

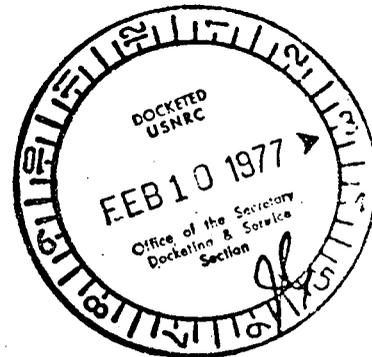
RELATED CORRESPONDENCE

ROISMAN, KESSLER AND CASHMAN

1025 15TH STREET, N. W., 5TH FLOOR

WASHINGTON, D. C. 20005

(202) 833-9070



50-286

ANTHONY Z. ROISMAN
GLADYS KESSLER
DAVID R. CASHMAN
KARIN P. SHELDON
CLIFTON E. CURTIS
DAVID S. FLEISCHAKER
GAIL M. HARMON

February 8, 1977

Mike Graine, Esq.
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mike,

This is to confirm in writing my response to your letter dated January 25, 1977 requesting certain information relevant to the Staff's assessment of the safety implications in continued operation of the Indian Point Station pending an Appeal Board decision on implementation of the seismic monitoring condition in the operating license for Unit 3. As I indicated at the meeting on January 31, 1977, CCPE has developed no information additional to that presented at the hearings last summer.

Sincerely yours

David S. Fleischaker
Counsel for Citizens Committee
for the Protection of the Environment

cc: Michael C. Farrar, Esq.
Dr. John H. Buck
Dr. Lawrence R. Quarles
Harry H. Voight, Esq.
Michael Curley, Esq.

Samuel J. Chilk
Sandra M. Caron, Esq.
Atomic Safety & Licensing Board Panel
Docketing & Service Section

286
Hy

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PDR ADOCK 05000286
G PDR

ROISMAN, KESSLER AND CASHDAN

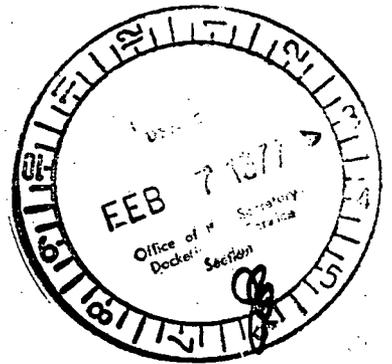
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DAVID R. CASHDAN
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GAIL M. HARMON

February 4, 1977



Michael C. Farrar, Esq., Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Lawrence R. Quarles
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Consolidated Edison Company of New York, Inc.
and Power Authority of the State of New York
(Indian Point Station, Units 1, 2 and 3)
Docket Nos. 50-3, 50-247 and 50-286
(Show Cause-Seismic)

Gentlemen:

In choosing not to reverse this Board's decision establishing a hearing on the merits of the licensing condition requiring expansion of the seismic monitoring network, the Commission considered to be important the fact that "a hearing on the merits before the Appeal Board is imminent." */ In addition, the Commission stated, "[U]nder the circumstances, we believe that the Appeal Board should move expeditiously to complete those hearings." **/

In its order dated January 17, 1977, this Board stated, "[U]ntil we received the licensee's January 14, 1977, letter,

*/ Commission Order, dated January 14, 1977, Slip Op. at 4.

**/ Id.

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Hy

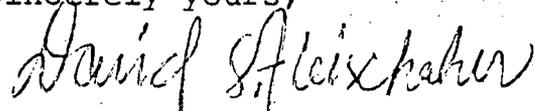
Messrs. Farrar, Buck and Quarles
February 4, 1977
Page two

it had been our intention to begin hearings within two weeks of February 25, 1977, the date on which the Staff is now to file its testimony. In light of the conflict adverted to in the licensee's letter, however, we will have to give that matter further thought." */

Under the circumstances, CCPE believes it imperative that this Board set the hearings for this matter as soon as possible after submission of the testimony. In fact, we believe the Board should follow its initial plan to set hearings within two weeks of February 25. The Commission has stated its view that this Board should move forward as expeditiously as possible. Regarding the conflict with the construction permit proceeding in Marble Hill, this proceeding clearly takes precedence over that one. There are no health and safety implications in interrupting that construction permit proceeding. **/ The same cannot be said here. Two reactors at Indian Point are in operation. There is a risk, regardless of how large or small it may be, that those reactors will be subjected to a potentially damaging earthquake while operating. This Board should not stay its consideration of whether that risk is sufficiently large to merit expansion of the seismic monitoring network.

Accordingly, CCPE requests this Board to set hearings within two weeks of filing of the testimony on February 25, 1977.

Sincerely yours,



David S. Fleischaker
Counsel for Citizens Committee
for Protection of the Environment

cc: All parties of record

*/ Order dated January 17, 1977, Slip Op. at 3.

**/ It may be the case that interruption is unnecessary.
That proceeding may recess at some point early on.

ROISMAN, KESSLER AND CASHDAN

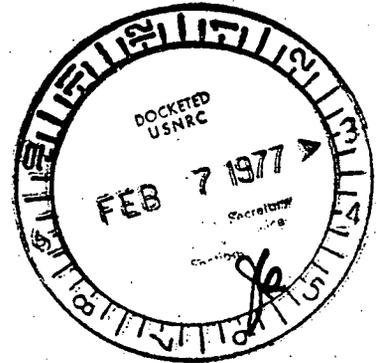
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DAVID R. CASHDAN
KARIN P. SHELDON
CLIFTON E. CURTIS
DAVID S. FLEISCHAKER
GAIL M. HARMON

February 4, 1977



Mr. Ben C. Rusche, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Rusche:

I am writing to express our concern about the conduct of a meeting between Consolidated Edison Company of New York, Inc./Power Authority State of New York, the licensees at the Indian Point Station, and the Staff. The meeting to which I refer, held January 31, 1977, was initiated by the Staff to require Con Edison/PASNY to present any information relative to the geology, tectonics and seismicity in the vicinity of the Indian Point site that would assist the Staff in determining whether to permit continued operation at the Indian Point Station in view of the Appeal Board's order staying the effectiveness of the operating license condition requiring expansion of the seismic monitoring network. As you are aware, the review is required because issuance of the operating license for the Indian Point Unit 3 nuclear reactor was conditioned on expansion of the seismic monitoring network. */

At the beginning of the meeting, Mr. Aycok, the lead Staff representative, asked the licensees' attorneys whether they had any comments. The licensees' attorneys then announced that because the licensee was involved in a legal proceeding, it was not presenting any documentation to the Staff, but a slide show only; that all questions would have to await completion of the 2-1/2 hour presentation; and that all questions were to be submitted through the licenses' attorneys. In addition, the Staff had apparently accepted the licensees' refusal to submit any data

*/ Letter from Michael Grainey, Staff Counsel, to Michael Farrar, Chairman, Appeal Board, dated January 10, 1977.

Mr. Ben C. Rusche
February 4, 1977
Page two

for analysis prior to their meeting. ^{*/}

These procedures deserve some comment. First, because the licensees were not required to submit, prior to the meeting, the data underlying the conclusions presented in the slide show, the Staff had no opportunity to prepare for a vigorous cross-examination of the licensees' presentation. Rather, the technical people were required to formulate their questions following a 2-1/2 hour presentation of material, a substantial portion of which was being seen for the first time.

Second, for the most part, what the licensees presented was their conclusions with a selective presentation of the underlying data. The failure to require the licensees to present the complete data base for their conclusions precludes a meaningful critique of these conclusions.

Third, it is hard to understand how the Staff can tolerate the requirement that it question the licensees' experts through the licensees' lawyer. That set-up is calculated to defeat an open exchange of information. The Staff should have insisted upon a face-to-face, direct exchange between the technical people.

