August 13, 1982

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, ET AL.	)	50-441
	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

APPLICANTS' ANSWER TO MOTION BY SUNFLOWER ALLIANCE, INC. ET AL. FOR RECONSIDERATION, OR, IN THE ALTERNATIVE, CERTIFICATION TO THE COMMISSION

On August 4, 1982, Sunflower Alliance, Inc. et al. ("Sunflower") filed a motion requesting the Licensing Board to reconsider its Memorandum and Order (Concerning Psychological Stress Contention) of July 19, 1982, dismissing Issue #10 from this proceeding. In the alternative, Sunflower asks the Licensing Board to certify the question to the Commission pursuant to 10 C.F.R. § 2.718(i). The motion is without merit, and should be denied.

Sunflower does not disagree with the Licensing Board's interpretation of the Commission's Statement of Policy concerning the psychological stress issue. 47 Fed.Reg. 31,762 (July 22, 1982). Rather, Sunflower describes the Commission's Statement of Policy as "sophmoric" [sic] and "illegal," and asks the Licensing Board to disregard the Statement. Sunflower bases its request on two arguments: that the Commission does not correctly construe People Against Nuclear Energy ("PANE") v. United States Nuclear Regulatory Commission, 678 F.2d 222 (D.C. Cir. 1982); and, that the Commission is without authority to direct licensing boards to dismiss psychological stress contentions. The simple answer to both arguments is that whether the Commission is right or wrong in its analysis of PANE v. NRC, supra, the Licensing Board is obligated to follow the express dictates of the Commission.

Sunflower apparently believes that under PANE v. NRC, supra, psychological stress is litigable in any licensing proceeding in which it is raised. Whatever the validity of this assumption, some dispositive determination must now be made of how the decision impacts proceedings other than the TMI-1 Restart. The Commission could have done nothing in this regard, and simply let individual licensing boards struggle with that question. The result most likely would have been chaotic, with different and potentially inconsistent standards applied from proceeding to proceeding. Instead, the Commission

took the entirely sensible approach of providing an analysis of PANE v. NRC, supra, and instructing licensing boards to deal with psychological stress issues accordingly.1/

At the core of Sunflower's dissatisfaction with the Commission's Statement of Policy lies a substantial misappreciation of the Commission's role in supervising the type and scope of issues that can be litigated before licensing boards. Licensing boards are arms of the Commission, with certain delegated authority. See 10 C.F.R. § 2.785. The Commission retains the power, however, to supervise how that delegated authority is used, and, where necessary, provide appropriate guidance to licensing boards carrying out the Commission's statutory mandate.

The fact that the Commission retains such authority was made plain in its opinion in United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 N.R.C. 67 (1976). There, intervenors argued that the Commission could only review matters pursuant to its powers under 10 C.F.R. § 2.786(a). The Commission rejected the argument as without merit, and described its supervisory authority in the following terms:

1/ The Commission's decision to interpret the impact of the decision is particularly appropriate since the issues raised are ones of law, not fact. In this regard, see Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 N.R.C. 503, 517 (1977) (remand to licensing board not necessary since raised questions are not fact-dependent).

> While 10 CFR 2.786(a) states the ordinary practice for review, it does not--and could not--interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this Commission, including the authority to step in and rule on the admissibility of a contention before a Licensing Board. See, Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), 6 AEC 995 (1973), petition for review dismissed sub nom. Ecology Action v. AEC, 492 F.2d 998 (C.A. 2,1974). See also, Consolidated Edison Co. (Indian Point Station, Units 1, 2, and 3), NRC 173 (1975). A contrary view could seriously dislocate the adjudicatory process within this agency and would imply a delegation of authority by the Commission difficult to justify.
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> . . . .
>
> In the interest of orderly resolution of disputes, there is every reason why the Commission should be empowered to step into a proceeding and provide guidance on important issues of law and policy.

Id. at 75-76; accord, Consolidated Edison Company of New York (Indian Point, Unit 2), CLI-82-15, 16 N.R.C. _____, slip op. at 11 (July 27, 1982).

These views were reiterated by the Commission one year later in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 N.R.C. 503 (1977). Quoting from its earlier Clinch River decision, the Commission made the following additional pertinent observation:

> While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the Nuclear Regulatory Commission is not a court constrained to the "passive virtues" of judicial action, which can afford in every instance to wait for the better-framed issue or fully developed argumentation. We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings.

> Nor can we regard the proceedings of our appellate and hearing tribunals with the detachment the Supreme Court may bring to trial and intermediate appellate action; the analogy is imperfect. Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal--subject only to the constraints of action on the record and reasoned explanation of the conclusions--constraints imposed on all agencies by the Congress.

Id. at 516; accord, Consolidated Edison Company of New York (Indian Point, Unit 2), CLI-82-15, 16 N.R.C. _____, slip op. at 11 (July 27, 1982).

These decisions clearly indicate that the Commission has the power and the responsibility of providing guidance to its licensing boards where guidance will eliminate "unnecessary delay or excessive inquiry." It was this inherent power that the Commission exercised in issuing its Statement of Policy.2/ There is nothing "illegal" or improper in the Commission exercising that power. The Motion for Reconsideration, therefore, should be denied.

In the alternative, Sunflower asks the Licensing Board to certify the question to the Commission. The Commission already

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2/ Sunflower's citation to K. Davis, Administrative Law Treatise § 17.13 (2d ed. 1980), is inapposite. Although both the NRC Rules of Practice and the Administrative Procedure Act give licensing boards the power to "regulate the course of the hearing," there is a crucial distinction between regulating the course of a hearing -- essentially a procedural function -- and making policy decisions (such as what types of issues are litigable). Policy decisions are the inherent domain of the Commission, and nothing in Davis suggests the contrary.

has spoken through its Statement of Policy. Nothing could possibly be achieved through certification. Certification thus would be a waste of time and resources for all parties. Sunflower's request for certification to the Commission should be denied.

For the stated reasons, the motion for reconsideration, or, in the alternative, certification to the Commission, should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____

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Dated: August 13, 1982

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer To Motion By Sunflower Alliance, Inc. et al. For Reconsideration, Or, In The Alternative, Certification To The Commission," were served by deposit in the U.S. Mail, First Class, postage prepaid, this 13th day of August, 1982, to all those on the attached Service List.

Robert L. Willmore

Dated: August 13, 1982

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