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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of: )  
)  
Consolidated Edison Company )  
of New York, Inc., )  
)  
and )  
)  
Entergy Nuclear Indian Point 2, LLC, )  
and )  
Entergy Nuclear Operations, Inc. )  
)  
(Indian Point Nuclear Generating )  
Units 1 and 2) )

Docket Nos. 50-003-LT  
50-247-LT

ANSWER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, ENTERGY  
NUCLEAR INDIAN POINT 2, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC.  
TO PETITIONS FOR LEAVE TO INTERVENE AND REQUESTS FOR HEARING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1307(a), Consolidated Edison Company of New York, Inc. ("Con Edison"), Entergy Nuclear Indian Point 2, LLC ("Entergy Nuclear IP2"), and Entergy Nuclear Operations, Inc. ("ENO") (collectively, "Applicants") herein answer the Request for Hearing and Petition to Intervene filed on February 20, 2001, by the Citizens Awareness Network, Inc. ("CAN"), as well as the Petition for Leave to Intervene, Request for Hearing, and Request for Additional Time filed on February 20, 2001, by the Town of Cortlandt, New York, and the Hendrick Hudson School District ("Cortlandt") (collectively, "Petitioners"). The Petitioners seek a hearing and leave to intervene regarding Nuclear Regulatory Commission ("NRC" or "Commission") approval, pursuant to Section 184 of the Atomic Energy Act of 1954,

as amended, and 10 C.F.R. § 50.80, of a transfer of the operating licenses for Indian Point Nuclear Generating Station Units 1 and 2. As discussed below, Petitioners fail to raise litigable issues, and thus their petitions for leave to intervene should be denied.

## II. BACKGROUND

In an application dated December 12, 2000, Applicants requested the NRC's approval of the direct transfer of the Indian Point Nuclear Generating Station Unit 1 ("Unit 1") Facility Operating License DPR-5, and the Indian Point Nuclear Generating Station Unit 2 ("Unit 2") Facility Operating License DPR-26, both currently held by Con Edison as owner of Unit 1 and owner and operator of Unit 2. Following approval of the proposed transfer, Entergy Nuclear IP2 would assume title to both facilities. ENO would become responsible for the maintenance of Unit 1 and the operation and maintenance of Unit 2. As part of the transaction, Con Edison would transfer decommissioning funds for both plants to Entergy Nuclear IP2 upon closing of the sale. Entergy Nuclear IP2 would then become responsible for decommissioning the facilities.

Entergy Nuclear IP2, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Entergy Corporation and Entergy Nuclear Holding Company #3. ENO, a Delaware corporation, is an indirect wholly-owned subsidiary of Entergy Corporation and Entergy Nuclear Holding Company #2. As discussed in the application, the proposed transfer will have no effect on plant equipment or operating procedures. No physical alterations to either Unit 1 or Unit 2 are being proposed as a part of the license transfer process, and virtually all of the operating personnel at the stations will be transferred to the new licensees.

Pursuant to 10 C.F.R. § 2.1301(b), on January 29, 2001, the NRC published a notice of consideration of approval of the license transfers and opportunity to request a hearing.

66 Fed. Reg. 8,122 (2001). Petitioners timely filed their respective petitions on February 20, 2001.

### III. CAN'S PETITION

#### A. CAN's Standing Is Not Contested

CAN, a non-profit organization, alleges that the health and safety of its members will be adversely affected by “defects in the application or shortcomings in the Entergy companies’ technical and financial qualifications to operate, maintain, and decommission [Unit 1] and [Unit 2].” (CAN Pet. at 4.) CAN bases its claim of standing on the affidavit of Marilyn Elie, a “representative member of CAN” who resides “approximately 5 to 5½ miles from the Indian Point 2 Nuclear Power Station.” (CAN Pet. at 4; Elie Decl. ¶ 4.) In Power Auth. of the State of New York (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Station Unit No. 3), CLI-00-22, 52 NRC 266, 293 (2000) (“Indian Point 3”), the Commission found that similar assertions by CAN, also relying in part on an affidavit by Marilyn Elie, satisfied the NRC’s standing requirements. Indian Point 3, 52 NRC at 293-94. In light of that determination, Applicants do not challenge CAN’s standing in this proceeding at the present time. However, CAN’s intervention petition and request for hearing should nonetheless be denied because CAN fails to set forth at least one admissible issue as required by the Commission’s rules for license transfer proceedings, as discussed below.

#### B. CAN's Petition Fails To Meet NRC Pleading Requirements For A Hearing Request

Subpart M establishes clear requirements for a hearing request or intervention petition. Under 10 C.F.R. § 2.1306(b)(2), a petitioner must:

(2) Set forth the issues sought to be raised and

- (i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,

- (ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,
- (iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and
- (iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

See also Indian Point 3, CLI-00-22, 52 NRC at 295; GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-05, 51 NRC 193, 203 (2000). The Commission will not accept mere "notice pleading," or the filing of "vague, unparticularized" issues, unsupported by alleged fact or expert opinion and documentary support. Indian Point 3, CLI-00-22, 52 NRC at 295; see also N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). In many respects, these requirements track the standards for admission of contentions adopted in the NRC's more general Subpart G hearing procedures. The Commission has previously emphasized that those standards in Subpart G were adopted to raise the threshold for admitting contentions<sup>1</sup> and that the standards are to be strictly applied.<sup>2</sup> Similar expectations were re-stated in the Commission's 1998 Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

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<sup>1</sup> Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (1989).

<sup>2</sup> Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991) ("if any one of these requirements is not met, a contention must be rejected").

