UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S BRIEF IN SUPPORT OF EXCEPTIONS

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APPLICANT'S BRIEF IN
SUPPORT OF 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"), as Applicant in the above captioned proceeding, filed Exceptions to the Partial Initial Decision on December 6, 1976, and submits the instant brief in support of these exceptions.

Exception No. 1

THE LICENSING BOARD ERRED IN ITS DETERMINATION THAT AS OF NOVEMBER 30, 1976, APPROVAL BY THE VILLAGE OF BUCHANAN WAS NOT A GOVERNMENTAL APPROVAL THAT IS REQUIRED TO PROCEED WITH CONSTRUCTION OF

THE CLOSED-CYCLE COOLING SYSTEM AND THAT ALL NECESSARY GOVERNMENTAL APPROVALS WILL HAVE BEEN RECEIVED WHEN AN AMENDMENT TO THE FACILITY OPERATING LICENSE IS ISSUED PURSUANT TO THE PARTIAL INITIAL DECISION

In its Partial Initial Decision dated November 30, 1976, the Licensing Board determined that "with this approval by the Board of the recommended preferred type of closed-cycle wet [natural] draft cooling tower system and the issuance by the Commission's Director of Nuclear Reactor Regulation of the requested amendment that all necessary governmental approvals will have been received by the Licensee . . .". (Partial Initial Decision, Slip op. at 13.) This is based on the 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.)

Con Edison respectfully submits that this conclusion and determination incorrectly disregard the pendency of judicial review proceedings in the New York courts concerning the need for a variance from the Village of Buchanan Zoning Ordinance. Until those proceedings are concluded, resulting either in issuance of a variance or a conclusive determination that no variance is necessary, it is error to rule that all necessary

governmental approvals have been received.

A. Meaning of "All Governmental Approvals" in License DPR-26

The legal question presented is whether all governmental approvals were obtained within the meaning of License No. DPR-26 when the Commission issued the license amendment authorized by the Partial Initial Decision. Paragraph 2.E(1)(b) of License DPR-26 provides, in pertinent part, that if Con Edison acting with due diligence has not obtained all governmental approvals required to proceed with the construction of a closed-cycle cooling system by December 1, 1975, then the May 1, 1979 date for termination of operation with the once-through cooling system "shall be postponed accordingly".* The Appeal Board stated that the purpose of this provision was its recognition that Con Edison could not control the time required for regulatory actions. The Appeal Board stated,

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*Prior to the license amendment of December 1, 1976, 41 Fed.Reg. 53873 (1976), this paragraph read in full as follows:

"(b) The finality of the May 1, 1979 date also is grounded on a schedule under which the applicant, acting with due diligence, obtains all governmental approvals required to proceed with the construction of the closed-cycle cooling system by December 1, 1975. In the event all such governmental approvals are obtained a month or more prior to December 1, 1975, then the May 1, 1979 date shall be advanced accordingly. In the event the applicant has acted with due diligence in seeking all such governmental approvals, but has not obtained such approvals by December 1, 1975, then the May 1, 1979 date shall be postponed accordingly."

"We are not endowed with the powers of clairvoyance which would enable us to know how these matters will be resolved or when." ALAB-188, 7 AEC 323, 389 (1974).

Con Edison acknowledges that all required governmental approvals have now been obtained, except for the Village of Buchanan zoning approval.

B. History of Buchanan Proceeding

Con Edison initiated the proceedings with the Village of Buchanan by applying for a variance from the 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. Buchanan Code, § 54-7, Zoning Map and § 54-22A (1969).

A hearing was held by the Zoning Board of Appeals on May 6, 1975. The Zoning Board in a Decision dated June 19, 1975 (Exhibit A) denied the variance requested primarily on the grounds that Con Edison's application was premature in that Con Edison had not been ordered to construct a natural-draft cooling tower. Con Edison appealed this decision to the New York State Supreme Court, Westchester County. The Hudson River Fishermen's Association ("HRFA") intervened in support of Con Edison's appeal. The case was argued on September 19, 1975.

