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 BRIEF IN RESPONSE
TO COMMISSION'S ORDER OF
OCTOBER 23, 1975

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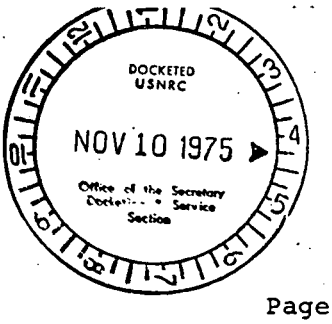

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Introduction

On June 12, 1975, the Atomic Safety and Licensing Board ("Licensing Board") issued its "Memorandum and Order Approving Stipulation for Settlement Proposed by Parties and Decision Respecting Concerns Related to the Authorization of a Full-Term, Full-Power Operating License," LBP-75-31, NRCI-75/6 593, in the operating license proceeding for Indian Point Unit No. 3 ("Indian Point 3"). That decision approved a Stipulation entered into by all parties to the litigation on January 13, 1975, which was basically designed to settle contested issues relating to the choice of a cooling system for Indian Point 3. Pursuant to paragraph 12 of the Stipulation, it was transmitted to the Atomic Safety and Licensing Appeal Board ("Appeal Board") for approval. On

September 3, 1975, the Appeal Board issued its Decision, ALAB-287, NRCI-75/9 ____, which approved the Stipulation, thus finally authorizing the issuance of a full-term, full-power operating license for Indian Point 3. See Slip Op. at 6. On October 23, 1975, the Commission elected to review ALAB-287. Consolidated Edison Company of New York, Inc. ("Con Edison") hereby submits its brief on the issues raised by the Commission.

Indian Point 3 is a pressurized water power reactor constructed in accordance with Provisional Construction Permit No. CPPR-62, issued on August 13, 1969. 4 AEC 246 (1969). As was the case with the Indian Point 2 facility, there was sharp disagreement among the parties to the Indian Point 3 operating license proceeding with respect to the need for installation of a closed-cycle cooling system to protect the aquatic biota of the Hudson River, on the banks of which the facility stands. At present, Indian Point 3 is complete in all but insignificant regards. As built, the plant has the once-through cooling system using Hudson River water authorized in the construction permit.

Recognizing that a repetition of the then-recently concluded Indian Point 2 operating license case would serve no purpose, the parties to this proceeding met extensively in the latter months of 1974 and were able to reach an

agreement which all participants felt preserved their respective interests without resolving their fundamental disagreement prior to the issuance of an operating license. That agreement, which took the form of the Stipulation dated January 13, 1975, appears in the front of volume 1 of the Final Environmental Statement prepared by the Regulatory Staff for Indian Point 3. The Stipulation expressly provides (¶12) that it shall not be final and binding upon the parties unless approved by the Licensing Board and by the Appeal Board.

The Licensing Board conducted an inquiry into the background and basis for the Stipulation, and ruled on June 12, 1975 that the Stipulation was in the public interest and should be approved. Pursuant to the Commission's interlocutory decision of July 16, 1974, CLI-74-28, RAI-74-7, 7, the Licensing Board also conducted a brief inquiry into certain other matters not here relevant.

On review, the Appeal Board similarly approved the Stipulation in its decision ALAB-287 of September 3, 1975. The Commission's Order taking jurisdiction over the case came shortly before the deadline for petitions for reconsideration of ALAB-287. The Regulatory Staff was apparently preparing such a petition. Two intervenors, Hudson River Fishermen's Association, Inc. ("HRFA") and Save Our Stripers, Inc. ("SOS"), advised the Appeal Board by letter that they would seek

judicial review rather than reconsideration within the agency. HRFA and SOS thereafter filed a petition for review of ALAB-287 in the United States Court of Appeals for the Second Circuit. HRFA v. NRC, No. 75-4212. On October 29, 1975, the Commission moved to dismiss the petition on the ground that no final order of the agency had been issued, or alternatively, to hold the petition in abeyance pending action by the Commissioners.

The Commission's Order of October 23, 1975 stated that the decision was not to stay the effect of the Appeal Board decision. No operating license has yet been issued by the Director of Nuclear Reactor Regulation for Indian Point 3.

Responses to the Commission's Questions

Pursuant to the Commission's October 23 Order, five questions are to be addressed by each party. Those questions, and Con Edison's answers, are set forth below. The reasoning in support of Con Edison's answers is then detailed in the following section of this brief.

Question 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 or conditions has been effected?

