

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges
James P. Gleason, Chairman
Dr. Oscar H. Paris
Frederick J. Shon

In the Matter of)

CONSOLIDATED EDISON COMPANY)
OF NEW YORK, INC.)

POWER AUTHORITY OF THE STATE)
OF NEW YORK (Indian Point,)
Unit No. 3))

Docket Nos.
50-247SP
59-286SP

April 1, 1983

NEW YORK STATE'S
RESPONSE TO NYPIRG's
MOTION FOR PRODUCTION OF DOCUMENTS

By motion dated March 29, 1983, the New York Public Interest Research Group (NYPIRG) has moved for an order requiring New York State, among other parties and participants, to produce documents connected with the March 9 exercise. These documents were preserved pursuant to a stipulation resolving NYPIRG's February 22 motion for an order requiring New York State and other parties and participants to preserve documents relating to the exercise. New York State will now show that: (1) the documents sought are privileged and (2) the Nuclear Regulatory Commission did not resolve this claim of privilege in its MEMORANDUM served on August 20, 1982.

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I. NYPIRG SEEKS PRIVILEGED DOCUMENTS

The documents NYPIRG seeks from New York State are the individual evaluations* performed by New York State employees for the New York State Radiological Emergency Planning Group (NYSREPG). These persons observed the March 9 exercise on behalf of the State, assessed areas in which they believe persons participating in the exercise performed their functions properly and made recommendations for changes in off-site radiological emergency practices and procedures. As such, the documents in which the evaluations are performed are of great importance to the State's exercise of its emergency planning functions and are shielded by the privilege attaching to intra-governmental communications that are part of a government's deliberative process.

The intra-governmental "deliberative process" privilege protects the decision making process of governments by shielding from discovery intra-governmental documents"reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." McClelland v. Andrus 606 F.2d 1278, 1287 (D.C. Cir. 1979), Liuzzo v. United States 508 F. Supp. 923, 937 (E.D. Michigan 1981), In Re Franklin National Bank Security Litigation 478 F.2d 577 (E.D. N.Y.

* These items are different from the FEMA team leader reports which the Board ordered released on March 31, 1983. Rather these documents are comparable to the individual FEMA evaluation forms that the Board did not order released on March 31, 1983.

1979). The rationale behind the privilege is that the frank discussion necessary for proper governmental decision making might not be possible if documents containing intra-governmental opinions were made public. "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by a decisionmaker on the subject of the decision prior to the time the decision is made." National Labor Relations Board v. Sears Roebuck & Co., 421 U.S. 132, 151 (1975).

Pursuant to §20(e) of the New York State Executive Law it is the responsibility of NYSREPG in its role as staff to the New York State Disaster Preparedness Commission to ensure that radiological emergency plans, organizational arrangements and response capability "shall at all times be the most effective that current circumstances and existing resources allow." In order to achieve that end, it is necessary that REPG receive candid evaluations on the actions of persons implementing the plan and necessary alterations. In order to ensure the candid exchange of opinions, it is necessary that the author of documents containing opinions be ensured that those opinions will be protected from hostile scrutiny. As Commissioners Roberts and Ahearne have recognized, the knowledge that exercise evaluations will be released may have a "chilling effect" on the author of an evaluation and lead to a sanitization of the evaluation. Such sanitization of the evaluations will mean that REPG will not be completely informed about the exercise. In fact,

as Commissioner Roberts, joined by Commissioner Ahearne, noted in his concurrence to the August 20, 1983 Memorandum (Additional Views of Commissioner Roberts, p. 3), discovery of notes might lead to a failure to record such notes. In either event, the purpose of the exercise -- to ensure that radiological planning will be tested, will be undercut. It is essential that the State's decision making process be protected and that the individual exercise evaluations requested not be released.

II. THE COMMISSION HAS NOT DETERMINED
THAT THE EVALUATIONS ARE NOT PRIVILEGED

In its MEMORANDUM served August 20, 1982, the Commission explained the reasons for its ORDER served March 3, 1982. That Order stayed an oral discovery ruling of the Atomic Safety and Licensing Board which allowed NYPIRG entry into licensee control-rooms and the emergency operations centers of State and local governments during the radiological emergency planning exercise of March 3, 1982. One of the reasons for staying this Order offered by the Commission is that "UCS/NYPRIG (sic) had access to extensive documentation generated by the NRC and FEMA staffs during the exercise and had ample legal tools at their disposal to secure the information they wished, following the exercise " (Memorandum served August 20, 1982, p. 3). That language does not mean that the Commission considered or even reached the privileged status of the New York State exercise evaluations.

That the Commission stated that documents were available does not mean that the Commission decided that individual evaluation forms were to be released. The documents referred to by the Commission could be FEMA and NRC staff reports on the exercise, not individual evaluations. The reference in the Commission's Memorandum (page 3) to "ample legal tools" is an indication that legal questions of privilege remain to be discussed. Indeed, it is very difficult to see how the Commission could resolve the question of privilege without giving parties who might raise such claims, such as the State of New York, an opportunity to raise these claims.