Aside from whatever rules licensees' attorneys set down, the fact that they were permitted to do so, at the meeting's beginning, unchallenged by the Staff, is a matter of concern. The danger, of course, is that such a "takeover" by the licensees' attorneys chills the willingness of the technical members of the Staff to challenge aggressively the utility's presentation. One can only speculate as to whether that was the case at Monday's meeting. The point, however, is that there should be no question about it. Meetings should be conducted in an atmosphere that unquestionably promotes a vigorous Staff examination of the licensees' presentation.

The situation is not remedied by the fact that, at the meeting's end, the Staff attorney obtained the licensees' agreement to make certain documentation available for study. The licensees had already made clear that they were defining the rules regarding the release of information. The impression of timidity had already been cast. The belated request unfortunately takes on the aspects of a face-saving gesture.

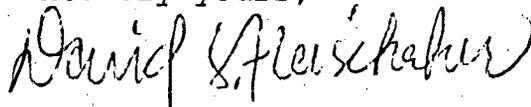
^{*/} The Staff cannot plead press of time for failure to require submission of these materials prior to the meeting. The meeting was postponed one week from the date initially set.

Mr. Ben C. Rusche
February 4, 1977
Page three

The intervenors are permitted to observe only -- and not to speak -- in meetings between the Staff and the licensees. Thus, there is no way for intervenors to join issue with the licensees in these circumstances. In any event, that is not the intervenor's place. As you are well aware, it is the Staff -- not the intervenor -- which must find that a nuclear facility can be operated without undue hazard to the public health and safety.

I trust that you will move to assure that such procedures are not countenanced in the future. With respect to this case, whatever conclusions the Staff may reach as a result of studying the slide show, they are not sufficient for the finding that the Staff must make. The licensees' presentation cannot be adequately analyzed unless all the underlying data is thoroughly studied. In our view, this includes any preliminary drafts of the licensees' final geologic and seismic investigations that it states will be issued in April, 1977. We trust that when the Staff obtains that data, it will make it available to the other parties to the show cause proceeding, as required by the Appeal Board's order dated January 17, 1977.

Sincerely yours,



David S. Fleischaker
Counsel for Citizens Committee
for Protection of the Environment

cc: All parties of record



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 25, 1977



Sandra M. Caron, Esq.
Suite 866
230 Park Avenue
New York, New York 10017

In the Matter of
Consolidated Edison Company of New York, Inc.
and
Power Authority of the State of New York
(Indian Point, Units 1, 2 and 3)
Docket Nos. 50-3, 50-247 and 60-286

Dear Ms. Caron:

Pursuant to 10 CFR §§ 2.740 and 2.741, the NRC Staff hereby requests the State of New York to produce the following documents:

1. Provide all information not previously submitted to the NRC, including all reports, draft reports, documents supporting data and any other information relative to geology, tectonics and seismicity in the vicinity of the Indian Point site that could affect the safety of the Indian Point Units.

The NRC requires this information in making its assessment of whether there are any safety implications in continued operation of the Indian Point Station during the pendency of the Appeal Board proceedings while certain seismic monitoring requirements are stayed by ALAB-357. Accordingly, the NRC Staff hereby requests that any such information be presented on or before the meeting with representatives of the Licensees and all other parties scheduled for Monday, January 31, 1977.

Sincerely,

Michael W. Grainey
Michael W. Grainey
Counsel for NRC Staff

cc: Michael C. Farrar, Esq.
Dr. John H. Buck
Dr. Lawrence R. Quarles
Harry H. Voigt, Esq.
David S. Fleischaker, Esq.
Michael Curley, Esq.
William H. Cuddy, Esq.

Gerald Garfield, Esq.
Samuel J. Chilk
Atomic Safety and Licensing
Board Panel
Atomic Safety and Licensing
Appeal Panel
Docketing and Service Section

286

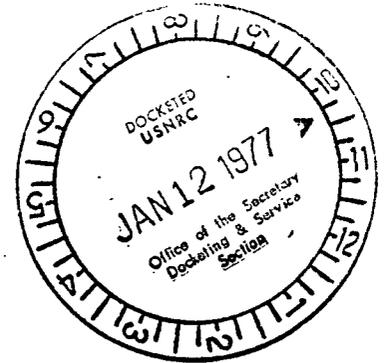
44



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 10, 1977

Michael C. Farrar, Esq., Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



In the Matter of
Consolidated Edison Company of New York, Inc.
and
Power Authority of the State of New York
(Indian Point, Units 1, 2 and 3)
Docket Nos. 50-3, 50-247 and 50-286

Dear Mr. Chairman:

Reference is made to the Appeal Board's Order of December 23, 1976, which denied the motions for reconsideration of ALAB-357 filed by the Staff and by the Citizens Committee for the Protection of the Environment. The December 23, 1976 Order directed that written testimony on issues raised by the Appeal Board in ALAB-357 respecting certain seismic monitoring requirements be filed by January 17, 1977. No date has been set for the hearing which will follow the prefiled testimony. The effectiveness of these seismic monitoring requirements is stayed by ALAB-357 pending the Appeal Board's resolution of the questions it has raised in ALAB-357 about the propriety of these requirements. Accordingly, it is clear that, absent action by the Commission *sua sponte*, the monitoring requirements at issue will be stayed for the foreseeable future.

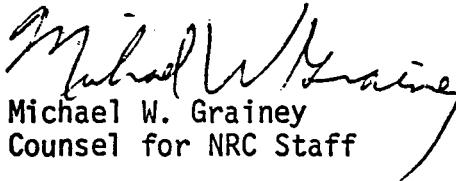
As the Staff noted in its Motion for Reconsideration of ALAB-357 and in its Response to Licensee's Motion to Modify License Conditions, the Staff issuance of the operating license for the Indian Point Unit 3 nuclear reactor was clearly conditioned on the implementation of the monitoring requirements at issue. The Staff reasons for imposing these requirements were articulated in Supplement No. 3 to the Safety Evaluation for Unit 3, as well as in the two above-cited Staff pleadings, and will not be repeated here. However, Supplement No. 3 to the Safety Evaluation makes clear that the existence of the monitoring requirements was an integral part of the analysis performed by the Staff in concluding that pursuant to 10 CFR § 50.57 there was reasonable assurance that the Indian Point Station could be operated without endangering the health and safety of the public. The Staff had performed no analysis which omitted such requirements and had made no evaluation of

the acceptability of operation of the Indian Point Station if the monitoring requirements are eliminated or stayed indefinitely. Specifically, as stated in its Motion for Reconsideration of ALAB-357, the Staff's reliance on the low probability of occurrence during the next three years of an earthquake larger than that for which the Indian Point Station was designed assumed the implementation of the seismic monitoring requirements during this interim period.

Accordingly, pursuant to the statutory responsibilities of the Atomic Energy Act, as well as to the Staff's continuing regulatory responsibilities pursuant to 10 CFR Part 50, the Staff believes that it is required to determine whether there are any safety implications presented by continued operation of the Indian Point Station without the seismic monitoring requirements during the period that the Appeal Board's proceeding is pending. The Staff believes that this analysis must be performed and action, as appropriate, taken by the Director of Nuclear Reactor Regulation as a matter of first priority. The Staff expects this analysis to be completed in approximately two weeks. Upon completion, the results of the Staff's review will be promptly forwarded to the Appeal Board and the parties.

The same Staff members who would be preparing the testimony required by ALAB-357 will be involved in the Staff's analysis of the safety implications of continued operation of the Indian Point Station while the proceeding called for by ALAB-357 is pending. The Staff, therefore, will be unable to prepare testimony in response to ALAB-357 until after the above-mentioned analysis is completed. Because of the time necessary to prepare the testimony in response to ALAB-357 and because of schedule conflicts of the necessary Staff personnel, the Staff has found it necessary to file a motion for an extension of time until February 25, 1977 to file that testimony.

