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IN THE MATTER OF:

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

(Indian Point, Unit 2)

Docket No. 50-247

ORAL ARGUMENT

Place - Bethesda, Maryland

Date - Wednesday, 9 February 1977

Pages 1 - 119

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the matter of	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	Docket No. 50-247
Indian Point Unit 2	

Fifth Floor Hearing Room,
East-West Towers,
4350 East-West Highway,
Bethesda, Maryland.

Wednesday, 9 February 1977

Oral argument in the above entitled matter was had at 10:00 a.m., pursuant to notice,

BEFORE:

JEROME E. SHARFMAN, Esq., Chairman
Atomic Safety and Licensing Appeal Board

DR. JOHN H. BUCK, Member.

DR. LAWRENCE R. QUARLES, Member.

APPEARANCES:

EDWARD J. SACK, Esq., Consolidated Edison Company of New York, 4 Irving Place, New York, New York;
LEONARD M. TROSTEN, Esq. and EUGENE R. FIDELL, Esq., LeBoeuf, Lamb, Leiby and MacRae, 1757 N Street, Washington, D.C.;
on behalf of Applicant.

SARAH CHASIS, Esq., Natural Resources Defense Council, 15 West 44th Street, New York, N.Y.;
on behalf of Intervenor Hudson River Fishermen's Association.

wb

STEPHEN H. LEWIS, Esq., Office of Executive Legal Director, Nuclear Regulatory Commission, Washington, D.C., 20555;
on behalf of the Nuclear Regulatory Commission Staff.

wb

C O N T E N T S

Oral Argument on Behalf of:	Page
The Applicant, Consolidated Edison Company	
by Edward J. Sack, Esq.	6
Hudson River Fishermen's Association,	
by Sarah Chasis, Esq.	42
NRC Regulatory Staff,	
by Stephen H. Lewis, Esq.	74
Rebuttal Argument on Behalf of:	
The Applicant, Consolidated Edison Company	
by Edward J. Sack, Esq.	103

ebl

P R O C E E D I N G S

CHAIRMAN SHARFMAN: Be seated, please.

This morning this Board is hearing oral argument on the appeal which has been taken by Consolidated Edison Company from the Licensing Board's partial initial decision on November 30th, 1976, and its supplemental partial initial decision of December 27th, 1976.

In the first decision the Licensing Board approved a stipulation among the parties that the preferred type of closed-cycle cooling system for installation at Indian Point No. 2 was a natural-draft wet cooling-tower system. It also decided that after issuance by the Director of Nuclear Reactor regulation of the amendment to the license making this point, all necessary governmental approvals will have been received by the licensee within the meaning of Section 2.E.1.b of the license.

In its decision of December 27th, the Licensing Board authorized the amendment of the license so as to change the date for termination of once-through cooling from May 1, 1979 to May 1, 1980. There is no appeal, none has been taken, from the decision as to the preferred type of closed-cycle cooling system.

Therefore, this appeal relates only to the latter two issues which are really interdependent.

Our order of January 27th, ALAB-369, which

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1 calendered the case for oral argument, allotted one hour to
2 each side, with the Appeallee's time to be divided between
3 them as they see fit.
4 I will now ask Counsel if they would please iden-
5 tify themselves for the record.
6 MR. SACK: Con Edison is represented here today
7 by myself, Edward J. Sack, of 4 Irving Place, New York,
8 New York.
9 Also with me at the Counsel table are Leonard M.
10 Trosten and Eugene R. Fidell, both of LeBoeuf, Lamb, Leiby,
11 and MacRae of 1757 N Street, Washington, D. C.
12 MS. CHASIS: My name is Sarah Chasis and I repre-
13 sent the Hudson River Fishermen's Association, and I'm
14 associated with the Natural Resources Defense Council, 15
15 West 44th Street, New York, New York, 10036.
16 MR. LEWIS: My name is Stephen H. Lewis, represent-
17 ing the Staff of the Nuclear Regulatory Commission, Washington,
18 D. C. 20555.
19 CHAIRMAN SHARFMAN: Now how have the Appellees
20 agreed to divide their time?
21 MR. LEWIS: The Staff will take a half hour and
22 HRFA will take a half hour.
23 CHAIRMAN SHARFMAN: Will the Staff go first?
24 MR. LEWIS: The Staff will go last.
25 CHAIRMAN SHARFMAN: And Mr. Sack, are you allowing

eb3

1 any of your hour for rebuttal?

2 MR. SACK: I would like to reserve 15 minutes for

3 rebuttal, please.

4 CHAIRMAN SHARFMAN: All right.

5 Mr. Sack, would you proceed?

6 ORAL ARGUMENT ON BEHALF OF THE APPLICANT,

7 CONSOLIDATED EDISON COMPANY

8 By Edward J. Sack, Esq.

9 MR. SACK: Mr. Chairman, may it please the Board,

10 I would like to start with a brief statement concerning the

11 history of this proceeding.

12 The origin of this limited proceeding is in the

13 Indian Point 2 license itself. The license as originally

14 issued provided in Paragraph 2.E.2 that Con Edison should

15 prepare a report on the economic and environmental impacts

16 of alternative closed-cycle cooling systems.

17 CHAIRMAN SHARFMAN: Mr. Sack, may I say -- I

18 should have said this before -- we have read all the briefs

19 and so we are familiar with whatever is in them. It will be

20 best to tailor your remarks accordingly.

21 MR. SACK: I thought maybe the background would

22 be useful.

23 CHAIRMAN SHARFMAN: Well, some of it might be, but

24 go on. I just wanted to caution you that it isn't necessary

25 to repeat all of it.

eb4

MR. SACK: Okay, that's very helpful.

The report was for the purpose of determining a preferred closed-cycle cooling system for installation. The report was submitted on December 2nd, 1974, December 1, the date of the license having been a Sunday. The report considered several alternatives in quite some detail and concluded that a natural-draft wet cooling tower was the preferred alternative, principally for environmental reasons. It was the preferred alternative if it should be ultimately determined that a closed-cycle cooling system was required for the plant.

The Regulatory Staff prepared Draft and Final Environmental Statements which you've probably seen, and they concurred in Con Edison's selection.

The parties stipulated that the preferred alternative was a natural-draft cooling tower, and the Licensing Board in its decision of November 30th, 1976, agreed with this conclusion and authorized the license amendment with which you are familiar.

Con Edison's first exception concerns the question whether all governmental approvals have been received.

CHAIRMAN SHARFMAN: If you're finished with the background, let me ask you some questions that I have on the background that were not answered in the briefs.

Can you tell me procedurally exactly how this

eb5

1 particular proceeding that resulted in these two orders was
2 handled by the Licensing Board? Was there a hearing? Were
3 there issues pleaded? How did it proceed?
4 MR. SACK: There was a prehearing conference in
5 the fall, I believe it was in late October or November, which
6 identified the issues. At that time we reported the parties
7 were working on a stipulation which was not yet ready.
8 A hearing was then held in White Plains, New York,
9 to consider the issues. At that hearing we presented the
10 stipulation which had then been signed by all the parties,
11 agreeing that the natural-draft cooling tower was the pre-
12 ferred closed-cycle cooling system.
13 There were some evidentiary presentations of this
14 cooling tower report which Con Edison filed in December of
15 '74. The Staff presented their Environmental Statement and
16 there was some additional evidentiary presentation, I believe
17 on the question of scheduling.
18 CHAIRMAN SHARFMAN: Scheduling what?
19 MR. SACK: The schedule that would apply because
20 of the-- There was another section of the license which said
21 that if all regulatory approvals had not been received by
22 December 1, 1975, the date for termination of operation of
23 the once-through cooling system would be postponed accord-
24 ingly. And there was a question as to how that applied to
25 the facts of this particular proceeding.

eb6

1 So there was some discussion on that issue.

2 The Board --

3 CHAIRMAN SHARFMAN: The date of this was what? I

4 think I missed that.

5 MR. SACK: The date of the hearing?

6 CHAIRMAN SHARFMAN: Yes. Do you have it?

7 MR. FIDELL: October 5.

8 MR. SACK: October 5, 1976.

9 CHAIRMAN SHARFMAN: Thank you.

10 MR. SACK: The Board at that time determined to

11 what we call bifurcate the hearing and in view of the stipula-

12 tion, get out a preliminary partial initial decision desig-

13 nating the preferred system as the natural-draft cooling

14 tower, and reserving decision for a later date on these other

15 issues which had come up between the parties, namely,

16 scheduling and some other subsidiary issues which were later

17 dropped. So that's why we had a partial initial decision.

18 After that, the Board issued its decision on

19 November 30th, referring to it as a partial initial decision.

20 It scheduled another conference for December 8th, 1976, and

21 after that conference issued a second decision which it also

22 designated I believe a supplemental partial initial decision,

23 resolving certain additional issues, mainly the scheduling

24 issues. And I believe that that now completes all the

25 issues that are in contention.

eb7

CHAIRMAN SHARFMAN: Well, what about the other issues that are still pending before the Licensing Board? Can you give me a laundry list of those, or is there just one issue pending before the Licensing Board?

MR. SACK: Well, I think, as your order noted, there are two proceedings in this docket which the Licensing Board is keeping separate and distinct. You're referring to this other proceeding?

CHAIRMAN SHARFMAN: Yes.

MR. SACK: In June, 1975, Con Edison filed an application under another provision of the license to extend the date for termination of operation of the once-through cooling system to May 1, 1981. The Staff processed that application on a schedule lagging somewhat behind the first application.

Hearings on that application were held the second week of December -- the first week of December, and they terminated on December 10th. They were adjourned on December 10th, 1976. And the Board ordered the Staff to prepare a proper benefit-cost analysis to replace what the Staff had designated in its Final Environmental Statement as a cost-benefit balance.

The Staff has not yet produced that document. It's promised for later in the month. And on the basis of that promise, two days of hearing are scheduled for the last

eb8

1 week of February, February 23rd and 24th. And we have been
2 told by the Board that if we don't complete the hearing on
3 February 24th, and the Board has expressed considerable doubt
4 as to whether we can, the next date available to the Board
5 and the other parties is March 29th, 1977.
6 So that hearing is going at a much slower pace
7 than this proceeding has gone, and it's lagging somewhat
8 behind.
9 CHAIRMAN SHARFMAN: And that's the only other
10 proceeding pending with respect to Indian Point 2, other than
11 the seismic hearing which respects all the Indian Point
12 reactors? Is that correct?
13 MR. SACK: That's correct as of this moment, but
14 we anticipate initiating another proceeding in about a month
15 or so. Shall I tell you about that one?
16 CHAIRMAN SHARFMAN: I would like to hear it, yes.
17 MR. SACK: The fundamental issue all along in this
18 case is the effect of the once-through cooling systems at
19 the Hudson River Power Plants on the Hudson River. In order
20 to resolve this question with substantial data,-- Con Edison
21 believed there really wasn't enough data on the new issues
22 which were raised in the original Indian Point 2 operating
23 license case to resolve these questions so we initiated
24 what is a seven-year ecological study program in 1970. We
25 consider that one of the largest programs, ecological study

eb9

1 programs, ever undertaken in an estuarine system.

2 That was completed on January 1, 1977, on schedule.

3 And Con Edison has been advised by its consultants who per-

4 formed this work that after all this study they've concluded

5 that the environmental effect of the once-through cooling

6 system is insignificant. That's the word they've given us:

7 insignificant.

8 On the basis of that we are preparing an applica-

9 tion to delete from the license the requirement to terminate

10 operation with the once-through cooling system, and that

11 application, as you know, must be accompanied by an Environ-

12 mental Report. So we are in the process of preparing that

13 Environmental Report to accompany the application, and we

14 hope that we will be able to file it -- I hate to give dates

15 but I would suppose within the next month or so.

16 CHAIRMAN SHARFMAN: Well, why did you first choose

17 the other date of May 1, 1981 in the proceeding that's now

18 pending?

19 MR. SACK: The license required us to base that

20 application on data from operations. Now we have always

21 said that -- from the first time we mentioned it that we would

22 not have complete data until January 1, 1977.

23 Now because of the time that it takes to review

24 these applications, considering the interval the Staff needs

25 to complete a Draft Environmental Statement, circulate it

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for comments, then a Final Environmental Statement, we figured we had to file the application in June, 1975. And by June, 1975, we only had one year of data from operations and our consultants said they simply could not make any really firm, long-term conclusions on the basis of only one year of data that had not been fully analyzed.

So we did not have the data in June, '75, to justify an application to eliminate the cooling tower requirement entirely. We thought we had enough in terms of data and analysis to support what was then a two-year extension. And because of the delay in the designation of the cooling tower, it turns out it is only a one-year extension.

DR. QUARLES: Mr. Sack, can you tell me just where EPA comes into this? Do you make application just to NRC, or do you make a simultaneous one to EPA to pick it up after the critical dates they have? Or just where do they fit into the act?

MR. SACK: EPA at the present moment we believe is a separate but equal jurisdiction, to borrow a phrase. The EPA also has concurrent jurisdiction of the subject matter, and we have been proceeding in accordance with the Federal Water Pollution Control Act and the regulations of the Environmental Protection Agency under that.

So pursuant to that they have issued permits which provide for termination of operation of the once-through

ebll

1.25

1 cooling system similar to the way the NRC license reads.

2 We have applied for a hearing on those permit

3 conditions so under the EPA procedures, the permit conditions

4 are suspended pending the hearing.

5 So those permit conditions are suspended. They

6 have no legal effect at the moment, until completion of that

7 hearing.

8 A prehearing conference with EPA is scheduled for

9 February 22nd, this month, and that will hopefully set a

10 schedule for the conduct of the hearing, but we do not know

11 when that hearing will be held or how long it will take. It

12 will involve-- EPA of course has jurisdiction over all plants,

13 not just nuclear plants, so the hearing there will probably

14 be a joint hearing involving the Hudson River Plants for which

15 EPA has required cooling towers.

16 That involves two units at Bowline Point which is

17 somewhat opposite the river from Indian Point, and another

18 two units at Roseton, which is north near Newburgh.

19 DR. QUARLES: Well, assuming that you win your

20 present case, the one that's pending, to go to May 1, 1981,

21 is it your understanding that jurisdiction will move from

22 NRC to EPA on July 1 of 1981, so there's only a two-month

23 overlap after that?

24 MR. SACK: No, sir. We think the concurrent

25 jurisdiction will continue, and we need relief from both

12

1 provisions. The NRC license on its face is a legally binding
2 document on Con Edison, and in order to continue operation
3 with the once-through cooling system, we would have to secure
4 amendments of both the NRC license and the EPA permit unless
5 there is some new agreement or new statute to change the
6 jurisdiction.

7 As it stands now, these are both documents which
8 are equally binding on the plant.

9 CHAIRMAN SHARFMAN: Are you familiar, Mr. Sack,
10 with the Appeal Board's recent decision in the Seabrook case?

11 MR. SACK: When you say "familiar," I've heard of
12 it.

13 CHAIRMAN SHARFMAN: Well, there's quite a discussion
14 in there about the jurisdiction of the EPA under the Federal
15 Water Pollution Control Act, and how that affects the juris-
16 diction of this Commission.

17 And I believe in that case, although I don't want
18 to oversimplify it, the Board held that the question of whether
19 or not there should be a closed-cycle or an open cooling system
20 was within the jurisdiction exclusively of EPA and could not
21 be decided by this Commission.

22 Now that was for a new plant which will operate
23 after July, 1981.

24 MR. SACK: That's right.

25 CHAIRMAN SHARFMAN: But nevertheless, there are some

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provisions that I want to call your attention to.

One of them is Section 5.11.C.2.a of the Federal Water Pollution Control Act which says:

"Nothing in the National Environmental Policy Act shall be deemed to authorize any federal agency. . . ."

I'm skipping somewhat.

