Exhibit 4

COURT OF APPEALS
STATE OF NEW YORK

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IN THE MATTER OF THE APPLICATION

of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner-Respondent,

To review a determination of, and for an Order and Judgment pursuant to Article 78 of the CPLR to annul the determination denying a variance,

-against-

WALTER HOFFMAN, GERALD MAROLLO, JOHN MORAITIS, WILLIAM MURRAY and JOHN KOBIEROWSKI, as the Zoning Board of Appeals of the Village of Buchanan, New York,

Respondents-Appellants,

HUDSON RIVER FISHERMAN'S ASSOCIATION,

Intervenor-Petitioner-Respondent.

----------x

RESPONDENTS-APPELLANTS' JURISDICTIONAL STATEMENT PURSUANT TO RULE 500-2 OF THE COURT OF APPEALS

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COURT OF APPEALS
STATE OF NEW YORK

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Respondents-Appellants,

HUDSON RIVER FISHERMAN'S ASSOCIATION,

Intervenor-Petitioner-Respondent.

----------X

RESPONDENTS-APPELLANTS' JURISDICTIONAL STATEMENT PURSUANT TO RULE 500-2 OF THE COURT OF APPEALS.

(I) The title of the case is as above stated.

(II) The appeal is taken from an order of the Appellate Division in the Second Judicial Department.

(III) The date of service of the Notice of Appeal is December 1, 1976.

(IV) The Order appealed from and Notice of Entry thereof were served on Appellants by personal service on their attorneys of record on November 12, 1976.

(V) The name of the attorneys for the petitioner-respondent is Williams & O'Neill. Their address is 130 East 15th Street, New York, New York 10003.

The name of the attorney for the intervenor-petitioner-respondent is NATURAL RESOURCES DEFENSE COUNCIL, INC. Its address is 15 West 44th Street, New York, New York 10036.

The reasons for and the authority supporting the assertion that this Court has jurisdiction to entertain the appeal and to review the questions raised are as follows:

This appeal is taken as of right pursuant to authority granted by CPLR 5601, subdivision (a), in an action originating in the Supreme Court, Westchester County, from an order of the Appellate Division in the Second Judicial Department. The order of the Appellate Division finally determined this action and directed a modification of the order and judgment of the Westchester County Supreme Court (one paper) appealed from in a substantial respect, which is within the power of the Court of Appeals to review on this appeal. The respondents-appellants who have taken this appeal are aggrieved by the modification of the judgment.

The material facts are as follows:

This proceeding was brought by Consolidated Edison Company of New York, Inc., (hereafter "Con Edison") pursuant to Article 78

CPLR to annul and set aside a decision of the Zoning Board of Appeals of the Village of Buchanan (hereafter the "Zoning Board") which denied Con Edison's application for a variance pursuant to the Zoning ordinance of the Village.

Con Edison had submitted an application to the Building Inspector of the Village for a building permit for the erection of a "closed-cycle cooling tower system" for Con Edison's nuclear generating unit No. 2 at Indian Point, New York. The application was denied and Con Edison appealed to the Board for a variance to permit the erection of the tower.

The reason for the appeal, as stated therein, was that Con Edison had been required by the Atomic Energy Commission to terminate operation of its existing once-through cooling system by May 1, 1979 and that, unless Con Edison could show by data from actual operations of Indian Point Unit No. 2 that the replacement of the existing system was unnecessary, it proposed to construct the natural-draft cooling tower.

It was further stated that, if Con Edison failed to install a closed-cycle cooling system, as required, it would be unable to operate its licensed nuclear generating plant after May 1, 1979. This, it was stated, would result in serious practical difficulties.

No claim was made of unnecessary or legal hardship, although the application was for both a use variance and an area variance.

The structure required for the closed-cycle cooling system

proposed to be installed by Con Edison, is a massive cooling tower 562 feet high, with a base diameter of 462 feet and a top diameter of 310 feet. The tower will produce at the top blow-offs of vaporized water in the form of white vapor plumes or clouds of varying size and stability. Due to the salinity of the Hudson River water at Indian Point, the vapor will contain salt droplets which will drift and fall to the ground substantially throughout Buchanan with a consequent effect on vegetation and other property in the vicinity.

