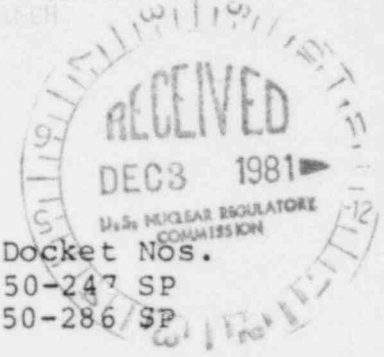
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Louis J. Carter, Chairman
Mr. Frederick J. Shon
Dr. Oscar H. Paris



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)	)	

POWER AUTHORITY'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO EXCLUDE FEAR
AS AN ISSUE IN THIS PROCEEDING

The New York Public Interest Research Group, Inc. (NYPIRG), the Union of Concerned Scientists (UCS), Parents Concerned About Indian Point (Parents), and others have been engaged in scaremongering among the residents living near the Indian Point plants through tactics that are the equivalent of "falsely shouting fire in a theatre and causing a panic."[1] Schenck v. United States, 249 U.S. 47, 52 (1919)

1. The Power Authority of the State of New York has raised the issue of scaremongering as a basis of its opposition to the intervention of UCS, NYPIRG, and Parents in this proceeding. Power Authority's Answer to Petitioners for Leave to Intervene 38-40 (Nov. 24, 1981). In this motion and memorandum, the Power Authority addresses the issue of

D503
s
1/1

(Holmes, J.). This Atomic Safety and Licensing Board (Licensing Board) should exclude from this proceeding the issue of fear because prospective intervenors who exacerbate fear of nuclear power are estopped from raising that issue and consideration of the issue of fear of nuclear power is neither authorized, allowed nor required under the Atomic Energy Act.

---

fear, requesting that evidence of fear be excluded from this proceeding.

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. UCS and NYPIRG have filed a joint petition to intervene. Joint Petition for Leave to Intervene by the Union of Concerned Scientists and the New York Public Interest Research Group (filed Nov. 9, 1981). UCS and NYPIRG have also filed a joint petition for review of a Nuclear Regulatory Commission decision concerning the adequacy of emergency planning in the event of a nuclear emergency at the Indian Point units. Union of Concerned Scientists v. NRC, No. 81-4188 (2d Cir., filed Oct. 9, 1981).

Upon information and belief, NYPIRG expressly created Parents as an entity to participate in this proceeding. Parents has sought leave to intervene with respect to the issue of "[w]hether the psychological, emotional, and physical health and safety of children are adequately protected against the dangers of" the Indian Point units. Petition for Leave to Intervene [Parents] at 2 (Nov. 9, 1981) (emphasis added). The issues raised in the Joint Petition for Leave to Intervene by the UCS and NYPIRG are broad enough to encompass the issue of fear. For example, UCS and NYPIRG seek leave to intervene with respect to the issue of "the public health," and the "other consequences of an accident at Indian Point." Joint Petition for Leave to Intervene by the Union of Concerned Scientists and the New York Public Interest Research Group at 4, 5.

I. PROSPECTIVE INTERVENORS WHO EXACERBATE FEAR OF NUCLEAR POWER ARE ESTOPPED FROM RAISING THAT ISSUE

Rather than attempt to focus upon the issues pinpointed by the Nuclear Regulatory Commission's (Commission's) orders of January 8, 1981, and September 18, 1981, relating to the operation of the Indian Point units, the potential intervenors have conducted a campaign to induce, instill, or exacerbate a phobia of nuclear power in the residents living near the plants. This campaign to frighten and terrify can have but one purpose: to create fear in the minds of the public.

The "Parents' Survey" and the booklet, "In Case of a Nuclear Accident . . . Do You Know What To Do?", both distributed by NYPIRG, are examples of the scaremongering campaign. The "survey" seeks to elicit no useful information and is clearly intended to frighten the reader. See Affidavit of Dr. Robert L. DuPont in Support of Licensees' Motion to Exclude Fear as an Issue in this Proceeding ¶ 6. 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." Id. ¶ 8.

