

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James P. Gleason, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

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)	
In the Matter of)	
)	Docket Nos. 50-247-SP
CONSOLIDATED EDISON COMPANY)	50-286-SP
OF NEW YORK, INC.)	
(Indian Point, Unit No. 2))	
)	January 24, 1983
POWER AUTHORITY OF THE STATE)	
OF NEW YORK)	
(Indian Point, Unit No. 3))	
)	
-----X)	

CON EDISON'S MEMORANDUM RESPECTING THE LICENSING BOARD'S
JANUARY 7, 1983 MEMORANDUM AND ORDER REFORMULATING
CONTENTIONS UNDER COMMISSION QUESTIONS 3 and 4

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Pursuant to the Licensing Board's December 8, 1982 Memorandum and Order, Consolidated Edison Company of New York, Inc., licensee of Indian Point Unit No. 2, ("Con Edison") hereby submits its response to the Board's January 7, 1983 "Memorandum and Order Reformulating Contentions Under Commission Questions 3 and 4" ("January 7 Order").

INTRODUCTION

In both its July 27, 1982 Memorandum and Order (CLI 82-15) and in its September 17, 1982 Order (CLI 82-25), the

Commission provided this Board with suggested guidance to be used in re-examining and reformulating previously admitted contentions.

After reviewing the Board's January 7 Order Con Edison believes that the Board's disposition of contentions 3.2, 3.3, 3.10, 4.3, 4.4, 4.5 and 4.6 was proper and faithful to Commission intent, as was its rejection of the additional proposed contentions of UCS/NYPIRG and Parents Concerned About Indian Point. With regard to Contentions 3.4, 3.6, 3.7, 3.9, 4.2 and 4.7, Con Edison believes that the Board has not fully considered and applied the Commission's guidance as we understand it, and that these contentions should not be admitted. In addition, Con Edison believes that the Board should reformulate contentions 3.1 and 4.1 after first providing an adequate statement of factual bases and sufficient specificity.

In the July 27 Order the Commission restated its decision that in admitting contentions this Board is to apply a higher threshold for proffered contentions than would apply in normal licensing proceedings. Characterizing and interpreting its earlier September 18, 1981 Order, the Commission noted at 12-13 that:

Our intent was not that the requirements of 10 CFR § 2.714 be dispensed with or to encourage contentions challenging the Commission's regulations, but that additional requirements be applied to admission of contentions to assure a focused proceeding. In particular, we had in mind that the

Board would, first, assure itself that proffered contentions included a statement of bases and that both the contentions and bases were stated with reasonable specificity, and second, further screen out those contentions which, while complying with § 2.714, did not seem likely to be important in answering our questions. In this latter regard, we had in mind that the Board would itself redraft the contentions, screening out those issues which, in its judgment, would not contribute materially to the resolution of the Commission questions in light of the stated purpose of the proceeding, i.e., the extent to which nearby population affects the risk posed by Indian Point as compared to the spectrum of risk posed by other nuclear power plants. In light of this purpose, the Board is expected to screen out those issues which, in its judgment, would make only a minor contribution to the Commission's goal. . . .

The July 27 Order, at 13-14, also clarified the Commission's intent with regard to the admission of contentions which challenged Commission regulations:

In our September 18, 1981 Order, we did not address specifically the application of 10 CFR § 2.758 which generally precludes litigation of rule challenges in adjudications. In its April 23, 1982 Order, however, the Licensing Board indicated that 10 CFR § 2.758 would not apply to contentions related to the Commission's questions. The Licensing Board erred . . . in its ruling on the applicability of Section 2.758 to the contentions in this proceeding. In light of the fact that application of Section 2.758 to this proceeding will help keep the proceeding focused on the Commission's questions, the Commission has decided to provide guidance.

We agree with the staff's formulation: "where the Commission intended that certain of its regulations be subject to challenge, it explicitly indicated this intent by framing questions which challenge the regulations." Staff Response of June 1, 1982, at 20. Under the Commission's questions, a challenge to the regulations should occur only to a limited extent, as described below.

