

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

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OFFICE OF THE SECRETARY  
NUCLEAR REGULATORY COMMISSION

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In the Matter of ) Docket Nos.  
CONSOLIDATED EDISON COMPANY OF NEW YORK, ) 50-247 SP  
INC. (Indian Point, Unit No. 2) ) 50-286 SP  
POWER AUTHORITY OF THE STATE OF NEW YORK ) May 31, 1982  
(Indian Point, Unit No. 3) )  
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LICENSEES' ANSWER  
TO UCS/NYPIRG MOTION  
TO COMPEL DISCOVERY

Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Indian Point Station, Unit No. 2, and Power Authority of the State of New York, licensee of Indian Point 3 Nuclear Power Plant (collectively the "licensees"), submit this memorandum, pursuant to 10 CFR §2.730(c), in opposition to the motion served on the licensees on the afternoon of May 28 - hours before the close of business on the last business day before the close of discovery - by joint

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intervenors Union of Concerned Scientists and the New York Public Interest Research Group, Inc. ("UCS/NYPIRG") to compel depositions of Dr. Russell R. Dynes, Dr. Sidney Lecker, and three employees of Parsons Brinckerhoff Quade & Douglas Inc. (the "Parsons Brinckerhoff witnesses"), all of whom licensees intend to present as witnesses at the hearings. UCS/NYPIRG's motion should be denied for the following reasons.

(1) UCS/NYPIRG's request is not in compliance with the Commission's rules or this Board's orders regarding discovery. 10 C.F.R. §2.740a(a) requires that reasonable written notice of a deposition be given to all parties. Herein, UCS/NYPIRG first gave oral notice of their request at approximately 4 P.M. on May 24 -- four working days before the close of discovery established by the Board. At no prior point, including the extensive discussion of discovery at the prehearing conference on April 13-14, did UCS/NYPIRG indicate an intention to take deposition testimony herein.\* Correspondingly no provision for

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\* At the April 13 prehearing conference, licensee Con Edison reiterated its earlier statement to the Board that the Parsons Brinckerhoff witnesses would testify (Tr. 656). The taking of depositions was not included in the proposed schedules submitted to this Board. See, e.g., UCS-NYPIRG Prehearing Memorandum and Proposed Order at 7-8 (Dec. 1, 1981); WESPAC's Prehearing Memorandum and Response to Staff and Utility Answers to Petitions for Leave to Intervene at 3 (Dec. 1, 1981) (Concurring with UCS/NYPIRG's general approach); NRC Staff Prehearing Conference Memorandum and Proposed Order at 7-8 (Nov. 27, 1981).

such discovery and the scheduling changes that would be required was included in the Board's April 23, 1982 order.\* While UCS/NYPIRG is not in compliance with the requirement of reasonable written notice of 10 C.F.R. Part 2, this Board's order would in any event bar the taking of depositions since "this agency's Rules of Practice provide that discovery may be 'limited by order,' or may 'not be had,' or even 'may be had only by a method of discovery other than that selected by the party seeking discovery.'" Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), 2 N.R.C. 858, 870 (1975).

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\* Contrary to the somewhat less than forthcoming characterization presented by UCS/NYPIRG, Power Authority counsel Mr. Levin advised UCS/NYPIRG counsel Mr. Blum on May 25 that it was on this basis that licensees would not produce witnesses for deposition. As Mr. Levin pointed out to Mr. Blum on this occasion, had UCS/NYPIRG raised the subject of depositions at the April 13-14 conference, a different discovery schedule would have been adopted reflecting the time needed to prepare for and take depositions.

Moreover, at no time following Mr. Levin's May 25 notice to Mr. Blum did UCS/NYPIRG notify Mr. Levin or any other representative of the Power Authority that an oral or written motion would be presented to the Board. Indeed, Mr. Levin's first hint that such a motion might be filed was gained purely by chance as a result of a telephone call Thursday afternoon from Ruth-Ann Miller, Clerk to the Board.

(2) UCS/NYPIRG's failure to give the required notice is particularly prejudicial in the circumstances of this expedited hearing. Both the witnesses UCS/NYPIRG seeks to depose and counsel for the licensees are fully engaged in responding to intervenors' interrogatories and preparing the witnesses' direct testimony. Since the commencement of discovery herein, the licensees have responded to over 130 interrogatories posed by the intervenors. (This contrasts with the failure of the intervenors, including UCS/NYPIRG, to make any meaningful response to the licensees' interrogatories.) To now require licensees' witnesses and counsel to take the substantial additional time to prepare for and attend depositions would severely impair licensees' ability to meet the June 7 deadline set by the Board for the filing of direct testimony. See United States v. 412.93 Acres of Land, 455 F.2d 1242, 1246 (3d Cir. 1972) (deposition subpoena quashed because it would unduly delay trial).

