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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
OF LICENSING & SERVICE
BRANCH

ATOMIC SAFETY AND LICENSING BOARD

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

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In the Matter of)	
)	
CONSOLIDATED EDISON COMPANY OF NEW YORK,)	Docket Nos. 50-247-SP
INC. (Indian Point, Unit No. 2))	50-286-SP
)	
POWER AUTHORITY OF THE STATE OF NEW YORK)	October 19, 1982
(Indian Point, Unit No. 3))	
)	
-----)	

CON EDISON'S MEMORANDUM RESPECTING THE LICENSING BOARD'S
OCTOBER 1, 1982, ORDER REFORMULATING CONTENTIONS

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SUMMARY OF POSITION

Consolidated Edison Company of New York, Inc., licensee of Indian Point Units No. 2 ("Con Edison"), submits this memorandum in response to the Licensing Board's Memorandum and Order dated October 1, 1982 (the "October 1 order").

Con Edison concurs with those views stated in the October 1 order and accordingly raises no objection to the admission of New Contention 1.1, bases 2a) and 2b),* Board Questions 1.1, 1.2, 1.3, 1.4, and 2.2.1, the deferral of contentions under Commission Questions 3 and 4, the treatment of Commission Question 5, and the admission of Contentions 6.1 and 6.3. However, for the reasons set forth below, Con Edison objects to the admission of New Contention 1.1, bases 1a) and 1b), Contentions 2.1(a), 2.1(b), 2.1(c), 2.1(d), 2.2(a), and 2.2(b).

In response to the Board's request, the licensees are today separately submitting their proposed schedule for the continuation of this proceeding.

* But see footnote at p. 9, infra, regarding the wording of New Contention 1.1.

Before proceeding to a contention-by-contention analysis of the October 1 order, Con Edison wishes to emphasize what it believes is a common theme running through all of the contentions which it opposes, namely that these contentions are not supported by a statement of basis, set forth with reasonable specificity. The Commission's Rules of Practice, 10 CFR § 2.714, contain well-understood requirements for bases for contentions, which must be set forth with "reasonable specificity." There is an established body of case law arising from licensing proceedings construing the § 2.714 basis requirements in particular situations.

In earlier submissions to the Board, and in argument at the special prehearing conference on April 13 and 14, both the licensees and the Staff objected that several of the contentions proposed by intervenors lacked the specific factual bases required by the Rules. However, in its April 23, 1982, order, the Board found that § 2.714 basis requirements for contentions did not apply to contentions arising under the Commission's questions, and thereby excused intervenors from supplying the basis -- set forth with reasonable specificity -- that would otherwise be required. The Board's April 23 order, at 2, stated that:

"We have deliberately avoided specifying detailed factual bases in our formulation of contentions

because this is an investigative proceeding."*

However, the Commission has ruled in its July 27, 1982, Order that the requirements of § 2.714 are not to be dispensed with. The Commission stated, at 12, that:

"We had in mind that the Board would, first, assure itself that proffered contentions included a statement of bases and that both the contentions and bases were stated with reasonable specificity...."

Con Edison submits that the "reasonable specificity" basis requirements of § 2.714 are still missing for those contentions opposed in this memorandum, and the Board's earlier avoidance of specific bases continues. We believe that application of § 2.714 standards does not permit any of the contentions opposed in this memorandum to be admitted.**

* The Board essentially ruled that the Staff and licensees must await discovery in order to learn the basis for proffered contentions. See transcript of special prehearing conference at 605. However, now that the Commission has determined that § 2.714 requirements apply, specific factual bases for opposed contentions remain absent at least until such discovery is responded to, and there is accordingly no ground for admitting such contentions at this time.

** In several instances, the Board has apparently taken the position that Commission documents not originating with the sponsoring intervenor may satisfy the reasonable specificity basis requirement. However reasonable this position may be with respect to the two prong test (see discussion below), it is inappropriate to "borrow" a basis statement from a source unrelated to the intervenor proffering the contention, since the adopted basis may not reflect the intervenor's intent. The purpose for requiring an intervenor to state the basis for a contention is to force it to set forth exactly what it is driving at, and to put opposing parties on notice as to what will be claimed at the hearing. Adopting a wholly unrelated document as the basis for a contention obscures, rather than clarifies, what is meant by a contention.

Con Edison will now address separately each of the contentions set forth in the October 1 order for which admission is opposed.

COMMISSION QUESTION 1

What risk 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 described in (2) and (4) below? Although not requiring the preparation of an Environmental Impact Statement, the Commission intends that the review with respect to this question be conducted consistent with the guidance provided the Staff in the Statement of Interim Policy on "Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969;" 44 F.R. 40101 (June 13, 1980). (Footnote omitted.)

New Contention 1.1

The probabilities and consequences of accidents at Indian Point Units 2 and 3 combine to produce unacceptably high risks of health and property damage not only within the plume exposure EPZ but also beyond the plume exposure EPZ as far as the New York City metropolitan area.

The bases for the reformulated contention are:

- 1) The risk of injurious health effects to people

in the plume exposure EPZ from excessive exposure to radiation, as a result of reasonably probable accidents, will be exacerbated by an impeded evacuation because:

- a) Licensees have failed to demonstrate that proper emergency action levels (EALs) as required by 10 C.F.R. §50.47(b)(4) have been established which will allow prompt recognition of the range of possible accidents at Indian Point Units 2 and 3 and prompt and correct diagnoses of such accidents for the recommendation of appropriate protective actions (UCS/NYPIRG IB5); and
 - b) Licensees have failed to provide instrumentation in accordance with Reg. Guide 1.97, Rev. 2, thus compromising their ability to adequately monitor the course of accidents at Indian Point Units 2 and 3 (UCS/NYPIRG IB5);
- 2) An unacceptable risk of health and property damage as a result of reasonably probable accidents extends beyond the plume exposure EPZ to the New York City metropolitan area because:
- a) under certain meteorological conditions, life-threatening doses would occur in the New York City metropolitan area for a WASH-1400, PWR 2 type accident (UCS/NYPIRG IIID), and there are no established radiological emergency plans for this area which would adequately protect the public health and safety in such circumstances (UCS/NYPIRG IIID, FOE/Audubon I, basis 7); and
 - b) contamination of the Hudson River would affect beaches as far away as Coney Island and Rockaway Beach (See NUREG-0850, Vol. I, Preliminary Report, Appendix D) (UCS/NYPIRG IVA).

