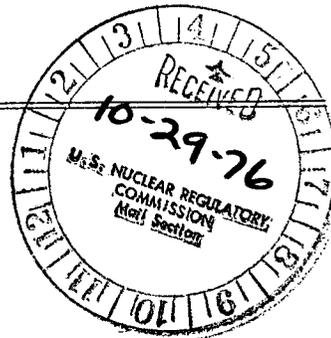
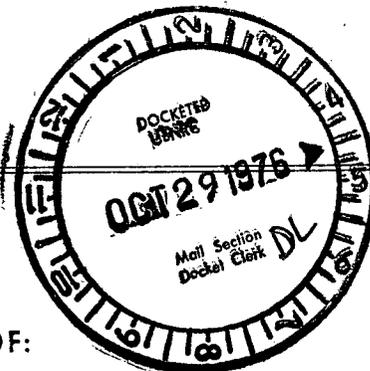


Regulatory Docket File

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

CONSOLIDATED EDISON COMPANY  
OF NEW YORK

Docket No. 50-247

(Indian Point Unit 2)

Silver Spring, Maryland

Place - Wednesday, 27 October 1976

1 - 99

Date -

Pages

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the matter of: :  
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CONSOLIDATED EDISON COMPANY : Docket No.: 50-247  
OF NEW YORK :  
:  
(Indian Point Unit 2) :  
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NRC Public Hearing Room, 1st Floor  
Wilste Building,  
7915 Eastern Avenue,  
Silver Spring, Maryland.

Wednesday, 27 October 1976

The above-entitled matter came on for Prehearing,  
pursuant to notice, at 10:15 a.m.

BEFORE:

SAMUEL W. JENSCH, Esq., Chairman  
Atomic Safety and Licensing Board.

DR. FRANKLIN C. DAIBER, Member

R. BEECHER BRIGGS, Member.

APPEARANCES:

LEONARD M. TROSTEN, Esq. and EUGENE R. FIDELL, Esq.,  
LeBoeuf, Lamb, Leiby and MacRae, 1757 N Street, NE,  
Washington, D.C., and

EDWARD J. SACK, Esq., Law Department, Consoli-  
dated Edison Company of New York, 4 Irving  
Place, New York, N.Y.;  
on behalf of the Applicant.

STEPHEN H. LEWIS, Esq. and MICHAEL W. GRAINEY, Esq.,  
Office of Executive Legal Director, Nuclear  
Regulatory Commission, Washington, D.C., 20555;  
On behalf of the Regulatory Staff.

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SARAH CHASIS, Esq., Natural Resources Defense Council, 15 West 44th Street, New York, N.Y., on behalf of the Hudson River Fishermen's Association

PAUL S. SHEMIN, Esq., Department of Law, 2 World Trade Center, New York, N.Y., on behalf of the Office of the Attorney General, State of New York; Department of Environmental Conservation of the State of New York; the State Energy Office, State of New York, and the New York State Public Service Commission.

CARL R. D'ALVIA, Esq., Village Attorney, Village of Buchanan, New York, 395 South Riverside Avenue, Croton-on-Hudson, New York; on behalf of the Village of Buchanan.

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P R O C E E D I N G S

CHAIRMAN JENSCH: Please come to order.

This proceeding is a prehearing conference in the matter of Consolidated Edison Company of New York, Inc. in reference to its Indian Point Station, Unit No. 2. The proceeding is related to a proposed amendment or an application by Consolidated Edison for an extension of the period of time within which once through cooling operation of the Indian Point Station, Unit No. 2, may be had.

The order convening this prehearing conference was given general public distribution which included publication in the Federal Register as reflected by Volume 41 of the Federal Register at page 45,919 and was published on October 18th, 1976. This date was selected after a consultation with the parties who indicated that either October 27th or 28th would be a convenient date for this prehearing conference.

This prehearing conference follows the previous one which was held in White Plains, New York, at which time consideration was given to a presentation respecting a suggestion for the preferred type of closed cycle cooling. And while in some respects these two proceedings have some common elements, they are distinct in the sense of two separate presentations by the Applicant -- or the Licensee, rather, the Consolidated Edison Company of New York, Inc.,

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1 and therefore, two separate proceedings are maintained.

2 Before we proceed, mention should be made that  
3 the microphones here are not at their peak performance and  
4 all persons speaking are requested to speak directly to the  
5 microphone with sufficient volume so that-- We won't need  
6 the microphones, I guess.

7 May there be appearance on behalf of the parties  
8 to the proceeding? Is there an appearance on behalf of  
9 Consolidated Edison Company of New York, Inc.?

10 MR. TROSTEN: Yes, Mr. Chairman. I am Leonard  
11 M. Trosten of the firm of LeBoeuf, Lamb, Leiby and MacRae,  
12 1757 N Street, N. W., Washington, D. C. I'm appearing here  
13 today on behalf of the Applicant, Consolidated Edison Company  
14 of New York.

15 Appearing with me here today are my associate,  
16 Mr. Eugene R. Fidell, and Mr. Edward J. Sack of the Law  
17 Department of Consolidated Edison. Mr. Sack's address is  
18 4 Irving Place, New York, New York.

19 CHAIRMAN JENSCH: Thank you, sir.

20 Is there an appearance on behalf of the Regulatory  
21 Staff of the Commission?

22 MR. LEWIS: Mr. Chairman, my name is Stephen H.  
23 Lewis, appearing on behalf of the Regulatory Staff.

24 I'm accompanied by Mr. Michael W. Grainey.

25 CHAIRMAN JENSCH: And your address is, please?

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1 MR. LEWIS: Washington, D. C. 20555.

2 CHAIRMAN JENSCH: Thank you, sir.

3 Is there an appearance on behalf of the State of  
4 New York?

5 MR. SHEMIN: Yes. On behalf of the State of New  
6 York, my name is Paul S. Shemin. My address is Department  
7 of Law, 2 World Trade Center, New York, New York 10047.

8 CHAIRMAN JENSCH: Thank you, sir.

9 Is there an appearance on behalf of the National  
10 Resources Defense Council?

11 MS. CHASIS: My name is Sarah Chasis, and I'm  
12 appearing on behalf of the Hudson River Fishermen's Associa-  
13 tion. My address is the Natural Resources Defense Council,  
14 15 West 44th Street, New York, New York 10036.

15 CHAIRMAN JENSCH: Thank you, ma'am.

16 I believe that's all the appearances. Is there  
17 any other formal party to this proceeding whose appearance  
18 should be entered?

19 (No response.)

20 CHAIRMAN JENSCH: I hear no such request.

21 I should state we have received a petition seeking  
22 to intervene in this proceeding by Carl R. D'Alvia, who  
23 resides in Croton-on-Hudson, New York, and he states he's  
24 the village attorney for the Village of Buchanan.

25 In this petition, permission is requested to

eb4 1 intervene in this proceeding.

2 There has been an answer filed by Consolidated  
3 Edison Company to that petition wherein Consolidated Edison  
4 takes the position that the petition is really for and on  
5 behalf of the Village of Buchanan and the petition therefore  
6 should address the interests of the Village of Buchanan in  
7 this proceeding. And unless there is objection to that posi-  
8 tion, we will so consider that the petition is for and on  
9 behalf of the interests of the Village of Buchanan.

10 Comments are requested by the parties now of  
11 record in this proceeding to that petition on that basis.

12 Consolidated Edison Company's answer has indicated  
13 it has no objection to the petition and sets forth reasons  
14 why it believes that the late filing by the Village of  
15 Buchanan is excusable, that it has interests separate and  
16 distinct from other parties that would not otherwise be ade-  
17 quately represented in the proceeding, and therefore recom-  
18 mends the acceptance of the petition for and on behalf of the  
19 Village of Buchanan.

20 What is the view of the Regulatory Staff?

21 MR. LEWIS: Mr. Chairman, our response to the  
22 Village's petition was filed yesterday. You undoubtedly  
23 have not yet received it. I will summarize what we said  
24 there.

25 We do not oppose the admission of the Village of

eb5

1 Buchanan into the two-year extension request proceeding.  
2 Although the petition is untimely, because of the present  
3 status of the extension of operation -- of the interim opera-  
4 tion proceeding, namely, that the Final Environmental State-  
5 ment will probably be published in the month of November but  
6 is not yet out, we do not believe that the untimeliness is  
7 an overwhelming factor in the situation and we don't think  
8 that the Village's admission into the proceeding would have  
9 the necessary effect of delaying that proceeding.

10 We did note in our response that there are  
11 numerous assertions in the petition which relate either to  
12 the Village's position that it is opposed to any type of  
13 cooling tower or a position that says that some type of cool-  
14 ing tower other than the natural draft wet cooling tower  
15 should be adopted, and we do point out in our response that  
16 both of these positions are inappropriate in the proceeding  
17 on the request for an extension of time.

18 With respect to the question of whether or not  
19 towers should be built at all, that really is not an appro-  
20 priate consideration in either of the two amended proceedings  
21 presently pending; with respect to the specific choice or  
22 type of tower, that of course has been the major point dis-  
23 cussed in the selection of the preferred type of tower system.

24 So we did point out that while we have no objec-  
25 tion to the petition, that it should be clearly understood

eb6

1 and in fact I might add that during oral discussions with  
2 Mr. D'Alvia last week in New York he confirmed for me that  
3 it is the Village's intention to have this petition pertain  
4 only to the extension of interim operation proceeding and  
5 not to the selection of a tower proceeding.

6 On that basis, we did not oppose its admission.

7 CHAIRMAN JENSCH: Very well.

8 The State of New York?

9 MR. SHEMIN: We have no objection to the ad-  
10 mission.

11 CHAIRMAN JENSCH: Hudson River Fishermen's Asso-  
12 ciation?

13 MS. CHASIS: The Hudson River Fishermen's Asso-  
14 ciation does not oppose the intervention. However, we had  
15 many of the same reservations expressed by the Staff con-  
16 cerning the broadness of the petition in terms of the issues  
17 and problems which the Village is concerned with.

18 And we would also point out that questions re-  
19 lated to whether or not a tower should be built and if a  
20 tower is built, what kind of tower, are not pertinent to this  
21 extension proceeding. And therefore, to the extent of their  
22 intervention, their evidence, or whatever the Village is  
23 planning to come forward with should be related solely to the  
24 two-year extension issue.

25 MR. TROSTEN: Mr. Chairman?

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1 CHAIRMAN JENSCH: Very well.

2 I should note the absence of Dr. Daiber. He is  
3 en route. He had expected to be here at 10:15. He had  
4 indicated if he were unable to arrive precisely on time that  
5 we should go ahead. He will be here and will participate in  
6 all matters.

7 Is there any objection by any party to continuing  
8 in his absence?

9 (No response.)

10 I hear no such objection.

11 He has been undoubtedly delayed by some traffic  
12 arrangement.

13 Excuse me. Do you wish to speak?

14 MR. TROSTEN: Yes, Mr. Chairman.

15 I have a comment on the remarks made by Staff  
16 Counsel and Counsel for HRFA.

17 As our answer indicates, Mr. Chairman, we support  
18 the granting of the petition for intervention by the Village  
19 of Buchanan. It is our view that this intervention will not  
20 result in a delay of the proceeding and we certainly do not  
21 want to see any delay in the proceeding.

22 However, we feel it is improper to make a judg-  
23 ment that issues pertaining to whether or not any type of  
24 closed cycle cooling system is necessary, those issues are  
25 pertinent in the two-year extension proceeding, and I don't

eb8

1 think that it's proper to take the position that the question  
2 whether any type of a closed cycle cooling system should be  
3 built is beyond the scope of the two-year extension pro-  
4 ceeding.

5           It is pertinent in the sense that the granting  
6 of the extension that has been requested preserves an option  
7 which we consider, and we have pointed this out in detail  
8 in our Environmental Report and in our Application, this  
9 option is preserved by the granting of the extension they  
10 have requested. So in that sense, the issue of whether any  
11 type of a closed cycle cooling system should be built is  
12 pertinent to this proceeding in that limited sense.

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1 CHAIRMAN JENSCH: Well, we'll give consideration to  
2 that phase of it as we proceed in this hearing, or prehearing  
3 or any evidentiary hearing.

4 The attention of the parties should be called to  
5 a communication which I received and which does not however  
6 reflect service on other parties to the proceeding. It came  
7 in yesterday and I did not have an opportunity to heretofore  
8 inform the parties. It's signed by Bernard G. Gordon and the  
9 correspondence paper indicates he is a Senator in the State  
10 of New York and he's chairman of the committee on the judiciary.

11 He has enclosed a copy of an article from the  
12 New York Times entitled "Geologists Find Radioactive Waste  
13 From Con Ed Building Up On The Hudson."

14 I will make this available to everybody for reading  
15 now, but I will try to arrange for its copying and general  
16 distribution to all parties and placing in the public record.

17 With that preliminary, perhaps we can proceed.

18 We would like to await Dr. Daiber's arrival before  
19 we indicate the view of the Board respecting the petition to  
20 intervene, but for the purposes of the proceeding so far if  
21 the Village of Buchanan's attorney desires to make any state-  
22 ment about the Village's participation he may do so.

23 Do you desire to make any statement, and if you do  
24 would you kindly give your full name and address for the  
25 Reporter?

mpb2

1           If I may repeat, for the present purposes we'll  
2 assume that the Village of Buchanan is a party. However, the  
3 formal order will await the arrival of Dr. Daiber, but if you  
4 desire to make any statement as the other parties have done  
5 here so far you may do so, if you will give your full name  
6 and address to the Reporter.

7           MR. D'ALVIA: Well, the only statement we would  
8 like to --

9           CHAIRMAN JENSCH: What is your name, please?

10          MR. D'ALVIA: My name is Carl R. D'Alvia. I am  
11 the Village attorney of the Village of Buchanan, New York.

12          CHAIRMAN JENSCH: And your address is?

13          MR. D'ALVIA: My address is 395 South Riverside  
14 Avenue, Croton-on-Hudson, New York.

15           The only statement we'd like to make in connection  
16 with the proceeding that's at issue here today and which you  
17 are going to have a hearing later on is we would like to wait  
18 -- the Village of Buchanan would like to wait until you re-  
19 ceive a Final Environmental Statement from your Board and also  
20 we would like to wait until the Fisheries statement or the  
21 report and the study that Con Edison has made with respect  
22 to the fish life in the Hudson River has been evaluated by  
23 them and then at that time we'll decide what to do. That's  
24 the reason why we're here. We'd like to -- we're in the  
25 position that we want Con Edison to have the extension of time

mpb3

1 for those reasons.

