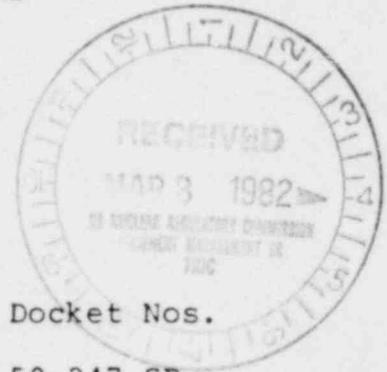


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Louis J. Carter, Chairman
Frederick J. Shon
Dr. Oscar H. Paris



82 MAR -1 A9:54

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

_____ x
:
In the Matter of :
: Docket Nos.
CONSOLIDATED EDISON COMPANY OF NEW YORK : 50-247 SP
INC. (Indian Point, Unit No. 2) : 50-286 SP
POWER AUTHORITY OF THE STATE OF NEW YORK :
(Indian Point, Unit No. 3) : March 1, 1982
:
_____ x

LICENSEES' APPLICATION FOR CERTIFICATION AND REFERRAL
TO THE COMMISSION AND FOR A STAY OF THE BOARD'S RULING
ON THE UCS-NYPIRG MOTION FOR DISCOVERY AND TO PERMIT
ENTRY UPON LAND IN CONTROL OF THE LICENSEES AND
INTERESTED STATES

ATTORNEYS FILING THIS DOCUMENT:

Charles Morgan, Jr.
MORGAN ASSOCIATES, CHARTERED
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-7000

Brent L. Brandenburg
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place
New York, New York 10003
(212) 460-4600

D503
5
1/1

8203030306 XA

8243030306

Preliminary Statement

Late Friday afternoon (February 16, 1982), Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Indian Point Station, Unit No. 2, and Power Authority of the State of New York ("Authority"), licensee of Indian Point 3 Nuclear Power Plant (collectively the "licensees") received oral notification that the Atomic and Safety Licensing Board (the "Board") had granted the motion of potential joint intervenors Union of Concerned Scientists and New York Public Interest Research Group (collectively "UCS-NYPIRG") for "discovery" and "entry upon land" dated February 9, 1982 ("UCS-NYPIRG Motion"). This access is to be permitted during an emergency planning exercise mandated by generic requirements of the Commission and FEMA scheduled for March 3, 1982.* The licensees have been advised** that the Board granted (subject to certain conditions) the first three requests in the UCS-NYPIRG Motion:

* As stated in the licensees' answer to the UCS-NYPIRG Motion ("Licensees' Answer"), the haste with which the Board and the Commission must deal with UCS-NYPIRG's motion and the serious safety concerns it raises is entirely the fault of UCS-NYPIRG, which waited until the eleventh hour to make its application with respect to the long-scheduled emergency planning exercise.

** The licensees have not received a written order from the Board.

- 1) to observe the March 1982 exercises from the control room of Indian Point Unit 2;
- 2) to observe the March 1982 exercises from the control room of Indian Point Unit 3; and
- 3) to observe the March 1982 exercises from the near-site emergency operations facility ("EOF").

The licensees have been advised that the Board has requested the State of New York to cooperate in permitting the access sought in the following requests in the UCS-NYPIRG Motion:

- 4) to observe the March 1982 exercises from the State Emergency Operations Center in Albany, New York; and
- 5) to observe the March 1982 exercises from the Office of Disaster Preparedness Southern District, Emergency Operations Center in Poughkeepsie, New York.*

* The State of New York has opposed such access. See Reply of the New York State Energy Office in Opposition to the UCS-NYPIRG Motion, dated February 23, 1982. The licensees have been advised that the Board stated that the State of New York's cooperation in complying with the requests would be a factor in the Board's determination on the State of New York's application to appear as an interested state herein.

The licensees have been advised that the remaining requests in the UCS-NYPIRG Motion were determined by the Board by reference to stipulations between UCS-NYPIRG, Westchester County, Rockland County, the Commission staff, and FEMA, and by requesting the cooperation of Orange and Putnam Counties.

Thus the Board's extraordinary and unprecedented ruling would permit these potential intervenors or their unspecified designees access to the control rooms of operating nuclear power plants and to the EOF. This access is to be permitted during an exercise to whose very purpose (maintenance of effective emergency planning at Indian Point) potential intervenors herein are concededly hostile.*

The licensees also plan to file with the Commission an application to review the Board's ruling on the UCS-NYPIRG motion, and for an undertaking by the Commission to hold harmless and indemnify the licensees against any consequences which may result from the presence of UCS-NYPIRG representatives in the control rooms or EOF (including, but not limited to the cost of any replacement power necessitated by actions resulting from such presence).