Similarly, when addressing the admissibility of issues in a Subpart M proceeding, under the Subpart M regulations the Commission must consider whether the issues sought to be litigated are:

- (i) Within the scope of the proceeding;
- (ii) Relevant to the findings the Commission must make to act on the application for license transfer;
- (iii) Appropriate for litigation in the proceeding; and
- (iv) Adequately supported by the statements, allegations, and documentation required by 10 C.F.R. § 2.1306(b)(2)(iii) and (iv).

10 C.F.R. § 2.1308(a)(4).

CAN has clearly failed to meet the requirements of 10 C.F.R. §§ 2.1306(b) and 2.1308(b)(4). CAN has failed to set forth specific issues, and support (such as alleged facts or expert opinions) for those issues, that would satisfy the Commission's pleading requirements. Indeed, CAN has failed to set forth a single, concise statement of an issue that is "appropriate for litigation" in this proceeding, and has failed to provide any factual support for its allegations in the form of expert testimony, documentation or other materials.<sup>3</sup> Instead, CAN's petition

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<sup>3</sup> CAN does broadly identify several areas of concern. However, not one of these assertions has a nexus to this transfer proceeding or would be affected by the transfer under review. These include design and licensing basis issues articulated in a Section 2.206 petition to the NRC; condition reports purportedly relevant to the issue of the current "work atmosphere" at Unit 2, Con Edison's alleged failure to satisfy commitments it made to the NRC, and Con Edison management performance issues as monitored by the NRC Staff under the Reactor Oversight Program; and emergency preparedness exercise issues raised in a Section 2.206 petition. (See CAN Pet. at 5-13.) At one point, CAN tries to turn these operational issues into financial concerns by arguing that, should these safety reviews reveal the need for substantial plant improvements, this "could increase the projected operating and maintenance costs which ENIP2 and ENO must be able to cover." (Id. at 13.) Even setting aside the obviously speculative nature of this allegation, it does not raise a sufficiently specific issue that can meet the requirements of 10 C.F.R. § 2.1306(b)(2)(iii). The materials provided with CAN's petition are all directed at alleged safety deficiencies at Unit 2 and, as further discussed below, are outside the scope of the Subpart M proceedings. Therefore, they provide no support for the formulation of admissible contentions in this proceeding.

consists of essentially two arguments: (1) that this proceeding should be suspended, and (2) that CAN should be given more time to articulate an admissible contention, and that it should be given access to proprietary materials filed with the license transfer application in order to be able to frame such a contention. Therefore, CAN's petition is fatally deficient. Moreover, for the reasons discussed below, neither of these arguments is valid.

C. CAN's Motion To Suspend The Proceeding Should Be Denied

The main focus of CAN's petition is its assertion that, because of alleged "safety problems and systemic mismanagement of IP2," consideration of the license transfer application would be premature at this time and that the proceeding must therefore be suspended. (CAN Pet. at 1.) CAN alleges that "problems" in the license transfer application cannot be adequately evaluated until "ongoing reviews of the design and licensing bases of the reactor and the financial qualifications of [Entergy Nuclear IP2]'s affiliate companies are completed." (CAN Pet. at 4-5.) The "ongoing reviews" to which CAN refers are (1) a proceeding before the NRC's Petition Review Board ("PRB") relative to a petition filed pursuant to 10 C.F.R. § 2.206 by CAN and four other entities; and (2) resolution of a separate 10 C.F.R. § 2.206 petition, filed by Public Citizens' Critical Mass Energy Project, which questions the frequency of emergency preparedness exercises at the Indian Point site. CAN also raises as a potential basis for suspending this proceeding the existence of the pending proceeding, presently before an NRC presiding officer, regarding transfer of the operating licenses of the FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Station Unit 3, Docket Nos. 50-333-LT and 50-286-LT, to ENO and other Entergy Corporation subsidiaries not involved in the instant transfer. CAN alleges that the pendency of these proceedings represents a special circumstance, pursuant to 10 C.F.R. § 2.1329(b), justifying the waiver of (unspecified) Commission regulations, such

that this proceeding should be suspended until these other proceedings are concluded. (CAN Pet. at 5-14.)

CAN's arguments for a suspension, based on the Section 2.206 petitions and the related possibility of a future enforcement action against Con Edison at Unit 2, do not provide a basis to suspend a Subpart M license transfer proceeding. It is well settled that the pendency of parallel proceedings are not adequate grounds to stay a license transfer adjudication. Indian Point 3, CLI-00-22, 52 NRC at 289, citing Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-44 (1999). Moreover, in this case *not one of CAN's assertions would be adversely affected by the license transfers under review*, and by any measure are unrelated to the review under 10 C.F.R. § 50.80.<sup>4</sup> In adopting the Subpart M procedures, the Commission recognized that "license transfers do not involve any technical changes to plant operations" (63 Fed. Reg. 66,721, at col. 3 (1998)) and that the focus of the proceeding is on financial qualifications and decommissioning funding assurance matters (id. at 66,722, col. 1). It follows that the operational matters raised by CAN, and the related requests for enforcement action under Section 2.206, are not a basis for suspending the present proceeding.<sup>5</sup>

Likewise, the pendency of a parallel proceeding involving the transfer of the operating license of another reactor located at the Indian Point site to ENO and another Entergy

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<sup>4</sup> It is most significant that CAN has acknowledged that, by not challenging it, ENO has the technical and managerial competence to operate Indian Point 2 safely and in accordance with NRC regulations.

<sup>5</sup> CAN itself recognizes that the issues that have been raised in the pending enforcement petitions are outside the scope of Subpart M proceedings and are therefore irrelevant. "In addition, the Commission has made it explicitly clear that a Subpart M proceeding is not a proper forum for reviewing the management of day-to-day operations, the material condition, or the design and licensing basis of a reactor." (CAN Pet. at 9.)