Con Edison objects to bases 1a), and 1b), set

forth by the Board to support New Contention 1.1. With regard to basis 1a), UCS/NYPIRG originally asserted in their contention IB5 that the licensees had not demonstrated that proper EALs had been established as mandated by 10 CFR §50.47(b)(4). This regulation requires that:

A standard emergency classification and action level scheme, the bases of which include facility system and effluent parameters, is in use by the nuclear facility licensee, and State and local response plans call for reliance on information provided by facility licensees for determinations of minimum initial offsite response measures.

Guidance for complying with the above requirements is provided in Appendix 1 to NUREG-0654. Because UCS/NYPIRG is the proponent of this contention, it was incumbent upon it to give some indication as to what it contended the licensees were failing to do, resulting in noncompliance with the regulation. As Con Edison emphasized in its December 31, 1981, and February 11, 1982, submissions regarding contentions, no such specification was made by UCS/NYPIRG. (See, Con Edison's Memorandum Respecting Contentions Proposed by Prospective Intervenors, December 31, 1982, at 81.)

UCS/NYPIRG instead claimed that the Licensees "have failed to demonstrate" compliance with § 50.47(b)(4). If this language were adequate to establish the basis required by 10 CFR § 2.714 for contentions in Commission proceedings, contentions could be accepted by licensing boards solely by the invocation of a regulation and an assertion that compli-

ance "has not been demonstrated." Such a standard for admissibility of contentions -- even in a regular licensing proceeding, much less under the more rigorous standards applicable here -- would relieve an intervenor of any burden whatever to specify inadequacies in the plants or procedures. Having initiated the process by which we are now considering the risk of these facilities, UCS/NYPIRG should have shouldered the burden of specifying in some detail how the licensees are not in compliance with § 50.47(b)(4). Indeed, UCS/NYPIRG has never even alleged non-compliance, confining itself to requesting a demonstration that compliance has been achieved. Having failed to do so, the contention should not be admitted.

Basis 1(b) is also insufficient and should be stricken. In the January 29, 1982 "UCS/NYPIRG Response to Objections to UCS/NYPIRG Contentions Filed by NRC Staff, Power Authority of the State of New York and Con Edison" (January 29 Response), UCS/NYPIRG abandoned this portion of original contention IB5, as is apparent from a review of its amended contention IB5 (January 29 Response, p. 55). Con Edison pointed this out in its February 11, 1982, "Reply Memorandum Respecting Contentions Proposed By Respective Intervenors" (at 38-39), and UCS/NYPIRG has never since pursued the matter. There is

therefore no basis whatsoever for this Board now to admit a contention relating to compliance with Regulatory Guide 1.97. This is particularly so in view of the fact that compliance with regulatory guides is not legally required,* and because UCS/NYPIRG never specified, even before abandoning this allegation, what specific provisions of the regulatory guide were claimed not to be complied with. Because this contention was abandoned, and also because it never contained a basis sufficient to comply with the requirements of

* Every NRC Regulatory Guide bears the following notation:

Regulatory Guides are issued to describe and make available to the public methods acceptable to the NRC staff of implementing specific parts of the Commission's regulations, to delineate techniques used by the staff in evaluating specific problems or postulated accidents, or to provide guidance to applicants. Regulatory Guides are not substitutes for regulations, and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.

10 C.F.R. § 2.714, it should not be admitted by the Board.*

* While not objecting to the substance of the remainder of New Contention 1.1, Con Edison does object to the Board's use of the term "unacceptably high risk" in the main body of the contention. This language appeared in the original statement of Contention 1.1 in the Board's April 9, 1982, order initially formulating contentions (p. 4). At the April 13-14 special prehearing conference, the licensees argued that the Commission had charged the Board in asking Commission Question 1 with determining only the quantitative risk associated with operation of the Indian Point facilities, and had reserved for itself the responsibility for making a judgment as to whether that risk was acceptable or unacceptable. See, Tr. at 561 et seq. In response, the Board deleted the phrase "unacceptably high risks" from its reformulation of Contention 1.1 in its April 23 order (p. 3). However, it has now reappeared in the most recent formulation of this contention, perhaps inadvertently. Con Edison believes that for the reasons previously stated and accepted by the Board, it should strike the phrase "unacceptably high risks" from any contention arising under Commission Question 1. The same rationale applies to basis 2 of Contention 1.1, where the phrase "unacceptable risk" appears.

Finally, Con Edison objects to the use of the term "reasonably probable accidents" in both bases 1 and 2 for New Contention 1.1. That description is so vague that it is impossible for Con Edison to know what it must address in its testimony. The Board has been asked by the Commission to quantify the risk associated with the Indian Point plants. Unless the vague and qualitative term "reasonably probable" is redefined in terms that all participants in the proceeding can understand, the testimony, later proposed findings of fact by the parties, and the Board's recommendations to the Commission may well be rendered meaningless.

COMMISSION QUESTION 2

What improvements in the level of safety will result from measures required or referenced in the Director's Order to the licensee, dated February 11, 1980? (A contention by a party that one or more specific safety measures, in addition to those identified or referenced by the Director, should be required as a condition of operation would be within the scope of this inquiry if, according to the Licensing Board, admission of the contentions seems 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.)