No building permit can be issued for such a tower pursuant to Buchanan's Zoning Ordinance without a variance since the height of the tower far exceeds the maximum permitted in Con Edison's M-D Zone on which the tower is to be located, or any other zone, and the use requirements of industrial operation in the M-D Zone forbid uses which project such a vapor beyond Con Edison's property, or which disperse the resulting salt deposits on vegetation and property of Buchanan's residents.

What Con Edison referred to as a requirement to terminate its once-through cooling system by May 1, 1979, is included in its facility operating license and was in effect when this proceeding was commenced and decided at Special Term.

Con Edison was required by its license to evaluate the economic and environmental impacts of an alternative closed-cycle system in order to determine a preferred system for installation. The evalua-

tion was required to be submitted to the Commission by December 1, 1975, for review and approval prior to construction.

That valuation was made in a three-volume Cooling Tower Report which was submitted to the Village. The report describes and discusses various types of closed-cycle cooling systems, including the use of ponds or spray canals for natural cooling, and two basic systems of cooling towers referred to as wet towers and dry towers. Dry towers involve no fogging or plume or salt spray such as those which are characteristics of the wet towers. The report rules out ponds, spray canals and dry towers, however, and states that, if an alternative to the once-through cooling system is required, a natural-draft, wet cooling tower system is selected as the preferred closed-cycle cooling system.

This selection was made without consultation with or approval by the Village of Buchanan. The record contains no evidence that it has been approved or ordered installed by the Nuclear Regulatory Commission.

The Environmental Protection Agency has also ordered Con Edison to cease operation of its present once-through cooling system by May 1, 1979, but there is no evidence on the record that it has ordered or approved the installation of the cooling tower for which the variance was requested.

The Zoning Ordinance of the Village of Buchanan requires that anyone who undertakes any new construction shall apply to the Building Inspector for a zoning permit, and that the Building

Inspector is given the duty, power and authority to enforce the provisions of the ordinance. It further provides that the Zoning Board may not grant a use variance unless it finds that strict application of the use provisions of the ordinance would result in both practical difficulties and legal hardship for the applicant. Before such a variance may be granted, the Board must also find that the variance requested is a departure to only a minor degree from the text of the ordinance, and that it is the minimum variance that will accomplish the purpose.

Area variances may be granted on proof of practical difficulty only. (A question has been raised as to whether any area variance is required in view of a provision of the ordinance exempting utility towers from height limitations.)

Legal hardship is defined as follows: "Hardship or Legal Hardship pursuant to well established Court decisions - means a three point hardship, namely:

(1) The land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.

(2) The plight of the owner is not self-inflicted, but is due to unique circumstances and not to the general conditions in the neighborhood.

(3) The use to be authorized by the variance will not alter the essential character of the locality nor depreciate aesthetic or property values."

The Zoning Board denied the application for the requested variances. It found an absence of harm to Con Edison in not being

relieved of the requirements of the Zoning Ordinance because Con Edison had not shown that it was under any compulsion to construct the tower described in the application or to take any other definitive steps in contravention of the ordinance, and might never be in a position where it was authoritatively commanded to erect such a structure. The Board also pointed out that Con Edison had arrogated to itself the decision as to which type of closed-cycle system, if any were to be installed, had the least drastic impact on the Village of Buchanan and would be least disruptive to the community.

The Board also pointed out that Con Edison had not shown that the variances requested were the minimal variances which must be granted in order to preserve the spirit of the ordinance while protecting the public interest under Village Law §7-712, subd. 2(c). The decision also states the Board's finding that a closed-cycle cooling system does not require the 565 foot tower for which the variance was requested.

