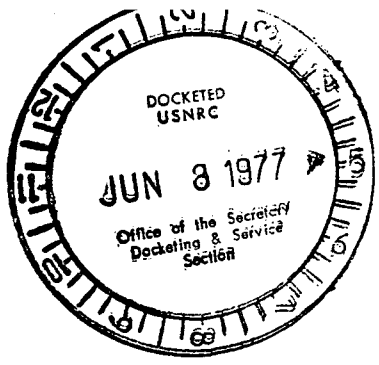

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

6/6/77

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)

PETITION FOR REVIEW

Consolidated Edison Company of New York, Inc. ("Con Edison"), as holder of Facility Operating License DPR-26 ("the License") and as applicant in the above-captioned proceeding, hereby petitions for review of Decision ALAB-399 issued by the Atomic Safety and Licensing Appeal Board ("the Appeal Board") on May 20, 1977, pursuant to § 2.786(b)(1) of the Rules of Practice of the Nuclear Regulatory Commission ("the Commission"). It is not entirely clear that this regulation applies to this proceeding in view of the fact that the Appeal Board Decision was issued prior to June 1, 1977, the effective date of the regulation. 42 Fed.Reg. 22128. Con Edison files this petition to protect its rights in the event that the Commission should determine that this regulation is applicable.

Summary of Decision of Which Review Is Sought

Con Edison seeks review of only one ruling in

ALAB-399. That decision involved the interpretation of § 2.E(1)(b) of License No. DPR-26, which formerly provided, in pertinent part, that the date for termination of operation of Indian Point 2 with once-through cooling was grounded on a schedule under which Con Edison acting with due diligence obtained all governmental approvals required to construct a closed-cycle cooling system by December 1, 1975 and in the event such approvals were not obtained by that date, the May 1, 1979 date for termination of once-through operation would be postponed accordingly. ALAB-399, p. 4. The Appeal Board reversed the decision of the Atomic Safety and Licensing Board ("the Licensing Board") that had held that a zoning variance issued by the Buchanan, New York, Zoning Board of Appeals ("the Zoning Board") was not a necessary governmental approval. LBP-76-43, 4 NRC 598, 605 (1976); LBP-76-46, 4 NRC 659, 661 (1976); ALAB-399, pp. 22-28. The Appeal Board then said that it would not await the outcome of litigation now pending before the New York Court of Appeals (the highest court of New York State) concerning the legal authority of the Village of Buchanan in this matter. ALAB-399, p. 29. Con Edison hereby petitions for review of this latter determination not to await the final resolution of the pending litigation before the New York Court of Appeals.

The procedural history of Con Edison's application to the Village of Buchanan for approval of construction of a natural-draft cooling tower is essential to understand this issue. In accordance with the requirements of License DPR-26, Con Edison applied for a variance from 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, in order to obtain a building permit to construct a natural-draft wet cooling tower. After a public hearing, the Zoning Board denied Con Edison's application on June 17, 1975. Con Edison sought judicial review of this denial in the Supreme Court of New York, Westchester County, Special Term. On November 14, 1975, Mr. Justice Marbach of that court enjoined the Village "from enforcing or attempting to enforce the provisions of the Buchanan Zoning Code against construction of a closed-cycle cooling system." Consolidated Edison Co. of New York, Inc. v. Hoffman, 2 CCH Nucl. Reg. Rptr. ¶ 20,018 (N.Y. Sup. Ct. 1975).

The Zoning Board appealed this decision to the Appellate Division of the Supreme Court, Second Department, which, on October 25, 1976, held that although both Federal and state law prohibited the Zoning Board from preventing construction

of a cooling tower, the Village was nevertheless permitted to impose local and incidental conditions on construction. The Zoning Board appealed this decision to the Court of Appeals of New York. On February 10, 1977, that court granted Con Edison's motion to dismiss the Zoning Board's appeal as of right. Thereafter the Zoning Board moved the court for leave to appeal, and Con Edison filed a memorandum in opposition to that motion on March 22, 1977. That motion was granted on June 2, 1977.

The Commission is not a party to the litigation in the New York courts and has not participated or sought leave to participate therein as an amicus curiae. Neither the Zoning Board nor the Village of Buchanan is a party to the instant proceeding. The Village of Buchanan was granted amicus status before the Appeal Board. The Village has been granted leave to intervene in related Commission proceedings with respect to Con Edison's June 6, 1975 application to extend the period of interim operation with the once-through cooling system at Indian Point 2 to May 1, 1981.

These Matters Were Raised Below

The subject matter of this petition was raised in Con Edison's December 21, 1976 Brief in Support of Exceptions

at pages 2-10 and in its January 21, 1977 Reply Brief in Support of Exceptions at pages 2-3.