The great majority of Con Edison's objections to proposed reformulated contentions arise under that portion of Commission Question 2 relating to proposed "further safety measures." While other areas of this proceeding tend by their nature to be self-limiting -- such as a review of present plant risk using probabilistic tools, economics, and compliance with existing regulations -- proposals of safety measures beyond Commission regulations are confined only by the limits of human imagination. Since almost any such measure can be justified as having at least some potential for reducing risk, the Commission imposed several admissibility requirements upon further safety measure contentions. These requirements are discussed separately.

- A.) Each proposed further safety measure must be specific.

One of the difficulties with the further safety measures contentions admitted under the Board's previous order was that they were not specific. The licensees pointed this out in their May 10, 1982, petition to the Commission for directed certification. The Commission expressly provided in its January 8 and September 18, 1981, Orders that contentions admissible under Commission Question 2 were only to be those proposing "one or more specific safety measures." By necessary implication, further safety measures proposals which are non-specific are not entitled to be admitted.

The distinction is more than academic, since non-specific proposals cannot be addressed by the parties in the probabilistic framework which the Commission has emphasized is to be used as the yardstick of risk in this proceeding. Moreover, without knowing exactly what measures are being proposed, Con Edison will not be on notice of the ways in which such measures will be claimed to reduce risk and will be unable to formulate responsive testimony.* Since

* For example, under the licensees' proposed schedule for the continuation of this proceeding, intervenors would not file proposed special features testimony until January 21, yet licensees would be required to file responsive testimony just two weeks later -- on February 4.

contentions which are not specific as to the item being proposed are of no use or value in this proceeding, a fortiori contentions which merely complain of some supposed problem but offer no corrective measure at all -- specific or non-specific -- cannot possibly be entitled to admission.

B.) The Board must make a threshold finding for each proposed further safety measure contention that its admission is likely to be important to resolving whether there exists a significant risk to the public.

The first prong of the so-called two prong test* was developed by the Commission in its September 18, 1981, Order for the express purpose of insuring at the outset of the hearing that each proposed further safety measure contention was likely to be important to resolving whether Indian Point poses a significant risk to public health and safety. This standard, together with the second prong of the test discussed

* The Commission set forth the two prong test in its September 18 Order at 4 as follows:

"A contention by a party that one or more specific safety measures, in addition to those identified or referenced by the Director, should be required as a condition of operation would be within the scope of this inquiry if, according to the Licensing Board, admission of the contention seems 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."

below, requires more than the bases and factual underpinnings generally required in adjudicatory proceedings, and takes into account the Commission's intent that there be "some special considerations regarding admission of contentions under question 2 . . . [i]n addition to assuring compliance with 10 CFR § 2.714 before admitting such contentions." (July 27 Order at 13.)

Con Edison respectfully submits that a subtle change has been made by the Board in applying the Commission's two prong test which if pursued would in practice defeat the Commission's purpose and intent. In its October 1 order the Board suggested that the sponsors of further safety measure contentions would satisfy the first prong of the test by merely showing that "there may exist a significant risk to public health and safety." (October 1 order at 13, emphasis supplied.)

However, there is a great deal of difference between finding that a particular inquiry seems likely to be important to a determination of significant risk, on the one hand, and saying that there may exist a significant risk, on the other. The Commission has unmistakeably placed upon the sponsors of these contentions the obligation of preliminarily persuading the Board that the inquiry which it proposes is likely to be important to a risk determination, not merely that significant risk

"may" exist. A "may" standard would impermissibly substitute speculation for persuasion, mere possibilities for likelihood.

The intervenors must do more than simply "establish that there is an 'issue' to be presented," as required by 10 CFR § 2.714. In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB 107, 6 AEC 188, 192 (1973). They must show that their Question 2 contentions "seem[] likely to be important" to the resolution of the Commission's risk inquiry.

C.) The Board must make a threshold finding that each proposed further safety measure would likely result in a reduction in risk, and that this reduction would be significant.

The second prong of the two-prong test for further safety measure contentions requires the sponsoring intervenor to demonstrate to the Board a likelihood of significant risk reduction as a result of the measure being proposed. As with the first prong of the test, the Board is to make such threshold findings "before admitting [further safety measure] contentions," July 27 Order at 13.

As with the first prong, in its October 1 order the Board suggests that some substantially lesser showing by a sponsoring intervenor may suffice to meet the test. While the Commission required a showing of likelihood of significant risk reduction, the Board has preliminarily adopted as a

standard whether any given proposed measure "could result in a significant reduction in that risk." (October 1 order at 13, emphasis supplied.)

In addition to a preliminary showing to the Board of a likelihood of risk reduction, the Commission carefully required the sponsors of further safety measures contentions to convince the Board that the risk reduction due to that measure was likely to be significant. Thus, whatever the risk of the Indian Point plants may prove to be at the conclusion of the Question 1 phase of the case, at this stage the Commission has directed the sponsoring intervenors of a particular measure to preliminarily persuade the Board that the increment of risk reduction due to its proposed measure is likely to be substantial or significant.

With respect to at least one proposed further safety measure, however, the Board has implied that any reduction in risk would satisfy the second prong. At p. 18 of the October 1 order, the Board preliminarily indicated that the second prong was satisfied because the reduced risk increment of one particular measure "is clearly not zero." But "greater than zero" is not "significant," and even the

subconscious application of a greater than zero standard* for the admission of further safety measures contentions is clearly not what the Commission intended, and would defeat the entire purpose of the Commission's Orders. An endless number of putative further safety measures can be presumed to have at least some tiny ("greater than zero") safety benefit under certain circumstances, but a much lesser number can be preliminarily justified as likely to be significant -- and thus entitled to admission under Commission standards.

- D.) The Board's threshold findings must be based on written materials provided by the sponsor of the proposed further safety measure.

