UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of

Docket Nos. 50-440-OL
50-441-OL

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant, Units 1 & 2)

August 30, 1982

MEMORANDUM AND ORDER
(Motion for Reconsideration or Certification)

Sunflower Alliance Inc., et al. (Sunflower) has requested the Board either to reconsider its July 20, 1982 decision excluding psychological stress issues from this proceeding (LBP-82-53A, Memorandum and Order of July 20, 1982) or to certify the issue to the Commission. The grounds for the motion, which is supported by Ohio Citizens for Responsible Energy (OCRE), are: (1) that the Commission's Statement of Policy, "Consideration of Psychological Stress Issues", 47 Fed. Reg 31762 (July 16, 1982), on which this Board relied, is not a rule and cannot restrict the Board's authority, which is granted by a rule (10 CFR §2.714), and (2) that the Commission's policy statement incorrectly interpreted People Against Nuclear Energy v. United States Nuclear Regulatory Commission, No. 81-1131, slip op. (D.C. Cir., April 2, 1982). OCRE also argues that the Statement of Policy is not binding on the Board, citing the dissenting view of Commissioner Thomas M. Roberts concerning the "Policy Statement of Information Flow." 47 Fed. Reg. 31482 (July 20, 1982) at 31483.

Since no party has challenged our interpretation of the Commission's policy statement, and since we find the statement to be binding on us, we conclude that the motion for reconsideration is without merit. In addition, since neither Sunflower nor OCRE has demonstrated any need for interlocutory

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review of this issue, the motion for certification also is found lacking in merit.

I JURISDICTION

Our first concern is that §191.a of the Atomic Energy Act of 1954 created atomic safety and licensing boards solely as delegates of the Commission. That section states that "[T]he Commission is authorized to establish one or more atomic safety and licensing boards . . . to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize. . . ." It was pursuant to that statutory authorization that we were appointed. Establishment of Atomic Safety and Licensing Board to Preside in Proceeding, 46 Fed. Reg. 20340 (March 25, 1981).

It did not take a Commission rule to appoint us. It does not take a Commission rule to limit our jurisdiction. Hence, we find that the Statement of Policy effectively limited our jurisdiction over psychological stress issues.

OCRE has argued that the Commission's action improperly interfered with this Board's duty to uphold the law, and Sunflower has argued that the Commission has improperly altered the effect of 10 CFR §2.718, which gives the Board the authority to conduct hearings. Sunflower cites K. Davis, 3 Administrative Law Treatise §17:13 at 319-20 (2d Ed. 1980), in support of this proposition. However, we do not see any relationship between this action of the Commission, limiting this Board's authorization, and our responsibility to uphold the law or our §2.718 powers to conduct fair hearings. Hence, we find this argument to be without merit.

We conclude that the Commission has exercised its authority over our jurisdiction and that we may not consider whether the Commission's interpretation of Pane was correct.

II EFFECT OF THE POLICY STATEMENT

OCRE is correct in arguing that policy statements, which are exempt from the notice and comment requirement of rulemaking pursuant to 5 U.S.C. §553(b)(A), ordinarily are not binding. On the other hand, agencies enjoy broad latitude in their prerogative to issue interpretations or policy statements and the limits on their prerogative are hotly debated. See Asimow, "Public Participation in the Adoption of Interpretive Rules and Policy Statements," 75 Mich. L.Rev. 521 (1976); 1 CFR §305.76-5. See also Stewart v. Smith, 673 F.2d 485 (D.C. Cir. October 1, 1981); Chamber of Commerce of the U.S.A. v. Occupational Safety and Health Administration, 636 F.2d 464 (D.C. Cir. 1979)(the agency's label on what it has done is suggestive but not dispositive); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979); Energy Reserves Group, Inc. v. Department of Energy, 89 F.2d 1082, 1096 (T.E.C.A. 1978); Joseph v. U.S. Civil Service Commission, 554 F.2d 1140, 1153 n. 24 (D.C. Cir. 1977); Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C.Cir. 1974); Rivera v. Patino, 524 F. Supp. 136 (N.Dis. Calif., July 9, 1981); and Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921, 947-950 (1965).

However, in this instance we have interpreted the policy statement as removing our jurisdiction. The intent of the policy statement is clear, and neither Sunflower nor OCRE has argued that we have misinterpreted it. It is intended to be binding on this Board. Under these circumstances, we cannot address psychological stress issues in our proceeding and we consequently cannot decide whether or not the Statement of Policy falls within the scope of 5 USC §553(b)(A). That argument must be addressed to other tribunals.

III MOTION FOR CERTIFICATION

Sunflower and OCRE, neither of which had the opportunity to address the Commission prior to the issuance of the Statement of Policy which had the effect of dismissing their contention in this proceeding, ask that we

certify the issue to the Commission. Certification has the advantage of permitting these parties to address the Commission directly on an issue that affects the conduct of their case.

Since this Board has refused to address their arguments because of lack of jurisdiction, there is some attractiveness to this request to address a properly authorized forum. However, certification is an interlocutory remedy and these parties have not shown how they will be injured by being left to their more ordinary remedy of appealing our decision at the conclusion of the case. At that time, these parties may attempt to persuade the Commission that its policy statement is illegal and incorrect, and we have not been shown why intervenors' interests will be prejudiced in any way by waiting until a later date. Indeed, the only possible prejudice would appear to be to Cleveland Electric Illuminating Company, whose operating license might be delayed were these parties ultimately to prevail on these grounds.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 30th day of August 1982

ORDERED:

(1) Sunflower Alliance Inc., et al.'s (Sunflower) August 4, 1982, Motion for Reconsideration is denied.

(2) Sunflower's August 4, 1982, Motion for Certification is denied.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline,
ADMINISTRATIVE JUDGE

Mr. Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland