Exhibit C

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.	:	

MEMORANDUM OF LAW OF THE PETITIONER
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

WILLIAMS & O'NEILL
Attorneys for Petitioner
Consolidated Edison Company
of New York, Inc.
Address:
130 East 15th Street
Borough of Manhattan
New York, N.Y. 10003

EDWARD J. SACK
Of Counsel

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MEMORANDUM OF LAW OF THE PETITIONER
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

I. FACTS

This is a petition pursuant to Article 78 of the Civil Practice Law and Rules to annul, revoke and set aside the Decision of the Zoning Board of Appeals of the Village of Buchanan (the "Board") denying Petitioner's Appeal for a Variance from the Village of Buchanan Zoning Code (the

"Code"). Petitioner contends that the decision is in violation of state and federal law.

The Board's Decision which is the subject of this proceeding denied Petitioner's Appeal for a Variance to build a natural-draft cooling tower system for its nuclear-powered electric generating plant known as Indian Point Unit No. 2 (the "Plant"). A variance was requested with respect to the following three provisions of the Code:

A. Height limitation of 40 feet. [1/]

B. Prohibition of dissemination of observable atmospheric pollutants beyond site boundaries. [2/]

C. Prohibition of hazard to vegetation. [3/]

The proposed tower would be approximately 565 feet high, would produce a visible vapor plume beyond the site boundaries and would at certain times result in a deposition of saline drift which may be harmful to certain plants indigenous to adjacent areas.

1/ Buchanan Zoning Code, Zoning Map District M-D.

2/ Buchanan Zoning Code, Section 54-22, A(1).

3/ Buchanan Zoning Code, Section 54-22 A(2).

The Petitioner's application to build the cooling tower stems from a proceeding before the United States Nuclear Regulatory Commission [4] (the "Commission"), which regulates the Plant pursuant to the Atomic Energy Act [5] and the National Environmental Policy Act. [6] The Commission issued a construction permit to build the Plant on October 14, 1966. Hearings on the issuance of an operating license were commenced December 1, 1970 and concluded on April 26, 1973. The Commission issued the first limited operating license on October 19, 1971. Subsequent amendments authorized increasing operational levels until the full-power operating license was issued on September 28, 1973. In these hearings, the Commission Staff recommended that operation of the present once-through cool-

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4/ The Nuclear Regulatory Commission has succeeded to the regulatory jurisdiction formerly exercised by the Atomic Energy Commission. Energy Reorganization Act of 1974, 88 Stat. 1233, effective January 19, 1975 (E.O. 11834,40 Fed.Reg.2971). References to the Commission shall be to the Atomic Energy Commission for events prior to January 19, 1975 and to the Nuclear Regulatory Commission for events subsequent thereto.

5/ 42 U.S.C. Sec. 2011 et seq., as amended.

6/ 42 U.S.C. Sec. 4321 et seq.

ing system be terminated as rapidly as possible because of a potential threat to the aquatic ecology of the Hudson River, and that the Plant thereafter be operated with a closed-cycle cooling system. 7/

Con Edison contended that a decision on the necessity for a closed-cycle cooling system should be deferred until completion of its ecological study program now in progress. Extensive hearings were conducted before an Atomic Safety and Licensing Board in which the position of the Commission Staff was supported by the Hudson River Fishermen's Association and the Attorney General of the State of New York. The Village of Buchanan did not participate in this proceeding. The result was the present license condition (Exhibit "C" to the Petition) which is based on a decision of an Atomic Safety and Licensing Appeal Board (the "Appeal Board").

7/ "Once-through cooling system" means water is taken from the Hudson River to cool the condensers and is returned to the river. A "closed-cycle system" re-circulates condenser cooling water through a cooling tower which cools the water by evaporation and returns it to the plant for reuse, withdrawing from the river only enough water to make up what is lost by evaporation and what is required for periodic cleaning of the tower. A cooling tower cools the circulating water by allowing it to fall through an air draft. The air draft can be created by a large chimney-like structure which is called a natural-draft tower. The air draft can be created by fans in a mechanical-draft tower. These systems and their environmental impacts were described in detail in Petitioner's Cooling Tower Report referred to below.

The license requires termination of operation with the once-through cooling system on May 1, 1979. The license contemplates construction of a closed-cycle cooling system since it provides that an evaluation of economic and environmental impacts of alternative closed-cycle cooling systems (the "Cooling Tower Report") be submitted to the Commission by December 1, 1974 and that all governmental approvals required to proceed with the construction of the closed-cycle cooling system be obtained by December 1, 1975. The Appeal Board's decision makes it clear that the May 1, 1979 date is based on a finding that a closed-cycle cooling system should be constructed as rapidly as possible after receipt of all regulatory approvals on December 1, 1975.

The license specifically permits the Petitioner to apply for an extension of the period of operation with the once-through cooling system if justified by empirical data collected during operations. Such an application was filed with the Commission on June 6, 1975. The Commission Staff informed Petitioner that it would not commence processing this application until receipt of data from operations in 1974. These data were submitted as soon as they were available, which was August 12, 1975. The Commission's procedures for processing this application make

it extremely unlikely that a decision can be obtained before June 1976. (See generally 10 C.F.R. Parts 2, 50 and 51).

The Cooling Tower Report was submitted to the Commission on time and recommended a wet natural-draft cooling tower systemas the preferred closed-cycle cooling system, principally for environmental reasons. The schedule mandated by the terms of the license and the Appeal Board's decision required Petitioner to proceed with the detailed engineering of that system while attempting to obtain necessary governmental approvals, one of which is the subject of this proceeding. Adherence to this schedule requires receipt of all governmental approvals by December 1, 1975.

The history of this proceeding shows that Petitioner has consistently opposed the requirement for a closed-cycle cooling system and intends to pursue all legal avenues available to secure a change in the conditions of the license. But until the license is amended, Petitioner remains bound by its terms. Accordingly, it is required to attempt to obtain all regulatory approvals for construction of a closed-cycle cooling system by December 1, 1975, and failure to do so may lead to long-term shutdown of the Plant on May 1, 1979 with practical and economic hardships which are described in this memorandum.

