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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSIONERS:

Nunzio J. Palladino, Chairman  
Victor Gilinsky  
John F. Ahearne  
Thomas M. Roberts  
James K. Asselstine

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.  
(Indian Point, Unit No. 2)

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

Docket Nos.

50-247 SP

50-286 SP

May 20, 1983

POWER AUTHORITY'S RESPONSE TO COMMISSION  
ORDER ESTABLISHING PROCEDURES  
FOR DECISION ON ENFORCEMENT ACTION

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## PRELIMINARY STATEMENT

The Power Authority of the State of New York (Power Authority), licensee of Indian Point 3 Nuclear Power Plant, submits this memorandum in response to the Nuclear Regulatory Commission's (Commission's) May 5, 1983 Order Establishing Procedures for Decision on Enforcement Action. For the reasons set forth below, the Power Authority submits that the criteria established by the Commission for continued operation of Indian Point Unit 3 have been met. Specifically, the deficiencies noted by the Federal Emergency Management Agency (FEMA) concerning the state of emergency planning in Westchester and Rockland Counties have been successfully addressed. Even if the deficiencies had not been resolved, they are not significant. Additionally, compelling reasons exist to permit continued operation of the plant. The Power Authority submits that any enforcement action by the Commission is unwarranted, counterproductive, and procedurally and constitutionally improper.

### I. OFFSITE RADIOLOGICAL EMERGENCY PLANNING AT INDIAN POINT

#### A. Background

Prior to the implementation of the Commission's first detailed offsite emergency planning regulations in November 1980, the Power Authority had been committed whole-heartedly to emergency planning both on- and off-site. Licensees<sup>1</sup> have provided enormous financial support

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1. Consolidated Edison Company of New York, Inc. (Con Edison) is licensee of the Indian Point Station, Unit No. 2. The Power Authority estimates that Con Edison has spent approximately the same amount as the Power Authority on offsite emergency planning.

— over \$17 million — to state and local governments in direct payments, equipment, training, and other benefits since 1979.

The Power Authority recognizes that offsite emergency planning is enhanced by cooperation between the licensees and state and local governments. As a public benefit corporation,<sup>2</sup> with a statutory mandate to provide low-cost power to such customers as local governments, transit systems, and public housing projects, the Power Authority has a special appreciation for this relationship.

B. Past Financial Support of Emergency Planning

The Power Authority has contributed approximately \$9 million of the over \$17 million in total funding and benefits provided by licensees to state and local governments around Indian Point. (An itemized accounting of the Power Authority's expenditures and other support of emergency planning is annexed hereto as the Appendix.)

The first expenditures were used, even before the new Commission regulations became effective, to fund the position of coordinator of the Four County Nuclear Safety Committee and to pay consultants selected by state and local governments to prepare evacuation travel time estimates and offsite radiological emergency response plans (RERP's) for the four surrounding counties of Orange, Putnam, Westchester, and Rockland. Those RERP's, developed by the consultants working closely with the licensees, the four counties, and the State, constitute the basis for the revised plans in effect today in Westchester, Putnam, and Orange

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2. The Power Authority is a corporate municipal instrumentality of the State of New York, exercising governmental and public powers. Power Authority Act, N.Y. Pub. Auth. Law § 1002 (McKinney 1982).



Counties.<sup>3</sup> In fact, the successful reformulation of the RERP's by those counties demonstrates that Rockland also could have completed its own plan by now. Consultants paid by the licensees also developed the first draft of the State's radiological emergency preparedness plan.

In addition to the over \$2 million paid for developing the RERP's, the licensees have paid a total of over \$1.5 million to the State for offsite radiological emergency planning purposes, a sizable amount of which was passed directly on to the four counties. Moreover, the licensees have paid over \$10 million for items for the State and counties such as an elaborate 146-unit siren system; an annually-revised and distributed emergency planning brochure; portable survey kits; computerized meteorological/dose assessment system (MIDAS); communications equipment; evacuation studies; fixed-site radiation monitors; training programs and materials; public information programs; State and county staff and consulting positions; and support for a helicopter program for Rockland County. The Power Authority also has funded the salary of the project coordinator for the Four County Nuclear Safety Committee.

Licensees' support and cooperation has been acknowledged by officials of the State and all four counties throughout the special proceed-

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3. A two-volume RERP was also prepared for, exercised, and used for some time by Rockland County. The Rockland County RERP is still in existence, although it was formally disavowed by the Rockland County Legislature in May 1982. Resolution No. 320 (May 18, 1982). Licensees paid the full cost of developing that plan. There is no reason why that plan could not be used if there were an emergency today; the Power Authority believes that the draft plan now being finalized by Rockland County is substantially based on the earlier RERP.

ing being conducted by the Atomic Safety and Licensing Board (Licensing Board). The Director of the State Radiological Emergency Preparedness Group (REPG) testified that the licensees have provided funding, training, equipment, and other assistance well beyond that required by law. Tr. at 11453-57.<sup>4</sup> Phil Schmer, Orange County's emergency planning chief, testified that the licensees provided his county with "a tremendous amount of . . . sophisticated equipment" including "sophisticated dosimeters . . . computers, telefax machines, telephones, really anything we requested to insure that our plan would work." Tr. at 12094 (emphasis added). Michael Scalpi, Putnam County's Civil Defense Director, also stated that the "utilities, also, gave us all kinds of equipment. As a matter of fact, anything we want, they have been more than decent about giving us." Tr. at 12095 (emphasis added). Both the present and former Westchester County Executives have acknowledged the "good faith efforts" by licensees and their role in significantly improving offsite emergency planning over the past two years. Tr. at 5889 (Del Bello); Direct Testimony of Westchester County Executive Andrew P. O'Rourke. Even Rockland County, whose avowed objective is the shutdown of Indian Point, has acknowledged the contributions made by licensees there. Tr. at 3794-95 (McGuire, J.); Tr. at 4023, 4168-69 (McGuire, D.).

C. FEMA's Assessment

The Commission's May 5 Order was prompted by FEMA's April 15, 1983

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4. Transcript and exhibit references denote citations to the official record in the Indian Point special proceeding.

Post Exercise Assessment of the March 9 Indian Point fullscale emergency planning exercise. Both there and in its December 1982 interim findings, FEMA lauded the dramatic progress recently made in emergency planning around Indian Point, and concluded that many earlier deficiencies had been corrected. Notwithstanding its generally favorable assessment, however, FEMA declined to certify the overall adequacy of emergency planning, citing concerns about a lack of agreements with bus operators and a need for additional training in Westchester County, and Rockland County's lack of cooperation in the exercise. The Power Authority continues to believe that FEMA's Post Exercise Assessment presented an incomplete and inaccurate picture of these two issues.<sup>5</sup> See Letter from J. P. Bayne, Executive Vice President, Power Authority to Commissioners (May 3, 1983) (Bayne Letter). Nevertheless, actions taken by the

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5. Additionally, basing enforcement action on FEMA's assessment is inappropriate because it would subject the Power Authority to unreasonable, arbitrary regulations. FEMA recognizes that its regulations are not coordinated with those of the Commission. See, e.g., Letter from Lee M. Thomas to William J. Dircks at 2 (Dec. 17, 1982) ("the 120 day time frame in NRC's regulations is not keyed to the FEMA planning and preparedness evaluation process"); Letter from Frank P. Petrone to Dave McLoughlin at 3 (Apr. 14, 1983) ("the CFR 350 process of FEMA does not lend itself to tight deadlines"); Letter from Assistant Associate Director Richard W. Krimm to Samuel J. Chilk at 16 (Krimm Letter) (inconsistent regulations govern exercises). Ambiguous or misinterpreted regulatory guidelines have resulted in misallocation of functions between the Commission and FEMA. The Atomic Energy Act and Commission regulations make clear that the Commission is responsible for ultimately determining whether the public health and safety is adequately protected against radiological accidents. FEMA's role is simply to report the status of emergency plans. A Commission decision based solely on FEMA's report would necessarily exclude Commission judgments about the plant's safety, risk, and accident scenarios.

