UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

1-12-77

HUDSON RIVER FISHERMEN'S ASSOCIATION BRIEF IN OPPOSITION TO APPLICANT'S EXCEPTIONS

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January 12, 1977

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BRIEF IN OPPOSITION TO APPLICANT'S EXCEPTIONS

On November 30, 1976, the Atomic Safety and Licensing Board (the "Licensing Board") issued a Partial Initial Decision in Reference to Stipulated Preferred Type of Closed-Cycle Cooling System and Receipt of Governmental Approvals ("Partial Initial Decision"). Consolidated Edison Company of New York, Inc. ("Con Edison"), the Applicant in the above-captioned proceeding, filed exceptions to the Partial Initial Decision on December 6, 1976 and submitted a brief in support of these exceptions on December 21, 1976.

The Hudson River Fishermen's Association ("HRFA"), an intervenor in the above-captioned proceeding, submits this brief in opposition to the Applicant's exceptions.

I. ALL NECESSARY GOVERNMENTAL APPROVALS REQUIRED TO PROCEED WITH CONSTRUCTION HAVE BEEN RECEIVED

The Applicant takes exception to the Licensing Board's determination that "with this approval by the Board of the recommended preferred type of closed-cycle wet draft cooling tower system and the issuance by the Commission's Director of Nuclear Reactor Regulation of the requested amendment that all necessary governmental approval will have been received by the Licensee..." (Partial Initial Decision. slip op. at 13) and to the Licensing Board's conclusion that "approval by the Village [of Buchanan] is not a governmental approval that is required to proceed with construction of the closed-cycle cooling system" (Partial Initial Decision, slip op. at 11).

HRFA respectfully submits that the Licensing Board was correct in its conclusion. Con Edison's argument in essence is that the Village of Buchanan holds a veto over the NRC's decision respecting once-through versus closed-cycle cooling at Indian Point 2. This argument is frivolous and contravenes basic tenets of federal and state law.

Under these applicable principles, a local government does not have the power to determine both how and whether an existing nuclear power plant may operate. A contrary conclusion, which acceptance of Con Edison's arguments would necessitate, would seriously affect the regulation of nuclear power plant operation.

Approval by the Village is not required prior to Con Edison's proceeding with construction of the preferred closed-cycle

cooling system. Two New York courts have so held and the Partial Initial Decision is in accord with these decisions.

For these reasons, more fully amplified below, HRFA respectfully submits that Con Edison's exception should be denied.

A. Approval of a Closed-Cycle Cooling System by the Village of Buchanan is Not a Necessary Governmental Approval Which Must be Obtained by Con Edison Before It Proceeds with the Construction of the Natural Draft Wet Cooling Tower.

The Nuclear Regulatory Commission, acting pursuant to its mandate under the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., and after extensive proceedings in which all interested persons had an opportunity to participate, ordered that the existing Indian Point Unit No. 2 generating station would not be permitted to operate with the present once-through cooling system after May 1, 1979. NRC Facility Operating License No. DPR-26, Para. 2.E(1). The Commission itself has construed this license, as well as the Indian Point 3 license, to mean that: "No further Commission consideration of the once-through versus closed-cycle question is necessary for either unit [2 or 3]." In re Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station, Unit 3), Docket 50-286, Memorandum and Order, CLI-75-14 (December 2, 1975). The controversy between once-through and closed-cycle is ended, so far as the NRC is concerned, unless a new proceeding is commenced and reaches a contrary conclusion based upon empirical evidence collected during interim operation. Paragraph 2.E(1)(c) of the License.

Con Edison seeks to defer construction of the preferred type of closed-cycle cooling at its Indian Point Unit No. 2 by claiming that the license term requiring Con Edison to obtain all necessary governmental approvals prior to commencement of construction has not been met. Con Edison argues that so long as the Village of Buchanan opposes construction of the cooling tower, by denying variances and continuing to litigate the issue of its jurisdiction, the license termination date must be deferred. Con Edison argues its point in several ways. It claims that because the Village's court case is still pending, a finding that all necessary governmental approvals required to proceed with construction may not be made. Alternatively, it speculates that even if the Village ultimately loses its court case (a likely prospect since two state courts have rejected the Village's position), the Village might still fight the cooling tower by imposing requirements not permitted by the state courts (Con Edison Brief, p. 12).

