

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	Docket No. 50-247
CONSOLIDATED EDISON COMPANY)	OL No. DPR-26
OF NEW YORK, INC.)	Extension of Interim
(Indian Point Station,)	Operation Period
Unit No. 2))	

CON EDISON'S ANSWER TO PETITION
OF THE VILLAGE OF BUCHANAN
FOR LEAVE TO INTERVENE

By Petition dated October 13, 1976, the Village of Buchanan ^{1/} moved for leave to intervene in the above-captioned proceeding. Pursuant to § 2.714(c) of the Commission's Rules of Practice, 10 C.F.R. § 2.714(c) (1976), Consolidated Edison Company of New York, Inc. ("Con Edison"), as applicant for an amendment to Facility Operating License No. DPR-26, submits its Answer to the Petition, and supports the granting of the Petition.

^{1/} The Petition was filed by Carl R. d'Alvia, Esq., as Village Attorney for the Village of Buchanan, and refers to Mr. d'Alvia as the Petitioner. It is plain, however, from the allegations in the Petition, and from the supporting affidavit executed by Mayor George V. Begany, that the real party in interest is the Village of Buchanan as a New York municipal corporation. Cf. Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 402-03 (1974). Accordingly, Con Edison will respond to the Petition as having been filed by the Village.

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That the Village's Petition is untimely is clear. See 40 Fed. Reg. 45874 (1975). Even inexcusable tardiness, however, does not stand as an insuperable obstacle to intervention. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, NRC 273, 275 (1975); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-239, 4 NRC 20, 24 & n.12 (1976). In the view of Con Edison, the Village has made the necessary showing to support a late intervention under § 2.714(a)(1)-(4) of the Rules of Practice. Taking each of the criteria in turn:

(1) The availability of other means whereby the Village may protect its interest with respect to the requested extension: In Con Edison's view, there is no other forum in which the Village may adequately protect its interest with respect to the requested extension.^{2/} As the Board is already aware, the Village's Zoning Board of Appeals has denied Con Edison's request for a variance from portions of the local zoning ordinance. Under the decision of the

^{2/} Since the rights afforded to those making limited appearances, 10 C.F.R. § 2.715(a) (1976), are far fewer than those of full parties, Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), ALAB-263, 1 NRC 208, 225 n.10 (1975) (Mr. Rosenthal, dissenting), a limited appearance by the Village "would not be an adequate substitute for participation as a party." Id., CLI-75-4, 1 NRC at 276.

Special Term, New York State Supreme Court, Westchester County, in the case of Consolidated Edison Co. of New York, Inc. v. Hoffman, 2 CCH Nucl. Reg. Rptr. ¶ 20,018, 174 N.Y. L.J. No. 102, Nov. 26, 1975, at 14, col. 3F (Sup. Ct. Westchester Co. 1975), the Village would not have zoning power with respect to installation of a cooling tower at the Indian Point site, on the ground that Federal legislation was preemptive. This decision is now on appeal and has been argued before the Supreme Court Appellate Division, Second Department. In the absence of a final decision on the matter, it cannot be said that the Village's zoning power constitutes an "other means whereby the petitioner's interest will be protected."

Furthermore, the issues in the zoning variance proceeding, were the Appellate Division to reverse and direct a remand to the Zoning Board of Appeals, would be different from and narrower than those before the Commission with respect to this application. For example, a benefit/cost analysis required under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970) ("NEPA"), and Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), would apparently not be required. Hence, the zoning proceeding is not a substitute for this

licensing hearing. Cf. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 647-48 (1975) (Opinion of Mr. Rosenthal).

(2) The extent to which the Village's interest may reasonably be expected to assist in developing the record: The Petition refers to professional advice the Village has received concerning the impact of cooling towers at Indian Point Unit No. 2 ("Indian Point 2"). In view of the magnitude of the issue before the Board in this proceeding, this evidence should be placed before the Board so that all pertinent information may be weighed, consonant with the mandate of NEPA. Particularly with respect to the local impacts such as aesthetic intrusion, noise and saline drift, it is fitting that any evidence offered by the local governing body be presented, and that the Village be permitted to exercise the other rights of a full party to the proceeding.