Corporation subsidiary provides no grounds for staying this proceeding. Any issues adjudicated in the Indian Point 3 proceeding that might become relevant and material to Indian Point Units 1 and 2 can subsequently be taken into account, as appropriate, in this proceeding. As noted, the pendency of another proceeding – in this case, one involving two different plants, one of them not even at the same site as Indian Point Units 1 and 2 – provides no justification for staying this proceeding until the other one runs its course. See Indian Point 3, CLI-00-22, 52 NRC at 289.

10 C.F.R. § 2.1329 provides for a waiver of Commission rules under “special circumstances” wherein the “application of a rule or regulation would not serve the purposes for which it was adopted.”<sup>6</sup> CAN’s request for a stay does not involve “special circumstances” and is actually contrary to the Commission’s objectives for Subpart M proceedings. In adopting Subpart M, the Commission recognized the need for “expeditious decisionmaking” in power plant transactions. 63 Fed. Reg. at 66,721, col. 3. A suspension based on developments at other nuclear units or based on ongoing operational and regulatory issues at the same units would not be consistent with that objective. Moreover, CAN has not demonstrated, indeed not even alleged, that continuation of the instant proceeding would not serve the purposes for which Subpart M was instituted; that is, to determine the acceptability under NRC regulations of the transfer of the Indian Point Units 1 and 2 licenses to the Entergy companies. Indeed, the

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<sup>6</sup> 10 C.F.R. § 2.1329 reads, in relevant part:

- (a) A participant may petition that a Commission rule or regulation be waived with respect to the license transfer application under consideration.
- (b) The sole ground for a waiver shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.
- (c) Waiver petitions shall specify why application of the rule or regulation would not serve the purposes for which it was adopted and shall be supported by affidavits to the extent applicable.

justification offered by CAN for seeking a stay is one of mere convenience.<sup>7</sup> Convenience is not a recognized basis for granting a waiver of the regulations.

D. CAN's Request For An Extension of Time And An Unredacted Version of the License Transfer Application Should be Rejected

Should the NRC reject its motion to stay the proceeding, CAN requests that the NRC grant it an extension of time until it can "review the application and prepare properly documented and specific contentions." (CAN Pet. at 14.) Because CAN has failed to plead any proposed contentions as discussed above, its request for an extension of time should be denied. Moreover, CAN has not demonstrated "unavoidable and extreme circumstances" which would warrant an extension of time. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 21.

In support of its request for an extension of time, CAN states that its representatives are engaged in four other adjudicatory proceedings, are "unable to take on yet another adjudicatory proceeding," and that "it would be a prohibitive burden to require CAN to litigate the same issues simultaneously before the NRC in different forums." (Can Pet. at 15.) However, easing the burden on a participant is not a valid reason to deviate from Commission procedures. As the Commission has stated:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party from its hearing obligations.

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<sup>7</sup> CAN argues: "The resolution of that proceeding would effectively streamline the review of the application by ConEd and Entergy, thus conserving the agency's and the parties' resources." (CAN Pet. at 6.)

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

NRC's 1998 policy statement, Policy on Conduct of Adjudicatory Proceedings, endorses this position, and notes:

The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. . . . The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

CLI-98-12, 48 NRC at 21 (emphasis added). See also Florida Power & Light Co. (Turkey Point, Units 3 & 4), 2000 WL1911658, at \*3-4 (denying petitioner's request for extension of time for lack of "unavoidable and extreme circumstances" where petitioner had "work and family commitments that she must meet prior to leaving town for the [Christmas] holiday"). CAN's request falls squarely within this precedent. CAN is participating voluntarily in all of the proceedings it mentions. While it is fully entitled to do so, it is also responsible for marshalling its resources so that it can participate in a timely manner in each proceeding in which it chooses to be a party.

CAN also raises as a potential basis for being granted an extension of time its alleged inability to obtain a copy of the license transfer application until "at least February 20." (CAN Pet. at 15-16.)<sup>8</sup> However, the filing of the application was noticed in the Federal Register on January 29, 2001. In accordance with Commission regulations, the notice provided 22

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<sup>8</sup> CAN alleges that the NRC's ADAMS electronic repository was "inaccessible and impossible to use." (CAN Pet. at 15.) Assuming such was the case, it is reasonable to surmise that CAN made this determination early on in its attempts to secure a copy of the application, which by its own admission began during the week of February 5, 2001. (CAN Pet. at 16.) Even with this relatively late start, CAN still had at least two weeks in which to secure a copy of the application from a variety of sources.

calendar days – until February 20, 2001 – for interested parties to file petitions to intervene. 66 Fed. Reg. 8,122, 8,123 (2001). The notice provided the telephone and fax numbers of counsel for Applicants, as well as the e-mail addresses of those counsel and the NRC general counsel, and mailing addresses for all three plus the Secretary of the Commission. *Id.* at 8,122. Even with the exercise of minimum diligence, CAN should have been able to successfully and timely contact at least one of these persons by one of the means suggested to request a copy of the application.<sup>9</sup> Thus, CAN fails to make a case for the existence of “unavoidable and extreme circumstances” justifying an extension of time.