2 CHAIRMAN JENSCH: Did you hear the statement by  
3 Mr. Lewis of the Staff saying he met with you in New York the  
4 other day?

5 MR. D'ALVIA: Yes, sir, I have.

6 CHAIRMAN JENSCH: You heard his statement, did you,  
7 in which he stated, as I recall it, that you are interested in  
8 the proposed extension of time consideration.--

9 MR. D'ALVIA: Yes, sir.

10 CHAIRMAN JENSCH: -- and not the type of cooling  
11 tower to be built.

12 MR. D'ALVIA: Well, I think as far as the cooling  
13 -- well, we're interested in the cooling tower but I'm afraid  
14 we're too late with respect to that because I think it has  
15 already been decided by you gentlemen, by your Board that  
16 there is to be a closed cycle cooling tower and it's just a  
17 question of what type. Of course, we'd like to get into that  
18 also if we can, but if the Board still rules otherwise then  
19 we'll just stay in the one proceeding.

20 CHAIRMAN JENSCH: Well, as Mr. Lewis expressed it,  
21 as I recall it he said his conversation with you indicated that  
22 you were interested primarily in the request by Con Edison  
23 for a extension of time of operation of the once through  
24 cooling system and that is your position, is it?

25 MR. D'ALVIA: That's our position, that's right.

1 CHAIRMAN JENSCH: That being your interest and your  
2 position, we will consider your petition on that basis; and  
3 you so understand, do you not?

4 MR. D'ALVIA: Yes, sir.

5 CHAIRMAN JENSCH: And you don't disagree with  
6 Mr. Lewis's statement of his understanding of your position,  
7 do you?

8 MR. D'ALVIA: That's correct, sir.

9 CHAIRMAN JENSCH: All right.

10 Thank you very much.

11 We might note here that Dr. Daiber has arrived  
12 and we have just completed the statements by the parties of  
13 what they feel their views are about the petition to intervene  
14 by the Village of Buchanan. We will have an opportunity at  
15 a recess to consider with Dr. Daiber the statements that have  
16 been made.

17 We can now, then, proceed to a consideration with  
18 the parties of what they believe we should be doing at this  
19 prehearing conference as well as what other procedures might  
20 be undertaken to expedite this proceeding. Con Edison has  
21 sent us, or, rather, I did receive this morning a copy of  
22 a filing made by Con Edison dated October 20 addressed to  
23 the Director of Nuclear Reactor Regulation in reference to  
24 the subject of proceeding for extension of operation of once  
25 through cooling. The Con Edison document is in the Public

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1 Document Room, as I understand it, and was signed by William  
2 J. Cahill, Vice President of Con Edison, and the letter speaks  
3 to several matters, one of which is their anxiety to proceed  
4 promptly to this consideration of their request for extension  
5 of operation with once through cooling.

6 I'm not going to undertake to describe all aspects.  
7 The full document is available for review. As I understand  
8 it, one of their complaints however is that the Final  
9 Environmental Statement seems to be subject to some varying  
10 predictions of release, and I think Mr. Lewis indicated that  
11 it would be published in November. Is that correct?

12 MR. LEWIS: That's our present schedule, some time  
13 during November.

14 CHAIRMAN JENSCH: Can you do any better than that,  
15 "sometime during" before, after or in between?

16 MR. LEWIS: It's very hard for me to do. We're  
17 almost into November, so I will stand by "some time during  
18 November."

19 CHAIRMAN JENSCH: All right.

20 Very well, will the Applicant speak to the matters  
21 we should be getting on with in this proceeding?

22 By the way, if I might interrupt, we have talked  
23 about this other proceeding, the selection of the preferred  
24 type of cooling system which was the subject of presentations  
25 up in White Plains a couple of weeks ago. I wonder if, while

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1 there have been several briefings and discussions about the  
2 matter, is it much of a chore for the parties to address  
3 themselves to a briefing situation on the finality of the  
4 issuance of a permit from the Village of Buchanan, which I  
5 understand is at litigation. Certainly permits of this kind  
6 must abound throughout the land, not only in New York but in  
7 many other areas. Particularly important, however, in New York  
8 as Mr. Sack pointed out at our hearing that the court held  
9 as I understand it in the pending litigation that a village  
10 or a town in the State of New York can not interfere with the  
11 rendition of public utility services by a public utility.

12 Now my research into the law has indicated that  
13 that seems to be the uniform rule in the State of New York  
14 and while there has been injected this preemptive situation  
15 which seems to invite a lot of litigation or briefing, to  
16 what extent can we say that the State of New York's law is  
17 uniform certainly up and down the Hudson. The cases that I  
18 read in reference to Terrytown and I think maybe another  
19 town in there where Con Edison itself has been involved the  
20 law has been uniformly applied that a village or town through  
21 zoning can not prevent the utility from rendering its required  
22 utility services.

23 Does that -- the question I have, then, is does  
24 that permit such a finality that we can recognize that a  
25 permit is available and Con Edison then has received all the

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1 necessary permits so that while it's probably interesting  
2 from a philosophical point of view about preemptive aspects  
3 of federal legislation, we can wish them good luck and God's  
4 speed in carrying on their fine endeavor, but let's take a  
5 look at the law as it is and recognize that there has not been  
6 any exception to it and that therefore we can not be restrained,  
7 let us say, by the pending litigation and say that all appro-  
8 vals have been received?

9 Hudson River, would you care to speak to that matter?

10 MS. CHASIS: Mr. Chairman, I just wanted to point  
11 out that the appellate division of the State Courts of  
12 New York has ruled on the appeal of the Village of Buchanan  
13 and I believe Con Edison has had copies of the decision,  
14 which was issued on October 25.

15 CHAIRMAN JENSCH: To keep us from suspense, what  
16 did they do?

17 MR. SACK: If you will permit me to distribute it,  
18 to speak to this, first of all we just received it on Monday,  
19 the decision of the --

20 CHAIRMAN JENSCH: We are receiving from Mr. Fidell  
21 copies of the decision.

22 Will you proceed, Mr. Sack?

23 MR. SACK: To put this in context of the statement  
24 you just made, Mr. Chairman, in the first argument before the  
25 Supreme Court in Westchester County we did refer to the State

mpb8

1 doctrine which, as you have indicated, I thought was more  
2 conclusive than the federal preemption issue, so I put the  
3 State argument first and then the federal preemption argument  
4 last.

5           The Westchester Court, as you know, accepted the  
6 federal preemption argument and was silent on the state law.  
7 Now the appellate division first says that they agree with  
8 the special terms finding on federal preemption, then they  
9 also say that -- there is also a reference here to state law.  
10 It says:

11           "And conclude also that such action" --  
12 the denial of the variance --

13           "contravenes state law."

14           That's on page 2, the fourth line, the third and  
15 fourth line:

16           "...that such action contravenes state law."

17           So, in those four words in this very brief opinion  
18 they are referring to doctrine which the Chairman referred to  
19 a few minutes ago.

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1           So now the appellate division is saying that a  
2 denial of the variance offends both the federal law and the  
3 state law.

4           They altered the federal court's decision in a  
5 certain respect since the lower court enjoined the  
6 Village from regulating the construction in any manner. The  
7 appellate division thinks that that is going a little too far.  
8 What they do here is they delete from the lower court order  
9 that language of prohibiting regulation in any manner and  
10 they direct the zoning board to issue the variance to Con  
11 Edison for construction of the tower.

12           Then they say that Buchanan may regulate local  
13 and incidental conditions and in the opinion they say that  
14 they had imposed such regulation as is reasonable and not  
15 inconsistent with the construction of the proposed facility.

16           CHAIRMAN JENSCH: I presume that means the trucks  
17 bringing the material in will have to confine themselves to  
18 the right side of the road and not exceed the speeding limits  
19 and stop at stop signs.

20           MR. SACK: I believe that's right. I think that  
21 stems from an exchange I had with the court in the oral  
22 argument when they were pressing the question of not being  
23 able to regulate at all. And I had to admit that under the  
24 cases on federal preemption they could not interfere with  
25 constructing something the Commission had ordered us to

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construct but they could otherwise regulate, impose fire rules and sanitary rules and other the other incidental local regulations. And the court apparently accepted that argument.

Now getting back to your first question as to where this leaves us on the doctrine, it leaves us in the position where we have a very favorable appellate division decision. The order has not yet been entered and after the order is entered, the Village has 30 days to appeal.

So what the status of the case is really depends on what the Village does by way of appeal.

CHAIRMAN JENSCH: Well, maybe we should try to get the decision out right away, within the 30 days, on the preferred type of cooling system.

MR. SACK: It is my understanding the court enters the order and it is usually just a matter of days. It's nothing we have any control over. Then the 30-day period runs.

Now the problem with simply relying on your view of the law which is now confirmed by the appellate division is that the Village is arguing that in view of all the uncertainties -- and Mr. D'Alvia may be ready to express the Village's views better than I, since he's here. But basically their argument is that in view of all the uncertainties surrounding the construction of the tower, there is

eb3

1 not a sufficient direction to proceed to justify the applica-  
2 tion of these doctrines.

3 The Village doesn't really contest the existence  
4 of the state law doctrine which you referred to, and the  
5 federal preemption doctrine. They say they don't believe it  
6 applies to the facts of our case.

7 Now they have lost now before the Supreme Court  
8 of Westchester and the appellate division, and we just have  
9 to wait and see what their next move will be.

10 CHAIRMAN JENSCH: The next step is the Court of  
11 Appeals?

12 MR. SACK: The next step would be an appeal to  
13 the Court of Appeals.

14 CHAIRMAN JENSCH: Is that on a certiorari type  
15 of approach to the Court of Appeals?

16 MR. SHERMIN: Mr. Jensch, I think I can amplify.  
17 Because it was a unanimous decision upholding the court below,  
18 putting aside the technical modification, they have to move  
19 for leave to appeal to the Court of Appeals. And if the  
20 court denies that leave, that's the end of it.

21 MR. SACK: I hesitate to quarrel with the  
22 Attorney General's office on state law, but I since I'm not  
23 familiar with it, I happened to take the time to look at the  
24 civil practice law and rules yesterday before coming down.

25 And although one section says what Mr. Shemin

eb4

1 says, there is another section of the civil practice law  
2 which says you can appeal as of right when there is a con-  
3 stitutional issue, when there's an order from the Appellate  
4 Division where it directly involves the construction of the  
5 Constitution of the United States.

6 So because a constitutional issue was involved  
7 there may be an appeal as of right.

8 MR. SHEMIN: It gets a little more technical.  
9 Mr. Jensch may be familiar with various constitutional  
10 matters involving three-judge courts which have said pre-  
11 emptation involving the supremacy clause is not the type of  
12 constitutional issue one normally associates with the type  
13 of CPLR or FR or the federal rules when they discussed that.

14 Beyond that, the state law determination may  
15 preclude a constitutional appeal because, irrespective of  
16 the preemption issue, if the state law goes against them,  
17 they lose anyway.

18 CHAIRMAN JENSCH: Yes. I suppose the more the  
19 case involves several perhaps peripheral matters, they  
20 kind of bury the real issue of the state law that's involved  
21 here, and two out of three ought to be some basis for pro-  
22 ceeding, I would think.

23 But if the parties have anything that indicates  
24 that we have to wait out every possible time for appeal and  
25 argument between the sections of the appellate practices

eb5

1 of the State of New York, I think it might destroy the  
2 purpose of some of our inquiry.

3 We have noticed perhaps in some wholly unrelated  
4 proceedings that stay of mandates can be quite serious con-  
5 cerns in some types of proceedings, and if there is a stay  
6 of mandate here, why maybe we can proceed to accept the  
7 court's determinations. And if somebody wants to carry on,  
8 maybe we can proceed to do so. But I don't know that it  
9 subjects the determination by the court to any invalidity  
10 by endeavors to keep on going.

11 MR. SACK: Well, I don't think any additional  
12 briefing is required. The arguments are set forth in the  
13 briefs that we have already submitted and it has had a final  
14 decision. And it's not a question of a discretion to accept  
15 or reject a court decision. A case is in court and we have  
16 to await a final decision, and a decision is not final until  
17 leave to appeal has expired -- until rights to appeal have  
18 expired, and if an appeal is filed, until the appeal is  
19 decided.

20 I just don't think it's a question of discretion  
21 to accept or reject a decision that is not final. We have to  
22 wait until it's final.

23 CHAIRMAN JENSCH: Well, I think regulatory agen-  
24 cies are empowered to proceed to recognize the matters that  
25 pertain to their regulatory duties, and I think the Nuclear

eb6

1 Regulatory Commission itself has indicated that it will  
2 respect court decisions even before perhaps finality has  
3 been achieved in many respects.

4 And I think this Board may well decide that it  
5 will follow the pattern of the Commission in that regard  
6 and issue a decision subject of course to whatever ultimate  
7 disposition may be made by a court that would affect any  
8 administrative agency decision.

9 We'll give consideration to the matter.

10 Let us get on with this session of the prehear-  
11 ing conference.

12 Does the Applicant care to speak to some of the  
13 matters it believes we should be doing and undertaking, and  
14 what procedures we should be following at the present time?

15 MR. TROSTEN: Yes, sir.

16 CHAIRMAN JENSCH: Will you proceed, please?

17 MR. TROSTEN: Mr. Chairman, it is our view that  
18 although certain matters must await the publication of the  
19 Final Environmental Statement by the Regulatory Staff, we  
20 feel that we definitely can proceed forward in this hearing  
21 session to obtain on the record the Hudson River Fishermen's  
22 Association's contentions with regard to the application  
23 that Con Edison has filed.

24 I think we should ascertain here whether we're  
25 dealing with purely legal issues or whether we are dealing

eb7

1 with legal and factual issues so that we can decide what type  
2 of a hearing, what type of a proceeding is necessary.

3 We also should attempt to ascertain from the  
4 Fishermen whether there is any discovery that they feel they  
5 need above and beyond all the information which they are  
6 receiving as a matter of course in accordance with the license  
7 requirements.

8 Finally, it seems to me that we ought to iden-  
9 tify to the extent that we can any of the HRFA witnesses and  
10 any cross-examination that they intend to conduct.

11 We are of course, Mr. Chairman, dealing with a  
12 very limited proceeding here. We're dealing with essentially  
13 a one-year extension of the period of once-through cooling  
14 for Indian Point 2, the period having been automatically  
15 extended for essentially a year by virtue of the Regulatory  
16 approvals provision.

17 There is also the fact that the Indian Point  
18 Plant did not operate during the 1976 spawning season, as  
19 pointed out in the letter to the Regulatory Staff which you  
20 mentioned a moment ago.

