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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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In the Matter of	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, Et Al.	Docket Nos. 50-440 50-441
(Perry Nuclear Power Plant, Units 1 and 2)	(Operating License)

OCRE REPLY TO MOTION BY
SUNFLOWER ALLIANCE INC. ET AL. FOR
RECONSIDERATION OR IN THE ALTERNATIVE
MOTION TO CERTIFY TO THE COMMISSION

Pursuant to 10 CFR 2.730(c), Ohio Citizens for Responsible Energy ("OCRE") hereby files this response to the Sunflower Alliance Motion for Reconsideration of Issue #10, on psychological stress. Issue #10 was admitted by the Licensing Board by its July 12, 1982 Memorandum and Order, LBP-82-53. On July 16, 1982 the Commission issued a statement of policy, "Consideration of Psychological Stress Issues," 7590-01, which interpreted the D.C. Appeals Court decision in PANE v. NRC, Docket No. 81-1131, such that the only reactor site where psychological stress can be considered is Three Mile Island. Accordingly, the Licensing Board in a Memorandum and Order dated July 19, 1982 dismissed Issue #10, but allowed parties to file motions for reconsideration or clarification. On August 4, 1982 Sunflower filed a motion for the reconsideration of the psychological stress contention. OCRE supports Sunflower's motion for the reasons stated below.

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I. THE COMMISSION'S POLICY STATEMENT VIOLATES THE LAW

The Commission issued the policy statement in order "to provide guidance on the applicability" of PANE v. NRC to proceedings other than TMI-1 Restart, the forum in which the psychological stress issue was first raised. As the Commission correctly indicates, the court "did not provide explicit instructions" on this issue in regard to other proceedings. The Commission, purportedly to serve the public interest, has adopted a "literal reading" of the decision, precluding thereby the consideration of psychological stress issues in proceedings other than TMI-1 Restart.

The Commission has indeed taken a literal interpretation of a few selected statements in PANE v. NRC, no doubt to support its position of long standing that the NRC need not consider psychological stress under NEPA. The phrases upon which the Commission places so much weight, in referring to "post-traumatic anxieties" and "fears of recurring catastrophes," are simply reflections of the context of the case. By developing its argument on these phrases and neglecting all other statements of the court, the Commission is violating the principle of stare decisis, as defined by the North Dakota Supreme Court:

> The rule of stare decisis is a rule of policy grounded on the theory that when a legal principle is accepted and established, rights may accrue under it and security and certainty require that the principle be recognized and followed thereafter even though it later be found to be not legally sound. Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 145 ALR 1343, 1352 (1942)

In declaring that PANE v. NRC applies only to TMI, the Commission

has adopted a parochial philosophy which it does not exhibit elsewhere in its conduct of proceedings. Since the Commission freely applies the principle of stare decisis to its other rulings, OCRE must conclude that the Commission understands the principle and has decided to violate it for the purpose of limiting the litigation of psychological stress contentions.

It is the language ignored by the Commission that forms the essence of PANE v. NRC. E.g., "in the context of NEPA, health encompasses psychological health," slip op. at 13; "the Commission has a continuing responsibility to comply with NEPA's procedural requirements in its supervision of licensed nuclear facilities, including TMI-1," slip op. at 9; "(i)n the wake of the most publicized nuclear accident of our time, the people of the Three Mile Island area -- and the people of the nation as a whole -- are entitled to the protections Congress provided in the National Environmental Policy Act," slip op. at 28. The inescapable conclusion is that psychological health is cognizable under NEPA, a federal statute to which the Commission must conform its practices in all of its actions.

The Commission, rather than obeying the court's mandate, instead proceeds to circumvent the decision in its policy statement. It obviously cannot refuse to consider psychological stress at TMI; this would be too blatant a violation. However, using the same arguments the court rejected,[1/] the Commission then

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1/ E.g., the Commission argues that its resources should be devoted to addressing the technical safety issues which might be the cause of stress, rather than evaluating the stress itself. Policy Statement at 3-4. The Commission advanced this same

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moves to deny the people living in the vicinity of other reactors the protection provided by Congress in NEPA. OCRE must therefore conclude that this policy statement is a blatant violation of NEPA.

II. THE POLICY STATEMENT IS NOT BINDING ON THE LICENSING BOARD

Thirty-eight years ago the Utah Supreme Court made this ruling on the validity of an agency regulation which violates the law:

> An administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight. To do so would in effect amend the statute. Construction may not be substituted for legislation. United States v. Missouri Pac. R. Co. 278 US 269, 73 L ed 322, 48 S Ct 133.
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> In Manhattan General Equipment Co. v. Commissioner of Internal Rev. 297 US 129, 80 L ed 528, 56 S Ct 397, 400 the court held that an administrative regulation which was contrary to the statutory provision was a nullity. In so holding, the court said: "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. (citing cases) And not only must a regulation, in order to valid, be consistent with the statute, but it must be reasonable. (citing cases) The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable." Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 153 ALR 1176, 1181.

1/ continued. argument in its brief before the Appeals Court, dated July 1981, at 39-41. The court notes that Congress required each federal agency to utilize both the natural and social sciences to fulfill NEPA's requirements. Slip op. at 13.

This policy statement is both inconsistent with NEPA and unreasonable. Furthermore, a policy statement, as Commissioner Roberts has noted, "is not legally enforceable." (Dissenting View of Commissioner Roberts, re "Policy Statement of Information Flow," 47 FR 31842-3, July 20, 1982) It is therefore abundantly clear that this policy statement is null and void and not binding upon the Licensing Board.

III. THE LICENSING BOARD SHOULD UPHOLD THE LAW AND READMIT ISSUE #10

NEPA, as interpreted by PANE v. NRC, requires the consideration of psychological stress in licensing proceedings. The Licensing Board has a duty to uphold the law, regardless of the illegal actions of its superior tribunal, the Commission. 2/ See, e.g., the Code of Judicial Conduct, Canon 3 A (1):

> A judge should be faithful to the law and maintain professional competance in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

It is thus imperative that the Licensing Board ignore the Commission's illegal policy statement and comply with the law by readmitting Issue #10.

Respectfully submitted,

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2/ A superficial reading of South Carolina Electric & Gas Co.,

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2/ continued.

et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-663, 14 NRC 1140 (1981) at 1150 may lead one to a contrary conclusion. However, this situation is unlike that in ALAB-663. The Appeal Board makes this clear in its decision regarding Applicants' motion for directed certification (ALAB-675 at 12, footnote 6). ALAB-663 involved a Licensing Board's reluctance to follow an Appeal Board order specifically directed to that Board and concerning that particular case. This case involves neither an order nor a regulation, but a policy statement, which, as stated above, is not legally enforceable. The Appeal Board's comments in ALAB-663 cannot apply here. However, should the Licensing Board feel constrained by them, certification to the Commission is an alternative.

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing OCRE REPLY TO MOTION BY SUNFLOWER ALLIANCE INC. ET AL. FOR RECONSIDERATION OR IN THE ALTERNATIVE MOTION TO CERTIFY TO THE COMMISSION were served by deposit in the U.S. mail, first class, postage prepaid, this 12th day of August, 1982 to those on the service list below.

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