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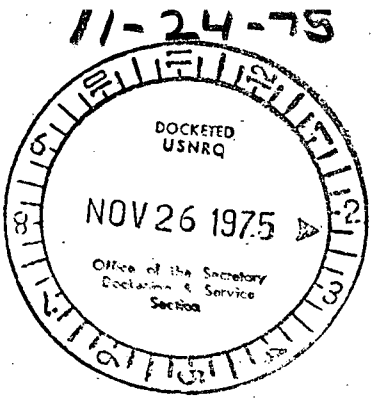

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of :

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. : Docket No. 50-286
(Indian Point Station, Unit No. 3) :

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MOTION BY HUDSON RIVER FISHERMEN'S ASSOCIATION AND SAVE OUR STRIPERS FOR A STAY OF ALAB-287 PENDING DECISION BY COMMISSIONERS.

By order of October 23, 1975, the Commission elected to review the decision of the Atomic Safety and Licensing Appeal Board given September 3, 1975, In the Matter of Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit 3), ALAB-287, Docket No. 50-286 (hereafter "ALAB-287"), on the ground that it may conflict with Commission policy forming settlement of contested issues. The Commission specifically stated that its direction for review under 10 C.F.R. Section 2.786(a) "shall not stay the effect of the Appeal Board decision."

By cross-motion filed with the United States Court of Appeals for the Second Circuit on November 13, 1975, Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS") sought a stay of ALAB-287 pending decision by the Commission. On November 18, 1975 the Court ruled on petitioners' cross-motion and the NRC's motion to dismiss the petition for review of ALAB-287 (filed with the Court by HRFA and SOS on October 2, 1975), or alternatively hold the appeal in abeyance pending decision by the Commissioners. Based on the representation of counsel for the NRC that no license would issue except on five days actual notice to all parties and petitioners in particular, and on Con Edison's and the NRC's representations that they would forego all procedural objections before the NRC on petitioners' motion for a stay, the Court held that:

(1) the court appeal will be held in abeyance pending decision by the Commission;

(2) petitioners shall move within five days for a stay before the Commission, which motion neither Con Edison nor the NRC General Counsel shall oppose on technical or procedural grounds, as, for example, that the motion is too late; and

(3) in all other respects the motions are denied.

Pursuant to the Court's ruling HRFA and SOS hereby move the Commission for a stay of ALAB-287 pending decision

by the Commissioners. HRFA and SOS base their arguments in support of a stay on the Commission's own regulations, their high probability of success on the merits, the likelihood of irreparable harm if there is no stay and the furtherance of the public interest by such a stay.

1. The Commission does not Have the Authority under its own Regulations to Elect not to Stay the Effect of the Decision.

Section 10 C.F.R. §2.786(a) states that the Commission may on its own motion direct that the record of a proceeding be certified for review, and that if it does so, "[t]he effect of the Atomic Safety and Licensing Appeal Board's decision or action is then stayed until the Commission's review of the proceeding is completed." Thus the rule pursuant to which the Commission has here acted provides an automatic stay of the decision. No exception or qualification to this provision exists. Thus the Commission does not have the authority not to stay a decision it has elected to review.

The circumstances in which the Commission may elect to review a decision are strictly limited to those in which an Appeal Board decision is in conflict with statute, regulation,

case, precedent or established Commission policy and either could significantly and adversely affect the public health and safety or involves an important policy question. 10 C.F.R. §2.786(a). The rationale and wisdom of automatically staying a decision reviewed for these reasons are evident: the status quo should be maintained until the serious questions concerning the decision are finally resolved. The Commission has elected to review ALAB-287 because it may conflict with Commission policy favoring settlement of contested issues. The ratonale for the Commission's general rule staying the effect of a decision under review is thus entirely apposite in this case.

The Commission, consistent with its own stated policy and Rules of Practice, should modify its earlier order and stay the effect of ALAB-287 pending completion of its review.

