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April 9, 2001

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VIA E-MAIL AND OVERNIGHT DELIVERY

The Honorable Janet H. Deixler
Secretary
New York State Board on Electric
Generation Siting and the Environment
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 99-F-1314: East River Repowering Project
Consolidated Edison Company of New York, Inc.

Dear Secretary Deixler:

In accordance with §§ 3.6 and 4.7 of the New York State Department of Public Service rules of procedure, as adopted by the New York State Board on Electric Generation Siting and the Environment, Consolidated Edison Company of New York, Inc. encloses herewith the original and twenty-five copies of its Response to EREC/CB3's Interlocutory Appeal of the Presiding Examiners' Ruling Pursuant to Article X in the above-referenced case. EREC/CB3's Interlocutory Appeal, dated March 30, 2001, was postmarked April 2, 2001 and received by Con Edison on April 5. Additional copies of this Response in electronic and hard copy format are being provided as indicated below.

Respectfully submitted,

[signature]

Enclosures

cc: The Hon. Walter T. Moynihan (via e-mail and overnight mail)
The Hon. Rafael A. Epstein (via e-mail and overnight mail)
The Hon. Daniel P. O'Connell (via e-mail and overnight mail (3 copies)
The Hon. Erin M. Crotty (via e-mail and overnight mail)
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## AFFIRMATION OF SERVICE

LAURENCE A. HORVATH, an attorney admitted to practice in the Courts of the State of New York, affirms the following:

1. I am not a party to the within proceeding. I am over 18 years of age and reside in Greenwich, Connecticut.

2. On Monday, April 9, 2001, I served the within Response of Consolidated Edison Co. of New York, Inc. to EREC/CB3'S Interlocutory Appeal of the Presiding Examiners' Ruling upon:

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Each party on the annexed Active Party List (as of 3/21/01) other than the Consolidated Edison parties.

by depositing true copies of the document enclosed in properly addressed wrappers with sufficient postage in an official depository under the exclusive care and custody of the United States Postal Service within New York State, or by causing a true copy of the same, enclosed in a properly addressed prepaid wrapper, to be deposited into the custody of Federal Express for overnight delivery.

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10516-00012/880378.1

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

IN THE MATTER of the Application by Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article X of the Public Service Law to Repower its East River Generating Station in Manhattan, New York County, New York

Case No. 99-F-1314

# CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'S RESPONSE TO EREC/CB3'S INTERLOCUTORY APPEAL OF THE PRESIDING EXAMINERS' RULING PURSUANT TO ARTICLE X

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## INTRODUCTION

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Applicant") respectfully submits this memorandum pursuant to 16 NYCRR §§ 3.6(d) and 4.7(b) in response to the appeal by the East River Environmental Coalition and Manhattan Community Board No. 3 ("EREC/CB3" or "Petitioners") of certain portions of the March 15, 2001 joint Issues Ruling and Procedural Ruling (the "Issues Ruling") of Department of Public Service Presiding Examiners Walter T. Moynihan and Rafael A. Epstein (the "Presiding Examiners") and Department of Environmental Conservation ("DEC") Associate Examiner/Administrative Law Judge Daniel P. O'Connell (the "DEC ALJ"). EREC/CB3 contends that the Issues Ruling should be reversed in so far as it did not allow for adjudication of the issues concerning: (i) operational restrictions and physical alterations to existing boilers and stacks at the East River Generating Station that are not part of the East River Repowering Project (the "Project"); (ii) environmental justice; and (iii) allegations that the Project's predicted noise impacts have not been accurately modeled by the Applicant, where the Project's compliance with New York City's Noise Code would be a condition of the Certificate of Environmental Compatibility and Public Need (the "Certificate").[1] For the reasons set forth below, the ruling of the Presiding Examiners on each of these issues was correct, and should be upheld by the Siting Board.

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[1] As discussed in Con Edison's Appeal of the Issues Ruling and Procedural Ruling dated March 27, 2001 (the "Con Edison Appeal"), Con Edison seeks a Certificate for the Project pursuant to Article X of the Public Service Law ("PSL"). The Project involves installation of two combustion turbine generators and two heat recovery steam generators in the eastern portion of the currently existing East River Generating Station on 14th Street in Manhattan; the western portion of the Station would continue to house two existing high pressure boilers (Boilers 60 and 70) that exhaust through stacks that will not be used by the Project.

