

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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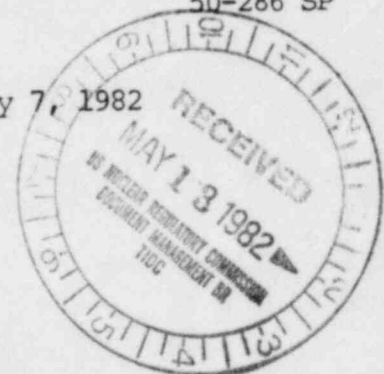
In the Matter of)
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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.)
(Indian Point, Unit No. 2))
)
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POWER AUTHORITY OF THE STATE OF NEW YORK)
(Indian Point Unit No. 3))
)
)

Dockets Nos. 50-247 SP
50-286 SP

May 7, 1982



UCS/NYPIC'S OPPOSITION TO PASNY'S
MOTION FOR DIRECTED CERTIFICATION OF MOTION FOR A
STAY OF COMMISSION'S ORDERS REQUIRING INVESTIGATION
INTO SAFETY OF INDIAN POINT PLANTS OR FOR DISMISSAL
OF ADJUDICATORY HEARING

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By its order of March 29, 1982,¹ the Atomic Safety and Licensing Board in this proceeding (Board), denied the November 25, 1981 joint motion of Con Edison and PASNY to stay the Nuclear Regulatory Commission's (Commission) orders that directed an investigation into the safety issues raised by the operation of Indian Point nuclear power plants Units 2 and 3. Order of March 29, pp. 4-5. The Board declined to certify to the Commission the Licensees' motion for a stay pursuant to C.F.R. §2.718(i), because no "major or novel questions of policy law or procedure" were presented by the motion. Order of March 29, 1982, pp. 5-6.

¹ A copy of the Order is annexed hereto as Appendix A, since PASNY failed to include the Order with its attachments to the motion for directed certification.

PASNY alone seeks review of the Board's March 29th Order in its motion to the Commission for directed certification dated April 20, 1982. The motion should be denied. The Board correctly ruled that the issue of the stay is inappropriate for certification. Further, the underlying motion for a stay was frivolous, and, we submit, interposed primarily to thwart the mandate of the Board to conduct a full investigation of the Commission's questions about the safety of the Indian Point plants and to submit its recommendations to the Commission by September 18, 1982.

- I. THE BOARD CORRECTLY RULED THAT THE ISSUE OF A STAY PRESENTS NO MAJOR OR NOVEL QUESTION OF POLICY LAW OR PROCEDURE. FURTHER, THE PUBLIC INTEREST WOULD SUFFER AND UNUSUAL DELAY OR EXPENSE WOULD BE ENCOUNTERED IF THE COMMISSION DIRECTED CERTIFICATION.

The Licensees' untimely² November 25, 1982 motion for a stay of the Commission's January 8th and September 18, 1981 orders, or for a dismissal of the investigation, was in effect an attempt to appeal the Commission's orders to the Board. The Board noted in its order of March 29th that the objections to the proceedings raised by Licensees in their November motion for a stay had been raised to the Commission in 1979 and 1980, before the issuance of the 1981 orders. Yet, PASNY in its present motion, beats the dead horse once again, seeking to undermine the integrity of the adjudicatory process established by the Commission and unnecessarily burdening all of the parties to this proceeding, which is now in the discovery stage.

The Commission must rule consistently with its previous orders directing the investigation, and deny the motion for directed certification. We urge the Commission to take this opportunity, further, to warn

² A motion for a stay must be filed within ten days after service of the decision or action sought to be stayed; here, within ten days of the September 18th, 1981 order. 10 C.F.R. §2.788(a).

the Licensees against future meritless litigation undertaken at rate-payers' expense.

