VARIANCE.

A. USE VARIANCE — The Board's authorized departure, to a minor degree, from the text of this ordinance, in direct regard to a legal hardship otherwise imposed upon an owner.

B. AREA VARIANCE — The Board's authorized departure, to a minor degree, from the text of this ordinance, as to an area, lot or building, in direct regard to unnecessary hardship or practical difficulties otherwise imposed upon an owner.

C. 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.

YARD — An open space, as may be required by this ordinance, on the same lot with a building or a group of buildings, which open space lies between the principal building or group of buildings and the nearest lot line and is unoccupied and unobstructed from the ground upward, except as specified elsewhere in this ordinance.

A. YARD, FRONT — An open space extending the full width of the lot between a building and the front lot line.

(12) Village of Buchanan Building Department

December 1, 1974 - Con Edison filed with the Zoning Board of Appeals the Cooling Tower Report and an application for a Building Permit for the natural draft cooling tower system and a request for a zoning variance from height requirements and special permit for construction of utility facilities.

December 21, 1974 - Zoning Board of Appeals sent to Con Edison an application for variance to be submitted with fee.

January 6, 1975 - Con Edison filed with the Zoning Board of Appeals the Appeal for Variance and required fee.

January 8, 1975 - Con Edison filed with the Building Department an Application for Building Permit for the natural draft ccoling tower.

January 18, 1975 - Building inspector returned to Con Edison the Appeal for Variance and fee.

January 21, 1975 - Con Edison representatives met with officials of Buchanan and neighboring communities in an open meeting attended by the press.

January 27, 1975 - Application for Building Permit returned to Con Edison by Building Inspector as being incomplete, and requesting additional fee.

February 11, 1975 - Letter received by Con Edison from Building Inspector requesting resubmittal of application for Building Permit with $5000 fee.

February 21, 1975 - Con Edison filed with Building Department the application for Building Permit and $5000 fee.

February 22, 1975 - In response to request of Mayor of Buchanan, Con Edison representatives and several officials of Buchanan and adjacent communities visited the Three Mile Island Plant of Metropolitan Edison Company near Harrisburg, Pa., to observe four natural-draft cooling towers, two in operation and two fully constructed but not yet in operation.

March 4,1975 - Buchanan Building Inspector denied application for building permit on grounds of violation of zoning code.

March 21, 1975 - Con Edison filed appeal to Village Zoning Board of Appeals for a variance from building code.

May 6, 1975 - Buchanan Zoning Board conducted public hearing on appeal.

June 19, 1975 - Zoning Board of Appeals denied appeal primarily on the grounds that the application was premature in that there was no present intent, commitment or direction to begin constructon.

July 17, 1975 - Con Edison petitioned the Supreme Court of the State of New York, Westchester County, to set aside decision of Buchanan Zoning Board of Appeals.

August 29, 1975 - Hudson River Fishermen's Association (HRFA) filed motion to intervene.

September 4, 1975 - Con Edison filed brief.

September 10, 1975 - HRFA filed brief.

September 19, 1975 - Village of Buchanan filed brief.

September 19, 1975 - Oral argument in Supreme Court of Westchester County.

September 23, 1975 - HRFA filed reply brief.

September 26, 1976 - Con Edison filed reply brief.

November 14, 1975 - Decision of the Supreme Court of the State of New York, Westchester County, in favor of Con Edison enjoining the Buchanan Zoning Board of Appeals from enforcing the Zoning Code against construction of the closed cycle natural draft cooling tower system for Indian Point Unit No. 2.

December 9, 1975 - Supreme Court, Westchester County entered order in accordance with its Decision of November 14, 1975.

January 2, 1976 - Village of Buchanan appealed decision to Appellate Division of Supreme Court.

January 28, 1976 - Village of Buchanan requested NRC to allow limited appearance at any public hearings to be held in connection with proposed amendment to IP2 Operating License.

March 9, 1976 - Con Edison filed with Appellate Division motion to dismiss appeal by Village of Buchanan or alternatively perfect their appeal for June term of Court.