The Commission then discussed the extent to which contentions challenging Commission regulations should be admitted for each of the relevant Commission questions. With regard to Commission Question 3, the Commission stated, at 14-15:

Question 3 deals with compliance with Commission emergency planning regulations and supplemental NRC/FEMA emergency planning guidance. The question starts with an explicit reference to "the status and degree of conformance with NRC/FEMA guidelines." The Commission expected primarily a description of plans and capabilities in response to this question, and did not contemplate a challenge to the Commission's regulations.*

With regard to the admission of contentions which challenge Commission regulations under Commission Question 4 the Commission stated, at 15-16:

Question 4 has two parts. First, the question asks what improvements in emergency planning can be expected in the near future and on what time schedule. In response to this part the Commission expected a description of plans and capabilities of the licensee and state and local governments. The second part deals with other "specific offsite emergency procedures that are feasible and should be taken to protect the public." Here we did have in mind the possibility that additional emergency planning measures, not required by NRC or FEMA, could be raised for Indian Point as prudent risk-reduction measures in light of the risk posed by Indian Point as opposed to the spectrum of risks posed by other

* The Commission then went on to address its regulations dealing with the size of the emergency planning zones. This issue is discussed at pp. 16-17, infra.

nuclear plants. In this sense a "challenge" to NRC emergency planning regulations, as applied to Indian Point, was contemplated. However, parties must first provide a sound basis for this further exploration. This element is missing from the Board's orders.

It can be seen that under Question 3 the Commission anticipated the admission of contentions which would deal with whether emergency planning at Indian Point meets regulations and guidance of NRC and FEMA. The Commission explicitly stated that it "did not contemplate a challenge to the Commission's regulations" under Question 3. Under Question 4, contentions challenging Commission regulations could be admitted to the extent a party proposes specific, feasible off-site emergency planning procedures beyond those required by NRC or FEMA. However, contentions of this sort are to be admitted only upon a showing by a party proposing the procedure that the risk posed by Indian Point is greater or different from the "spectrum of risks posed by other nuclear plants." The Commission stated that this showing, that is, the provision by the sponsor of proposed specific, feasible offsite emergency procedures of "a sound basis for further exploration" of the proposed procedure, was missing from the Board's earlier orders admitting contentions.

The Commission's July 27 and September 17 Orders also reiterated and emphasized that the requirements of 10 CFR § 2.714 regarding specificity and adequate factual bases fully applied to this proceeding. Previously, the Board had found the

investigatory nature of this proceeding justified the admission of contentions which might have been inadmissible in normal licensing proceedings. The Commission's July 27 and September 17 Orders establish that even higher thresholds should apply here than those set forth in § 2.714. Since sponsoring intervenors have not come forward with the missing specificity which largely prompted the Commission to intercede, the great bulk of the Question 3 and 4 contentions formerly found admissible must now be rejected.

Lastly, both the Commission and this Board have recognized that the FEMA "120-day clock" process and the efforts to resolve the alleged significant deficiencies in FEMA's July 30, 1982 Interim Report would have an impact on the consideration of emergency planning issues in this proceeding. In its September 17 Order the Commission suggested that "[i]n light of this development [i.e., the start of the 120-day clock] and based upon the Commission's perception that to hear testimony regarding what is likely to be a rapidly changing situation would be wasteful, . . ." the Board defer the consideration of evidence under Questions 3 and 4. In its October 1, 1982 Memorandum and Order, the Board agreed with Con Edison's suggestion that, given the Commission's stated view on the sequencing of issues, the Board should defer the consideration of the reformation of contentions under Questions 3 and 4 until the conclusion of the 120-day period. The Board noted, at 28-29:

The time that the Board and the parties would spend now on contentions relating to emergency planning could very well be a waste. We note that some of the contentions directly address some of the deficiencies found by FEMA in its July 30, 1982, interim report on the Indian Point emergency plan. It is certainly reasonable to expect that the relevancy of some of those contentions might change. . . .*

It is thus clear that in reformulating emergency planning contentions, the Board was to adopt a current, up-to-date stance while weighing the continued relevance of proffered contentions in light of facts developed during the 120-day clock process.

