UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '81 NOV 25 P4:37
Louis J. Carter, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

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

LICENSEES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A STAY OF COMMISSION'S ORDERS OF JANUARY 8, 1981 AND SEPTEMBER 18, 1981 OR FOR DISMISSAL OF THIS PROCEEDING OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE COMMISSION

This memorandum of law is filed by the Consolidated Edison Company of New York, Inc. (Consolidated Edison) and the Power Authority of the State of New York (Authority), licensees of Indian Point Units 2 and 3, respectively, in support of licensees' motion for a stay of the Nuclear Regulatory Commission's (Commission's) Orders of January 8, 1981, and September 18, 1981, pending the completion of presently scheduled and proposed generic proceedings, or for dismissal of this proceeding. In the alternative, licensees seek certification of the issues raised in their motion and memorandum of law to the Commission for its determination, pursuant to 10 C.F.R. § 2.718(i) (1981), if the Atomic Safety and Licensing Board

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(Licensing Board or ASLB) considers that the Commission's prior orders preclude the Licensing Board from granting the relief requested.[1]

The grounds for this motion are:

(1) commencement of an adjudicatory proceeding prior to completion of ongoing proceedings to establish generic standards constitutes a denial to licensees of procedural due process (text at 8, infra);

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1. Licensing boards may certify questions to the Commission without first having ruled on them. "[I]t would be wholly irrational to read Section 2.718(i) in such a manner that its availability . . . would [depend on] the wholly fortuitous circumstance that the licensing board had already expressed its own views."). In re Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 1 N.R.C. 478, 482 (1975); see In re Consumers Power Co. (Midland Plant, Units 1 and 2), 6 A.E.C. 816, 818 n.6 (1973) (emphasis in original) ("Under the Rules of Practice, a certification involves the submission of a legal issue to a higher tribunal for its consideration, without a ruling having been made on that issue by the certifying body"). The Commission has the power at any time to undertake interlocutory review of any matter in any proceeding before any licensing board. In re United States Energy Research & Development Administration (Clinch River Breeder Reactor Plant), 4 N.R.C. 67, 74-76 (1976); In re Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 5 N.R.C. 503, 516-17 (1977), aff'd, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

Certification to the Commission pursuant to 10 C.F.R. § 2.718(i) is compelled by the unique circumstances of this case. The licensees' motion is one which "must be reviewed now or not at all." In re Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), 3 N.R.C. 408, 413 (1976); In re Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), 13 N.R.C. 469, 473 (1981).

The exceptional circumstances of this motion are such that failure to resolve the issues posed would jeopardize the public interest or cause unusual delay or expense. See In re Toledo Edison Co. (Davis-Besse Nuclear Power Station), 2 N.R.C. 752, 759 (1975). In light of the fact that licensees' motion presents "major or novel questions of policy, law or procedure," 10 C.F.R. § 2.785(d), directed certification is mandated because of the "exceptional circumstances which warrant the extraordinary involvement of the Commission." Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 11 N.R.C. 678, 679 (1980).

(2) principles of res judicata and collateral estoppel bar reconsideration of the physical and population characteristics of the Indian Point site (text at 22, infra);

(3) the Commission's failure to adhere to its existing Siting Criteria constitutes action which is arbitrary, capricious, an abuse of discretion, and a deprivation of property without due process of law: (a) the Siting Criteria are violated by the Commission's January Order (text at 29, infra); (b) the application of existing Siting Criteria to existing plants has been ratified by Congress (text at 35, infra); and (c) the retroactive application of new siting standards would violate the due process clause (text at 37, infra);

(4) the Constitution requires that the Commission establish compelling reasons to justify a shutdown of Indian Point (text at 40, infra);

(5) an adverse ruling from a readjudication of the Indian Point site would result in an impairment of contract and a taking of property without just compensation guaranteed by the fifth amendment (text at 45, infra); and

(6) the Commission lacks jurisdiction to conduct the hybrid investigatory-adjudicatory proceeding which constitutes an unconstitutional singling out of the Indian Point licensees (text at 53, infra).

STATEMENT OF FACTS

The Indian Point site was found safe by the NRC in 1966, 1969, and 1977. See In re Consolidated Edison Co. (Indian Point, Unit 2), 3 A.E.C. 144, 151, aff'd, 3 A.E.C. 162 (1966); In re Consolidated Edison Co. (Indian Point, Unit 3), 4 A.E.C. 246, 262, aff'd, 4 A.E.C. 392 (1969); In re Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), 6 N.R.C. 547, 624 (1977), 10 N.R.C. 410 (1979), review denied, 2 CCH N.R.R. ¶ 30,536 (1980). In reliance thereon, the Authority authorized the issuance of bonds to purchase Indian Point 3 from Consolidated Edison.[1]

On September 17, 1979, the UCS filed a petition with the NRC requesting a proceeding to modify, suspend, or revoke the operating licenses for Indian Point Units 2 and 3. Union of Concerned Scientists' Petition for Decommissioning of Indian Point Unit 1 and Suspension of Operation of Units 2, and 3, In re Consolidated Edison Co. (Indian Point, Units 1, 2 and 3), No. 50-3 (filed Sept. 17, 1979) (Petition). The Petition requested that Indian Point Units 2 and 3 be shut down "unless and until the Commission determines that 1) the site is suit-

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1. See Power Authority of the State of New York, Financial Statements 8, 11 (Dec. 31, 1980). Documents reflecting the financial statements of Consolidated Edison and the Authority, which detail the financing of the Indian Point units, are on file with the NRC. "It is . . . well established that a regulatory agency has the right to take official notice of reports filed with it by a regulated company." P. Saldutti & Son, Inc. v. United States, 210 F.Supp. 307, 313 (D.N.J. 1962); see Market St. Ry. v. Railroad Comm'n, 324 U.S. 548, 561-62 (1945); Wisconsin v. FPC, 201 F.2d 183, 186 (D.C.Cir. 1952), cert. denied, 345 U.S. 934 (1953).

able for nuclear power generation; 2) each applicable unresolved safety problem is addressed; and 3) the requirements of each Regulatory Guide are addressed." Id. at ¶ 65(c).

Remarkably, the Petition did not contend that Indian Point Units 2 or 3 differed in safety from other plants located throughout the country. Instead, it acknowledged that "[s]ome of the safety issues raised by this petition are not unique to the Indian Point nuclear power plants." Id. at ¶ 10 (emphasis added). The Petition did argue that the proximity of the plants to the New York City metropolitan area makes the Indian Point site "unique." Id.

The Commission treated the Petition as a request for action pursuant to 10 C.F.R. § 2.206 (1981) and referred it to the Office of Nuclear Reactor Regulation (NRR). Request for Action Under 10 C.F.R. § 2.206 (filed Dec. 3, 1979). On February 11, 1980, the Director of NRR recommended denial of the Petition's request for a hearing and a shutdown, and he directed the licensees to undertake operational and training initiatives to further enhance plant safety. In re Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), 11 N.R.C. 351 (1980).[1]

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1. The Director's decision summarized several extraordinary and safety enhancing design features of the two operating reactors at the site which are found in few other plants. The decision also carefully evaluated each of the supposed safety deficiencies alleged in the Petition. The decision comprised a thorough and comprehensive safety evaluation of Indian Point Units 2 and 3. The Director concluded that "[b]oth plants have been significantly modified to meet NRC safety and security requirements." In re Consolidated Edison Co., 11 N.R.C. at 369.

Despite the recommendation of the NRR Director, the NRC solicited public comment as to the merits of the Director's decision and as to the form further Commission consideration of the matter should take. Solicitation of Comment on Director's Decision Under 10 CFR 2.206, at 2 (filed Feb. 19, 1980). Thereafter, the NRC decided to conduct an "adjudicatory" proceeding to determine what, if any, action should be taken. The NRC also established a task force to analyze and report to the NRC on the reactor accident risk (both in terms of probability and consequences) at Indian Point compared to reactor accident risk at other sites. Order at 3, 5-6 (filed May 30, 1980).

This task force concluded that the "overall (i.e., societal) risk of the Indian Point reactor is about the same as a typical reactor on a typical site." Task Force Report on Interim Operation of Indian Point 40 (NUREG-0715) (1980) (Indian Point Task Force Report). With respect to the level of safety to individuals, the task force concluded that the Indian Point units posed 30 to 50 times less risk to persons and property than the postulated typical (Surry) reactor. Id. at 34.[1]

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1. The Indian Point Task Force Report is not the only study which arrived at this conclusion. The task force's safety analysis is generally consistent with an analysis prepared by Westinghouse Electric Corporation, which concluded that the risk of Indian Point is substantially less than the postulated typical reactor evaluated in the Reactor Safety Study, WASH-1400. Westinghouse/Offshore Power System (OPS), Report on the Evaluation of Residual Risk for the Indian Point Power Plant (filed May 23, 1980).

On January 8, 1981, the Commission ordered that hybrid hearings be conducted by an ASLB and permitted continued operation of the plants during the planned hearings. In re Consolidated Edison Co. (Indian Point, Units 2 and 3), 13 N.R.C. 1 (1981). Although the hearing is to use "the full procedural format of a trial-type adjudication, including discovery and cross-examination," the Commission exempted this hearing from the application of the important procedural requirements of 10 C.F.R. Part 2 (1981). In re Consolidated Edison Co., 13 N.R.C. at 5 & n.4. Although the population characteristics of the Indian Point site had been fully examined prior to the issuance of a license, the Commission emphasized that its "primary concern is the extent to which the population around Indian Point affects the risk posed by Indian Point as compared to the spectrum of risks posed by other nuclear plants." Id. at 6.

The Commission directed the ASLB to address an ambitious list of issues which includes: the level of risk posed by serious accidents, including incredible accidents, at this site; the improvements in safety which will result from the measures taken pursuant to the Order of the Director of NRR; the status of emergency planning, including improvements that can be made; the level of safety at Indian Point compared to the level of safety at the site of other operating facilities; the economic, environmental, energy or other consequences of a

shutdown; and the official position of the Governor of the State of New York. Id. at 7-8. The Commission wrote, "Although normal ex parte constraints will apply to communications to the Licensing Board, the Commission will not be limited in its ability to obtain information with respect to Indian Point from any source." Id. at 5 n.4.