March 23, 1976 - Appellate Divison denied Con Edison motion to dismiss appeal on condition that Village of Buchanan perfect their appeal for the September term which begins September 7, 1976.

July 22, 1976 - Record on Appeal and Brief of Buchanan Zoning Board of Appeals filed with the Appellate Divison of the New York Supreme Court, Second Department.

August 13, 1976 - Con Edison and HRFA filed briefs with the Appellate Division of the New York Supreme Court Second Department.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S MEMORANDUM IN RESPONSE TO BOARD'S REQUEST

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March 4, 1977

hearing jacket

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Unit No. 2)	)	Cooling System)

APPLICANT'S MEMORANDUM IN RESPONSE TO BOARD'S REQUEST

Consolidated Edison Company of New York, Inc. ("Con Edison"), as applicant in the above captioned proceeding, files this Memorandum in response to the Appeal Board's request at the Oral Argument of February 9, 1977 and in its Order dated February 10, 1977. This brief addresses the following issues:

1. Nuclear Regulatory Commission and U.S. Environmental Protection Agency jurisdiction over this case.

2. Con Edison's diligence in securing approval of the Village of Buchanan for construction of a closed-cycle cooling system.

3. Federal preemption of local zoning authority concerning construction of a natural-draft cooling tower.

4. Stay of the orders of the New York courts pursuant to § 5519 of the New York Civil Practice Law and Rules.

1. NUCLEAR REGULATORY COMMISSION AND U.S. ENVIRONMENTAL PROTECTION AGENCY JURISDICTION OVER THIS CASE

At the Oral Argument held on February 9, 1977, the Board explored with counsel the question of the role of the Environmental Protection Agency ("EPA") with respect to the cooling system condition of Facility Operating License DPR-26 ("the License"). As indicated by counsel for Con Edison at that time, it is Con Edison's understanding that at this time and in the current factual setting of this proceeding, the Commission's jurisdiction under the National Environmental Policy Act of 1969 ("NEPA") is concurrent with regulation in accordance with the Discharge Permit program under the Federal Water Pollution Control Act ("FWPCA"). Until Con Edison is released from requirements imposed under each regulatory scheme, it is subject to each.

A.

When the NPDES permit appeared, the License had already been issued by the Atomic Energy Commission. As modified following this Board's decision in ALAB-188, 7 AEC 323 (1974), the period of interim operation with the installed once-through cooling system would expire, in the absence of

an order granting an extension or other relief, on May 1, 1979. The License, of course, also provided for another form of extension to reflect the possibility that Con Edison, acting with due diligence, did not receive all necessary governmental approvals by December 1, 1975.

The key date in the NPDES permit, found in § 10(b), was the same May 1, 1979 date allowed in ALAB-188, and EPA correspondence indicates quite plainly that the date was derived from the License. The two documents were also similar in that each held out the possibility of extensions of time: the License placed no limit on the extensions or other relief that could be sought, but the permit placed an outer bound of July 1, 1981 on such extensions, upon a showing of cause. The License, on the other hand, provided for automatic extensions for lack of necessary governmental approvals, while the permit omitted an express mechanism for this contingency.

At present, the License diverges from the EPA permit by ending interim operation on May 1, 1980 (subject to the outcome of the "extension" request case), rather than May 1, 1979. The May 1, 1979 EPA date, however, has been stayed under EPA regulations.

B.

As stated in the Final Environmental Statement ("FES") in this proceeding, "[o]n March 31, 1975, the applicant received a Section 402 permit from the EPA requiring a closed-cycle cooling of Unit No. 2 after May 1, 1979. This requirement . . . has, in accordance with EPA's regulations, been suspended pending an adjudicatory hearing." FES § 4.2(3). Con Edison's Environmental Report, however, noted that an authorized New York State agency, rather than EPA, might have to take action with respect to the § 402 permit. See 1 Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point Unit No. 2, § 4.3(2) (1974). The possibility that such a change might occur was also adverted to in the Environmental Report submitted by Con Edison in support of its application for extension of the period of interim operation of Indian Point 2 until May 1, 1981. See Environmental Report to Accompany Application for Facility License Amendment for Extension of Operation with Once-Through Cooling for Indian Point Unit No. 2, § 7 (1975).

