

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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In the Matter of :
CONSOLIDATED EDISON COMPANY OF NEW YORK, : Docket Nos.
INC. (Indian Point, Unit No. 2) : 50-247 SP
: 50-286 SP
POWER AUTHORITY OF THE STATE OF NEW YORK : July 2, 1982
(Indian Point, Unit No. 3) :
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LICENSEES' RESPONSE TO UCS/NYPIRG
MOTION FOR AN ORDER COMPELLING
LICENSEES TO PROVIDE CERTAIN DOCUMENTS

ATTORNEYS FILING THIS DOCUMENT:

Brent L. Brandenburg
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place
New York, New York 10003
(212) 460-4600

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

Prop. Preliminary Statement

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 ("Power Authority"), licensee of Indian Point 3 Nuclear Power Plant (collectively the "licensees"), hereby respond to the UCS/NYPIRG Motion for an Order Compelling Licensees to Produce Certain Documents Requested in Formal and Informal Discovery and to Respond to UCS/NYPIRG Interrogatory Number 67 ("UCS/NYPIRG Motion").

The UCS/NYPIRG Motion broadly purports to seek discovery of documents relating to public perceptions of the licensees' "credibility." Licensees filed a timely objection to the UCS/NYPIRG discovery request on the grounds that:

- (a) it is too vague for response;
- (b) it appears to arise beyond any contention for which UCS/NYPIRG has been assigned lead or contributing intervenor status; and
- (c) it is beyond the scope of the Commission's Questions.

(Licensees' Responses to UCS/NYPIRG First Set of Interrogatories and Addendum Thereto at p. 60.)

Now, more than a month subsequent to licensees' filing of their objection, UCS/NYPIRG belatedly seeks not only to compel discovery, but to broaden its initial request to include actual production of documents which it earlier sought only to identify.

Licensees oppose the UCS/NYPIRG Motion for the reasons set forth in their original objection, and for the additional reason that the Motion is untimely.*

A. The UCS/NYPIRG Motion Is Untimely

The UCS/NYPIRG Motion, filed over a month subsequent to licensees' timely filing of their objection to UCS/NYPIRG Interrogatory 67, which underlies this motion, is clearly untimely. 10 CFR § 2.740(f) states without qualification:

If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request for an order compelling a response or inspection in accordance with the request. (Emphasis added.)

* As the Board is undoubtedly aware, licensees have expended considerable effort to comply with the extensive and burdensome discovery requests herein. Keeping objections to a minimum, licensees have already responded to hundreds of interrogatories and requests for admissions, and produced thousands of pages of documents. It is noteworthy, in light of these many discovery requests, that this motion - concerning a single interrogatory - is the only instance in which any intervenor has moved to compel a response by licensees to an interrogatory or document request.

It is particularly important in this expedited proceeding that strict adherence be given to discovery deadlines.* The instant motion, more than three weeks tardy, is palpably improper.

Moreover, the UCS/NYPIRG Motion also seeks to expand the initial discovery request, which sought only identification of documents, to include actual production of the items sought. This additional request comes more than seven weeks following the due date for filing of interrogatories and several weeks past the close of discovery under Commission Questions 3 and 4. Hence, the UCS/NYPIRG Motion is an attempt to circumvent the Commission's Rules of Practice and the Board's discovery schedule herein.**

* Indeed, the Board has placed such importance on expediting discovery that it recently ordered that all filings concerning discovery requests shall be physically lodged with the Board and parties on or before the due date, not merely mailed on that date. (June 3, 1982 Order at p. 3.) The untimely UCS/NYPIRG Motion disregards the Board's directive that "discovery in this proceeding will be abbreviated and must be conducted efficiently" (April 2, 1982 Order at p. 41, n. 14).

** Any reliance by UCS/NYPIRG on the June 3, 1982 letter (the "June 3 letter") from NYPIRG counsel Amanda Potterfield to Power Authority counsel David Pikus is misplaced. That letter was written and delivered subsequent to the May 31 close of discovery under Commission Questions 3 and 4, and long after the filing of licensees' three-pronged objection to Interrogatory 67. It specifically addressed only one of licensees' three objections. (A copy of the June 3 letter is annexed to the UCS/NYPIRG Motion as Appendix A.)

The UCS/NYPIRG Motion should be denied for either of the above reasons alone.

B. Licensees' Objection Should be Upheld

The UCS/NYPIRG discovery request was initially met on May 18 with three valid objections based on (1) relevance and materiality; (2) vagueness; and (3) standing. We submit that these objections should be upheld.