21 So we are dealing here with a very limited pro-  
22 ceeding and it seems to me that what we want to do is move  
23 forward as rapidly as we possibly can, and then recognizing  
24 that it may well be necessary to reconvene after the Final  
25 Environmental Statement is published.

eb8

1 We have had our meeting as the Chairman sug-  
2 gested, and we've had some general discussions, but I'm  
3 afraid I don't have anything very specific that we can offer  
4 to you, Mr. Chairman, in terms of specific contentions or  
5 lists of witnesses or anything of that sort. I think it is  
6 really necessary that Counsel for the Hudson River Fisher-  
7 men's Association address these points, and I understand she  
8 is prepared to do so.

9 CHAIRMAN JENSCH: Before she does, there have  
10 been references in your letter of October 20th, or I think  
11 it may be in the Village of Buchanan's petition, to the on-  
12 going ecological studies being undertaken by Con Edison.

13 MR. TROSTEN: Yes, sir.

14 CHAIRMAN JENSCH: And as I understand, it will  
15 be available in January, 1977. I don't have a recollection  
16 of previous predictions of the anticipated completion of  
17 that study from some of the hearings we had. But I think the  
18 predictions of its completion are on the same par with some  
19 predictions we get on other environmental matters from some  
20 of the parties in the proceeding.

21 I wonder, are there some data from your study  
22 that you could give to the parties now or in the next little  
23 while so that they can kind of get on? I wonder what their  
24 contentions would be, lacking your study, because the argu-  
25 ment as I recall it by Con Edison has always been don't do

eb9

1 anything until we get the study. Now we're working on it but  
2 it will be another six months or another year, but we're  
3 doing a great job.

4 And so we held off doing anything about it.

5 Don't they have to have the study or some data  
6 to know what their contentions are? Maybe they'll agree that  
7 there is a great radioactive buildup in the Hudson River  
8 and you should stop operations; whatever your study says.  
9 I don't know.

10 MR. TROSTEN: Let me speak to that, Mr. Chairman.

11 We have been estimating and planning for sub-  
12 mission of the report in January, 1977; for I'd say four or  
13 five years that date has been used. I know it was being used  
14 in 1973 and '74. It's a date that goes back several years.  
15 We are essentially on schedule.

16 The work in preparing that report has been under-  
17 way for the past several months, and of a most intensive  
18 kind, under the direction of Dr. McFadden, and working with  
19 Texas Instruments and the other contractors. It is indeed  
20 a massive document which represents the culmination of years  
21 of effort.

22 The information that's contained in this report  
23 also reflects reports that have been produced over the past  
24 several years, all of which are furnished to all the parties  
25 on an absolutely current basis.

eb10

1                   What we intend to do of course is to synthesize  
2 the entire effort in this document, and so the basic data  
3 are available to all the parties and have been available to  
4 all the parties all along.

5                   I would add that the basic data upon which a  
6 decision needs to be made here whether or not to grant us a  
7 one-year extension have been in the hands of the parties  
8 since August of 1975. We submitted in June of 1975 an  
9 Environmental Report, and in August of 1975 we supplemented  
10 that by submitting the multiplant report which contained the  
11 1974 year class data.

12                   What will be coming in in January of 1977 is the  
13 synthesis of the entire effort and the 1975 year class  
14 data plus many other things. This report is indeed a massive  
15 effort that reflects all the work that has been going on.

16                   So our position is that the record is complete  
17 with regard to the decision that's before the Board right  
18 now, which is whether to grant us a one-year extension. We  
19 feel that there's enough information plus of course the flow  
20 of information that's been coming in which could of course  
21 be commented upon as necessary.

22                   But we feel that the information is available to  
23 the parties on which to base their contentions for the limited  
24 decision before us now.

25                   CHAIRMAN JENSCH: Well, the only problem I have

eb11

1 is that your summary of all the data might be the most  
2 important part of the entire submittal in this sense, that  
3 you may be finding-- I don't know whether the background of  
4 this New York Times article is correct or not, about the  
5 buildup of radioactivity in the Hudson River, but if you  
6 should agree that there's a substantial buildup and this  
7 should be terminated, operation should be terminated until  
8 the cooling towers are set up, it might eliminate some of  
9 the contention, I guess.

10 So I think your conclusions are the most impor-  
11 tant because your inferences from the data might be other  
12 than what perhaps those who haven't followed this so closely  
13 might be able to do.

14 What I have in mind really is is there much we  
15 can do-- While we do have a Draft Environmental Statement  
16 and the Staff's Final Environmental Statement may be modi-  
17 fied in parts or in portions, we don't have anything in a  
18 summary form from Con Edison from its study. Do you have  
19 any tentative drafts like the Staff's Draft Environmental  
20 Statement which may be subject to modification, just as  
21 the Staff's Draft Environmental Statement is subject to  
22 modification? But do you have some preliminary drafts that  
23 the parties could have that you're drawing up?

24 Do you have a date in January? January 2nd, or  
25 something like that, or the end of January '77? We're

eb12

1 almost into November. It will have to go to the printer  
2 and as I recall some of the presentations of Con Edison  
3 of bound and fine volumes, if it goes into the bindery it  
4 will take some time. I would think some preliminary drafts  
5 might be helpful.

6 MR. TROSTEN: I think it's absolutely vital,  
7 Mr. Chairman, that we not make the mistake of treating as  
8 the subject of this hearing the January, 1977, report for  
9 the following reason:

10 This hearing is for the purpose of determining  
11 whether we should be granted a two-year extension. The  
12 1977 report is going to have to be the subject of a very  
13 detailed Staff evaluation. It's going to be the subject of  
14 another Environmental Impact Statement. It's going to take  
15 the Staff a fair amount of time, judging by past experience,  
16 to prepare an Environmental Impact Statement on the January,  
17 1977, report, given the amount of time that it took them to  
18 prepare the Environmental Impact Statement on the extension  
19 request that we have filed. They're going to be at that for  
20 a while.

21 And I think that it's completely wrong to attempt  
22 to hold up this hearing for this Board to consider all the  
23 analyses that are going to be in that report, which is a  
24 huge document, as part of the decisional process in deciding  
25 whether we should be granted this one-year extension.

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1           We filed the information that ALAB-188 suggested  
2 should be available for a decision to be made. We presented  
3 empiracal date from operation during the first year of opera-  
4 tion to be presented to the Board for its consideration in  
5 this regard. We don't have preliminary -- among other things  
6 we don't have preliminary drafts to be submitted and much more  
7 importantly this is not the proper subject of this hearing.  
8 The subject of this hearing is the document that we filed  
9 over a year ago, and the environmental report that we filed  
10 over a year ago. The Cost-Benefit analysis that we submitted  
11 then is entirely different than the Cost-Benefit Analysis that  
12 we're going to be submitting early next year, which is going  
13 to be on the basic question of whether or not we should have  
14 closed cycle cooling at Indian Point 2.

15           So we're talking about an entirely different present-  
16 ation here and we feel it would be completely misplaced to  
17 defer deciding this question in order to take a look or re-  
18 view because that review is going to take a very long period  
19 of time we would predict.

20           CHAIRMAN JENSCH: Well, we'll hear from the parties  
21 respecting this matter.

22           The Staff?

23           MR. LEWIS: Mr. Chairman, there are a number of  
24 points which the Licensee has raised which I would like to  
25 address, and I think I will begin first of all with the points

1 that were addressed just now with regard to the extension of  
2 interim operation proceeding.

3 With regard to the January, 1977 report it is the  
4 Staff's understanding that the Applicant intends this report  
5 to supply the basis for its application for amendment to the  
6 license which would lift the requirement of any closed cycle  
7 cooling and indeed it is correct that on that basis a very  
8 extensive environmental statement will have to be prepared by  
9 the Staff. And on that basis it does present a broader ques-  
10 tion than simply the question of an extension for a finite  
11 period of time of the operation with once through cooling.

12 So on that basis it has been our position, as  
13 stated in the Draft Environmental Statement, and I believe  
14 this will also be reflected in good part in our Final  
15 Environmental Statement, that although the ongoing reports  
16 of the Applicant have provided justification for a certain  
17 deferral we believe that that deferral for that reason was  
18 essentially a one year deferral and it's our belief that that  
19 one year deferral has essentially run now. It's the period  
20 which we have essentially completed.

21 And indeed I might add that, you mentioned to  
22 Mr. Trosten, whether or not preliminary drafts of his January  
23 '77 report might not be available. In fact, I think it is  
24 fair to state that the Staff, particularly as part of an  
25 inter-agency task force studying the Hudson River Fishery, has

mpb3

1 been receiving on an ongoing basis much of this data. Now  
2 of course it's also true, as Mr. Trosten pointed out, that  
3 this data is officially before this Board and before the  
4 parties in the form of all the various reports that are a  
5 part of this docket and of course the report on the extension  
6 of operation. But, in addition to that I believe it is fair  
7 to say that the Staff not only has seen all this data that  
8 everyone else here has but has had a continuing discussion  
9 with the Licensee as part of this inter-agency task force,  
10 and in essence has seen much of this data and discussed with  
11 the Applicants much of the analyses.

12 Now it is true that I'm sure any Staff expert look-  
13 ing at these things would not say that-- certainly those experts  
14 want to see the January '77 report, and you're quite correct  
15 that the kind of summarization and analyses and synthesizing  
16 that will be contained in that report will be valuable. It  
17 is true because of the complexity of that report and because  
18 of the fact that it is intended that that supply the basis  
19 for really what is going to be the next amendment proceeding--

20 CHAIRMAN JENSCH: May I interrupt?

21 The question I have, and let me ask you, while that  
22 report, the '77 report may be the basis of another type of  
23 request are not those data nevertheless pertinent to a consider-  
24 ation of an extension of once through cooling so that the fact  
25 that Con Edison plans to use that '77 report for some other

1 thing that's coming down the pike, we still want to know, do  
2 we not, all that we can know about the Hudson River now so  
3 that we don't shut our eyes to the things that are going on  
4 when we're talking about an extension of once through cooling?

5 MR. LEWIS: Well, Mr. Chairman, I think one thing  
6 that Mr. Trosten pointed out is that their basic case for the  
7 two year extension request was as set forth in their environ-  
8 mental report filed on that subject.

9 CHAIRMAN JENSCH: That's no limitation in our  
10 consideration.

11 MR. LEWIS: No, it certainly isn't. However, he  
12 did say that's what they're relying upon. It certainly is  
13 no limitation upon your consideration.

14 The second thing I'm trying to emphasize is that  
15 indeed you're correct, that much of that data is valuable.  
16 The point is that that data, as he himself stated, has in  
17 fact been before the parties for some time.

18 Now the Staff sees substantial beneficiality in  
19 proceeding to a decision on the request for the two year  
20 extension and attempting to achieve some finality on that  
21 point. We believe this also circles around and comes back  
22 to the same emphasis that we now have on attempting to achieve  
23 finality on the cooling tower selection proceeding, so that  
24 there are certain fixed points with respect to time schedules,  
25 with respect to obligations of the Licensee that become fixed.

mpb5

1 And because of the way the Indian Point 2 license is structured  
2 it is true that perhaps we are probably going to see indeed  
3 another amendment request which we have just described.

4 But we do believe that the data that we believe is  
5 important, and the DES basically describes this data as data  
6 which would compare the various years as to information on the  
7 impacts on the striped bass during those years, and we believe  
8 much of that data has already been made available to us, an  
9 analysis of it has been reflected in the DES and I'm sure  
10 that more analyses of it will be reflected in the FES.

11 But it is our position that the Board should pro-  
12 ceed to a decision in this proceeding on the two year exten-  
13 sion request without awaiting what would have to be first of  
14 all the submission of the January '77 report and second of  
15 all what I in all candor do have to acknowledge would probably  
16 be a lengthy review of that report whose end date I really  
17 have no idea.

18 CHAIRMAN JENSCH: I don't understand your statement  
19 If you say the data have been available to the parties for a  
20 long period of time I presume they have been looking at it  
21 and evaluating it and you say it is already reflected in  
22 part in the DES and will probably be reflected more in the FES.  
23 You know we don't have to turn it up again just because it has  
24 come in with a summary on it, so the fact that, as I under-  
25 stand the implication of Con Edison's statement that all of

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1 these data have been supplied to the parties all along that  
2 should push the other parties to hurry up and come in with  
3 your contentions, but we've got a lot of time to come up with  
4 our summary. So it cuts, it seems to me, both ways. If the  
5 data are available and they have been available to the parties  
6 over the years that this has been developed I take it the  
7 outside date must have been very "conservatively" estimated  
8 for January, 1977 as if certainly we can't think of anything  
9 that would delay it beyond that date. So surely it's easy  
10 to come within their projection. But if everybody has had  
11 it let's take a look at it now to the extent that we can.  
12 Either we get contentions, it seems to me, of the parties  
13 about the data or we get the summary right away. Maybe we  
14 can get the summary and rush into this hearing with no delay  
15 at all. Maybe the Staff would like to spend more time eval-  
16 uating it and maybe Con Edison will say on the basis of this  
17 we're going to ask for something else later. But it seems  
18 to me the whole environmental picture has to be taken into  
19 consideration as to what it looks like as of the date of the  
20 hearing and Con Edison apparently has been developing a lot  
21 of data and that's grand, and exchanging it and submitting it.  
22 That's great, but if it's good enough for the parties to  
23 come in with the contentions it's good enough for the -- for  
24 Con Edison to speak up about it right now.

25 Did you have something further?

mpb7

1 MR. LEWIS: Mr. Chairman, I recognize that it is  
2 a hazardous undertaking to attempt to draw a line as to  
3 data which is on the side where you feel you have had suffic-  
4 ient and data which you feel you have to wait further time  
5 for. I'm reluctant to, you know, attempt to draw a line.  
6 I discussed this with my environmental experts and they said,  
7 Well, you know, we're uncomfortable trying to draw a line too  
8 between data which we think is sufficient for the purposes of  
9 this amendment proceeding and data which, while we certainly  
10 want to look at it, we feel could be looked at in the context  
11 of a different amendment proceeding and I recognize that's  
12 a difficult line to draw.

13 However, the position we have taken is that while  
14 we felt that a one year delay was justified to look at this  
15 data particularly the comparison between years, we did not  
16 expect that that data would overturn our preliminary opinions  
17 that we had formed over the course of much study of the  
18 Indian Point area and it is our position and will continue to  
19 be in the Final Environmental Statement that the biological  
20 data base is sufficient to proceed to a decision in this  
21 amendment proceeding. That of course is for the Board to  
22 determine, but that will be our position.

