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March 19, 1980

Mr. Leonard Bickwit, Jr.
Nuclear Regulatory Commission
Washington DC 20555

Dear Mr. Bikwit:

Thank you for sending me a copy of your "study" of separation of functions.

I should like to be cordial to you, but I think that I also have to try to be helpful, and that requires me to say that the study in my opinion does not make a sound analysis. Its interpretations of doubtful law all seem to go in the same direction, and law that is contrary to the study's conclusions seems to be interpreted away. It is more like a piece of advocacy than a study.

Although I have read the whole study, I shall limit my examples to pages 120-132.

Most serious is the position at page 121 that "the scope of due process [is] co-extensive with . . . the APA" on separation of functions. The study cites the Withrow case, but apparently the authors did not note that the unanimous Supreme Court in Withrow holds that what would violate the APA does not violate due process.

The extreme position is taken in note 195 that the view of Congress in the APA is "erroneous." The authors ought to reexamine their position in the light of the Withrow holding.

The study reverses the thrust of Withrow by quoting a portion of a sentence at 129 to condemn officers who are "psychologically wedded" to a position; what the Court said went in the opposite direction, for the Court said the officers were not "psychologically wedded . . ."

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Page Two

The study in note 204 summarizes a case that does not at all deal with separation of functions; the problem in the case is denial of a chance to meet extrarecord material, not separation of functions.

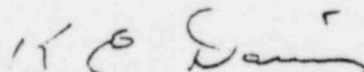
The study at 131-132 rejects my view about consultation of officers who have testified. The study quotes the Supreme Court's quotation from my Treatise. But the study fails to notice that the Supreme Court was quoting with approval, so that my words become part of the unanimous Court's opinion. The quarrel of the study should be with the Supreme Court, not with me. But it is mighty brave people who disagree with the unanimous Supreme Court's position that is in accord with almost all the other law on the subject. I think the position of the study is totally without merit.

The authors' carelessness is shown by the misquotation of me in note 194 at the bottom of page 120; they quote the end of a sentence without including qualifying words at the beginning of the sentence, so that what is quoted is obviously unsound on its face.

The study needs a good deal of revision before it is sent to Congress, in my opinion. The authors' attitude about separation of functions is out of line with the basic attitude of the Supreme Court, of other courts, and of other agencies. Maybe the authors ought to study the basic meaning of *Marcello v. Bonds*, 349 U.S. 302 (1955), and then reexamine all their positions.

I'm sorry that my reactions are so unfavorable, but I do hope this letter will be helpful to you.

Sincerely yours,



KCD/ ds

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In reply, please refer
to: NIS-80-4-6

April 1, 1980

Mr. Leonard Bickwit, Jr., General Counsel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Subject: USNRC And Ex Parte Rules

Reference: Letter - L. Bickwit, Jr. To W. F. Kirk,
Dated March 14, 1980

Dear Mr. Bickwit:

It has been my experience that fair, proper (and operationally safe) decisions can only be made by persons having full access to all information and personnel, and having high standards of individual ethics.

Improperly influenced decisions can be and are made in the judicial, legislative, or executive branches of government, or in private industry, and are dependent primarily on the standards of ethics of the individual involved.

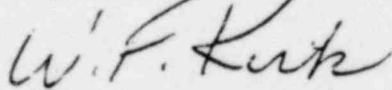
Ex parte restrictions can lead much more often to a technically wrong decision, or to a partially wrong decision, than to an influenced wrong decision where ex parte did not exist.

Where a person or group's standards of ethics are low, ex parte separation will not prevent an influenced decision.

I strongly support the direction recommended and hope the implementation will carry even further towards elimination of ex parte rules.

Thank you for this opportunity to comment.

Very truly yours,



W. F. Kirk, Manager
Nuclear & Industrial Safety

jr

TENNESSEE VALLEY AUTHORITY
KNOXVILLE, TENNESSEE 37902

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Leonard Bickwit, Jr., Esq.
General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Bickwit:

Thank you for the opportunity to comment on your office's study entitled "A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing."

