UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS:
Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts

and

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point, Unit No. 2)	)	Docket Nos. 50-247 SP
POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3)	)	50-286 SP

POWER AUTHORITY'S BRIEF IN SUPPORT OF ITS APPEAL OF THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER GRANTING INTERVENTION AND DENYING THE POWER AUTHORITY'S REQUEST FOR AN EVIDENTIARY HEARING

Pursuant to 10 C.F.R. § 2.714a(a),(c) (1981), the Power Authority of the State of New York (Power Authority), licensee of Indian Point Unit No. 3, hereby appeals the Atomic Safety and Licensing Board's (Licensing Board's) order granting intervenor status in this proceeding to the following petitioners:

(1) Union of Concerned Scientists (UCS);

(2) New York Public Interest Research Group, Inc. (NYPIRG) and Parents Concerned About Indian Point (Parents);[1]

1. Inasmuch as Parents is but a created and controlled branch,

(3) Westchester People's Action Coalition, Inc. (WESPAC);

(4) Friends of the Earth (FOE); and

(5) Rockland Citizens for Safe Energy (RCSE).[1]

The Power Authority bases its appeal on the following grounds:

(1) because the persons UCS purports to represent are not members or the functional equivalent thereof, UCS does not have standing to intervene in this proceeding;

(2) the intervenors, opponents of nuclear power regardless of safety, should not be allowed to use this proceeding to debate nuclear power;

(3) because of their diverse purposes, intervenors are not adequate representatives of their members; and

(4) intervenors' attempts to undermine the objective resolution of issues germane to the continued operation of Indian Point bar their participation in this proceeding.

The Power Authority also appeals, pursuant to 10 C.F.R. § 2.714(a),(b), the Licensing Board's denial of the Power Authority's request for an evidentiary hearing on both the

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child, or subsidiary of NYPIRG, all of the allegations contained herein regarding NYPIRG apply with equal force to Parents.

1. As the petition of the Greater New York Council of Energy (GNYCE) was conditionally granted, the Power Authority reserves its right to appeal a subsequent grant of intervenor status to GNYCE, if and when it is granted.

questions of memberships and membership control over the policies and practices of those organizations.

I. BECAUSE THE PERSONS UCS PURPORTS TO REPRESENT ARE NOT MEMBERS OR THE FUNCTIONAL EQUIVALENT THEREOF, UCS DOES NOT HAVE STANDING TO INTERVENE IN THIS PROCEEDING

The Licensing Board terms adherence to constitutional requirements for standing to be a "needless paper charade." Memorandum and Order (Ruling on Petitions to Intervene and Agenda for Second Special Prehearing Conference) at 35 n.9 (Apr. 2, 1982) (Order). Yet, the Supreme Court of the United States has ruled that the "persons" an organization seeks to represent in a proceeding must be members or the functional equivalent thereof. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977); see also Health Research Group v. Kennedy, 82 F.R.D. 21 (D.C.Cir. 1979).[1] They must "possess all of the indicia of membership in [that] organization." Hunt v. Washington Apple Advertising Commission, 432 U.S. at 344. "[I]ndicia of membership" is established by the right to elect and serve upon boards of

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1. In determining whether a petitioner seeking leave to intervene has asserted an interest which may be affected by a proceeding, see 10 C.F.R. § 2.714(a)(2) (1981), the Nuclear Regulatory Commission (Commission) applies contemporaneous judicial concepts of standing. In re Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), 7 N.R.C. 737, 739-40 (1978); In re Public Service Co. (Black Fox Station, Units 1 and 2), 5 N.R.C. 1143, 1144-45 (1977); In re Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), 4 N.R.C. 610, 612 (1976).

directors. Id. at 344-45; Health Research Group v. Kennedy, 82 F.R.D. at 26.

Here, however, the Licensing Board has admitted UCS as an intervenor even though the persons it purports to represent are not members with voting control over the board, officers, and policies of the organization. They are, instead, non-voting "sponsors" who have no rights and are entitled to exercise absolutely no control over the organization. Order at 31-35.

Article III of the Constitution of the United States requires that the person before the tribunal "be himself among the injured." Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.

Warth v. Seldin, 422 U.S. 490, 499 (1975). That person "generally must assert his own legal rights and interests, and cannot rest his claim to the relief on the legal rights or interests of third parties." Id.

Because the "associational standing doctrine represents a very limited exception to the fundamental Article III requirement," Health Research Group v. Kennedy, 82 F.R.D. at 25, more than the mere existence of a cognizable injury to a third party must be established. Otherwise, "any association . . . could gain standing simply by presenting the

court with the case or controversy of any unrelated third party." Id.

> So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plaintiff - a nexus normally to be provided by actual membership or its functional equivalent measured in terms of control - it can reasonably be presumed that, in effect, it is the injured party who is himself seeking review. Absent this element of control, there is simply no assurance that the party seeking judicial review represents the injured party, and not merely a well informed point of view.[1]

Yet, the Licensing Board has determined regarding UCS and its powerless, non-member "sponsors" that "where an individual UCS sponsor has standing, this provides sufficient nexus between the organization and this proceeding so as to permit representational standing by UCS." Order at 34.

UCS has no members. UCS is funded by contributions from non-voting "sponsors."[2] Originally, UCS' Articles of

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1. Id. at 26-27 (emphasis in original and added); cf. In re Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), 9 N.R.C. 439, 459 (1979) ("[T]here may be a difference between [the petitioner's] 'constituency' and its 'members.'").

2. See Transcript of Testimony of Robert Pollard, Hearing Before the Special Comm. on Nuclear Safety at 13 (Special Committee Testimony) ("We are sponsored by donations from over 75,000 sponsors"). UCS generally refers to its adherents as "sponsors." See, e.g., Industry's Response to the Accident at Three Mile Island: Oversight Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 56 (1979) (statement of Robert D. Pollard accompanied by Ellyn R. Weiss) (Oversight Hearings); Special Committee Testimony at 13; Letter from Eric E. Van Loon to Fellow Citizen at 4 (undated solicitation letter).