On September 18, 1981, the Commission revised its January Order in an effort to limit the contentions that would be considered, to clarify the risk analysis required, and to appoint an ASLB. Memorandum and Order at 1-4 (NRC, filed Sept. 18, 1981) (September Order); 45 Fed. Reg. 47,330 (Sept. 25, 1981). On October 7, 1981, the ASLB ordered that requests to be admitted as parties and to intervene must be filed by November 6, 1981. 46 Fed.Reg. 49,688 (Oct. 7, 1981).

I. COMMENCEMENT OF AN ADJUDICATORY PROCEEDING PRIOR TO COMPLETION OF ONGOING PROCEEDINGS TO ESTABLISH GENERIC STANDARDS CONSTITUTES A DENIAL TO LICENSEES OF PROCEDURAL DUE PROCESS

The public interest requires the prompt resolution of generic issues prior to the commencement of any Indian Point site-specific proceeding.[1]

Congress has directed the NRC to

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1. Petitioner admits the issues it raises are not limited to the Indian Point plants. Petition ¶ 10. The promulgation of generic standards would not only apprise other licensees of their duties, it would avoid the unnecessary litigation of issues.

> develop, submit to the Congress, and implement, as soon as practicable after notice and opportunity for public comment, a comprehensive plan for the systematic safety evaluation of all currently operating utilization facilities . . . .

NRC Appropriations Act, Act of June 30, 1980, Pub.L.No. 96-295, § 110(a), 94 Stat. 785 (1980) (emphasis added). The NRC is specifically directed to ascertain each facility's level of compliance with significant rules and regulations pertaining to the public health and safety. The NRC also is to develop a schedule for incorporating technical solutions to unresolved generic safety issues into its regulations. Id. § 110(b).

Congress, thus, has directed the NRC to proceed with the establishment of a comprehensive plan to set standards for an evaluation of the safety of all operating nuclear power plants. The NRC Appropriations Act forbids inclusion of a requirement that the NRC address compliance with NRC rules and regulations absent a "comprehensive plan for . . . systematic safety evaluation" for all plants. No plan exists and to mandate a unique proceeding for one site is to violate the congressional intent. See City of Santa Clara v. Andrus, 572 F.2d 660, 677 (9th Cir.) (citations omitted) ("administrative actions taken in violation of statutory authorization or requirement are of no effect"), cert. denied, 439 U.S. 859 (1978); United Steelworkers v. NLRB, 390 F.2d 846, 851 (D.C.Cir.) ("Administrative agencies will be required to follow Congressional mandate, whether explicit or ascertainable as

inherent in underlying policy."), cert. denied, 391 U.S. 904 (1968); Summit Nursing Home, Inc. v. United States, 572 F.2d 737, 742 (Ct.Cl. 1978) (citation omitted) ("It is well settled, that administrative agencies are required to follow a congressional mandate.").

Underlying the issues raised by the NRC's January Order (and the Petition) are broad policy questions which are currently the focus of major NRC generic proceedings and studies. Without the articulation and publication of this revised safety philosophy, there can be neither a fair nor even an adequate analysis of the comparative safety of the Indian Point facilities.

Since the filing of the Petition, the Commission has:

(1) initiated establishment of an overall safety goal in March 1981, NRC, Toward a Safety Goal: Discussion of Preliminary Policy Considerations (NUREG-0764);

(2) noticed a rulemaking process on damaged cores on October 2, 1980, 45 Fed. Reg. 65,474;

(3) begun preparation of a Procedures Guide for application of probabilistic analysis to all nuclear power plants on May 27, 1981, 46 Fed. Reg. 28,536;

(4) considered establishment of minimum engineered safety features, 45 Fed. Reg. 50,350, 50,351 (1980); and

(5) initiated implementation of a TMI Action Plan in November 1980. NRC, Clarification of TMI Action Plan Require-

ments (NUREG-0737) (1980); NRC, NRC Action Plan Developed as a Result of the TMI Accident (NUREG-0660) (1980).[1] The litigation of issues prior to the enunciation of industry-wide standards concerning them[2] constitutes a denial of due process of law to the licensees.[3]

The Commission's own position regarding generic proceedings is consistent with the approach licensees advocate here:

> We agree with the Commission's position that it could properly consider the complex issue of nuclear waste disposal in a "generic" proceeding such as rulemaking, and then apply its determinations in subsequent adjudicatory proceedings.

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1. In addition, many of the petitioner's concerns have been resolved as the plants have been modified to meet them. See In re Consolidated Edison Co., 11 N.R.C. at 369-70.

2. Although the licensees addressed this question following the May 30, 1980 Order, Licensees' Motion for Reconsideration of That Portion of the Commission's Order of May 30, 1980 Which Directs Adjudicatory Hearings at 10-12 (filed July 25, 1980), the Commission failed to address it in its January Order. Instead, the Commission focused on the issue of comparative risk between Indian Point and other sites. In re Consolidated Edison Co., 13 N.R.C. at 6.

In its January Order, the Commission implicitly acknowledged that standards do not exist for this proceeding by requesting its staff as a "highest priority" to formulate options on how to address the generic question of the operation of nuclear reactors in areas of high population density through a generic proceeding. Id. at 2 & n.2.

3. Due process of law governs standards for both rulemaking and adjudication. See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 541-42 (1978); Morgan v. United States, 304 U.S. 1, 18-21 (1938); Hoffman-La Roche, Inc. v. Kleindienst, 478 F.2d 1, 12 (3d Cir. 1973). In licensing matters, particularly, the fundamental requirements of due process must be met. Bell v. Burson, 402 U.S. 535, 539 (1971); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964).

Minnesota v. NRC, 602 F.2d 412, 416 (D.C.Cir. 1979).[1] See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 535 n.13 (1978) (generic fuel cycle rulemaking); Nader v. Ray, 363 F.Supp. 946, 955 (D.D.C. 1973) (generic treatment of emergency core cooling system).

Agencies should use their rulemaking powers in lieu of adjudication. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). The Supreme Court in NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (emphasis added) (citation omitted), stated:

> The rule-making provisions of [the Administrative Procedure] Act . . . were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings.

See Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) (Congress, in enacting the Administrative Procedure Act (APA), "made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an oppor-

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1. This position was recently affirmed by then-Chairman of the NRC Joseph M. Hendrie. Statement of Joseph M. Hendrie, Chairman, NRC, Concerning the Commission's FY 1982 Budget Request before the Subcomm. on Energy, Conservation and Power of the Comm. on Energy and Commerce, 97th Cong., 1st Sess., at 38 (Mar. 30, 1981) (emphasis added) ("The Commission has decided that during this [nuclear waste] proceeding, the issues being considered in this rulemaking should not be addressed in individual licensing proceedings but all current licensing proceedings will be subject to whatever final determinations are reached in this proceeding.").

tunity to comment"); Morton v. Ruiz, 415 U.S. 199, 232 (1974) (citation omitted) (APA intended to provide "that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations").

Principles of fairness--due process--mandate that rulemakings presently underway be completed so that known standards exist prior to commencement of the Indian Point proceeding.

The NRC is charged with administering a statute couched in the broad terms of protecting the public health and safety, 42 U.S.C. § 2201; "it is imperative . . . to narrow, clarify and explain this general directive" through standards. City of Lawrence v. CAB, 343 F.2d 583, 587 (1st Cir. 1965). Such "[s]tandards are necessary . . . for reasons of fairness [and] to maintain the independence of the agencies, ... [F]rom the failure to develop and abide by standards flow errors." Id.; see Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers (International Union), 367 U.S. 396, 404 (1961) (Atomic Energy Act "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license"); 2 Davis, Administrative Law Treatise § 7.26, at 131 (2d ed. 1979) ("Lack of standards or rules to guide discretion . . . may encourage arbitrary and

discriminatory action . . . ."). Notice prior to promulgation of standards and public participation through rulemakings minimize the potential for unfair treatment of one regulatee. National Petroleum Refiners Association v. FTC, 482 F.2d 672, 683 (D.C.Cir. 1973), cert. denied, 415 U.S. 951 (1974).[1]

The proposed discretionary adjudication will address the issue of "how do the risks posed by Indian Point Units 2 and 3 compare with the range of risks posed by other nuclear power plants licensed to operate by the Commission?" In re Consolidated Edison Co., 13 N.R.C. at 8. Yet, the licensees have been given no notice of what new level of safety will be acceptable for Indian Point or acceptable for other nuclear power plants. The NRC's decisions "must not only be lawful--[they] must be lawfully made as well. Indeed, that is what the due process clause is all about. . . . [O]ne element of a lawfully made decision is that it accords with previously stated and clearly articulated rules." J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 591 (1972) (emphasis added) (footnote omitted); see Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 165-68 (1962); Secretary of

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1. "Regulatory systems which operate without rules are inherently irrational and arbitrary. The purpose of such a system is presumably to bring primary conduct into conformance with agreed upon societal norms. Yet a system operating without rules cannot possibly achieve this goal, since the people being regulated are not informed of what the societal norms are." J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 589 (1972).

Agriculture v. United States, 347 U.S. 645, 653-54 (1954); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303-05 (1937).

Because the proposed discretionary adjudication fails to give the licensees "'fair notice or warning'" of what is acceptable so they may act accordingly, Parker v. Levy, 417 U.S. 733, 752 (1974), quoting Smith v. Goguen, 415 U.S. 566, 572 (1974), it is unconstitutionally void for vagueness. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) ("no standard of conduct is specified at all"). The rule that the requirements of a statute must be specified clearly and precisely has been defined as "a basic principle of due process." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). A basic constitutional assumption has always been that one "is free to steer between lawful and unlawful conduct," and that the laws are to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Id. The contemplated proceeding illegally "trap[s] the innocent by not providing fair warning." Id. (footnote omitted).