2. HRFA and SOS Have A High Probability of Success on the Merits.

In the briefs of HRFA and SOS filed with the Commission on November 10, and November 21, 1975, HRFA and SOS argue that ALAB-287 violates the Commission policy favoring settlement of contested issues and should be vacated. The

stipulation should either be approved without modification or rejected with the right to a full evidentiary hearing reinstated. HRFA and SOS base their challenge to ALAB-287 on the grounds that ALAB-287 materially modified the stipulation of settlement agreed to by the parties, is violative of due process and The Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011, et seq. and further is contrary to law in that it violates the National Environmental Policy Act (NEPA). HRFA and SOS believe that they will have a high probability of success on the merits.

ALAB-287 materially altered the Stipulation of agreement on the environmental issues entered into by the parties to the Indian Point Unit No. 3 proceeding before the NRC. As is fully discussed in HRFA and SOS' briefs to the Commission of November 10 and 21, 1975, the first and foremost intent of that Stipulation was to settle for now the question of the type of cooling system with which the plant would operate. As the Licensing Board stated in its memorandum and order approving the Stipulation, the Stipulation requires the construction of a closed-cycle cooling system for Unit 3, unless Con Edison or some other party proves that the adverse impact of the present cooling system is not serious, or that

the most acceptable alternative will have a more seriously adverse impact.

Appended to the brief of HRFA and SOS filed on November 10 is a copy of the Authorization of HRFA and SOS to accept the Stipulation. This Authorization makes clear that only the Applicant's agreement to proceed to install closed-cycle cooling made the Stipulation acceptable to them.

The statements of all the parties before the Appeal Board reflected their common understanding of the Stipulation respecting the requirement of installation of closed-cycle cooling.

The ALAB decision materially modified the Stipulation in a manner directly contraty to the intent of the parties. The Board interpreted the Stipulation as an agreement to operate the plant and see what happens before making a final decision regarding a permanent cooling system. The ALAB thus modified the portion of the Stipulation most critical to petitioners.

By approving the Stipulation "as interpreted" and thus attempting to bind the parties to an agreement so materially changed, the ALAB acted in an arbitrary and capricious fashion and, further, sought to deprive HRFA and SOS of

their due process and statutory rights to notice and opportunity for hearing. HRFA and SOS agreed to waive their right to a hearing, provided pursuant to the Atomic Energy Act §189, 42 U.S.C. §2239, based on the inclusion in the Stipulation of certain critical requirements. The Appeal Board, in attempting to modify the requirement of installation of a closed-cycle system, without outright rejection of the Stipulation, unlawfully deprived HRFA and SOS of their right to a hearing.

The ALAB has also acted contrary to law by violating the most basic tenets of NEPA. It has specifically found that the final cost/benefit balance required by NEPA has not been made, yet has authorized issuance of an operating license. NEPA requires that the balance be struck before the major federal action is taken. Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971). The major federal action here involved is the issuance of an operating license up to and including a full-term, full-power license. The evaluation of costs and benefits and their accommodations must be made in connection with the method of operation before the license issues, not after.

The likelihood that ALAB-287 will be reversed is highly probable in light of the fact that the NRC Staff, as

well as all the other signatories of the Stipulation except Con Edison, have challenged the ALAB decision on the grounds articulated above. The NRC Staff in its brief to the Commission of November 10 states that:

> As discussed supra, the approval given to the Stipulation by the Appeal Board in ALAB-287 cannot constitute the requisite approval inasmuch as the Appeal Board approved a document, the interpreted terms of which the parties had never agreed upon. A primary consequence of the Appeal Board's action is, therefore, that the Stipulation has yet to obtain the approval required by paragraph 12 of the Stipulation and the Stipulation is not yet final and binding on the parties to the Stipulation. Stated differently and in answer to the second question of the Commission's October 23, 1975 Order, the parties are not bound to the terms of the Stipulation as modified by the Appeal Board. Moreover, no operating license of any type may be issued for Indian Point Station, Unit No. 3, until the Stipulation has been properly approved or, absent approval, the requisite evidentiary hearing has been held before an Atomic Safety and Licensing Board. Brief at 28.