The Commission's July 27 Order provided that in making its threshold two prong test findings for each proposed further safety measure, the Board should make its findings "based on written material provided by the sponsor of the the proposed measure." (Order at 13.) In its October 1 order

* Throughout this proceeding, intervenors have attempted to meet the Commission's probability and consequence requirements by saying that the probability of serious accidents is "greater than zero." See, e.g., UCS/NYPIRG Response to Objections to UCS/NYPIRG Contentions Filed by NRC Staff, Power Authority of the State of New York and Con Edison, dated January 29, 1982, at 2-4. This was rejected by the Commission in its July 27, 1982 Order, and a greater than zero standard should similarly be rejected by the Board here.

the Board instead conducted a literature search itself, in the interests of time.

Con Edison agrees that the Board has chosen a proper course insofar as evaluation of the two prong test is concerned.* However, since the Board has determined to conduct its own search for materials relevant to two prong test issues, rather than rely upon written material provided by the sponsor, Con Edison submits that the Board should at least conduct a balanced search for materials which would both tend to demonstrate satisfaction of the test's significant risk standards, as well as other materials which may suggest that there is no such risk. In this sense Con Edison believes that the Commission envisioned a procedure not dissimilar to that followed in connection with preliminary injunction or motion to suppress phases of court cases, where triers of fact consider both sides on a particular threshold issue before making the same sort of preliminary rulings which the Commission has asked the

* Con Edison does submit, however, that it is inappropriate for documents totally unrelated to a particular contention to be considered in satisfaction of the § 2.714 basis requirement. Simply put, the filtered vent proposed by the intervenor here may be -- and probably is -- entirely different from that which the author of a NUREG document had in mind. Licensees would be severely prejudiced at the hearings with the basis requirement unmet, and consequently unable to anticipate just what sort of device to evaluate probabilistically. See discussion at pp. 11-12, above.

Board to make in connection with the two prong test.

For the reasons discussed below with respect to each such proposed further safety measure, the written materials cited as support for satisfaction of the two prong test in fact fall far short of meeting its requirements. However, there are numerous other documents not referenced by the Board in its October 1 order which not only fail to support test standards but indeed suggest that various of the proposed features do not satisfy the two prong test. One such important document, relevant to the first prong, was referred to by the Commission in its September 17, 1982 Order, when it said:

"In 1980 the NRC staff did a preliminary risk analysis for the Indian Point plants. The staff concluded that, compared with other U.S. operating nuclear power plants, the consequences of an accident at Indian Point would be about an order of magnitude greater but that the probability of an accident was about an order of magnitude less. Thus the risks were comparable." (Order at 3.)

Another document bearing upon whether or not the two prong test may be satisfied by the further safety features suggested here is "Proposed Commission Policy Statement on Severe Accidents and Related Views on Nuclear Reactor Regulation," SECY-82-1A (July 16, 1982). In that proposed statement, which is currently under review by the Commission, the Staff concludes that:

"[L]arge, dry containments may be sufficiently capable of mitigating the consequences of a wide spectrum of core-melt accidents; hence, further

requirements are unnecessary or, at most, limited improvements of their existing capability may be required." (Id. at 22).

In the absence of materials from sponsoring intervenors in support of the admissibility of these contentions under the two prong test, it can scarcely be said that a likelihood of either significant risk or the promise of significant reduction in that risk is supported by the literature on this topic.

Contention 2.1(a) and (d)

The following additional specific safety measures should be required as conditions of operation:

- (a) A filtered vented containment system for each unit must be installed.
- (d) A separate containment structure must be provided into which excess pressure from accidents and transients can be relieved without necessitating releases to the environment, thereby reducing the risk of containment failure by overpressurization.

These contentions are addressed together because both suggest an additional safety measure to deal with the alleged risk of overpressurization of containment, and because the Board has used the same rationale for making its threshold findings with regard to 2.1(d) (separate containment) as it has used in finding that the two prong test is satisfied for 2.1(a) (filtered vent).*

In making its findings with regard to the first prong of the two prong test, the Board addresses both filtered vents and separate containment as follows:

The fact that NUREG-0850 rates one mode of overpressurization as a "high concern" item (NUREG-0850, p. 3-99) in combination with the fact that the Director may consider above-design accident pressures to be reasonably probable convinces us that a threshold finding that a significant risk to public health and safety may exist is warranted (emphasis supplied).**

* See October 1 order at 19.

** Id. at 16.

This application of the two prong test varies from Commission intent in two significant ways. First, as discussed at pp. 12-14 above, the Commission clearly has required this Board to find, prior to admitting contentions involving additional safety measures, that their admission seems likely to be important to a determination of significant risk. Instead, the Board has substituted its own less stringent standard, i.e. that a significant risk may exist. The basis for even this lesser finding is the highly speculative reasoning that the Director may consider overpressurization to be reasonably probable.*

The fact is that neither document cited by the Board -- neither the Director's Decision nor NUREG 0850 -- support the position that it is likely a significant risk exists notwithstanding the measures mandated by the Director's Order. The Director specifically concluded that the modifications made to the Indian Point facilities negated UCS's argument that they were "relics of the past." The Director also found that "[b]oth plants have been significantly modified to meet NRC safety and security requirements."** He further found that the interim measures identified in the confirmatory order "provid[ed] additional assurance of the safe operation of these facilities."***

* As discussed above in regard to New Contention 1.1 (p. 9), the term "reasonably probable" is so vague that it could not be addressed with any precision.