Con Edison's Response: The Appeal Board expressly approved the Stipulation. In so doing, it did not modify or alter the agreed terms and conditions in any significant way. Therefore, the Appeal Board has not exceeded the limits of permissible interpretation of an agreed settlement among the parties.

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

Con Edison's Response: Yes.

Question 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?

Con Edison's Response: Both the Rules of Practice and the express provisions of the Stipulation (which are largely parallel) provide full opportunity for a public hearing at a later time to determine the appropriate permanent cooling system for Indian Point 3.

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

Con Edison's Response: None.

Question 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?

Con Edison's Response: No.

Argument

I.

THE DECISION OF THE APPEAL BOARD WAS A PERMISSIBLE AND CORRECT INTERPRETATION OF THE STIPULATION, AND NO MATERIAL CHANGE IN THE STIPULATION WAS MADE.

At the outset, it must be emphasized that the Appeal Board approved the Stipulation as submitted to it. Similarly, the Appeal Board approved, without altering so much as a comma, the license condition that the parties agreed upon in the Stipulation. That being the case, the Commission should view with a jaundiced eye any claim that the Appeal Board in fact did something other than what it purports to have done. Any party who claims that its rights or obligations under the Stipulation have been materially altered by ALAB-287 should be required to explain with precision how that is so.

It is our perception that what certain parties dislike about ALAB-287 is not what the Appeal Board did in approving the Stipulation. Rather, the real discontent is

with what the Appeal Board said concerning the meaning of its earlier decision in ALAB-188 and the requirements for further evaluation of the need for a cooling tower under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1970) ("NEPA"). If that perception is correct, no basis exists for relieving any party of its obligations under the Stipulation. The existence of ALAB-188 is a fact, it has the effect of a final decision of the Commission, and its relevance to this proceeding would seem beyond dispute.

In Con Edison's view, the decision of the Appeal Board was a proper statement of the law and a correct reading of the Stipulation. No change in the terms or conditions of the Stipulation was effected by ALAB-287, and, as detailed in response to Question 2, infra, any interpretation supplied by the Appeal Board does not vitiate the Stipulation or release the parties from its provisions.

It will perhaps be helpful to reverse the order of the questions posed under the Commission's initial inquiry. First, what are the modifications or alterations made in the Stipulation? Essentially, it is the position of Con Edison that no changes have been made in the Stipulation, but rather that an elucidation has been provided for the agreement -- a kind of roadmap through its inevitably complicated provisions.

Among other things, the Appeal Board provided guidance to the Director of Nuclear Reactor Regulation with respect to the philosophy he should apply in the event an interested person not presently in the case seeks in the future to obtain a modification of the cooling-system condition to the Indian Point 3 operating license under the Commission's Show Cause regulations. 10 C.F.R. § 2.206 (1975). The Appeal Board has, in this regard, merely urged the Director to resolve doubts about convening such a proceeding in favor of doing so, where the request is substantial and not frivolous. Guidance of this sort is entirely appropriate, even though the Appeal Board has no direct power under the Commission's regulations to review this function of the Regulatory Staff. Moreover, this guidance says nothing at all about the burden of going forward with evidence or the ultimate burden of persuasion in the event the Director of Nuclear Reactor Regulation were to convene a cooling-system show cause proceeding at the instance of a stranger to the present case. Since, in any event, the Stipulation says nothing about the application of the § 2.206 procedure to further licensing actions concerning the cooling system for Indian Point 3, this feature of ALAB-287 can hardly be called a modification or alteration.

The Appeal Board also stated that its decision in the Indian Point 2 case, ALAB-188, had left open the question

of whether that plant should have a closed-cycle cooling system instead of the installed once-through cooling system. A re-reading of ALAB-188 makes plain the correctness of that statement. In this regard, the Appeal Board noted that to date there has been no balancing of overall costs and benefits, as required by NEPA, taking into account a specific kind of closed-cycle cooling system. That statement also is true. Those statements, moreover, did not contradict the Stipulation, and do not vitiate the agreement of the parties. The Stipulation, earlier in the portion which is to become a condition to the Indian Point 3 operating license, states that after September 15, 1980, Con Edison (or its successor in interest)[1/] will not operate the plant without a closed-cycle cooling system. That statement is in accordance with the license condition imposed by the Appeal Board in the Indian Point 2 decision. The Stipulation further provides, however, that Con Edison may apply to the Commission for an amendment to the license seeking an extension of the interim operation period "or other relief." Such "other relief" obviously can include a complete vacation of the closed-cycle cooling license condition based, for example, on new

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1/ Con Edison and the Power Authority of the State of New York are in negotiations for the transfer of the plant. An application to amend the operating license, when issued, was filed with the Commission on April 25, 1975.

data as to the effect of plant operation on the fisheries, new data on the environmental impact of cooling towers, or any other information relevant to the NEPA benefit-cost analysis.

