

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
)
CONSOLIDATED EDISON COMPANY) Docket No. 50-247
OF NEW YORK, INC.)
)
(Indian Point Station, Unit No. 2))

APPLICATION FOR EXPERT
WITNESS' AND ATTORNEYS FEES

On the basis of the attached affidavit of Angus Macbeth and the entire record of this proceeding, the Hudson River Fishermen's Association ("HRFA") hereby applies to the Atomic Energy Commission for the payment of expert witness' fees and application is made for the payment of attorneys' fees.

The attached affidavit sets out the benefit which HRFA's participation in this proceeding has provided to the protection of the environment. HRFA successfully argued that a review of the Indian Point 2 facility was required under the National Environmental Policy Act, a position which was opposed at the outset of the hearing by the Staff and the Applicant. HRFA was the first party to contend, as early as December, 1971, through detailed factual analysis that the damage to the aquatic biota of the Hudson caused by the use of a once-through cooling system at Indian Point with consequent

entrainment and impingement of fish and other organisms was so great that a closed cycle cooling system had to be installed at the plant. This position was eventually adopted by the Staff, and at the end of the hearing process, the company also conceded in its proposed license condition that the record supported the requirement of closed cycle cooling. The Commission has made closed cycle cooling a condition of the license issued for the plant. HRFA has won these major changes in the license conditions originally proposed only through vigorous and continual effort over the last four years and only through extensive expert assistance on factual matters and extensive legal assistance in the preparation and presentation of its case.

The factual explication and analysis developed in connection with the Indian Point proceeding have also allowed HRFA to act to protect the public interest in other forums and have thus benefited the public generally. The fishery issue at the Storm King pumped storage plant has been remanded to the Federal Power Commission on the basis of action brought by HRFA and based on the work done at Indian Point. Hudson River Fishermen's Association v. Federal Power Commission, - F.2d -, 6 ERC 1545 (2d Cir. 1974). The Army Corps of Engineers has undertaken an environmental analysis of the Bowline and Roseton fossil fuel plants pursuant to consent decrees settling suits brought against the Corps by HRFA, which were based largely on facts developed in the Indian

Point 2 proceeding. HRFA v. Orange & Rockland Utilities, 72 Civ. 5460 (S.D.N.Y. 1972); HRFA v. Central Hudson Gas & Electric Co., 72 Civ. 5459 (S.D.N.Y. 1972)

This application for expert witness and attorneys fees should be granted on the basis of benefit to the Commission and to the public which have flowed from HRFA's participation in this proceeding. The Second Circuit Court of Appeals has recently awarded attorneys' fees to attorneys for HRFA in a case growing directly out of the Indian Point 2 proceeding. HRFA v. FPC, - F.2d -, 6 ERC 1545 (2d Cir. 1974); motion granting fees decided August 6, 1974.

Important governmental policies have been vindicated in this proceeding. The policies set forth in NEPA, the importance of which has been repeatedly recognized by courts in numerous decisions, have not only been observed procedurally but have resulted in major conditions imposed in the operating license. E.g., Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Wilderness Society v. Morton, 495 F.2d 1026, (D.C. Cir. 1974).

The interests represented by the plaintiffs are not personal interests but public ones. The fisheries and wild-life of the Hudson River are a great public resource held by the state for the benefit of the people. See, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965); HRFA v. FPC, - F.2d -, 6 ERC 1545 (2d Cir. 1974); Geer v. Connecticut, 161 U.S. 519 (1896); Barrett v. New York,

220 N.Y. 423 (1917); Thomson v. Dana, 52 F.2d 759 (D. Ore. 1931), aff'd, 285 529 (1932). The Hudson River fishery provides recreation and food both to the people of the Hudson Valley and the Atlantic coastal waters and also to those who travel distances to fish those waters or receive fish from them. The economic issues touch all the people of New York City and Westchester County and not simply HRFA.

The course of government activity with respect to the impacts of power plants on the Hudson River fishery has made it clear that the legislative and judicial mandates protecting the public interests along the River will only be vindicated if private parties were willing to shoulder the burdens of litigation and participation in agency proceedings. The Court of Appeals for the District of Columbia Circuit in Wilderness Society v. Morton, supra, 495 F.2d at 1030, underscored the importance of the award of attorneys' fees to those who take up such burdens.

"Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits."

HRFA has virtually no resources for sustained litigation in vindication of such policies. Unwillingness to award attorneys' fees in cases where intervenors successfully vindicate congressional and judicial mandates will inevitably limit the ability of the plaintiffs to undertake efforts to protect

the public interest.