Sincerely,


Michael W. Grainey
Counsel for NRC Staff

Attachment: NRC Staff Motion For Extension Of Time

cc: (w/attachment)

Dr. John H. Buck
Dr. Lawrence R. Quarles
Harry H. Voigt, Esq.
David S. Fleischaker, Esq.
Michael Curley, Esq.
William H. Cuddy, Esq.
Gerald Garfield, Esq.

Atomic Safety and Licensing
Board Panel
Atomic Safety and Licensing
Appeal Panel
Samuel J. Chilk
Docketing and Service Section

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC. and)
POWER AUTHORITY OF THE STATE)
OF NEW YORK)
(Indian Point Station, Unit)
Nos. 2 and 3))

STATE OF NEW YORK)
)) ss:
COUNTY OF NEW YORK)

Docket Nos. 50-247
50-286

AFFIDAVIT OF JOHN R. JANNARONE

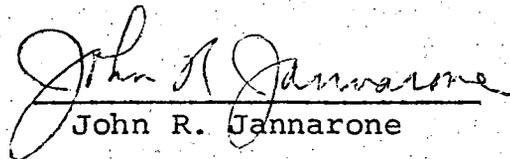
1-4-77

John R. Jannarone, being duly sworn, states: That he is Vice President in the Office for Environmental Affairs of Consolidated Edison Company of New York, Inc; that he is familiar with the contents of the following document prepared by Texas Instruments Incorporated entitled:

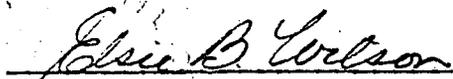
A SYNTHESIS OF AVAILABLE DATA PERTAINING
TO MAJOR PHYSICOCHEMICAL VARIABLES
WITHIN THE HUDSON RIVER ESTUARY
Emphasizing the period from 1972 through 1975

NOVEMBER 1976

and that the same is true to the best of his knowledge and belief.


John R. Jannarone

Sworn to before me this
4th DAY OF JANUARY 1977



ELSIE B. WILSON
NOTARY PUBLIC, State of New York
No. 03-4515902 Qualified in Bronx Co.
Certificate filed in New York County
Commission Expires March 30, 1977

286
HY

LAW OFFICES OF
LEBOEUF, LAMB, LEIBY & MACRAE

RELATED CORRESPONDENCE

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WASHINGTON, D. C. 20036

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TELEX: 440274

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TAYLOR R. BRIGGS
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CAMERON F. MACRAE *
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GERARD A. MAHER
SHEILA H. MARSHALL
JAMES G. MCELROY
JAMES P. MCGRANERY, JR. *
L. MANNING MUNTZING *
JAMES O'MALLEY, JR. *
J. MICHAEL PARISH
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JOSEPH S. STRAUSS
SAMUEL M. SUGDEN
EUGENE B. THOMAS, JR. *
LEONARD M. TROSTEN *
HARRY H. VOIGT *
H. RICHARD WACHTEL
GERARD P. WATSON

RANDALL J. LEBOEUF, JR. 1929-1975
ADRIAN C. LEIBY 1952-1976

OF COUNSEL
ARVIN E. UPTON

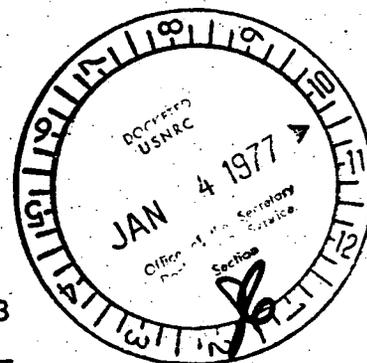
140 BROADWAY
NEW YORK, N.Y. 10005
TELEPHONE 212 269-1100
CABLE ADDRESS
LEBWIN, NEW YORK
TELEX: 423416

December 30, 1976

* RESIDENT PARTNERS WASHINGTON OFFICE
* ADMITTED TO THE DISTRICT OF COLUMBIA BAR

Director of Nuclear Reactor Regulation
Attn: Mr. George W. Knighton, Chief
Environmental Projects Branch No. 1
Division of Site Safety and
Environmental Analysis
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Indian Point Station, Units 2 and 3
Docket Nos. 50-247 and 50-286



Dear Mr. Knighton:

In accordance with Paragraph 2.E(4) of Facility Operating License No. DPR-26 and Paragraph 2.E(1)(f) of Facility Operating License No. DPR-64, we hereby submit an affidavit executed on December 28, 1976 by Mr. John R. Jannarone, a Vice President of Consolidated Edison Company of New York, Inc., and six (6) copies of the LaSalle Hydraulic Laboratory document entitled "Indian Point Generating Plants Hydraulic Model Study of Hudson River Flows Around Cooling Water Intakes" dated November 1976.

By copy hereof, two copies of the document and the original and twenty (20) copies of Mr. Jannarone's affidavit are being filed with the Secretary of the Commission.

Very truly yours,

LeBoeuf, Lamb, Leiby & MacRae

Enclosures

cc: See page 2.

44

Mr. Knighton

- 2 -

December 30, 1976

cc (w/encl): Samuel W. Jensch, Esq.
Mr. R. Beecher Briggs
Dr. Franklin C. Daiber
Dr. Richard Rush (3)
Stephen H. Lewis, Esq.
Richard C. King, Esq.
Paul S. Shemin, Esq.
Sarah Chasis, Esq.
Nicholas A. Robinson, Esq.
Anthony Z. Roisman, Esq.
Carl R. d'Alvia, Esq.
Hon. George V. Begany
Mr. Arthur Glowka
/Secretary, USNRC (2)

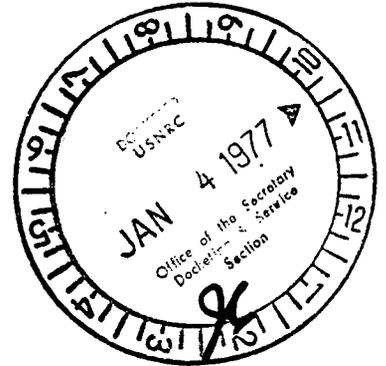
BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

RELATED CORRESPONDENCE

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC. and)
POWER AUTHORITY OF THE STATE)
OF NEW YORK)
(Indian Point Station, Unit)
Nos. 2 and 3))

Docket Nos. 50-247
50-286

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss:



AFFIDAVIT OF JOHN R. JANNARONE

John R. Jannarone, being duly sworn, states: That he is Vice President in the Office for Environmental Affairs of Consolidated Edison Company of New York, Inc; that he is familiar with the contents of the following document prepared by the LaSalle Hydraulic Laboratory entitled:

INDIAN POINT GENERATING PLANTS

Hydraulic Model Study of
Hudson River Flows
Around Cooling Water Intakes

November, 1976

and that the same is true to the best of his knowledge and belief.

