

10-6-76

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

BRIEF ON BEHALF OF LICENSEE

Introduction

In accordance with the request of the Atomic Safety and Licensing Board at the prehearing conference held on September 22, 1976, this brief is submitted on behalf of Consolidated Edison Company of New York, Inc. (Con Edison), the licensee in this proceeding. This brief addresses three legal issues which were raised at the prehearing conference and in prior correspondence:

1. Is a final disposition of pending legal proceedings concerning the Village of Buchanan's zoning authority required before Con Edison has received "all governmental approvals" within the meaning of License No. DPR-26?

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2. Is a re-examination of the construction time for a natural-draft cooling tower system not proper in this proceeding?

3. Do the extension provisions of License No. DPR-26 permit consideration of "winter lag"?

The answers to these questions will permit simple calculation of the date for termination of operation with the once-through cooling system, once the date of receipt of all governmental approvals is known.

I. A FINAL DISPOSITION OF PENDING LEGAL PROCEEDINGS CONCERNING THE VILLAGE OF BUCHANAN'S AUTHORITY IS REQUIRED BEFORE CON EDISON HAS RECEIVED "ALL GOVERNMENTAL APPROVALS" WITHIN THE MEANING OF LICENSE NO. DPR-26

A. Meaning of "All Governmental Approvals" in License DPR-26

The legal question presented is whether all governmental approvals have been obtained within the meaning of License No. DPR-26. Paragraph 2.E(1)(b) of License DPR-26 provides, in pertinent part, that if Con Edison acting with due diligence has not obtained all necessary governmental approvals required to proceed with the construction of a closed-cycle cooling system by December 1, 1975, then the May 1, 1979 date for termination of operation with the once-through cooling system

"shall be postponed accordingly."* The Appeal Board stated that the purpose of this provision was its recognition that Con Edison could not control the time required for regulatory actions. The Appeal Board stated, "We are not endowed with the powers of clairvoyance which would enable us to know how these matters will be resolved or when." ALAB-188, 7 AEC 323 at 389.

As we understand the present position of the Hudson River Fishermen's Association (HRFA) as stated in the prehearing conference (Tr. 17), HRFA agrees that Nuclear Regulatory Commission issuance of the proposed license amendment to designate a natural-draft cooling tower as the preferred alternative closed-cycle cooling system is an outstanding governmental approval, the lack of which postpones the May 1, 1979 date. The only issue in contention in this regard would

*This paragraph reads in full as follows:

"(b) The finality of the May 1, 1979 date also is grounded on a schedule under which the applicant, acting with due diligence, obtains all governmental approvals required to proceed with the construction of the closed-cycle cooling system by December 1, 1975. In the event all such governmental approvals are obtained a month or more prior to December 1, 1975, then the May 1, 1979 date shall be advanced accordingly. In the event the applicant has acted with due diligence in seeking all such governmental approvals, but has not obtained such approvals by December 1, 1975, then the May 1, 1979 date shall be postponed accordingly."

seem to be the status of the Village of Buchanan zoning approval.

B. History of Buchanan Proceeding

Con Edison initiated the proceedings with the Village of Buchanan by applying for a variance from the provisions of the Buchanan Zoning Code which restricted the height of structures in an industrial zone and prohibited the dispersion of pollutants beyond the site boundary. If the variance had been granted as requested, it would have promptly disposed of the requirement of the Village of Buchanan for a building permit.

A hearing was held by the Zoning Board of Appeals on May 6, 1975. The Zoning Board denied the variance requested primarily on the grounds that Con Edison's application was premature in that Con Edison had not been ordered to construct a natural-draft cooling tower. Con Edison appealed this decision to the New York State Supreme Court, Westchester County. HRFA intervened in support of Con Edison's appeal. The case was argued on September 19, 1975.

On November 14, 1975, this Court issued a decision in favor of Con Edison. It first found that the Zoning Board had improperly interpreted the terms of the license, the effect of which was to require Con Edison to construct a closed-cycle cooling system. Instead of remanding the case to the Zoning

Board, the Court went on to hold that the doctrine of Federal preemption applied to this case. The Court enjoined the Zoning Board from enforcing the zoning code against construction of a closed-cycle cooling system for Indian Point 2.

