UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

6/13/77

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)

ANSWER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. TO APPLICATION OF HUDSON RIVER FISHERMEN'S ASSOCIATION FOR PARTIAL STAY OF ALAB-399

Consolidated Edison Company of New York, Inc. ("Con Edison") submits herewith its answer to the Application of the Hudson River Fishermen's Association ("HRFA") for Partial Stay of ALAB-399 ("the Application"), which was served on June 3, 1977. Con Edison opposes the Application.

There are two basic reasons why the HRFA Application should be denied: First, it is untimely. Second, it fails to meet the rigorous standards set forth in the new stay regulation of the Nuclear Regulatory Commission ("the Commission").

1. The Application Is Untimely

First, as to timeliness, § 2.788 of the Commission's Rules of Practice, 42 Fed. Reg. 22128, 22130 (1977), provides for stays of Appeal Board decisions, and requires that such

relief be sought within seven (7) days after service of the decision to be stayed. Here, the decision in question was served on May 20, 1977, and the period for seeking a stay accordingly expired on May 31, 1977.* HRFA has not requested an extension of the period prescribed in a timely fashion, 10 C.F.R. Pt. 2, App. A, § IX(d)(3) (1977), and has in any event failed now to demonstrate good cause for a relaxation of the prescribed period. 10 C.F.R. § 2.711(a) (1977). There has been no showing of "extraordinary and unanticipated circumstances" which form the basis for a motion for leave to file out of time. These circumstances form a completely sufficient basis on which to deny the application for a partial stay.

Should the Appeal Board nevertheless entertain HRFA's Application on the merits, it is equally plain that it should be denied.

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*See 10 C.F.R. § 2.710 (1977). As pointed out in Con Edison's Petition for Review, filed with the Commission on June 6, 1977 pursuant to § 2.786, the applicability of the June 1, 1977 rule changes to cases decided by the Appeal Board before that date is unclear. Assuming, however, that the new rule on stays applies to ALAB-399, and the period there prescribed would anomalously have expired on May 31 (i.e., prior to the formal effective date of the new rule), equity would only require that an additional business day be allowed to HRFA in which to seek a stay under the rule.

2. The Application Does Not Establish A Likelihood of Prevailing on The Merits

The Appeal Board said that there were six reasons why the Licensing Board was in error as to the requirements of a zoning variance from the Village of Buchanan Zoning Board of Appeals ("the Zoning Board"). HRFA has not even addressed these points. Success on the merits requires that HRFA refute all of the points mentioned by the Appeal Board.

HRFA instead says that the Appeal Board concluded "that because of Federal preemption the Village could not delay forever its approval of the construction . . . ." Application, p. 3. This is an incorrect characterization of the decision. The Appeal Board in fact said it would "be premature to rule at this time on whether the Zoning Board's local and incidental regulation might be preempted by this Commission's license conditions." ALAB-399, p. 28. It permitted a party to ask the Licensing Board in future proceedings to find that the Zoning Board's action or inaction is inconsistent with Federal law. ALAB-399, p. 30. That future determination on Federal preemption would be reviewable by the Appeal Board and then potentially the Commission.

HRFA next attacks ALAB-188 (7 AEC 323 (1974)) and License DPR-26 when it refers to undercutting "an NRC decision

made pursuant to its responsibilities under NEPA as to the appropriate termination date for once-through cooling at Indian Point 2." Application, p. 4. HRFA in effect refuses to accept the fact that ¶ 2.E(1)(b) is part of License DPR-26. HRFA ignores the fact that ALAB-188 did not establish a fixed date for termination of operation of the once-through cooling system but to the contrary provided for flexibility in establishing that date. ALAB-198, 7 AEC 475, 476 (1974); see also ALAB-188, 7 AEC at 389-91 (1974). The principal grounds for the Application are no more than an untimely and collateral attack on that condition.*

When HRFA argues that the decision allows an extension past May 1, 1980 without analysis of environmental impacts (Application, p. 4) it ignores the fact that this is the clear purport of ¶ 2.E(1)(b) of the License, which is amply supported by the environmental analysis in ALAB-188. Con Edison does not believe that the Commission could have validly imposed a license condition which required termination of operation with the once-through cooling system without also providing a condition such

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*A petition for review of the Indian Point 2 operating license case was filed by HRFA in 1974 in the U.S. Court of Appeals for the Second Circuit, but was later abandoned. Hudson River Fishermen's Ass'n v. A.E.C., No. 74-2113 (2nd Cir.).

as ¶ 2.E(1)(b). That paragraph is an integral part of the License, and support for it may be found in the record and decision that led to issuance of the License in the first place.* If HRFA felt the condition was not supported, its time to complain was in 1974, when the condition was imposed. HRFA should not be allowed to achieve a deletion of this provision from the License with its argument for a stay, which in substance argues that ¶ 2.E(1)(b) should no longer be given effect.

HRFA also errs when it states that the Village of Buchanan has already ruled that Con Edison's plans are in compliance with local requirements except for the matters subject to the variance application. Application, p. 4. HRFA attributes some significance to the fact that the Village has not suggested that other regulations may be applicable. Application, p. 5. HRFA thus ignores the pendency of the litigation in the New York State courts in which the Zoning Board is attempting to vindicate its authority to prohibit construction of a cooling tower.

