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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

COMMENTS OF THE POWER AUTHORITY OF THE STATE OF NEW YORK WITH RESPECT TO CLOSED-CYCLE COOLING CONDITIONS

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Summary

These comments are submitted on behalf of the Power Authority of the State of New York ("the Power Authority") in response to the November 15, 1978 Memorandum and Order of the Nuclear Regulatory Commission ("the Commission") entered in the above-captioned docket for Indian Point Station, Unit No. 2 ("Indian Point 2"). In that Memorandum and Order, the Commission invited the Power Authority, which is the owner and operator of the Indian Point Station, Unit No. 3 ("Indian Point 3") facility, to comment on:

(1) the implication of the Seabrook decision with respect to closed-cycle cooling at Indian Point Unit No. 2; and the existing termination date of May 1, 1982 for operating Indian Point 2 with once-through cooling; and

(2) to what extent the Indian Point 2 conditions 2.E.(1)(a-d) should be modified to take proper account of EPA's authority.

The Power Authority's position on these two questions may be summarized as follows:

(1) The Seabrook case[1/] supports the position that termination dates for operation with once-through cooling in the Indian Point 2 and 3 license conditions are barred by the express language of § 511(c)(2) of the Clean Water Act. The reasoning of the Commission in Seabrook is fully consistent with the important principle that by the Clean Water Act Congress has vested in the Environmental Protection Agency ("EPA") and state environmental agencies the responsibility to resolve questions of non-radiological water quality impacts, and that cooling system and other water-quality-related conditions imposed by the Commission represent an unnecessary and burdensome regulatory duplication in an area better left to direct determination under the Clean Water Act.

(2) The Commission should take licensing action to withdraw from areas subject to EPA or state regulation governed by the Clean Water Act. Because of the lead times required for planning, design, site preparation, construction, and start-up of closed-cycle cooling systems for Indian Point Units 2 and 3,[2/] it now appears that the

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1/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977); CLI-78-1, 7 NRC 1 (1978).

2/ In the Final Environmental Impact Statement for Selection of the Preferred Closed-Cycle Cooling System at Indian Point Unit No. 2 (NUREG-0042) and the Draft Environmental Statement for selection at Indian Point 3 (NUREG-0296), the Staff designated natural draft wet cooling towers as the preferred alternative closed-cycle cooling system for the Indian Point units.

final determination under § 402 of the Clean Water Act of whether closed-cycle cooling ultimately will be required at Indian Point will not have been reached by the time it would be necessary to commmence a construction program for a closed-cycle cooling system under the Indian Point license conditions as they now exist. Accordingly, the conditions should either be eliminated or so modified as to extend the termination date to allow for a determination by EPA or the State (and any judicial review thereof) of the type of cooling system to be required prior to the date it would be necessary to commence construction of a closed-cycle cooling system.[3/]

3/ It is not without reservation that we suggest action to be taken with respect to another utility's operating license, even at the invitation of the Commission. The relationship between the Indian Point 2 and Indian Point 3 licenses, however, is both direct and obvious. Both licenses contain similar conditions requiring termination dates for operation with once-through cooling. The termination dates for Indian Point 2 and 3 are now May 1, 1982 and September 15, 1982, respectively. The legal and policy principles warranting modification or elimination of the conditions are the same. Hence, we believe that the same modification should be made to both licenses. The license conditions are, for the reasons stated in the Application filed by the Power Authority with the Commission in August 1978 ("the Extension Application"), barred, as a jurisdictional matter, by § 511(c)(2), but extension of the termination date may suffice to alleviate the pressing problems caused by the conditions without requiring the Commission to decide the jurisdictional issue at this time. Because these comments are in the nature of an amicus submission, we do not wish to be understood as having, by these comments, either waived the right to litigate this issue in the Indian Point 3 docket or acknowledged that actions taken in the Indian Point 2 docket have conclusive effect with regard to Indian Point 3.

Discussion

In August 1978, relying on § 511(c)(2) of the Clean Water Act, the Power Authority, as licensee for Indian Point 3, filed an Application for an Extension of the Period of Interim Operation Using the Installed Once-Through Cooling System and Motion for Expedited Commission Consideration ("Extension Application").4/ As may be seen from a review of that document, a copy of which is attached, issues similar to those before the Commission in the instant case also occur in Docket No. 50-286. The governing principles of statutory construction and policy as described in that Application are equally pertinent here.

I.

A.

