

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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

In the Matter of)
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)

CONSOLIDATED EDISON COMPANY)
OF NEW YORK)
)

(Indian Point, Unit 2))
)
)

POWER AUTHORITY OF THE STATE)
OF NEW YORK)
)

(Indian Point, Unit 3))
)
)

Docket Nos. 50-247
50-286

May 20, 1983

VIEWS OF MEMBERS OF THE NEW YORK CITY COUNCIL
IN RESPONSE TO COMMISSION ORDER ESTABLISHING
PROCEDURES FOR DECISIONS ON
ENFORCEMENT ACTION
(CLI-83-11)

-I-

On May 5, 1983, the Commission invited affected local governments to supply their views regarding the FEMA report on emergency planning and preparedness at Indian Point and on the question of plant shutdown. The Members of the New York City Council*(hereinafter Members or the Council Members) welcome this invitation to file this statement and to appear before the Commission on May 26, 1983, to express, directly to the Commission, their perspective on what they think are among the most important issues to be con-

*The Members of the New York City Council are 23 members of the Council, a majority of the body, who have been granted "interested state" status in the Indian Point Atomic Safety and Licensing Board proceeding.

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fronted by the public officials and by the residents of the New York metropolitan area.

The Members of the New York City Council represent over five million people. They represent districts as diverse as Manhattan's Upper East Side and Brooklyn's Brownsville; as different as the South Bronx and Staten Island or Greenwich Village and Forest Hills, Queens. The Members of the Council speak on behalf of the residents of Harlem and Bedford-Stuyvesant as well as for those who live in Brooklyn Heights or on the edges of Central Park.

This recitation of the Members' diversity, and indication of the diversity of their constituencies, is offered in the hope of making quite clear the Members' belief that the issues this Commission is engaged in addressing transcend questions of race or class or ethnicity. 50% of New York City is Black and Hispanic. A significant portion of New York's citizenry has incomes below federal poverty standards. All, however, are vitally concerned about the safety of their families and themselves.

The Council Members' constituents live almost entirely within a 50-mile radius of Indian Point. Those in the Bronx live only 20 or so miles from the reactor site. Hospitals within New York City's boundaries will receive evacuees from within the 10-mile Emergency Planning Zone (EPZ) in the event of an accident and the concomitant implementation of certain protective actions. Certainly, many of those who live in Westchester and Rockland Counties can be expected to enter New York City if an evacuation were to be ordered--or even in the event of an accident without a formal evacuation order. The Council Members are, therefore, deeply concerned about the state of emergency planning and preparedness around Indian Point.

This party is aware that testimony has been received by your special Atomic Safety and Licensing Board investigating the situation at Indian Point suggesting that under certain conditions, concededly somewhat remote, New York City itself would be exposed to plume radiation which could require abandoning

sections of the City for significant periods. This too prompts deep concern because of the lack of any emergency planning or preparedness for accidents for those who live in our City.

The Members of the Council have another interest in this matter. Their constituents are almost all Con Edison ratepayers; those who are not receive electricity generated by New York Power Authority facilities and sold to the New York City Housing Authority. Members' constituents are also subway riders and, as you know, the Metropolitan Transportation Authority (MTA) buys its power from the New York Power Authority, as does the City of New York for its buildings and the Port Authority for its use. Members are very aware of and interested in your consideration of the economic consequences of a shutdown of the nuclear reactors at Indian Point should you choose to consider this factor at all in your deliberations under 10 CFR 50.54(s)(2).

Finally, it should be noted that the interests of Council Members in the Indian Point situation go beyond the submission of the instant document and participation in your May 26, 1983 hearings. Council Members have been, by far, the most active "interested state" in the recently concluded ASLB proceedings and have, on more than one occasion, considered Indian Point-related resolutions in New York City Council legislative sessions.

-II-

This Commission is now involved in what this party believes must be the final stage of a much-too-prolonged process of determining what enforcement actions should be taken in light of the continued inability of the Federal Emergency Management Agency (FEMA) to state to the Nuclear Regulatory Commission (NRC) that the state of emergency preparedness at Indian Point provides reasonable assurances that adequate protective measures can and will be taken in the event of a radiological emergency.