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*To the very limited extent that the operation of the automatic extension provision of ¶ 2.E(1)(b) may have an environmental impact, it is groundless to suggest, as does HRFA (p. 4), that a new impact statement is required under the National Environmental Policy Act of 1969. An impact statement was prepared in connection with issuance of the License. A further impact statement is not necessary with respect to ¶ 2.E(1)(b) extensions of the period of interim operation of Indian Point 2. In any event HRFA waived this argument by failing to take an exception to the Licensing Board's decisions which allowed an extension to May 1, 1980.

The Zoning Board's decision was that Con Edison's application was premature and therefore the Zoning Board chose not to review the details of the application. Con Edison Brief in Support of Exceptions, Dec. 21, 1976, Ex. A, p. 13. Obviously, the Zoning Board cannot be expected to act further until completion of the state litigation, and the New York Court of Appeals has now determined to hear the case. Thus, the implication that the Village (Zoning Board) has somehow been dilatory in not granting the requested variance and has waived its rights to impose conditions (Application, p. 3) is refuted by the fact that the Zoning Board has been vigorously pursuing its legal remedies in the New York State courts.

3. HRFA Has Failed To Establish Irreparable Injury Absent A Partial Stay

HRFA's argument to establish irreparable injury, unsupported by affidavit or other evidence, is simply that the date for termination of operation of the once-through cooling system would be extended. As indicated above, this results from ¶ 2.E(1)(b) of the License, not from ALAB-399. This argument is simply another attempt to circumvent the License provisions.

Furthermore, the notion that an extension of interim operation inevitably leads to irreparable environmental injury

is contradicted by the conclusion of the Commission's Regulatory Staff in a related proceeding that the environmental impact of "a two-year extension of operation with once-through cooling for Indian Point Unit No. 2 would not be expected to be large and has essentially no risk of being irreversible." Final Environmental Statement for Extension of Operation With Once-Through Cooling, NUREG-0130, p. 3-8 (1976).

4. Con Edison Would Be Substantially Injured by the Requested Stay

HRFA interprets Con Edison's failure to seek a stay of the Licensing Board's decision as a concession that there is no irreparable injury to Con Edison from compliance with the May 1, 1980 date pending appeal. Application, p. 6. This is completely fallacious. The fact that Con Edison chose not to apply for extraordinary relief has no relevance to the application. Con Edison relied on the expectation that the Appeal Board would handle the case with reasonable dispatch and events have shown that it was correct in this anticipation.

Moreover, the facts are now substantially different from those that existed at the beginning of 1977 because a point in time has now been reached when construction activities in the field would have to be commenced in order to meet a May 1, 1980 date. Thus the requested stay would not mean that

Con Edison would "adhere to its schedule" but would place Con Edison in the dilemma of not knowing how to proceed. HRFA would have Con Edison now commence cooling tower construction, which requires substantial financial commitments, destruction of a wooded area, and excavation of a hillside, at the same time that the Commission and the New York Court of Appeals review the applicable law. Con Edison's alternative would be to expose itself to substantial risks, discussed below. The requested stay would therefore not have the effect of preserving the status quo but would require a substantial alteration of it.

5. A Stay Would Not Serve the Public Interest

HRFA's perception of public interest in the stay is no more than another attack on ¶ 2.E(1)(b) of the License. The automatic allowance of further operation with once-through cooling follows from the provisions of ¶ 2.E(1)(b), supported by the environmental analysis in the earlier operating license proceedings. As indicated above, the License would be fundamentally defective if it did not contain such a provision.

Con Edison believes the public interest is best served by avoiding the dilemma which requires Con Edison to speculate on the course of this complex litigation. If Con

Edison proceeds with a construction program, as HRFA desires, it risks the possibility that environmental and economic costs will have been needlessly incurred if an extension of interim operation is ultimately granted. If Con Edison does not proceed with the construction program, it risks the possibility that, if the May 1, 1980 date is ultimately upheld, Indian Point 2 would be out of operation for a longer period than would otherwise be necessary, with severe economic consequences for its customers. See generally attached Affidavit of Carroll H. Dunn, dated March 14, 1977, ¶¶ 7-11. The Commission should not place a licensee in the position of making such a choice. Indeed, ¶ 2.E(1)(b) of License DPR-26 was intended to avoid precisely this type of problem.

6. HRFA's Proposed "Partial Stay" Is Inconsistent

HRFA proposes a partial stay which retains a May 1, 1980 date in the License but at the same time seeks to retain the portion of ALAB-399 which requires the Zoning Board to act within 45 days. Application, p. 2. This is inconsistent. If the portion of ALAB-399 which holds that Zoning Board approval is an outstanding necessary governmental approval is stayed, then there cannot logically also be a requirement that the Zoning Board act within a specified period of time. If HRFA

desires that the Zoning Board take future action, that implies that such action is an outstanding necessary governmental approval. The existence of an outstanding governmental approval means that the date for termination of once-through operation cannot be May 1, 1980.

7. Conclusion

For the foregoing reasons, the application for a partial stay should be denied.

Respectfully submitted,

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