23 CHAIRMAN JENSCH: I think one of the concerns the  
24 Board might have is, and I think that has been submitted and  
25 exchanged as Con Edison has done with the parties, should get

mpb8

1 some sort of response by the parties when we're talking about  
2 what will be the environmental affect of extending the time  
3 for once through cooling and I think that's where we are now.  
4 Con Edison can use those data for something else later. There  
5 is no restriction on their doing so, but let's not shut our  
6 eyes to things that Con Edison has kindly exchanged to all  
7 parties in the meantime.

8 MR. TROSTEN: May I speak to that, Mr. Chairman?

9 In the first place, we certainly do not in any way  
10 want to restrict the Board's attention in this hearing to  
11 just those matters that we submitted in August of 1975.  
12 Obviously if there are other matters that are contained in  
13 reports that have been submitted between August, 1975 and the  
14 date of the hearing and somebody believes that these matters  
15 raise an issue with regard to the matters in contention, it's  
16 fair game, Mr. Chairman, for consideration.

17 That, however, is entirely different than taking  
18 the position that a document which is still in preparation and  
19 on which there is a tremendous amount of effort going in --  
20 and by the way, I would say we're not dealing just with a  
21 summary, Mr. Chairman, far from it. There have been many  
22 other cases where data have been available, for example, but  
23 they haven't been synthesized and analyzed --

24 CHAIRMAN JENSCH: What do you mean "synthesized?"

25 Reduced or called out or made comprehensive or what is your

mpb9

1 process? It's

2 MR. TROSTEN: It's kind of like expediting, it gets  
3 to be a different term.

4 MR. SACK: I can give you examples if you like,  
5 Mr. Chairman, of what's going on. For example, as you know,  
6 a critical item was the entrainment mortality of organisms  
7 passing through the plant. And keeping in mind that we're now  
8 required to look at all plants, there are studies going on  
9 now on entrainment mortalities at Bowline and Roseton and at  
10 Indian Point. We have developed a problem that -- Our latest  
11 findings are that the nets-- because of the high velocities  
12 in the discharge you're getting a higher mortality in the  
13 discharge because of the action of the water into the nets  
14 as opposed to the much lower velocities you have in the intake.  
15 So that the problem of net-induced mortality has become  
16 a critical thing.

17 Now in the past our documents have just presented  
18 the data. It shows what we show, what survival is in the  
19 intake, what survival in the discharge, and that's the data  
20 we have been presented to date.

21 When we say "synthesized" what we mean is that  
22 Dr. McFadden and Mr. Lauer and the Texas Instruments people  
23 are getting together, and Dr. Marcellous of our staff, are  
24 getting together and analyzing these data, looking at the  
25 studies made of net induced mortalities, looking at the data

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on entrainment mortalities and then reaching a conclusion of what the entrainment mortality is at each of these plants, and that's what we mean by synthesizing the data.

Now this is just one example and it's being done with several points.

The reason we don't have drafts is that that operation -- these discussions are going on at this time and the results of those discussions must then be given to Lawlor, Matusky and Skelly to put the appropriate factors into the model and then run the model. So the life cycle model has not yet been run with these latest factors, with the '74 and '75 data.

CHAIRMAN JENSCH: I think one of the problems that everybody has in these things is that we don't run into paralysis by analysis.

(Laughter.)

We can always find something new that hasn't been considered and they will have to run another study, but I think the only inquiry I have is that from what you have said this study is coming to a conclusion of a fairly comprehensive review of the whole Hudson River and I think all those matters probably are pertinent to almost every phrase of consideration of what to do about cooling. I think there is where we are as to what we can do with what we have.

Have you concluded, Mr. Lewis?

mpb11

1 MR. LEWIS: I think probably so on the points  
2 raised as to the two year extention. I will of course have  
3 comments later on with regard to the pending matters on  
4 the selection of the cooling tower.

5 CHAIRMAN JENSCH: The State of New York?

6 MR. SHEMIN: Yes.

7 We stated our position briefly in our submittal,  
8 our comments on the DES and we would like to state them in  
9 the context of what has gone on so far.

10 Our problem relates to the fact that we do not  
11 think Con Edison has justified the initial basis for the  
12 issuance of any amendment, and that is before they can get  
13 an amendment, whatever the benefits might be in terms of  
14 -- or the purported not benefits, but the harm to the fishery  
15 or lack of harm from the two year delay, they have to demon-  
16 strate that the data being collected in the remainder of the  
17 period or the analysis going on with respect to data already  
18 collected will be useful in supporting their arguments, the  
19 ones they would presumably present in the future about modi-  
20 fication of the license.

21 The reports that they just referred to which were  
22 submitted in support of their application, the two blue  
23 volum , I think they are in support of the environmental  
24 report and the multi-plant impact study, as far as we're  
25 concerned contain nothing but generalizations which basically

1 state in broad strokes their general arguments as to their  
2 position, the same position they have had since the original  
3 hearings.

4 Our opinion is that there is no justification for  
5 reconsideration of any issues that were not in dispute at  
6 the original hearing, that in fact when one eliminates a lot  
7 of the technical language used one can boil down the issues  
8 that would have controlled the determination there to no  
9 more than certainly less than a half dozen, probably three or  
10 four relating to F-factors, compensation and entrainment  
11 mortality perhaps, the contribution of the Hudson Fishery  
12 to the mid-Atlantic and we feel that Con Ed, nowhere in  
13 those reports or in their application have they specifically  
14 said this is the issue which remains in dispute or which we  
15 feel we can change the Board's mind on, these are the data  
16 that we have collected or are finishing our collections for,  
17 this is the analysis we plan to do and based on what we've  
18 got so far this is why we think the future course will lead  
19 to a conclusion again that the cooling towers should be re-  
20 moved and that's why we want the extension. They list  
21 sources of data and they list general conclusions and they  
22 never tie the two together sufficiently to permit either  
23 the Board or the State of New York or presumably the Staff  
24 to look and see whether in fact the data they are collecting  
25 in house really can be said to support their principles.

mpbl3

1           For instance, the multi-plant report which they  
2 referred to as providing support for their application, the  
3 only substantive compensation material in that report relates  
4 to fishery data running from the 1930s through I think 1972,  
5 which was available in the old proceeding, and statistics  
6 of a very limited nature regarding Indian Point regional fish  
7 collections through seining in I think '71 and '72, data  
8 that was available in the old proceedings. There is no  
9 analysis of new data in that report or any specific indica-  
10 tion what new data in the last three years of sampling will  
11 be used to indicate that compensation exists. The same thing  
12 goes for these other issues.

13           We also feel that if they had confined themselves  
14 to the issues in controversy instead of filing report after  
15 report after report, and those issues mentioned, those four  
16 issues I mentioned really were the only issues remaining in  
17 controversy, they had refrained from developing yet another  
18 model and another model after that. There have been two later  
19 models since this last proceeding. No one has disputed the  
20 essential accuracy of the Staff's model or Con Ed's model.  
21 Once you remove certain assumptions, such as F-factors and  
22 compensation, if they had limited their study to the specific  
23 issues in controversy we wouldn't be waiting for this monument-  
24 al January, '77 report.

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We appreciate having all the data. We think, as

mpbl4 1 the Chairman suggested, that it is going to be very useful  
2 in a great many ways relating to the Hudson. We don't think  
3 that most of the material they're going to be providing will  
4 have any relevance to a license amendment application which  
5 is supposed to be based on new empirical data gathered during  
6 actual operation of the system. And therefore we think before  
7 any license amendment can be granted for the two year exten-  
8 sion the Company should be required to specifically state what  
9 it is in their program that relates to issues that are going  
10 to make the difference at an eventual hearing, the extent to  
11 which it is supported by the study.

12 CHAIRMAN JENSCH: Would you care to answer that?

13 I think, as I understand the State of New York,  
14 he's saying what data do you specifically rely on for your  
15 request for a two year extension.

16 MR. TROSTEN: Oh, yes, certainly, Mr. Chairman.

17 CHAIRMAN JENSCH: I mean, as I understand, the  
18 State of New York is saying we have had a great volume of  
19 reports, but what is it that is sufficiently material to the  
20 real issues.

21 MR. TROSTEN: First of all, let me say, Mr. Chairman,  
22 that his statement is replete with errors. The statement  
23 that there is no basic dispute over the model, the statement  
24 that there are just certain issues in dispute I think reflects  
25 a misconception of what the record of this proceeding has been.

mpbl5

1 It seems to me what Mr. Shemin is saying is that he's basically  
2 arguing that all these things are res judicata and I think  
3 that if he just wants to present a legal brief on this ques-  
4 tion that perhaps all we need to do is to file a brief on  
5 this issue, Mr. Chairman.

6 CHAIRMAN JENSCH: I don't think the Board would  
7 go along with that, but go ahead.

8 MR. TROSTEN: I feel that basically the data  
9 upon which we are relying for our application are those data  
10 which are set forth in the environmental report which we filed  
11 in June of 1975 and in the supplement which we filed in  
12 August of 1975. The data are also the data which are contained  
13 in the answers to the Staff questions.

14 Now once we receive additional contentions, once  
15 we receive specific contentions as opposed to legal arguments  
16 and theories of what the Board's decisional process should  
17 be in this case, we will then of course be prepared to offer  
18 any and all evidence that are necessary to address the issues  
19 in contention.

20 The problem is, Mr. Chairman, that all we're  
21 getting is legal arguments and constructions of what the Board  
22 should be doing in this proceeding. The Board is not bound  
23 of course by anyone's, any party's theory of how this case  
24 should be decided and what we need to hear, sir, are some  
25 contentions that we can then address.

mpb16

1 MR. SHEMIN: Mr. Chairman, just very briefly, there  
2 is no technical individual in this room or working for any  
3 of these parties that will claim that if you eliminate the  
4 discrepancies in F-factors and compensation and entrapment  
5 mortality from the model that Con Ed uses and the model that  
6 the Staff uses, if you eliminate those discrepancies the  
7 results of the models basically produce numbers close enough  
8 so there is no quibbling between the two systems. There are  
9 minor abstruse technical arguments about little refinements;  
10 neither Con Ed's experts nor the Staff's experts in this  
11 proceeding will quibble as to the small differences you get if  
12 you use the same F-factors, entrapment mortalities and  
13 compensation numbers, that's not a legal argument, that's a  
14 factual argument. It goes to the heart of whether one has  
15 to go through a detailed argument as to which model is better  
16 when in fact what we're really talking about is whose F-factors,  
17 entrapment mortality and compensation curves should be used.  
18 That's the essence of the argument and it is to those issues  
19 that the data must be directed in order for us to provide  
20 anything productive for the proceeding. That's not a legal  
21 argument, that's a factual argument. We are asking factually  
22 what is it about the data that is being gathered, the empira-  
23 cal data gathered during actual operation as is the language in  
24 the license and the language in the NRC ruling and, I believe,  
25 in most of these rulings. What is there about the data that

mpbl7

1 has been gathered that could change the Board's determination,  
2 or the conclusions reached as a result of the evidence presented  
3 on those issues? We haven't gotten anything on that.

4 MS. CHASIS: HRFA would like to speak to this  
5 issue. I think that Con Edison seeks to shift the burden of  
6 proof here. It has presented its reports and a massive amount  
7 of data over the last year and a half. What it has failed to  
8 do is specify clearly what information has been gathered  
9 which would alter the conclusions which led to the establish-  
10 ment of the present termination date.

11 Now our position is that the question of the termina-  
12 tion date was litigated extensively in the Indian Point 2  
13 licensing proceeding, that Con Ed is under a burden to come  
14 forward and show that the findings upon which the 1979 date  
15 was established are altered by the data which they have coll-  
16 ected in that either the evidence demonstrates that the impact  
17 is not what was originally predicted and what the termination  
18 date was predicated upon or that their data to be gathered  
19 during the course of their research program will answer these  
20 critical questions.

21 Now the original finding was that the research  
22 program did not appear to answer, would not answer in the  
23 time frame which was contemplated, the critical questions  
24 about compensation, F-factors, and the other matters which  
25 Mr. Shemin has enumerated and which are the key questions.

1                   So that the burden must be clearly placed on  
2 Con Ed to come forward and show these -- show how their data  
3 really demonstrate with specificity how these data would alter  
4 the conclusions upon which the decision was made and until  
5 they do that, and they have not done that, it really places  
6 I think an unreasonable burden upon the other parties to  
7 respond to that.

8                   Now, in connection with their justification for the  
9 extension, what they have stated is that the achievement --  
10 that they believe there will be an achievement of a substantial  
11 improvement in the biological data base at the completion  
12 of its research program. That's what they state in their  
13 environmental report.

14                   Now we believe that the analysis which the Staff  
15 has undertaken of the data which has been submitted indicates  
16 that there is no data indicated that the predicted impact  
17 will be different than what was originally contemplated or  
18 that critical answers are going to be provided to the ques-  
19 tions concerning compensation and the other issues upon which  
20 the whole question of whether or not we have a once through  
21 or closed cycle cooling system turn.

22                   The Staff -- and I would just like to quote some  
23 of the material from the DES with which we agree. The Staff  
24 has concluded approving its earlier conclusion in the FES  
25 for Indian Point Number 3 which, I would hasten to add, was

mpbl8

mpb19 1 found to be adequate by the full Commission and was found to  
2 constitute the fresh look which the Appeal Board in ALAB-188  
3 said was required upon its review of the Indian Point 2 state-  
4 ment, and this is a quote from the DES now:

5 "If there is to be a quantum jump in ability  
6 to forecast the impact of plant operation on the  
7 Hudson River eco-system and on the striped bass  
8 and on the air population in particular as a result  
9 of the extensive TINYU and QLM environmental studies  
10 presently scheduled to be completed by January 1,  
11 1977 that quantum leap will be based primarily on  
12 the 1973-74 cycle of data and analysis."

13 Now with respect to the 1973-74 data which has  
14 already been presented and was analyzed by the NRC Staff the  
15 following conclusions were reached:

16 "The Staff has found no new information in the  
17 Applicant's environmental report for a two year  
18 extension that requires changes in the Staff's end of  
19 the year striped bass model as applied to the 1973  
20 data."

21 Another quote:

22 "However, the Applicant's analyses, and this  
23 is on compensation, do not remove the Staff's concern  
24 for the long term consequences of protracted and un-  
25 controlled density independent mortalities, such as

mpb20

1 the cropping imposed by power plants since the range  
2 of cropping rates which could be offset by compensa-  
3 tory responses and the degree of the offset are not  
4 known."

5 And I would also point to a statement in the  
6 Indian Point 3 impact statement by the Staff, that:

7 "Con Edison has not and will not be able to  
8 quantify the degree of natural compensation by 1977.