In order for this Commission to understand the reaction of Council Members and their constituents to this inquiry, the larger context must be appreciated. The residents of New York City, like nearly all the rest of the country, were deeply affected by the events at Three Mile Island in the Spring of 1979. Many New Yorkers left the City, even though New York is hundreds of miles from the TMI reactor site. This Commission's subsequent initiative, under then-Chairman John Ahearn, to upgrade its emergency planning regulations in order to assure that adequate protective actions can and will be taken in the event of a radiological emergency was, therefore, welcomed.

New Yorkers, however, were not satisfied when, in August of 1980, the Final Rule on Emergency Planning appeared in 45 Fed. Reg. 55402 et seq. Members believed then and continue to believe that, at least at Indian Point, a 10-mile EPZ is woefully inadequate. Members think also that adequate planning, for even the 10-mile EPZ, requires coordination of effort with the surrounding local governments, a matter that NUREG-0654 fails to address adequately (and which recent testimony before the Atomic Safety and Licensing Board indicates has not, to this day, occurred).

Not surprisingly, then, the Members of the New York City Council, having followed closely the filing of the UCS/NYPIRG 10 CFR 2.206 petition of September, 1979, anxiously awaited the convening of a special investigative Atomic Safety and Licensing Board as announced by the Commission orders of January 8 and September 18, 1981.

Members of the New York City Council actively participated in the ASLB hearings as an "interested state" and filed extensive testimony with the panel regarding a variety of emergency planning and preparedness considerations focusing primarily on their impact on the City of New York and its residents. Members' faith in this investigative process was seriously shaken, however, by the actions of this Commission in August of 1982 which culminated in the resign-

ation from the ASLB of its Chair, Lewis J. Carter. In his letter of September 1, 1982, to this Commission explaining his resignation, Carter stated it appeared to him

...that the goal of a truly independent Licensing Board has been needlessly subordinated to the Commission's other goals in the Indian Point case... [t]o sit as Chairman of the Board...would be incompatible with my sense of fairness.

Unfortunately this case has indicated to me that we do not share a common concern for the processes which regulate the resolution of these matters or in making the NRC's legal process a finer craft...

This statement shook deeply the confidence all New Yorkers had in this Commission's commitment to finally resolve the Indian Point controversy on its merits, without fear or favor.

Our faith was again shaken in December 1982 when this Commission was called upon to take enforcement action against the Indian Point licensees as a result of their failure to remedy emergency planning and preparedness inadequacies identified by FEMA the previous summer which caused this Commission to establish a 120-day clock.

In its decision of December 22, 1982 (CLI-82-38), this Commission showed a cognizance of the unique long-term planning and preparedness difficulties that obtain at the Indian Point site. Commissioner Ahearne, in his additional views, opined that the

difficulties stem from the large population surrounding the plants and the unusual multigovernment involvement required to develop successful plans.

Despite this awareness, over the objections of Commissioner Gilinsky, and in the face of a well-reasoned legal analysis by this Commission's only lawyer member, Commissioner Asselstine, to the contrary, this Commission took no enforcement action on Indian Point.

Council Members and their constituents could only wonder whether this Commission had been captured by those interests it is mandated to regulate, as have been other regulatory agencies during our history. Council Members were, however, encouraged by aspects of Commissioner Ahearne's views, which seemed to present an ultimatum to the plant operators and to the relevant governmental units regarding the continued operation of the reactors. (Members were not encouraged enough, on the other hand, for them to refrain from intervening in a still-pending lawsuit challenging this Commission's failure to take enforcement action which was brought in the United States Court of Appeals for the Second Circuit by Rockland County, and which was broadened by the Court to consider the appeal of a 10 CFR 2.206 petition which had been filed by UCS/NYPIRG.)

In December, Commissioner Ahearne, for one, anticipated being able to review these issues by the end of April. At present, no enforcement is likely until early June, at best. Already there is slippage in the schedule. Commissioner Ahearne certainly must have hoped that he and the other members of the NRC would not have to confront the current dilemma when he stated:

I do not believe I would support continued operation
of the plants...

without

...a resolution of the Westchester County bus driver issues
and approved Rockland County emergency plans.