The United States Environmental Protection Agency

("EPA") also has jurisdiction over the liquid effluents of the Plant, pursuant to the Federal Water Pollution Control Act.[8/] On February 24, 1975, EPA issued a permit for the Plant which required termination of operation with a once-through cooling system by May 1, 1979. On April 7, 1975 Con Edison filed with EPA a request for an adjudicatory hearing on that issue, among others, which was granted on May 6, 1975. Such hearing has not yet been scheduled. EPA's regulations provide that the grant of a request for an adjudicatory hearing stays the effect of contested provisions of the permit. 40 C.F.R. Sec. 125.35(d)(2).

II. QUESTIONS PRESENTED

A. Is the decision of the Board denying the appeal for a variance arbitrary and capricious or an abuse of discretion?

B. Is the decision of the Board denying the appeal for a variance not supported by substantial evidence in the record before the Board?

C. Is the Board's decision affected by an error of law because of conflict with State law regarding the furnishing of essential electric utility services?

8/ 33 USC Sec. 1151 et seq.

D. Is the Board's decision affected by an error of law because of conflict with federal laws?

III. SUMMARY OF ARGUMENT

In this Memorandum, Petitioner presents four arguments any one of which is sufficient to justify the Court's setting aside of the decision of the Board and ordering the Village to issue the building permit for the cooling tower.

First, the Memorandum will point out that Petitioner has met all the proper legal requirements for the granting of the variance. The uncontested facts show that very serious practical difficulties and unnecessary hardships will result from the Board's decision. In particular the economic consequences to the Petitioner and its customers are extraordinarily severe.

Secondly, the Memorandum notes that there was no evidence in the record before the Board to justify its determination that Petitioner's application was premature. The uncontradicted evidence shows that Petitioner is subject to the terms of a validly issued license of the Nuclear Regulatory Commission, which is legally binding upon the Petitioner. This license requires Petitioner to proceed with its program for licensing and construction of the

cooling tower. The possibility that the license may be amended in the future does not constitute evidence negating Petitioner's present legal obligations.

Thirdly, New York law is clear that a local zoning ordinance such as the Buchanan Zoning Code cannot be used to prevent the construction of an essential utility facility required to meet Petitioner's obligations to furnish utility service. The terms of the Commission license presently in effect make the cooling tower an essential utility facility.

Fourthly, since the Board's decision makes it impossible to comply with an order of a federal agency, it is invalid as a violation of the requirements of the Constitution of the United States. The law is clear that state and local agencies cannot conflict with a federal regulatory program.

IV. ARGUMENT

POINT I

THE BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION BECAUSE PETITIONER HAS BEEN ORDERED TO CONSTRUCT A CLOSED-CYCLE COOLING SYSTEM AND FAILURE TO DO SO WILL LEAD TO SERIOUS PRACTICAL DIFFICULTIES AND UNNECESSARY HARDSHIP

A. The Legal Standard for Review Requires a Showing of Practical Difficulties and Unnecessary Hardship

The standard for review applicable to this proceeding is set forth in Article 78 of the Civil Practice

Law and Rules, Section 7803. Point I of the argument will discuss Petitioner's contention that the Board's decision was arbitrary and capricious or an abuse of discretion. Section 7803.3.

The legal standard for the issuance of a variance is set forth in the Village Law as follows (Sec. 7-712.2(c)):

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the local law or ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the provisions of such local law or ordinance relating to the use, construction, or alteration of buildings or structures, or the use of land, so that the spirit of the local law or ordinance shall be observed, public safety and welfare secured and substantial justice done."

The necessity for a variance from the height limitations of the Code is considered an area variance which reqires only a showing of practical difficulties. Foley v. Feriola, 23 App. Div. 2d 498, 256 N.Y.S. 2d 187 (2nd Dep't. 1965). The other two variances requested are use variances which require a showing of both practical difficulties and unnecessary hardship. Code Section 54-22A.

The criteria for these variances are set forth in the leading case of Otto v. Steinhilber, 282 N.Y. 71 (1939) as follows: (at Page 76)

"Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."

Buchanan has prescribed substantially the same criteria in the Code. Sec. 54-5 Variance Def. C.

B. Commission License Requires Construction of Tower As Rapidly as Possible

The practical difficulties and unnecessary hardships imposed upon Petitioner by the Board's decision derive from the terms of the Commission's license. The license provides that operation of the present once-through cooling system must terminate on May 1, 1979. Par. 2.E(1). The license also contemplates that all regulatory approvals required to construct a closed-cycle cooling system must be obtained by December 1, 1975. Par. 2.E(1)(b). Any slippage in this date leads to an automatic adjustment of the May 1, 1979 date. The linking of the date for termination of operation with the once-through cooling system with the date for obtaining regulatory approvals of the closed-cycle cooling system shows that the May 1, 1979 date was grounded on the concept that the Petitioner would

construct a closed-cycle cooling system. Par. 2.E(1)(d) also indicates that the construction of a closed-cycle cooling system was clearly contemplated by the license.

The license requires Petitioner to complete an evaluation of the economic and environmental impacts of alternative closed-cycle cooling systems "in order to determine a preferred system for installation." Par. 2.E(2). Furthermore the decision of the Atomic Safety and Licensing Appeal Board, the decision of the Atomic Safety and Licensing Board, the Commission Staff's Final Environmental Statement and the record of the hearing all show that a closed-cycle cooling system was contemplated if the present cooling system should be found unacceptable. Accordingly, the license constitutes an order to proceed with the construction of the closed-cycle cooling system.

The date of May 1, 1979 was derived from testimony presented to the Atomic Safety and Licensing Board on the time required to construct a cooling tower system as rapidly as possible. Affidavit of Carl L. Newman, Par. 3. The Appeal Board, in reviewing that testimony, found that 48 months from the date of receipt of all necessary regulatory approvals was a reasonable time to allow for construction of a cooling tower system. It agreed with Petitioner's position that 12 months were required for excavation. The hilly terrain requires extensive rock excavation in order to

create a large-enough flat area for erection of a cooling tower. Thirty-six months following completion of excavation are necessary for the complex construction requirements of erecting the large tower and construction of auxiliary mechanical, electrical and piping systems required to pump the cooling water from the Plant through the tower. The use of this schedule in establishing the time interval between December 1, 1975 and May 1, 1979 confirms that the license constitutes an order to proceed with construction as rapidly as possible after receipt of all regulatory approvals.