While Con Edison has cooperated fully with the EPA notice and hearing procedures, the question of Federal versus State jurisdiction under § 402 of the FWPCA is not

free from doubt. On October 28, 1975, EPA approved the New York State program, vesting control in the New York State Department of Environmental Conservation ("DEC") as of the following day. See 40 Fed. Reg. 54462, 54463 (1975). The NPDES permit for Indian Point 2 (provided to this Board on February 9, 1977) bore an earlier date, and, under a Memorandum of Agreement between EPA Region II and the DEC (see 40 Fed. Reg. at 54463), the permit would continue to be under the jurisdiction of EPA for adjudicatory hearing purposes.

It has been suggested by several utilities that have power plants on the Hudson, including Con Edison, that to the extent that any of the terms of the NPDES permits were stayed prior to the transfer of jurisdiction to the State, such permits were pro tanto not "issued" (there having been no adjudicatory hearing prior to release by the Regional Administrator of EPA Region II (see FWPCA § 402(a)(1)), and hence jurisdiction over such stayed provisions passed to the State authorities. At a prehearing conference held in New York City on February 22, 1977, the presiding EPA Administrative Law Judge indicated that he would consider certifying the question of jurisdiction to the General Counsel of EPA. It is unclear when this issue will be resolved

within EPA, whether it will be certified to the General Counsel or held by the Judge until after the adjudicatory hearing. For present purposes it is assumed that the NPDES permit remains under EPA jurisdiction and has not passed into State SPDES control.

C.

The view of the EPA as to the interaction between its jurisdiction and that of the NRC is, at this time, difficult to divine. In comments on the Draft Environmental Statement prepared by the Regulatory Staff with respect to Con Edison's request to extend the period of interim operation,* EPA Region II remarked that

> any action by NRC should await EPA's final decision, according to the regular procedures established for resolving such matters. By taking the proposed action, NRC would contradict EPA's permit requirements, conflict with

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*The NPDES permit and Notice of Adjudicatory Hearing provided to the Appeal Board by letter of February 9, 1977 have figured more prominently in the companion proceeding involving Con Edison's request for an extension of the period of interim operation of Indian Point 2. At a hearing session on December 10, 1976, the Licensing Board declined to take official notice of the documents (which, together with related EPA correspondence, are marked as Applicant's Exhibits OT-18 and OT-19 for identification). Official notice was again requested at the reconvened evidentiary hearing on February 25, 1977, at which time a Con Edison witness, who is the custodian of the papers, testified to their authenticity. Both motions were taken under advisement by the Licensing Board.

> EPA's decisionmaking responsibility, and perhaps even prejudice the adjudicatory hearing on the closed-cycle cooling system and compliance schedule. In our judgment the proposed action will serve no practical purpose and may even interfere with the expeditious resolution through normal channels of the questions concerning closed-cycle cooling at Unit 2. Letter from Gerald M. Hansler, P.E., Regional Adm'r., EPA Region II, to George W. Knighton, September 2, 1976, at 2, reproduced in NUREG-0130 at A-10 (1976).

EPA's detailed comments further suggested that the proposed action in that case "would also confuse the issues currently under consideration by EPA . . . ." Id. at A-11.

Because the "extension" case is still before the Licensing Board, and proposed findings of fact and conclusions of law have not yet been submitted, it would be premature to discuss this letter in full. However, it is fair to say that the Regulatory Staff has been unable in that hearing and in the Oral Argument before this Appeal Board* to render a meaningful account of the "contradiction," "prejudice," "interference," or "confusion" referred to in EPA Region II's letter.

