

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



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

CON EDISON'S ANSWER TO MOTION OF NRC STAFF

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January 31, 1978

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Consolidated Edison Company of New York, Inc.

("Con Edison") respectfully files this answer to the motion of the NRC Staff ("the Staff") for leave to withdraw its appeal from the Appeal Board's decision in ALAB-399 (5 NRC 1156 (1977)).

Con Edison supports the Staff's motion and agrees with the Staff's conclusion that this appeal no longer meets the criteria which the Commission has established for exercising its review of Appeal Board decisions. The Licensing Board's decision of June 17, 1977, ^{1/} extending operation of the once-through cooling system to May 1, 1982, and the

1/ In the Matter of Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), LBP-77-39, 5 NRC 1452 (1977).

Appeal Board's decision of January 11, 1978^{2/} eliminate the necessity for Commission action at this time. The Appeal Board's decision makes it apparent that the next development in this matter should be the decision of the New York State Court of Appeals in Con Edison v. Hoffman et al.,^{3/} which was argued on January 5, 1978. Once that decision is received, the parties can determine what further action, if any, by the Commission or its licensing boards is required in this proceeding.

In disposing of the Staff's motion, the Commission should make clear that it is not passing judgment on the legal issue discussed in the Staff's motion papers concerning the preemptive effect of the Commission's exercise of its jurisdiction under the National Environmental Policy Act on construction of a nuclear power plant. The facts of this proceeding do not present any such issue and discussion on this point would be dicta. The Commission should await the presentation of a specific factual dispute on this question

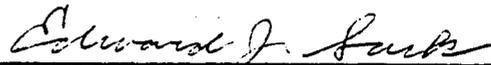
^{2/} do., ALAB-453, 6 NRC ____ (1978).

^{3/} Consolidated Edison Co. v. Hoffman, 54 A.D.2d 761, 387 N.Y.S. 2d 884 (2d Dep't 1976), appeal pending, 42 N.Y.2d 801 (1977).

before issuing any opinion which bears on it.

The federal preemption issue involved in this case is, as Staff indicates, a very narrow question. The Commission's action should be accordingly restricted to the facts of this proceeding in which Con Edison, as a licensee, is being required to add a cooling tower to an existing, operating plant. ^{4/} As the Staff indicates, the Appeal Board's decision is now clearly so restricted, and no further Commission action is warranted.

Respectfully submitted,



Edward J. Sack

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Attorney for Consolidated Edison

Company of New York, Inc.

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^{4/} Con Edison is seeking a license amendment to delete this requirement in an application filed with the Commission on March 15, 1977.

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I hereby certify that I have this 31st day of
January, 1978, served the foregoing document entitled "Con
Edison's Answer to Motion of NRC Staff" by mailing copies
thereof first class mail, postage prepaid and properly
addressed to the following persons:

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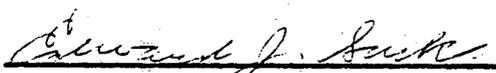
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