The Board found at page 5 of its March 29th order that the Licensees' motion for a stay or dismissal of the Indian Point hearings raised no "major or novel questions of policy law or procedure." PASNY would have the Commission apply the more liberal standard for interlocutory appeals, that "the public interest will suffer or unusual delay or expenses will be encountered" if the certification is not forthcoming. PASNY's Memorandum of Law in Support of Motion for Directed Certification, etc, at p.2. The application of either standard compels the same result: certification to the Commission would result in severe delay and expense contrary to the public interest. In this proceeding, parties have been admitted, contentions have been formulated and discovery has begun. The taking of testimony is scheduled to begin June 22nd, 1982.

Regardless whether the Licensees presented the exact legal theories to the Commission in 1980 as were presented in their November 1981 motion,³ the relief they seek is the same: a reversal of the Commission's decision to act on its responsibility to protect the health and safety by investigating the Indian Point nuclear power plants. If the Licensees presented, as they claim at pp. 6-8 of the memorandum in support of the motion for directed certification, different arguments in 1980 than were included in their 1981 motion, the answer is simply that they should have presented all of their arguments directed at avoiding an investigation of their operation of the Indian Point plants at the earlier time. Now that an Atomic Safety and Licensing Board has been appointed and the proceeding

³Those issues are briefly discussed in the pages that follow.

underway, the presentation of new arguments is especially inappropriate.

The only unprecedented aspect of the Licensees' attempts to abort the Indian Point hearings would be the waste of time and money and the outrage and disillusionment of the public should the Commission revoke its previous decisions to investigate the safety of the Indian Point plants.

II. LICENSEES' ARGUMENTS FOR STAY OR THE
COMMISSION'S ORDERS OR FOR DISMISSAL
OF THE HEARING ARE FRIVOLOUS

The licensees' joint November 1981 motion purports to argue for a stay of the Commission's orders or a dismissal of the Indian Point site-specific hearings on six grounds. Memorandum of Law in Support of Motion on Nov. 25, 1981, pp. 2-3. The Board requested a response to the motion limited to the issue of the power of the Board to grant the relief requested, and UCS/NYPIRG submitted a response on that issue only.

UCS and NYPIRG now take this opportunity to briefly address Licensees' arguments only to illustrate the distortion of constitutional principles that characterizes each of these arguments.

- 1.) Commencement of an adjudicatory proceeding prior to completion of ongoing proceedings to establish generic standards constitutes a denial to licensees of procedural due process.

According to the Licensees' argument, the Nuclear Regulatory Commission could never have an adjudicatory proceeding focussed on a single plant until it has completed all of its generic proceedings. However, because the Nuclear Regulatory Commission is almost always engaged in setting generic standards, it would never be able to investigate the safety of any given plant. Thus, the generic standards, by virtue of their ongoing revision, could never be applied. The due process clause of the fifth amendment entitles the licensees to neither an irrevocable operating license nor immunity from investigation of safety problems at the Indian Point plants.

2.) Principles of res judicata and collateral estoppel bar reconsideration of the physical and population characteristics of the Indian Point site.

and

3.) The Commission's failure to adhere to its existing Siting Criteria constitutes action which is arbitrary, capricious, an abuse of discretion and a deprivation of property without due process of law.

The Licensees' attempt to endow their licenses with unlimited tenure, here, by arguing that a question of safety in the rapidly changing technology of nuclear power plants can never be re-opened without "changed circumstances" and, in point three, that a plant's site is impervious to reasoned challenge once the plant is built.

The operation of a nuclear power plant does not terminate the Commission's first mandate to protect the public health and safety. See, Power Reactor Development Co. v. International Union, 361 U.S. 396 (1961). UCS/NYPIRG remind the Licensees' of troubling developments like the accident at Three Mile Island, the Indian Point plants' frequent unplanned shutdowns, steam generator problems leading to relaxed license specifications, vessel embrittlement and the continuing serious criticisms of the Indian Point emergency plans -- all indicating the need for the Commission to take a new look at the safety of the Indian Point plants.

4.) The Constitution requires that the Commission establish compelling reasons to justify a shutdown at Indian Point.

Despite the Licensees' assertions, their "compelling interests" test for shutdown has no basis in the Tenth Amendment nor in any statute or case law. However, protection of the public health and safety is a compelling reason that would justify any decision to shut down the Licensees' plants.

