

POWER AUTHORITY OF THE STATE OF NEW YORK

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August 13, 1982

The Honorable Richard L. Ottinger
Chairman, Subcommittee on Energy
Conservation and Power
Committee on Energy and Commerce
United States House of Representatives
2241 Rayburn House Office Building
Washington, D.C. 20515

50-247 SP
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Dear Congressman Ottinger:

We have been advised by your staff that the Power Authority of the State of New York, the licensee of the Indian Point Unit 3 Nuclear Power Plant, is expected to provide testimony during the hearing scheduled by the Subcommittee on Energy Conservation and Power on August 16, 1982, relating to the pending Indian Point adjudicatory proceeding. We have also reviewed correspondence between the Chairman of the Nuclear Regulatory Commission and you in which Chairman Palladino explains why it would be inappropriate for either members of the Commission or members of the Atomic Safety and Licensing Board to appear at this time.

The Authority, as a party to the special proceeding, is itself gravely concerned that the Subcommittee's hearing could threaten the integrity of the special proceeding, the rights of the licensees, and the ability of the Commission to expeditiously complete its investigation of Indian Point.

A congressional investigation of a regulatory agency's conduct of an ongoing adjudicatory proceeding could irreparably impair the legal validity of subsequent agency decisions because the fact or at least the appearance of impartiality could be destroyed. Our review of applicable judicial precedent and the the questions you have addressed to Chairman Palladino indicates that the proposed Subcommittee hearing during the pending special proceeding is constitutionally circumscribed by the doctrines of separation of powers and due process of law. We are enclosing a

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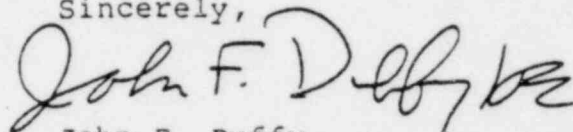
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memorandum which details our concerns and the legal constraints they engender.

Because of the Commission's ongoing proceeding, the Authority is obliged respectfully to advise you of its belief that congressional investigation at this time is inappropriate and of the Authority's consequent inability to provide testimony at the hearing. The Authority, however, is fully willing to cooperate with the Subcommittee to respond to its legitimate inquiries upon satisfactory resolution of the serious concerns and legal constraints noted above.

Sincerely,



John F. Duffy
Assistant General Counsel

JFD:llb
Enclosure

cc: By Hand: Honorable Carlos J. Moorhead
United States Nuclear Regulatory Commission

MEMORANDUM

August 12, 1982
USNRC

To: Power Authority of the State of New York

From: Charles Morgan, Jr.

Charles Morgan, Jr.

22 AUG 13 1982

Re: Congressional Investigation of Indian Point Proceeding

OFFICE OF THE CLERK
DOCKETING & SERVICE
BRANCH

The Power Authority of the State of New York (Power Authority), licensee of the Indian Point Unit 3 nuclear power plant, should decline to appear on August 16, 1982, before the House of Representatives Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce. The hearing to be held by this subcommittee to investigate the Nuclear Regulatory Commission's (Commission's) special proceeding on Indian Point may create undue pressure or prejudice, or the appearance thereof, which may deprive the participants in the Commission's adjudicatory proceeding of their right to a fair trial.

Because of the nature of the Commission's ongoing proceeding, congressional intervention is inappropriate at this juncture. "Congress intended that the Commission be independent not only from pressure brought to bear by the President, but from all external pressures." Westinghouse Electric Corp. v. NRC, 598 F.2d 759, 775 (3d Cir. 1979) (emphasis added). "The fundamental justification for making agencies independent is that since they exercise adjudicatory powers requiring impartial expertise, political interference is undesirable." Consumer Energy Council of America v. FERC, 673 F.2d 425, 472 (D.C.Cir. 1982). An independent agency "is to be nonpartisan; and it must, from the

very nature of its duties, act with entire impartiality."

Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).

