

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., :

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, :

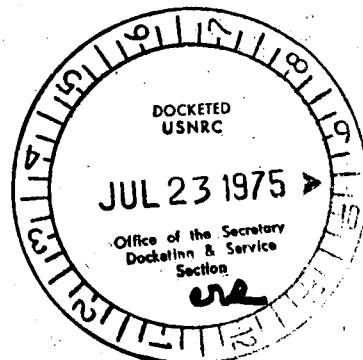
- against -

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.

INDEX NO.

VERIFIED PETITION



TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The verified petition of Petitioner, Consolidated Edison Company of New York, Inc., respectfully alleges upon information and belief:

1. This is an application made pursuant to Article 78 of the Civil Practice Law and Rules for a Judgment and Order annulling, revoking, and setting aside the Decision of the Zoning Board of Appeals of the Village

of Buchanan (the "Board") which denied Petitioner's Appeal for a Variance from the height limitations and certain use restrictions of the Zoning Ordinance of the Village of Buchanan for the purpose of building a cooling tower at Petitioner's nuclear generating station located in the Village of Buchanan known as Indian Point Unit No. 2 ("Indian Point 2").

2. Petitioner, Consolidated Edison Company of New York, Inc. ("Con Edison"), is and was at all times herein mentioned a gas, electric and steam corporation duly organized and existing under and pursuant to the Transportation Corporations Law of the State of New York and subject to the provisions of the Public Service Law and to the jurisdiction of the Public Service Commission.

3. The operations of Indian Point 2 are subject to the jurisdiction of the United States Nuclear Regulatory Commission ("NRC"), a successor agency to the regulatory functions formerly performed by the United States Atomic Energy Commission ("AEC").

4. The Respondents constitute the Zoning Board of Appeals of the Village of Buchanan with authority pursuant to the Village Law and the Village of Buchanan Zoning

Code (the "Code") to make decisions on applications for variances from the Code. The Code provides that any order of the Board not appealed within thirty days of the date thereof shall be the final action of the Village of Buchanan.

(§ 54-44C.)

5. On March 21, 1975 Con Edison filed with the Board an appeal for a variance, a copy of which is attached hereto as Exhibit "A", pursuant to § 54-44 of the Code, seeking a variance from the following provisions of the Code in order to permit Con Edison to construct a cooling tower at Indian Point 2:

A. Height of proposed cooling tower is approximately 565 feet, which exceeds height limitation in M-D district of 40 feet.

B. Operation of cooling tower will result in production of visible vapor plume beyond boundaries of immediate site contrary to § 54-22A(1) of the Code.

C. Operation of cooling tower will result in deposition of saline drift which may be harmful to certain plants indigenous to adjacent areas contrary to § 54-22A(2) of the Code.

6. Thereafter, pursuant to the provisions of § 54-44 of the Code, a public hearing was held before the Board on May 6, 1975, at which time statements of Con Edison's witnesses, Edward J. Sack, Salvatore A. Dambra, Lester A. Cohen, and John J. Szeligowski, were entered into the record of the hearing, along with statements of others.

7. On June 19, 1975 the Board issued its Decision, attached hereto as Exhibit "B", on the aforesaid application. The Decision denied Con Edison's request for a variance. The basis for the denial was that Con Edison had not shown sufficient practical difficulties to justify its requested variance because the application was contingent, i.e., there was "no present intent, commitment or direction to begin excavation, construction or any other activity on the premises for which a building permit would be required by the Village of Buchanan." (Page 13.) This determination was erroneous, arbitrary and capricious, an abuse of discretion and is not supported by any evidence in the record before the Board.

8. Con Edison operates Indian Point 2 pursuant to Facility Operating License No. DPR-26 issued by the AEC. Amendment No. 6 to said License, issued on May 6, 1974, attached hereto as Exhibit "C", provides that operation of

Indian Point 2 with the presently installed once-through cooling system will be permitted during an interim period, the reasonable termination date for which appears to be May 1, 1979. The effect of this provision is to require Con Edison to terminate operation of Indian Point 2 on May 1, 1979 for installation of a closed-cycle cooling system. In order to minimize the enormous costs of Indian Point 2 being out of service (approximately \$567,000 per day at full power), the closed-cycle cooling system must be constructed in advance of May 1, 1979 so that on that date the final work of connecting the closed-cycle cooling system with existing plant systems can commence. This license condition therefore constitutes an order and direction to construct a closed-cycle cooling system.

9. In order to meet the requirements imposed by the May 1, 1979 date of its present License, Con Edison has been proceeding diligently with all steps necessary to complete the construction of the closed-cycle cooling system. In accordance with Paragraph 2.E(2) of Exhibit "C", Con Edison has evaluated the economic and environmental impacts of alternative closed-cycle cooling systems and determined a preferred system for installation. This evaluation was

embodied in a report entitled "Economic and Environmental Impacts of Alternative Closed-Cycle Cooling Systems for Indian Point Unit No. 2" (the "Cooling Tower Report") and was submitted to the Village of Buchanan, the AEC and others on December 2, 1974. This report contained analyses of alternate closed-cycle cooling systems, presented the advantages and disadvantages of each alternate and concluded that the best closed-cycle cooling system was a natural draft wet system, requiring the construction of the large tower which was the subject of the Petitioner's appeal to the Board.