The regulations are also unreasonable and arbitrary because they assume the cooperation of state and local governments (see, e.g., 10 C.F.R. Part 50, App. E), but provide no means for the licensees, Commission, or FEMA to compel such cooperation.

licensees, state and local governments, and other parties over the past several weeks are sufficient to resolve those alleged deficiencies, independently of their significance.

D. Recent Actions

As detailed below,<sup>6</sup> licensees, the State of New York, and Westchester County have worked intensively over the past several weeks to remedy the concerns expressed by FEMA. In Westchester, licensees and county officials have resolved FEMA's objections by obtaining commitments from bus owners for buses to respond to a radiological emergency and by initiating a training program for drivers. In Rockland, the State has rewritten its emergency plans to clarify for FEMA that the State's compensatory plan allows the State to direct or supplement a response to a radiological emergency, with Rockland County providing the actual resources (which it has pledged to do). Consequently, the facts no longer warrant enforcement action.

II. WESTCHESTER COUNTY

A. Resolution of Alleged Deficiencies

According to FEMA, the only significant deficiency remaining in Westchester County emergency planning was a lack of written commitments from bus operators and a need for additional training.<sup>7</sup> This deficiency

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6. See Sections IIA and IIIA, infra.

7. The basis for FEMA's finding a deficiency in this area is not clear. Before the Licensing Board, FEMA agreed that, given the requirements of the exercise scenario, the evacuation and transportation actions in Westchester County on March 9 were adequate. Tr. at 14893. This evaluation was also that of the FEMA team leader in Westchester County (Tr. at 14776-77, 14893; Con Edison Ex. 18) who, in a report written on the evening of the exercise rated "Actions to Protect the



has now been resolved. Three bus companies involved in the emergency plan have committed approximately 1,000 buses to respond in case of a

Public" in Westchester as a "3" or "acceptable." Tr. at 14773-74. In addition, the Chairman of FEMA's Regional Assistance Committee has acknowledged to the Power Authority "that the observations regarding problems with bus drivers and routes set forth at pages 29-30 of the Post Exercise Assessment may not be accurate." Bayne Letter at 9. This not only undercuts the basis for FEMA's conclusions regarding bus utilization in Westchester, but also raises general questions about the accuracy of the Post Exercise Assessment.

Hence, the exercise results could not provide a basis for FEMA's finding of a significant deficiency.

FEMA has indicated both before the Licensing Board (Tr. at 14977-78, McIntire) and in its May 4, 1983 Letter from Assistant Associate Director Richard W. Krimm to Samuel J. Chilk at 2 (Krimm Letter) that its concern over the bus situation stemmed from testimony by the former Westchester County Executive and "some bus drivers" that "bus drivers may not respond to evacuate the general population after the initial evacuation of school children was completed" (emphasis added). The former County Executive's testimony appeared to be only speculation. The only other witnesses to testify on the subject of buses were the owner of one of the largest bus companies involved in the plan, one bus driver, and a union official. The bus owner testified that he believed most of the drivers would respond in a radiological emergency. Direct Testimony of Seth Corwin at 1. The driver testified that five of six drivers sampled in her garage indicated they would respond. Tr. at 10823 (Narod-Shiek). The union official had no opinion as to whether the drivers would or would not respond. In Putnam County, where there are no contracts with bus drivers or owners (and FEMA evidently does not find them necessary (see Tr. at 14897-98, McIntire; Kowieski), 88 out of 100 bus drivers sampled stated they would respond to a radiological emergency. Tr. at 12135 (Scalpi). Thus, the testimony from the hearings also does not support FEMA's finding.

Finally, FEMA has just recently further clarified that its concern was that bus drivers would not respond to a so-called "second wave" assignment after first transporting school children. Krimm Letter at 2. This situation was based on the former "two-wave" evacuation procedure. That procedure has been revised by the "O'Rourke plan," devised by the new County Executive to dismiss schools at the earliest stages of an incident at Indian Point. Although the early dismissal plan was successfully exercised on March 9, FEMA did not evaluate it because the revised procedure allegedly had not then been incorporated into the written plan. (While the early dismissal option has always existed in the radiological emergency response plans, the revised procedure formalizes the intent to use it. Moreover, State law requires schools to have generic early dismissal plans, so implementing procedures are already in place.) The revision of this procedure provides another reason why the alleged deficiency was without basis.

radiological emergency, over twice the number of buses required under the worst case scenario of the RERP. This commitment is being confirmed by a letter of intent. This is the step which FEMA prescribed in order to eliminate the so-called "significant deficiency" in Westchester County. Tr. at 14977 (McIntire).

Although not required by FEMA, licensees have undertaken the additional step of funding a \$241,725 comprehensive transportation study for Westchester County.<sup>8</sup> This study, scheduled for completion within ten months, will reexamine the County's transportation network, the demand for buses in the event of an emergency, bus routes, and alternatives to street bus pick-up points in the event of an emergency. The study will be conducted by the Transportation Planning Study Group, an organization of bus operators involved in the emergency plan. This group recently completed a similar study with excellent results in Orange County.

The final component of the recent emergency planning efforts is the acceleration of the training program for bus drivers. A number of drivers have already received initial training in radiological emergency procedures. A total of some 1,600 will be trained by June 9, or more than three times the numbers of drivers potentially needed under the RERP. Follow-up training is also scheduled.<sup>9</sup>

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8. Such a study was requested by Westchester County. The Power Authority notes, however, that the existing evacuation time estimates have been endorsed by the NRC Staff. Testimony of Dr. Thomas Urbanik, II Concerning the Evacuation Time Estimate Studies for Indian Point, Units 2 and 3, at 3.

9. In In re Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), 2 CCH N.R.R. ¶ 30,773, at 30,746 (1983), the Appeal Board ruled that twin reactors could commence opera-



In addition, licensees are voluntarily training approximately 200 of their own employees as a backup pool of bus drivers. The training has already commenced and these employees are scheduled to be trained and licensed before June 9, 1983. The State has delivered 1,000 dosimeters to the Westchester County Department of Transportation for possible use by bus drivers.

Resolution of these transportation matters was accomplished through continued close cooperation among the licensees, the State REPG, the County Executive, and bus operators and drivers.

B. Insignificance of Alleged Deficiencies

Notwithstanding the successful efforts to satisfy FEMA's objections, the Power Authority continues to believe that the significance of the bus issues was overstated.

1. FEMA's Analysis

FEMA did not examine the actual demand for buses. The Post Exercise Assessment assumes, without analysis, that car-pooling, ride-sharing, and ad hoc transportation measures would be inadequate. But a survey introduced by the intervenors before the Licensing Board indicates that only 3% of the population believe they would require bus transportation in the event of a radiological emergency.<sup>10</sup> This is a far smaller percentage than the 11% or more conservatively estimated in

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tion even though bus drivers had not been trained, conditioned on the initiation of a training program within 120 days. There is even less reason to disallow continued operation at Indian Point, where most drivers will have been trained by the Commission's shutdown deadline, and nuclear plants have operated safely for 20 years.

10. Testimony of Roger Seasonwein on Commission Question 3, at T-17; Bayne Letter, Ex. K.

the plans. FEMA also did not evaluate the early dismissal plan for school children, which would drastically reduce any demand for buses.<sup>11</sup>

2. Risk and the Need for Evacuation

The probability of any person near the plant incurring adverse health effects is extremely small even assuming that no protective response occurs for one day.<sup>12</sup> Evacuation by bus is not important in the case of a rapidly developing accident and ample time exists for a slow evacuation even at walking speed for the gradually evolving accident. Assuming a rapidly developing accident, the risk posed to Westchester County remains very small whether sheltering followed by relocation or evacuation is employed. Therefore, given the accident profile of Indian Point Unit 3, the absence of contracts with bus drivers cannot constitute a significant deficiency in emergency preparedness.