The Cooling Tower Report, referred to in paragraph 2.E(2) of the license, was submitted to the Commission, as well as the Board, on December 2, 1974 and concluded that the preferred closed-cycle cooling system, principally for environmental reasons, was the natural-draft cooling tower system. Affidavit Par. 5. The schedule approved by the Appeal Board and which formed the basis of the May 1, 1979 date then required Petitioner to proceed with detailed engineering and securing regulatory approvals of the preferred system described in the Cooling Tower Report. Although the Commission Staff has not yet indicated its concurrence with Petitioner's Cooling Tower Report and has indicated that it will issue an environmental statement with respect thereto (40 Fed. Reg. 30882, July 23, 1975), Petitioner is obligated by the present terms of the license

to continue with its program for design, licensing and construction of a natural-draft cooling tower system. This mandated program requires receipt of regulatory approvals by December 1, 1975.

Petitioner has proceeded with detailed design and applications for regulatory approvals of the natural-draft cooling tower system, and such a system is now the only closed-cycle cooling system which can be constructed on a schedule consistent with the May 1, 1979 date. Accordingly, the license now in effect constitutes an order to proceed with the engineering design, licensing and construction of a natural-draft cooling tower system.

C. The Board Was Unduly Influenced by Possibility of License Amendment

The Board appeared to be influenced by the fact that the license provides that Petitioner can obtain an extension of the interim operation period if justified by empirical data collected during operations. Par. 2.E(1)(c). This is in the nature of a condition subsequent to the Commission's order.

The Board has apparently assumed that Petitioner's application under this paragraph of the license will be granted. The Commission is not expected to act on that request until June 1976 at the earliest. Affidavit

Par. 15. The variance is required by December 1, 1975 to adhere to the schedule ordered by the Commission. Thus the existence of a condition subsequent is no reason to ignore the specific terms of the Commission's mandate.

The Board apparently believed that the existence of this condition subsequent made Petitioner's appeal premature in that there was no present intent to build the cooling tower. Board's Decision p. 13. This is contradicted by the clear terms of the license as presently in effect, described above, which requires Petitioner to proceed with the design, licensing and construction of the natural-draft cooling tower.

Furthermore, the issuance of a building permit does not guarantee construction. Under Sec. 54-42.A. of the Code, a permit expires in one (1) year if it is not renewed. Thus, if the terms of the license are subsequently changed or modified, any permit secured by Petitioner which is inappropriate would automatically lapse.

Moreover, it is not within the province of the Board to deny Petitioner's application on the ground that there may be contingencies in the license which have not yet occurred. No such ground is sanctioned by the Code for denial of an application for a variance. 2 R. Anderson New York Zoning Law and Practice, Sec. 1858 (2d ed. 1973). The Board can adequately protect its interests in assuring that

the contingencies are met by appropriate conditions attached to the building permit. See Sec. 54-44.B and 54-33 of the Code and the discussion under Point III of the argument below.

A building permit is but an early step in facility development plans and frequently is a condition precedent for financing and other preliminary matters, difficulties with which may lead to abandonment of the project.

D. Petitioner's Practical Difficulties and Unnecessary Hardships

If the variance is not received by December 1, 1975, Petitioner faces a dilemma which clearly constitutes a practical difficulty and unnecessary hardship. [9/] Petitioner has two alternative courses of action.

9/ Although the license provides a possibility of an extension if regulatory approvals are not received by December 1, 1975 (Par. 2.E(1)(b)), the Court cannot rely on this provision being operative for the following reasons: (a) This provision did not contemplate a denial of the variance as the Board did herein, but only a delay in obtaining it; (b) This extension is not automatic and it may be opposed by other parties; and (c) the Court cannot assume it will be granted.

It can proceed on the construction program in spite of the lack of a building permit. This would require getting bids for excavation and tower erection negotiating contracts and commencing work in the field (land clearing and excavation) in the summer of 1976. Affidavit Par. 12 and 13.

Proceeding on this course without having a building permit in hand obviously places Petitioner in an extremely difficult position. If the permit is never received, Petitioner would possibly have committed unnecessary, irrevocable actions, such as land clearing and excavation, would incur substantial expenses for cancellation of contracts and would endanger its relations with suppliers by having negotiated contracts which cannot be fulfilled.

The alternative course of action for Petitioner is to suspend the cooling tower program until the issues concerning the permit and variance are resolved. This requires Petitioner to assume the risk that the Commission will extend the period of operation with once-through cooling on the grounds that either (a) all regulatory approvals have not been received by December 1, 1975, or (b) the application filed on June 6, 1975 based on data from operations is granted.

This is a totally unreasonable risk, because these extensions are beyond Petitioner's control and are

subject to regulatory action which can be contested before the regulatory agency and in court. If the extension should not be granted, the economic penalties are severe.

E. Economic Hardships are Enormous and Clear

Since, as noted above, the cooling tower schedule is based on constructing a cooling tower as rapidly as possible, any suspension of the schedule would mean that the Plant would be out of operation after May 1, 1979 longer than would otherwise be the case. Petitioner has estimated that an outage of the Plant would cost it approximately $567,000 per day assuming full power operation. This is the additional fuel cost for generating replacement electricity at Petitioner's fossil fuel plants. Since this is fuel cost, the cost is passed on directly to Petitioner's customers by operation of the fuel rider clause in its rates. The fuel in question would consist of approximately 2,100,000 gallons of fuel oil per day, which would undermine national policies for conservation of oil. Affidavit Par. 17. These enormous numbers clearly establish an economic hardship not only to Petitioner but also to all of its customers including those in Westchester County. These costs would be incurred by reason of any suspension of the cooling tower schedule after December 1, 1975.

If Petitioner must cease operations of the Plant altogether because the license has not been amended and the building permit has not been issued, more enormous costs would be incurred. In addition to the costs of replacement power indicated above, Petitioner has an investment in Indian Point 2 in excess of $204,000,000. This would be rendered worthless and would have to be written off over a period of years, which write-off would have an adverse impact on Petitioner's rates charged to its customers. Affidavit Par. 17.

