

6/20/77
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY) Docket No. 50-247
OF NEW YORK, INC.) OL No. DPR-26
(Indian Point Station,) (Determination of Preferred
Unit No. 2)) Alternative Closed-Cycle
) Cooling System)

ANSWER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
TO PETITION OF HUDSON RIVER FISHERMEN'S ASSOCIATION
FOR COMMISSION REVIEW

Consolidated Edison Company of New York, Inc. ("Con Edison") submits herewith its answer to the Petition dated June 7, 1977 ("the Petition") of the Hudson River Fishermen's Association ("HRFA") for Commission review of the Atomic Safety and Licensing Appeal Board's ("the Appeal Board") decision ALAB-399.

Con Edison believes the Commission should deny HRFA's Petition. The Petition is based on a series of errors of law, unsupported or contradicted by the record. The Petition raises no issue of fact, contrary to assertions on pages 4, 5 and 7.

1. A Variance is necessary. HRFA states that a variance is not required for initial phases of construction, which do not involve the erection of any structure. HRFA then

uses this statement to argue that the variance is therefore not a necessary governmental approval within the meaning of License DPR-26. Petition, p. 5. This is a non sequitur. It is obvious that whether or not a variance is required for pre-construction activity, Con Edison cannot commence procurement or excavation until it knows precisely what it will build and where. And the Village of Buchanan Zoning Board of Appeals ("the Zoning Board") may have authority to alter these matters, depending upon the resolution of the zoning litigation, now pending before the New York Court of Appeals. Thus, until the Zoning Board issues a satisfactory variance, Con Edison does not have all necessary governmental approvals.

2. The Village has not ruled on Con Edison's plans.

HRFA asserts that "Con Edison's plans for a cooling tower satisfy whatever local and incidental regulation the Village has the authority to impose under its Zoning Code." HRFA claims that the Village has also ruled that Con Edison's plans are in compliance except as to those matters subject to a variance. Petition, p. 5. These assertions have no support whatsoever in the record. The Zoning Board's decision was that Con Edison's application was premature and therefore the Zoning Board chose

not to review the details of the application. Con Edison's Brief in Support of Exceptions, December 21, 1976, Exhibit A, p. 13. HRFA provides no citation for the alleged ruling of the Village, and Con Edison is not aware of any such ruling.

3. The Village has not waived its rights. HRFA further asserts that the Village's (i.e., Zoning Board's) failure to suggest other applicable regulations constitutes a possible waiver of its rights. Petition, p. 6. This suggestion is refuted by the fact that the Zoning Board has been vigorously pursuing its legal remedies in the New York State courts. It has waived none of its rights and powers and will be able to impose on Con Edison whatever requirements are allowed by the Court of Appeals.*

4. Construction permit analogy is incorrect. HRFA analogizes the issue of an outstanding necessary governmental approval under License DPR-26 with the Commission's practice with respect to the issuance of construction permits. Petition, p. 7. These are completely different matters.

The instant proceeding is concerned with a provision

* HRFA complained, at p. 6, that the Village "had chosen not to act but to continue to obstruct." The Zoning Board certainly has a right to seek a judicial determination of its rights in the circumstances of this case.

of a Commission license which requires the receipt of "all necessary governmental approvals". There is no requirement in either law or regulation that all necessary governmental approvals be obtained prior to issuance of a construction permit.

Furthermore, the issuance of a construction permit is merely an authorization to proceed at the permittee's risk. The permittee is free to exercise his business judgment whether in view of the prevailing circumstances it will incur that risk. The instant case deals not with an authorization to proceed but with the establishment of an end date (i.e., termination of operation of the once-through cooling system) which requires that Con Edison take action prior to that date. This is a very different type of Commission action. Con Edison has already expressed its views that it would be unreasonable to proceed with the construction program in view of all the uncertainties surrounding the several proceedings involving the necessity for a cooling tower at Indian Point 2. Con Edison's Brief in Support of Exceptions, December 21, 1976, pp. 13-16.

The Appeal Board correctly stated Con Edison's due diligence obligation in this regard as follows (ALAB-399, p. 37):

"A mandatory order requiring the issuance of variances subject to reversal on a pending appeal is not an approval. It is merely permission to start construction at

one's own risk while the question of approval of construction is being litigated. It was not our intention in putting the due diligence requirement into the license to penalize the licensee if it did not voluntarily place itself into this type of jeopardy."

5. HRFA is collaterally attacking License DPR-26.

HRFA claims that the effect of ALAB-399 is to extend the date for termination of operation of once-through cooling "without any analysis of environmental impacts of such an action."