Incorporation provided that "the corporation shall have no members."[1] Later this clause was amended to allow "non-voting members."[2] "[I]ndividuals will become bona fide members upon the contribution of time or money and shall have the right to receive certain publications and other items at reduced or no fee."[3]

The UCS' "sponsors" have no active voice in management of the group's affairs.

> We have a management structure up in Cambridge, Mass., an executive director and an assistant director and a board of directors which meets occasionally to discuss major policy issues. The management together with the board decides when we are going to make various moves, what cases we will get into and what policy positions the organization will take.[4]

UCS is totally controlled by the Cambridge Group. Its "sponsors" possess not a scintilla of the control incident to membership.[5]

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1. Articles of Incorporation of Union of Concerned Scientists Fund, Inc. at 1 (Sept. 19, 1973) (emphasis added).

2. Articles of Amendment to the Articles of Incorporation of Union of Concerned Scientists Fund, Inc. (Nov. 15, 1978).

3. Id. (emphasis in original and added).

4. Oversight Hearings at 56-57 (emphasis added).

5. See Hunt v. Washington Apple Advertising Commission, 432 U.S. 333; Health Research Group v. Kennedy, 82 F.R.D. 21.

Despite this, the Licensing Board granted intervenor status to UCS.[1] The Licensing Board reasoned that when

> a non-membership organization has a well-defined purpose which is germane to [a proceeding], sponsors can be considered equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization.

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1. The Licensing Board noted that it would have admitted UCS at its discretion had it not ruled that UCS met the standards for intervention as a matter of right. Order at 35 n.10. Yet, UCS has not even approached meeting its burden of showing that the requirements for discretionary intervention have been met. See In re Public Service Co. of Oklahoma, 5 N.R.C. at 1149-51 (Licensing Board's grant of discretionary intervention overturned when record devoid of any indication that petitioner might make a substantial contribution to the proceeding); see also In re Nuclear Engineering Co., 7 N.R.C. at 745 (burden on petitioner to show it meets criteria for discretionary intervention).

"Foremost among the factors which are to be taken into account in deciding whether to allow participation in the proceeding as a discretionary matter is whether such participation would likely produce 'a valuable contribution . . . to [the] decision-making process.'" In re Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), 4 N.R.C. 631, 633 (1976); In re Nuclear Engineering Co., 7 N.R.C. at 743-44. Accordingly, a petitioner "must specify the extent to which it will involve itself . . . and the contribution which that involvement can reasonably be anticipated to make." In re Nuclear Engineering Co., 7 N.R.C. at 745. "[B]road, generalized averments will not suffice." Id.

UCS has presented no evidence that its participation would constitute a valuable and significant contribution to this proceeding. UCS claims that it "has been involved with safety issues relating to the Indian Point reactors for the last five years," Petition for Leave to Intervene at 2, but has not demonstrated that its staff members are "qualified by either specialized education or pertinent experience to make a substantial contribution." In re Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), 5 N.R.C. 1418, 1422 (1977). Nor has it shown that its "participation may reasonably be expected to assist in developing a sound record." In re Portland General Electric Co., 4 N.R.C. at 616; In re Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), 7 N.R.C. 381, 387, aff'd, 7 N.R.C. 473 (1978).

Additionally, UCS's attempt to undermine this proceeding by promoting psychological distress in the community provides further support for not allowing UCS special treatment. See text, infra at 23-26.

Order at 34.[1] In this regard, the Licensing Board noted that UCS's objectives with regard to nuclear power are widely known and that "it is a desire to support the pursuit of those goals that motivates the financial participation of UCS sponsors." Id. at 32.

Exercising "considerable influence on [an organization's] policies and projects" through "financial support" and "letter writing" constitutes neither indicia of membership nor anything else that is sufficient to confer associational standing. Health Research Group v. Kennedy, 82 F.R.D. at 27.[2] "[A] plaintiff cannot gain standing merely on a showing that its interests and expertise are germane to the interests of any third parties who would have standing in their own right." Id. at 26 (emphasis added).[3]

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1. The Licensing Board also based its decision on the opinion in the Three Mile Island Restart proceeding in which UCS was admitted "on the basis of UCS sponsors who lived within 20 miles of the plant." Order at 34. However, because "neither the staff nor the licensee oppose[d that] ruling," its value as precedent is limited. In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1) (Restart), Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conference at 14 (unpublished, Sept. 21, 1979).

2. In a previous case in which UCS was denied intervention for failure to particularize its interests, an Atomic Safety aand Licensing Board declined "to explore the question whether representational standing can be based on the personal interests of a mere financial contributor to the organization." In re Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), 9 N.R.C. 402, 404 n.2 (1979).

3. The Licensing Board suggested that UCS' sponsors could have independently been granted intervenor status and then authorized UCS to represent them. However, NRC regulations only allow an individual to be represented by himself or herself or by an attorney-at-law. 10 C.F.R.

Similarly, RCSE has failed to establish the requisite nexus between the organization and the persons it purports to represent.[1] Although RCSE submitted affidavits from two persons alleging membership,[2] this mere recitation does not establish that they "possess all of the indicia of membership in [RCSE],"[3] or "any other connection with [RCSE] sufficiently substantial to confer associational standing on [RCSE]."[4]

§ 2.713(b); see In re Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), 6 N.R.C. 642, 643 n.3 (1977) ("an individual not appearing on his or her own behalf must be represented by a lawyer").

The Licensing Board's interpretation of Health Research Group with regard to the substitution of parties is also incorrect. See Order at 34-35 n.9. While Judge Sirica did allow the public interest organizations to amend their pleadings to substitute persons with standing, Health Research Group v. Kennedy, 82 F.R.D. at 30 (emphasis added), he did not indicate that the new plaintiffs could then authorize the public interest organizations to pursue the litigation.

1. In re Houston Power & Lighting Co., 9 N.R.C. at 459 ("A petitioner is responsible for providing a Board with sufficient information for determining whether the petitioner has standing of right."); accord Hunt v. Washington Apple Advertising Commission, 432 U.S. 333.

