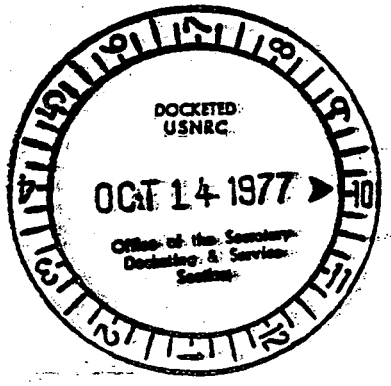
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE COMMISSION

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

BRIEF OF THE NEW YORK STATE ENERGY OFFICE

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Albany, New York
October 11, 1977

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This brief on behalf of the New York State Energy Office is being filed in response to the Commission's order of August 26, 1977, granting the petition of the NRC staff to review the Appeal Board's order of May 20, 1977. The Energy Office, while a party to this aspect of the proceeding, has not previously expressed its views on the question at issue.

I. THE MEANING OF THE GOVERNMENTAL APPROVAL CONDITION.

We are convinced that defining the scope of the license condition with respect to obtaining "all governmental approvals" depends simply on a construction of ALAB-188 in the context of the Commission's obligation under NEPA. The meaning of the condition does not, in our view, depend on the scope of federal preemption or the meaning of New York law.

The condition, on its face, did contemplate that Con Edison would seek zoning approval from Buchanan. The context in which

it was written confirms this understanding. Moreover, Condition 2.E(1)(b), read in isolation from the rest of ALAB-188, would seem to stay the termination date for the once-through cooling system indefinitely if any contemplated governmental approval could not be obtained. But we believe that such a literal construction is totally unreasonable in light of: (1) the recognition in ALAB-188, which added the language of the condition at issue, that the overriding factor with respect to the dates in the license is that continued operation of the once-through cooling system would have a significant adverse effect on the Hudson River fishery (see, *e.g.*, ALAB-188, p. 183); and (2) the Commission's obligation under NEPA to make its own definitive decision on balancing competing considerations without an open-ended delegation in date-fixing to other agencies, federal, state or local. In this respect, the Appeal Board in ALAB-188 found (pp. 155-156) that the additional one year of once-through cooling would not cause significant adverse impact to the environment. No finding was made that substantially longer delays would not be deleterious. A construction of the subject condition as being totally open-ended (and dependent on the action of other agencies, both federal and state or local) would be inconsistent with this basic conclusion.

In these circumstances, we believe the license condition meant only that governmental approvals should be sought in the first instance. If all the governmental approvals needed to

construct a closed-cycle cooling system were not received by May 1, 1975, or a relatively short time thereafter, the Commission retained the right to determine whether resultant delays in the termination of once-through cooling would be compatible with the protection of the Hudson River fishery that it found necessitated the termination of once-through cooling in the first instance.

II. NEITHER THE ATOMIC ENERGY ACT NOR NEPA BAR THE NEED FOR STATE OR LOCAL LICENSING APPROVAL TO PERMIT CONTINUED OPERATION OF INDIAN POINT NO. 2 WITH COOLING TOWERS.

The Commission has also requested briefing on whether the Atomic Energy Act or NEPA preempt state regulation. We agree with the NRC staff in its petition for review that there is no preemption of state (or local) regulation, except insofar as has been determined in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (CA8, 1971), affirmed without opinion, 405 U.S. 1035 (1972) with respect to radiological health and safety regulation.

Before discussing this conclusion, we recognize that Indian Point No. 2 would not be able to operate without a cooling tower if that is a condition *for operation* under the NRC license. But, as the Hudson River Fishermen's Association has said (Ans. to Petition for Review, p. 4), "the state could say that Indian Point 2 could not operate at all if it must have a cooling tower." The fact is that Con Edison is not under a

legal compulsion to operate Indian Point No. 2 because it has a license from the Commission. Moreover, the Commission has no responsibility under either the Atomic Energy Act or NEPA to assure reliable service by an electric utility. If New York were to determine that continued operation of a nuclear facility would be too costly to the utility's consumers because of new safety or environmental conditions, a State order barring continued operation in such circumstances would not conflict with any federal requirement. Indeed, the Atomic Energy Act has made clear that issues of cost have not been preempted.* The situation is no different from the one that exists for Indian Point No. 1. Under an order of this Commission, that plant cannot resume operation without being retrofitted with an emergency core cooling system. There is, however, no compulsion on the company to operate that plant. Moreover, we are confident that the State could require Con Edison to justify the cost effectiveness of such reconstruction before it were undertaken.