## SUMMARY OF ARGUMENT

The Presiding Examiners properly rejected Petitioners' attempt to impose restrictions on existing Boilers 60 and 70 and their associated stacks. Article X grants the Siting Board authority only to impose conditions on the "facility" that is the subject of the Application. Petitioners do not contest the Presiding Examiners' finding that Boilers 60 and 70 and the stacks that serve them are "not part of the facility" under review in this proceeding. Issues Ruling at 43. Accordingly, the statute's plain language precludes the Siting Board from regulating these existing separate facilities, as the Presiding Examiners appropriately ruled. Since the statutory language on this point is clear and unambiguous, Petitioners' arguments concerning the "purposes" of the statute should not so much as be considered. In any event, the legislative history of Article X and case law construing analogous statutes confirm the statutory interpretation upon which the Presiding Examiners' ruling rests.

Likewise, there is no basis in the statute or legislative history to support the contention that issues relating to "environmental justice" are properly considered in this proceeding. EREC/CB3 would like the Siting Board to add environmental justice to the list of topics to be considered in its issuance of findings under Article X. To do so, however, would be to amend the statute without legislative action. Article X, as it currently reads, contains nothing to indicate such matters should be considered, and has never before been interpreted as Petitioners suggest. Notwithstanding Petitioners' arguments, allegations regarding the disproportionate nature of any impacts of various Project alternatives are not relevant to the Siting Board's findings under Article X that relate to "environmental" values or the "public interest". Rather, environmental justice is a principle that has evolved under Federal law to

protect against a social and political concern – the inequitable distribution of environmental burdens. Accordingly, the Presiding Examiners were correct in steering Petitioners towards the complaint resolution process established by the U.S. Environmental Protection Agency ("EPA") under the federal Prevention of Significant Deterioration ("PSD") Program. Issues Ruling at 44. In any event, the evidence Petitioners have proffered on this subject is of no probative value, since it is at odds with all federal guidance on how to analyze environmental justice in connection with a project.

Finally, the Presiding Examiners were well justified in ruling out Petitioners' issues concerning noise impacts, since any Certificate issued to Con Edison will be conditioned to require that noise from the Project be limited to comply with protective City standards.

## ARGUMENT

### I. The Presiding Examiners Correctly Ruled That Boilers 60 and 70 Are Not Part Of the Proposed Facility and Are Therefore Beyond the Scope of this Proceeding.

The Presiding Examiners have ruled that Con Edison's choice of fuel for Boilers 60 and 70 -- existing boilers at the East River Generating Station -- is not an issue to be considered in this proceeding. Looking to the plain language of Section 168.2 of the Public Service Law, they have ruled this issue out because the existing boilers are not part of the proposed "facility" and are, therefore, outside the scope of Article X.[2] Issues Ruling at 42-43. EREC/CB3 now appeals that ruling, contending that the Presiding Examiners' ruling with respect to the regulatory reach of the Board under Article X is "untenable" in light of the Board's

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2 For the same reason, issues relating to existing stacks 3 and 4 at the East River Generating Station, which vent emissions from Boilers 60 and 70 and which would not be used for the Project, are also excluded. Issues Ruling at 17 n.37.

obligation to conduct a cumulative environmental review of the impact of the Project together with those of other facilities in the vicinity. Put another way, Petitioners argue that the Siting Board's regulatory power extends to the numerous emission sources that must be considered as part of the cumulative impact assessment that Article X requires. EREC/CB3's appeal of this issue must be denied because, as explained below, it is not consistent with either established rules of statutory construction or judicial decisions under analogous situations presented by the State Environmental Quality Review Act ("SEQRA") and National Environmental Policy Act ("NEPA").

## A. The Presiding Examiners' Ruling Correctly Applied Well-Established Rules of Statutory Construction.

PSL § 168.2 reads, in pertinent part, as follows:

> The board shall render a decision upon the record either to grant or deny the application as filed or to certify the facility *upon such terms, conditions, limitations or modifications of the construction or operation of the facility* as the board may deem appropriate.[3]

(Emphasis added). The Presiding Examiners read the plain language of this provision as it is written: to authorize imposition of a term, condition, limitation or modification only insofar as such restriction relates to "the construction or operation of the facility" for which a Certificate has been sought. This self-evident interpretation was correct under the rules of statutory construction in New York.