Licensees therefore petition the Board, pursuant to 10 C.F.R. §§ 2.718(i), 2.730(f), and 2.788, for relief as follows:

* Under UCS-NYPIRG's proposal, the identities and backgrounds of the "representatives or consultants" to whom access is to be permitted are not only unspecified, but such "representatives or consultants" may be "from" any of seven potential intervenors herein.

(1) to refer or certify to the Commission for immediate review the Board's ruling upon the UCS-NYPIRG Motion, and

(2) to stay its ruling upon the UCS-NYPIRG Motion until that ruling has been finally reviewed.

GROUNDS FOR REFERRAL OR CERTIFICATION*

The Commission's Rules of Practice provide that a Licensing Board may refer a ruling to the Commission when, in the judgment of the Licensing Board, a "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense." 10 C.F.R. § 2.730(f). A Licensing Board may also certify questions to the Commission for its determination. 10 C.F.R. § 2.718(i). Referral or certification under these provisions is appropriate where the Board's ruling:

either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. (Footnote omitted.)

Public Service Co. of Indiana (Marble Hill Nuclear Generating

* The licensees submit that for the reasons set forth herein the requirement for a stay of the Board's ruling pursuant to 10 C.F.R. § 2.788 are satisfied.

Station, Units 1 and 2), 5 NRC 1190, 1192 (1977). These standards clearly warrant such review herein.

(1) Irreparable impact

The Board's unprecedented ruling requiring the licensees to permit unidentified persons access to the vital areas of two operating nuclear plants manifestly threatens the licensees with immediate and serious irreparable impact, including:

(1) the possibility of interference with operations or damage to the control rooms of two operating nuclear plants with resulting threats to the public safety and/or to the uninterrupted provision of low-cost electricity to the public; and

(2) disruption (whether intentional or not) with the emergency planning exercise. The exercise is a matter of the utmost importance for the licensees and the public. Any disruption of the exercise or interference with its integrity would compromise the objectives of the exercise and would frustrate the salutary purposes sought to be achieved. (Such disruption could also have unpredictable licensing consequences.)

A later reversal of the Board's decision herein could not undo the damage of the type described above. Such damage would affect not only the licensees, but also the

interests of the public. In this circumstance, referral or certification of the Board's ruling to the Commission is clearly required.

To the licensees' knowledge, this is the first instance in which any licensee has been compelled contrary to its own judgment and security procedures to allow persons into a control room. The Board is of the view that permitting unknown persons--selected by avowed opponents of the continued operation of the Indian Point plants--to enter vital areas of those plants poses no threat to the public safety. Nonetheless, the licensees believe that access to the control rooms and the EOF during a demanding exercise, as required by the Board's ruling, poses unpredictable safety consequences.

Balanced against these unpredictable consequences, UCS-NYPIRG has not advanced any persuasive reasons why its continuous and immediate presence is necessary or even desirable to assess the adequacy of the exercise. UCS-NYPIRG, if granted intervenor status, will have ample access to other effective discovery devices. Discovery of the Staff, FEMA, and licensee witnesses will undoubtedly be requested. UCS-NYPIRG, the Staff, and FEMA have entered into a stipulation regarding the preservation of documents relating to the exercise, and again, UCS-NYPIRG will undoubtedly seek production of these documents.

Further, as the control rooms are "vital areas" as defined in the Commission's regulations, and the EOF would be considered such an area in the event of an emergency (which the exercise is intended to simulate), the Board's order would purport to require the licensees to violate 10 C.F.R. § 73.55(d)(7), which provides:

The licensee shall positively control all points of personnel and vehicle access into vital areas. Access to vital areas shall be limited to individuals who are authorized access to vital equipment and who require such access to perform their duties. Authorization for such individuals shall be provided by the issuance of specially coded numbered badges indicating vital areas to which access is authorized. Access to vital areas for the purpose of general familiarization and other non-work-related activities shall not be authorized except for good cause shown to the licensee. Unoccupied vital areas shall be locked and protected by an active intrusion alarm system. (emphasis added).

