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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Louis J. Carter, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

OFFICE OF SECRETARY
ADMINISTRATIVE JUDGES
CHIEF

In the Matter of)
) Docket Nos.
)
CONSOLIDATED EDISON COMPANY OF NEW YORK,) 50-247 SP
INC. (Indian Point, Unit No. 2)) 50-286 SP
)
POWER AUTHORITY OF THE STATE OF NEW YORK) June 14, 1982
(Indian Point, Unit No. 3))
)

LICENSEES' MOTION FOR AN ORDER
STRIKING DIRECT TESTIMONY AND
ANSWER TO UCS/NYPIRC REQUEST
FOR AN EXTENSION OF TIME IN
WHICH TO FILE TESTIMONY

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NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
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CONSOLIDATED EDISON COMPANY OF :
NEW YORK, INC. (Indian Point, : June 14, 1982
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POWER AUTHORITY OF THE STATE OF :
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LICENSEES' MOTION FOR AN ORDER
STRIKING DIRECT TESTIMONY AND
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Consolidated Edison Company of New York, Inc.,
licensee of Indian Point Station, Unit No. 2, and Power
Authority of the State of New York, licensee of Indian Point 3
Nuclear Power Plant (collectively the "licensees"), hereby move
the Atomic Safety and Licensing Board ("Board"), pursuant to 10
CFR Part 2, and the orders of the Commission and the Board
governing this proceeding, to strike the purported direct
testimony of intervenors Union of Concerned Scientists/New York
Public Interest Research Group, Inc. ("UCS/NYPURG"), Westchester

People's Action Coalition, Inc. ("WESPAC"), West Branch Conservation Association ("WECA"), Friends of the Earth, Inc. ("FCE"), New York City Audubon Society ("Audubon"), Parents Concerned About Indian Point ("Parents"), and Rockland Citizens for Safe Energy ("RCSE"), and the interested state, the Attorney General of the State of New York. (The parties sponsoring the purported direct testimony are hereinafter referred to collectively as "intervenorors.")

On June 9, licensees received a melange of documents purporting to be the direct testimony of 158 witnesses on Commission Questions 3 and 4 and an application to untimely file direct testimony of 13 additional witnesses. The most cursory examination of this filing demonstrates that it in no sense constitutes direct testimony within the meaning of the Commission's rules and orders. Rather, intervenors seek to subvert the Commission's goal of a limited, focused inquiry and to make a mockery of the Board's established procedures and schedule by seeking a proceeding without foreseeable termination.

At the April 13 and 14 prehearing conference, the intervenors gave no indication whatsoever that they would seek to file direct testimony for some 171 witnesses. If they had, then discussion of the proposed hearing schedule would have

been substantially different. Nor did the intervenors reveal their plans in sworn responses to licensees' interrogatories wherein intervenors collectively listed only 36 witnesses for emergency planning issues. And, again, during a June 1, 1982 telephonic conference with this Board in which the taking of depositions of witnesses was discussed, not one word was uttered or even hinted by intervenors to suggest that they would have 171 witnesses.

Further, in what can only be characterized as bad faith, intervenors on June 7 (only three business days later) "supplemented" their original witness lists to add 137 witnesses or approximately five times the number of total witnesses they had previously revealed. Additionally, 13 of these witnesses provided no direct testimony. Thus, only ten days before the prehearing conference and, only two weeks before the commencement of the evidentiary hearing, intervenors have thrown into havoc the Board's schedule for cross-examination plans, for the beginning of the hearing, and for a good faith, mutual discovery process.

The intervenors have left this Board with only one choice: the intervenors' direct testimony of 171 witnesses must be stricken and the intervenors ordered to act responsibly in this proceeding by submitting a realistic and reasonable

list of witnesses with completed prefiled testimony. To require less of intervenors is to stamp with approval their bad faith conduct and their attempts to make a mockery of this specially mandated Commission proceeding.

