

354 F.2d 608 (2d Cir. 1965)
Decided Dec 29, 1965

No. 106, Docket 29853.

Argued October 8, 1965.

609 Decided December 29, 1965. *609

Lloyd K. Garrison, New York City, (Simon H. Rifkind, Albert K. Butzel, Paul, Weiss, Rifkind, Wharton Garrison, New York City, and Dale E. Doty, Washington, D.C., of counsel), for petitioner, Scenic Hudson Preservation Conference.

Samuel L. Slutsky, Putnam Valley, N.Y., for petitioner, Town of Putnam Valley.

John C. Tuttle, Peekskill, N.Y., on the brief, for petitioner, Town of Cortlandt.

John R. Kibbe and Raymond Margles, Yorktown Heights, N.Y., on the brief, for petitioner, Town of Yorktown.

Josephine H. Klein, Washington, D.C. (Richard A. Solomon, Gen. Counsel for Federal Power Commission, Howard E. Wahrenbrock, Sol., Melvin Spaeth, Asst. Gen. Counsel, Washington, D.C., on the brief), for respondent.

Randall J. LeBoeuf, Jr., New York City (LeBoeuf, Lamb Lieby, New York City, on the brief), for intervener.

Before LUMBARD, Chief Judge and WATERMAN and HAYS, Circuit Judges.

HAYS, Circuit Judge:

pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York;

(b) An order of May 6, 1965 denying petitioners' application for a rehearing of the March 9 order, and for the reopening of the proceeding to permit the introduction of additional evidence;

(c) An order of May 6, 1965 denying joint motions filed by the petitioners to expand the scope of supplemental hearings to include consideration of the practicality of

river. The installation would have a capacity of 2,000,000 kilowatts, but would be so constructed as to be capable of enlargement to a total of 3,000,000 kilowatts. The water in the upper reservoir may be regarded as the equivalent of stored electric energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall. See Federal Power Commission, National Power Survey 120-21 (1964).

The Storm King project has aroused grave concern among conservationist groups, adversely affected municipalities and various state and federal legislative units and administrative agencies.⁷

⁷ For bills

President Roosevelt's veto message read:

See also President Roosevelt's veto of the James River bill, H.R. 17767, 60th Cong., 2d Sess. (1909), veto message, 43 Cong.Rec. 978 (1909); President Roosevelt's letter appointing the Inland Waterways Commission, 42 Cong.Rec. 6968 (1908), which read in part:

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are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents"). In affirming Namekagon the Seventh Circuit upheld the Commission's denial of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a "beautiful stretch of water" were threatened. Namekagon Hydro Co. v. Federal Power Comm., [216 F.2d 509, 511-512](#) (7th Cir. 1954).

Commissioner Ross said in his dissent in the present case: "[I]t appears obvious that had this area of the `Hudson *615 Highlands' been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it."

II.

Respondent argues that "petitioners do not have standing to obtain m ac

Commission denied. Petitioners asked for review
under § 313(b) and the court]

"[P] roject' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structch

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"(b) If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

The Commission in its opinion recognized that in connection with granting a license to Consolidated Edison it "must compare the Cornwall project with any alternatives that are available." There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans. See *Michigan Consolidated Gas Co. v. Federal Power Comm.*, 108 U.S.App.D.C. 409, 283 F.2d 204, 224-226, cert. denied, *Eastern Pipe Line Co. v. Michigan Consol. Gas Co.*, 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227 (1960); *City of Pittsburgh v. Federal Power Comm.*, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

In *City of Pittsburgh*, three months after the hearings were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative suggestion. The District of Columbia Circuit set aside the Commission's order and remanded the case with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. The court stated that:

618 "The existence of a more desirable alternative is one of the factors which enters into the consideration of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." *City of Pittsburgh v. Federal Power Comm.*, 99 U.S.App.D.C. 113, 237 F.2d 741, 751 n. 28 (1956).