". . . .to review any effluent limitation or other requirement established pursuant to this Act."

MR. SACK: The distinction I was going to make was one you hit on earlier, that that's a construction permit case and when we have a fully-built, operating plant we run into a problem of timing. That 5.11 provision applies to a final decision of EPA.

The problem here is of dates. We may run into dates in the NRC license that require us to take action prior to the time we have a final decision from EPA so that is why when we have an operating plant we feel we need relief from both provisions because if the EPA case should be delayed, and all the indications are that they move at a very slow pace over there, we would run into the dates in the NRC license which are legally binding on us until EPA reaches a final decision.

CHAIRMAN SHARFMAN: Well, first, the document you have from EPA now that allows you to discharge hot water

eb14

1 into the river, that is a discharge permit under Section 402
2 of the Act; right?
3 MR. SACK: That's correct.
4 CHAIRMAN SHARFMAN: Now the terms of that discharge
5 permit are exactly the same as the terms of your NRC license,
6 are they, or are they different in some respects?
7 MR. SACK: They picked and chose. They picked
8 the provision for terminating May 1, '79 out of the NRC
9 license, but they didn't add all the other provisions that
10 were in the NRC license for changing that date.
11 CHAIRMAN SHARFMAN: What about the other govern-
12 mental approvals provision?
13 MR. SACK: That was not in there, so that's one
14 of our issues in the adjudicatory hearing is they picked
15 one section of the NRC license without picking out the other
16 sections which move that date.
17 CHAIRMAN SHARFMAN: Is this discharge permit in
18 the record before this Commission in this case?
19 MR. SACK: No, sir, I don't believe it is.
20 CHAIRMAN SHARFMAN: Would you be able to supply
21 us with a copy of that as soon as possible, because I think
22 it's very important for us to see that.
23 MR. SACK: Well, I would have to accompany it
24 with the order that suspended certain provisions of the
25 permit.

eb15

CHAIRMAN SHARFMAN: I would like to see that as well. That was my next request. Perhaps you should supply the other parties, too, if they don't have it.

MR. SACK: I'm told it's an exhibit in the extension request case. But we can furnish it to this Board.

CHAIRMAN SHARFMAN: Why don't you do that anyway.

(The Board conferring.)

CHAIRMAN SHARFMAN: I think because the extension case is still pending it might be cumbersome for us to try to take those exhibits away from the Licensing Board, so that maybe you had better supply us independently.

Do the other parties have those?

(Chorus of "yes.")

CHAIRMAN SHARFMAN: All right, so there's no problem there.

All right. So we would like to, please, get both the discharge permit and the order suspending provisions of it. Is that what it does?

MR. SACK: That's correct. It grants the hearing and suspends certain provisions.

CHAIRMAN SHARFMAN: Of the discharge permit. Does it suspend the provision which requires termination of once-through cooling by May 1, 1979?

MR. SACK: Yes, sir. That's the main one we're interested in.

eb16

1 CHAIRMAN SHARFMAN: All right.

2 Now then, that would provide a basis for saying

3 that it's up to us to decide then whether that should be

4 extended.

5 MR. SACK: That's correct.

6 CHAIRMAN SHARFMAN: Okay. Fine. Go on.

7 MR. SACK: Con Edison's first exception concerned

8 the necessity for finding there were all governmental appro-

9 vals. Our point in this exception is very simple.

10 Until the litigation that is now pending in the

11 New York courts is terminated, we do not know the limits of

12 Buchanan's legal authority. Con Edison tried to obtain a

13 building permit from the Village of Buchanan. That applica-

14 tion was denied. We appealed that to the Supreme Court of

15 Westchester County, who affirmed Con Edison's position.

16 Buchanan appealed that to the Appellate Division

17 of the New York State Courts and Con Edison won again.

18 Buchanan has now filed an appeal with the Court of Appeals.

19 We have moved to dismiss that appeal; the Court of Appeals

20 has not yet acted on that motion.

21 CHAIRMAN SHARFMAN: Do you mean the Court of

22 Appeals since December has still not acted on that motion?

23 MR.SACK: That's correct. They have a lot of

24 problems up there, if you read the newspapers, with New York

25 City's financial crisis. It has now been taken over to some

eb17

1 extent by the Court of Appeals.

2 CHAIRMAN SHARFMAN: I had thought that jurisdic-

3 tional motions were dealt with promptly.

4 MR. SACK: I thought so, too, but they have not

5 acted.

6 CHAIRMAN SHARFMAN: Well, let me ask you something:

7 Has Con Edison taken an appeal from the Appellate

8 Division's order?

9 MR. SACK: No, sir.

10 CHAIRMAN SHARFMAN: Has Hudson River Fishermen's

11 Association taken an appeal?

12 MR.SACK: No, sir.

13 CHAIRMAN SHARFMAN: Why did Con Edison not take an

14 appeal? After all, that modification gave the Village of

15 Buchanan some power over you, and as you say in your brief,

16 they might harrass you, they might put conditions in that

17 might disturb you. Why didn't you appeal?

18 MR. SACK: The modification resulted from sub-

19 stantially what might be called a concession I made at oral

20 argument. When the judges of the Appellate Division appeared

21 kind of really shocked at the notion that a community could

22 not regulate such a substantial structure that was being

23 built within its borders, the soundest grounds constitutionally

24 that I could argue for preemption is when there is a conflict,

25 so I pressed the argument that preemption, federal preemption,

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1 applies when there is conflict between two agencies, when
2 one agency is telling you to do this and another agency is
3 telling you to do exactly the opposite, and there's an in-
4 consistency.
5 And the cases supported preemption very strongly,
6 most strongly when there was this inconsistency.
7 So one of the judges picked up right away, Well,
8 can they regulate to the extent that there is not an incon-
9 sistency? And I had to agree that that would be proper be-
10 cause that is what federal preemption is based on, is an in-
11 consistent direction.
12 And so he said Well, then they could regulate
13 roads, traffic, traditional local concerns.
14 And I replied Yes.
15 And that is the basis for the way the Appellate
16 Division decided the case. And I did not think Con Edison
17 could appeal because it would be very weak to argue that they
18 could not regulate at all in the absence of any direct pre-
19 emption. There is no direct preemption in either the Atomic
20 Energy Act or the National Environmental Policy Act. I had
21 to rely on implied preemption.
22 CHAIRMAN SHAREMAN: What does New York law say
23 about this kind of local and incidental regulation?
24 I'm thinking in terms of the statute that the
25 Appellate Division cited, the State statutes.

eb19

1 MR. SACK: Well, as alternate grounds there are
2 federal grounds which the Licensing Board thought were very
3 strong, and I did, too, initially. It's called the State
4 Doctrine of Public Utility Necessity, that a local community
5 cannot prevent a public utility from constructing essential
6 public utility facilities.
7 Now I made that argument before the Westchester
8 Court and they said nothing about it in their decision.
9 I repeated the argument before the Appellate
10 Division and they put in one brief phrase in their decision.
11 The issue there is not whether the doctrine exists; Buchanan
12 has conceded that. But they are arguing it does not apply
13 to the facts of our case.
14 CHAIRMAN SHARFMAN: Well, then, what I'm asking you
15 is this:
16 The part of the order that says they can regulate
17 you locally, the local and incidental features of it, does
18 that have a basis in the New York case law interpreting those
19 New York statutes?
20 MR. SACK: Oh, yes; yes, sir. The doctrine of
21 Public Utility Necessity only applies to a complete prohibi-
22 tion, and the case of Northport Waterworks versus Carl is
23 one of the key cases involving expansion of a water treatment
24 plant. And the courts held that the local community could
25 not prevent the structure, which exceeded the height

eb20

1 limitations, but they could impose certain requirements like
2 painting it green, and other requirements to improve the
3 aesthetics could be imposed.
4 So it's a similar doctrine.
5 CHAIRMAN SHARFMAN: Well, what is your understand-
6 ing of what that modification in the Appellate Division's
7 order means? To what extent can Buchanan regulate this
8 cooling tower?
9 MR. SACK: They can impose traditional local
10 regulations such as traffic controls and safety standards,
11 building permit requirements to see that it doesn't fall down
12 physically.
13 CHAIRMAN SHARFMAN: What about the type of cooling
14 tower? Can they tell you to have a mechanical draft rather
15 than a natural draft?
16 MR. SACK: No, sir. The Commission has decided
17 that and I think that's part of the federal preemption. The
18 Commission has decided that we should have-- The Commission
19 has now said we should have a natural-draft cooling tower.
20 DR. QUARLES: Didn't they decide this on the basis
21 of the NEPA analysis which did not include the inputs from
22 the people that would probably be most affected?
23 If the Village of Buchanan decided -- and I don't
24 see why they would, but if they were to decide that they
25 would rather put up with noise and low-level fogging than

eb21

have this tall structure staring them in the face all the time, wouldn't this mean that the cost-benefit analysis had to be redone with their views in it?

MR. SACK: Well, that gets into the issue of finality. The Village had an opportunity to intervene in this proceeding, in the preference proceeding, and they chose not to. As a matter of fact the Westchester Court urged them to intervene. In that decision it said the views of the Village are properly expressed in the Commission proceeding. They did not participate so now the Commission has reached an order.

Now what you're saying is that perhaps the Village could file an order to show cause or some type of initiating a new proceeding to reopen the analysis and perhaps the Village could do that.

But barring any action by the Village, I don't think the Commission can redo its decision.

DR. QUARLES: Well, let me move to a hypothetical:

On the natural draft towers, suppose the Village imposed additional conditions on the drift eliminators to cut down on the amount of fogging. Would this come within the -- quote -- "reasonable conditions" -- unquote?

MR. SACK: I think so, if it was something that was physically and technologically possible to do, I think it would. There would be no conflict with our construction

eb22

1 of the closed-cycle cooling system.

2 DR. QUARLES: Thank you.

3 DR. BUCK: While we're on that question, Mr. Sack,
4 I'd like to see if I can find out how far these conditions
5 that Buchanan could put on this can go.

6 Could they, for example, insist on a certain
7 location for the tower, put it further away from roads or
8 further away from residences or anything of that nature?

9 MR. SACK: I believe they could.

10 DR. BUCK: I mean assuming the location they're
11 insisting on still allowed the towers to be built?

12 MR. SACK: As soon as you move it on our terrain
13 you get immediately different cost factors, different
14 technological factors. As long as they moved it but didn't
15 drastically change the economics or the environmental effects
16 that would maybe alter the cost-benefit balance --

17 DR. BUCK: But they could move the location to
18 some extent as far as you're concerned now?

19 MR. SACK: Yes.

20 DR. BUCK: Okay. Thank you.

21 MR. SACK: Perhaps I'd better move on.

22 The basic point on this exception is that that
23 proceeding is not yet terminated and until it terminates,
24 we do not know the limits of Buchanan's authority.

25 The HRFA brief indicates that they think we are

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1 arguing that Buchanan has a veto power. We are not arguing
2 that. As I've said, as a party to the State proceedings,
3 HRFA is aware of the fact that we have worked very hard to
4 establish that Buchanan cannot prevent Con Edison from con-
5 structing a natural draft cooling tower if ordered to do so
6 by a federal agency.
7 Inconsistent directives from federal and local
8 governments are unacceptable to Con Edison. My only point is
9 that that case is not ended.
10 I would like to move on to the second exception
11 where the Licensing Board found that Con Edison should
12 commence construction of its recommended closed-cycle cooling
13 tower system.
14 Now there's some ambiguity about the legal signi-
15 ficance of this finding. The Board did not order Con Edison
16 to commence construction; it simply made a finding which
17 could be simply precatory or it could be legally enforceable.
18 In order to protect our rights we felt we had to
19 file this exception to clarify the issue.
20 My first point is that this was unnecessary to the
21 disposition of the issue of the proceeding. The purpose of
22 the proceeding was a very limited one, to designate a pre-
23 ferred alternative closed-cycle cooling system within the
24 meaning of the license. And as I explained at the beginning,
25 the license itself prescribed the limits of this proceeding.

eb24

1 CHAIRMAN SHARFMAN: Well, it's a necessary corol-
2 lary of the date, the termination date, given the decision
3 on necessary government approvals, isn't it, to say by
4 when you have to have the license?
5 And wasn't it decided in ALAB-188 that it would
6 take you a certain amount of time to get the tower built
7 and therefore, you needed that amount of time, and so on?
8 I mean isn't it the same issue, really? Why do you say it
9 had nothing to do with the case?
10 MR. SACK: No, the focus of the license-- The
11 focus of ALAB-188 and of the license on Indian Point 2 was
12 always the date for termination of operation of the once-
13 through cooling system. There was no requirement in ALAB-
14 188 for the date to start construction, and changing the
15 focus of the license from termination to start of construc-
16 tion is a very fundamental change in the basic nature of
17 the license which was not authorized in what we conceived
18 and initiated as a very limited proceeding to designate the
19 preferred alternative.
20 If, however, the Board should decide that there
21 is some jurisdiction to consider the desirability of requir-
22 ing commencement of construction, then this is a discretionary
23 matter and the Board must consider all the factors relevant
24 to the exercise of that discretion.
25 CHAIRMAN SHARFMAN: You've stated that argument

eb25

1 in your brief, have you not, over discretionary factors?

2 MR. SACK: That's correct. I would like to run

3 through them and just say that the Licensing Board donned a

4 pair of very heavy blinders. They looked at this limited

5 proceeding and said that since they had found that all

6 government approvals had been obtained, it was time to start

7 construction, but we don't believe that blinders of this

8 nature are appropriate head gear for an administrative agency.

L.6 9 All the factors must be considered.

10 Now I did list most of them in the brief. There

11 is the extension proceeding which was initiated in June,

12 '75, now almost 20 months ago.

13 Also important is the completion of the ecological

14 study program which I have referred to before.

15 Also I believe it is important to consider the

16 financial problems of the New York Metropolitan Area. People

17 in New YOrk City are going through a very difficult financial

18 crisis. As noted on page 14 of our brief, the Public Service

19 Commission has stated high utility rates contribute to these

20 problems. There is no question that cooling tower costs would

21 exacerbate these problems.

