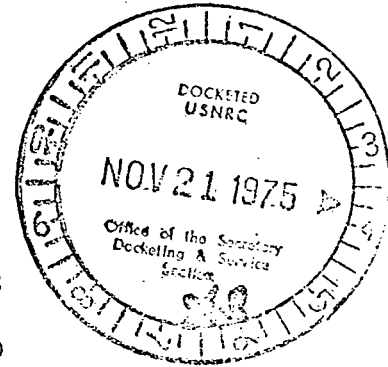


UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of :  
CONSOLIDATED EDISON COMPANY : Docket No. 50-286  
OF NEW YORK, INC. :  
:   
(Indian Point Nuclear :  
Generating Station, Unit :  
No. 3) :  
:   
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BRIEF OF THE HUDSON RIVER FISHERMEN'S  
ASSOCIATION AND SAVE OUR STRIPERS IN  
REPLY TO BRIEFS SUBMITTED PURSUANT TO  
THE NRC ORDER OF 23 OCTOBER 1975

The Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS") submit this brief in reply to the briefs of the other parties filed on or about November 10, 1975, in the above-captioned matter pursuant to the Order of the Nuclear Regulatory Commission ("NRC") dated October 23, 1975. This Brief supports approval of a stipulation dated January 13, 1975 ("Stipulation"); and vacatur of the ruling of the Atomic Safety and Licensing Appeal Board ("Appeal Board") purporting to "approve" that Stipulation.

The HRFA and SOS agree with the positions asserted in the Briefs by the Nuclear Regulatory Commission Staff ("Staff") and the State of New York by both the Attorney-General and

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the Atomic Energy Council. The thorough and incisive analysis of the Staff is both persuasive in its presentation and laudable in its strong defense of the public interest.

The same cannot be said about the Applicant's Brief. This Reply Brief for HRFA and SOS will address the deficiencies of the Applicant's position on issues one and two posed by the NRC Order of October 23, 1975.

At the outset, the HRFA and SOS wish to make clear their understanding that the Applicant and/or licensee will have the right to reopen the requirement for closed-cycle cabling, but only subject to the specific terms of the Stipulation, consistent with the regulations of the NRC. The approval of the Stipulation by HRFA and SOS is premised upon the fact that closed-cycle cooling will be installed, and only the presentation of new data on the Hudson fish nursery will justify reopening the issue of cooling towers.

HRFA and SOS are confident that new data, if valid at all, will only reaffirm the need for closed-cycle cooling.

If the Consolidated Edison Company of New York ("Con Edison") continues to own and operate Indian Point Station, Unit No. 3, HRFA and SOS are aware that Con Edison's present

intent is to seek new data and attempt to relitigate the need for closed-cycle cooling. As counsel for Con Edison observed before the Appeal Board, "Certainly the company's [Con Edison] present intention, unless the research program proves to the contrary, would be to apply for a modification of the license condition. If that is done, then the issue will be reopened." App. Bd. Tr. 104-108.

Even if that is done in the future, however, Con Edison agrees to perform necessary steps or tasks to prepare for and build the closed-cycle cooling in the interim. These undertakings must be done with "due diligence," as required by the Stipulation.

Should the NRC accept in any form the Appeal Board's view that closed-cycle cooling cannot now be required for Indian Point Station, Unit No. 3, then regardless of any verbiage purporting to "approve" the stipulation, it is not approved in the understanding of the HRFA and SOS and the matter of any Indian Point application for an operating license must be referred back to the Atomic Safety and Licensing Board ("Licensing Board") for a full evidentiary hearing on environmental issues.

The National Environmental Policy Act, 42 U.S.C. 4321 et seq. ("NEPA"), requires a reasoned choice of alternatives to assure adequate consideration and protection of environmental interests. NRDC v. Morton, 458 F.2d 827 (D.C. Cir., 1972). No one disputes the fact that closed-cycle cooling will in fact protect the Hudson fish nursery from the injury which otherwise would occur if Indian Point Station Unit No. 3 were to operate with once-through cooling using water pumped out of the Hudson River at the plant site. Since all parties agreed to a balance of interests which in fact protects the environment, it is arbitrary and capricious and contrary to NEPA for the Appeal Board to rule that closed-cycle cooling is not needed.

Against this background, it is unconscionable for Con Edison to urge that the Appeal Board "approval" of the Stipulation was a permissible interpretation and not a material modification. HRFA and SOS are of the view that Con Edison's position ipso facto approaches a lack of due diligence in violation of the Stipulation.