The fact that the "survey" is targeted at parents of young children rather than the public at large, and the fact that the question implicitly suggests 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 an irrational fear, not to provide or solicit objective information. 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 booklet is equally inflammatory and biased. Its purpose 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?" This rhetorical statement is not an objective inquiry for educational or research purposes, but a fearful conclusion couched as a question. See Id. ¶¶ 12-13.

The phobia-inducing and inflammatory conduct of the potential intervenors, designed to poison the well of public opinion, undermines evidence of public views, including public opinion surveys, and such evidence now must be excluded. Expressions of public opinion would merely be a barometer of NYPIRG's, UCS', Parents' and other groups' efforts to induce and instill fear in the residents near Indian Point.

The results of NYPIRG's earlier referenced "survey" efforts would be excluded under existing federal case law. A public opinion survey would be inadmissible for lack of reliability if "the questions were 'unfairly worded to suggest answers favorable to the party sponsoring the survey', because in such a case the circumstantial guarantees of trustworthiness would be lacking."[1] Pittsburgh Press Club v. United States, 579 F.2d 751, 758-59 (3d Cir. 1978), quoting Zippo Manufacturing Co. v. Rogers Imports,

---

1. The court referenced the Judicial Conference Study Group on Procedure in Protracted Litigation, which, in its Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 429 (1960), discusses the factors which must be examined in determining whether a survey has the minimum guarantees of trustworthiness such that it can be admitted into evidence. Pittsburgh Press Club v. United States, 579 F.2d at 758. The court summarized the generally accepted survey principles which must be met:

> A proper universe must be examined and a representative sample must be chosen; the persons conducting the survey must be experts; the data must be properly gathered and accurately reported. It is essential that the sample design, the questionnaires and the manner of interviewing meet the standards of objective surveying and statistical techniques. Just as important, the survey must be conducted independently of the attorneys involved in the litigation. The interviewers or sample designers should, of course, be trained, and ideally should be unaware of the purposes of the survey or the litigation. A fortiori, the respondents should be similarly unaware.

Id. (emphasis in original).

The documents distributed by NYPIRG do not meet the standards delineated in the Pittsburgh Press Club case.

Inc., 216 F.Supp. 670, 684 (S.D.N.Y. 1963). See United States v. Healthco, Inc., 387 F.Supp 258, 269 (S.D.N.Y), aff'd mem., 535 F.2d 1243 (2d Cir. 1975); Allen v. Morton, 333 F.Supp. 1088, 1094 (D.D.C. 1971), rev'd and remanded per curiam on other grounds, 495 F.2d 65 (D.C.Cir. 1973). See also Baumholser v. Amax Coal Co., 630 F.2d 550, 552 (7th Cir. 1980).

However, not only should the results of the NYPIRG-distributed "survey" be excluded, but other evidence which raises the issue of fear of nuclear power in this proceeding should be barred. NYPIRG, UCS, Parents, and others have attempted to induce a phobic reaction to the use of nuclear power.[1] Having created fear, they now seek to raise the issue of that same fear in their attempt to shut down the

---

1. Robert Pollard, of UCS, has characterized "[a] nuclear plant license [as] nothing more or less than a murder license," N-Protest Attracts Thousands B. Globe, May 7, 1979, at 1, col. 4 (emphasis added), while Joan Holt, of NYPIRG, has warned the public that the Commission is playing "Russian Roulette" with their lives. Nuclear Panel Approves Restart of PASNY Plant, Gannett Westchester Newspapers, Nov. 15, 1980. Pollard has additionally toyed with the public's worst fears:

> Besides the number of people that are actually killed, you have people worrying about developing cancer for the rest of their lives, and you have people worried about whether or not their children are going to grow up normally, and so forth.

Transcript of Testimony of Robert Pollard, Hearing Before the Special Comm. on Nuclear Safety at 115 (1979).

Indian Point units.