The manner of the Court's disposition of the case converted what was possibly a routine zoning case into an important constitutional proceeding. The issue became whether the Nuclear Regulatory Commission's exercise of its jurisdiction granted by the National Environmental Policy Act (NEPA) preempted local zoning. I believe this is a case of first impression on this point.

The Zoning Board appealed the Supreme Court's decision to the Appellate Division, Second Department, an intermediate New York State appellate court. Con Edison attempted to require the Zoning Board to present their case in the June Term of the Court by motion filed on March 9, 1976. This motion was denied and the case set down for the September Term. Oral argument was presented to the Appellate Division on September 21, 1976. It is not possible to predict when the Appellate Division will issue a decision.

C. The Requirements of the License Are Not Satisfied
While the Appeal is Pending

The legal question becomes whether Con Edison has received "all governmental approvals" prior to the final disposition of the pending litigation. It is beyond question that the Village of Buchanan as the governmental jurisdiction in which the cooling tower will be located has a jurisdictional concern. The proceedings described above were commenced to clarify Buchanan's jurisdictional authority. The Buchanan Zoning Board has persisted in its opposition to Con Edison's legal contentions. Certainly no one can say that the Zoning Board's arguments presented on the appeal are frivolous. In these circumstances it would be a matter of conjecture to conclude at this stage of the proceedings that the approval of the cooling tower by the Village is clearly not required.

More importantly, the license does not require any such speculation. As noted above, the Appeal Board in ALAB-188 ruled that Con Edison should not proceed until all governmental approvals were received and it was not possible to predict how or when these problems would be resolved. The existence of a legal issue now pending for decision before an appellate court means that "all governmental approvals" have not been received.

D. Irresponsible to Proceed While Appeal is Pending

The purpose of the Appeal Board in providing for an extension of the date for termination of operation with once-through cooling to take into account delays encountered in securing regulatory approvals was soundly based upon the premise that Con Edison should not be placed in the economically untenable position of being forced to proceed with the construction program while the obtaining of those approvals is in doubt. Con Edison respectfully submits that this purpose would be irresponsibly frustrated by a ruling that treats the Village of Buchanan approval authority as a settled issue while the judges of the Appellate Division are considering whether they should affirm or reverse the lower court's finding of Federal preemption.

Let us assume that the program were to commence and then the Appellate Division reversed the lower court. Contracts would have been signed, forces mobilized for construction, and perhaps even excavation would have commenced. This action would then have to stop with adverse economic and possibly environmental consequences. It was precisely this situation that the Appeal Board made appropriate provisions to avoid.

It would be most unusual for Con Edison to commence a construction program in the face of such a major uncertainty

as is raised by the Buchanan litigation. The plants recently built on the Hudson River, such as the Bowline and Roseton plants, were built without dispute. They were constructed in industrial zones, had the support of the local communities and faced no organized opposition. In the case of Con Edison's proposed pumped storage plant at Cornwall, New York, Con Edison, after having obtained a license which was upheld in the courts, suspended construction because of the developments arising out of subsequent legal proceedings.

Undertaking construction of the proposed cooling tower would be the first time within memory that Con Edison has proceeded with major construction at a generating site in the face of unresolved opposition by local governmental authorities. Indeed, Con Edison has on occasion been denied the right to construct facilities which conflicted with local zoning, e.g., Con Edison Co. v. Town of Rye, 16 Misc. 2d 284, 182 N.Y.S. 2d 688 (Sup. Ct. 1959).

The Commission's handling of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in NRDC v. U.S. Nuclear Regulatory Commission and Vermont Yankee Nuclear Power Corporation, _____ F.2d _____, (July 21, 1976), presents an entirely different posture. There the Commission

lost the case and decided to implement the decision while considering an appeal. Here, the losing party, the Buchanan Zoning Board, took a contrary position. They were not willing to accept the decision and filed the appeal.

Similarly, experience with limited work authorizations is not relevant. A company receiving a limited work authorization may proceed with site preparation and construction of foundations while a hearing proceeds usually on the safety of the design of component systems. In the Buchanan Zoning case, the Zoning Board is challenging the construction of the cooling tower in its entirety, not merely with respect to an auxiliary matter which could be altered at a later date.