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*See Appeal Board Tr. 95 (Mr. Lewis) ("the point the EPA was asserting there was that to grant the two-year extension would somehow prejudge their proceeding") (emphasis added).

The enigmatic comments by EPA are the fullest explanation available to date of that agency's understanding of the interaction between its hearing process and that of the NRC, so far as Indian Point 2 is concerned. We merely note at this time that the EPA letter contains a fundamental contradiction. Insofar as the denial of the requested amendment might have the effect of preventing Con Edison from obtaining a timely decision on its application to delete from the License the requirement to terminate operation of the once-through cooling system, such denial could "prejudice" the EPA adjudicatory hearing by possibly rendering it moot, as a practical matter. The denial instead of preserving EPA jurisdiction, as the letter claims, could in effect result in the final decision being made by the NRC in lieu of EPA. Furthermore, the letter erroneously implies that the May 1, 1979 date for termination of the operation of the once-through cooling system was established independently by EPA. Both EPA and the Regulatory Staff ignore the critical fact that the NPDES permit provides an opportunity for extensions of the period of interim operation to as late as July 1, 1981 "on a basis of a showing of good cause by the permittee." NPDES Permit No. NY 0004472, at 9, ¶ 11(d)n.**.

Con Edison is compelled to view NRC's regulation of

the Indian Point 2 cooling system on the basis of the terms of the License, which is presently issued and legally binding. If the License were to provide that cooling system operation would be as ordered by EPA, then Con Edison would not be required to contest the cooling system issue before NRC. The License, however, does not contain such a condition but, to the contrary, contains a condition that provides that operation with the present once-through cooling system must terminate on a specific date. Accordingly, Con Edison must seek to amend that condition to be relieved of this requirement.

If, upon completion of the NPDES process, the EPA decides to adhere to the position stated in the NPDES permit, then the schedule for compliance stated in the NRC License condition will have to be conformed with that fixed in the EPA proceeding. See FWPCA § 511(c)(2), 33 U.S.C. § 1371(c)(2) (Supp. V, 1975). If, on the other hand, the result of the FWPCA decisional process is to release Con Edison from the cooling system obligation implicit in ¶ 10(b) of the permit, then it would seem that the NRC will have an obligation under § 511(c) of the FWPCA to take corresponding action with respect to the cooling condition of the License, if that

condition has not been earlier vacated.*

The Regulatory Staff in the Final Environmental Statement in the "extension" case stated that EPA hearings on this matter "are scheduled for early 1977." NUREG-0130, § 4.1.1 (1976); see also letter from Gerald M. Hansler, P.E., Regional Administrator, EPA Region II, to George W. Knighton, September 2, 1976, in id at A-10. The Appeal Board should be aware that at the February 22, 1977 EPA prehearing conference, Administrative Law Judge Yost established a schedule for the consolidated Hudson River NPDES adjudicatory hearing. Under that schedule, testimony of the utilities and two individual intervenors is to be provided by July 1, 1977, with cross-examination beginning on August 16, 1977. EPA Staff and other intervenor testimony is to be served by November 1, 1977, with cross-examination beginning on December 6, 1977. Utility

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*Con Edison intends shortly to apply for an amendment to the License to permit operation with the installed once-through cooling system for the life of the facility, based upon the results of an extensive ecological study program. On February 18, 1977, Con Edison's final research report with respect to Indian Point 2 was filed and served. See Influence of Indian Point Unit 2 and Other Steam Electric Generating Plants on the Hudson River Estuary, with Emphasis on Striped Bass and Other Fish Populations (J. McFadden ed. 1977). This report will represent an Appendix to the Part 51 Environmental Report Con Edison will file with its formal application papers.

rebuttal testimony (the last round of prepared evidence) will be due on January 31, 1978, with cross-examination beginning on February 28, 1978.