5.) An adverse ruling from a readjudication of the Indian Point site would result in an impairment of contract and a taking of property without due process of law.

Licensees' impairment of contract theory has not been taken seriously since the days of Lochner v. New York, 198 U.S. 45 (1905). A license to operate a nuclear power plant is not a contract, but even if it were, it could be altered or superseded if the public safety or welfare demanded. See, Building And Loan Association v. Blaisdell, 290 U.S. 398 (1934).

6.) The Commission lacks jurisdiction to conduct the hybrid investigatory-adjudicatory proceeding which constitutes an unconstitutional singling out of the Indian Point licensees.

The Licensees' complaint of selective investigation is but another facet of their illogical first argument, that generic rulemaking must be completed before their plants at Indian Point can be investigated. Both of these arguments ask the Commission to ignore the unique dangers of operating the Indian Point plants.

III. A RECORD OF ALL EX PARTE CONTACTS
SHOULD BE KEPT AND MADE PUBLICLY
AVAILABLE.

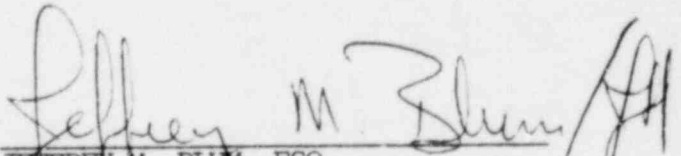
UCS and NYPIRG join in the complaint of the Licensees that ex parte contacts with the Nuclear Regulatory Commissioners are permitted in the Indian Point proceedings. Memorandum of Law in Support of Motion of Nov. 25, 1981, at pp. 53-54. UCS and NYPIRG request that the Commission keep detailed record of the occurrence and substance of all ex parte contacts that pertain to Indian Point. A current copy of this record must be made available to the public in order to ensure that the Commission's final ruling on Indian Point is "supported by an independent agency determination, not one dictated or pressured by external forces." SEC v. Wheeling Pittsburgh Steel Corp., 648 F. 2d 118, 130 (3rd Cir. 1981).

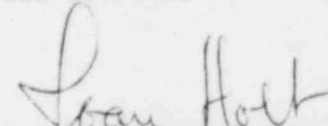
CONCLUSION


The Licensees' motion for a stay or for dismissal of the Indian

Point hearings was based on frivolous and misleading arguments. PASNY's motion for directed certification of the motion can only be regarded as a ploy to exhaust the NRC Staff and intervenors. The Commission must firmly decline to direct certification and order PASNY to begin to participate constructively in the hearings. PASNY and Con Edison both have a duty to contribute to a complete record on the serious questions raised about the Indian Point plants by the Commission in its January 8 and September 18, 1981 orders.

Dated: New York, New York
May 7, 1982


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UNITED STATE OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Certificate of Service

I hereby certify that copies of:

UCS/NYPIRG'S OPPOSITION TO PASNY'S MOTION
FOR DIRECTED CERTIFICATION OF MOTION FOR A
STAY OF COMMISSION'S ORDERS REQUIRING IN-
VESTIGATION INTO SAFETY OF INDIAN POINT
PLANTS OR FOR DISMISSAL OF ADJUDICATORY
HEARING

PARENT'S, UCS AND NYPIRG'S NOTICE OF INTENTION NOT TO RESPOND TO
POWER AUTHORITY'S NOTICE OF APPEAL OF BOARD'S ORDER GRANTING
INTERVENTION AND DENYING REQUEST FOR EVIDENTIARY HEARING ON ISSUES OF STANDING

have been served on the official minimum service list*and to Chairman
Nunzio J. Palladino, Commissioner Victor Gilinsky, Commissioner John F.
Ahearne and Commissioner Thomas M. Roberts for the above captioned pro-
ceeding by depositing in the United State mail, first class, this 7th day
of May, 1982.

*Absent Appendix A, March 29, 1982 Board Memorandum and Order.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

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 SP
50-286 SP

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