

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 3350

ATOMIC SAFETY AND LICENSING BOARD PANEL

DOCKETED 08/30/01

SERVED 08/30/01

Before Administrative Judge:

Ann Marshall Young
Presiding Officer

_____)	
In the Matter of)	Docket Nos. 50-003-LT
)	and 50-247-LT
CONSOLIDATED EDISON COMPANY)	(consolidated)
OF NEW YORK and)	
ENTERGY NUCLEAR INDIAN POINT 2, LLC,)	ASLBP No. 01-792-03-LT
and ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating)	August 30, 2001
Units 1 and 2))	
_____)	

MEMORANDUM AND ORDER

(Setting Preliminary Procedural Guidelines)

Background

By Memorandum and Order dated August 22, 2001, CLI-01-19, the Commission granted the requests for hearing of the Citizens Awareness Network ("CAN") and the Town of Cortlandt together with the Hendrick Hudson School District (collectively "Cortlandt") and admitted certain issues relating to a December 12, 2000, application (notice of which was published in the *Federal Register* on January 29, 2001) seeking the Commission's authorization, pursuant to Section 184 of the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2234, and 10 C.F.R. § 50.80, for Consolidated Edison Company of New York ("ConEd") to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point Nuclear Generating Unit Nos. 1 and 2 (collectively, "the Indian Point plant") to Entergy Nuclear

Indian Point 2, LLC (“Entergy Indian Point 2”) and Entergy Nuclear Operations, Inc. (“Entergy Nuclear Operations”), respectively. CLI-01-19, 54 NRC at — (slip op. at 1-4, 36).

Finding that both petitioners had demonstrated standing and raised at least one admissible issue, *id.* (slip op. at 10); see AEA § 189a, 42 U.S.C. § 2239(a); 10 C.F.R. § 2.1306, the Commission set the case for hearing and addressed certain procedural matters, including a schedule for filing and for the hearing, which are addressed in detail below. The Commission also declined Cortlandt’s request for a waiver of 10 C.F.R. § 50.75(e)(1)(i) regarding consideration of site-specific decommissioning funding estimates, *id.* (slip op. at 24, 37), and its request to dismiss the application based on questions raised regarding its sufficiency, ruling that any missing data can be submitted for consideration by the Presiding Officer at the hearing, observing that dismissing this proceeding would not serve the parties’ best interests as the deficiency in the application can easily be cured and the focus should be on the numerous substantive matters to be resolved, and noting that the Applicants have already supplied missing data to the NRC Staff and to the Petitioners. *Id.* (slip op. at 7, 37).

The Commission also denied CAN’s request for a formal hearing under 10 C.F.R. Part 2, Subpart G, ruling that the hearing shall be conducted under the Subpart M procedures that normally apply to license transfer adjudications, and denied as well CAN’s request for a “broad-ranging” hearing under Subpart M, stating that the Commission will consider additional procedures if it deems them necessary as this proceeding moves forward. *Id.* (slip op. at 5-6, 37). Finally, the Commission provisionally granted CAN’s and Cortlandt’s request to cosponsor each issue admitted for hearing, subject to the requirement that, should the primary sponsor of an issue withdraw from this proceeding, the remaining sponsor must then demonstrate to the Presiding Officer its independent ability to litigate this issue, the failure to do which will render the issue subject to dismissal prior to the hearing. *Id.* (slip op. at 8-10, 37).

On August 28, 2001, the undersigned was designated to serve as Presiding Officer in this proceeding. The contact information for the Presiding Officer is as follows:

Administrative Judge Ann Marshall Young, Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: amy@nrc.gov; Fax: 301/415-5599

Issues for Hearing

Of the issues filed by CAN on April 9, 2001, and Cortlandt on April 12, 2001, those admitted by the Commission involve whether the Entergy companies have demonstrated their financial ability to operate and maintain the Indian Point plant safely. *Id.* (slip op. at 4). To avoid confusion regarding the issues found to be admissible, the Commission directed the parties to organize their presentations at the hearing of this case around the following outline of issues, all of which issues relate to the Applicants' 5-year cost and revenue projections:

1. Revenue

- a. Whether Entergy's 85% capacity factor assumption is reasonable in its own right and reasonably rests on the Entergy companies' operating experience at other plants;
- b. Whether, even assuming an 85% capacity factor, the revenue claimed by Entergy exceeds the revenues likely to be attained, given Entergy's fixed price agreement with ConEd and Entergy's estimate of the sale price per megawatt hour; and
- c. Whether Entergy's projected decrease in retained earnings will leave Entergy short of necessary operational funds.

