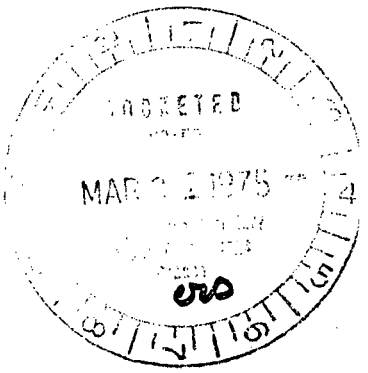

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANT'S ANSWER IN OPPOSITION TO STAFF'S MOTION FOR ORDER ADOPTING CERTAIN PROCEDURES

On March 20, 1974, the Regulatory Staff served by mail its "Motion for Order Adopting Certain Procedures Regarding Licensing Board's Consideration of Indian Point Three Stipulation and Safety Issues Raised Sua Sponte by the Licensing Board". The motion embodies the text of the order proposed by the Staff. For the reasons set forth below, Consolidated Edison Company of New York, Inc. ("Applicant") opposes certain provisions of paragraphs 1 and 4 of the proposed order. Applicant opposes paragraph 5 of the proposed order in its entirety.

I.

Paragraph 1 of the Staff's proposed order would require that: "All documentary evidence pertaining to the stipulation . . . will be sponsored by qualified witnesses."

We believe that the proposed requirement that documentary evidence be sponsored by qualified witnesses is inconsistent with this Board's notice of February 18, 1975, convening "a session of the proceeding for the presentation of data related to the stipulation signed by all the parties." By its notice, the Board has--we think quite properly--refrained from requiring the presentation of "evidence" in support of the Stipulation dated January 13, 1975, signed by all the parties. Instead, the Board has simply asked that the parties supply it with certain documents and written answers to certain questions, so that the Board may review the Stipulation as a settlement.

No "evidence" is required in support of a settlement to which all parties have agreed, and no "hearing" is required to consider the settlement. Under the Commission's practice, the Board would have been at liberty to terminate the proceeding upon receipt of the Stipulation. It has chosen not to do so, and we do not here quarrel with that determination. We think the Board has discretion to request background information and ask appropriate questions before it approves the Stipulation. However, the Staff's proposed requirement for "documentary evidence . . . sponsored by

qualified witnesses" finds no support in the Regulations of the Commission, the prior order of this Board, previous actions by other licensing boards, or other pertinent authority.

In addition, the Staff's proposed requirement is unnecessary. Even in contested cases, lengthy documents such as an applicant's Environmental Report or the Staff's Final Environmental Statement are made a part of the record by consent, without the formalistic requirement that a witness appear and swear to their contents. Surely such a procedure is appropriate here, where all requests for a hearing have been withdrawn, and there are no matters in controversy remaining among the parties.

Applicant will have available, at the April 1 session, qualified persons to clarify for the Board any matters concerning the Stipulation that the Board feels require additional explanation. Applicant has already responded in writing to all of the Board's questions and is prepared to submit additional documentation in response to any additional inquiries deemed necessary. Applicant should not be burdened with a formalistic requirement that all of its written responses and documentary submittals be "sponsored."

The Staff has made clear its position that the Board should not write an initial decision with respect to the Stipulation. Instead, the Staff advocates an order "dismissing the proceeding insofar as it relates to the issues settled by the stipulation." That position is clearly inconsistent with the Staff's proposed requirement that the April 1 session be conducted as an evidentiary hearing in which the formalities of sponsorship of documents, followed by their introduction in evidence, must be adhered to.

We suggest substitution of the following as paragraph 1 of the proposed order:

> 1. All documentary evidence pertaining to the stipulation (including written submittals in response to specific questions) requested by the Licensing Board will be incorporated into the record without further formality. The session of the proceeding for the presentation of data related to the stipulation is convened to permit the Licensing Board to direct additional questions concerning the stipulation to the parties or obtain clarification of the responses already received and to receive statements of position and explanations concerning the stipulation, not to create an evidentiary record either in support of, or in opposition to, approval of the stipulation. The Licensing Board may require that a specific question be answered by a qualified witness. If so, there will be no cross-examination by the parties.

II.

In paragraph 4 of its proposed order, the Staff would require submission by the parties of "the reasons why they believe the stipulation to be fair, reasonable, and in the public interest." This requirement appears to be a correct interpretation of Section 2.759 of the Commission's Regulations. Applicant has already complied with it in "Applicant's Memorandum In Response To Inquiries By the Atomic Safety and Licensing Board," served March 10, 1975.

Therefore, we oppose Staff's proposal that Applicant be required to submit a memorandum concerning five specific elements, identified in subparagraphs (a) to (e) of Staff's proposed paragraph 4. The Staff has its reasons for supporting the Stipulation; they apparently correspond to subparagraphs (a) through (e). Other parties may have supported the Stipulation for different reasons. We believe that each party should be free to submit its own reasons, rather than being required to consider each of the reasons advanced by the Staff.