Con Edison's comments with regard to those contentions which we believe either should not be admitted or which should be admitted only after reformulation follow.

COMMISSION QUESTION 3

What is the current status and degree of conformance with NRC/FEMA guidelines of state and local emergency planning within a 10-mile radius of the site and, to the extent that it is relevant to risks posed by the two plants, beyond a 10-mile radius? In this context, an effort should be made to establish what the minimum number of hours warning for an effective evacuation of a 10-mile quadrant at Indian Point would be. The FEMA position should be taken as a rebuttable presumption for this estimate.

* This decision was re-affirmed in the Board's November 15, 1982 Memorandum and Order at 14-16, in which the Board directed intervenors to inform the Board of their views on the continued support of their emergency planning contentions.

Contention 3.1

Emergency planning for Indian Point Units 2 and 3 is inadequate in that the present plans do not meet any of the sixteen mandatory standards of 10 C.F.R. 50.47(b), nor do they meet the standards of Appendix E to 10 C.F.R. Part 50.

Con Edison Response

Con Edison requests that this contention be reformulated. For a number of reasons we object to this contention, as currently stated - boldly asserting, in the teeth of recent FEMA findings, that none of the NRC's planning standards are met. First, both the contention itself and the intervenor submittals referenced as bases fail to provide any reasonable specificity or factual basis as to just how the emergency plans for Indian Point fail to meet NRC and FEMA guidelines. The common shortcoming of many if not all of the underlying intervenor contentions backing up Contention 3.1 is a failure to distinguish what is claimed to be merely ineffective emergency planning, according to some unspecified standards, and the quite different issue of whether an actual failure to meet existing emergency planning requirements is asserted.* The result is a blurring of the fundamental distinction between Commission

* A number of the cited bases for Contention 3.1 fail to allege that NRC/FEMA planning standards are not met. WESPAC Contentions 1, 2 and 3 simply list what WESPAC believes to be deficiencies in emergency planning without any attempt to show that these alleged deficiencies are contrary to specific NRC/FEMA guidelines. Similarly, the referenced NYPIRG December 28, 1982 submittal does not list specific failures to meet NRC/FEMA guidelines but instead lists additional information which they believe is needed before they can conclude whether or not any of these guidelines are met. (NYPIRG December 28, 1982 submittal at 2.)

Questions 3 and 4, and how it is claimed that emergency planning requirements are not met. Thus, licensees are left to guess as to what intervenors believe to be the details of these alleged deficiencies, and what NRC requirement will be claimed to be unsatisfied.

The failure to specify the regulations upon which contentions are based (if this is indeed the case) creates severe problems for licensees in attempting to prepare for hearings. Given intervenors' pervasive failure to provide even the most minimal notice to licensees of the allegations they are expected to rebut, licensees are placed in the barely tenable position of somehow attempting to prove a negative. This lack of notice, in addition to denying licensees due process of law, is contrary to the Commission's directive that "both . . . contentions and bases . . . [be] stated with reasonable specificity." (July 27 Order at 2.) Also, since the parties are unable to distinguish between claims of regulatory noncompliance and mere claims that more should be required, there is no ability to implement 10 CFR § 2.758 precluding challenges to NRC regulations except as the Commission has provided.

The admission of this contention as now stated is also objectionable because it appears that neither the sponsoring intervenors nor the Board have reviewed this contention and its bases in light of FEMA's present position that during the recent

120-day clock period, substantial improvements were made such that significant deficiencies remain in only two emergency planning areas. Surely the Commission at a minimum expects an updating of Question 3 and 4 contentions from where they were almost a year ago to reflect the changing circumstances during this period.

