

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

- (Indian Point, Unit No. 1)
- (Indian Point, Unit No. 2)
- (Indian Point, Unit No. 3)

- Docket No. 50-3
- Docket No. 50-247
- Docket No. 50-286

NRC STAFF ANSWER TO PETITION FOR LEAVE
TO INTERVENE IN PROCEEDING RELATING TO SEISMIC ISSUES

DECEMBER 2, 1975

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NRC STAFF ANSWER TO PETITION FOR LEAVE
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On August 5, 1975, the Atomic Safety and Licensing Appeal Board (Appeal Board) issued a Notice of a Public Hearing on Seismic Issues, and Order in Connection Therewith (Notice) in this proceeding. 40 F.R. 33498, August 8, 1975. The Notice provided, inter alia, that any person whose interest may be affected by the proceeding could file a request for a hearing in the form of a petition for leave to intervene by August 29, 1975. The Notice also summarized the provisions of 10 CFR Section 2.714, the Commission's rule which prescribes the form and content of petitions for leave to intervene.

On November 14, 1975, the Northeast Nuclear Energy Company, et al. (Petitioners), Applicants for construction permits in the Montague proceeding, Northeast Nuclear Energy Company, et al. (Montague Nuclear

Power Station, Units 1 and 2), Docket Nos. 50-496 and 50-497, filed a Petition for Leave to Intervene in Proceeding Relating to Seismic Issues (Petition) in the above-captioned proceeding.

Before intervenor status may be granted, a petitioner must establish (1) that he has an interest which may be affected by the proposed action and (2) that there is present at least one contention which complies with the requirements of 10 CFR Section 2.714. See Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (June 19, 1973); Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371 (May 25, 1973); Duquesne Light Co., et al. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243 (April 2, 1973); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (March 29, 1973).

Moreover, in view of the fact that the instant Petition was not timely filed, a determination must be made that the Petitioner has made a substantial showing of good cause for failure to file on time. 10 CFR Section 2.714(a). In addition to the question of good cause, consideration must also be given to the four factors set forth in 10 CFR Section 2.714(a), namely:

- (1) The availability of other means whereby the petitioner's interest will be protected.
- (2) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (3) The extent to which petitioner's interest will be represented by existing parties.
- (4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

See Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, NRCI-75/4R 273 (April 17, 1975), reversing ALAB-263, NRCI-75/3 208 (March 28, 1975). See also Virginia Electric and Power Co. (North Anna Station, Units 1 and 2), ALAB-289, NRCI-75/9 395 (September 18, 1975); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, NRCI-75/10__ (October 2, 1975).

I. Petitioners' Interest

Petitioners state that their interest in this proceeding "is the need for a proper determination of the Safe Shutdown Earthquake and ground acceleration value for the Montague units." Petition, at 3. Petitioners indicate that their interest will be affected by the results of this proceeding in that "the Appeal Board's determination of the applicability of the Cape Ann earthquake of 1755 or 'other historic events' to the Indian Point site and its determination on 'sub-issues involving tectonic

provinces and other geological phenomena' ...may have the practical effect of establishing or affecting the Safe Shutdown earthquake and ground acceleration value for the Montague Units prior to the time when the Petitioners would otherwise be permitted to present their case on such issues in the Montague proceeding itself." Petition, at 4.

Petitioners conclude that:

Such a determination affecting the Montague site prior to the public hearings in the Montague proceeding would cause the Petitioners injury in fact by denying them the right to a public hearing upon such issues on their own application for a construction permit, in clear violation of the Atomic Energy Act of 1954, as amended, the Administrative Procedure Act and the constitutional requirements of due process. Moreover, if the Appeal Board were to make a determination that the Cape Ann earthquake, or other historic events, are applicable to a geographic region of which the Montague site is a part, the Petitioners could be required to modify the proposed design of the Montague Units, and would thereby suffer severe economic injury without any opportunity to demonstrate at a public hearing that the Cape Ann earthquake or other historic events, or associated sub-issues, do not relate to the Montague site. Petition, at 4-5.

The Nuclear Regulatory Commission Staff (Staff) submits that Petitioners do not assert an interest, in accordance with 10 CFR Section 2.714, sufficient to confer standing to intervene in this proceeding. The scope of this proceeding is limited to the matters discussed in the

Commission's August 4, 1975, Memorandum and Order. Consolidated Edison Company of New York, Inc. (Indian Point Station, Units 1, 2 and 3), Memorandum and Order, Docket Nos. 50-3, 50-247, and 50-286 (August 4, 1975). The issues addressed in the Commission's Memorandum and Order are factual, and relate solely to the Indian Point site. Any determinations made by the Appeal Board will relate solely to the proper seismic analysis, in accordance with 10 CFR Part 100, Appendix A, for the Indian Point site. Petitioners have not attempted to assert an interest with respect to the Indian Point site but rather rely solely upon their interest with respect to the Montague proceeding, an interest not within the purview of the issues delineated by the Commission.