Not only are "there [here] no standards governing the exercise of discretion," the proposed proceeding "permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972). Vague, inconsistent "goals" and "suggestions" as to what might satisfy agency requirements have been harshly dealt

with by the courts. Paccar, Inc. v. NHTSA, 573 F.2d 632, 645-46 (9th Cir.), cert. denied, 439 U.S. 862 (1978), emphasized a specific reason for plain standards:

> Statutes prescribing penalties, civil or criminal, must be drafted without ambiguity. Successive authorities of NHTSA might take an entirely different view than that announced by the incumbents, and subjecting [regulated parties] to such a risk does not comport with due process requirements.

Such "definitional uncertainty is open invitation, if indeed not inevitably an antecedent, to virtually unrestrained administration." Ricks v. District of Columbia, 414 F.2d 1097, 1101 (D.C.Cir. 1968).

The standardless proceeding to be held "'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions.'" Id. (footnote omitted). The ASLB may not constitutionally hold a hearing "without any legally fixed standards," and decide "what is prohibited and what is not." Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966). Such a procedure "impermissibly delegates basic policy matters [to the ASLB] on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. at 108-09 (footnote omitted).

Because "[v]ague [application of the laws] in any area suffer[s] a constitutional infirmity," Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (footnote omitted), the standardless

proceeding contemplated by the Commission is void for vagueness.

The petitioner admitted that the NRC must "decide crucial policy matters of first impression in this case." Union of Concerned Scientists' Comment on Director's Decision Under 10 CFR 2.206, at 4 (filed Mar. 10, 1980). Yet, a case-by-case adjudication of "crucial policy matters of first impression" necessarily "avoid[s] an overall policy statement of approach." American Airlines, Inc. v. CAB, 359 F.2d 624, 630 n.16 (D.C.Cir.), cert. denied, 385 U.S. 843 (1966).

The "breadth of the questions involved" requires that rulemakings should be completed first. Minnesota v. NRC, 602 F.2d at 417 (generic consideration of waste disposal).

> While the line of dividing them may not always be a bright one, [there is] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973); accord, Independent Bankers Association v. Board of Governors of the Federal Reserve System, 516 F.2d 1206, 1215 (D.C.Cir. 1975) (agencies generally employ rulemaking to resolve broad policy questions). Rulemaking is "particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest." American

Airlines, Inc. v. CAB, 359 F.2d at 629 (emphasis added); accord, WBEN, Inc. v. United States, 396 F.2d 601, 618 (2d Cir.), cert. denied, 393 U.S. 914 (1968).

Generic proceedings, like the Indian Point hearings, address complex, technical issues, and rulemaking is the "more suitable context," American Commercial Lines, Inc. v. Louisville and Nashville R.R., 392 U.S. 571, 592 (1968),[1] especially when efforts to resolve generic issues are underway.[2] See Ford Motor Co. v. FTC, 654 F.2d 599, 601-02 (9th Cir. 1981) (because a "pending rulemaking proceeding and this adjudication seek to remedy, more or less, the same credit practices" and "the rule of the case . . . will have general application," the agency "exceeded its authority by proceeding to create new law by

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1. Rulemaking "opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication." National Petroleum Refiners Association v. FTC, 482 F.2d at 683; see Minnesota v. NRC, 602 F.2d at 419 (rulemaking would keep the NRC and the industry abreast of the "continuing evolution of the state of pertinent knowledge"); Ecology Action v. AEC, 492 F.2d 998, 1002 (2d Cir. 1974) (citations omitted) ("the idea that a licensing agency should endeavor to identify . . . issues common to many [facilities] and handle them in 'generic' proceedings would seem to benefit all parties"); National Tour Brokers Association v. United States, 591 F.2d 896, 902 (D.C.Cir. 1978) (rulemaking allows "the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule"); Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3d Cir. 1969) (agency needs "to educate itself before establishing rules and procedures which have a substantial impact on those regulated").

2. The NRC's Statement of Policy strongly supports the use of generic rulemaking to resolve issues arising out of the Three Mile Island Unit 2 accident in March 1979. As "policy rather than factual or legal decisions" are most often involved, a generic resolution would be the most responsible course. NRC, Further Commission Guidance for Power Reactor Operating Licenses: Statement of Policy at 6-7 (June 16, 1980).

adjudication rather than by rulemaking"); Patel v. INS, 638 F.2d 1199, 1204 (9th Cir. 1980) (agency "recognized the desirability of establishing a job-creation standard by rulemaking when it proposed the 1973 regulation" although it did not include the standard in the rule, and court "conclude[d] that if the INS wished to add the job-creation criterion, it should have done so in a rulemaking procedure"). A preliminary safety goal proposal has been issued by the NRC. NRC, Toward a Safety Goal: Discussion of Preliminary Policy Considerations (NUREG-0764) (1981); see 45 Fed. Reg. 71,023 (1980) (notification of the NRC's plan to promulgate a safety goal); Plan for Developing a Safety Goal (NUREG-0735) (1980); An Approach to Quantitative Safety Goals for Nuclear Power Plants (NUREG-0739) (1980). Additionally, the petitioner and the nuclear industry have been allowed to participate in the establishment of this safety goal. They have a forum in which their concerns and grievances are being addressed.[1]

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1. See T. Cochran, D. MacLean, R. Pollard, & E. Weiss, Comments on the NRC Office of Policy Evaluation's "Discussion Paper: Safety Goals for Nuclear Power Plants" (July 1981). The UCS presented its views, which include an alternative safety goal to that presented by the NRC, at an NRC workshop in Harpers Ferry, West Virginia, on July 23, 1981.

See also Atomic Industrial Forum, A Proposed Approach to the Establishment and Use of Quantitative Safety Goals in the Nuclear Regulatory Process (May 1981). The Atomic Industrial Forum (AIF) has recommended that the Commission issue a policy statement that individual hearings will not preempt generic proceedings. Letter from D. Clark Gibbs to Secretary of the Commission at 2 (Dec. 31, 1980); see generally Atomic Industrial Forum Committee on Reactor Licensing and Safety, Comments on 10 CFR Part 50, Domestic Licensing of Production and Utilization Facilities[--] Consideration of Degraded or Melted Cores in Safety Regulation, Advance

Most importantly, the Congress expressly adopted this position in the following words:

> It is the Committee's intention that the NRC follow the standard rulemaking procedure in dealing with the safety goal issues as it does with other proposed rule changes.

Energy and Water Development Appropriation Bill, 1982, H.R. Rep.No. 177, 97th Cong., 1st Sess. 151-52 (1981) (emphasis added). The NRC's decision to promulgate a safety goal is supplemented by 42 U.S.C.A. § 5845(f) (Supp. 1980).[1]

The NRC has issued an Advance Notice of Rulemaking on damaged core issues. 45 Fed. Reg. 65,474 (1980). The AIF has simultaneously taken steps to formulate its suggestions regarding core damage through the Industry Degraded Core Rulemaking (IDCOR) Program which has superseded the AIF Subcommittee on Degraded Core Rulemaking. See Atomic Industrial Forum Committee on Reactor Licensing and Safety Comments on 10 CFR Part 50, Domestic Licensing of Production and Utilization Facilities[--]

Notice of Proposed Rulemaking (45 Fed. Reg. 65,474), October 2, 1980 (Dec. 1980). The AIF supports "[a]n integrated approach to rulemakings, with priority attention given to development of a safety goal and methodology." Letter from Byron Lee, Jr. to the Honorable John Ahearne at 1 (Dec. 31, 1980). Upon completion of the safety goal rulemaking, research and analysis should then be performed to determine whether to proceed with the damaged core rulemaking based upon technical considerations. Letter from D. Clark Gibbs to Secretary of the Commission at 2. The NRC staff's long-range research plan advocates a broad basis of technical information sufficient to support a rulemaking. Memorandum from William J. Dircks to Commissioners at 2 (SECY-81-229) (Apr. 9, 1981).

1. Section 5845(f) provides that the "Commission shall develop a long-term plan for projects for the development of new or improved safety systems for nuclear power plants." 42 U.S.C.A. § 5845(f).

Consideration of Degraded or Melted Cores in Safety Regulation, Advance Notice of Proposed Rulemaking (45 Fed. Reg. 65,474), October 2, 1980 (Dec. 31, 1980). Additionally,

> the NRC has been exploring ways to systematically apply probabilistic analysis to nuclear power plants. The NRC, in its Interim Reliability Evaluation Program (IREP) which is now underway, is developing and giving trial use to a procedures guide which could be the basis for systematic analysis of all nuclear power plants, a National Reliability Evaluation Program (NREP).

46 Fed. Reg. 28,536 (1981) (emphasis added). To further this program, the NRR has awarded grants to the Institute of Electrical and Electronics Engineers ($238,000) and the American Nuclear Society ($228,000). Id.[1]

Thus, there has been significant progress in the establishment of quantitative safety goals for industry-wide application, the analysis of damaged core phenomena, and the preparation of a probabilistic analysis for systematic evaluation of all reactor units. Prompt completion is a necessary precondition to a fair and meaningful adjudication and is in the public interest, for

> [t]he comprehensive, rather than the individual, treatment may indeed be necessary for quick effective relief. . . . To require separate judicial proceedings . . . would be to create delay where in the interest of public health there should be

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1. The IREP program provides for analyses of five nuclear power plants.

> prompt action. A single administrative proceeding . . . is constitutionally permissible measured by the requirements of procedural due process.

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 625 (1973) (citation omitted) (emphasis added).

II. PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR RECONSIDERATION OF THE PHYSICAL AND POPULATION CHARACTERISTICS OF THE INDIAN POINT SITE

A finding that the Indian Point site was safe was an essential pre-condition to the issuance of construction permits and operating licenses.[1] "[T]he site and all its properties are among the most important ingredients of a finding of safety vel non." Power Reactor Development Co. v. International Union, 367 U.S. at 414. In 1974, regarding existing sites including Indian Point, the NRC wrote:

> Population density always has been an important consideration in the process for determining the suitability of any proposed site and nuclear plant design. All presently approved sites have been found, in terms of population density as well as other considerations, to be acceptable by the AEC.