As noted earlier, the Commission clearly anticipated that on-going changes in the status of emergency planning at the Indian Point site would have an impact on the consideration of emergency planning issues in this proceeding. The Board stated in its October 1 Order (at 28-29) that "it is certainly reasonable to expect that the relevancy of some . . . contentions might change. . . ." In light of this statement and given FEMA's findings at the end of the 120 day period, the intervenors collectively sponsoring this contention -- which alleges that none of the NRC/FEMA standards [is] met -- were clearly on notice that the continued viability of the contention in light of changed circumstances was in doubt. Intervenors should have come forth with specific information as to why they continue to believe that the plans remain in total non-conformance, despite vastly different circumstances and FEMA's positive findings with regard to specific emergency planning standards. Intervenors failed to do this.*

* The Board's January 7 Order does refer to NYPIRG's December 28, 1982 "Submission in Support of Contentions" as one of the bases for Contention 3.1. This document does not address FEMA's findings and simply includes the bare assertion that nothing has happened in the intervening months which would "necessitate abandoning any of our original contentions. . ." (at 2).

Although the Board's October 1, 1982 order stated that FEMA's findings could bring the relevancy of certain contentions into question, an attempt by the Board to determine the continued relevance or importance of Contention 3.1 in light of FEMA's findings is not apparent from the January 7 Order. The Board was directed by the July 27 Order to eliminate "those issues which in its judgment would not contribute materially to the resolution of the Commission questions." In light of the contrast between FEMA's detailed findings with regard to each emergency planning standard and the unsubstantiality of the response by intervenors to these findings, Con Edison believes that continuing to litigate the question of compliance with each emergency standard would be wasteful. Accordingly, Con Edison requests that the Board reformulate Contention 3.1 in light of FEMA's findings.

Contention 3.4

The Licensees cannot be depended upon to notify the proper authorities of an emergency promptly and accurately enough to assure effective responses.

Con Edison Response

Con Edison objects to the admission of this Contention.

First, nothing in the contention or in the underlying intervenor contentions alleges that the current Indian Point emergency plans are not in compliance with current FEMA/NRC guidelines. As noted earlier, compliance with these guidelines -- not some other gossamer goal of excellence -- is the only area to be examined under Commission Question 3.

Second, the contention and its underlying bases suffer from a lack of specificity and adequate factual bases. The contention consists simply of a bald statement that licensees cannot be relied upon to act properly. No attempt has been made to specify the defects under which licensees operate. The referenced contentions are similarly bereft of relevant information. RCSE Contention basis 2(a) simply states that "Past experience involving Consolidated Edison and other utilities indicates that such prompt notification cannot be assured." What past experience? What other utilities? How are these unspecified past failures at all relevant to the question of prompt notification? Basis (b) of RCSE Contention 2 refers to the October 1980 leak at Indian Point but makes no showing that this event is analogous to an event which would require the implementation of emergency planning notification regulations. Similarly, WESPAC Contention 2, to the extent it deals with licensee reliability (paragraphs (c) through (f) do not deal with licensee dependability and accordingly should not be part of the basis for Contention 3.4), does not offer specific facts relevant to this contention.

Contention 3.6

The emergency plans and proposed protective actions do not adequately take into account the full range of accident scenarios and meteorological conditions for Indian Point Units 2 and 3.

Con Edison Response

Con Edison objects to the admission of this contention.

The Contention and the referenced intervenors' contentions do not allege non-compliance with a single NRC/FEMA emergency planning guideline and thus the contention is not a proper contention under Commission Question 3. In addition, both the Contention and the referenced intervenor contentions fail to provide a specific factual basis. The Contention does not specify which of the "full range of accident scenarios and meteorological conditions" are not "adequately" accounted for.

Thus, WESPAC Contention 3, basis (d) simply states that "effective drills are precluded because they can only simulate one situation at a time and the variant atmospheric and other circumstances surrounding an accident are many." This is inappropriate under Commission Question 3 since the basis does not criticize sufficiency of the emergency plans for Indian Point but rather attacks the effectiveness of any sort of emergency planning drill per se. As such it is an impermissible attack on the Commission's regulations. If there is any residue of claim here that meets the contention practice requirements of § 2.714 and survives an assessment of 120-day clock developments, then Con Edison fails to see how it is not fully subsumed within Contention 3.1, claiming as it does that no standard is met. In its January 7 Order the Board refused to formulate a question on the adequacy of emergency exercises as a measure of emergency preparedness

"because such a question or contention would challenge the regulations and violate Commission guidelines under Commission Question 3" (January 7 Order at 15). The same reasoning forces the conclusion that WESPAC Contention 3(d) cannot form the basis for Contention 3.6.

