



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

August 11, 1982

DESIGNATED ORIGINAL

Certified By

D. Brown

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

Dear Mr. Chairman:

In your letter of August 6, 1982, you posed twenty-one questions related to the process by which the Commission decided the issues addressed in its Order of July 22, 1982, in the Indian Point special proceeding, and you requested the appearance of those Commissioners able to attend a hearing before the Subcommittee on August 16. The questions contained in your letter have enabled us to focus our concerns regarding the legal limitations on the form and content of Commission discussions concerning this adjudicatory proceeding that I described in my August 5 letter to you.

For the reasons that follow, we regret that it is not possible for the Commission to be responsive to your questions at this time. As our General Counsel advised your staff by telephone on August 5, 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, under the rule of Pillsbury Company v. Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966). As described below, we believe that to describe our deliberative processes in detail, whether in writing or at a hearing, might well destroy the legal validity of subsequent Commission decisions in this proceeding. We have even greater concerns about the appearance of the Board at such a hearing. In addition, as discussed in my August 5 letter, the scheduling problems and need for all the Commissioners to appear at such a hearing remain valid concerns.

Procedurally, the Pillsbury case bears strong resemblance to the present situation. There, the Federal Trade Commission had issued an interlocutory order reversing a hearing examiner's ruling in a pending adjudicatory proceeding initiated by the Commission. Subsequently, hearings were held before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee. As the Fifth Circuit observed:

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It is to be noted that these hearings were held after the Commission had issued its interlocutory order, but long before the examiner made his Initial Decision on the merits, and, of course, before the Commission made its final decision. . . .

At the hearings, the then Chairman of the FTC, another Commissioner, the General Counsel, and other staff members appeared. The Chairman was subjected to extremely close questioning about the basis for the Commission's decision. Although the Chairman informed the Senators that in view of their questioning, he would have to disqualify himself from further participation in the Pillsbury case, his action was insufficient to prevent the proceeding from later being voided by a court. On its review of the case, the Fifth Circuit held that the senators' questions "constituted an improper intrusion into the adjudicatory processes of the Commission and were of such a damaging character as to have required at least some of the members in addition to the Chairman to disqualify themselves." The court explained:

[W]hen such an 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.

* * *

To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, [footnote omitted] sacrifices the appearance of impartiality -- the sine qua non of American judicial justice -- in favor of some short-run notions regarding the Congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission [citation omitted].

It may be argued that such officials as members of the Federal Trade Commission are sufficiently aware of the realities of governmental, not to say "political," life as to be able to withstand such

questioning as we have outlined here. However, this court is not so "sophisticated" that it can shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process. We conclude that we can preserve the rights of the litigants in a case such as this without having any adverse effect upon the legitimate exercise of the investigative power of Congress. What we do is to preserve the integrity of the judicial aspect of the administrative process.

* * *

We conclude that the order appealed from must be vacated and the case remanded to the Commission.
[emphasis in the court's opinion.]

Ironically, the result of the senatorial probing, which stemmed from the senators' desire that the Commission enforce the antitrust laws vigorously against the Pillsbury Company, was that when the Commission ultimately found against Pillsbury on the merits, the company was able to have the decision overturned.

In the present case, the rationale for the Commission's decision has been set forth in the Order and in the separate views of the Commissioners. To describe the thought processes of the Commissioners in detail in response to your questions would constitute an inappropriate intrusion into the adjudicatory process, and, as in Pillsbury, could fatally taint the legal validity of the outcome of the Indian Point proceeding. Using the Pillsbury analogy, the Commission would run the legal risk of a court overturning the outcome of the Indian Point proceeding on the basis of a claim by the licensees that they were deprived of an adjudicatory process which is both fair and has the appearance of impartiality. For the same reason that responding to the questions by letter would be inappropriate, we believe that detailed discussion in hearings by Commissioners and Licensing Board members of the thought processes underlying their adjudicatory decisions, with regard to a proceeding still pending, would be inappropriate at this time.

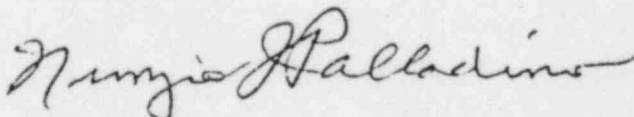
Given these legal limitations, we would like to suggest an alternative approach to meeting the needs of the Subcommittee without subjecting to legal challenge subsequent Commission decisions in the Indian Point special proceeding. We suggest that, prior to our response to questions or to our appearance at a hearing, our General Counsel meet with your staff to establish mutually acceptable guidelines for questioning that

would satisfy the limitations established by the Pillsbury case. Such guidelines would enable us to respond to legally permissible questions and to appear before the Subcommittee without fear of tainting our ongoing adjudicatory proceeding.

In order to provide sufficient time to establish the necessary guidelines, we request that the appearance of the Commission before the Subcommittee be postponed until after August. This postponement would have the added benefit of allowing the Commission to respond to Board requests for further guidance and of permitting scheduling of a hearing when more Commissioners could attend. We question the advisability of the Licensing Board's appearing before the Subcommittee, because they are currently presiding over the proceeding.

In closing, I would add that the Commission takes very seriously its responsibility to meet the informational, oversight and legislative needs of the Subcommittee. Our objective, in offering these suggestions, is to be as responsive as possible to the needs of the Subcommittee, consistent with the legal limitations that apply to this ongoing adjudicatory proceeding.

Sincerely,



Nunzio J. Palladino

cc: The Honorable Carlos J. Moorhead