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[3] Article X requires that a Certificate be obtained for the "construction" of any "facility," a term defined to include "an electric generating facility with a generating capacity of eighty thousand kilowatts or more." PSL §§ 160.2, 162.1. Accordingly, an Article X application has been submitted for the Project. Notably, no such certificate is required for the continued operation of existing electric generating units, such as Boilers 60 and 70 at the East River Generating Station.

Statutory construction must begin with an examination of the statutory language, since that language is "the clearest indicator of legislative intent." People v. Robinson, 95 N.Y.2d 179, 182, 711 N.Y.S.2d 148, 150 (2000). If the statutory language is clear, the inquiry should go no further -- the words of the statute must be applied as they appear without resort to some forced construction that either limits or extends their effect. See Tucker v. Board of Education, Community School District No. 10, 82 N.Y.2d 274, 278, 604 N.Y.S.2d 506, 508 (1993); Cole v. Mandell Food Stores, Inc., 93 N.Y.2d 34, 39, 687 N.Y.S.2d 598, 600 (1999); Schmidt v. Roberts, 74 N.Y.2d 513, 520, 549 N.Y.S.2d 633, 637 (1989). Here, the language of Section 168.2 is free from ambiguity and distinctly expresses the legislature's intent that any conditions imposed by the Siting Board must relate to the proposed facility.

Nevertheless, EREC/CB3 contend that the "terms, conditions, limitations or modifications" authorized by Section 168.2 need not be so limited, but may be applied to virtually anything, so long as the results of their imposition are consistent with the purposes of Article X. EREC/CB3's Interlocutory Appeal at 9-10. Their reason for this expansive statutory reading -- which begins with the observation that the Board must consider the cumulative impacts of the facility along with others in the affected area and jumps to the conclusion that the Board's power to regulate must be coextensive with that broad review -- is a non sequitur that is at odds with a number of fundamental legal principles.

First, an administrative agency is created by statute, and any action taken by it must fall within the authority conferred by its enabling law. See Shankman v. Axelrod, 73 N.Y.2d 203, 538 N.Y.S.2d 783, 784 (1989). Under this basic principle, the Siting Board must confine the restrictions it imposes to the facility at issue, since while Section 168.2(b) instructs

the Siting Board to *find and determine* the cumulative effect of air emissions from existing facilities, after having done so, it may properly take only those limited actions authorized by Section 168.2. In particular, the conditions it imposes in any Certificate it issues must be confined to the "construction or operation *of the proposed facility*." EREC/CB3's contrary interpretation would have the Board impermissibly exceed the authority granted to it under Article X.

The scope of the authority that EREC/CB3 would have the Siting Board assume is extraordinary, as the Applicant's cumulative impact assessment included dozens of utility and non-utility sources (such as apartment building and hospital boilers) both in New York City and New Jersey. The notion that the Siting Board has the authority to regulate each of these emission sources simply because each was considered in the Applicant's cumulative impact assessment has no support in the language or purpose of Article X.[4]

Further, EREC/CB3's construction of the statutory language renders the phrase "of the construction or operation of the facility" in Section 168.2 superfluous -- a result which is contrary to a basic tenet of statutory construction. "It is well settled that in the interpretation of a statute we must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose . . . and each word must be read and given a distinct and consistent meaning." Rodriguez v. Perales, 86 N.Y.2d 361, 366, 633 N.Y.S.2d 252, 254 (1995). See also Branford House, Inc. v. Michetti, 81 N.Y.2d 681, 688, 603 N.Y.S.2d 290, 293-4 (1993)

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[4] Petitioners offer no suggestion as to where the line would be drawn on the exercise of the Siting Board's regulatory authority over such other sources. Left open is the question of whether the Siting Board's power to regulate would extend only to adjacent Con Edison's facilities, nearby Con Edison properties or facilities owned by other parties.

