UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

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IN SUPPORT OF EXCEPTIONS

Consolidated Edison Company of New York, Inc. ("Con Edison") submits herewith its reply to the brief of the Hudson River Fishermen's Association ("HRFA") dated January 12, 1977 and the brief of the Nuclear Regulatory Commission Staff ("the Staff") dated January 13, 1977, in this proceeding.

1. Exception No. 1 Concerning Regulatory Approvals

HRFA completely misconstrues Con Edison's argument on this point. Contrary to the assertion on pages 2 and 4 of the HRFA brief, Con Edison does not argue that the Village of Buchanan holds a veto over the NRC's decision. Con Edison argued the opposite in the New York State court proceedings vigorously and successfully. See Exhibits B and C to Con Edison's brief dated December 21, 1976. In fact, both HRFA

and the Staff cite cases drawn from Con Edison's brief in the State proceedings to argue that the Village cannot prevent Con Edison from constructing a closed-cycle cooling system.

Con Edison's point is that the Village of Buchanan is seeking a judicial determination of this matter. Until that proceeding is finally concluded, the legal opinions of Con Edison, HRFA, the Staff, the Licensing Board and even the Commission, are not determinative. Certainly it would be inappropriate for this Appeal Board to render a judgment on the effect of New York State law, as invited on page 2 of HRFA's brief, at a time when the very question is pending before the highest court of New York State.

The difficulty of relying on opinions of HRFA and the Staff as to state law is illustrated by their emphasis on the principle of New York State law that local communities cannot interfere with the construction of essential utility facilities. Although Con Edison presented this argument at some length to the Supreme Court, Westchester County, that court made no reference to this principle in its opinion. (See Exhibit B to Con Edison's brief dated December 21, 1976.) The Appellate Division made a very brief reference to this concept. (See Exhibit C to Con Edison's brief dated December

21, 1976.) The emphasis of HRFA and the Staff appears to be inconsistent with the approach taken by the New York courts. The Appeal Board should therefore be wary of accepting the opinions of HRFA and the Staff as to New York State law.

HRFA characterizes the license provision permitting extension of the interim period of operation with the once-through cooling system because of failure to receive all necessary governmental approvals of a closed-cycle cooling system, as "an accommodation to Con Edison" on page 8 of its brief. The implication is that this is some sort of special favor to Con Edison which is not important to the license condition. This is refuted by the language the Appeal Board used in establishing this provision of the license, referred to on pages 3-4 of Con Edison brief dated December 21, 1976. The condition constitutes an acknowledgment of the fact that Con Edison could not and can not control the time required for regulatory action.

2. Exception No. 2 Concerning Commencement of Construction

Both HRFA and the Staff fail to respond to Con Edison's basic argument that the Licensing Board's findings on this issue were beyond its powers in this limited proceeding.

The addition to the license of the concept of commencement of construction constitutes a major change in its fundamental nature not within the scope of Con Edison's application to the Commission which commenced the proceeding nor of the Commission's order constituting the Licensing Board to act on that application.

Both HRFA and the Staff challenge Con Edison's reference to the June 6, 1975 application to extend the date for termination of once-through cooling ("the Extension Request") and other matters in support of its argument on this point. They note that the License provides that "[t]he filing of such application in and of itself shall not warrant an extension of the interim operation period." License No. DPR-26, ¶ 2.E(1)(c). To say that filing of the Extension Request in and of itself does not warrant an extension--which we of course concede--is not to say that the pendency of that request and the adjudicatory hearing thereon cannot be considered at all. Con Edison's argument is that the application together with the other matters set forth on pages 13-16 of its brief dated December 21, 1976, are highly relevant to the issue now before this Appeal Board, and cannot be ignored.

An additional factor which we believe equity requires

to be considered is the Regulatory Staff's unconscionable delay in completing a quantified benefit/cost analysis with respect to the proposed action in the Extension Request case. On December 10, 1976, at the end of four days of evidentiary hearings on the Extension Request, the Atomic Safety and Licensing Board directed the Regulatory Staff to submit such an analysis. The Staff's latest estimate is that it will have this analysis available by the end of January 1977. See Letter of Stephen H. Lewis to the Licensing Board, Jan. 6, 1977 (attached hereto). Thus, as we near the end of the twentieth month since submission of the Extension Request, the hearing process is being delayed due to the Staff's delay in connection with its benefit/cost presentation. Con Edison submits that the leisurely pace the Staff has adopted in connection with the Extension Request should not be disregarded when considering the correctness of the Licensing Board's "direction"--if it was such--to proceed with construction.