Other factors affect the reasonableness of proceeding with a cooling tower construction program. First, Con Edison's application to extend the May 1, 1979 date to May 1, 1981 must be taken into account. The NRC staff has issued a Draft Environmental Statement dated July 1976 recommending that this extension be granted. We have been advised that the staff intends to issue a Final Environmental Statement later this year. The granting of this amendment would postpone the cooling tower construction program. There is obviously no point in starting a program which might very well be suspended in a short time

with large and unnecessary losses.

Secondly, the Ecological Study Program for Indian Point 2 is nearing its completion. The preliminary indications are that the results of this program are most likely to support the original position taken by Con Edison in the Indian Point 2 proceeding. Good data have been obtained on many of the key issues which were the subject of controversy in the Indian Point 2 hearings. It would be unreasonable to force the commencement of a cooling tower construction program at the very time we are receiving results of the Ecological Study Program which may indicate that a cooling tower is unnecessary.

Another factor which must be considered is the financial crisis which in the last few years has gripped the New York Metropolitan community. In a recent decision of the Public Service Commission granting Con Edison only approximately 26% of the rate increase requested, it was noted:

"... the economy of New York City is in an extraordinarily precarious condition, and high utility rates are one important reason. We refer here not merely to the effect of these utility rates on commerce and industry in the City, and, therefore, equally directly, on the levels of employment the companies in the City are able to provide, but also on the welfare of its inhabitants, many of them oppressed by depression, unemployment, and inflation, including inflation in

the rates they have to pay for such an essential service as electricity." Consolidated Edison Company of New York, Inc., Opinion No. 76-3, p. 6 (N.Y.P.S.C., February 27, 1976).

In these circumstances Con Edison is under the most stringent mandate from the Public Service Commission and as a matter of its own corporate policy to avoid all unnecessary expenses in the interests of its consumers.

Costs of the proposed cooling tower are enormous whatever method of computation is used. The NRC staff's most recent estimate, which appears in the Final Environmental Statement (FES) for this proceeding at page 6-25, shows an annualized cost of \$21,741,000. Although Con Edison believes this is a gross understatement (FES p. B-3), this number is sufficiently high that it is clear that a cost of this magnitude cannot be incurred in times of financial crisis unless it is established that the installation of a cooling tower is absolutely essential.

Furthermore, in this climate of financial stringency, Con Edison must not incur the unnecessary expenses which would result from cancellation of contracts if the cooling tower program were commenced and soon aborted. It is true, as stated at the prehearing conference, that the schedule shows six months

before the necessity for actual commencement of excavation. During that period of time Con Edison would be required to enter into contracts for the excavation work and for tower erection. The contingencies surrounding the cooling tower construction program are well known to potential contractors, and these contracts would therefore in all likelihood not be cancellable without payment of substantial penalties. Such penalties would be unnecessary expenditures and an undue burden on our ratepayers in view of the significant uncertainties which still surround this project.

E. HRFA's Proposed Test of "Appropriateness" Is Erroneous

At the prehearing conference, counsel for HRFA stated that it would be "entirely inappropriate" to defer commencement of the cooling tower construction program pending the outcome of the Buchanan proceeding, "which could be many many months." (Tr. 17) This is a highly improper legal standard for interpreting a provision of a license which says that operation with once-through cooling should be extended as long as Con Edison has not received "all governmental approvals." The question is not whether it is "appropriate" to proceed but whether Con Edison has received all governmental approvals.

The fact that it could take many months to conclude a legal battle is simply a fact of modern life. The Board could take official notice of the fact that projects are frequently delayed by protracted litigation. The newspapers contain many examples of projects that are delayed, such as drilling for oil and gas off the East Coast of the United States and the construction of the Trans-Alaskan pipeline. Some projects are abandoned or defeated after protracted litigation or threats thereof, such as the Kaiparowits Power Plant in Utah proposed by a group of four utilities headed by Southern California Edison Co., and the Blue Ridge Pumped Storage Plant of Appalachian Power Company, a subsidiary of American Electric Power Company.