("A construction rendering statutory language superfluous is to be avoided."); People v. Giordano, 87 N.Y.2d 441, 448, 64 N.Y.S.2d 432, 436 (1995) ("[E]ffect and meaning should be given to the entire statute and 'every part and word thereof.'" (citation omitted)). EREC/CB3's construction of Section 168.2 runs afoul of this principle, as it reads out of the statute the limiting phrase "of the construction or operation of the facility" and confers upon the Siting Board the vast power to impose "such terms, conditions, limitations or modifications as the board may deem appropriate." This wide-open interpretation must be rejected, since the Legislature had a purpose when it placed the unambiguous phrase "of the construction or operation of the facility" in the statute -- and that purpose was to limit the regulatory powers of the Siting Board in accordance with that language.

B. The Legislative History of Article X Also Supports The Presiding Examiners' Interpretation of Section 168.2.

Since the language of the statute is clear and unambiguous, there is no need to dig into legislative history in order to discern the meaning of Section 168.2. Lloyd v. Giella, 83 N.Y.2d 538, 545-46, 611 N.Y.S.2d 799, 802 (1994). Nevertheless, it is helpful to inquire into such matters to address Petitioners' contention that it would serve the legislature's purpose for the Board to not just consider, but also to impose conditions with respect to facilities other than the one proposed by an applicant under Article X.

In 1999, in the midst of a major effort by New York State to restructure the power industry, the Legislature introduced an omnibus bill which included several proposed amendments to Article X. See *New York State Assembly - Memorandum in Support of Legislation*, Bill Jacket, L. 1999, ch. 636. One such amendment was to Public Service Law § 168.2(b), the provision of Article X which requires the Siting Board to find and determine the

"nature of [the] probable environmental impacts" associated with a proposed facility. The provision added by the amendment included the very language Petitioners point to in extending the powers of the Board, which called for including in the environmental analysis "the cumulative effect of air emissions from existing facilities." See L. 1999, ch. 636, § 10.

As evidenced by the material included in the Bill Jacket to Chapter 636, however, the amendments that bill proposed to Article X were opposed by certain groups on the ground that, while it facilitated the approval of new, more efficient power plants, it failed to address the reduction of emissions from existing facilities. See *Opposition of American Lung Association of New York State, Inc.*, L. 1999, ch. 636; *Opposition of EPL - Environmental Advocates*, L. 1999, ch. 636 ("EA Letter"); *Opposition of New York Public Interest Research Group*, L.1999, ch. 636. In particular, those groups proposed incorporating into the law provisions that would impose stringent emission standards on existing power plants, as well as new ones. Id.; see EA Letter ("When New York amends the power plant siting law, the playing field should be leveled between new and existing power plants by requiring old power plants to meet the most modern air standards. It would be a serious mistake to dismiss this opportunity to deal comprehensively with power plants and their impacts on public health."). The Legislature declined to modify the language of the proposed amendment, notwithstanding such recommendations. In doing so, it clearly expressed its intent to require the Siting Board to consider the cumulative effect of air emissions from existing facilities, but not impose conditions, limitations or modifications on such existing facilities. "It is well settled that legislative intent may be inferred from the omission of proposed substantive changes in the final legislative enactment." In re Grand Jury

Subpoena Duces Tecum Served On the Museum of Modern Art, 93 N.Y.2d 729, 738, 697 N.Y.S.2d 538, 542 (1999).

Thus, the Presiding Examiners' ruling that the Siting Board is without power to impose conditions on existing boilers at the East River Generating Station must be upheld as consistent with both the plain and unambiguous language of Section 168.2, and with the intent of the Legislature as evidenced by the statute's legislative history.

C. The Presiding Examiners' Ruling Comports with the Caselaw Concerning Environmental Review Authority under SEQRA and NEPA.

Petitioners contend that it is somehow "untenable" for the Board to consider impacts of facilities in addition to the one proposed in an Article X proceeding, if such other facilities are beyond its regulatory reach. EREC/CB3's Interlocutory Appeal at 6. This contention is contradicted by caselaw under SEQRA and NEPA -- two other statutes that obligate agencies to conduct broad environmental reviews, and act upon the information developed through the imposition of mitigating measures.

In E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 526 N.Y.S.2d 56 (1988), the Court of Appeals struck down a Town Planning Board's attempt to address environmental problems related to existing buildings within a real estate development project in connection with a site plan review of a modification to that existing project. The Court of Appeals recognized that, when a developer seeks to take further action at a site, a lead agency is empowered to *consider* the environmental impact of the entire real estate development project, including existing buildings. According to the Court, however:

> the Board cannot use its powers to review the environmental impact of the entire project as a pretext for the correction of

perceived problems which existed and should have been addressed earlier in the environmental review process.