9 "Finally, that the Staff emphasizes however, that  
10 the 1974 data"

11 -- this is on distribution and abundance of end of the year  
12 life cycles of striped bass and other species --

13 "do not provide and the 1975 data will not pro-  
14 vide the basis for a quantum jump in ability to  
15 forecast the impact of plant operation on the Hudson  
16 River eco-system or fish populations."

17 And as we stated in our comments on the draft  
18 statement we think that the above quotes demonstrate that  
19 Con Edison after years of research, and I would argue starting  
20 in 1965 with the Hudson River Fisheries investigation has to  
21 date been unable to come forward with any evidence to alter  
22 the conclusions which were reached in the Indian Point 2  
23 proceeding and upon which the 1979 termination date was estab-  
24 lished.

25 The critical '73-74 data in the Staff's eyes is

mpb21

1 already before the agency. It has been found not to justify  
2 the elimination of the requirement of closed cycle cooling.

3 So I think that there has been a failure to come  
4 forward and demonstrate that any further delay will allow  
5 for provision of data which will alter the predictions concern-  
6 ing the plant or answer any of the critical questions.

7 That is HRFA's position with respect to the  
8 biological data and I think that the Staff's analyses in its  
9 draft impact statements support our position and our position  
10 is very much based on those statements by the Staff.

11 Now the Staff has raised really other issues to  
12 justify two years of extension. They have said the new data  
13 may justify one year, but not two years and --

14 CHAIRMAN JENSCH: Is that their language, that it  
15 may? I mean I suppose it could "may" either way. If it is  
16 "may" it doesn't help anybody anywhere I don't think because  
17 anything could possibly do something. But anyway, we'll check  
18 it out later.

19 MS. CHASIS: Our position is that their conclusions  
20 about the data really indicate there is no basis for a two  
21 year extension. I believe that the Staff's position is that  
22 one year is justified in terms of collection of the biological  
23 data, but not two years.

1           The Staff's position on the need for the second  
2 year of delay is based upon the analysis that EPA will be  
3 considering the question of whether or not Con Edison must  
4 construct a closed-cycle system and until that final decision  
5 of EPA is reached, the NRC should not proceed.

6           Now our position is that that's an absolutely  
7 incorrect construction of the responsibilities of the NRC  
8 and the EPA and that in fact, by going forward and granting  
9 a deferral, NRC is in a sense undercutting EPA which has  
10 proposed itself 1979 as the termination date for closed-  
11 cycle cooling at Indian Point.

12           If this agency says Yes, Con Edison, you may  
13 have a two-year deferral until 1981, then EPA is going to  
14 be faced with that fact and rather than the agency's de-  
15 ferring to EPA, I think by granting the extension it would  
16 rather undercut EPA's own actions.

17           Now I think, secondly, on the EPA-NRC question  
18 that until EPA has acted with finality, the NRC has inde-  
19 pendent NEPA responsibility to exercise and its authority is  
20 in no way undercut by the pendency of the EPA proceeding.

21           So I think on the basis, the Staff's basis for  
22 justifying the second year, the HRFA finds that that basis  
23 is totally inadequate.

24           That is our position, both with respect to Con  
25 Edison's justification and the Staff's justification for the

eb2

1 granting of a two-year extension.

2 Now our final position, I would like to add,  
3 should await and will await the issuance of the FES.

4 CHAIRMAN JENSCH: Well, there's an old presump-  
5 tion, as I recall it, a condition once established is pre-  
6 sumed to continue until the contrary has been shown. I  
7 presume if EPA has come out with one date in 1979, that the  
8 fact that they're looking at it again doesn't mean that  
9 there's going to be any change or anything else.

10 And you know, we're waiting for the court and  
11 the variance and the Village of Buchanan. We're waiting and  
12 nobody is doing anything, and I just wonder if that's the  
13 approach we should take.

14 It's easy to say Well, I think somebody else  
15 is going to take a look at it, too; maybe the Court of  
16 Appeals will take a look at this variance. Let's move on  
17 with what we have I think might be the approach that we  
18 should take.

19 Do you want to give the Reporter a break, or do  
20 you want to speak now?

21 MR. TROSTEN: I have a few things to say.  
22 Perhaps Mr. Bloom would like a break, and then we could  
23 resume.

24 CHAIRMAN JENSCH: Well, he's still upright.

25 MR. TROSTEN: Well, I have several comments,

eb3

1 Mr. Chairman.

2 First of all, with regard to the position that  
3 we've taken, what is the basis for our application, it is  
4 set forth on pages 4-1 and 4-2 of the Environmental Report,  
5 and in essence we have stated that the chief benefit which  
6 will be derived from the proposed action is the achievement  
7 of a substantial improvement in the biological data base  
8 which will be available to the Commission through completion  
9 of our research program.

10 And we list very specifically, Mr. Chairman,  
11 several areas in which the analysis will be improved as a  
12 result of the work that is being done and the report that will  
13 be presented early next year.

14 We say specifically that further refinement will  
15 be made in the striped bass life cycle models. We note  
16 that --

17 CHAIRMAN JENSCH: Are you reading from the 1972  
18 hearings? It sounds like the same language. There was  
19 always a study that was going to be refined and better.

20 MR. TROSTEN: No, sir, I'm reading from our  
21 Environmental Report.

22 "Empirical data from two years of  
23 operation of the plant will be made possible. . . ."

24 We note that:

25 Further analysis of the movements of

eb4

1 Hudson River striped bass and their contribution  
2 to sports and commercial fisheries can be made."

3 I'm afraid that Mr. Shemin went over that a  
4 little bit too quickly. That's an extremely important  
5 aspect at this point.

6 "Work on the effects of entrainment  
7 of the proportion of total organisms actually  
8 entrained will continue."

9 which we believe will lead to a better evaluation of the  
10 effect of the plant on entrained organisms.

11 "There will be research and experi-  
12 mentation on stocking and the rearing of hatchery  
13 fish on the Hudson River."

14 And finally:

15 "The critical concept of compensation  
16 in the striped bass and other fishery populations  
17 of the Hudson River will be explored and defined."

18 Now in addition to that being our basic position  
19 we have also in our comments on the Draft Environmental  
20 Statement listed a number of reports which are very important  
21 and which relate to this matter.

22 We have indicated, for example, that we have  
23 submitted a study on the ratio investigation of the  
24 striped bass using the critical scale analysis. We submitted  
25 a report, for example, on the feasibility of a hatchery.

eb5

1 We've submitted a variety of reports, all of which are listed  
2 and a list of which has been given to Mr. Briggs. And these  
3 are the data which we feel further support, beyond what we  
4 have said and submitted in July and August of 1975, that  
5 there will indeed be a substantial improvement in the bio-  
6 logical data base and that we should be given this addi-  
7 tional year to test this out.

8 Now in this connection I have always been puzzled  
9 by the Staff's position that a one-year delay is enough.  
10 A one-year delay may be enough for the Staff to form its  
11 judgment but it isn't enough for the parties to form -- the  
12 other parties, the Hudson River Fishermen's Association, the  
13 Attorney General's office, who wish to contest this; it  
14 isn't enough for the Board to form its decision. This Board  
15 has to have time to make these judgments.

16 And that's the reason why the one-year period  
17 may be fine for the Staff and it may have been fine if we  
18 had had the Environmental Report out six or eight months ago,  
19 but it isn't good now.

20 Now several things were said by Counsel for HRFA,  
21 namely, -- and I believe she utterly misconstrued the effect  
22 of ALAB-188 as ALAB-188 found, in all major, substantial  
23 respects, the analysis that had been done by the HRFA was  
24 incorrect, and in many major respects, the analysis that had  
25 been performed by the Regulatory Staff was incorrect.

eb6

1 I think that it is totally incorrect to say  
2 that the result of that decision was that all major findings  
3 were made and that it's simply a question of whether we have  
4 found anything new that changes those major findings. In  
5 fact, what ALAB-188 found was that there were tremendous  
6 uncertainties on all major matters which needed to be ex-  
7 plored further, and that's what we're doing now.

8 CHAIRMAN JENSCH: Isn't that a characteristic of  
9 all the research, particularly say on the Hudson River? It  
10 is so complex a system that if you studied it for 50 years  
11 you would still say Well, I really don't know whether the  
12 silt coming out is going to affect the spawning areas? You  
13 would never get done with all the possibilities that might  
14 be intriguing?

15 But assuming for the moment the premise that the  
16 Hudson River Fishermen's Association has taken, and with  
17 your comments here that the Appeal Board may have indicated  
18 some shortcomings in some respects in the presentations  
19 made, nevertheless there were findings made in some parti-  
20 culars and if so, isn't that the basis from which we should  
21 proceed and therefore find out from you wherein do you have  
22 data that would modify those findings, so that the parties  
23 may address your specification of evidence to alter what  
24 has been established by, let us say, the law of the case?

25 MR. TROSTEN: Well, Mr. Chairman, we certainly

eb7

1 do indeed have data that bear on the critical findings that  
2 were contained in the Commission's decision in ALAB-188.

3 CHAIRMAN JENSCH: Could you draw us up kind of a  
4 chart, and take a look at 188 and find out where the find-  
5 ings were-- I don't mean these comments about where the  
6 Appeal Board felt further research should be undertaken, but  
7 there were certain findings made. And then take that as a  
8 sort of a subparagraph and then underneath that give us the  
9 page references in the Environmental Report and as you said,  
10 your answers to the Staff questions where you say are shown  
11 data which would modify those specific findings. Will you  
12 do that?

13 MR. TROSTEN: Yes.

14 Mr. Chairman, we certainly can produce a document  
15 in accordance with your request. I think it is mischarac-  
16 terizing ALAB-188 when you suggested that these data modify  
17 these findings because indeed these data confirm these find-  
18 ings.

19 CHAIRMAN JENSCH: All right. Well, either way;  
20 put it in both ways, --

21 MR. TROSTEN: All right, sir.

22 CHAIRMAN JENSCH: -- whatever you think is your  
23 position.

24 I think we have to proceed from the Appeal Board  
25 and I guess the Commission decision also that came out on

eb8

1 Indian Point 3 should be sort of a consideration of the  
2 review of the Hudson River conditions.

3 But wherever you think-- Whatever be those find-  
4 ings in the Appeal Board determinations and the Commission  
5 determinations, whether they are either confirmation or  
6 variances, changes that you believe your data will support.

7 MR. TROSTEN: All right.

8 Mr. Chairman, let me comment with regard to the  
9 Indian Point 3 Final Environmental Statement by the Staff  
10 and also the Commission decision.

11 The Final Environmental Statement of the Regula-  
12 tory Staff was a document that was submitted in an uncon-  
13 tested proceeding, never subjected to cross-examination,  
14 never subjected to an adjudicatory hearing.

15 CHAIRMAN JENSCH: You all waived it, didn't you?

16 MR. TROSTEN: We agreed --

17 CHAIRMAN JENSCH: You're not complaining about  
18 what you did?

19 MR. TROSTEN: We agreed, Mr. Chairman, that it  
20 was adequate to support the issuance of the operating license  
21 for Indian Point 3 and that from a NEPA point of view, it  
22 was acceptable for purposes of issuing the operating license  
23 which contained the essential conditions that the Indian Point  
24 2 operating license did, namely, the opportunity for further  
25 study to be made so that a true evaluation could be made.

eb9

1 All of the parties in the Indian Point 3 case  
2 agreed to put aside -- to stand back from their tremendous  
3 disagreements over these things in order to allow a stipu-  
4 lated license to be issued.

5 So references by any other party to what the  
6 Staff found in the Indian Point 3 FES are interesting. They  
7 are interesting in the same sense that what was contained  
8 in the Applicant's Environmental Report are interesting to  
9 this Board.

10 CHAIRMAN JENSCH: Well, I think you should have  
11 the opportunity, if you feel that the FES for Indian Point  
12 3 is different than what your position should be here, to  
13 take that sentence from the FES at Indian Point 3 and show  
14 particularly where you have data that you would urge would  
15 be the basis for a change or a variance from what the Staff  
16 found in the FES.

17 I think the condition of the Hudson River is not  
18 compartmentalized between two proceedings, Indian Point 2 and  
19 3. They're still talking about what's going on in the Hudson  
20 River. And I think all the data that can be related to that  
21 should be utilized.

22 Or do you disagree?

23 MR. TROSTEN: No, I don't disagree with that,  
24 Mr. Chairman. I would make these two comments:

25 First of all, we're not dealing with on-going,

eb10

1 never-ending programs here. We're dealing with a program  
2 which, in accordance with predictions made many years ago,  
3 will produce the document at the beginning of next year.

4 CHAIRMAN JENSCH: You'll make or break Con Edison  
5 on this report; is this your view?

6 MR. TROSTEN: The position we're taking is that  
7 we'll file an application which will seek whatever it seeks;  
8 on the basis of whatever we've seen now, it appears to us  
9 that we would proceed to seek an amendment which would  
10 eliminate the requirement for closed-cycle cooling, but that  
11 is the position that we will, in all likelihood, be taking  
12 when we submit that application, Mr. Chairman.

13 We're not dealing with a never-ending program  
14 here which will go on forever.

15 I would say one final matter with regard to EPA.

16 The EPA condition which was contained in the  
17 proposed permit that was issued to Con Edison in early 1975,  
18 namely that once-through cooling would terminate on May 1,  
19 1979, was taken, lock, stock and barrel, from the NRC's  
20 decision. It did not in any way represent an independent  
21 EPA decision.

22 CHAIRMAN JENSCH: I don't think we can attack a  
23 finding by EPA. Maybe they thought of something else, too. If  
24 there isn't something establishing a limitation on on the  
25 basis I think we have to say that that's EPA's view.

eb11

1 MR. TROSTEN: I just wanted the record to be  
2 clear on that, Mr. Chairman.

3 The other point I want to make, Mr. Chairman, is

4 CHAIRMAN JENSCH: I think the record should also  
5 be clear that the basis of the determination by EPA is not  
6 open for our attack or review here.

7 MR. TROSTEN: We're not seeking to attack EPA's  
8 determination in this proceeding, Mr. Chairman, but I think  
9 it should also be clear that the argument that is made that  
10 somehow what the NRC is doing here pursuant to its inde-  
11 pendent responsibility under NEPA undercuts EPA is totally  
12 fallacious.

13 The EPA condition, the May 1, 1979 date, is  
14 the subject of a request for an adjudicatory proceeding. The  
15 condition is stayed. What the NRC is doing here it is doing  
16 pursuant to its independent authority under NEPA and hence  
17 in no way does the action that is being requested here under-  
18 cut EPA's authority.