Under § 511(c)(2) of the Clean Water Act, the Commission is barred from imposing any closed-cycle cooling system condition, including a termination date, different from that imposed by EPA

In the Extension Application, the Power Authority demonstrated that § 511(c)(2) of the Clean Water Act, as well as the Seabrook decisions, require the Commission to extend the termination date for Indian Point 3 operation with

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4/ See August 2, 1978 letter to Harold R. Denton, Director of Nuclear Reactor Regulation, from Paul J. Early, Assistant Chief Engineer (Projects) of the Power Authority, accompanying Extension Application, and supporting Affidavit, filed in Dkt. No. 50-286.

once-through cooling pending decision on cooling systems at Indian point by EPA or a State authority[5/] under § 402 of the Clean Water Act.

On page 9 of the Extension Application, we stated:

> Because the EPA requirements that govern the type of cooling system to be required for Indian Point 3 are currently stayed, 40 C.F.R. § 125.35(d)(2), and because the Commission is prohibited by law from taking any action inconsistent with the EPA action, it follows that the period of interim operation provided for in ¶ 2.E.(1) of the License must be extended until EPA has taken final action (including judicial review, if any) with regard to what requirements concerning cooling systems or other effluent limitations should be imposed under the Clean Water Act.

As we discussed, "effluent limitaton", as that term is used in § 511(c)(2) includes "schedules of compliance." Although EPA issued proposed NPDES permits under § 402 of the Clean Water Act that called for cooling towers at Indian Point, and included a termination date for operation with once-through cooling, those requirements have been automatically stayed under 40 C.F.R. § 125.35(d)(2) pending hearings and a factual determination on the need for such requirements. Hence, any schedul· of compli-

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5/ At page 5, note 3, we noted that the question of whether EPA retained discharge permit jurisdiction over the Hudson River power plants or whether that jurisdiction has passed to the New York State Department of Environmental Conservation was pending before the United States Court of Appeals for the Second Circuit. In a decision rendered November 3, 1978, a panel of the Second Circuit held 2-1 that EPA retained such jurisdiction. Central Hudson Gas & Electric Corp. v. EPA, Nos. 77-4192 and 78-6032 (2d Cir. Nov. 3, 1978). A petition for rehearing and rehearing in banc has been filed.

ance that may have existed for closed-cycle cooling at Indian Point under Clean Water Act authority is currently stayed. The Power Authority believes that any cooling system requirement, including a termination date, that is contained in the Commission's licenses for Indian Point should likewise be inoperative in order to avoid conflict with § 511(c)(2).

We believe that the passages from Seabrook cited in the Commission's Memorandum and Order at page 2, note 1, as well as another portion of the Commission's January 6, 1978 Memorandum and Order cited at page 16 of the Extension Application support our position. The interpretation of Seabrook in Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), LBP-78-7, 7 NRC 215 (1978), is completely consistent with our views.[6/]

The legislative history of § 511(c)(2) specifically addressed the cooling system condition imposed at Indian Point 2. During the floor debates, newspaper articles reporting the then-recent imposition of a closed-cycle cooling condition at Indian Point 2 were read into the record. Senator Buckley declared that, "[e]nvironmental decisions of this type are barred by clause 511(c)(2)(B) of the Conference Report on S.2770. This [cooling condition] appears to be an 'effluent limitation' which is a 'condi-

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6/ In the Extension Application at page 17, note 6, we stated that the Yellow Creek decision had been appealed and that the case was pending before the Appeal Board. The Appeal Board held oral argument in the case on December 6, 1978.

tion precedent' to a license."7/ Similarly, Senator Jackson stated that the Atomic Energy Commission's decision to require closed-cycle cooling at Indian Point was "... barred by clause 511(c)(2)(B) of the conference report on S.2770. This appears to be an 'effluent limitation' which is a 'condition precedent' to a license. Therefore, I read 511(c)(2)(B) as prohibiting the AEC-Indian Point action."8/

Hence, the Indian Point situation was directly addressed, and the floor debates could not have been more explicit in declaring that the types of cooling conditions and termination dates currently being imposed by the Commission at Indian Point are barred by § 511(c)(2).

B.

Even if the Commission were not legally barred from imposing the closed-cycle cooling conditions, principles of inter-agency comity and conservation of administrative resources militate against imposition of the conditions

Even if § 511(c)(2) did not compel the Commission to extend the period of interim operation to reflect the discharge permit proceedings and the automatic stay of any cooling system requirements pending a § 402 determination, principles of inter-agency comity and effectuation of the underlying policy manifested in § 511(c)(2), as well as the Clean Water Act more generally, would still warrant vaca-

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7/ See Extension Application at 14, citing 118 Cong. Rec. S33,708 (daily ed. Oct. 4, 1972).

8/ Id. at S33,710.

tion of the current termination date contained in the Indian Point license conditions.