Con Edison's experience in this regard is certainly no better than others. Although as noted above Con Edison has in conjunction with other utilities succeeded in constructing plants at Bowline and Roseton, Con Edison has not been able to carry out its plans to build nuclear plants at either Verplanck or David's Island. Con Edison was permitted to construct only one new unit at Astoria instead of the two which were originally proposed. And as HRFA well knows, Con Edison's proposed pumped storage plant at Cornwall, New York, is setting a record for

legal delay.

The NRC's response to what has become an increasingly common phenomenon cannot be simply to ignore it. There is no basis for saying that a bona fide legal dispute in the courts of the State of New York can be ignored. The fact it may take a long time to reach a resolution of this litigation is no reason to pretend it doesn't exist.

E. Conclusion

The term "governmental approvals" as used in License DPR-26 includes the appropriate permits from the Village of Buchanan. The respective licensing powers of the Village of Buchanan and of the Nuclear Regulatory Commission have become the subject of legal proceedings in the courts of New York State. Until these proceedings are terminated, Con Edison cannot be considered to have the necessary governmental approvals to proceed with the construction of a natural draft cooling tower system, and it would also be highly unreasonable for Con Edison to be forced to proceed with such construction in the face of the contingencies surrounding the necessity for construction of the cooling tower.

II. A RE-EXAMINATION OF THE CONSTRUCTION TIME
FOR A NATURAL DRAFT COOLING TOWER SYSTEM
IS NOT PROPER IN THIS PROCEEDING

At the prehearing conference, counsel for HRFA suggested that the Regulatory staff should evaluate Con Edison's proposed schedule to determine if it represents the minimum feasible time for construction of a closed-cycle cooling system. The question of "minimum feasible time" to construct a closed-cycle cooling system was discussed extensively in the Indian Point 2 operating license proceedings. It was the subject of testimony presented by Con Edison, the Regulatory staff and HRFA, and was reviewed at length by the Appeal Board in ALAB-188. 7 AEC 323, 389-98 (1974). Accordingly, this matter must be considered res judicata for purposes of this proceeding. Moreover, HRFA has not come forward with any new information bearing on the subject.

For these reasons, the Board should not re-examine the question of how much time is required to construct a natural draft, wet cooling tower system.

III. THE EXTENSION PROVISIONS OF LICENSE NO. DPR-26
DO PERMIT CONSIDERATION OF "WINTER LAG"

In letters from Mr. William J. Cahill, Jr. of Con Edison to Mr. Ben C. Rusche of the Nuclear Regulatory Commission

dated November 17, 1975 and January 8, 1976 in connection with the extension of once-through cooling operation because of failure to receive governmental approvals by December 1, 1975, reference was made to the possibility of additional winter lags requiring more than a day-for-day postponement of the date for termination of operation with the once-through cooling system. The basis for this position is set forth herein.

The license condition states that the May 1, 1979 date in these circumstances "shall be postponed accordingly." Since the date of May 1, 1979 was derived from the extensive discussion of predicted cooling tower construction time contained in ALAB-188, the meaning of "postponed accordingly" must be determined by reference to the predicted construction time required by reason of the new date on which regulatory approvals are received. Once that new date is established, the predicted construction intervals as set forth in ALAB-188 must then be applied to determine a new date for termination of operation of the once-through cooling system.

In applying this schedule due consideration must be given to the problem of "winter lag". The concept of winter lag was inherent in all predicted construction schedules submitted by Con Edison and in the schedule approved by the Appeal Board.

Con Edison's predicted schedule set forth as Figure 4.1 in the Cooling Tower Report shows a winter lag from December 1, 1977 to March 1, 1978. The predicted schedule set forth in the FES as Figure 4-1, p. 4-2, shows a winter lag from January 1 to April 1, 1978.

The winter lag arises out of the fact that work involving pouring of the concrete cooling tower shell cannot be performed during cold weather. Figure 4.1 of the Cooling Tower Report shows pouring of the cooling tower shell occurring between March 1, 1978 and December 1, 1978. If the schedule were to shift a few months so that this work could not be completed before the onset of cold weather, estimated by Con Edison as occurring on December 1, the pouring of the cooling tower shell would have to be interrupted and an additional winter lag would arise. This would postpone the completion of the cooling tower shell until after March 1. The work shown on Figure 4.1 as being performed during the winter of 1979 would then have to be performed at a later time in the year.