Reasons Why The Decision Is Erroneous

The question presented by this petition is the interpretation of the phrase "all governmental approvals" within the meaning of License DPR-26. The Appeal Board correctly held that a zoning variance issued by the Zoning Board is a required governmental approval under New York law. ALAB-399, pp. 25-25. The Appeal Board correctly noted that the necessity for a variance was a matter of New York law and the highest state court which had acted to date held that a variance was necessary. ALAB-399, p. 24. The Appeal Board also correctly held that it would be premature to rule at this time whether the Zoning Board's local and incidental regulation might be preempted by the Commission's License conditions. ALAB-399, p. 28.

It follows from these findings that the License condition is not satisfied until Con Edison has received the necessary variance. This cannot be deemed a ministerial act in view of the pendency of the state litigation. The record of this proceeding amply demonstrates that the Village of Buchanan is objecting strenuously to the construction of a

cooling tower and has vigorously opposed Con Edison's application in the New York State courts, its chosen forum. Final Environmental Statement, NUREG-0042, pp. B-51 to B-62; Amicus Brief of Village of Buchanan before the Appeal Board, dated January 7, 1977. Until the Court of Appeals rules, it would be a matter of conjecture to predict what will be the limits of the legal authority of the Zoning Board. More importantly, the License does not require such speculation. When this License condition was imposed, the Appeal Board expressly recognized that Con Edison could not control the time required for regulatory actions and therefore the date for termination of once-through operation should be postponed because of failure to receive all required governmental approvals by the specified date. ALAB-188, 7 AEC at 389.

The Appeal Board in ALAB-399 stated that it did not have to wait for the Court of Appeals' decision because that court could not give the Zoning Board any greater powers than those afforded to it by the decision of the Appellate Division. ALAB-399, p. 29. This is pure speculation by the Appeal Board and obviously does not bind the Court of Appeals. The Zoning Board is making substantive arguments in the state proceeding, which have not been presented to the Appeal Board. The Appeal

Board's forecast of the Court of Appeals' actions cannot properly be a basis for licensing action.

The basis for the Appeal Board's action would seem to be its view that a final disposition of the New York proceeding could take a long time. ALAB-399, p. 29. This again is not a valid argument. Con Edison has just received notice that the Zoning Board's motion for leave to appeal was granted on June 2, 1977. That means that the Court of Appeals perceives a substantial issue as to the correctness of the decision of the Appellate Division. This casts a major cloud over these proceedings and means that Con Edison now does not know whether it has received all necessary governmental approvals. As stated above, License DPR-26 does not require speculation but provides for an extension of interim operation in a situation such as this. It would be serious error for the Commission to proceed as indicated in ALAB-399 while the highest Court of New York State has determined to exercise its jurisdiction.

Furthermore, the Court of Appeals may decide the case on state law grounds, i.e., the doctrine of "public utility necessity". The definitive disposition of such an issue must

come from the highest court of the state. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967); Leiter Minerals Inc. v. United States, 352 U.S. 220, 229 (1957); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Since the zoning litigation may turn on state law issues rather than the question of Federal preemption, the Court of Appeals' decision may render it unnecessary for the Commission to reach the question of preemption. Avoidance of such constitutional issues is the Federal rule, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1949), and should be applied by the Commission in this case.

The practical consequences of the Appeal Board's holding on this point are extremely onerous to Con Edison. The Appeal Board's disposition of this proceeding places Con Edison in a position where it may have to start construction of a natural-draft cooling tower in order to meet the Commission deadline for termination of interim operation with the once-through cooling system while at the same time the courts are determining the power of the Zoning Board to prohibit or regulate this construction. Con Edison is caught between two sovereign powers and is subject to both.

We believe that sound reasons of comity make it inappropriate for the Federal government to proceed in disregard

of the attention being given this matter by New York State. The Commission should stay its hand until this litigation is concluded, notwithstanding the delay this may entail and even though it is a state rather than a Federal court which is adjudicating the matter. Morgan v. Equitable Life Assurance Soc'y. of United States, 446 F.2d 929, 932 (10th Cir. 1971); Stafford Bros. v. Center, 24 Agric. Dec. 819, 17 Ad.L.2d (P & F) 869 (Agric. Dep't 1965); cf. California v. FPC, 369 U.S. 482, 489 (1962).

The Appeal Board's approach needlessly sets the Commission on a possible collision course with the courts of New York State. The Commission should strive to avoid such a constitutional confrontation.

Reasons Why Commission Review Should Be Exercised

The issue raised in this petition involves an important question of policy concerning the relations between the Commission and the political subdivisions and courts of the states. Con Edison, as a Commission licensee, is faced with the possibility of inconsistent directives from Federal and state bodies, both having jurisdiction over it. This raises a serious legal and policy issue which merits the attention of the Commission.

Conclusion

For the foregoing reasons, the Commission should review ALAB-399 and should hold that all necessary governmental

approvals within the meaning of License No. DPR-26 will not have been received until final disposition of the pending litigation between Con Edison and the Zoning Board and the issuance of any variance or other document determined to be necessary as a result of that litigation.

Respectfully submitted,

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June 6, 1977

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of June, 1977, served the foregoing document entitled "Petition for Review" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

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