To date, there has been no designation of a preferred alternative cooling system for Indian Point 3, although the Stipulation would require Con Edison to submit a report on alternative systems, just as was required for Indian Point 2. Without knowing which kind of system is the best, it remains to be seen how the Commission will comply with its independent obligation under NEPA to determine whether the benefits of closed-cycle cooling are exceeded by the costs. The Stipulation is not contradicted by those statements of the Appeal Board which merely note the applicable law. The stipulated license condition would bind Con Edison to build another cooling system or shut down Indian Point 3, unless the interim operation period were extended for one reason or another under the Stipulation. At the same time, both the Stipulation and ALAB-287 contemplate the filing of a request by Con Edison for relief from that obligation under certain circumstances. As the proponent of an amendment seeking such relief, Con Edison or its successor (if an amendment to vacate the closed-cycle cooling system were filed) would have the burden of proof under § 2.732 of the Commission's

Rules of Practice. As a result, here too, the Appeal Board has not modified the Stipulation.

If Con Edison files an application to vacate the closed-cycle cooling requirement, that application will require preparation of an Environmental Report pursuant to Part 51 of the Commission's regulations. At that time the overall or ultimate benefit-cost balance that the Appeal Board held had not yet been performed in respect of Indian Point 2 could be performed for Indian Point 3. Of course it is possible to postulate a case where neither Con Edison nor any other person will seek such relief, leaving open the question whether the requisite benefit-cost analysis had been performed. This possiblity is sufficiently speculative, however, that it would be improvident for the Commission to treat it as a key determinant in its present decisionmaking.

As is apparent on its face, the Indian Point 3 Stipulation was a direct descendant of the Appeal Board's decision in the Indian Point 2 case. ALAB-188 was specifically referred to in the preambular paragraphs, and the structure and content of the operative provisions shows unmistakably the influence of that decision. It is, as a result, impossible to discuss the Stipulation without also discussing Indian Point 2. Perhaps such discussion is technically dicta, but the Appeal Board can scarcely be criticized for taking the opportunity

in this case to shed further light on its analysis of a prior, closely-related matter. Particularly since all of the active environmental parties to the Indian Point 2 case are active in this proceeding, and had an ample opportunity to brief and argue their positions before the Appeal Board, no unfairness can be perceived in the procedure followed.

Moreover, what the Appeal Board said about NEPA and ALAB-188 was a statement of the applicable law that may govern future proceedings commenced pursuant to the Stipulation. It can hardly be argued that the parties could agree to ignore or violate applicable law. The Stipulation must perforce be read to comply with the law, and that is all the Appeal Board did.

Under no circumstances can the Appeal Board's interpretation of the Stipulation be said to be impermissible. The interpretation of the agreement -- in many respects a blueprint for further action by the Staff and other parties -- was reasonable and foresighted. Any decisional body has to tread a fine line between reaching for sweeping opportunities to govern future conduct and a myopic resolution of a single case or issue. Here the Appeal Board recognized its responsibility as surrogate for the Commission to minimize future conflict and ensure that the Commission's duties under NEPA

are fulfilled. It cannot be said that its efforts were so zealous as to depart from the policy of encouraging just settlements set forth in § 2.759 of the Rules of Practice..

II.

THE PARTIES ARE BOUND BY THE STIPULATION BECAUSE THE APPEAL BOARD'S INTERPRETATION DID NOT ALTER ITS TERMS.

A basic principle of law governing the effect of a stipulation is that parties are generally bound to the terms thereof and can be released therefrom only upon a showing of good cause. As stated by the court in Fenix v. Finch, 436 F.2d 831, 837 (8th Cir. 1971),

> [i]t is well settled that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them. The general rule is that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances. [Citations omitted.]

Paragraph 12 of the Stipulation involved herein expressly provides that the parties become bound and the "license condition provisions" become final when the Stipulation is approved by the Appeal Board.

Con Edison does not disagree with the thesis that upon a proper showing the Commission might release the parties from the Stipulation. The showing required to earn release from a stipulation has also been termed a showing of "manifest injustice." Laird v. Air Carrier Engine Service, 263 F.2d 948 (5th Cir. 1959). However, without a showing that enforcement of the Stipulation would "operate unjustly

and to prejudice" of the party seeking relief, release will not be granted. Morse Boulger Destructor Co. v. Camden Fibre Mills, 239 F.2d 382 (3rd Cir. 1956).

