Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application :

of :

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., : INDEX NO. 10811/75

Petitioner, :

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 MARALLO, JOHN MORAITIS, WILLIAM MURRAY, and JOHN KOBIEROWSKI, as the Zoning Board of Appeals of the Village of Buchanan, New York, :

Respondents, :

HUDSON RIVER FISHERMEN'S ASSOCIATION, :

Intervenor-Petitioner.

PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENTS' MEMORANDUM OF LAW

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PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENTS' MEMORANDUM OF LAW

This Memorandum responds to certain arguments made by the Attorney of the Village of Buchanan at oral argument on September 19, 1975 and in the Respondents'

Memorandum of Law ("Village Memorandum").

POINT I

THE DECISION OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARD IN ALAB-287 IS NOT CONTROLLING IN THE INSTANT CASE

Both at oral argument and in their Memorandum of Law, Respondents have argued that the September 3, 1975 decision of the Atomic Safety and Licensing Appeal Board (ALAB-287) is controlling in its interpretation of Amendment No. 6 to the full power operating license (License DPR-26) for Indian Point 2 (Exhibit "C" of Petition; DPR-26 as amended is referred to herein as the "License"). This Amendment came about as a result of a decision by the Atomic Safety and Licensing Appeal Board of April 4, 1974 (ALAB-188).

At the outset, it should be noted that ALAB-287 is an opinion relating to Indian Point 3, specifically reviewing a June 1975 Memorandum and Order made by the Atomic Safety and Licensing Board approving a stipulation proposed by the parties involved in the authorization of a Full-Term, Full-Power Operating License for Indian Point 3 (ALAB-287, p. 2). Nowhere in ALAB-287 do we find language

modifying or amending the License for Indian Point 2.

Respondents are correct in noting that ALAB-287 refers to the Indian Point 2 operating license as well as the earlier ALAB-188 opinion. Indeed, some of the language used in ALAB-287 (as cited on page 60 of the Village Memorandum) appears somewhat inconsistent with the terms of the License for Indian Point 2 as described in Petitioner's Memorandum, page 5. Con Edison submits, however, that mere inconsistent language changes nothing. The fact is that Con Edison remains legally bound by the present terms of the License.

Additionally, under the Rules of Practice governing the Nuclear Regulatory Commission, ALAB-287 is not yet final. The parties may petition to reconsider the ALAB decision, and the Nuclear Regulatory Commission may review it on its own motion. 10 C.F.R. § 2.771, § 2.786. In fact, the N.R.C. staff was granted an extension of the time in which to file a petition for reconsideration of ALAB-287 until September 29, 1975, by Order of the Appeal Board. (Order is attached as Exhibit 1). Furthermore, the Commission has extended its own time to review ALAB-287 to October 23, 1975. (Exhibit 2 attached hereto.)

Thus, as long as the finality of ALAB-287 is uncertain, any argument that ALAB-287 controls or is even relevant to the issues at present regarding Indian Point 2, must fail.

POINT II

THE EFFECT OF THE OPERATING LICENSE FOR INDIAN POINT 2 IS THAT OF AN ORDER TO CON EDISON TO BUILD A COOLING TOWER

Condition 2.E(1) of the Operating License states:

> "Operation of Indian Point Unit No. 2 with the once-through cooling system will be permitted during an interim period, the reasonable termination date for which now appears to be May 1, 1979. ...
>
> * * *
>
> (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."

It is apparent that, by linking the May 1, 1979 termination date of operation with the once-through cooling system with the deadline date for obtaining all regulatory approvals for a closed-cycle system, the terms of the license order Con Edison to construct a closed-cycle cooling system. Additionally, the license required Con Edison to evaluate the environmental and economic impacts of alternative closed-cycle cooling systems, in order to determine the preferred system for installation. DPR-26, ¶ 2.E(2). This study culminated in the preparation of the Cooling Tower Report, which concluded that the natural-draft cooling tower is the preferred cooling system for Indian Point 2, primarily for environmental reasons.