It is quite clear that neither Section 189 of the Atomic Energy Act of 1954, as amended, nor the Commission's implementing regulations require, as a prerequisite to intervention, that it be established that the asserted interest of the petitioner will be affected by the results of the proceeding in question. Rather, the statutory standard is whether that interest may be affected. 42 U.S.C. 2239; 10 CFR Section 2.714. See Long Island Lighting Company, supra, slip opinion at 11. Given this standard, however, the Staff submits that Petitioners have failed to show that their interest may be affected by the results of this proceeding. As noted above, the determinations by the Appeal Board in this proceeding

will be with respect to the Indian Point site, not the Montague site. Moreover, these determinations would be factual in nature. Any determination by the presiding Atomic Safety and Licensing Board in the Montague proceeding on the question of seismic design of the Montague units must be based solely upon the record developed in that proceeding, not upon reliance on the factual matters which would be developed in this proceeding. The facts developed in this proceeding will not be susceptible to official notice in the Montague proceeding. See 10 CFR Section 2.743(i); Davis, Administrative Law Text, Section 15.03; McCormick, Handbook of the Law of Evidence, Chapter 35; Rule 201, Federal Rules of Evidence. Finally, the Appeal Board in this proceeding is acting as the original trier of fact with respect to the seismic issues in this proceeding and not in its customary appellate capacity. Thus, the record developed will reflect the facts relevant to the Indian Point site and the resulting Decision should not be accorded precedential value as a determination on a regional basis. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), CLI-74-40, RAI-74-11 809, 814-15 (November 17, 1974). The Staff, therefore, submits that Petitioners have failed to demonstrate that their interest, assuming arguendo that such interest is cognizable in this proceeding, may be affected by the results of this proceeding.

The Staff will address the remaining issues with respect to the Petition below, assuming arguendo that Petitioners meet the interest requirements of 10 CFR Section 2.714.

II. Contentions

Petitioners adopt as contentions issues number 1 and 2 as set forth in the Appeal Board's Prehearing Conference Order, dated October 17, 1975. While Petitioners do not independently state contentions, the nature of this proceeding may not mandate that the Petitioners are required to state contentions different than the issues previously submitted by the parties to this proceeding. The fact that Petitioners adopt contentions previously admitted in the proceeding does not perforce constitute a bar to the Petition. Cf. Louisiana Power and Light Company, supra, at 373, fn. 10. We, therefore, submit that Petitioners have satisfied the contentions requirements of 10 CFR Section 2.714.

III. Good Cause for Untimely Filing

Petitioners assert that the Appeal Board's Prehearing Conference Order, dated October 17, 1975, was the first indication of the possible scope

of this proceeding, which scope Petitioners state "may include a finding of the seismic or geologic characteristics of the entire area arguably affected by the Cape Ann earthquake of 1755." Petition, at 6-7. Petitioners argue that the Notice did not disclose that "issues of regional import would be considered." Petition, at 7. While we disagree with Petitioners' assertion that this proceeding will consider issues "of regional import" (see Part I, supra), we agree that the issues as set forth in the Prehearing Conference Order were not specified in the Notice. However, the Notice makes specific reference to the Commission's Memorandum and Order, which refers to the relevant pleadings by the Citizen's Committee for Protection of the Environment (CCPE) and the New York State Atomic Energy Council (NYSÆEC), which led to the initiation of this proceeding. Inasmuch as the CCPE and NYSÆEC pleadings specifically discuss the issues set forth in the Prehearing Conference Order, and the Notice made reference to the availability of the underlying documents related to this matter, we do not believe Petitioners have shown good cause for their untimely filing.

IV. The Factors Specified in
10 CFR Section 2.714(a)

As noted supra, one must consider the four factors specified in 10 CFR Section 2.714(a) in determining whether an untimely petition for leave to intervene should be granted. These factors will be discussed below.