1. The request is irrelevant, immaterial and beyond the scope of the Commission's Questions

UCS/NYPIRG has consistently urged that its discovery request falls under Board Contention 3.4. Nowhere, however, does UCS/NYPIRG indicate how the information sought is relevant to that contention. Indeed, UCS/NYPIRG states only that "[i]f the documents and information sought by UCS and NYPIRG exist, their relevance ... is obvious" (UCS/NYPIRG Motion at p. 4), without providing any support whatsoever for its conclusion. In fact, a comparison of Contention 3.4 (or any of the contentions or Commission Questions) and Interrogatory 67 shows clearly that there is no connection and, hence, no relevance.

The instant motion seeks production of documents relating to subjective public perceptions of the licensees' credibility. Contention 3.4, on the other hand, is limited

solely to the licensees' dependability for notification of off-site governmental authorities. It reads as follows:

The Licensees cannot be depended upon to notify the proper authorities of an emergency promptly and accurately enough to assure effective response.

(April 23, 1982 Order at p. 9.)

As Contention 3.4 recognizes, the off-site governmental authorities, not the licensees, are responsible for notifying the public in the event of a radiological emergency. Licensees have no responsibility for notification of the public under either Commission regulations or the Indian Point emergency plans. See 10 CFR Part 50, Appendix E (IV)(D)(3) ("[t]he responsibility for activating such a public notification system shall remain with the appropriate government authorities"). Hence, there is no connection between subjective public perceptions of the "credibility" of the licensees and the licensees' abilities to effect proper notification in the event of an emergency. Accordingly, subjective public perceptions of the licensees' credibility have no relation to the issues raised by Contention 3.4.*

* Licensees further note that the State of New York, which we would be obligated to notify in the event of a radiological incident, has stated that "State experience with the reporting of incidents from both Consolidated Edison and PASNY has been acceptable." (State of New York Answer to UCS/NYPIRG Interrogatory 13.)

Evidently recognizing the irrelevance of Interrogatory 67 to Contention 3.4, UCS/NYPIRG now belatedly seeks to connect it somehow to Contention 3.2. That contention, however, is equally unrelated:

Emergency planning for Indian Point Units 2 and 3 is inadequate in that the plans make erroneous assumptions about the response of the public and of utility employees during radiological emergencies.

(April 23, 1982 Order at p. 8).

Again, UCS/NYPIRG fails to state how subjective public perceptions of the licensees' credibility have any bearing on the response of the public to instructions from governmental officials, or on the actual response of utility employees.

Indeed, Interrogatory 67 is immaterial and irrelevant to any issues raised by Commission Questions 3 and 4. Those Questions are concerned only with the current status of emergency planning and specific, feasible off-site improvements. While the licensees are aware of the Board's desire to gather as much information as is possible on those subjects, it is obvious that the UCS/NYPIRG Motion seeks wholly irrelevant information for purposes extraneous to this proceeding. This is made clear in UCS/NYPIRG's so-called "amended" Interrogatory 67, which states that the information sought was developed "in

conjunction with dispute over summer-winter rate differentials." However the parties may choose to define the contours of Commission Questions 3 and 4, "summer-winter rate differentials" are clearly not within them.

2. The request is too vague for response.

Apparently conceding the vagueness of its initial request, UCS/NYPIRG purported to amend the request in its June 3 letter.* The first paragraph of the "amended" request, however, which contains the operative language, remains unchanged. The new second paragraph simply narrows one such alleged study to "sometime before June 1981." This obviously does little to overcome our vagueness objection. The new third paragraph claims that a study was done in conjunction with a "dispute over summer-winter rate differentials." If anything, this demonstrates the complete irrelevance of the request, since "summer-winter rate differentials" have nothing to do with this proceeding.

3. The request appears to arise beyond any contention for which UCS/NYPIRG has been assigned lead or contributing intervenor status.

The Board has directed in the clearest of terms that

* This manner of attempted amendment was not only procedurally defective but untimely as well.

discovery may only be requested by intervenors assigned lead or contributing intervenor status on the contention to which such discovery relates:

Discovery may be had both on and by Contributing Intervenors as well as the Lead Intervenor listed for each contention.

