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
James A. Laurenson

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 25, 1983
POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3)	)	

POWER AUTHORITY'S MEMORANDUM REGARDING SCHEDULING OF TESTIMONY UNDER COMMISSION QUESTIONS 3 AND 4

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Preliminary Statement

Power Authority of the State of New York ("Power Authority"), licensee of Indian Point 3 Nuclear Power Plant, submits this memorandum addressing the issues to be discussed at the Conference on scheduling testimony under Commission Questions 3 and 4 scheduled for February 28, 1983.

History of the Proceeding

A. Origins

The instant hearings were ordered in response to a Petition filed by intervenor Union of Concerned Scientists ("UCS") in September, 1979. The Petition sought, inter alia, the decommissioning of Indian Point Unit 1, the suspension of operations of Units 2 and 3, and various changes to be made at Units 2 and 3.

B. The Special Proceeding

The Commission, although denying much of the relief sought by UCS, ordered the instant proceeding, which it labeled a "discretionary adjudication." January 8, 1981 Memorandum and Order (CLI-81-1) ("January 8 Order") at 2. The Commission made clear that its "primary concern is the extent to which the population around Indian Point affects the risk posed by Indian Point as compared to the spectrum of risks posed by other nuclear plants." Id. at 6. The proceeding was not designed as an operating-license type proceeding in which the applicant/licensee has the burden of proof, and all regulations are potentially at issue. Rather, it is a relatively narrow, "focused" proceeding

designed to obtain specific answers to seven questions.*

"No party [has] the 'burden of persuasion.'"

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* The questions read as follows:

1. What risks 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?

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 of the facility or facilities, would be within the scope of this inquiry.)

3. What is the current status and degree of conformance with NRC/FEMA guidelines of state and local emergency planning within a 10-mile radius of the site and, of the extent that it is relevant to risks posed by the two plants, beyond a 10-mile radius? In this context, an effort should be made to establish what the minimum number of hours warning for an effective evacuation of a 10-mile quadrant at Indian Point would be. The FEMA position should be taken as a rebuttable presumption for this estimate.

4. What improvements in the level of emergency planning can be expected in the near future, and on what time schedule, and are there other specific offsite emergency procedures that are feasible and should be taken to protect the public?

5. Based on the foregoing, how do the risks posed by Indian Point Units 2 and 3 compare with the range of risks posed by other nuclear power plants licensed to operate by the Commission? (The Board should limit its inquiry to generic examination of the range of risks and not go into any site-specific examination other than for Indian Point itself, except to the extent raised by the Task Force.)

6. What would be the energy, environmental, economic or other consequences of a shutdown of Indian Point Unit 2 and/or Unit 3?

7. Does the Governor of the State of New York wish to express an official position with regard to the long-term operation of the units?

The Commission would like to receive the Board's recommendations no later than one year from this date.

(Id. at 5, n. 4.) The two questions concerning emergency planning are scheduled to be addressed in 12 hearing days in March, 1983.

C. The Witness Problem

Following the conclusion of pre-hearing matters and an abbreviated discovery period, the hearings commenced on Questions 3 and 4 on June 22, 1982. Approximately two weeks prior to that date, most participants filed their original Question 3 and 4 direct testimony.* The licensees filed testimony for 12 witnesses, the State of New York filed 2 witnesses' testimony, and the Commission Staff and the Federal Emergency Management Agency ("FEMA") filed testimony for 6 witnesses.

By contrast, the intervenors filed testimony for over 170 witnesses (including clergymen, parents, school-teachers and politicians) most of which was conclusory, non-expert, and generally of the form normally offered as limited appearance statements under 10 CFR §2.715.** Numerous govern-

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* The New York City Council testimony was belatedly filed many weeks after this deadline, and some intervenor and governmental witnesses' testimony was also filed late.

** WBCA witness Marie R. Tomkins is a good example. Most of her testimony is devoted to conclusory political statements and concludes:

> Incidentally, even if we could all be removed by some magic carpet, could we ever return to our homes?