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1. See Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League, Inc., 423 U.S. 12 (1975), on remand, Porter County Chapter of the Izaak Walton League, Inc. v. AEC, 533 F.2d 1011 (7th Cir.), cert. denied, 429 U.S. 945 (1976); Power Reactor Development Co. v. International Union, 367 U.S. at 414; New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); North Anna Environmental Coalition v. NRC, 533 F.2d 655 (D.C.Cir. 1976).

Press Release No. T-160, AEC Makes Public Staff Working Paper on Population Density Around Nuclear Power Plant Sites 1-2 (Apr. 9, 1974) (emphasis added) (Press Release).

Despite that, the principal purpose of this proceeding is "a final decision on the long-term acceptability on the Indian Point site," In re Consolidated Edison Co., 13 N.R.C. at 5, and the primary concern expressed "is the extent to which the population around Indian Point affects the risks posed by Indian Point." Id. at 6.

In the absence of changes in the site or new facts relating to the site, elementary principles of res judicata and collateral estoppel bar readjudication of its suitability.

Indian Point's physical characteristics were subjected to extensive study. The NRC fully considered the site "in terms of population density as well as other considerations." Press Release at 1-2. Indian Point met the unchanged[1] requirements

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1. The exclusionary area and the low population zone (LPZ) are established on the basis of the maximum radiation dose to which an individual can safely be exposed in the event of a major credible accident and embody the idea of individual risk. 10 C.F.R. §§ 100.3(a),-.3(b), -.11(a)(1),-.11(a)(2). The population center distance requirement, id. §§ 100.3(c),-.11(a)(3), incorporates the concept of societal risk. See In re Public Service Co. (Seabrook Station, Units 1 and 2), 6 N.R.C. 33, 49 (1977), aff'd, 7 N.R.C. 1 (1978) (citation omitted) (footnote omitted) ("[P]rotecting individuals . . . is [accomplished] through the dose limitations and other protective requirements applicable up to the LPZ boundary. . . . [T]he population center requirement is imposed to insure that the cumulative exposure doses to the population as a whole is kept within bounds in the event of a postulated major accident."). See also Statement of Consideration, Reactor Site Criteria, 27 Fed. Reg. 3,509 (1962).

of the NRC's legal standards--the Siting Criteria.[1] See generally North Anna Environmental Coalition v. NRC, 533 F.2d 655, 659 (D.C.Cir. 1976); Porter County Chapter of the Izaak Walton League, Inc. v. AEC, 533 F.2d 1011, 1016 (7th Cir.), cert. denied, 429 U.S. 945 (1976).

The general population in the vicinity of Indian Point has not exceeded estimates. The distance of Indian Point from New York City has not changed.

Evidence of the actual cumulative population at various distances from the site was presented and considered prior to the issuance of construction permits and operating licenses for both plants. Substantial population increases were projected. The AEC's Safety Evaluation Report in the Indian Point 3 construction permit proceeding contained the following projected cumulative population for 1980: 1 mile--2,100; 2 miles--20,900; 3 miles--59,520; 4 miles--78,800, 5 miles--

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1. In re Consolidated Edison Co. (Indian Point, Unit 2), 3 A.E.C. at 151 (construction permit hearing) ("taking into consideration the site criteria contained in Part 100, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public"); In re Consolidated Edison Co. (Indian Point, Unit 3), 4 A.E.C. at 262 (construction permit hearing) ("taking into consideration the site criteria contained in 10 CFR Part 100, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public"); see In re Consolidated Edison Co. (Indian Point, Unit 2), 6 A.E.C. 751, 752 (1973) (authorization of full power license), aff'd, 7 A.E.C. 323, 328 (1974); In re Consolidated Edison Co. (Indian Point, Unit 2), 7 A.E.C. 971, 973 (1974) (denial of motion to reopen the record); In re Consolidated Edison Co. (Indian Point, Unit 3), 1 N.R.C. 593, 599-601, aff'd and modified in part on other grounds, 2 N.R.C. 379, aff'd and vacated insofar as it modified the cooling tower stipulation, 2 N.R.C. 835 (1975) (authorization of full power license).

108,060, and 10 miles--312,640. Safety Evaluation by the Division of Reactor Licensing, AEC, at 4-5, In re Consolidated Edison (Indian Point, Unit 3), No. 50-286 (Feb. 20, 1969). Virtually the same projections were made in the Indian Point 2 proceedings. For example, the 1980 population projection at 10 miles was 325,000. In re Consolidated Edison Co. (Indian Point Unit 2), 3 A.E.C. at 145; see In re Consolidated Edison Co. (Indian Point Unit 2), 5 A.E.C. 43, 45 (1972) (authorization of limited operation) (projected 1980 population at 15 miles--670,000). The Safety Evaluation Report prepared prior to the authorization of the full power license for Indian Point 3 estimated that the population within a ten mile radius by 2010 would be more than 700,000. Safety Evaluation by the Directorate of Reactor Licensing, AEC, at 2.1-2.6, 2.8-2.9 (Sept. 21, 1973).

According to updated population estimates, the population surrounding the Indian Point site has not exceeded the 1980 projections, let alone the projections for 2010.

Additionally, the Atomic Safety and Licensing Appeal Board found that the site was safe insofar as its physical characteristics were concerned. See, e.g., In re Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), 6 N.R.C. at 624. As far as the site is concerned, these proceedings were over five years ago.

The principle of res judicata applies to the Government as well as private parties. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940). See also Montana v. United States, 440 U.S. 147, 157-58 (1979) (collateral estoppel applies to the Government); Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979). Res judicata "bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised." Angel v. Bullington, 330 U.S. 183, 186 (1947)(citations omitted); accord, Continental Can Co., U.S.A. v. Marshall, 603 F.2d at 593-94 n.4. The NRC, as successor to the AEC's licensing and regulatory functions, 42 U.S.C. § 5814, is bound by the prior site determinations, see Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381,[1] and there was notice and opportunity for any interested persons to

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1. See also United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966) (citations omitted) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."); In re Alabama Power Co. (Joseph M. Farley, Units 1 and 2), 7 A.E.C. 210, 211, remanded on other grounds, 7 A.E.C. 203 (1974).

intervene in these proceedings.[1]

Consolidated Edison, as licensee, was a party to the prior proceedings. The Authority, as holder of the license for Indian Point 3 and purchaser of that plant from Consolidated Edison, is in privity with Consolidated Edison.

In Power Reactor Development Co. v. International Union, 367 U.S. at 414 (citation omitted), the Supreme Court expressly rejected the argument that the Commission "may not authorize the construction of a reactor near a large population center without 'compelling reasons' for doing so." The Court determined that

> [t]he statute and regulations say nothing about "compelling reasons" . . . . Of course, . . . the problem of safety . . . is most acute when a reactor, potentially dangerous, is located near a large city. But the Commission found reasonable assurance . . . that the reactor could be operated at the proposed location, and that is enough to satisfy the requirements of law. The Commission recognized that the site and all of its properties are among the most important ingredients of a finding of safety vel non. It considered the site along with all other relevant data.

Id. (emphasis added).

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1. See Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486, 505-506 (1968) ("[Plaintiff] had an adequate opportunity to join in the litigation . . . . [T]he decision of the . . . court . . . precludes further . . . adjudication of the issues upon which it passes."); Nader v. NRC, 513 F.2d 1045, 1054 (D.C.Cir. 1975); Easton Utilities Comm'n v. AEC, 424 F.2d 847, 851-52 (D.C.Cir. 1970); Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87 (D.C.Cir.), cert. denied, 305 U.S. 625 (1938).

The public interest requires that licensees not be forced to engage in "endurance contests modeled after relay races"[1] to again and again justify the safety of acreage. The policy considerations of "finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense . . . are as relevant to the administrative process as to the judicial" process. Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5th Cir. 1969); see Montana v. United States, 440 U.S. at 153-54 (footnote omitted) (doctrines of finality foster "the conclusive resolution of disputes" by avoiding "the expense and vexation attending multiple lawsuits, [by] conserv[ing] judicial resources, and [by] foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions").

When as here, there has been no change in the binding legal standards, "[n]o such policy considerations mitigate against the application of collateral estoppel to facts previously adjudicated . . . . Indeed, all the judicial policies behind collateral estoppel apply." Mosher Steel Co. v. NLRB, 568 F.2d 436, 440 (5th Cir. 1978) (citation omitted); see Continental Can Co., U.S.A. v. Marshall, 603 F.2d at 596-97.

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1. Easton Utilities Comm'n v. AEC, 424 F.2d at 852 ("We do not find in statute or case law any ground for accepting the premise that [administrative proceedings] are . . . endurance contests modeled after relay races in which the baton of proceeding is passed . . . successively from one legally exhausted contestant to a newly arriving legal stranger.").

The "litigation of issues at some point must come to an end." James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir.), cert. denied, 404 U.S. 940 (1971).[1]

III. THE COMMISSION'S FAILURE TO ADHERE TO ITS EXISTING SITING CRITERIA CONSTITUTES ACTION WHICH IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

A. The Siting Criteria are violated by the Commission's January Order.

There is nothing new about the Indian Point site. It was found suitable years ago. Bonds were issued, the plants were built. The Commission's affirmative finding of the safety of the site was a pre-condition for granting the licenses.

