UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	10/15/76
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	Docket No. 50-247 OL No. DPR-26 (Determination of Preferred Alternative Closed-Cycle Cooling System)
(Indian Point Station, Unit No. 2)	

BRIEF ON BEHALF OF LICENSEE IN RESPONSE TO PROPOSED PARTIAL INITIAL DECISIONS

This brief is submitted on behalf of Consolidated Edison Company of New York, Inc. (Con Edison), the licensee in this proceeding, in accordance with 10 CFR § 2.754(b)(3) and the order of the Licensing Board (Tr. 292), with respect to the Proposed Partial Initial Decisions which were submitted to the Board by the Nuclear Regulatory Commission Staff (the Staff), the Hudson River Fishermen's Association (HRFA) and Con Edison. It is our understanding that the New York State Atomic Energy Council did not submit a Proposed Partial Initial Decision.

I. THE PROPOSALS OF THE STAFF AND HRFA ARE CONTRARY TO THE STIPULATION AND MUST BE DISREGARDED BY THE BOARD

The parties to this proceeding signed a Stipulation

for a Partial Settlement of Proceeding and Identification of Remaining Issues, which has been presented to the Board for its approval. In that document the parties agreed that the license amendment requested by licensee "should be granted". The requested amendment referred to was set forth in full as Footnote 1 on page 2. The HRFA Proposed Partial Initial Decision on page 2 proposes a finding by the Board which correctly states that the parties agreed "that the license amendment requested by the licensee should be granted".

The Staff and HRFA have each submitted proposed license amendments on pages 17 and 5 respectively of their Proposed Partial Initial Decisions which are different from the license amendment requested by licensee. Thus, they are proposing an amendment different from that which they stipulated "should be granted".

The Stipulation means precisely what it says and the parties, having agreed that the amendment requested by licensee should be granted, cannot now be heard to propose another form of license amendment. Any variation of the words requested by licensee is a violation of the Stipulation. If this be deemed simply a matter of semantics, then the parties should stick with the words all the parties agreed were correct.

While the Board is not bound by the Stipulation, the parties are. The appropriate remedy for this violation of the Stipulation is that the Board should disregard entirely the proposals of the Staff and HRFA. Any other result would be tantamount to a decision by the Board that stipulations are useless and should be discouraged.

II. CON EDISON'S PROPOSAL IS THE ONLY ONE THAT CONFORMS TO THE LICENSE

In the event the Board seeks an understanding of the differences among the parties in spite of the clear violation of the Stipulation, we will discuss the substance of this dispute. The scope of this proceeding is delineated in ¶ 2.E(2) of License DPR-26 which provides as follows:

> "(2) Evaluation of the economic and environmental impacts of an alternative closed-cycle cooling system shall be made by the licensee in order to determine a preferred system for installation. This evaluation shall be submitted to the Atomic Energy Commission by December 1, 1974, for review and approval prior to construction."

This proceeding was commenced by Con Edison's application dated December 1, 1974 as required by this paragraph of the license. The purpose as stated in the application was to comply with this condition of the license "to determine a

preferred system for installation". The license condition proposed by Con Edison on page 5 of its Proposed Partial Initial Decision conforms precisely to that language by stating "that a closed-cycle natural draft, wet cooling tower system is the preferred alternative closed-cycle cooling system for installation at Indian Point Unit No. 2".

HRFA alters this language by inserting "required under the license" before the statement "for installation". The Staff proposal makes no pretense of following the language of the license and on page 17 of its proposal suggests something entirely different.

Although these parties may argue that they are attempting to reflect the true meaning of the license, they are in fact attempting to put a gloss on the license to correct what they feel was an inadequacy in the license conditions as prescribed by the Appeal Board in ALAB-188. It is not correct in this limited proceeding, convened for the purpose of designating the preferred alternative closed-cycle cooling system, to attempt to re-interpret or add anything regarding this matter which was the heart of the controversy in the Indian Point 2 operating license hearing. The license must remain as is in this respect. Certainly the record of this limited proceeding

contains no data concerning whether or not a closed-cycle cooling system is required and therefore does not support such a change in the terms of the license.

In particular, the Staff's proposed finding on page 13 that the benefits to be derived from a closed-cycle cooling system outweigh the potential impacts on the environment has no support in the record of this proceeding. There is a complete absence of a benefit/cost analysis to support this conclusion.

For all the above reasons, Con Edison believes the Board must refrain from attempting to clarify, amend or otherwise add to the terms of the Indian Point 2 license other than as specifically required by ¶ 2.E(2) to determine a preferred closed-cycle cooling system for installation.