As the Commission reads this submission and the others filed with it, and as it listens to oral argument on May 26 and deliberates thereafter, it must realize that the skepticism regarding its commitment to emergency planning and preparedness as general concepts, and as they obtain at Indian Point in particular, is growing among those who have paid attention to this process over the years and among those who only now have become aware of the role of the NRC as a result

of the media attention paid to the Indian Point controversy. At least one Commissioner exhibited sensitivity to this reality when he wrote that

Many people are watching to see if we stand behind our regulations.

The residents of the City of New York and Members of the New York City Council are among them.

-III-

Members of the New York City Council expect other submissions of views by parties better versed in the particulars of the FEMA findings and emergency planning and preparedness to address their adequacies and inadequacies. Members also expect other submissions to address, in some detail, the "legislative history" of 10 CFR 50.54(s)(2). This party would here note only its belief that the parameters of 10 CFR 50.54(s)(2), while constructed to provide considerable flexibility, as witnessed by the continual use of the disjunctive in the regulations, do not provide unlimited flexibility.

Since the role of FEMA and the validity of its judgments, the meaning and the present or future existence or non-existence of "adequate interim compensating actions," and the significance or insignificance of particular planning or preparedness deficiencies will be addressed in other submissions, the remainder of this submission will address sections 2(c) and 2(d) of this Commission's restatement of 10 CFR 50.54(s)(2) as it appeared in its May 5, 1983 ORDER ("other compelling reasons" and "other factors").

The "other factors" and "other compelling reasons" phraseology build into 10 CFR 50.54(s)(2) tremendous discretionary powers. Though the phrases could reasonably be interpreted as redundant on their face, with "other factors" subsuming "other compelling reasons," a review of the administrative record of the rulemaking process and the subsequent uses of the phrases indicate that they

look to different families of considerations.

The "other factors" terminology appears to dove-tail and, in some cases, to overlap, with the explicit criteria set forth in the rule. Certainly its focus is on emergency planning and preparedness considerations (as opposed to more extrinsic factors). As the NRC asserted in its brief in County of Rockland v. U.S. NRC (2nd Cir., 83-4003, 83-4037),

The Commission intended to balance the lack of a particular plan with other factors, allowing operation where protection of the public, though not optimum, was adequate on an interim basis.
(emphasis added)

Under this rubric, it is at least arguably appropriate to consider, for example, the fact that one of the plants is off-line or that some progress in planning has been made. This is not to suggest that Members of the New York City Council agree with how the Commission has weighed these factors. In fact, in the face of the Commission conclusion

...that adequate emergency preparedness is an essential aspect in the protection of the public health and safety (45 Fed. Reg. 55402, 55404),

this party believes that this Commission has failed to balance these factors correctly, at least with regard to Indian Point.

In the instant matter, Members submit that a balancing exercise, should the Commission feel compelled to engage in one, must not be used to protect the plants from a shutdown order.

To discuss briefly a number of what appear to be, in the Commission's view, relevant "other factors":

"Substantial Progress" - In December, this Commission justified continued plant operation upon assertions of substantial progress in planning. The Commission, Pollyanna-like, looked to workable Rockland County plans in January 1983 and a speedy resolution of the Westchester bus driver difficulty. Today, five months later, little has changed. The two major deficiencies identified

by FEMA have existed for two years beyond the date set by this Commission for compliance with emergency planning and preparedness requirements. Other significant inadequacies not identified by FEMA also exist.

This Commission must finally realize that without the most stringent enforcement action, no progress will be made. In any case, it is very unlikely that a Rockland County plan will exist before the end of this year (and it will then require testing and review), and, despite the possibility of "signed contracts" (as distinguished from a letter of intent to contract sometime in the indefinite future) with Westchester County bus companies, it is unlikely that there can be any realistic appraisals regarding the availability of drivers until late this year, at best. Further, Westchester is only now in the process of commissioning a whole new transportation study which will certainly delay firm planning and preparedness structures.

Without arguing the proper weight accorded the "substantial progress" factor at other points in the planning process, it should be clear now that very little progress can be anticipated "promptly," new claims of "substantial progress" notwithstanding.

Low Probabilities of an Accident - The Commission used the fact that Indian Point 3 would be off-line during the period December 1982 to April 1983 to support its assertion that the probabilities of an accident were reduced. Without conceding this point, Members point out that that Indian Point 3 will be returning to service, without a Commission order to the contrary, in June 1983. Thus, using the same reasoning as this Commission used in December, it is fair to point to an increased probability of an accident subsequent to the startup of Indian Point 3.