2. Costs

- a. Whether, given fixed operating costs, Indian Point 2's historical operating expenses, and the application's asserted lack of information on cost savings, Entergy's cost estimates are too low; and
- b. Whether Entergy's cost estimates include appropriate amounts to resolve a shortage of spent fuel storage capacity expected to begin in 2004.

Id. (slip op. at 32-33).

Filing and Hearing Schedule

The Commission in CLI-01-19 also set forth the following deadlines and dates for the filing of documents and the hearing of the case:

1. If the parties agree to a non-oral hearing, they must file a joint motion **no later than September 6, 2001**. See 10 C.F.R. § 2.1308(d)(2).

2. All initial **written statements of position and written direct testimony** (with any supporting affidavits) must be filed **no later than September 21, 2001** (30 days after the issuance of CLI-01-19). See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1).

3. All **written responses to direct testimony, rebuttal testimony (with supporting affidavits), and proposed questions directed to written direct testimony** must be filed **no later than October 11, 2001** (20 days after the submission of written statements of position and written testimony). See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). As suggested by the Commission in *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant and Indian Point, Unit 3), CLI-01-14, 53 NRC ___ (June 21, 2001), (slip opin. at 82-83) [hereinafter "*Indian Point 3*"], **the parties are strongly encouraged to file written prehearing questions, as proposed questions at the hearing will be entertained sparingly, limited primarily to unexpected issues that arise only at the hearing.**

4. All **proposed questions directed to written rebuttal testimony** must be submitted to the Presiding Officer **no later than October 22, 2001** (10 days after the submission of rebuttal testimony, see 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4); the 7-day filing period specified in the last two of these regulations was, pursuant to 10 C.F.R. § 2.1314(b) and 2.1314(c), extended by 3 days, because the period includes a Saturday and a Sunday, and extended one additional day because the prescribed time period ends on a Sunday.)

5. If the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral **hearing beginning at 9:30 a.m. on October 29, 2001** (5 business days after submission of questions), at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issues designated above. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

6. All **written post-hearing statements of position must be filed no later than November 19, 2001** (20 days after the oral hearing, pursuant to 10 C.F.R. § 2.1322(c), plus one additional day because the due date falls on a Sunday, see 10 C.F.R. § 2.1314(a)).

Id. (slip op. at 34-35).

Expedited Nature of Proceedings

Given the expedited nature of license transfer proceedings, and to avoid any delays that might be occasioned by the beginning of the holiday season immediately after the completion of the above schedule, all deadlines and dates set forth in this Memorandum and Order shall be scrupulously followed in this proceeding, and the parties are directed to see that they are conscientious in observing the deadlines.

Service Requirements

Absent good cause shown, the parties shall observe the preferred method of filing stated by the Commission in CLI-01-19, namely that all documents shall be filed electronically by e-mail, in WordPerfect format (in a version at least as recent as 6.0). *Id.* (slip op. at 36); *see also* 10 C.F.R. § 2.1313(c). Service will be considered timely if the e-mail is sent not later than 11:59 p.m. of the due date under the Subpart M rules. The parties are also required to submit a single, signed hard copy of any filings to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. The fax number for the Office of the Secretary is (301) 415-1101 and the e-mail address is secy@nrc.gov.

Procedure at Hearing

The parties to this proceeding at this point are CAN, Cortlandt, ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations. The Staff will also participate as indicated below. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed. *Id.* (slip op. at 34); *see also* Confidentiality Agreement discussion, below. The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party. *Id.* (slip op. at 35); *see* 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b); *Indian Point 3*, CLI-01-14, 53 NRC at ___, (slip op. at

82-83). Any party submitting prefiled direct testimony should make the sponsor of that testimony available for questioning at the hearing. *Id.*

Based upon the Commission's indication that it anticipates that the hearing will take no longer than 1 day, and pursuant to its direction in CLI-01-19, 54 NRC at — (slip op. at 35), the following preliminary allotments of time for the initial and reply presentations of the parties, as well as for questioning by the Presiding Officer, are hereby established:

