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December 17, 1982

Chairman Nunzio J. Palladino
Commissioner John F. Ahearne
Commissioner Victor Gilinsky
Commissioner Thomas M. Roberts
Commissioner James K. Asselstine
United States Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: Consolidated Edison Co. of New York, Inc.
(Indian Point, Unit No. 2)

Power Authority of the State of New York
(Indian Point, Unit No. 3)

Docket Nos. 50-247 SP, 50-286 SP

Dear Commissioners:

Enclosed is a copy of a letter dated December 1, 1982 to the Power Authority of the State of New York from Congressman Richard L. Ottinger seeking the Power Authority's testimony before the House Subcommittee on Energy Conservation and Power regarding the Subcommittee's investigation into the Indian Point case. Also enclosed is the Power Authority's response of December 3 to the Subcommittee's request.

Sincerely,

Joseph J. Levin, Jr.

JJL,Jr./pat

Enclosures

cc: Official Service List

DS03

HOUSE OFFICE BUILDING ANNEX NO
PHONE (202) 226-2424

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON ENERGY CONSERVATION
AND POWER
OF THE
COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, D.C. 20515

December 1, 1982

Mr. John S. Dyson
Chairman
Power Authority of the
State of New York
The Coliseum Tower
10 Columbus Circle
New York, New York 10019

Dear Chairman Dyson:

The Subcommittee will continue its hearings on procedures governing Atomic Safety and Licensing Boards, and particularly the Indian Point case, on December 13, 1982. The hearing will be in Room 2322 Rayburn House Office Building and will begin at 10:00 a.m.. You are requested to testify at this hearing.

The Subcommittee is aware that you have declined to testify in response to an oral invitation to our first hearing and a written invitation of September 24, 1982 to our second hearing. Your responses of August 13, 1982 and September 30, 1982 fail to provide a legal basis for your refusal to appear. You have raised the issue of the appropriateness of Congressional inquiries into administrative proceedings, but even the Nuclear Regulatory Commission, which raised the issue initially, has now appeared and had no objection to the conduct of the hearing. Moreover, the NRC General Counsel Leonard Bickwit has written the Subcommittee, and we concur:

> "Finally, we would note that the Pillsbury line of cases applies only to pressure or inquiries directed to administrative decisionmakers. It has no bearing whatsoever on inquiries directed to private parties to agency proceedings."

We are certain that your testimony can provide insight into the proceedings on Indian Point. All the major parties, including Consolidated Edison, have testified, with the Power Authority being the lone exception. Should we fail to learn of your acceptance by close of business, December 3, 1982, we intend to seek your presence through the use of subpoena.

Sincerely,

Richard Ottinger

Richard L. Ottinger
Chairman

RLO:mb

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December 3, 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

Dear Congressman Ottinger:

The subcommittee's letter of December 1, 1982 to the Power Authority of the State of New York, which requests that the Power Authority voluntarily appear before your subcommittee to testify about an ongoing adjudicatory proceeding directed against the operation of the Indian Point nuclear power plants, has been referred to us for response. The Power Authority, a non-profit public benefit corporation of New York State committed to the safe and efficient operation of its generation and transmission facilities, must respectfully decline your request for testimony.

During a meeting on the afternoon of December 1, the subcommittee's staff expressed confusion as to the reasons for the Power Authority's refusal to volunteer. The reason as then expressed is the unfairness, indeed the basic impropriety, of an attempt to inject political influence to affect the outcome of the ongoing adjudicatory[1] hearing.

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1. As the General Counsel of the Nuclear Regulatory Commission has observed, "This is an adjudicatory proceeding in [the Commission's] view." Stenographic Minutes at 24, Oversight Hearing on Nuclear Regulatory Commission and Licensing Board Procedures: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. (Oct. 1, 1982) (Oversight Hearing Minutes).

The Power Authority's position is a principled one, grounded in both legal and equitable considerations. The mischaracterization of that position does nothing to alter it.

The Power Authority's position is that the entire hearing process, in which the subcommittee has involved the Nuclear Regulatory Commission, the former chairman of the Special Licensing Board, the parties and the intervenors, and in which the testimony of the remaining members of the Special Licensing Board has been sought, affronts fundamental legal principles that bar political interference with judicial hearings.

> [W]hen [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 influence.

Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (emphasis in original and 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), petition for cert. filed, 50 U.S.L.W. 3949 (U.S. May 21, 1982) (No. 81-2151).

These hearings do not exist in a vacuum. The private parties, including the Power Authority, the administrative judges, and the Commission are all part of a judicial process and are inextricable, one from the other. Attempts to draw the Power Authority into these hearings merely constitute an extension of the subcommittee's efforts to influence the judgment of the Special Licensing Board and the Commission. In other words, it is the very existence of the subcommittee's hearings that offends constitutionally and statutorily guaranteed due process rights of the Power Authority and its customers and bondholders. The fact that the subcommittee's staff cannot find a case precisely on point suggests not that the Power Authority's view of the political interference doctrine is incorrect, but rather that no committee or subcommittee of the Congress has ever attempted to insert itself so deeply and dramatically into an ongoing adjudicatory proceeding.

Additionally, the subcommittee's unvarnished attempt to coerce a party to the Indian Point proceeding into adopting particular legal strategies constitutes an independent violation of due process.[1] The Power Authority's counsel was told by the subcommittee's staff during the meeting of December 1 that, indeed, the subcommittee intended to influence how and in what way the Power Authority defends itself. That, is a denial of due process by the federal government which is not dependent upon the political interference doctrine for its support.

The subcommittee staff stated that House Counsel had prepared a memorandum which supports the staff's position on the political interference doctrine. The letter of December 1, 1982

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1. Several questions posed to Consolidated Edison's Vice President, Mr. John O'Toole, are illustrative:

> [Mr. Ottinger.]
> I suppose what principally concerns me is . . . the company's attitude towards public participation in safety hearings and . . . I don't quite understand why the company feels it is in its interest to try to exclude public intervenors or to have them raise issues that they think may involve substantial safety questions.
>
> . . . .
>
> Mr. OTTINGER. What I find inconsistent with your statement that you welcome public participation is the various petitions in which the company joined with the Power Authority in seeking to restrict public participation.
>
> . . . .
>
> Mr. OTTINGER. In the future conduct of these hearings do you intend to make further motions to try and restrict the participation of the intervenors in the proceedings?
>
> . . . .
>
> [Mr. OTTINGER.]
> Has the company taken a position of trying to stretch out these hearings?
>
> . . . .
>
> Mr. OTTINGER. Are you going to seek to throw out any of the evidence that was previously given in the hearings?

Oversight Hearing Minutes at 157, 159, 164, 169, 171.

made reference to a letter from Leonard Bickwit, General Counsel of the Commission, which we now understand to be a memorandum from Mr. Bickwit to Mr. Michael McCabe of the subcommittee's staff,[1] in which you state that he rejected the view that private parties are covered by the policy enunciated by the political interference doctrine cases.[2] We respectfully request that copies of the memorandum and letter be provided to us for the Power Authority's review and consideration.

Sincerely,

Charles Morgan, Jr.

CM,Jr.:llb

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1. The subcommittee staff informed us today that we could not obtain a copy of this public memorandum until after the subcommittee received this letter.

2. Ironically, Mr. Bickwit's opinion on this point is graphic evidence of how the Subcommittee's activity appears to have already influenced the judgment of the Commission on a legal issue which may well be before the Commission at some point in the adjudicatory process.