Petition, p. 6. This is no more than an untimely and collateral attack on ALAB-188 (7 AEC 323 (1974)), which inserted ¶ 2.E(1)(b) in the License DPR-26. This condition is amply supported by the environmental analysis contained in ALAB-188 and the extensive hearings which preceded its issuance.

The fact that there is a related proceeding in which Con Edison seeks similar relief is a circumstance dictated by the terms of the License. The instant proceeding is based on ¶ 2.E(1)(b) of the License which provides for extensions of interim operation in the event of a failure to receive all governmental approvals required to construct a closed-cycle cooling system. Another paragraph of the same License provides for extensions of interim operation based on data collected during interim operation. License DPR-26, ¶ 2.E(1)(c). Since these two sections require different showings by Con Edison

and applications thereunder were necessarily on different time schedules, it is appropriate that they be considered separately. The fact that the relief requested in one may overlap the relief requested in the other is not a reason for denial of either application.

Moreover, to the extent that HRFA claims that an analysis of the environmental impacts of a ¶ 2.E(1)(b) extension is necessary, Con Edison respectfully notes that this matter could have been, but was not, raised before the Atomic Safety and Licensing Appeal Board. HRFA took no exception to the Licensing Board decision which extended the interim operation period pursuant to ¶ 2.E(1)(b). Accordingly, this aspect of HRFA's Petition for Review is barred by § 2.786(b)(4)(iii).

HRFA's Request for a Partial
Stay Should Be Denied

Despite the fact that HRFA's application for a partial stay of ALAB-399 is still pending before the Appeal Board, HRFA has applied to the Commission for similar relief under § 2.788 of the Rules of Practice. By way of justification for its action, HRFA asserts that there is "uncertainty as to whether the Appeal Board or the Commission has the authority to stay the effectiveness of a decision once the petition for review is granted." HRFA Petition at 8 n.*.

The new stay regulation is, we agree, silent on the precise point, but we submit that it is inappropriate for HRFA to proceed in the fashion it has chosen at a time when its stay request is pending before the Appeal Board. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365, 366 (1976) (Mr. Rosenthal & Dr. Buck, dubitante).

Since, however, HRFA has made this request, albeit in a contingent fashion, a comment on the merits of the stay application is in order. HRFA has made no showing that it is likely to prevail on the merits, and its bald assertions of harm to it and lack of harm to Con Edison are supported no better here than they were in HRFA's application to the Appeal Board. See generally Con Edison's Answer to HRFA's Application for Partial Stay of ALAB-399, dated June 1st, 1977.

HRFA's claim that the public interest, the fourth of the Commission's stay criteria, 10 C.F.R. § 2.788(e)(4), "would be undercut" by denial of the stay because this would permit operation of Indian Point 2 through another striped bass spawning season, is a blatant bootstrap argument. From Con Edison's perspective, issuance of a stay of ALAB-399 could have the consequence of either (1) compelling investment in a

cooling tower the need for which is the subject of active controversy or (2) exposing the Company to an enforced outage in the event the closed-cycle cooling system is required, but not in place by the still-to-be-designated termination date for once-through cooling operation. Neither of these latter alternatives, we submit, would serve the public interest.

In comparison with the alleged harm to the public interest asserted by HRFA--harm which no one claims will be biologically significant or, a fortiori, irreversible--these are substantial dangers. Moreover, to the extent that HRFA represents a special interest--the fishermen--it is plain that the public interest that group seeks to vindicate is far narrower than the interest represented by consumers of electric energy in the Metropolitan New York region.

Con Edison also wishes to emphasize the gross error of HRFA's suggestion that Con Edison has conceded that it would not be injured by a stay. Petition, p. 9. Con Edison's actions in early 1977 in failing to seek extraordinary relief have no relevance to HRFA's request in June 1977. Con Edison would now be required to undertake substantial construction activities in order to meet a May 1, 1980 date. Con Edison's Brief to Licensing Board, October 6, 1976, Exhibit B. The requested

stay would therefore substantially alter the status quo, to Con Edison's detriment, as discussed in detail in Con Edison's Answer of June 13, 1977. In short, the ancillary request by HRFA for a partial stay of ALAB-399 is not only premature but unsupported.

Conclusion

For the foregoing reasons, the Petition of HRFA should be denied.

Respectfully submitted,



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June 20, 1977

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CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of June, 1977, served the foregoing document entitled "Answer of Consolidated Edison Company of New York, Inc. to Petition of Hudson River Fishermen's Association for Commission Review" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

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