Section 511(c)(2) was enacted to remove any doubt that EPA and designated state agencies are to be the arbiters of water quality impact decisions under the Clean Water Act. As Senator Muskie explained:

> EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants into the waters of the United States. . . .
>
> [Other agencies] shall accept as dispositive the determinations of EPA and the States . . .9/

Because the Commission must accept EPA's decisions as "dispositive", it is a thoroughly wasteful exercise for the Commission to conduct its own set of hearings, briefings, and other proceedings to reach a decision that will inevitably be supplanted by a determination by EPA or a state agency. Indeed, the situation regarding the Indian Point licenses represents a model case of the difficulties arising from the Commission's retention of jurisdiction in the face of the statute.

We explained in the Extension Application how imposition of the termination date would result in a circumstance where the need to begin implementation of closed-cycle cooling conversion would arise prior to any decision from the final arbiter of the question whether

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9/ See Extension Application at 12, citing 118 Cong. Rec. S33,701 (daily ed. Oct. 4, 1977).

closed-cycle cooling will be required at Indian Point. The affidavit of Paul J. Early clearly states the considerable lead times involved; possible outages that may occur under the current license condition for Indian Point 3 as it is being imposed; the potentially irreversible environmental impacts that may unnecessarily occur if the Power Authority is forced to begin conversion to cooling towers; and the possibility that a type of closed-cycle cooling system other than natural draft wet cooling towers may be designated by the final decision-maker.

Substantial resources of the Commission, the Power Authority and other interested parties are unnecessarily expended as a result of the dual regulation currently in effect. The Clean Water Act scheme of regulation administered by EPA and the states, and particularly the requirement contained in EPA's regulations that cooling system requirements are automatically stayed while hearings are going forward on the issue of water quality impacts, would be frustrated if the Commission did not similarly allow interim relief from cooling system requirements. Thus, the Commission should, in the event that the Commission concludes that § 511(c)(2) gives it any discretion in the matter, withdraw from the nonradiological water quality arena entirely, leaving it to the agency that has the statutory

obligation to address the cooling system question once and for all.

On October 13, 1978, the Staff responded to the Extension Application. A copy of that letter is attached to these Comments. The Staff's letter stated that it was denying the relief requested on several grounds, including the fact that the Commission will be required to conform the Indian Point 3 license to whatever compliance schedule may be adopted by EPA. See also 43 Fed. Reg. 49,082 (1978). On November 13, 1978 (before issuance of the Memorandum and Order to which the present Comments respond), the Power Authority advised the Staff by letter (a copy of which is also attached) that "[w]e do not agree with every assertion in your letter, but your letter does as a practical matter provide the firm commitment we had sought. Our disagreements as to any legal issues or future reviews that the Staff may feel an obligation to undertake need not be resolved now." The Staff agreed to "take a further look at the need for formal relief as the date for termination of once-through operation comes closer, and to withhold any enforcement action until the cooling system issue is finally resolved." Consequently, although the Power Authority is concerned about the underlying legal bases and factual assumptions used by the Staff in stating its denial of the Extension Application, the Authority determined not

to request a hearing at that time. The Power Authority nevertheless believes that the legal and policy principles stated in these comments and set forth in the Extension Application are compelling, and that "formal relief" will ultimately be necessary on the basis of those principles. While the Power Authority draws comfort from the Staff's assurances (which we consider to be a firm commitment), our view is that formal relief from the Commissioners is important and should be provided now, rather than later, in order to reduce the uncertainties under which we and other licensees have had to function in this area.

II.

The License Condition in ¶ 2.E.(1)(a-d) should either be eliminated or enforcement thereof should be withheld indefinitely through an extension

Whether one examines the express terms of and the history surrounding the Clean Water Act and the history surrounding it, or steps back and surveys the confusion and duplication that has unfortunately followed the Commission's efforts to pass on Clean Water Act issues, the conclusion is the same: the Commission should relieve the Licensee of Indian Point 2 of the requirement for conversion to closed-cycle cooling by May 1, 1982, by either deleting ¶ 2.E.(1) entirely, or in effect withholding enforcement of that condition through a formal extension of the termination

date until the Clean Water Act proceedings have achieved a final determination. When that has occurred, the Commission, which is bound to accept that determination as "dispositive", can then consider how best to take action consistent with the Clean Water Act and decisions reached under that statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 15th day of December, 1978, served the foregoing Comments of the Power Authority of the State of New York With Respect to Closed-Cycle Cooling Conditions, dated December 15, 1978, by hand delivery or by mailing copies thereof first class mail, postage prepaid and properly addressed, as indicated below, to the following persons:

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