Respondents argue at page 31 of the Village Memorandum that the Cooling Tower Report conclusion constitutes a mere "recommendation", to be considered at some later time when a final decision will be rendered. This point is met by an analysis of the timing set forth in the license.

The license, on its face, does not prescribe what type of closed-cycle system must be built. However, the date of May 1, 1979 was derived from a schedule approved

in ALAB-188. (RAI-74-4, pp. 389-394.) That schedule provides that, after preparation of the Cooling Tower Report, Con Edison would then proceed to complete designs and to obtain all regulatory approvals for the preferred system as indicated in that Report. One year was allotted for obtaining the approvals, then one year for excavation, and 36 months following the completion of excavation for the erection of the cooling tower and construction of auxiliary systems.

The Staff of the Nuclear Regulatory Commission has taken the position that it will conduct a detailed environmental review before announcing its conclusion as to the preferred closed-cycle cooling system. 40 FR 30882. However, the schedule outlined by the Atomic Safety and Licensing Appeal Board did not allow for any postponement while the Commission Staff undertook its own review, unless the Staff does not complete its work by December 1, 1975.

Thus, the May 1, 1979 date requires Con Edison to obtain diligently all regulatory approvals for the construction of the natural-draft cooling tower, as the preferred system indicated in the Cooling Tower Report. Such a tower is now the only closed-cycle cooling system which

can be constructed on a schedule consistent with the May 1, 1979 deadline, because of the design and licensing progress to date.

Attached hereto as Exhibit 3 is a recently received letter dated September 23, 1975 from the Executive Legal Director of the Nuclear Regulatory Commission Staff which describes the requirements of the License in a manner substantially similar to that set forth above and which concludes that due diligence requires that Con Edison pursue its judicial remedies to challenge the action of the Buchanan Zoning Board.

It should be noted here that, contrary to Respondents' implied assertion at page 28 of its Memorandum, Con Edison has applied for most, and received some, of the regulatory approvals outlined in Section 4.3 of the Cooling Tower Report. Nothing has been entered into the record regarding these other permits only because they were not deemed relevant to an application for a building permit to the Village of Buchanan. The schedule described in ALAB-188 requires review by regulatory agencies concurrently, not consecutively, to the extent possible.

The License also contains a provision that Con

Edison may apply for an extensi[on] deadline for the elimination of once-through coo[ling] stified by empirical data collected during [the] s. ¶ 2.E(1)(C). Con Edison has exercised its ri[ght] this provision and on June 6, 1975 filed an ap[plication] to change the May 1, 1979 date to May 1, 1981 [in] application is granted, there would be no need [for] lding permit at this time.

However, the mere fil[ing] an application does not constitute an amendment [to] icense. Since such a request must be reviewed [by] mission Staff, it is reasonable to assume that [it] will conduct an environmental review in accordan[ce] C.F.R. Part 51. This requires preparation of a D[raft] onmental State-ment, circulating that for comme[nt] ther governmental agencies and the public, and pre[paration] f a Final Envi-ronmental Statement incorporati[ng] received. This may be followed by a hearing and [an] appeal to the courts. Nevertheless, until suc[h] ment is granted, Con Edison remains bound by the [t]he present License.

On page 15 of the Vill[age] ndum, Respondents

state that the Zoning Board, in its decision, relied on subparagraph (b) of Condition 2.E(1) of the License quoted above. This Court cannot properly assume that an amendment of the License will automatically be granted under this provision. This subparagraph appears to contemplate a delay in obtaining a permit and not a complete denial as ordered by the Zoning Board so that the applicability of this subparagraph is unclear. Furthermore, amendment under this subparagraph is not automatic and it may be opposed by other parties with opportunity for a hearing and possible judicial review.