71 N.Y.2d at 373, 526 N.Y.S.2d at 64.

New York courts have consistently followed the E.F.S. Ventures holding. See, e.g., Schulz v. State, 710 N.Y.S.2d 702 (3d Dep't 2000) (quoting E.F.S. Ventures in holding that petitioners could not use their challenge to a supplemental EIS filed for a later phase of a sewer project as a vehicle for pressing claims with respect to previous phases of the same project); Stewart Park & Reserve Coalition v. New York State Dept. of Transportation, 555 N.Y.S.2d 481, 485 (3d Dep't 1990) ("SEQRA review of later additions or modifications involving the same project cannot be used 'as a pretext for the correction of perceived problems which existed and should have been addressed earlier in the environmental review process.'"), aff'd, 571 N.Y.S.2d 905 (1991).

Similarly, the U.S. Court of Appeals for the District of Columbia held that EPA exceeded its authority when it imposed discharge permit conditions under the Clean Water Act ("CWA") that went beyond effluent limits, the subject of the permit application. Section 511(c)(1) of the CWA, 33 U.S.C. § 1371(c)(1), provides that EPA's issuance of a discharge permit to a new source may be considered a "major Federal action" for NEPA purposes (thereby subjecting the issuance of such permits to NEPA review). NEPA instructs the permitting agency to *consider* all environmental effects of any such action and to incorporate information into its final decision. See 42 U.S.C. § 4332. At the same time, the CWA authorizes EPA to allow, prohibit, or condition a *pollutant discharge* from a new point source. In reviewing an application for such a permit, EPA construed the provisions of NEPA together with those of the CWA, and determined that NEPA authorized it to not only *consider* additional environmental factors, but to

act on such factors by imposing any condition necessary to account for the environmental effect of the new facility in its entirety.

The Court of Appeals, upon review of the EPA's decision, held the agency to be powerless to impose permit conditions unrelated to the discharge itself, observing:

> EPA may not . . . under the guise of carrying out its responsibilities under NEPA transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves. To do so would unjustifiably expand the agency's authority beyond its proper perimeters.

Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988).

Thus, the courts have found it to be not the least bit untenable for a statute to require a comprehensive review of the effects of a project, in combination with other facilities, while at the same time confining the regulatory powers of the agency to the project before it. Accordingly, the Presiding Examiners' ruling to that effect in this proceeding should be upheld.

## II. The Presiding Examiners Correctly Determined that Issues Relating to Environmental Justice Are Not Appropriately Considered Under Article X.

### A. Petitioners May Raise their Environmental Justice Concerns in the Proper Forum.

The Presiding Examiners' decision to exclude environmental justice from the Article X hearing does not bar the Petitioners from voicing their concerns regarding the environmental justice of the Project. Rather, the ruling simply directs Petitioners to EPA's environmental justice complaint resolution process, which is the proper avenue for addressing such concerns.[5] Under that process, a factual investigation is conducted by the EPA's Office of

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[5] As explained by the DEC ALJ, EPA has assumed jurisdiction over environmental justice issues arising under the PSD permitting program. Issues Ruling at 36-7. The correctness of this ruling is demonstrated by the fact that the legal underpinnings of a claim based on (continued...)

Civil Rights when an environmental justice complaint is filed, to determine "whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population." Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, February 5, 1998 (the guidance is published at http://es.epa.gov/oeca/oej/titlevi.html). Where, upon due inquiry, a disparate impact is found to exist, the state permitting agency is provided with an opportunity either to arrange for a program of mitigation, or demonstrate there is a substantial legitimate interest that justifies the permit issuance, notwithstanding that impact. Id.

Thus, if EREC/CB3 elects to pursue the environmental justice issue they have raised with respect to the Project, they may do so by filing a complaint with EPA, and participating in the ensuing federal review.