CAN also seeks access to an unredacted version of the license transfer application, and an extension of time while it reviews that proprietary information, to allow CAN to formulate “well-documented and specific contentions challenging the Entergy companies’ technical and financial qualifications.” (CAN Pet. at 17.) The Commission should not require production of such information, because as a threshold matter CAN has failed to assert a cognizable issue in this Subpart M proceeding. The situation here is thus unlike that presented in the Indian Point 3 proceeding. There, CAN had asserted a contention ruled admissible by the Commission, and had further raised a financial qualifications issue that challenged the Entergy companies’ cost and revenue projections. The contention, if properly backed up, would meet the threshold requirement for properly supported contentions. For that reason, the Commission allowed CAN access to the unredacted license transfer application and additional time so that

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<sup>9</sup> CAN complains that its call to Entergy counsel was not returned. No details of this unsuccessful attempt are provided and Applicants are unaware of any such attempt. In any event, CAN does not explain any other options pursued or how Cortlandt could obtain a copy while it, CAN, could not. CAN indicates that it ultimately obtained “a partial copy” of the application on “an emergency basis” from Petitioner Cortlandt’s attorney on February 17, 2001. (CAN Pet. at 3.) CAN does not explain why it waited until virtually the due date for petitions to intervene before it contacted Cortlandt.

CAN could “properly document the issue.” Indian Point 3, 52 NRC at 300 & n. 23. None of those circumstances is present in this case.

To allow CAN, without any attempt to meet its threshold obligations, to review the confidential information filed by the Entergy companies would have the effect of doing away with the requirements in 10 C.F.R. § 2.1306 for raising issues in Subpart M proceedings, and would also negate the ability of applicants to file confidential information with the assurance that only those with legitimate grounds for reviewing such information would have access to it. Therefore, both CAN’s request for an extension of time and its request that it be granted access to the unredacted version of the license transfer application should be denied.<sup>10</sup>

E. Conclusion With Regard To CAN

For the reasons set forth above, CAN has failed to meet its burden under 10 C.F.R. § 2.1306 of coming forward with issues that would justify its participation in this proceeding. The request for hearing and petition for leave to intervene filed on behalf of CAN should therefore be denied, and CAN’s requests to stay the proceeding and for an extension of time should also be denied.

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<sup>10</sup> Should the Commission require that proprietary information be provided, any issues subsequently proffered by CAN would be late-filed issues subject to the acceptance criteria in 10 C.F.R. § 2.1308(b). Those proposed contentions should be reviewed against the standards for late-filed contentions set forth in 10 C.F.R. § 2.714(a). See Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC 67, 69 (1983) (“the finding of good cause for the late filing of contentions is related to the total previous unavailability of information. . . . [a] submitted document, while perhaps incomplete, may be enough to require contentions related to it to be filed promptly.”).

#### IV. CORTLANDT'S PETITION

##### A. Cortlandt's Standing Is Not Contested

The Town of Cortlandt and the Hendrick Hudson School District (collectively, "Cortlandt") assert that both parties have standing based upon the factors cited by the Commission in its November 27, 2000, order in the Indian Point 3 proceeding:

Cortlandt and the Hendrick Hudson School District collectively seek standing in the Indian Point 3 license transfer proceeding on the grounds that the Indian Point 3 plant is located within the boundaries of both governmental entities and that the plant's safe operation and decommissioning is of great concern to the safety and long-term economic well-being of the Town and School District Communities. We find that, for these reasons, Cortlandt has demonstrated standing with respect to the Indian Point 3 license transfer application. [citation omitted] Moreover, Cortlandt is the locus of the Indian Point 3 plant and therefore is in a position analogous to that of an individual living or working within a few miles of a plant whose license may be transferred.

Indian Point 3, CLI-00-22, 52 NRC at 294-295. In light of the Commission's determination in that case, Applicants do not challenge Cortlandt's standing in this proceeding at the present time.

##### B. Cortlandt's Request For Extension Of Time Should Be Denied

At the outset of its petition, Cortlandt requests an extension of time until April 1, 2001, or 30 days after it receives an unredacted copy of the license transfer application, whichever is later. (Cortlandt Pet. at 1.) Cortlandt asserts two justifications for this request. First, Cortlandt seeks time to allow it to "modify or augment" its proposed issues for hearing after consideration of information now being provided in multiple parallel administrative proceedings, including the Indian Point 3 proceeding, a proceeding before the New York State Public Service Commission ("PSC") on the present license transfer application, the above-referenced Section 2.206 matters involving Con Edison, and other ongoing proceedings before the Federal Trade Commission and the Federal Energy Regulatory Commission ("FERC"). (Id.

at 3-4.) Second, Cortlandt seeks time to allow it to draft new issues, following receipt and review of proprietary material which was redacted from the application. (Id. at 7.) As discussed above with respect to CAN's similar requests, Cortlandt has not demonstrated "unavoidable and extreme circumstances" which would warrant an extension of time. Thus, the request should be denied.

As noted in the discussion of CAN's request for an extension of time, the pendency of parallel proceedings before other forums is not adequate grounds to stay a license transfer proceeding. Indian Point 3, 52 NRC at 289; Nine Mile Point, CLI-99-30, 50 NRC at 343-44. For the same reasons, multiple proceedings do not provide good cause for lesser delays, such as an extension of time. To the extent that other agencies are considering the same or similar issues, that consideration takes place following different statutory mandates from those of the NRC, and the conclusions would not be dispositive of the issues before the NRC. Nine Mile Point, CLI-99-30, 50 NRC at 344. Moreover, other ongoing NRC proceedings or Section 2.206 petitions are wholly separate from the license transfer proceeding and provide no basis for delaying it, as noted above with regard to CAN. This is particularly true where, as here, the delay is intended as a substitute for discovery, which is not available in Subpart M proceedings (except in the limited sense provided by 10 C.F.R. § 2.1322).