In its November 21 Order in Docket Nos. 50-155, 50-271, 50-443 and 50-444, the Commission deferred ruling definitely on the issue of payment of intervenors' costs and fees except insofar as the costs were incurred prior to November 21, 1974. Slip Op. p. 9, fn. 6.^{*/} It ruled that costs incurred prior to November 21, 1974 would never be reimbursable. We respectfully submit that the decision is arbitrary and capricious. First, the entire Order presupposes that more study needs to be made before a definite rule can be adopted. How then could the Commission so confidently reject totally applications for previously incurred costs?

Second, the stated reason given is unpersuasive. If any party has been unjustly enriched it is the AEC, the Applicant and the general public who have received the benefit of HRFA's efforts but have not paid for them. HRFA will receive no economic gain from its participation. The right to intervene is premised on the usefulness of the intervention and implicit in that is the responsibility to pay for the benefit conferred. In addition, HRFA's future ability to function is directly related to its ability to be reimbursed

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The footnote could be read to preclude reimbursement for costs incurred prior to adoption of a final rule because the phrase "this decision" could refer to the decision on the rule rather than the November 21 decision. This interpretation seems a little strained and we assume that November 21, 1974 is the cut off. Either date has the same impact on HRFA.

for the costs it must incur. The fact that HRFA performed its services without expectation of reimbursement only underscores the willingness of the organization to serve the public interest at its own expense. The rule now announced by the Commission would discourage any public group from participating in any proceeding unless it could be reimbursed for its costs thus reducing the number of groups willing to come forward and punishing those which did so in the past. We urge the Commission to reverse the decision to preclude all expenses incurred prior to November 21, 1974.

The HRFA request is simple and does not raise intractable policy questions. First, the authority to reimburse costs has been thoroughly briefed in at least five cases before the agency, two court cases and in connection with Title V to S. 2744.^{*/} Further study is unwarranted. Second, whatever standards are adopted they will clearly authorize reimbursement where the AEC and the public have been directly benefited and the existence of that benefit must be conceded where it is

^{*/}
Metropolitan Edison Co. (Three Mile Island), RAI-73-2-4, petition for review dismissed sub. nom. Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (CA 3, 1974); Philadelphia Electric Co. (Peach Bottom), RAI-73-2-46; Consumers Power Co. (Big Rock) Docket No. 50-155; WMEAC v. AEC, W.D. Mich., No. G 5873 decided June 19, 1974; Vermont Yankee Nuclear Power Corporation, Docket No. 50-271; Public Service Company of New Hampshire (Seabrook) Docket Nos. 50-443 and 50-444; Congressional Record (Daily Ed.) October 10, 1974, S. 18721-752; Hearings before Joint Committee on Atomic Energy and Senate Government Operations Subcommittee on Reorganization in 1974.

attested to by the fundamental and dramatic change of position by the Staff and the Applicant, recognizing the force and persuasiveness of HRFA's position. The public value of this effort is underscored by the grant of attorney's fees by the Court of Appeals in HRFA v. FPC, supra.

RELIEF SOUGHT

HRFA is aware that the present Commission position as expressed in the November 21 Order is that HRFA and its attorneys are ineligible for reimbursement and fees. If the Commission intends to persist in this view, we seek a response to this request within two weeks and will assume that unless a response is received within two weeks, the Commission has decided to treat the HRFA request on the merits and will not apply the rule announced on p. 9, fn. 6 of the November 21 Order.

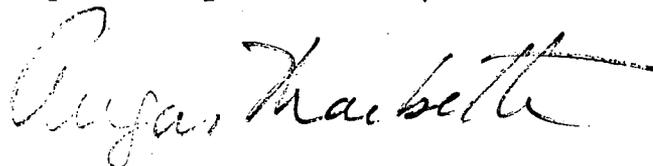
If the Commission does determine to respond to this on the merits without application of the fn. 6 rule, we seek a response within thirty days. If we do not receive a response within thirty days, we will assume the Commission has refused our request.

In Docket No. 50-155, WMEAC has filed a request that the rulemaking be concluded by January 31, 1975. Failing a favorable response to this request, we join in this request for a prompt resolution of the entire matter.

CONCLUSION

The Commission has virtually conceded that the Atomic Energy Act of 1954 authorizes it to provide reimbursement to public participants for attorneys' and expert witness fees. This conclusion is twenty years late already and further delay in implementing this authority seriously impedes the Commission's ability to carry out its regulatory responsibilities. This application for expert witness fees of \$18,062.54 and for attorneys' fees of \$30,000 should be granted.

Respectfully submitted,

A handwritten signature in cursive script that reads "Angus Macbeth". The signature is written in dark ink and is positioned below the typed name.

ANGUS MACBETH

Attorney for Hudson River
Fishermen's Association

Dated: New York, New York
December 13, 1974