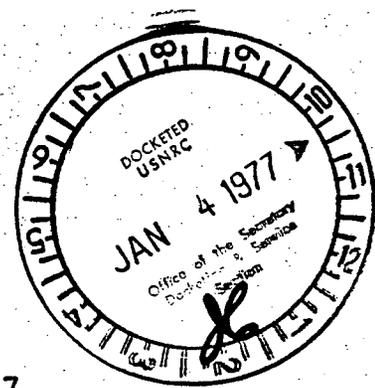
John R. Jannarone

John R. Jannarone

Sworn to before me this
28th day of December, 1976
Elsie B. Wilson

ELSIE B. WILSON
NOTARY PUBLIC, State of New York
No. 03-4515802 Qualified in Bronx Co.
Certificate filed in New York County
Commission Expires March 30, 1977

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION



In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)
(Indian Point Station)
Unit No. 2))
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC. and)
POWER AUTHORITY OF THE)
STATE OF NEW YORK)
(Indian Point Station)
Unit No. 3))

Docket No. 50-247

Docket No. 50-286

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of
December, 1976, served the foregoing affidavit of John R.
Jannarone dated December 28, 1976, and the document entitled
"Indian Point Generating Plants Hydraulic Model Study of
Hudson River Flows Around Cooling Water Intakes" dated
November 1976, by mailing copies thereof, first class postage
prepaid and properly addressed, to the following persons:

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

Mr. R. Beecher Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

Dr. Richard Rush
Team Leader
Oak Ridge National Laboratory
P.O. Box X
Oak Ridge, Tennessee 37830

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College of Marine Studies
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Newark, Delaware 19711

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Albany, New York 12223

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Washington, D.C. 20555

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
188 Westchester Avenue
Buchanan, New York 10511

Carl R. d'Alvia, Esq.
Village Attorney
Village of Buchanan
Municipal Building
Buchanan, New York 10511

Mr. Arthur Glowka
Hudson River Fishermen's
Association
60 Round Hill Drive
Stamford, Connecticut 06903

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
Attn: Chief, Docketing and
Service Section

Eugene R. Fidell

Eugene R. Fidell

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ADRIAN C. LEIBY 1952-1976

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HARRY H. VOIGT *
H. RICHARD WACHTEL
GERARD P. WATSON

December 29, 1976

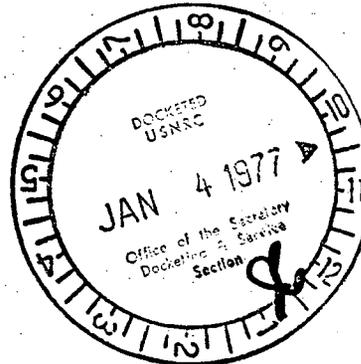
OF COUNSEL
ARVIN E. UPTON

140 BROADWAY
NEW YORK, N. Y. 10005
TELEPHONE 212 269-1100

CABLE ADDRESS
LEBWIN, NEW YORK
TELEX: 423416

* RESIDENT PARTNERS WASHINGTON OFFICE
* ADMITTED TO THE DISTRICT OF COLUMBIA BAR

Mr. Ben C. Rusche
Director
Office of Nuclear Reactor
Regulation
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555



Re: Consolidated Edison Co. of New York, Inc.
(Indian Point Station, Units 1 & 2), Dkt.
Nos. 50-3 and 50-247; Consolidated Edison
Co. of New York, Inc. and Power Authority
of the State of New York (Indian Point
Station, Unit No. 3), Dkt. No. 50-286

Dear Mr. Rusche:

As attorneys for Consolidated Edison Company of New York, Inc. and Power Authority of the State of New York, and in accordance with 10 C.F.R. § 50.90 (1976), we hereby transmit three (3) originals and forty (40) copies of a document entitled "Application for Amendment of Operating Licenses" sworn to by Mr. Carl L. Newman on December 28, 1976. This amendment conforms the fish impingement limitations applicable to operation of the Indian Point Station facilities with the numbers established in the amended certification issued on December 23, 1976 by the New York State Department of Environmental Conservation pursuant to § 401 of the Federal Water Pollution Control Act. For the convenience of the recipients of this filing, a copy of the amended certification is being distributed with this Application.

286
HD
4

Mr. Rusche

- 2 -

December 29, 1976

A certificate of service is enclosed.

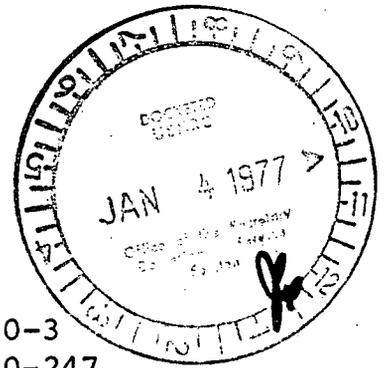
Sincerely yours,

LeBoeuf, Lamb, Leiby & Mack

Enclosures

cc (w/encl): Samuel W. Jensch, Esq.
Mr. R. Beecher Briggs
Dr. Franklin C. Daiber
Stephen H. Lewis, Esq.
Richard C. King, Esq.
Sarah Chasis, Esq.
Nicholas A. Robinson, Esq.
Carl R. d'Alvia, Esq.
Paul S. Shemin, Esq.
Hon. George V. Begany
Hendrick Hudson Public Library
Atomic Safety and Licensing Appeal Board Panel
Secretary, USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)
(Indian Point Station,)
Units 1, 2 and 3))

Docket Nos. 50-3
50-247
50-286

APPLICATION FOR AMENDMENT
OF OPERATING LICENSES

Pursuant to Section 50.90 of the regulations of the NRC (the "Commission"), Consolidated Edison Company of New York, Inc. ("Con Edison"), as holder of facility operating license No. DPR-5 and facility operating license No. DPR-26, and in its own right and as agent for the Power Authority of the State of New York as joint holders of facility operating license No. DPR-64, hereby applies for an amendment to the Environmental Technical Specification Requirements ("ETSR") contained in Appendix B of each license.

By letter dated December 23, 1976 from Langdon Marsh, Esq., General Counsel of the New York State Department of Environmental Conservation ("DEC") to Mr. Carl L. Newman, Vice President of Con Edison, DEC approved new limits on the numbers of fish of all sizes and species which, if collected from the fixed and traveling screens from all forebays at the Indian Point Station will require corrective action, pursuant to Condition A(2) (b) (1) of the Certification dated May 2, 1975 pursuant to Section 401 of the Federal Water Pollution

Control Act. We understand that a copy of this letter has been furnished to the Commission by DEC. Con Edison hereby requests that these limits prescribed by DEC be incorporated into Appendix B of the operating licenses for Indian Point Units 1, 2 and 3.

These new limits are:

- 10,000 fish or more per day for 7 consecutive days
- 30,000 fish or more per day for 3 consecutive days
- 40,000 fish or more in a single day.

Attachment A to this application contains the revised version of Section 4.1.2 (a) (2) (VI) (ii) which should replace the current section of that number of the ETSR for Indian Point Units 1 and 2 and the revised version of Section 4.1.2 (a) (3) A (iii) which should replace the current section of that number of the ETSR for Indian Point Unit 3.

An Environmental Impact Evaluation of the environmental impact of this proposed change is presented in Attachment B.

This request has been reviewed and approved by the Environmental Protection Committee which concluded that there will be no significant environmental impact attributable to the proposed action. The proposed amendment will not cause any change in the types or amounts of effluents from the site and does not involve significant hazards consideration.

This application does not replace or revoke any other pending application of Con Edison for amendment of the ETSR.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

By: Carl L. Newman
Carl L. Newman

Subscribed and sworn to
before me this 28th
day of December , 1976 .

Angela Roberti

Notary Public

— ANGELA ROBERTI —
Notary Public, State of New York
No. 41-8593213
Qualified in Queens County
Commission Expires March 30, 1978

ATTACHMENT A

APPLICATION FOR AMENDMENT
OF OPERATING LICENSES

Consolidated Edison Company of New York, Inc.
Power Authority of the State of New York
Indian Point Units 1, 2 and 3
Docket Nos. 50-3, 50-247 and 50-286

December 28, 1976

Section 4.1.2 a (2) vi (iii) of the ETSR for Indian Point Units 1 and 2

If the number of fish of all sizes and species collected in all forebays of the Indian Point Generating Station exceeds 10,000 per day for seven consecutive days, 30,000 per day for three consecutive days or 40,000 in a single day, immediate corrective action shall be taken to reduce the number to below these levels. This shall not apply at Unit 1 using the submerged Weir Feasibility Study.