The foregoing indicates that, if the predicted construction schedule as set forth in ALAB-188 and adapted to the new date for receipt of regulatory approvals shows pouring of the cooling tower shell other than between March 1 and December 1,

an additional winter lag is required, and the date for termination of operation of once-through cooling is postponed a sufficient amount of time to account for the additional winter lag. The language of License DPR-26 ("postponed accordingly") allows this additional postponement.

Summary

Once the above issues are resolved, the calculation of the date for termination of operation with the once-through cooling system will be a simple mechanical procedure. The predicted construction intervals were established in ALAB-188. These must follow the date on which it is determined Con Edison has received all governmental approvals required to proceed with the construction of a closed-cycle cooling system. If the schedule shows pouring of the cooling tower shell during the winter, an additional winter lag must be inserted in the schedule.

An example of this predicted schedule with an additional winter lag was annexed to the letter dated January 8, 1976 of Mr. William J. Cahill, Jr., referred to above, and is annexed hereto as Exhibit A. This schedule assumed receipt of all governmental approvals on May 15, 1976 and led to a date for termination of operation with the once-through cooling system

on February 1, 1980. Annexed hereto as Exhibit B is the predicted schedule based on the assumption that all governmental approvals are received on November 1, 1976. This shows a winter lag commencing November 1, 1978 because it is not practical to interrupt pouring of the cooling tower shell after only one month. The date shown for termination of operation with the once-through cooling system is May 1, 1980.

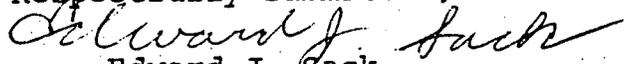
For the foregoing reasons, Con Edison respectfully requests the Board to rule as follows:

1. "All governmental approvals" within the meaning of License No. DPR-26 will not have been obtained prior to the final disposition of the current litigation between Con Edison and the Zoning Board of Appeals of the Village of Buchanan.
2. The Board will not re-examine the construction time required for a natural draft cooling tower system in this proceeding.
3. In establishing the postponed date for termination of operation with the once-through cooling system pursuant to ¶ 2.E(1)(b) of License No. DPR-26, a postponement greater than the time elapsed in obtaining governmental approvals may occur if required by "winter lag".
4. If all governmental approvals required to proceed

with the construction of a natural draft cooling tower system are received by November 1, 1976, the date for termination of operation with the once-through cooling system in License No. DPR-26 would be May 1, 1980.