F. Variance Will Not Alter the Character of the Locality

The issuance of the variance would not alter the character of the area in which the Plant is located. The Plant is in a heavy industrial zone with large manufacturing plants both north and south of it. The site already contains three large electric generating units which constitute the Indian Point Station. Several structures on the site exceed the height limitations of the Code. The two large dome containment buildings of Indian Point Units 2 and 3 are 219 feet high and Indian Point Unit 1 has a stack approximately 375 feet high. The turbine halls also exceed the height limitations of the Code. Thus there is no change in the character of the area from the variance in height limitations of the Code.

The other variances requested will also not affect the character of the area. The Cooling Tower Report concluded that the natural-draft cooling tower system was preferable to other alternatives because it minimized the impact on the community. The large tower will raise the vapor plume to a height at which impacts are not expected to be severe, its precise nature varying with meteorological conditions. The Cooling Tower Report indicated that the impact of the saline drift from a natural-draft cooling tower would be minimal and only potentially harmful in the event of an extended period of rainless days. Accordingly, these impacts would not alter the character of the locality.

G. The Foregoing Establish That Petitioner Meets the Legal Criteria for a Variance

The foregoing establish that the Petitioner has met the test of practical difficulties and unnecessary hardships as set forth in the case of Otto v. Steinhilber, supra.

The case of North American Holding Corp. v. Murdock, 9 Misc. 2d 632, 167 N.Y.S. 2d 120 (Sup. Ct. 1957), appeal dismissed 6 App. Div. 2d 596, 180 N.Y.S. 2d 436 (1st Dep't. 1958), aff'd 6 N.Y. 2d 902, 190 N.Y.S. 2d 708 (1959), is somewhat analogous. The petitioner in that case was faced with the dilemma of two inconsistent legal requirements. The Multiple Dwelling Resolution prohibited

the use of cellar space for residential purposes and the New York City Zoning Law prohibited the use of that space for retail business. The petitioner filed an application for a variance from the Zoning Law to use the cellar space for retail stores. The application was denied by the New York City Board of Standards and Appeals and that denial was reversed by the Court which held that the petitioner had satisfied the three criteria for the issuance of a variance established by Otto v. Steinhilber.

Other cases have held that conflicting regulatory requirements leading to financial hardship can justify variances. Jayne Estates, Inc. v. Raynor, 22 N.Y. 2d 417, 293 N.Y.S. 2d 75 (1968); Ullian v. Town Board of Hempstead, 68 Misc. 2d 393, 326 N.Y.S. 2d 606 (Sup. Ct. 1971), aff'd 38 App. Div. 2d 850, 330 N.Y.S. 2d 779 (2nd Dep't 1972).

The facts of economic losses indicated above clearly show a sufficient economic hardship. The facts also indicate that the variance is needed because of the unique circumstances of the Petitioner and its regulation by the Commission and not because of general conditions in the neighborhood. Furthermore, there is no change in the essential character of the locality in view of the existing industrial uses of the site, the large structures already in existence, and the minimal effects of the vapor emissions and salt drift. It is therefore clear that Petitioner is

applying for only the minimum essential variances needed under the Code.

H. Conclusion of Point I

The practical effect of the present terms of the Commission license requires Petitioner to proceed with the licensing, design and construction of a natural-draft cooling tower. The Board's decision makes it impossible to comply with this directive. The results of this decision is that the Plant will be out of service longer than would otherwise be the case, and possibly forever, with an economic penalty to Petitioner and its customers of approximately $567,000 per day. Thus Petitioner has met all the requirements of the New York law for the granting of the variance.

POINT II

THE BOARD'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD

The record before the Board consisted of Petitioner's application for a building permit, the appeal for a variance, the Cooling Tower Report, Amendment No. 6 to the Commission license (Exhibit "C" to the Petition) and the transcript of the hearing held on May 6, 1975. This record clearly establishes the facts of practical difficulties and unnecessary hardships recited above. There is a complete absence of any evidence contradicting these facts.

The Board's decision was based on a determination that Petitioner's application was premature in that there was "no present intent, commitment or direction to begin excavation, construction or any activity on the premises for which a building permit would be required by the Village of Buchanan." Board's Decision p. 13. There is no evidence in the record to support this statement and there is no support in the Code for denial of a variance on this ground.

Petitioner presented to the Board Amendment No. 6 to its present license (Exhibit "C" to the Petition) and described how this required Petitioner to proceed on a schedule for construction of the cooling tower system. Petitioner's representative did state that Petitioner was pursuing its legal rights to obtain an amendment of the

license to postpone and perhaps eventually eliminate the requirement for construction of a cooling tower. Hearing Transcript, p. 6. However, it was immediately pointed out to the Board that there was no assurance that these attempts for a license amendment would be successful and that they were dependent on regulatory action which would probably be contested by other parties. Accordingly, Petitioner's representative emphasized that Petitioner was bound by the terms of the present license and was presently required to pursue the construction schedule ordered by the Commission. This therefore cannot possibly be construed as constituting evidence of a lack of direction to begin construction. The fact uncontroverted on the record remains that the present Commission license, discussed in detail above, is a presently outstanding, legally valid license binding and enforceable against Petitioner.

The record of the hearing of May 6, 1975 contains a number of statements criticizing the conditions contained in the Commission's license. This evidence is properly presented to the Commission in support of Petitioner's application to amend the license but cannot serve to contradict the clear direction to Petitioner contained in the license as presently in effect.

POINT III

THE BOARD'S DECISION IS AFFECTED BY AN ERROR OF LAW BECAUSE IT CONFLICTS WITH PETITIONER'S DUTY TO FURNISH UTILITY SERVICE

A. Construction of Cooling Tower is Essential for Continued Operation of Petitioner's Plant

The Board's decision must be vacated because it was affected by an error of law CPLR, Sec. 7803(3). As described in Section I of this brief, the Commission license requires termination of operation of the Plant with the present once-through cooling system by May 1, 1979. A nuclear power plant cannot operate without a cooling system. Thus Petitioner cannot operate its plant to generate electricity after that date unless a cooling tower system is in operation. Section I and the discussion under Point I of this Section IV of the brief further show that in order for such a system to be completed on schedule, it is necessary that all governmental approvals be obtained by December 1, 1975. Thus the Board's decision, if allowed to stand, forces Petitioner to shut down the Plant.