Potential serious accidents at the plant can be divided into those that evolve very slowly and those that develop rapidly. The first type

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11. Furthermore, substantial indications exist that bus use problems are not unique to Indian Point. Indeed, FEMA recognized the generic nature of the problem in its recent study, "Generic Deficiencies in Off-Site Emergency Preparedness at Commercial Nuclear Power Plants" (Bayne Letter at 11 & Ex. N). FEMA conceded that not all regions require contractual commitments for buses. FEMA Answer to Licensees' Interrogatory 19 (Apr. 29, 1983). FEMA has yet to provide specific details about these generic deficiencies or measures taken in other regions. Before the Licensing Board, FEMA's witnesses admitted they did not know how many of the sites FEMA approved pursuant to proposed 44 C.F.R. Part 350 have contractual commitments from bus owners or drivers. Tr. at 14903-04.

Selective action against the Indian Point licensees for a generic problem would not only be unwarranted, but unconstitutional as well.

12. See Section IVB, infra.

has a median frequency of once in about 170,000 reactor years.<sup>13</sup> For this accident, characterized by a gradual overpressurization containment failure, there would be a minimum of 12 hours and more likely at least one day between accident initiation and any radioactive release.<sup>14</sup> This is certainly sufficient time to implement adequate protective measures, including very slow evacuation, even under less than ideal conditions.<sup>15</sup> Although this accident would not likely cause early fatalities, there is a once in about 100,000,000 reactor years chance of increasing the background cancer fatality rate by one percent. Evacuation has little effect on this risk because it is largely determined by long term exposure.<sup>16</sup>

The second type of accident, developing rapidly and bypassing containment, is very unlikely, and has a median frequency of once in about 25,000,000 reactor years.<sup>17</sup> This accident is the dominant contributor to early fatality risk. Even unrealistically assuming that no one would evacuate or take special shelter for one day following a rapidly developing accident (people would continue their usual daily

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13. Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 24; IPPSS Amendment One at 8.1-5.

14. Tr. at 7337; Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 24.

15. Additionally, during this one day delay, radioactive products would be lessened by natural processes and the plant operators would have time to attempt recovery precluding any atmospheric release. Id.

16. Id. at 27, 30.

17. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 13; IPPSS Amendment One at 8.1-5.

activities), the average risk of early fatality to an individual within a mile of the plant would be one in about 19,000,000 for each year of reactor operation.<sup>18</sup>

Furthermore, sheltering followed by relocation would be an adequate and effective protective response for rapidly developing accidents. After sheltering, some persons in a small area may need to be relocated. This small number of people would not have to travel far because even with the most unfavorable atmospheric conditions, the distance from the center of such a sector to its edge would be less than one and one-half miles.<sup>19</sup>

This approach would thus require fewer County resources, in particular obviating the need to quickly provide bus transportation.

The NRC Staff's analysis concluded that, regarding early fatality risk, "an anticipatory evacuation emergency response is not, on the average, appreciably lower than the risk with early [8 hours after plume passage] relocation."<sup>20</sup>

### III. ROCKLAND COUNTY

The Power Authority continues to believe that certain prominent figures in Rockland County are more concerned with permanently shutting

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18. Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 120a.

19. Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 119, 122-25; see Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 1 [IV.B], at 7, 12-13; Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at B-13.

20. Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 1 [IV.B], at 12 (emphasis added).

the Indian Point plants than with expediting the approval process for a plan already drafted by the County's Office of Emergency Services.

The licensees worked with Rockland County officials between 1979 and the County's withdrawal from the four-county process in mid-1982 in an attempt to develop a plan acceptable to all parties. Licensees have provided nearly \$3 million in equipment, services, and funding to Rockland County for emergency planning since 1980. Notwithstanding the County's formal withdrawal from the coordinated process last year, licensees have attempted to maintain an ongoing dialogue with County officials. Licensees have supported the State's recent effort to clarify and amend its compensating plan for Rockland County, which they believe would be fully effective to protect the population in the event of an emergency.

A. Resolution of Alleged Deficiency

FEMA's apparent basis for finding the emergency planning exercise inadequate in Rockland County turns on the County's failure to adopt a plan of its own and to participate with its own personnel in the March 9 exercise. As FEMA recognized in its December 1982 interim findings, however, these problems were created by Rockland County itself and are entirely within the County's power to correct. May 5 Order at 3; FEMA Update Report at 7-9 (Dec. 16, 1982).

Rockland County, which is not directly served by either of the Indian Point plants,<sup>21</sup> has consistently sought their immediate

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21. Although the principal electricity provider in Rockland County does not purchase power directly from Indian Point, it does purchase power from the Power Authority's James A. FitzPatrick nuclear power



shutdown.<sup>22</sup>

In May 1982, the Rockland County Legislature passed a resolution withdrawing from further participation in the coordinated radiological emergency planning effort by the licensees, State of New York and neighboring counties. At the same time, however, the County resolved to participate fully in the event of an actual radiological emergency. Resolution No. 320, at 3. Subsequently, Rockland County agreed to accept and has in fact received funding and training from the State of New York, and has made substantial progress on drafting its own emergency plan. Although Rockland officials participated in the early morning hours of the March 9 exercise and observed the entire event, the County Legislature prevented them from actively participating during normal business hours.<sup>23</sup>

The State of New York has recently completed an intensive effort to resolve any doubts or ambiguities regarding the efficacy of the State compensating plan for Rockland County.

Subsequent to Rockland County's formal withdrawal from emergency

plant and benefits from other facilities. It would suffer significant penalties if Indian Point were shut down. See Licensees' Testimony of Eugene T. Meehan on Commission Question 6, at 33, a copy of which was annexed to the Bayne Letter as Exhibit A.

22. For example, Rockland County seeks the shutdown of Indian Points in a case pending in the United States Court of Appeals for the Second Circuit, County of Rockland v. NRC, No. 83-4003 (2d Cir. filed Jan. 5, 1983), and has appeared as an "interested state" in the Licensing Board hearings.

23. On May 16, 1983, the Multi-Services Committee of the Rockland County legislature voted a resolution to consider acceptance of an interim emergency plan. On May 19, however, the County legislature defeated an attempt to bring this resolution to the floor for a vote.



planning in May 1982, New York State adopted a compensating plan for use in the event of a radiological emergency. The compensating plan was exercised on March 9. The recently revised compensating plan enables the State to use its own and licensees' resources to augment or replace Rockland County's own resources, if necessary, in case of a radiological emergency. Pursuant to the clarified State plan, the State would provide a 50-person core response team capable of responding in Rockland County in a timely manner. Approximately 300 trained licensee employees and consultants would be available, if necessary, to perform such tasks as traffic control, accident assessment, and decontamination.

This action would address FEMA's concern that the role of the State and appropriate resources in Rockland County had not been sufficiently defined. Indeed, the revised State plan should give Rockland County's residents adequate protection.

B. The Response Capability is Adequate

The FEMA Post Exercise Assessment did not even attempt to evaluate Rockland County's actual response capabilities. Both the State and Rockland County, however, have demonstrated an adequate emergency response capability.

1. Rockland County

A deposition of Donald P. McGuire, Rockland County's emergency planning coordinator, probed beyond the County's official non-participation in the exercise and revealed that Rockland in fact is capable of performing its functions in conjunction with the State and licensees. Indeed, Mr. McGuire testified that county personnel could, if allowed, perform the tasks required by the exercise, and that he believed that

volunteers needed to support the response would, in fact, respond to an actual emergency. Bayne Letter, Ex. C at 18-20.<sup>24</sup>

The FEMA Post Exercise Assessment also does not reflect the substantial and continuing amount of training provided to Rockland County workers. Rockland County also participated in the March 1982 exercise. Mr. McGuire opined that his observation of the recent 1983 exercise was more educational than his actual participation would have been. Id. at 112.

