UNITED STATES OF AMERCA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 50-247
CONSOLIDATED EDISON COMPANY	)	OL No. DPR-26
OF NEW YORK, INC.	)	Extension of Interim
(Indian Point Station,	)	Operation Period
Unit No. 2)	)	

11-24

CON EDISON'S ANSWER TO PETITION OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK FOR LEAVE TO INTERVENE

By Petition dated November 18, 1976, the Attorney General of the State of New York ("the Attorney General") moved for leave to intervene in the above-captioned proceeding. Pursuant to § 2.714(c) of the Rules of Practice of the Nuclear Regulatory Commission ("the Commission"), 10 C.F.R. § 2.714(c) (1976), Consolidated Edison Company of New York, Inc. ("Con Edison"), as applicant for an amendment to Facility Operating License No. DPR-26, submits its Answer in opposition to the Petition.

Under the Notice of Opportunity for Hearing in this case, the deadline for filing petitions for leave to intervene was November 3, 1975. 40 Fed. Reg. 45874, 45875 (1975). The Attorney General's Petition was, therefore, over a year late. In the circumstances, the Commission's Rules of Practice require an inquiry into whether the four factors noted in § 2.714(a) have been met.

50-247
#4

The Petition does not show good cause for its extreme tardiness. The only explanation of why the Attorney General did not file within the period provided in the Notice of Hearing appears on page 3 of Assistant Attorney General Shemin's affidavit, which recites that the Attorney General had believed that his concerns in the case could be coordinated with those of the New York State Atomic Energy Council ("the Council"), an admitted intervenor, and its successor agency, the State Energy Office. In the period since the prehearing conference held on October 27, 1976, however, the Attorney General has apparently concluded that "the views of the State Energy Office may not represent those of the Attorney General, and that said Office intends to appear on its own behalf in future hearings herein." The record of that prehearing conference indicates that a single appearance was entered on behalf of the Office of the Attorney General, the New York Department of Environmental Conservation, the State Energy Office, and the New York Public Service Commission. Tr. 2; see also Tr. 98-99. It also indicates that an appearance was entered "[o]n behalf of the State of New York." Tr. 5. At that time, the only State agency to have sought leave to intervene was the Atomic Energy Council, which applied for intervention on October 30, 1975. On November 25, 1975, the Atomic Safety and Licensing Board ("the Board") granted the Atomic Energy Council's petition.

The allegation of the Attorney General with respect to why he has only now sought to intervene is materially deficient. It fails to state with any kind of precision the respect in which the views of the Atomic Energy Council "may not" represent his own views. In the absence of such information, it is impossible to determine--as the Board must, in order to grant this Petition--that the claimed divergence of the views of the various State entities was not and could not reasonably have been discovered at an earlier time. We submit that the requirement that matters be set forth "with particularity," 10 C.F.R. § 2.714(a) (1976), applies not only to timely petitions but to untimely ones as well--indeed, the standards should be applied with greater conviction to petitions as untimely as this.

Given the lack of detail in the Attorney General's Petition, the Board would have to undertake a leap of faith to rule that the Attorney General's interest would not be represented by existing parties, one of the key factors in weighing untimely petitions. Whatever the nature of the undisclosed possible divergence of views as between the Attorney General and State Energy Office, Con Edison is not aware of any divergence of views between the Attorney General and the Hudson River Fishermen's Association ("HRFA"), which has already been admitted as a party, based on a timely petition.

The Attorney General seeks to justify his untimely intervention in part on the assertion that HRFA and the Atomic Energy Council cannot represent the State's interests because "[t]here is . . . a question as to whether [they] will have adequate resources to make a complete presentation in support of the interests they may share with the Attorney General." To the extent that this refers to the State Energy Office, which is supported by the taxing power of the State of New York, the proposition is ridiculous. To the extent that it refers to HRFA, one would have thought that such a complaint lies more in the mouth of that organization. Neither in its Petition for Leave to Intervene dated October 31, 1975, nor in its Answer to the Notice of Hearing dated February 26, 1976, did HRFA suggest that it was indigent or otherwise unable to meet its responsibilities as an intervenor. The bald assertion that "there is question" as to these parties, ability to shoulder their burden cannot suffice.

The Attorney General cites the fact that he has participated in previous Commission proceedings as a reason for permitting him to enter this proceeding now. Affidavit of Paul S. Shemin at 2-4. In fact, however, this argument cuts directly against allowing this untimely petition, for it shows that the Attorney General is familiar with the Commission's procedures, and was aware that it was waiving something when it chose not to intervene during the period

allowed for interventions or at any time prior to November 18, 1976. Claims of unfamiliarity with the Commission's procedures have been deemed "unimpressive". See Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, NRCI-76/10 (Oct. 29, 1976). Here the petitioner cannot even make such a claim.

It is also pertinent to note that this is hardly the first time the Attorney General has failed to honor a deadline properly imposed by the Commission's rules. We have in the past attempted to invite attention to this pattern,[1/] and we do so again, particularly in light of the remarks of the Atomic Safety and Licensing Appeal Board ("the Appeal Board") in Jamesport. There, the Appeal Board noted that "were [it] to hold that a petitioner for intervention may ignore established time deadlines with impunity if, in so doing, it presents no threat to the progress of the adjudication," it would be "recasting Section 2.714(a)." Long Island Light Co. (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631, 651 (1975); see also Clinch River, supra.

[1/] Previous failures of the Attorney General to comply with various time limits are discussed in Applicant's Answer to Petition of Attorney General of State of New York for Leave to Intervene, May 14, 1973, at 2; Applicant's Answer to Second Petition of Attorney General of State of New York for Leave to Intervene, May 31, 1973; [Applicant's] Objection to Interrogatories and Motion to Strike, Jan. 23, 1974, at 2; Applicant's Reply to Attorney General's Answer to Objection to Interrogatories and Motion to Strike, Feb. 8, 1974; all from Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3), Dkt. No. 50-286.