This proceeding was, consequently, commenced by Con Edison, solely against the Zoning Board. Neither the Village, the Village Trustees nor the Building Inspector was joined as a party. The Hudson River Fisherman's Association was permitted to intervene as an additional petitioner. In the petitions, the claims were made inter alia that, unless the variances applied for were granted, Con Edison would be unable to comply with the requirements of its

federal license, and its E.P.A. permit, which would be contrary to Article VI of the Constitution of the United States, and that the Zoning Board's decision would constitute an undue burden on interstate commerce in violation of §8 of Article I of the United States Constitution.

The decision at Special Term, which the Appellate Division modified, stated that the provisions of subsection (c) of §2021 of the Atomic Energy Act, which requires the Commission to retain authority with respect to the construction and operation of "utilization facilities", indicated Federal preemption with respect to local legislation in matters concerning the generating unit despite the provisions of a later subdivision of the same section of the statute which provided that "nothing 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."

Aside from the statutory language, the court also found an implied preemption because of the pervasive federal regulation of Con Edison's facility.

Neither petition was granted insofar as it sought the grant of the variance applied for. Instead the court decided that the actions of the Zoning Board in requiring Con Edison to seek a building permit and in attempting to regulate or prohibit construction of the closed-cycle cooling system contravened the supremacy clause of the United States Constitution and were illegal

and void. The Zoning Board was enjoined from enforcing or attempting to enforce the provisions of the Buchanan Zoning Code as against construction by Con Edison of a closed-cycle cooling system at its Indian Point No. 2 facility.

The judgment, at Special Term, ordered, adjudged and decreed that the actions of the Zoning Board in requiring the petitioner to seek a building permit and in attempting to regulate or prohibit construction of the closed-cycle cooling system referred to in the petition, contravene the supremacy clause of the United States Constitution and are thus illegal and void.

The petitions were granted, to the extent that the Zoning Board was enjoined from enforcing or attempting to enforce the provisions of the zoning ordinance as against construction by Con Edison of a closed-cycle cooling system at its Indian Point No. 2 facility.

The Appellate Division modified the judgment by deleting the provisions thereof which had adjudged that the actions of the Zoning Board which required Con Edison to seek a building permit and attempted to regulate or prohibit construction of a closed-cycle cooling system contravened the supremacy clause of the United States Constitution and were thus illegal and void, and which enjoined the Zoning Board from enforcing or attempting to enforce the zoning ordinance against construction by Con Edison of a closed-cycle cooling system. It substituted therefor a direction that the

Zoning Board issue the variance to Con Edison for the construction of a tower as part of a closed-cycle cooling system, and a provision that respondents might regulate local and incidental conditions relative to the construction of the proposed facility.

The judgment was affirmed as so modified.

The Appellate Division's decision slip, which was made a part of its order, however, besides providing for such deletion and substitution, also stated that the court agreed with Special Term that the Zoning Board's action in denying Con Edison the variance contravened Federal Law as noted in its decision and concluded also that such action contravened State Law (Public Service Law §65, subd. 1; Transportation Corporation Law §11). The Appellate Division further directed that the proper village authorities should be permitted limited regulation of local and incidental facilities in accordance with the zoning ordinance as long as such regulation is reasonable and not inconsistent with the construction of the proposed facility.

It is respectfully submitted that the modification by the Appellate Division was clearly substantial, and that the Zoning Board is obviously aggrieved thereby. While the judgment at Special Term declared that actions by the Board, which as a matter of fact the Board had never taken (requiring Con Edison to apply for a building permit and attempting to regulate or prohibit construction of the closed-cycle cooling system) were unconstitutional, it directed no action by the Board, but merely enjoined it from

attempting to enforce the zoning ordinance. This injunction had no effect on the Zoning Board's normal activities. The Zoning Board was not charged with the duty, or granted the authority to enforce the zoning ordinance. Enforcement of the ordinance was a function of the Building Inspector, who had not been made a party to this proceeding.