A recent practical demonstration confirms the existence of Rockland's capabilities. On April 12, 1983, the County successfully evacuated several hundred residents following a chemical fire. Emergency organizations promptly responded county-wide. In fact, key officials were notified with paging devices purchased with licensees' funds contributed to the radiological planning effort. Despite concern expressed about the imperceptible nature of the chemical hazard, all personnel responded. County officials were able to set up a command and communications center at the scene. The nearby population was alerted and shelters for evacuees were established on an ad hoc basis. Mr. McGuire testified that the evacuation was a success. Id. at 102-06, 108.

Thus, the most critical components of any emergency response — organization, alerting, communications, and coordination<sup>25</sup> — were

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24. The Power Authority notes the anomaly of FEMA's basing its deficiency finding in Westchester primarily on the speculation of a county elected official, while the agency has failed to consider the opinion of the leading professional emergency planner in Rockland.

25. FEMA views "executive decision-making . . . in the county EOCs and the state EOCs [as the] heart and soul of a successful disaster

clearly demonstrated by Rockland County in an actual emergency.

2. State of New York

The record contains extensive praise of New York State's demonstration at the March 9 exercise. FEMA gave generally high marks to all important categories of the State's response including shift changes, emergency operations management, briefings, emergency classification system, monitoring, reception centers, communications, assessment, public information, and protective action recommendations. FEMA Post Exercise Assessment at 38-43.

Furthermore, ample basis exists to conclude that State and Rockland County personnel could work together effectively in an actual emergency. The two jurisdictions worked well together in the early morning hours of the exercise, before the Rockland County workers were precluded from further participation.

Notwithstanding the withdrawal from the plan, Rockland County personnel have continued to work with State personnel "[a]lmost on an ongoing basis" to plan a response to a radiological emergency. Bayne Letter, Ex. C at 26. This includes extensive and continuing training given to Rockland personnel and volunteers by the State.<sup>26</sup> The State's compensating plan is based upon the December 1982 draft of the plan Rockland is now engaged in finalizing.<sup>27</sup> Hence, both State and Rockland

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response." Tr. at 15000 (McIntire). The components identified above are essential elements of effective decision-making.

26. See New York State Ex. 9; Bayne Letter, Ex. D.

27. There may be some confusion as to what "plans" actually exist for Rockland County. The County's Office of Emergency Services (OES) has virtually completed a radiological emergency plan, principally

County personnel are well-acquainted with the plan that would be implemented in the event of an actual emergency. Bayne Letter, Ex. C. at 27-28.

In light of the demonstrated capabilities of the State and Rockland County and the recently revised State compensating plan, FEMA's alleged deficiency would be resolved. It is entirely reasonable to expect that the State and the County could jointly or individually implement an adequate response to a radiological emergency.

C. Rockland County Cannot Be Allowed to Veto Nuclear Power

Rockland County's refusal to develop or implement emergency plans cannot support any action by the Commission to shut down Indian Point Unit 3. To find otherwise would give Rockland County, and similarly situated state subdivisions, an effective and proliferating veto power over safety decisions which are within the exclusive jurisdiction of federal regulation. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 51 U.S.L.W. 4449 (U.S.

authored by Mr. D. McGuire. (The only significant component currently missing from the draft plan concerns the schools, but an ad hoc capability to evacuate the schools was successfully demonstrated during the March 9 exercise, and all schools are required by State law to have an early dismissal plan for any type of emergency.) The OES plan is merely awaiting formal review and approval by a citizens' panel and the Rockland County Legislature. The State compensating plan is based on the OES plan.

In addition, as noted above, consultants paid by the licensees have completed and distributed a voluminous plan tailored to Rockland County which, although not formally approved by the County, could be used during an actual emergency. Nothing in the Commission or FEMA regulations requires emergency plans to be drafted or approved by a county. Indeed, the Commission recently stated that under its regulations and the NRC Authorization Act that the Commission is obligated to review utility sponsored emergency plans. In re Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), No. 50-322-OL, slip op. at 3 (N.R.C. May 12, 1983).

Apr. 20, 1983); FERC v. Mississippi, 102 S.Ct. 2126 (1982). The potential for Rockland County, or any local authority, to second-guess the federal government's judgment with respect to the planning for radiological emergencies is endless. Local officials will always be able to say that the federal government's judgment is poor, inadequate or not far-reaching enough.<sup>28</sup>

In Pacific Gas & Electric Co., 51 U.S.L.W. at 4453-57, the Supreme Court held that the Atomic Energy Act of 1954, as amended, preempts any state attempts to regulate the safety-related aspects of nuclear power.<sup>29</sup> Although the state and local authorities have a potential role to play in developing and implementing emergency plans, see 10 C.F.R. Part 50, Appendix E (1982), ultimate responsibility for and judgment of

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28. Rockland County Resolution No. 320 is predicated on second-guessing the judgment of the Commission and FEMA with respect to their decisions regarding the safe operation of the Indian Point units. For example, the Resolution concludes that "substantial inherent risks" exist at Indian Point, that there have been "numerous violations of safety requirements," and that the existing roadway system cannot "accommodate the safe and timely evacuation" of the citizens of Rockland County. Resolution 320, at 1-2.

29. See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-58 (1978); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1153 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). Specifically, the Court found that California's statute "was aimed at economic problems, not radiation hazards," and was "outside the occupied field of nuclear safety regulation." Pacific Gas & Electric Co., 51 U.S.L.W. at 4455, 4456 (footnote omitted). Recent state attempts to restrict federal regulatory authority over nuclear safety matters have been declared unconstitutional. Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627, 630-32 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3789 (U.S. May 3, 1983) (state law banning storage and disposal of all non-medical low-level radioactive waste and spent fuel generated outside Washington State unconstitutional); Illinois v. General Electric Co., 683 F.2d 206, 214-16 (7th Cir. 1982), cert. denied, 51 U.S.L.W. 3789 (U.S. May 3, 1983) (state law prohibiting shipment of spent nuclear fuel into Illinois for storage unconstitutional).



the adequacy of emergency preparedness and other safety matters is within the sole jurisdiction of the Commission. Rockland County's refusal to participate in federally-required emergency planning clearly frustrates congressional policies. "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." Pacific Gas & Electric Co., 51 U.S.L.W. at 4457.

Rockland County's action, therefore, contravenes the supremacy clause of the United States Constitution because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941), and makes "compliance with both federal and state regulations . . . a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), quoted in Pacific Gas & Electric Co., 51 U.S.L.W. at 4452.

Consistent with Pacific Gas & Electric Co. is the recent Commission decision affirming a Licensing Board opinion which rejects the so-called "county veto." In re Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), No. 50-322-OL, slip op. (Apr. 20, 1983) (Shoreham), aff'd in part, No. 50-322-OL (N.R.C. May 12, 1983).

