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RECORD #126

TITLE: Ex Parte Communication

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F. W. Wenzel



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



February 3, 1981

MEMORANDUM FOR: James G. Keppler, Director
Region III

FROM: James P. Murray
Director and Chief Counsel
Rulemaking and Enforcement Division

SUBJECT: EX PARTE COMMUNICATIONS

You asked for "a meaningful explanation of ex parte" with a view toward assisting you and other I&E personnel in the recognition of potential ex parte contacts. Here is an attempt to briefly summarize the situation in simplified terms.

The latin phrase "ex parte" means "from one side only". It has application only in the context of a legal "proceeding". That is, we do not worry about ex parte matters unless there is a proceeding going on. What is a "proceeding"? It is the agency's process for issuing, amending, suspending or revoking a license or issuing a civil penalty. When is it "going on"? It begins when a hearing has been noticed or when a request for a hearing is made. It ends with the final decision by the agency.

The basic idea behind the ex parte prohibition, codified in our regulations at 10 CFR 2.780, is the prevention of the unfairness which could occur if one of two (or more) parties to a proceeding were to have secret discussions with the decisional authority on a matter at issue in the proceeding. One party ought not be allowed to discuss secretly with the judge matters at issue before the judge. This could be unfair to the party or parties left in the dark as to what was said.

In NRC's practice, the "judges" are: the licensing boards, the administrative law judge, the appeal board and, of course, the Commissioners themselves when there is a case pending before them. (This includes all members of the staffs of these "judges".) Also, in NRC's practice the "parties" to our proceedings are: the NRC staff, the applicant or licensee, and any intervenors.

So, the prohibition is against discussion--written or oral--between one of the parties and a judge concerning a matter at issue in a pending proceeding. Put

another way, all parties to a proceeding are entitled to be in on any discussions which occur between the judge and any of the other parties.

One final observation. Although the subsequent revelation on the record of a prior ex parte contact serves, at least in most cases, to largely eliminate the pernicious effect which might otherwise occur, such a "curative" action does not eliminate the original illegality of the contact.

To sum up, I would counsel I&E people, first, to be sensitive to any contacts they may have with the "judges" or their staffers and, secondly, never to discuss a matter currently pending before one of the "judges" with that "judge", except on the formal record.

I would be happy to address any individual questions you may have, but I'm afraid any further generalized "explanations" of ex parte by me would only be counterproductive.


James P. Murray
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cc:
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