III. THE COMMISSION DECISION IN THE INDIAN POINT 3 CASE DOES NOT AUTHORIZE OR REQUIRE AMENDMENT OF THE INDIAN POINT 2 LICENSE

At the hearing on October 5, 1976, it was argued that the Commission's decision in the Indian Point 3 operating license proceeding (CLI-75-14, 2 NRCI 835) requires the Board to take some action in this proceeding beyond that specified in Con Edison's application. It is important to note that

ALAB-188 constituted the Commission's decision on the environmental issues in the Indian Point 2 proceeding because the Commission did not make any changes in the Appeal Board's review of these issues when it reviewed ALAB-188. CLI-74-23, 7 AEC 947 (1974). Although HRFA filed a petition in the Court of Appeals to review this decision, it subsequently withdrew its petition.

The Commission decision in the Indian Point 3 docket does not expressly amend the Commission's prior determination and neither authorizes nor requires an amendment of the Indian Point 2 license in the manner suggested by the Staff and HRFA. The Commission in the Indian Point 3 case ruled on a stipulation among the parties intended to resolve the contested issues in that proceeding by basically accepting license conditions modeled after License DPR-26. Accordingly, the Indian Point 3 case involved an uncontested request by the parties to approve a stipulation. The Commission by way of dictum described in shorthand fashion the terms of License DPR-26 in a manner which did not adequately describe the import of the Commission's specific omission from the license of an affirmative direction to Con Edison to build a closed-cycle cooling system.

Whatever the Commission stated in the Indian Point 3

proceeding speaks for itself. It did not purport to amend License DPR-26. It does not require any further elaboration or implementation by this Board in this limited proceeding which is merely to determine the preferred alternative closed-cycle cooling system.

Con Edison is not asking the Board to ignore the Commission's decision. Con Edison is simply noting that the Board is not required to do anything in this limited proceeding because of the Commission's decision.

If the Board were to feel compelled to insert in this proceeding the issue whether or not a cooling tower is required by the specific terms of the license, it would greatly expand the scope of this proceeding. In the circumstances Con Edison urges the Board not to add this complexity to what we conceive to be a relatively simple proceeding.

IV. CON EDISON'S PROPOSED INTRODUCTORY LANGUAGE TO THE LICENSE AMENDMENT IS ESSENTIAL

Neither HRFA nor the Staff included the language contained in Con Edison's proposal (to which each consented in the Stipulation), "Subject to all the foregoing provisions of this Paragraph 2.E., ..." This introductory language is essential as a structural matter. The license amendment

adds a separately numbered paragraph to License DPR-26. The question arises as to its relationship to the preceding four paragraphs. The sub-paragraphs of (1) in particular have a relationship to the new ¶ (5).

It must be made explicit that the new ¶ (5) is subject to the other provisions of ¶ 2.E in order to avoid confusion and potential unnecessary disputes over matters of interpretation.

The introductory clause of Con Edison's requested amendment is consonant with the rest of the conditions to the license by making clear that the various procedural features provided in the other conditions are not affected by the definition of a particular closed-cycle cooling system.

V. THE BOARD IS NOT REQUIRED TO MAKE DETAILED EVIDENTIARY FINDINGS

The Staff proposed detailed findings concerning the analysis of alternative closed-cycle cooling systems as set forth on pages 6 through 15 of its Proposed Partial Initial Decision, culminating in a finding on page 15 that the Licensing Board adopt the analysis of the Staff set forth in the Final Environmental Statement. HRFA in a similar manner proposes in finding (1)(a) on page 3 a detailed evidentiary finding.

(Con Edison has no objection to HRFA's proposed finding (1)(b).)

Although the parties are in agreement that a natural draft cooling tower system is the preferred closed-cycle cooling system, there is considerable disagreement on the details of the environmental analysis (see Tr. pp. 78-83). Similarly, the New York State Atomic Energy Council also indicated its disagreement with the Staff's analysis in many respects (see Tr. pp. 206-218).

If this kind of detail is deemed necessary, extensive hearing time is required to resolve these matters which are in dispute concerning the environmental impacts of alternative closed-cycle cooling systems. Con Edison cannot permit the Staff's analysis to go unchallenged because of possible ramifications in subsequent proceedings.

Neither the National Environmental Policy Act nor the rules of the Nuclear Regulatory Commission require this type of detailed analysis when a licensing board is approving a stipulated license condition. All that is required under the regulations is a finding that the stipulation is in the public interest and that an adequate NEPA statement has been prepared. See 10 CFR ¶ 51.52(b).

Conclusion

In view of the foregoing the Board should authorize an amendment of License DPR-26 identical to that which is contained in Con Edison's Proposed Partial Initial Decision. This was the amendment Con Edison originally requested in its application, and all other parties to this proceeding specifically agreed in the Stipulation that this amendment "should be granted". Any other action on the part of the Board would raise serious issues involving matters in contention among the parties and would unnecessarily complicate what should be a simple and limited proceeding.

Dated: October 15, 1976
New York, New York

Respectfully submitted,

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Unit No. 2)	)	Cooling System)

CERTIFICATE OF SERVICE

I hereby certify that I have, this 15th day of October, 1976, served the foregoing document entitled "Brief on Behalf of Licensee in Response to Proposed Partial Initial Decisions" upon the following persons by mailing copies thereof, first class mail, postage prepaid:

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