2. Affidavits of Helga Ancona and Wayne Browning (Exhibits A and B to Amended Petition of Rockland Citizens for Safe Energy for Leave to Intervene (Dec. 14, 1981)). In its original petition for leave to intervene, RCSE stated that it sought to intervene on behalf of persons who were either "sponsors or members." Petition for Leave to Intervene at 2 (Nov. 9, 1981).

3. Hunt v. Washington Apple Advertising Commission, 432 U.S. at 344.

4. Health Research Group v. Kennedy, 82 F.R.D. at 27.

II. THE INTERVENORS, OPPONENTS OF NUCLEAR POWER REGARDLESS OF SAFETY, SHOULD NOT BE ALLOWED TO USE THIS PROCEEDING TO DEBATE NUCLEAR POWER

Commission Chairman Nunzio Palladino has stated that

> [t]he function of the NRC is to safely regulate nuclear power and not to become an advocate for nuclear power. However, neither is the NRC to debate whether or not there ought to be nuclear power; this is the province of the Congress.[1]

The Commission, in addressing a petition to shut down all nuclear power plants, further declared that it

> does not sit as an arbiter of any national morality alleged to exist apart from the Constitution and the laws of Congress, which each Commissioner is sworn to uphold. Nor does any other Commission. Nor does any Court.
>
> . . . .
>
> If the petitioners feel that the statutory standards applying to nuclear power are not stringent enough on moral grounds, they must make that case to the Congress. The morality embodied in the existing statutes is not the one that they urge, and we have no power to change that.[2]

UCS and NYPIRG do not seek a safe nuclear plant. They seek no nuclear plants at all.

> [N]uclear power is neither necessary nor in the public's interest [and NYPIRG]

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1. Letter from Nunzio J. Palladino to The Honorable Robert Stafford (June 18, 1981) (emphasis added) (attachment; response to question submitted by Senator Hart).

2. 46 Fed.Reg. 39,573, 39,580 (1981).

> favor[s] an expeditious phase out of New York State's operating reactors.[1]

Robert Pollard, a UCS nuclear engineer, told reporters at a news conference that the only question with which the nation is presented is "how fast we should do away with nuclear power as an energy source."[2] Such statements by UCS and NYPIRG raise a serious question as to whether they "look[] upon [this] proceeding as a forum for resolving technical questions in the fairest and most comprehensive manner, or alternatively, whether [they] view[] this proceeding merely in terms of a podium for soapbox oratory." In re Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 10 N.R.C. 597, 602 (1979).

UCS and NYPIRG should not be allowed to call upon the resources of the NRC to aid them in achieving their goals which are inconsistent with congressional policy[3] and the

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1. Letter from Joan Holt, NYPIRG, to NRC Commissioners at 10 (July 24, 1981).

2. Gloom Voiced on Atom Power, Wash. Post, May 3, 1979, § 1, 8, col. 1, at col. 2.

3. Congress has declared:
   (a) the . . . use . . . of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject . . . to the paramount objective of making the maximum contribution to the common defense and security; and
   (b) the . . . use . . . of atomic energy shall be directed so as to . . . improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

purposes of this proceeding.[1] See Doyle v. United States,

Atomic Energy Act, 42 U.S.C. § 2011. These policies are to be effectuated by a program which encourages "widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." Id. § 2013(d).

The Supreme Court of the United States has affirmed that Congress' role is to establish policy regarding nuclear power.

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. . . . Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-58 (1978) (emphasis added); see TVA v. Hill, 437 U.S. 153, 194 (1978) ("it is . . . the exclusive province of the Congress . . . to formulate legislative policies and mandate programs and projects").

1. In rejecting this argument, the Licensing Board reasoned that "[t]he fact that 'the sole or primary purpose of the petitioner organization [is] to oppose nuclear power in general or the facility at bar in particular' is not a basis for denying a petition to intervene." Order at 28 n.7., quoting In re Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), 9 N.R.C. 377, 396 (1979). However, the Appeal Board in Houston Lighting was not addressing the issue of whether a petitioner's oppostition to nuclear power should preclude its intervention. Rather, it was addressing only the requirement that an organization submit authorizations from the persons it purports to represent.

> [I]n some instances the authorization might be presumed. For example, such a presumption could well be appropriate where it appeared that the sole or primary purpose of the petitioner organization was to oppose nuclear power in general or the facility at bar in particular. In such a situation, it might be reasonably inferred that, by joining the organization, the members were implicitly authorizing it to represent any personal interests which might be affected by the proceeding.

In re Houston Power & Lighting Co., 9 N.R.C. at 396. Therefore, the Licensing Board erred when it applied this reasoning to the issue raised by the Power Authority.

494 F.Supp. 842, 844 (D.D.C. 1980).

To UCS, power plants are "unnecessary reactors" which can cause cancer and genetic damage to future generations.[1]

Robert D. Pollard,[2] formerly employed by the NRC and currently on the staff of UCS, is vehemently opposed to the nuclear option at any cost. Pollard envisions a future of either catastrophe or no nuclear power:

> [F]or the long term, even after Three Mile Island, I think I see only two options for nuclear power.
>
> We are either going to have a catastrophic accident, and that will finish it off, or the Nuclear Regulatory Commission will begin to do its job, and in doing that job it will make nuclear power so expensive that no more nuclear plants will be built, and the existing ones will be phased out as rapidly as possible.[3]

Mr. Pollard's UCS is so adamant in its belief that the Indian Point plants should be closed at once[4] that evidence

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1. Letter from Eric E. Van Loon, Executive Director of UCS to Friend at 2 (undated solicitation letter) (emphasis in original); see id. at 3 ("Since 1971, UCS has been a leader in the struggle against the dangers posed by nuclear power.").

2. Pollard has "affirmed" that the information in both the Union of Concerned Scientists' Petition for Decommissioning of Indian Point 1 and Suspension of Operation of Units 2 & 3 (filed Sept. 17, 1979), and its Petition to Intervene, is correct. Affidavit of Robert D. Pollard (filed Nov. 9, 1981).