In the Shoreham case, Suffolk County's decision not to adopt or implement an offsite radiological emergency response plan for the Shoreham Nuclear Power Station, Unit 1 was used by the County as a basis for its motion to terminate the operating license proceeding based on the alleged legal impossibility of the applicant's ability to demonstrate compliance with emergency planning requirements. The Licensing Board denied the motion holding that the applicant should be permitted



to show that the state of offsite emergency preparedness provides adequate protective measures even when a local county refuses to prepare or implement an emergency plan. Id. at 26-28. Characterizing Suffolk County's inaction as "'preemption in reverse,'" the Licensing Board concluded that "a decision to neither adopt nor implement a radiological emergency response plan based on a state or local government's assessment of what the public health and safety requires is clearly precluded by federal law." Id. at 47-48, 56. Hence, the Licensing Board determined that Suffolk County does not have a veto power over the operation of a nuclear facility. Id. at 23-24, 58 n.32.<sup>30</sup> Such a veto power

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30. To avoid an impermissible delegation of federal authority to local governments, the emergency planning regulations should be interpreted in one of two ways. The first is that the regulations require local governments to participate in emergency planning. "[T]he [Supreme] Court has upheld federal statutory structures that in effect directed state decision-makers to take or to refrain from taking certain actions." FERC v. Mississippi, 102 S.Ct. at 2138 (federal energy statute required state regulatory commission to carry out certain federal functions); see Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 692-96 (1979); Fry v. United States, 421 U.S. 542, 545 (1975); Testa v. Katt, 330 U.S. 386, 392-94 (1947). The failure to require Rockland County's participation in emergency planning exercises, therefore, would be an abdication of federal jurisdiction and additionally would serve as a basis for estopping consideration of Rockland County's nonparticipation as a factor which could affect the Power Authority's license to operate Indian Point Unit 3. Alternatively, the existing regulations are beyond statutory authority because they impermissibly delegate to local governments an effective veto power over nuclear facilities. Regulations must have a statutory foundation and be within the statutory authority granted the agency. Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946). To allow state subdivisions veto power under the Commission's emergency planning regulations would not only be an impermissible delegation of jurisdiction to local governments, but also would be a denial of due process. By promulgating emergency planning regulations which are subject to the political choices of local voters, the Commission has, in effect, promulgated standardless and arbitrary regulations. In an analogous context, the Ninth Circuit recently struck down as standardless a state law requiring a referendum as a precondition to further construction of

delegated to local government constitutes an impermissible delegation of authority.<sup>31</sup> Indeed, the Commission is "not only authorized" but also "obligated to consider a utility plan submitted in the absence of State and local government-approved plans." In re Long Island Lighting Co., No. 50-322-OL, slip op. at 3 (N.R.C. May 12, 1983).

Accordingly, Rockland County's refusal to develop and implement an emergency plan cannot be considered as a basis for closing Indian Point Unit 3.

Indeed, it could very well be counterproductive to close the plants, even temporarily. If the plants are shut, Rockland County will lose any incentive it now has to complete the development of its own

nuclear power plants. Continental Illinois National Bank v. Washington, 696 F.2d 692, 700 (9th Cir. 1983). Therefore, the Commission's emergency planning regulations, in the absence of an assertion of federal authority to compel state subdivision compliance, also violate due process.

31. The potential problems of a veto power for local governments has received substantial media attention. One article indicates that only 16 of the 53 nuclear power sites have formally approved emergency plans. Evacuation Issue Threatening Nuclear Plants, N.Y. Times, May 12, 1983, at A1, col. 3. Donald P. Hodel, Secretary of Energy, has stated that the breakdown in emergency planning threatens "the viability of the nuclear power industry" and that the current stalemate "has become an issue of national significance." Id. Moreover, a local governmental veto has the potential for substantial abuse unrelated to local opposition to nuclear power. According to a spokesman for the Atomic Industrial Forum, one Kentucky county "insisted that the state build a road it had been wanting as the price for participating in an emergency plan." Id. Similarly, Ottawa County, Ohio "refused to take part in an emergency exercise around the Davis Besse nuclear plant unless the utility financed improvements in the county's emergency operating center. When the utility agreed, the county presented a new list of demands." Id.; see also Who Should Veto Nuclear Power?, N.Y. Times, May 7, 1983, at A22, col. 1 (editorial) (Commission interpretation of emergency planning regulations "appears to give local authorities a veto over reactors by refusing to approve or cooperate in evacuation plans. If so, the devolution of power over nuclear power from the Federal to the local level has gone too far.").

emergency plans. This would also likely encourage local governments elsewhere to take similar actions, thereby fostering the spectre of a local government veto over nuclear power. If, on the other hand, the Commission allows the plants to continue operation, Rockland County will presumably honor its pledge to complete the approval process for its own plans in an expeditious manner.

D. Risk and the County's Role

Rockland County's role within the risk profile of Indian Point Unit 3 is very small. The only type of accident which would develop quickly enough to require prompt protective action would occur with a median frequency of once in 25,000,000 reactor years,<sup>32</sup> and even then Rockland County is not likely to be affected.

Radioactive material released in an accident would be unlikely to reach the County because of local wind patterns. Early fatality risk decreases markedly with increasing distance from the plant. Most residents in the County live beyond three miles from Indian Point; further, the population is sparse near the mile-wide Hudson River which separates the plant from the County. Given this population distribution and the wind patterns, Rockland County residents are at extremely low risk even if a rare accident should occur.

As stated earlier, evacuation has little effect on the latent fatality risk and the early fatality risk can be acceptably responded to

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32. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 13; IPPSS Amendment One at 8.1-5.

by sheltering followed by relocation.<sup>33</sup> Given this protective response and the extremely low risk in Rockland County, the role of County officials is particularly limited.

Additionally, more realistic estimates of the amount and type of radioactive material released (source term) from an accident would reduce the already low early fatality risk dramatically, probably approaching zero. While disagreements exist regarding the "correct" source term for specific accident sequences, there is no debate regarding the basic conclusion: based upon current methodology, risk assessments (including the IPPSS and the Staff's independent analysis) probably have significantly overstated the source terms and, therefore, overstated the risk.<sup>34</sup> The Power Authority's experts testified that with a more realistic source term no early fatalities result from accidents at Indian Point.<sup>35</sup> The processes which deplete radioactive material are not dependent upon functioning of plant equipment, operator actions or the cooperation of county officials, but rely instead on the laws of nature.

The role of Rockland County officials in affecting the risk to

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33. See Section IIB(2), supra.

34. Licensees' Testimony of William R. Stratton, Walton A. Rodger, and Thomas E. Potter on Question One at 5, 61; see Staff Testimony of Robert M. Bernero on Severe Accident Source Terms at 3; Testimony of Dr. Sarbeswar Acharya Regarding NRC Staff Assessment of Accident Consequences and Risks at III.C.A.-20 to III.C.A.-21.

35. Licensees' Testimony of William R. Stratton, Walton A. Rodger, and Thomas E. Potter on Question One at 6; see Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 125-27.

County residents, thus, is particularly minimal and the deficiencies relating to the County should not be considered significant.

#### IV. COMPELLING REASONS SUPPORTING CONTINUED OPERATION

##### A. Economic Impacts of a Shutdown

Permanent shutdown of Indian Point Units 2 and 3 would result in grave economic consequences for customers; particularly those in southeast New York. Throughout the state, closing the Indian Point units would have a strong negative effect on large industrial employers, such as General Motors in Westchester County. Closing Indian Point would also further widen the substantial rate disparity between upstate and downstate New York, already a divisive issue.

The shutdown of the Indian Point units will have a direct cost impact in the form of increased rates on the customers of both Con Edison and the Power Authority.

Electricity from Indian Point Unit 3 and the Charles Poletti Project, an 825 MW oil- and gas-fueled plant, is sold to 76 governmental customers in New York City and Westchester County. These entities use the power for public buildings, mass transit, public housing, street lighting, and other public purposes. The Power Authority also sells electricity to Con Edison from these plants. The largest customers in the New York City region are the Metropolitan Transportation Authority (MTA) and New York City. In 1982, the MTA used 35% of the Power Authority's nuclear and fossil fired output in southeast New York and New York City used 32%.<sup>36</sup>

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36. Power Authority's Testimony of Charles R. Dean, Harold M.



