UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts

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)	:	May 10, 1982

LICENSEES' PETITION FOR DIRECTED CERTIFICATION PURSUANT TO 10 CFR § 2.718(i) AND FOR WAIVER OF 10 CFR § 9.103

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) 460-4333

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I. THE PETITION

Consolidated Edison Company of New York, Inc. and the Power Authority of the State of New York, Licensees of Indian Point Units No. 2 & 3, respectively, (the "Licensees") hereby apply to the Commission for directed certification of several questions related to an April 23, 1982 pre-hearing order issued by the Atomic Safety and Licensing Board (the "Board") herein. The order sets forth the Board's formulation of contentions and the basis upon which evidence may be admitted, and establishes a schedule for further proceedings.

II. INTRODUCTORY STATEMENT

Licensees submit that the Board's April 23 order is incompatible in a number of important respects with the Commission's January 8, 1981 and September 18, 1981 Orders establishing this unique special proceeding. In direct contravention of the Commission's orders, the Board has created a free-roving, unbounded inquiry which far exceeds the Commission's mandate to address seven specific questions, ignores contention practice, challenges the validity of Commission regulations, and disregards the Commission's explicit instructions regarding the conduct of the proceeding. Unless the Commission immediately undertakes to require Board adherence to the Commission's purpose as set forth in its January 8 and September 18 Orders, the result can only be an administrative free-for-all.

A. Certification Questions

The grounds for the Commission to direct certification pursuant to 10 CFR §2.718(i) are set forth below. Licensees seek certification of the following questions:

(1) Whether the Commission intended in footnote 4 of its September 18 Order to permit intervenors to introduce contentions without having to provide a specific factual basis therefor and without having to justify the admission of late-filed contentions.

(2) Whether the Commission intended in footnote 4 of its September 18 Order that contentions challenging existing Commission regulations could be raised without meeting the requirements of 10 CFR §2.758.

(3) Whether the Board failed to comply with the intent of footnote 5 of the Commission's September 18 Order

by permitting intervenors to file testimony describing release consequences without "a discussion of the probability of such a release for the specific Indian Point plants."

(4) Whether the Board failed to comply with the instructions in Commission Question 2 by admitting contentions suggesting specific additional safety measures without requiring a preliminary showing by the sponsoring intervenor that the suggested measures meet the Question's two-pronged test, and by failing to make the explicit Board findings required by the Commission for each suggested measure.

B. Background

This proceeding was initiated by Commission Orders of January 8 and September 18, 1981, which empaneled the Board to conduct hearings on seven questions enumerated by the Commission. In its Orders, the Commission emphasized that:

> The Commission's 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. (January 8 Order at 7, emphasis supplied).

The Commission stated its intent "to compare Indian Point to the spectrum of risks from other nuclear power plants," and based upon that comparison, to determine whether additional safety measures should be required or some other action taken.* The Board was requested to hear evidence on the Commission's specific questions and to make recommendations to the Commission "no later than" September 18, 1982** in

* January 8 Order at pp. 7-9.

** September 18 Order at 5.

order that the Commission could "make its decision within a reasonable period of time."*

Because of the particular time constraints which it applied to the proceedings, and because of their precise focus, the Commission directed that special procedures be followed in the proceeding. The Commission directed the Board to employ higher standards for the admission of contentions than would be applied in licensing proceedings. The Board was:

> Empowered only to accept and formulate . . . contentions which seem likely to be important to resolving the Commission's questions . . . .

The above language was added to the January 8 Order by the September 18 Order.** In addition to this change, two other significant changes were made to the Commission's earlier order. First, Question 1 of the January 8 Order was amended by including a reference to the Commission's Interim Policy on "Nuclear Power Plant Accidents under the National Environmental Policy Act", and by adding footnote 5 to the January 8 Order which provides inter alia, that "... a description of the release scenario must include a discussion of the probability of such a release for the specific Indian point plants..." Second, a two-pronged test was added to Question 2 with regard

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* January 8 Order at 7.