On November 14, 1975, the Westchester Court issued a decision in favor of Con Edison (Exhibit B). 2 CCH Nuc. Reg. Rep. ¶ 20,018. It first found that the Zoning Board had improperly interpreted the terms of the license, the effect of which was to require Con Edison to construct a closed-cycle cooling system. Instead of remanding the case to the Zoning Board, the Court went on to hold that the doctrine of Federal preemption applied to this case. The Court enjoined the Zoning Board from enforcing the zoning code against construction of a closed-cycle cooling system for Indian Point 2.

The manner of the Court's disposition of the case converted what was possibly a routine zoning case into an important constitutional proceeding. The issue became whether the Nuclear Regulatory Commission's exercise of its jurisdiction granted by the National Environmental Policy Act ("NEPA") 42 U.S.C. ¶ 4321 et seq. preempted local zoning. We believe this is a case of first impression on this point.

The Zoning Board appealed the Supreme Court's decision to the Appellate Division, Second Department, an intermediate New York State appellate court. This appeal was argued on September 21, 1976.

The Appellate Division in a Decision dated October 25,

1976 (Exhibit C) agreed with the lower court that the action by the Zoning Board of Appeals in denying the variance contravened Federal law and concluded also that such action contravened a state law doctrine that prohibits local jurisdictions from interfering with the construction of essential utility facilities. Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955); Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954). The appellate court modified the portion of the lower court's decision which said that Buchanan could not regulate the closed-cycle cooling system at all by holding that the Village was "permitted limited regulation of local and incidental conditions with respect to the proposed facilities, in accordance with the Zoning Ordinance so long as such regulation is reasonable and not inconsistent with the construction of the proposed facility." In re Consolidated Edison Co., - App. Div. - (2nd Dept. 1976), Slip op. p. 2.

On December 2, 1976, after issuance of the Partial Initial Decision, Con Edison was served by counsel to the Buchanan Zoning Board with a Notice of Appeal of the decision of the Appellate Division to the Court of Appeals, the highest court in New York State (Exhibit D). Counsel to the Buchanan Zoning Board filed a jurisdictional statement with the Court

of Appeals on December 3, 1976 and a supplemental jurisdictional statement on December 14, 1976. On December 17, 1976, Con Edison filed with the Court of Appeals a motion to dismiss the appeal. If this motion is granted, the Buchanan Zoning Board will have thirty days thereafter to file an application for leave to appeal. New York Civil Practice Law and Rules, § 5514.

The Commission has to date not participated in any capacity in the proceedings before the New York Courts.

C. Partial Initial Decision is Inconsistent with State Court Ruling

The Licensing Board's conclusion that approval by the Village of Buchanan is not a governmental approval required for construction of a closed-cycle cooling system is apparently based on the portion of the Westchester court's opinion quoted on page 12 of the Partial Initial Decision. The Appellate Division in effect reversed that statement of the lower court when it directed that the variance be issued. The order of the Appellate Division struck from the lower court's order the language that enjoined Buchanan from regulating construction and expressly permitted the Village to impose "reasonable" requirements. The Zoning variance is therefore a necessary governmental approval and the Licensing Board's conclusion to the contrary is

inconsistent with controlling law as stated by the New York courts.

The Licensing Board also stated on page 12 that the lower court's statement was an expression of the requirements of New York State law that a village cannot prevent (essential) utility construction. This is inconsistent with the opinion itself (Exhibit B). The lower court did not even address this issue of State law but relied solely on Federal law.

Accordingly, Con Edison does not have all necessary governmental approvals until the variance is issued as directed by the Appellate Division, assuming the Court of Appeals does not reverse. Only when the variance is issued will we know what local and incidental conditions Buchanan wishes to impose and whether those conditions are properly within the scope of the Appellate Division's decision. In view of Buchanan's stated opposition to closed-cycle cooling at Indian Point,* it is not possible to predict what procedural and substantive obstacles they may impose before issuing the variance, and the assumption cannot be made that reconsideration on remand will be pro forma. Con Edison will not have received all "governmental

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*The Village has become an intervenor in the hearing being conducted before the ASLB on Con Edison's request for an extension of the period of interim operation with once-through cooling until May 1, 1981. The Village is supporting that request.

approvals" within the meaning of License DPR-26 until a variance has been issued or the matter of preemption is resolved.