** 11 NRC at 369.

*** Id. at 370.

On the strength of the Director's rulings, no plant shutdown was ordered. Obviously, had the Director determined that the lack of a filtered vent or a separate containment was likely to present a significant risk to public health and safety, his responsibility would have been to order the facilities to shut down.*

Similarly, NUREG-0850 fails to supply the necessary underpinning for a finding that admission of contentions proposing schemes for ameliorating overpressurization seem likely to be important to a determination of significant risk. That document does not assess the level of risk presented by operation of the Indian Point facilities. It simply reports the results of a limited inquiry into the major contributors to the existing level of risk, without characterizing that risk as significant to public health and safety. Thus, despite the fact that the authors of the NUREG were concerned with late overpressurization of the containment as a contributor to risk, the significance or level of that risk was neither discussed or identified.** It is therefore impossible to make a determination that a significant risk exists from overpressurization of containment, notwithstanding the measures ordered by the Director, by reference to documents which do not even discuss

* The determination of whether a significant residual risk remained despite all the measures already taken was left to the NRC Task Force.

** See NUREG-0850, p. 1-2.

the level of that risk.

The second prong of the two prong test requires the Board to find, as a threshold matter, that each proposed further safety measure would likely result in a significant reduction in risk. With regard to contention 2.1(a) relating to a filtered vented containment system, the Board's conclusion is that the basis originally supplied by UCS/NYPIRG in their Contention IIIA "provides specific and sufficient documentation for us to make a threshold finding that a filtered vented containment system could result in a significant reduction in that risk." (Emphasis supplied).* Once again, the Board has adopted a much less stringent standard than that mandated by the Commission. It has substituted "could reduce" the risk for "likely to reduce" the risk.

More importantly, UCS/NYPIRG Contention IIIA, on which the Board relies, fails even to support a conclusion that filtered vents could significantly reduce overpressurization risk. UCS/NYPIRG's sole comment on filtered vented containments is that they are "capable of being constructed at Indian Point Units 2 and 3 to permit controlled venting of the containment buildings during accidents to prevent or mitigate overpressurization of the containments."** Clearly this basis for UCS/NYPIRG

* October 1 order at pp. 16-17.

** "Contentions of Joint Intervenors Union of Concerned Scientists and New York Public Interest Research Group," December 2, 1981 at pp. 41-42.

Contention IIIA addresses only the feasibility of installation of such systems ("capable of being constructed"), and does not even offer a statement, let alone a basis or support for it, that implementation of such a proposed measure at Indian Point is likely to reduce significantly any risk of overpressurization at these facilities.

A document which, unlike UCS/NYPPIRG's contention, does address the likely benefits of a filtered vented containment system is the "Proposed Commission Policy Statement on Severe Accidents" referred to above. That document states that:

"Some recent information indicates [filtered vented containment] systems may not be cost-effective for large, dry containments while other studies indicate these may be of value for some pressure suppression containments such as the MK III design of General Electric." (Id. at 24.)

Thus the available NRC available literature on such devices fails to assist in satisfying the two prong test.

With regard to Contention 2.1(d), the Board's threshold finding is that a separate containment structure "could result in a significant reduction" in overpressurization risk because "it would reduce containment pressure without allowing the escape of radioactive material."* Once again, the Board has returned to the same less stringent standard which was rejected by the Commission in its July 27, 1982 Order, and the finding

* October 1 order at 20.

should be reconsidered on that basis alone. Further, in making its finding, the Board has simply stated what a separate containment is designed to do (reduce containment pressure without allowing a radioactive release) rather than explaining why, in the Board's view, there has been a showing that a significant reduction in risk would likely result for Indian Point by employing that design feature.* We submit that there is no basis for making such a determination.

For all of the above reasons, Con Edison believes that the Board has misapplied the standards required by the Commission under the two prong test in making its findings with respect to Contentions 2.1(a) and (d), and submits that the Board's discussion does not support the requisite findings which are a condition precedent to the acceptance of these proposed contentions.

* Indeed, the Board has simply restated the contention in explaining the alleged reduction in risk.

Contention 2.1(b)

License conditions must be imposed to prohibit power operations with less than a fully operable complement of safety-grade and/or safety-related equipment.

This Board's findings with regard to proposed Contention 2.1(b) represent a serious departure from the application of the two prong test as envisaged by the Commission. As is discussed above, the Commission added the two prong test because it wished the Board only to consider specific proposals which were supported by specific reasoning. The statements made by the Board at pp. 17-18 simply do not support the findings made. The Board first finds that:

"The basis provided for this subpart is that operation during periods of time of inoperable safety-grade or safety-related equipment reduces the margin of safety for Indian Point Units 2 and 3 reactors, and thus increases the probability of the accident which the safety equipment in question was meant to counter (UCS/NYPIRG IIIA)."

The problem presented by the above "basis" is that it does nothing more than state the obvious. Of course some margin of safety is reduced when redundancy in safety systems is lost. That is precisely why the NRC has already addressed the loss of redundancy by appending to the Indian Point operating licenses (and those of all other operating plants) detailed "Limiting Conditions for Operation," which set forth the requirements for operation and shutdown of the units when redundant safety-related equipment is not operable.*

* See, e.g., Section 3 of the Indian Point Unit 2 Technical Specifications.

Since the NRC recognized the importance of maintaining the margin of safety referred to in the above-quoted statement by establishing limiting conditions for operation as part of the operating license, the general statement made by the Board lacks the specificity required for a valid contention. Present license conditions clearly prohibit plant operation with less than a fully operable complement of safety-grade equipment sufficient to avoid posing a significant risk. The Board has failed to specify how the limiting conditions for operations already required by the NRC are likely not to adequately protect the public health and safety and, more specifically, why in spite of the actions required in the Director's Order of February 11, 1980, there exists a significant risk.

The Board attempts to answer the latter question with the following rationale (October 1, order at 18):

"The proposed improvement is not an improvement imposed by the Director's Order, but the Director's Order did consider limiting the time of operation with one specific safety-related system disabled (11 NRC 351, 362). Therefore, we have applied the two-pronged test and have made the threshold finding that the proposed safety measure meets the standard. It is clear to the Board that lacking the proposed safety measure the plants may pose a significant residual risk to public health and safety because the probability of the failure of redundant systems increases as the number of such systems in operation decreases."

