BEFORE THE UNITED STATES

ATOMIC ENERGY COMMISSION

1-19-73

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

APPLICANT'S ANSWER TO MOTION TO CONSOLIDATE

Introduction

By Motion dated January 2, 1973, Hudson River Fishermen's Association ("HRFA") and Save Our Stripers ("SOS") moved that the Commission consolidate the above-captioned matter and Consolidated Edison Co. (Indian Point Unit No. 2), Docket No. 50-247, under the authority of Sections 2.730 and 2.716 of the Commission's Rules of Practice.[1/] In accordance with Section 2.730(c) of the Rules, Consolidated Edison Company of New York, Inc. ("Applicant") submits this Answer in opposition to the motion to consolidate, and prays that the motion be denied.

1/ 10 CFR §§ 2.716, 2.730.

Procedural Setting of the
Motion and the Two Cases

On October 17, 1966, the Commission issued Construction Permit No. CPPR-21 to Applicant to construct Indian Point 2. Pursuant to that Permit, construction was undertaken. On October 5, 1970, Applicant requested that a hearing be held on the issuance of an operating license. A hearing was ordered, and an Atomic Safety and Licensing Board was appointed.[2/] Six intervenors were admitted as parties to that proceeding: the State of New York, the New York State Atomic Energy Council, HRFA, Environmental Defense Fund ("EDF"), Citizens Committee for the Protection of the Environment ("CCPE"), and Mrs. Mary Hays Weik. Mrs. Weik later abandoned her intervention in the case.

Since its appointment, that Licensing Board has convened for over forty days of conferences and evidentiary sessions. At present, the transcript amounts to over 7,000 pages. Thus far, the Indian Point 2 proceeding

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2/ 35 Fed. Reg. 7679 (1970).

has been before the Atomic Safety and Licensing Appeal Board six times,[3/] including the denial of a motion for reconsideration of the Appeal Board's decision of March 10, 1972.[4/] Another recent action of the Appeal Board was a denial of a request for a consolidated hearing on fuel densification that would have joined the case pro tanto with Point Beach 2.[5/] The case has already been before the Commission.[6/]

In marked contrast to the Indian Point 2 operating license proceeding, the Indian Point 3 operating license proceeding has barely begun. Petitions for leave to intervene and requests for hearing have been submitted

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3/ Consolidated Edison Co. (Indian Point Unit No. 2), ALAB-46 (Mar. 10, 1972), ALAB-48 (Apr. 14, 1972), ALAB-66 (Aug. 29, 1972), ALAB-71 (Sept. 27, 1972), ALAB-92 (Jan. 16, 1973), ALAB-95 (Jan. 18, 1973).

4/ Consolidated Edison Co. (Indian Point Unit No. 2), ALAB-95 (Jan. 18, 1973).

5/ Consolidated Edison Co. (Indian Point Unit No. 2) and Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 2), ALAB-92 (Jan. 16, 1973).

6/ Consolidated Edison Co. (Indian Point Unit No. 2), Docket No. 50-247, Commission Memorandum and Order (Oct. 26, 1972).

by HRFA and SOS, and by the State of New York (acting by and through its Atomic Energy Council), Cortlandt Conservation Association, Inc. ("CCA"), and Mrs. Mary Hays Weik. No action has been taken on these petition-requests to date, nor has an Atomic Safety and Licensing Board been designated. The Notice of Consideration of Issuance of Facility License and Notice of Opportunity for Hearing in this proceeding were issued on October 19, 1972,[7/] almost two years after the Indian Point 2 Notice. The Commission's Regulatory Staff ("Staff") has not yet circulated a Draft Environmental Statement with respect to Indian Point 3.

Summary of Argument

Applicant's position is that the instant motion is not authorized because the moving parties are not parties to the proceeding, the Commission not yet having ruled on their petitions for leave to intervene. In any event, the relief sought in the motion will not be conducive to the proper dispatch of Commission business, nor will it advance the ends of justice. The significant

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7/ 37 Fed. Reg. 22816 (1972).

differences in the progress of the two cases sought to be consolidated, the potential for non-common issues and the probability that the Indian Point 2 case will be delayed, militate against consolidation. The benefits sought to be achieved by consolidation can be achieved by less drastic means with none of these drawbacks.