B. Article X's Plain Statutory Language Does Not Require Consideration of Environmental Justice.

Instead of invoking EPA's environmental justice complaint review process, Petitioners seek to submit evidence in the Article X hearing that would allegedly show "disproportionately high and adverse impacts on low income or minority populations" because of the Project. EREC/CB3's Interlocutory Appeal at 8. Petitioners look to findings requirements relating to environmental considerations and the public interest as the basis for the relevance and materiality of such matters in this case. Id. (citing § 168.2(b), (c) and (e)).

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[5] (...continued)
environmental justice is Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally funded state programs. The PSD program is federally funded while the Article X program is not. See Issues Conference Transcript at 108.

In considering this issue, a distinction must be drawn between potential environmental and public health impacts, on the one hand, and environmental justice, on the other. It is undisputed that potential environmental and public health impacts are germane to this proceeding. However, Petitioners do not merely seek a hearing on the environmental and public health impacts they believe the Project will have. They also wish to air their view that the impacts they predict would fall disproportionately on disadvantaged populations. Thus, they are not raising an environmental or public health issue by opening up the topic of environmental justice. Rather, what they are raising is a socio-political question relating to the equitable distribution of power plants in New York City. Yet none of the required Article X findings on which EREC/CB3 rely as the basis for inserting environmental justice issues into this hearing encompass such issues.

Section 168.2(b) calls for findings on the "nature of the probable environmental impacts" of a project, and goes on to describe the sorts of environmental concerns to be addressed as including "ecology, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air and water quality. . .fish. . .and wildlife."

Section 168.2(c) also deals solely with environmental and public health concerns, by requiring a finding that the facility "minimizes adverse environmental impacts," considering alternatives, a number of specifically described ecological factors, and public health and safety.

Finally, the "public interest" finding required by § 168.2(e) explicitly references environmental concerns -- requiring the Siting Board to find that "the facility is in the public interest, considering the environmental impacts . . . and reasonable alternatives."

Thus, the statutory provisions that Petitioners cite as the foundation for their appeal go into considerable detail with respect to the environmental and public health related findings to be made by the Siting Board. However, there is not a word in any of these provisions concerning the "equitable siting" issues Petitioners are seeking to introduce into the hearing. Indeed, EREC/CB3 conceded at the Issues Conference: "With respect to whether Article X specifically requires environmental justice, there is nothing in the law or regulations that require that." Issues Conference Transcript at 243. Nevertheless, Petitioners would like the Siting Board to layer that additional finding requirement into the statute, and declare that it would be "arbitrary and capricious" not to do so. EREC/CB3's Interlocutory Appeal at 9.

C. There is No Basis for Reading an Environmental Justice Finding into Article X by Inference.

It is axiomatic that "[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." Pajak v. Pajak, 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 382 (1982); see also City of New York v. New York Telephone Co., 108 A.D.2d 372, 375, 489 N.Y.S.2d 474, 476 (1st Dept. 1985); City of New York v. Show World, Inc, 178 Misc.2d 812, 817, 683 N.Y.S.2d 376, 380 (Sup. Ct. New York Co. 1998). Similarly, many courts have held that where a statute identifies the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." People v. Jackson, 87 N.Y.2d 782, 788, 642 N.Y.S.2d 602, 605 (1996); PBA v. City of New York, 41 N.Y.2d 205, 208-09, 391 N.Y.S.2d 544, 546 (1976); Schultz Management v. Board of Standards and Appeals of the City of New York, 103 A.D.2d 687, 689, 477 N.Y.S.2d 351, 354 (1st Dept. 1984).

Accordingly, the statutory language -- which sets forth with exactitude the concerns the Siting Board must consider under Article X -- compels the conclusion that the environmental justice considerations EREC/CB3 has raised were intentionally excluded by the legislature.[6]

It would be particularly inappropriate to tack environmental justice considerations on to the "public interest" finding required by § 168.2(e) because it is clear from both the statutory language and legislative history of Article X that this finding was intended to result from a balancing of environmental considerations against the need for power. Thus, it is evident from the statutory language that § 168.2(e) was not intended as some "catchall" finding because the "public interest" determination was, as noted above, tied specifically to environmental concerns and alternatives. The meaning of words in a statute is to be discerned from the context in which those words appear. See Albano v. Kirby, 36 N.Y.2d 526, 369 N.Y.S.2d 655 (1975) ("No rule of construction . . . permits the segregation of a few words from their context and from all the rest of the section or rule for purposes of construction."); see also MHG Enterprises, Inc. v. New York, 91 Misc.2d 842, 846, 399 N.Y.S.2d 837, 841 (Sup. Ct. New York Co. 1977). When all of the words of § 168.2(e) are read together they require only that the Siting Board