Nothing contained in this portion of the Board's order supports its finding with regard to the first portion of the

two prong test. The Director not only considered a limitation on the time one auxiliary feedwater pump could be inoperable, but, as the Director's Decision clearly indicates, Con Edison had already submitted an amendment to the technical specifications to incorporate that measure prior to issuance of the decision. Thus, the limiting conditions for operation were made even more conservative by incorporating the AFW pump limitation. Therefore, it is baffling how the Board could conclude that a significant risk may be presented by a lack of redundancy notwithstanding the Director's Order, in light of the fact that the limiting conditions for operation explicitly address lack of redundancy and require shutdown of the plant under specified conditions.

Finally, the Board finds, with regard to the second prong of the two prong test:

"The extent and degree of significance of this risk should be made apparent at the evidentiary hearing, but it is clearly not zero. It follows that a requirement for all systems to be operable could significantly reduce the risk."

The Board has thus concluded that because the risk is "clearly not zero," it could be significant when a "full complement" of safety grade equipment is not operable. First, as discussed at p. 15-16, above, a "clearly not zero" test employs a standard which would justify admission of a limitless range of additional safety measures. Common sense dictates that any accident scenario that can be imagined has in theory a probability greater than zero.

Second, it scarcely follows that because a risk is more than zero, it is likely to be significant. Yet that is the leap in reasoning that the Board has made. There is simply no basis for concluding that there is likely to be significant risk in light of the protection to the public associated with a faithful application of existing limiting conditions for operation contained in the Indian Point licenses. It follows that no basis exists for postulating a significant reduction in a risk which is itself not significant.

However, the Commission has required a threshold finding of more than either "greater than zero" or "could." The Commission's second prong requires the sponsoring intervenor to demonstrate to the Board a likelihood of significant risk reduction for each measure being proposed. What the Board appears to have concluded is that because the risk resulting from a lack of redundancy is "clearly not zero", it could possibly be significant. This clearly does not comply with the Commission's direction.

There is yet another reason why this contention should be rejected by the Board, independent of the two prong test. The Commission instructed the Board in the July 27 Order that:

"[T]he Board is expected to screen out those issues which, in its judgment, would make only a minor contribution to the Commission's goal, incommensurate with the time and resources required to address them." (July 27 Order at 13).

As discussed above, the NRC has already issued technical specifications which contain limiting conditions for operation requiring shutdown of the facility when certain safety-related equipment is not operable. Thus a contention such as 2.1(b) would impose upon intervenors the task of preparing a probabilistic assessment of every piece of safety-related equipment to determine the increment in risk reduction achieved by implementing full redundant availability beyond that already afforded by limiting conditions for operation. Such an examination, such as attempting quantitatively to determine how much safer it might be to have four pumps available rather than three when only two are actually required to run the plant, could consume months of hearing time and can be of no conceivable benefit given the protection already provided by existing technical specifications.

For the reasons discussed above, proposed Contention 2.1(b) should not be admitted by the Board in this proceeding.

Contention 2.1(c)

A "core catcher" must be installed at each unit to provide additional protective action time in the event of a "melt-through" accident in which the reactor pressure vessel is breached by molten fuel.

Con Edison objects to the admission of Contention 2.1(c). This contention also fails to meet the two-prong test for proposed additional safety measures at Indian Point. No attempt has been made to satisfy the first prong of the test, since neither the referenced intervenor contention (UCS/NYPIRG III A) nor the discussion of the contention in the October 1 order reveals how the contention seems likely to be important to resolving whether the Indian Point plants in their current state (i.e., after the adoption of the measures called for in the Director's Order) "pose a significant threat to public health and safety." In the September 18 Order the Commission established such a showing as a necessary precondition to the consideration of any proposed further safety measures.

Contention 2.1(c) is a verbatim restatement of subparagraph (g) of original UCS/NYPIRG contention IIIA. The basis for contention 2.1(c) is, in turn, a word-for-word restatement of the basis offered by UCS/NYPIRG in its original submittal. (See UCS/NYPIRG contentions at 41.) The basis for the contention simply amounts to an assertion of what a core catcher may do if it works properly, i.e., delay or prevent

a reactor cavity basemat melt-through. Something more than a conclusory and unsubstantiated reference to the intended function of a safety device is required to meet the Commission's two prong test. The offered basis fails to meet even the Commission's normal basis requirements for contentions. No determination has been made by the Board that the plants in their current condition are likely to pose a significant risk to the public. Speculation that they "may" do so is not in accordance with the two prong test as formulated by the Commission.

The October 1 order's discussion of contention 2.1(c) also refers to the Director's February 11, 1980 order (October 1 order at 18). While acknowledging that the Director's Order does not address the core catcher concept, the October 1 order cites the Director's Order for the proposition that the Director recognized "that additional safety measures are appropriate where the population density is high." This conclusion proves too much. It would support the admission of any further safety measure contentions. It cannot in any way support the admission of a contention dealing with a core catcher since the Commission's Orders in this proceeding establish that the Commission was aware of the high population density around Indian Point, was concerned that this fact may justify the adoption of additional specific safety measures, and directed that the Board to utilize the two prong test to determine which of the endless list of

possible safety measures appear to be worth pursuing.