Opening Statements - Each Party:	15 minutes
CAN and Cortlandt presentations on Revenue issues:	1 hour
ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations replies on Revenue issues:	1 hour
Presiding Officer Questions on Revenue issues:	1 hour
CAN and Cortlandt presentations on Cost issues:	1 hour
ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations replies on Cost issues:	1 hour
Presiding Officer Questions on Cost issues:	1 hour

Pursuant to the Commission's Memorandum and Order, CLI-01-19, 54 NRC at — (slip op. at 33), prefiled testimony and exhibits should contain *specific* facts and/or expert opinion in support of their positions on the issues set forth above, and be as concise, short and focused as possible. New issues or new arguments related to the admitted issues at the hearing shall not be considered unless they satisfy the provisions of 10 C.F.R. § 2.1308(b) relating to late-filed issues, and claims rejected in the Commission's Memorandum and Order, CLI-01-19, shall not be considered. Redundant, duplicative, unreliable, or irrelevant submissions will not be accepted and will be stricken from the record. See 10 C.F.R. § 2.1320(a)(9). In addition, the Intervenor shall state explicitly the remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

As the Commission also stated in CLI-01-19, 54 NRC at — (slip op. at 37), the parties are required to inform the Commission, and shall also timely inform the Presiding Officer, of any court or administrative orders, settlements, or business decisions that may in any way relate to, or render moot, part or all of the instant proceeding.

In this regard, on August 28, 2001, the Presiding Officer received a copy of an August 27, 2001, Order of the NRC Staff approving the license transfers at issue, with a cover letter and attachments including a non-proprietary and a proprietary version of the Staff's Safety Evaluation Report (SER). The proprietary version of the SER contains a reference to shaded text indicating proprietary information; however, the copy received contains no shaded text, indicating that the document is a copy rather than an original. The Staff is directed to provide the document with actual shaded text indicating proprietary information, **no later than September 4, 2001.**

On August 29, 2001, Counsel for ConEd notified the Presiding Officer by e-mail that the parties to the license transfers intend to close on the transfers on September 6, 2001. As stated by the Commission in *Indian Point 3*, this does not affect the instant proceeding, the purpose of which is "to resolve whether, for the reasons raised by the petitioners, the Commission should disapprove the transfers and require the applicants to return the plant ownership to the *status quo ante* or modify the license notwithstanding the staff's orders and the applicants' actual consummation of the sale." *Indian Point 3*, CLI-01-14, 53 NRC at ___, (slip op. at 2); and authorities cited therein.

Finally, on the procedure at the hearing, although the NRC Staff has, pursuant to 10 C.F.R. § 2.1316(b)-(c), indicated that it will not be a party to this proceeding, it is expected both to offer into evidence its SER and to proffer one or more sponsoring witnesses for that document, see 10 C.F.R. § 2.1316(b); this should not, however, be a time-consuming element

of the hearing, and the parties are directed to incorporate any issues or questions relating to the SER into the above time allotments, according to whether the questions relate to revenue or cost issues, or to indicate, no later than the prehearing conference set below, why this cannot be accomplished.

Settlement

The Commission in CLI-01-19 directed the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing. The parties may contact the Presiding Officer if they wish to have a Licensing Board Panel-appointed Settlement Judge or Mediator to assist them in this endeavor, and shall file a joint status report notifying the Presiding Officer of the progress of any settlement negotiations, or of any actual settlement between any present parties, **no later than September 7, 2001**.

Confidentiality Agreement

In a Memorandum and Order entered by the Commission in this case on March 6, 2001, CLI-01-8, 53 NRC 225, 228, 231, the Commission directed the parties to enter into a confidentiality agreement with regard to financial information relevant to the expected costs of the plant's operation and maintenance, similar to that entered into in another case involving the Indian Point 3 reactor. See *Indian Point 3*, CLI-01-14, 53 NRC ___ (June 21, 2001); CLI-00-22, 52 NRC 266 (2000). The parties shall provide a copy of this agreement to the Presiding Officer **no later than September 7, 2001**, in order that she may assure that the provisions of the agreement are complied with in this proceeding. All parties shall take care that any copies of documents containing shaded text or similar indications of proprietary information clearly indicate the protected information, to avoid inadvertent disclosure of such information.