Argument

I.

THE MOTION SHOULD BE DENIED BECAUSE IT IS PREMATURE.

HRFA and SOS, Movants herein, have filed petitions for leave to intervene and requests for a hearing on the issuance of an operating license in the above-captioned matter. Applicant and Staff have not opposed the granting of intervention to these petitioners. The Commission itself has taken no action on these petitions and requests. Thus, Movants are not parties to this proceeding, and accordingly may not file pleadings other than those indicated in the Notice published in the Federal Register of October 25, 1972. The only other

submission the Commission's Rules of Practice contemplate for one not a party is the written statement of position allowed in limited appearances.[8/]

The Regulatory Staff has not yet submitted a Draft Environmental Statement regarding Indian Point 3. Until this is filed, neither Applicant nor Movants can know what the exact positions of the potential parties will be on the serious question of cooling towers. No action has been taken on the petitions to intervene, nor, of course, has a special prehearing conference been held.[9/] Hence, unlike the Indian Point 2 hearing, where the issues have been defined after a lengthy initial period, the issues to be set down for hearing in Indian Point Unit 3 remain to be determined. For these reasons, the motion is premature and should be denied.

II.

THE MOTION SHOULD BE DENIED BECAUSE CONSOLIDATION WILL ONLY CONFUSE AND DELAY BOTH PROCEEDINGS.

The test to be applied in ruling on a motion to consolidate proceedings is whether such consolidation

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8/ 10 CFR § 2.715(a).

9/ 10 CFR § 2.751a.

will be conducive to the proper dispatch of Commission business and to the ends of justice.[10/] A showing of good cause is required. In the motion at bar no such showing of good cause has been made, nor could such a showing be made under the standards set forth in the Rules of Practice. For this reason, the Motion should be denied on the merits.

A. Granting consolidation would frustrate reasonable expectations of an orderly proceeding where the issues and parties are stable. In an earlier portion of this Answer, Applicant has presented in summary form a picture of the relative procedural settings in the two dockets for which consolidation has been sought. Even the most cursory review of the comparative situations of these cases reveals that the Indian Point 2 hearing is well on the way to completion. Thousands of hours of research, hearing preparation, and actual hearings have been dedicated to Indian Point 2 by all parties, the Licensing Board, the Appeal Board, and the Commission, predicated on the assumption that the case would go forward on its

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10/ 10 CFR § 2.716; Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 1), Docket No. 50-266, Commission Memorandum and Order (Dec. 26, 1972).

own merits. Now, after literally years of intensive effort on the Indian Point 2 hearings, Movants would set back the hands of the clock for that unit by burdening the Indian Point 2 hearing with an additional inquiry into Indian Point 3. The ends of justice require greater solicitude for the reasonable expectations of an applicant regarding the issues and course of a licensing proceeding.

B. The requested consolidation will cause unnecessary confusion and delay due to the interaction of the parties to the two proceedings. From a reading of the motion and associated papers, it might be thought that Movants were the only intervenors in the Indian Point 2 case and the only petitioners for intervention in the case at bar. In point of fact, one of the Movants, SOS, is not even a party to Indian Point 2. The State of New York, CCA, and Mrs. Weik have also sought leave to intervene in Indian Point 3, and their contentions are in significant respects different from those of Movants. Without attempting to describe in detail the contentions of these other three would-be intervenors, it is worth noting that the State's contentions focus sharply on compliance with State water quality criteria, CCA's refer at least in part to

radiological issues (including the results of accidents and low-level radioactive waste storage), and Mrs. Weik's range broadly from radiological to environmental matters. These petitions show that a variety of potential issues can be thought of in connection with the instant case which were not addressed in the Indian Point Unit 2 proceeding.