The economic impacts of an Indian Point shutdown may be categorized as follows: replacement power costs, other costs and savings resulting from a shutdown, business costs to the Power Authority, and indirect economic effects on society. Licensees have projected the statewide replacement power cost of a shutdown in 1984 to be \$463 million. Practically all of that increase in the cost of electricity, \$455 million, will occur in the Con Edison service territory. The replacement power cost, for the years 1984 - 1999, totals almost \$18 billion before adjustments for inflation and any savings that would result from closing Indian Point.<sup>37</sup> The economic consequences of a shutdown, adjusting for the savings in operations and maintenance and added capital cost, based upon a 63% capacity factor, and calculated to the respective ends of plant lifetime, 2006 and 2009, results in a present worth replacement power cost of about \$9 billion.<sup>38</sup> Additionally, licensees calculated the replacement cost using a low oil price forecast, increased plant expense projections, and a 57% capacity factor, resulting in a net

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Hochman, Paul H. Rubin on Commission Question 6.3, at 6.

37. Licensees' Testimony of Eugene T. Meehan on Commission Question 6, Table 4.1 at 30, Table 4.2 at 31, 40.

38. Testimony of Sally Hunt Streiter on Commission Question 6, at 2. Other parties' estimates of the replacement power cost do not vary dramatically from the projection noted above based upon estimates of low capacity factor and low oil price increases. See Testimony of Vince Taylor on the Economic Costs of Closing Indian Point, Union of Concerned Scientists at 2, Table A at 17 (25-year cost penalty \$4.4 billion; cost adjustments \$4.1 to \$4.2 billion); Testimony of David Schlissel and John Mavretich, New York City Council, at 23 (cost penalty \$2.9 to \$4.7 billion); NRC Staff Testimony of William A. Buehring, et al. at 42 (replacement power costs after savings \$4.4 billion). Only one party submitted shutdown costs that were markedly different. Testimony of GNYCE Witness Richard Rosen on Commission Question 6.3, at 5.



production cost impact of \$4.9 billion for the two plants. If oil costs move higher than expected, the plants achieve a 69% capacity factor and plant expenses are not as high as estimated, the replacement power costs could rise to \$12.9 billion on a present worth basis.<sup>39</sup>

The economic impact of closing Indian Point will not be borne equally by all New York City residents. The cost impact to a customer of the Power Authority will be higher than to a typical Con Edison customer. It is estimated that MTA's power cost will increase by approximately 25 to 30% for each year after a shutdown. This will result in a fare rise. If the increased cost is paid for solely by increasing fares, it is estimated that approximately 11,400 individuals will be compelled to leave the work force because of the increased cost of transportation. If the MTA chooses to meet the added cost of electricity, not by increasing fares, but by reducing service, the job losses would be even greater.<sup>40</sup>

The added cost of electricity is not limited to the customers who are directly served by licensees. The added cost of energy will have indirect or secondary effects on other individuals and business entities throughout the New York City region. It is expected that the increased cost of electricity will cause job losses not only in the Power Authority's customers, but also in other businesses which are indirectly affected. Four thousand three hundred jobs per year would be lost and

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39. Con Edison, Ex. 14, at 1, 2.

40. Licensees' Testimony of Dr. Frederick C. Dunbar on Commission Question 6, at 2, 12, 14, 20.

New York City income would be reduced by \$160 million to \$726 million per year (current dollars). Most of the decline in employment would be concentrated in the nondurable manufacturing, wholesale and retail trade, and service sectors of the New York economy.<sup>41</sup>

These projected economic effects are not abstract. One Westchester County customer of Con Edison, the General Motors' Tarrytown plant, has the highest energy rate of any General Motors assembly plant in the United States. This plant employs 2,600 workers. There have already been extensive discussions between plant management and both licensees to discuss General Motors' desire to reduce expenses and, in particular, to reduce the cost of electricity.<sup>42</sup> The impact of closing Indian Point would increase, not reduce, the energy costs to this major industrial customer.

A separate economic impact is the increased need for constructing new generation facilities. While substantial generating capacity over the expected peak demand presently exists, the shutdown of Indian Point would have a significant impact on reserve capacity, and would require additional generating capacity by 1998.<sup>43</sup> A shutdown of Indian Point because of emergency planning considerations would be likely to add to the pressure to block the opening of Shoreham, where emergency planning

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41. Power Authority's Testimony of Charles R. Dean, Harold M. Hochman, and Paul H. Rubin on Commission Question 6.3, at 24.

42. O'Rourke Bids Utility Agency Help Keep G.M. in County, N.Y. Times, Jan. 30, 1983, § 11, at 1, col. 4.

43. Licensees' Testimony of Eugene T. Meehan on Commission Question 6, Table 4.1, at 30.

is also an issue.<sup>44</sup>

B. Level of Safety of Indian Point Unit 3

The risk to the public from an accident at Indian Point Unit 3 is extremely low and within the range of risks estimated for other operating nuclear power plants.<sup>45</sup> The median frequency of one or more early fatalities is once in 140,000,000 reactor years, and the median frequency of one or more latent cancer deaths is once in 58,000 reactor years.<sup>46</sup> The NRC Staff's independent assessment is that Indian Point Unit 3 does not pose an undue or high risk.<sup>47</sup>

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44. In addition to the quantifiable cost impacts, the impact of a shutdown on the role of the Power Authority in southeast New York may be substantial. Since 1974-75, when the Power Authority purchased the Charles Poletti Project and Indian Point Unit 3 from Con Edison, much of the Power Authority's efforts have been directed toward reducing the high cost of energy in the New York City region. In the event that Indian Point Unit 3 were closed, the Power Authority would no longer be able to meet all of its customer demand in southeast New York through just the Poletti Project. Certain of its present customers may be forced to return to Con Edison. Additionally, the Power Authority may be unable to operate economically the Poletti fossil-fueled plant on a stand-alone basis. This result, if it occurred, could lead to all of the Power Authority's customers returning to Con Edison and the Power Authority withdrawing from its efforts to mitigate the cost of power in southeast New York.

45. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 10-12, 14-17; Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question Five at [A] 33.

46. Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 30. These data are derived from the licensees' Indian Point Probabilistic Safety Study, as amended, which the Staff termed a comprehensive, pioneering risk assessment. Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 1, at 25.

47. Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at [C] 14-15.

The health risks at the plant are well below the Commission's preliminary safety goals: for individual early fatality risk by a factor of approximately 75, and for societal latent fatality risk, by a factor of 710.<sup>48</sup> The Staff, agreeing that the plant is below the safety goal, stated that the early fatality risk is "quite likely to be well below one tenth of one percent" of the background, non-nuclear risks and that the latent fatality risk is "extremely unlikely" to "pose anywhere near one tenth of one percent of the background risk of cancer fatalities."<sup>49</sup>

Even without sheltering or evacuation for one day following a rapid radioactive release and assuming normal activities, the early fatality risk would still be below the preliminary goal. Staff testified that, with the unrealistic assumption that no one would receive supportive medical treatment, the preliminary goal for early fatalities is still met, using a relocation approach.<sup>50</sup>

Indian Point Unit 3 compares very favorably with the estimates from other plants for those accidents that dominate early fatality risk.<sup>51</sup> Staff concluded that the plant is "safer than average" in this regard

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48. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 6-7.

49. Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at B-14, B-16.

50. Licensees' Testimony on Commission Question One, Board Question 1.1, and Contention 1.1, at 120, 120a; Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at B-13 to B-14.

51. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 12-14.

and that it is one of the "best" with respect to the frequency of resulting severe releases.<sup>52</sup> An important factor in this low risk is the Indian Point containment capability.<sup>53</sup> Indian Point Unit 3 is well within the spectrum of risks estimated for other plants with respect to latent cancer fatality risk.<sup>54</sup>

Accordingly, licensees' and Staff's analyses dramatically underscore that even with a high density population the Indian Point Units are within the range of risks estimated for other plants. Moreover, even without prompt evacuation, the plants would still meet the Commission's preliminary safety goals. The low level of risk of Indian Point Unit 3 with or without prompt evacuation offers compelling justification for continued operation.