22 Another factor which I did not mention in the brief

23 and which we believe is important -- and I think you have

24 already hinted at it today -- is the extreme opposition to

25 cooling towers in the Village of Buchanan and the neighboring

eb26

1 communities. These are the people who will have to live with
2 the towers. You have their views in their comments in the
3 Draft Environmental Statement which are attached to the Final
4 Environmental Statement. They did enter a limited appearance
5 and now you have a brief amicus curiae before you.
6 CHAIRMAN SHARFMAN: May I ask you a question?
7 It's not on this point but a point that troubles me.
8 You take the position, I gather, that there is
9 federal preemption here on the cooling towers.
10 MR. SACK: That's correct.
11 CHAIRMAN SHARFMAN: If that's the case, how can we
12 sit back and say that the New York Courts ought to decide
13 whether all necessary governmental approvals have been ob-
14 tained? Isn't it for us to decide that?
15 MR. SACK: The New York Courts are deciding not
16 whether all necessary approvals have been obtained but the
17 New York Courts are deciding whether the legal authority --
18 CHAIRMAN SHARFMAN: Whether Buchanan's approval
19 is necessary?
20 MR. SACK: That's right. They are deciding the
21 legal jurisdiction of the Village of Buchanan with respect
22 to the cooling tower and Con EDison --
23 CHAIRMAN SHARFMAN: But if that matter is federally
24 preempted, shouldn't we be deciding that rather than the
25 New York Courts?

eb27

1 MR. SACK: Well, first, we need a decision that
2 it is federally preempted. I believe as a matter --
3 CHAIRMAN SHARFMAN: Well, we can decide that,
4 couldn't we?
5 MR. SACK: Well, I believe as a matter of comity,
6 you should await the decision that is now pending before the
7 judiciary. It would be inappropriate to get into a juris-
8 dictional battle with the New York Courts, particularly as
9 long as there is an independent State grounds that they could
10 go off on. If they decide on the independent State grounds
11 then that would resolve the issue.
12 If they decide on the federal grounds then it may
13 be possible for the Commission -- and incidentally, the
14 Commission had notice of this State proceeding and they chose
15 not to participate in it.
16 Now the Commission, if it chooses, could probably
17 go off and try to have a confrontation with the New York
18 Courts. This would require Con Edison to go into a District
19 Court and try to get the issue of conflict of authority
20 resolved by the federal judiciary, and would simply delay
21 the whole proceedings and confuse them to a much greater
22 degree than they already are.
23 But ultimately I would have to say I suppose you
24 could go in and have a confrontation with the State judi-
25 ciary officials.

eb28

1 CHAIRMAN SHARFMAN: We can decide it right here,
2 couldn't we? Indeed, it's a necessary question for us in
3 this appeal, isn't it? I mean if there's federal preemption,
4 then we don't care what the New York Courts are saying.
5 MR. SACK: I think you could decide it but I don't
6 think it's correct to say that you don't care; at least
7 you should not say that you don't care.
8 CHAIRMAN SHARFMAN: What I mean is we ought to be
9 asserting it, shouldn't we, because there might be a federal
10 policy involved in getting the cooling system changed, might
11 there not, and if that's so, then if we have a federal power
12 that is preempted -- that preempts State power, we ought to
13 be asserting that power to prevent delay, arguably.
14 MR. SACK: Well, I thought the Commission ought
15 to intervene in the State proceeding to protect precisely
16 that question because it is their jurisdiction that is being
17 litigated there.
18 As a matter of --
19 CHAIRMAN SHARFMAN: The Commission doesn't have to.
20 MR. SACK: That's correct. As a matter of comity
21 I would think that you would have to -- you should await the
22 outcome of this litigation in the State Courts. When an issue
23 is pending in another -- in the Courts, I believe it is
24 customary for an administrative agency to defer.

25 And I think a similar situation arose in Seabrook,

eb29

1 I believe, where the Commission held out until there was some
2 judicial determination. Technically, from a technical legal
3 point you could have a confrontation with the New York Courts
4 if you so chose. As I said, this would just initiate-- It
5 would force Con Edison to take some action to clarify the
6 jurisdiction.
7 If we had a state decision telling us to do one
8 thing and a federal decision telling us to do the opposite
9 we would simply have to go into federal court and say Look,
10 what's binding here? Which one do we have to follow?
11 And that would, as I said, delay this whole cool-
12 ing tower situation.
13 DR. QUARLES: As I understood you a while ago you
14 said preemption only came in if there were conflict between
15 the two authorities.
16 MR. SACK: That's correct.
17 DR. QUARLES: And the only point of conflict
18 really between the two authorities, it seems to me here,
19 is do you build the tower or do you not.
20 And you're saying now that the State or the Village
21 of Buchanan has jurisdiction over -- for lack of a better
22 word I will say "minor details." They may not be quite so
23 minor.
24 MR. SACK: That's right.
25 DR. QUARLES: Are you saying this is really not an

eb30

1 area of conflict and therefore, preemption doesn't come into
2 play on the point at issue here?
3 MR. SACK: Well, preemption does not come into
4 play on the minor -- on these minor effects which are left
5 to local regulation. There's no preemption on that.
6 DR. QUARLES: Okay.
7 MR. SACK: But on the cooling tower issue, the
8 basic cooling tower issue, I think there is.
9 The HRFA mentioned the Commission's Indian Point 3
10 decision as a basis for the order to -- the finding to commence
11 construction. We find difficulty understanding that. The
12 holding in that decision was to approve a stipulated license
13 condition that paralleled the terms of the Indian Point 2
14 license very closely. It had the same focus on the date for
15 termination of the once-through cooling system that the Indian
16 Point 2 license had. It said nothing about the commencement
17 of construction.
18 It said that Con Edison could seek license amend-
19 ments based on empirical data collected during operation
20 which is precisely what Con Edison has done.
21 In no way does that decision of the Commission
22 authorize or require a finding that construction should
23 commence.
24 The third issue was the Licensing Board's comments
25 that HRFA had a substantial basis for its comments on Con

eb31

Edison's conduct at the Buchanan Zoning Board hearing.

CHAIRMAN SHARFMAN: Let me ask you something about that.

Supposing we find that all the necessary government approvals have not been obtained and supposing we agree with you that we ought to wait and see what the New York Court of Appeals does.

Then we have smack in front of us the question of due diligence.

Now in your view, is there an adequate record on which we can decide that now, or does that have to go back for hearing before the Licensing Board?

MR. SACK: There is an adequate record. We submitted a schedule of all the activities we had done, all the action we had taken to get all the necessary governmental approvals. And I believe that's in the record of the proceeding, and no party has raised a contention on due diligence.

CHAIRMAN SHARFMAN: Is it an exhibit?

MR. SACK: It was offered as an exhibit. I'm not sure-- It was offered--

CHAIRMAN SHARFMAN: Maybe you can locate it and tell us where it is.

MR. SACK: I don't know whether it was actually accepted into evidence, but it was offered as part of the

eb32

1 record.

2 But no party has made any challenge to due dili-

3 gence or has come up with any issue.

4 CHAIRMAN SHARFMAN: Well, the Fishermen's Asso-

5 ciation has, haven't they?

6 MR. SACK: They have not. On several occasions

7 they were asked and they specifically said on the record

8 they are not raising an issue of due diligence.

9 When the Board decision came out the way it did,

10 HRFA is now arguing that the Board should look into this

11 issue as sort of a roving inquisition without any specific

12 contention that Con Edison can respond to. Apparently they

13 believe that they were unable to find a contention and they

14 were hoping that the Board may come up with something that

15 they haven't found.

16 But they could not find a contention and they

17 specifically said on the record that they did not raise

18 a contention of due diligence. These criticisms were made

19 in a general way without any focus, and not in the form of a

20 contention that Con Edison can address.

21 CHAIRMAN SHARFMAN: Well, can you tell us where

22 in the record they stated that they were not questioning due

23 diligence?

24 MR. SACK: I'll have to give that on rebuttal.

25 It is a specific point in the transcript.

eb33

1 CHAIRMAN SHARFMAN: All right. I would like to have
2 that reference.
3 MR. SACK: Our exception is basically one of due
4 process. The Board scheduled on --
5 CHAIRMAN SHARFMAN: I know that. I'm familiar with
6 your argument, but the question really is you wanted a hearing
7 on it, do we have to give you one now if we face that issue.
8 MR. SACK: You say Con Edison wanted a hearing?
9 CHAIRMAN SHARFMAN: You just said you were denied
10 due process. There was a hearing scheduled, the decision
11 was rendered before you got to hearing. Do we have to go
12 back and give you that hearing now, --
13 MR. SACK: Our point is --
14 CHAIRMAN SHARFMAN: -- assuming we decide with you
15 on these other points?
16 MR. SACK: If you decide Issue 4 against us, then
17 there would have to be a hearing. But my point is that the
18 Board should not have said anything about this matter until
19 after the prehearing conference it had scheduled.
20 CHAIRMAN SHARFMAN: Assuming you're right about
21 that, it's done it now. Now what do we do if we agree with
22 you that the government approvals haven't been obtained and
23 there is no federal preemption that prevents this local
24 regulation by Buchanan, and so forth; we agree with you all
25 down the line, but we have to decide due diligence.

eb34

1 Can we do it on the basis of the record we have
2 now? Are you willing to waive any hearing and have us do
3 it on the basis of the record we have now?
4 MR. SACK: That's correct, because there is no
5 contention. There is no issue that we can address.
6 That gets into the fourth exception which is --
7 CHAIRMAN SHARFMAN: When you say that's correct
8 you mean you are not insisting on a hearing on that issue?
9 You would agree that we could decide it on the record as it
10 stands, including the record of the December 8th hearing?
11 MR. SACK: If there is-- Well, the problem is I
12 don't understand what it is that you're deciding, and that
13 ties into the fourth exception, whether there has to be
14 a sui sponti inquiry into due diligence.
15 CHAIRMAN SHARFMAN: I realize you're saying we
16 don't have to look at it. Suppose we disagree with you on
17 that and decide we have to look at it.
18 MR. SACK: Then we would need a contention. As
19 of now there is not in the record any issues that Con Edison
20 can address. Con Edison has stated at length what we're
21 done.
22 CHAIRMAN SHARFMAN: Well, isn't it necessary for
23 the Licensing Board or this Board, if it is going to extend
24 the date on the ground that necessary approvals have not
25 been obtained, isn't it necessary under the terms of the

eb35

1 license that we find that you have acted with due diligence
2 to obtain these government approvals?
3 MR. SACK: That is correct, and the record-- If
4 this document that I have referred to before is in the
5 record, that document and the statements made at the December
6 8th conference and the absence of a contention by any party,
7 is ample to support a due diligence finding.
8 It's impossible to find any other finding because
9 there has not been any formal contention that Con Edison
10 can address that it has not been duly diligent.
11 CHAIRMAN SHARFMAN: I'm suggesting to you that you
12 don't need a contention, that the license tells you this is
13 something that we have to find. It's an issue raised by that
14 license provision that you're asking us to invoke here.
15 MR. SACK: Well, the record to date here-- The
16 only finding that could be made on the record to date is a
17 finding that Con Edison has been duly diligent.
18 CHAIRMAN SHARFMAN: But you would not ask for a new
19 hearing on this? You are willing to let us make that finding
20 on the record?
21 MR. SACK: That's correct, unless there is some
22 contention which has not been raised so far.
23 CHAIRMAN SHARFMAN: Well, supposing there is no
24 contention but supposing we're considering the matter and
25 we're considering all aspects of due diligence. Supposing

eb36

1 we're considering the question of whether or not you should
2 have made that concession in the Appellate Division that
3 they have the power of local regulation, or perhaps you
4 should have appealed from that modification by the Appellate
5 Division? Do you want a hearing on that, or should we decide
6 that on the record as it stands?
7 MR. SACK: Well, if the Board has any questions
8 then we would have to address them.
9 CHAIRMAN SHARFMAN: Well, I asked you some questions
10 about that today. Is that enough, or do you need an evi-
11 dentiary hearing? That's what I'm asking.
12 MR. SACK: On those questions asked today I would
13 think that would be enough, if there are no additional
14 questions.
15 CHAIRMAN SHARFMAN: Well, I wish before your
16 rebuttal you would think the matter over and tell us if you
17 think you would require an evidentiary hearing at all on this
18 issue if we have to get to it. And I think there's no ques-
19 tion we have to get to it if we decide in your favor on all
20 the other issues.
21 MR. SACK: Except exception 4, if you decide
22 exception 4 in our favor.
23 CHAIRMAN SHARFMAN: What's that?
24 MR. SACK: That you don't have to conduct the sui
25 sponti inquiry into --

eb37

CHAIRMAN SHARFMAN: That's based on Section 2.760A of the regulations?

MR. SACK: That's correct.

CHAIRMAN SHARFMAN: Take a look at Section 2.760A. It says:

> "In any initial decision in a contested proceeding on an application for an operating license. . . ."

Well, this is no application for an operating license. You have an operating license.

MR. SACK: It's an application to amend an operating license. That is a technical distinction. But we think the concept of the regulation and the policy behind it as specifically limited to operating license proceedings and not proceedings to amend an operating license is a very cramped and unduly cramped interpretation.

CHAIRMAN SHARFMAN: I would think from the jurisprudence I know that a regulation is usually not construed with the same broad sweep that a constitutional provision is.

MR. SACK: Well, I think a regulation has to be construed in light of its intent and its purpose, and if you adopt a contrary interpretation, you have the bizarre result that an operating license proceeding to grant a 40-year operating license has a narrower jurisdiction than a limited proceeding of this nature, to amend one section of the

eb38

1 operating license.

2 And I think it is weird to say that the Board is

3 more restricted in an operating license proceeding than it

4 is in a proceeding to amend an operating license, that it

5 has a much broader jurisdiction to look into --

6 CHAIRMAN SHARFMAN: When the Commission writes

7 it regulations they know what they're doing and if they want

8 to write a very broad regulation to apply to all kinds of

9 proceedings, they know how to say that, don't they?

10 MR. SACK: That's possible, but I think when that

11 was enacted there was a decision of the Commission and it

12 indicated a policy and I think that policy applies to our

13 situation.

14 CHAIRMAN SHARFMAN: Well, I think your time is

15 up, Mr. Sack.

16 MR. SACK: Thank you.

17 CHAIRMAN SHARFMAN: Let's have a recess for ten

18 minutes.

19 (Recess.)

20

21

22

23

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CHAIRMAN SCHARFMAN: Ms. Chasis, go ahead.

ORAL ARGUMENT ON BEHALF OF HUDSON RIVER FISHERMEN'S ASSOCIATION

By Sarah Chasis, Esq.

MS. CHASIS: I would like on behalf of the Fishermen to put this proceeding in perspective as we see it.

The full Commission has said that there need be no further consideration of the once-through versus closed cycle issue with respect to Indian Point Unit 2. And this was stated by the full Commission in the context of their ruling in the Indian Point-3 decision.

Therefore, absent a license amendment to the contrary, the once-through versus closed cycle issue has been resolved.

CHAIRMAN SHARFMAN: But they also said, as I recall, that ConEdison could make a motion.

MS. CHASIS: Could apply.

CHAIRMAN SHARFMAN: Could make an application.

MS. CHASIS: Could make an application. But unless there was a ruling on the application to the contrary, no further consideration of the once-through versus closed cycle need be undertaken.

In other words, they found that the fresh look which had been ordered in ALAB-188 had been satisfied.

wb2

The Licensing Board in the context of that decision has now designated the type of closed cycle cooling system to be built. And, therefore, it was perfectly logical for them at that point to direct ConEdison to proceed with the construction of the preferred alternative system.

Now we view ConEdison's exceptions to that decision as attempts to delay compliance with what has been ordered by the Commission and the Licensing Board.

The question concerning the Village of Buchanan approval has been answered, and all parties, including ConEdison, the Licensing Board, two state courts which have considered the issue, have found that the village may not regulate inconsistent with the federal regulations.

And this applies not only to the type of system, HRFA would argue, but to the timing of the installation of that type of system.

So that the kinds of incidental and local regulations which we believe that the village does have the power to impose may not interfere with the basic schedule or type of system.

DR. QUARLES: May I ask a question there? I will ask the same one I asked Mr. Sack:

Would you consider that the additional drift eliminator equipment at the top of the tower would be

wb3

within the terms of "reasonable requirements"?

MS. CHASIS: I can't answer as to the specifics because I'm not sufficiently familiar with the specifics of the natural draft system approved. But I would agree with Mr. Sack's answer that if that does not -- if that is not inconsistent with what the Licensing Board has approved, and what ConEdison requested approval for, that the village could so do that.

DR. QUARLES: Then assuming this is so, the Licensing Board has not approved or disapproved -- of course the Licensing Board does not act on design details like this, but-- They have approved the mechanical draft cooling tower, yes. But this would be within the kind of design they approved.

MS. CHASIS: That's right.

DR. QUAPLES: And if you don't think so, let's say it is for the sake of argument so I can get my question in.

MS. CHASIS: I would say, then, the village may not.

DR. QUARLES: But assuming this is within their authority, is it your contention that this would not affect the start of the project? My question really is, How would one design the tower now if one did not know what went in it?

wb4

MS. CHASIS: Let me be sure I understand your assumptions.

Your assumptions are that the design as submitted to the Licensing Board and approved by it regulated, or dealt with this design issue; is that right?

DR. QUARLES: My assumption is that it's not even in there, it's not in the record.

MS. CHASIS: Oh, it's not in there.

I would say that as long as that regulation of the village was not inconsistent with that design they could do it.