(footnote continued on next page)

mental units appearing as "interested states" also submitted testimony for approximately 20 additional witnesses.

Prior Efforts to Address the Witness Problem

In view of the immateriality of such testimony and the months that would be necessary to hear it, the Power Authority -- supported by Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Unit 2 -- moved to strike all of the intervenor testimony. (See Licensees' Motion for an Order Striking Direct Testimony, dated June 14, 1982.) Our objective was not in any way designed to limit public participation in the hearings, but simply to have the intervenors return with a reformulated, reasonable number of material witnesses who could be cross-examined within the available hearing time.

The Board did not grant the specific relief requested by licensees, bu did direct the intervenors to develop a more manageable presentation of testimony:

(footnote continued)

> What would we have when we returned? Will our wells be contaminated? Our uninsurable houses? The vegetation? Our land?
>
> Abraham Lincoln is quoted as saying that all of the people can't be fooled all of the time, and therein lies our hope . . . that reality will prevail among those entrusted with and responsible for our common safety.

Plainly, such testimony is immaterial and unresponsive to the Commission's Questions. There are numerous other examples of such conclusory testimony.

> JUDGE CARTER: Now, with regard to the UCS-NYPIRG request for an extension of time to file testimony, and for the Licensing Board to set a date by which UCS-NYPIRG's request for admission must be answered, and with regard to the issue raised concerning the 171 witnesses, the following is the Board's ruling.
>
> UCS-NYPIRG is to prepare a classification of the subject matter of the evidence to be adduced by the 157 plus or minus witnesses. The classification is to include the name and number of the witnesses under each class or subclass. This is not to be a listing by contention. It should consider the geographical area where applicable. By 9:30 a.m. tomorrow, June 18th, UCS-NYPIRG shall provide copies for all parties.
>
> This filing will also include a proposal as to which witnesses they consider to [sic] essential, with a view to and with the object of paring, p-a-r-i-n-g, the list. Absent such proposal, the Board will perform that paring job.

(T: 1064.)

When the intervenors' filing failed to meet the Board's requirements, the Board ruled that "the intervenors will be permitted to present for formal filing in the record the testimony of 50 witnesses." (T: 1191.) But the Board qualified this limitation by allowing the intervenors to present multiple witnesses as panels, which would be treated as one witness. (T: 1198.) This resulted in the collapse of efforts to manage the presentation of evidence, since the intervenors simply grouped all their witnesses into so-called panels.

With the introduction of the first "panel," it immediately became obvious that the panel system could not, in most cases, reduce hearing time, since the individually

filed direct testimony required the same amount of cross-examination time, whether the witnesses appeared as panels or individually.* Indeed, the first panel was quickly disbanded, and the witnesses appeared individually.

The July 27 Order

On April 20, 1982, the Power Authority moved for directed certification by the Commission, inter alia, of the issue whether the Board misconstrued the Commission's instructions in its admission of contentions. In particular, the Power Authority argued that the Board had expanded the scope of the hearings well beyond the Commission's intention to conduct a brief, focused proceeding.

On July 27, 1982, the Commission issued a new Memorandum and Order (the "July 27 Order") providing further guidance as to the scope of the proceeding. The July 27 Order dispels any doubt that this is a focused proceeding, designed principally to address "the extent to which nearby population affects the risk posed by Indian Point as compared to the spectrum of risks posed by other nuclear power plants" (July 27 Order at 12-13):

> It has become clear to us that our instructions are not being applied by the Licensing Board. Our intent was not that the requirements of 10 CFR § 2.714 be dispensed with or

* The first panel consisted of police chiefs sponsored by WBCA.

