

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
CONSOLIDATED EDISON COMPANY) Docket No. 50-247
OF NEW YORK, INC.) OL No. DPR-26
) (Determination of Preferred
) Alternative Closed-Cycle
(Indian Point Station,) Cooling System)
Unit No. 2))

10/19/76

REPLY BRIEF ON BEHALF OF LICENSEE

This brief is submitted on behalf of Consolidated Edison Company of New York, Inc. (Con Edison) in reply to the brief dated October 13, 1976 of the Hudson River Fishermen's Association (HRFA) as permitted by the Licensing Board at the prehearing conference of September 22, 1976. (Tr. 68-69.)

In view of the letter of the Nuclear Regulatory Commission Staff (the Staff) to Samuel W. Jensch, Esq., Chairman, dated October 13, 1976, Con Edison has nothing to add to its prior submittals concerning the position of the Staff.

1. HRFA POINT I - NECESSARY GOVERNMENTAL APPROVALS

In its brief, HRFA sets forth a number of contentions regarding the efforts that have been made to obtain necessary governmental approvals for a closed-cycle cooling system at

Indian Point Station, Unit No. 2. In general, Con Edison will rely on the points it has already made in its October 6 brief.

Con Edison, does, however, feel compelled to note its disagreement with HRFA's description of Con Edison's May 6, 1975 presentation before the Buchanan Zoning Board of Appeals. The record of that proceeding speaks for itself, and Con Edison sees little purpose to be served by seeking to characterize the presentation of either party. Con Edison made a full, balanced presentation of the data pertinent to the issues before the Zoning Board. We merely note that HRFA's display at the Zoning Board hearing of an enormous sturgeon said to have been recently caught off Indian Point was not likely to assist in the granting of a variance.

HRFA's statement on page 11-12 that Buchanan might impose more stringent environmental controls is erroneous. HRFA is confusing concepts which may be applicable under the Federal Water Pollution Control Act and the Federal Clean Air Act with the National Environmental Policy Act. A decision under the National Environmental Policy Act and the Commission's regulations must be based on a balancing of costs and benefits of the proposed action. Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); 10 CFR Part 51. If a

state or local jurisdiction were to impose more stringent environmental controls, that would upset the balancing of costs and benefits on which the Commission's decision must be based.

HRFA states on page 12-13 that the Appeal Board did not consider local zoning approval within the purview of "necessary governmental approvals". This is a blatant error. The Appeal Board cited not only the Staff response referred to by HRFA but the testimony of witness Newman. ALAB-188 at 390. In the referenced testimony Mr. Newman referred to "local Westchester agencies, the Village of Buchanan," and others. This was preceded by Chairman Jenssch's statement that the list Mr. Newman would be enumerating would not be "binding on the applicant". (Tr. 7572-73.) The Appeal Board went on to say that time would be required to obtain "all other regulatory reviews and approvals which may be required for the cooling system". ALAB-188 at 391. It did not refer to the Staff's supplied list but said all approvals. There is not a scintilla of evidence to suggest that the Appeal Board was making a decision on federal preemption or in any way determining that Buchanan approval was unnecessary.

On pages 14-15 HRFA states that the Westchester Court

found that the Village of Buchanan lacked authority on two separate grounds. While HRFA is correct that federal preemption was such a ground, it is not correct on the second ground. The Westchester Court, after finding that the license had the effect of requiring construction of a closed-cycle cooling system, said that were it not for federal preemption it would remand the case to the Zoning Board for a decision on the merits. The Court did not order the Zoning Board to grant the variance requested. Thus the alternative ground does not have the force stated by HRFA.

HRFA states on page 15 that the NRC is at least as well, if not better suited to decide questions of federal preemption than a state court. This reflects a bizarre notion of the allocation of jurisdiction between courts and administrative agencies. Although an administrative agency is frequently required to decide a legal issue, such a decision is reviewable by the judiciary and in a government ruled by law the courts have the final say. If HRFA means that a state court is somehow incapable of deciding a question of federal constitutional law, such an assertion has no basis and in fact is contradicted by the willingness of the State Supreme Court

in Con Edison's case against the Buchanan Zoning Board to address delicate questions of federal preemption.