Section 4.1.2 a (3) A (iii) of the ETSR for Indian Point Unit 3

If the number of fish collected as determined in (ii) above exceeds 10,000 per day for seven consecutive days, 30,000 per day for three consecutive days or 40,000 in a single day, immediate corrective action shall be taken to reduce the number to below these levels. (Fish impingement numbers are subject to the evaluation required under Reporting Requirements (d) (1) page 4.1-18.) The fish collected at Unit 1 shall not be included in the total station counts and shall not apply to the environmental protection conditions described in this paragraph when the submerged Weir Feasibility Study is being conducted.

ATTACHMENT B

APPLICATION FOR AMENDMENT
OF OPERATING LICENSES

Environmental Impact Evaluation

Consolidated Edison Company of New York, Inc.
Power Authority of the State of New York
Indian Point Units 1, 2 and 3
Docket Nos. 50-3, 50-247 and 50-286

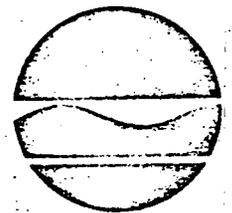
December 28, 1976

DEC in its letter of December 23, 1976, explained the basis for its action. It said that its analysis of 2¹/₂ years of recorded impingement data led to the conclusion that the new limits would assure that the allowable level (worst case) will not exceed the Commission Staff's predicted upper range of 4.6 million fish.

Con Edison agrees with that conclusion. Furthermore, we note that the fish numbers and species collected fluctuate greatly from day to day and season to season. Accordingly, the probable level of impingement is substantially less than the 4.6 million worst case referred to by DEC. The monthly reporting of daily collections permits the Commission Staff to monitor impingement. We also note that virtually all of these fish are young-of-the-year, 2 to 4 inches in length and averaging less than one ounce in weight.

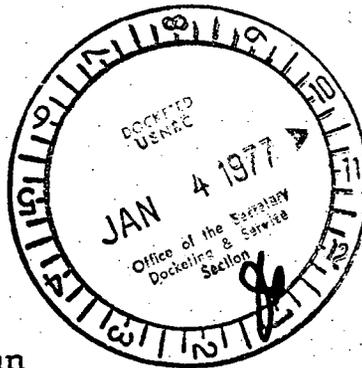
In view of the data on fish populations in the river obtained by the Ecological Study Program, Con Edison concludes that there will be no significant environmental impact attributable to the proposed license amendments.

New York State Department of Environmental Conservation
50 Wolf Road, Albany, New York 12233



~~Order Book~~
Commissioner

Peter A. A. Berle



December 23, 1976

Mr. Carl L. Newman
Vice President
Consolidated Edison Company
of New York, Incorporated
4 Irving Place
New York, New York 10003

RECEIVED (16)
DEC 27 1976
C. L. NEWMAN

Dear Mr. Newman:

Pursuant to your letters of May 29, 1975 and November 10, 1975, I am responding to your requests for amendments to the 401 Certification for Indian Point Units 2 and 3, dated May 2, 1975.

The Department of Environmental Conservation has reviewed the latest proposal from Consolidated Edison (Con Edison) that it be allowed to impinge fish at up to 10,000 per day for seven (7) consecutive days or 30,000 for three (3) consecutive days or 60,000 for one (1) day ($10K^7/30K^3/60K^1$) before taking corrective action at the Indian Point facility to reduce impingement.

Extrapolation of the recorded data over a 2 1/2 year period have been evaluated by simple arithmetic extrapolation and the results show that the probable annual level of impingement is around the predicted mean of 2.6 million predicted earlier by the Atomic Energy Commission. Suggested criteria contained herein will assure that the allowable level (worst case) will not exceed the predicted upper range of 4.6 million.

It is the Department's conclusion based on our arithmetic analysis that with reduction of the proposed limits to $10K^7/30K^3/40K^1$, defined as below) this combination will insure that annual impingement does not exceed the predicted level of 2.6 million fish plus or minus 2 million fish ($2.6M \pm 2M$).

Mr. Carl L. Newman
Page 2
December 23, 1976

At the 10K⁷/30K³/40K¹ level, projections indicate the plant would have to take corrective action about four (4) times in a normal year.

Pursuant to Condition A(2)(b)(1) of the Certification dated May 2, 1975 pursuant to Section 401 of the Federal Water Pollution Control Act Amendments of 1972 relating to Con Edison's Indian Point Nuclear Power Plants, the Department hereby approves the following new limits on the number of fish of all sizes and species which, if collected from the fixed and traveling screens of all forebays at the Indian Point Units 2 and 3, will require corrective action:

- 10,000 fish or more per day for seven consecutive days
- 30,000 fish or more per day for three consecutive days
- 40,000 fish or more in a single day

subject to the following conditions:

1. The (10K⁷/30K³/40K¹) levels are intended only for interim operation until a closed cycle cooling system is in operation for Indian Point Units 2 and 3.
2. Con Edison shall perform a monitoring program of fish populations until closed cycle cooling is in operation, which program shall be capable of detecting a 25 percent or greater change in fish populations in the Hudson River in the vicinity of Indian Point.
3. The Department will review the impact of this facility on aquatic organisms after one year of operation from the date of this letter. Con Edison shall submit reports to the Department prior to this one year review sufficient for the Department to assess the impact of the facility operations on the Hudson River ecosystem.

Mr. Carl L. Newman
Page 3
December 23, 1976

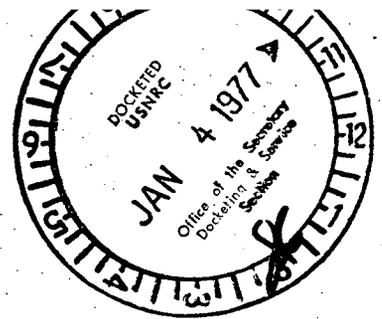
It should be noted that the Department's approval of the (10K⁷/30K³/40K¹) levels is based on its best judgment at this time and not on information sufficient to provide precise conclusions of expected impacts of impingement at Indian Point. The Department also is concerned about the impact of impingement at Indian Point on individual species. Should additional information or reports, actual operating experience, or other contingencies provide a basis for additional concerns, we reserve the right to impose additional restrictions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Langdon Marsh".

Langdon Marsh
General Counsel

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION



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

CERTIFICATE OF SERVICE

I certify that I have, this 29th day of December, 1976, served the foregoing document entitled "Application for Amendment of Operating Licenses" dated December 28, 1976 by mailing copies thereof, first class postage prepaid and properly addressed to the following persons:

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

Mr. R. Beecher Briggs
110 Evans Lane
Oak Ridge, Tennessee 37830

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

Stephen H. Lewis, Esq.
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Washington, D.C. 20555

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Natural Resources Defense
Council, Inc.
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Assistant Attorney General
of the State of New York
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New York, New York 10048

Hon. George V. Begany
Mayor, Village of Buchanan
188 Westchester Avenue
Buchanan, New York 10511

Hendrick Hudson Public Library
31 Albany Post Road
Montrose, New York 10548

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

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
Attn: Chief, Docketing and
Service Section.

Eugene R. Fidell

Eugene R. Fidell

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC. and) Docket Nos. 50-247
POWER AUTHORITY OF THE STATE) 50-286
OF NEW YORK)
(Indian Point Station, Unit)
Nos. 2 and 3))

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AFFIDAVIT OF JOHN R. JANNARONE

John R. Jannarone, being duly sworn, states: That he is Vice President in the Office for Environmental Affairs of Consolidated Edison Company of New York, Inc; that he is familiar with the contents of the following document prepared by Texas Instruments Incorporated entitled:

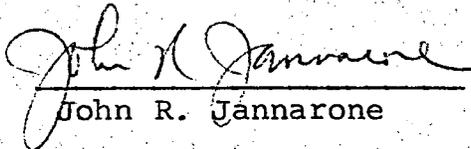
INDIAN POINT IMPINGEMENT STUDY REPORT

FOR THE PERIOD

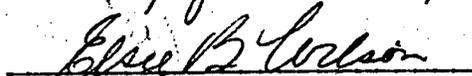
1 JANUARY 1975-31 DECEMBER 1975

November 1976

and that the same is true to the best of his knowledge and belief.