The Attorney General of the State of New York states that unless the modifications of the Stipulation wrought by ALAB-287 are vacated, the Attorney General will consider the Stipulation disapproved and seek the reinstatement of his right to a hearing on all relevant NEPA issues. (Brief of November 10 at 5 - 6).

Finally, the Commission's election to review the decision itself signifies the serious doubts which exist concerning the decision's validity.

3. HRFA and SOS Will Suffer Irreparable Harm if There is no Stay.

Unless the Commission stays the effect of ALAB-287 during its review, HRFA and SOS may suffer irreparable injury. The injury threatened is the issuance of an operating license and the resulting deprivation of HRFA and SOS' rights under the National Environmental Policy Act to meaningful environmental review and under the Atomic Energy Act to a hearing.*

HRFA and SOS have alleged the NRC's failure to comply with NEPA. This failure consisted primarily of the Appeal Board's specific refusal to accept the cost/benefit balance struck by the Stipulation of agreement between the parties and its authorization of a major federal action, i.e. issuance of an operating license, leaving that most critical cost/benefit analysis unresolved. The issuance of a license in the face of this most apparent failure to comply with the mandate of NEPA, threatens petitioners with irreparable injury.

* The Commission Staff has indicated, via letter of November 13, 1975 from the Deputy Director of the Office of Nuclear Reactor Regulation to counsel for HRFA and SOS, that no operating license may be issued for Indian Point Station, Unit No. 3, until the Stipulation has been properly approved, which so far it has not, in his opinion, or absent such approval, until the requisite evidentiary hearing is held. If this is the Commission's position, then let it so state and a stay will not be necessary. At present, however, the Commission's order of October 23, 1975 specifically states that its review will not stay the effect of the ALAB and therefore the harm threatened to HRFA and SOS is real and imminent.

See Izaak Walton League of America v. Schlesinger, 337 F. Supp. 387 (D.C.D.C. 1971).

HRFA and SOS' right to a hearing on the environmental issues prior to issuance of any operating license, pursuant to NEPA, the Commission's regulation, 10 C.F.R. Part 51, and the Atomic Energy Act §189, will be rendered meaningless if an operating license is allowed to issue prior to completion of Commission review. If the Commission does not approve the Stipulation without material modification, then the Stipulation must fall and the petitioners' right to a hearing must be reinstated. However, if the plant is already operating, HRFA and SOS' right to a meaningful hearing will be destroyed. Adequate consideration of environmental impacts and alternatives must precede issuance of a license, not come after. Whatever the evidence regarding adverse impact, the public expectation of operation makes subsequent license revocation or even substantial modification a most difficult step.

Courts have recognized this principle in a closely parallel set of cases. In Scenic Hudson Preservation Conference v. FPC, 354 F.2d 600 (2d Cir. 1965) the United States Court of Appeals for the Second Circuit ordered the FPC to consider the potential danger of plant operation to fish "before deciding whether the Storm King project [was] to be licensed." 354 F.2d 624-25. In HRFA v. FPC, 498 F.2d 827, 835 (2d Cir. 1974) the Court stated that "[E]nvironmental issues, however, should be considered early in the life of a project to insure that construction or operating changes will conform to environmental requirements. Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971)." The whole line of Storm King cases should serve as sad testimony to the consequences which flow from an agency's failure to adequately consider environmental consequences prior to issuance of a license.

3. Public Interest Considerations Favor A Stay of ALAB-287.

The public interest is best served by a stay which will assure compliance with NEPA before a major federal action, namely issuance of a license, is taken. The cases decided under NEPA support this approach.

In addition, the public policy of encouraging reasonable and fair settlement of issues is served by issuance of a stay. Such a policy is reflected in the rules of the agency. 10 C.F.R. §2.759. That policy has been flaunted and undercut by the ALAB decision which penalized and unlawfully deprived parties who had entered into such a Stipulation of their most basic rights. Such a decision should be stayed pending review, otherwise parties to NRC proceedings will be loathe to enter into stipulations in the future.

CONCLUSION

For the foregoing reasons, a stay of the order of the Appeal Board, pending Commission review thereof, should be issued.

Respectfully submitted,

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