The questioning of the members of the Commission or its Atomic Safety and Licensing Board (Board) by a congressional committee "endangers, and may undermine," the impartiality of the Commission and its administrative law judges,¹ see American Public Gas Association v. FPC, 567 F.2d 1016, 1069 (D.C.Cir. 1977), cert. denied, 435 U.S. 907 (1978), who must be permitted to conduct their administrative hearings free from external pressure. See Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966); see also SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981) (parties in an administrative proceeding "are entitled to a decision by the SEC itself, free from third-party political pressure") (emphasis in original). "With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality." D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1246-47 (D.C.Cir. 1971), cert. denied, 405 U.S. 1030 (1972) (emphasis added).

Yet, in public statements the subcommittee demands "a full explanation and justification regarding Section II D of the Commission's ruling on the Licensing Board's conduct of the

1. The Commission has already noted that its appearance before the subcommittee to discuss an "adjudicatory proceeding before it" raises serious concerns. Letter from Nunzio J. Palladino to the Honorable Richard Ottinger at 1 (Aug. 5, 1982) ("There are, of course, legal limitations on the form and content of Commission discussions concerning any adjudicatory proceeding before it.").

proceeding"¹ and terms the Commission's order an "alarming decision."² The subcommittee has announced its list of 21 specific inquiries to the Commission. Illustrative of these improper inquiries are:

(3) The July 22 Order further states the Commission's concern that the Board needs to "assure that the proceeding remains clearly focused on the issues of the Order." What in the Board proceedings is perceived by the Commission to be unfocused or beyond the scope of inquiry? What is the basis for that judgment?

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(9) What affect [sic] did the pre-filed testimony of the intervenors have on the Commission's decision about the Order and guidance?

(10) How does the Commission characterize the July 22 Order? Does the Commission assert that the July 22 Order reiterates instructions previously established, refines the original guidance, or changes the instructions?

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(12) Did the Commission ask the OGC to provide any guidance or evaluation or to render a systematic review of the Board's proceedings? If not, why not?

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(21) The Subcommittee also requests that the NRC provide all relevant documents on this Decision and Order, including transcripts of meetings, staff notes, internal memoranda,

1. Letter from Richard L. Ottinger to the Honorable Nunzio Palladino at 1 (Aug. 3, 1982).

2. News Release, Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce (July 28, 1982) (the subcommittee "want[s] a full explanation and justification from the [C]ommission for this alarming decision").

draft orders, guidance comments, and other communications involving commissioners or staff, including the Office of General Counsel.

Letter from Richard L. Ottinger to the Honorable Nunzio Palladino at 2-4 (Aug. 6, 1982) (emphasis added).

The actions of the subcommittee raise serious questions, for "Congress may [not] interfere with an independent agency's decisions without regard to separation of powers." Consumer Energy Council of America v. FERC, 673 F.2d at 472. The power to conduct investigations is not unlimited, see Watkins v. United States, 354 U.S. 178, 187 (1957):

when [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

Pillsbury Co. v. FTC, 354 F.2d at 964 (emphasis in original and added); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("inquiry into the mental processes of administrative decisionmaking is usually to be avoided"). As Commission Chairman Nunzio J. Palladino stated,

close Congressional probing of the deliberative process of an independent regulatory agency with regard to an adjudication pending before that agency presents extremely serious legal problems, capable of rendering the outcome of that proceeding void as a matter of law.

Letter from Nunzio J. Palladino to the Honorable Richard L. Ottinger at 1 (Aug. 11, 1982).

The conduct of this hearing in which the Power Authority's rights are at issue is a denial of due process of law. Pillsbury Co. v. FTC, 354 F.2d at 964. "Congress . . . has responsibility to protect the [Commission's] decisional integrity." American Public Gas Association v. FPC, 567 F.2d at 1069. There exist "legal constraints on the Commission which are designed to insulate and protect the integrity of the regulatory process."

Letter from Nunzio J. Palladino to the Honorable Richard Ottinger at 1 (Aug. 5, 1982).

In view of the foregoing, the Power Authority should decline to participate in this hearing.

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