> to encourage contentions challenging the Commission's regulations, but that additional requirements be applied to admission of contentions to assure a focused proceeding. In particular, 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, and second, further screen out those contentions which, while complying with § 2.714, did not seem likely to be important in answering our questions. In this latter regard, we had in mind that the Board would itself redraft the contentions, screening out those issues which, in its judgment, would not contribute materially to the resolution of the Commission questions in light of the stated purpose of the proceeding, i.e., the extent to which nearby population affects the risk posed by Indian Point as compared to the spectrum of risks posed by other nuclear power plants. In light of this purpose, the 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.[*]

The hearings were suspended for several months while contentions were reformulated. The hearings resumed in January, 1983 with one week of Question 3 and 4 testimony sponsored by the Westchester County Executive. Over licensees' objections, the Board imposed strict time limits on cross-examination, in

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* While the July 27 Order speaks in terms of screening out issues and contentions, a fortiori this guidance should apply to presentation of evidence. The Commission's obvious objective is to avoid wasting hearing time on matters beyond its primary concerns. To screen out issues and contentions but then to allow the presentation of evidence without regard to the Commission's guidance, would make no sense, contravene the Commission's objectives, and waste time.

order to accommodate 10 witnesses in five days. In several instances, these limits prevented licensees and others from completing their cross-examination. (See, e.g., T: 5510, 5607.)

The following weeks were devoted to hearings under Questions 1 and 2, which involved a far smaller number of intervenor witnesses than proposed under Questions 3 and 4.

Although several contentions under Questions 3 and 4 were eliminated and others narrowed in the Board's February 7, 1983 Memorandum and Order, intervenors still propose to present over 170 witnesses in 12 hearing days. (These 12 days must also accommodate some 30 additional witnesses sponsored by other participants.)* Indeed, the intervenors have added even more witnesses since the hearings were suspended last July. As the Board correctly recognizes, "[t]here is no way in our handling of this issue that we are going to be able to accommodate that large number of [intervenor] witnesses." (T: 6933.) Plainly, major steps must be taken to manage the presentation of testimony.

Prior measures have not worked. The panel system has proven itself incapable of solving the problem, and, as

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* In the four weeks of Question 3 and 4 hearing time held to date, approximately 25 witnesses have testified. The 200 remaining witnesses include such key individuals as FEMA, New York State, the on-site emergency planning witnesses, and the experts who designed the basic evacuation plan. Most of the remaining witnesses, however, are the intervenors' original witnesses, whose testimony is conclusory, repetitive, and has not been updated to reflect the major improvements in emergency planning accomplished over the past year. In addition, certain testimony may no longer be admissible in light of the recent reformulation and deletion of certain contentions. A pending proposal by intervenors to withdraw a small fraction of their witnesses (see Intervenor Proposal for Fair and Efficient Method for Receiving Evidence dated February 7, 1983 at 3) would do little to resolve the overall problem.

the Board recently noted, has only further frustrated attempts to reach an adequate accommodation:

> MR. BLUM: The other thing the Board had done before when it was talking about the number of 50 was to say that where witnesses logically constitute a panel, where their testimony is closely related to one another, they could go up as a panel and the panel would count as one witness.
>
> * * *
>
> JUDGE GLEASON [sic]: I think that is the thing that broke it down in the past, if I recall, Mr. Blum.

(T: 6938.)

Limitations on cross-examination have not worked, since testimony must be given varying scrutiny, in accordance with its length and content. As a result, relevant and necessary cross-examination has frequently been curtailed by the Board. (See, e.g., T: 5607.) The Power Authority has a standing objection to limitations on cross-examination which would prejudice the parties.

The addition of further hearing days is impractical in light of the Commission's July 29, 1983 deadline for the Board's recommendations, and the need to accommodate Questions 5 and 6 testimony and preparation of proposed findings of fact by May 27, 1983.

Accordingly, the Power Authority has proposed a third solution, which would allocate hearing time among the parties. Our proposal is contained in Power Authority's Motion

to Establish Schedule and Limit Scope of New York City Council Testimony Under Commission Questions 3 and 4, a copy of which is annexed hereto as Exhibit A. The proposal affords the intervenors more time than any other party, and is fair, efficient, and consistent with the Commission's orders and due process.

We respectfully urge that the Power Authority's proposal be adopted, and that all participants be required to submit a schedule of proposed witnesses and anticipated cross-examination time for each, no later than March 2.