19 Indeed, it permits EPA to make the decision which  
20 is the subject of the adjudicatory hearing.

21 CHAIRMAN JENSCH: Are you saying then that  
22 the Staff's view that we shouldn't do anything about it  
23 until EPA has acted further is fallacious and that we should  
24 make an independent review of it here now? Is that your  
25 thought?

eb12

1 MR. TROSTEN: It's not our view, Mr. Chairman,  
2 that we should make an independent review in this proceeding  
3 of the ultimate question whether closed-cycle cooling will  
4 be required, but it is most certainly our view that you  
5 should make an independent determination now that the one-  
6 year extension is authorized and that you should do this--

7 Our position is that your doing it should be  
8 made on the basis of your independent responsibility under  
9 NEPA, and that you are not undercutting EPA by doing that.

10 CHAIRMAN JENSCH: That wasn't really my question.  
11 My question was, as I understand the Staff, the Staff has  
12 said maybe we had better give them another year because EPA  
13 is going to take a look at it. Well, we might as well forget  
14 EPA because we'll have to make the decision here and that  
15 should not be any reason to give an extra year to Con Edison.

16 MR. TROSTEN: Well, the Staff's argument is an  
17 alternative bases upon which to do this, Mr. Chairman.

18 CHAIRMAN JENSCH: And you feel that that is in-  
19 adequate, I take it?

20 MR. TROSTEN: No, I don't feel that that is in-  
21 adequate, Mr. Chairman. I think it's an alternative.

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1 CHAIRMAN JENSCH: Let's take about a 30-minute  
2 recess and meet here at 12:15.

3 (Recess)

4 CHAIRMAN JENSCH: Please come to order.

5 The Board has given consideration to the petition  
6 to intervene filed by the Village of Buchanan, and on the  
7 basis of the answers made to the petition and the discussions  
8 here this morning the Board grants the petition to intervene  
9 by the Village of Buchanan, and a formal order to that effect  
10 will be issued within the next week. And the Village may  
11 thereby proceed as a party and participate in all respects.

12 The Board believes one way to move this case  
13 along is to try to set a hearing date. And we aren't able  
14 to give much certainty to the suggestion we now make, but  
15 hopefully we can develop it, and as to which all parties  
16 will be informed. The first available date we seem to be  
17 able to include is December 7th, 1976.

18 Now a comparison with the record in another  
19 case would indicate that the Vermont Yankee case is set for  
20 December 7th, but it has been my impression from some dis-  
21 cussion which I understand was had yesterday in the Seabrook  
22 case, and in view of the Staff recommendation to the Com-  
23 mission on all of the cases which have been considered for  
24 hearing since the July 21st, 1976 orders of the Court of  
25 Appeals of the District of Columbia, that if the Commission

wb2 1 accepts the Staff recommendation then all show cause orders,  
2 or suspension proceedings will be suspended, and therefore  
3 Vermont Yankee will be cancelled.

4 So that is the first premise for our date.

5 And we will try to firm it up as soon as we can.

6 I think there has been some impression by those  
7 who attended the hearing yesterday in the Seabrook argument  
8 that the Commission may issue a statement, or an order this  
9 week.

10 And on December 7th, then, we would expect  
11 the Applicant to proceed with the presentation of its case  
12 which would be open for cross-examination. And if time  
13 permits during that week the Staff could follow with its  
14 Final Environmental Statement which will be out. And its  
15 witnesses will be available for cross-examination. And if  
16 the FES is not out we will then select another date for  
17 further hearings.

18 Now we will expect the Intervenor parties to  
19 state their contentions after the issuance of the FES and  
20 subject to any modification they would make following the  
21 presentation of the Applicant's case.

22 We will, in the meantime, give early considera-  
23 tion to the request by the Applicant as formulated for a  
24 determination of the preferred closed cycle cooling system,  
25 and we will be guided in part at least by the stipulation of

wb3

1 the parties. There may be aspects of the stipulation that  
2 may be more expanded than relevant to the request that the  
3 Applicant made for determination of the preferred closed  
4 cycle cooling system.

5 Incidentally, there has been returned this  
6 letter from Senator Gordon. Has everybody seen it? We'll  
7 get copies and send it around.

8 MR. BRIGGS: With regard to the Applicant's  
9 presentation beginning on December 7th, I believe it's import-  
10 ant that the information that was in his Environmental Report  
11 be supplemented by a comprehensive discussion of information  
12 that has been developed since that time.

13 In particular, the Board would like to know how  
14 the data that have been obtained prior to that report and  
15 since the time of that report lend support to the position  
16 that the Applicant took in the Indian Point-3 hearings  
17 that operation of the plant with an open cycle system would  
18 not cause undue mortality to the fish population in the Hudson  
19 River.

20 It's not a situation where the Board intends  
21 to decide whether cooling towers are necessary or not neces-  
22 sary; but the Board is interested in what has changed since  
23 the time of the Indian Point-2 hearings, and also how any  
24 additional data or analysis that will take place from now  
25 through the next year or two -- through the next year, I

wb4 1 should say -- will help to support the Applicant's position  
2 that was taken in the Indian Point-2 proceeding.

3 I would also be interested in whether there are  
4 additional measures that might be taken during the next year  
5 or two, or prior to the time that a closed cycle cooling  
6 system would be constructed, to compensate for the fish  
7 mortality. I think one can state a little more plainly in  
8 saying what have you learned about stocking of fish in the  
9 Hudson River, and is this a mechanism that can now be said  
10 to reduce the effect of plant operation.

11 But I think what is required is a very compre-  
12 hensive review of what the situation is now; not what it  
13 was a year ago or two years ago but how do we stand at the  
14 present time. And possibly work that has been done on the  
15 document that is to be issued in January will help to provide  
16 this information.

17 CHAIRMAN JENSCH: The Board has noted that  
18 the Staff recommended a bird monitoring program. And the  
19 Board has noted that ConEdison opposed it. There has not been  
20 an evidentiary opportunity for either the reasons for the  
21 Staff recommendation or the Applicant's view, and therefore  
22 we feel that the bird monitoring is beyond the scope of the  
23 precise issue raised by the Applicant for a determination of  
24 the preferred closed cycle cooling system.

25 MR. LEWIS: In any event, Mr. Chairman, that

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1 matter I think, if not -- if there has not yet been a letter  
2 that indicates that there is agreement on that in fact, I think  
3 there will be one shortly submitted into the record that  
4 will indicate that there is agreement among the Applicant  
5 and the Staff as to the scope of that program.

6 CHAIRMAN JENSCH: Very well. I was concerned  
7 about the due process situation for the Applicant in not  
8 having a chance to address the matter. If you're working  
9 out a stipulation that's a different approach.

10 Is there any other matter we might consider?

11 MR. TROSTEN: Yes, Mr. Chairman, there are just  
12 a couple of points.

13 Mr. Briggs, with regard to your request, which  
14 we will certainly comply with, do you intend that we have  
15 this information presented on the 7th of December? Is that  
16 what you had in mind?

17 MR. BRIGGS: Well of course that's up to the  
18 Applicant. If the Applicant could be prepared by December  
19 the 7th, starting December 7th, it would be a good time.

20 MR. TROSTEN: Fine.

21 Several other points, then, Mr. Chairman.

22 We would recommend that the hearings be held,  
23 if the Board would agree, in the hall offered by the Village  
24 of Buchanan.

25 CHAIRMAN JENSCH: Well as you know, the Commission,

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1 I think within the last three years or so, has been very  
2 anxious that these hearings be held in courtrooms or in  
3 federal buildings of some kind.

4 We did find, through the kind arrangements of  
5 the court personnel in White Plains, that we did have the  
6 use of a courtroom there. And hopefully we can do it again.

7 But the Commission is anxious that the hearings  
8 be held in courtroom or federal buildings.

9 MR. SHEMIN: Could I just mention along those  
10 lines: Several parties are located in New York, several air-  
11 ports are located in New York, and we would like to suggest  
12 investigating the use of courtroom in New York City itself  
13 which may be available. We've had a little experience in  
14 another proceeding where a Special Master was searching for  
15 a courtroom and was able to find one that was very infrequent-  
16 ly used.

17 I'm just suggesting White Plains seems to incon-  
18 venience all parties concerned. And if we can find one a  
19 little more conveniently located it might be useful.

20 CHAIRMAN JENSCH: I think that would be fine.  
21 The Big Apple is an attraction for some people. But unless  
22 armed guards are furnished in some areas I think it loses  
23 some attraction. And White Plains seems to afford security  
24 and convenience.

25 So we thank you for your suggestion, Mr. Shemin.

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1 But I think the Appeal Board made a selection that might be  
2 a pattern for us in going to White Plains.

3 MR. D'ALIVIA: The new Municipal Building we  
4 have in Buchanan has an up-to-date courtroom with plenty of  
5 room. It's all up-to-date. In fact we just moved into the  
6 place in June of this year. You're perfectly welcome, I'm  
7 sure -- the Mayor is here -- to have you up there. The  
8 facilities are better than the courtroom that they have in  
9 White Plains, that's for sure. And you can have our courtroom  
10 if you so desire.

11 CHAIRMAN JENSCH: Is the Fire Hall a new  
12 Municipal Building, too?

13 MR. D'ALVIA: No, sir. All we have is our own  
14 facilities. The Municipal Building is strictly Forest Ser-  
15 vices, the Mayor's office, the Board Room. We have the  
16 Police Department is a separate corner which we lock off.

17 And our facilities-- We have an elevator up and  
18 down, and we're up on the third floor.

19 CHAIRMAN JENSCH: The elevator goes up and down?

20 MR. D'ALVIA: Yes, sir.

21 (Laughter)

22 CHAIRMAN JENSCH: Sometimes they don't go at  
23 all.

24 Well, we thank you for your suggestion, and we'll  
25 give it consideration.

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1 MS. CHASIS: Mr. Chairman, in that respect, it's  
2 our position that public access to public transportation is  
3 important. And White Plains certainly provides that. There's  
4 train service within a few blocks of the Courthouse. So for  
5 us that's a very important consideration.

6 CHAIRMAN JENSCH: Yes, it is for us, too.

7 We don't want to be ungracious as respects  
8 the use of facilities heretofore enjoyed, but I think there's  
9 a great improvement in having the hearings in White Plains.

10 Did you have something further?

11 MR. TROSTEN: Yes, Mr. Chairman.

12 My last point pertains to the matter of con-  
13 tentions. I would ask the Board to require that all conten-  
14 tions by other parties who are opposing the application be  
15 served in writing within five days. And hopefully the  
16 parties can reach agreement on these contentions so that  
17 there's no need for the Board to rule.

18 But we've had our prehearing conference now.  
19 It's perfectly obvious-- We've had our discussion, we've had  
20 our prehearing conference, I think it's entirely possible for  
21 the Attorney General's office and for the Hudson River  
22 Fishermen's Association to state their contentions with  
23 regard to this application, subject to possible revision  
24 when the Final Environmental Statement comes out.

25 In this way we would have a much better feeling

ebl

1 for the direction of preparation of any additional testimony  
2 that we need to prepare besides what we will offer in the  
3 way of our Application. And if there needs to be any dis-  
4 covery we can get on with it.

5 But I really feel that we have some time now  
6 and I appreciate the Board setting the hearing date. I  
7 certainly think that's the way to move along. I think the  
8 only way to move along is to get these contentions out,  
9 ruled on if necessary, and get moving.

10 CHAIRMAN JENSCH: I think the reason the Board  
11 felt otherwise was, as I understand the presentation by  
12 the parties, they don't know on what you rely, and until  
13 they see what your evidence is, they can't firm their con-  
14 tentions.

15 If they knew-- As I understand Mr. Shemin, for  
16 instance, he said there were some fine conclusions in your  
17 reports but little data, and I think his thought was that  
18 he can't really formulate his views about the matter until  
19 he sees precisely on what you rely, and then they will cross-  
20 examine perhaps on areas in which they have some perhaps  
21 differences, and out of that they can express their conten-  
22 tions.

23 It may be that we will not be able to finish this  
24 hearing on December 7th in its complete entirety, so that  
25 there will have to be perhaps a recess at the end of it,

eb2

1 during which time the contentions can be more precisely  
2 framed.

3 Now if you can propose what your proposed evi-  
4 dence is by writing in advance and service upon the parties  
5 within five days --

6 MR. TROSTEN: Mr. Chairman, they have our evi-  
7 dence. They've had our evidence since June of 1975.

8 MS. CHASIS: I would like to make a statement,  
9 Chairman Jensch.

10 I think in our view what really makes sense is  
11 to have the comprehensive study or summary of the evidence  
12 in terms of -- or the data in terms of certainly what has  
13 been forthcoming since their original application and their  
14 supplement to it, to have that as soon as possible so that  
15 then we can file our contentions as soon as that's in, and  
16 the FES is in.

17 Then they will know what our contentions are in  
18 advance of the hearing and also we will have an opportunity  
19 to prepare for cross-examination.

20 We object to starting the hearing and having  
21 this comprehensive study made available at that time, which  
22 is the way it has been left, and merely being aware at that  
23 point in time exactly what data Con Edison is relying on.

24 Our suggestion to the Board -- and we feel very  
25 strongly -- is that this comprehensive statement should be

eb3

1 forthcoming as soon as possible from the Applicant. And as  
2 soon as that is in and the FES is out, we will file our con-  
3 tentions and then we can go to the hearing on the 7th.

4 MR. TROSTEN: Mr. Chairman, may I respond to this?

5 I think that this position is totally contrary  
6 to the regulations of the Commission.

7 We have submitted an application. The application  
8 is analogous to an application for a construction permit.  
9 Under the regulations of the Commission this application  
10 constitutes the evidence upon which we rely. Any party that  
11 opposes the application has the burden, under the Commission's  
12 regulations, of stating the contentions that they have with  
13 regard to this.

14 When they state their contentions we can then  
15 decide whether we want to stand on the record and move for  
16 summary judgment or whether we want to submit some additional  
17 evidence.

18 They have this burden. They way this matter is  
19 being portrayed by Counsel for HRFA, it is as if this matter  
20 is suddenly emerging fresh; this is not the case at all.  
21 This matter has been before Counsel for HRFA since last July.

22 In addition to that, Counsel for all parties have  
23 been receiving all this information and yet, somehow, this  
24 is being portrayed in such a fashion that until they receive  
25 the additional information which we will prepare in response

eb4

1 to the Board's request, they have no idea what we're about.

2 Well, that is just totally ridiculous. They've  
3 had all this information all along and it's up to them to sit  
4 down now and do what any intervenor does, namely, decide what  
5 it is they are going to do in this hearing.