Let me add there has been no indication from the village -- and in our Appendix A to our brief we include the letter of the building code, the Building INspector, which indicates the issues which they see as conflicting with their zoning code.

And we believe as to these three issues the appellate division decision ordering the issuance of the variances eliminates any question about those three issues. And, therefore, we believe it's a red herring for the Company now to say that it may appear that the regulation the village engages in will be burdensome to us. Because there has been no indication, other than those three matters on which a variance has been ordered issued, that

wb5

the village zoning code conflicts with the design that was submitted to them by the Company.

And, therefore, we consider that to be a red herring issue.

CHAIRMAN SHARFMAN: Well how is it a red herring if the variance could say, Do your cooling tower a little differently, or make it a different type of cooling tower to some extent?

MS. CHASIS: Because it could not conflict with what ConEdison has planned to do to date, and therefore they can proceed and make adjustments as they go along.

In other words, the basic design, the basic set is something that the village is going to have to live with. They had an opportunity to effect that by intervention in the Licensing Board proceeding, but they chose not to. And that would have been the appropriate place and time for them to do that, not at some subsequent time.

DR. BUCK: The court has now given them opportunity to put conditions on. Now what I'm trying to find out -- and I asked Mr. Sack this morning -- how wide are those conditions? He said they could, in his opinion, order a slight change in the location of the towers.

Now do you disagree with that?

wb6

MS. CHASIS: I would disagree.

DR. BUCK: Why?

MS. CHASIS: Because I think that the consideration which-- Well, first of all, the design that was submitted by ConEdison, and the FES which considered construction of the tower, considered location as well as design. And this was one of the factors, then, which this Licensing Board has addressed and decided on. That's one of the factors that has gone into its calculations.

So, as I understand it -- and I think this is what the appellate court intended, was that things which would not interfere with the scheduling of construction and construction of the type of system which ConEd and the Commission approved--

DR. BUCK: They didn't say anything about scheduling construction, did they?

MS. CHASIS: Well, they said "the construction of."

DR. BUCK: Yes, but they didn't say anything about interfering with the schedule or anything of that nature.

MS. CHASIS: Well I consider when you talk about--

DR. BUCK: Well, on what basis?

MS. CHASIS: Well I consider that because the

wb7

1 language says "the construction of," "shall not interfere
2 with the construction of."
3 I think the point is, where the federal regula-
4 tion has addressed an area, and they have addressed not
5 only the type of system but the timing of installation of
6 that system, that the village may not interfere and may
7 not act inconsistent with that regulation.
8 CHAIRMAN SHARFMAN: Well how specifically has
9 the Commission acted with respect to the type of cooling
10 tower?
11 MS. CHASIS: They've accepted very detailed
12 studies and the proposal which the Company has submitted
13 to it. And I would say as to those aspects which are
14 covered in that submission, and which the FES addressed
15 and the Commission reviewed in making its decision, those
16 matters are finalized, and the village may not regulate
17 inconsistent.
18 CHAIRMAN SHARFMAN: Do you mean, then, that
19 the order of the Licensing Board is not the thing that
20 controls. The order merely says "a natural draft cooling
21 tower." It doesn't say how tall it has to be, it doesn't
22 give you any details.
23 MS. CHASIS: Well the order I think has to
24 be read in light of the record before the Board. And that
25 indicates that -- that was based on the economic and

wb8

environmental evaluation which was undertaken by the Company, and the very detailed Final Environmental Statement by the Staff. So there was a real backdrop to the words "natural draft cooling system." And there was very careful analysis of the specifics.

So I think that is not just any natural draft tower; they were approving the proposal which ConEd had come in with. And I think that that's clear from the record and the review they undertook.

DR. QUARLES: Where is this design in the record? I haven't seen it. And my question--

MS. CHASIS: My reference is to the two documents, the economic and environmental evaluation of alternatives which was submitted by ConEdison and made an exhibit.

DR. QUARLES: My question is not eliminated by that, though. You can change the drift elimination equipment within the confines of a cost analysis. So we haven't changed this. And the drift eliminator is directly connected to two out of the three objections raised by the village.

MS. CHASIS: My answer is that if it interferes with the construction, including the scheduling of construction, then they may not regulate drift eliminators. And if it was not specifically something detailed in

wb9

ConEdison's proposal and approved by the Licensing Board, then the village could regulate it.

DR. QUARLES: Then you're basing your argument on the schedule as part of the construction?

MS. CHASIS: I'm basing it on the fact that that was part of the NEPA review which this Commission carried out. It was a consideration not only of what kind of system but when that system should be imposed, because ofthe biological impacts on the river.

That was an essential aspect of the decision; that was part of the NEPA analysis. And therefore that decision is part of the Federal regulation which the village cannot undercut.

CHAIRMAN SHARFMAN: Well, now, Ms. Chasis, the order of the Appellate Division, which I'm looking at here, on page C-4 of the appendices to the Applicant's brief says,-- It does not say that the village may not interfere with the construction as you have said; it says:

> "So long as such regulation is reasonable and is not inconsistent with the construction."

Now that sounds like they're saying so long as the village doesn't make it impossible to construct the tower; but it doesn't say that the village may not interfere with the construction schedule, and the village may under this order be allowed to ask for some modification that's

wb10

consistent with the basic design of the tower but that might require some adjustments in the contracts you make with your builder and some changes in how you build it. And that might delay the construction a little bit.

And might it not also mean that if you go ahead and just build it the way the Company wants to build it before you see what the village imposes in its variance, you would have to do it all over again and delay things even more?

MS. CHASIS: No. I don't think that's correct. Because I think that the language of the Appellate Division decision is broad enough to include construction schedule with the timing of construction.

When they say "consistent with construction,"--

CHAIRMAN SHARFMAN: "Inconsistent with construction."

MS. CHASIS: When they say "inconsistent with construction" I think what they're specifically talking about is that the village may not regulate inconsistent with the federal regulation. That's the principle that they base their decision on. And therefore I think that considering the fact that the federal regulation is not only of the type of system but the timing of installation, that their decision is broad enough to apply. And, even if it isn't, I think that this Commission -- and I would

wb11 1 disagree with Ms. Sack on that -- certainly has the
2 authority to decide the federal pre-emption question.
3 And I think it is appropriate for the Commission to address
4 this.
5 I don't think we need to reach it, because I
6 think the state grounds are adequate, the state law grounds
7 are adequate.
8 CHAIRMAN SHARFMAN: Well I can agree with you
9 if our license said "You must terminate once-through
10 cooling by a definite date." But it doesn't say that.
11 It says: If you have all the necessary government approv-
12 als.
13 So the government approvals are factored into
14 the time schedule required by this Commission.
15 So, therefore, if it's a necessary government
16 approval and a proper government approval and a proper
17 local regulation by the village, it would not be inconsist-
18 ent with the time schedule set forth in the license of
19 this Commission.
20 MS. CHASIS: Well we would hold that it is.
21 Because the basic timing question was based on a NEPA
22 consideration. I mean, the May 1, 1979 date came out of
23 a long history of litigation over how long the plant could
24 operate without causing harm, irreparable, irretrievable,
25 substantial harm to the environment. And that was May 1, 19

wb12

Initially it was May 1st of '78.

DR. BUCK: Into that was put the facet of getting the proper government approval. And 188 was very specific about that; that this could be extended, that it would have to be extended if government approvals weren't obtained.

MS. CHASIS: Yes; but the government approvals which--

DR. BUCK: I'm sorry; all environmental respects, everything else to what was happening in '79. '79 was the date that was set on the basis of government approvals. And if government approvals had not been obtained, then that date was to be extended.

MS. CHASIS: Yes; but the question is, What kind of government approvals? Government approvals required to proceed with construction. That's the language. It's not all governmental approvals; it's governmental approvals required to proceed with construction.

And our argument is, the local incidental types of regulation which the village has the power to impose don't relate to proceeding with construction, and that ConEdison can proceed with the construction, make the necessary adjustments based on the incidental regulations that the village may impose. If they need time as a result of those incidental regulations, let them come back

wb13

and ask for it.

CHAIRMAN SHARFMAN: Well they don't know right now.

MS. CHASIS: Well there's no reason to presume that it is going to be inconsistent with the design.

And furthermore, as we argue, they may not regulate inconsistent with the design.

CHAIRMAN SHARFMAN: No; that's right. And the Appellate Division has said that.

But let's say they regulate consistently with the design, but you have to do things differently when you build a tower. You say, Go ahead and build it the way you want to and then change it later?

MS. CHASIS: That tower is not even going to start being built until a year from June of 1977. In other words, June 1978.

DR. BUCK: But you have to finalize design before you start building, Ms. Chasis.

MS. CHASIS: Yes, you have to finalize design. But the first year is primarily devoted to excavation. And I can't accept the fact that incidental changes could not be made in that design during that period.

DR. BUCK: Well it depends on how incidental they are.

MS. CHASIS: There's been absolutely no showing

wb14

of that. So I think that this is really focusing on a way to obstruct compliance and meeting the deadline that this Commission has set.

CHAIRMAN SHARFMAN: Well you had an opportunity: there was a hearing, I gather Mr. Sack said, on the question of scheduling. And you had an opportunity to introduce evidence on that question, to cross-examine. What did that show? What does the evidence show about that?

MS. CHASIS: About what?

CHAIRMAN SHARFMAN: About the question of whether or not regulation by the village might require you to delay construction so that you see what they do.

MS. CHASIS: I think the burden there was on the Company, and they made no showing of that sort, absolutely none. Nor did the village.

And we have asked-- We sent a letter to Ned Sack asking him to consult with the village and find out what kind of regulation they may impose. To our knowledge they have not even done so.

This is an issue which I think is really interfering with a major-- The village is maybe going to do something which is in violation of the Appellate Division decision. That's one of the things that ConEdison argues. And I think that you may not presume that they're going to

wb15

act inconsistent--

CHAIRMAN SHARFMAN: Ithink you're on very sound ground on that point.

But what I'm concerned about, as I said, is WHat if they do something consistent with the Appellate Division's decision?

MS. CHASIS: Well if they do something consistent, then my position, and HRFA's position is that that cannot interfere with ConEd's plans.

DR. BUCK: It can't interfere with the ultimate construction?

MS. CHASIS: Or their plans.

DR. BUCK: It doesn't say "plans."

CHAIRMAN SHARFMAN: But it might clearly interfere with some of the details.

MS. CHASIS: Yes. But my argument--

CHAIRMAN SHARFMAN: You can't build a house and then rebuild it, you know.

MS. CHASIS: But my argument there is that there is no proof that that is going to affect the construction or the timing of construction. And ConEdison can come in and ask for time. The license specifically says they can come in for good cause and ask for delay if it should come up. There's no reason to presume now that that's going to happen.

wb16

And that's exactly what you're being asked to presume. And there's no justification--

CHAIRMAN SHARFMAN: What provision of the license are you referring to now?

MS. CHASIS: I'm referring to paragraph 2.E.1.d of the license.

"After the commencement of the construction of a closed cycle cooling system a request for an extension of the interim operation period will be considered by the Atomic Energy Commission on the basis of a showing of good cause by the Applicant, which also includes a showing that the aquatic biota of the Hudson River will continue to be protected from any significant adverse impacts during the period for which the extension is sought."

So right there in the license is a mechanism whereby the Company can come in if the regulation is causing a delay in the construction schedule and get relief. And there's no reason now to presume that the regulation that the village may impose is going to be inconsistent.

CHAIRMAN SHARFMAN: Isn't it clear from the Appellate Division's decision that a variance from the village is required? Because, after all, they ordered the variance to be issued.

wb17

MS. CHASIS: That's right.

CHAIRMAN SHARFMAN: And there's an automatic stay provision, as you know, in the CPLR that says, If a government agency appeals there's an automatic stay and they don't have to issue that.

So isn't it clear, then, that the variance is a necessary approval under New York law?

MS. CHASIS: But ithas to issue. And therefore I think it is academic to say that you have to have the piece paper when the court has said they have to issue it and they have to issue it so as not to prevent construction -- not to--

CHAIRMAN SHARFMAN: They can issue it with some modifications.

MS. CHASIS: But the point is they have to issue it. And I don't think you can say you have to wait until you get the piece of paper. Because they're under a specific, a very specific directive. And just because they choose to litigate this issue, which everyone except the village agrees is something on which the law, federal and state, is clear they cannot do, that should not stop the commencement of construction, just because the village chooses to carry on this hopeless fight and not issue the variance.

CHAIRMAN SHARFMAN: I understand your point.

wb18

But let me ask you a question that really bothers me on your position here, and that is:

It's clear to me as a lawyer, and should have been clear to you, looking at that paragraph B.2.e.1.b in the license that it might be that in trying to obtain some necessary government approval you might have litigation, and you might not have the government approval until the litigation would terminate. And, as you said, the finding in ALAB-188 was, the fish were safe until May 1st, 1979.

And if you were concerned about the fish at that point, and the license said the government approvals have to be required, why didn't you appeal? Why didn't you go to the courts and says, This is a bad condition; it's inconsistent with NEPA; it doesn't protect the fish?

Youcould go on for years not getting the government approvals.

MS. CHASIS: Because we read that provision to indicate that it was an accommodation -- and I don't say that in a pejorative sense, but it was a recognition that ConEdison could not control the timing of approval.

It was not a mechanism put in the hands of an entity which did not have the authority to prevent construction, a mechanism for delying and preventing that construction.

So that I think that's what the village has

wb19

done; they have taken this provision and they have basically used it, even though everybody agrees the substantive law on this point is very, very clear. And the fact that they have chosen to thrash this out in the state courts through lengthy procedures -- and the Court of Appeals hasn't even decided it's going to consider the question, I think cannot form the basis for a delay in compliance with the May 1st, 1979 date.

And that's very clearly our position. It should not be a weapon: it was never intended to be, as we read that license condition, a weapon in the hands of the village of Buchanan or any other agency.

CHAIRMAN SHARFMAN: Well it looks to me as if it's a protection for ConEdison, that they don't have to build something that a local agency later says doesn't comply with their -- with the necessary regulatory authority.

MS. CHASIS: I think the answer to that is that the courts have made very clear -- and I think the Licensing Board was correct in relying on the state court's decision -- that ConEd is protected, and that the village may not interfere with the plan that Consolidated Edison has.

CHAIRMAN SHARFMAN: You're using wording that isn't in there. As I read it to you, it said they can't do anything inconsistent with the construction. They didn't

wb20

say they can't interfere in some way so long as the interference is local and incidental and limited. --to use a few words that they used.

MS. CHASIS: That's right. Okay.

And I think, you know, that puts it in a very proper perspective. This is a very limited kind of regulation which is being permitted to the village.

CHAIRMAN SHARFMAN: Well, let's say ConEdison digs a hole, and that takes -- I don't know how long it takes to dig a hole for a cooling tower.

MS. CHASIS: A year, I believe.

CHAIRMAN SHARFMAN: All right.

And after they dig the hole they have to start to build it; right?

Now even you would agree that in the actual building of the thing there might be some things that the village wants in there that would be inconsistent with the way ConEd might be building it. At that point, according to you, ConEd has to come back to us and make a motion under paragraph D of the license asking for an extension of the interim operation period, showing not only good cause but showing that the fish will continue to be protected.

And then I gather the Staff would have to come up with an environmental statement; wouldn't they

MS. CHASIS: If there is significant impact on

wb21

1 the human environment.

2 CHAIRMAN SHARFMAN: And that might take a year

3 or two. And what happens, then, with building your cooling

4 tower?

5 MS. CHASIS: That's the way the license reads.

6 That is the National Environmental Policy Act. That is the

7 law.

8 That's the way the license--

9 CHAIRMAN SHARFMAN: That means, though, you're

10 putting ConEdison in the position of really having to go

11 ahead and built it and possibly having to tear it down again

12 to comply with--

13 MS. CHASIS: No; because the village cannot do

14 that. That's exactly the point. They cannot go that far.

