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June 21, 1984

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board '84 JUN 25 P1:40

In the Matter of ) Docket Nos. 50-440-OL  
CLEVELAND ELECTRIC ILLUMINATING ) 50-441-OL  
COMPANY, et. al. )  
(Perry Nuclear Power Plant, )  
Units 1 and 2) )

OFFICE OF SECRETARY  
& GENERAL COUNSEL  
BRANCH

RESPONSE OF SUNFLOWER ALLIANCE TO 'APPLICANT'S  
FURTHER ANSWER TO SUNFLOWER'S MOTION TO READMIT  
ISSUE NO. 2'

Now comes Sunflower Alliance, by and through counsel, and opposes Applicant's position as set forth in its June 15, 1984 "Further Answer."

By its June 12, 1984 "Policy Statement," 49 Fed. Reg. 24111, the Nuclear Regulatory Commission ordered that its March 31, 1982 rule eliminating financial qualifications review from operating license proceedings continue in effect pending finalization of a Commission response to the remand of the Washington, D.C. Circuit Court of Appeals in New England Coalition on Nuclear Pollution v. NRC, 727 F. 2d 1127 (D.C. Cir. 1984). To echo the "Separate Views of Commissioner Asselstine. at 49 Fed. Reg. 24112, "[t]he Commission's policy statement is both short-sighted and most likely illegal."

In New England Coalition, the D.C. Circuit quoted from Williams v. Washington Metropolitan Area Transit Commission, 415 F. 2d 922, 939-40 (D.C. Cir. 1968):

[W]here agency action must be set aside as invalid, but the agency is still legally free to pursue a valid course of action, a reviewing court will ordinarily remand to enable the agency to enter a new order after remedying the defects that vitiated the original action.

The D.C. Circuit in New England Coalition plainly stated, id. at 1135, that it remanded the rule to the Commission for further proceedings consistent with its holding that the rule was not accompanied

by a statement of basis and purpose.

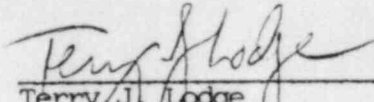
It might be different were the Commission seeking leave to appeal the 1982 rule to the U.S. Supreme Court, and there were a stay pending which might continue the rule's effect. The circumstance perpetrated here, however, is illegal. As Commissioner Asselstine has noted:

The Commission is in effect betting that the D.C. Circuit will not now act to make it very clear that the Commission's 'new' financial qualifications rule has indeed been vacated, and that the Commission must re-open all those proceedings in which the rule was used to exclude financial qualifications.

(emphasis in original) Id. at 24112.


It would be unfortunate, indeed, for this Licensing Board to line up at the same bettor's window. Sunflower Alliance is aware that generally licensing boards must follow mandates of the Commission. Certainly this Board would not wish to take so patently illegal a posture under the circumstances.

WHEREFORE, Sunflower Alliance respectfully prays the Licensing Board to take jurisdiction and to readmit the former Issue No. 2.

  
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Terry J. Lodge  
Counsel for Sunflower Alliance

CERTIFICATION

I hereby certify that a copy of the foregoing "Response" was sent to all parties on the accompanying "Service List" this 21st day of June, 1984 via regular U.S. Mail, postage prepaid.

  
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Terry J. Lodge

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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THE CLEVELAND ELECTRIC )  
ILLUMINATING COMPANY )

(Perry Nuclear Power Plant, )  
Units 1 and 2) )

Docket Nos. 50-440  
50-441

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