John R. Jannarone

Sworn to before me this
16th day of December, 1976



ELSIE B. WILSON
NOTARY PUBLIC, State of New York
No. 03-4515802 Qualified in Bronx Co.
Certificate filed in New York County
Commission Expires March 30, 1977

50-286
#4

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
)
CONSOLIDATED EDISON COMPANY) Docket Nos. 50-3---
OF NEW YORK, INC. and) 50-247
POWER AUTHORITY OF THE) 50-286
STATE OF NEW YORK) (Show Cause - Seismic)
(Indian Point Station,)
Units 1, 2 and 3))

LICENSEE'S RESPONSE TO
CCPE'S AND THE STAFF'S
MOTIONS FOR RECONSIDERATION
OF ALAB-357

Introduction

12-8

On August 27, 1976, Consolidated Edison Company of New York, Inc. and Power Authority of the State of New York, co-holders of Facility Operating License No. DPR-64 for Indian Point Unit No. 3 ("Licensees"), asked this Appeal Board to modify the time limits within which Licensees were required to install and operate an expanded micro-seismic monitoring network. The requirement for the expanded network is contained in ¶ 2C(4) of that operating license. In essence, that paragraph would have Licensees commence operation of the expanded network no later than April 5, 1977, and gather two years' data from the network by April 5, 1979.

50-286
#4

Citizens' Committee for Protection of the Environment ("CCPE") and the Commission's Regulatory Staff ("the Staff") opposed the requested modification. On September 14, 1976, this Board temporarily relieved Licensees from taking the steps necessary to comply with the condition, in order to allow full consideration of the pending motion. On November 10, 1976, the Board issued ALAB-357 which, with one member dissenting, 1) ordered a hearing to examine the validity of the license condition requiring an expanded micro-seismic monitoring network and 2) continued to relieve Licensees from taking the necessary steps to comply with the condition pendente lite. CCPE and the Staff have each asked the Board to reconsider ALAB-357 on the grounds that a hearing should not now be held and that Licensees failed to meet the tests applicable for a stay of the license condition.

Licensees submit that: 1) the Board correctly ordered a hearing on the appropriateness of the requirement for the expanded network; 2) the Board has the inherent power to temporarily relieve Licensees from taking those measures necessary to implement the condition pending the outcome of the hearing on the validity of the condition; and 3) such relief is not a "stay" and does not require inquiry concerning the traditional showing required for a stay. Accordingly, Licensees urge this Board either not to reconsider ALAB-357, or alternatively, upon reconsideration, to adhere to ALAB-357.

Argument

- I. THE APPEAL BOARD CORRECTLY ORDERED AN EVIDENTIARY HEARING TO EXAMINE THE VALIDITY OF ¶ 2C(4) OF OPERATING LICENSE NO. DPR-64.

All members of this Board agreed that this Board possesses full jurisdiction over the license condition in question. ALAB-357, slip op. at 8-9; see also id. at 31, n. 13. Section 2.717(b) of the Commission's Rules of Practice, 10 C.F.R. § 2.717(b), clearly recognizes this Board's power to review the questioned condition, imposed as it was during the pendency of the seismic proceeding. Even the Staff agrees (Staff Motion at 8) that this Board has jurisdiction pursuant to § 2.717(b) to modify the condition. Accordingly, Licensees will not present further arguments concerning jurisdiction and submit that the issue of jurisdiction merits no reconsideration.

The Staff argues, however, that the Appeal Board's decision to hold a hearing on the merits of the condition contained in ¶ 2C(4) is based on a misapprehension of the Staff position concerning the necessity for the condition. Staff Motion at 14. Licensees consider it inappropriate at this time to present detailed arguments concerning the validity of the condition. Those should await the forthcoming hearing. Licensees do agree, however, with the majority's conclusion (ALAB-357, slip op. at 14) that the existing record amply demonstrates that there are significant questions concerning the utility of the license condition

requiring the expanded seismic monitoring network. Specifically, there exist questions concerning the correct configuration of the network. Tr. 5454, 5521-22. The Staff's own witness stated there was considerable uncertainty whether micro-seismicity data is a reliable basis for predicting the occurrence of larger earthquakes. Tr. 5529. Dr. Richter also questioned the utility of micro-seismic data. Tr. 4792-93. The Staff frankly admitted the expansion of the network was "in part a research project". Tr. 5531. The Staff can not now complain that these remarks were mischaracterized. Staff Motion at 11. There is a substantial question whether the Staff-imposed condition is the proper remedy to confirm the Staff's conclusion that the Ramapo Fault is non-capable. The Board was correct in ordering a hearing to resolve this question of the utility of the condition, and the record clearly substantiates the majority's decision.

The Staff contends (Staff Motion at 10) that the above quotations from the transcript "do not represent accurately the position of the Staff". If that is true, Licensees submit that the Staff's interests would be served by holding a hearing to clarify the record which the Staff believes does not now accurately reflect its position. If, as the Staff contends, the Appeal Board has incorrectly interpreted the existing record (Staff Motion at 12), then a hearing is required to remove any misapprehension.

Based upon information that came to light during the hearings, substantial doubts also exist concerning the validity of the Staff's stated basis for imposing the condition. The Staff contends that the reasons for imposing the monitoring requirements are "explained in Supplement No. 2 [sic]" to the Indian Point 3 SER. Staff Motion at 9. Supplement No. 3, issued April 5, 1976, states (at 2-6) that the condition is based upon the "recent location of the two earthquakes near the fault". The first of these is the September 3, 1951 Rockland County event, located by Dr. Sykes in his March 19, 1976 pre-filed, non cross-examined direct testimony no more than 1-2 km. from the Ramapo Fault. Dr. Sykes subsequently revised this location to some 9 km. from the fault. Tr. 3813, July 12, 1976. The second event is that of March 11, 1976, the location of which was sharply disputed during the course of the hearings.

There are also significant questions concerning the legality of the condition when it is measured against the applicable benchmark of 10 C.F.R. Part 100, Appendix A. These questions further justify the Board's decision to examine the license condition. For example, the Staff indicated that data from the micro-seismic monitoring network would "assist in defining the tectonic environment and in providing guidance on the relationship of microearthquakes to the potential for larger earthquakes in the region." Staff Motion at 12. If, however, that is the purpose of the

requirement, Licensees contend it has no basis in Appendix A. Paragraph 4 of Appendix A ("Required Investigations") is silent regarding any requirement concerning operation of a micro-seismic monitoring network. Further, the whole thrust of Appendix A is deterministic, not probabilistic. In the one instance where earthquakes can be inferred (§ V(a)(1)(i)), the inference is made from the information collected pursuant to § IV(a)(8), which emphasizes past displacements. That inference is relevant, however, only for the derivation of the Safe Shutdown Earthquake, not for the definition of capability. Appendix A, § III(g). Furthermore, § III(g)(2) speaks of faults which have exhibited macro-seismicity. In short, Licensees submit that the requirement for the expanded network has no basis in Appendix A.

It appears to Licensees that the real reason that the Staff now opposes a hearing on the validity of the condition contained in § 2C(4) is that the Staff considers that it "has already answered that question [of the necessity of the condition] in Supplement Number 2 [sic] to the Safety Evaluation for Unit 3 and in the record of this proceeding". Staff Motion at 15. Licensees agree that in an operating license proceeding, the responsibility for making statutory findings as to non-contested matters lies with the Staff. 10 C.F.R. § 2.760a. Section 2.760a does not, however, give the Staff a blank check to impose conditions that can never be reviewed. In short, the Staff now seeks to

insulate the condition from any scrutiny. This attempt is inconsistent with the Staff's earlier admission (Staff Motion at 8) that this Board has jurisdiction to review the conditions imposed on the Licensees.