15 They cannot regulate inconsistently.

16 And Ithink you have to look at what was before

17 the licensing board in terms of the design of the tower.

18 And when they approved it they approved that design, and

19 they approved that tower. And ConEdison can build that

20 tower. And the kind of regulation which the village may

21 impose is incidental: --roads; questions such as that,

22 and maybe things affecting the tower. But only if they

23 don't interfere with the basic construction of that tower.

24 So that there's absolutely no possibility of

25 tearing down the tower once it's built. I think that is

wb22

really a red herring.

CHAIRMAN SHARFMAN: Well maybe not tearing the whole things down, but pulling parts of it out and replacing them.

MS. CHASIS: There's a provision in the license, if the village imposes conditions which cause substantial delays, or cause delays, for them to come in and seek relief here. And I think that's the way to go. Because there's absolutely no indication that the village is going to interfere in such a way as to delay construction. And if you wait until they decide they're going to issue the variance and stop litigating this, they may want to go to the Supreme Court of the United States, and we may be talking about years of litigation.

You know, I think there is an appropriate mechanism for ConEdison to obtain relief, and it is not through deciding now that all necessary approvals to proceed with construction have not been received.

CHAIRMAN SHARFMAN: But it is your position you would have to await a new environmental statement if they came in with a motion like that?

MS. CHASIS: No. You have to look at the amount of time they're asking for. And we don't make that decision; that's a decision that this Commission makes, and the Staff makes.

wb23

CHAIRMAN SHARFMAN: What would your position be, though?

MS. CHASIS: We cannot take a position at this point: you know that; we don't know the facts.

CHAIRMAN SHARFMAN: Go ahead.

MS. CHASIS: Now I think that, as even ConEdison has indicated, that the federal pre-emption law and the state law are clear that the village's power is restricted in this respect.

CHAIRMAN SHARFMAN: Well let me ask you a question about that. I'm not so sure it's all as clear as you say.

Isn't the federal pre-emption limited to radioactive emissions?

MS. CHASIS: When I say "federal pre-emption" I'm talking about the entrance of -- I'm not talking about a total pre-emption of state regulation, which I think is the case on the radiological side; I'm talking about where the federal government, pursuant to its authority here under the Atomic Energy Act and the National Environmental Policy Act, has entered a field and has properly applied its regulatory authority, the state, or agency of a state is precluded from regulating inconsistent with that regulation. And that's the Florida Lime and Avocado Growers' principle.

wb24

1 CHAIRMAN SHARFMAN: You're talking about a
2 regulation, not under the Atomic Energy Act but really some-
3 thing that is entered under our NEPA authority, aren't you?
4 Isn't that what the cooling tower is all about?
5 MS. CHASIS: Well, it's both. Because under
6 the Atomic Energy Act you have the power over construction
7 and operation of nuclear power plants. You have the power
8 to determine how nuclear power plants are to be built and
9 operated.
10 Our argument is that the kind of federal pre-
11 emption here involved does not preclude the state or an
12 agency from any kind of activity.
13 We agree that they can regulate as long as it's
14 not inconsistent with the federal regulations. They are
15 free to participate in the federal proceedings and the
16 federal determinations. And, therefore, they are not-- And
17 basically they could have decided they didn't want that
18 plant there. But once the plant is there the federal agency
19 is the one that determines the manner of construction and
20 operation.
21 CHAIRMAN SHARFMAN: Well, what about-- What
22 do you do with this provision of Section 274(k) of the
23 Atomic Energy Act,
24 "Nothing in this section shall be
25 construed to affect the authority of any state

wb24

or local agency to regulate activities for purposes of protection against radiation hazards."

MS. CHASIS: I think that has been construed-- the Act has been construed to totally pre-empt states or localities from involvement in radiological issues.

However there is not a statutory pre-emption, I agree. But where there's a federal common law pre-emption, and that is, that where an agency, a federal agency pursuant to its authority has entered an area and has regulated, that the state, or an agency thereof cannot--

CHAIRMAN SHARFMAN: Well that depends on how it entered the area. It depends on whether it has occupied the field, if I may use a legal shibboleth; doesn't it? I mean there are a lot of areas in which this Commission regulates where you do have to get local and state permission to do things. And isn't that true under NEPA very often; that NEPA governs what the federal government can do or cannot do? But it doesn't necessarily mean that a state has to allow it.

MS. CHASIS: Yes, it does. What it means is that a state cannot establish a threshold below that point.

In other words, a state cannot say -- cannot vitiate the federal requirement, as would be the case here with the village of Buchanan by saying You can operate the plant but you can't operate it with a closed cycle system.

wb25

1 That would effectively vitiate the federal requirement imposed
2 under NEPA.
3 Now under federal law the state or agency could
4 say, We don't want any operation of the plant. They have
5 that option. But under state law, as Mr. Sack has pointed
6 out, the state law prevents local zoning from interfering
7 with construction of reasonably necessary utility facilities.
8 So the federal law does not cut out the state,
9 but it restricts what it may do. And it may not allow
10 something to go on which, pursuant to federal law, properly
11 exercised, it has been determined would violate federal
12 environmental law.
13 CHAIRMAN SHARFMAN: Have you cited any cases in
14 your brief on the question of pre-emption, where the federal
15 government is acting under its NEPA authority?
16 MS. CHASIS: No, I haven't. I have cited to
17 the Florida Lime and Avocado Growers, and--
18 CHAIRMAN SHARFMAN: I was wondering if you knew
19 ofany such cases?
20 MS. CHASIS: I know that the NEPA does not
21 permit delegation of responsibility, except under very
22 limited circumstances, to a state or an agency thereof, or
23 to a private party. The burden is on the federal agency
24 and--
25 CHAIRMAN SHARFMAN: The question of whether the

wb27

1 state may impose some additional requirements, or even
2 restrictions, is a different question, is it not?
3 MS. CHASIS: Well where the federal agency has
4 determined under NEPA that certain environmental harms are
5 threatened, and therefore there needs to be a limitation of
6 operation, or a conditioning of operation, then it may not
7 delegate the decision -- it may not -- to a state or
8 locality.
9 That is our position.
10 If you would like the issue briefed we would
11 be prepared to go into that.
12 CHAIRMAN SHARFMAN: Maybe we should. Let us
13 consider that.
14 MS. CHASIS: It's a federal responsibility.
15 And I think Calvert Cliffs makes very clear, I think the
16 Greene County decision in the Second Circuit makes very
17 clear, that that responsibility must rest with the federal
18 agency.
19 CHAIRMAN SHARFMAN: Well I want you to under-
20 stand the point that I'm concerned about.
21 I understand very well that if the federal
22 government wants to do something it has to make the NEPA
23 evaluation.
24 But my question is, Does NEPA occupy the field
25 and pre-empt the state? I think that's a harder question.

wb28

1 And I'd be interested in seeing some authority on that.

2 MS. CHASIS: Well I think it is also, as you

3 I think indicated, a question of each factual situation,

4 how has it entered? And, as I say, I don't argue a total

5 pre-emption. I don't say it precludes any kind of regula-

6 tion.

7 I think that the point is that it establishes

8 the minimum level below which the state may not go. I

9 don't think NEPA -- that there's a statutory pre-emption

10 under NEPA.

11 CHAIRMAN SHARFMAN: Would you also agree that

12 if the Appellate Division's decision is law, then we do

13 not have a state trying to act unlawfully here; that

14 that regulation is permissible?

15 MS. CHASIS: I think that's absolutely right.

16 And we supported that.

17 Now I'd like to address very briefly the other

18 exceptions, because time is running.

19 CHAIRMAN SHARFMAN: Okay.

20 MS. CHASIS: I really consider the other excep-

21 tions frivolous.

22 The second exception to the Licensing Board's

23 finding that ConEd should commence construction is totally

24 invalid. The Licensing Board merely took what Consolidate

25 Edison had itself said was the schedule required to comply

wb29 1 with the present license conditions for termination by
2 May 1st, 1979. And, based upon that-- and that's a schedule
3 which is set out in the November 30th letter by Ned Sack,
4 and also is supported by Mr. Sack's statement on the
5 record of the December 8th hearing at page 326. Taking
6 that period the Board said, Okay, if you're going to
7 meet that -- basically what they're saying is, If you're
8 going to meet that termination date you have to initiate
9 your construction schedule now.
10 So that it is not interference in any way with
11 the company; it was taking their schedule.
12 And I might say the reason I think they made
13 the statement was because at the October 5th hearing, at
14 pages 81 to 83, counsel for Consolidated Edison indicated
15 that this proceeding was operating in a vacuum, and that
16 once the type of system was determined nothing further
17 happened, because the whole question of once-through versus
18 closed cycle had not been resolved.
19 And I think that the Commission decision in the
20 INdian Point-3 proceeding makes very clear that that issue
21 has been resolved, absent a license amendment.
22 The question of--I think the pendency of the two-
23 year extension and the potential application for lifting of
24 the closed cycle requirement altogether may not interfere
25 with the construction, because I think the license itself

wb30

1 states the filing of such application in and of itself shall
2 not warrant an extension. And ConEdison's arguments are
3 to the contrary of the license.
4 On the question of due diligence, I don't under-
5 stand how ConEdison is harmed. The Licensing Board made
6 no ruling on due diligence with respect to the village of
7 Buchanan's approval. Furthermore, the finding was based
8 upon the record of the proceedings before the village,
9 which ConEdison had consented to make available to the
10 Licensing Board.
11 What the Licensing Board was saying is, Based
12 on their review of those proceedings there appeared to be
13 substantial basis for criticizing, or for questioning the
14 conduct of ConEdison, and that further inquiry would be
15 appropriate.
16 CHAIRMAN SHARFMAN: You said that in a brief?
17 MS. CHASIS: No; this is, I think -- you know --
18 what the Licensing Board was saying.
19 CHAIRMAN SHARFMAN: But when you raised the
20 issue you raised it in a brief; is that right?
21 MS. CHASIS: That's correct.
22 We did not raise it as a formal contention.
23 CHAIRMAN SHARFMAN: Is Mr. Sack right when he
24 said you made a statement on the record at one of these
25 conferences that you're not questioning due diligence?

wb31

MS. CHASIS: We stated we were not raising it as an issue. We were not going to argue it. And the reason we said that was because our position was that the village's approval was not required to proceed with construction, therefore we thought it was not an issue in the proceeding.

CHAIRMAN SHARFMAN: Well I'm not very impressed with that, let me tell you. Because you knew that it was a potential issue and that it might be held that all necessary approvals had not been obtained. And I think you were bound to raise it if you wanted to raise it.

MS. CHASIS: Well perhaps you're right. That was the choice we made.

I, however, think that the LIcensing Board is absolutely correct and acting properly in deciding to look into it, if they want to. And I think they have that authority. And I think that authority is, as yousuggest, derived from the license terms explicitly. To grant the requested license amendment, which includes a request to extend the termination date, there has to be a determination of compliance with the license terms. And Ithink that it is the Licensing Board's prerogative to inquire into the due diligence issue if it decides, or you decide that the village's approval is a prerequisite.

So I think that whether or not we raised it, and the correctness of our decision not to raise it, is not

wb32

1 the key to this. I think the key is really the Licensing
2 Board's authority. And I think they have it.
3 CHAIRMAN SHARFMAN: Well what about our author-
4 ity? Can we decide it on the basis of this record?
5 MS. CHASIS: Well I thought about that during
6 the break, because I anticipated that question. And I think
7 we would like an opportunity to brief that issue.
8 I don't think that further evidentiary hearings
9 would be necessary. We would stand on the record of the
10 proceeding before the village of Buchanan, which is what
11 the Licensing Board considered.
12 But we would like an opportunity to brief the
13 point, which we did not brief on appeal.
14 CHAIRMAN SHARFMAN: Well why didn't you brief
15 it already on appeal? It was raised by their exceptions,
16 wasn't it?
17 MS. CHASIS: Well I don't believe that they--
18 No, I don't think it was. Because what they were object-
19 ing to was the possible interpretation of the Licensing
20 Board decision making a finding on that. They didn't argue --
21 they didn't get into the merits. I mean, that wasn't the
22 issue before you. The issue before you--
23 CHAIRMAN SHARFMAN: Ithink they did somewhat
24 get into the merits. They said, Look at our answer. And
25 they attached it as an appendix.

wb33

MS. CHASIS: Okay. I don't think it was directly raised on appeal. And we would want an opportunity to address it. That's my answer.

CHAIRMAN SHARFMAN: We'll consider that before we adjourn. Okay.

MS. CHASIS: Finally, I think with respect to Exception No. 5 that the Licensing Board acted properly in setting a definite date for termination. They had decided the question of all necessary approvals, and there was no need therefore to condition that date, as ConEd has suggested.

CHAIRMAN SHARFMAN: Thank you very much. We allowed you to go over because we asked an awful lot of questions, and we thought it wasn't fair to cut you off there and not let you address the other exceptions.

Now, Mr. Lewis?

End 1B

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1 ORAL ARGUMENT ON BEHALF OF THE REGULATORY STAFF
2 OF THE NUCLEAR REGULATORY COMMISSION
3 by Stephen H. Lewis, Esq.
4 MR. LEWIS: Mr. Chairman and Members of the Board,
5 the Staff's position on this appeal is basically set forth
6 in our two briefs, the brief of January 13th and the brief
7 of January 21st, and I will not seek to reiterate the points
8 that we focused on there.
9 I would like to launch first of all into the state
10 law question.
11 CHAIRMAN SHARFMAN: Let me ask you about that.
12 Your brief does launch into that, and it seems to me you want
13 us to decide New York state law. Why should we do that?
14 Why shouldn't the New York courts decide that?
15 MR. LEWIS: Well, Mr. Chairman, basically our
16 position is that already two state courts have addressed--
17 Well, the first state court, the Supreme Court of Westchester,
18 did not address the state law question. However, the
19 Appellate Division did address the state law question and
20 cited to the two provisions of the statute, --
21 CHAIRMAN SHARFMAN: It didn't just cite it; it
22 decided it.
23 MR. LEWIS: -- and decided, we believe consistent
24 with the previous case law which we understand to be to the
25 effect that while a municipality can impose reasonable

eb2

1 local and incidental regulations upon utility construction
2 of various types, that if we're dealing with a so-called
3 essential utility facility, the municipality does not have
4 the authority to prevent the construction of that facility.
5 And that is a distinction that has been re-
6 iterated in numerous state law cases which we did cite in
7 our brief.
8 And we believe that the Appellate Division deci-
9 sion in the Buchanan zoning appeal case is quite consistent
10 with that. It establishes, first of all, that-- It directs
11 the variance to issue --
12 CHAIRMAN SHARFMAN: Well, assume it is consistent
13 with that, what's your point?
14 MR. LEWIS: My point is that we have here a
15 doctrine of state law which was relied upon by the Licensing
16 Board in reaching a determination that the Buchanan zoning
17 approval was not a required governmental approval prior to
18 commencement of construction.
19 The Board did this on the basis that it was their
20 understanding of state law, with which we concur, that the
21 Village of Buchanan does not have the authority to prevent
22 the construction of the facility.
23 CHAIRMAN SHARFMAN: Then the Appellate Division
24 was right, and they still have to get that variance with
25 whatever modifications are in there? They haven't got it

eb3

1 yet?

2 MR. LEWIS: Mr. Chairman, I would view that at this

3 stage of the proceeding as a purely ministerial act. The

4 Appellate Division, which is a court which has precedent-

5 setting power in the State of New York, and absent an appeal,

6 absent the allowance of an appeal before the Court of Appeals,

7 that would be a binding precedent from the Appellate Division,

8 has already stated that -- has directed that the Village of

9 Buchanan issue the variance.

10 Now the fact that there may be some delay-- Indeed

11 it appears that because of the pendency of the appeal and

12 the provision ofthe New York laws which we acknowledge, that

13 the enforcement of the judgment is stayed under New York law.