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1. To proceed with this hearing in the absence of changed circumstances also violates the guarantee of due process of law because it is inconsistent with the purposes of 10 C.F.R. § 2.206 (1981), governing petitions to institute proceedings to suspend, modify or revoke an operating license. "The purpose of 10 CFR § 2.206 is fully consistent with the principle that agency decisions must be accorded finality, once all administrative and judicial appeals have been exhausted." In re Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), 7 N.R.C. 429, 431 (1978), aff'd, Porter County Chapter of the Izaak Walton League, Inc. v. NRC, 606 F.2d 1363 (D.C.Cir. 1979). Section 2.206 is not a "vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented." In re Consolidated Edison Co. (Indian Point Station, Units No. 1, 2, and 3), 2 N.R.C. 173, 177 (1975). Yet, the Commission has not indicated that "the standard [for petitions under 10 C.F.R. § 2.206] is being changed and not ignored," thereby "assuring that it is faithful and not indifferent to the rule of law." CBS, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C.Cir. 1971) (footnote omitted). If the Commission is in fact changing the standard for petitions brought under 10 C.F.R. § 2.206, and not fashioning an impermissible special rule for one case, it has not adequately explained the reasons for the change. The Commission must "'do more than enumerate factual differences . . . it must explain the relevance of those differences to the purposes of the'" Atomic Energy Act. CBS, Inc. v. FCC, 454 F.2d at 1026, quoting Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C.Cir. 1965).

The application of a new standard would be an abrupt departure from the Commission's longstanding, and congressionally ratified, siting practices. Existing Siting Criteria--the generic or legislative rules promulgated by the Commission pursuant to congressional authority[1]--have the "force of law."[2] Paul v. United States, 371 U.S. 245, 255 (1963); Joseph v. CSC, 554 F.2d 1140, 1154 n.26 (D.C.Cir. 1977). The Commission "is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations." Nader v. NRC, 513 F.2d 1045, 1051 (D.C.Cir. 1975); see Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954). The Siting Criteria are "regulations . . . attempt[ing] to accomplish the statutory mandate . . . 'to prescribe such regulation or orders

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1. See e.g. Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League, Inc., 423 U.S. 12; New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87; North Anna Environmental Coalition v. NRC, 533 F.2d 655. Congress may, of course, mandate that an agency use a particular procedure, thereby removing an agency's discretion. However, if an agency has the power to develop legal standards, to fill "in the interstices of the Act" by rulemaking or by ad hoc adjudication, the choice of method rests in the first instance within the discretion of the agency. SEC v. Chenery Corp., 332 U.S. at 202. Once an agency exercises this discretion and proceeds by rulemaking, another set of legal principles comes into play, and an agency is bound to follow its rules until changed or amended in a subsequent rulemaking.

2. Compliance with the Commission's regulatory guides and working papers concerning site suitability is not required because they do not have the binding effect of regulations. Porter County Chapter of the Izaak Walton League, Inc. v. AEC, 533 F.2d at 1016 & n.5; York Committee for a Safe Environment v. NRC, 527 F.2d 812, 814 (D.C.Cir. 1975).

. . . necessary . . . including standards and restrictions governing the design, location, and operation of facilities . . . in order to protect health and to minimize danger to life or property.'" New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 91 (1st Cir. 1978) (citation omitted).

Despite the existence of its Siting Criteria, the Commission has stated that its decision as to the "long term acceptability" of the Indian Point site will be based on "how extreme are the individual and societal risks . . . compared to the spectrum of risks from other operating stations." In re Consolidated Edison Co., 13 N.R.C. at 5-6. The January Order requires that the ASLB address the risk that "may be posed by serious accidents at Indian Point 2 and 3, including accidents not considered in the plants' design basis, pending and after any improvements" in the levels of emergency planning and safety which result from the Director's Order. Id. at 7 (emphasis added).

Thus, the adequacy of the site under the AEA having been determined, any reconsideration contravenes the Siting Criteria. In clear conflict with the governing precepts of the AEA and the Commission's own siting regulations, the Commission seeks to reopen the issue of the adequacy of the Indian Point site. See Power Reactor Development Co. v. International Union, 367 U.S. at 414.

Legislative rules, such as the Siting Criteria, are "determinative of the issues or rights to which [they] are addressed," Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C.Cir. 1974), and, "until amended, are controlling alike upon the [agency] and all others whose rights may be affected by the [agency's] execution of them." CBS, Inc. v. United States, 316 U.S. 407, 422 (1942). The NRC cannot now say that its own Siting Criteria do not apply even if "in this case the Commission thinks that the 'public interest' requires a different interpretation . . . . The Commission's notion of the public interest cannot justify its failure to abide by its own rules and to act in a manner inconsistent with its own precedents." Teleprompter Cable Communications Corp. v. FCC, 565 F.2d 736, 742 (D.C.Cir. 1977).[1]

By finding that the Indian Point plants were properly situated, the NRC acted in accordance with the AEA and the regulations enacted pursuant to that statute. That finding was a condition precedent to the granting of the operating

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1. Panhandle Eastern Pipe Line Co. v. FERC, 613 F.2d 1120, 1135 (D.C.Cir. 1979), cert. denied, 449 U.S. 889 (1980) (footnote omitted) ("The fact that a regulation as written does not provide [an agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'"); Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C.Cir.), cert. denied, 434 U.S. 956 (1977) (agency "acted arbitrarily and abused its discretion in applying a standard contrary to existing regulations"); In re Pub. Serv. Co. (Seabrook Stations, Units 1 and 2), 6 N.R.C. at 50 n.13 (1977) ("Until amended by the Commission . . . we are bound to apply the [Siting Criteria] according to its terms . . . .").

license.[1] 42 U.S.C. § 2235; Power Reactor Development Co. v. International Union, 367 U.S. at 411. Indeed, even the Petition did not--as it could not--allege a failure to comply with the Siting Criteria. It clearly states:

> The NRC has never determined what the consequences would be of a so-called Class 9 accident-especially a core melt down with breach of containment-at the Indian Point site. Conformance with NRC regulations does not guarantee that such an accident will not occur; it is an attempt only to reduce the probability of having one.

Petition ¶ 5 (emphasis added).

The Siting Criteria establish the Commission's previous yet still current, indeed, only, standards that establish acceptable levels of individual and societal risk.

Essential to the Siting Criteria is protection from a major accident, 10 C.F.R. § 100.11(a)--a major accident but not

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1. Undergirded by the reasonable assurance that the public health and safety can and will be protected, Power Reactor Development Co. v. International Union, 367 U.S. 396; Nader v. NRC, 513 F.2d at 1052, an "[a]bsolute[ly] risk-free siting is similar to other absolute positions and arguments that have been rejected by the courts." North Anna Environmental Coalition v. NRC, 533 F.2d at 665 (citations omitted). As the Court of Appeals for the District of Columbia has explained:

> As a precondition to grant of a license for operation of a nuclear facility, the Atomic Energy Act explicitly requires a Commission finding that the licensed facility will afford "adequate protection to the health and safety of the public." The Commission has long interpreted this provision as a demand for "reasonable assurance" of that protection, and the Supreme Court in its Power Reactor decision has squarely sustained that administrative construction.

Nader v. NRC, 513 F.2d at 1052 (emphasis added) (footnotes omitted).

an accident so unlikely to occur that it is beyond the realm of reason.[1] It is in that context that the Siting Criteria "strike a balance between site isolation and proximity to load [population] centers." D. Bunch, Metropolitan Siting--A Historical Perspective 2 (NUREG-0478) (1978) (hereinafter Bunch).[2]

In another departure from its Siting Criteria, the Commission indicates that its ultimate determination will depend upon a comparison of the "risks posed by Indian Point Units 2 and 3 with the range of risks posed by the other nuclear power plants licensed to operate by the Commission." In re Consolidated Edison, 13 N.R.C. at 8. The AEA does not speak in terms of relative levels of safety among nuclear facilities. The AEA does speak in terms of unconditional standards which must be met by every licensee. Thus, even though a study of the comparative safety of nuclear power plants may be useful for other regulatory purposes, the Commission seeks to do more.

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1. The Siting Criteria require that "reactors be so designed that no design basis accident will result in calculated offsite doses exceeding specified guideline values . . . [which] are well below levels at which serious injury or death would be expected to occur." SECY-79-594, Class 9 Accident Considerations, Enclosure 1, at 1 (1979). The size and distance from the site of the exclusion area, the LPZ, and the population center distance are based upon the calculation of the radiation dose exposure resulting from a major credible accident.

2. See Proposed Extension of AEC Indemnity Legislation, Hearings before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 89th Cong., 1st Sess. (1965) (Statement of James T. Ramey, Commissioner, AEC), reprinted in Bunch at 32 ("Under the site criteria . . . provision is made to balance . . . engineered safeguards in relation to the distance between reactor and population centers.").

Such a study can provide no legal basis for determining whether the Indian Point site complies with the requirements of the statute as construed in the Siting Criteria.

B. The application of existing Siting Criteria to existing plants has been ratified by Congress.

The Siting Criteria were "a contemporaneous construction by those . . . presumably intimately familiar with the legislative history and who [were] charged with enforcement of the" AEA. Shell Oil Co. v. Kleppe, 426 F.Supp. 894, 901 (D.Colo. 1977), aff'd sub nom., Shell Oil Co. v. Andrus, 591 F.2d 597 (10th Cir. 1979), aff'd, 446 U.S. 657 (1980) (citations omitted). The Joint Committee on Atomic Energy (JCAE) was established to keep Congress "in constant touch with what was happening in this unfolding area of industrial applications of atomic energy." Siegel v. AEC, 400 F.2d at 783. In Power Reactor Development Co. v. International Union, 367 U.S. at 409, the Supreme Court considered this fact significant when finding congressional ratification of the AEC regulations there at issue. Until abolished by the Energy Reorganization Act of 1974, the JCAE monitored the NRC's siting policy and its balancing of engineered safety features with the site.[1]

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1. See, e.g., Letter from W.H. Lit , Acting Chairman, AEC, to Senator Bourke Hickenlooper (March 14, 1956), reprinted in Bunch at 25; Proposed Extension of AEC Indemnity Legislation, Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 89th Cong., 1st Sess. (1965) (Statement of James T. Ramey, Commissioner, AEC),

When Congress enacted the Energy Reorganization Act of 1974, it restructured nuclear regulation. However, it did not alter the approach of the Siting Criteria.