3. Transcript of Testimony of Robert Pollard, Hearing Before the Special Comm. on Nuclear Safety at 78-79 (1979) (hereinafter Special Committee Testimony).

4. U.S. Panel Releases Reports that Critic Says Show Failure to Act on Safety Before Licensing Atom Reactors, N.Y. Times, Feb. 13, 1976,

to be offered at the hearing could not alter this view. He reiterated this immovable stance at a congressional hearing.

> Mr. Pollard: I would think that what we need to do with these plants is decommission them and not let them operate again.
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> The Chairman: How quickly?
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> Mr. Pollard: Immediately.
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> The Chairman: Tomorrow afternoon?
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> Mr. Pollard: Yes sir.
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> The Chairman: As soon as we can?
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> Mr. Pollard: As soon as we can. I think if we wait until tomorrow afternoon, and the accident occurs tomorrow morning, everyone will agree we should have shut them down today. That is what we are facing here, is the country going to be smart enough or wise enough to face up to the problems[1] which we know exist. Or are we going to wait until we have a serious accident that kills 10,000 people, that contaminates metropolitan New York? That is the choice we are facing.[2]

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§ 1, at 15, col. 1. UCS has made public its objection with regard to Indian Point by placing a full-page advertisement against operation of the plants in the New York Times. 48,000 People Could Die on a Northerly Wind from Indian Point, N.Y. Times, Sept. 23, 1979, § 4, at 20; see also Some Day We All Will Wake Up, N.Y. Times, Apr. 8, 1979, § 4, at 22, (full-page advertisement in which UCS claims that "[t]he government has violated a public trust").

1. The courts have uniformly confirmed that "[a]bsolute or perfect assurances are not required [by the Atomic Energy Act], and neither present technology nor public policy admit of such a standard." Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1297 (D.C. Cir. 1975).

2. Industry's Response to the Accident at Three Mile Island: Oversight Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 44 (1979) (statement of Robert D. Pollard).

NYPIRG established its Indian Point Shutdown Project in 1979.[1] NYPIRG Annual Report, 1979-1980, at 13. Joan Holt, project coordinator, has stated that no amount of safeguards could satisfy her concerns; the only solution is to shut down Indian Point.

> CHAIRMAN AHEARNE: [I]f I was tracking what some of your initial comments were tell me if this impression is wrong. The impression I got was that if a number of changes are made in the operator improvements, procedural improvements and in short and long term safeguards that there are really no set of those that would meet your concerns.
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> MS. HOLT: That's right.
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> CHAIRMAN AHEARNE: That your concerns really would only be met when the plant is being shutdown.
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> MS. HOLT: Yes, because of the site. That's my personal view, yes. And that's the view of my organization. We feel that there is no way because you cannot guarantee that accidents cannot

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Dr. Henry W. Kendall, a UCS co-founder, states:

> We [UCS] believe that in view of the unique features of nuclear power that it is imprudent for a nation to adopt a commitment to this source until all feasible alternative means of preventing energy are exploited, energy management and conservation implemented fully, and, finally, a compelling need shown to exist.

H. Kendall, Nuclear Power: A Review of Its Problems, reprinted in U.S. Foreign Policy and the Export of Nuclear Technology to the Middle East: Hearings Before the Subcomms. on International Organizations and Movements and on the Near East and South Asia of the House Comm. on Foreign Affairs, 93d Cong., 2d Sess. 298 (1974) (emphasis added).

1. A NYPIRG publication proclaims that nuclear power has became a "nightmare." Nuclear Power: An Idea Whose Time Has Passed? (1979) (unpaginated); see NYPIRG's 1980 Legislative Program 7; NYPIRG Annual Report, 1979-1980, at 13; NYPIRG Annual Report, 1975, at 6.

> happen. You can debate probabilities all day but they can happen, and if they happen our region is in double jeopardy because of the dense population.[1]

NYPIRG intends to use this hearing. To NYPIRG, it "should be of a broad enough scope to allow participants to raise basic questions about nuclear safety--and to challenge many of the assumptions underlying the way the NRC regulates nuclear power plants."[2] Holt, New York City's Nuclear Threat, Agenda, at 5 (Jan.-Feb. 1981) (emphasis added).

Because the Commissioners have mandated that the scope of the hearing be limited specifically to Indian Point, Memorandum and Order at 2 (NRC Sept. 18, 1981), NYPIRG's

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1. Transcript of NRC Public Meeting, Presentation by Commenters in UCS 2.260 Petition on Indian Point at 71-72 (Feb. 5, 1980); see Statement of Joan Holt for Presentation to the NRC at 4 (Feb. 5, 1980) (Holt Presentation Statement) ("There is no way around it: those plants must be closed!").

2. Holt has denounced the Commissioners for perpetrating "lies, cover-ups, and . . . public relations hype." Statement of Joan Holt Before the United States Nuclear Regulatory Commission for the Committee to Protect Children from Nuclear Dangers 1 (Jan. 15, 1980) (Holt Committee Statement). Holt has told the Commissioners that it is they "who are on trial here!" Holt Presentation Statement at 4. She has accused the Commissioners of "collusion" with the utilities, id. at 2, and with being "more interested in protecting the nuclear industry than in safeguarding the public." Holt Committee Statement at 1. She has characterized Governor Carey as misled and misinformed, Letter from Joan Holt and Dean Corren to Governor Hugh L. Carey at 1 (June 30, 1980), and with being more concerned with "money rather than lives." Consumer Group Raps Carey on Indian Point, Daily News, Nov. 18, 1980, at 10.

She claims that the "emergency preparedness scheme of the NRC is a criminal sham," id. (emphasis added), and that the NRC is playing "Russian Roulette" with the citizens of New York. Nuclear Panel Approves Restart of PASNY Plant, Gannett Westchester Newspapers, Nov. 15, 1980.

challenges and those of UCS are within "the province of Congress," not this Licensing Board.