Additionally, the entire issue of probability assessment must be examined carefully, both in terms of its use for bottom line assessment (a point on which the NRC staff position is well known) and in light of the Commission's

oft-articulated position regarding the essential nature of emergency planning and preparedness. Specifically, having chosen to go the offsite emergency preparedness route, can this Commission now argue low probability to excuse failure in planning and preparedness?

State Compensating Measures - The FEMA exercise assessments have been presented to this Commission. Others will certainly comment upon them. It should be noted, however, that FEMA witnesses at the ASLB proceeding on April 25 and 26, 1983, indicated a strong belief that New York State could not adequately compensate for the lack of Rockland County participation in the event of a real radiological emergency at Indian Point because of the State's failure to commit the necessary resources. This important point was also made by Mr. Krimm in his response of May 4, on behalf of FEMA, to Mr. Chilk's inquiries of April 26. Additionally, it seemed to be conceded in the public statements of New York Governor Mario Cuomo.

Emergency Exercise of March 1983 - In December, the Commission majority looked to the impending emergency exercise as an "other factor" which weighed against a shutdown order. The Commission asserted that without a FEMA evaluation of an exercise, no judgment regarding actual preparedness could be made. Assuming, without conceding, the validity of this judgment at that time, the occurrence of the drill and the appearance of the FEMA report of April 15, 1983, necessarily eliminates this "other factor" from the Commission's deliberations.

If all of these sorts of considerations are "other factors," what did the Commission intend to include in the catch-all, "other, compelling reasons," in 10 CFR 50.54 (s)(2)? In his additional views filed with the Commission's decision on December 22, 1982, Commissioner Asselstine stated

...I do not believe that the Commission has before it in the record other information that demonstrates a compelling need for continued operation of the Indian Point plants until the significant deficiencies in emergency preparedness are corrected.

(emphasis added)

An analysis of what the record before the Commission in December included would indicate that, to Commissioner Asselstine at least, the "other compelling reasons" terminology focuses on non-emergency planning or preparedness considerations.

However, Commissioner Ahearne, in his additional views, put within the "other compelling reasons" framework the "substantial improvement" in planning and preparedness, and the existence of a compensatory state plan--issues which Commissioner Asselstine appears not to find appropriately within this rubric.

It may be inferred that there is no great clarity, even within the Commission, regarding the import of "other compelling reasons." Then Commissioner Hendrie augured this difficulty when he, at the rulemaking session of this Commission on July 23, 1980, in a discussion of the meaning of "adequate interim compensating measures," stated

You know, the other compelling reasons are not going to cut it. That is, I can't see us looking at a plant in which there is effectively nothing out there in the way of emergency planning, you know, above the present level and up to the new guidelines and saying, well, they really need this plant. It is going to cost a mint on the one hand and a reserve marginal below on the other. If they don't have it, never mind. We are not going to have that situation and, you know, the Governor calling up and saying, don't shut it down, for God sakes, Murtle Beach [sic] will go dark and I can't stand it. At 87. (emphasis added)

Though Commissioner Hendrie did not foresee it, it seems likely that this Commission will be asked to consider the economic impact of a shutdown order, coupled with a claim that there will be a shortage of generating capacity if Indian Point were to be ordered shut, as an "other compelling reason." Council

Members do not believe that this kind of "other compelling reason" is appropriately balanced against the personal health and safety factors which prompted this Commission to upgrade its emergency planning and preparedness regulations. In recent weeks, however, it has become, in the media and, all too often, in public discourse, the central countervailing factor. For this reason, this submission will briefly address the economic consequences of a shutdown, in contemplation of this Commission's being asked to consider the costs of a shutdown as an "other compelling reason."

-IV-

All of New York City is in the Con Edison franchise area. The constituents of the Members of the New York City Council are ratepayers. They are also subway riders. It is these residents of New York City, as well as those who work there, who, the reactor licensees assert, will have to bear the enormous economic penalties they forecast will result from a shutdown of Indian Point.