V. COMMISSION'S MAY 5 ORDER DENIES POWER AUTHORITY A FAIR HEARING

By order of May 30, 1980, the Commission announced its intention to initiate a special adjudicatory proceeding addressing the risk posed by the Indian Point plants. Order at 3-4 (May 30, 1980). The Power Authority, for more than three years, in reliance upon the process established by the Commission, has invested enormous time and resources in

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52. Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at [A] 9, 10.

53. See Licensees' Testimony on Commission Question One, Board Question 1.1., and Contention 1.1, at 72-73; see Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at [A] 33.

54. Licensees' Testimony of Dennis C. Bley, Donald F. Paddleford, Thomas E. Potter, and Dennis C. Richardson on Commission Question Five at 11, 14-15, 25-26; Direct Testimony of Frank Rowsome and Roger Blond Concerning Commission Question 5, at [A] 9, 10.



the preparation and presentation of its case. The trial portion of the proceeding before the Licensing Board concluded on April 29, 1983. By virtue of its May 5, 1983 Order, the Commission has effectively pre-empted and assumed for itself the material issues presented to and argued before the Licensing Board: emergency planning, level of risk, and economic impact of a shutdown.<sup>55</sup>

In establishing the special adjudicatory proceeding, the Commission stated that "[t]he record of the proceeding, together with recommendations, will then be forwarded to the Commission for the final agency decision on the merits of the proceeding."<sup>56</sup> May 30 Order at 3; In re Consolidated Edison Co., 13 N.R.C. 1, 6 (1981) (Jan. 8 Order). In so

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55. In order to avoid shutdown, both the May 5 Order and the Commission's regulations require, inter alia, the Power Authority to present evidence by May 20 that "compelling reasons exist to permit operation of the facility" or "other factors justify[] continued operation." May 5 Order at 4-5; see 10 C.F.R. § 50.54(s)(2)(ii)(1982). The scope of such a showing implicates the substantive questions which the Commission directed the Licensing Board to consider, and on which the Licensing Board has received evidence since June 1982.

56. Following any adverse decision by the Commission, the Power Authority has the right to an on-the-record adjudication. 42 U.S.C.A. § 2239 (West Supp. 1983). This is consistent with the Commission's January 8, 1981 Order which characterized the special adjudicatory proceeding as an extension of the factfinding process completed by the Task Force on Interim Operation of Indian Point. See In re Consolidated Edison Co., 13 N.R.C. 1, 5 (1981) (Jan. 8 Order). Indeed, the Commission recognized the distinction between a special adjudicatory proceeding resulting in recommendations and an on-the-record adjudicatory proceeding required in the event of a decision "to suspend, revoke, or modify the [Power Authority's] operating license[]." May 30 Order at 2; see 42 U.S.C. § 2239.

In addition, under 10 C.F.R. § 50.54(s)(2)(ii), the Power Authority is entitled to an adjudicatory hearing should the Commission determine that the overall state of emergency preparedness at Indian Point is inadequate. See Emergency Planning (Final Rule), 45 Fed.Reg. 55,402, 55,403, 55,408 (1980); 10 C.F.R. § 2.202(c).

doing, the Commission delegated to the Licensing Board the authority to hear evidence on questions posed by the Commission and to make corresponding recommendations.<sup>57</sup> Moreover, the Commission specifically delegated to the Licensing Board the authority, in the first instance, to make interim recommendations concerning the continued operation of Indian Point prior to submitting its final recommendations on the Commission's questions, id. at 3, a delegation the Commission now, in effect, has withdrawn.

The Commission also stated that, except as noted, the procedural regulations set forth in 10 C.F.R. Part 2<sup>58</sup> would control the Licensing Board hearing. In re Consolidated Edison Co., 14 N.R.C. 610, 611 (1981) (Sept. 12 Order). Although the Commission may limit its consideration to the exceptions taken to the Licensing Board's decision, it is ordin-

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57. Board members shall  
preside in . . . proceedings for granting, suspending,  
revoking, or amending licenses or authorizations as the  
Commission may designate, and [shall] perform such other  
adjudicatory functions as the Commission deems  
appropriate.

10 C.F.R. § 2.721(a); accord 42 U.S.C. § 2241(a). These "adjudicatory functions" include the formulation of recommendations on the Commission's questions. In re Consolidated Edison Co., 13 N.R.C. at 5-6 (Jan. 8 Order).

58. The Commission is bound by its regulations. Nader v. NRC, 513 F.2d 1045, 1051 (D.C.Cir. 1975); see United States v. Nixon, 418 U.S. 683, 696 (1974); Vitarelli v. Seaton, 359 U.S. 535, 540 (1959); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954); International House v. NLRB, 676 F.2d 906, 912 (2d Cir. 1982); Bray v. United States, 515 F.2d 1383, 1395 (Ct.Cl. 1975) (per curiam). These regulations have the force and effect of law. Rodway v. USDA, 514 F.2d 809, 814 (D.C.Cir. 1975). Although the regulations and orders provide for discretionary powers delegated by the Commission to the Licensing Board, the Commission is still bound by its regulations and cannot ignore them. Service v. Dulles, 354 U.S. 363, 372 (1957); Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969).

arily required to consider the entire record. 10 C.F.R. § 2.770(a). Accordingly, by regulation, the Commission is bound to review the recommendations of the Licensing Board.<sup>59</sup> Moreover, failure of the Commission to abide by its order prejudices the Power Authority and constitutes a denial of due process.<sup>60</sup> See Pacific Molasses Co. v. FTC, 356 F.2d 386, 387 (5th Cir. 1966).

The Commission cannot now practically or constitutionally "base its decision on evidence which has not been specifically brought before it." Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); accord Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945); United States v. Abilene & S.Ry., 265 U.S. 274, 288 (1924). Sixteen thousand pages of transcribed testimony and thousands of pages of exhibits, all of which are before the Licensing Board and not the Commission, reflect the complexity of this matter.<sup>61</sup> When the Commission issued the May 5 Order,

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59. The Licensing Board's "findings and conclusions, or recommended action, will have great significance [and constitute], of course, a relevant and important part of the administrative record." T.S.C. Motor Freight Lines, Inc. v. United States, 186 F.Supp. 777, 789-90 (S.D. Tex. 1960), aff'd per curiam, 366 U.S. 419 (1961). The record must be considered as a whole by the Commission if the Commission decides to shut down Indian Point. Any Commission decision is "vulnerable" if it fails "to reflect attentive consideration" to the Licensing Board's recommendations. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C.Cir. 1970), cert. denied, 403 U.S. 923 (1971).

60. Other due process considerations relating to Commission action under 10 C.F.R. § 50.54(s) may bar a shutdown of Indian Point Unit 3. See Licensees' Motion for a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or for Dismissal of this Proceeding or, in the Alternative, for Certification to the Commission and supporting memorandum (Nov. 25, 1981).

61. The Commission itself has recognized "the complexity of this proceeding." In re Consolidated Edison Co., 13 N.R.C. at 6 (Jan. 8 Order).

the Power Authority was in the process of preparing its proposed findings of fact, conclusions of law, and recommendations<sup>62</sup> in order to aid the Licensing Board in analyzing the massive amount of evidence presented in the proceeding. A "constitutionally sufficient review of the evidence entails consideration of . . . findings and recommendations prepared by" the Licensing Board. Jones v. Morris, 541 F.Supp. 11, 18 (S.D.Ohio 1981), aff'd mem., 455 U.S. 1009 (1982).