In the present case, the Commission heard oral argument on November 17, 1964, on the various exceptions to the Examiner's report. On January 7, 1965 the testimony of Mr. Alexander Lurkis, as to the feasibility of an alternative to the project, the use of gas turbines, was offered to the Commission by Hilltop Cooperative of Queens, a taxpayer and consumer group. The petition to intervene and present this new evidence was rejected on January 13, 1965 as not "timely." It was more than two months after the offer of this testimony on March 9, 1965, that the Commission issued a license to Consolidated Edison. When Mr. Lurkis's testimony was subsequently re-offered by the petitioners on April 8, 1965, it was rejected because it represented "at best" a "disagreement between experts." On the other issue, a

15 Mr. Lurkis has made numerous studies of utility adequacy including a survey of "blackouts" in New York during 1959 and 1961, which resulted in revisions of the Consolidated Edison system. He is a member of many professional associations and has published numerous articles and presented many papers on electrical engineering subjects.

16 A total of 107 witnesses were heard; the large majority objected to the project.

"Mr. Alexander Lurkis * * * presented a detailed proposal for using gas turbines. This, he claimed, would meet the alleged peaking need of Con Ed and result in a saving for its customers of \$132,000,000. The Committee has learned that similar gas turbine installations are now in use or proposed for use by a number of progressive electric utilities throughout the nfor

(4) that since 3 kilowatts of power must be generated by steam plants in New York City in order to get 2 kilowatts of power from the Storm Kin

"In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.

Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." Id. at 226.

Judge Frank, in response to a submission similar to the one made here, said:

"This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: `* * * 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 s

"ample spinning reserve would be available during the winter from the interconnected companies in New Jersey and Pennsylvania, including the 'mine-mouth' plants. Thus, even at times of the greatest diversion of Cornwall power, Con Edison would have other power sources immediately available to it for its peak requirements."

If interconnecting power can replace the Storm King project in December, why was it not considered as a permanent alternative?

Commissioner Ross in his dissent said:

"In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. There are two possibly differing sources; one would be purchasing pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power from new large scale thermal stations in Pennsylvania in

The Philipstown Citizens Association, in its Application for Rehearing, specifically urged that the "Commission committed error in excluding further consideration of underground transmission at the remand hearings which started on May 4, 1965."

As we said earlier, the petitioners may raise issues which are not personal to them.

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Consolidated Edison; to attempt to prove that, contrary to the impression given by Dr. Perlmutter, bass eggs and larvae float in the water, at the mercy of currents; that due to the location of the spawning ground and the Hudson's tidal flow, the eggs and larvae would be directly subject to the influence of the plant and would be threatened with destruction; that "no screening device presently feasible would adequately protect these early stages of fish life" and that their loss would ultimately destroy the economically valuable fisheries. Their evidence also indicated that in the case of shad, the young migrate from their spawning grounds, down past Cornwall, and being smaller than the meshes of the contemplated fish screens, would be subject to the hazards already described.²⁵ The Commission rejected all these petitions as "untimely," and seemingly placing great reliance on the testimony of Dr. Perlmutter, concluded:

²⁵ The Committee concluded:

"The Hudson River is a spawning ground for shad and striped bass. A multi-million dollar fishing industry, both commercial and sport, has been built on this process of nature. * * * The Joint Legislative Committee * * goes on record as being unalterably opposed to the granting of Con Ed's application, until such time as there is definite, impartial and conclusive proof that the project will not have an adverse effect on the fish life and spawning process upon which the fishing industry depends for its livelihood." Preliminary Report 7.

"The project will not adversely affect the fish resources of the Hudson River provided adequate protective facilities are installed."

Although an opportunity was made available at the May hearings for petitioners to submit evidence on protective designs, the question of the adequacy of *any* protective design was inexplicably excluded by the Commission.

Recent events illustrate other deficiencies in the Commission's record. Intentionally

The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence ⁶²⁵ of reasonable alternatives. Of course, the Commission should make every effort to expedite the new proceedings.

Petitioners' application, pursuant to Federal Power Act § 313(b), 16 U.S.C. § 825 l (b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.

The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.