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[6] As noted in Point I.B., supra, there were substantial amendments to Article X in 1999. Those amendments added, among other things, "the cumulative effect of air emissions" to the list of "environmental impacts" for which a specific finding by the Siting Board is required under PSL § 168.2. L.1999, c. 636. The Legislature, however, remained silent on the issue of environmental justice. This silence is telling in light of the public debate surrounding environmental justice at both the state and national levels since well before the 1999 amendments.

consider the Project in light of environmental factors and available alternatives -- and thereby find whether the Project is in the public interest.[7]

Thus, no support can be found in the statute or its history for considering the issue of environmental justice under Article X. It is no surprise, therefore, that no court or administrative body has adopted the interpretation Petitioners suggest at any time over the decades that the provisions at issue have been in effect.

D. The Environmental Justice Methodology EREC/CB3 Seek to Present at the Article X Hearing is Fundamentally Flawed.

Even if environmental justice were an issue that is appropriate for consideration in an Article X hearing, the evidence EREC/CB3 have proferred would not be relevant and material, since it would be of no assistance to the examiners in making a finding on that issue.[8] It

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7 The legislative history of Article VIII, the virtually identical predecessor to Article X, confirms this interpretation. See 1972 Session Laws, Chapter 385, where the legislature declared that "it is essential to the public interest that meeting power demands and protecting the environment be regarded as equally important . . ." (emphasis added). There are other references in the declaration of legislative intent to "serv[ing] the public interest" by striking a balance between the "physical environment," "protect[ion of] environmental values" and "conservation," on the one hand, and ensuring "an adequate supply of electric power," on the other. Id. at 823-24.

8 At the very least, issues raised for adjudication in the Article X hearing must be "relevant" and "material" to whether a certificate should be issued by the Siting Board. "Relevant" for purposes of an Article X proceeding has been defined to "concern whether the proffered evidence tends to prove a fact that would tend to affect whether or not a certificate should be issued." Application of Mirant Bowline, L.L.C. for a Certificate of Environmental Compatibility and Public Need ("Bowline"), Ruling on Issues, dated March 30, 2001, at 6. The term "material" concerns "whether evidence is directly related to any specific statutory findings the Board is required to make." Id. Moreover, the Presiding Examiners have indicated that the "substantive and significant" standard applicable to DEC proceedings might also be applied in the Article X context. See Issues Conference Transcript at 180-81. If so, the Petitioners' issues must raise reasonable doubts about Con Edison's entitlement to a certificate, under the "findings" requirements (continued...)

is EREC/CB3's intention to seek to demonstrate that the Project would have a disparate impact on a disadvantaged population by comparing the demographic characteristics of one ZIP Code in the vicinity of the East River Generating Station against ZIP Codes in areas surrounding various suggested alternative locations. As Con Edison explained at the Issues Conference, evidence on these matters would have no bearing on the issue of environmental justice, since it would demonstrate nothing more than that the characteristics of one Manhattan neighborhood differ from those of another. Such information would be valueless in addressing the question relevant to environmental justice: whether a neighborhood that -- in comparison to the more general population of the community (e.g., all of New York City) -- is disadvantaged would be disproportionately affected by the Project. Under all of the guidance issued by EPA, it is this question -- rather than the entirely different one EREC/CB3 has posed for the hearing -- that must be answered to come to a conclusion on the environmental justice issue. Thus, the Interim Environmental Justice Policy issued by EPA Region 2 calls for a disparity analysis that compares the "community of concern", i.e., the area affected by a project against a "statistical reference area," based upon a blending of the demographic statistics and income characteristics of the urban areas of New York State. EPA Region 2 Interim Environmental Justice Policy, December 2000; see also Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39,650, 39,661 (2000) (calling for a comparison of the "affected population" against a reference area that "would usually be larger

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[8] (...continued)
of Article X.

than the affected population and may include the general population for the reference area (e.g., a county or state population) or the non-affected population for the reference area.") The methodology EREC/CB3 has employed is markedly different from those sanctioned by EPA and would prove nothing with respect to the environmental justice of the Project. Indeed, the application of such methodology could show disparate impacts in every case, since one can always find an alternative location with demographics that differ from those in the location proposed for a project.