Respectfully submitted,

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Dated: February 25, 1983

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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
James P. Gleason, Chairman
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In the Matter of	:	Docket Nos.
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point, Unit No. 2)	:	50-247 SP 50-286 SP
POWER AUTHORITY OF THE STATE OF NEW YORK, (Indian Point, Unit No. 3)	:	February 7, 1983

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POWER AUTHORITY'S MOTION TO ESTABLISH SCHEDULE AND LIMIT SCOPE OF NEW YORK CITY COUNCIL TESTIMONY UNDER COMMISSION QUESTIONS 3 AND 4

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Preliminary Statement

Power Authority of the State of New York ("Power Authority"), licensee of Indian Point 3 Nuclear Power Plant, hereby moves the Board for an Order (1) establishing a schedule and time allocation for the hearing of witnesses under Commission Questions 3 and 4; and (2) limiting the scope of the testimony to be presented by the New York City Council Members (the "City Council").

The Board correctly recognizes that "[t]here is no way in our handling of this issue that we are going to be able to accommodate that large number [over 170] of [intervenor] witnesses." (T:6933.) We respectfully submit, however, that the Board has substantially underestimated the hearing time necessary to accommodate even 47 intervenor witnesses, as the Board has proposed, and the host of additional witnesses to be presented by the Commission Staff, FEMA, New York State, the licensees, and the City Council. Even with reasonable limits placed on cross-examination time, we estimate that it would take at least double the number of hearing weeks presently allocated to hear this testimony.

Thus, rather than establish limits on the number of individual witnesses, the Power Authority submits that it would be more fair, efficient, and consistent with the

Commission's orders and due process to allocate existing hearing time to the various parties and interested states. We also believe that the Board should limit the scope of the City Council testimony in order to further the above goal of properly managing limited hearing time, as well as to comply with the Commission's orders herein.

Hearing Time Should Be Allocated Among the Parties

The Commission's July 27, 1982 Memorandum and Order (CLI-82-15) ("July 27 Order") strongly reaffirms the Commission's directive to focus this proceeding and to screen out evidence* that would not contribute materially to addressing the stated purpose of the proceeding, namely the comparative risk posed by Indian Point.

Obviously, some witnesses will present testimony which is more material than others'. FEMA, the Commission Staff, and New York State, for example, are in a position to

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* While the July 27 Order speaks in terms of screening out issues and contentions, a fortiori this guidance should apply to presentation of evidence. The Commission's obvious objective is to avoid wasting hearing time on matters beyond its primary concerns. To screen out issues and contentions, but then to allow the presentation of evidence without regard to the Commission's guidance, would make no sense, contravene the Commission's objectives, and waste time.

compare emergency planning at Indian Point with planning at other sites.* Licensees' on-site panels and the Commission Staff are the only witnesses to have filed testimony on the most important aspect of radiological emergency preparedness -- the on-site response.

A full opportunity must be given, of course, to hear and cross-examine witnesses presented by all parties, intervenors, and interested states. A limitation on the number of witnesses has proven all but impossible to effect in the past, and the Power Authority has a standing due process objection to arbitrary limits placed upon cross-examination time which would prejudice the parties. Accordingly, we propose the following schedule within which the parties, interested states, and intervenors must present their direct testimony and accommodate reasonably anticipated cross-examination:

(1) Lead intervenors (2 days).

(2) Contributing intervenors (1 day).

(3) City Council** (1 day).

(4) Licensees (2 1/2 days).

(5) Commission Staff (2 days).

(6) State of New York (2 1/2 days).

(7) FEMA (2 days).

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* Further, New York State should be allowed additional time to respond to the testimony of Rockland and Westchester County witnesses, who were allotted two full weeks of testimony during which they made repeated allegations concerning the State's role and participation in emergency planning.

** But see objections at pp. 4 - 6, infra.

This schedule affords the intervenors more time han any other party, and reflects the Power Authority's expectations regarding time necessary to reasonably cross-examine material witnesses. The Board should require all parties, intervenors, and interested states to submit a schedule of proposed witnesses and anticipated cross-examination time for each, no later than February 15. The Board can then, in consultation with the participants, determine whether such schedules are reasonable and, if not, make its own modifications.