The Board will, of course, recall that only recently an untimely petition for leave to intervene was filed in this case by the Village of Buchanan, a local governmental unit, and that Con Edison supported the granting of that petition. The short answer to any suggestion that the same result should obtain here is that the cases are distinguishable in significant, and, we believe, critical respects. For one thing, recent decisions appear to suggest that local governmental bodies have a direct interest in hearing questions that puts them in a preferred position as regards other classes of intervenors. See, e.g., Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB239, 4 NRC 20, 2425 (1976). On this view, what will be forgiven a local governmental unit will not necessarily be forgiven a State government.

Similarly, it can hardly be asserted that a local government unit such as a village would have the same legal resources available to it as would the office of the Attorney General of the State of New York. Plainly, some allowance may properly be made for the modest size and resources of a mere village, and conversely, the availability of substantial legal resources cuts against a lenient attitude with respect to failures to meet deadlines as blatant as is here involved on the part of the Attorney General. A lenient attitude is also inappropriate where, as here, the real party in interest--the people of the State of New York--are already represented through the State Energy Office.

Furthermore, an important difference between the two petitions is that of timing. The Village of Buchanan's petition was filed on October 13, 1976, more than a month before that of the Attorney General. Timeliness is, of course, a question of linedrawing, and it might be supposed that a disparity of this duration should not lead to a difference outcome. Con Edison submits, however, that this difference of nearly five weeks' time is significant. The Village's petition was filed before the Final Environmental Statement was issued; the Attorney General's Petition came after the Statement was made available by the Regulatory Staff.[2/] Moreover, given the hearing schedule established by the Board for the taking of evidence on September 27, 1976, Tr. 64-65, 91-92, in a prehearing conference in which the Attorney General participated, to insert a new party into the proceedings at this very late date, while the parties are presumably already preparing their testimony, is markedly different from allowing in the Village. Unlike the Village's petition, the petition filed by the Attorney General comes on the virtual eve of the evidentiary hearing. It should not be allowed.

[2/] For this reason the case is distinguishable from the Board's Order Permitting Participation by Attorney General of New York issued on October 5, 1973 in the Indian Point 3 docket, where an FES had not been issued even at the time the Board entered its ruling. Consolidated Edison Co. of New York, Inc. (Indian Point Nuclear Generating Unit No. 3), Dkt. No. 50-286 (Oct. 5, 1973), at 2.

We turn now briefly to the "contentions" set forth in the Attorney General's Petition at pages 2-5. The Attorney General's threshold "contention" that Con Edison must show that it could not have filed its application to vacate the license condition is a red herring that has no foundation in logic or in the terms of the license. Con Edison was given the opportunity to seek relief of the sort here in question, Facility Operating License No. DPR-26, ¶ 2.E(1)(c), and that opportunity is not conditional upon a prior showing that the more fundamental relief could not have been sought earlier. In point of fact, however, that relief--vacation of the license condition--could not have been previously sought, since the ecological study program has never been scheduled for completion prior to 1977. Hence, any such application would have been premature.

Con Edison's study program is massive only because of the complexity of the ecological issues before the Commission. To suggest, then, as the Attorney General does, that the program is overbroad represents a grotesque and ironic distortion of the history of this proceeding, although it is a refreshing change from the usual complaints that the ecological study program is inadequate. The study program was discussed at length in the course of the Indian Point 2 operating license hearing, and was reviewed in detail in the Indian Point 3 Final Environmental Statement. Never was there a suggestion that the program should have been limited as the Attorney General now claims.

Conclusion

For the foregoing reasons, the Petition of the Attorney General of the State of New York for Leave to Intervene should be denied.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By _____
Leonard M. Trosten

1757 N Street, N.W.
Washington, D.C. 20036
(202) 457-7500

Attorneys for Consolidated Edison Company of New York, Inc.

Of Counsel:

EUGENE R. FIDELL

EDWARD J. SACK
Consolidated Edison Company
of New York, Inc.
Four Irving Place
New York, New York 10003

Dated: November 24, 1976

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 50-247
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	)	OL No. DPR-26
(Indian Point Station, Unit No. 2)	)	Extension of Interim Operation Period

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of November, 1976, served the foregoing document entitled "Con Edison's Answer to Petition of the Attorney General of the State of New York for Leave to Intervene" by mailing copies thereof, first-class mail postage prepaid, and properly addressed, to the following:

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(original + 20)

Samuel W. Jensch, Esq.
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Franklin C. Daiber
College of Marine Studies
University of Delaware
Newark, Delaware 19711

Mr. R. B. Briggs
110 Evans Lane
Oak Ridge, Tennesee 37830

Sarah Chasis, Esq.
Natural Resources Defense Council, Inc.
15 West 44th Street
New York, New York 10036

Stephen H. Lewis, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon George V. Begany
Mayor
Village of Buchanan
Buchanan, NY 10511

Michael Curley, Esq.
New York State Department
of Commerce
99 Washington Avenue
Albany, NY 12245

Werner P. Kuhn, Esq.
New York State Department
of Environmental Conservation
50 Wolf Road
Albany, NY 12201

Paul S. Shemin, Esq.
Assistant Attorney General
of the State of New York
Two World Trade Center
New York, New York

Carl R. D'Alvia, Esq.
Village Attorney
Municipal Building
Buchanan, NY 10511

Richard C. King, Esq.
New York State Energy Office
Swan Street Building
Empire State Plaza
Albany, New York 12223

Eugene R. Fidell