BEFORE THE UNITED STATES
NUCLEAR REGULATORY 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)

11-23

CON EDISON'S MEMORANDUM CONCERNING
INVESTIGATION BY THE LICENSING BOARD
OF MATTERS NOT PLACED IN CONTROVERSY BY ANY PARTY

In a telephone conference held on November 17, 1976, the Chairman of the Atomic Safety and Licensing Board ("the Board") reviewed the possibility that the Board might wish to conduct an inquiry into whether Consolidated Edison Company of New York, Inc. ("Con Edison") acted with due diligence in seeking the required government approvals in connection with construction of a closed cycle cooling system for its Indian Point Station, Unit No. 2 ("Indian Point 2") facility. Such due diligence was required under Paragraph 2.E(1)(b) of the Indian Point 2 operating license, Facility Operating License No. DPR-26. Con Edison respectfully submits that such an inquiry would be unjustified and in contravention of the regulations of the Nuclear Regulatory Commission ("the Commission"). In support of this position, Con Edison states as follows:

1. Under the regulations of the Commission, the Board is required to undertake an inquiry in proceedings for

the issuance of operating licenses or amendments thereto solely with respect to the matters placed in controversy by the parties. 10 C.F.R. § 2.760a (1976). No party to the instant proceeding has submitted a contention that Con Edison acted otherwise than with due diligence in seeking and obtaining the necessary governmental approvals for a cooling tower at Indian Point 2. Certain language used by one intervenor, Hudson River Fishermen's Association ("HRFA"), in a submittal to the Board dated October 13, 1976, and quoted in part by the Board in its November 9, 1976 Order Convening Further Conference, 41 Fed. Reg. 50358 (1976), was critical of Con Edison -- a posture that is hardly surprising given the long period during which HRFA and Con Edison have been adversaries in this proceeding. The Board's Order stated that HRFA's submittal gave "the implication . . . that the Licensee [Con Edison] did not act with due diligence. . . ."

At the October 5 hearing, however, counsel for HRFA specifically said she did not anticipate raising due diligence factual issues. Tr. 276. Furthermore, in the course of the conference telephone call of November 17, counsel for HRFA expressly disclaimed that she was raising a contention as to Con Edison's diligence. Moreover, counsel for both HRFA and the State of New York stated in the course

of that conference that even if there was a failure of due diligence on the part of Con Edison, it was moot (presumably meaning harmless) in light of the fact that the pacing item, in their view,[1/] in terms of the receipt of governmental approvals, was issuance of a license amendment by the Commission designating a particular cooling system.[2/]

1/ Con Edison does not share this view, considering the status of the proceeding for a variance from the Village of Buchanan's zoning ordinance. See Letter from Edward J. Sack, Esq. to the Board, Nov. 5, 1976. The period for appeals to the Court of Appeals of New York has not expired, N.Y. Civ. Prac. Law § 5513, and it remains unclear whether and how the Village Zoning Board of Appeals will exercise those residual powers reserved to it under the Appellate Division's October 25, 1976 decision. See Consolidated Edison Co. of New York v. Hoffman, No. 1622E (2d Dep't, Oct. 25, 1976), modifying 2 CCH Nucl. Reg. Reptr. ¶ 20.018 (Sup. Ct., Westchester Cty., Dec. 9, 1975). Moreover, in light of the original decision of the Zoning Board, and the approach adopted by the reviewing courts, the alleged deficiencies in Con Edison's presentation in support of its request for a variance would have had no effect on the progress of that proceeding, and would therefore have been harmless for purposes of ¶ 2.E(1)(b) of the license.

2/ The Chairman raised the possibility that Con Edison may have acted otherwise than with due diligence in not earlier submitting its three-volume report entitled "Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point Unit No. 2." This massive report was required under the license to be submitted on December 1, 1974, a date which the Appeal Board designated in its interlocutory decision of January 29, 1974. ALAB-174, 7 AEC 55 (1974), reconsideration denied, ALAB-178, 7 AEC 157 (1974). December 1, 1974 having been a Sunday, the report was timely filed the following day. 10 C.F.R. § 2.710 (1976). The Appeal Board established this date by requiring the collection of data which would not be completed until September 1974, and then finding that three months would be necessary to analyze the data and prepare the Environmental Report. 7 AEC at 61. Con Edison is not aware of any facts which alter these findings, nor do any such facts appear in the record of this proceeding.

2. Despite the foregoing, it was suggested by the Chairman that the Board is under a duty to inquire into the due diligence matter independent of its being raised by any party, in light of a decision in another case by the Atomic Safety and Licensing Appeal Board ("the Appeal Board").[3/] The Chairman also suggested that certain language in the Appeal Board's decision of April 4, 1974 in this docket, 7 AEC 323, might compel the Board to address the matter. We shall address each of these points.

The starting point of this portion of the inquiry is § 2.760a of the Commission's regulations, a provision that was amended last year to reflect the Commission's decision in the Indian Point 3 operating license case. 40 Fed. Reg. 2973 (1975), implementing Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3), CLI-74-28, 8 AEC 7, 9 (1974). Under that change to the regulations, the Board may conduct a sua sponte inquiry as to matters not put in controversy by a party "only in extraordinary circumstances where [it] determines that a serious safety, environmental, or common defense and security matter exists. This authority is to be used sparingly."