(3) The extent to which the Village's interest will be represented by existing parties: The Village contends that in the past it has relied on the efforts of Con Edison to make the arguments and present the evidence with respect to the necessity of modifying the cooling system at Indian Point 2. Now, however, the Village states that it believes that Con Edison "has not adequately emphasized the environmental dangers to the community should the proposed system

be installed." Petition at 4. Con Edison believes that this is a judgment best left to the Village. We believe that we have properly sought to lay before the Commission all data pertinent to the question of the requested extension of once-through cooling at Indian Point 2 and the need (or lack thereof) for installation of any closed-cycle cooling system. Nevertheless, Con Edison has not sought to represent the particular interests of the Village or its inhabitants, since it would be improper and presumptuous to do so. We feel that it would be unseemly for this Board to hold that Con Edison as a private corporation (even though a public utility) may represent the interests of this governmental agency. See generally West Valley, supra, CLI-75-4, 1 NRC at 275.

The Village further states that it did not participate in NRC proceedings earlier because its interests appeared identical to those of Con Edison. That failure to participate, however, has on occasion been misinterpreted to indicate a lack of interest in the proceedings or a lack of concern about the impacts of cooling towers on the Village of Buchanan. Accordingly, intervention should be granted so that there may be no further misunderstanding of the Village's views.

The only other governmental body (aside from the Regulatory Staff) to participate in this proceeding is the

New York State Atomic Energy Council ("the Council"), which was granted leave to intervene as an interested state on November 25, 1975. See 41 Fed. Reg. 5459 (1976); 10 C.F.R. § 2.715(c) (1976). Under the Commission's Rules of Practice, "a state participating under Section 2.715(c) need not file contentions, take positions on issues or even assume an active role in the hearing." Marble Hill, supra, 4 NRC at 25. To the extent, therefore, that that agency has not taken a position in favor of the requested extension of interim operation, as has the Village, it would be mistaken to suggest that the Village's interests will be represented by the Council. The Council, of course, has a state-wide constituency, and the interests it represents may well be adverse, in the circumstances of this case, to those of the Village. Moreover, to the extent that the Council's views reflect those of another agency of the State government--the Attorney General has gone on record as opposing the requested license amendment. See Comments by the N.Y. State Att'y Gen. on the Draft Environmental Statement for Facility License Amendment for Extension of Operation with Once-Through Cooling for Indian Point Unit No. 2 (Sept. 30, 1976), at 1.

Finally, it is plain that the only other party to this case, Hudson River Fishermen's Association ("HRFA"), would not adequately represent the interests of the Village.

HRFA has been instrumental in obtaining the present license condition, and has gone on record as opposing Con Edison's request for an extension of interim operation. Rejecting the Village's intervention on the ground that HRFA will represent its cause is akin to asking the wolf to guard the sheep.

(4) The extent to which the Village's participation will broaden the issues or delay the hearing: Since a pre-hearing conference has not yet been held, there has been no formal sharpening of the issues in controversy in this proceeding. Nevertheless, to the degree that the likely shape of the issues may now be perceived from the various comments filed with respect to the Draft Environmental Statement issued by the Regulatory Staff, 41 Fed. Reg. 29228 (1976), a review of the Petition and Mayor Begany's supporting affidavit discloses (Paragraph 5(d) of the Petition to the contrary notwithstanding) that the issues in this proceeding will not be enlarged materially by granting the Petition. Certainly there will be no delay at all in the hearing since the first prehearing conference will not be held in this case until October 27, 1976. 41 Fed. Reg. 45919 (1976). There has been no discovery to date.

Assessing all of the criteria listed in the Commission's Rules of Practice, Con Edison believes that the Petition should be granted. Despite the delay since the expiration of the

period for filing interventions, it should be recognized by the Board that the Village has a strong interest in the outcome of the case, has evidence and perspectives to contribute to the proceeding, and will not delay the already long-overdue commencement of the hearing process.

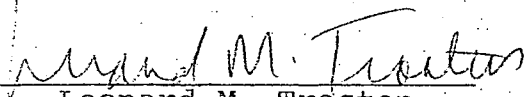
The Atomic Safety and Licensing Appeal Board has stated that it is proper to consider the "governmental nature" of a petitioner for intervention. Marble Hill, supra, 4 NRC at 24-25. No other organ of local government has sought leave to intervene--neither the Town of Cortlandt, nor the County of Westchester, nor the City of Peekskill.

WHEREFORE Con Edison respectfully advises the Board that it supports the Petition of the Village of Buchanan for leave to intervene. 3/

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By



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October 22, 1976

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The Petition also seeks an order setting the venue for the hearings at the new Municipal Building. Con Edison concurs that as much of this proceeding as possible should be conducted in the general vicinity of the site.