As discussed in response to Question 1, supra, ALAB-287 suggested particular opportunities for hearings on the question of the proper cooling system for Indian Point 3. This cannot be said to cause "manifest injustice" to any of the parties to the proceeding, nor could it "operate unjustly." Expressly granting to the Regulatory Staff the power to seek an amendment to the license by means of the Stipulation prejudices no party; it merely duplicates the Staff's inherent power under 10 C.F.R. § 2.202 (1975).

A decision that the parties are no longer bound by the Stipulation would essentially have the effect of remanding this operating license proceeding to the Licensing Board. This is certainly prejudicial to the interests of Con Edison because of the large amount of time and great expense that will have been wasted. In view of the completion of the facility and its readiness for fuel-loading, Con Edison cannot be restored "to the same position [it] . . . would have had if no agreement had been made." Greenspahn v. Joseph Seagram & Sons, 186 F.2d 616, 620 (2nd Cir. 1951). Accordingly, Con Edison submits there is no justification for releasing any of the parties, and in addition, substantial prejudice will result should the Commission do so.

III.

ADEQUATE OPPORTUNITIES TO LITIGATE THE ISSUE OF ONCE-THROUGH VERSUS CLOSED-CYCLE COOLING IN THE FUTURE HAVE BEEN PROVIDED.

Regardless of the existence of the Stipulation or its specific provisions, § 189a of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a)(1970), allows Con Edison to apply to the NRC for an amendment to its operating license that would abrogate the present condition provisionally requiring closed-cycle cooling. Should Con Edison make such an application, the other parties to the Stipulation ("whose interest[s] may be affected") would, pursuant to § 189a have the right to request a hearing on this issue of open versus closed-cycle cooling. See also Brooks v. Atomic Energy Commission, 476 F.2d 924 (D.C. Cir. 1973). The Commission's regulations, 10 C.F.R. §§ 2.105 and 2.714 (1975), further implement these hearing rights and contemplate participation by both the present parties and other interested individuals.

Again, regardless of the existence of the Stipulation or its specific provisions, the NRC Staff could also seek to re-open the question independently. Such action is specifically authorized by 10 C.F.R. § 2.202 (1975), which in turn grants to Con Edison the right to request a hearing should the Staff seek to modify the license. 10 C.F.R.

§ 2.202(b) and (c). Such Staff action is specifically not foreclosed by the Stipulation; paragraph 2 provides "except as hereinafter provided or as ordered by the Atomic Energy Commission, the Plant shall be operated with... closed cycle cooling". Presumably, other parties to the Stipulation, as well as other members of the public (non-parties), could seek to intervene in such a proceeding under the provisions of 10 C.F.R. § 2.714 (1975).

Should "any other interested group", i.e., a non-party, wish to initiate a hearing on the issue of the appropriate type of cooling system for Indian Point Unit No. 3, it would, lacking the benefit of the Stipulation, be forced to rely on 10 C.F.R. §2.206 (1975). This procedure contemplates the presentation of evidence to the Director of Nuclear Reactor Regulation with a request for action based thereon.

The Stipulation reiterates statutory opportunities for reopening the question of once-through versus closed-cycle cooling at a time when additional empirical evidence is available. See Response to Question 4, infra. Paragraph 2(c) of the Stipulation reserves to Con Edison the right to apply to the Commission for relief from the license condition contained in paragraph 2 requiring cessation of once-through cooling by September 15, 1980.[2/] Paragraph 4(b)

2/ Because Indian Point 3 has not yet operated, ¶ 2(e) of the Stipulation extends that date until September 15, 1981. The Appeal Board has so recognized, Slip Op. at 6, n.4, and the required Notice of Extension was filed on September 8, 1975.

provides an opportunity for a hearing for the other parties in this instance.

ALAB-287 interprets paragraph 5 of the Stipulation to vest in the NRC Staff a similar right to propose a "modification of the license condition" and provides guidelines for Staff action. Implicit in the Appeal Board's suggestions was the possibility of non-parties approaching the Staff, thus supplementing their § 2.206 remedy. Appeal Board Tr. at 68. Under the terms of the Stipulation, the same hearing opportunities would flow from the Staff's application for a modification of the license condition.

Regardless of whether the Commission accepts the meaning of paragraph 5 of the Stipulation as stated in ALAB-287, the Stipulation should not be disapproved for offering insufficient opportunities for public hearings on the issue of closed-cycle versus once-through cooling. As discussed above, sufficient opportunities exist under the Atomic Energy Act and the Commission's regulations, regardless of the existence of the Stipulation. The Stipulation duplicates those opportunities and more importantly does not curtail any opportunities that already exist.