B. Continued Operation of Petitioner's Plant is Essential for the Public Interest

Delay in returning the Plant to service after installation of a cooling tower system, or long-term cessation of its operation, would substantially impair

Petitioner's ability to supply electricity, and would adversely affect the supply of energy in surrounding regions. Affidavit, Par. 18. It would also adversely affect the public interest by increasing the cost of service to consumers and increasing the use of scarce fuel oil. Affidavit, Par. 17.

The Petitioner operates under the mandate of state law to "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Public Service Law, Section 65, Subd. 1; see also Transportation Corporations Law, Section 11.

It is clear that there is real public need for this facility and Petitioner has a duty to provide it.

C. Provisions of Buchanan Zoning Code are Invalid Insofar as They Bar Construction of the Cooling Tower

1. Local Rules in Conflict with State Policies are Invalid

It is a well established principle of law in New York that municipalities cannot exercise their local police powers in a manner so as to conflict with an overriding state policy. The reason for this is that the source of police power is the sovereign, that is the state, and the political subdivisions of the state are simply delegated this power by the state. City of Albany v. Anthony, 262

App. Div. 401, 28 N.Y.S. 2d 963 (3d Dep't 1941); Peo. v. Blue Ribbon Ice Cream Co., 1 Misc. 2d 453, 148 N.Y.S. 2d 408 (N.Y. Cty. Magis. Ct. 1956)

Therefore, a city cannot require a streetcar company to provide more frequent service than that established by the Public Service Commission, which has general regulatory power over the company's operations. City of Troy v. United Traction Co., 202 N.Y. 333 (1911). In the case of Polsky v. Walsh, 220 App. Div. 559, 222 N.Y.S. 120 (1st Dep't 1927), the court voided a New York City ordinance which required that buildings in the city be equipped with shut-off gas valves on the ground that the ordinance conflicted with the Public Service Law which gave the Public Service Commission the power to assure that the facilities and equipment of public utilities are adequate and safe.

A municipality's zoning power, like all of its other police powers, is limited by the principle that it cannot be exercised in such a manner as to conflict with or frustrate a policy of the state or the performance of a duty or right imposed or granted by the state. Therefore, a village ordinance which zoned all of the property in its territory residential cannot act to prohibit a town with the statutory power to build parks, from building a park within the borders of the village. Incorporated Village of Lloyd

Harbor v. Town of Huntington, 4 N.Y. 2d 182, 173 N.Y.S. 2d 553 (1958). A town ordinance which bars the establishment of hospitals for the treatment of contagious diseases within the town is invalid as applied to a tuberculosis sanitarium for which state approval has been obtained. Jewish Consumptive Relief Society v. Town of Woodbury, 230 App. Div. 228, 243 N.Y.S. 2d 686 (2d Dep't 1930), aff'd 254 N.Y. 619 (1931). A local zoning ordiance may not prohibit the construction of a public high school which has been approved by the State Commissioner of Education. Union Free School District No. 14 v. Village of Hewlett Bay Park, 198 Misc. 932, 102 N.Y.S. 2d 81 (Sup. Ct. 1950), aff'd 278 App. Div. 706, 103 N.Y.S. 2d 831 (2d Dep't 1951), nor may a town zoning ordinance prohibit a county Board of Cooperative Educational Services established pursuant to the Education Law from maintaining a vocational high school within the town, for to permit such action would be to permit the town to frustrate the performance by the Board of its statutory duty. Board of Cooperative Educational Services v. Gaynor, 60 Misc. 2d 316, 303 N.Y.S. 2d 183 (Sup. Ct.) aff'd 33 App. Div. 2d 701, 306 N.Y.S. 2d 216 (2d Dep't 1969).

Finally, given the fact that billiard parlors are licensed by the Secretary of State and subject to his regulation, a local zoning ordinance cannot totally exclude

billiard parlors. G.B. Billiard Corp. v. Horn, 42 Misc. 2d 673, 248 N.Y.S. 2d 757 (Sup. Ct. 1964).

2. Local Rules in Conflict with Requirements for Public Utility Facilities are Invalid

As stated above in subdivision B of this Point, Petitioner as a gas, electric and steam corporation is under a statutory duty to provide adequate service to the public of the state within the areas of its franchise. The court of this state have recognized the demands of this public duty by overturning zoning ordinances which would bar necessary utility facilities. Long Island Water Corp. v. Michaelis, 28 App. Div. 2d 887, 282 N.Y.S. 2d 22 (2d Dep't 1967); Long Island Lighting Co. v. Griffin, 272 App. Div. 551, 74 N.Y.S. 2d 348 (2d Dep't 1947); Long Island Lighting Co. v. Incorporated Village of South Floral Park, 158 N.Y.S. 2d 878 (Sup. Ct. 1956); Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955); Long Island Lighting Co. v. Village of Old Brookville, 84 N.Y.S. 2d 385 (Sup. Ct. 1948).

In the case of Consolidated Edison Co. v. Village of Briarcliff Manor, supra, Con Edison sought to reverse the denial of a variance for the erection of a transmission line. The court found the provisions of the zoning ordinance "invalid insofar as they absolutely prohibit the petitioner from constructing and maintaining through the

village, a publicly needed high-tension electric line", 208 Misc. at 300. The court reasoned as follows:

> "Now, upon the undisputed facts, there is necessity for the public utility improvement proposed by the petitioner and the only bar to the same is the local ordinance of this village. The question is, does this village have the right to absolutely bar the passing through it of a high-tension electric line required in the interests of the public. In this connection, it is to be noted that public utility corporations of the nature and type of the petitioner are created and regulated by State law. There is the absolute mandate by State law that the petitioner shall 'furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.' (Public Service Law, Section 65, Subd. 1. See also, Transportation Corporations Law, Section 11.) The petitioner has the franchise and right, and furthermore the duty, subject to reasonable regulations, to erect and maintain the proposed transmission line, and no local governmental unit shall nullify or interfere with that right and duty. Such unit may not, without unequivocal and express statutory grant of autority, enact a local ordinance tending to abrogate or contravene the State law and policy with respect to such a utility. The general grant of power to a municipality to adopt zoning laws in the interest of public welfare does not have the effect of permitting the local legislative body to override such State law and policy." Id. at 299-300.

