

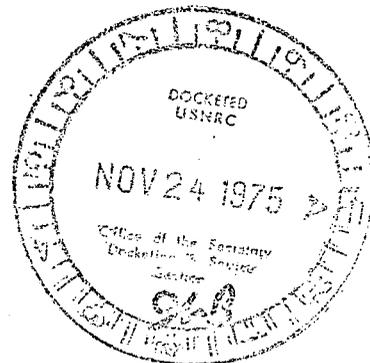
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

CONSOLIDATED EDISON COMPANY )  
OF NEW YORK, INC. )  
(Indian Point Station, )  
Unit No. 3) )

Docket No. 50-286

CON EDISON'S REPLY BRIEF



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November 21, 1975

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Introduction

Consolidated Edison Company of New York, Inc. ("Con Edison") hereby submits its reply to the briefs filed on November 10, 1975 before the Nuclear Regulatory Commission ("the Commission") by the Regulatory Staff, Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS"), and the State of New York ("the State").

Above all, Con Edison desires to preserve the Stipulation approved below by both the Atomic Safety and Licensing Board ("Licensing Board") and the Atomic Safety and Licensing Appeal Board ("Appeal Board"). The plant is needed to meet the power requirements of New York City and Westchester County. To delay its availability at this time in order to hold a hearing that the parties unanimously characterize as serving no purpose would be in disregard of the public interest. Hence, while Con Edison

believes that there was no error in the decision of the Appeal Board below, Con Edison joins the other parties in urging the Commission to approve the Stipulation as written.

Notwithstanding Con Edison's belief that the Appeal Board decision should be upheld on the merits by the Commission, it is apparent that the disagreement of the other parties threatens to delay issuance of an Operating License. The Staff has unilaterally announced that it will not issue a license, even though ALAB-287 authorized one, and the Commission has expressly refused to stay that authorization. Con Edison strenuously objects to this Staff position, for as a litigant before the Commission the Staff has no power to set aside an order of the Appeal Board merely because it disagrees with it.

HRFA and SOS have already tried to secure a court-ordered stay of any Operating License and no doubt will continue on the obstructionist course they have charted. Indian Point 3 is now ready to load fuel and commence operating, and Con Edison regards the immediate issuance of a license as more important than continued legal skirmishing. Con Edison therefore will consent to

a prompt termination of the controversy by means of a Commission Order vacating as unnecessary to the decision below those portions of ALAB-287 to which the other parties object, approving the Stipulation as written, and reaffirming the existing authorization for a full-term, full-power Operating License.

One further matter requires preliminary comment. We feel constrained to reply to the suggestion by HRFA and SOS that Con Edison in some way sabotaged their effort to terminate the controversy. HRFA-SOS Brief at 9.

In the interests of preserving the Stipulation, counsel for Con Edison did confer with attorneys for all parties to the case. These negotiations, unfortunately, failed to result in a common position on the issues. Con Edison considers HRFA's and SOS' disclosure of the negotiations to be a breach of the longstanding rule by which settlement discussions are privileged. Further, a comparison of the brief of HRFA and SOS with that of the State indicates that each viewed the agreement differently. Those parties do not speak with one voice, HRFA's and SOS' representations to the contrary notwithstanding. HRFA and SOS have left the false impression that Con Edison was obdurate. To rebut this implication

would compel Con Edison to lower even further the veil of privilege that should surround settlement discussions; this we will not do. Finally, HRFA and SOS question Con Edison's commitment to the Stipulation, HRFA-SOS Brief at 13, a contention they would seem to be estopped from making in view of their attempt to have the United States Court of Appeals for the Second Circuit release them from the Stipulation. Hudson River Fishermen's Ass'n v. NRC, Petition for Review filed, No. 75-4212, (2d Cir. Oct. 2, 1975).

I.