Con Edison's position can be summarized as follows: The Village of Buchanan holds a veto over the NRC's decision to require closed-cycle cooling at Indian Point 2. That position is frivolous because it violates not only the license term but federal and state law.

The Village of Buchanan does not have the authority to interfere with the decision of the NRC that Indian Point Unit No. 2 must cease operation with a once-through cooling system after May 1, 1979. Two state courts have so held. Consolidated Edison Co. v. Hoffman, Index No. 10811/75 (West. Sup. Ct., Nov. 14, 1975),

aff'd as modified, ___App. Div.___, 387 N.Y.S. 2d 884 (2d Dept. 1976), appeal filed, December 2, 1976. The Appellate Division expressly differentiated between power over construction and residual power not interfering with construction. It ordered that while the Village might regulate "local or incidental conditions with respect to the proposed facilities," it could not enforce any regulation "inconsistent with the construction of the" cooling tower. 387 N.Y.S. 2d at 885. The Licensing Board, therefore, was correct in concluding that the Village's approval is not a necessary approval which Con Edison must have before it proceeds with construction of the natural draft wet cooling tower. To hold otherwise would place in the Village's hands the power to undercut the NRC's decision.

The state court decision is clearly correct. The NRC, pursuant to its jurisdiction under the Atomic Energy Act, 42 U.S.C. §§2011 et seq., as amended, and the National Environmental Policy Act, 42 U.S.C. §§4321 et seq., has determined that, absent a license amendment, construction and operation of the existing plant must be upgraded to more fully protect the environment and to this end has ordered cessation of once-through cooling as a condition to the Facility Operating License issued to Con Edison. That decision effectively sets a minimum requirement for operation of the power plant which may not be circumvented by the Village of Buchanan.

Where, as here, the federal government possesses the power to regulate in a given area, a state or locality's power to regulate is preempted if its regulation inevitably conflicts with

the federal scheme of regulation:

> "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility..." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

See also, Northern States Power Co. v. Minn., 447 F.2d 1143, 1146 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972); State Department of Environmental Protection v. Jersey Central Power & Light Co. 351 A.2d 337 (N.J. Sup. Ct. 1976). The minimum standards imposed by the federal government, pursuant to its licensing power, therefore must be met and cannot be lowered by a state or agency thereof.

There is in this federal regulatory scheme, therefore, no room for the Village of Buchanan to undercut the federal decision requiring a closed-cycle cooling system at Indian Point 2 including its decision as to when that system must be installed. A contrary conclusion would place in the hands of a locality significant new power over the operation of existing nuclear plant operation and would establish a dramatic new precedent applicable to every other aspect of nuclear power plant operation.

Not only would basic tenets of federal law be overturned by such a decision, but of state zoning law as well. Under New York State law, zoning requirements may not be used to prevent utilities from constructing necessary facilities. Consolidated Edison Co. v. Village of Briarcliff Manor, 203 Misc. 295 (Sup. Ct. 1955); Long Island Water Corp. v. Michaelis, 28 App. Div. 2d 887 (2d Dept. 1967); Long Island Lighting v. Griffin, 272 App. Div.

551 (2d Dept. 1947). State law holds that even if a utility can not meet the test for legal hardship, a local ordinance may not be applied to prevent a utility from constructing facilities if the utility can establish a reasonable necessity to build the facility on the particular site. Niagara Mohawk Power Corp. v. City of Fulton, 8 App. Div. 523(4th Dept. 1959); New York State E & G Corp. v. McCabe, 32 Misc 2d 898 (Sup. Ct. 1961); Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954). The natural draft wet cooling tower is a necessary facility since under the NRC license Con Edison may not operate Indian Point 2 without such a system after May 1, 1979. The Village of Buchanan Zoning Board is a local agency established pursuant to state law and may not insulate itself from governing state law. It was in recognition of the correctness of this principle that the Licensing Board based its decision. slip op at 12.

B. The Pendency of State Litigation is Not an Impediment to Con Edison's Proceeding With Construction of a Closed-Cycle Cooling System.