The action of the Board in denying the Petitioner a variance to build the cooling tower contravenes the principle enunciated in Briarcliff and the other cited cases, since as was established under Point I of Section IV of this memorandum, the natural-draft cooling tower is legally essential to the uninterrupted operation of the

Plant. In this regard, it should be noted that under the terms of the Code the cooling tower cannot be built in any portion of the Village. The Board's action, therefore, in denying Petitioner a variance to build in the M-D zoning district, where the towers would not alter the character of the district and where the plant to which the towers are accessory is located, amounts to a total exclusion of the tower from the Village.

3. Variance Is Not Required for Essential Utility Facility

It has been recognized that even if a public utility is unable to meet the tests of Otto v. Steinhilber, supra, for the issuance of variances, a local zoning ordinance will be held to be invalid as applied to the utility if the utility can establish a reasonable necessity to build a facility on a particular site. Niagara Mohawk Power Corp. v. City of Fulton, 8 App. Div. 2d 523 188 N.Y.S. 2d 717 (4th Dep't 1959); Video Microwave Inc. v. Zoning Board of Appeals. 77 Misc. 2d 793, 354 N.Y.S. 2d 817 (Sup. Ct. 1974); New York State Electric & Gas Corp. v. McCabe, 32 MIsc. 2d 898, 224 N.Y.S. 2d 527 (Sup. Ct. 1961); Northport Water Works Co. v. Carll, 133 N.Y.S. 2d 859 (Sup. Ct. 1954), 1 R. Anderson, New York Zoning Law and Practice, Section 9.23 (2d ed. 1973).

In Niagara Mohawk Power Corp. v. City of Fulton, supra, the court stated that

> "...upon a proper factual demonstration of a public necessity, the petitioner would be entitled to a declaration that the ordinance was void as to it, insofar as it prevented it from erecting a structure which was reasonably necessary to enable it to perform its public duties under the statutes of the State. The power of the municipality to enact a zoning ordinance must yeild to the superior force of the state statutes which impose upon the public utility company the duty of rendering safe and adequate service" 8 App. Div. 2d at 527.

The case of Northport Water Works Co. v. Carll, supra, is in many ways analagous to the present case. In that case a waterworks corporation organized under the Transportation Corporation Law and under a statutory duty to provide water to its franchise area sought a variance to permit it to expand its existing plant which was located in a residential area. The Village of Northport's Zoning Board of Appeals granted a variance to construct a housing for pumps and auxiliary gasoline engine, denied a variance to build an overhead storage tank and granted a conditional variance to construct a reservoir. The variance to construct the reservoir was conditioned on the waterworks corporation limiting the height of the reservoir and landscaping the surrounding area and painting the reservoir green to limit its adverse aesthetic impact.

The court reversed so much of the Board's opinion as denied the petitioning utility a variance to construct the storage tank and limited the height of the reservoir. The court recognized that the proposed additions to the petitioner's plant would probably lessen the value of surrounding properties due to the adverse aesthetic effect but since petitioner had established a need for expanding its plant the effect on the immediate area was held to be not determinative.

> "It may well be that the erection of the proposed addition to petitioner's facilities will detract from the value of the surrounding residential property, but that fact standing alone, is not controlling. The injury which may flow from the enlargement of the petitioner's plant must be weighted against the benefits to be derived from the community as a whole. When taken into consideration with the benefits to be derived by the community as a whole from the enlargement of petitioner's facilities, in my opinion, the ill effects growing out of the enlargement are greatly outweighted by such benefits." (133 N.Y.S. 2d at 863-4)

The cooling tower is no different in substance from the transmission lines, substations, and other facilities previously considered by the courts. It has been made a vital and necessary component of Petitioner's electricity supply system by the Commission's license which provides that the Plant may not operate after May 1, 1979 without it. Accordingly, the provisions of the Code which would deny Petitioner permission to construct the towers are

invalid even if Petitioner has failed to establish its right to a variance under the terms of the Code.

D. Village May Not Control Selection of Cooling Tower Type

New York has permitted a limited regulation of public utility facilities by localities. "A village may, within reason, regulate public service improvements, but may not ban them altogether." Consolidated Edison Co. v. Village of Briarcliff Manor, supra; Long Island Water Corp. v. Michaelis, supra.

Thus, courts have sanctioned the regulation of local and incidental conditions under the zoning power, at least to the extent of selecting alternative locations (Long Island Lighting Co. v. Horn, 23 App. Div. 2d 583, 256 N.Y.S. 2d 690 (2d Dep't. 1965) aff'd. 17 N.Y. 2d 652, 269 N.Y.S. 2d 532 (1966)), requiring underground rather than overhead location of transmission lines (Niagara Mohawk Power Corp. v. City of Fulton, supra.; New York State Electric & Gas Corp. v. McCabe, supra.; locating substation, or camouflaging facilities (Consolidated Edison Co. v. Town of Rye, 16 Misc. 2d 284, 182 N.Y.S. 2d 688 (Sup. Ct. 1959)).

However, utility facilities may be regulated under local zoning ordinances only if such regulation does not materially affect the distribution of electricity. Long Island Lighting Co. v. City of Long Beach, 280 App. Div.

823, 113 N.Y.S. 2d 762 (2nd Dep't. 1952), aff'd. 305 N.Y. 880 (1953) (substation location).

In the case at bar, the Board contends that it has the power to decide which type of cooling tower is to be built. Such regulation goes far beyond the regulation of local and incidental conditions. The selection of the proper closed-cycle cooling system was the subject of Petitioner's Cooling Tower Report and is now the subject of extensive Commission review. The Commission Staff has determined that the selection of a system is a major federal action requiring review under the National Environmental Policy Act of 1969 (40 Fed. Reg. 30882, July 23, 1975). Accordingly, it will prepare a draft environmental statement, circulate that draft for comment among appropriate federal, state and local regulatory bodies and the public, and, after review of comments, will prepare a final environmental statement. Petitioner has requested a hearing on this subject but will withdraw the request if the review by the Commission Staff favors a natural-draft tower.

Buchanan's views can be properly placed before the Commission in comments on the draft environmental statement and at a hearing, if held. The Attorney General of the State of New York has urged the Commission to require Petitioner to install a natural draft cooling tower at the earliest possible time. "Memorandum of State of New York

Regarding the Applicability of State Laws to the Operation of Indian Point Unit No. 2" dated March 6, 1973, presented to the Atomic Safety and Licensing Board. Buchanan can likewise present its views.