General principles of equity estop the introduction of public opinion surveys and any other evidence of fear in this proceeding. Equity compels that parties before the Licensing Board 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). Equity does not allow a wrongdoer to profit from his own transgressions, and "one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character." Id. at 815. When an action "concerns the public interest [the Licensing Board should] withhold its assistance in such a case [because] it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." Id. (emphasis added).

When a party has made affirmative misrepresentations to mislead others, the wrongdoer cannot derive any benefits from, or use the fruits of, his misrepresentations. See Covington County Bank v. R. J. Allen & Associates, Inc., 462 F.Supp. 413, 423-24 (M.D.Ala. 1977) (where deception of investors in securities occurred, no relief to deceiving party was allowed); Monsanto Co. v. Rohm & Haas Co., 312

F.Supp. 778, 794 (E.D.Pa. 1970), aff'd, 456 F.2d 592 (3d Cir.), cert. denied, 407 U.S. 934 (1972) ("affirmative misrepresentations by a patent applicant, made with the intent to deceive, even if not material, is grounds" to deny relief); De Gaster v. Dillon, 247 F.Supp. 511, 516-17 (D.D.C. 1963), aff'd per curiam, 354 F.2d 515 (D.C.Cir. 1965) (relief denied when court found that fraud had been worked upon the Foreign Claims Settlement Commission by filing with it a false document). Because UCS, NYPIRG, Parents, and others have actively misrepresented the potential dangers of the Indian Point units to exacerbate an anti-nuclear phobic reaction in the public, these groups should be estopped from introducing any evidence of fear in this proceeding.

II. CONSIDERATION OF THE ISSUE OF FEAR OF NUCLEAR POWER IS NEITHER AUTHORIZED, ALLOWED NOR REQUIRED BY THE ATOMIC ENERGY ACT

The issue of fear of nuclear power is neither authorized nor required to be considered in this proceeding under the Atomic Energy Act (AEA). See In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1) 12 N.R.C. 607, 607-08 (1980), appeal docketed, People Against Nuclear Energy v. NRC, No. 81-1131 (D.C.Cir., filed Feb. 3,

1981).[1] See also New Hampshire v. AEC, 406 F.2d 170, 174 (1st Cir.) ("history of the 1954 legislation reveals that Congress, in thinking of the public's health and safety, had in mind only the special hazards of radioactivity") cert. denied, 395 U.S. 962 (1969); Siegel v. AEC, 400 F.2d 778, 783-84 (D.C.Cir. 1968) (Atomic Energy Commission's determination that the public health and safety standard did not require consideration of possible sabotage or enemy attack on a nuclear power plant did not conflict with the purposes of the AEA). The Commission's mandate under the AEA "is to permit the operation of licensed facilities upon a finding that they are safe" rather than to "consider whether the existence of psychological stress in the community should lead [the Commission] to deny permission to operate [a] reactor regardless of [its] judgment that the plant is safe from a technical standpoint, a decision which would be contrary to the mandate of the statute." In re Metropolitan

---

1. The Commission's decision was the result of a 2-2 vote and the "Commission decided that it [would] reconsider and vote on the question [of the relevance of psychological stress] when the makeup of the Commission [was] altered by the appointment and confirmation of a fifth Commissioner." In re Metropolitan Edison Co., 12 N.R.C. at 608.

Edison Co., 12 N.R.C at 612 (separate views of Commissioner Hendrie).[1]

The best way to allay any such community fears, consistent with the purpose of the AEA, "is [for the Commission] to do its statutorily mandated job of protecting the public's physical health and safety and to publicize effectively its conclusions and the facts which underly those conclusions." Id. at 615 (separate views of Commissioner Hendrie).