** September 18 Order at 2.

to the admission of contentions dealing with Intervenor proposals for additional specific safety measures. Under this test, the Board was to admit contentions which seem likely to be important to resolving whether (a) there exists a significant risk to public health and safety notwithstanding the Director's measures, and (b) the additional proposed measures would result in a significant reduction in that risk. These changes to the earlier order, together with the Commission's directive that the Board complete its work by September 18, 1982, all bespeak a Commission intent to maintain a narrow focus in this proceeding.

The Commission's September 18 Order (p. 2) provided that except with respect to contentions and the order of presentation, its regular Rules of Practice, 10 CFR Part 2, "will control." The Commission thus did not disturb the normal prohibition against challenges to the validity of Commission regulations set forth in 10 CFR § 2.758, although Question 2 of its September 18 order did permit the proposal of additional specific safety features going beyond present Commission requirements upon satisfaction of the two specific pre-conditions.

By order issued November 13, 1981 the Board directed that contentions be filed prior to the first special prehearing conference on December 2, 1981. At that conference, in the course of discussing the Commission's directives regarding contention practice for the hearings, the Board stated that:

> If you simply read the revised footnote 4 which the Commission had in their order of September 18, it is not clear what the Commission meant. (Tr. at 100; emphasis supplied)*

Numerous contentions were submitted by prospective intervenors prior to the Board's December 2 deadline. Both Licensees and the NRC Staff filed extensive memoranda on December 31, 1981 and February 11, 1982 contending, inter alia, that many of the proposed contentions did not comply with the provisions of the Commission's January 8 and September 18 Orders regarding the admission of contentions and the consideration of additional specific safety measures. The Licensees and the Staff also argued that many of the proposed contentions constituted an impermissible attack on NRC regulations, and that many were vague and lacked the underlying specific factual basis required by NRC regulations governing contentions.

On April 9, 1982 the Board preliminarily ruled upon proposed contentions, and announced that final rulings would be made following the second special prehearing conference scheduled for April 13 and 14, 1982. The Board's only discussion of the Staff's and the Licensees' extensive and detailed memoranda on contentions is as follows:

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* The Board went on to interpret the Commission's September 18 Order based upon its understanding of an unspecified transcript of Commission's discussions, Tr. at 101. See pp. 18-19 infra.

> We have carefully considered the arguments of Licensees and the Staff to the effect that many of the contentions were unacceptable. We did not agree with many of those objections. (April 9 order at 15)

The Board took the position that the Commission order permitted it to entertain challenges to existing Commission regulations. For example, with regard to a contention which alleged that the 10 mile plume exposure EPZ should be substantially expanded, the Board ruled:

> Staff has objected to any contention of this sort as an unacceptable challenge to NRC Regulations. We do not read 10 CFR § 50.47 and Appendix E as requiring strict adherence to the 10-mile radius. Further, we believe that this is exactly the sort of contention the Commission intended us to accept under revised footnote 4 of its September 8, 1981 Memorandum and Order, when it said, "[T]he Board will not be bound by the provisions of 10 C.F.R. Part 2 with regard to the admission and formulation of other contentions." (April 9 order at 10, n.4)

At the second special prehearing conference on April 13 and 14, the Staff and Licensees argued that the Board's preliminary formulation of contentions suffered from the same defects as the Intervenors' contentions on which the Board's issues are based.

On April 23, 1982 the Board issued its order formulating the contentions and setting a schedule for the hearings. In response to the Staff and Licensees' objections that the contentions in the April 9 order lacked specific factual basis, the April 23 order stated that:

> We have deliberately avoided specifying detailed factual bases in our formulation

of contentions because this is an investigative proceeding.*

In addition, the Board again referred to footnote 4 of the Commission's January 8 and September 18 orders as permitting it to accept challenges to Commission regulations.** The Board's Contentions 2.1 and 2.2 include eight safety measures which had been proposed by intervenors. The contentions proposing these safety measures were admitted without any showing in the record by the sponsoring intervenors, or any reasoned explanation by the Board itself, that the requirements of Commission Question 2 with regard to proposed safety measures had been complied with.