The Commission must give "reasoned consideration to all the material facts and issues." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C.Cir. 1970), cert. denied., 403 U.S. 923 (1971) (footnote omitted).<sup>63</sup> However, the Licensing Board is the only body presently able to give "reasoned consideration" with regard to recommendations affecting the operation of Indian Point.<sup>64</sup> Having established the

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62. The Power Authority's proposed findings of fact, conclusions of law, and recommendations are estimated to total over 400 pages, more than ten times the amount to which it has been limited by the Commission to respond to the May 5 Order within 15 days of its issuance.

63. One of the primary objectives of procedural due process as applied to administrative proceedings is to insure that an agency will acquire the information it should have in a manner fairly calculated to illuminate the issues for reasoned decisionmaking, and thereby to minimize the risk of erroneous or arbitrary action. NAACP v. Wilmington Medical Center, Inc., 453 F.Supp. 330, 337 (D.Del. 1978), rev'd on other grounds, 599 F.2d 1247 (3d Cir. 1979) (footnotes omitted); accord Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1192-93 (D.D.C. 1975), aff'd mem., 539 F.2d 243 (D.C.Cir. 1976).

64. It is important that the persons making the determinations have heard the evidence presented. See Morgan v. United States, 298 U.S. 468, 481 (1936); Greater Boston Television Corp. v. FCC, 444 F.2d at 850 ("[f]ull allowance must be given . . . for the opportunity . . . to observe the demeanor of the witnesses").

special adjudicatory proceeding pursuant to its own regulations, the Commission must allow the Licensing Board to exercise its independent discretion.<sup>65</sup> Failure to do so would constitute a denial of due process. See United States v. Nixon, 418 U.S. 683, 696 (1974); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954).

If the Commission does not allow the Licensing Board to evaluate the proposed findings, arrive at its own findings, and make its recommendations to the Commission, the Licensing Board hearing will be effectively aborted.

The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not con-

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65. The Commission's May 5 Order prejudices specific emergency planning issues which were delegated to the Licensing Board for adjudication and recommendation. See In re Consolidated Edison Co., 13 N.R.C. at 7 (Commission Questions 3 and 4) (Jan. 8 Order). This prejudgment has so tainted the proceeding that an adverse recommendation by the Licensing Board on emergency planning and related issues may be hopelessly flawed. Furthermore, the Commission has previously specifically rejected the notion that the lack of an emergency plan at Indian Point alone should precipitate shutdown.

While a successful plan for evacuation at Indian Point would probably reduce overall risk, the fact is that most operating reactor sites do not yet have an approved plan and Indian Point is not different in this regard.

Id. at 3-4.

The Indian Point plan has dramatically improved since issuance of the May 30, 1980 Order and since the 1982 drill. See Sections II and III, supra. Nuclear power plants operating at 36 other sites in the nation lack approved evacuation plans. Washington Puts Indian Point on Notice, N.Y. Times, May 8, 1983, 6E, col. 3, at col. 5. The Commission points to no new evidence which could justify its changed opinion.



considered evidence or argument, it is manifest that the hearing has not been given.

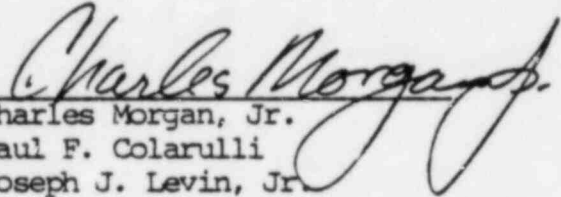
Morgan v. United States, 298 U.S. at 480-81.

Thus, the Commission must adhere to its May 30, January 8, and September 18 Orders delegating to the Licensing Board the authority to issue recommendations regarding the safety of Indian Point, and to recommend shutdown or other action if necessary. The Commission's present action as set forth in its May 5, 1983 Order frustrates and preempts the ongoing special adjudicatory proceeding and consequently stands as a denial of due process to the Power Authority. Therefore, if the Commission is to satisfy due process requirements it must allow the Licensing Board to accomplish and conclude its delegated responsibilities.

#### CONCLUSION

For the foregoing reasons, the Power Authority submits that no enforcement action is warranted.

Respectfully submitted,

  
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Dated: May 20, 1983

APPENDIX: Summary of Funds Expended by Power Authority on Offsite  
Emergency Planning 1980-date

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<u>Date(s)</u>	<u>Item</u>	<u>Amount</u>
1980-date	Salary for coordinator of Four County Nuclear Safety Committee	110,000
1980-81	Funding of consultants (EDS Nuclear & Parsons, Brinckerhoff, Quade & Douglas, Inc.) to work with State and counties to develop RERP's	1,150,000
1980-date	Alert Notification (siren) System	2,346,500
1980-date	Power Authority Staff working with State and counties on offsite emergency planning	941,150
1980	Funding for State REPG activities prior to enactment of fee legislation	87,859
1980	Funding of study to assess emergency housing needs of evacuees	16,555
1980	Funding of computer services to perform dynamic traffic analysis	15,000
1980	Study of Mississauga, Canada evacuation	2,000
1980	Rockland County helicopter program	12,000
1980	Funding of consultant to act as liaison between State REPG and four counties	15,000
1980	MIDAS system and meteorological equipment	521,000
1980	Evacuation traffic study	21,000
1981-date	EOF modifications	552,000
1981	Funding for Radiological Emergency Communications System (RECS Hotline) connecting offsite authorities on dedicated party line	45,000
1981	Computer terminals for all county EOC's to enable access to meteorological, dose assessment, and plume projection data	40,000
1981	Printing of county RERP's	1,500
1981	Federal signal study for siren activation	6,000

1981	State radiological preparedness fee	75,000
1981	Consultant to assist in revising and maintaining Putnam County RERP	6,000
1982	Printing and distribution of emergency planning brochures	114,000
1982	Communications equipment for State and counties	300,000
1982	Funded new radio system to augment NAWAS and place all four counties on same district disaster preparedness frequency	45,000
1982	Funding of dedicated Executive Hotline connecting chief executives of four counties	30,000
1982	Communications devices for State and counties	23,249
1982	State radiological preparedness fee	250,000
1982	Additional funding for State REPG to resolve "120-day clock" items (all monies passed on to four counties)	105,000
1982	Training funding for county, local and volunteer response personnel	230,038
1982	Offsite telephone maintenance	1,000,000
1982	Reuter-Stokes Offsite Monitoring System	216,000
1983	State radiological preparedness fee	250,000
1983 (to date)	Printing and distribution of emergency planning brochures and posters	119,000
1983 (to date)	Offsite telephone maintenance	333,333
1983	Funded Westchester County transportation study	120,863
1980-date	TOTAL POWER AUTHORITY FUNDING FOR OFFSITE <u>EMERGENCY PLANNING*</u>	<u>\$9,100,047</u>

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\* This amount does not include expenditures by Con Edison for offsite emergency planning, or expenditures by either licensee for onsite emergency planning.

CERTIFICATE OF SERVICE

DOCKETED  
MAY 20 1983

I hereby certify that on the 20th day of May, 1983, I caused  
copies of the foregoing Power Authority's Response to Commission  
Order Establishing Procedures for Decision on Enforcement Action  
to be hand delivered to:

Nunzio J. Palladino, Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner Victor Gilinsky  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

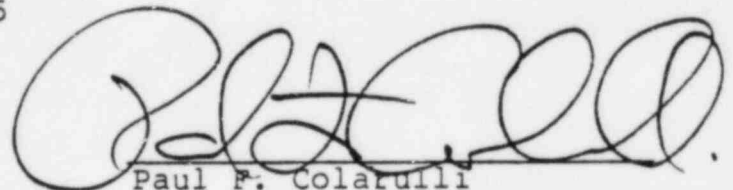
Commissioner John F. Ahearne  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner Thomas M. Roberts  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner James K. Asselstine  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Secretary  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Chief, Docketing and Service Section

Office of the Executive Legal Director  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

  
Paul F. Colarulli