

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC. (Indian Point
Unit No. 2)

Docket No. 50-247

CONSOLIDATED EDISON'S
ANSWER TO NOTICE OF PROPOSED
IMPOSITION OF CIVIL PENALTY

This answer is submitted by Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Indian Point Unit 2, pursuant to NRC Regulations 10 CFR 2.205(b) and to the Notice of Proposed Imposition of Civil Penalty ("Notice"), dated December 19, 1980.

Con Edison protests the imposition of the civil penalty for the reasons set forth below.

I. Summary of Con Edison's Position

1. Con Edison denies the alleged violation set forth in the Notice of Violation accompanying the Notice, for the reasons stated in Section III of Con Edison's Statement in Reply to Notice of Violation.

2. Assuming, arguendo, that the facts alleged in the Notice of Violation constitute a violation of NRC regulations, there are extenuating circumstances that make the imposition of a civil penalty unreasonable. These extenuating circumstances are set forth in Section II, below.

3. Assuming, arguendo, that the facts alleged in the

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Notice of Violation constitute a violation, and that the imposition of a civil penalty is reasonable, there are extenuating circumstances that make the proposed civil penalty excessive. These extenuating circumstances are set forth in Section II, below.

4. It is Con Edison's position that no civil penalty should be imposed because the imposition of such a penalty is not consistent with the NRC Enforcement Criteria in effect at the time of the alleged violation. The basis for this position is set forth in Section III, below.

II. Extenuating Circumstances

A. The purpose of Con Edison's revision of the operating procedure was to enhance personnel safety. The objective was to avoid subjecting personnel who entered containment at power from immersion in sprayed Boric Acid and Sodium Hydroxide if the spray system were to be spuriously actuated. In the best technical judgment of Con Edison personnel, the revision of the procedure did not affect the operability of the containment spray system and enhanced the safety of personnel entering containment.

B. NRC Staff's evaluation that an "unreviewed safety question" was involved in the revised procedure is nothing more than a technical judgment that differs from one made by the licensee. This should not be the basis for a notice of violation or the imposition of a civil penalty (see, Statement in Reply to Notice of Violation, Section III.A.2).

C. The revised procedure had been in effect for more than three years, during which time many NRC inspections had been

made. Indeed, the specific procedure in question and a related one were reviewed during two NRC inspections in 1979 (Inspection Report No. 50-247/79-13, reviewing procedure SOP 10.6.2, Rev. 3, and HPP 2.4, Rev. 1, and Inspection Report No. 50-247/79-14, reviewing HPP 2.4, Rev. 1). It was therefore reasonable for Con Edison to assume in the absence of any objections raised in those inspections, that NRC had no serious objections to Con Edison's technical judgment on the safety of the revised procedure. It is arbitrary and capricious for NRC to now take an apparently different position on the acceptability of the procedure without prior notice to the licensee, and declare what it formerly did not find unacceptable to be a violation of such severity that the maximum penalty should be imposed.

D. As NRC acknowledges in its letter forwarding the Notice, Con Edison "initiated corrective action expeditiously" after the NRC inspector informed Con Edison of his interpretation of the situation as a non-compliance. This is a circumstance that should be taken into account when NRC is considering imposing a civil penalty and determining its amount. NRC has not stated any basis for the imposition of the maximum penalty in this case.

III. Application of NRC Enforcement Criteria

The Notice states that "[i]n proposing to impose a civil penalty, the factors identified in the Statement of Consideration published in the Federal Register with the rule-making action which adopted 10 CFR 2.205 (36 FR 16894) August 26, 1971, and the 'Criteria for Determining Enforcement Action', which was sent to NRC licensees

on December 31, 1974, have been taken into account".

According to the "Criteria for Determining Enforcement Action" ("Criteria"), referred to above, there are certain cases where a "Notice of Violation" alone, i.e., without an accompanying Notice of Proposed Imposition of Civil Penalty or other Order, "may be considered sufficient enforcement action. . . ." (Criteria,

Attachment A, page 2) Those are cases where:

- "a. Items of non-compliance are readily correctable, or
- b. Items of noncompliance are not repetitive or numerous, and do not constitute an immediate or serious threat to the health and safety of the licensee's employees or the public, to the environment, or to the common defense and security, and
- c. There is no indication that appropriate corrective action will not be taken." (Criteria, Id.)

The situation described in the Notice of Violation satisfies these conditions. First of all, the alleged "item of non-compliance" is readily correctable, and indeed corrective action was immediately taken after the NRC inspector expressed his opinion that the situation represented a non-compliance. That alone is sufficient, under the applicable NRC policy, to make the imposition of a civil penalty inappropriate in this case. Secondly, the alleged item of non-compliance, issuing of the procedure change, is not "repetitive or numerous", does not "constitute an immediate or serious threat" to anyone, and has been corrected, a situation which also renders the imposition of a civil penalty inappropriate.

Furthermore, a review of the criteria for civil monetary penalties set forth in Attachment A to the Criteria, page 3 and 4, makes it clear that the sanction of civil penalties is intended to

be applied only to cases involving serious threats or repetitive or deliberate violations. It appears that the only justification for a civil penalty being imposed in the instant case is the NRC's determination that the alleged item of non-compliance is in the "violation" category (Criteria, Attachment A, page 4, item h). As discussed elsewhere, assignment of this item to the "Violation" category is unreasonable and not in accordance with the Criteria (see Statement in Reply to Notice of Violation, Section III.B., page 5-6).

As far as the Commission's discretion is concerned, the alleged non-compliance is not comparable in severity with the other items listed as typical situations for imposition of civil penalties (Criteria, Attachment A, page 3-4) and, therefore, is not an item of non-compliance for which the Commission could reasonably determine that civil penalties are appropriate and necessary.

In summary, the imposition of a civil penalty is inappropriate and unreasonable in this case since it does not satisfy the applicable NRC Criteria for such action and would have no practical remedial or deterrent value.

IV. Request for Relief

Based upon the foregoing Answer, Con Edison requests that

no civil penalty be imposed and that the instant proceeding be dismissed.

John D. O'Toole
John D. O'Toole
Assistant Vice President
Consolidated Edison Company
of New York, Inc.

Dated: New York, New York
January 13, 1981