Con Edison argues that because the Village is attempting to appeal to the New York State Court of Appeals, it cannot as yet be determined that "all governmental approvals" have been received; further, it would be irresponsible to proceed with construction of a closed-cycle cooling system before the issue is resolved. (Con Edison Brief, p. 9)

The argument is wholly a bootstrap argument. The NRC can only concern itself with state litigation involving the kind of

state approvals which could lawfully control NRC-ordered activities for existing plants. But the Village, as a matter of federal and state law, cannot interfere with settled NRC decisions respecting operation of existing plants. The NRC has the responsibility under NEPA to assure that plant operation is consistent with the minimum standards it has determined are necessary to protect the environment. For Indian Point 2 the Commission has ruled that that means plant operation with a closed-cycle cooling system after May 1, 1979. The NRC has a responsibility to see that these federally imposed standards are met. The pendency of state litigation, particularly where two state courts have already rejected the Village's position, may not be allowed to erode compliance with these standards. The license did not condition cooling tower construction on Village approval nor could it. Such a condition would constitute an improper delegation by the NRC of its responsibilities under NEPA. See Calvert Cliffs Coord. Comm. v. AEC. 449 F 2d. 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

Furthermore, to allow a delay in the construction schedule because of the Village's litigation of the issue would be to put a weapon in the hands of Buchanan not intended by the license nor permissible under law. The approval provision of the license is intended as an accommodation to Con Edison rather than as a sword in the hand of the Village. If the pugnacity of the Village to gain jurisdiction where it has none is deferred to, then the approval provision under the license becomes a weapon in the Village's hands. The longer Buchanan litigates, the longer it defers the federal requirement of closed-cycle cooling. Control would thereby

be wrested from the federal agency, which under federal law has the power to regulate the manner of operation of existing nuclear plants, and would be placed in the Village's hands.

C. There is No Evidence of Uncertainty Related to the Village's Issuance of a Variance as Directed by the State Court.

Con Edison speculates that it should not be compelled to go forward with construction until it knows what incidental regulation the Village wishes to impose. (Con Edison Brief, p. 8). Con Edison surmises that the Village might act contrary to the Appellate Division order and as a result Con Edison may be forced into a situation of additional litigation. Con Edison's argument is frivolous and contrary to fact. No one need speculate as to whether Con Edison can comply with the existing, written Village of Buchanan building code and zoning ordinances. The Village of Buchanan has already notified Con Edison as to what aspects of the closed-cycle cooling tower are not consistent with the Village codes. The Village did so on March 4, 1975 in a letter by Charles E. White, Building Inspector. (Appendix A). That letter listed only three items: height of the tower, visible vapor plume, and saline drift. But these were the items at issue in Con Edison's successful appeal. Accordingly, under the Village's own interpretation of its codes, Con Edison can meet all the incidental requirements for construction.

It should be noted with respect to Con Edison's good faith in making the argument that, to the knowledge of HRFA, Con Edison has not sought and received from the Village any indication of

whether the Village would impose additional incidental or local requirements. Con Edison lists no specifics in its papers. Thus Con Edison has offered to the Board no evidence to support the assertion that the Village might act arbitrarily, or reverse its written report. Con Edison's claim should be rejected.

D. Conclusion

The Licensing Board was correct in determining that with its approval of the recommended closed-cycle wet draft cooling tower system and the issuance of the requested license amendment, all necessary governmental approvals required to proceed with construction will have been received by the Licensee. The Licensing Board was correct in its conclusion that approval by the Village is not a governmental approval that is required to proceed with construction of the closed-cycle system. The Applicant's exception should be denied.

II. THE LICENSING BOARD DID NOT ERR IN STATING THAT THE LICENSEE SHOULD COMMENCE CONSTRUCTION.

Con Edison attacks the directive by the Board to commence construction of the preferred alternative closed-cycle system. The Board's directive, however, was in conformity with law. Con Edison has repeatedly told the NRC that if it is to meet the Commission-ordered deadline for termination of once-through cooling, it must commence construction now. The Board's action was plainly appropriate since it was based on Con Edison's own admission as to the construction time needed to comply with the license requirements.