Last year, Congress directed the NRC to promulgate siting regulations that "shall specify demographic criteria for facility siting, including maximum population density and population distribution for zones surrounding the facility without regard to any design, engineering, or other differences among such facilities." Act of June 30, 1980, Pub.L.No. 96-295, § 108, 94 Stat. 783. Simultaneously, Congress, aware of then existing policy,[1] ratified then-existing Siting Criteria insofar as then-existing facilities were concerned. It specifically exempted from any new siting criteria, construction permits applied for prior to October 1, 1979. Id. § 108(b). By requiring the NRC to promulgate new siting rules and to apply them only prospectively, Congress removed any discretion to apply them retroactively, whether formulated in the NRC's first hybrid investigatory-adjudicatory proceeding, or not.

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reprinted in Bunch at 32.

1. See H. Conf. Rep. No. 96-1070, 96th Cong., 2d Sess. 24-25, reprinted in 3 U.S. Code Cong. & Ad. News 2267-68 (1980); Report of the Siting Policy Task Force (NUREG-0625) (1979).

C. The retroactive application of new siting standards would violate the due process clause.

The Commission cannot impose "new liability . . . for past actions . . . taken in good faith reliance" on the NRC's determination that the Indian Point site was a safe location. NLRB v. Bell-Aerospace Co., 416 U.S. 267, 295 (1974). The licensees, in reliance upon the Commission's prior decisions, have procured and expended substantial sums of money for the construction, and, in the case of the Authority, the purchase of Unit 3.[1]

As the Second Circuit has warned,

> a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles . . . . And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.
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> . . . .
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> [T]he problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates.

NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966)

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1. See United States v. Caceres, 440 U.S. 741, 752-53 (1979) (due process claim triggered when a person has relied upon an agency rule and suffers substantial detriment because of its violation).

(citations omitted) (emphasis added).[1]

The extent of reliance by the licensees and their investors on the Commission's prior determination is substantial, self-evident, known to the public and to the Commission, and a subject of judicial knowledge.[2] As the court in Shell Oil Co. v. Kleppe, 426 F.Supp. at 908, stated:

> [T]he Government cannot assert that the very oil shale claims it had encouraged are not valid. The reversal of the original intention of the Interior Department and of Congress requires application of estoppel against the Government. . . . Moreover, where an established rule has long been relied upon by investors, an administrative agency should not reverse its position on a retroactive basis.

Id. at 908 (citations omitted).[3]

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1. See Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C.Cir. 1972) (retroactive application determined by "whether the . . . case is one of first impression"; "whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law"; "the extent to which the party . . . relied on the former rule"; "the degree of the burden which a retroactive order imposes"; and "the statutory interest in applying the new rule").

2. Documents reflecting the financial statements of Consolidated Edison and the Authority, which detail the financing of the Indian Point units, are on file with the NRC. "It is . . . well established that a regulatory agency has the right to take official notice of reports filed with it by a regulated company." P. Saldutti & Son, Inc. v. United States, 210 F.Supp. at 313; see Market Street Ry. v. Railroad Comm'n, 324 U.S. at 561-62; Wisconsin v. FPC, 201 F.2d at 186.

3. In Shell Oil Co. v. Kleppe, 426 F.Supp. at 903, the court held that the Department of Interior could not retroactively apply a new standard to determine the validity of oil shale claims because that agency through public statements of its officials and through its rulings "actively encouraged Westerners to invest in Colorado's oil shale deposits," an investment "which had been scorned by prudent persons at the turn of the

When Congress enacted the AEA, the United States entered into a partnership with the states and private industry to promote and to develop nuclear power for commercial use.[1] See Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 63-65 (1978). The AEA embodies this deliberate policy choice. The Price Anderson Act, 42 U.S.C. § 2210, is a clear cut congressional acknowledgement that, even though nuclear power is not risk free, the public interest requires its development as an energy source This Act incorporates the "dual purpose of 'protect[ing] the public and . . . encouraging the development of the atomic energy industry.'" Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. at 64 (citation omitted).

The AEA and the Siting Criteria embody this policy decision. Until irrational fears escaped from Three Mile Island, this proceeding would have been unthinkable. To apply new rules or, as is true in this case, no rules at all, to plants previously licensed at an unchanged site previously ruled safe is unconstitutional.

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century."

1. The history of the siting policy indicates that "[t]o acccomplish the policy towards peaceful uses of nuclear energy, broad participation on the part of the utility industry was necessary." Bunch at 1. The shift in policy to balancing site isolation with containment was deemed necessary in order for nuclear power to be feasible for private utilities. Id.

IV. THE CONSTITUTION REQUIRES THAT THE COMMISSION ESTABLISH COMPELLING REASONS TO JUSTIFY A SHUTDOWN OF INDIAN POINT

Consolidated Edison, a privately owned public utility, is a constitutionally protected person. Its rights arise under the fifth amendment. See Kaiser Aetna v. United States, 444 U.S. 164 (1979). Its duty is to protect the rights of its security holders. Regarding its security holders, the Authority has the same obligation.

Additionally, the Authority as a state governmental agency has a statutory duty to furnish inexpensive electricity to "the metropolitan transportation authority, . . . the New York City transit authority, the port authority of New York and New Jersey, the City of New York, the State of New York [and] other public corporations." Power Authority Act, N.Y. Pub. Auth. Law §§ 1001, 1005 (McKinney Supp. 1980-81).[1] Operation of Indian

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1. Among the public bodies served by Indian Point 3 are 39 cities, towns, and villages, 20 school districts, 8 housing authorities, and 2 water districts. Power Authority of the State of New York, Meeting New York's Energy Needs . . . Past, Present and Future 30 (1980). A state's determination of what is in the public's interest is a legitimate exercise of governmental power. Compare the words of Justice Rehnquist writing for the majority in National League of Cities v. Usery, 426 U.S. 833, 855 (1976), "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made," with the words of Justice William O. Douglas:

> A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its own economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant.

Point 3 is crucial to the Authority's capacity to meet its peakload demand and its reserve margin required by the New York Power Pool, and to produce low cost electricity.

The State of New York, pursuant to its powers to protect the public health, safety, and welfare of its people, has declared that "the public interest requires that [the Authority] participate in the generation of supplemental electric power and energy by . . . nuclear means." Power Authority Act, N.Y. Pub. Auth. Law § 1001 (McKinney Supp. 1980-81).[1]

In our federal system, states share power with the federal government, and a state's interest is a fundamental interest protected from commerce clause infringement or impairment by

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> What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. . . . [A]ny activity in which a State engages within the limits of its police power is a legitimate governmental activity.

New York v. United States, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting) (citation omitted). See also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility . . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

1. See also Power Authority Act, N.Y. Pub. Auth. Law § 1001-a (McKinney Supp. 1980-81) ("extraordinary circumstances, including excessive costs, shortages of supply, and the inflated price of fuel threaten the capacity to provide utility service essential to the continued safety, health, prosperity and well-being of the people of the metropolitan area of the city of New York").

the tenth amendment. arce v. Wichita County, Wichita Falls, Hospital Board, 590 F.2d 128, 132 (5th Cir. 1979); Usery v. Allegheny County Institution District, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); Marshall v. Delaware River & Bay Authority, 471 F.Supp. 886, 892 (D.Del. 1979).[1] Federal legislation that infringes upon state sovereignty is subjected to strict scrutiny. See National League of Cities v. Usery, 426 U.S. 833, 849 (1976). The tenth amendment is

> an affirmative limitation on the exercise of [congressional] power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment.

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1. Cf., Buckley v. Valeo, 424 U.S. 1, 25 (1976) (citation omitted) (first amendment) ("In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (citations omitted) (emphasis in original) (right to travel) ("any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional"); United States v. Jackson, 390 U.S. 570, 582 (1968) (citations omitted) ("Whatever might be said of Congress' objectives [in the Federal Kidnapping Act], they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights [including right to jury trial]. . .; the question is whether that effect is unnecessary and therefore excessive.").

Id. at 841 (citations omitted).[1]

As the Supreme Court has consistently recognized, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." National League of Cities v. Usery, 426 U.S. at 844, quoting Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). "[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers." Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926).

The Authority acts with the state's power. In some respects its powers exceed those of the federal government, in others its powers are subordinate, in others they are co-equal. In its sovereign capacity, the Authority delivers services necessary to the health, safety, and welfare of the citizens of the State of New York. In addition, the Authority

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1. Mr. Justice Rehnquist, who wrote for the majority in National League of Cities v. Usery, 426 U.S. 833, had elaborated upon this concept more fully in his dissenting opinion in Fry v. United States, 421 U.S. 542, 552-53 (1975) (citations omitted):

> [T]he Tenth Amendment 'is not without significance' . . . . [I]t is useful to explore further the situation of ar individual confronted with Commerce Clause regulation. . . . [A]n individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the . . . claim . . . may succeed . . . is well established.

(and Consolidated Edison) enters into contractual relations, through issuance of bonds, upon which individuals and businesses--constitutionally protected persons--throughout the nation rely.[1]

Despite the NRC's previous rulings regarding the site, this proceeding threatens to impair those contracts by depriving them of security and a revenue source. Thus, while "[i]t is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside[,] [i]t is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States." Id. at 845; cf. Kaiser Aetna v. United States, 444 U.S. at 174 (if congressional regulation of private property constitutes a "taking", just compensation is due). Because of this difference, the Court in National League of Cities refused to apply the Fair Labor Standards Act to municipalities despite finding a "sufficiently rational relationship to commerce to

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1. "It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. . . . The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where the action would not contravene the provisions of the Federal Constitution. . . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority." United States v. Bekins, 304 U.S. 27, 51-52 (1938).

validate the application of the overtime provisions to private employers." Id. at 849 (emphasis added).[1]

V. AN ADVERSE RULING FROM A READJUDICATION OF THE INDIAN POINT SITE WOULD RESULT IN AN IMPAIRMENT OF CONTRACT AND A TAKING OF PROPERTY WITHOUT JUST COMPENSATION GUARANTEED BY THE FIFTH AMENDMENT

The State of New York declared that "the public interest requires that [the Authority] participate in the generation of supplemental electric power and energy by . . . nuclear means." Power Authority Act, N.Y Pub. Auth. Law § 1001 (McKinney Supp. 1980-81). The NRC granted a construction permit. The Authority and Consolidated Edison relied upon that permit.[2] The NRC granted an operating license. The Authority and Consolidated Edison relied upon that license. The Authority issued $1,460,000,000 worth of bonds in part to raise funds for the purchase of the plant from Consolidated Edison

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1. Fry v. United States, 421 U.S. 542 (1975), is not contrary. As interpreted in National League of Cities v. Usery:

> The enactment at issue [in Fry] was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully crafted so as not to interfere with the States' freedom beyond a very limited, specific period of time.

