

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

'82 DEC -2 P1:51

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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

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CONSOLIDATED EDISON COMPANY OF : Docket Nos. 50-247-SP  
NEW YORK, INC. (Indian Point, : 50-286-SP  
Unit No. 2) :  
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POWER AUTHORITY OF THE STATE OF :  
NEW YORK, (Indian Point, :  
Unit No. 3) : December 1, 1982  
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LICENSEES' MOTION TO DISMISS CERTAIN CONTENTIONS

In its October 1, 1982 Memorandum and Order herein (October 1 Order), this Board assigned responsibility for presentation of the affirmative case regarding Contentions 2.1 and 2.2 to the Union of Concerned Scientists/New York Public Interest Research Group (UCS/NYPIRG) and West Branch Conservation Association (WBCA), respectively.\* As reflected in the Board's November 15, 1982 Memorandum and Order, (November 15 Order), the remaining contentions under Commission Question 2

\* These assignments reflected the fact that UCS/NYPIRG and WBCA had been the original proponents of these issues. See "Contentions of Joint Intervenors Union of Concerned Scientists and New York Public Interest Research Group," dated December 2, 1981; "WBCA's Reply to Objections to its Filed Contentions," dated January 11, 1982.

are 2.1(a) and (d), dealing with filtered vented containments and separate containments, respectively, and 2.2(a) and (b), concerning brackish water and specific pressurized thermal shock responses, respectively. With respect to those intervenor contentions, the November 15 Order directed sponsoring intervenors to file testimony in support on December 23 and 30, and permitted Licensees and Staff to file responsive testimony on January 7.

On November 23, 1982, Mrs. Zipporah Fleisher, the representative of WBCA, informed the Licensees that although she would be presenting a single witness with regard to Contention 2.2(a), she would have no witnesses concerning 2.2(b), and did not consider that to be a contention for which she was responsible. On November 24, 1982, counsel for UCS informed the Licensees that UCS/NYPIRG would be presenting no witness on either of the remaining issues under Contention 2.1. In light of this unexpected development, and for the reasons further discussed below, the Licensees respectfully request that this Board dismiss Contentions 2.1(a) and (d) and Contention 2.2(b) as issues in controversy in this proceeding.

In assigning "lead intervenor" responsibility for these contentions to UCS/NYPIRG and WBCA, and setting the schedule for filing of testimony with regard to these issues, it was clearly contemplated that the intervenors would have an

affirmative case to present. The Licensees believed this as well, since during the discussions of the Scheduling Committee at the November 3 and 4 pre-hearing conference, the Licensees agreed to present testimony initially on Questions 1 and 5 in exchange for intervenors commitment to proceed with the initial filing of testimony on Question 2. Thus, the November 15 Order directed intervenors to file testimony first with regard to their proposed additional safety measures. As the Board implicitly recognized, this order of presentation was the only logical way to proceed given the fact that (1) the intervenors were the proponents of the issues, and (2) the Licensees should not be expected to address the risk implications of the additional safety features being proposed until the elements of such features were presented in the intervenors' direct case.\*

As noted, during the November 3-4, 1982 prehearing conference, and as the Scheduling Committee's proposed schedule reflected, both UCS/NYPPIRG and WBCA agreed to file their additional safety features testimony prior to the Licensees and

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\* See "Con Edison's Memorandum Respecting the Licensing Board's October 1, 1982, Order Reformulating Contentions," dated October 19, 1982 at pp. 11, 12, 17; "Power Authority's Response to Board's October 1, 1982 Order Reformulating Contentions," dated October 19, 1982 at p. 10.

NRC Staff. The Committee thus put into practice Commissioner Asselstine's explicit suggestion in the Commission's July 27 Order herein that "to more sharply focus on the issues" in this proceeding, the proponent of each contention should file testimony first and other parties be given ample time to prepare written rebuttal testimony.\*

As the Appeal Board recognized in Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331 (1973):

[W]here, as here, one of the [intervenors] contends that for a specific reason ... the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license. 6 AEC at 345 (emphasis in original).

Accord: Consolidated Edison Company of New York, Inc.

(Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 356 (fn. 142) (1974). While there is authority that intervenors can develop support for contentions through cross-examination in normal licensing cases, this is surely not the case here where the sponsors of certain safety features have belatedly elected not to pursue them. Licensees should not be put to the task

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\* Consolidated Edison Company of New York (Indian Point Unit 2); Power Authority of the State of New York (Indian Point, Unit 3) CLI-82-15, NRC, Docket Nos. 50-247, 50-286 (July 27, 1982), separate views of Commissioner Asselstine at 5, slip op.

of presenting a seminar on unfocused safety measures.\*

For the foregoing reasons, the Licensees respectfully move the Board for an order dismissing Contentions 2.1(a) and (d) and Contention 2.2(b) as issues in controversy in this proceeding.

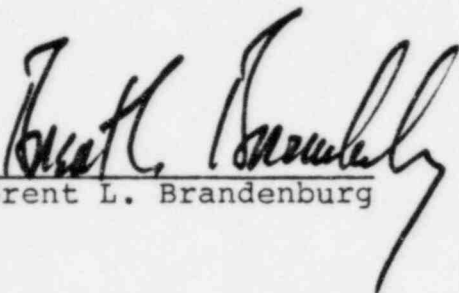
Since the current schedule requires depositions concerning Commission Question 2 to be taken by December 9, Licensees respectfully request that the Board within 24 hours of receipt of this motion initiate a conference call among representatives of the Licensees, the NRC Staff, and sponsoring intervenors UCS/NYPIRG and WBCA for the purpose of hearing responses and argument regarding the motion.\*\*

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\* For example, only after the details of the filtered vented containment system suggested by UCS/NYPIRG were set forth in UCS/NYPIRG's direct case could the Licensees address the potential for reduction in risk offered by the specific device being proposed. Without testimony from the sponsoring intervenor, however, the potential for risk reduction at the Indian Point facilities cannot be fruitfully explored.

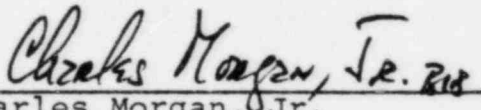
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\*\* Copies of this motion are being hand delivered to the Board, NRC Staff, UCS/NYPIRG and WBCA.

  
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Dated: December 1, 1982

UNITED STATES OF AMERICA  
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ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 1982, I caused a copy of the Licensees' Motion to Dismiss Certain Contentions to be hand-delivered to the following parties marked with an asterisk, and served by United States express mail, postage prepaid on the following:

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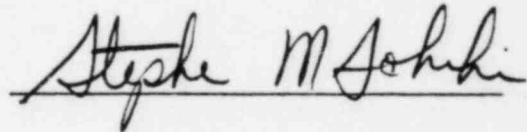
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