We discuss a number of respects in which intervenors' filing - by its very nature - is manifestly not in compliance with the Commission's rules and orders.*

1. Intervenors' filing is entirely inconsistent with the Commission's direction that this proceeding be focused. In its January 8, 1981 order instituting this proceeding, the Commission stated (at p. 7):

In view of the complexity of this proceeding, and in order that the Commission may make its decision within a reasonable period of time, we stress that the Board should focus clearly upon the questions asked by the Commission.

No more unfocused proceeding can be imagined than one in which intervenors are permitted to present 171 witnesses on two of the Commission's seven questions, particularly where the testimony of such witnesses manifestly includes cumulative, redundant, and immaterial testimony. See 10 CFR §2.757.

* Thus, licensees will not address in this motion the question of whether, had a coherent subset of intervenors' submission been filed, such testimony would otherwise be properly admissible on Commission Questions 3 and 4. Such a coherent filing is simply presently not before the Board. When and if such a filing is made, the admissibility of particular items of testimony can be addressed by motion to strike or otherwise.

Intervenors have repeatedly stated that at the next stage of this proceeding their case would be focused. This promise has never been realized. When licensees objected to the unfocused nature of intervenors' contentions, details were promised in discovery. As an excuse for their inadequate and incomplete discovery answers, intervenors pointed to their forthcoming direct testimony. Intervenors' purported direct testimony exacerbates rather than cures the deficiencies in intervenors' earlier filings. The Board cannot permit this filing to serve as "direct testimony" in view of the Commission's direction that this hearing be focused.

2. Intervenors' filing is entirely inconsistent with the Commission's and the Board's schedule herein. The Commission has stated that it would like to receive the Board's recommendations no later than September 18. The Board's April 23 order provides for twenty-three (23) hearing days, commencing on June 22 and continuing intermittently until August 6. It would not realistically be possible for hearings to continue beyond August 6, inasmuch as the parties will be required to prepare proposed findings and the Board will be required to review the record and prepare recommendations by September 18. It is evident that the Board intended June 22, 23, 24 and 25

and July 6, 7, 8, and 9 as hearing dates upon which Commission Question 3 and 4 issues would be considered, because three days afterwards, on July 12, the parties are required to move on to Question 6 by filing Question 6 cross-examination plans.

Acceptance of the proposition that intervenors may present 171 witnesses on two of the Commission's seven questions would require complete abandonment of the Commission's and Board's schedule, and would require a proceeding without foreseeable termination, but certainly requiring several years. Such a proceeding is certainly not the type of focused, expedited proceeding mandated by the Commission.

3. Intervenors' filing demonstrates a total disregard of their discovery obligations. Licensees consistently have argued in this proceeding that intervenors have proffered contentions related to emergency planning for which they have failed to provide adequate factual bases pursuant to 10 CFR §2.714. The Board, taking the position that whatever was lacking with regard to factual bases could be cured during the discovery process, stressed at the second special prehearing conference the importance of the use of discovery to identify the crucial issues in the proceeding. Transcript of Proceeding at 605 (April 13, 1982). Interrogatory responses are thus particularly important in this present proceeding since the Board

(unlike boards in typical operating licensing cases) has here in substance found that discovery would serve to supply the specific factual bases for contentions (id.), which bases were notably absent from many of intervenors' initial contention submissions. Licensees specifically directed an interrogatory to intervenors regarding the identity of their witnesses and the subject matter and bases of their testimony.* Prior to June 9, intervenors had identified only 36 witnesses.**

* Licensees posed the following interrogatory:

Identify:

(a) each person whom you expect to call as a witness at the evidentiary hearings relating to Commission Questions 3 and 4...