As a result of this schedule, and making no allowance for the usual contingencies of litigation, it is apparent that it will be at least one full year before the EPA record is closed. In view of the automatic stay of contested NPDES permit conditions provided under EPA regulations, 40 C.F.R. § 125.35(d)(2) (1976), it may be concluded that the NRC license date for termination of once-through cooling at Indian Point 2, if not extended beyond the present May 1, 1980 deadline, or vacated, could have the practical effect of compelling investment in a closed-cycle cooling system at an earlier time than would the NPDES permit (assuming, again, that the result of the adjudicatory hearing is not to release Con Edison from the contested portions of ¶ 10(b)).

D.

Prior to enactment of NEPA, the Commission lacked jurisdiction with respect to the nonradiological environmental consequences of its licensing actions. New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969). With enactment of NEPA, this rule was cast aside,

and the Commission gained a vast new role with respect to consideration of environmental impacts. See generally Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). Thereafter, in the Federal Water Pollution Control Act Amendments of 1972, Congress refined the environmental responsibilities of Federal licensing agencies. This refinement is found in § 511(c)(2) of the FWPCA, which must be examined textually. Plainly, the NRC license condition here in question (and the proposed action of designating a particular form of preferred alternative closed-cycle cooling system) does not represent an effort to "review" an effluent limitation or any other "requirement" set by EPA under the FWPCA. The action here proposed, to the extent that it involves mere designation of a particular closed-cycle system, actually advances the apparent purposes of the permit. To the degree that the case involves the automatic extension provision due to the failure to receive all necessary governmental approvals within the year contemplated by the License, a variance can arise between the terms of the License and those of the permit. This variance could be adjusted by means of the good cause extension term of the permit, but such an adjustment would not be necessary for the simple reason that

all contested terms of the permit have been automatically stayed in accordance with EPA regulations. 40 C.F.R. § 125.35 (d)(2) (1976). It follows that there is at this time no pertinent "effluent limitation or other requirement established" for Indian Point 2 within the meaning of § 511(c)(2)(A). (Emphasis added.)* It further follows that there is at best only a speculative possibility that the permit terms emanating from the EPA adjudicatory hearing will be irreconcilable with the terms of the License.

Subsection (B) of § 511(c)(2) bars the NRC from imposing, as a condition precedent to licensing, "any effluent limitation other than any such limitation established pursuant to" the FWPCA. For the reasons stated in the preceding paragraph, no effluent limitation pertinent to the cooling system condition may be deemed to have been "established" at this time. Assuming the cooling system condition in the License

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*A similar reading should be given to Appendix A to the Second Memorandum of Understanding between the NRC and EPA, 40 Fed. Reg. 60115 (1975), to the extent that that provision narrows the remedies available to the Commission in the face of EPA requirements that have been "issued" (¶ 4a), or "promulgated or imposed" (¶ 4d). Under ¶ 14 of the Memorandum, the other terms of the Agreement will be applied "to the maximum extent practicable" where an application was docketed prior to January 30, 1976. We assume that the Memorandum has a penumbra that includes applications for amendments to licenses filed before that date. The application in the present proceeding was filed on December 2, 1974.

were deemed to be an effluent limitation, there would be no basis for concluding that the License set a limitation that was "other than" a limitation imposed through the discharge permit mechanism until the conclusion of the discharge permit adjudicatory process. Hence, it would require the exercise of clairvoyance on the part of this Board to hold now that § 511(c)(2) is an impediment to the license action in the case at bar.

In this regard we wish to address the colloquy which took place between Chairman Sharfman and Applicant's counsel concerning the recent Appeal Board decision in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC - (Jan. 21, 1977). See Tr. 15-16. We respectfully submit that the Seabrook decision does not stand for the proposition that "the question of whether or not there should be a closed-cycle or an open cooling system was within the jurisdiction exclusively of the EPA." Tr. 15. There is nothing in that decision or § 511(c) which holds that the NRC may not also examine the question of cooling systems. Indeed, Seabrook is inapposite to the case at bar. There the Licensing Board had issued the Seabrook construction

permit utilizing an Environmental Impact Statement which was based on an assumption that closed-cycle cooling would not be necessary at that site, and had hence excluded numerous alternative sites from consideration. When the EPA subsequently issued a determination that once-through cooling should not be allowed at the Seabrook site, the EIS was deemed to have been rendered inadequate.* Hence, the issue was not so much one of jurisdiction, as it was that "no serious attempt was made to compare that site with alternate sites" in the event that EPA would require cooling towers. ALAB-366, slip op. at 47.