The potential intervenors unidentified representatives or consultants are neither individuals "authorized access to vital equipment" nor individuals "who require such access to perform their duties," and accordingly the licensees cannot allow the access provided by the Board's order consistent with the requirements of the regulation. The licensees are therefore now faced with a Hobson's Choice between compliance with the Board's order, or compliance with Commission's regulations, and, more importantly, the safety considerations which underlie those

regulations. It is respectfully submitted that if the licensees are to be directed to violate 10 C.F.R. § 73.55(d)(7), such direction should come from the Commission.

As noted above, the licensees plan to file with the Commission an application for an undertaking by the Commission to hold harmless and indemnify the licensees against any consequences resulting from the presence of UCS-NYPIRG representatives in the control rooms or EOF during the emergency planning exercise (including, but not limited to, cost of any replacement power necessitated by consequences resulting from the presence of UCS-NYPIRG representatives in vital areas). The licensees -- which have extraordinary commitments to the public safety as well as to their consumers, bondholders, and shareholders -- cannot accept the risk of irreparable harm that would otherwise follow.

(2) Effect on the structure of the proceeding

The grant of relief which is beyond the Board's jurisdiction or otherwise improper could also have a profound impact on the structure of this proceeding. The licensees submit that the Board has exceeded its jurisdiction and has clearly contravened the Commission's Order of September 18, 1981. In a key procedural directive (September 18 Order at pp. 1-2; January 18 Order at pp. 6-7, n.4), the Commission exempted

the Board from certain provisions of 10 C.F.R. Part 2, but only with respect to contentions and order of presentation. At the same time, the Commission expressly directed:

In other respects, except as provided elsewhere in this Order, 10 CFR Part 2 will control. If the Board concludes that further departure from Part 2 is necessary for the efficient conduct of the hearing, it should request such authorization from the Commission.
(Emphasis added.)

By permitting discovery prior to the issuance of a special pre-hearing conference order allowing the admission of parties and contentions, the Board has directly circumvented the requirements of 10 C.F.R. § 2.740(b)(1) and 10 C.F.R. Part 2, Appendix A (IV)(a),* and thus the Commission's Orders,

* 10 C.F.R. § 2.740(b)(1) -- the very section relied upon by UCS-NYPIRG in its instant discovery request -- states that:

discovery shall begin only after the prehearing conference...and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference.
(Emphasis added.)

10 C.F.R. Part 2, Appendix A (IV)(a) states:

Once the key issues in controversy are identified in the special pre-hearing conference order (§ 2.751a.(d)), discovery may proceed and will be limited to those matters. (Emphasis added.)

since it departed from 10 C.F.R. Part 2 without requesting authorization from the Commission.

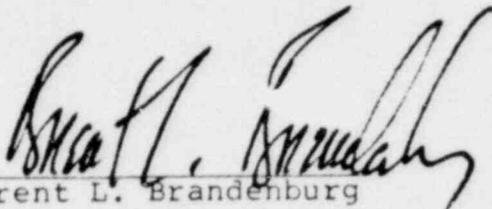
The licensees respectfully submit that the Board has further exceeded its jurisdiction in that it is now engaged in rewriting the Commission's rules in the area of emergency planning with regard to the conduct of emergency planning exercises.

For these reasons, the Board's decision will severely affect the structure of the proceeding, and the decision should be reviewed by the Commission.

WHEREFORE, the licensees respectfully request that the Board, pursuant to 10 C.F.R. §§ 2.718(i), 2.730(f), and 2.788:

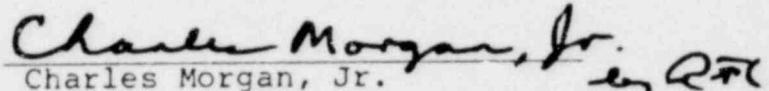
(1) refer or certify to the Commission for immediate review the Board's ruling upon the UCS-NYPIRG Motion, and

(2) stay its ruling upon the UCS-NYPIRG Motion until that ruling has been finally reviewed.


Brent L. Brandenburg

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
Licensee of Indian Point
Unit 2
4 Irving Place
New York, New York 10003
(212) 460-4600

Respectfully submitted,


Charles Morgan, Jr.
Paul F. Colarulli
Joseph J. Levin, Jr.

MORGAN ASSOCIATES, CHARTERED
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-7000

Thomas R. Frey
General Counsel

Charles M. Pratt
Assistant General Counsel

POWER AUTHORITY OF THE
STATE OF NEW YORK
Licensee of Indian Point Unit 3
10 Columbus Circle
New York, New York 10019
(212) 397-6200

Bernard D. Fischman
Michael Curley
Richard F. Czaja
David H. Pikus

SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Dated: March 1, 1982