The Board's action was necessitated by Con Edison's own conduct below. At the October 5, 1976 hearing, Con Edison attempted to mislead the Licensing Board into assuming that the issue of once-through versus closed-cycle cooling was still open. (Tr. 81-83) While Con Edison has now dropped that argument to this Appeal Board, it nevertheless attacks the Board's decision made in response to Con Edison's own spurious claims below. Con Edison's new objections to the Board's directive are without merit.

First, Con Edison suggests that it is beyond the power of the Licensing Board to issue the order. But the Licensing Board's order is consistent with Con Edison's own position that unless it commenced construction by January 1, 1977, it could not meet the approved termination date. Con Edison's claim that the Board is interfering with internal management matters is absurd. The Board did nothing more than order Con Edison to do what Con Edison

conceded it had to comply with the license.

Secondly, Con Edison again repeats the argument that nothing should happen so long as the Village continues to litigate. But that consideration is legally irrelevent as set forth in Point I above.

Thirdly, Con Edison argues that because its application for a two year extension of interim operation is pending, it should not be required to comply with the approved construction schedule. But the license term answers that. Applications alone cannot change the termination date. And, precisely because an application is pending, the Board felt compelled to repeat what the license explicitly states; Con Edison must conform to the approved schedule.

Finally, Con Edison complains that compliance with NRC's order will cost substantial amounts of money. But that issue has been already litigated. The Commission has ruled that insofar as the NRC is concerned, the decision on once-through versus closed-cycle cooling has been made, absent a license amendment. In re Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Station Unit 3), Docket 50-286, Memorandum and Order, CLI-75-14 (December 2, 1975). While Con Edison refuses to accept the Commission's decision, this Board must. The Board can give no credence to Con Edison's continued claims that money may be spent unnecessarily. The Commission has ruled that absent a license amendment, Con Edison must go forward with construction of a closed-cycle system.

III. THE LICENSING BOARD DID NOT ERR IN STATING THAT HRFA HAS A SUBSTANTIAL BASIS FOR ITS COMMENTS UPON CON EDISON'S CONDUCT AT PROCEEDINGS CONDUCTED BY THE VILLAGE OF BUCHANAN.

The Licensing Board did not err in concluding that "HRFA has a substantial basis for its comments respecting Con Edison's conduct in seeking the approval of the Village." (slip op. at 13) The Licensing Board was not making a finding on the issue of Con Edison's due diligence in seeking Village approval. As the Licensing Board indicated, this issue was not germane to its decision since it had determined that the Village's approval was not a necessary approval required for Con Edison to proceed with construction. (slip op. at 13) Since the Licensing Board's statement did not constitute a finding on the issue of due diligence, Con Edison's exception is frivolous and should be denied.

Moreover, the statement which the Licensing Board made was fully supported by the record below. That record consisted of the transcript of the proceedings before the Village of Buchanan Zoning Board of Appeals and was made available to the Licensing Board upon the agreement of all parties, including Applicant. That record discussed herein demonstrates that the Licensing Board was correct in its conclusion.

Con Edison's presentation at the Village hearing was reluctant. Although operating under the specific NRC requirement of "due diligence" (Paragraph 2.E(1)(b) of the license), Con Edison's presentation contained neither a listing of environmental harms which had persuaded the NRC to require closed-cycle cooling, nor a

relevant discussion of the law compelling the granting of the variance. Instead, the presentation stressed the pro forma nature of Con Edison's application, and the alleged disadvantages of cooling towers (salt drift and vapor plume) despite the fact that both the company's and the NRC's studies revealed that the adverse effects of the natural draft tower are small.

Con Edison emphasized its future hopes to obtain a change in the NRC license requirement. It declared that it was continuing its studies of the Hudson River and reaffirmed its belief that future studies would ultimately vindicate Con Edison's position. Con Edison testified that it intended to apply for a delay in the May 1, 1979 date but, of course, could not predict what the NRC would do and for that reason was compelled to make its application for a variance.