Accordingly, the effect of the provisions of the License DPR-26 which require termination of the once-through system on May 1, 1979 is that of a direction to proceed with the engineering design, licensing, and construction of a natural-draft cooling tower system, which was the subject of Con Edison's application for a building permit to the Village of Buchanan.

POINT III

THE FACTS SHOW THAT FAILURE TO CONSTRUCT A CLOSED-CYCLE COOLING SYSTEM WILL LEAD TO PRACTICAL DIFFICULTIES AND UNNECESSARY HARDSHIP

It is not necessary to repeat here Con Edison's legal analysis of the standard for the issuance of a variance as set forth in the case of Otto v. Steinhilber, 282 N.Y. 71 (1939). (See Con Edison Memorandum, pp. 9-11.) Con Edison has amply demonstrated that if the requested variances are denied, it faces unnecessary legal risks as well as severe economic penalties. Surely it cannot be denied that a loss of $567,000 per day due to outage, which must be passed on to Con Edison's customers, including those in Westchester County, plus a potential write-off of a plant investment of over $204,000,000 constitute the severest of hardships as contemplated by the drafters of section 7-7.2.2(C) of the Village Law. (See Con Edison Memorandum pp. 16-19; Cooling Tower Report Section 5.0.)

Respondents argue, however, that Con Edison has offered no proof that the variances requested would not depreciate esthetic or property values. (Village Memorandum, p. 75.) The answer to this assertion may be found

by looking at the character of the area in which Indian Point 2 is located. Most obvious is the fact that Indian Point 2 is on a site which contains two other generating units. Several structures there already exceed the height limitations of the Buchanan Zoning Code. Similarly, the plant is in a heavily industrialized zone, with large manufacturing plants on both sides of the Indian Point site. (See Con Edison Memorandum, pp. 19-20.) Thus, the facts show that the granting of a variance under these circumstances would not lower esthetic or property values.

In addition, Con Edison has offered proof regarding the environmental impact of the natural-draft tower on the locality. (Cooling Tower Report, Section 6.0.) The entire thrust of the analysis which led to the selection of the natural-draft tower as the preferred alternative was that adverse impacts of a closed-cycle cooling system were minimized by use of the tall natural-draft tower. Accordingly, this analysis constitutes proof that the natural-draft tower is the minimum variance necessary within the intent of the Zoning Code.

The Cooling Tower Report shows that the impacts

of vapor emissions and salt drift from the tall natural-draft tower are minimal, and they should not have a significant impact on esthetic or property values. Furthermore, assuming, arguendo, that this impact is adjudged to be of a high magnitude, that fact alone is not determinative. Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954). That case is discussed on pages 32-34 of Petitioner's Memorandum and holds that the fact that a utility's facilities may detract from the value of surrounding property is not controlling when a utility is seeking to construct an essential facility.

Since the facts show that Con Edison was entitled to a variance under the terms of the Buchanan Zoning Code, the argument presented in the Village Memorandum at pages 73-74 and repeated by Respondents' Counsel at oral argument that Con Edison is seeking to attack the validity of the Code is erroneous. Neither the Village nor the Village Trustees are necessary parties since Con Edison is not attacking the validity of the Zoning Code but is attacking the action of Respondents pursuant thereto in denying the appeal for a variance.

CONCLUSION

For the foregoing reasons, as well as those set forth in Con Edison's Memorandum of Law, the Court should set aside the decision of the Board dated June 19, 1975 and direct the Board to order the issuance of the building permit requested by Petitioner.

In the alternative, the Court should set aside the decision of the Board dated June 19, 1975 and direct the Board to issue the variance as requested by Petitioner or direct the Board to issue the variance requested by Petitioner conditioned upon the Nuclear Regulatory Commission's denial of Petitioner's pending application for an amendment of its license to change the date for termination of operation with the once-through cooling system from May 1, 1979 to May 1, 1981 or upon a decision by the

Environmental Protection Agency denying Petitioner's request for alternative thermal limitations.

Respectfully submitted,

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