision do not relate to a rule-making proceeding, particularly an informal rule-making proceeding. Appeals Board Memorandum, pp. 6-7. On February 18, 1972 the United States Court of Appeals for the District of Columbia Circuit decided a case which bears directly on this issue and is in partial conflict with the Appeals Board's interpretation of the applicable administrative law standard. Kennecott Copper v. EPA _____ F2d _____ (CADC, 1972) 3 ERC 1682.

In that case the Court heard a challenge to the validity of the national secondary ambient air quality standards promulgated by informal rule-making by EPA pursuant to Sections 108 and 109 of the Clean Air Amendments of 1970 (42 U.S.C. Sections 1857c-3 and 1857-4). As a basis for the challenge, petitioners alleged, inter alia, that the statement of reasons given for the standards did not comply with Section 4(c) of the APA (5 U.S.C. Section 553(c)) and in any event the statement of reasons was inadequate to insure adequate judicial review. The Court, confirming that the same thorough statement required for an adjudicatory proceeding is not required for an informal rule-making, nonetheless stressed the need

for a sufficiently full exposition of the reasons for the rule so that it can be determined whether there was "an abuse of discretion or error of law". 3 ERC at 1684.

Then, the Court, with special attention to clear legislative history accompanying the Clean Air Amendments of 1970 which urged expedition in setting standards, found that while there "was sufficient exposition of the purpose and basis of the regulation as a whole to satisfy the legislative minimum" (emphasis added) (3 ERC at 1685) the Court must have a more thorough statement of the basis for the regulation in order to assist the Court in deciding whether the regulation is valid or not. 3 ERC at 1685.

Unlike the instant proceeding, the Court had before it a statement by EPA which did arguably include data from which the secondary air quality standard could be justified. Thus there was data that a level of 85 micrograms per cubic meter of sulfur oxides (arithmetic mean) was unsafe and from this the Administrator determined that a maximum permissible level of 60 micrograms per cubic meter would provide an adequate margin of safety. Here, however, there is nothing in the statement of reasons accompanying the ECCS Interim Criteria from which it can be concluded that as to plants not yet licensed an emergency existed which required the establishment of a safety standard without prior opportunity for public comment. Until those plants begin operating there is no safety problem and the Commission fails to disclose any basis for concluding that licensing of those plants should not have been

delayed [1] for the time necessary to permit some public participation in the rule-making and a fuller exposition of the basis for the Interim Criteria.

In light of the recent decision in Kennecott Copper v. EPA, supra, we respectfully request this Board to reconsider its decision.

---

[1] In fact no full power operating licenses have been issued for commercial light water reactors since the promulgation of the Interim Criteria. There was, and still is, plenty of time for a short period of public comment and for the Commission to give a fuller exposition of the technical basis for the Criteria.

II.

Pursuant to 10 CFR Section 2.785(d) the Appeals Board may "in its discretion ... certify to the Commission for its determination major or novel questions of policy, law or procedure". The questions raised by this proceeding and in this Petition for Reconsideration appear to fall within the area of "major ... question of ... law or procedure" and we request this Board, if unpersuaded by our argument, to certify the question to the Commission. The challenge involved in this proceeding affects every nuclear power plant which receives a license pursuant to the Interim Criteria. The procedural error which we assert will (if valid) form the basis for Courts to reverse and remand to the Commission every license issued under the Interim Criteria. Many months, even years, of time may be lost in resolving pending licensing proceedings as a result of such a decision. We believe the Commission should have the opportunity to correct this error and remove this grave risk to the "orderly resolution" of pending license applications.

Of particular relevance in any Court proceeding will be the record now being developed which challenges the validity of the Interim Criteria. The testimony of highly qualified experts who are "Commission personnel", who have disagreed with the Interim Criteria and who were not consulted in the development of the Interim Criteria will underscore the significance of the failure of

the Commission to articulate its reasons for the Interim Criteria and their adoption without prior public participation. Any rational assessment of the present situation would indicate that the decision to uphold the validity of the Interim Criteria for all pending licensing proceedings involves grave risks which deserve the thoughtful attention of the Commission.

Even the substantive interpretation of the Appeals Board with respect to the second certified question is subject to serious attack based upon data developed in the National Hearings which indicates that Westinghouse computer codes and analysis do not adequately predict the effects of rod swelling and bursting and flow blockage. This data appears to have been excluded from the deliberations in setting the Interim Criteria. While the Appeals Board ruling may appear to serve the industry's desire to promptly license nuclear plants under the Interim Criteria in the long run it may prove to be the cause of substantial delay.

There is an expression which has gained some notoriety at the Commission in recent months which is "Welcome to the NFL" meaning "Welcome to the Next Foolish Litigation". Foolish litigation is the product of poor judgment of administrators at least as often as it is the product of the over-zealousness of the public in challenging administrative action. Here we have a situation in which the public is aware that numerous Commission personnel

who are undoubted experts with respect to ECCS, have grave doubts that the Interim Criteria will provide adequate protection for the health and safety of the public. Nonetheless the Commission appears to persist in its position that the "licensing must go on" under these Criteria which were promulgated without any public participation, without consulting these dedicated experts who hold contrary views and without fully articulating the reasons for the hasty application of the Interim Criteria to pending licensing proceedings. There can be little doubt that here it is the Commission which is on the verge of buying a franchise in the NFL. This Board should give them the opportunity to reflect further on their decision.

Respectfully submitted,

Anthony Z. Roisman

Counsel for Citizen Committee for
Protection of Environment

March 15, 1972