On June 19, 1975, the Zoning Board of Appeals issued an opinion denying the variance. This Board ruled that Con Edison had not shown practical difficulties because, as it interpreted the license, the license requirement lapsed if a governmental unit such as the Village of Buchanan did not approve the cessation of closed-cycle cooling. According to the Board the license only demanded a good faith and pro forma application by Con Edison. The Zoning Board viewed itself as entirely free to accept or reject the license requirement, and placed great reliance upon the Village's own expert's testimony that the superiority of closed-cycle cooling over once-through cooling was an open factual question. The Board concluded that there was neither a factual nor legal compulsion for it to grant the variance. It also held, as an alternative

reason for denying the variance, that Con Edison had failed to establish that the natural draft wet tower was the miniuum variance needed.

With this record before it, the Licensing Board was perfectly correct in concluding that HRFA's criticism of the Applicant's performance had substantial basis in fact and that further inquiry might be necessary if it should turn out that the issue of Con Edison's due diligence in obtaining this approval had to be reached.

Applicant's exception to the Licensing Board's statement on this issue should, therefore, be denied since the Board did not make a finding on the issue of due diligence and since the conclusion that the Board did make is fully supported by the record below.

IV. THE LICENSING BOARD DID NOT ERR IN STATING THAT IF ISSUANCE BY THE VILLAGE OF VARIANCES AND A BUILDING PERMIT WERE REQUIRED, FURTHER EXAMINATION OF THE LICENSEE'S EFFORTS TO OBTAIN THE VARIANCES MIGHT BE WARRANTED.

Con Edison contends that, despite the language of the Appeal Board decision and the license itself which require Con Edison to exercise due diligence in seeking all necessary governmental approvals, 10 CFR §2.760(a)(1976) precludes Licensing Board inquiry into this matter since the issue was one never formally placed in contention by a party. This is a spurious argument and Con Edison's exception should be denied.

What is at stake here is the NRC license itself. The Commission or its Licensing Boards may always inquire as to whether NRC license terms are being met. Inquiry into compliance with the explicit requirement of due diligence in the Indian Point 2 license is therefore, within the scope of the Licensing Board's authority. The section Con Edison cites in an attempt to refute this, 10 CFR §2.760(a), is not even applicable to this proceeding. It is applicable only to a contested proceeding "for an operating license for a production or utilization facility." This is not an operating license proceeding and the rule is inapplicable.

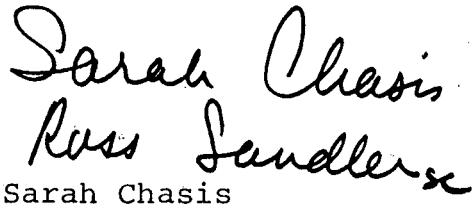
Furthermore, the issue was not raised sua sponte by the Board, but was brought to their attention by HRFA in its brief to the Board filed October 13, 1976. In addition, the transcript of the proceedings before the Village of Buchanan Zoning Board of Appeals was made available to the Board upon agreement of all parties,

including the Applicant. The Licensing Board concluded, after review of the transcript of the proceeding, that further inquiry into the due diligence question might be warranted if Village approval were required. As discussed above under Point III, the record of that proceeding fully supports the Board's conclusion. Con Edison's exception should be denied.

CONCLUSION

For the foregoing reasons, the exceptions of Con Edison should be denied in full.

Respectfully submitted,



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January 12, 1977

APPENDIX A

Village of Buchanan

BUCHANAN, NEW YORK 10511
Tel. PEekskill 7-1033

March 4, 1975

Charles D. Lohrfink
CON EDISON
210 Westchester Avenue
White Plains, New York 10606

Dear Mr. Lohrfink:

On February 21, 1975, you submitted an application for building permit to construct an alternative closed-cycle cooling tower system for unit #2.

This application has been denied for the following reasons:

1. The height of the cooling tower exceeds the height limitation in the MD District of 40 feet.

2. The visible vapor plume extending beyond the boundary of the immediate site of the tower is contrary to section 54-22.

3. The deposition of saline drift is contrary to section 54-22.

Con Edison has the right to file a written appeal to the Zoning Board within 20 days upon receipt of this letter.

If there are any questions, please call me.

Very truly yours,

Charles E. White
BUILDING INSPECTOR

pen