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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICATION OF HUDSON RIVER FISHERMEN'S ASSOCIATION
 FOR PARTIAL STAY OF ALAB-399 PENDING FILING OF AND
DECISION BY COMMISSION ON PETITION FOR REVIEW

On May 20, 1977, the Atomic Safety and Licensing Appeal Board ("ALAB") issued a decision ("ALAB-399") on an appeal by Consolidated Edison Company of New York ("Con Edison") from two decisions of the Atomic Safety and Licensing Board ("Licensing Board") in the above-captioned proceeding. The decision reverses the orders of the Licensing Board except with respect to the finding on the preferred alternative closed-cycle cooling system for Indian Point 2. The Hudson River Fishermen's Association ("HRFA"), a party to the proceeding, plans to file with the Commission a petition for review of ALAB-399 on or before June 7, 1977, pursuant to 10 C.F.R. 2.786 (effective June 1, 1977).

Pending the filing and decision on HRFA's petition for review and the Commission's decision on the appeal, should it grant the petition, HRFA seeks a partial stay of ALAB-399. HRFA seeks to stay that portion of the ALAB decision which reverses

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the Licensing Board's order setting May 1, 1980 as the reasonable date for termination of once-through cooling and which orders that the license be amended to provide that the termination date be fixed by the Licensing Board in future proceedings (Decis. at 39). HRFA does not seek a stay of that portion of ALAB-399 which gives the Village of Buchanan forty-five days from the service of the ALAB's order to issue a variance. (Decis. at 31).

Summary of the Decision Requested to be Stayed

ALAB-399 reverses the orders of the Licensing Board of November 30, and December 27, 1976, with the exception of the Licensing Board's finding that the natural draft, wet cooling tower system is the preferred alternative closed-cycle cooling system for Indian Point 2 (Decis. at 38). The decision finds that a zoning variance from the Village of Buchanan's Zoning Board of Appeals is a required governmental approval and thus concludes that the approvals required in paragraph 2.E.(1)(b) of the license have not been obtained. (Decis. at 25,30-31). As a result, ALAB-399 overturns the Licensing Board's order setting May 1, 1980 as the termination date of once-through cooling at Indian Point 2 and instead orders that the operating license be amended to provide that the termination date for operation of the plant with once-through cooling be fixed by the Licensing Board in future proceedings. (Decis. at 31,39).

The effect of this portion of the ALAB decision is to allow Con Edison to operate through an additional striped bass spawning

season with the present once-through cooling mode of operation. The May 1, 1980 date set by the Licensing Board was premised on the finding that all necessary governmental approvals had been received by December 1, 1976. This date must give way under ALAB-399 to a termination date several months later in 1980 and certainly well past the 1980 striped bass spawning season which is from May to July.

Grounds for Partial Stay Application

1. Likelihood of Prevailing on the Merits

HRFA plans to seek review of ALAB-399 on the grounds that it is arbitrary and capricious in that its conclusion runs directly counter to the legal reasoning of the decision, and violates the doctrine of federal preemption, as well as applicable principles of state law. HRFA believes that it is likely to prevail on the merits in its appeal to the Commission.

On the key issue of whether or not the Village of Buchanan's approval must be obtained prior to the construction of the closed-cycle cooling system under the provisions of the operating license, ALAB concluded that such approval was a prerequisite, but that because of federal preemption the Village could not delay forever its approval of the construction, otherwise the date for termination of once-through cooling would be delayed indefinitely. However, despite the Village's refusal over the last two years to grant the requisite variance, the Appeal Board chose to give the Village additional time to act. (Decis. at 29-31). This has the extremely significant effect of permitting Con Edison to operate

with the present once-through cooling system for an additional spawning season. The ALAB decision therefore accomplishes a result which the reasoning of the decision itself rejects: it allows a local government's refusal to exercise its limited authority in an area to undercut an NRC decision made pursuant to its responsibilities under NEPA as to the appropriate termination date for once-through cooling at Indian Point 2. The result is arbitrary and capricious, particularly where as here the Village has had years to act and since October, 1976 has had the full opportunity to grant the variance with local and incidental controls, as directed by the Appellate Division of the Supreme Court of the State of New York.

—Furthermore, the decision is arbitrary in that it extends the termination date past May 1, 1980 without any analysis of the environmental impacts of such an action and effectively grants to Con Edison the relief sought in an entirely separate proceeding in which Con Edison seeks permission to operate Indian Point 2 through another spawning season. The ALAB decision completely undercuts that whole contested proceeding.

In addition, the decision is arbitrary and capricious because it ignores the fact that the limited regulations which the Village may impose are not of an ad hoc nature, but are embodied in the Village building and zoning codes. As to these codes, the Village has already ruled that Con Edison's plans are in compliance except for those matters for which a variance was ordered by the Appellate Division of the Supreme Court of the State of New York.

At no time before or after that decision has the Village suggested there were other regulations, yet the Appeal Board speculates that there are such regulations and overturned the May 1, 1980 termination date based on that speculation.

Because the ALAB decision is clearly erroneous in its conclusion and arbitrary and capricious in that its legal reasoning runs counter to its conclusion, HRFA believes it is likely to prevail on the merits in its appeal to the Commission.

2. Irreparable Injury Absent Partial Stay

A stay of that portion of the decision which lifts the requirement for a May 1, 1980 termination date is needed pending the filing of HRFA's petition for review and decision by the Commission on the petition and on the appeal (if the petition is granted) in order to protect HRFA from irreparable injury.

If a partial stay is not granted, the time elapsing during the appeal process may well undercut the efficacy of any relief which Commission review of the ALAB decision could afford. Suspension of the construction schedule which may occur under ALAB-399 would preclude subsequent compliance with the May 1, 1980 date since a loss of months or even weeks in that schedule might preclude meeting the May 1, 1980 date.

3. Harm of Partial Stay to Other Parties

No serious harm would occur from such a partial stay to

other parties, including Con Edison. Up until the ALAB decision, Con Edison has had to proceed on a construction schedule designed to meet the May 1, 1980 termination date set in the license. Con Edison declined to seek a stay of the Licensing Board's decision. It never suggested that it was threatened with irreparable injury by its compliance with that date pending its appeal. The effect of the partial stay now sought by HRFA would simply mean that Con Edison would continue to adhere to its schedule pending Commission decision on the appeal. Con Edison would not have to alter its prior course of action, only continue it, so as not to irreparably jeopardize the May 1, 1980 date should it be reinstated by the Commission on appeal.

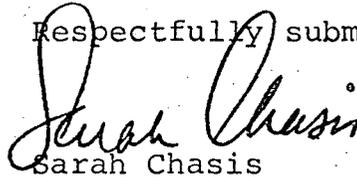
—4. Public Interest

The important public policy of assuring a party the opportunity for meaningful review would be furthered by the granting of a partial stay. Furthermore, the important public policy of protecting the Hudson River fishery through the installation of closed-cycle cooling at Indian Point would be undercut by failure to issue the stay because such failure would automatically permit another year's operation with once-through cooling irrespective of the merits of HRFA's appeal.

CONCLUSION

For the foregoing reasons, a partial stay of that portion of the order of the Appeal Board eliminating the May 1, 1980 termination date, pending the filing and decision on HRFA's petition for review, as well as the Commission's decision on appeal if review is granted, should be issued.

Respectfully submitted,



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June 3, 1977