Con Edison cannot agree to install closed-cycle cooling by the Stipulation and then be heard to urge acceptance of the Appeal Board "approval" which is premised on the contrary proposition. In like vein, the NRC cannot seek to review

the Appeal Board and at the same time not stay the effect of the Board's "approval," thereby technically allowing the issuance of an operating license. In both instances, the Applicant and Commission seek the best of both worlds - to have their cake and eat it too. This posture is internally inconsistent and arbitrary and capricious. To oppose both postures, the HRFA and SOS have had to file a petition to review in the U.S. Court of Appeals for the Second Circuit. HRFA v. NRC, Petition No. 75-4212, which Petition as of November 18, 1975 has been held in abeyance by the Court until the NRC rules.

This Commission can vacate the Appeal Board ruling and substitute its approval of the Stipulation on the basis of the Licensing Board approval. In so acting, the NRC would eliminate the inconsistencies in both the Con Edison and Commission positions. Until that time, the Stipulation is not binding. Trans-Pacific Freight Conf. of Japan v. F.M.B., 302 F.2d 875 (D.C. Cir. 1962); Isbrandtson Co. v. U.S., 211 F.2d 51 (D.C. Cir., 1954).

Con Edison provides no authority for its position in Point I of its Brief that the Appeal Board's interpretation of the Stipulation is merely a "proper statement of the law" (Con Edison's Brief at 7). The bald conclusion pressed by

Con Edison falls of its own lack of substantiality. Similarly, so long as the parties dispute whether the necessary approvals of the Stipulation have been given, it is beyond cavil that the Stipulation is not yet binding. All Con Edison's cases asserted for the contrary position (Id. 13-14) are thus irrelevant here, since they involve stipulations after they become effective by their own terms.

Con Edison could have agreed with HRFA and SOS and the other intervenors on the terms for vacating the Appeal Board ruling, as set forth in the Brief of HRFA and SOS In Support of Vacating ALAB Ruling, at 7-8. Instead, Con Edison has taken a position inconsistent with the settlement of the parties.

Accordingly, if the NRC accepts the Con Edison position, there is no binding stipulation and HRFA and SOS insist on reversion to a full evidentiary hearing under NEPA. Cf., Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 600 (2d Cir. 1965); HRFA v. FPC, 498 F.2d 827 (2d Cir. 1974).

The positions of HRFA, SOS, the Staff, the Attorney-General and Atomic Energy Councils of the State of New York should be accepted by this Commission and the Applicant's position rejected. Insofar as Con Edison may sell Indian

Point Station Unit No. 3 to the Power Authority of the State of New York ("PASNY"), the NRC should make clear that PASNY will also be bound. HRFA and SOS will also continue to press for reconstituting the Appeal Board in light of its manifest bias.

Dated: New York, New York  
November 19, 1975

Respectfully submitted,

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

I hereby certify that a copy of the foregoing "Brief of the Hudson River Fishermen's Association and Save Our Stripers In Reply to Briefs Submitted Pursuant to the NRC Order of 23 October 1975" has been served upon counsel for all parties, by deposit in the United States mail, postage prepaid, addressed to the following, this 19th day of November, 1975:

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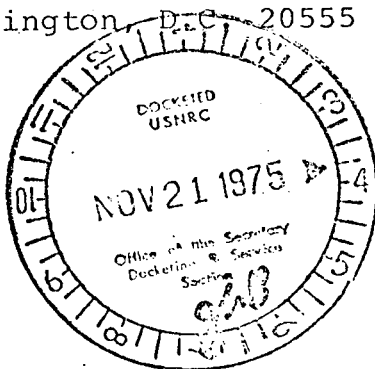
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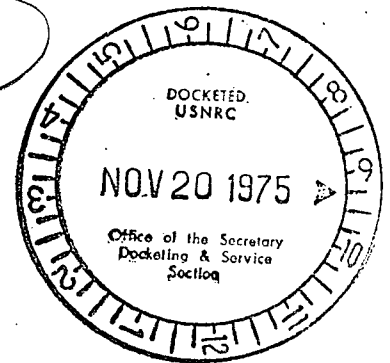
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Dated: New York, New York  
November 19, 1975



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

November 19, 1975



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Re: Consolidated Edison Company of New York, Inc.  
Indian Point Unit Nos. 1-3 (Seismic)  
Docket Nos. 50-3, 50-247 and 50-286

Dear Dave:

Enclosed please find a revised cover page to the interrogatories submitted to CCPE by the Staff, dated November 17, 1975, which reflects the proper caption for this proceeding.

Sincerely,

Frederic S. Gray, Acting  
Assistant Chief Hearing Counsel

Enclosure:  
As stated

cc w/enclosure:

John B. Farmakides, Esq.  
Dr. John H. Buck  
Dr. Lawrence R. Quarles  
Harry H. Voigt, Esq.  
J. Bruce MacDonald, Esq.  
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Board Panel  
Atomic Safety and Licensing  
Appeal Board  
Docketing and Service Section