While the foregoing discussion shows our understanding that neither a state nor its subdivisions can compel operation of a nuclear facility that does not conform with federal licensing requirements, that conclusion does not warrant the further

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* To avoid having our statement of legal position misunderstood, our understanding of the facts is that shutting down the operation of Indian Point No. 2 in lieu of constructing cooling towers would be costly to Con Edison's ratepayers.

conclusion of the Appeals Board that the State must, under the preemption doctrine, permit operation of the facility. As we understand the Appeal Board decision, it concluded that the determinations of the NRC on environmental questions totally occupy the field. But, as the NRC staff ably explained in the petition for review, there is simply no basis for such a conclusion. The NRC has consistently recognized that the Atomic Energy Act does not occupy the field of nuclear power plant regulation to the exclusion of the states. Indeed, prior to NEPA, it was established that the Atomic Energy Act was not a comprehensive certification scheme requiring consideration of all siting concerns. Thus, in *New Hampshire v. Atomic Energy Commission*, 406 F.2d 170 (1st Cir. 1969), the court rejected an attempt by the State of New Hampshire to review an order of the Commission refusing to consider evidence of possible thermal pollution of the Connecticut River as a result of cooling water discharges from a plant it had licensed at Vernon, Vermont.

As a result of NEPA, the Commission now has the obligation to consider thermal pollution and other environmental considerations as part of its decision-making process. Of course, as part of its NEPA consideration, the Commission, as here, may condition the license for a nuclear power plant on meeting particular environmental requirements. But this conditioning authority is not exclusive and continues to parallel state or local licensing. If there are conflicts, the consequence may

be that an applicant to the NRC might not be able to proceed at all under an NRC license since the process contemplates the concurrence of several approvals.

We, like your staff, have found no support for the apparent view of the Appeal Board that NEPA was intended to convert an otherwise nonexclusive license to an exclusive license. The cases cited by the various parties show only that NEPA imposes an affirmative obligation to consider potential environmental consequences before major actions are authorized by the federal government, even if the organic statute under which the action is approved did not require such consideration. Unlike the NRC staff (Pet. for Review, p. 7), we view the obligation under NEPA as having a direct and substantive bearing on the Commission's decision-making. For example, the environmental impact of a proposed nuclear plant might in a given case result in denying a license if a better alternative, taking all factors into consideration, were available. But we do agree with the staff that broadening of the decision-making process does not make the federal role exclusive or expand the affirmative role of the federal licensing. The Commission's basic affirmative role under the Atomic Energy Act is to assure the radiological health and safety of nuclear power plants. That role is not in derogation of state authority in other areas. The 1954 amendments to the Atomic Energy Act, which paved the way for private ownership of nuclear materials, stated:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission...

(42 U.S.C. § 2018). Further congressional consideration was given to federal-state relationships under the Atomic Energy Act in 1959 in 42 U.S.C. § 2021. That section outlined federal and state responsibilities for protection from radiation hazards and made clear in 42 U.S.C. § 2021(k) that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." We know of no basis for the conclusion below that NEPA changed this relationship which permits state or local veto of a nuclear project if it does not meet state or local objectives subject to state or local jurisdiction. Of course, as noted above, neither a state nor locality can negate federally imposed operating conditions if it wants a plant to operate.

This Commission has quite properly viewed its role as nonexclusive. One illustration of this recognition is the conduct of joint licensing proceedings for nuclear plants with state siting bodies. Thus, the Commission and the New York State Board on Electric Generation Siting and the Environment are currently conducting such joint hearings with respect to

the New York Power Authority's application to construct a Greene County nuclear power plant.

III. THE COMMISSION HAS NO PRESENT NEED TO ATTEMPT TO DEFINE THE SCOPE OF AUTHORITY OF THE BUCHANAN ZONING BOARD OF APPEALS.

The Commission's August 26 order granting staff's petition for review also requested comments as to whether there is any state or local law in direct conflict with the license and whether the Zoning Board of Appeals has the power to block construction of cooling towers, presumably under state law. For the reasons stated above, we do not believe there can be any direct conflict since there is no obligation on Con Edison to operate Indian Point No. 2. As to the scope of the Zoning Board's authority under state law, the issue will, we believe, be decided by New York's highest court, the Court of Appeals, early in 1978. Since resolution of the state law question should not have any bearing on the meaning of this Commission's license condition, we respectfully urge the Commission not to construe state law. We do urge the Commission, however, to make a prompt decision on the other questions posed in the August 26 order.

Respectfully submitted,

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