APPROVAL OF THE STIPULATION  
BY THE APPEAL BOARD ACCORDS  
FULLY WITH THE INTENT OF  
THE PARTIES AND WITH ALAB-188.

The Staff argues (Staff Brief at 8) that the parties intended the Stipulation to conform to their "understanding" of the Appeal Board's earlier decision in the Indian Point 2 case, ALAB-188, RAI-74-4, 323 (Apr. 4, 1974). Con Edison contends the Stipulation was designed to replicate the result reached in that decision, and accordingly was structured to conform to the decision -- not to any party's "understanding" thereof. In any event, the Appeal Board in ALAB-287 simply confirmed certain key aspects of ALAB-188 that should have been clear to all parties from the beginning.

The Staff (Staff Brief at 8-10) attempts to catalog the "central holdings" of ALAB-188. Item 1 thereunder (Staff Brief at 9) incorrectly implies that the termination date for the cessation of once-through cooling is unalterably May 1, 1979. As the Indian Point 2 license expressly recognizes (Para. 2.E.), that date is subject to advancement or postponement for several reasons, and any requirement for closed-cycle cooling may ultimately be

vacated if Con Edison applies for a license amendment.<sup>1/</sup>  
Item 3 of the catalog (Staff Brief at 9-10) contains an equally erroneous implication, i.e., that Con Edison might not seek such an amendment. As argued in Con Edison's initial brief (at 11), this is extremely unlikely. See also argument of Mr. Voigt, Appeal Board Tr. at 108. In summary, the question of the cooling system for Indian Point 2 was provisionally decided, subject to being reopened upon Con Edison's application. Paragraph 2 of the Stipulation copies this result, and ALAB-287 is quite correct in classifying the question as ultimately open.

HRFA and SOS are equally off-target in their characterization of the intent of the parties in entering the Stipulation. They argue that when HRFA and SOS entered the Stipulation, each sought only to impose a binding obligation upon Con Edison and any successor in interest to construct a closed-cycle cooling system for Indian Point 3. Such argument is contained in their self-serving "Authorizations"

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<sup>1/</sup> The quantum of proof necessary to remove the present license condition is a preponderance of the evidence. ALAB-287 correctly so held, and to the extent HRFA and SOS rely (Brief at 6) upon the Indian Point 3 Licensing Board's "convincing" standard, Con Edison suggests they are in error. Likewise the State's assertion that Con Edison must "go beyond" its Indian Point 2 presentation (State Brief at 3, 4) can in no way increase this burden.

appended to their brief and incorporated therein by reference. HRFA-SOS Brief at 10. But it is clear from the Stipulation itself that the "binding obligation" was subject to being reopened.

HRFA and SOS also incorrectly characterize Con Edison's view of the Stipulation gleaned from transcript references. HRFA-SOS Brief at 12. A more accurate reporting of Mr. Voigt's argument to the Appeal Board is contained in the transcript at 105:

" . . . [T]he stipulation is a determination as of now that once-through cooling can only continue for the period of time permitted. It's by no means [in] the company's view a final determination that a cooling tower should be built. That is the reason why the company has vigorously insisted in Indian Point 2 and Indian Point 3 that it should be given a reasonable opportunity . . . to complete its research program. It's the research program . . . that will provide the additional information that is necessary to make an authoritative resolution of this program." (Emphasis added.)

Accordingly, the ultimate resolution of the cooling system issue will not be made until Con Edison seeks to amend its license. Thus ALAB-287, unlike HRFA and SOS, is on target. The question is ultimately open.

HRFA and SOS further misstate the intent of the parties in entering the Stipulation. There is no record support for their assertion (HRFA-SOS Brief at 12) that the parties wished to "establish a clear procedure which would

appended to their brief and incorporated therein by reference. HRFA-SOS Brief at 10. But it is clear from the Stipulation itself that the "binding obligation" was subject to being reopened.