6 CHAIRMAN JENSCH: Isn't there some part of the  
7 regulation that requires a summary statement, a PSAR, for  
8 instance? Is that the statement to which HRFA is referring?

9 MS. CHASIS: I'm not aware of the requirement that  
10 you state but I think our contention at this time is that  
11 Con Edison has not produced the kind of document which directs  
12 and analyzes and summarizes the data which they have a  
13 plethora of. There is no question about that.

14 But in terms of the critical question, which is  
15 what is new, what is different from what they presented in the  
16 Indian Point 2 proceeding, which would lead to a contrary  
17 conclusion on the appropriate termination date? --that's our  
18 contention at this time.

19 And I think as soon as they come forward with that,  
20 we are prepared to respond.

21 Now I think it is only fair that the FES come out  
22 before the contentions of the parties are stated.

23 MR. SHEMIN: Mr. Chairman, what we're really  
24 trying to do is resolve, on a somewhat informal basis through  
25 discussion in this prehearing conference, what would normally

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1 be done by way of interrogatories. We can submit to Con Ed  
2 extensive questions saying exactly what data and where is  
3 it by page reference that you refer to with respect to F-  
4 factors delineating such-and-such and so forth with respect  
5 to stocking.

6 We could put down a long list of questions that  
7 would require them to list in detail exactly what we hope  
8 they would put in the supplemental memorandum or summary  
9 that was referred to. I avoided using the word "comprehen-  
10 sive," which is the word that has been used all along, because  
11 I find that a comprehensive statement normally means some-  
12 thing that has everything in it. It's comprehensive in that  
13 sense, but it's not detailed or specific in the sense of  
14 providing you information so that it can be used.

15 Their submissions have been comprehensive  
16 usually in that they cover the whole ballfield. The problem  
17 is they don't tell us where in the ballfield the relevant  
18 things can be found. And that is what we would ask by way  
19 of interrogatories which, by the way, in your proposed  
20 schedule are not at all included, nor is prepared testimony  
21 which would give us an idea.

22 Now we just wanted that without going through  
23 the formal detail.

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1 CHAIRMAN JENSCH: Yes, we have yet to reach that  
2 point.

3 I think the request I made before the recess, and  
4 that which Mr. Briggs has made after the recess is if the  
5 Applicant could have those in within -- how much time -- it  
6 might provide a basis for a statement to contentions.

7 The second possibility is as Mr. Shemin suggests,  
8 that maybe they should flesh out a long list of things and  
9 let that go along too by way of interrogatories. If you can  
10 get a statement out shortly by that you will note the areas  
11 in which they have particular interest.

12 MR. TROSTEN: Mr. Chairman, two points.

13 In the first place, under the rules, as the Board  
14 knows of course, discovery follows the statement of conten-  
15 tions. We are in no different situation than any other  
16 Applicant which has presented an application. The other  
17 parties now which oppose this have the burden of stating  
18 their contentions before they go on a fishing expedition and  
19 they ask for a lot of information.

20 This is my concern, it looks to me as if we may be  
21 heading into a somewhat lengthy proceeding here. They have  
22 had -- we have submitted a two volume environmental report  
23 which contains a detailed benefit-cost analysis in accordance  
24 with Part 51 of the Regulations. It is absolutely mystifying  
25 to me that another party can say that they do not know the

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1 information upon which we rely. Either they choose to ignore  
2 the information or they haven't studied it.

3 CHAIRMAN JENSCH: I think what they're saying is  
4 what is new in what you have. You may have copied, or rather  
5 it may be so similar to the previous presentation that they  
6 can't readily distinguish between what we're relying on,  
7 something new to change, what has been established.

8 MR. TROSTEN: Mr. Chairman, we will certainly be  
9 prepared as quickly as we can and we certainly will do it as  
10 quickly as we can to get that summary in. However, it's just  
11 fundamentally the case that they must take what we have  
12 submitted and they must say in what respect they consider  
13 that there is something that there is a problem with.

14 CHAIRMAN JENSCH: My inquiry to you is when can  
15 you get that statement in so that we can fix a time thereafter  
16 for a statement of contentions.

17 MR. SACK: Mr. Chairman, excuse me for a minute  
18 for interrupting. I'm just mystified as to what's going on  
19 here. When Con Edison was initially faced with the National  
20 Environmental Policy Act enactment we presented a succinct  
21 environmental report which gave information in very clear,  
22 simple, direct language, easily understood by everyone. That  
23 was roundly criticized. We were told we must have data, we  
24 must have data, so now we produced detailed environmental  
25 reports that have voluminous detail. Now all that they are

mpb3 1 requesting, Mr. Chairman, is in here. All they are saying in  
2 a sense is that they are too lazy to read that. They want us  
3 to prepare an index for them and I submit that that is improper.

4 You are now saying that we will not proceed with  
5 this hearing which must be undertaken with dispatch. You're  
6 now saying we can not proceed with this until we furnish them  
7 an index because they don't want to read what we have already  
8 submitted.

9 CHAIRMAN JENSCH: I don't think they are asking  
10 for an index at all. I think they are asking for a statement  
11 of what is new.

12 Let me go back to Mr. Trosten. What time do you  
13 think you could respond to the Board's request for an outline  
14 of your principal points and then your supporting data and  
15 then the material which Mr. Briggs referred to?

16 My thought was that we would fix a date, ten days  
17 after the receipt by the parties to these submittals and then  
18 the contentions can be asserted at that time.

19 MR. TROSTEN: Will you give me a moment, Mr.  
20 Chairman, so we can discuss this?

21 CHAIRMAN JENSCH: Surely.

22 (Pause.)

23 MR. TROSTEN: Mr. Chairman, we have considered  
24 both your request and the request offered by Mr. Briggs and  
25 we believe that the document which Mr. Briggs suggested that

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1 we prepare is going to take more work than compiling the  
2 information which you have requested. We interpret the  
3 request and what is involved in doing that as requiring that  
4 we have that information we believe ready to present on  
5 December 7 when the hearing starts.

6 With regard to the information which you requested  
7 we feel we will have it in the hands of the Hudson River  
8 Fisherman's Association and the Attorney General's office  
9 not later than November 10.

10 What we would request -- as I say, I certainly  
11 state, Mr. Chairman, that I feel that it is not necessary  
12 in the slightest way that that document be available before  
13 contentions are stated. I feel that they have that information,  
14 they have the necessary information. I would request that  
15 notwithstanding the fact that they may not have this before  
16 November 10 that they state their contentions before then.

17 MR. SHEMIN: Mr. Chairman, to get right down to  
18 what he's saying, I fail to see why he thinks we haven't  
19 stated our contentions. We fairly specifically stated that  
20 there are certain specific issues relevant to this proceeding  
21 which we feel remain in dispute as a result of the prior  
22 hearing and as to those specific issues the Applicant's  
23 submission does not specifically relate how the data and  
24 analysis will justify their proposition as opposed to any  
25 other propositions. That's our contention. If they want

mpb5

1 the specific issues we can give them to them. I mentioned  
2 most of them.

3 MR. LEWIS: Mr. Chairman, if this were a construc-  
4 tion permit or an operating license proceeding, something of  
5 a more broad and plenary nature I would have to agree with  
6 Mr. Trosten that a written set of contentions would be an  
7 absolute prerequisite to proceeding.

8 CHAIRMAN JENSCH: I was just about to mention that.  
9 We have tried to handle this on an expedited basis. Therefore  
10 we set December 7. He is entitled to have his contentions  
11 and the discovery process can follow thereafter, and if he  
12 would like to have the full scope of the rules completely  
13 applied we'll cancel the December 7 date and we'll get a  
14 statement of contentions and we'll let discovery follow and  
15 we'll set a date after that.

16 Now in one sense you are correct and he is correct,  
17 that the specific procedures should be out in a specific se-  
18 quence, but we thought it would be helpful to the parties  
19 to pick a date. Now if they don't like that we will change  
20 it.

21 MR. LEWIS: Mr. Chairman, what I'm going to argue  
22 is that conceivably that date might well work from our point  
23 of view, assuming that we run into no snags in issuance of the  
24 FES.

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25 But my feeling is and has been all along in this

mpb-6

1 proceeding that because it is a fairly narrow proceeding and  
2 because of the fact that we have had fairly articulate comments  
3 on the Draft Environmental Statement from the parties and  
4 because of the fact that we have had articulation at this  
5 prehearing conference of, if you will, contentions, I would  
6 have to agree with Mr. Shemin that in effect I believe the  
7 contentions have been stated and really the contention is  
8 just one major contention as I see it from both HRFA and  
9 the State, and that is that there is not new data that  
10 justifies an extension.

11 Now personally I think the Staff understanding the  
12 thrust of the Intervenor's argument in this sense would be  
13 prepared to proceed even if we didn't have in writing a  
14 further sub-listing of the contention because I think it is  
15 a fairly narrow environmental statement and what we would  
16 propose to do in response to that kind of a broad contention  
17 is to, without going through prior prepared written testimony,  
18 make a panel available who would be knowledgeable generally  
19 on these matters.

20 Now of course as you point out it may well be that  
21 the alternative route would be to in fact have formalized  
22 contentions and perhaps even prior written testimony, but I  
23 had not conceived that to be necessary considering the scope  
24 of the proceeding.

25 CHAIRMAN JENSCH: We didn't either.

mpb7

1           You mentioned four items, Mr. Shemin, compensation,  
2 the F-factors and --

3           MR. SHEMIN: I left one out, actually, F-factors --  
4 these are what I think resulted from the prior hearings,  
5 F-factors, entrainment mortality, compensation -- well, she  
6 just mentioned entrainment mortality was an F-factor. When  
7 I referred to F-factors I was referring to the differences  
8 in concentrations of the organisms going into the intake as  
9 opposed to the cross-sectional concentration at the site;  
10 compensation, entrainment mortality, F-factors, the contribu-  
11 tion of the Hudson River Fishery to the Mid-Atlantic Fishery  
12 and I had left out stocking which was previously mentioned in  
13 another context which I think remained in controversy at the  
14 prior hearing. I did not say hatcheries and I would like to  
15 distinguish between the two because whenever we mentioned  
16 stocking Con Ed comes in and says how terrific hatcheries  
17 will work. They're two different issues. We don't object really  
18 to the concept that hatcheries are commercially feasible.

19           CHAIRMAN JENSCH: Mr. Sack added a new consideration  
20 for you, the discharge mortality is worse than the entrainment.

21           MR. SHEMIN: What he was referring to was that  
22 the tests that they had done to demonstrate entrainment mortal-  
23 ity showed such a high entrainment mortality that they did  
24 further analysis to examine their tests and found that the  
25 speed of discharge was resulting in mortality that they had

mpb8

1 not planned on. Therefore their test was no good. We're  
2 back at square one in those tests.

3 MR. SACK: That's a ridiculous characterization of  
4 what I said. That's just absurd.

5 MR. SHEMIN: That's what your report said.

6 MR. SACK: The fact is that the entrainment mortal-  
7 ities we found were certainly much lower than 100 percent,  
8 but even those we found because of the net-induced mortality  
9 were even lower than the numbers which I believe appear in  
10 the Indian Point 3 FES, so what we're talking about is reduc-  
11 ing the less than 100 percent entrainment mortality we testi-  
12 fied to previously to a number much lower. That has not yet  
13 been derived but it is not a question of having an unexpected  
14 mortality.

15 CHAIRMAN JENSCH: Well, do I understand your  
16 statement to say that those that aren't killed in the entrain-  
17 ment are killed in the discharge?

18 MR. SACK: They're killed by netting them to  
19 count them. If we didn't conduct the entrainment studies  
20 they would survive, but what is -- they are -- in order to  
21 conduct entrainment studies we have to take organisms from  
22 the intake and also take organisms from the discharge and  
23 unfortunately that process results in killing them. What  
24 we are finding is that the process itself has a greater impact  
25 in the discharge than it does in the intake, greater under

mpb9 1 high velocity conditions which also exist in the river, so  
2 the river and discharge samples are high velocities and your  
3 intake samples are low velocities and that leads to a lack  
4 of direct comparability to the mortality factors and so a  
5 correction has to be made.

6 CHAIRMAN JENSCH: Would you accept Mr. Lewis's  
7 statement and the statement by Mr. Shemin and the Hudson  
8 River Fishermen's Association? Is it enough for you to  
9 get started on and will keep you busy until we get the state-  
10 ments from you on November 10 and then their statement of  
11 further sub-pointing contentions within ten days thereafter?

12 MR. TROSTEN: Mr. Chairman, we certainly have a  
13 better idea than we did when we came into the room what the  
14 contentions might be.

15 But really, Mr. Chairman, for Mr. Shemin, who  
16 probably has read these reports about as carefully as anybody  
17 has to say well our contentions are F-factors, compensation,  
18 contribution to the Hudson and stocking, I'm sorry, sir, but  
19 that really is absurd because you know how detailed these  
20 questions are and what these subjects cover and you know, you  
21 probably know by now exactly what the questions are that you  
22 want to ask and that's the reason why I find that just a  
23 general listing of what the areas of controversy are as opposed  
24 to a listing of contentions is unsatisfactory and not in  
25 accordance with the rules.

mpb10

1 CHAIRMAN JENSCH: Well, I understood it was related  
2 to his principal statement that none of the data that you  
3 presented has provided an adequate basis for the amendment to  
4 the application that you request.

5 MR. TROSTEN: Mr. Chairman, would you be willing  
6 to just let the matter be submitted on briefs?

7 In other words, you make your argument, Mr. Shemin  
8 that the data will not justify the application, the granting  
9 of the application. File your brief, we'll file our brief  
10 and shall we submit?

11 MR. SHEMIN: No, my argument is fundamentally a  
12 factual one. I think that a hearing will ultimately show my  
13 contention to be true. I don't think it is apparent from the  
14 documents for someone who hasn't gone over them in detail  
15 and gone through hearings on this data, this specific data in  
16 the context of the proceeding two years ago. It's the same  
17 data really. I don't think it is apparent at this point how  
18 inadequate that information is and where the hidden problems  
19 are in that material. I would expect after a hearing at  
20 which I took each specific suggestion in the report and showed  
21 how it really was inadequate that at that point with a brief  
22 I would prevail. However, at this point I don't think -- all  
23 I can say at this point is at this point there's a problem,  
24 at this point there is a problem and at this point there is  
25 a problem in the different areas of the report and it would

mpb11

1 leave a gap as to whether I was right or you were right and  
2 the only way to answer that is by having people on the stand  
3 to testify to it. I'm trying to avoid spending weeks and weeks  
4 and probably months taking your experts, as was done  
5 in Cornwall, step by step by step through everything and ask-  
6 ing them to provide detailed support for every generalization  
7 they make because that's the way most of these things should  
8 be done.

