UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

11/10/75

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

BRIEF OF THE STATE OF NEW YORK BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AND THE NEW YORK STATE ATOMIC ENERGY COUNCIL RE ALAB-287

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Introduction

This brief is submitted by the Attorney General of the State of New York ("Attorney General") and the New York State Atomic Energy Council ("NYAEC") in response to the order of the Nuclear Regulatory Commission dated October 23, 1975 electing to review the September 3, 1975 decision of the Atomic Safety and Licensing Appeal Board (ALAB-287), which reviewed the June 12, 1975 memorandum and order of the Atomic Safety and Licensing Board (ASLB) approving the stipulation of the parties in this proceeding. Where the Attorney General and NYAEC do not speak with one voice, their positions are stated separately.

In its order, the Commission requested the submission of written briefs addressed in particular to five propounded questions.

1. To what extent, if any, has the Appeal Board exceeded the bounds of permissible interpretation of a stipulation of the parties? What modification or alteration of terms of conditions has been effected?

The substance of the stipulation (annexed to the ASLB decision) adopted by the parties is that the applicant will be required to install a closed cycle cooling system at its Indian Point 3 plant by a date certain unless it can present empirical data collected during the interim operation of the plant sufficient to justify amendment of the license to permit operation on a permanent basis with once-through cooling (Stipulation 2[c]).

The stipulation attempts to deal with various possible contingencies and to establish an ordered framework within which the rights of all parties will be preserved. Neither the ASLB nor the Appeal Board has found specific fault with the stipulation as to these technical and procedural matters.

However, the Appeal Board, in its decision approving the stipulation, saw fit to enter into a lengthy discussion of the meaning of its prior decision to approve an interim operating

license for the applicant's Indian Point 2 plant (ALAB-188, RAI-74-4 323; April 4, 1974). The Indian Point 2 license requires the installation of a closed cycle cooling system by a date certain, but permits the licensee, on the basis of subsequently developed environmental data, to apply for an amendment of the license to permit permanent plant operation with once-through cooling. To obtain any such amendment, the licensee of necessity must present a case going beyond its presentation at the Indian Point 2 hearings. The stipulation was intended to impose an identical burden on the applicant, and in fact contains virtually identical language.

The Appeal Board agrees that its construction of the stipulation could have a bearing on any subsequent interpretation of that stipulation. ALAB-287, p. 18, fn. 18. Further, the Appeal Board makes it clear that it believes the stipulation to represent an attempt by the parties to establish identical treatment for both Indian Point 2 and Indian Point 3 (ALAB-237, p. 6). The Appeal Board discussion of its interpretation of its prior ALAB-188 opinion and holding regarding Indian Point 2 and the license conditions imposed pursuant thereto, thus represents an attempt by the Appeal Board to integrate its latest understanding of ALAB-188 into the stipulation.

ALAB-188 has been a continuing source of friction between the parties. The Attorney General has always read ALAB-188 as requiring the installation of closed cycle cooling

unless the licensee can present environmental data and analyses carrying its case beyond the presentation made before the ASLB at the Indian Point 2 hearings. The Appeal Board now suggests that in ALAB-188 it merely decided that there was insufficient information to reach a determination, and that interim operations with once-through cooling would be permitted until additional information and analyses were developed and presented at subsequent hearings. The Appeal Board intimates that were evidence equivalent to that presented by the parties to Indian Point 2 introduced at subsequent hearings, it would not require installation of cooling towers.

On the contrary, the Indian Point 2 license clearly requires the installation of a closed-cycle cooling system by a date certain unless the licensee successfully seeks an amendment of the license permitting the use of once-through cooling on a permanent basis. While ALAB-188 does contain certain references indicating the Appeal Board's problems with this conclusion, these doubts were not sufficient to motivate the Appeal Board to reverse the ultimate determination of the ASLB in that proceeding. Had ALAB-188 not required the installation of closed cycle cooling, necessary appeals to the courts would have been taken by the Attorney General and others and the matter finally decided. However, cooling towers having been incorporated as a license condition, this controversy should have been water under the dam.

