

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|                             |   |                          |
|-----------------------------|---|--------------------------|
| In the Matter of            | ) | Docket 50-247            |
| CONSOLIDATED EDISON COMPANY | ) | (Selection of Preferred  |
| OF NEW YORK, INC.           | ) | Alternative Closed-Cycle |
| (Indian Point Station,      | ) | Cooling System)          |
| Unit No. 2)                 | ) |                          |

ANSWER OF THE HUDSON RIVER FISHERMEN'S  
ASSOCIATION IN SUPPORT OF NRC  
STAFF MOTION

11-24

On November 18, 1976, the NRC Staff filed a motion for issuance of a Partial Initial Decision in this proceeding. The Hudson River Fishermen's Association (HRFA) supports the Staff's motion to the extent that it seeks issuance of a Partial Initial Decision approving the selection of the natural draft cooling tower and determining whether upon the issuance of the Partial Initial Decision, all required governmental approvals will have been received.

HRFA agrees with the Staff's reasons for seeking the Board's decision on these issues. In addition, HRFA believes that there are compelling reasons for the Board to act. HRFA considers that it would be an abuse of this Board's discretion and a violation of its substantive responsibilities under the National Environmental Policy Act not to proceed with issuance of such a Partial Initial Decision. HRFA's position is based on the following.

The termination date for once-through cooling at Indian Point 2 has already been delayed one year because of the NRC's failure to act. If this Board withholds its approval and thereby contributes to a further delay in Con Edison's attaining the approvals necessary for commencement of construction of the closed-cycle system, another year may be lost and operation of the plant through yet another spawning season will occur. Indeed, according to Con Edison's calculations, if the necessary approvals are not obtained by January 1, 1977 it will require until October, 1980 for termination of once-through cooling.

Failure to issue a timely Partial Initial Decision respecting the two findings (i.e. the approval of the preferred system and a finding that all necessary approvals have been received) which must be made before the clock starts to run on the construction schedule for the closed-cycle cooling system undercuts the NRC's conclusion on the appropriate termination reached in the proceeding on issuance of the operating license for Indian Point 2. The Board, through its own inaction, should not vitiate the results of that proceeding, reached after years of litigation and extensive expert testimony.

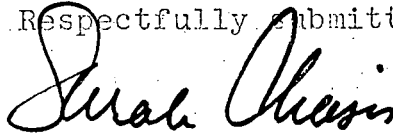
The Board should not delay issuance of such a decision because of the controversy involving the Village of Buchanan. HRFA has already made several arguments in support of its position on this issue-- in its brief filed in this proceeding

(dated October 13, 1976, pp 2-18), in its letter to the Board (dated November 9, 1976) and in the statement of counsel at the October hearings. In response to Chairman Jensch's specific inquiry respecting the applicable tenets of New York State law on this issue, it is HRFA's position that under New York State law, zoning requirements cannot be used to prevent utilities from constructing necessary facilities. Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295 (Sup. Ct. 1955); Long Island Water Corp. v. Michaelis, 28 App. Div. 2d 887 (2d Dept. 1967); Long Island Lighting v. Griffin, 272 App. Div. 551 (2d Dept. 1947). State law holds that even if a utility can not meet the test for legal hardship, a local ordinance may not be applied to prevent a utility from constructing facilities if the utility can establish a reasonable necessity to build the facility on the particular site. Niagara Mohawk Power Corp. v. City of Fulton, 8 App. Div. 523 4th Dept. 1959); New York State E & G Corp. v. McCabe, 32 Misc. 2d 898 (Sup. Ct. 1961); Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954). The preferred closed-cycle cooling system is a necessary facility since under the NRC license Con Edison may not operate Indian Point 2 without such a system after May 1, 1979. The Village of Buchanan Zoning Board is a local agency established pursuant to state law and may not insulate itself from governing state law. Under applicable principles of state law the Village of Buchanan Zoning Board should have granted the variance sought by Con Edison. Two state courts have already found that the Village was wrong in

what it did. Neither the Village's failure to act properly nor the possibility that it may continue to litigate in defense of its position should bar a commencement of construction of the closed-cycle system.

For the above reasons, as well as those set forth in the Staff's motion, HRFA urges the Licensing Board to issue the requested Partial Initial Decision without further delay.

Respectfully submitted,



Sarah Chasis

Attorney for Hudson River  
Fishermen's Association

Dated: New York, New York  
November 24, 1976