UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CONSOLIDATED EDISON COMPANY	)	
OF NEW YORK, INC.	)	
	)	
(Indian Point Station, Unit No. 1)	)	Docket No. 50-3
(Indian Point Station, Unit No. 2)	)	Docket No. 50-247
(Indian Point Station, Unit No. 3)	)	Docket No. 50-286

REPLY OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. TO RESPONSE AND REQUEST OF NEW YORK STATE ATOMIC ENERGY COUNCIL

Pursuant to the Commission's order dated April 28, 1975, Consolidated Edison Company of New York, Inc. ("Con Edison") hereby replies to the pleading filed on April 21, 1975, by the New York State Atomic Energy Council ("the State").

For the reasons set forth below, it is Con Edison's position that (1) the petition filed on January 15, 1975, by Citizens Committee for the Protection of the Environment ("CCPE") should be denied and (2) the State's request for a hearing should be denied and the State should be directed forthwith to serve its testimony and proceed to cross-examination in the pending Indian Point 3 operating license hearings in Docket No. 50-286.

I.

Con Edison has already submitted its response to CCPE's petition. There, we pointed out that the State had earlier said that it was "satisfied with the action that was taken" by the Acting Director of Licensing in denying CCPE's petition for a show-cause order and that there is "no reason" to have a hearing on CCPE's petition. See Con Edison Response to Request for Review of Denial of Petition for an Order to Show Cause, served February 7, 1975, p. 3. Now, nearly five months later, the State has reaffirmed its position that no hearing should be held on the contentions asserted by CCPE. Recalling that the Regulatory Staff's investigation was prompted by the State's earlier concern, not CCPE's, we continue to believe that the State's concurrence with the outcome is persuasive that no hearing on CCPE's petition is appropriate.

II.

While the State opposes a hearing upon CCPE's petition, it has advanced a new issue of its own upon which it requests a hearing. The legal basis for the State's request is not revealed. If the State seeks to invoke Section 2.206

of the Commission's Regulations, its request is misdirected. If not, we are aware of no provision in the Regulations that sanctions the State's request. In any event, Con Edison submits that there is ample basis upon which the Commission can, and should, deny the State's request on the merits.

The State's request for a hearing is based upon, and supported by, an affidavit (marked Exhibit A), of Dr. James F. Davis, the State Geologist, sworn to on April 18, 1975. In his affidavit, Dr. Davis makes clear that he is not advancing any conclusion of his own that the design of Indian Point 3 is inadequate or that any of the Indian Point units are unsafe from a seismic standpoint. What Dr. Davis questions is the adequacy of the Regulatory Staff's Safety Evaluation for Indian Point 3, specifically Appendix C to Supplement No. 1, dated January 16, 1975.[1/] Dr. Davis essentially makes two charges against the Staff report. First, he argues that the Boston-Ottawa seismic trend, identified by the Staff, cannot be considered a "tectonic structure" as defined in Appendix A to Part 100

1/ Appendix C was originally made public as a separate document on November 29, 1974.

of the Commission's Regulations. This is essentially a semantic argument concerning the meaning of the Regulations. Second, he urges that the existence of the Boston-Ottawa seismic trend is open to debate.[2/] Both of the charges made by Dr. Davis are directed solely to the adequacy of the Staff's analysis in reviewing Indian Point 3.

In addition, the State initially chose to raise the issue in the Indian Point 3 operating license proceeding. During the hearing session held pursuant to an order of the Atomic Safety and Licensing Board in Docket No. 50-286 on April 1, 1975, counsel for the State advised the Licensing Board that the State had "concluded that the Staff has misapplied Appendix A to Part 100" (Tr. 360) in the analysis contained in Appendix C. Thereafter, counsel for the State cross-examined the Staff's expert witnesses at some length concerning the analysis contained in Appendix C (Tr. 389-424).

2/ Dr. Davis's further assertion that the Staff has conceded that the existence of a tectonic structure between Boston and Ottawa is "highly speculative" (Davis aff. ¶ 22) is a blatant distortion of the record. The only conclusion that the Staff witness conceded was "speculative" was that "the Boston-Ottawa Seismic Belt . . . may reflect instability along paleofracture zones." Compare App. C, p. 2-13 with Tr. 416. The response by the Staff witness was further clarified at Tr. 422, an exchange that Dr. Davis evidently preferred to ignore.

In short, the State has challenged the sufficiency of the safety evaluation for Indian Point 3, and it has spread that challenge upon the record of that proceeding.

It should be noted that Dr. Davis was present during the Indian Point 3 hearing on April 1, together with one of his professional colleagues (Tr. 551). However, the State deliberately refrained from putting Dr. Davis on the witness stand or offering any affirmative testimony. Now the State says it has decided not to pursue the matter any further in the Indian Point 3 proceeding.

While we appreciate the withdrawal of the State's objection to the issuance of a full-term operating license to Con Edison and the State's frank concession that there is presently no safety concern, we disagree that the State is free so cavalierly to raise an issue in one forum and then abandon it and seek to raise it anew in a different forum. A comparable situation arose in Omaha Public Power District (Fort Calhoun Station, Unit No. 1), Docket No. 50-285. There, an intervenor raised two safety issues, but subsequently failed to document its contentions as requested by the Licensing Board. The Licensing Board held that the

intervenor's default could not suffice to withdraw the issue from the proceeding and stated that it would determine the question on the merits in the intervenor's absence.

The situation here is comparable, but it differs in two significant respects. First, the State has not yet really defaulted on the issue, since no one has told the State to document its contentions. Second, if the State were to default, there is adequate evidence in the record to permit the Licensing Board to render findings and conclusions without any further proceedings.

Under the circumstances, Con Edison believes that the Commission should require the State to proceed to document its objection to the Indian Point 3 safety evaluation in the Indian Point 3 licensing case. If the State fails or refuses to do so, it will then be proper for the Licensing Board to render an initial decision based on the record before it. If the State takes advantage of the opportunity thus offered to it, there will be some delay in concluding the licensing case, but the State's objections will have been resolved in the most appropriate forum.

In either event, there is no need for the Commission to offer the State a separate forum. The entire matter can most appropriately and expeditiously be disposed of before the Licensing Board, and this should be done as quickly as possible. There is simply no reason to require Con Edison to bear the burden of participating in two hearings when one will do the job.

It should be clear that there is no legal authority for the State's request. Section 274(l) of the Atomic Energy Act, 42 U.S.C. § 2021(l) (1970) and Section 2.715(c) of the Commission's Regulations give the State the right to participate in licensing cases. Neither the Act nor the Regulations authorize the State to request a separate hearing. If the State elects not to go forward in the forum provided to it by law, that should be the end of the matter. Its unilateral decision not to proceed in the available forum cannot justify its claim of special privilege to be heard separately.

Conclusion

The State's April 21 request should be denied as contrary to law and sound principles of agency administration.

The State should be told to show its hand now in the Indian Point 3 licensing case.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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May 8, 1975

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of May, 1975, served the foregoing document entitled "Reply of Consolidated Edison Company of New York, Inc. to Response and Request of New York State Atomic Energy Council" by mailing copies thereof first class, postage prepaid, and properly addressed to the following persons:

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