Accordingly, paragraph 4 of the proposed order should be revised to read as follows:

4. The parties, acting individually or by stipulation, shall submit a final proposed order

for disposition of the stipulation to be received by the Licensing Board at its office in Bethesda, Maryland, not later than 5:00 p.m. on Monday, April 7, 1975, as initially requested by the Licensing Board in its letter of March 7, 1975. Each party is also invited to submit a statement of the reasons why it believes the stipulation to be fair, reasonable, and in the public interest.

III.

Paragraph 5 of the Staff's proposed order would require an adjudicatory hearing with respect to "those safety issues raised sua sponte by the Licensing Board." It would further require findings of fact, conclusions of law, and an initial decision concerning the "safety issues." No specification of the "safety issues" is presented.

We submit that the Board is not required to hold an adjudicatory hearing in this case. Whether or not the Board does so remains within its discretion. In Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-248, RAI-74-12 957 (Dec. 24, 1974), the Appeal Board considered this very question. In that case, intervenors took exception to the Licensing Board's failure to make specific findings on matters raised by the board sua sponte during the course of the hearings. The Appeal Board denied the exception. It said: "The mere fact

that, in the course of the hearing, a licensing board may pose questions of its own to one or more of the parties does not create an inviolate duty to make additional findings specifically addressing the subject matter of the questions." Id. at 974-75.

The Commission's recent amendment of Section VIII of Appendix A to 10 C.F.R. Part 2 simply confirms the San Onofre holding. Paragraph (c) of Section VIII provides that the board will make findings on "any matter not raised by the parties but examined by the board in its discretion . . . ." (Emphasis added.) Thus, this Board has discretion either (1) to determine that the questions raised by it sua sponte have been answered to its satisfaction and that no findings and conclusions are required, or (2) to make a finding under Section 2.104(c) of the Commission's regulations that "extraordinary circumstances" require detailed findings and conclusions concerning "a serious safety, environmental, or common defense and security matter" not raised by the parties. Accordingly, we believe that the Staff has erred in asserting that the Board "should conduct a full adjudicatory hearing and issue an initial decision on matters raised sua sponte . . . ." Staff's Memorandum of Law, p. 8.

The Board, pursuing its independent responsibilities under the Atomic Safety Act of 1954, has raised various questions at various times concerning a variety of issues. Certain of those issues may have seemed important at the time a question was raised, but subsequent events may have dispelled any cause for concern. (We believe that the Applicant's financial qualifications fall in this category.) Other questions may have been removed from the purview of the Board. (Seismic suitability of the site is in this category.) Experience teaches that many questions will be asked by a licensing board in the performance of its duties, and that most, if not all, of those questions will be answered prior to the conclusion of the proceeding. The San Onofre decision confirms the inherent authority of a licensing board to say simply that its questions have been answered.

We suggest that many of the questions asked by this Board have been fully answered and are no longer a subject of legitimate concern. Such questions would not require the Board to proceed with an adjudicatory hearing or make findings and conclusions.

The Board must then consider whether there are any questions that have not been answered satisfactorily. Even

so, the Board is still not required to make findings and conclusions, since all requests for a hearing have been withdrawn. The only case in which the Board must make findings and conclusions is where (1) a question raised sua sponte has not been answered satisfactorily and (2) the question is so significant as to justify a finding of "extraordinary circumstances" by the Board pursuant to Section 2.104(c) of the Commission's Regulations.

We continue to believe that there are no such questions in this case. If the Board does not agree, then its duty is clear. It must state precisely what the questions are and what the "extraordinary circumstances" are. Then, and only then, will the Board be required to conduct an adjudicatory hearing and make findings and conclusions on those questions.

It is clear that paragraph 5 of the Staff's proposed order should not be adopted as written. The Board may determine that questions raised by it sua sponte can be dealt with satisfactorily by the presentation of data at the April 1 session already scheduled. In the alternative, the Board may enter a finding (with reasons) of extraordinary circumstances and set forth in its order one or more

specific questions for an evidentiary hearing. We recommend the first choice and believe that the Board has full discretion to adopt it.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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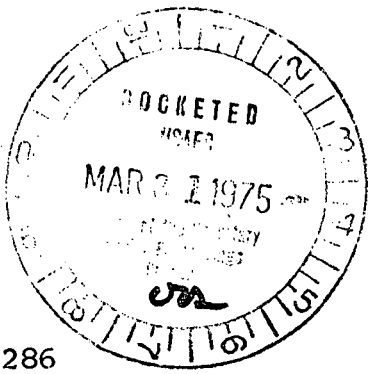
March 28, 1975



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CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of March, 1975, served the foregoing document entitled "Applicant's Answer In Opposition To Staff's Motion For Order Adopting Certain Procedures" by mailing copies thereof first class, postage prepaid, and properly addressed to the following persons:

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