

Natural Resources Defense Council, Inc.

122 EAST 42ND STREET
NEW YORK, N.Y. 10017

212 949-0049

Washington Office

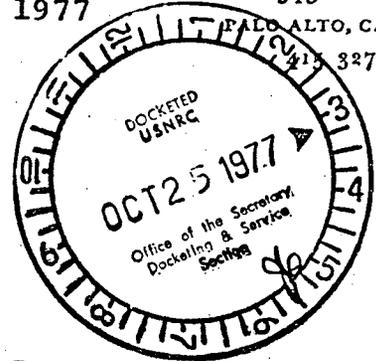
917 15TH STREET, N.W.
WASHINGTON, D.C. 20005
202 737-5000

Western Office

2345 YALE STREET
PALO ALTO, CALIF. 94306
327-1080

October 20, 1977

Hon. Samuel W. Jensch
Chairman, Atomic Safety and
Licensing Board
United States Nuclear Regulatory
Commission
Washington, D.C. 20555



Re: Consolidated Edison Company of New York,
Inc. (Indian Point Station, Unit No. 2),
Docket No. 50-247

Dear Chairman Jensch:

This letter responds to your letter of October 4, 1977, requesting comments from the parties on the Licensing Board's tentative intention to comply with the Appeal Board's directive in ALAB-399.

HRFA believes the Licensing Board should proceed immediately to comply with the Appeal Board's directive. The directive is clear, there has been no stay of the directive, and the arguments for further delay made by Con Edison and the Village of Buchanan (which is not a party to this proceeding) have already been specifically rejected by the Appeal Board.

Contrary to Con Edison's arguments, the Appeal Board made a specific ruling of law that the Village may not continue to block construction of the cooling tower.* Instead of ruling that Village regulation had already been preempted, however, the Appeal Board chose to instead give the Village of Buchanan an opportunity to act after issuance of ALAB-399. This was the stated purpose of the 45-day period. After elapse of this period, the Appeal Board contemplated that the time would be ripe for a ruling by the Licensing Board in the pre-emption issue at the request of one of the parties.** The

*/ALAB-399, 26-27 ("The Zoning Board's attempt to prevent construction of the cooling tower is preempted under all these tests."); ALAB-399 at 27. ("If the Zoning Board uses this declaration of its powers under state law in such a way as substantially to obstruct or to delay the license conditions imposed upon Con Ed by this Commission pursuant to NEPA, then its 'regulation' would be preempted by federal law.")

**/ALAB-399 at 30-31.

Licensing Board is bound by the Appeal Board's directive in this matter. Accordingly, since the Village has failed to act and has made clear its intent not to act with respect to local and incidental regulation, the Licensing Board should find that the Village's approval is no longer a required governmental approval under the license.

Both Con Edison and the Village in their papers to this Board continue to make arguments specifically rejected by the Appeal Board. The Appeal Board found that final resolution of the issue should not await the ruling of the New York State Court of Appeals.*/ This Board is bound by the Appeal Board's ruling in this matter and must reject the arguments made by Con Edison and the Village.**/

With respect to the Staff's position, the fact of the matter is that ALAB-399 has not been stayed. HRFA's request for a partial stay of ALAB-399 was specifically rejected by the Appeal Board in ALAB-414 and also by the Commission (Order of August 26, 1977). Moreover, the Staff itself, pursuant to the decision in ALAB-399, has issued a license amendment stating that all required governmental approvals have not been received pending further proceedings with respect to the Village of Buchanan approval, thus giving effect to the Appeal Board decision. In the same way that this finding of the Appeal Board has been implemented, so too must the Appeal Board's directive with respect to the 45-day provision.

Finally, action by the Licensing Board at this time would in no way cut off the Village's rights abruptly. The Village has had over three years to act. It has had one year since the Appellate Division decision to issue the variance with local and incidental regulation. It has had five months from the Appeal Board Decision in ALAB-399. It has chosen not to act. The Village's position from the beginning has been clear. It is not interested in imposing local or incidental regulation.***/

*/ALAB-399 at 29.

**/It should be noted that the Village's estimate of the time for decision by the New York State Court of Appeals is pure guesswork. The decision could take 6 to 8 months from the date of argument or could be made much sooner. Certainly, the April-May, 1978 date suggested by the Village as the latest date for decision is totally uncertain.

***/See paragraph 2 of the letter of Carl D'Alvia to Chairman Jensch (October 15, 1977) for recent confirmation of this fact.

Hon. Samuel W. Jensch

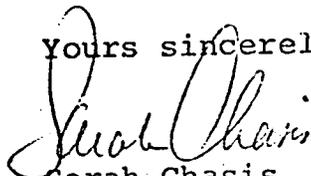
October 20, 1977

page 3

It opposes construction of the cooling tower entirely. Thus, a Licensing Board finding that the Village has forfeited the opportunity to impose local or incidental regulation will not deprive the Village of any power it is truly interested in exercising.

For the foregoing reasons, HRFA believes its motion to the Licensing Board of August 31, 1977 should be granted.

Yours sincerely,



Sarah Chasis

Attorney for Hudson River
Fishermen's Association

SC:pn

cc: Mr. R. Beecher Briggs
Dr. Franklin C. Daiber
Stephen H. Lewis, Esq.
Joseph D. Block, Esq.
Edward J. Sack, Esq.
Carl R. D'Alvia, Esq.
Richard C. King, Esq.
Paul S. Shemin, Esq.
Secretary, U.S. Nuclear
Regulatory Commission