Once the Commission has reached its decision, however, the closed-cycle cooling system selected by the Commission will be an essential utility facility, and the cases described above establish that the Village is prohibited from interfering with the construction of that alternative. Furthermore, such a decision would constitute a federal policy determination which preempts local regulation, as discussed below under Point IV.

POINT IV

THE BOARD'S DECISION IS AFFECTED BY AN ERROR OF LAW IN THAT IT CONFLICTS WITH FEDERAL REGULATORY ORDERS AND PROGRAMS

A. Federal Law Preempts Local Regulation

The Board's decision must be vacated because, in addition to the error of law discussed under Point III, it was affected by an error of law concerning federal preemption. CPLR, Sec. 7803(3). It is well established that state and local regulations in conflict with a federal regulatory program are prohibited by the United States Constitution. This is called the doctrine of federal preemption. The source of federal preemption in this case the supremacy clause[10/] and the interstate commerce clause of the Constitution.[11/] In addition, as indicated below, one case raises questions of the due process and equal protection clauses.

B. Nuclear Regulatory Commission Decision Preempts Issue of Necessity for Cooling Tower

Although the Atomic Energy Act preempts state and local regulation on questions of radiation safety (Northern

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10/ U.S. Const. Art. VI, Cl. 2; First Iowa Hydroelectric Cooperative v. FPC, 328 U.S. 152 (1946); deRham v. Diamond, 32 N.Y. 2d 34 (1973).

11/ U.S. Const. Art. I. Section 8; Florida Lime & Avocado Growers, Inc. v. Paul 373 U.S. 132 (1963).

States Power Company v. Minnesota, 447 F. 2d 1143 (8th. Cir. 1971), aff'd 405 U.S. 1035(1973)), this statute does not in itself, preempt state regulations of other environmental concerns. New Hamshire v. AEC, 406 F 2d 170 (1st Cir. 1969), cert. denied 395 U.S. 962 (1969); Atomic Energy Act Sec. 274(k), 42 U.S.C. Sec. 2021 (k).

The Commission, however, in ordering the construction of a cooling tower is exercising jurisdiction conferred by the National Environmental Policy Act of 1969 ("NEPA").[12/] That Act, passed after the decision in New Hamphire v. AEC, directs federal regulatory agencies such as the Commission to interpret and administer the policies, regulations and public laws of the United States to the fullest extent possible in accordance with the policies of the Act. The policy is declared in Sec. 2 of the Act as follows:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

12/ 42 U.S.C. Sec. 4321. et seq.

It was pursuant to this statutory direction that the Commission ordered the conduct of a hearing on the environmental impacts of the Plant which lasted more than a year, contained several thousand pages of testimony, reviewed the costs and benefits of Plant operation with the present once-through cooling system and alternatives, and resulted in the license condition described above.

NEPA does not on its face preempt state and local regulation. Cases however have established the doctrine of implied preemption. The leading case on this subject is Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). This decision established a fourfold approach as follows (331 U.S. at 230):

1. "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. (citations)."

2. "Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. (citations)."

3. "Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. (citations)."

4. "Or the state policy may produce a result inconsistent with the objective of the federal statute. (citations)."

The leading recent case dealing with implied preemption is City of Burbank v. Lockheed Air Terminal,

Inc., 411 U.S. 624 (1973). There, the Court invalidated a city ordinance banning jet takeoffs between 11 pm and 7 am on the grounds that local regulation of air travel was preempted by both the exclusive national sovereignty over airspace and "the pervasive nature of the scheme of federal regulation of aircraft noise." 411 U.S. at 633.

A recent case with a fact pattern similar to Petitioner's Indian Point problem is Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Devel. Comm., 464 F. 2d 1358 (3rd Cir. 1972), cert. denied, 409 U.S. 1118 (1973). The plaintiff engaged in the interstate transportation and sale of natural gas and had received a certificate from the Federal Power Commission authorizing the construction of an additional above-ground liquid natural gas storage facility at its existing storage plant. The defendant, a regional development commission, denied the company's request for a building permit, saying the facility was not a "permitted use" under its Master Plan. Later, a variance was applied for and denied. Transco sued to enjoin the Commission from interfering with construction of the facility, and a restraining order was issued by the District Court. The question posed by the appellate court was whether a "complete interdiction of the proposed facility was a reasonable exercise of (the Commission's) police powers...". 464 F. 2d at 1362.

The Court of Appeals affirmed the District Court's order because, among other reasons, the requirements established by the Commission were "quite unreasonable in view of the potential conflict with a federally regulated business." 464 F. 2d at 1363, n. 17.

Furthermore, where it is impossible to comply with both federal and state regulatory schemes, state regulation is preempted. FPC v. Corporation Commission of the State of Okla., 362 F. Supp. 522 (W.D. Okla., 1973) aff'd 415 U.S. 961 (1974).

This doctrine has been used to override a local zoning ordinance when provisions of the Clean Air Act conflicted with a local ordinance for provision of employee parking space. Southern Terminal Corp. v. EPA, 504 F. 2d 646 (1st Cir. 1974).

The rationale of these cases applies to this case. NEPA orders a comprehensive review by all federal agencies of the environmental impacts of their actions. In accordance with this directive, the Commission thoroughly analyzed all aspects of operation of the Plant with the present once-through cooling system and alternative cooling systems including the natural-draft cooling tower which is the subject of the requested variance. The Commission concluded that the present available evidence indicated the existence of an unacceptable risk to the population of

striped bass, a migratory fish which constitutes an important commercial and recreational resource in New York and adjacent states. The Commission's conclusion that operation with the present once-through cooling system must terminate on May 1, 1979 constitutes a federal policy decision based on a federal interest in protecting an interstate resource. This is clearly an implementation of the policies of NEPA pursuant to a pervasive federal regulatory program, and the cases cited above establish that local concerns cannot interfere with such an implementation of federal policy.