No so, however, for the Appeal Board. For when the ASLB in its decision approving the stipulation characterized ALAB-188 as having required the installation of closed cycle cooling -- a characterization supported by an express license condition -- the Appeal Board felt it necessary to rebut this otherwise reasonable conclusion.

The Attorney General and other parties to the Indian Point 3 proceeding entered into the stipulation herein with the understanding that a license condition requiring the installation of a closed cycle cooling system by the applicant at its Indian Point 3 plant would mean just that. However, with respect to an analogous condition in the Indian Point 2 license, the Appeal Board had the following to say:

> "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 enviornmental results."

That was not the basis upon which the Attorney General agreed to the stipulation, and unless this statement and other similar retrospective statements regarding ALAB-188 are vacated

by the Commission, the Attorney General will consider the stipulation disapproved and seek the reinstatement of his right to a hearing on all relevant NEPA issues. The Attorney General does not consider Con Edison to have made a case for once-through cooling in the Indian Point 2 hearings, he does not believe Con Ed can do so now, and he believes that the data now being gathered by the applicant will not change the situation. It is the Attorney General's hope that Con Edison, in the final analysis, will adopt this conclusion and proceed to take all necessary steps to install cooling towers at Indian Point 2, as required by the license issued pursuant to ALAB-188, and at Indian Point 3, as would be required by any license issued pursuant to the stipulation.

Accordingly, the Attorney General and the New York State Atomic Energy Council agree that so much of the Appeal Board decision in ALAB-287 set forth as follows should be vacated by the Commission:

> "(a) Page 6, the last full sentence of the first full paragraph beginning 'Given the similarities ... '; (b) All of page 7; (c) All of Page 8; (d) All of page 9; (e) All of page 10; (f) The first three lines of page 11; (g) The first two lines of page 13 provided that the paragraph begin by adding the words 'The intent of paragraph 5' was to provide....; (h) The last full sentence of the first paragraph of page 13 beginning 'This intent of ...'; (i) The last paragraph of page 13; (j) All of page 14; (k) The first three words of page 21 reading 'As interpreted above.'"

2. Are the parties bound to the terms of the stipulation, as interpreted by the Appeal Board?

As stated previously, ALAB-287 interprets ALAB-188 and the license conditions imposed pursuant thereto in a manner inconsistent with the understanding of the parties of the holding of ALAB-188, upon which the stipulation was based. If the stipulation remains approved and agreed to, the parties will be bound to its terms. The interpretation of the Appeal Board is unacceptable to the Attorney General and other parties, and, if asserted by the applicant in the future, would result in litigation over the meaning of the terms. For that reason the Attorney General cannot accept the stipulation as approved under the cloud of ALAB-287.

3. Under what circumstances do the Commission's Rules of Procedure or the provisions of the stipulation of January 13, 1975, permit the parties (or any other interested group) to raise at any later time the issue whether a once-through or closed-cycle cooling system should be the required permanent system for this plant?

The stipulation does not abrogate any rights any interested group might otherwise have with respect to the issue posed above. Under the terms of the stipulation, a mechanism is provided to the parties for the review contemplated by this question.

4. What purpose, if any, would an environmental hearing now serve?

The Attorney General does not believe an environmental hearing now would be of any greater or lesser value than any hearing in the future. However, the applicant wishes to preserve its right to present data now being gathered in support of a license amendment to be sought in the future, and this right has been preserved. NYAEC does not believe that the evidence gathered to date would add anything to the record established in the Indian Point 2 proceeding.

5. Should the stipulation be disapproved as a device to defeat the Appeal Board's review authority, as exercised in the Indian Point 2 proceeding?

No. As drafted the stipulation incorporates conditions in the Indian Point 3 license directly analogous to those in the Indian Point 2 license which were approved by the Appeal Board after appropriate review. In addition, the stipulation provides for additional hearings if requested (on the basis of additional empirical data) by the licensee or by the Regulatory staff.

It is the position of the State of New York that the stipulation and the license conditions contained therein are unambiguous and not in need of interpretation. The Appeal Board's

lengthy discussion of ALAB-188, in the context of its approval of the stipulation, serves to becloud the stipulation's express language and should be vacated as noted above.

Dated: New York, New York
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Respectfully submitted,

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