In an analogous situation arising in the Indian Point seismic proceeding, the Commission on January 14, 1977 approved a deferral of the construction of an expanded seismic monitoring network previously required by the Staff on the ground that it would be "pointlessly burdensome to now require the licensee

to construct the network, with a decision on its merits expected in the near future." Consolidated Edison Co. of New York et al. (Indian Point Station, Units 1, 2 and 3), CLI-76- (Jan. 14, 1977). With a hearing on the Extension Request expected to reconvene in a matter of weeks, the results of which could moot this exception, the same principle of avoiding actions that are "pointlessly burdensome" should be applied.

On page 12 of its brief HRFA refers to the Commission's decision in the Indian Point 3 operating license proceeding in support of its contention that construction of a closed-cycle cooling system should now commence. Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 3), 2 NRC 835 (1975). It is a misstatement of that decision to say that the Commission there ruled that "Con Edison must go forward with construction." That decision did not alter the course adopted in the Appeal Board's April 4, 1974 ruling, ALAB-188, 7 AEC 323 (1974), of focusing on the termination date for operation with the installed once-through cooling system, rather than on a commencement date for construction of a closed-cycle cooling system. Indeed, the Commission's decision approved a stipulated license condition that had the very same focus.

Furthermore, the decision specifically noted that

Con Edison could seek license amendments based on empirical data collected during interim operation. That is precisely what Con Edison has done in its application to extend operation with once-through cooling to May 1, 1981 and is about to do to delete the requirement for termination of operation with the once-through cooling system from the present license.

Con Edison protests the statement on page 11 of the HRFA brief that Con Edison attempted to mislead the Licensing Board. Con Edison counsel said that the necessity for a cooling tower at Indian Point 2 is governed by ALAB-188 (7 AEC 323 (1974)) and the terms of the present license for Indian Point 2, neither of which was amended by the Commission's Indian Point 3 decision referred to above. Con Edison still believes that ALAB-188 constitutes the law of the case for Indian Point 2 proceedings. While counsel for HRFA is free to disagree with this position, her imputation of bad faith on Con Edison's part for asserting a position contrary to HRFA's is not in keeping with the standards properly set by this Board for advocacy before it. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-204,

7 AEC 835, 838 & n. 3 (1974).*

3. Exception No. 4 Concerning Further Examination of Due Diligence

HRFA argues, at page 16 of its brief, that § 2.760a of the Commission's Rules of Practice, 10 C.F.R. § 2.760a (1976), does not apply to this proceeding. The construction offered by HRFA is unduly cramped and should be rejected by the Appeal Board. That regulation was promulgated by the Commission following its decision on the certified "ventilation" question from the Indian Point 3 operating license proceeding. As a result, it is not surprising that the regulation refers to operating license proceedings.

Surely, however, the principle stated in the Commission's decision on ventilation, Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3),

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*Con Edison notes with concern HRFA's similar challenge to Con Edison's good faith. See HRFA brief at 9. While HRFA may question Con Edison's exercise of due diligence as required by the license, it may not, in this adversarial situation, blacken Con Edison's name with attacks of this nature every time Con Edison makes an argument with which HRFA disagrees. The "due diligence" standard was not inserted in the license for use as a bludgeon by which HRFA may question its adversary's bona fides at every turn.

8 AEC 7 (1974), and reflected in the regulation, that only in extraordinary cases will uncontested issues be examined, applies as fully to operating license amendment cases (such as the case at bar) as it does to cases involving the issuance of an operating license. In each situation the Atomic Energy Act does not require a hearing, but only an opportunity for a hearing, 42 U.S.C. § 2239(a) (1970). The consequence of HRFA's construction--that a Licensing Board's authority is narrower in an operating license case than it is in an operating license amendment case--is an absurdity that should be eschewed.

Respectfully submitted,

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