As modified by the order of the Appellate Division, the judgment now directs the Zoning Board to issue a variance which it has not been given authority to issue by the legislature (Village Law §7-712) or the Board of Trustees of the Village, and which it has been forbidden to issue by the provisions of the zoning ordinance without proof of legal hardship, as defined therein (Zoning Ordinance §54-43). Certainly the Zoning Board had no legal duty to issue the variance and it is fundamental that a judgment in the nature of mandamus will not issue except to compel performance of official duty clearly imposed by law. (Matter of Burr v. Voorhis, 229 NY 382, 387; Matter of Colonial Beacon Oil Co., Inc. v. Finn, 245 App. Div. 459 3rd Dept. 1935, aff'd. 270 NY 591; and cf. Scarsdale Supply Co. v. Vil. of Scarsdale, 8 NY 2d 325, 330.)

There was a further modification by the Appellate Division in the statement of its conclusion that in denying the variance the zoning ordinance violated State Law. In this connection it was argued that the Zoning Board had ignored settled State Law to the effect that zoning regulations cannot be used to prevent utilities

from constructing necessary facilities, and obviously the Appellate Division found that the Zoning Board had ignored State case law to that effect.

However, the short and complete answer to that argument is that Con Edison had completely failed to establish any necessity for the construction of the tower for which the variance was sought.

It is apparent that the license under which Con Edison is operating does not require the erection of the proposed cooling tower. That choice was made by Con Edison. Concededly there are other alternatives which will be equally effective.

Even Con Edison did not claim in its Cooling Tower Report that this massive cooling tower was a necessary installation. It was reported as the preferred closed-cycle cooling system.

The modification of the judgment by the Appellate Division was "on the law" and it is respectfully submitted that this court has jurisdiction to entertain the appeal and to review the questions raised.

Submitted herewith are copies of:

(1) The dated Notice of Appeal.

(2) The Order appealed from.

(3) The Memorandum Opinion of the Appellate Division.

(4) The Judgment reversed by the Appellate Division.

(5) The findings and conclusions upon which such judgment was entered.

Dated: White Plains, New York
December 3 , 1976

Respectfully submitted,

McCARTHY, FINGAR, DONOVAN & GLATTHAAR
Attorneys for Respondents-Appellants
As Special Counsel to
CARL R. D'ALVIA
Village Attorney, Village of Buchanan
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White Plains, New York 10601
(914) 946-3700

DEC 9 1976

Exhibit 5

State of New York
Court of Appeals

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

December 7, 1976

COPY

Henry J. Smith, Esq.
McCarthy, Fingar, Donovan & Glatthaar
175 Main Street
White Plains, New York 10601

Re: Matter of Consolidated Edison v. Hoffman

Dear Mr. Smith:

I acknowledge receipt of your 500.2a jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte.

Your jurisdictional statement is quite ample. Nevertheless, two aspects of the order sought to be appealed require further inquiry and amplification. First, there are aspects to the Appellate Division order which may deprive it of the necessary finality for any appeal as of right. I refer to the decretal language that "respondents may regulate local and incidental conditions relative to the construction" etc. Secondly, the aggrievement issue raises the arguable assertion that the Appellate Division order in reality benefits the Zoning Board by eliminating the broader declaration of unconstitutionality and substituting a direction for a variance but with some control and conditions within the Board's power.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange

for the execution of a stipulation consenting to dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversaries are likewise afforded this opportunity.

Very truly yours,

Joseph W. Bellacosa

Joseph W. Bellacosa

JWB:im

cc: Williams & O'Neill, Esqs.
National Resources Defense Council, Inc.
George Morrow, Clerk of Westchester County

Exhibit 6

COURT OF APPEALS
STATE OF NEW YORK

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-against-

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Respondents-Appellants,

HUDSON RIVER FISHERMAN'S ASSOCIATION,

Intervenor-Petitioner-Respondent.

----------x

RESPONDENTS-APPELLANTS' SUPPLEMENTAL JURISDICTIONAL STATEMENT PURSUANT TO SECTION 500.2a OF THE RULES OF THE COURT OF APPEALS.

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IN THE MATTER OF THE APPLICATION

of

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Respondents-Appellants,

HUDSON RIVER FISHERMAN'S ASSOCIATION,

Intervenor-Petitioner-Respondent.