Contention 3.7

The problems of evacuating children from threatened areas have not been adequately addressed in the present emergency plans.

Con Edison Response

This contention is faulty because it does not specify which NRC/FEMA guideline is not conformed to. Such specificity is expressly required by the language of Commission Question 3. As noted above, the absence of such supporting information from the sponsoring intervenor makes it impossible for the Board or licensees to consider whether 10 CFR § 2.758 is being violated.

Moreover, Contention 3.7 appears to be purely generic. The Commission has repeatedly stated that it is interested in evacuation problems posed by the high population density in the area surrounding Indian Point. There is no assertion in the Contention or in the underlying intervenor contentions that there is an unusually high concentration of children in the population in the Indian Point area, nor are other Indian Point site-specific difficulties alleged. The intervenors should have come forward with site-specific statements about the way in which particular emergency planning provisions regarding children fail to meet particular NRC/FEMA guidelines. This they have failed to do, and

therefore the contention cannot stand. The same reasoning that mandated deletion of Contention 3.2 (January 7 Order at 5) controls here. In addition, the contention and its bases lack the adequate factual bases and necessary specificity required by 10 CFR § 2.714.

Contention 3.9

The road system in the vicinity of the Indian Point plant is inadequate for timely evacuation.

Con Edison Response

Once again, this contention and its referenced intervenor contentions fail to address non-conformance with NRC/FEMA guidelines, which, as noted above, the Commission has explicitly required as a precondition for Question 3 contentions.

The cited bases for this Contention are WESPAC Contention 5 and WBCA's Reply as to Contentions 1 and 5. As discussed in Con Edison's Memorandum Respecting Contentions Proposed by Prospective Intervenors, dated December 31, 1981, at pp. 45-46, WESPAC's bases a) through d) for its Contention 5 are lacking in any allegation that the routes in question would be subject to congestion in the event of a radiological emergency, the areas to be evacuated that would be affected by these routes, and the particular impact of the supposed congestion on the postulated evacuation. WESPAC's basis e) is too general and non-specific to form the basis for a contention.

COMMISSION QUESTION 4

What improvements in the level of emergency planning can be expected in the near future, and on what time schedule, and are there other specific offsite emergency procedures that are feasible and should be taken to protect the public?

Contention 4.1

The plume exposure pathway EPZ should be expanded from its present 10-mile radius in order to meet local emergency response needs and capabilities.

Con Edison Response

This Contention should be reformulated or clarified in order to insure that it is in accord with the express requirements of the Commission Regulations and the orders of the Commission in this proceeding. 10 CFR § 50.47(c)(2) requires that the plume exposure EPZ have a radius of "about 10 miles." While this radius may be expanded under certain circumstances, the Regulation is clear that it may not be expanded without limit. The Commission in its July 27 Order at page 15 was equally explicit:

The Commission intended to address the plume exposure pathway EPZ in Question 3. That EPZ is to be about 10 miles. However the exact size and configuration can be affected by local conditions. Under Question 3 the Board was to address whether the high population density posed by the two plants is such a local condition.

The Contention as admitted could be interpreted as permitting an expansion of the EPZ to an area beyond the "about 10 miles" radius established by the Commission regulations. This, as the July 27 Order made clear, is not what the Commission intended. In this regard, see Southern California Edison Co. (San Onofre Nuclear Generating Stations, Units 2 and 3) 14 NRC 691, 698 (1981), in which the Licensing Board limited contentions dealing with the EPZ to those seeking "minor adjustments" to the 10 mile radius.

Even if the Contention were reformulated consistent with 10 CFR § 2.758 to require that the EPZ should be approximately 10 miles in radius, the underlying intervenor bases cited for the previous version of the contention (no bases were cited for the revised version) would be inadequate to support it since they lack the adequate factual basis and necessary specificity required by § 2.714. Nowhere have intervenors set forth, for example, how demographic considerations militate in favor of an expanded EPZ, or in what directions, or for what reasons.