## III. An Adjudicable Issue Does Not Exist With Regard to the Sufficiency of Con Edison's Noise Modeling Analyses or the Measures it has Agreed to Implement In Connection with the Construction and Operation of the Project.

At the issues conference, EREC/CB3 raised concerns relating to the accuracy of the noise modeling performed in connection with the application. Issues Conference Transcript at 219-20. The Presiding Examiners ruled that such issue need not be considered at a hearing, in light of Con Edison's commitment to "accept as a condition of certification" the obligation to comply with the New York City Noise Code set forth at Title 24, Chapter 2 of the New York City Administrative Code. Issues Ruling at 41-42.

In their appeal, EREC/CB3 contend that they should be permitted to open up the hearing to the noise modeling issue because the Applicant is required under Article X to demonstrate on the record its compliance with local laws. EREC/CB'3 Interlocutory Appeal at 12. However, EREC/CB3 offers nothing more than an unsubstantiated assertion regarding the deficiency of Applicant's noise modeling methodology in alleging that this requirement was not satisfied. Id. at 10-12. Such generalized concerns do not raise an adjudicable issue in this proceeding because: (i) the Certificate issued to Con Edison will require compliance with New

York City's stringent noise standards; (ii) Con Edison will have to demonstrate compliance with such regulations through post-certification filings with the Siting Board under 16 NYCRR Part 1003; and (iii) if, by some yet unforeseen circumstance, it is subsequently determined that the Project-related noise mitigation measures set forth in the Application and supporting materials are insufficient, Con Edison will be required to take additional measures to ensure that noise levels from the Project comply with New York City Noise Code limits.

According to the Petitioners, "mere acceptance of a condition to the certificate" does not suffice because under § 168 there must be "specific evidence that demonstrates that design of the certified facility will in fact comply with local laws and regulations." EREC/CB3's Interlocutory Appeal at 12. Such arguments ignore the fact that the Application does include such a specific demonstration, by providing a noise assessment conforming to the methodologies of the City Environmental Quality Review Technical Manual. See Application § 6.3.1 & App. F.1. It was on the strength of this demonstration, coupled with Con Edison's commitment to a Certificate condition requiring compliance with the New York City Noise Code, that the Presiding Examiners determined that EREC/CB3's concerns about noise modeling "will not be of decisional consequence" to the proceeding. Issues Ruling at 41.[9] The Presiding Examiners correctly excluded Petitioners' noise issues on this basis. See Point II.D. at n. 8, supra (factual

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9 For the first time on appeal, EREC/CB3 raises issues concerning the mitigation of noise from an existing electrical substation at the East River Generating Facility. EREC/CB3's Interlocutory Appeal at 10. Such issues are not adjudicable, for two reasons. First, they were not raised at the Issues Conference and cannot be raised for the first time upon appeal. See Ruling Establishing Procedural Schedule, December 21, 2000. Second, the issue relates to a condition that exists at a separate facility -- the 13th Street substation. The substation is not part of the "facility," and for the reasons set forth in Point I of this memorandum is not part of this proceeding.

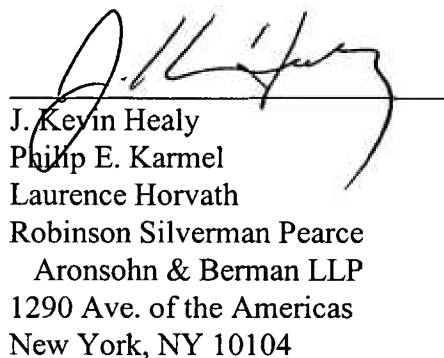
issues raised for adjudication must either meet the substantive and significant standard or, at a minimum, be relevant and material to the issuance of findings).

## CONCLUSION

For the foregoing reasons, Con Edison respectfully requests the Siting Board to affirm the rulings of the Presiding Examiners concerning EREC/CB3's proposed mitigation measures to Boilers 60 and 70, environmental justice and noise modeling.

Dated: New York, New York
April 9, 2001

Respectfully submitted,



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