(April 9, 1982 Order at p. 16.)*

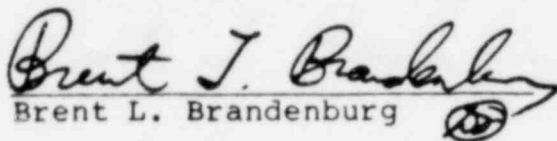
UCS/NYPIRG has consistently asserted that it relied on Contention 3.4 to support this discovery request. (See June 3 letter at p. 2.) When advised by licensees' counsel of the procedures set forth in the April 9 Order, UCS/NYPIRG conceded that it is neither a lead nor contributing intervenor on that contention.**

* Even under this procedure, licensees have found themselves heavily burdened with hundreds of interrogatories, depositions, requests for admissions, and so-called "informal discovery" requests. Any broader framework of discovery would make this proceeding - which involves nine intervenors, nine interested states, the Staff, and two licensees - totally unmanageable.

** At that point, UCS/NYPIRG turned to intervenor Rockland Citizens for Safe Energy ("RCSE") and asserted that the information sought was also requested in an RCSE interrogatory. When asked by licensees' counsel to identify the specific RCSE interrogatory, counsel for UCS/NYPIRG reviewed the RCSE interrogatories and conceded that the information was not requested therein. In any event, RCSE has not moved to compel discovery and UCS/NYPIRG, of course, would have no standing to move on RCSE's behalf. Now, apparently as an afterthought, UCS/NYPIRG attempts to fit its Interrogatory 67 within Contention 3.2, which UCS/NYPIRG admits is concerned only with assumptions about the response of the public and utility employees in an emergency. As noted above, however, this contention is completely unrelated to any subjective public perceptions of the "credibility" of the licensees. Moreover, this additional argument is simply untimely.

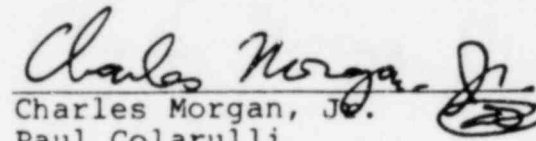
Thus, by UCS/NYPIRG's own admission, it has no standing to request the discovery sought or, a fortiori, to move to compel discovery.

WHEREFORE, licensees respectfully urge that the UCS/NYPIRG Motion be denied in all respects.


Brent L. Brandenburg

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
Licensee of Indian Point
Unit 2
4 Irving Place
New York, New York 10003
(212) 460-4600

Respectfully submitted,


Charles Morgan, Jr.
Paul 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: July 2, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEES' RESPONSE TO UCS/NYPING MOTION FOR AN ORDER COMPELLING LICENSEES TO PROVIDE CERTAIN DOCUMENTS in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 2nd day of July, 1982.

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

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

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

Joan Holt, Project Director
Indian Point Project
New York Public Interest
Research Group
9 Murray Street
New York, N.Y. 10007

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

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

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

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

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

Marc L. Parris, Esq.
Eric Thorson, Esq.
County Attorney
County of Rockland
11 New Hemstead Road
New City, N.Y. 10956

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

Joan Miles
Indian Point Coordinator
New York City Audubon Society
71 West 23rd Street, Suite 1828
New York, N.Y. 10010

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

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

Alfred B. Del Bello
Westchester County Executive
Westchester County
148 Martine Avenue
White Plains, N.Y. 10601

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

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

Renee Schwartz, Esq.
Paul Chessin, Esq.
Laurens R. Schwartz, Esq.
Margaret Oppel, Esq.
Botein, Hays, Sklar & Herzberg
200 Park Avenue
New York, N.Y. 10166

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

Honorable Ruth Messinger
Member of the Council of the
City of New York
District No. 4
City Hall
New York, New York 10007

Richard M. Hartzman, Esq.
Lorna Salzman
Friends of the Earth, Inc.
208 West 13th Street
New York, N.Y. 10011

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, N.Y. 10601

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

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

Alan Latman, Esq.
44 Sunset Drive
Croton-on-Hudson, N.Y. 10520

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

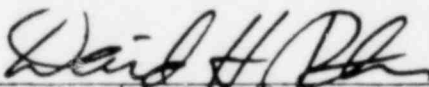
Mayor George V. Begany
Village of Buchanan
236 Tate Avenue
Buchanan, N.Y. 10511

Judith Kessler, Coordinator
Rockland Citizens for Safe
Energy
300 New Hempstead Road
New City, N.Y. 10956

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

Ruthanne G. Miller, Esq. *
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Mr. Donald Davidoff
Director, Radiological
Emergency Preparedness
Group
Empire State Plaza
Tower Building, RM 1750
Albany, New York 12237


David H. Pirus

* Service effected by hand.

** Service effected by hand at the NYPIRG offices, 9 Murray Street,
New York, New York.