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June 28, 1984

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Mr. Glenn O. Bright  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

In the Matter of  
The Cleveland Electric Illuminating Company, et al.  
(Perry Nuclear Power Plant, Units 1 and 2)  
Docket Nos. 50-440 and 50-441

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Gentlemen:

On June 25, 1984, Ohio Citizens for Responsible Energy (OCRE) filed with the Board a "Brief on Financial Qualifications Policy Statement." OCRE argues that the Commission's Policy Statement is invalid, not only because OCRE disagrees with the Commission's conclusion, but because of an alleged improper ex parte contact. OCRE therefore urges the Board to disobey the Commission's instructions.

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The validity of the Commission's Policy Statement is an issue that must be addressed to the Commission, not to the Licensing Board. Commission Policy Statements and policy declarations are binding on the boards. Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 N.R.C. 1725, 1732 (1982); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 N.R.C. 41, 51 (1978), remanded on other grounds sub nom., Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). As this Licensing Board has ruled, a licensing board has no jurisdiction over an issue resolved by Policy Statement, and is prohibited from inquiring into the procedural regularity of the Policy Statement. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-69, 16 N.R.C. 751 (1982).

OCRE's allegations of ex parte communication are also misplaced. On February 7, 1984, the U.S. Court of Appeals for the District of Columbia Circuit handed down its decision in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). This law firm was counsel of record in that proceeding. On April 2, 1984, the Commission commenced a rulemaking proceeding to address the New England Coalition decision. This firm is counsel to utilities participating in that rulemaking proceeding. Ex parte restrictions do not generally apply to NRC rulemaking. Sierra Club v. Costle, 657 F.2d 298, 386-410 (D.C. Cir. 1981) (except where there are conflicting private claims to a valuable privilege, ex parte proscriptions do not apply to notice-and-comment rulemaking). Nor is there any restriction on discussions between one party to a litigation (the NRC) and counsel to another party (this firm on behalf of its utility clients) on matters directly concerning that litigation.

The letter from Mr. Charnoff to a Commissioner and assistants to three others discussed the New England Coalition litigation, and specifically the effect of issuance of the court's mandate in New England Coalition on the NRC's financial qualifications rule. It was one of several such letters sent by parties to the litigation and others to the Commissioners. All of these documents including Mr. Charnoff's letter, were placed in the Public Document Room. Most were not served in pending NRC proceedings. For example, counsel for New England Coalition submitted a letter (dated May 8, 1984) to the Commissioners on the same subject as Mr. Charnoff's letter, without serving other parties in the Seabrook case -- in which the Coalition is a party.

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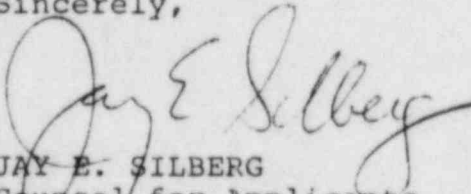
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Further, comments on rulemakings are not routinely sent to other parties in adjudicatory proceedings -- even if similar issues may be involved. For example, Ms. Hiatt filed comments with the NRC on the pending financial qualifications rule (letter dated May 28, 1984), but did not serve Applicants or other parties in the Perry proceeding. Ms. Hiatt also had filed comments in the now-completed ATWS rulemaking, see 49 Fed. Reg. 26036 (June 26, 1984), but did not send a copy to Applicants or other parties. OCRE should not now be heard to complain of the same conduct which it has practiced, particularly when that practice violates no rules of conduct and is perfectly proper.

Sincerely,



JAY E. SILBERG  
Counsel for Applicants

JES:lam

cc: Service List

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC	)	Docket Nos. 50-440
ILLUMINATING COMPANY, <u>ET AL.</u>	)	50-441
	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

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