Dated: October 6, 1976
New York, New York

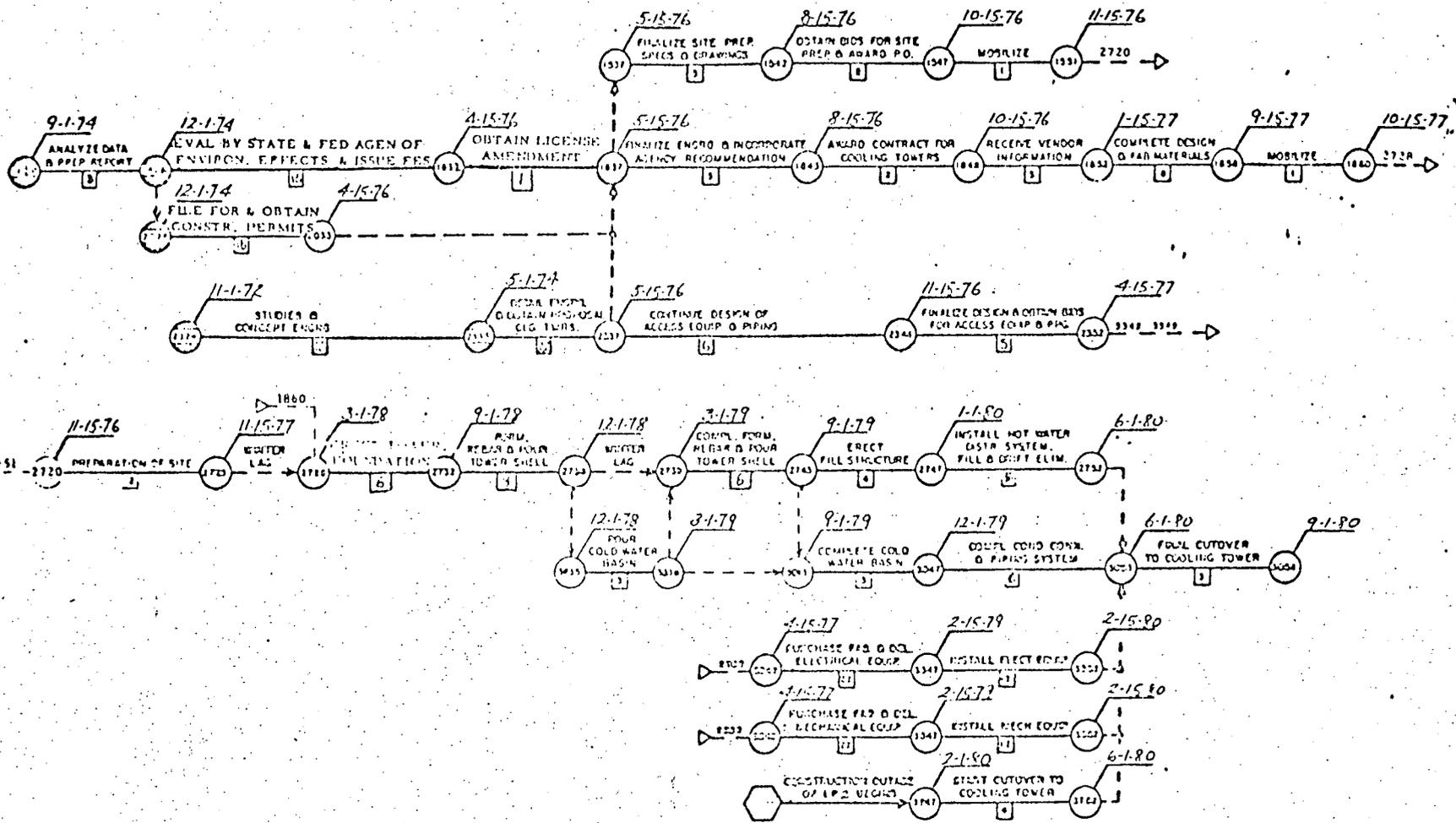
Respectfully submitted,



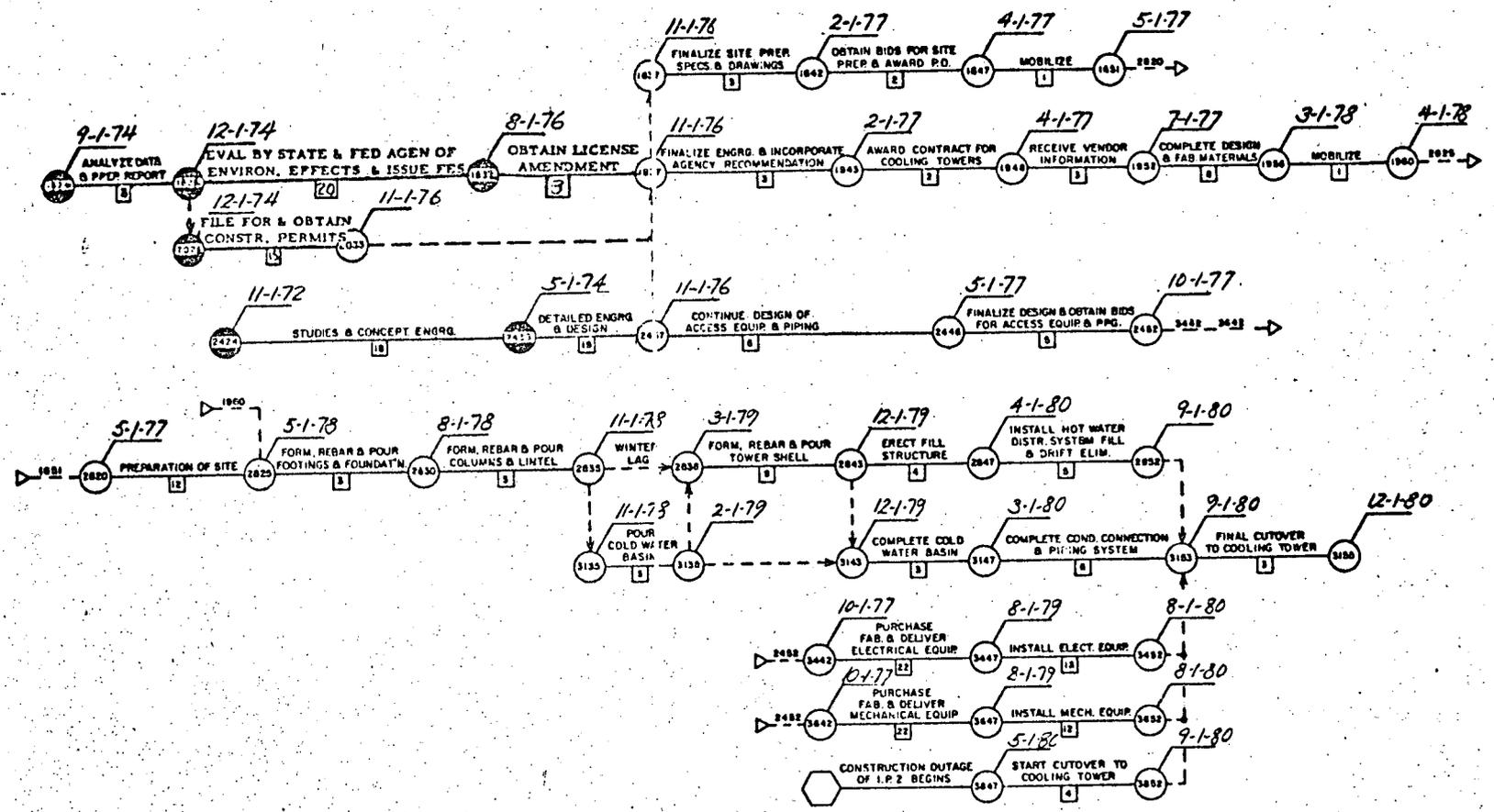
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"NRC LICENSING SCHEDULE" WITH F.E.S. ON 4-15-76 AND AMENDMENT ON 5-15-76



"THE NRC LICENSING SCHEDULE" WITH AMENDMENT ON 11-1-76

EXHIBIT B

NOTE: All Activity Durations Are in Months

REV.	DATE	PROJ. ENG.	PROJ. MGR.	REV.	DATE	PROJ. ENG.	PROJ. MGR.

- ACT NOT STARTED IN COMPL.
- PREDECESSOR ACT COMPL. SUCCESSOR ACT NOT STARTED
- PREDECESSOR ACT COMPL. SUCCESSOR ACT STARTED
- PREDECESSOR ACT NOT COMPL.
- ▶ PREREQUISITE COMPLETE
- MILESTONE ACT.

CONSOLIDATED EDISON CO. of NEW YORK

PROJECT ENGRG. DEPT. SCHEDULING BUREAU

SCHEDULING: ENR-111A APPROVED BY: PROJECT ENGR. APPROVED BY: PROJECT MGR.

OVERALL SCHEDULE FOR NATURAL DRAFT COOLING TOWER FOR INDIAN POINT 2

REVISION: C	ISSUE NO: 7-76	STATUS DATE: 7-76	FIG. SERV. DATE:	PROJ. NO: 2732	B.R. NO: 3EP5	SHEET NO: 1
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of October, 1976, served the foregoing document entitled "Brief on Behalf of Licensee" by mailing copies thereof, first class mail, postage prepaid, to the following persons:

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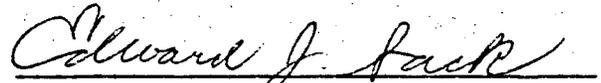
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