Similarly, WESPAC and FOE should not be allowed to intervene in this proceeding to promote their goals of closing down the nuclear power industry.[1]

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1. WESPAC admits that its ultimate goal is to terminate the use of nuclear power as a viable energy source in this country. In its Amended Petition, WESPAC states:

> Yes, we would like to close down the industry--we believe it represents an unconscionable threat to the health, safety, and financial well-being of people living in areas populated by nuclear plants and other components of the fuel cycle. Furthermore, we would like to end the nuclear weapons industry . . . and free the world's people from the Sword of Damocles hanging over our heads.

WESPAC's Pre-hearing Memorandum and Response to Staff and Utility Answers to Petitions for Leave to Intervene at 5 (Dec. 1, 1981) (WESPAC Amended Petition) (emphasis added); see WESPAC Petition, reprinted in Emergency Planning Around U.S. Nuclear Powerplants: Nuclear Regulatory Commission Oversight Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 351 (1979) (statement of Connie Hogarth, Director, WESPAC) (Emergency Planning Hearings) (emphasis added) ("nuclear powerplants are a clear and present danger to the health and welfare of living things"). WESPAC's director, Connie Hogarth, believes that nuclear power is "threatening to world peace, threatening to the very future of humankind." Hogarth, A Defense of Civil Disobedience, N.Y. Times, Sept. 22, 1977, § 22, at 20, col. 3 She holds that

> [e]very nuclear plant built today increases the probability of a nuclear accident and increases the probability that the plutonium produced will eventually become a weapon of mass destruction.

Id. at 20, col. 4.

Lorna Salzman, Mid-Atlantic Representative for FOE, has urged that nuclear energy be abandoned and that the United States "opt for safer forms of energy that do not mortgage our lives and those of our descendants." Salzman, Carl, & Dickerson, Nuclear Gamble, N.Y. Times, Mar. 31, 1974, § 6, at 65, col. 1.

Moreover, FOE endorsed, with other environmental groups, "a phase out of nuclear energy over the next 10 years and a major shift away from large-scale, high technology energy developed generally." Carter, Failure Seen for Big-Scale, High-Technology Energy Plans, Science, Mar. 2, 1977, at 764.

The views of UCS emanate from the desire to place the Commission, not the safety of Indian Point, on trial. UCS charges Commission "mismanagement."[1] It has accused the Commission of being "blind to safety issues."[2] It claims that the

> NRC safety standards are in a state of disarray. Rather than having an organized, unified and unequivocal set of safety standards, NRC has a bewildering collection of regulations, regulatory guides, informal rules-of-thumb, formal technical specifications, design requirements, performance criteria, etc. that are applied and interpreted on an ad hoc basis.[3]

III. BECAUSE OF THEIR DIVERSE PURPOSES, INTERVENORS ARE NOT ADEQUATE REPRESENTATIVES OF THEIR MEMBERS

Even if they were not barred from this proceeding because of their opposition to nuclear power regardless of safety, intervenors' purposes are so broad and their

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1. Pollard resigned from the Commission because "I could no longer, in conscience, participate in a process that so effectively evades the single legislative mandate given to the N.R.C.--protection of public health and safety." Con Ed Official Brands Critic of Atom Safety Unprofessional, N.Y. Times, Feb. 24, 1976, § 1, 16, col. 4, at col. 5 (emphasis added).

2. Safety an Issue at Indian Point, N.Y. Times, Jan. 21, 1976, § 1, at 62, col. 7, at col. 8.

3. Nuclear Siting and Licensing Act of 1978: Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess. 975 (1978) (Detailed Testimony of Robert D. Pollard Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce).

members' interests are so diverse that intervenors cannot adequately represent their members. See Associated General Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979); Simone, Associational Standing and Due Process: The Need for an Adequate Representational Scrutiny, 61 B.U.L.Rev. 174, 180 (1981) (Simone) ("An adequate representation problem occurs when an [organization] represents a diverse membership which has varied interests.")

NYPIRG, WESPAC, and FOE are multi-issue groups with diverse interests. Decisions made by their control groups may not reflect the views of presumed "constituencies."[1] They must demonstrate that "the interests [they] seek[] to protect are germane to the organization's purpose." Hunt v. Washington Apple Advertising Commission, 432 U.S. at 343; see In re Houston Lighting and Power Co., 9 N.R.C. at 447. Their concerns are certainly not germane to their purposes. Germaneness

> helps insure, not only that the party before the Court be a competent and effective advocate on the issues presented, but also that the members of the plaintiff organization have had an opportunity to influence their representatives on positions related to the particular member injury at issue. Like the membership requirement . . . this too ultimately insures that it is the injured party, and not merely a

1. See Simone at 179.

> well-intentioned advocate, who is, at least in effect, before the Court.

Health Research Group v. Kennedy, 82 F.R.D. at 28 (emphasis in original and added).[1] In granting intervenor status to NYPIRG, WESPAC, and FOE, the Licensing Board refused to recognize this well-established requirement.[2]

NYPIRG has wide ranging, disparate goals:

> The public or quasi-public objectives which the purposes will achieve are to provide citizens of Central New York a lawful and meaningful method to influ-

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1. In Health Research Group v. Kennedy, 82 F.R.D. 21, Public Citizen and Health Research Group (HRG), both Nader-inspired groups, challenged certain aspects of the Food and Drug Administration's regulation of over-the-counter drugs. For standing, both organizations relied upon contributors to Public Citizen which served as an umbrella organization and conduit for funds to a diverse set of consumer advocacy groups, one of which was HRG, whose primary purpose was consumer advocacy on health issues. Id. at 28. In denying standing to Public Citizen, Judge Sirica observed that a person contributing to Public Citizen "exercis[ed] influence over an organization with the broadest of concerns: the public interest," and that the interests sought to be protected by the lawsuit were germane only to the purposes of HRG. Id. (emphasis added). The Court, however, denied HRG standing because its relationship with the contributors was "highly attenuated." Id. at 28. The Court further noted that "[health issues were] merely one of many projects to which Public Citizen's contributions are channeled." Id.