For its part, CCPE (CCPE Motion at 9) argues that the Board's decision to convene a hearing at this time is not in the public interest because only a financial investment is at stake. This argument ignores the obvious reality that the costs of installing and running the expanded network for an additional two years will be borne by the consumer in the form of higher rates. CCPE's unduly restrictive view of the "public interest" 1 / also overlooks the effect of the recently-passed National Productivity and Quality of Working Life Act of 1975 ("the Act"). 2 / Section 103 of the Act, 15 U.S.C. § 2403 (Supp. V 1975), states the Act's policy as follows:

"(a) The Congress, recognizing the profound impact of productivity on the interrelations of all components of the national economy, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, to use all practicable means and measures, including financial and technical assistance, to stimulate a high rate of productivity growth.

1 / The Appeal Board has, on at least one prior occasion, considered the "public interest" to be defined in part by economic considerations. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, NRCI-75/6, 539 (June 18, 1975).

2 / 15 U.S.C. §§ 2401 et seq. (Supp. V 1975).

"(b) It is the continuing responsibility of the Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources to carry out the policy set forth in this chapter.

"(c) The laws, rules, regulations, and policies of the United States shall be so interpreted as to give full force and effect to this policy."

The House Committee Report 3 / accompanying this statute interprets this section as follows:

"Witnesses at the committee's hearings emphasized the need to establish a Federal policy to stimulate a high rate of productivity growth through the use of all practicable means and measures, and to require that the laws, rules, regulations, and policies of the United States be interpreted to carry out this policy. Accordingly, the bill provides for the establishment of such a policy, and it makes it the continuing responsibility of the Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources to achieve a high rate of productivity growth.

"Much has been written about the effect of governmental regulation on the efficient working of the economy. The purpose of the committee in establishing a Federal productivity policy is to require each agency to assess the impact of its regulations, policies, and programs on national productivity growth."

3 / H.R. Rep. No. 94-540, 94th Cong., 1st Sess. (1975), 1975 U.S. Code Congressional and Administrative News ("U.S.C.C.A.N") 1327, 1331.

Productivity growth is defined in § 104 of the Act, 15 U.S.C. § 2404, as including, although not exclusively, "improvements in technology, management techniques, and the quality of working life". This definition is fleshed out by § 101 of the Act as well as by the House Committee Report. A reading of § 101, 15 U.S.C. § 2401, indicates Congress believed that productivity growth is impeded by misapplication of capital in the American economy (15 U.S.C. § 2401(10)) as well as by inefficient governmental policies. 15 U.S.C. § 2401(13). The Committee Report also considers "the adverse effect of some Federal and State laws, regulations and policies" as contributing to the decline in productivity growth. 1975 U.S.C.C.A.N. at 1329. Accordingly, Licensees submit that requiring the installation of a costly network with only questionable utility runs expressly counter to the national policy of efficient governmental regulation mandated by the National Productivity Act.

The above policy language of the Act is almost verbatim that of NEPA. 4 / Section 101(a) of NEPA, 42 U.S.C. § 4331(a), provides "that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote [environmental concerns]." Section 101(b),

4 / National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970 and Supp. V 1975).

42 U.S.C. § 4331(b), provides: "In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs and resources. . . ."

The policy directive in § 101 of NEPA has been construed to impose additional duties on Federal agencies. For example, in EDF v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972) the Court recognized that

"NEPA was intended to effect substantive changes in decision-making. Section 101(b) of the Act states that agencies have an obligation 'to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources' to preserve and enhance the environment."

470 F.2d at 297. The District of Columbia Circuit in Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) found that "a requirement of consideration [of environmental values] is clearly implicit in the substantive mandate of § 101". 449 F.2d 1112, 1113, n. 5. Accordingly, Licensees contend that the identical language appearing in the National Productivity Act must likewise be construed to make concern with productivity and the efficient use of resources part of the mandate of each Federal agency. Given the real questions that now exist on the record concerning the utility of the expanded monitoring network, and the fact

the Staff performed no cost-benefit analysis of the condition (Tr. 5502-04), 5 / not to question this condition further would be an express violation of the terms of the Act. See also § 302 of the Act, 15 U.S.C. § 2432, which specifically requires each Federal agency to review the implementation of its policies with a view to identifying and eliminating those "which adversely affect productivity growth in the . . . private sector[]".

Furthermore, Licensees submit that the question of the validity of the license condition would almost certainly be brought before this Board for review after the Board's expected decision in the pending seismic proceeding. Licensees expressed their intention to do so depending on the Board's resolution of capability. Tr. 5505. Thus, a finding of non-capability could well be expected to be the predicate for a request to eliminate the condition. Likewise, a finding of capability and the correlative question of remedy would also involve the network. Even if the Board were to rule the question open -- as the State suggests -- the proper configuration of the network would certainly be an issue ripe for adjudication. Given the very high probability that the requirement for the network will ultimately be brought before the Board, it is judicially economical to hear that issue now in connection with the

5 / Cf. 10 C.F.R. Part 50, Appendix I, Sec. II(D).

Board's decision in the seismic proceeding. In fact, the Commission's delegation of "full authority in this matter to the Appeal Board in the interest of a comprehensive and expeditious resolution of the issues" 6 / suggests the Board is required to examine that condition and can do so in connection with its decision in the entire proceeding.

II. THIS BOARD CORRECTLY DEFERRED IMPLEMENTATION OF THOSE ACTIONS BY LICENSEES NECESSARY TO FULFILL THE CONDITION PENDING THE BOARD'S CONSIDERATION OF THE CONDITION.

CCPE considers Licensees' motion to modify the license condition as tantamount to a request for a stay. CCPE Motion at 5. CCPE argues that this Board issued a stay despite the fact Licensees failed to address and consequently satisfy the four-fold test of Virginia Petroleum Jobbers. 7 / CCPE Motion, Part II. The Staff agrees with CCPE that Licensees' initial motion "in effect" sought a stay, yet failed to meet the four-fold test. Staff Motion at 4. Accordingly, the Staff views the Board's action as erroneous.

Licensees did not, however, request a stay. Their August 27 pleading was designed to be a request for a license amendment, and was so entitled. Licensees' August 27 motion

6 / Consolidated Edison Co. of New York, Inc. (Indian Point Unit Nos. 1, 2 and 3), CLI-75-8, NRCI-75/8, 173, 179 (August 4, 1975).

7 / Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

can not be termed a request for a stay because the duties imposed by the April 5, 1976 license amendment are prospective. The condition in ¶ 2C(4) of Operating License DPR-64 requires data collection to commence by April 1977 and to be completed by April 1979. Accordingly, Licensees would not be in violation of the condition imposed by ¶ 2C(4) until April 6, 1977, and arguably, not until April 5, 1979. A request to "stay" such a prospective condition would not now lie because the condition has only prospective--not current--effect.

More importantly, we believe that the Appeal Board majority has correctly perceived that the Virginia Petroleum Jobbers case simply does not apply to the facts of this case. Virginia Petroleum Jobbers involved a stay pending appeal. Similarly, the decisions cited by the Staff 8 / and CCPE 9 / all involved stays pending appeal. Cf. 10 C.F.R. § 2.764(a). Further, Virginia Petroleum Jobbers was premised upon the natural reluctance of a reviewing court to substitute its judgment for that of an independent agency that had reviewed a record and issued a final order. Here,

8 / Public Service Co. of New Hampshire (Seabrook Station), ALAB-338, NRCI-76/7, 10 (July 14, 1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-199, 7 AEC 478 (1974); and Northern Indiana Public Service Co. (Bailly Generating Station), ALAB-192, 7 AEC 420 (1974). See Staff Motion at 4, n. 5.