Cortlandt's request for an extension of time is combined with a request to receive information withheld from disclosure pursuant to 10 C.F.R. § 2.790(a)(4) and 10 C.F.R. § 9.17(a)(4). Cortlandt asserts that its lack of access to proprietary information included in the application compromises its ability to raise issues. Thus, it intends to review the information with the aim of proffering wholly new proposed issues. However, the Commission's rules clearly contemplate that petitioners have an initial burden of drafting the issues for hearing, and

this is not in any way conditioned upon receipt of proprietary financial information. Cortlandt's approach confuses issues and evidence. Under the regulations, a petitioner's obligation is to draft its own issues with its own expert or documentary bases. The fact that additional information or evidence may become available later should not prevent drafting issues of concern to it now and should not delay the proceeding. Because Cortlandt had, in its possession, sufficient information to formulate issues in accordance with 10 C.F.R. § 2.1306(b), the request for an extension should be denied.

Cortlandt relies on the November 27, 2000 Commission order in the Indian Point 3 proceeding, as well as the February 5, 2001 order of the Presiding Officer in the same proceeding, for the proposition that redacted information should be provided in order to facilitate Cortlandt's drafting of new issues. As explained above, this was not the ruling in Indian Point 3. In that case an issue had been offered that was found to be admissible. Should the Commission find here, after Cortlandt has advanced one or more admissible issues, that redacted information is necessary for Cortlandt to participate effectively in this proceeding *on that issue*, the Applicants are prepared to enter into an appropriate nondisclosure agreement (or protective order) in order to provide the required information. Such protective order or nondisclosure agreement would go into effect, however, only upon *the admission of litigable issues*.

C. Cortlandt's Proposed Issues

A review of the issues proposed by Cortlandt compels two conclusions: (a) with respect to the financial qualifications of Applicants, which are generally within the scope of this proceeding, Cortlandt has failed to set forth specific issues and support (such as alleged facts or expert opinions) that satisfy the Commission's pleading requirements; and (b) with respect to all of its other issues, Cortlandt has failed to raise a material issue of law or fact within the scope of

the proposed license transfer.<sup>11</sup> In sum, the issues identified are not appropriate for litigation in this proceeding.

1. Financial Ability

a. In General

Cortlandt contends that the application is deficient because it fails to contain the information specifically required by 10 C.F.R. § 50.33(f) with respect to financial qualifications. (Cortlandt Pet. at 13.) While Cortlandt lists a number of areas of concern, as discussed below, none is asserted with the level of specificity required for an issue to be admissible under 10 C.F.R. § 2.1306(b)(2).

Cortlandt broadly asserts that: ENO's and Entergy Nuclear IP2's anticipated expenses and taxes will outpace anticipated revenues (based on historical information); the plant capacity factor assumed in the cost and revenue projections of 85% is unsubstantiated and untenable; ENO and Entergy Nuclear IP2 improperly rely on credit lines as part of the minimum financial assurance requirement; and the financial information of affiliates is improperly relied upon for financial assurance of a limited liability entity. Cortlandt fails to concisely state these issues or to provide details and the required bases supporting each assertion.<sup>12</sup> With the exception of the two specific issues discussed below, Cortlandt has not even attempted to meet the specificity and basis requirements of the Subpart M regulations. Accordingly, Cortlandt's broad-brush claims regarding the financial ability of the transferees should be rejected.

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<sup>11</sup> In fact, virtually all of the other issues were raised by Cortlandt and rejected by the Commission as out of scope in the Indian Point 3 proceeding.

<sup>12</sup> Moreover, Cortlandt's attempt to challenge Applicants' use of credit lines is contrary to the Commission's clear direction. See Indian Point 3, CLI-00-22, 52 NRC at 298-99.

b. Sufficiency Of The Applicants' Five-Year Projections

Cortlandt contends that the five-year projections provided by Applicants, pursuant to 10 C.F.R. § 50.33(f)(2), are deficient. (Cortlandt Pet. at 19.) Particularly, Cortlandt challenges Applicants' submission of cost and revenue projections through the year 2005. (Id.) This issue, however, does not establish a genuine dispute of material fact or law.

10 C.F.R. § 50.33(f)(2) requires that an applicant submit estimates "for total annual operating costs for each of the first five years of operation of the facility," as well as indicate the source of funds to cover these costs. A license transfer applicant satisfies the NRC's financial qualifications rule if it provides a cost-and-revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. Vermont Yankee, CLI-00-20, 52 NRC 151, 176 (2000); Seabrook, CLI-99-6, 49 NRC at 220. Applicants have requested that the Commission review its application on a schedule that will permit closing to occur by May 11, 2001. Accordingly, 2001 is the first year of operation of the facility by the transferee and Applicants' projections meet the requirements. Even assuming, arguendo, that Applicants' cost and revenue projections should extend to May 11, 2006, Cortlandt provides no specific allegations or evidence that the projections offered in the application fail to provide reasonable assurance of financial qualifications for that five-month period. In the absence of plausible and adequately supported claims that such projections are inaccurate or otherwise do not provide adequate assurance of financial qualifications, challenges to the five-year cost and revenue projections are held to be inadequate. See Oyster Creek, CLI-00-06, 51 NRC at 207. Therefore, Cortlandt's general attack on the projections does not meet the NRC's pleading requirements and should be rejected.

c. Employment Issues

Cortlandt alleges that ENO's agreement to honor the existing collective bargaining agreement, offer employment to all plant employees, and provide equivalent compensation and benefits to continuing non-union management for three years "calls into question the reasonableness of the redacted cost [projections], the 85% plant capacity factor, and the ability of [Entergy Nuclear IP2]/[ENO] to safely operate and maintain" Units 1 and 2. (Cortlandt Pet. at 19-20.) Labor issues, "if closely tied to specific health and safety concerns or to potential violations of NRC rules, can be admitted for a hearing" under Subpart M. Indian Point 3, CLI-00-22, 52 NRC at 315. On the other hand, general plant staffing allegations, such as those asserted by Cortlandt here, are beyond the scope of a license transfer proceeding. Id. at 316. Cortlandt points to no details or evidence suggesting that the Entergy Nuclear IP2 and ENO will reduce the staff of Units 1 and 2 below NRC requirements as a result of the license transfer, or that the existing three-year contract will cause the facilities' projected expenses to exceed projected revenues. In any event, the adequacy of staffing is an ongoing operational issue which should be addressed via a Section 2.206 petition. See 10 C.F.R. § 50.54(m); Oyster Creek, CLI-00-06, 51 NRC at 209 ("If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then . . . the agency can and will take the necessary enforcement action to ensure the public health and safety.") In sum, the assertions in the area of employment do not present a litigable issue, and should be rejected.