D. The Requirements of the License Are Not Satisfied While the Appeal is Pending

Even if the requirements for the issuance of the variance were disregarded, Con Edison has not received "all governmental approvals" prior to the final disposition of the pending litigation. The Buchanan Zoning Board has now appealed the case to the Court of Appeals. Until that Court rules, it would be a matter of conjecture to predict the outcome of the proceeding. Accordingly, no one can now state with assurance that the approval of the cooling tower by the Village will ultimately not be required.

More importantly, the license does not require any such speculation. As noted above, the Appeal Board in ALAB-188, 7 AEC at 389, 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. The appeal of this case to the Court of Appeals means that all governmental approvals have not yet been received.

E. Conclusion

The term "governmental approvals" as used in License DPR-26 includes the appropriate permits from the Village of Buchanan. The respective licensing powers of the Village of Buchanan and of the Nuclear Regulatory Commission have become the subject of legal proceedings in the courts of New York State. Until these proceedings are terminated, and until any permit from the Village ordered by the Court is issued, Con Edison cannot be considered to have the necessary governmental approvals to proceed with the construction of a natural-draft cooling tower system.

Exception No. 2

THE LICENSING BOARD ERRED IN STATING THAT THE LICENSEE SHOULD COMMENCE CONSTRUCTION OF ITS RECOMMENDED CLOSED-CYCLE COOLING TOWER SYSTEM

In the Partial Initial Decision the Licensing Board first found " . . . that construction preliminaries and activities can now be undertaken" (Slip op. at 13) and then that Con Edison " . . . should commence construction of its recommended closed-cycle wet draft cooling tower system." (Id. at 14.) There is some ambiguity about the meaning of the word "should". If the word expresses merely the Licensing Board's view of a recommended but not required course of action to Con Edison, then the finding is dictum and harmless error. The word "should" can also express obligation. (See Webster's Seventh New Collegiate Dictionary, 1967 edition at 804.) If the Licensing Board intended to express an obligation, the finding is in error.

The purpose of this proceeding, as defined by Con Edison's application, was to determine a preferred closed-cycle cooling system for installation in accordance with the terms of Paragraph 2.E(1)(b) of License DPR-26. That license only establishes the date for termination of operation with the once-through cooling system. The timing of specific construction procedures was left to the discretion of Con Edison, within the

constraints imposed by the date for termination of once-through cooling operation and other factors affecting the practicalities of the situation.

As a result, it was beyond the power of the Licensing Board to direct Con Edison - if the quoted language was intended as a direction - to proceed with construction. Once an end date for the period of interim operation has been fixed, it is Con Edison's responsibility only to cease operation by that date unless (a) the entire license condition is vacated, (b) the interim operation period is further extended, or (c) a natural-draft wet cooling tower is in operation. Any other result could inject the Licensing Board and the Appeal Board in continual oversight of construction - a development which we believe was not contemplated by the Appeal Board in ALAB-188.

A finding that Con Edison should proceed with construction is also inconsistent with the purpose of the Appeal Board's provision in ALAB-188 of an automatic extension of once-through operation for delays encountered in securing governmental approvals. That provision was soundly based upon the premise that Con Edison should not be placed in the economically untenable position of being forced to proceed with the construction program while the obtaining of those approvals was in doubt. Con Edison respectfully submits that this purpose

has been frustrated by the Licensing Board which first treated the Village of Buchanan approval authority as a settled issue while the possibility of an appeal to the Court of Appeals still existed (which possibility has now occurred) and then said that Con Edison should commence construction.