----------x

RESPONDENTS-APPELLANTS' SUPPLEMENTAL JURISDICTIONAL STATEMENT PURSUANT TO SECTION 500.2a OF THE RULES OF THE COURT OF APPEALS.

On December 3, 1976, we forwarded to the Clerk of this Court our jurisdictional statement pursuant to Section 500.2 of the rules of this Court.

By communication from the Clerk, dated December 7, 1976, we have been informed that two aspects of the order sought to be appealed require further inquiry and amplification as follows:

> "First, there are aspects to the Appellate Division order which may deprive it of the necessary finality for any appeal as of right. I refer to the decretal language that 'respondents may regulate local and incidental conditions relative to the construction' etc. Secondly, the aggrievement issue raises the arguable assertion that the Appellate Division order in reality benefits the Zoning Board by eliminating the broader declaration of unconstitutionality and substituting a direction for a variance but with some control and conditions within the Board's power."

With respect to the suggestion that the decretal language of the order sought to be appealed from may deprive it of the necessary finality, we respectfully submit that the order modifies the judgment of the Special Term of the Supreme Court so that it now directs by its decretal provision that the Zoning Board of Appeals of the Village of Buchanan "be and they hereby are directed to issue the variance to petitioner for the construction of a tower as part of a closed-cycle cooling system", and provides that "respondents may regulate local and incidental conditions relative to the construction of the proposed facility."

That judgment, we respectfully submit, is an unqualified direction to the Zoning Board to issue the variance applied for and, as such, it finally determines this proceeding. That was the relief requested by the petitioners and the granting of that relief leaves nothing further to be determined in this proceeding.

Neither the judgment, as modified, nor the order of the Appellate Division makes any provision for the issuance of a variance which may be conditioned on the compliance by Con Edison with any specific direction by the Board. Even if they did, however, the order of the Appellate Division would, nevertheless, finally determine this proceeding.

The Zoning Board does not act, of its own motion, to regulate local conditions. Its duties and powers are described in §54-41, B. of the Zoning Ordinance of the Village of Buchanan as follows:

> "The duties and powers of the Board shall be to hear and decide appeals if it is alleged an error has been made in the enforcement of this ordinance; hear and decide requests for uses and variances. The Board shall have such other duties as may be provided or made necessary by this ordinance, including the interpretation of

boundaries, the holding of public hearings, the referral of any pertinent matter to the Planning Commission for review and recommendations, and the maintenance of records on all decisions and findings."

Similar provisions are contained in §7-712 of the Village Law. Variances are granted only on appeals. (Zoning Ordinance, §54.43). The Zoning Board may also hear and determine applications for special permits for specified uses. (Zoning Ordinance, §54.33) Thus no provision of the ordinance or the statute authorizes the Zoning Board to regulate local conditions except insofar as such regulation may result from its action on an appeal from a determination of the Building Inspector, or on an application for a special permit.

The provisions of the order of the Appellate Division that the Board may regulate "local and incidental conditions relative to the construction of the proposed facility" are obviously intended to make it clear that the Board may still exercise its powers with respect to local and incidental conditions if, in the future, the Board may find it appropriate to do so in the course of an appeal from a decision of the Building Inspector, or an application for a special permit.

Any decision which it may make on such an appeal or application will, of course, be subject to review in a proceeding pursuant to Article 78, CPLR (Village Law §7-712, 3). That review, however, if applied for, will be in a separate proceeding and not in this proceeding in which the order sought to be appealed from was made.

It is respectfully submitted, therefore, that, even though there may be a possibility of future appeals to the Zoning Board with respect to the "limited regulation of local and incidental conditions" which the "proper Village authorities" may attempt to act upon under the decision of the Appellate Division, this proceeding is finally determined by the modification of the judgment appealed from, which directs the issuance of the variance applied for by Con Edison.

Even if the order of the Appellate Division were to be construed as authorizing the issuance of a conditional variance, the result would be the same since, if conditions were so imposed, the only question which could arise would be whether the issuance of such a conditional variance complied with the judgment as modified. Determination of that

question might involve interpretation of the order of the Appellate Division but would not require any further judicial action by way of amendment of the order or of the judgment which it modified.