The Scope of The City Council Testimony Should Be Limited

The Power Authority has no objection to the City Council presenting material evidence regarding the 50-mile plume ingestion pathway emergency planning zone ("ingestion EPZ"). Most of the City Council's pre-filed testimony, however, concerns issues irrelevant to the ingestion EPZ and instead deals with the possible evacuation of New York City (which includes areas nearly 60 miles from Indian Point).

The Commission has provided explicit guidance, in its orders herein and its regulations, regarding the extent to which emergency planning issues beyond the 10-mile plume exposure pathway EPZ ("plume EPZ") may be considered in this proceeding. First, the Commission has stated that issues

relating to the exact size of the plume EPZ must be determined under Question 3.* (July 27 Order at 15.) Second, the Commission has proscribed challenges to the Commission's regulations under Question 3. (Id.) Third, while the Commission's regulations permit "minor adjustments" to the size of the plume EPZ to account for local conditions, the plume EPZ must still be "about 10 miles." (July 27 Order at 15; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), 14 NRC 691, 698 (1981).) Fourth, the Commission regulations provide for a 50-mile ingestion EPZ, which would include portions of New York City. But evacuation planning is not required beyond the plume EPZ. (NUREG-0654 at 59-65.)

Thus, the City Council could properly present testimony relating to protective measures required for the ingestion EPZ, which principally deal with "protecting the public from consumption of contaminated foodstuffs." (Id. at 64.) The bulk of the City Council's testimony, concerning evacuation planning and a vast expansion of the plume EPZ, is both irrelevant, and a direct challenge to the regulations proscribed by 10 CFR

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* We noted in the Power Authority's Response to Reformulated Contentions Under Questions 3 and 4 dated January 24, 1983 (at 11, n.(*)) that the contention regarding the size of the plume EPZ was erroneously designated under Question 4. If the City Council testimony were, in fact, proper under Question 4, it would be required to meet the special requirements set forth below, at page 6, n.(*).

§ 2.758 and the July 27 Order.*

Accordingly, the Board should limit the scope of the City Council testimony to matters relating to the ingestion EPZ, and, inter alia, strike all testimony concerning evacuation planning and expansion of the plume EPZ to include New York City. This will assure compliance with the Commission's orders, and assist in managing the proceeding within its tight schedule.**

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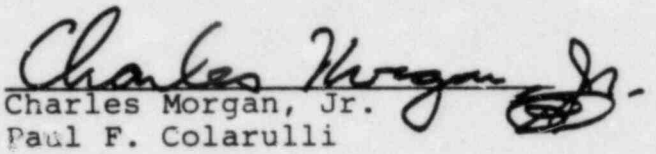
* Moreover, Commission Question 4 asks whether there are additional "specific offsite emergency procedures that are feasible and should be taken to protect the public." Even assuming that the evacuation of New York City is somehow relevant under Question 4, the City Council testimony consists mainly of conclusions by politicians and others that evacuation is unfeasible there. It contains no recommendations for specific, feasible procedures, and does not contain any "sound basis" or any demonstration whatsoever that New York City is at risk from Indian Point any more than it is at risk from Shoreham, Oyster Creek, or any other nuclear plant. Thus, it manifestly fails to satisfy the requirements stressed in the July 27 Order and is unimportant in answering the Commission's Questions.

** In the event that the Board denies our motion regarding the City Council, the Power Authority alternatively requests leave to take the depositions of the City Council witnesses. These witnesses raise issues clearly beyond the existing regulations, with which the Power Authority is generally unfamiliar, and upon which we have not pre-filed testimony. Such depositions are imperative in order to avoid prejudice.

Respectfully submitted,



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Dated: February 7, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point, Unit No. 2)	)	50-247 SP 50-286 SP
POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3)	)	February 25, 1983

CERTIFICATE OF SERVICE

I hereby certify that copies of POWER AUTHORITY'S MEMORANDUM REGARDING SCHEDULING OF TESTIMONY UNDER COMMISSION QUESTIONS 3 AND 4 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 25th day of February, 1983.

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