III. COMMISSION STANDARDS FOR DIRECTED CERTIFICATION

Commission Rules of Practice, 10 CFR § 2.718(i), expressly provide that a presiding officer may certify questions to the Commission "either in his discretion or on direction of the Commission."*** While there is a general Commission policy disfavoring interlocutory review [(10 CFR §2.730(f)], the Appeal Board has on many occasions stated that discretionary

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* April 23 order at 2. In addition to stating that it did not feel compelled to provide detailed factual bases for the issues it had formulated the Board's April 23 order invited intervenors to "submit such evidence as they deem relevant to support the contentions and may submit such other evidence as they deem necessary to answer the Commission's Questions." (April 23 order at 21)

** Id. at 12, n.2

*** See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975).

interlocutory review pursuant to § 2.718(i) will be granted where the ruling below either threatens the adversely affected party with immediate and serious irreparable impact which, as a practical matter, cannot be alleviated by a later appeal, or which affects the structure of the proceeding in a pervasive or unusual manner.*

In addition, the Commission has on many occasions emphasized its "inherent supervisory authority over the conduct of adjudicatory proceedings" before the agency, "including the authority to step in and rule upon the admissibility of a contention before a Licensing Board."** In this regard, the Commission has stated:

> [I]n the interest of the orderly resolution of disputes, there is every reason why the Commission should be empowered to step into a proceeding and provide guidance on important issues of law or policy.***

IV. THE LICENSEES' PETITION MEETS THE COMMISSION'S STANDARDS FOR DIRECTED CERTIFICATION

The April 23 order which is the subject of the instant petition presents a compelling case for interlocutory review by

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* Public Service Company of Indiana (Marble Hill Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 694 (1979); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 534 (1980); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310 (1981).

** Footnote on following page.

*** Footnote on following page.

the Commission. It cannot be seriously disputed that the course which the Board has charted in its April 23 order "affects the structure of a proceeding in a pervasive or unusual manner."

Licensees' basic claim is that the Board has defined a roving, free-form proceeding which is wholly inconsistent with the Commission's express desire for a focused proceeding in which the "primary concern" is how the Indian Point population factor affects numerical risk calculations.

Since the Commission has itself initiated the proceeding and defined its scope, and because the controversy regarding the Commission's intentions regarding that scope can thus be put to rest solely by the Commission, the proposed certified questions call for the prompt policy guidance that the Commission has made

** (Footnote from previous page)
United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976); See also Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), CLI-77-8, 5 NRC 503, 516-517 (1977).

*** (Footnote from previous page)
Id. As a general rule, § 2.718(i) certification authority is invoked only after a Licensing Board has been afforded at least a reasonable opportunity to decide the question sought to be certified. Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727, 729 (1975). In the instant case, the Board has twice had occasion to consider Licensees' arguments that it has misconstrued the intention of the Commission in initiating this proceeding: first in its April 9 order, in which it rejected (without comment) the Staff's and Licensees' arguments made in contentions briefs, and again in its April 23 order, in which it rejected renewed arguments made at the April 13-14 second pre-hearing conference.

clear it would provide in the furtherance of "the orderly solution of disputes" such as this. Clinch River, supra; Seabrook, supra.

The first two questions which the Licensees seek to have reviewed relate specifically to the Commission's intention in footnote 4 of the September 18 order. In that footnote, the Commission provided that contentions based upon the original UCS petition alleging that Commission regulations are not met will be accepted "if they meet the requirements of 10 CFR Part 2 without regard to whether they fall within the scope of the Commission's seven questions." (September 18 Order at 2; emphasis supplied.) The Commission went on to state that:

> [T]he Board will not be bound by the provisions of 10 CFR Part 2 with regard to the admission and formulation of other contentions. In granting this discretion to the Board, the Commission emphasizes that its purpose is to insure that the Board is empowered only to accept and formulate, after consultation with the parties, the issues which seem likely to be important to resolving the Commission's questions . . . .(Id.)

