

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	)	OL No. DPR-26
OF NEW YORK, INC.	)	
	)	(Determination of Preferred
(Indian Point Station,	)	Alternative Closed-Cycle
Unit No. 2)	)	Cooling System)

HUDSON RIVER FISHERMEN'S ASSOCIATION  
PETITION FOR MODIFICATION OF ORDER

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January 23, 1978

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PETITION FOR MODIFICATION OF ORDER

Pursuant to the rules of the Commission, 10 C.F.R. §2.771, the Hudson River Fishermen's Association ("HRFA") respectfully petitions the Atomic Safety and Licensing Appeal Board (the "Appeal Board") for a modification of its January 11, 1978 order in ALAB-453 to conform with the substance and impact of the decision. HRFA specifically requests that the Appeal Board amend its order to permit renewal of HRFA's motion on or after November 1, 1978, or 45 days subsequent to the decision of the New York Court of Appeals in Consolidated Edison Co. v. Hoffman, whichever is sooner.

On January 11, 1978 the Appeal Board issued ALAB-453 reversing the Atomic Safety and Licensing Board's order of November 23, 1977 which had determined that all governmental approvals required to proceed with construction of the cooling

tower at Indian Point 2 had been received.\*/ The Appeal Board stated that the critical principle enunciated in ALAB-399 was that preemption would arise if the Zoning Board used its power "in such a way as substantially to destruct or delay the license conditions imposed on Con Edison by this Commission pursuant to NEPA..." and relied upon the fact that construction need not commence until December 1, 1978 to meet the May 1, 1982 deadline set in the license. (ALAB-453 at 12). Since the Zoning Board inaction had not obstructed or delayed compliance with the NRC license condition requiring termination of once-through cooling at Indian Point 2 by May 1, 1982, the Appeal Board held that preemption had not arisen. (ALAB-453 at 12). The Appeal Board went on to state that, without delaying effectuation of the license condition, the Commission would now await the decision of the New York State Court of Appeals, thus fully accommodating the rule referred to in ALAB-399 that federal tribunals should await a state court's interpretation of a state statute which may or may not conflict with federal law. (ALAB-453 at 12-13).

In its order, the Appeal Board reversed the Licensing Board's order, without prejudice to a renewal of HRFA's motion at least 45 days subsequent to the decision of the New York State Court of Appeals in Consolidated Edison Co. v. Hoffman. That order, however, does not cover the situation that might

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\*/LBP-77-63, 6 NRC \_\_\_\_\_.

occur if there is substantial delay in the New York Court of Appeals' decision. In order to assure that the principles enunciated by the Appeal Board in ALAB-399 and reiterated in ALAB-453 will be fully adhered to, HRFA therefore requests that the Appeal Board amend its order to permit renewal of HRFA's motion on or after November 1, 1978 in the event that the New York State Court of Appeals' decision has not been handed down or the 45-day period subsequent to that decision has not run. This relief is requested in order to ensure that the license conditions imposed by the Commission pursuant to NEPA are not undermined.

HRFA seeks leave to renew its motion on or after November 1, 1978 in order to ensure that there is sufficient time before December 1, 1978 for the other parties to answer HRFA's motion and for the Licensing Board to rule.\*/ HRFA believes the relief it seeks is necessary, proper and flows directly from the principles enunciated by the Appeal Board in ALAB-399 and ALAB-453.

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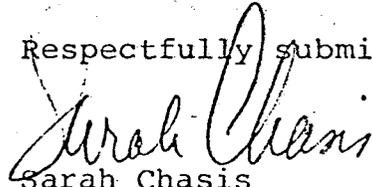
\*/A decision from the Licensing Board by December 1, 1978 is necessary. A decision thereafter would, according to the position taken by Con Edison earlier in this proceeding, affect the termination date since every month of the construction schedule is crucial. A one-month slippage in the construction schedule would extend operation of once-through cooling into the striped bass spawning season which runs from May to July.

For these reasons, HRFA respectfully requests that the Appeal Board amend the order set forth on page 14 of ALAB-453 as follows:

For these reasons, the Licensing Board's order of November 23, 1977 is reversed and HRFA's motion of August 31, 1977 is denied, without prejudice to its renewal on or after November 1, 1978, or at least 45 days subsequent to the decision of the New York Court of Appeals in Consolidated Edison Co. v. Hoffman, supra, n. 2, whichever is sooner.

(proposed new language is underlined)

Respectfully submitted,



Sarah Chasis  
Attorney for Hudson River  
Fishermen's Association

January 23, 1978