---

1. In discussing the legislative history of the AEA, Commissioner Hendrie observed:

> One of the major reasons for providing for public hearings on nuclear power plants was to provide a means for educating the public about nuclear energy and the measures taken to assure its safety. . . . Congress implicitly acknowledged that public fears about nuclear reactors were a reality which had to be addressed; the means chosen by Congress was to have technical issues of nuclear safety addressed and resolved by technical experts in a public licensing review process administered by the Atomic Energy Commission. Thus, it is not only that there is no suggestion in the Act, its legislative history, or more than a quarter century of Congressional oversight that the Commission's decisions in licensing proceedings were intended to encompass psychological stress associated with particular licensing actions, it is also that Congress envisioned that the Commission's expert judgments, publicly arrived at, would help serve to prevent or allay public fears.

In re Metropolitan Edison Co., 12 N.R.C. at 613 (separate views of Commissioner Hendrie).

The interjection into this proceeding of the issue of fear of nuclear power would divert attention and resources from the real issues in this case. "The citizens of this country have a right to know the facts about nuclear safety. . . . They have a right to know on what basis the [Commission] makes its decisions. They also have a right to be regarded as capable of responding rationally to factual information." Id. at 618 (separate views of Commissioner Hendrie). As Justice Douglas vigorously argued:

> "We must choose between freedom and fear--we cannot have both. If the citizens of the United States persist in being afraid, the real rulers of this country will be fanatics fired with a zeal to save grown men from objectionable ideas by putting them under the care of official nursemaids."
>
> . . . .
>
> "History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows."

Scales v. United States, 367 U.S. 203, 270, 274 n.8 (1961) (Douglas, J., dissenting), quoting Chafee, The Blessings of Liberty 156 (1956) & Gellhorn, American Rights 82-83 (1960) (citations omitted).

The public interest is only served by permitting this forum to be used for its statutory purpose, and not as a "podium for soapbox oratory" to litigate a fabricated issue,

created by scaremongering.[1] In re Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 10 N.R.C. 597, 602 (1979).

---

1. Similarly, the National Environmental Policy Act (NEPA) neither authorizes nor requires the Licensing Board to consider this issue. Consideration of fear of nuclear power is outside the scope of NEPA because it is too speculative, immeasurable and indirect. See, e.g., Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 833 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). Additionally, subjecting the fear issue to NEPA cost/benefit analysis

> would have a destructive effect on the hearing process. . . . If psychological stress is determined to be an impact which must be mitigated (in the NEPA sense of that term), there would seem no obvious basis for differentiating between rationally and irrationally grounded anxieties. If anxieties are rationally based, the corrective measures which would alleviate the stress would presumably be justifiable in terms of protecting physical health and safety--irrespective of their effect on psychological stress. If the anxieties are irrationally based . . . then they are by definition not likely to be alleviated by a demonstration that some additional safety feature has been added.

In re Metropolitan Edison Co., 12 N.R.C. at 617 (separate views of Commissioner Hendrie); see also id. at 610 (Chairman Ahearne's separate views) ("the best way to decrease such stress is to insure the plant is safe" and for NRC to "insure [that] clear and accurate information is provided regarding what is being done"); id. at 619 (separate views of Commissioner Gilinsky) ("decision to consider stress in this post-accident case would not be a precedent for considering psychological stress in all furture [sic] NRC action"); id. at 621 (dissenting views of Commissioner Bradford) ("I think it unlikely that the actual reopening of TMI-1 could hinge on the psychological stress contentions framed here").

CONCLUSION

The issue of fear, which is raised by potential intervenors who have exacerbated fear, and which is not authorized, allowed or required under the Atomic Energy Act, should be excluded from this proceeding.

Respectfully submitted,

Charles Morgan, Jr.
Paul F. Colarulli
Joseph J. Levin, Jr.
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-7000

Thomas R. Frey
General Counsel
Charles M. Pratt
Assistant General Counsel
10 Columbus Circle
New York, New York 10019
(212) 397-6200

MORGAN ASSOCIATES, CHARTERED
1899 L Street, N.W.
Washington, D.C. 20036

SHEA & GOULD
330 Madison Avenue
New York, New York 10017

POWER AUTHORITY OF THE STATE
OF NEW YORK
Licensee of Indian Point
Unit 3
10 Columbus Circle
New York, New York 10019

Dated: December 1, 1981