9 MR. TROSTEN: You see, that's the problem I have,  
10 Mr. Chairman -- and I thank you, Mr. Shemin, for your laying  
11 this matter out.

12 You see, it is not just a relatively narrow thing  
13 because of the position that the other parties may wish to  
14 take and we may be here a long time and we don't have a long  
15 time to do this. That's the point I've been trying to make,  
16 Mr. Chairman, that it may be viewed by the Applicant, perhaps  
17 is viewed by the Staff as a relatively straightforward matter  
18 because we are, after all, only talking about a year's exten-  
19 sion here. But the other parties don't view it and they may  
20 want to take us through step by step by step relitigating the  
21 Indian Point 2 hearing and we don't have the time to do that  
22 and that's why I want to get to --

23 MS. CHASIS: I think we're interested in expediting  
24 I think it can be a circumscribed hearing. I don't think it's  
25 going to be the same kind of hearing we go through on the

mpbl2

1 question of once through versus closed cycle.

2           The point is that your statement which you will  
3 provide on November 10, Mr. Trosten, will permit a narrowing  
4 of the issues. I think the way in which the application  
5 is presently stated and then all the subsequent data since  
6 August of '75, without that being related back to the question  
7 of what in it is new and justifies the extension really makes  
8 it -- makes our position right now so much broader and I  
9 think when you file that report the issues will be narrowed  
10 and I think that's why it's important for that to be done as  
11 soon as possible so that we can respond. And we asked for  
12 this in the summer of '75 and we criticized the application  
13 that was filed. There was a meeting of all the -- there was  
14 a meeting with the Staff and the utility and we said at that  
15 time that the application that had been filed failed to  
16 specify what in the data was new and I think, you know, it  
17 is not as though we have been sitting around. We have review-  
18 ed that application in full.

19           Now I think in fairness to the parties, unless we  
20 have Con Edison's assessment of the subsequent data and reports  
21 in terms of how they demonstrate new facts that are different  
22 from what was demonstrated in Indian Point 2 that for us to  
23 proceed with cross-examination on the 7th is really improper.  
24 It doesn't give us really an adequate opportunity to assess  
25 that.

mpb13

1 CHAIRMAN JENSCH: Well, I take it that -- you say  
2 you raised this point in August of '75, so to use Mr. Trosten's  
3 firm language, people, somebody sitting around for some time,  
4 maybe the Applicant has been sitting around not responding.

5 I do feel this way: The Board is not going to  
6 listen to the establishment of F-factors with the same data  
7 utilized in the previous hearings. Now I think one way to  
8 move this along, as the Applicant has indicated a great desire  
9 to do, is to show precisely what new data you have to justify  
10 a change in these crucial matters as to which they are having  
11 contentions and if you do not do that it seems to me the  
12 parties are going to have to say right from the beginning,  
13 Well, didn't you have this in 1972 or whenever we had our  
14 hearings and if you say Yes, all right, what's new, then they  
15 will search and scratch around where there is something new.

16 Now you can save a lot of time it seems to me by  
17 showing wherein you have something new in your report. Now  
18 you apparently -- I haven't analyzed it, but you have a  
19 collection of everything under the sun and I think if you do  
20 that we will take a tremendous amount of time but I don't  
21 think the Board is going to tolerate going over the same  
22 material we had in previous hearings. Now if you have some-  
23 thing new let's hear it, let's see it.

24 MR. TROSTEN: Well, Mr. Chairman, we certainly  
25 will submit the information. I must say that I am at a total.

1 loss as to exactly what counsel for HPFA is referring to  
2 with regard to the statement. I'm looking at a set of  
3 minutes of the meeting and don't see anything referred to  
4 there. This set of minutes was prepared by the Staff.

5 We will certainly prepare the document that you  
6 refer to, Mr. Chairman. I must say that I have to agree with  
7 the remarks that were made earlier by counsel for the Applicant  
8 that we are simply providing an index for what is already  
9 there. The information is there. If you'll analyze it, it  
10 is there. We will supply the information as requested by  
11 the Board and we will have it in by the 10th of November.

12 CHAIRMAN JENSCH: Very well. I am sure that  
13 will be very helpful and I think we will move along. I do  
14 think that -- I don't denigrate any statement by Mr. Sack, but  
15 their present environmental reports have to include everything  
16 they think of because there has to be a change at one time  
17 or another and Applicants I expect generally are under the  
18 burden of trying to select just what will fulfill the require-  
19 ments. But I do think this, that the parties likewise have  
20 a job to say, Well, what's new and I think we can take the  
21 time on the stand or we can take the time in advance. Now  
22 the choice is yours.

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1 MS. CHASIS: Mr. Chairman, I would like to make  
2 the point it is not just what's new but how what's new  
3 affects the findings. In other words there has to be that  
4 critical link. It has got to really alter the findings,  
5 the critical findings upon which the '79 date was based.  
6 So what's different, and how is that difference critical  
7 to the termination date.

8 CHAIRMAN JENSCH: Yes, I think that's a point  
9 well taken.

10 I do think this: It may be that after a state-  
11 ment of contentions-- We'll expect the statement of con-  
12 tions to be served on or before-- Well, if you get the  
13 10th, ten days would be the 20th, a Saturday. Make it  
14 Monday, the 22nd, in the hands of the Applicant by November  
15 22nd.

16 If those contentions indicate that Applicant is  
17 not ready to proceed fully on December 7th, we'll pick  
18 another date, and if discovery has to be had by the parties  
19 on those contentions, maybe we'll have to adjust the schedule.  
20 Let's see what we can do with December 7th with these two  
21 date of November 10th and 22nd in mind.

22 MR. TROSTEN: Mr. Chairman, would you allocate  
23 if you will some additional-- Were you planning to allo-  
24 cate some additional time beyond the 7th? I just wanted  
25 to inquire of that. The 7th is a Tuesday. And I just

eb2

1 wanted to know-- I can't tell, sir, how this is going to go,  
2 but I would just request that you consider that.

3 CHAIRMAN JENSCH: Well, I think we have knocked  
4 out the next two weeks. They say New Year's Eve at the Big  
5 Apple is a good time.

6 DR. BRIGGS: I think Chairman Jensch means the  
7 7th, 8th, and 9th and the rest of the week, do you not?

8 CHAIRMAN JENSCH: Yes.

9 MR. TROSTEN: Thank you.

10 CHAIRMAN JENSCH: Oh, yes, indeed, the rest of  
11 the week.

12 MR. LEWIS: Are you also saying perhaps the  
13 second week?

14 CHAIRMAN JENSCH: No, the second week is not  
15 available.

16 MR. LEWIS: Okay. So it's the week of the 7th.

17 CHAIRMAN JENSCH: Yes.

18 MR. LEWIS: Mr. Chairman, I might add that  
19 obviously the schedule that is being laid out here is built  
20 around the Licensee's submittal. Now equally obviously,  
21 the contentions may or may not have the benefit of the Final  
22 Environmental Statement before they have to be filed. And  
23 I point it out not to indicate that I think that the con-  
24 tentions should not be filed on that date, but we'll have  
25 to be aware of the fact that the contentions may be affected.

eb3

1 CHAIRMAN JENSCH: Yes. Surely.

2 Well, I think it's contemplated by the rules  
3 that contentions can be formulated before the FES but subject  
4 to modification or at least to change when the FES does come  
5 out. The rules do say the Staff cannot be expected to express  
6 its final view until the FES is out, and I think that's a  
7 guide to the parties themselves.

8 Is there any other matter we can take up before  
9 we recess?

10 MR. LEWIS: Yes, Mr. Chairman.

11 I wanted to address a few matters which relate  
12 to the remaining issue on the selection of a tower, and I  
13 had understood your -- at the evidentiary hearing that you  
14 indicated that would be appropriate at this prehearing con-  
15 ference, to attempt to address that open item.

16 Perhaps the other parties will want to comment  
17 on this.

18 It would be my view that the remaining potentially  
19 evidentiary item in that case is the schedule impact of  
20 the delay in the receipt of regulatory approval.

21 Now I would like to advise the Board that this  
22 afternoon the parties are meeting in an attempt to enter  
23 into a stipulation as to a construction schedule that would  
24 flow from a commencement of construction on a given date.

25 Now the problem that we have I believe is that

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1 for purposes of agreeing to a construction schedule we have  
2 to have a beginning date. Now it's the Staff's view that  
3 that beginning date would be mandated by this Board's deci-  
4 sion.

5 For example, if we were to sit down today, all  
6 the parties, and say Well, supposing there were a Board  
7 decision by November 1, 1976, what would the end date then  
8 be? But I guess I'm indicating to you that I see a substan-  
9 tial benefit in terms of being able to finalize the construc-  
10 tion schedule in having an as-prompt-as-possible Board  
11 determination which would kick off the commencement of con-  
12 struction.

13 Now you have before you all of the presentation  
14 that should provide the underpinning for a decision on the  
15 selection of the preferred type of closed-cycle cooling.  
16 You also have before you the various briefs of the parties  
17 on the question of what are the required regulatory approvals.

18 CHAIRMAN JENSCH: Your question is when is the  
19 decision coming from the Board?

20 MR. LEWIS: No, I'm not asking you when it's  
21 coming.

22 CHAIRMAN JENSCH: The outside date would be  
23 December 1, and hopefully we can expedite it to a lesser  
24 period, a shorter period.

25 MR. LEWIS: Fine. Well, that's helpful, too,

eb5

1 because then we can key our discussions this afternoon around  
2 something like December 1. And it does serve to give us  
3 a beginning date in order to determine what the construction  
4 schedule is.

5 Now I note that Con Edison in its various  
6 briefs has taken the position that the license only addresses  
7 the question of the date for cessation of operation with  
8 once-through cooling, and they have used this to argue that  
9 this Board somehow does not have authority to issue an order  
10 that would determine a commencement date.

11 Well, we don't agree with that position. We  
12 think that the determination by the Board of a reasonable  
13 termination date depends upon the determination of the Board  
14 of a --

15 CHAIRMAN JENSCH: Well, didn't the Appeal Board  
16 take care of everything but the start of construction or  
17 some such?

18 MR. LEWIS: There are time periods for con-  
19 struction that are contained in the Unit 2 decision and  
20 indeed, those would be very definite background to our  
21 discussion this afternoon. But nevertheless, the parties  
22 are --

23 CHAIRMAN JENSCH: So we would proceed in  
24 accordance with the Appeal Board's schedule.

25 MR. LEWIS: It certainly is correct that there

eb6

1 has been a termination of --

2 CHAIRMAN JENSCH: Whatever date that happens to  
3 fall on we'll --

4 MR. LEWIS: The parties are also going to want  
5 to discuss the impacts of whatever delay grew out of the  
6 failure to have the regulatory approvals.

7 As far as the argument that was made earlier  
8 about the lack of finality to the appellate division deci-  
9 sion, I can only say that even without the appellate  
10 division decision, it was the Staff's view that we had suffi-  
11 cient finality and we had something we could rely upon to  
12 say that the Buchanan matter was settled at that point.

13 Now of course it is our view that we have one  
14 more step to finality. It may be that for some time to come,  
15 if there are subsequent appeals, that the matter would still  
16 be lacking in -- quote, unquote -- "finality." But we don't  
17 see that as in any way precluding the Board from finding that  
18 the Buchanan matter has been resolved in a way that would  
19 permit the Board to enter its decision.

20 I believe those are the matters that I wanted to  
21 address. Perhaps the other parties have some comments.

22 MS. CHASIS: HRFA agrees with Mr. Lewis' state-  
23 ment that there should be a linkage of this Board's decision  
24 on the preferred type of system in question, whether all  
25 regulatory approvals have been received, with the setting of

eb7

1 a termination date. In other words, those should all come  
2 together and preferably before December 1st.

3 And I think we have briefed in full our reasons  
4 for believing that the Board can and should reach a decision  
5 on Con Ed's having received all necessary regulatory appro-  
6 vals once it has received the NRC approval for a preferred  
7 type of system, so we rest on our brief and our exposition  
8 there on that issue.

9 On the question of the effect of the Board's  
10 finding that all such approvals have been received, I would  
11 state that I think it needs to be spelled out in the order  
12 that once this decision is made, nothing further need be  
13 done by the Commission for closed-cycle cooling to be re-  
14 quired; that that under the license terms is final, subject  
15 to the actual issuance of a license amendment.

16 And we would ask that the Board specifically  
17 make such a finding in the decision that it does issue in  
18 the preferred system proceeding.

19 CHAIRMAN JENSCH: Very well.

20 MR. SACK: I believe most of what I have heard  
21 just echoes what has already been briefed at some length.

22 One point, though: Even setting aside the  
23 Village of Buchanan approval, the NRC approval comes not when  
24 the Board issues a decision but when the Commission issues  
25 the license amendment. We ought to be clear on that.

eb8 1 And as far as setting a date for commencement of  
2 construction, I think, as we stated in the brief, that is  
3 not part of the present license. That would be a major altera-  
4 tion of the present structure of the license which merely  
5 has a date for termination of operation of once-through  
6 cooling, and that's what the Board should deal with.

7 MR. LEWIS: Mr. Chairman, I might say that there  
8 really is no factual distinction-- There is a factual dis-  
9 tinction between the Board's determination and the Commission's  
10 issuance of the amendment, but I assure you that it will be  
11 a very, very short time span between those two events. And  
12 so I really think it is of no significance for planning  
13 purposes.

14 CHAIRMAN JENSCH: Well, we'll try to get it out  
15 before the end of November, so that if December 1 is some  
16 magic date, if the Board decides to make the selection and  
17 so forth, the Staff could issue the remaining step in the  
18 program.

19 MR. SHEMIN: I just have one small clarification.

20 Mr. Chairman has referred to me as representing  
21 the State of New York, and the Applicant has occasionally  
22 referred to me as representing the Attorney General.

23

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eb9

1                   The positions I've taken in this hearing repre-  
2 sent the Attorney General's office, the Department of Environ-  
3 mental Conservation of the State of New York, the State  
4 Energy Office which is the new successor to the Atomic  
5 Energy Council, and the New York State Public Service Commis-  
6 sion, which is the utility regulatory agency.

7                   CHAIRMAN JENSCH: It will be so understood.

8                   Is there any other matter we can take up before  
9 we conclude?

10                   (No response.)

11                   If not, this prehearing conference is now con-  
12 cluded.

13                   (Whereupon, at 1:15 p.m., the prehearing  
14 conference was concluded.)

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