Before addressing this problem directly, Council Members wish to lay to rest the energy generating capacity issue. The NRC staff analysis received into evidence by the ASLB on April 22, 1983, proves beyond cavil that New York State's excess generating capacity will meet all electricity needs without Indian Point on line well into the next decade. Assertions to the contrary are totally unwarranted and smack of the worst kind of fearmongering.

Members of the New York City Council believe that the direct economic consequences of an Indian Point shutdown will, at worst, be a fraction of what the licensees self-servingly project. Further, Members believe that this "penalty" is a cost that can be borne with little economic dislocation or hardship by New York City and New York State.

To pose the issue somewhat differently, Commissioner Ahearne compassionately

stated in his remarks of May 5, 1983:

This action [shutdown], if left in place, will raise the electric rates of hundreds of thousands of New Yorkers. Some can easily afford it; for others, this will be one more blow as they struggle against poverty.

Is this really the case?

As the Commission is well aware, calculating the costs of a nuclear plant shutdown is a complicated endeavor--one that is nearly totally dependent upon the assumptions used. Among the most significant variables are: capacity factor estimates, projected nuclear operating and maintenance costs, forecast demand growth, and oil price projections. An overall cost analysis requires an estimate of how much electricity Indian Point will produce over its lifetime (capacity factor) and what it will cost to produce it (O and M, plus other factors). A parallel assessment of real energy needs must be computed as well, in order to judge what part of the nuclear energy lost due to the shutdown must be replaced by alternative generation. The cost of this replacement energy must be determined, with oil prices as a key index. The difference between this amount and the cost of what Indian Point would produce results in a figure representing the overall direct costs of a shutdown.

In the recent ASLB proceedings, a number of parties offered evidence on this issue. Sally Streiter, testifying for the licensees before the Board, offered a "reference case" projection which that the total cost of a shutdown would be \$9 billion over the projected lifetimes of the plants.

Council Members submit that the real cost of a shutdown will be less than half this amount--a cost that is manageable. In considering this position, this Commission must remember it is Council Members and their constituents who, in the main, will have to bear this additional cost. Their judgment should, therefore, should be accorded considerable weight by this Commission for this reason alone.

Council Members' conclusion was arrived at through an analysis of the estimates made by the licensees as well as through review of other studies, including the one done by the Energy Systems Research Group. Since all these studies are available to the Commission and will certainly be reviewed by it, should the NRC determine that the economic issue is irrelevant to the decision it must make, Council Members will not burden this record with an extensive analysis. However, with regard to the major assumptions, Council Members request the Commission to consider the following:

Capacity Factor - The licensee "reference case" capacity factor is 63%. In 1982 Indian Point 3 ran 17% of the time as it hasn't operated at all for 14 months. The historical performance average for both plants up to 1982 is less than 55%. How then can a 63% capacity factor be justified? This is especially hard to comprehend because the 63% projection overlooks the 2-year down time for steam generator replacements which will alone result in a 3% to 5% capacity factor reduction. Aging effects and other major repair problems resulting in line time are also computed. The impact of the capacity factor assumption cannot be overestimated. Licensee consultants have conceded that the difference between between a 63% capacity factor and a 51% capacity factor is a cost differential of approximately \$3 billion. As a point of comparison, the Commission should note that the NRC used a 50% capacity factor in its analysis.

O & M - The licensee projections do not consider the costs of major repairs that are even today being planned, such as the \$.8 billion for steam generator replacements. The possibility that the generators will have to be replaced again during the life of the plants (Indian Point 3 is only one-third through its life cycle) or that other major repairs will be needed is also not addressed.

Demand Growth - The reactor operators forecast a large growth in energy demand. It is this demand, they argue, that will require them to build a

new generating facility in the late 1990's should Indian Point be closed. It is the cost of this plant, including its financing and the increase in current profits allegedly required to attract investors 15 years hence that are added to utility cost-of-shutdown calculations. This is clearly a manipulation intended to deceive rather than enlighten. In fact, there is no justification for the load growth assumption used by the licensees. A look at recent history in the Con Edison franchise area shows this quite clearly. Further, a look at previous utility load growth projections reveals that utility estimates have been consistently 25% to 30% too high.