In the case at bar, however, both the NRC and the Regional Staff of EPA have indicated that the closed-cycle cooling system was an appropriate system to deal with certain environmental issues at Indian Point 2. Indeed, at the time that the EPA permit was stayed, the NRC license condition and the § 402 permit were generally consistent. Further, since the permit is stayed, no § 511(c) conflict can now exist. Absent such a conflict, the NRC may not refrain from making its own environmental rulings pending the outcome in the § 402 permit

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*It is important that the EPA determination in Seabrook was not stayed, (ALAB-366, slip op. at 10), as it is in the present proceeding. Therefore, a § 511(c) conflict potentially existed in that case.

adjudicatory hearing. As the Appeal Board in Seabrook stated, there is no "absolute bar to NRC action in all circumstances in which EPA's final decision has not been forthcoming." ALAB-366, slip op. at 36-37. Hence, so long as no inconsistent EPA requirement is in effect, the NRC acts properly in making whatever determinations it deems appropriate on the issue of closed-cycle cooling.

It is also important to note that Seabrook involved a construction permit proceeding while this case involves an operating plant which is subject to the conditions imposed by the License. Accordingly, the utility in the Seabrook case was not faced with a pre-existing NRC license condition which prescribed a date for change in cooling system operation.

In conclusion, Con Edison believes that the Commission and its Boards have the power to act in this case, to designate a type of closed-cycle cooling system, to enter an automatic extension owing to the lack of a necessary governmental approval, and to take other action contemplated by paragraph 2.E of the License.

2. CON EDISON'S DILIGENCE IN SECURING APPROVAL OF THE VILLAGE OF BUCHANAN FOR CONSTRUCTION OF A CLOSED-CYCLE COOLING SYSTEM

Con Edison continues to urge the Appeal Board that a finding of due diligence is not required, as stated in Exception No. 4. There is nothing in the License or record of the Indian Point 2 operating license proceedings, including ALAB-188, which requires a specific finding on this subject in the absence of a contention. The Commission's decision in the Indian Point 3 case and § 2.760a of the Commission's Rules of Practice establish the principle that, where the Atomic Energy Act does not provide for a mandatory hearing, such an inquiry should be undertaken only in extraordinary circumstances where the Board determines that a serious safety, environmental or common defense and security matter exists. This authority should be used sparingly, Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Unit No. 3), 8 AEC 7, 9 (1974), and the case at bar does not represent the extraordinary situation where the tribunal, rather than the parties, must identify the areas of controversy.

If the Appeal Board nevertheless determines that it should make a finding on the question of due diligence,

the Board must first establish the standard for review of Con Edison's efforts to obtain governmental approvals under ¶ 2.E(1)(b) of the License.* The requirement for due diligence does not mean that the parties to this proceeding may second-guess Con Edison or substitute one lawyer's judgment for that exercised by Con Edison as to the proper course of action. Con Edison submits that the appropriate test is whether the strategy adopted by Con Edison was reasonably designed to secure the governmental approval and was pursued with reasonable dispatch. While other strategies are obviously possible, if the approach taken by Con Edison was reasonably calculated and pursued to secure the necessary variance, or a determination that the variance was not required, the Appeal Board must find that Con Edison has exercised due diligence.