10. In order to complete construction of the natural draft system on a schedule mandated by the May 1, 1979 date, Con Edison was required to complete prior to the date hereof the detailed engineering of the system and the filing of applications for all necessary governmental approvals. Amendment No. 6 of the NRC License (Exhibit "C") contemplates that all regulatory approvals will be received by December 1, 1975. After that date Con Edison must proceed to finalize designs to incorporate comments of regulatory agencies, to finalize site preparation specifications and drawings, and to obtain and evaluate bids for site preparation and cooling tower fabrication and erection.

By the spring of 1976, Con Edison must enter into binding contracts for site preparation and cooling tower procurement (assuming NRC denial of the application referred to in paragraph 13 below), which in all likelihood will not be cancelable without incurring substantial penalties. During the summer of 1976, Con Edison will be required to commence clearing land and excavation for the cooling tower site.

11. The foregoing activities are mandated by the terms of the present NRC license because of the May 1, 1979 termination date for operation of the present cooling system. Therefore as long as that deadline stands, Con Edison will be unable to proceed without incurring substantial economic losses, unless the requested variance is obtained before December 1, 1975. If Con Edison proceeds on the schedule and the Board's Decision is not set aside, losses would result from cancellation charges on contracts entered into in the spring of 1976. If Con Edison were to suspend the procurement and construction schedule, losses would result from an inability to use Indian Point 2 after May 1, 1979 for a longer period than would be required if the closed-cycle cooling system were constructed on the schedule contemplated by the NRC license. If the Board's Decision is

not set aside and if the terms of the NRC license remain unchanged, Con Edison will also lose the use of Indian Point 2, which has a capital cost in excess of \$204,000,000, and is a major supplier of electric power to Westchester County, New York City and the adjacent interstate area.

12. The foregoing constitute practical difficulties sufficient to require the Board to issue the requested variance. The Board's statement that there is no "direction to begin excavation, construction or any other activity on the premises for which a building permit would be required by the Village of Buchanan" is erroneous because of the terms of the present License (Exhibit "C") described above.

13. On June 6, 1975 Con Edison filed an application to the NRC for an amendment of its License to change the date for termination of operation with once-through cooling from May 1, 1979 to May 1, 1981. The laws and regulations applicable to the NRC's review of this application make it unlikely that the NRC will reach a decision before June 1, 1976. In view of this uncertainty, Con Edison must proceed on the basis of the schedule described above which will allow sufficient time to minimize plant unavailability

after May 1, 1979 and such a schedule requires that the requested variance be granted by December 1, 1975.

14. On February 24, 1975, the United States Environmental Protection Agency ("EPA") issued a discharge permit for Indian Point 2 pursuant to the Federal Water Pollution Control Act. That permit required termination of operation with the 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, and a request for alternative thermal limitations which would permit continued operation with a once-through cooling system. By public notice dated May 16, 1975, EPA granted Con Edison's request for an adjudicatory hearing. Con Edison does not know when such hearing will be held.

* 15. If the Board's Decision is not set aside and the requested variance is not obtained by December 1, 1975, Con Edison will be unable to comply with the requirements contained in the NRC license and EPA permit and such a result would be contrary to Article VI of The Constitution of the United States.

16. If the Board's Decision is not set aside and the requested variance is not obtained by December 1, 1975,

Con Edison will be unable to adhere to the cooling tower procurement and construction schedule referred to above and will therefore incur substantial economic costs, as described above, which will be passed on to Con Edison's customers. Thus the Board's Decision constitutes an undue burden on interstate commerce in violation of Section 8 of Article I of The Constitution of the United States.

WHEREFORE, the Petitioner respectfully prays that a judgment be granted annulling, revoking and setting aside the Decision of the Board dated June 19, 1975 and directing the Board:

- (a) to issue the variance to Petitioner as requested in its appeal to the Board; or
- (b) in the alternative, to grant the variance conditioned upon the NRC's denial of Con Edison's pending application for an amendment of its License to change the date for termination of operation with once-through cooling from May 1, 1979 to May 1, 1981 or upon a decision by EPA denying Con Edison's request for alternative thermal limitations; and

for such other and further relief as the Court may deem
just and proper.


Dated: New York, New York
July 17, 1975

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

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

The undersigned being duly sworn, deposes and says:
That he is an officer of Consolidated Edison Company of New York, Inc.; that the foregoing is true to the knowledge of the deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.



Peter A. Irwin
Assistant Secretary

Sworn to before me this

17th day of July, 1975.



Notary Public

ANGELA ROBERTI
Notary Public, State of New York
No. 03-8593813
Qualified in Bronx County
Commission Expires March 30, 1976