

NEW YORK SUPREME COURT
APPELLATE DIVISION - SECOND DEPARTMENT

-----X

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

Respondents-Appellants,

HUDSON RIVER FISHERMEN'S ASSOCIATION,
Intervenor-Petitioner-Respondent.

-----X

EDWARD J. SACK, an attorney admitted to practice in
the courts of this state, associated with Williams & O'Neill,
the attorneys of record in this action for Consolidated
Edison Company of New York, Inc. ("Con Edison"), affirms under
the penalties of perjury and pursuant to Rule 2106 CPLR, that
the following facts are true:

1. That final judgment was duly rendered in this

action on the 14th day of November 1975 in the Supreme Court, Westchester County, in favor of the petitioner-respondent against the respondents-appellants above named, declaring the action of the respondents-appellants illegal and void insofar as the respondents-appellants had required the petitioner-respondent to seek a building permit and had attempted to regulate or prohibit construction of a closed-cycle cooling system of the petitioner-respondent referred to in the petition herein and enjoined the respondents-appellants from enforcing or attempting to enforce the provisions of the Buchanan Zoning Code as against construction of such closed-cycle cooling system by the petitioner-respondent, and said judgment was duly entered in the office of the Clerk of the County of Westchester on the 9th day of December 1975, Index No. 10811/75.

2. That on or about the 2nd day of January 1976, the respondents-appellants appealed from said judgment to the Appellate Division of this Court and served a notice of said appeal on Williams & O'Neill, attorneys for the petitioner-respondent, and filed the same in the office of the Clerk of the County of Westchester. A copy of said Notice of Appeal

is annexed hereto.

3. That two months have elapsed since the Appeal herein was taken as hereinbefore alleged and the said respondents-appellants have failed to serve and file the papers which it is their duty to file and serve under CPLR 5530 of this Court, namely, a copy of the transcript.

4. That the special facts of this case show that Con Edison will suffer irrevocable injury if this appeal does not proceed expeditiously. This case derives from a license issued by the Atomic Energy Commission, now the Nuclear Regulatory Commission (the "Commission") to operate a nuclear-powered electric generating station in Buchanan, New York, known as Indian Point Unit No. 2. The license provides, among other things, that operation with the present once-through cooling system must terminate on May 1, 1979, subject to certain conditions. Petitioner-respondent contends, and the Court below agreed, that the effect of this and other provisions of said license is to require Con Edison to construct a closed-cycle cooling system (i.e., cooling tower) on a schedule which would permit cessation of operations of the once-through cooling system on the date established in the license.

5. That said license contains a provision that the finality of the May 1, 1979 date is grounded on a schedule under which the applicant (Con Edison) acting with due diligence obtains all governmental approvals required to proceed with the construction of the closed-cycle cooling system by December 1, 1975. If Con Edison has acted with due diligence in seeking such governmental approvals but has not obtained such approvals by December 1, 1975, then the May 1, 1979 date "shall be postponed accordingly".

6. That on December 1, 1975, in addition to the issues raised by the instant proceeding, Con Edison had not received approval of the Commission of its selection of a natural-draft cooling tower as the preferred closed-cycle cooling system. On February 24, 1976, Con Edison received the Commission Staff's Draft Environmental Statement on selection of the preferred closed-cycle cooling system for Indian Point Unit No. 2, which statement concurred in Con Edison's selection of a natural-draft cooling tower system.

7. That the Commission's regulations require it to circulate this draft statement for comments, prepare a final environmental statement and file that with the Council on Environmental Quality. If the Commission proceeds

expeditiously, final Commission action is possible by June 1976. After the Commission has taken final action, Con Edison will be required to determine whether it has received all regulatory approvals required to construct a natural-draft cooling tower system.

8. That petitioner-respondent has asserted in a letter to the Director of Nuclear Reactor Regulation of the Commission that all regulatory approvals have not been received as long as the instant appeal is pending. The intervenor-petitioner-respondent, in a letter to the said Director, has asserted that a permit from the Village of Buchanan is not necessary on the basis of the decision of the Westchester County Supreme Court and that a postponement of the May 1, 1979 date on this ground is not valid.

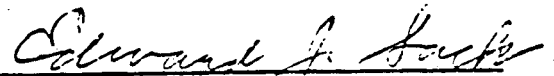
9. Accordingly, it appears that in June 1976 Con Edison may be required to determine whether or not it has obtained all governmental approvals required to proceed with the construction of a natural-draft cooling tower system. If Con Edison proceeds with the construction program and the decision of the Supreme Court of Westchester County should thereafter be reversed, Con Edison will have incurred irrevocable injury in the form of cancellation charges on contracts

entered into, and it would be possible that irrevocable destruction of the wooded area on which the cooling tower will be located would be commenced. If Con Edison does not proceed with the construction schedule, and the May 1, 1979 date should not be further postponed because of the pendency of this appeal, Con Edison would incur irrevocable injury in the form of damages arising from the premature termination of operation of the once-through cooling system. Damages would arise from the requirements of generating electric power at oil burning plants to replace that which would otherwise have been generated by the Indian Point Unit No. 2 plant. These additional costs have been estimated as in excess of \$500,000 per day assuming full power operation.

10. That the foregoing facts establish that an expeditious decision in this proceeding is essential to the public interest.

WHEREFORE, it is respectfully requested that the motion be granted dismissing the Appeal or in the alternative that the respondents-appellants perfect their appeal for the June term of this Court.

Subscribed to this 8th day of March, 1976.


EDWARD J. SACK