9 / CCPE relied primarily on Seabrook, n. 8, supra. CCPE's Motion at 1, n. **, and at 7, n. **.

by contrast, there has never been any hearing concerning the appropriateness of the monitoring condition, and it has not yet been subjected to the review jurisdiction of this Appeal Board.

The instant case is directly comparable to the controversy over "inerting" in Vermont Yankee.^{10/} In that proceeding, the Appeal Board repeatedly deferred the effectiveness of Staff-imposed conditions requiring injection of nitrogen into the containment. At no time was Virginia Petroleum Jobbers cited, and the judicial tests for imposition of a stay were never invoked by the Board. Licensees submit that the Vermont Yankee series of decisions are good precedents to support deferring action to implement the untested license condition in this case without resort to the Virginia Petroleum Jobbers tests.

Because this Board has jurisdiction to consider the validity of the questioned condition (see text supra at 3), Licensees submit that the Board necessarily has the power to relieve Licensees, pendente lite, from taking those steps necessary to implement the condition. Licensees consider ALAB-357 as ordering just that. The majority did nothing more than continue the relief granted by the Board's earlier September 14, 1976 Order. ALAB-357,

^{10/} Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431 (1974); ALAB-214, 7 AEC 1001 (1974); and ALAB-217, 8 AEC 61 (1974).

slip op. at 19. That earlier order was challenged by no party to the proceeding and did nothing to the condition itself. It merely afforded Licensees a day-for-day postponement from taking "the steps which will enable them to comply with the condition" (September 14, 1976 Order at 2), until a decision on the motion was made. The continuance of this relief--which is operative on Licensees, not the condition--is necessary to insure that the Board's review of the condition will not be merely academic. Without such deferral, Licensees will have to now commit substantial resources to install the network prior to the Board's consideration of the condition, or risk a license violation some time in the future should the condition ultimately be upheld. Such power to defer this "irrevocable action" (September 14, 1976 Order at 3) can be found within the Commission's delegation of full authority to this Board (NRCI-75/8 at 178-79) as well as within the powers conferred under 10 C.F.R. § 2.718. This power is akin to that possessed by a federal court to issue orders in aid of its jurisdiction. 28 U.S.C. § 1651(a) (1970).

Despite the Staff's argument to the contrary, (Staff Motion at 7-8) such deferral was not in "derogation" of the Board's commitment to all parties concerning the license condition made at the seismic hearing. 11/ In essence,

11/ Tr. 5509; ALAB-357, slip op. at 3-4.

that commitment was to take "no action" on the condition until the parties have had a chance to be heard. Licensees submit that no action has been taken. The validity of the condition has not yet been adjudicated and must await the evidentiary hearing. The Staff, however, alleges (Staff Motion at 6) that the Board "has made conclusions on an issue without providing any of the parties an opportunity to adequately address that issue." To the contrary, it appears to Licensees that the "opportunity" requested is afforded precisely by the forthcoming evidentiary hearing. This is exactly what the Board promised the parties and in Licensees' view, the parties received that which was promised. CCPE and the Staff should not now be heard to complain.

III.

Conclusion

For the foregoing reasons, Licensees contend that ALAB-357 was correctly decided. Accordingly, Licensees urge this Board to either deny reconsideration, or upon reconsideration, adhere to ALAB-357.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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Attorneys for Licensees

Of Counsel:

PATRICK K. O'HARE

December 8, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY) Docket Nos. 50-3
OF NEW YORK, INC. and) 50-247
POWER AUTHORITY OF THE) 50-286
STATE OF NEW YORK) (Show Cause - Seismic)
(Indian Point Station)
Units 1, 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of December, 1976 served the foregoing document entitled "Licensees' Response to CCPE's and the Staff's Motions for Reconsideration of ALAB-357" by mailing copies thereof, first class postage prepaid and properly addressed, or by personal delivery, as so indicated, to the persons listed below:

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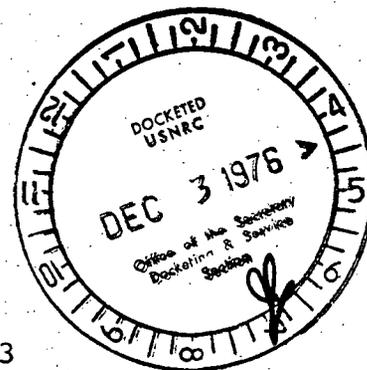
December 3, 1976

* RESIDENT PARTNERS WASHINGTON OFFICE

† ADMITTED TO THE DISTRICT OF COLUMBIA BAR

Director of Nuclear Reactor Regulation
Attn: Mr. George W. Knighton, Chief
Environmental Projects Branch No. 1
Division of Site Safety and
Environmental Analysis
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Indian Point Station, Units 2 and 3
Docket Nos. 50-247 and 50-286



Dear Mr. Knighton:

In accordance with Paragraph 2.E(4) of Facility Operating License No. DPR-26 and Paragraph 2.E(1)(f) of Facility Operating License No. DPR-64, we hereby submit an affidavit executed on November 23, 1976 by Mr. John R. Jannarone, a Vice President of Consolidated Edison Company of New York, Inc., and six (6) copies of the Edenton National Fish Hatchery Report entitled "The Rearing of Hudson River Striped Bass at the Edenton National Fish Hatchery 1975" dated August 1976.

By copy hereof, two copies of the report and the original and twenty (20) copies of Mr. Jannarone's affidavit are being filed with the Secretary of the Commission.

Very truly yours,

LeBoeuf, Lamb, Leiby & MacRae

Enclosures

cc: See page 2.

50-286
#4

Mr. Knighton
December 3, 1976
Page 2

cc (w/encl): Samuel W. Jensch, Esq.
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November 23, 1976

Michael C. Farrar, Chairman
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Washington, D.C. 20555

Dr. John H. Buck
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Dr. Lawrence R. Quarles
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RE: In the Matter of Consolidated Edison Company of New York and Power Authority of the State of New York (Indian Point Station, Units 1, 2 & 3) Docket Nos. 50-3, 50-247, 50-286

Gentlemen:

CCPE requests permission for a two day extension in filing its reply brief. The brief will be filed on November 26, 1976.

The new scheduling is requested because CCPE's attorney is completing the reply brief in Seabrook to be filed before the Appeal Board the same day. The Staff and Licensee have no objection to the requested scheduling change.

Respectfully,

A handwritten signature in cursive script, appearing to read "David S. Fleischaker".

David S. Fleischaker

cc: All persons on Service List

50-286
H 4

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC. and) Docket Nos. 50-247
POWER AUTHORITY OF THE STATE) 50-286
OF NEW YORK)
(Indian Point Station, Unit)
Nos. 2 and 3))

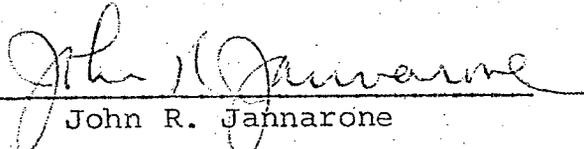
STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

AFFIDAVIT OF JOHN R. JANNARONE

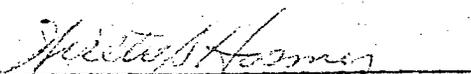
John R. Jannarone, being duly sworn, states: That he is Vice President in the Office for Environmental Affairs of Consolidated Edison Company of New York, Inc; that he is familiar with the contents of the document prepared for the Company by the Edenton National Fish Hatchery entitled:

THE REARING OF
HUDSON RIVER STRIPED BASS
AT THE
EDENTON NATIONAL FISH HATCHERY
1975
August, 1976

and that the same is true to the best of his knowledge and belief.


John R. Jannarone

Sworn to before me this 11/23/76



WALTER S. HOSMER
Notary Public State of New York
No. 39-6973150
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

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