UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
James P. Gleason, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

In the Matter of	:	Docket Nos. 50-247 SP
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point, Unit No. 2)	:	50-286 SP
	:	February 8, 1983
POWER AUTHORITY OF THE STATE OF NEW YORK, (Indian Point, Unit No. 3)	:	

LICENSEES' RESPONSE TO UCS/NYPIRG MOTION FOR CERTIFICATION

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Preliminary Statement

Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Indian Point Station, Unit No. 2 and the Power Authority of the State of New York ("Power Authority"), licensee of Indian Point 3 Nuclear Power Plant (collectively the "licensees"), hereby respond to the UCS/NYPIRG motion to certify two questions to the Commission regarding proposed contentions ("UCS/NYPIRG Motion"). In the UCS/NYPIRG Response to the Memorandum and Order (Reformulating Contentions under Commission Questions 3 and 4) dated January 24, 1983, UCS/NYPIRG moved the Board to certify the following two questions to the Commission pursuant to 10 CFR §2.718(i):

> Should the Board accept for litigation and reformulate a contention challenging the adequacy of the exercise process to provide a basis for determining emergency response capability for an accident at Indian Point and proposing that alternative criteria be developed based on written commitments from emergency workers, emergency response organizations, and local officials who will be called upon to implement the plans?
>
> Alternatively, should the Board formulate a question and invite testimony from all parties regarding the adequacy of the exercise and the results of the exercise as a measure of preparedness?

UCS/NYPIRG Motion at 8.

The proposed question for certification arises out of two new contentions proposed by NYPIRG, and one proposed by

Parents Concerned About Indian Point in their respective filings dated December 28, 1982 and December 24, 1982.*

The Board, in its January 7, 1983 Memorandum and Order (Reformulating Contentions Under Commission Questions 3 and 4), rejected these proposed contentions on the grounds that (1) the FEMA witnesses will report on the results of the exercise; (2) matters contained in the proposals that do not challenge the regulations are already covered under Contention 3.1; and (3) the intervenors failed to provide the required "sound basis" for those portions of the proposed contentions which challenge the regulations. (January 7 Order at 15-16.)

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* The proposed NYPIRG contentions stated:

I. The exercise process is not an adequate basis for determining aspects of emergency response capability for an accident at Indian Point.

II. Letters of agreement, memoranda of understanding, and mutual aid agreements, signed by the responsible local officials and by the emergency workers themselves should be the determining criteria in evaluating emergency response capability.

The proposed Parents contention stated:

IV. Preparedness should be demonstrated by the willingness and ability of emergency workers in the field, by commitments in the form of letters of agreement from all emergency response agencies including schools, bus companies, fire departments, ambulance corps, and local governments which will be called upon to implement the plans.

Licensees support the Board's rejection of these belated proposals. (See Power Authority's Response to Reformulated Contentions Under Questions 3 and 4 at 1 and Con Edison's Memorandum Respecting the Licensing Board's January 7, 1983 Memorandum and Order Reformulating Contentions Under Commission Questions 3 and 4 at 2.)

Licensees oppose the instant motion on the grounds that the questions proposed for certification do not present major or novel questions of policy and the instant circumstances do not warrant resort to the extraordinary remedy of certification.*

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* Moreover, certification is no more warranted for the three contentions at issue on this motion than it would be for other contentions to which objection has been made. If certification is somehow appropriate, it should be granted for all contentions, to avoid piecemeal review.

CERTIFICATION IS NOT WARRANTED HEREIN

The Commission's regulations make clear that certification is appropriate only under extraordinary circumstances:

> A question may be certified to the Commission or the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party.

10 CFR Part 2, App. A(V)(f)(4); see also Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), 4 NRC 625 (1976) (no basis shown "for concluding that sufficiently extraordinary circumstances are present" to justify direction of certification); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 5 NRC 1190, 1192 (1977) (interlocutory review appropriate only 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").

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 1 NRC 478 (1975), the Appeal Board ruled that a Licensing Board's refusal to summarily dispose of issues relating to off-site emergency planning was not certifiable pursuant to CFR §2.718(i). The Appeal Board went on to hold that, despite an alleged conflict among different Boards on the issue of which certification was sought,

> there does not appear here to be any exceptional circumstance which, either in the furtherance of the public interest or to avoid the imposition of a patently unreasonable burden upon one of the litigants, dictates that we step into the case at this time.

Id. at 486.

The Appeal Board (at p. 483, n. 11) cited a similar certification provision governing the federal courts, 28 U.S.C. §1292(b), which permits a district court judge to certify for interlocutory appeal an order that "involves a controlling question of law as to where there is substantial ground for difference of opinion." It is well settled under §1292(b) that "such matters as the sufficiency of pleadings ... are not ordinarily certifiable" and "[t]he critical requirement is that [the certified question] have the potential for substantially accelerating the disposition of the litigation." 9 Moore's Federal Practice ¶110.22[2] (1982).

Herein, the proposed contentions indisputably challenge the Commission's regulations* (see, e.g., 10 CFR §50.47(b)(14)). The Commission's position on the adequacy of the exercise process is well-established and clearly presents no novel question of policy. The exercise requirements contained in 10 CFR Part 50 were adopted after careful consideration and extensive comment. See 45 Fed. Reg. 55402 (Aug. 19, 1980). Indeed, the Commission has rejected proposals for more extensive exercise and emergency planning assessment regulations. See In re Critical Mass Energy Project, PRM-50-23, 46 Fed. Reg. 11288 (Feb. 6, 1981). Similarly, the Commission/FEMA requirements for letters of agreement and similar memoranda are already clearly set forth in NUREG-0654. No novel or major questions of policy are therefore presented by the instant motion.

In addition, the proposed contentions contravene the Commission's recent directions herein. The Commission's July 27, 1982 Memorandum and Order directed the Board to expeditiously reconsider the admissibility of contentions previously admitted to the proceeding, and to reformulate

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* The Board correctly noted that the intervenors provided no "sound basis" to support such a challenge as required under Commission Question 4. We further note that enhanced exercises and letters of agreement are not off-site emergency procedures, and therefore fail to meet another Question 4 requirement.

existing contentions in accordance with that Order's guidance. (July 27 Order at 17.) The Commission in no way sanctioned the proposal of completely new contentions; the deadline for submission of such contentions was December 2, 1981. The instant motion, which seeks certification to admit entirely new contentions, runs contrary to the Commission's intent.

Finally, rather than accelerate the disposition of this proceeding (9 Moore's Federal Practice, supra), the admission of the proposed contentions would clearly lengthen and expand the hearings. Hence, certification is not merely unwarranted, but would in fact be improper and counterproductive.

In declining to certify questions herein regarding novel issues far more significant than those raised by the instant motion, the Board has noted that its certification power is to be used "sparingly." (March 29, 1982 Memorandum and Order at 5.) The instant motion clearly does not merit certification.

Respectfully submitted,

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Dated: February 8, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEES' RESPONSE TO UCS/NYPIRG MOTION FOR CERTIFICATION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 8th day of February, 1983.

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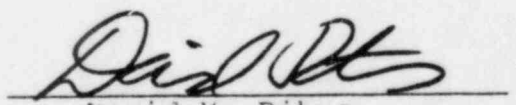

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