2. Post-Hunt cases have continued to require a close relationship between an organization's purpose and the interest it seeks to protect. See, e.g., Church of Scientology of California v. Cazares, 638 F.2d 1272, 1279-80 (5th Cir. 1981); NCAA v. Califano, 622 F.2d 1382, 1391 (10th Cir. 1980); Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 998 n.13 (D.C.Cir. 1979), cert. denied, 445 U.S. 915 (1980); National Constructors Association v. National Electrical Contractors Association, Inc., 498 F.Supp. 510, 520-21 (D.Md. 1980); Wampler v. Goldschmidt, 486 F.Supp 1130, 1133-34 (D.Minn. 1980); National Office Machine Dealers Association v. Monroe, The Calculator Co., 484 F.Supp. 1306, 1307 (N.D.Ill. 1980); Consumers Union of United States, Inc. v. Miller, 84 F.R.D. 240, 244 (D.D.C. 1979); Huertas v. East River Housing Corp., 81 F.R.D. 641, 649 (S.D.N.Y. 1979); Boyce v. Rizzo, 78 F.R.D. 698, 704 (E.D.Pa. 1978).

> ence decisions which affect the public interest. . . . [NYPIRG] will seek to contribute to and effect informed public action by research, evaluation, and education. The areas of involvement include environmental preservation, consumer protection, racial and sexual discrimination, product safety, corporate responsibility, as well as problems of social welfare.[1]

NYPIRG is involved with issues concerning consumer protection, the environment, government reform, health, higher education, energy, redlining, senior citizens, small claims, taxes, and mass transit.[2]

In its Petition for Leave to Intervene at 1, WESPAC states that it is "concerned about the quality of life, peace [and] justice." WESPAC's purposes are:

> To stimulate among the residents of Westchester County, New York, through an exchange of ideas and cooperation among diverse organizations, a fuller understanding of the issues which offset the quality of life including, but not limited to, the environment, economic security, the preservation and expansion of individual rights, the equality of all peoples, and the promotion of world peace, all for the betterment of Westchester County, America and the World.

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1. Certificate of Incorporation of Central New York Public Interest Research Group, Inc. (filed Aug. 8, 1972) (emphasis added). The group's name was changed to New York Public Interest Research Group, Inc. in 1973. Certificate of Amendment of the Certificate of Incorporation of Central New York Public Interest Research Group (filed Nov. 12, 1973).

2. NYPIRG Annual Report, 1979-1980, at 12-24.

Certificate of Incorporation at 3 (emphasis added).[1] WESPAC seeks to combat racism and sexism, Emergency Planning Hearings at 335, United States imperialism, prison overcrowding, and anti-union corporations. WESPAC Newsletter, Jan./Feb. 1981, at 7, 10, 12.[2]

FOE comes closer. At least it "is 'dedicated to the preservation, restoration, and rational use of the earth's resources,' and is working for 'a clean environment, a decent workplace, and reasonable use of energy.'"[3] But FOE has been quoted as stating that it

> will "continue the tone, extent, and breadth" of the work it has been doing, covering a broad range of energy, land management, and resource exploitation issues[4]

The constitutional requirement articulated in Hunt is

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1. WESPAC's concern with "economic security" is not a cognizable interest. In re Tennessee Valley Authority, 5 N.R.C. at 1420-21 (neither taxpayers nor ratepayers have requisite interest for standing); In re Portland General Electric Co. (Pebble Springs Nuclear Plants, Units 1 and 2), 3 N.R.C. 804, 806 (1976) (ratepayers have insufficient interest).

2. WESPAC claims that its "broad range of concerns makes [it] more, not less, qualified to participate in this proceeding." WESPAC Amended Petition to Intervene at 6. The issue is not whether WESPAC is "qualified," but whether WESPAC is an appropriate agent to represent a diverse membership with varied interests.

3. Foundation for Public Affairs, Public Interest Profiles F-45 (1980).

4. Id. at F-51 (emphasis added). FOE has been involved in proceedings concerning nuclear weapons proliferation and radioactive waste transport. FOE Statement to the New York City Council Environmental Protection Committee on Indian Point II at 1 (Oct. 28, 1981) (statement of Lorna Saltzman). These issues are not on trial in this proceeding.

to ensure that an "association has a personal stake in the outcome of [a lawsuit] by limiting the type of member interests for which it may sue."[1] On the one hand intervenors' purposes -- to shut down all plants regardless of safety -- preclude their participation. On the other hand, the stakes and interests of intervenors' "members" "are too diverse and possibilities of conflict too obvious to make [them] appropriate vehicle[s] to litigate the claims of [their] members" in this proceeding.[2] Associated General Contractors v. Otter Tail Power Co., 611 F.2d at 691.

IV. INTERVENORS' ATTEMPTS TO UNDERMINE THE OBJECTIVE RESOLUTION OF ISSUES GERMANE TO THE CONTINUED OPERATION OF INDIAN POINT BAR THEIR PARTICIPATION IN THIS PROCEEDING

Equity compels parties before the Licensing Board to act "fairly and without fraud or deceit as to the controversy in issue." Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15 (1945). Yet, the Licensing Board has refused to address

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1. Simone at 183.

2. NYPIRG's "mandatory membership" (students are automatically members unless they request a refund of their dues) further supports the notion that the interests of NYPIRG members are too diverse to make NYPIRG an adequate representative in this proceeding.
The propriety of mandatory student assessments by a state PIRG is pending before the United States Court of Appeals for the Third Circuit. Galda v. Bloustein, 516 F.Supp. 1142 (D.N.J. 1981), appeal docketed, No. 81-2433 (3rd Cir., filed Sept. 3, 1981).

UCS', NYPIRG's, and Parents' urgent efforts[1] to undermine this proceeding.[2]

UCS, NYPIRG, and Parents[3] have conducted a campaign to induce, instill, or exacerbate a phobia of nuclear power in the residents living near the plants.[4] This campaign to frighten and terrify can have but one purpose: to create or exacerbate fear.