14 Admittedly this creates a situation in which the Village of

15 Buchanan will probably not in fact issue the variance as

16 a formal matter until either -- until their appeal is denied

17 or somehow decided.

18 But what the Board decided below-- What the

19 Licensing Board decided was that by virtue of the state-law

20 doctrine, the Buchanan approval is not a required govern-

21 mental approval. In light of that, I think the fact that a

22 variance may not have formally issued is not a serious defect

23 in preventing the commencement of construction of the cooling

24 tower.

25 CHAIRMAN SHARFMAN: Why not?

eb4

1 MR. LEWIS: Mr. Chairman, the Appellate Division
2 first of all directed that the variance issue, then went on
3 and pointed out that certain limited local and incidental
4 regulation might take place. I think that in your question-
5 ing Mr. Sack, his answer, his first response to this was
6 perhaps most on point; namely, he said that it was his under-
7 standing that when he was questioned by the Appellate Divi-
8 sion, there was discussion about what types of regulation
9 are we talking about. And he said Well, traffic, whether
10 or not dump trucks or perhaps trucks with very large loads
11 going to the cooling tower could traverse the streets; and
12 things of that nature.
13 And indeed, that would be my first thought, that
14 that is the kind of regulation, perhaps a police power kind
15 of regulation.
16 I can also conceive of how, under the building
17 code, there might be-- I'm not familiar with the zoning,
18 with the building code of the Village of Buchanan, but there
19 might well be certain provisions of the building code which
20 could continue to be asserted by the Village of Buchanan
21 with respect to the cooling tower.
22 But I believe that the Appellate Division made it
23 clear that they're talking about limited regulation.
24 It's difficult for me to draw a line as to what
25 would be included on one side of the limited regulation and

eb5

what would be included on the other side. There was discussion about drift eliminators and there was also discussion about moving the location of the tower.

Mr. Chairman, in my view, the Village of Buchanan could not change the location of the tower because I would view that as going beyond the limited regulation intended under the Appellate Division's view.

CHAIRMAN SHARFMAN: Where is there anything in the Licensing Board's order the requires a specific location?

MR. LEWIS: The Licensing Board's order, in its first five pages, at some length repeated the -- summarized the Final Environmental Statement and the Applicant's Environmental Report with respect to the types of cooling towers and indeed, in the proceeding below, even though there was a stipulation with respect to the choice of the tower, there was a presentation of panels by both the Applicant and the Staff to create a sufficient evidentiary record as to the types of towers we're dealing with and their various attributes.

Now there is in the Final Environmental Statement a good deal of discussion about the type of tower --

CHAIRMAN SHARFMAN: I'm talking about the location now.

MR. LEWIS: Yes, I believe that the location of the tower is also a matter discussed in the Final Environmental

eb6

1 Statement. It may not have been referenced specifically in
2 the --
3 CHAIRMAN SHARFMAN: Maybe it was discussed but does
4 it say that it has to be specifically on this spot or other-
5 wise we would not conclude the way we're concluding?
6 MR. LEWIS: No-- Well, it may not say that speci-
7 fically. Various studies were made of drift, deposition
8 patterns, noise levels, and various other impacts of the tower,
9 and of course those are based on location, a fixed location
10 on the site, and then calculations are made from that loca-
11 tion out to other fixed points.
12 CHAIRMAN SHARFMAN: Suppose it were moved 20 feet:
13 would there be a tremendous amount of difference to the Village
14 as far as the drift locations -- I mean as far as the drift
15 of the plume and the vapor and so forth, the ice?
16 MR. LEWIS: You mean if the Village did want to
17 require it to be moved 20 feet?
18 CHAIRMAN SHARFMAN: Yes, let's say to be set back
19 so much distance from the road, for example. I don't know
20 that that's a conceivable type of --
21 MR. LEWIS: Well, I don't know how much of a change
22 in location would have to be ordered by the Village in order
23 to effectuate some meaningful result.
24 CHAIRMAN SHARFMAN: But it's conceivable that you
25 might have a change in location, is it not, that would not

eb7

have any -- make any meaningful difference?

MR. LEWIS: Well, Mr. Chairman, the two provisions of the zoning codes which were the subject of the appeal were height and in fact the dispersion of pollutants, I suppose particularly here salts.

CHAIRMAN SHARFMAN: The subject of what?

MR. LEWIS: Of the sought zoning variance. The two provisions of the zoning code for which Con Edison sought a variance were the height provision and the dispersion of pollutants, so that this matter has been focused on considerably at the zoning board level.

CHAIRMAN SHARFMAN: Okay.

Now are you saying that the height could not be varied at all without being inconsistent with what the Commission approved?

MR. LEWIS: It is perhaps possible that the height could be varied some.

Mr. Chairman, I can't --

CHAIRMAN SHARFMAN: What about these drift eliminators that might change the dispersion of pollutants?

MR. LEWIS: Well, I think a review of the Final Environmental Statement will indicate that pursuant to the concern about possible levels of drift deposition offsite, that state-of-the-art drift eliminators are required.

Nevertheless it is possible that the Village of

eb8

1 Buchanan might assert different views as to what should be
2 done with regard to drift eliminators or other pieces of
3 equipment.
4 I can easily foresee a possibility of the Village
5 of Buchanan undertaking various discussions with the Applicant
6 with regard to various pieces of equipment in the design of
7 the tower and indeed, as Ms. Chasis has pointed out, since
8 the first order of business to be undertaken by the Applicant
9 would be the letting of the bids for the excavation and the
10 commencement of excavation, which does take a year at the
11 site because of the rock formations, as I understand it, there
12 would perhaps be a built-in amount of time during which
13 finalizing of design might be able to include the Village of
14 Buchanan in that process.
15 I don't know how the Applicant intends to proceed.
16 CHAIRMAN SHARFMAN: And what if the litigation
17 takes that long in the New York courts, which is entirely
18 conceivable? As I read the CPLR, they have two more motions
19 to make before they're shut out of the Court of Appeals,
20 and if they win any one of those three motions, then they go
21 ahead on the merits in the Court of Appeals. So you could
22 have a rather prolonged litigation of this appeal.
23 MR. LEWIS: Well, Mr. Chairman, we believe the
24 pendency of the appeal before the courts of New York is not
25 any impedement to commencement of construction. There is an

eb9

1 established doctrine of law in New York regarding essential
2 utility facilities. While it is always possible that the
3 Court of Appeals might reverse that doctrine, we do not think
4 it is likely in view of the number of cases that we have
5 been able to uncover that have reiterated consistently with
6 respect to transmission lines, booster pumping stations for
7 water companies, and various other facilities.
8 And municipalities do not have the power, under
9 zoning ordinances, to prevent this type of construction.
10 CHAIRMAN SHARFMAN: Well, now, but they need that
11 variance under New York state law in order to build, don't
12 they? Can they start anything without the variance under
13 New York law?
14 MR. LEWIS: Under New York law, under the zoning
15 ordinance of the Village of Buchanan, they apparently need
16 a variance --
17 CHAIRMAN SHARFMAN: Even before they start digging
18 a hole?
19 MR. LEWIS: Well, I don't-- I do not know specifi-
20 cally what the zoning ordinance says on that point so I can't
21 say.
22 CHAIRMAN SHARFMAN: Well, if that is true you can't
23 compel the Village to give them the ordinance because the
24 CPLR stays that order of the Appellate Division, does it not?
25 Or maybe is it possible to make a motion to remove the stay?

eb10

I don't know.

Have you looked into that question?

MR. LEWIS: I have not. We did cite in our brief-- We did bring to the Board's attention in our brief the fact that there is a stay of enforcement of the order.

CHAIRMAN SHARFMAN: Section 5514; right?

MR. LEWIS: I think it is 5519.

But we did point out that we did not consider that this stay of enforcement of the Appellate Division's order in any way requires any element of this Commission to stay their hand with regard to commencement of construction of the tower.

CHAIRMAN SHARFMAN: Well, how do you get around the license requirement that you have to have the necessary government approvals? You admit that it's necessary or at least might be necessary; you're not sure. And yet you say that we have to order construction started despite the fact that the license says the date should be moved up if they haven't gotten the necessary government approvals. How do you get around that?

MR. LEWIS: Mr. Chairman, perhaps I misspoke myself slightly before.

You asked me if I thought the variance, the actual issue of the variance itself was a necessary precondition to the commencement of some type of construction.

ebll

CHAIRMAN SHARFMAN: Necessary under New York law.

MR. LEWIS: Perhaps I should clarify my view on that.

I believe that in view of the state court doctrine which we have relied upon and which the Licensing Board relied upon that no significance should attach to whether or not as a matter of actual procedure, the Village of Buchanan has in fact issued the variance.

And indeed it's obvious in the present situation they are not going to issue the variance as long as their appeal is pending.

The fact of the matter is that the outstanding orders of two Boards have either--

CHAIRMAN SHARFMAN: What about the Appellate Division's order? They say you have to issue the variance so they apparently regard the variance as necessary. And if the Village were to exercise any rights of local regulation that deal with either the height or the -- What was the other?

MR. LEWIS: The dispersion of pollutants.

CHAIRMAN SHARFMAN: -- the dispersion of pollutants, the place to do it would be in the variance, would it not?

MR. LEWIS: Yes, it would. But as I have stated, it would be my position that under the limited nature of the regulation that can be undertaken by Buchanan, those elements placed in the license would be of such a nature that they would

ebl2

1 prevent commencement of construction of the tower.

2 I believe that certainly the excavation can com-
3 mence and I can conceive of no proper condition under the
4 Appellate Division order which would invalidate the work
5 that had been begun.

6 CHAIRMAN SHARFMAN: You're arguing practicalities
7 of construction and my question relates to the laws of New
8 York, as to whether they can commence construction without
9 that variance.

10 MR. LEWIS: Well, I admit, Mr. Chairman, that the
11 Village of Buchanan zoning ordinance does require a variance.

12 CHAIRMAN SHARFMAN: And theAppellate Division
13 requires a variance.

14 MR. LEWIS: And the Appellate Division --

15 CHAIRMAN SHARFMAN: And the license says they
16 don't have to start unless they've got the necessary govern-
17 mental approvals.

18 MR. LEWIS: Mr. Chairman, I would submit, in view
19 of the argument I've made about the ministerial nature, if
20 there were no appeal pending in the Court of Appeals, that I
21 would say that, particularly in that situation, Buchanan's
22 responsibility in the present situation would be purely
23 ministerial.

24 But they have taken an appeal to the Court of Appeals.
25 I'm not questioning anything about their right to take it,

ebl3

but in my view of the New York state law, the fact that the specific variance has not issued and probably will not for some time is not an impedement to the commencement of construction of the tower.

DR. BUCK: You're adding modifications to 188 that aren't there.

MR. LEWIS: I'm sorry, what specific provisions?

DR. BUCK: That all necessary government approvals have to be obtained. Obtained -- period -- not obtained in some lawyer's mind that's going to come three months from now.

MR. LEWIS: I'm arguing that the Village of Buchanan is not a necessary governmental approval under that provision.

CHAIRMAN SHARFMAN: Which is inconsistent with the Appellate Division's decision.

MR. LEWIS: No, I don't believe it is inconsistent. The Applicant focused very closely on the question of whether or not there was some extreme difference between the Westchester court's decision saying that Buchanan -- that the Village of Buchanan was enjoined from enforcing or attempting to enforce the zoning provisions, and the Appellate Division's order that the Village was directed to issue the variance. Frankly, I don't see that great a difference.

I think one of the main reasons that the Appellate

ebl4

1 Division directed the issuance is that they recognize that
2 certain local and incidental provisions might be placed in
3 it. Well, in view of that I would assume that they felt
4 that they had to direct the issuance of a variance which
5 might well include certain local and incidental regulations.
6 But I do not consider-- Other than that, I do not
7 consider the distinction to be that significant and I don't
8 believe that the language of the Appellate Division in any
9 way prevents the commencement of construction here.
10 CHAIRMAN SHARFMAN: Well, what are your views on
11 federal preemption? As I recall, your brief says nothing.
12 MR. LEWIS: Well, our brief says that the federal
13 preemption issue need not be reached by the Appeal Board for
14 the following reasons:--
15 CHAIRMAN SHARFMAN: Well, "need not" -- Well, I'm
16 sorry. Go ahead.
17 MR. LEWIS: The Appellate Division relied upon two
18 documents of law. They affirmed Westchester Court's reliance
19 upon federal preemption.
20 They also cited to the state law doctrine of
21 essential utility facilities.
22 The Licensing Board did not rely upon the federal
23 preemption argument but reiterated its understanding,
24 consistent with the Appellate Division's opinion, of the
25 state law doctrine.

eb15

1 The Staff, in view of this, stated the facts.
2 We believe that the Licensing Board's decision is clearly
3 supportable on the state law doctrine which we have enun-
4 ciated here. And the federal preemption question-- While we
5 admit that it might well be an interesting question because
6 of the NEPA aspects, because it is a question of preemption
7 under NEPA as opposed to under the Atomic Energy Act, we
8 do not believe that that is a necessary inquiry for this
9 Board's decision on the exceptions raised by Con Edison.
10 CHAIRMAN SHARFMAN: Because you don't think the
11 Appellate Division's decision conflicts with the federal
12 regulation?
13 MR. LEWIS: In other words, the Appellate Division's
14 decision that federal preemption does apply?
15 CHAIRMAN SHARFMAN: No, their decision that they
16 may regulate the local effects.
17 MR. LEWIS: No, I believe that certain residual
18 regulation of local effects would not be a violation of any
19 federal regulation that I'm aware of.
20 CHAIRMAN SHARFMAN: What about the possibility
21 that the Court of Appeals will take the case and say there's
22 no federal preemption at all, and you can regulate to the
23 hilt, Village, then where are we?
24 MR. LEWIS: Well, I doubt that-- Mr. Chairman,
25 I cannot accept the premise of that. In order to say that

ebl6

1 the Court of Appeals would not only have to say that there
2 is no federal preemption but they would also have to sub-
3 stantially modify or overrule the doctrine of essential
4 utility facilities, which does hold that the type of regula-
5 tion that can be undertaken by municipalities is limited.
6 CHAIRMAN SHARFMAN: You're saying that's completely
7 impossible?
8 MR. LEWIS: No, I certainly would not claim that.
9 CHAIRMAN SHARFMAN: Well, I submit to you the
10 question of preemption is not at all crystal clear from what
11 I've seen in this particular context.
12 MR. LEWIS: I would agree with that.
13 CHAIRMAN SHARFMAN: So maybe they might disagree
14 with the Appellate Division. It's not entirely inconceiv-
15 able. And then on the question of state law you would have
16 to show, as I read the statute, that it's an essential
17 facility.
18 MR. LEWIS: Yes.
19 CHAIRMAN SHARFMAN: And you can argue that it is
20 not essential because you have the plant running without it,
21 arguably.
22 MR. LEWIS: You could argue that.
23 CHAIRMAN SHARFMAN: You can argue that it's essen-
24 tial because the NRC has required it, but you have both
25 arguments.