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HRFA and SOS further misstate the intent of the parties in entering the Stipulation. There is no record support for their assertion (HRFA-SOS Brief at 12) that the parties wished to "establish a clear procedure which would

guide the future course of action by the parties before the Commission." Further, they erroneously opine that the "desire for clarity and definiteness is also reflected in the clear requirement of closed-cycle cooling." This "clear requirement" is reflected only in HRFA's and SOS' self-serving "Authorizations." Paragraph 2 of the Stipulation, on the other hand, recognizes the issue is only provisionally settled.

In essence, ALAB-188 reached only a provisional resolution of the cooling system issue for Indian Point 2. The Stipulation was designed to duplicate this result and apply it to Indian Point 3, thus postponing the ultimate and final decision on Unit 3's cooling system until Con Edison seeks to lift the license restriction.

We invite the Commission's attention to the remarks of Chairman Jensch during the Licensing Board hearings:

"As I read the stipulation, everything is in the hold position, although the applicant has agreed to take the burden of saying, 'We will build cooling towers if we can't show to the contrary,' nevertheless, this thing is in a hold position."

"No one is hurt. This thing, as Mr. Gallo pointed out, is going to be the subject of another hearing. You can be sure." Tr. 320 (Emphasis added).

"So, really, we are here only to send to the Commission whether this stand-still stipulation, the hold-everything stipulation until data is collected, is adequate in the public interest. So that cooling towers do not necessarily follow [from] this proceeding today." Tr. 331.

No party objected to Chairman Jensch's "interpretation" of the Stipulation at that time or thereafter before the Appeal Board. The effort now to convert the Stipulation into a rigid commitment by Con Edison to build a cooling tower regardless of the results of the research program should be firmly rejected by the Commission.

II.

THE APPEAL BOARD'S DECISION  
IN ALAB-287 DID NOT MODIFY  
THE TERMS OF THE STIPULATION.

The Staff correctly recognizes that the Appeal Board approved the Stipulation (ALAB-287, slip op. at 6). But the Staff also contends that the Appeal Board modified the Stipulation by "interpreting" ALAB-188. To support this argument, the Staff (Staff Brief at 22, 23) isolates three quotations from ALAB-287:

1. "It should be apparent, however, that we have never sanctioned the use of closed-cycle cooling at the Indian Point site. In ALAB-188 we viewed -- and we still view -- the cooling system questions as open, and we required that there be a full NEPA review of that question." ALAB-287, slip op. at 7.
2. "In sum, ALAB-188 did not decide that, on balance, a closed-cycle cooling system for Indian Point 2 is preferable to an open-cycle system. Rather, it determined that the record evidence was not adequate to make such a finding, that a further determination on this subject should be made, but that in the interim (and subject to appropriate safeguards) operation with once-through cooling would not produce unacceptable environmental results." ALAB-287, slip op. at 9.
3. "In ALAB-188 we did not say that data necessary to make an adequate review did not exist, but rather that the evidence presented on the record did

remains open to litigation. The final resolution will be achieved upon Con Edison's or the Staff's (Staff Brief at 23 n\*) possession of new information that would necessitate seeking a change to the present license. The Stipulation, in duplicating ALAB-188, recognizes the possibility of future litigation. Moreover, the expansion of paragraph 5 of the Stipulation, to which the Staff does not object (Staff Brief at 27 n\*, 37), expressly allows the Staff to initiate litigation to reopen the cooling system question. In short, ALAB-287 and ALAB-188 are not inconsistent.