Moreover, even if the Commission did decide that the documentation resulting from the March 3, 1982 exercise should be made available it may not have decided that documentation from the March 9, 1983 exercise should similarly be made available. Commissioner Roberts stated in his concurring opinion that he did not believe that the practice of preserving draft reports of individual observers should be continued in large part because such evaluations may not be accurate standing alone (Additional Views of Commissioner Roberts pp. 2-3). His view that "I do not believe that it is in the NRC's interest that Licensing Boards require the staff and FEMA to preserve and distribute handwritten notes written during the emergency exercise" was joined by Commissioner Ahearne (Additional Views of Commissioner Ahearne, p. 3). That these two Commissioners out of three in the majority believe the result in the future would be different makes it likely that the full Commission intended that the matter of whether

individual exercise evaluations should be released should be considered again by this Board.

It is also important to note that if the Commission has rejected any claims of privilege it has probably done so only in relation to claims that could be raised by FEMA and Staff. It is those parties that the Commission noted were expected to make documents available. The Commission never indicated that the State of New York was expected to release such documents.* It is not surprising that the Commission would single out FEMA and the NRC staff as parties that might be expected to release documents. FEMA and the NRC staff have the duty of evaluating the exercise and reporting to the Commission. As such, the Commission might decide that these documents should be subjected to public scrutiny, regardless of the "chilling effect" on the evaluation of the exercise. Moreover, it is more important for intervenors to obtain those documents and subject them to examinations since those documents will be the basis of the Commission's evaluation. On the other hand, New York State's documents resulting from the exercise will not be used by the NRC in the evaluation process. Thus, not only do the intervenors have a lesser interest in obtaining the REPG's documents, but the Commission will have lesser interest in revealing them.

* Copies of some of the individual state evaluation forms were inadvertently released after the March 3, 1982 exercise. Attempts to enter these documents into the record have been rejected on two occasions (January 13, 1983 and March 23, 1983). The State has not lost its privilege as a result of this inadvertant release.

CONCLUSION

The Board should protect the exercise of the State's decision making function in performing its emergency planning role. The exercise evaluations that the intervenors seek should be regarded as privileged. Moreover, it should be recognized that the NRC never reached the question of whether or not these documents were privileged in its Memorandum served on August 20, 1982.

Respectfully submitted,

Jonathan D. Feinberg

JONATHAN D. FEINBERG
Staff Counsel

APPEARING FOR
STANLEY KLIMBERG
General Counsel
New York State Energy Office

Dated: Albany, New York
April 1, 1983

cc: Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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POWER AUTHORITY OF THE STATE OF)
NEW YORK (Indian Point, Unit 3))

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 1983, I mailed a copy of New York State's Response to NYPIRG's Motion for Production of Documents by first class mail except that those persons whose names are marked with an * received service by express mail on April 1, 1983.

* James P. Gleason, Esq.
Administrative Judge
513 Gilmore Drive
Silver Springs, Maryland 20901

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

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
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, NY 10003

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

Paul F. Colarulli, Esq.
Joseph J. Levin, Jr., Esq.
Pamela S. Horowitz, Esq.
Charles Morgan, Jr., Esq.
Morgan Associates, Chartered
1899 L Street, N.W.
Washington, D.C. 20036

Charles M. Pratt, Esq.
Thomas R. Frey, Esq.
Power Authority of the State
of New York
10 Columbus Circle
New York, NY 10019

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

* Amanda Potterfield, Esq.
Indian Point Project
New York Public Interest
Research Group
3 Murray Street
New York, NY 10007

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

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

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

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

Andrew T. O'Rourke
Westchester County Executive
Westchester County
148 Martine Avenue
White Plains, NY 10601

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

Renee Swartz, Esq.
Botein, Hays, Sklar & Herzberg
Attorneys for Metropolitan
Transportation Authority
200 Park Avenue
New York, NY 10166

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

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

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

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

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

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

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

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

Craig Kaplan, Esq.
National Emergency Civil
Liberties Committee
175 Fifth Avenue - Suite 71
New York, NY 10010

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

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

Judith Kessler, Coordinator
Rockland Citizens for Safe Energy
300 New Hempstead Road
New City, NY 10956

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

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

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

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

Stephen Sholly
Union of Concerned Scientists
Suite 1101
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036

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

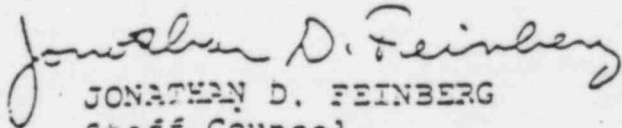
Spence W. Perry
Office of General Counsel
Federal Emergency Management Agency
500 Southwest Street
Washington, D.C. 20472

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

Stewart M. Glass
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza-Room 1349
New York, NY 10278

Mayor F. Webster Pierce
Village of Buchanan
236 Tate Avenue
Buchanan, NY 10511

David Duboff
Westchester Peoples' Action
Coalition
255 Grove Street
White Plains, NY 10601


JONATHAN D. FEINBERG
Staff Counsel
NYS Public Service Commission