2. Decommissioning Fund Levels And Responsibilities

This proposed issue alleges that the application contains insufficient information to comply with the requirements of 10 C.F.R. § 50.33(k)(1) pertaining to financial assurance for facility decommissioning. (Cortlandt Pet. at 20.) Cortlandt further alleges that the decommissioning trust fund amount for Units 1 and 2 is “plainly insufficient” to fund the decommissioning. (*Id.* at 21.) As a basis for this statement, Cortlandt references an affidavit of Edward Rasmussen, which states that another decommissioning cost study finds that the actual cost of decommissioning both units may be greater than the amount contained in the decommissioning trusts. (*Id.*) However, as explained below, because Entergy Nuclear IP2 and ENO have met the NRC’s minimum requirements for decommissioning financial assurance, this proposed issue does not present a genuine dispute on a material issue of law or fact, and should be rejected.

10 C.F.R. § 50.75 requires a power reactor licensee to demonstrate to the NRC how it will provide reasonable assurance that funds will be available for the decommissioning process. Pursuant to 10 C.F.R. § 50.75(b), the licensee is required to provide decommissioning funding assurance by one or more of the methods described in 10 C.F.R. § 50.75(e). Entergy Nuclear IP2 and ENO propose to satisfy this requirement, for both Units 1 and 2, by holding \$430 million in trust. This amount meets the minimum funding requirement under the “prepayment” method set forth at 10 C.F.R. § 50.75(e)(1)(i).<sup>13</sup> This amount was calculated using the generic formulas set forth at 10 C.F.R. § 50.75(c). Because the licensee has met the NRC’s requirements, there is no genuine dispute of material fact or law on which to base a contention.

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<sup>13</sup> This amount takes credit for a 2 percent annual real rate of return on the trust through the projected decommissioning period. Application, Encl. 1 at 14; 10 C.F.R. §§ 50.75(c), 50.75(e)(1)(i).

The Commission has held that licensees show sufficient assurance of decommissioning funding by complying with 10 C.F.R. § 50.75. Seabrook, CLI-99-6, 49 NRC at 217. Cortlandt argues that specific conditions at Units 1 and 2 preclude Applicants' use of the generic method for calculating decommissioning costs under the formula set forth in Section 50.75. However, Cortlandt is barred from challenging NRC's decommissioning cost formula on the basis of site-specific conditions. Such an argument (which Cortlandt unsuccessfully sought to raise in the Indian Point 3 proceeding) amounts to an impermissible challenge to the NRC's formula for estimating decommissioning costs, and thus an impermissible attack on the NRC's regulations and there has been no attempt to meet the criteria of 10 C.F.R. § 2.758. Indian Point 3, CLI-00-22, 52 NRC at 303; Seabrook, CLI-99-6, 49 NRC at 217 n.8; Vermont Yankee, CLI-00-20, 52 NRC at 165-66.

Moreover, there is no basis for inferring that compliance with 10 C.F.R. § 50.75 must depend upon an exquisitely accurate projection of costs occurring decades in the future. Rather, the NRC's decommissioning funding rules recognize that compliance with Section 50.75 supplies conclusive assurance with respect to future uncertainties. The Commission's regulations, at 10 C.F.R. § 50.75(f)(2), also require that the licensee, five years prior to the expected end of operations, submit both a cost estimate for decommissioning based on an up-to-date assessment of the actions necessary for decommissioning, and plans for adjusting levels of funds for decommissioning, if necessary. Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (1988). NRC's rules, therefore, take into account the possibility of changes over time; the regulation was intended to establish no more or less than a "general level of adequate financial responsibility for decommissioning early in life." Id.

Finally, Cortlandt requests that the Commission take into consideration “the present uncertainty in the financial markets, and the widespread perception that [the] United States is on the verge of recession.” (Cortlandt Pet. at 22.) Cortlandt asserts that a “change in financial conditions may make it impossible for the [decommissioning trust] fund to appreciate at the estimated two percent real growth rate assumed by current regulations.” The Commission, however, has adopted the 2 percent assumption as a generic rule.<sup>14</sup> Cortlandt’s challenge to the basis for computing the rate of growth in investment funds has already been rejected by the Commission in the Indian Point 3 proceeding. Indian Point 3, CLI-00-22, 52 NRC at 303 n. 25. The Commission also held that “absolute certainty” in financial forecasts is impossible, and the NRC does not require it. Indian Point 3, CLI-00-22, 52 NRC at 300; Seabrook, CLI-99-6, 49 NRC at 222 (“[a petitioner’s] arguments ultimately will prevail only if it can demonstrate relevant uncertainties significantly greater than those that usually cloud business outlooks”). Therefore, arguments going to the uncertainty in the future outlook of the economy are not appropriate in this forum. In conclusion, with regard to decommissioning funding issues, Cortlandt has not proffered a litigable issue within the scope of this proceeding.<sup>15</sup>

### 3. On-Site Storage Capacity

Cortlandt contends that the license transfer application is deficient because it fails to demonstrate the transferees’ ability to manage spent nuclear fuel once the Unit 2 spent fuel pool reaches capacity in 2004. (Cortlandt Pet. at 23.) Cortlandt asserts that Entergy Nuclear IP2

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<sup>14</sup> 10 C.F.R. § 50.75(e)(1)(i).

