

POOR ORIGINAL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

FEB 29 1980

50-367



The Honorable Floyd J. Fithian  
United States House of Representatives  
Washington, DC 20515

Dear Congressman Fithian:

Chairman Ahearne has asked me to reply to your letter of February 22, which concerned a filing by the NRC staff in the proceeding, now underway before an Atomic Safety and Licensing Board, on the request of the Northern Indiana Public Service Company for an extension of the construction permit completion date for the Bailly Generating Station, Nuclear-1.

It may be useful to describe at the outset how the Commission's adjudicatory processes work. In all licensing proceedings, the Commission's staff acts as a party, taking adversary positions like any other party. The resolution of issues is the responsibility of the Atomic Safety and Licensing Board, an independent adjudicator. Decisions of the Licensing Board are appealable to the Atomic Safety and Licensing Appeal Board. Its decisions are in turn subject to review by the Commission, and ultimately by the courts of appeals and the Supreme Court. In the present case, the Atomic Safety and Licensing Board has yet to make a ruling on the issues that are involved in the NRC staff filing that occasioned your letter. Other parties will have an opportunity to reply to it before the Board acts, and as noted above, the Board's resolution of the issues will be subject to multiple levels of review.

These multiple levels of independent decisionmaking provide as substantial a degree of assurance as can be afforded that the decision ultimately reached will be sound. The adjudicatory process, whether in an administrative agency or in a court, proceeds from the premise that the correct outcome can best be achieved when adversary parties present their conflicting positions as effectively as they can, and an independent adjudicator then makes the decision.

Members of Congress are free to participate in Commission adjudications on the same basis as other interested members of the public. Congressional oversight during the course of an adjudication, however, may be perceived as an attempt to influence the outcome of the decisional process, and therefore as an improper interference with the administrative agency. In Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966), an administrative decision was overturned because close Congressional questioning of the

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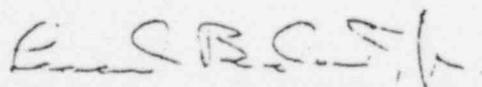
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decisionmaker about the case was found to be an "improper intrusion into the adjudicatory processes of the Commission." 354 F.2d at 963. In D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), the court overturned an agency's decision because of a Congressman's statements on the particular issue then before the agency, even though it found that the Congressman had not acted illegally or improperly. More recently, a decision of the Secretary of the Interior was set aside in part because a letter from a Congressman was found to have "compromised the appearance of the Secretary's impartiality." Koniag v. Andrus, 580 F.2d 601 (D.C. Cir. 1978). These restrictions on oversight during adjudications would not be applicable to oversight conducted after final agency action was complete, however.

Just as direct questioning of decisionmakers may be perceived as interference with the adjudicatory process, the questioning of a party to that adjudication, where the party is the agency's staff, could well be perceived as an effort to affect the content of that party's future filings in the proceeding, and thereby to affect the outcome. As a result, to accede to a request to question an NRC staff attorney about a filing in a proceeding now in progress would be to create a serious risk that whatever outcome the Atomic Safety and Licensing Board reached could be overturned in court.

Once final agency action has been taken in this proceeding, the Commission will be in a position to respond to Congressional inquiries regarding the outcome. At the present time, however, for the reasons outlined above, the Commission cannot permit an NRC staff attorney to be questioned about a filing in the proceeding, where to do so could create the perception that the integrity of the adjudicatory process had been compromised, and could seriously jeopardize the validity of any agency decision reached.

Sincerely,



Leonard Bickwit, Jr.  
General Counsel