If these petitioners are admitted and consolidation is ordered, they may be found to have rights to examine witnesses, introduce evidence, and seek judicial review, as to Indian Point 2, thereby casting to the winds any closing of issues in that case.[11/] Another result of consolidation could be that Indian Point 2 intervenors

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11/ Movants suggest that "consolidation should in no way impede or delay the resolution of the Indian Point 2 proceeding. That hearing should continue on its present course without interruption." Memorandum in Support of Motion to Consolidate, at 4. This is a dubious proposition. If the cases are consolidated, it would appear that SOS would have all the rights of a party with respect to the entire Indian Point 2 case. The Memorandum can be read as a waiver of such rights as to SOS, but it cannot be so read as to the other petitioners in Indian Point 3 who have joined in neither the Motion nor the Memorandum. As to these petitioners, no disclaimer by the Movants can have the effect of foreclosing any of their rights in a consolidated proceeding.

might be entitled to participate in and perhaps seek review of the Indian Point 3 proceeding. And finally, even a petitioner such as Mrs. Weik, who abandoned her intervention in Indian Point 2, would in effect be given an opportunity to take up again the cudgels she had previously laid aside. The morass of issues and intervenors thus created by an order of consolidation would surely not vindicate the purpose of the "restructured" Rules of Practice to keep hearing issues well-defined.

Even if no party to Indian Point 3 sought to participate with respect to Indian Point 2, there would still be delay. Once the two cases were consolidated, we cannot perceive how the Indian Point 2 hearing could be formally concluded without taking the additional time that unquestionably will be required for presentation of evidence concerning Indian Point 3. Each day required for testimony, briefing, or deliberation by the Licensing Board concerning Indian Point 3 issues would ipso facto delay the disposition of Indian Point 2 by one day.

The surest way to avoid the probability of confusion and the certainty of "unnecessary delay in the

completion of the hearing on the [Indian Point 2] facility license"[12] is to deny the motion.

III.

THERE IS NO PRACTICAL NEED FOR CONSOLIDATION IN THIS CASE.

As Applicant has demonstrated, consolidation of these two proceedings under Section 2.716 of the Rules of Practice would not serve the ends of justice or be conducive to the proper dispatch of Commission business. In further support of this conclusion, it should be recognized that the only advantages claimed by Movants can be achieved without consolidation.[13]

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[12] Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 1), Docket No. 50-266, Commission Memorandum and Order (Dec. 26, 1972), at 3; see Consolidated Edison Co. (Indian Point Unit No. 2) and Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 2), ALAB-92 (Jan 16, 1973), at 3.

[13] It has been suggested that " [a]ny findings of fact made in Unit 2 will stand as collateral estoppel on the same issues of fact in the application for Unit 3." Motion ¶ 7. The relevance of this doctrine to administrative proceedings and its operation in the present context, are matters of greater complexity than this assertion suggests. Applicant submits that because the issues of fact and the identities of the parties in the two proceedings are different, the rule is inapplicable. Alternatively, if the doctrine does apply, it follows that there is no advantage to consolidation. Movants will have an opportunity to test their theory under the Commission's procedure for partial summary disposition on the pleadings once the Indian Point Unit 2 findings are issued and a final agency decision rendered. See 10 CFR §§ 2.749, 2.760.

First, the Commission has discretion to appoint to the Atomic Safety and Licensing Board in this proceeding the same persons who comprise the Indian Point 2 Licensing Board.

Second, once the parties to the instant proceeding are known and a prehearing conference has been held to define the matters in controversy, there will be nothing to prevent a stipulation under which appropriate portions of the evidence adduced in the Indian Point 2 hearing could be incorporated by reference.[14/] Applicant favors this approach, as it would save time and expense without prejudicing its rights or those of any prospective intervenors, and would permit the introduction of any relevant data to account for differences between the two units or information which has come to light subsequent to the preparation of Applicant's case in Indian Point 2. Thus, if Movants are amenable to this approach, they can achieve without consolidation the same savings as they seek by the instant motion.

14/ See Consolidated Edison Co. (Indian Point Unit No. 2) and Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 2), ALAB-92 (Jan. 16, 1973), at 4; 10 CFR § 2.753.

Conclusion

WHEREFORE, Applicant prays that the Motion to Consolidate be denied.

Respectfully submitted,

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January 19, 1973

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ATOMIC ENERGY COMMISSION

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point Station, Unit No. 3))	)	Docket No. 50-286

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of January, 1973, served copies of the foregoing document entitled "Applicant's Answer to Motion to Consolidate" by mailing copies thereof first class, postage prepaid and properly addressed to the following persons:

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