<sup>15</sup> Cortlandt briefly mentions that there are questions relative to decommissioning “just by virtue of the Statement of [Unit 2] that [Unit 2’s] license may be extended and alternative decommissioning plans implemented.” Issues related to the potential effect of license renewal are clearly beyond the scope of license transfer proceedings, and the Commission has already rejected the same claim when Cortlandt advanced it in Indian Point 3. Indian Point 3, CLI-00-22, 52 NRC at 303-04.

will not have adequate financial resources to manage spent fuel at Unit 2. (Cortlandt Pet. at 24.) However, because this issue falls beyond the scope of this license transfer proceeding, it should not be admitted. Furthermore, Cortlandt has provided no facts, expert opinions, or references to specific support or documents supporting a position that Entergy Nuclear IP2 will be unable or unwilling to manage spent nuclear fuel at Unit 2 in accordance with NRC regulations. In sum, these assertions are baseless, speculative, outside the scope of this proceeding, and do not present a litigable issue.

An issue, such as spent fuel management, which addresses the plant's ongoing safety-related programs, is an operational issue which will remain whether or not the license is transferred. See Oyster Creek, CLI-00-06, 51 NRC at 213-14 (where the Commission declined to admit an issue relating to how the licensee should conduct spent fuel management). If Petitioners seek to litigate specific proposals related to spent fuel storage, the appropriate avenue is in response to any specific proposed license amendment that will be necessary when the licensee seeks approval of measures to address the capacity of its spent fuel pool. Oyster Creek, CLI-00-06, 51 NRC at 214.<sup>16</sup> The issue should not be admitted in the guise of a "financial qualifications" issue.<sup>17</sup> It is clearly not the Commission's intent to open the door in Subpart M proceedings to potential spent fuel storage issues.

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<sup>16</sup> If the petitioners seek staff enforcement action relating to spent fuel management, the appropriate vehicle is a petition for NRC Staff enforcement action pursuant to 10 C.F.R. § 2.206.

<sup>17</sup> It should be noted that a licensee is required, within 2 years following permanent cessation of operation of the reactor or 5 years before expiration of the reactor operating license (whichever occurs first), to submit written notification to the NRC of the program by which the licensee intends to manage and provide funding for the management of spent fuel, following permanent cessation of reactor operation, until title to and possession of all spent fuel is transferred to the Department of Energy for its ultimate disposal in a repository. This notification must be reviewed and preliminarily approved by the Commission. 10 C.F.R. § 50.54(bb).

4. Anticipated Environmental Expenses At Unit 2

Cortlandt contends that Entergy Nuclear IP2 may lack the financial resources to adequately fund environmental remediation required at the Unit 2 site. (Cortlandt Pet. at 24-25.) Cortlandt cites to a “Phase I and Phase II Environmental Site Assessment” performed for Unit 2 in 2000, referenced in a Draft Supplemental Environmental Impact Statement prepared by Con Edison for the New York State PSC, for the proposition that, in addition to operating expenses, the owner of Unit 2 is likely to incur “significant environmental expenses.” (*Id.* at 25.) Cortlandt also tries to introduce issues associated with the State Pollutant Discharge Elimination System water discharge permit for Unit 2. (*Id.*) Cortlandt asserts that these costs must be addressed to determine whether Entergy Nuclear IP2 will have adequate financial resources to operate Unit 2. These matters pending before other administrative agencies are simply inappropriate for NRC license transfer proceedings.

The substance of environmental remediation proposals for Indian Point are not matters within the jurisdiction of the NRC. Moreover, as the Petition itself points out (*id.*), issues concerning environmental remediation are ongoing operational concerns that will affect any operator of the plant, regardless of whether a license transfer takes place. A license transfer proceeding is an improper forum in which to conduct an inquiry involving current plant operation. Oyster Creek, CLI-00-06, 51 NRC at 213-14; Vermont Yankee, CLI-00-20, 52 NRC at 169. Moreover, Cortlandt’s assertions relative to remediation costs are vague and are pure speculation. Cortlandt has provided no facts, expert opinions, or references to specific support or documents supporting a position that Entergy Nuclear IP2 will be unable or unwilling to manage or pay for any environmental remediation that may be required in the future. In sum, this proposed issue should be rejected.

5. Radiological Emergency Response Plans

Cortlandt asserts that the license transfer application is deficient because it fails to provide a radiological emergency response plan, in accordance with 10 C.F.R. § 50.33(g), to account for the increased population and development in the “immediate vicinity” of the facilities. (Cortlandt Pet. at 26.) In addition, Cortlandt asserts that the application is deficient because it does not consider the probability that a new plan may have to be developed, or how such a plan will be funded. (*Id.* at 26-27.) Finally, Cortlandt contends that a new evacuation plan will need to be designed. (*Id.* at 26.) This proposed issue is beyond the scope of the license transfer, and, thus, not appropriate for litigation in this proceeding.

The Commission specifically rejected an almost identical claim by Cortlandt in Indian Point 3, where it held that issues involving emergency evacuation plans are not appropriate in license transfer proceedings. Indian Point 3, CLI-00-22, 52 NRC at 317. The license transfer application does not propose any change, other than the change in the responsible licensee, to emergency preparedness or response plans. The new licensees will be required to conform to all of the emergency planning and preparedness requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50.