In addition, the parties, as well as the parties in *Indian Point 3*, are notified that the Presiding Officer may be consulting the record in *Indian Point 3*, including proprietary

information, with regard to any procedures and issues that may be similar to, or contrast with, those in this case, or are otherwise appropriate for use to become familiar with the issues in this case. Any party in either this case or the *Indian Point 3* case who objects to this approach shall file any such objection **no later than September 7, 2001**.

Prehearing Conference

A telephone conference will be held in this proceeding on **Wednesday, October 17, 2001, commencing at 10:00 a.m.**, to address the status of the case and any procedural issues, to consider whether any developments in the case have affected the potential duration of the hearing and the possible necessity for a second day of hearing in the case (for which possibility October 30 shall be reserved), and to address any other appropriate matters. It is emphasized that the parties should not interpret the previous statement as encouraging them in any way to anticipate a second day of hearing, which shall not be allowed absent actual necessity therefor, but rather to assure that if additional time is required by necessity, it will be reserved at this point so as to prevent delay both in completing the hearing and in filing the parties' post-hearing statements.

Prior to the conference, an Order will be entered notifying all parties of the telephone number and password to use to be connected to the conference. Because of the possibility that proprietary information may be discussed in this conference, only enough lines for the parties or their representatives, as well as the Staff and the Office of General Counsel if they so desire, shall be reserved; unless any party specifically requests in writing **at least one week prior to the conference** that they be provided more than one line, only one line will be reserved for each party.

If any additional prehearing conference is deemed appropriate, the parties will be informed of appropriate information with regard to scheduling and contact information.

Notices of Appearance

As required by the Commission, if they have not already done so, each attorney or representative for each party shall file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b), **no later than 11:59 p.m. on September 4, 2001**. Each notice of appearance shall specify the attorney's or representative's business address, telephone number, facsimile number, and e-mail address. Any attorney or representative who has already entered an appearance but who has not provided any part of this information should do so not later than the date and time specified above. At this point the recipients on the service list are:

The General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1537
(E-mail: ogclt@nrc.gov)

The Secretary of the Commission
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1101 (FAX)
(E-mail: secy@nrc.gov)

Timothy L. Judson
Central New York-Citizens Awareness
Network
140 Bassett St.
Syracuse, NY 13210
(E-mail: cnycan@rootmedia.org)

Paul V. Nolan, Esq.
5515 North 17th Street
Arlington, VA 22205
(E-mail: pvnvn@aol.com)

Brent L. Brandenburg, Esq.
Consolidated Edison Co. of New York
4 Irving Place, Room 1830
New York, NY 10003
(E-mail: brandenburg@coned.com)

Douglas E. Levanway, Esq.
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205
(E-mail: del@wisecarter.com)

David A. Repka, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502
(E-mail: drepka@winston.com;
mwetterh@winston.com)

Jay E. Silberg, Esq.
Matias F. Travieso-Diaz, Esq.
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
(E-mail: jay.silberg@shawpittman.com;
matias.travieso-diaz@shawpittman.com)

To the extent any of the above information is incomplete or inaccurate, any affected party shall immediately supplement or correct the above information and notify all recipients of any such changes.

IT IS SO ORDERED.¹

/RA/

Administrative Judge Ann Marshall Young
PRESIDING OFFICER

Rockville, Maryland
August 30, 2001

¹Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
CONSOLIDATED EDISON COMPANY)	
OF NEW YORK INC.,)	
ENERGY NUCLEAR INDIAN POINT 2, LLC,)	Docket Nos. 50-003-LT
and)	and 50-247-LT
ENERGY NUCLEAR OPERATIONS, INC.)	(consolidated)
)	
(Indian Point Nuclear Generating)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SETTING PRELIMINARY PROCEDURAL GUIDELINES) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lawrence J. Chandler, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Timothy L. Judson
Central New York-Citizens Awareness
Network
140 Bassett St.
Syracuse, NY 13210

Paul V. Nolan, Esq.
5515 North 17th Street
Arlington, VA 22205

Brent L. Brandenburg, Esq.
Consolidated Edison Company of New York
4 Irving Place, Room 1830
New York, NY 10003

Docket Nos. 50-003-LT and 50-247-LT
(consolidated)
LB MEMORANDUM AND ORDER (SETTING
PRELIMINARY PROCEDURAL GUIDELINES)

Douglas E. Levanway, Esq.
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205

David A. Repka, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502

Jay E. Silberg, Esq.
Matias F. Travieso-Diaz, Esq.
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of August 2001