

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
(Indian Point Station
Unit No. 2)

9/13/77 9/12/77
) Docket No. 50-247
) OL No. DPR-26
) (Determination of Preferred
) Alternative Closed-Cycle
) Cooling System)

CON EDISON'S ANSWER TO HRFA'S MOTION
FOR A FINDING THAT ALL NECESSARY
GOVERNMENTAL APPROVALS HAVE BEEN RECEIVED

Consolidated Edison Company of New York, Inc. ("Con Edison") submits herewith its answer to the Motion dated August 31, 1977 ("the Motion") of the Hudson River Fishermen's Association ("HRFA") to the Atomic Safety and Licensing Board ("Licensing Board") requesting a finding that all governmental approvals required under ¶ 2.E.(1)(b) of the license have been received and for the establishment of an appropriate termination date for once-through cooling.

1. The Motion Should Be Dismissed Without Prejudice as Premature.

Con Edison believes that the Licensing Board should dismiss the Motion of HRFA without prejudice. The Motion is filed pursuant to the decision of the Atomic Safety and Licensing Appeal Board ("Appeal Board") dated May 20, 1977. In the Matter of Consolidated Edison Company of New York, Inc. (Indian

Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1170-71. By order dated August 26, 1977, the Nuclear Regulatory Commission granted the petition of the NRC Staff for review of ALAB-399 on issues which are inextricably intertwined with the subject matter of the Motion. Although the Appeal Board decision has not been stayed, Con Edison submits that it would be inappropriate for the Licensing Board to take action pursuant to ALAB-399 while the Commission is reviewing that decision. The Commission decision may have a significant effect on, or even eliminate the necessity for, a ruling by the Licensing Board.

Furthermore, the related zoning litigation in the New York courts is now pending before the New York Court of Appeals, the highest court of that State. Con Edison petitioned the New York courts for an order directing the Buchanan Zoning Board to issue variances to build a natural-draft cooling tower. The Supreme Court, Westchester County, issued an order dated December 9, 1975, enjoining the Buchanan Zoning Board from enforcing the provisions of the Buchanan Zoning Code as against construction by Con Edison of a closed-cycle cooling system. The Buchanan Zoning Board appealed that decision to the Supreme Court, Appellate Division, which issued a decision dated October 25, 1976, amending the order to provide that the Buchanan Zoning Board was directed to issue the variance to

Con Edison for construction of the tower as part of the closed-cycle cooling system and allowing the Buchanan Zoning Board to regulate local and incidental conditions relative to the construction of the proposed facility. On June 2, 1977, after the Appeal Board entered its decision ALAB-399, the Court of Appeals of New York granted the Buchanan Zoning Board's motion for leave to appeal. The Buchanan Zoning Board filed its brief on July 25, 1977. Briefs on behalf of Con Edison and HRFA, an intervenor in that proceeding, are due September 16, 1977.*

The principal issue on this appeal is the legal authority of the Village of Buchanan to prohibit and/or regulate construction of the cooling tower. Hence, it would be inappropriate for the Licensing Board to review this subject while this case is pending before the highest court of New York State, as well as before the Commissioners.

2. The Motion Misconceives the Appeal Board's Decision.

HRFA misinterprets the Appeal Board's ruling in stating that, if the Zoning Board does not act or acts inconsistently with the license, then "the Licensing Board should find, upon the request of a party, that the Zoning Board's

* It is not known whether the Commission intends to file a brief as amicus curiae in the New York Court of Appeals.

inaction or local and incidental regulation is inconsistent and hence preempted by federal law." HRFA Motion at 2. The Appeal Board did not require the Licensing Board to find that the "inaction or local and incidental regulation" was inconsistent with and therefore preempted by federal law, but merely authorized it to consider this issue. The Appeal Board, in stating that "[s]hould the Licensing Board make such a finding, the Zoning Board's permission will no longer be a required governmental approval," clearly demonstrated that entry of such a finding was not required. 5 NRC 1156, 1171 (emphasis added).

3. It is Inappropriate to Treat Buchanan's Inaction as a Waiver of its Rights to Impose Local and Incidental Forms of Regulation, or to Hold That Those Rights Have Been Preempted.

As the Appeal Board pointed out in ALAB-399, there are circumstances in which agency inaction may constitute a denial of the relief that has been requested of it. See 5 NRC at 1171, n. 56; slip op. at 30 n. 56. Here, however, it is improper to characterize the stance of the Buchanan Zoning Board in declining to exercise its reserved and conceded powers of local and incidental regulation as inaction amounting to denial of relief.

The posture adopted by the Zoning Board appears to be that it is entitled, as a governmental body and litigant,

to await the result of the litigation pending in the Court of Appeals. No claim has been raised by any party to this case-- and none is here raised--that the Village has in any way done anything more than assert its appellate rights in the manner and at the time provided by the laws of the State of New York.

For this reason, Con Edison submits that it would be entirely improper for the Licensing Board to rule that, for purposes of ¶ 2.E(1)(b) of the License, the Village had somehow waived the local and incidental regulation rights that all parties concede it could exercise, by not asserting them in accordance with the schedule imposed by the Appeal Board. Entry of an order that all necessary governmental approvals had been received and designating a new termination date, would represent a determination as against Con Edison that such a waiver had occurred. Without a guaranty that the New York Court of Appeals will also find such a waiver, Con Edison could be faced with inconsistent determinations from federal and state bodies. The Licensing Board should strive to avoid such a confrontation.

If, as, and when the Zoning Board does exercise its local and incidental regulation rights, all parties and the Commission and its boards will be in a position to form a judgment as to whether the Village's action is within or

beyond the limits that may be allowed to it under State law and under the doctrine of federal preemption, as those issues may ultimately be resolved. To form a judgment now would be an exercise in speculation and a waste of the Licensing Board's time and that of the parties.

Conclusion

For the foregoing reasons, Con Edison respectfully requests the Licensing Board to dismiss the Motion of HRFA without prejudice.

Respectfully submitted,



Edward J. Sack
4 Irving Place
New York, New York 10003
(212) 460-4333
Attorney for Consolidated Edison
Company of New York, Inc.

Of Counsel:

Eugene R. Fidell
LeBoeuf, Lamb, Leiby & MacRae
1757 N Street, N.W.
Washington, D.C. 20036

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CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of September, 1977, served the foregoing document entitled "Con Edison's Answer to HRFA's Motion for a Finding that All Necessary Governmental Approvals have been Received" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
Attn: Chief, Docketing and
Service Section
(Original & 20)

Samuel W. Jensch, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. R. Beecher Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

Dr. Franklin C. Daiber
College of Marine Studies
University of Delaware
Newark, Delaware 19711

Jerome E. Sharfman, Esq.
Chairman, Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Lawrence R. Quarles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

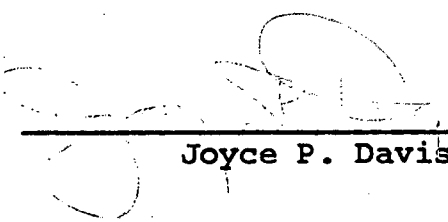
Sarah Chasis, Esq.
Natural Resources Defense
Council, Inc.
15 West 44th Street
New York, New York 10036

Stephen H. Lewis, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Carl R. D'Alvia, Esq.
Attorney for Village of Buchanan
395 S. Riverside Avenue
Croton-on-Hudson, N.Y. 10520

Richard C. King, Esq.
New York State Energy Office
Swan Street Building, Core 1
Empire State Plaza
Albany, N.Y. 12223

Honorable George V. Begany
Mayor, Village of Buchanan
Buchanan, New York 10511



Joyce P. Davis