Other factors affect the reasonableness of proceeding with a cooling tower construction program. First, Con Edison's application to extend the period of interim operation with once-through cooling to May 1, 1981 must be taken into account. Hearings on this application were held December 7-10, 1976 and were then adjourned to allow the NRC Staff time to revise the benefit/cost analysis contained in the Final Environmental Statement ("FES"), which the Licensing Board found inadequate. In re Consolidated Edison Company (Indian Point Station, Unit No. 2) Extension of Interim Operation Period, Tr. 869. The granting of this amendment would postpone the cooling tower construction program. There is obviously no point in starting a program which might very well be suspended in a short time with large and unnecessary losses. (See In re Consolidated Edison Co. (Indian Point, Units 1, 2 and 3) Order, September 14, 1976; Memorandum and Order (ALAB-357) November 10, 1976.)

Secondly, the Ecological Study Program for Indian Point 2 is nearing its completion. The final report for this program is now being written and its conclusions support the original position taken by Con Edison in the Indian Point 2 proceeding. Good data have been obtained on many of the key issues which were the subject of controversy in the Indian Point 2 hearings. It would be unreasonable to force the commencement of a cooling tower construction program at the very time results of the Ecological Study Program are coming in which indicate that a cooling tower is unnecessary.

Another factor which must be considered is the financial crisis which in the last few years has gripped the New York Metropolitan community. In a recent decision of the New York Public Service Commission granting Con Edison only approximately 26% of the rate increase requested, it was noted:

> " . . . the economy of New York City is in an extraordinarily precarious condition, and high utility rates are one important reason. We refer here not merely to the effect of these utility rates on commerce and industry in the City, and, therefore, equally directly, on the levels of employment the companies in the City are able to provide, but also on the welfare of its inhabitants, many of them oppressed by depression, unemployment, and inflation, including inflation in the rates they have to pay for such an essential service as electricity." Consolidated Edison Company of New York, Inc., Opinion No. 76-3, p. 6 (N.Y.P.S.C., February 27, 1976).

In these circumstances Con Edison is under the most stringent mandate from the Public Service Commission and as a matter of its own corporate policy to avoid all unnecessary expenses in the interests of its consumers.

Costs of the proposed cooling tower are enormous whatever method of computation is used. The NRC Staff's most recent estimate, which appears in the FES for this proceeding at page 6-25, shows an annualized cost of $21,741,000. Although Con Edison believes this is a gross understatement (FES p. B-3), this number is sufficiently high that it is clear that a cost of this magnitude cannot be incurred in times of financial crisis unless it is established that the installation of a cooling tower is absolutely essential.

Furthermore, in this climate of financial stringency, Con Edison must not incur the unnecessary expenses which would result from cancellation of contracts if the cooling tower program were commenced and thereafter aborted. The schedule presented to the Licensing Board allowed a period of six months before the actual commencement of excavation, during which period Con Edison would be required to enter into contracts for the excavation work and for tower erection. Con Edison's Exhibit No. 1 (Tr. 244), "Economic and Environmental Impacts

of Alternative Closed-Cycle Cooling Systems for Indian Point Unit 2, Fig. 4.1. The contingencies surrounding the cooling tower construction program are well known to potential contractors, and these contracts would therefore in all likelihood not be cancellable without payment of substantial penalties. Such penalties would be unnecessary expenditures and an undue burden on our ratepayers in view of the significant uncertainties which still surround this project.

Accordingly, not only is it legally incorrect in this limited proceeding to find that Con Edison should commence construction of a cooling tower but it is also an abuse of discretion for Con Edison to be forced to proceed with construction in the face of the contingencies surrounding the necessity for construction of the cooling tower.

Exception No. 3

THE LICENSING BOARD ERRED IN STATING THAT HRFA HAS A SUBSTANTIAL BASIS FOR ITS COMMENTS UPON CON EDISON'S CONDUCT AT PROCEEDINGS CONDUCTED BY THE VILLAGE OF BUCHANAN

In the Partial Initial Decision the Licensing Board noted that the Hudson River Fishermen's Association ("HRFA") had criticized Con Edison's presentation to the Village Zoning Board of Appeals (Slip op. at 12). The Licensing Board then went on to find that " . . . the Board agrees that HRFA has a substantial basis for its comments." (Id. at 13.)

Again, there is an ambiguity as to the meaning of the Licensing Board's finding. If the Licensing Board means simply that HRFA has raised a permissible question, the finding constitutes harmless dictum. This finding, however, can be interpreted to mean that the Licensing Board agrees with the substance of HRFA's comments. This would constitute error.