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*This paragraph read in full as follows:

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

In this connection, Con Edison must respectfully invite the Board's attention to the fact that by letter dated July 11, 1975, one of its attorneys requested that the General Counsel of the Commission "provide an interpretation of the term 'due diligence' as used in the condition" here in issue. Letter from Arvin E. Upton to Peter L. Strauss, July 11, 1975, at 3. The letter went on to seek guidance "in particular" with respect to whether "the term extends to the seeking of judicial review . . . ." The General Counsel responded on July 14, 1975, stating that "[w]e are actively pursuing the question what action would be appropriate to your request, and that [Con Edison counsel] will have a response as soon as it is possible to make one." Letter from Peter L. Strauss to Arvin E. Upton, July 14, 1975. Other parties, who had been sent copies of Mr. Upton's original inquiry, also commented to Mr. Strauss.

That was the last that Con Edison heard from the General Counsel. On September 23, 1975, Howard K. Shapar, the Executive Legal Director, who is, of course, counsel to one of the parties in this case, and not authorized to give binding interpretations, responded to Mr. Upton's inquiry,

stating at the outset that the July 11, 1975 letter had been "referred" to him. This nonbinding letter did not offer general guidance on the meaning of "due diligence," but simply commented that the Staff's opinion was that "due diligence requires that [Con Edison] pursue [its] judicial remedies promptly and with its best efforts." Letter from Howard K. Shapar to Arvin E. Upton, September 23, 1975, at 2. While Con Edison was pleased to have Mr. Shapar's views, they could not be deemed a substitute for the definitive guidance that had been sought from the General Counsel. Copies of the correspondence between the Commission and Con Edison's counsel are being furnished under separate cover.

In light of the timely efforts of Con Edison to obtain clarification of the standard of conduct implicit in the term "due diligence," and the refusal of the Commission's competent representative to render such guidance, application of any standard more stringent than that proposed above by Con Edison would be essentially retroactive and a violation of due process.

Although no contention has been made, certain questions have been raised concerning Con Edison's conduct

before the Buchanan Zoning Board. Reference is made to Exhibit E to Con Edison's brief dated December 21, 1976 for the statement on this subject presented at the Licensing Board hearing on December 8, 1976.

Con Edison's strategy before the Zoning Board was to establish that it met the test for a variance set forth in Sec. 54-5 of the Buchanan Zoning Code, annexed hereto as Exhibit A. This test requires the establishment of legal hardship and practical difficulties. Con Edison sought to meet these requirements by showing the problems Con Edison would encounter under the license if it did not receive permission to build a natural-draft cooling tower. Con Edison demonstrated enormous financial costs which would be incurred in these circumstances. This presentation at the same time established the factual record necessary for the legal arguments concerning the applicability of the doctrines of Federal preemption and the State doctrine of public utility necessity (i.e., that local governments cannot prevent the construction of essential utility facilities). By establishing that the practical effect of the Indian Point 2 license was to require Con Edison to construct a cooling tower, Con Edison established the basis for legal hardship and practical difficulties and

at the same time established the record for the legal arguments.

It is important to note that the desirability of the structure is not a ground for granting a variance. By stating that Con Edison should have stressed the environmental desirability of a cooling tower, the Hudson River Fishermen's Association ("HRFA") is urging that Con Edison should have made an irrelevant argument. There was no occasion for Con Edison to seek to justify the license condition since it would have been unlawful for the Zoning Board to have denied the variance merely because it disagreed with the merits of the cooling condition.

Furthermore, Con Edison would have difficulty with the factual accuracy of an argument in that case that a cooling tower was desirable. It could not say that Con Edison thought a cooling tower was necessary because that would be untrue. Furthermore, it could not say that the Atomic Energy Commission had found that the construction of a cooling tower was necessary, because the governing Commission decision at the time of the Buchanan Zoning Board hearing was ALAB-188 and that said that the construction schedule was applicable only " . . . in the event that the decision is made that the tower must be

constructed . . . ." In the Matter of Consolidated Edison Company of New York, Inc. (Indian Point Station Unit No. 2), ALAB-188, 7 AEC 323, 392, 394 (1974). Con Edison did say that the Regulatory Staff and HRFA thought a cooling tower was necessary, and we considered it the role of those who were urging that the cooling tower be constructed to argue its desirability.

