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Docketing & Service
Section

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

6/20/77

ANSWER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. TO PETITION OF NRC STAFF FOR COMMISSION REVIEW

Consolidated Edison Company of New York, Inc. ("Con Edison") submits herewith its answer to the Petition dated June 6, 1977 ("the Petition") of the Nuclear Regulatory Commission Staff ("the Staff") for Commission Review of the Atomic Safety and Licensing Appeal Board's ("the Appeal Board") decision ALAB-399.

Con Edison believes the Commission should deny the Staff's Petition to rule on the constitutional issue of Federal preemption because any such ruling would be premature on the record of this proceeding. Contrary to the Staff's summary of the Appeal Board's decision (Petition, p. 3), the Appeal Board did not rule on Federal preemption. In fact, it expressly declined to do so when it concluded: "It would therefore be premature to rule at this time on whether the

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Zoning Board's local and incidental regulation might be pre-empted by this Commission's license conditions." ALAB-399, p. 28. The Appeal Board left this issue for future proceedings when it said that a party could ask the Licensing Board to find that the action or inaction of the Village of Buchanan Zoning Board of Appeals ("the Zoning Board") is inconsistent with Federal law. ALAB-399, p. 30. That future determination on Federal preemption, if requested after all the facts with respect to the Zoning Board's action or inaction have been established, would be reviewable by the Appeal Board and then potentially the Commission. If it becomes necessary to face this complex issue, the Commission should have the benefit of those facts and the analysis by the Licensing Board and the Appeal Board before it makes a decision. The decisions below show that both Boards properly abstained from reaching a decision on this constitutional issue at this time. LBP-76-43, 4 NRC 598 (1976); LBP-76-46, 4 NRC 659 (1976); ALAB-399, 5 NRC - (1977).

The Staff appears to recognize the Appeal Board's refusal to rule on Federal preemption but argues that the practical effect of the Appeal Board's order for subsequent proceedings amounts to such a ruling. Petition, pp. 4-5. The proper course would be to defer the subsequent proceedings

until final disposition of the pending litigation between Con Edison and the Zoning Board for the reasons stated in Con Edison's Petition for Review dated June 6, 1977.

Furthermore, a Commission ruling on the constitutional issue of Federal preemption may be completely unnecessary. In view of the fact that the New York Court of Appeals has granted the Zoning Board's motion for leave to appeal (Exhibit A annexed hereto), any conflict between New York and Federal law may be avoided if the New York Court decides the case on the doctrine of state law that a locality cannot prevent the construction of essential utility facilities, called the doctrine of public utility necessity. See e.g., Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954); Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955). For the reasons stated in Con Edison's Petition for Review, the Commission should not unnecessarily reach the issue of preemption in this case.

Staff appears to suggest that the Commission rule that the Zoning Board variance is not the kind of governmental approval contemplated by License DPR-26 on the basis of the decision of the Appellate Division of the New York Supreme Court. Petition, p. 5. The error of the Staff's reliance on

the decision of the Appellate Division for this point is clearly shown by the following language in the Appeal Board's decision (ALAB-399, p. 37):

> "A mandatory order requiring the issuance of variances subject to reversal on a pending appeal is not an approval. It is merely permission to start construction at one's own risk while the question of approval of construction is being litigated."

Moreover, aside from the obvious point that the Appellate Division decision will now be reviewed by the Court of Appeals, no basis appears, nor is one offered by the Staff, for dividing necessary governmental approvals into two classes, one within the meaning of the License and one outside the meaning of the License. The Staff may not retroactively insert an ambiguity in the License where none exists. The License says "all" and must be interpreted to mean precisely that.

The facts of this case do not support Staff's suggested application of a distinction between types of governmental approvals. The local and incidental regulation permitted under state law may affect the location of the cooling tower or its design, which would in turn affect the excavation, procurement contracts and final design, which are among the initial steps in the construction process. These steps cannot proceed

until it is clear what Con Edison must construct and where, and this will not be known until after the Zoning Board issues a variance.

With respect to the preemption issue, Con Edison believes that the Staff's argument is misplaced and represents an attempt to lure the Commission into a premature decision on sensitive issues not squarely raised in this proceeding. The Staff argues that the National Environmental Policy Act ("NEPA") does not "purport to regulate the substantive content of federal or state environmental decision-making." Petition, p. 7. If this is so, one would expect that the Commission could not impose a requirement to terminate operation with the once-through cooling system. See New Hampshire v. AEC, 406 F.2d 170 (1st Cir. 1969), cert. denied, 495 U.S. 962 (1969). The Staff goes on to pose a hypothetical case of a state banning both open-cycle cooling and cooling towers. Petition, p. 7. This is not this case. We are presented with a local authority that approves open-cycle cooling and a Federal authority that presently bans open-cycle cooling. This presents a direct conflict. Thus far, the state courts have upheld our contention that Federal pre-emption applies to this conflict, and we believe the law requires this result.

The Staff argues that there is no Federal case law

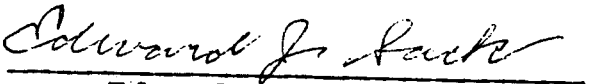
that supports a finding of preemption under NEPA. Petition, pp 6, 8. The absence of case law holding that a Federal license condition requiring affirmative action on the basis of NEPA would supersede local zoning is hardly an end to the matter. Even if this is a case of first impression as to the clash between a NEPA based agency directive and a local zoning ordinance, the general rule remains that Federal preemption arises where there is a conflict between Federal and state directives. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Southern Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Devel. Comm., 464 F.2d 1358 (3rd Cir. 1972), cert. denied, 409 U.S. 1118 (1973). The question therefore is whether that doctrine will apply in light of the facts of this case and the future action or inaction of the Zoning Board. The absence of a judicial precedent does not affect the issue one way or another.

Conclusion

For the foregoing reasons, the Petition of the Staff

for Commission review should be denied.

Respectfully submitted,



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June 20, 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of June, 1977, served the foregoing document entitled "Answer of Consolidated Edison Company of New York, Inc. to Petition of NRC Staff for Commission Review" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

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State of New York,
Court of Appeals

EXHIBIT A

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second *day of* June *A. D. 1977*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

No. No. 299

In the Matter of
the Application of Consolidated
Edison Company of New York,
Inc.,
Respondent,
To Review a determination &c.
vs.
Walter Hoffman &ors., as the
Zoning Board of Appeals of the
Village of Buchanan, New York,
Appellants,
Hudson River Fisherman's
Association,
Intervenor-Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same is hereby is granted.

Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court