The above language has fueled a continuing controversy in this proceeding among the Board and parties regarding the Commission's intent in relieving the Board of the obligation to adhere to the Rules of Practice in certain limited respects. Instead of carrying out the careful screening process called for by the above-quoted language, by which the Board was directed to apply higher standards of admissibility for contentions than would occur in a licensing proceeding, the Board has instead interpreted that language as a directive to:

1. relieve potential intervenors of the obligation to

provide a detailed factual basis for each contention proferred as an issue;*

2. permit the amendment of contentions and raising of new issues by intervenors without having to justify such late amendment pursuant to the five factors of 10 CFR § 2.714(a)(1);**

3. permit intervenors to file direct testimony not only to support their contentions, but also to discuss any other matters which are responsive to the Commission's questions.***

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* In this regard, the Board has ruled essentially that the Staff and licensees must await discovery in order to learn the basis for proffered contentions. See, e.g., Tr. 605. Further, the Licensing Board stated, in its April 23 Order (p.2) that it would not specify detailed factual bases for each issue because by doing so it would be "imposing inflexible legal standards." However, as is clear from 10 CFR § 2.714, the licensees are entitled, at the pleading stage, to learn the basis for each contention, stated with reasonable specificity.

** The April 23 Order admitted a number of new contentions which the Board formulated based upon oral statements made at the second special pre-hearing conference on April 13 and 14. Admitted as new contentions by the April 23 Orders were verbal assertions, unaccompanied by any factual basis, that a complete review of the construction and operation of both plants should be undertaken [Contention 2.2 (d)] and that current emergency planning brochures and other means of informing the public do not meet the needs of the deaf, blind and those too young to understand instructions (Contertion 4.7).

*** April 23 Order at p. 21.

4. entertain direct challenges to existing Commission regulations with regard to the size of the plume exposure EPZ* without requiring compliance with 10 CFR §2.758; and

5. entertain direct challenges to emergency planning regulations by requiring litigation of a suggestion that emergency planning may not proceed until a "maximum acceptable level of radiation exposure for the public" has been established, without requiring compliance with 10 CFR §2.758.**

The Board actions detailed above have demonstrably "affected the basic structure of the proceeding in a pervasive . . . manner", Marble Hill, supra. Those actions have transformed the narrowly focused inquiry contemplated by the Commission into a wide-ranging, freewheeling discussion of a wide variety of issues, some of which would be outside the permissible bounds of even an initial licensing case. Thus, the questions for which Licensees seek prompt review by the Commission are (as the Appeal Board stated in taking sua sponte review of one licensing board's interlocutory order) "central to charting the future course of the proceeding ...."***

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* April 9 Order at p. 10, n. 4; Contention 4.1 and subsumed intervenor contentions, April 23 Order, at pp. 12-13.

** Contention 4.6, April 23 Order, at p. 16.

*** Houston Lighting and Power Company (Allens Creek Unit 1), ALAB-565, 10 NRC 521 (1978).

Further, it is particularly important that the Commission exercise its inherent supervisory authority in the present circumstances since the Board itself has conceded its inability to discern the Commission's intention regarding footnote 4 of the September 18 Order without resorting to review and reliance on transcripts of open meetings held by the Commission to discuss that Order.*

With regard to the Licensees' third question proposal for or directed certification, the Commission was very explicit in footnote 5 of the September 18 Order in instructing the Licensing Board as to the type of testimony it was to entertain in this proceeding in response to Commission Question 1. After emphasizing that the risk associated with a release scenario was necessarily a product of both the probability and consequences of a given release, the Commission concluded:

> Thus, a description of a release scenario must include a discussion of the probability of such a release for the specific Indian Point plants. (September 18 Order at 3; emphasis supplied).