The Licensing Board identified these comments of HRFA in its Order Convening Further Conference dated November 9, 1976, which scheduled a conference among the attorneys to the proceeding to discuss these questions for December 8, 1976. Since the Licensing Board did not request a written response prior to the conference, Con Edison interpreted the Order of November 9, 1976 as requesting a response to HRFA's allegations

at the December 8 conference. Thus, the Partial Initial Decision of November 30, 1976 was issued prior to the date set by the Licensing Board for the Con Edison response. Making a finding against a party prior to the receipt of that party's response to the allegations violates elementary principles of due process of law.

For the information of the Appeal Board, Con Edison's response presented at the Conference of December 8, 1976 appears in the Transcript at pages 302 to 315 (Exhibit E).

If it is ultimately determined that a Buchanan variance for the cooling tower is an outstanding necessary governmental approval, this finding by the Licensing Board could be prejudicial to Con Edison on the question of due diligence.

Exception No. 4

THE LICENSING BOARD ERRED IN STATING THAT IF ISSUANCE BY THE VILLAGE OF VARIANCES AND A BUILDING PERMIT WAS REQUIRED, FURTHER EXAMINATION OF THE LICENSEE'S EFFORTS TO OBTAIN THE VARIANCES MIGHT BE WARRANTED

The Licensing Board found that under certain circumstances " . . . further examination of the Licensee's efforts to obtain the variances from the Village might be warranted." (Slip op. at 13.) Thus, if Village approval should ultimately be found to constitute an outstanding governmental approval, Con Edison would have to submit evidence concerning its due diligence in obtaining variances from the Village of Buchanan. This constitutes an erroneous finding.

Reference is made to Con Edison's Memorandum Concerning Investigation by the Licensing Board of Matters Not Placed in Controversy by Any Party, dated November 23, 1976, filed in this proceeding, for a full discussion of Con Edison's arguments on this point.

In brief, no party has stated a contention concerning a lack of due diligence by Con Edison in obtaining governmental approvals to construct the closed-cycle cooling system. The Licensing Board apparently believes it is required by

the language of the Appeal Board's Decision of April 4, 1974 in this docket (ALAB-188, 7 AEC 323) and by the language of License No. DPR-26 to make a finding sua sponte concerning Con Edison's due diligence in obtaining all required governmental approvals.

Although the Appeal Board in ALAB-188 did require that Con Edison exercise due diligence in this respect, there is nothing in ALAB-188 to suggest that a finding by the Licensing Board is required in the absence of a contention. This issue is governed by § 2.760a of the Commission's Rules of Practice. 10 CFR § 2.760a (1976). This regulation was amended last year to reflect the Commission's decision in the Indian Point 3 operating license case. 40 Fed.Reg. 2973 (1975), implementing In re Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3, 8 AEC 7, 9 (1974)).

Under that change to the regulations, a Licensing Board may conduct a sua sponte inquiry as to matters not put in controversy by a party " . . . only in extraordinary circumstances where [it] determines that a serious safety, environmental, or common defense and security matter exists. This authority is to be used sparingly."

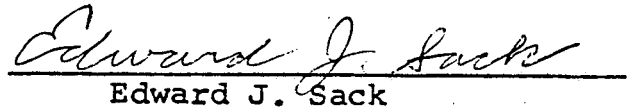
Con Edison believes that the Licensing Board must state what "extraordinary circumstances" it determines justify

the sua sponte inquiry, particularly in view of the admonition that this authority is to be used sparingly. The mere fact that the License imposes an obligation of due diligence cannot by itself be deemed to constitute extraordinary circumstances.

CONCLUSION

For the foregoing reasons, the Partial Initial Decision should be (1) affirmed to the extent that it authorizes the issuance of a license amendment which states that the natural draft, wet cooling tower system is the preferred closed-cycle system; (2) vacated to the extent it concludes that all required governmental approvals have now been received; and (3) modified in the other respects noted in Exceptions 2, 3 and 4 supra.

Respectfully submitted,



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