The "Parents' Survey" and the pamphlet, "In Case of A Nuclear Accident . . . Do You Know What To Do?",[5] both dis-

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1. All allegations contained herein apply to other petitioners whom the Power Authority would have expected to identify through an evidentiary procedure.

2. Although the Licensing Board decided to hold in abeyance the litigation of the issue of fear in this proceeding "pending issuance of an opinion by [the U.S. Court of Appeals for the D.C. Circuit] in Pane v. NRC, Docket No. 81-1131 . . . and any NRC policies or regulations as a result of that decision," Memorandum and Order (Formulating Contentions and Designating Intervenor Responsibilities) at 14 n.5 (Apr. 9, 1982), it did not address the Power Authority's contention that UCS, NYPIRG, and Parents should be barred from this proceeding because of their attempts to promote fear in the community.

3. UCS, NYPIRG, and Parents are acting in concert in these proceedings and any action of one should be construed as the action of all three.

4. Nowhere in any response do UCS, NYPIRG, or Parents deny that they have engaged in the very conduct which the Power Authority has charged.

5. This pamphlet was printed by the Fund for Secure Energy, Inc. (FUSE), and was distributed by NYPIRG. See Affidavit of Roger Stavis (Exhibit B to Power Authority's Motion for Leave to File the Following Reply to Potential Intervenors' Responses to Power Authority's Motion to Exclude Fear as an Issue in thie Proceeding (Dec. 31, 1981)). In addition, the Power Authority is informed and believes that officials of NYPIRG's Indian Point Shutdown Project have distributed both the NYPIRG "Parents' Survey" and the pamphlet "In Case of a Nuclear Accident . . . Do You Know What To Do?" to assemblies in Rockland and Westchester Coun-

tributed by NYPIRG, are examples of scaremongering. This "survey instrument was not intended to elicit objective responses regarding attitudes or knowledge pertaining to the respondents' emergency evacuation plans, but rather . . . was [intended] to intimidate, frighten, and create a sense of helplessness in those who read it." Affidavit of David Valinsky ¶ 8 (Exhibit A to Power Authority's Motion for Leave to File the Following Reply to Potential Responses to Power Authority's Motion to Exclude Fear as an Issue in this Proceeding (Dec. 31, 1981)).

The "survey's" primary aim appears to be to threaten the parents of young children by focusing on tension-raising hypotheticals such as the need to know "where my kids are at any minute of the day--and what will be done with them in a nuclear emergency." Affidavit of Dr. Robert L. DuPont in Support of Licensee's Motion to Exclude Fear as an Issue in this Proceeding ¶ 6.

The "survey's" targeting of parents of young children rather than the public at large, and the "questions" --

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ties.

NYPIRG makes the misleading claim that the pamphlet "is totally beyond the pale of the hearings" because "FUSE is not a participant before this board, and therefore cannot present any defense of the specific wording it adopted." Union of Concerned Scientists, New York Public Interest Research Group, and Parents Concerned About Indian Point Response to PASNY's Motion to Exclude Fear of Nuclear Power as an Issue in this Proceeding at 3 n.* (Dec. 17, 1981) (Joint Response). Although it distributed this pamphlet to the public, see Affidavit of Roger Stavis, NYPIRG would have the Commission believe that there is no connection between what it terms a "legitimate instrument of mass communication," Joint Response at 3 n.*, and itself.

implicit suggestions that something mysterious and awful might happen to the young children of concerned parents in a nuclear emergency -- demonstrates that the "survey" was designed to create and promote fear, not to provide or solicit objective information. See id. ¶ 9. The "survey" fails to provide useful information, such as "if you hear a siren, turn on your radio and get accurate information--do not listen to rumor and do not act before you are informed of a specific situation." Id. ¶ 10.

The purpose of the booklet can only be to induce or exacerbate fear in the reader. Id. ¶ 11. For example, after several questions designed to create misgivings about nuclear power, the twelfth question states, "Is nuclear energy worth all this?" See id. ¶¶ 12-13.

Thus, instead of offering a responsible or reasoned approach to this proceeding, UCS, NYPIRG, and Parents have attempted to undermine the objective resolution of germane issues. The Licensing Board erred by granting them intervenor status without even an evidentiary hearing.

V. BY REFUSING THE POWER AUTHORITY'S REQUEST FOR AN EVIDENTIARY HEARING, THE LICENSING BOARD DENIED THE POWER AUTHORITY THE OPPORTUNITY TO FURTHER SUBSTANTIATE ITS ALLEGATIONS

The Power Authority requested "an evidentiary hearing pursuant to In re Consumers Power Co. (Midland Plants, Units 1 and 2), 8 N.R.C. 275, 277 n.1 (1979), on both the ques-

tions of memberships and membership policies and practices of those organizations whose intervention the Authority oppose[d] . . . and on the contentions asserted . . . concerning the scaremongering conduct of UCS, NYPIRG and others." Power Authority's Answer to Petitions for Leave to Intervene at 40 (Nov. 24, 1981). Rather than an evidentiary hearing, the Licensing Board granted intervention.

"Standing to intervene . . . may appropriately be the subject of an evidentiary inquiry before intervention is granted."[1] The Licensing Board in Consumers Power Co. indicated that the applicant could pursue its "bona fide doubts" about the propriety of petitioner's intervenor status in this manner.

Pursuant to 10 C.F.R. § 2.718(e), the presiding officer has the authority to "[r]egulate the course of the hearing." Moreover, a Licensing Board is empowered to consider, at a party's request, "a particular issue or issues separately from, and prior to, other issues relating to the effect of the . . . operation of [a] facility upon the public health."[2]

NRC regulations "impose a duty" upon licensing boards

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1. In re Consumers Power Co., 8 N.R.C. at 277 n.1.