Despite this very clear expression of the Commission's intention that testimony was to address both aspects of the risk equation, the Board has already announced an intention to permit Intervenors to file testimony solely dealing with accident consequences, on the theory that the Board "might accept [one Intervenor's] analyses of consequences and somebody else's analysis of probability." (Tr. 858). However, as the Commission

* See p. 5-6, supra.

has implicitly recognized by its admonition in footnote 5, such an approach results in an unrealistic and disjointed discussion of any given release scenario because the probabilities of each of the multitude of occurrences in an event tree must be analyzed together with the consequences of each of those events for the specific Indian Point plant design in order to have a meaningful dialogue concerning the entire release scenario. One cannot divorce the discussion of either aspect of the risk equation from the other without rendering the outcome meaningless.

Thus, the determination by the Board to permit evidence to be advanced solely relating to accident consequences can only have the effect of cluttering the record in this proceeding with material which will confuse rather than clarify the issues which the Commission has asked the Board to consider.

Clearly, for the above reasons, the broadening of the scope of permissible evidence beyond what was intended by the Commission cannot fail to have a pervasive effect on the structure of the proceeding. Marble Hill, supra. Further, since a Commission policy decision is responsible for the initiation of this proceeding, there could be no more appropriate time for the Commission to step into this proceeding to provide prompt policy guidance in the exercise of its "inherent supervisory authority". Clinch River, supra; Seabrook, supra.

Regarding the Licensees' fourth question proposed for directed certification, Commission Question 2 permits the suggestion of additional safety measures beyond those identified in the Director of Nuclear Reactor Regulation's February 11, 1980 Confirmatory Orders to Licensees. However, the Commission clearly required, prior to admission of such issues, an examination and finding by the Licensing Board that the suggestion of such additional safety measures is likely to be important to resolving whether (a) there exits a significant risk to public health and safety, notwithstanding the Director's measures, and (b) the additional measures would result in a significant reduction in that risk

In issuing its April 23 order, the Board accepted for litigation in this proceeding contentions proposing eight additional safety measures, ranging from a complete reexamination of both plants to discover flaws resulting from poor quality control in construction and operation, to a double containment for the purpose of mitigating overpressurization accidents. Yet the Board did not require any showing by the sponsoring intervenors, nor did itself explicitly examine whether the two pre-conditions to litigation of such issues had been met. When the Licensees objected to the failure of the Board to follow the Commission's clear directive regarding these preconditions, the Licensees were rebuffed with the terse assertion that the Board's formulation of the issues with respect to the additional measures was intended to subsume

the two pre-conditions set forth by the Commission (Tr. 617).* Thus, there is no Board analysis in the April 9 or April 23 Orders regarding whether the pre-conditions have been met for any or all of the additional measures suggested by the Intervenors. Nor, as a reading of the discussion at the April 13 pre-hearing conference demonstrates, was any reasoned analysis of the two pre-conditions made by the Board on that occasion for each (or any) suggested addtional measure.

The result of the Board's failure to require even the most preliminary showing that the Commission's two-pronged test is satisfied for each additional measure suggested is that the possible issues arising under Commission Question 2 are limited only by the vivid imaginations of the Intervenors.

* In this regard, the failure of the Licensing Board to articulate in reasonable detail the basis for its rejection of Staff and Licensees' contention arguments violates a cardinal principle of agency decision-making which has previously been emphasized several times by the Appeal Board:

> ... [W]e deem it to be the general duty of licensing boards to insure that initial decisions and miscellaneous memoranda and orders contain a sufficient exposition of any ruling on a contested issue of law or fact to enable the parties, and this Board on its own review readily to apprehend the foundation for the ruling. Compliance with this general duty is not a mere procedural nicety, but is a necessity if we are to carry out efficiently our appellate review responsibility.

Northern States Power Company (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-104, 6 AEC 179 (1973); See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406 (1978).