Con Edison made a full and fair disclosure of its intentions and position concerning cooling tower construction. The requirement for due diligence in obtaining permits does not require that Con Edison abandon its wish and efforts to change the terms of the License. Any such interpretation would be inconsistent with the provisions of the License which specifically permit applications to amend the License based on data from operations. The parties to the instant proceeding cannot properly object to Con Edison making an accurate disclosure of its position, which was already known to the government of the Village of Buchanan by virtue of its receipt of all documents filed in the Commission proceedings. A failure to disclose Con Edison's intentions to the Zoning Board and members of the public present at the hearing would have been

materially misleading to the people of Buchanan.

In further support of Con Edison's exercise of due diligence, we enclose copies of the following documents:

Exhibit B - Extract from Report on Regulatory Approvals concerning list of events prior to August 30, 1976 in connection with Village of Buchanan approval

Exhibit C - Supreme Court, Westchester County, Special Term - Memorandum of Law of the Petitioner

Exhibit D - Supreme Court, Westchester County, Special Term - Petitioner's Memorandum of Law in Reply

Exhibit E - Supreme Court, Appellate Division, Second Department - Notice of Motion to Dismiss Appeal

Exhibit F - Supreme Court, Appellate Division, Second Department - Brief for Petitioner-Respondent

Exhibit G - Court of Appeals, State of New York - Notice of Motion to Dismiss Appeal

3. FEDERAL PREEMPTION OF LOCAL ZONING AUTHORITY CONCERNING CONSTRUCTION OF A NATURAL-DRAFT COOLING TOWER

Reference is made to Exhibit F, pages 6-17, for Con Edison's argument on the doctrine of Federal preemption as presented to the Appellate Division.

Con Edison continues to urge the Appeal Board to defer ruling on a matter now pending before the highest court of New York State. We believe that the Nuclear Regulatory Commission would be ill-advised to venture into a potential conflict with a state government at this stage of the proceedings. The New York State case may still be resolved on state law grounds (i.e., the doctrine of public utility necessity) without reaching a federal constitutional question. It is fundamental that such questions should be avoided where possible.

4. STAY OF THE ORDERS OF THE NEW YORK COURTS PURSUANT TO § 5519 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES

The Appeal Board, in its order dated February 10, 1977, requested comment on the application of § 5519 of the New York Civil Practice Law and Rules (CPLR). Con Edison reviewed this question after the decision of the Westchester Supreme Court and concluded that the stay under that section was not applicable to the facts of the case. It was noted that § 5519(a) only stays "all proceedings to enforce the judgment or order appealed from . . . ." If Con Edison were to proceed to construct a cooling tower, the initial steps in the construction

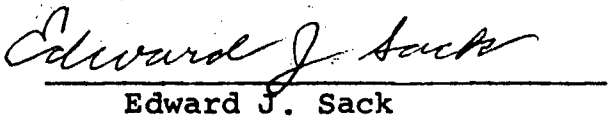
program would require execution of contracts, clearing of land and commencement of excavation. None of these activities constitutes a proceeding to enforce a judgment or order and would not be subject to the stay.

Although the Appellate Division changed the relief granted, its decision does not alter the fact that the stay does not apply to the initial stages of the construction program. At most, the stay would prohibit a mandamus proceeding to order the Zoning Board to issue the variance pending appeal. We believe that any attempt to bring such a proceeding while the appeal is pending would be frivolous. We cannot conceive of a court ordering the Zoning Board to issue a variance for construction of such a magnitude while an appeal is pending before the Court of Appeals.

Furthermore, even if a variance were obtained at this stage of the proceedings, it would be subject to revocation if the Court of Appeals were to reverse the

Appellate Division. Such a provisional variance hardly meets the license requirement for all governmental approvals.

Respectfully submitted,



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March 4, 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of March, 1977, served the foregoing document entitled "Applicant's Memorandum in Response to Board's Request" by mailing copies thereof first class mail, postage prepaid and properly addressed to the following persons:

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