eb17

1 MR. LEWIS: That's what the Board argued and that
2 is what we agree with, that it is an essential --
3 CHAIRMAN SHARFMAN: Well, the point of my questions
4 are that it's not inconceivable to me that the Court of
5 Appeals might give you a decision that's very different from
6 what you've got now, and that might make the question of
7 whether or not there is federal preemption important.
8 So why is it that you say we can just forget about
9 it at this stage?
10 MR. LEWIS: Well, Mr. Chairman, I say they have to
11 admit that it's not inconceivable that you would have perhaps
12 a substantial change in the groundrules by the Court of
13 Appeals, but there are certain independent responsibilities
14 that are imposed by the license. There are certain obliga-
15 tions that are imposed by the license upon Con Edison.
16 And there's a substantial history before this Com-
17 mission with respect to this proceedings, and the dates for
18 termination of once-through cooling of course are perhaps
19 the most essential provision of the license for Indian Point
20 2.
21 There has been concern for years in the various
22 proceedings before this Commission with respect to that date,
23 and of course the reasons were based upon ecological impacts.
24 So I would suggest that under these circumstances
25 there is a substantial incentive in the commencement of

eb18

1 construction in order to meet, on a construction schedule
2 which the Applicants themselves have sponsored in this pro-
3 ceeding-- The Applicants admit that if they are to complete
4 the facility by May 1, 1980, the should at the present time,
5 as I understand it, be undertaking -- receiving bids for
6 excavation.
7 But in any event there's a schedule which under-
8 lies this whole end date and it was a schedule that was very
9 substantially gone into in the hearings before the Licensing
10 Board in '73 or '73 or whenever, and were discussed in this
11 proceeding below.
12 So that just on the basis of the Commission's
13 orders in this proceeding -- and when I say the "Commission"
14 I mean all levels of the Commission, there is a substantial
15 reason why the commencement of this tower should be under-
16 taken at this time.
17 CHAIRMAN SHARFMAN: I hate to repeat myself, but
18 let me ask you the same question I asked Ms. Chasis when
19 she made this point and that is:
20 Why didn't you oppose this provision in the license
21 about the necessary government approvals if you were so
22 concerned that a delay might endanger the fish?
23 MR. LEWIS: I think the necessary governmental
24 approvals provision is a very fair provision, and I would not
25 have felt that it should have been opposed in any way. And

eb19

1 under the interpretation that the Staff is espousing today,
2 we do not see how that position interpreted in this manner
3 would in any way be an impediment to the commencement of
4 construction of the facility.
5 I don't know that there was ever set out anyplace
6 a list of what approvals were understood to be the approvals.
7 I believe there was some discussion of this in ALAB-188.
8 CHAIRMAN SHARFMAN: There was a mention, yes.
9 DR. BUCK: There was a lot of discussion of this
10 on the record of the hearing itself, and there were a great
11 number of agencies, including local government agencies'
12 approvals which were mentioned in this thing as being re-
13 quired.
14 I can't refer you to the exact page in the
15 transcript of the hearing that long ago but I know that there
16 was discussion of this sort of thing. You just can't wipe
17 out a local government agency because the people don't happen
18 to like towers. I mean this is one of these things that--
19 It was their approval along with many, many other possible
20 government agency approvals that were considered.
21 MR. LEWIS: That's correct. There was discussion
22 on that.
23 Mr. Chairman, this brings up a point. There was
24 discussion earlier as to whether or not the Village of
25 Buchanan had had its day in court, if you will, in this

eb20

1 proceeding.

2 Mr. Chairman, the Village of Buchanan-- I think

3 I can safely say in this proceeding that substantial dis-

4 cussions were undertaken between the Staff and the Village of

5 Buchanan on numerous instances, and the Village of Buchanan

6 offered comments, extensive comments, on the Draft Environ-

7 mental Statement in this proceeding.

8 They made limited appearances through their Mayor.

9 They did not, however, seek to become a party. And I have

10 to believe in this situation it was a conscious decision

11 on their part because in fact the nature of the discussions

12 that had been going on between the Staff and the Village had

13 been extremely extensive, and the Village was well aware

14 of the pendency of this proceeding, and in fact did intervene

15 in the extension-of-interim-operation proceeding and expressly

16 stated at that time that their intervention was so limited.

17 So that I believe the views of the Village of

18 Buchanan have been very substantially factored into this

19 proceeding. The Chairman directed the parties at one point

20 to assure that the Mayor of the Village of Buchanan was

21 receiving copies of everything because he was concerned as

22 to why Buchanan had not formally appeared in this proceeding.

23 CHAIRMAN SHARFMAN: What do you think about the

24 question of the EPA's jurisdiction under the Federal Water

25 Pollution Control Act? Do you agree with Mr. Sack that that

eb21

1 suspension of the discharge permit gives us full rein to
2 do what we want with our own license at this point?
3 MR. LEWIS: No, I can't quite agree with that.
4 The provision of the 402 permit has the same date, May 1,
5 1979, as the NRC license had.
6 Con Ed has appealed for an exemption under 316A and
7 for a determination under 316B with respect to the intake
8 and discharge systems and under EPA's regulations that there-
9 fore stays those contested provisions of the 402 permit.
10 However, EPA did, in a comment letter on the Draft
11 Environmental Statement in connection with the extension
12 of interim operation assert that although as a matter of
13 law the 402 provisions had been stayed that nevertheless, as
14 of the present time, their position still was May 1, 1979.
15 CHAIRMAN SHARFMAN: Wait a minute. What is this
16 document you're referring to?
17 MR. LEWIS: A comment letter on the Draft Environ-
18 mental Statement on the extension of interim operation, the
19 related proceeding.
20 CHAIRMAN SHARFMAN: Is this in the record?
21 MR. LEWIS: It's in the record of that proceeding.
22 CHAIRMAN SHARFMAN: It's published, attached to
23 the Draft Environmental Statement?
24 MR. LEWIS: Yes-- It's attached to the Final
25 Environmental Statement.

eb22

CHAIRMAN SHARFMAN: To the Final Environmental Statement?

MR. LEWIS: Yes. It's "Comments upon the --"

CHAIRMAN SHARFMAN: Which is in the record in the companion proceeding here?

MR. LEWIS: Yes, sir.

CHAIRMAN SHARFMAN: Does anyone object to our looking at that on this appeal?

MS. CHASIS: No.

CHAIRMAN SHARFMAN: Mr. Sack?

MR. SACK: Well, I would object to that. It's a very peculiar letter and we think it is essentially a non sequitur. We have not had an opportunity to address that letter.

CHAIRMAN SHARFMAN: Well, we might give you an opportunity to address it in brief; assuming we do, would you object to our looking at it?

MR. SACK: We would not object if we had an opportunity to submit a brief on it.

CHAIRMAN SHARFMAN: All right.

MR. LEWIS: Mr. Chairman, if I may pursue that letter for a moment, -- you will of course be able to read it -- but the point the EPA was asserting there was that to grant a two-year extension in that proceeding would somehow prejudge their proceeding which would have to come to grips

eb23

1 also with the questions of whether or not the tower, the
2 requirement of the tower should be continued in effect.
3 I believe that obviously EPA has a prime respon-
4 sibility -- the lead responsibility under the FWPCA with
5 respect to impositions of types of cooling systems. However,
6 the NRC also has responsibilities under NEPA.
7 At the moment what you have is you have an EPA
8 402 provision which has been stayed and which is now the
9 subject of proceedings. When those proceedings will be
10 terminated I do not know. In this state of the facts and
11 because I believe that there's a strong independent NEPA
12 basis for the Commission's determinations with respect to
13 the termination date of this proceeding, I believe that the
14 Appeal Board is free to complete this proceeding and deter-
15 mine the resulting termination date without awaiting the
16 results of the EPA proceedings.
17 CHAIRMAN SHARFMAN: Well, Mr. Lewis, as I read
18 Section 511.C of the Federal Water Pollution Control Act,
19 it's an either/or provision. We either have power to act
20 or we don't. And if we don't have power to act, then we don't
21 have power even to extend it one year, as the Licensing
22 Board did.
23 MR. LEWIS: Well, Mr. Chairman, of course in this
24 case you did have a 402. Admittedly that 402 is now stayed.
25 And of course you had the requisite 401 as well. Perhaps

eb24

there were even 21.Bs at that time.

I believe in reliance upon those permits, the Commission has proceeded to make certain determinations.

Now the NEPA obligations of the Commission with respect to a balancing of the costs imposed by the loss to the fisheries against the costs related to construction of a closed-cycle cooling tower would seem to me to continue to be a matter peculiarly within the province of this Commission.

CHAIRMAN SHARFMAN: Not if it's inconsistent with what the EPA decides.

MR. LEWIS: Well, at the moment there is no way that one can determine whether that is inconsistent. What you have is you have a state provision and you have no substitute provision from EPA.

CHAIRMAN SHARFMAN: Well, let me address your attention to some language in the Commission's policy statement on implementation of Section 511 of the Federal Water Pollution Control Act which was published on December 31, 1975, and made effective on January 30, 1976.

In that policy statement, paragraph 4, it reads:

"Alternatives: (a) Neither alternative cooling water intake structure location, design, construction and capacity nor alternative pollutant discharge systems will be considered

eb25

by NRC pursuant to NEPA. . . ."

And I'm omitting something here.

". . . .if and to the extent that a permit or determination with a condition requiring the adoption of a particular alternative has been issued for the facility or activity pursuant to. . . ." and they mention a whole bunch of sections of the FWPCA which includes Section 402.

So that if 402 requires something-- If 402 requires closed-cycle cooling by a certain date, as I read that, we do not have the power to say you can delay the closed-cycle cooling to a later date unless the EPA is not saying that and has-- I have not seen those documents. If they completely suspended that provision then we may be perfectly free to do that.

MR. LEWIS: Well, of course that provision refers to an "effective 402."

CHAIRMAN SHARFMAN: It seems to, yes.

MR.LEWIS: Well, with respect to the present status of this proceeding, of course you have a stay of the --

CHAIRMAN SHARFMAN: That's what everyone has told me. I'm just raising the question because I haven't had an opportunity to see those documents.

MR. LEWIS: Well, I think perhaps, Mr. Chairman, you're getting into the question of what would happen if

eb26

1 this Commission did keep in effect its orders requiring
2 conversion to closed-cycle cooling and somehow, at some later
3 point, EPA might in a 402 proceeding rule the opposite.
4 I think that --
5 CHAIRMAN SHARFMAN: Or rule a different date for
6 conversion.
7 MR. LEWIS: Well, that may be. In the past it has
8 appeared to be the case that they have been fully aware of
9 the NRC dates and have in fact, up to this time, mirrored
10 the NRC dates. Whether or not that would continue to hold
11 I don't know.
12 And they're well aware of the slip to May 1, 1980.
13 CHAIRMAN SHARFMAN: What is your position -- and
14 the time is moving on -- on the question of due diligence?
15 MR. LEWIS: Well, Mr. Chairman, first of all I
16 believe that the Licensing Board was correct in ruling that
17 they had an obligation under the license terms itself to
18 investigate whether or not due diligence had been practiced
19 by Con Edison.
20 The licensing provision says that if all regulatory
21 approvals have not been received by December 1, 1975, even
22 though Con Edison has acted with due diligence, then it is
23 entitled to a commensurate delay.
24 In order to make a determination as to whether or
25 not Con Edison was so entitled, one would have to determine

eb27

1 whether or not they have practiced due diligence in the
2 prosecution of the various permits they needed.
3 Now the Licensing Board determined that with
4 respect to all permits which it considered to be required
5 under this provision Con Edison had practiced due diligence.
6 It also determined, therefore, that it was not necessary for
7 it to determine the question of due diligence with respect
8 to Con Edison's presentations before the zoning board of
9 appeals. And we would concur in that handling of the matter.
10 CHAIRMAN SHARFMAN: So what do you think has to be
11 done now?
12 MR. LEWIS: Well, Mr. Chairman, if you--
13 CHAIRMAN SHARFMAN: Supposing we decide that the
14 Licensing Board was wrong on the question of necessary govern-
15 ment approvals, what can we or should we do on the question
16 of due diligence?
17 MR. LEWIS: I do know that we would want the oppor-
18 tunity to brief the matter; whether or not it would require
19 further evidentiary supplementation I do not have an opinion
20 on as yet.
21 As has been noted, and I think on rebuttal probably
22 the Applicant will point out where it is in the record,
23 the transcript of the zoning board of appeals' argument was
24 made available to the Board with the consent of the parties
25 and copies were made available to all the parties.

eb28

1 CHAIRMAN SHARFMAN: Is it an exhibit?

2 MR. LEWIS: It was never admitted into the record
3 formally. However, I believe there is a letter from the
4 Board Chairman noting that the Board is considering the trans-
5 cript in view of the consent of all the parties.

6 CHAIRMAN SHARFMAN: Is it attached to someone's
7 brief here or not?

8 MR. LEWIS: No.

9 CHAIRMAN SHARFMAN: Would any of the parties have
10 objection to our examining that transcript if we wanted to
11 consider the issue of due diligence?

12 MR. LEWIS: We would not.

13 CHAIRMAN SHARFMAN: Ms. Chasis?

14 MS. CHASIS: No.

15 CHAIRMAN SHARFMAN: Mr. Sack?

16 MR. SACK: I'd have to consider in what respect
17 you're considering it. If you're considering the whole due
18 diligence, which I plan to address later, there are other things
19 that should be considered.

20 CHAIRMAN SHARFMAN: I'm just asking you if you would
21 object to our considering it in view of the fact that it was
22 not admitted as an exhibit in evidence because if you don't,
23 then we don't have to go through that formality.

24 MR. SACK: I have no objection.

25 CHAIRMAN SHARFMAN: Somebody would have to actually

eb29

1 submit it to us, however. Maybe the burden should be on you,
2 Ms. Chasis, to do that.
3 MS. CHASIS: Well, I think Con Edison has copies
4 of it. I mean they provided it to the Board and agreed to
5 because they have copies.
6 MR. LEWIS: The Chairman of the Licensing Board
7 directed me to supply the Board with copies of it, so I'll be
8 happy to provide you with the necessary copies.
9 CHAIRMAN SHARFMAN: Okay.
10 MR. LEWIS: Mr. Chairman, in connection with the
11 question about the due diligence we note that Con Edison has
12 raised the question about 2.760A, the sui sponti review pro-
13 vision. We don't believe that that is controlling in this
14 situation for the reason that we believe the Licensing Board's
15 inquiry was dictated here by the provisions themselves of
16 the license, and we do not believe that there somehow had to
17 have been a contention on the subject before the Licensing
18 Board could properly consider it below.
19 CHAIRMAN SHARFMAN: I think your time has really run
20 over, so unless there is anything vital that you have omitted,
21 I would like to hear Mr. Sack on rebuttal.
22 MR. LEWIS: Thank you.
23
24
25

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MR. SACK: Couldwe have a few minutes' recess to confer among ourselves?

CHAIRMAN SHARFMAN: We'll have five minutes.

(Recess)

CHAIRMAN SHARFMAN: Mr. Sack?

REBUTTAL ARGUMENT ON BEHALF OF APPLICANT, CONSOLIDATED EDISON COMPANY OF NEW YORK

By Edward Sack, Esq.

MR. SACK: The first point I want to mention concerns the document on due diligence that lists all of ConEdison's actions taken to get regulatory approvals. It was offered in evidence, and on page 251 of the transcript was marked Exhibit 2 for identification. The parties then objected to the introduction of this in evidence on the grounds that it was not material, an objection which is completely inconsistent with the positions they're taking now. And that objection was sustained. So it is marked for identification. It is not admitted in evidence.

So we would need a hearing to submit this in evidence.

And also we would want an opportunity for hearing to address whatever specific issues the Board addresses, the Board wants to inquire into. But we would assume there would be some specifics if there would be a hearing.

wb2

HRFA, as I think the other parties have all informed you, did say that they were not raising due diligence issue. That's on page 276 of the transcript where Ms. Chasis said "We do not anticipate raising factual issues with the due diligence question."

CHAIRMAN SHARFMAN: So she clearly has waived a hearing, but you have not; you want one?

MR. SACK: We would want a hearing to address the issues raised by the Board. We wouldn't think that a new hearing would give the parties opportunity, a second chance to raise contentions they had not previously raised.

CHAIRMAN SHARFMAN: Well if we're having a hearing, Mr. Sack, I don't know how we can limit it.