The Board's disregard of this Commission-imposed obligation will certainly have a pervasive effect on the structure of the entire proceeding, Marble Hill, supra, since it has the effect of substantially broadening the scope of permissible issues raised in the case.

V. LICENSEES SHOULD BE GRANTED A WAIVER OF THE PROVISIONS OF 10 CFR § 9.103 FOR THE PURPOSE OF FILING BRIEFS ON THE CERTIFIED QUESTIONS

In connection with their petition for directed certification, the Licensees request relief from the provisions of 10 CFR § 9.103, which ordinarily prohibits the citation of Commission transcripts.* Here, reference to Commission transcripts leading up to the January and September 18, 1981 Orders are essential to a complete understanding of Commission intentions regarding this unique proceeding.

The Commission has previously granted relief from § 9.103 and Licensees submit that the "unusual factual circumstances" present in this proceeding require reference to transcripts of open Commission meetings during which the Commission's intentions regarding this proceeding were formulated

* 10 CFR § 9.103 provides, in pertinent part, that:

> Statements of views or expressions of opinion made by Commissioners or NRC employees at open meetings are not intended to represent final determinations or beliefs. Such statements may not be pleaded, cited or relied upon before the Commission or in any proceeding under Part 2 of these regulations (10 CFR Part 2) except as the Commission may direct.

and discussed. See, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-79-17, 9 NRC 680 (1979); Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), CCH Nuclear Regulation Reporter Transfer Binder, ¶30, 402 (1979).

Unlike most Commission proceedings where the types of issues appropriate for consideration are delineated by either statute, regulation or Appeal Board and Commission precedent, this special proceeding is the product of numerous Commission deliberations, memorialized in two orders. Certain points which we believe are necessary to an accurate interpretation of the two Commission orders can only be made by reference to the transcripts of the open meetings which the Commission convened prior to the issuance of those orders. Licensees believe that an examination of the transcripts of these Commission meetings demonstrates that the Board has far exceeded the authority which the Commission intended it to exercise. However, without permission to reference them as an indication of Commission intent, the only available avenue for clarification of the Commission's January 8 and September 18, 1981 directives will be lost.*

* The relief requested by Licensees is particularly important in this proceeding because the Board has apparently imposed a double standard regarding § 9.103. Specifically, although cautioning Licensees not to reference or cite Commission transcripts discussing the scope of this proceeding (see, e.g. April 23 Order at p. 12), the Board obviously believes itself entitled to review and rely on the same transcripts in determining whether to allow certain contentions. The Board candidly referred to its review of those transcripts at the December 2, 1981 prehearing conference (Tr. 99, 101) as a basis for its interpretation of the Commission's intent. In pursuing certification of the proposed questions to the Commission, Licensees should be afforded the same opportunity.

CONCLUSION

Because of "exceptional circumstances which warrant the extraordinary involvement of the Commission"* as set forth above, the Licensees urge the Commission to issue an order:

(1) Directing certification of the questions set forth above to the Commission for resolution;

(2) Granting the Licensees a waiver from the provisions of 10 CFR § 9.103 for the purposes of filing briefs regarding the certified issues; and

(3) Establishing an expedited briefing schedule to resolve promptly the issues raised by this petition, should the Commission determine that briefing is necessary.**

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* Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2) CLI-80-17; 11 NRC 678, 679 (1980).

** Such an expedited schedule is necessary in order that the issues presented may be resolved prior to the filing of testimony in this proceeding.

Respectfully submitted,

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) 460-4333

Of Counsel,
Thomas J. Farrelly
Stephen M. Sohinki

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 Frey
General Counsel
Charles 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: New York, New York
May 10, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
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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) : May 10, 1982

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CERTIFICATE OF SERVICE

I certify that I have served copies of "Licensees' Petition for Directed Certification Pursuant to 10 CFR § 2.718(i) and for Waiver of 10 CFR § 9.103" on the following parties by first class mail, postage prepaid, this 10th day of May, 1982.