Contention 4.2

The following specific, feasible off-site procedures should be taken to protect the public:

- a) Potassium iodide should be provided in an appropriate form for all residents in the EPZ.
- b) Adequate sheltering capability should be provided for all residents in the EPZ.
- c) License conditions should prohibit power operation of units 2 and 3 when the roadway network becomes degraded because of adverse weather conditions.
- d) The roadway network should be upgraded to permit successful evacuation of all residents in the EPZ before the plume arrival time.

Con Edison Response

Con Edison objects to the admission of this contention. The July 27 Order provided that contentions suggesting specific, feasible off-site emergency procedures must be grounded on a "sound basis" that the proposed procedure would be a "prudent risk reduction measure in light of the risk posed by Indian Point as opposed to the spectrum of risks posed by other nuclear plants"

(at 16). The sound basis continues to be lacking for the measures encompassed under Contention 4.2. There has been no showing that the risk of Indian Point is such that "further exploration" in this proceeding of these measures which are not required by NRC/FEMA guidelines is justified.

In addition, each of the parts of the contention and the referenced intervenor contentions lack factual bases and necessary specificity. Vague terms like "appropriate," "adequate," "substantial protection" and "requisite improvements in the roadway network" are used. Again, Commission Question 4 looks to specific offsite emergency procedures. This specificity is absent from the Contention and referenced intervenor contentions. In addition, no attempt has been made to show that these measures are "feasible." Finally, it is clear that Contention 4(c) is not even an off-site emergency procedure.

Giving Commission Question 4 every charitable interpretation, it is also impossible to find a nexus between the populous environs of Indian Point and the four proposals being advanced. To this end, the same rationale use in rejecting Contention 3.2 fully applies. The Commission's July 27 and September 17 Orders clearly establish that a permissible "beyond current regulations" contention under Question 4 must be defensible on population density grounds. The intervenors have failed to make the necessary showing with regard to Contention 4.2.

Contention 4.7

The present emergency planning brochures and present means of alerting and informing the population of an emergency do not give adequate attention to problems associated with persons who are deaf, blind, too young to understand the instructions, or who do not speak English.

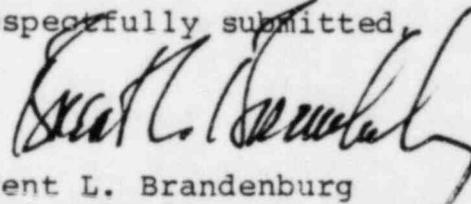
Con Edison Response

Con Edison objects to the admission of this contention. There has been no showing that the risk of Indian Point justifies the adoption of measures dealing with alerting and notifying specified groups which are not required at other nuclear power plants. Moreover the Contention is not site specific, but rather alleges conditions which if correct would be equally applicable to all nuclear power plant sites regardless of the population density. It is clear from the Commission's July 27 Order that the sponsor of an additional specific, feasible off-site emergency procedure must make a showing for treating Indian Point differently. No such showing has been made. Finally, this contention does not propose specific offsite emergency procedures but simply urges that the means of notifying certain groups be upgraded in an unspecified fashion. The Board correctly concluded that Contention 4.7 as formulated in its April 23, 1982 Order did "not suggest additional safety measures" (January 7 Order at 13), but rather simply identified alleged inadequacies in means of notifying certain groups. Unfortunately, the reformulated contention suffers from the same defect -- that is, it does not propose any specific changes.

CONCLUSION

For the foregoing reasons, the Board should reformulate Contentions 3.1 and 4.1 and should eliminate Contentions 3.4, 3.6, 3.7, 3.9, 4.2 and 4.7.

Respectfully submitted,



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January 24, 1983

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I certify that I have served copies of Con Edison's
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Memorandum and Order Reformulating Contentions Under Commission
Questions 3 and 4 on the following parties by deposit in the
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Dated: January 24, 1983
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