2. NRC Statement of General Policy and Procedure, 10 C.F.R. Part 2, Appendix A, ¶ I(c)(1); see In re Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), 1 N.R.C. 539, 544 (1975); cf. In re New England Power Co. (NEP, Units 1 and 2), 7 N.R.C. 271, 282-84 (1978).

to conduct proceedings "in the interest of insuring a fair, impartial, expeditious and orderly adjudicatory process."[1] On the face of this record, there are "bona fide doubts" about permitting UCS representational standing for it has no members to represent. At this stage of the proceeding, the record regarding the Intervenors' scaremongering is clear and unrefuted.

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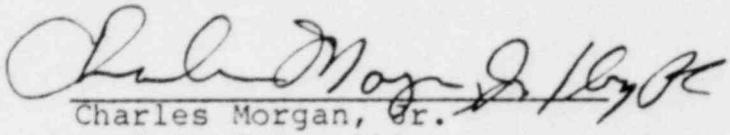
1. In re Consumers Power Co. (Midland Plant, Units 1 and 2), 5 N.R.C. 1442, 1445-46 (1977).

CONCLUSION

For the foregoing reasons, the Power Authority of the State of New York requests that the Nuclear Regulatory Commission reverse the order of the Atomic Safety and Licensing Board (1) granting the intervention of UCS, NYPIRG, Parents, WESPAC, FOE, and RCSE, and (2) denying the Power Authority's request for an evidentiary hearing.

Respectfully submitted,



Charles Morgan, Jr.
Paul F. Colarulli
Joseph J. Levin, Jr.

MORGAN ASSOCIATES, CHARTERED
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-7000

Thomas R. Frey
General Counsel
Charles M. Pratt
Assistant General Counsel

POWER AUTHORITY OF THE STATE
OF NEW YORK
Licensee of Indian Point Unit 3
10 Columbus Circle
New York, New York 10019
(212) 397-6200

Bernard D. Fischman
Michael Curley
Richard F. Czaja
David H. Pikus

SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Dated: April 19, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS:
Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts

and

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:	)	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Indian Point, Unit No. 2)	)	Docket Nos. 50-247 SP 50-286 SP
POWER AUTHORITY OF THE STATE OF NEW YORK (Indian Point, Unit No. 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 1982, I caused a copy of the Power Authority's Notice of Appeal of the Atomic Safety and Licensing Board's Order Granting Intervention and Denying the Power Authority's Request for an Evidentiary Hearing and the brief in support thereof to be served by first class mail, postage prepaid on:

Louis J. Carter, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
7300 City Line Avenue
Philadelphia, Pennsylvania 19151

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joan Holt, Project Director
Indian Point Project
New York Public Interest Research Group
5 Beekman Street
New York, New York 10038

John Gilroy
Westchester Coordinator
Indian Point Project
New York Public Interest Research Group
240 Central Avenue
White Plains, New York 10606

Jeffrey M. Blum, Esq.
New York University Law School
423 Vanderbilt Hall
40 Washington Square South
New York, New York 10012

Charles J. Maikish, Esq.
Litigation Division
The Port Authority of New York and New Jersey
One World Trade Center
New York, New York 10048

Janice Moore, Esq.
Counsel for NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Brent L. Brandenburg, Esq.
Assistant General Counsel
Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, New York 10003

Ellyn R. Weiss, Esq.
William S. Jordan, III, Esq.
Harmon and Weiss
1725 I Street, N.W., Suite 506
Washington, D.C. 20006

Charles A Scheiner, Co-Chairperson
Westchester People's Action Coalition, Inc.
P.O. Box 488
White Plains, New York 10602

Alan Latman, Esq.
44 Sunset Drive
Croton-On-Hudson, New York 10520

Ezra I. Bialik, Esq.
Steve Leipzig, Esq.
Environmental Protection Bureau
New York State Attorney General's Office
Two World Trade Center
New York, New York 10047

Alfred B. Del Bello
Westchester County Executive
Westchester County
148 Martine Avenue
New York, New York 10601

Andrew S. Roffe, Esq.
New York State Assembly
Albany, New York 12248

Marc L. Parris, Esq.
Eric Thorsen, Esq.
County Attorney
County of Rockland
11 New Hempstead Road
New City, New York 10956

Pat Posner, Spokesperson
Parents Concerned About Indian Point
P.O. Box 125
Croton-on-Hudson, New York 10520

Renee Schwartz, Esq.
Botein, Hays, Sklar and Herzberg
Attorneys for Metropolitan Transporation Authority
200 Park Avenue
New York, New York 10166

Honorable Ruth W. Messinger
Member of the Council of the City of New York
District #4
City Hall
New York, New York 10007

Greater New York Council on Energy
c/o Dean R. Corren, Director
New York University
26 Stuyvesant Street
New York, New York 10003

Geoffrey Cobb Ryan
Conservation Committee Chairman
Director, New York City Audubon Society
71 West 23rd Street, Suite 1828
New York, New York 10010

Lorna Salzman
Mid-Atlantic Representative
Friends of the Earth, Inc.
208 West 13th Street
New York, New York 10011

Mr. Donald L. Sapir, Esq.
60 East Mount Airy Road
RFD 1, Box 360
Croton-on-Hudson, New York 10520

Stanley B. Klimberg, Esq.
General Counsel
New York State Energy Office
2 Rockefeller State Plaza
Albany, New York 12223

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Honorable Richard L. Brodsky
Member of the County Legislature
Westchester County
County Office Building
White Plains, New York 10601

Zipporah S. Fleisher
West Branch Conservation Association
443 Buena Vista Road
New City, New York 10956

Mayor George V. Begany
Village of Buchanan
236 Tate Avenue
Buchanan, New York 10511

Judith Kessler, Coordinator
Rockland Citizens for Safe Energy
300 New Hemstead Road
New City, New York 10956

David H. Pikus, Esq.
Richard F. Czaja, Esq.
330 Madison Avenue
New York, New York 10017

Ms. Amanda Potterfield, Esq.
P.O. Box 384
Village Station
New York, New York 10014

Paul F. Colarulli