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

Louis J. Carter, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
7300 City Line Avenue - Suite 120
Philadelphia, Pennsylvania 19151

U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Janice Moore, Esq.
Counsel for NRC Staff
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Paul F. Colarulli, Esq.
Joseph J. Levin, Jr., Esq.
Pamela S. Horowitz, Esq.
Charles Morgan, Jr., Esq.
Morgan Associated, Chartered
1899 L Street, N.W.
Washington, D.C. 20036

Charles M. Pratt, Esq.
Thomas R. Frey, Esq.
Power Authority of the
State of New York
10 Columbus Circle
New York, N.Y. 10019

Ellyn R. Weiss, Esq.
William S. Jordan, III, Esq.
Harmon & Weiss
1725 I Street. N.W., Suite 506
Washington, D.C. 20006

Joan Holt, Project Director
Indian Point Project
New York Public Interest
Research Group
5 Beekman Street
New York, N.Y. 10038

John Gilroy, Westchester
Coordinator
Indian Point Project
New York Public Interest
Research Group
240 Central Avenue
White Plains, New York 10606

Jeffrey M. Blum
New York University Law School
423 Vanderbilt Hall
Washington Square South
New York, N.Y. 10012

Charles J. Maikish, Esq.
Litigation Division
The Port Authority of
New York and New Jersey
One World Trade Center
New York, N.Y. 10048

Ezra I.Bialik, Esq.
Steve Leipsiz, Esq.
Environmental Protection Bureau
New York State Attorney
General's Office
Two World Trade Center
New York, N.Y. 10047

Alfred B. Del Bello
Westchester County Executive
Westchester County
148 Martine Avenue
New York, N.Y. 10601

Andrew S. Roffe, Esq.
New York State Assembly
Albany, N.Y. 12248

Renee Schwartz, Esq.
Botein, Hays, Sklar & Herzberg
Attorneys for Metropolitan
Transportation Authority
200 Park Avenue
New York, N.Y. 10166

Stanley B. Klimberg
General Counsel
New York State Energy Office
2 Rockefeller State Plaza
Albany, N.Y. 12223

Honorable Ruth Messinger
Member of the Council of the
City of New York
District #4
City Hall
New York, N.Y. 10007

Marc L. Parris, Esq.
County Attorney
County of Rockland
11 New Hempstead Road
New City, N.Y. 10010

Geoffrey Cobb Ryan
Conservation Committee
Chairman, Director
New York City Audubon Society
71 W. 23rd Street, Suite 1828
New York, N.Y. 10010

Greater New York Council on Energy
c/o Dean R. Corren, Director
New York University
26 Stuyvesant Street
New York, N.Y. 10003

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

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

Richard L. Brodsky
Member of the County Legislature
Westchester County
County Office Building
White Plains, N.Y. 10601

Pat Posner, Spokesman
Parents Concerned About
Indian Point
P.O. Box 125
Croton-on-Hudson, N.Y. 10520

Charles A. Scheiner, Co-Chairperson
Westchester People's Action
Coalition, Inc.
P.O. Box 488
White Plains, N.Y. 10602

Alan Latman, Esq.
44 Sunset Drive
Croton-on-Hudson, N.Y. 10520

Lorna Salzman
Mid-Atlantic Representative
Friends of the Earth, Inc.
208 West 13th Street
New York, N.Y. 10011

Zipporah S. Fleisher
West Branch Conservation
Association
443 Buena Vista Road
New City, N.Y. 10956

Mayor George V. Begany
Village of Buchanan
236 Tate Avenue
Buchanan, N.Y. 10511

Judith Kessler, Coordinator
Rockland Citizens for Safe
Energy
300 New Hempstead Road
New City, N.Y. 10956

David H. Pikus, Esq.
Richard F. Czaja, Esq.
330 Madison Avenue
New York, N.Y. 10017

Amanda Potterfield, Esq.
Box 384
Village Station
New York, New York 10038

Dated: May 10, 1982
New York, New York

Stephen M. Sohinki
STEPHEN M. SOHINKI