The study appears to be a thoroughly researched, comprehensive, and well-reasoned legal analysis of the issues. We certainly agree with the general conclusion that the Nuclear Regulatory Commission has considerable latitude within which to frame its ex parte and separation of function rules. What the report does not analyze is the need for changes in the current rules. We believe that a careful study of experience under the current rules and an analysis of how various changes in the rule could improve upon that experience is necessary to an informed decision on whether there ought to be any changes.

In particular we believe that NRC should consider whether, under the existing rule and any proposed changes, decisionmaking would be efficient, timely, likely to achieve technically correct decisions, and have the appearance to the public of being fair and open proceedings. In the current climate, it appears that balancing the needs for appearance of fairness and for timely decisionmaking is particularly important. Thus, the options which go furthest toward permitting ex parte communication and consultation between decisionmakers and other NRC staff may have too great an appearance of unfairness. On the other hand, Option D, under which the NRC staff would not take a position on the issues, would appear to require a time-consuming hearing on the numerous issues now resolved between the applicant and the regulatory staff prior to the hearing. In licensing reactor construction or operation, such a hearing could be extremely time consuming, putting hundreds more matters into issue than would otherwise be contested. Moreover, the licensing boards would be required to decide questions in that many more technical areas, making their ability to render technically correct decisions on vital issues much more difficult.

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Leonard . . kwit, Jr., Esq.

In short, our view is that this study provides the necessary legal analysis the Commission needs as guidance in its consideration of changes to the current rules; but before any changes are adopted, there must be a careful analysis of the objectives of change and how best to balance the competing interests involved in designing a hearing process.

Sincerely,

Herbert S. Sanger, Jr.
Herbert S. Sanger, Jr.
General Counsel



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 28 1980

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OFFICE OF
GENERAL COUNSEL

Leonard Bickwit, Jr., Esq.
General Counsel
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Re: "A Study of Separation of Functions and Ex Parte
Rules in Nuclear Regulatory Commission
Adjudications for Domestic Licensing"

Dear Len:

Harvey Shulman and yourself deserve congratulations for the clear, balanced, thorough, and exceedingly well-written paper you have produced. In this letter of course I'll emphasize the points I do not agree with; that shouldn't obscure my over-all high opinion of the job.

I. Due Process

I think you make considerably too much of the potential due process objections to a "combination of functions" in NRC licensing. Since the nature of the test is flexible and case-specific, courts of course tend to reserve their options, and point out the points they are not deciding. This should not be taken as a strong indication that if the point not decided arose, it would be decided by finding a due process violation. Even taking your universe of cases on its own terms, it seems to me that the holdings are more restrained than the dicta, and the Supreme Court more restrained than the lower courts. I think this should be noted.

I also think the cases should be placed in a broader analytic setting. Focussing on the cases alone tends to produce (in part for the reasons just given) a more alarmist view of the due process danger. Here are some of the missing

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April 7, 1980

Leonard Bickwit, Esquire
General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Comments of Washington Public Power Supply System on a "Study of the separation of functions and *ex parte* rules in Nuclear Regulatory Commission adjudications for domestic licensing"

Dear Mr. Bickwit:

On behalf of our client, Washington Public Power Supply System, we thank you for the opportunity to present comments on the above identified document which was transmitted to our client with your letter of March 14, 1980. Unfortunately, your letter and the enclosure did not reach our client until April 2, 1980, the day on which you requested a response. Your office agreed to receive our comments by mid-day, April 7, 1980. We would hope in the future to have a longer period of time in which to prepare and furnish comments on matters of importance such as this is.

Due to the short time available to us for review of the document, our comments must necessarily be limited to the several key options which are presented at the end of the document. Though our discussion will be quite brief, we hope that the points raised will be of assistance to you in making your recommendations.

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