HRFA and SOS (Brief at 13) argue that since the ordering paragraph of ALAB-287 (slip op. at 21) states, "[a]s interpreted above, the stipulation is approved", the Appeal Board must have modified the Stipulation. However, a careful reading of ALAB-287 confirms that where the Appeal Board wanted to construe or modify the Stipulation, it did so expressly. For example, ALAB-287 (at 12) expressly modifies Paragraph 5 and in so doing, uses the language, "We likewise construe the stipulation . . . ." It continues (at 18), ". . . we construe the stipulation as incorporating the preponderance standard." The Appeal Board was thus conscious of its role as an interpreter of the Stipulation. Since the Board changed not so much as a comma of the crucial

license condition contained in Paragraph 2, the parties cannot legitimately argue that any significant "modification" of their agreement was made. That condition still requires, subject to Con Edison's or the Staff's application to remove the condition, that closed-cycle cooling will be employed. Judging by HRFA's and SOS' "Authorizations," this is exactly what each group bargained for. To the extent that the Staff and HRFA and SOS are mounting an attack on ALAB-188, decided over a year and a half ago, their efforts are untimely.<sup>2/</sup>

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<sup>2/</sup>

A petition for review of ALAB-188 was filed by HRFA but later dismissed by consent of the parties, Nov. 4, 1974. Hudson River Fishermen's Ass'n v. AEC, No. 74-2113 (2d Cir. 1974). The Staff also expressly chose not to seek reconsideration of ALAB-188. See AEC Regulatory Staff Statement as to Petition for Reconsideration of ALAB-188, June 14, 1974.

III.

THE COMMISSION SHOULD AFFIRM  
THE APPEAL BOARD'S AUTHORIZATION  
OF AN OPERATING LICENSE  
FOR INDIAN POINT 3.

The Staff argues (Staff Brief at 28) that because the Stipulation has been "interpreted," the "original" Stipulation has not yet received the requisite appellate approval under Paragraph 12 for its effectiveness. Regardless of what was said in ALAB-287 about the meaning of ALAB-188, the Stipulation was affirmed. As the Appeal Board stated (slip op. at 6):

"With that in mind, and subject to our understanding that it [the Stipulation] provides an opportunity to the staff as well as the applicant to seek amendment of the license as to once-through vs. closed-cycle cooling should this be later found appropriate in light of our comments and guidance below, we hereby approve the Stipulation referred to us."  
(Emphasis supplied.)

The Appeal Board's "understanding" effected only an expansion of Paragraph 5, a change now accepted by the Staff. Accordingly, as stated by the Staff (Brief at 27) the Stipulation ". . . is binding on the parties to it and on the court in the absence of grounds which would authorize a party to rescind or withdraw from it or a court to set it aside." There are no such grounds, and the Staff cannot argue that an Operating License

should not issue (Brief at 28). To the contrary, the Commission should order the issuance of an Operating License for Indian Point 3 forthwith.

HRFA and SOS have adopted an equally solipsistic course:

"Until the Commission approves the Stipulation on the terms outlined above, HRFA and SOS take the position that there is no binding Stipulation and no legal basis for the issuance of any license for Indian Point Unit No. 3. [Footnote omitted.] If the Commission does not approve the Stipulation on these terms, the Stipulation never will be effective and HRFA and SOS' right to a hearing must be honored forthwith. (HRFA-SOS Brief at 9.)"

As we have shown in Part II, supra, the Stipulation has been approved without modification. HRFA and SOS are bound by it and so is the Staff. The other parties continue to ignore the plain truth that the stipulated license condition for Indian Point 3 was approved as written. They cannot now withdraw their consent on the grounds that ALAB-188 has, in their view, been "reinterpreted."

IV.

THERE HAVE BEEN NO  
NEPA VIOLATIONS.

The Staff contends (Staff Brief at 40 - 41) that ALAB-287's construction of ALAB-188 is violative of the National Environmental Policy Act ("NEPA") 42 U.S.C. §§ 4321 et seq. (1970). HRFA and SOS (Brief at 21) echo this theme. The thrust of each's argument is that ALAB-287 indicated that a final NEPA balance had not yet been made regarding the ultimate cooling system for Indian Point 2. We think this argument is clearly beyond the scope of the five questions the Commission required the parties to address and should therefore simply be disregarded.

