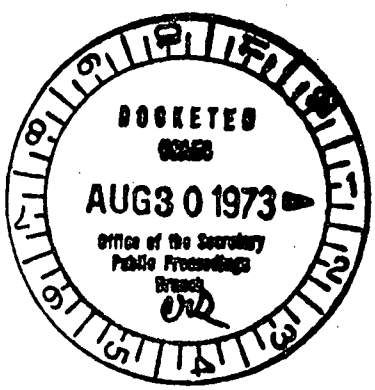
8-28-73

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter Of	)	
	)	
	)	
Consolidated Edison Company of New York, Inc.	)	Docket No. 50-247
	)	
	)	
Indian Point Station, Unit No. 2	)	



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

INTERVENOR HUDSON RIVER FISHERMEN'S ASSOCIATION'S BRIEF IN OPPOSITION TO APPLICANT'S EXCEPTION TO INITIAL DECISION ISSUED BY THE LICENSING BOARD ON AUGUST 9, 1973

By motion dated July 27, 1973 applicant, Con Edison moved the Atomic Safety and Licensing Board ("Licensing Board") to authorize operating of the Indian Point - 2 plant either at 50% steady-state operation or at 50% steady-state operation with additional authority to test the plant to 100% of full power. In an Intial Decision dated August 9, 1973, the Licensing Board considered this motion which Con Edison had made in the alternative and granted the first alternative, the authority to operate at 50%

steady-state but denied the second alternative, the additional authority to test to 100% of full power. On August 16, 1973, Con Edison took exception to the statement in the Initial Decision which says:

> Section 50.57(c) does not authorize testing operations up to full power.....

Con Edison has further attempted to attack through this exception an Order of the Licensing Board dated August 10, 1973, which denied a motion made by Con Edison on August 9, 1973 for a license authorizing testing operations to 99% full power which Con Edison sought to have treated as an amendment to the July 27, 1973 motion and which requested certification of the question to the Appeal Board if the Licensing Board should find that 99% testing operations were not legally permissable under 10 CFR 50.57(c). The Licensing Board denied the motion and denied the request to certify to the Appeal Board.

It is the position of the Hudson River Fishermen's Association that the August 9, 1973 Initial Decision is sound law as it is written and that the improper attempts of Con Edison to obtain review from the Appeal Board of the issues in its August 9, 1973 motion for 99% testing operation for which certification was requeste and denied must not be countenanced by the Appeal Board.

In the Initial Decision the Licensing Board made a very simple statement which Con Edison has asked this Board to reverse:

> Section 50.57(c) does not authorize testing operations up to full power...Initial Decision at 8.

A reading of section 50.57(c) shows this to be sound law:

> An applicant may...make a motion in writing...for an operating license authorizing <u>low power testing</u> (operation at not more than 1 percent of full power for the purpose of testing the facility), and further

> operations short of full power... 10CFR 50.57(c) (Emphasis added).

If the regulation is read to distinguish between testing and other forms of operation, then authority for testing at full power is clearly prohibited by the phrase "low power testing". If the regulation is read to treat testing as simply one form of operation, then authority for testing at full power is clearly prohibited by the phrase "operations short of full power operation". In either case, the statement in the Initial Decision that the regulation "does not authorize testing operations up to full power... is sound law. It is this statement to which Con Edison takes its exception. That exception must be denied.

It may be that this direct and straightforward analysis does not seem to meet the controversy that Con Edison has presented to the Board, but that is only so because Con Edison is not really taking an exception to the statement in the Initial Decision but rather seeking to obtain review of another motion-its later motion of August 9, 1973 which the Licensing Board denied on August 10, 1973 The August 9th motion, of course, followed the Initial Decision and Con Edison was well aware that under the Commission's rules it would have no automatic right of appeal and for that reason sought to have the question certified should the Licensing Board deny the motion. On August 10, 1973 the Licensing Board denied the motion and refused to certify the question:

> The Board has also concluded Applicant's further request that the matter be certified to the Atomic Safety and Licensing Appeal Board should be denied since no basis has been shown, for compliance with the Commission's regulations in this regard, in that

> there has not been shown any detriment to the public interest or unusual delay or expense. Order of August 10, 1973 at 3.

This is a clear finding under 10 CFR 2.730 (f) that no interlocutory appeal is to be allowed:

> No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgement of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission...10CFR 2.730 (f).

Con Edison is here openly inviting the Appeal Board to violate the Commission's regulations and grant an interlocutory appeal on an order which the Licensing Board has explicitly refused to certify to the Appeal Board. The Appeal Board should not countenance this attempt by Con Edison to manipulate its flurry of motion practice into an appelllate review which is clearly denied it by the Commission's rules and which Con Edison is estopped from making by its position in the August 9th motion that the question must be certified to the Appeal Board.

A reading of Con Edison's papers on this exception make it clear that the company has no real quarrel with the Initial Decision but only with the Order of August 10th. The arguments are all essentially addressed to the Order and in its request for relief Con Edison explicitly "requests the Appeal Board to determine that 10 CFR 50.57(c) permits the Licensing Board to authorize the issuance of a license for Indian Point 2 for testing purposes up to 99% of power (or such other power level as is determined by the Appeal Board)..."Applicant's Brief on Exception at 6. Thus it is obvious that Con Edison implicitly concedes that the Licensing Board

was correct in ruling in the Initial Decision that authority for testing to 100% of full power is prohibited by the section 50.57(c). Restricting itself to the Initial Decision from which the exception is taken, the Appeal Board must deny the exception. Following any other course will have the effect of violating the Commission's regulations and reviewing a question the Licensing Board has refused to certify.