(3) There is no necessity for the deposition testimony sought by UCS/NYPIRG. UCS/NYPIRG has not made any showing of special circumstances which would relieve it of the requirements of the Commission's rules or the Board's order. See also Fed. R. Civ. P. 26(b)(4)(A)(ii) (deposition testimony from expert witnesses permitted only upon court order). The licensees have provided in their interrogatory answers extensive information regarding the

witnesses, including the subject matter of their testimony, the grounds for their opinions, and lists of publications (licensees' answer to UCS/NYPIRG interrogatory no. 1). Further, when required by UCS/NYPIRG's instructions to its interrogatories, licensees have identified those instances in which the licensees' witnesses contributed to the licensees' interrogatory answers. As the Appeal Board stated in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1) 2 N.R.C. 858, 869 (1975):

... It is true, . . . that Joint Intervenors were not permitted to depose the witnesses. But this was not prejudicial "because those from whom depositions were sought appeared as witnesses at the hearing and were thus made available to cross-examination by the party seeking discovery," N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 854, 860 (2nd Cir. 1970), certiorari denied, 402 U.S. 915 (1971). Accord: N.L.R.B. v. Miami Coca-Cola Bottling Company, 432 F.2d 994, 996-97 (5th Cir. 1968); N.L.R.B. v. Safeway Steel Scaffolds Company, 383 F.2d 273 (5th Cir. 1967).

The proposed depositions herein would not contribute in any manner to the efficient conduct of the hearings. Licensees' extensive discovery responses to date have already fulfilled the principal purpose of discovery: to avoid surprise at the hearings. Depositions would only impede accomplishment of the schedule set by the Board.

(4) To the extent a basis for UCS/NYPIRG's motion

can be discerned from its moving papers, it appears to be that UCS/NYPIRG considers licensees' interrogatory answers to be, in some vague sense, inadequate. If this is in fact UCS/NYPIRG's argument, the remedy provided under the Commission's rules is a motion pursuant to 10 C.F.R. §2.740(f) directed to the allegedly defective interrogatory answers, not a request for deposition testimony. UCS/NYPIRG has not made such a motion.\*

The completeness of licensees' interrogatory answers is apparent when these answers are compared to UCS/NYPIRG's answer to licensees' interrogatory regarding UCS/NYPIRG's witnesses, \*\* which entirely fail to specify (1) the

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\* Moreover, nowhere has UCS/NYPIRG stated that the absence of depositions will prejudice its preparation for the hearings in any way, nor has UCS/NYPIRG set forth any information claimed to be needed which was not supplied in licensees' extensive interrogatory responses.

\*\* Licensees posed the following interrogatory:

Identify:

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

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

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

[footnote continued on next page]



subject matter on which its witnesses are to testify; (2) the substance of the facts and opinions to which the witnesses are to testify; (3) a summary of the grounds for such opinions; and (4) any proceeding in which its witnesses have previously

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\* [footnote continued from previous page]

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

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

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

UCS/NYPIRG's response to this interrogatory was:

Jan Beyea and Brian Palenik: Board Contentions 3.6, 4.1, and 4.3 and intervenor contentions referenced thereunder. Biographical information and list of documents attached as Appendix A. Pages of previous testimony unknown.

Kai Erikson: Board Contentions 3.2 and 3.7 and intervenor contentions referenced thereunder. Biographical information and list of documents attached as Appendix B. Pages following page 12407 of testimony at San Luis Obispo, California, to be found in the NRC Public Document Room. Pages of other previous testimony unknown.

(e) No relationship.

testified.\* Thus, licensees, despite having posed proper interrogatories (see Fed. R. Civ. P. 26(b)(4)(A)(i)), have no knowledge of the subject matter or the grounds for the testimony of the UCS/NYPIRG witnesses. In contrast, licensees have specified the subject matter and grounds for the testimony of their witnesses.

For the above reasons, UCS/NYPIRG's untimely request to take depositions should be denied. However, in the event UCS/NYPIRG's request is granted, licensees request that those individuals identified as UCS/NYPIRG's witnesses, including Jan Beyea, Brian Palenik, and Kai Erickson, be produced simultaneously with licensees' witnesses for depositions.

WHEREFORE, the licensees respectfully urge that UCS/NYPIRG's Motion to Compel Discovery be denied in all respects.

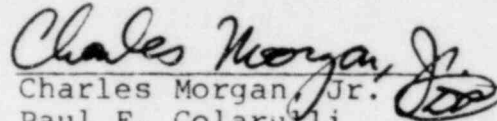
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\* UCS/NYPIRG disingenuously asserts that the pages of its witnesses' prior testimony are "unknown." We doubt that the names of the proceedings in which its witnesses previously testified (also called for by the interrogatory) are "unknown."



Respectfully submitted,

  
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Dated: May 31, 1982

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEES' ANSWER TO UCS/NYPIRG MOTION TO COMPEL DISCOVERY in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 31st day of May, 1982.

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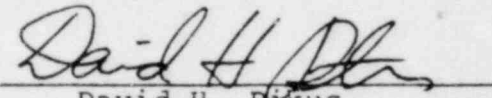
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\* Copies will also be served by hand delivery on the morning of June 1, 1982.