Oil Costs - The reactor operators assume that nearly all the energy lost by closing Indian Point will be replaced by oil. Even conceding the need for some added energy does not require the added assumption that oil will be the fuel of choice. Coal is certainly a far less expensive alternative, even with the cost of the necessary environmental protection devices. Even assuming the need to burn oil does not result in the costs projected by the licensees, whose oil price figures are far too high. The licensees project that oil will cost \$31.72 per barrel during 1983, rise to \$34.00 per barrel by 1985, and then go up 9% per year thereafter. Today oil prices are in the \$28.00 per barrel range, and some forecasts, including one done by an officer of the utilities' own consulting firm, project no real increase in oil prices through the end of the century.

An analysis of the testimony of the intervenors in the ASLB hearing and that of the NRC staff reveals that overall cost projections bunch in the \$2-\$4 billion range. The licensees' model, when programmed with more realistic assumptions, produces a similar result. It is this \$4 billion cost--which works out to an average approximate increase of \$15 per year to the ratepayer--that Council Members, the ratepayers' elected representatives, assert is manageable.

Of course, these costs are those that are projected to result from a permanent shutdown. The costs of a shutdown for some lesser period--for example, the period required to complete the development and testing of an emergency plan that is adequate and workable--could be significantly lower. Certainly, a shutdown will provide the best incentive possible for all those committed to the operation of Indian Point to work as hard as possible toward that end. Was not this the goal of 10 CFR part 50 in the first place?

-V-

The final point Members of the New York City Council wish to comment upon is, broadly speaking, a political one--that is, who should decide. Few, other than the reactor operators, argue for the continued operation of the Indian Point facility. The County of Rockland has gone to Court to shut the plants. The County of Westchester refuses to say that at present it can assure the health and safety of the public, despite "substantial progress." The town supervisors of Ossining, New York, a locale within the 10-mile EPZ, said their community was not prepared for an accident and presented a strong ultimatum to the licensees. As the representatives of those who allegedly benefit from the plants' operation, the Council Members urge a shutdown as well. Does this Commission believe that it is in a better position to assess the true situation than those selected by the residents of the 10-mile EPZ and the 50-mile EPZ to represent their interests?

Nuclear power and its future are not at stake here. The only argument being made is that, at present, Indian Point must be closed because off-site emergency preparedness deficiencies contravene a clear NRC regulation."

This country's Chief Executive has injected into the public consciousness the notion that power should be exercised whenever possible at those levels of government closest to the people. Is this not a principle that this Commission

is mandated to seriously consider? Is not the continued operation of a nuclear plant and the costs and benefits to be derived therefrom an issue on which a federal administrative agency should take guidance from local government? Is it not the local government that should determine whether the economic consequences, whatever they may be, constitute, in the parlance of 10 CFR 50.54(s)(2), "other compelling reasons?"

The issue that this Commission is now considering is really a narrow one: After more than two years of effort, is there a basis for the NRC to find today that the state of off-site emergency preparedness at the Indian Point nuclear reactor site provides reasonable assurance that appropriate protective measures can and will be taken in the event of a radiological emergency? The answer to this question is clear: No, not today, and not in the immediate future.

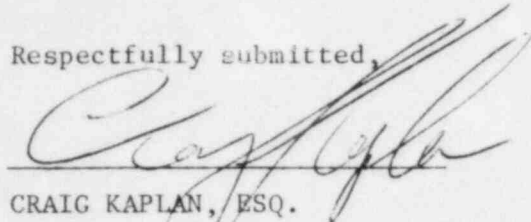
If the answer is clear, so is this Commission's obligation. As Commissioner Ahearne stated in his remarks of May 5, 1983,

Our rule is clear. There must be emergency planning. It is also clear that in the Indian Point case major problems which appear to significantly impact emergency planning remain unsolved. Therefore, if the emergency planning rule is to be kept in our regulations, the Indian Point plants must be shut down until any fundamental problems are resolved. Many people are watching to see if we stand behind our regulations.

Members of the New York City Council and the residents of New York City are among them.

For the foregoing reasons, Members of the New York City Council, on behalf of themselves and their constituents, urge this Commission to take the only reasonable enforcement action possible and to order the nuclear reactors at Indian Point to be shut down immediately.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Craig Kaplan", written over a horizontal line.

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On behalf of the
MEMBERS OF THE NEW YORK CITY COUNCIL