Assuming, however, that the Commission decides to address this issue, the fallacy of the contentions of the Staff and HRFA and SOS is immediately apparent upon a re-examination of the two decisions. In ALAB-287, slip op. at 7, the Appeal Board correctly reiterates its holding in ALAB-188, i.e., that closed-cycle cooling for Indian Point 2 was never finally approved. Upon Con Edison's application for relief from the provisional license condition, NEPA would certainly require a reopening of the question. Classifying this issue as ultimately "open" is not incorrect.

The Staff argues (Brief at 45):

"Had the Appeal Board [in ALAB-188] reached the conclusion that the balance should be struck in favor of interim operation with once-through cooling during the five spawning seasons and subsequent operation with a closed-cycle cooling system (subject to the right of extension or reconsideration) -- the conclusion which we believe was in fact reached in ALAB-188 -- this conclusion would have included the requisite final cost-benefit balance."

We think the Staff's interpretation of ALAB-188 is quite consistent with ALAB-287. Both decisions view the question as ultimately open, in the sense that the license condition is provisional and subject to being reopened. Con Edison does not disagree with the mandate of Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C.Cir. 1971) that the basic cost-benefit balance be performed prior to the contemplated federal action. But both ALAB-188 and ALAB-287 recognize such a balance and simply provide for reconsideration should new evidence be brought forward. The provision for reconsideration is consistent with Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, RAI-73-10, 831 (Oct. 26, 1973), a case requiring the applicant to abandon the allowed once-through cooling should its data collection program so indicate. So too, in Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262,

NRCI-75/3, 163 (Mar. 19, 1975), aff'd sub nom. Environmental Coalition of Nuclear Power v. NRC, No. 75-1421 (3d Cir.

November 12, 1975), the Appeal Board upheld the issuance of a construction permit based on a full NEPA analysis of one water-supply alternative. The Appeal Board expressly left open the question of substituting for the initial alternative another water supply alternative, in which case, a full NEPA review of that substituted alternative would have to have been performed. Id. at 200. In the interim, use of the first alternative would not have precluded eventual use of the second.

The Staff's perceived NEPA difficulties do not end there. It suggests (Brief at 46) that any "modification" of ALAB-188 is a de facto amendment of the Operating License for Indian Point 2. This is without merit. The license condition stands, and at such time as Con Edison seeks to have it vacated, the licensee will bear the burden of proof. 10 C.F.R. § 2.732 (1975). ALAB-287's construction of the Indian Point 2 license condition, although accurate, can have no significance because the decision affects only the Indian Point 3 proceeding. See Arkansas Power & Light Co. (Arkansas Nuclear One Unit 2), ALAB-94, RAI-73-1, 25, 30-31 (Jan. 18, 1973).

HRFA and SOS perceive another NEPA difficulty, for they contend (Brief at 20) that ALAB-287 found the final environmental statement for Indian Point 3 deficient. This

argument conflicts with these parties' desire to have the Stipulation preserved by the Commission, an action which implicitly would uphold the adequacy of the Indian Point 3 NEPA review.

Any controversy over the adequacy of the "fresh look" is a dispute between the Staff and the Appeal Board and should not impede the Commission from approving the Stipulation and authorizing issuance of an Operating License.

CONCLUSION

As indicated in the Introduction, Con Edison is presently more concerned with the prompt issuance of an Operating License for Indian Point 3 than with "winning" this case. We therefore urge the Commission to terminate its review by simply approving the Stipulation without comment and reaffirming Con Edison's immediate right to receive an Operating License. Should the Commission feel compelled to pass upon the merits of what was said by the Appeal Board, Con Edison consents to the Commission vacating as unnecessary to the decision of the Appeal Board those portions of ALAB-287 to which the other parties object as delineated on page 8 in the brief of HRFA and SOS dated November 10, 1975. In either case, the Commission should expedite its action to permit the prompt issuance of an Operating License.

Respectfully submitted,

  
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