IV.

AN ENVIRONMENTAL HEARING AT THIS TIME
WOULD BE COUNTER-PRODUCTIVE
AND CONTRARY TO THE PUBLIC INTEREST.

The Appeal Board's decision in ALAB-188 was devoted in large part to resolving the contested environmental issues connected with the selection of the proper cooling system for Indian Point 2. The Board there realized that the question of whether to require a closed-cycle cooling system for Indain Point 2 could not be definitively nor finally answered at that time. "The experts recognized, as did the Licensing Board, that their predictions involved a considerable number of unknowns regarding the predicted impact of once-through cooling if that mode of cooling is used permanently." RAI-74-4 at 325. Accordingly, the Board allowed once-through cooling to continue until at least May 1, 1979, during which time Con Edison could "collect data on the environmental impact of once-through cooling and data to evaluate the possible impact of closed-cycle cooling." Id. at 326.

Con Edison has consistently argued that the ultimate decision on the mode of cooling must await receipt of data from actual once-through operation of the units at the site. This argument was pursued before the Indian

Point 2 Licensing Board,[3] and before the Indian Point 2 Appeal Board.[4] Thereafter, the argument was renewed in the form of a Petition for Reconsideration.[5] The result of that litigation was to tentatively postpone until 1979 the date for termination of operation with once-through cooling, a compromise of the parties' conflicting positions.

An immediate hearing on this issue in the Indian Point 3 proceeding would be no more conclusive than the record before the Appeal Board in ALAB-188. Con Edison's Ecological Study Program is not expected to be concluded until 1977. No data from the actual operation of Indian Point 3 is now available. A hearing at this time to reach a final decision even for Indian Point 2 would be premature.

Also, an environmental hearing at this time would be contrary to the public interest as well as the interests of all the parties. Public funds would be expended to conduct further hearings at a time when no definitive conclusion is likely to result from such hearings. More importantly, operation of the plant might be delayed in

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3/ Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2) LBP-73-33, RAI-73-9, 751, 761 (Sept. 25, 1973).

4/ Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2) ALAB-188, RAI-74-4, 323, 325 (Apr. 4, 1974).

5/ Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2) ALAB-198, RAI-74-4, 475 (Apr. 25, 1974).

the interim. Con Edison estimates the cost of delay in operation of Indian Point 3 to be not less than $500,000 per day based only on the price differential between nuclear fuel and oil that otherwise must be burned. Because this is fuel cost, it will be directly borne by the consuming public in New York. Finally, a reversal of the Appeal Board and remand for an evidentiary hearing now would conflict with the Commission's regulation favoring settlement of contested issues, 10 C.F.R. § 2.759 (1975), and should not be considered unless some countervailing benefit can be derived. Con Edison contends there is no such benefit, since the hearing possibilities discussed in response to Question 3, supra, guarantee that the question of once-through versus closed-cycle cooling will be appropriately ventilated in a public proceeding at a time when the evidence necessary for a reasoned decision exists.

V.

THE STIPULATION SHOULD NOT BE DISAPPROVED AS A DEVICE TO DEFEAT THE APPEAL BOARD'S REVIEW AUTHORITY EXERCISED IN ALAB-188.

The Stipulation should be viewed by the Commission as an attempt by the parties to the Indian Point 3 operating license proceeding to replicate to the maximum extent possible the result reached in ALAB-188 for Indian Point 2. The parties themselves so characterized the Stipulation during oral argument before the Appeal Board. Appeal Board Tr. at 11, 51, 71. Paragraph 2 of the Stipulation conditions the Indian Point 3 operating license to require the cessation of once-through cooling by September 15, 1980, subject to Con Edison's request to abrogate this condition. It thus closely follows the Indian Point 2 license condition, contained in paragraph 2.E.(1) of that license, presently requiring a similar cessation by May 1, 1979.

It is therefore clear that the Stipulation was intended to honor, rather than defeat, the Appeal Board's review authority as exercised in the Indian Point 2 case. However, to be sure that the Stipulation did conform with the guidance of ALAB-188, the parties further provided for approval by the Appeal Board before the Stipulation became final. Since the Appeal Board has reviewed the Stipulation and approved it, it is apparent that there is here no device to defeat that body's review authority.

Conclusion

For the foregoing reasons, the Stipulation should be approved, and a Facility Operating License should be issued forthwith.

Respectfully submitted,

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