With respect to the suggestion that there may be an arguable assertion that the Appellate Division order, in reality, benefits the Zoning Board by eliminating the declaration of unconstitutionality, and substituting a direction of a variance, we respectfully submit that the complete answer to any such argument is that the Appellate Division did not eliminate the declaration of unconstitutionality.

The judgment at Special Term decreed that the actions of the Zoning Board "in requiring the petitioner to seek a building permit and attempting to regulate or prohibit construction of the closed-cycle cooling system referred to in the petition, contravene the supremacy clause of the United States Constitution and are thus illegal and void." It further enjoined the Zoning Board from enforcing or attempting to enforce the provisions of the Zoning Ordinance.

In the Appellate Division we argued that, whatever other action that court might decide to take, the judgment

appealed from could not stand in that form, since the Zoning Board had obviously not required Con Edison to apply for a building permit, nor had it attempted to prohibit or regulate the construction of the cooling system. Building permits were required by action of the Board of Trustees in enacting a building code, and regulation or prohibition of the construction of the cooling system resulted from the operation of the Zoning Ordinance, or the Building Code, as enacted by the Trustees, and was in the hands of the Building Inspector. The Zoning Board had no power to enforce the ordinance, nor had it attempted to do so. All it did was to act, at Con Edison's request, on Con Edison's appeal for a variance.

We further argued that the facts disclosed did not warrant the issuance of an injunction. The Appellate Division, apparently as the result of that argument, deleted the decretal provisions of the judgment which provided that the act of the Zoning Board <u>in requiring Con Edison to seek a building permit and in attempting to regulate or prohibit construction</u> contravened the supremacy clause of the United States Constitution, and the injunctive provisions thereof, and substituted therefor the direction for the issuance of the variance.

In so doing, however, they did not eliminate the constitutional question. In the Appellate Division's opinion and decision slip, which is expressly made a part of the order sought to be appealed from (see Order, Exhibit 2, submitted with jurisdictional statement) that court stated:

> "We agree with Special Term that appellants' actions in denying petitioner the variance sought by it contravened Federal Law as noted in its decision." (Emphasis supplied).

The contravention of Federal Law was noted in the decision at Special Term in the following language:

> "Accordingly it is the decision of this court that the actions of respondents in requiring petitioner to seek a building permit and in attempting to regulate or prohibit construction of the closed-cycle cooling system, contravene the supremacy clause of the United States Constitution and are thus illegal and void."

Accordingly, as we read the order of the Appellate Division, the question of preemption under the supremacy clause is still in the case, and in order to succeed on this appeal the Zoning Board must not only establish that its action did not violate State Law, but must also convince this Court that Congress had not so far preempted the field

with respect to the regulation of nuclear facilities as to require a determination that the action of the Zoning Board contravened the supremacy clause.

We respectfully submit that, if the Appellate Division had not also found that the action of the Zoning Board contravened State Law, the finding of Federal preemption would have been sufficient, standing alone, to justify a direct appeal to this Court pursuant to CPLR 5601(b), par. 1 (cf. Nettleton v. Diamond, 27 N.Y. 2d 182, 189).

The Appellate Division order did not benefit the Zoning Board by eliminating the declaration of unconstitutionality. Neither did it benefit the Zoning Board by substituting therefor the direction that a variance issue.

The judgment appealed from, although it erroneously held the Zoning Board responsible for the requirement that Con Edison should apply for a building permit and for attempting to regulate or prohibit Con Edison's proposed cooling tower, did not require any action on the part of the Zoning Board. The injunctive provisions against enforcement of the ordinance did not, in any way, limit the

Board's jurisdiction or authority, since it had no authority to enforce the ordinance in any event. As we have stated, however, the judgment, as modified by the order of the Apellate Division, now requires the Zoning Board to take affirmative action, which it has no authority to take, and which in its opinion will not be in the best interests of the inhabitants of the Village of Buchanan.

Dated: White Plains, N.Y.

December 14, 1976

Respectfully submitted,

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force