Moreover, no new emergency plans or evacuation time estimates are necessary at this time because the existing arrangements are unaffected by the proposed transfer. As long as the transferee demonstrates overall technical qualifications, and intends to implement the existing emergency response plan, there can be no issue regarding the plans themselves. As the existing Indian Point Unit 3 licensee, ENO and affiliates are *already fulfilling emergency planning and response obligations at the site*. Cortlandt has provided no facts, expert opinions, or references to specific support or documents supporting a position that Entergy Nuclear IP2

and ENO will violate NRC regulations governing emergency planning and preparedness.<sup>18</sup> Consequently, Cortlandt's assertions are baseless, speculative, and outside the scope of this proceeding.

6. The Proposed Transfer Is Not In The Public Interest

In this proposed issue, Cortlandt alleges that the proposed transfer is not in the public interest. (Cortlandt Pet. at 27.) In order to approve a license transfer, the Commission must find:

- (1) That the proposed transferee is qualified to be the holder of the license; and
- (2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

10 C.F.R. § 50.80(c). These requirements do not include a finding that the transfer is in the public interest. This issue is outside the jurisdiction of the NRC and should be denied.

In addition, Applicants must obtain approval of this transfer, including a finding that the transfer is in the public interest, from both FERC and the PSC. See, e.g., Federal Power Act § 203, 16 U.S.C. § 824b; N.Y. Public Service Law § 70 (McKinney 2000). Because this issue will be fully addressed in other forums, it need not be considered here. This proposed contention should be rejected.

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<sup>18</sup> Indeed, the license transfer application reiterates Applicants' commitment to compliance with the NRC's emergency planning requirements, and discusses the steps Applicants will take to ensure compliance. Application, Encl. 1 at 9-10.

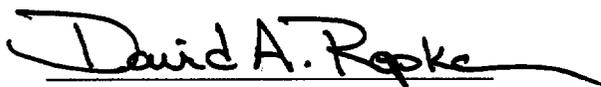
D. Conclusion As To Cortlandt

For the reasons set forth above, the request for hearing and petition for leave to intervene filed on behalf of the Town of Cortlandt and the Hendrick Hudson School District should be denied. Cortlandt's motion for extension of time should also be denied.

V. CONCLUSION

For the reasons set forth above, the requests for hearing and petitions for leave to intervene of both CAN and Cortlandt should be denied.

Respectfully submitted,



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ATTORNEYS FOR CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.

ATTORNEYS FOR ENTERGY NUCLEAR  
INDIAN POINT 2, LLC, and  
ENTERGY NUCLEAR OPERATIONS, INC.

Dated in Washington, District of Columbia  
This 2<sup>nd</sup> day of March 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Consolidated Edison Company of New York, Inc.,	)	Docket Nos. 50-003-LT
	)	50-247-LT
and	)	
	)	
Entergy Nuclear Indian Point 2, LLC,	)	
and	)	
Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating Units 1 and 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party:	Consolidated Edison Company of New York, Inc.

  
David A. Repka

Dated at Washington, D.C.  
this 2<sup>nd</sup> day of March, 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
)  
Consolidated Edison Company of New ) Docket Nos. 50-003-LT  
York, Inc., Entergy Nuclear Indian Point ) 50-247-LT  
2, LLC, and Entergy Nuclear Operations, )  
Inc. )  
)  
(Indian Point Nuclear Generating )  
Units 1 and 2) )

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Name of Party: Consolidated Edison Company of New York, Inc.

  
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Dated at Washington, D.C.  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )

Consolidated Edison Company of New )  
York, Inc. )

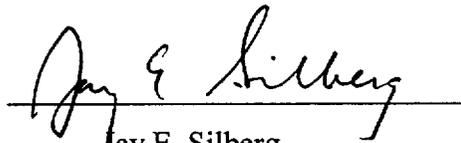
Docket Nos. 50-003-LT  
50-247-LT

and )

Entergy Nuclear Indian Point 2, LLC, )  
(Indian Point Nuclear Generating Units 1 )  
and 2) )

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia and the State of New Jersey, as well as various federal courts including the United States Supreme Court, hereby enters his appearance as counsel on behalf of Entergy Nuclear Indian Point 2, L.L.C. and Entergy Nuclear Operations, Inc. in any proceeding related to the above-captioned matter.



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Dated: March 2, 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
)  
Consolidated Edison Company of New ) Docket Nos. 50-003-LT  
York, Inc. ) 50-247-LT  
)  
and )  
)  
Entergy Nuclear Indian Point 2, LLC, )  
)  
(Indian Point Nuclear Generating Units 1 )  
and 2) )

NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia as well as various federal courts, hereby enters his appearance as counsel on behalf of Entergy Nuclear Indian Point 2, L.L.C. and Entergy Nuclear Operations, Inc. in any proceeding related to the above-captioned matter.



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Dated: March 2, 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
)  
Consolidated Edison Company of New ) Docket Nos. 50-003-LT  
York, Inc. ) 50-247-LT  
)  
And )  
)  
Entergy Nuclear Indian Point 2, LLC, )  
And )  
Entergy Nuclear Operations, Inc. )  
)  
(Indian Point Nuclear Generating )  
Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. TO PETITIONS FOR LEAVE TO INTERVENE AND REQUESTS FOR HEARING" in the above captioned proceeding have been served as shown below by electronic mail, the 2<sup>nd</sup> day of March 2001. Additional service by deposit in the United States mail, first class, has also been made this same day as shown below.

Richard A. Meserve, Chairman  
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Washington, DC 20555-0001

Edward McGaffigan, Commissioner  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Jeffrey S. Merrifield, Commissioner  
U.S. Nuclear Regulatory Commission  
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Greta J. Dicus, Commissioner  
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Nils J. Diaz, Commissioner  
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Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Office of the Secretary  
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