MR. SACK: In NRC practice the hearing is limited to specific issues and contentions.

CHAIRMAN SHARFMAN: But there are no contentions on this. It would be a sui sponti inquiry.

MR. SACK: Well the Board who is asking for this would have to state its -- the issues: they are not contentions when the Board states them. They would have to address, they would have to state the issues they want to hear evidence on. And we might wish to introduce not only the Buchanan zoning board record but the briefs that we submitted both to the Supreme Court of Westchester County and the Appellate Division, which are very extensive,

wb3

1 and they would support due diligence.

2 CHAIRMAN SHARFMAN: Well the zoning board

3 transcript is going to be furnished to us, I thought.

4 And you just said you had no objection to our looking at

5 that. Is that right?

6 MR. SACK: That's correct.

7 But I would urge the Board to read it in con-

8 nection with the portion of the transcript annexed to my

9 brief, where I explain the conduct. Because what does not

10 appear from just reading the transcript, and which confused

11 the Licensing Board, is that there were definite strategic

12 decisions made by ConEdison in its presentation as to what

13 was relevant and what was irrelevant. And the Board did

14 not understand that and went ahead and made those statements.

15 CHAIRMAN SHARFMAN: I understand that. We can

16 certainly review the December 8th transcript as part of

17 the record as I see it. Even though it came after the

18 November 30th decision it is relevant, and it came before

19 the December 27th decision. I don't think there should be

20 any insuperable obstacle to our considering that.

21 Now suppose we consider that transcript and

22 we also consider the zoning board record that's going to be

23 submitted to us. And supposing, if you wanted to submit

24 your briefs in the state courts to us, supposing we took

25 those. Would you still think there would be a need for

wb4

1 an evidentiary hearing?

2 MR. SACK: I'm sorry; did you say you would

3 take in evidence--

4 CHAIRMAN SHARFMAN: Not in evidence. We can't

5 do that.

6 MR. SACK: Take the document that was

7 Exhibit 2 for identification?

8 CHAIRMAN SHARFMAN: Would the other parties

9 have any objection to our looking at the-- What kind of a

10 document is it?

11 MR. SACK: It's a listing of all the steps Con-

12 Edison took to obtain governmental approvals, all govern-

13 mental approvals.

14 CHAIRMAN SHARFMAN: Do the other parties have

15 any objection to our looking at that?

16 MS. CHASIS: Yes, we do. We objected at the

17 time, I believe. And the problem was that there was, we

18 thought, unnecessary editorial comment. It was not a mere

19 listing. And of course it relates to government approvals,

20 not an issue here.

21 CHAIRMAN SHARFMAN: I gather the only area of

22 governmental approval that has been questioned on the subject

23 of due diligence is the village of Buchanan's zoning board's

24 variance.

25 MR. SACK: That's the only one we're raising as

wb5

1 an outstanding matter.

2 CHAIRMAN SHARFMAN: It's the only one that the

3 Licensing Board was concerned with, it's the only one that

4 HRFA was concerned with. And maybe we don't need evidence

5 as to the others, it would seem.

6 MR. SACK: Well, you could take that portion of

7 the document which refers to the village of Buchanan pro-

8 ceeding. It is separated out into the different permits.

9 And there's one section on--

10 CHAIRMAN SHARFMAN: Is there anything there

11 that is vital to you, other than the record of the zoning

12 board hearing, your briefs in the state courts, which you

13 could submit to us if you want? I don't see why we couldn't

14 take official notice of those, or why anybody would object

15 to our seeing them.

16 You wouldn't object, I gather?

17 MR. LEWIS: I'm not sure the list you're referring

18 to really adds anything. I think if you had the transcript

19 of the zoning board appeals and the briefs in the state

20 courts that would probably cover the field.

21 As I recall the document to which Mr. Sack is

22 referring, it's simply a listing of the dates on which

23 various steps were taken.

24 CHAIRMAN SHARFMAN: I'm just trying to see if

25 we could avoid an unnecessary hearing here.

wb6

MR. SACK: Well actually I think the chronology that is in the document, Exhibit 2 for identification, is probably recited in the briefs. I'm not sure whether the recitation in the briefs is as complete. But I think--

CHAIRMAN SHARFMAN: Well to the extent the other parties don't question it I think it's probably conceded. So you don't really need that.

MR. SACK: Well, then, that would be satisfactory.

Before we launch into this, though, I would like to reiterate the basis for exception 4.

CHAIRMAN SHARFMAN: I'm not saying we will. That assumes that we decide with you on the question of necessary government approvals, and that assumes that we don't decide the whole thing is federally pre-empted, and that the states can't act at all. --or the state can't act at all.

MR. SACK: We discuss in Exception No. 4 the regulation. The regulation was grounded on -- was preceded by a decision of the Commission in the Indian Point-3 docket. And even though the regulation may be limited to operating license proceedings, I think the Commission's decision which laid down the standard of extraordinary circumstances, I think the Commission's decision was establishing a broad principle which is applicable to this

wb7

proceeding.

CHAIRMAN SHARFMAN: To be applied in cases involving the application of license conditions?

MR. SACK: I think it is a principle that would apply to this proceeding as a proceeding to amend an operating license.

Now this is discussed in some detail in a memorandum to the Licensing Board that ConEdison submitted on November 23rd. And it is referenced in ConEdison's brief to the Appeal Board. On page 19 there is a reference to this memorandum.

CHAIRMAN SHARFMAN: That discusses the Commission's decision in Indian Point?

MR. SACK: That's correct. And how that prevents a sui sponti inquiry by--in this proceeding, in the absence of a showing of extraordinary circumstances.

Another point: We're discussing about the Court of Appeals, about how the other parties could not see how they could reverse the lower courts in view of the state doctrine. They could do that; I won't say "easily." But they could do that by simply accepting the argument that the village of Buchanan is making, that the doctrine does not apply because the license as it existed when the zoning board conducted its hearing -- and that's the one that would be relevant: the license that existed at that time -- did

wb8

not order ConEdison to build a natural draft cooling tower.

Now on both of the appeals I had to argue -- and it has been successful so far -- that the effect of the license, even though the words didn't say "build the cooling tower," the effect of the license was to require construction of a cooling tower. But if the Court of Appeals accepted the village's argument they could make a decision that the state doctrine did not apply, and also possibly the federal pre-emption argument.

CHAIRMAN SHARFMAN: And that would mean we have to get to the issue of federal pre-emption; doesn't it? Or does it not? Do you think we should wait and see?

MR. SACK: I think you have to wait and see. Because if the license -- if it is found that the license did not order construction of a cooling tower, then you wouldn't have the basis for the federal pre-emption argument either.

I think both legal issues go together, and would rise and fall on the same standards.

On the question of the village of Buchanan's authority that still remains to it. If they changed the location of the tower, say if theywanted it twenty feet away from the water, that would affect the excavation, and that would make a change in where we'd have to dig the hole.

wb9

CHAIRMAN SHARFMAN: They have the power to do that? Do you disagree with--

MR. SACK: I would think they do.

If they say they want it, say fifty feet back from the water, or back from this side because they have some riverfront development planned, or to get it out of the view of this new housing in Peekskill, I would think that would be a valid authority -- a valid regulation, provided it didn't make a drastic change in the cost. But it would-- The site there is constrained by a very steep hill, so it would change where we'd have to dig the hole to build it. So that would affect our starting point.

CHAIRMAN SHARFMAN: But you do think they could move it?

What about the FES that Mr. Lewis referred to?

MR. SACK: Mr. Lewis is correct, that the FES copied the ConEdison plans and they had a very definite location. And I don't think the village-- If they tried to move the tower closer to the plant, then that would have a nuclear safety implication, and there may be pre-emption. But if they moved it away from the existing plant I would see no conflict with the NRC that would give base to federal pre-emption. The precise location, it's hard to see that that's a federally pre-empted concept.

Mr. Lewis said the views of the village were

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1 factored in. That's a strange concept. The village was
2 listened to and completely ignored.
3 It is true that their comments are in the
4 various documents, but I cannot see a scintilla of evidence
5 that any consideration was given to what the village was
6 saying.
7 CHAIRMAN SHARFMAN: Well that isn't really
8 relevant, is it?
9 How is that relevant to any issue we have?
10 MR. SACK: It's relevant to the statement
11 that Mr. Lewis made. I agree, I don't see where it's rele-
12 vant except to the list, where I gave my list of factors
13 that have to be taken into account in a discretionary
14 judgment as to whether or not there should be an order to
15 proceed with construction. I said the views of the village
16 should be considered. And so far no consideration has been
17 given to those views.
18 CHAIRMAN SHARFMAN: You objected to the Licensing
19 Board's statement that you have to proceed with construc-
20 tion; yet you just told me that you've argued before the
21 New York courts that, in effect, the license meant you did
22 have to proceed with construction.
23 Isn't there some inconsistency there?
24 MR. SACK: It didn't say what date it is.
25 The argument to the court, to the New York state courts

wb11

1 doesn't involve any particular schedule, any particular
2 date.
3 CHAIRMAN SHARFMAN: No, but the license does
4 have dates in it.
5 MR. SACK: The license has an end date, it
6 only has an end date. When that end date arises ConEdison
7 may have options as to what they want to do. There is
8 nothing in these arguments that requires a commencement date
9 for construction.
10 I believe that completes the arguments.
11 If you want a brief on this other issue -- you
12 said on the EPA letter.
13 CHAIRMAN SHARFMAN: Well I want to get to that
14 now.
15 On the question of our jurisdiction under the
16 Federal Water Pollution Control Act, and as opposed to the
17 EPA's jurisdiction, it seemed, I think, to some of the
18 counsel, and it seems to us as well, that perhaps you ought
19 to have an opportunity to brief that.
20 The question arises as to whether you should
21 brief any other issues. Both you, Mr. Sack, and Ms.Chasis,
22 have asked to brief the due diligence question, which might
23 avoid the necessity of another evidentiary hearing. We
24 really think you all should have briefed it before, because
25 it was a necessary, a potentially necessary issue on this

wb12

appeal. And ordinarily we would not permit you to put in a supplementary brief on that.

But in view of the possibility that this might obviate the need for an evidentiary hearing before the Licensing Board we will permit it.

Now, did anyone think that perhaps they might want to say something additionally on the issue of pre-emption under NEPA?

Ms. Chasis, did you think you might want to add something on that?

MS. CHASIS: Yes, we'd be happy to address that.

Do you want to focus that issue a little more specifically?

CHAIRMAN SHARFMAN: Well, first of all, do my colleagues have any objection to that, if she does?

I wouldn't want a whole brief on the role of the federal government and the states under NEPA, but specifically on the question of where a federal agency applying NEPA has ordered that something be done to what extent are the states precluded from disapproving that, if any. I would be interested in seeing if there is any law on that subject.

MR. LEWIS: Are you envisioning, in the case of the pre-emption brief, a brief by HRFA and then responses by

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1 the other parties?

2 CHAIRMAN SHARFMAN: No. We're envisioning

3 simultaneous briefs by everybody at this point. Otherwise--

4 Isn't that right, gentlemen? I think otherwise it would

5 delay things extraordinarily.

6 MR. SACK: Mr. Chairman, you will find extensive

7 discussion of that in ConEdison's brief to the Appellate

8 Division. We went into that. That was the major point on

9 appeal. So we went into that.

10 CHAIRMAN SHARFMAN: Well if you 're sending us

11 that brief why don't you, in your other brief, just refer

12 us to the pages.

13 MR. SACK: I'll do that.

14 CHAIRMAN SHARFMAN: Okay.

15 MR. SACK: On the brief on due diligence, I'm

16 not sure what aspect of due diligence you want us to

17 address.

18 CHAIRMAN SHARFMAN: Anything you think is

19 relevant.

20 MR. SACK: Actually, I've written letters over

21 and over again explaining what we have done. And nobody

22 has yet found any instance of a lack of due diligence.

23 There were these odd criticisms that Ms. Chasis made

24 which did not have the dignity of a contention. And I think

25 I've already responded in the transcript to those contentions.

wb14

CHAIRMAN SHARFMAN: Well, one of the reasons that I said we would permit it to be entertained is, you said if there weren't going to be an evidentiary hearing you at least would like to have a chance to brief it. But if, on reconsideration, you think that's not necessary I'm perfectly happy just to look at the documents along with your explanation given at the December 8th hearing. --if that's all right with you.

MR. SACK: We'll submit the documents and with the appropriate references.

CHAIRMAN SHARFMAN: Right. Okay.

Is there any other business?

MR. LEWIS: The date.

CHAIRMAN SHARFMAN: The date. Yes. We'd like them to be served no later than Friday of next week which will be the 18th of February.

Is that satisfactory?

MR. TROSTEN: May we confer for just a moment?

CHAIRMAN SHARFMAN: Surely.

(Pause)

MR. SACK: Well, Mr. Chairman, we're getting into a multiplicity of activities here. We have an EPA prehearing conference which I referred to earlier for February 22nd. We have the NRC extension hearing starting the 23rd and 24th. Both of those involve extensive pre-

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paration. So, although, in the absence of other activities, the 18th would be satisfactory, I'm afraid it presents some difficulty.

CHAIRMAN SHARFMAN: The problem is, though, Mr. Sack -- I mean, I think you're claiming in your brief you really need some relief here from the Licensing Board's order, and if we don't expedite this thing who knows when you'll get your relief? It might be just as good as not having any. You might have to build those cooling towers.

MR. SACK: That is correct. That's a very serious dilemma.

But there are limits on how much we could do at one time.

CHAIRMAN SHARFMAN: Well, what would you request?

MR. SACK: I would think March 1st would be easier for us. That would give us a weekend after the close of the record on the extension proceeding. We feel that would be preferable.

CHAIRMAN SHARFMAN: Well I guess in view of the fact that ConEdison is the appellant, and is the one that has the greatest need for relief, if you're willing to delay it that long I don't see why we shouldn't go along with that. Unless some of the other parties feel we should not.

MR. LEWIS: That's better for us.

wb16

CHAIRMAN SHARFMAN: All right, then. What day of the week is March 1st?

Have them served by Tuesday, March 1st. Simultaneous brief, please. And no replies.

MR. SACK: And what is the status of the EPA letter? Is that going to be included? Shall we comment on that in the brief as well?

CHAIRMAN SHARFMAN: Well, wait a minute.

As far as the-- Yes, by all means. Because we want the jurisdiction question discussed. But insofar as you're supposed to be submitting to us, I gather, two documents, the discharge permit and the order of the EPA suspending it, or portions of it, I would like those tomorrow if it's possible. I don't see why we have to wait for that.

MR. SACK: Yes, sir.

CHAIRMAN SHARFMAN: I gather it's not necessary for us to see your various applications for exemptions with EPA; that we can see all that we need from the permit and the suspension order.

MR. SACK: I believe that's correct. The suspension order refers to specific sections of the permit. So if you have those two documents--

CHAIRMAN SHARFMAN: Yes. And it refers to what relief you've asked for.

wb17

MR. SACK: That's correct.

CHAIRMAN SHARFMAN: I think that should be enough.

So you'll give us those tomorrow, please.

MR. SACK: And the EPA -- the brief should discuss--

CHAIRMAN SHARFMAN: Does your law firm in Washington have those, so that there's no problem?

MR. SACK: I believe so. Yes.

CHAIRMAN SHARFMAN: Okay.

MR. SACK: And the brief is to include the EPA jurisdictional question?

CHAIRMAN SHARFMAN: Yes. That was the main purpose of it. Because that hasn't been discussed at all, either by the Licensing Board or in your briefs.

Well, that being all the business we have, I want to thank all counsel for their helpful presentations today. And this matter will then stand submitted.

Thank you.

(Whereupon, at 1:00 p.m., oral argument in the above-entitled matter was concluded.)

[redacted]

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