(b) the subject matter and board contention and underlying intervenor contention on which the witness is expected to testify;

(c) the substance of the facts and opinions to which the witness is expected to testify and a summary of the grounds for each opinion;

(d) each document...upon which the witness has based his testimony, or will so rely at the hearing, or will otherwise refer to in support of his testimony;

(e) any relationship between the witness and any intervenor or party therein; and

(f) any proceeding in which the witness has previously testified and the transcript pages of such testimony...

** Even in those instances in which intervenors identified their witnesses, they, for the most part, simply disregarded the remainder of licensees' interrogatory.

Manifestly, intervenors did not obtain the identities of an additional 137 witnesses between the filing of their interrogatory answers and their June 7 filing. Intervenors' utter disregard of their obligation to identify witnesses is a further reason requiring the striking of their direct testimony.

Licensees submit that it is no defense to the nature of intervenors' filing to assert that somewhere within it may be found elements of appropriate testimony. We submit that it is not the obligation of the Board, the licensees, or the other participants in this proceeding to now search through intervenors' filing for morsels of appropriate testimony. Rather, it was the obligation of intervenors to file a coherent set of direct testimony on June 7. Intervenors having failed to do this, this investigatory proceeding should now proceed in the limited time available for examination of Commission Questions 3 and 4 on the basis of the properly filed direct testimony before it.

Licensees further submit that UCS/NYPIRC's motion to untimely file the testimony of thirteen additional witnesses should be denied for the reasons set forth above and for the following additional reasons:

- (1) Licensees would be prejudiced by the filing of testimony on Commission Questions 3 and 4 one day before the

commencement of hearings on these questions, as proposed by UCS/NYPIRG;

(2) UCS/NYPIRG has been aware of the nature of the testimony it would be required to present since January, 1980; and

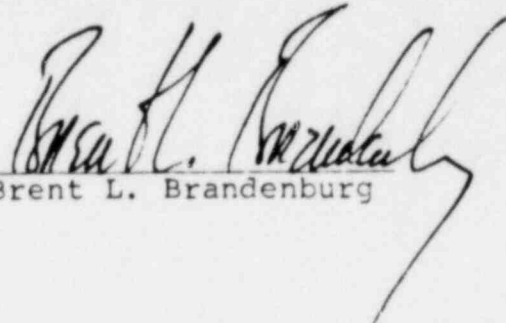
(3) The Board in setting a June 7 deadline for the filing of direct testimony adopted the proposal of intervenors at the April 13-14 prehearing conference. Since that date, UCS/NYPIRG has been well aware of the schedule on which direct testimony should be filed.

In summary, UCS/NYPIRG has failed to demonstrate good cause for its request for an extension of time, and the request should therefore be denied.

Licensees do not seek by this motion to foreclose completely intervenors' right to file testimony on Commission Questions 3 and 4. Rather this motion seeks to achieve the Commission's goal of a limited, focused inquiry based on appropriate direct testimony.

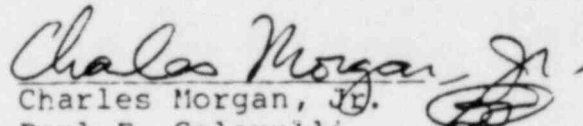
WHEREFORE, licensees respectfully request that the Board issue an order striking the direct testimony of intervenors UCS/NYPIRG, WESPAC, WECA, FCE, Audubon, Parents, RCSE, and the interested state, the Attorney General of the State of New York,

and denying UCS/NYPIRG's request for an extension of time to file direct testimony, together with such other and further relief as the Board may deem just and proper.


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Respectfully submitted,


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Dated: June 14, 1982

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEES' MOTION FOR AN ORDER STRIKING DIRECT TESTIMONY AND ANSWER TO UCS/NYPIRC REQUEST FOR AN EXTENSION OF TIME IN WHICH TO FILE TESTIMONY in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 14th day of June, 1982.

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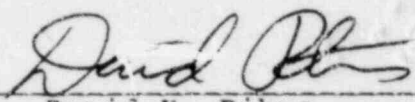
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