If the Appeal Board disagrees with HRFA on this fundamental point it should at most remand to the Licensing Board for further consideration of whatever motion the Appeal Board considers is properly before it. This is so for two obvious reasons. First, Con Edison made its motion of July 27, 1973 in the alternative. It was granted one alternative. It has made no showing to the Licensing Board that it must be granted the other alternative. And, of course, it would be absurd to make a motion in the alternative if the granting of one alternative did not provide sufficient relief to the moving party. A further presentation by Con Edison is needed before further operating authority should be granted. The second reason to require reconsideration is that the Order of August 10, 1973, of which Con Edison seeks review under the guise of seeking review of the Initial Decision, states a number of other reasons for granting only the authority for operation at 50% steady-state which is authorized in the Initial Decision. Order at 3-4. The further operating authority sought by Con Edison might well be denied on any of these grounds.

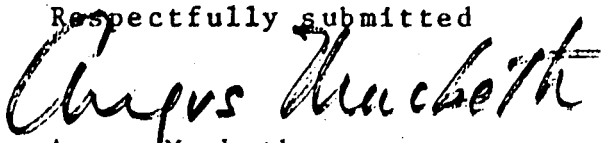
If the Appeal Board grants Con Edison's exception and remands to the Licensing Board for further consideration, HRFA joins the Regulatory Staff in its opposition to the imposition of the

time limits for reconsideration requested by Con Edison. HRFA agrees with the reasoning of the Staff on this issue as presented in the Staff's Brief of August 23, 1973 at 10-11 and adopts the same position as the Staff.

Conclusion

For the reasons given above, HRFA contends that Con Edison's exception should be denied since the Initial Decision is sound law and Con Edison is not entitled under the Commission's regulations to a review of the August 10, 1973 Order of the Licensing Board on which certification was explicitly denied. If Con Edison's exception is upheld, HRFA contends that the Appeal Board should remand for further consideration without the imposition of particular time limits for a ruling.

Respectfully submitted



Angus Macbeth
Attorney for the
Hudson River Fishermen's
Association

Dated: August 28, 1973
New York, New York

BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consolidated Edison Company of New York	)	Docket No. 50-247
(Indian Point Unit No. 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a document entitled: "Intervenor Hudson River Fishermen's Association's Brief in Opposition to Applicant's Exception to Initial Decision issued by the Licensing Board " by mailing copies thereof first class and postage prepaid to each of the following persons this 28th day of August, 1973:

Samuel W. Jensch, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Atomic Energy Commission
Washington, D.C. 20545

Dr. John C. Geyer, Chairman
Department of Geography and Environmental Engineering
The John Hopkins University
513 Ames Hall
Baltimore, Maryland 21218

J. Bruce MacDonald, Esq.
Counsel
New York State Department of Commerce
99 Washington Avenue
Albany, New York 12210

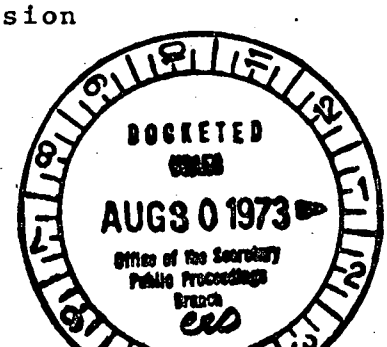
Atomic Safety and Licensing Board Panel
U.S. Atomic Energy Commission
Washington, D.C. 20545

Leonard M. Trosten, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1821 Jefferson Place, N.W.
Washington, D.C. 20036

Mr. Frank W. Karas
Chief, Public Proceeding Staff
Office of the Secretary of the Commission
U.S. Atomic Energy Commission
Washington, D.C. 20545

Anthony Z. Roisman, Esq.
Berlin, Roisman & Kessler
1712 N Street, N.W.
Washington, D.C. 20036

Mr. R. B. Briggs
Molten Salt Reactor Program
Oak Ridge National Laboratory
Post Office Box Y
Oak Ridge, Tennessee 37830



Myron Karman, Esq.
Counsel, Regulatory Staff
U.S. Atomic Energy Commission
Washington, D.C. 20545

Dr. Walter C. Jordan
Oak Ridge National Laboratory
Box X
Oak Ridge, Tennessee 37830

Mr. J. D. Bond
18700 Woodway Drive
Derwood, Maryland 20752

William C. Parler, Esq, Chairman
Atomic Safety and Licensing Board
U.S. Atomic Energy Commission
Washington, D. C. 20545

Dr. John H. Buck
Vice Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Atomic Energy
Commission
Washington, D. C.

Hon. Louis J. Lefkowitz, Esq.
Attorney General of the State
of New York
Attn: Philip Weinberg, Esq.
Assistant Attorney General
2 World Trade Center, Rm. 47-70
New York, New York

Hon. George Segnit
Mayor of the Village of Buchanan
Buchanan, New York 10511

Dr. Lawrence R. Quarles
Dean, School of Engineering
and Applied Science
University of Virginia
Charlottesville, Va. 22901

Angus Macbeth

ANGUS MACBETH