Regarding the second prong, what is missing is any link between a core catcher and a delayed release of radioactivity related to evacuation. The October 1 order, at 19, refers to the high population density as a factor which supports the admission of this contention since this fact "may lengthen evacuation time for a serious accident." Whatever relevance high population density may have to the application of the two prong test, it is clearly irrelevant to the admission of a contention dealing with a core catcher. NUREG-0850, a document which the Board has relied upon in admitting contentions, estimates that basemat penetration with a dry cavity and without a core catcher would take three to four days, and with a wet cavity would likely be even longer. (See NUREG-0350 at 3-98 and 5-3). More importantly, however, no one has even suggested that a postulated reactor cavity basemat melt-through could result in an airborne release, or that a possible ground release could occur within a time period related in any way to promptness of evacuation. Given these Staff conclusions and the absence of any materials from UCS/NYPPIRG to meet the second prong, possible delays in evacuation due to population density cannot provide support for the admission of a core catcher contention under the two prong test.

Contention 2.2(a)

The cooling system at the plants should be changed so that it no longer uses brackish Hudson River water. This change is needed to combat safety-related corrosion problems.

Con Edison objects to the admission of this contention. It does not even propose any specific safety measures, lacks adequate specificity and factual bases, and does not meet the two prong test.

Although the WBCA filing cited in support of this contention faults the use of brackish Hudson River water, neither it nor the Board's Order refers to any proposed "specific safety measures," which are the only items entitled to be evaluated by the two prong test for admission under Question 2. Given this, it would in practice be impossible to determine what decrease in risk might be achieved by the adoption of this contention, which poses a problem but no solution, specific or otherwise.

In addition, the contention fails to meet the Commission's normal standards for specificity and factual basis. Con Edison is simply left guessing as to what proposed changes it should be prepared to discuss in order to deal with unspecified "safety corrosion problems."

Neither the WBCA contention nor Contention 2.2(a) satisfies the two prong test. No estimate has been made by WBCA of the current level of risk posed by the Indian Point

plants, how much of this risk may be due to the use of brackish water, or how unspecified measures to eliminate the use of this water could "significantly" reduce risk.

The WBCA contention cited by the Board relied upon the October 1980 water leakage event at Indian Point Unit 2. This event cannot serve as the the basis for the admission of a contention seeking the elimination of the current cooling system as a "specific safety measure." The NRC official who headed the Staff's investigation of the October 1980 leakage event testified before a Congressional committee that it posed "no substantial hazard to the health and safety of the public at any time during the event."* This conclusion was echoed by the testimony of Victor Stello, then-Director of the Commission's Office of Inspection and Enforcement ("I & E"), and by the Committee itself.**

Moreover, reliance on the leakage event as a basis for admission of a contention has already been rejected by the Board in the October 1 order at 23-24. The Board there rejected former contention 2.2(d), which also relied upon the October 1980

* Prepared Testimony of Thomas T. Martin, Before the Subcommittee on Environment, Energy and Natural Resources of the Committee on Government Operations, March 5, 1981, at 2.

** "Inspecting Operating Nuclear Power Plants; Shortcomings in the Nuclear Regulatory Commission Program"; House Committee on Government Operations, House Report 97-144, at 31-32.

incident, because "the investigation of events such as the one cited is the responsibility of the Office of Inspection and Enforcement. That office thoroughly investigated the event cited, and is uniquely qualified to investigate and act on such events in the future." The same reasoning requires rejection of the October event as grounds for admitting Contention 2.2(a). The leakage event and the changes adopted to avoid a recurrence of similar events have long since been investigated and evaluated by I & E.

In addition, the Commission concluded in the course of approving license amendments for the Indian Point units which eliminated the requirements for cooling towers that "the NRC must defer to the final decision of the [Environmental Protection Agency] with respect to the type of cooling system to be employed by nuclear power plants."* Thus, the Commission approved the deletion of NRC license requirements for a closed cycle cooling system at Indian Point on the grounds that since the EPA had approved the continued use of the current system utilizing Hudson River water, the NRC was legally without authority to require the adoption of a closed system.

* May 12, 1981, Order (CLI-81-7) at 2.

This action of the Commission clearly negates WBCA's unsupported assertions about risk associated with the use of Hudson River water for cooling purposes at Indian Point, and constitutes dispositive grounds for finding that the "significant risk" thresholds of the two prong test are not met.

The October 1 order also refers to pitting in steam generator tubes at Indian Point 3. This fact does not supply a basis for the admission of Contention 2.2(a), since, as the order acknowledges at 21, the document the Board refers to (NUREG-0886) describes the cause of the pitting as "still under investigation," and does not cite the use of Hudson River water as a cause.

Regarding Indian Point Unit 3, to the extent that this contention suggests an examination of the circumstances of the turbine blade malfunction, it should be struck. This was a one-time event, and it and its aftermath have been and continue to be investigated. Under normal operating conditions, no path exists for Hudson River water to enter the secondary system. Should a small leakage path develop, no immediate safety concerns would arise.

Contention 2.2(b)

The residual risk posed by the Indian Point plants and discussed under Board Question 1.4 above is great enough to justify remedial measures to prevent pressure vessel damage by pressurized thermal shock. The specific measures needed include one or more of the following:

- (i) pressure vessel replacement;
- (ii) in situ annealing of the pressure vessel;
- (iii) revision of technical specifications to reduce the probability of pressurized thermal shock;
- (iv) use of preheated water for safety injection.

Con Edison objects to the admission of contention 2.2(b).

The basis offered by the Board for its consideration of this new contention is the same as that for Board Question 1.4, namely the statement in the "Letter Report on Review and Evaluation of the Indian Point Probabilistic Safety Study" by Sandia National Laboratories (the "Sandia Letter Report") that thermal shock had not been considered in the Indian Point Probabilistic Safety Study. As noted at p. 1, Con Edison does not object to the inclusion of Board Question 1.4. A consideration of the potential for pressurized thermal shock is a proper area to be addressed under Question 1 since this question seeks to determine the overall risk to the public from the two plants. However, no showing has been made to the Board under the two prong test to justify the consideration of the further safety measures proposed under Commission Contention 2.2(b).