3/ The Chairman referred to a case involving Commonwealth Edison Co., and the question whether a Licensing Board was required, seemingly from press accounts, to make further inquiry into the effect of a cooling lake for a facility from the standpoint of withdrawal of land from agricultural use. The reference presumably was to Commonwealth Edison Co. (LaSalle County Nuclear Station, Units 1 and 2), ALAB-153, 6 AEC 821, 824 (1973); ALAB-193, 7 AEC 423, 424 n.3 (1974).

10 C.F.R. § 2.760a (1976) (emphasis added). The Commission has indicated its expectation that use of this power would be a rarity, CLI-74-28, 8 AEC at 9 n.7, and has properly condemned as "an idle exercise" the examination of "issues just for the sake of examination." Id. at 8.

In Con Edison's view, these provisions create a heavy burden for the Board to shoulder before it takes on an inquiry no party is seeking. This burden is not met in the present case because there has been no showing or even intimation of "extraordinary circumstances" nor has there been a showing that a "serious" issue exists.

The suggestion that the LaSalle decision of the Appeal Board compels a different result is, with respect, unfounded. In that case, the Appeal Board had directed a remand on the ground that the Licensing Board had relied upon stale data in addressing a land-use issue. ALAB-153, 6 AEC at 822-24. After the remand, the Appeal Board noted that

> It was because of [the public-interest] implications [of the land-use issue], as well as because of the NEPA obligation to make an independent inquiry into the environmental impact of the construction of the facility, that we were quite unprepared to attach very much significance to the withdrawal of the intervention which had raised the land-use issue. While the settlement which prompted that withdrawal may well have satisfied the personal

> interests of the intervenors themselves, it does not necessarily follow that the broader public interest was being equally well served. ALAB-193, 7 AEC at 424 n.3.

Here, however, the Board deals not with a construction permit, but an operating license -- a consideration that counsels the exercise of caution in inferring an obligation to conduct a sua sponte inquiry from the LaSalle case. See Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit 3), ALAB-186, 7 AEC 245, 247 n.3 (1974).

Inferring from an isolated Appeal Board decision such as LaSalle the existence of a pervasive duty to inquire into particular issues regardless of whether they have been put into contention by a party is a course that should not commend itself to the Board. For one thing, it flies in the face of the Commission's Indian Point 3 ventilation decision and regulation, both of which were issued after the Appeal Board's decision in LaSalle. For another, any such inference is expressly refuted by the Appeal Board's own language in the Indian Point 3 case -- language that was left undisturbed by the Commission. There, the Appeal Board, in response to a question certified to it under § 2.718(i) of the Rules of Practice, stated:

> In this connection, we must dispel the impression created by the certified question that prior decisions of this Board have held otherwise insofar as quality assurance matters are concerned. In actuality, we have never intimated, let alone held, that a licensing board is duty-bound to pursue, in an operating license proceeding governed by Section 2.760a, quality assurance (or indeed any other) matters which have not been put in issue by a party. Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit 3), ALAB-186, 7 AEC 245, 247 & n.3 (1974) (footnote omitted; emphasis added).

It follows beyond peradventure that LaSalle no more commands a sua sponte ventilation of due diligence here than the cases cited in footnote 3 of ALAB-186 demanded a sua sponte investigation of quality assurance.

The only remaining point is whether the Appeal Board's decision in Indian Point 2 requires an express investigation and finding by the Board in the absence of controversy on due diligence. We detect nothing in ALAB-188 that supports such an inference, see 7 AEC at 406-07, and nothing in the license condition, ¶ 2.E(1)(b), that suggests in any way that the question of due diligence had been set down for extraordinary hearing regardless of controversy among the parties. Particularly when one considers that the Appeal Board had, only nine days earlier, in the Indian Point 3 decision cited supra, expressly disclaimed the notion that any of its decisions imposed a sua sponte ventilation duty

upon Licensing Boards in cases subject to § 2.760a, it is entirely plain that no special treatment was intended with respect to the due diligence matter.

Conclusion

For the foregoing reasons, the Board should not conduct an inquiry with respect to due diligence. The record now before the Board, as well as the transcript of the Zoning Board hearing, Con Edison's "Report on Regulatory Approvals", the Decision of the Supreme Court, Westchester County, the Order on Appeal from Judgment of the Appellate Division and the Judgment Entered on Said Order, supports a conclusion that no serious question exists as to whether Con Edison has acted with due diligence in seeking all necessary governmental approvals.

Respectfully submitted,

Edward J. Sack

EDWARD J. SACK
Consolidated Edison Company
of New York, Inc.
4 Irving Place
New York, New York 10003
(212) 460-4333

Of Counsel:

LEONARD M. TROSTEN
EUGENE R. FIDELL
LeBoeuf, Lamb, Leiby & MacRae
1757 N Street, N.W.
Washington, D.C. 20036

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CERTIFICATE OF SERVICE

I certify that I have, this 23rd day of November, 1976, served the foregoing document entitled "Con Edison's Memorandum Concerning Investigation by the Licensing Board of Matters Not Placed in Controversy by Any Party" by mailing copies thereof, first class mail, postage prepaid, to the following persons:

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(original + 20)

Samuel W. Jensch, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stephen H. Lewis, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Franklin C. Daiber
College of Marine Studies
University of Delaware
Newark, Delaware 19711

Mr. R. B. Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

Sarah Chasis, Esq.
Natural Resources Defense Council, Inc.
15 West 44th Street
New York, New York 10036

Hon. George V. Begany
Mayor
Village of Buchanan
Buchanan, New York 10511

Werner P. Kuhn, Esq.
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233

Edward J. Sack