The statement on page 16 that the license provision in question is "an accommodation to Con Edison" reflects HRFA's fundamental misconception of this provision. The basis of the Appeal Board's inclusion of the provision in the license was its recognition that Con Edison could not legally proceed until it had all necessary governmental approvals and the receipt of those approvals was not within Con Edison's control. This is not an accommodation but a recognition of fact.

HRFA implies that there is no serious loss in the first six months of Con Edison's construction schedule because there would be no excavation. As stated in Con Edison's brief of October 6, 1976, substantial economic costs would be incurred during this period. While HRFA's indifference to the economic burdens placed on the New York Metropolitan area is well documented, the Commission cannot evince a similar view. We need not repeat the quote from the Public Service Commission set forth on pages 10-11 of the brief of October 6, 1976. Con Edison cannot accept the concept that merely an expenditure of money is an insignificant factor when we are living in a

community which is enduring an economic crisis which has already resulted in the laying off of policemen, sanitation men, firemen, teachers and other municipal workers and the closing of hospitals. See New York City Seasonal Financing Act of 1975, P.L. No. 94-143, 89 Stat. 797.

HRFA notes on page 17-18 that the present license provides that the filing of an application for an extension of interim operation shall not, in and of itself, warrant an extension of the interim operation period and says that this means that the application "may play no role in determining whether Con Edison should or should not be required to proceed with construction of a closed-cycle system." This argument is erroneous on its face. To say that the application "in and of itself" does not warrant an extension is very different from saying that it is completely irrelevant to the determination concerning the extension. Although Con Edison is not entitled to an extension by the mere act of filing the application, such an application is obviously one of the factors that must be considered and the license does not require the Licensing Board to blind itself in this preference proceeding as to the pendency of the closely related

extension proceeding.

2. HRFA'S POINT II - NEED FOR RE-EXAMINATION OF
CONSTRUCTION SCHEDULE

HRFA suggests that the NRC must make a new determination that additional time for construction is in fact needed. The terms of the license are clear and unambiguous in this respect. The license contains no requirement for re-examination of the time required for construction of a closed-cycle cooling system in view of the extensive discussion of that matter in the Indian Point 2 record. As stated in the brief of October 6, 1976 (page 15), this matter must be considered res judicata for purposes of this proceeding.

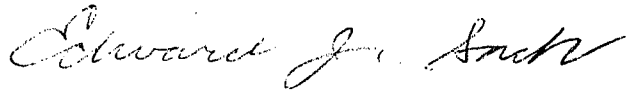
3. HRFA'S POINT III - DIRECTION TO PROCEED WITH CONSTRUCTION

HRFA suggests that the Licensing Board should order Con Edison to proceed with construction of a closed-cycle cooling system. As was discussed in Con Edison's brief dated October 15, 1976 in response to Proposed Partial Initial Decisions, it is not correct in this limited proceeding to do any more than determine a preferred closed-cycle cooling system for installation. HRFA now goes one step further and seeks an order that Con Edison must proceed with construction.

This suggestion goes beyond the terms of the license. As HRFA well knows, the license only establishes the date for termination of operation of the once-through cooling system. The timing of specific construction procedures was left to the discretion of Con Edison, within the constraints imposed by the date for termination of once-through operation and other factors affecting the practicalities of the situation. This Board would venture into an entirely new and improper area of regulatory jurisdiction if it were to attempt to determine the timing of construction.

Dated: October 19, 1976
New York, New York

Respectfully submitted,



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Of Counsel

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CERTIFICATE OF SERVICE

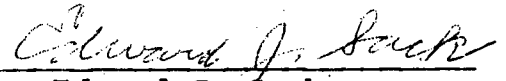
I hereby certify that I have, this 19th day of
October, 1976, served the foregoing document entitled "Reply
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