Probabilistic risk assessment, the method to be used to address Commission Question 1, quite properly considers the possible occurrence of very unlikely events. In Commission Question 2, on the other hand, the Commission has asked the Board to make "threshold findings" about significant risk posed by the plants, and that each proposed further safety measure would significantly reduce that risk. Thus a particular potential phenomenon could be a proper subject for review under Question 1, while a list of "fixes" to deal with such a phenomenon should not be considered under Question 2 since they do not meet the two prong test. This is precisely the case with the measures listed under Contention 2.2(b). The Sandia Letter Report did not find pressurized thermal shock to be a significant risk at either Indian Point plant; nor did it endorse any of the measures listed in Contention 2.2(b). Furthermore, in Contention 2.2(b) the Board seeks to treat the pressurized thermal shock issue deterministically. However, in its discussion of Board Question 1.4, which also pertains to thermal shock, the Board states that "[t]he Commission has directed us to give close attention to probabilistic evaluation of residual risks." (October 1 order at 11 [emphasis in original].) Thus, proposed Contention 2.2(b) would stray from the Board's mandate to "screen out those contentions which . . . [do] not seem likely to be important in answering [the Commission's] questions." (July 27 order at 12.) The Board's stated rationale for including new Contention 2.2(b) is as follows:

"The problem addressed by Board Question 1.4 has not been protected against by provisions in the Director's order, and the improvements proposed by subpart 2.2(b) were not imposed by the Director. Therefore, sufficient documentation exists for the threshold finding that the possibility of over-pressurization of an embrittled pressure vessel at Indian Point may present a significant risk to public health and safety, notwithstanding the Director's measures, and that one or more of the measures proposed in subpart 2.2(b) could result in a significant reduction in the risk to public health and safety." (October 1 order at 22.)

The above statement does not properly apply to the two-prong test. The fact that the Director did not consider a particular problem, and thus did not prepare a list of measures to address it, cannot possibly satisfy the requirement of the Commission's two prong test. The Director's Orders to the licensees were the result of an in-depth review of the Indian Point plants by the Staff of the Commission in response to the original UCS petition. As a result of this review, the Director made a decision as to what were potential areas of concern at both of the plants and what changes should be made to address these areas. It cannot seriously be suggested that because something was not raised by the Director it is therefore likely to be important to a determination of significant risk, or likely to reduce risk significantly if implemented. Thus, to conclude that a particular measure meets the Commission's threshold

because it relates to something outside the Director's Order would ignore two prong test, and would allow consideration of a myriad of issues which the Director in effect found to be of little or no concern.

Regarding thermal shock as a risk issue, the Board recognizes that the "Staff is addressing this problem generically and considers it unnecessary to examine it for Indian Point in particular. . . . [The Board is] also aware that analysis of eight other plants has suggested that, for the plants reviewed, this event would not pose a hazard for some years." (Id., emphasis added.)* Thus, it is unlikely that a factual basis exists sufficient for the admission of this contention under the traditional test of 10 CFR § 2.714(b), much less under the further two prong test required for its acceptance in this proceeding.

* Since the Board relies upon documents which have appeared since the intervenors submitted their original contentions, Con Edison submits that it is appropriate for the Board to rely upon the analysis which found that thermal shock at Indian Point 3 "would not pose a hazard for some years." As noted above, Con Edison believes that this analysis refutes any suggestion that measures to deal with pressurized thermal shock can meet the two prong test.

On October 8, 1982, the staff of the NRC discussed the question of pressurized thermal shock with the Advisory Committee on Reactor Safeguards. The purpose of the meeting was to present the Staff's suggested regulatory approach to pressurized thermal shock. The Staff's conclusion was that no immediate change was required at any nuclear plant to account for the potential of pressurized thermal shock, and that the first plant would meet Staff's proposed screening criterion for pressurized thermal shock only in "the late 1987-88 timeframe."* The analysis also concluded that the proposed criterion would be exceeded at Indian Point 3 in December 2002. Indian Point 2 was not listed at all as a plant of concern to Staff.**

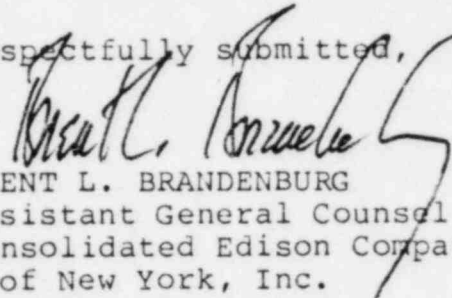
We are not suggesting that the final word has been written on pressurized thermal shock. Nor are we endorsing Staff's approach on this question. Rather, we are suggesting that Staff analysis of the potential for this phenomenon shows that it is not a matter of concern in the foreseeable future at either of the Indian Point units. The Board relies solely on the Sandia Letter Report for the inclusion of New Contention 2.2(b), but nothing in the report satisfies either part of the

* Transcript of 270th General Meeting of the Advisory Committee Reactor Safeguards, October 8, 1982 at 331-32.

** Slide 14, Attached to Ibid.

two prong test under Commission Question 2. Nowhere does this document conclude that the Indian Point plants pose a significant risk to the public, that pressurized thermal shock is likely to be a significant component of this risk, or that any of the Board's four proposed measures would likely result in a significant reduction in risk.*

Respectfully submitted,



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Dated: New York, New York
October 19, 1982

* It should be noted that the Commission Staff in its presentation to the ACRS mentioned the value of annealing the pressure vessel (see pp. 272-73), one of the measures listed by the Board.

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

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
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CERTIFICATE OF SERVICE

I certify that I have served copies of Con Edison's Memorandum
Respecting the Licensing Board's October 1, 1982 Order Reformulating Contentions
on the following parties by deposit in the United States
mail, postage prepaid, this 20th day of October, 1982.

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