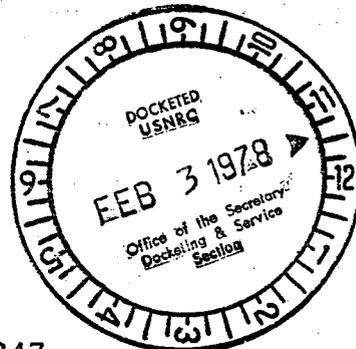


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

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

ANSWER OF HRFA TO NRC STAFF MOTION
FOR LEAVE TO WITHDRAW ITS APPEAL

On January 19, 1978, the NRC Staff filed a motion for leave to withdraw its appeal from the Appeal Board decision in ALAB-399 and also suggested that the Commission terminate its review of ALAB-399. Pursuant to Section 2.730 of the Commission's rules and regulations, HRFA submits the following answer. HRFA respectfully requests that its answer be accepted, even though it is filed out of time.*/

HRFA has taken the following position before the Commission in its review of ALAB-399: that the Commission's authority under the Atomic Energy Act as supplemented by the National

*/The rules of the Commission allow an answer to be filed within 5 days of the service of a written motion. Where service is by mail, three additional days are allowed. Since the NRC Staff motion was served on January 19, HRFA would have had to file its answer by Friday, January 27 in order to conform to the rules. However, counsel for HRFA did not receive the NRC Staff motion until January 25th, 1978, two days before the deadline. (This was apparently due to the weather conditions which affected mail delivery generally.) Because of the date of receipt, HRFA was unable to file this motion until Monday, January 30.

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Environmental Policy Act ("NEPA") does not preempt state or local regulation of environmental matters; but that an NRC license term, established pursuant to NEPA, cannot be nullified by a state or local decision which would allow continued plant operation, but with less environmental protection than the Commission has determined to be necessary. (See HRFA Brief to the Commission, page 33, October 14, 1977).

The Appeal Board's decision in ALAB-453 makes clear that its holding in ALAB-399 is consonant with the position taken by HRFA before the Commission. The Appeal Board has stated that in ALAB-399 it was dealing with a novel and narrow question, namely whether the Village of Buchanan could eschew any effort to bar the operation of Indian Point 2 and yet, at the same time, act to nullify a license condition imposed by the NRC pursuant to NEPA for the purpose of protecting the striped bass population of the Hudson River. (ALAB-453, p. 7). ALAB-453 makes clear that the Appeal Board's resolution of this question in ALAB-399 did not involve a finding of broad federal preemption of state and local environmental authority, but instead involved a narrow holding that, in the circumstances of this case, the Village of Buchanan may not act to nullify a license condition which the Commission has validly imposed under NEPA. (ALAB-453, pp. 5-7, 10-11).

The NRC Staff now appears to concur with the holding of ALAB-399, as clarified in ALAB-453. (Staff Motion, p. 7). HRFA

and the NRC Staff are thus both in basic agreement with the holding of the Appeal Board in ALAB-399, as clarified in ALAB-453.*

HRFA believes that it would be appropriate for the Commission to issue a decision in this case, rather than to dismiss the appeal as the NRC Staff suggests. A decision now from the Commission, even if in summary form, would clarify the rules which should govern future proceedings in this case and would help avert further delay and confusion.

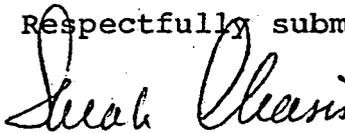
HRFA, therefore, respectfully requests that the Commission rule that:

1. The proper interpretation of ALAB-399, as clarified by ALAB-453, is that the decision represents not a holding of broad federal preemption of state and local authority over environmental matters, but a narrow holding that the Village of Buchanan may not act to nullify a license condition which the Commission has validly imposed under NEPA;

*/ There is one area of potential disagreement between HRFA and the NRC Staff. The NRC Staff suggests that if a direct conflict should develop between the NRC license condition and action by the Village of Buchanan, the Commission may be obliged to re-evaluate its own license requirement. (Motion, p. 8). To the extent the Staff is suggesting that any party may move to amend the license, pursuant to the rules of the Commission and the requirements of NEPA, HRFA has no objection. However, to the extent the Staff is suggesting that the Commission may have an affirmative duty to re-evaluate a license condition which is final, whenever a direct conflict develops between that condition and a local regulation, HRFA disagrees. HRFA also believes that the Staff position on this point is inconsistent with the Staff's acceptance of the Appeal Board's holding that the Village may not act to nullify a license condition imposed by the NRC pursuant to NEPA.

2. The Appeal Board was correct in holding that the Commission's authority under the Atomic Energy Act as supplemented by the National Environmental Policy Act (NEPA) does not preempt state or local regulation of environmental matters;
3. The Appeal Board was correct in holding that an NRC license term, established pursuant to NEPA, cannot be nullified by a local decision which would allow continued operation, but with less environmental protection than the Commission has determined is necessary pursuant to NEPA.

Respectfully submitted,



Sarah Chasis

Attorney for Hudson River
Fishermen's Association

January 30, 1978