C. Preemption by U.S. Environmental Protection Agency Also Exists

In addition to the Commission license, the Plant has a discharge permit issued by the U.S. Environmental Protection Agency ("EPA") pursuant to the National Pollutant Discharge Elimination System as required by Section 402 of the Federal Water Pollution Control Act ("FWPCA"). Affidavit Par. 21. This permit has the same condition as the Commission's license requiring the Plant to terminate operation with the once-through cooling system by May 1, 1979. Petitioner has requested a hearing on this condition, which request has been granted. Accordingly, this is similar to the condition subsequent discussed above with respect to the Commission's license in that it will be

applicable unless Petitioner succeeds in obtaining a change through regulatory proceedings which may be challenged by other parties. The existence of the May 1, 1979 date presents Petitioner with the same type of dilemma as described above with respect to the Commission license. As noted above, the facts show that the Buchanan building permit is required by December 1, 1975, to meet the schedule established by the May 1, 1979 date.

The FWPCA prescribes a comprehensive regulatory scheme for control of all liquid discharges into the Nation's waters. An objective of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation' waters..." Sec. 101(a), 33 U.S.C. Sec. 1251(a).[13/] This statute has a specific preemption of state regulation in Section 510 (33 U.S.C. Section 1370) as follows:

> "Except as expressely provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may

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13/ 33 U.S.C. Sec. 1251 et seq.

not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such States".

The second part of this section specifically prohibits a political subdivision of a state, such as the Village, from enforcing any effluent limitation, prohibition or standard which is less stringent than that prescribed under the FWPCA. If the Village requires continuation of the present thermal discharges, that would constitute a standard less stringent than that prescribed under the FWPCA. The requirement for termination of operation with the once-through cooling system and the construction of a closed-cycle cooling system is pursuant to an effluent limitation established by EPA regulations. 40 C.F.R. Sec. 423.13 (1).

The definition of "effluent limitation" in Sec. 502 (11) (33 U.S.C. Section 1362 (11)) of FWPCA includes "schedules of compliance" as a limitation. Accordingly, the Village is precluded from interfering with the schedule of compliance required by EPA regulations.

D. The Board's Decision Interferes with Interstate Commerce and Other Constitutional Provisions

Contemporary black letter law prohibits state action which "unreasonably burdens or discriminates against interstate commerce". Florida Lime & Avocado Growers, Inc., v. Paul, supra, at 152-3. In an analogous case, the plaintiff sought to restrain the defendant town from prohibiting construction of a 30-inch pipeline through the town. The court framed the issue as whether a company holding a certificate of public convenience and necessity pursuant to the National Gas Act was subject to local regulations in choosing a particular route for a pipeline. It held that such regulation was an undue burden upon interstate commerce and could not be sustained as a reasonable regulation in exercise of the town's police power. Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, 93 F. Supp. 287 (D.N.J. 1950).

In the Transcontinental case the construction was underground but its holding was applied to above ground construction in New York State Natural Gas Corp. v. Town of Elma, 182 F. Supp. 1 (W.D.N.Y. 1960). The plaintiff sought an injunction directing the municipality to reinstate a zoning permit for a pipeline, for which plaintiff had earlier received a certificate of public convenience and necessity from the Federal Power Commission. Although the 29.5-mile pipeline section was completely intrastate, the

Court found the disputed project to be part of an interstate distribution system. In analyzing the alleged burden on commerce, the Court referred to Transcontinental Gas v. Borough of Milltown:

> "A much closer case is presented in the case at bar, however. Here, there is no effort to restrain the construction of the pipeline itself, as there was in the Transcontinental case. Rather, through the exercise of an accepted local power the defendant seeks to restrict the construction of equipment, together with its housing, which is merely ancillary to the pipeline and which is located above ground in a zone where such construction is not permitted by the local zoning ordinance. Nevertheless, on the particular facts presented, the court is of the opinion there is a burden on interstate commerce." 182 F. Supp. at 3.

The facts of the case at bar establish similar equities. The environmental impacts of alternative closed-cycle cooling systems were carefully analyzed in the Cooling Tower Report. The natural-draft cooling tower was selected principally because it minimized the adverse environmental impacts presented by all other feasible alternate systems. The undisputed facts also establish that the impact of the Board's decision on interstate commerce is enormous. The Plant is an important source of electric energy for New York and adjacent states. Affidavit Par. 18. Any cessation of operation of the Plant because of Buchanan's failure to issue the required building permit would adversely affect the supply of electric power to this interstate area and

would, as described above, lead to an automatic increase in Petitioner's rates charged to customers in Westchester County and elsewhere. This would be a clear case of an impermissible burden on interstate commerce.

The case of Consolidated Edison Co. v. Briarcliff Manor, supra, discussed above under Point III, indicated that other constitutional provisions are violated by the type of action taken by the Village of Buchanan herein. In that case the Court found that the provision of the village ordinance was contrary to the general welfare since it stood in the way of necessary public utility development. The Court than said: "(W)here the provisions of a zoning ordinance restricting the use by a landowner of his lands do not tend to promote the public interest and general welfare, they may not be justified as being a proper exercise of the police power and they are invalid", citing Concordia College Inst. v. Miller, 301 N.Y. 189, 196 (1950). 208 Misc. at,300.

The Briarcliff court concluded:

> "The fact that such provisions may be said to promote the health, safety or welfare of a few neighboring property owners is no justification therefor where they are in derogation of general public welfare. Consequently, in additon to the provisions being invalid as tending to override the state law providing for public utility service, they are unconstitutional. Specifically, so far as petitioner is concerned, they offend against the due process and equal protection clauses of the Federal and State Constitutions and may not stand as authorized by the police power." 208 Misc. at, 301.

In the instant case as in the Briarcliff case, the local concerns of the Village cannot justify actions in derogation of the general public welfare as determined by the cognizant federal agencies.

E. Conclusion of Point IV

The Village of Buchanan cannot apply an otherwise valid zoning law in such a way as to frustrate national policies and regulatory schemes enunciated in such laws as NEPA and the FWPCA. In the alternative, it cannot use its powers to create an unreasonable burden on interstate commerce and to offend against the due process and equal protection clauses of the Constitution.

V. CONCLUSION

For the foregoing reasons, and particularly those set forth under Point III of the Argument, 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 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 EPA denying Petitioner's request for alternative thermal limitations.

Respectfully submitted,

WILLIAMS & O'NEILL
Attorneys for Petitioner
Consolidated Edison Company
of New York, Inc.

Address:
130 East 15th Street
Borough of Manhattan
New York, N.Y. 10003

Dated: New York, New York
September 4, 1975

EDWARD J. SACK
Of Counsel