National League of Cities v. Usery, 426 U.S. at 853 (emphasis added).

2. Interference with reliance interests may constitute a taking. See Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979).

and for its continued operation. Power Authority of the State of New York, Financial Statements 11 (Dec. 31, 1980). The Authority pledged its revenues as security and undertook the generation of low cost nuclear energy for the people of the City and State of New York. Id. at 8. Now, the Authority furnishes electricity to "the metropolitan transportation authority, . . . the New York city transit authority, the port authority of New York and New Jersey, the city of New York, the state of New York [and] other public corporations." Power Authority Act, N.Y. Pub. Auth. Law §§ 1001, 1005; see id. § 1001-a. Consolidated Edison produces, purchases, and distributes power to citizen consumers.

Lighting the lamps of New York requires capital, massive expenditures of money from private persons who purchase the stocks and bonds of Consolidated Edison and the bonds of the Authority. Yet, as an afterthought, without any change of facts, the Commission has decided that a site which it has adjudicated to be "safe" may be "unsafe. This is the very kind of governmental conduct that the impairment of contract, due process, and taking without just compensation clauses were designed to prevent.[1] Constitutional guarantees safeguard

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1. The underlying protection of property and of investors' expectations contained in the contract clause applies to the federal government through the due process clause of the fifth amendment. Thorpe v. Housing Authority of Durham, 393 U.S. 268, 277 n. 31 (1969) quoting Lynch v. United States, 292 U.S. 571, 579 (1934) ("Although the constitutional prohibition of the impairment of contracts . . . applies

contract-based rights against government impairment because national economic development totally depends upon adequate, reliable, and dependable credit markets in which money can be raised for investment purposes.[1] See Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 427 (1934). The Authority issued its bonds for the purchase and operation of Indian Point Unit 3. Power Authority of the State of New York, Financial Statements 8, 11, (Dec. 31, 1980) (General Purchase Bonds, Series C, E, F, G, and H). Private citizens and their institutions purchased the bonds and the Authority is obligated to protect them. Power Authority Act, N.Y. Pub. Auth. Law §§ 1010(6)-(8) (McKinney 1970). All of this was done in

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only to the States, '[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.'"); John McShain, Inc. v. District of Columbia, 205 F.2d 882, 884 (D.C.Cir.) ("a measure of protection against contract impairment by the federal government is given by the Fifth Amendment"), cert. denied, 346 U.S. 900 (1953); see Larionoff v. United States, 533 F.2d 1167, 1179 (D.C.Cir. 1976) (citations omitted) ("[s]ince contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed"), aff'd, 431 U.S. 864 (1977); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 623 (1869), overruled on other grounds, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870) (while express prohibition that no state shall pass any law impairing obligation of contracts is not applicable to the federal government "we cannot doubt that a [feueral] law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution").

1. Cf. Emshwiller, Some Investors Shun Nuclear-Powered Utilities, Jeopardizing Funds to Build New Atomic Plants, Wall St.J., Nov. 20, 1980, at 56, col. 1 ("the erosion [of the bond market for utilities involved in nuclear power] is eating at the foundations of the nuclear industry. If it spreads, it could do more to foreclose a future for atom-powered electricity in this country than all the efforts of nuclear opponents combined.").

reliance upon the Commission's affirmative finding of the appropriateness of the Indian Point site.

The protections underlying the Contract Clause "impose some limits upon the power of . . . [government] to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978) (emphasis in original). Here, as in United States Trust Co. v. New Jersey, 431 U.S. 1, 19 (1977) (emphasis added), an unconstitutional impairment of contract would occur if NRC action "totally eliminated an important security provision." See Power Authority of the State of New York, General Purpose Bonds, Series E, Official Statement at 12 (Sept. 21, 1976) ("The General Purpose Bonds will be secured by a pledge of . . . the net revenues of . . . Indian Point 3 . . . ."). There the Supreme Court found it unnecessary to resolve the extent of "financial loss the bondholders suffered . . . because the State . . . made no effort to compensate the bondholders for any loss sustained by the repeal." Id. (footnote omitted).

Without changed circumstances (new physical or population characteristics at the site), a shutdown of these plants based upon the previously considered attributes of the site would operate as a "substantial impairment of [the licensees'] contractual relationship[s]." Allied Structural Steel Co. v. Spannaus, 438 U.S. at 244 (footnote omitted) (state law

impaired contractual obligations because it retroactively modified company's payment obligations under pension plan and company's reliance on the absence of any previously imposed state obligations was vital). While the Commission cannot relinquish its duty to protect the public health and safety, there are limits on the exercise of this power.[1] In United States Trust Co. v. New Jersey, 431 U.S. at 28-30, the Court concluded that the harm incurred by the bondholders could not be justified by the state's claim of public benefit in advancing the goals of "[m]ass transportation, energy conservation, and environmental protection" because the state had not shown that the repeal was "essential" to further these public interests.

If the NRC were to determine that the plant location should cause a shutdown at Indian Point,[2] there would be a

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1. See Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 559 (1914); Stone v. Mississippi, 101 U.S. 814, 817 (1880) ("[l]egislature cannot bargain away the police power").

2. See FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933) (FTC erred in suppressing use of trade names for company's violation of the relevant statute because the trade names were "valuable business assets . . . the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result"); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 673 (1885) (the police power does not justify elimination of exclusive franchise by a state constitutional amendment; "[t]he rights and franchises . . . can be taken by the public, upon just compensation to the company"); Churchill Tabernacle v. FCC, 160 F.2d 244, 247-48 (D.C.Cir. 1947) (citations omitted) ("[V]aluable rights and investments made in reliance on a license . . . should not be destroyed except for the most compelling reasons. . . . [I]n ordinary fairness [an agency] owes the duty to exhaust all possible avenues of compliance with the Congressional purpose before requiring complete

compensable "taking" under the fifth amendment.[1] "[P]roperty may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).[2]

> When this seemingly absolute [fifth amendment] protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. The consitutional bar against regulatory taking has been reiterated by the Supreme Court in its discussions of the legal principles underlying the just compensation clause.[3]

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destruction of the private interest.").

1. United States v. Carmack, 329 U.S. 230, 242 (1946) ("when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation"); California v. United States, 395 F.2d 261, 263 (9th Cir. 1968) (footnote omitted) ("the Fifth Amendment protects the property of the State from appropriation by the United States without 'just compensation'").

2. In Pennsylvania Coal, the Court held that when the claimant had sold property which reserved underground mineral rights and a subsequently enacted Pennsylvania law which prohibited the mining of coal that caused the subsidence of a residence had the effect of destroying the claimant's expectation of use of these reserved rights, the law constitutes a compensable regulatory "taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. at 414-15.

3. See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (citations omitted) ("action in the form of regulation can so diminish the value of property as to constitute a taking"); Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) (emphasis added) (government cannot destroy property "value entirely, . . . inflict irreparable and permanent injury to any extent . . ., in effect, subject it to total destruction without making any compensation, because,

A shutdown of the Indian Point units would effect a taking because of the economic impact upon the licensees and the "interference with reasonable investment-backed expectations." PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); see Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). Kaiser Aetna v. United States, 444 U.S. at 179, involved mere statements rather than the orders of a commission. Even so, the Supreme Court wrote that while mere statements of government officials "cannot 'estop' the United States [from altering its regulatory policies, they] can lead to the fruition of a number of expectancies embodied in the concept of 'property' - expectancies that . . . the Government must . . . pay for [the] property."

A shutdown in any way based upon the unchanged characteristics of Indian Point would deprive the licensees of the only reasonable use of the property;[1] it would not merely extinguish

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in the narrowest sense of that word, it is not taken for the public use").

1. In Penn Central, a different result would have been reached if the site was rendered economically unviable by the landmark designation. The Court stated:

> We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral agrument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief.

Penn Central Transportation Co. v. New York City, 438 U.S. at 138 n.36; see

one of several alternative uses. Id. at 137.[1] See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (a state law retroactively destroying the claimants' expectation of the use of the reserved underground mineral rights constituted a compensable regulatory taking).[2]

Fundamental principles require that any such loss be borne by the government on behalf of the public. "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

Benenson v. United States, 548 F.2d 939, 948 (Ct.Cl. 1977) (government "so restricted and interfered with plaintiffs' use of their property as to constitute a complete taking of plaintiffs' fee interest").

1. Much state regulation of land-use deprives owners of the most beneficial use of their land. Notwithstanding the individualized harm suffered, the property so regulated can be put to another economically viable use. See Goldblatt v. Hempstead, 369 U.S. 590 (1962) (safety regulation prohibiting excavation below a certain level); Gorieb v. Fox, 274 U.S. 603 (1927) (requirement that buildings be set back from street line); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (prohibition of industrial use); Welch v. Swasey, 214 U.S. 91 (1909) (height restriction on buildings). However, even in the zoning context, "[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land." Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citation omitted). See also Nectow v. Cambridge, 277 U.S. 183 (1928) (zoning law as applied to individual's property was violative of fourteenth amendment).

2. Other cases have recognized "takings" when the government action resulted in the destruction of use and enjoyment of private property for a greater public benefit. United States v. Dickinson, 331 U.S. 745, 750-51 (1947) (property flooded because of government dam project); United States v. Causby, 328 U.S. 256, 261-62 (1946) (frequent low altitude flights of Army and Navy aircraft over property); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (military installations' repeated firing of guns over claimant's land).

whole . . . ." Armstrong v. United States, 364 U.S. 40, 49 (1960). As the Supreme Court has cautioned, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416.