The first factor requires a discussion of the availability of other means whereby the Petitioners' interest will be protected. In view of Petitioners' stated interest in the "need for a proper determination of the Safe Shutdown Earthquake and ground acceleration value for the Montague units," Petition, at 3, we submit that there most certainly exists other means to protect Petitioners' interest, viz., the licensing proceeding specifically convened to consider the Montague application (39 F.R. 29017, August 13, 1974). It is in this forum where Petitioners can directly raise, and the presiding Atomic Safety and Licensing Board must consider, the proper seismic design for the Montague units. The Montague proceeding will consider the specific characteristics of the Montague site; this proceeding will not. To the extent that the Appeal Board may interpret 10 CFR Part 100, Appendix A in this proceeding inconsistently with the views of Petitioners, Petitioners may certainly argue in the Montague proceeding that the views of the Appeal Board in this proceeding are limited to the specific factual matters raised herein or, in the alternative, may challenge the interpretation of the regulation pursuant to 10 CFR Section 2.758.

Secondly, one must consider the extent to which Petitioners' participation may reasonably be expected to assist in developing a sound record. While we have no doubt that Petitioners will bring to bear expertise on the Cape Ann earthquake of 1755, we would anticipate that the focus of Petitioners' evidence will be on the effect of this earthquake on the Montague site. To this extent, Petitioners' participation may serve to obfuscate the central issues relevant only to the Indian Point site.

Thirdly, consideration must be given to the extent to which Petitioners' interest will be represented by the existing parties to this proceeding. Quite clearly, inasmuch as Petitioners' interest lies in the proper seismic evaluation of the Montague site (see Part I, supra), no existing party to this proceeding will represent Petitioners' interest in this proceeding. While the Staff certainly has an interest in the evaluation of the Montague site, pursuant to 10 CFR Part 100, Appendix A, the thrust of the Staff's inquiry in this proceeding will be directed toward the Indian Point site.

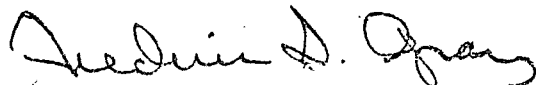
Finally, one must consider the extent to which Petitioners' participation will broaden the issues or delay the proceeding. Petitioners have stated that they would confine their participation to issues one and two as stated in the Prehearing Conference Order. Petition, at 8-9. However,

to the extent that Petitioners direct their evidentiary presentation to the Montague site, the issues must be considered broadened as compared to the existing issues, which only consider the Indian Point site. Petitioners further indicate that they will accept the schedule of action prescribed in the Prehearing Conference Order. Petitioners further state that any delay attendant with their participation could only occur as a result of "the complexity of the issues and the amount of information that must be considered to make an appropriate determination and is therefore justified." Petition, at 9, citing Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), LBP-75-45, NRCI-75/8 263, 268 (August 5, 1975). We disagree. While Petitioners are willing to accept the schedule of actions prescribed in the Prehearing Conference Order, one should only note that the Appeal Board set December 1, 1975, (now extended to December 15, 1975) as the deadline for completion of discovery. This date may have been passed prior to the time that Petitioners' status in this proceeding will have been determined. While Petitioners may not wish to seek discovery from the existing parties, and thus can accept the present schedule of actions, the existing parties might well desire discovery against Petitioners, whose position may not presently be known to some of the parties. Thus, the date for completion of discovery may well require extension, and, concomitantly, all other dates in the schedule may require extension.

V. Conclusion

For the foregoing reasons, the Staff submits that Petitioners have not satisfied the interest requirements of 10 CFR Section 2.714 and, assuming arguendo that Petitioners have satisfied those requirements, Petitioners have not shown good cause for their untimely filing. Furthermore, assessment of the factors specified in 10 CFR Section 2.714(a) weighs against Petitioners' admission as a party to this proceeding. The Staff, therefore, submits that the instant Petition should be denied.

Respectfully submitted,



Frederic S. Gray, Acting Assistant
Chief Hearing Counsel

Dated at Bethesda, Maryland
this 2nd day of December, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO PETITION FOR LEAVE TO INTERVENE IN PROCEEDING RELATING TO SEISMIC ISSUES" in the above-captioned matter has been served on the following by deposit in the United States mail, first class or air mail, this 2nd day of December, 1975:

John B. Farmakides, Esq., Chairman
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

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

Harry H. Voigt, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1757 N Street, N.W.
Washington, D.C. 20036

David S. Fleishaker, Esq.
Roisman, Kessler & Cashdan
1712 N Street, N.W.
Washington, D.C. 20036


J. Bruce MacDonald, Esq.
Deputy Commissioner and Counsel
Attn: Carmine J. Clemente, Esq.
New York State Department of
Commerce
99 Washington Avenue
Albany, New York 12210

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

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

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555.

William H. Cuddy, Esq.
Gerald Garfield, Esq.
Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103



Frederic S. Gray, Acting
Assistant Chief Hearing
Counsel