VI THE COMMISSION LACKS JURISDICTION TO CONDUCT THE HYBRID INVESTIGATORY-ADJUDICATORY PROCEEDING WHICH CONSTITUTES AN UNCONSTITUTIONAL SINGLING OUT OF THE INDIAN POINT LICENSEES

Although the Commission has the power to investigate, 42 U.S.C. § 2201(c), and adjudicate, id. § 2239, the Commission lacks jurisdiction to hold a hybrid adjudicatory-investigatory hearing. In its January Order, the Commission directed the ASLB to conduct a proceeding "using the full procedural format of a trial-type adjudication, including discovery and cross-examination." In re Consolidated Edison Co., 13 N.R.C. at 5 (footnote omitted). In further explanation of the procedural format, however, the Commission indicated that it was to be "investigative" in nature. September Order at 1.

According to that footnote, the proceeding is not "'on the record'" because it is not mandated by the AEA. Id. Because it is not mandated by the AEA, the Commission has substantially relaxed the procedural protections of 10 C.F.R. Part 2. On the basis of this tautology, even restraints on ex parte contacts

will apply only to the ASLB but not to the Commission.[1] Thus, inevitably, the proceeding will begin in procedural quicksand. There will be no burden of persuasion and the ASLB "will not be bound by the provisions of 10 C.F.R. Part 2 with regard to the admission and formulation of [contentions not based on allegations in the petition]" and to "establish whatever order of presentation it deems best suited to the proceeding's investigative purposes," without being bound by the provisions of Part 2. Id. at 2. Adding a Kafkaesque quality, the ASLB may request even further relaxation of the NRC's rules if it deems such action necessary. Id. Thereafter, there will be no decision. Instead, the ASLB will make recommendations and forward the record to the Commission, "for the final agency action on the merits of the proceeding." In re Consolidated Edison Co., 13 N.R.C. at 6.

Congress authorized the Commission, in furtherance of its investigatory powers, "to administer oaths and affirmations, and by subpena [sic] to require any person to appear and testify, or to appear and produce documents." 42 U.S.C. § 2201(c). Congress authorized the Commission to conduct adjudicatory hearings for the "granting, suspending, revoking, or amending of any license," id. § 2239, pursuant to the APA.

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1. Compare SEC v. Wheeling Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981) (agency "order must be supported by an independent agency determination not one dictated or pressured by external forces").

Id. § 2231. The Commission promulgated 10 C.F.R. Part 2 which "governs the conduct of all proceedings" for "[g]ranting, suspending, revoking, amending, or taking other action with respect to any license." 10 C.F.R. § 2.1 (1981) (emphasis added). Yet, no where in the statute or the regulations is the unique, specially-fashioned hybrid hearing contemplated by the January Order authorized.

The proceeding is not a statutory investigation. The January Order states that the Commission will take final agency action at the close of this proceeding. In re Consolidated Edison Co., 13 N.R.C. at 6. The proceeding is not a preliminary fact-finding inquiry. Third parties are permitted an opportunity to intervene and to engage in cross-examination and discovery. Furthermore, the Commission intends to test the weight and sufficiency of the evidence, and that too is a function of an adjudication.[1]

Simply stated, the proceeding cannot provide a lawful adjudication under the NRC's regulations, the APA, or the AEA. The AEA does authorize the Commission to conduct adjudications. It does authorize it to conduct investigations.

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1. The January Order states that the Indian Point Task Force Report "will be tested in an adjudicatory setting where parties may present additional or rebuttal evidence," In re Consolidated Edison Co., 13 N.R.C. at 5, and that "specific allegations [concerning specific safety defects] raise issues which are best resolved in the forthcoming adjudicatory proceedings." Id. at 3 (emphasis added).

It does not, however, authorize a hybrid proceeding which partakes of some of the characteristics of each, but omits important statutory procedural requirements of each.[1]

Because the substance of agency action rather than the label which an agency places on its exercise of power is controlling, Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972); see CBS, Inc. v. United States, 316 U.S. 407, 422 (1942), this proceeding is obviously an adjudication in fact. Under the January Order, the proposed hearing, functioning as an agency process for the formulation of a final agency disposition, is an adjudication.[2] As such, the proceed-

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1. The legislative history of the AEA contains no support for the proposition that Congress intended to grant the Commission special investigative powers of an adjudicatory nature. See AEC, Legislative History of the Atomic Energy Act of 1954 (Public Law 703, 83rd Cong.) (1955). See also Atchison, T.&S.F. Ry. v. ICC, 607 F.2d 1199, 1203 (7th Cir. 1979) ("an administrative agency cannot exceed the specific statutory authority granted it by Congress"); Doraiswamy v. Secretary of Labor, 555 F.2d 832, 843 (D.C.Cir. 1976); Nader v. NRC, 513 F.2d at 1051 ("an administrative agency is bound . . . by the precepts of its governing statute").

"In the absence of a conflict between reasonably plain meaning and legislative history, the words of a statute must prevail." Aaron v. SEC, 446 U.S. 680, 700 (1980) (footnote omitted); see CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Commissioner v. Brown, 380 U.S. 563, 571 (1965).

2. The APA defines "adjudication" as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6) (emphasis added). The Supreme Court has noted that "when Congress defined 'order' in terms of a 'final disposition,' it required that [the] 'final disposition' . . . have some determinate consequences for the party to the proceeding." IT&T v. Local 134, IBEW, 419 U.S. 428, 443 (1975) (emphasis added).

ing lacks the requisite notice and other procedural safeguards guaranteed by statute, regulation, and the due process clause of the fifth amendment.[1]

The January Order expressly states that the Commission intends to take final agency action at the conclusion of this proceeding. Even assuming that this proceeding is intended as the forerunner of a later adjudication conducted in accordance with all of the lawful requirements, the scope of this proceeding will control and infect the outcome of any second hearing. In fact, this adjudicatory proceeding with final action by the Commission may, for all practical purposes, circumscribe to an impermissible extent a second proceeding based upon the same issues with the same parties. Therefore, this is the determinative proceeding.

In addition, this hybrid hearing is an attempt to make binding, substantive rules during the course of a proceeding in violation of both the applicable rulemaking and adjudicatory

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1. The AEA provides that "[i]n any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). The Commission's regulations provide that a proceeding to modify, suspend, or revoke a license may be instituted by serving on the licensee an order to show cause which will, in part, "[i]nform the licensee of his right . . . to demand a hearing." 10 C.F.R. § 2.202(a)(3). If the licensee demands a hearing, the "Commission will issue an order designating the time and place of [the] hearing." Id. § 2.202(c).

procedures.[1] Thus, it constitutes a further impermissible infringement of the licensees' constitutional rights.

It is axiomatic that an agency is bound to follow its governing statute and rules.[2] When the NRC has "laid down [its] own procedures and regulations, [they] cannot be ignored by the [NRC] even where discretionary decisions are involved." Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969).

The licensees are also deprived of notice because the NRC is permitting the formulation of new contentions and new

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1. See NLRB v. Wyman-Gordon Co., 394 U.S. at 764-65 (citations omitted) (emphasis added):

> The rule-making provisions of [the Administrative Procedure Act], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of . . . the Administrative Procedure Act. . . . [U]nder the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making.

2. Vitarelli v. Seaton, 359 U.S. at 540; Service v. Dulles, 354 U.S. at 373; United States ex rel. Accardi v. Shaughnessy, 347 U.S. at 268; National Conservative Political Action Committee v. FEC, 626 F.2d 953, 959 (D.C.Cir. 1980); Way of Life Television Network, Inc. v. FCC, 595 F.2d 1356, 1359 (D.C.Cir. 1979); VanderMolen v. Stetson, 571 F.2d 617, 624 (D.C.Cir. 1977) (citations omitted) ("Actions by an agency . . . in violation of its own regulations are illegal and void."); see Yellin v. United States, 374 U.S. 109, 114-16 (1963).

subissues during the proceeding. The APA provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b)(3).

The due process clause also requires that rules governing conduct be stated in advance so that notice is given of what conduct is required. Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); cf. United States v. Atkins, 323 F.2d 733, 742 (5th Cir. 1963). As the Supreme Court has repeatedly written:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." . . . It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citations omitted) (emphasis added). Where, as here, statutes or regulations impinge upon constitutionally protected rights, they must set forth in advance what is and what is not lawful. See Cantwell v. Connecticut, 310 U.S. 296, 306-08 (1940); Schneider v. New Jersey, 308 U.S. 147, 163-64 (1939); Hague v. CIO, 307 U.S. 496, 516 (1939). The proper time for giving such notice is

prior to the hearing. NLRB v. Majestic Weaving Co., 355 F.2d at 861.

As the Supreme Court stated nearly 100 years ago, law "must be not a special rule for a particular person or a particular case, but . . .'the general law' . . . so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law . . . special, partial, and arbitrary exertions of power." Hurtado v. California, 110 U.S. 516, 535-36 (1884) (citation omitted). Adherence to the requirements of the APA, the AEA, and the NRC's regulations "avoids the problem of singling out [the Indian Point facilities] for initial imposition of a new and inevitably costly legal obligation." National Petroleum Refiners Association v. FTC, 482 F.2d at 683 (citations omitted). The Commission cannot ignore its governing statutes and regulations and act in a manner inconsistent with its precedents merely "because in this case the Commission thinks that that the [public health and safety] require[] a different interpretation." Teleprompter Cable Communications Corp. v. FCC, 565 F.2d at 742.

Conclusion

For the foregoing reasons, the licensees' motion for a stay of this hearing pending completion of presently scheduled and proposed generic proceedings, or for dismissal of this proceeding or, in the alternative, for certification of the issues raised in this motion to the Commission for its determination, pursuant to 10 C.F.R. § 2.718(i), should be granted.

Respectfully submitted,

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