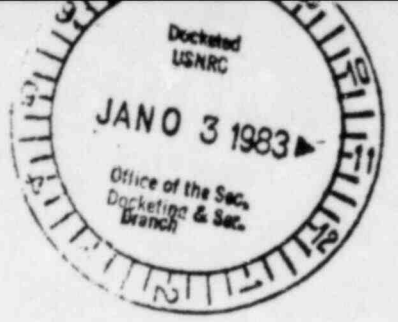

BRIEF

PART ONE

1. On November 17, 1981, a case known as People Against Nuclear Energy vs. N.R.C., 678 F2d 222(U.S.Ct.App. D.C., 1982) was argued before the United States Court of Appeals, District of Columbia Circuit. On January 7, 1982, the Court issued an interim judgment. An amended judgment was then filed on April 2, 1982. Finally, the Court's opinions and second amended judgment were filed on May 14, 1982.

2. On May 5, 1982 Sunflower filed a Motion to admit as a contention the issue of psychological stress. On July 12, 1982, this Board admitted as Issue 10 a contention dealing with psychological stress. (LBP-82-53). On July 16, 1982, the Commission issued a statement of policy, "Considerations of Psychological Stress Issues", 7590-01 (mimeo). On July 20, 1982, this Board dismissed Issue 10 on the basis of the Statement of Policy cited above. On August 4, 1982, Sunflower filed a Motion for Reconsideration or in the Alternative a Motion for Certification. That Motion was denied by this Board on August 31, 1982.

3. On September 13, 1982, Sunflower filed a Petition for Review with the United States Court of Appeals, Sixth Judicial Circuit, Case No. 82-3563. See attached Exhibit "A". The prupose of the Petition for Review is to review the legality of the Commission's July 16, 1982, Statement of Policy. Should this Statement of Policy be declared illegal, then, Sunflower intends to reapply to this Board to readmit Issue 10 in this proceeding.

4. On or about October 19, 1982, the NRC filed with the Court of Appeals a Motion for Leave to Hold Case in Abeyance. See attached Exhibit "B". The purpose of this Motion was to stay the case pending the outcome of a Petition for Certiorari that was filed with the United States Supreme Court in

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connection with the PANE, Ibid., decision. The Petition for Certiorari was granted by the United States Supreme Court. However, on December 8, 1982, the Court of Appeals denied the NRC's Motion for Leave to Hold Case in Abeyance. See attached Exhibit "C". Thus, the review of the Statement of Policy, cited above, will proceed in the ordinary course of the business of the Court of Appeals.

PART TWO

5. The PANE decision is essentially a case of statutory construction. The Court was construing the National Environmental Policy Act (hereinafter referred to as NEPA), 42 U.S.C. 4321, et seq. and the effect of this statute on the activities of the NRC. Section 42 USC 4321 provides:

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation...

Pursuant to this Act, Executive Order No. 11514, 3-5-70, 35 F.R. 4247 was issued. It says in part:

> ...Consonant with Title I of the NEPA...the heads of federal agencies shall (a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Agencies shall develop programs and measures to protect and enhance environment quality and shall assess progress in meeting the specific objectives of such activities...

Thus, the Commission is under orders from both Congress and the President to protect and enhance the quality of the environment.

6. The question now becomes what is meant by "protecting and enhancing

the quality of the environment"? The Court in PANE felt that at a minimun the Congress intended to promote the health and welfare of humankind:

> ...NEPA was designed to 'promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man'. PANE vs NRC, 678 F 2d 222,227 (U.S.Ct. App.D.C., 1982)

Based on this analysis the Court concluded:

> We conclude that, in the context of NEPA, health encompasses psychological health. To implement a national policy based on 'the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,' 42 U.S.C. 4331(a)(1970), Congress required each federal agency to utilize a 'systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts'... PANE vs. NRC, 678 F 2d 222,228 (U.S.Ct.App.D.C., 1982).

The Court further writes:

> ...NEPA, moreover, does not authorize federal agencies to deal with intangible factors by ignoring htem. It expressly instructs all federal agencies to identify and develop methods and procedures 'which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations. 42 U.S.C. 4332(2)(B)... PANE vs. NRC, 678 F 2d 222,229 (U.S.Ct.App.D.C., 1982).

Finally, the Court writes:

> The key to our decision is the potential effect on health. Not all physical effects have an impact on physical health; similarly, not all psychological effects rise to the level of psychological health effects. In our view, Congress intended to include psychological <u>health</u> within the meaning of 'health' for purposes of NEPA... PANE vs. NRC, 678 F 2d 222, 229-30 (U.S.Ct.App.D.C., 1982).

Thus, in conclusion, the NRC is under orders from Congress, the President and now the Courts to plug the psychological impact on people of its actions in its decision making process.

PART THREE

7. Rather than being challenged by the importance of serving the psychological needs of the American people, the Commission creates a Statement of Policy which clearly negates the impact of the PANE decision. What, then, is the status of "statements of policy" or "interpretative rules"? It is well settled that "statements of policy" or "interpretative rules", while should be considered, are not binding. Long ago, Mr. Justice Jackson wrote on behalf of the Supreme Court the proper role of these interpretative guidelines:

> There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons... Skidmore vs. Swift & Co., 323 U.S. 134, 139-40 (1944).

This policy is still followed. In Citizens to Save Spencer County vs. E.P.A., 600 F 2d 844 (U.S.Ct.App.D.C.,1974) the Court of Appeals wrote:

> This Court has noted even more recently that an interpretive rule is an administrative construction of a statutory provision on a question of law reviewable in the courts; and that 'interpretative rules, unlike the quasi-legislative rules which are subject to the prescription of 553 (of the APA), are merely an agency's interpretation of a statute it is charged with implementing and create no law and have no effect beyond that of the statute'. IBID, pg.876.

Mr. Chief Justice Vinson wrote the following:

> ...Here...the question presented 'is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'... Unemployment Compensation Commission of Alaska vs. Aragon, 329 U.S. 143, 153-4 (1946).

This, then, brings us to the question of whether or not the Statement of Polciy, cited above, has a reasonable basis in law.

8. It is well settled law that an administrative body is limited by statutes and has no power beyond that granted by the statutes. Federal Trade Commission vs. Sinclair Refining Co., 261 U.S. 463.475 (1923); Pearce Hospital Foundation vs. Illinois Public Aid Commission, 15 Ill 2d 301.307 (1958); Stark vs. Wickard, 321 U.S. 288, 309-10 (1944). An administrative body has no common law powers. Horwell School Board District

No.9 vs. Hubbartt, 246 Iowa 1265,1273 (1955). Thus, the NRC must and is required by law to obey the law. The NRC cannot evade the law, as it has attempted to do here, by the expediency of a "Statement of Policy". See Chamber of Commerce of the United States vs. OSHA, 636 F 2d 464,468-9 (U.S.Ct.App.D.C., 1980). The Statement of Policy does not seek to enhance and protect the health of humankind. It is a clear anc explicit abdication of NRC responsibility to the American people. The fact that considering psychological effects in its decision making process may prove to be difficult does not relieve the NRC of it statutory responsibility:

> It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions' and the indulging in impossible hypothesis' as to subjects 'incapable of rational ascertainment' and that such conclusions were the necessary consequences of the Minnesota Rate Cases, 230 U.S. 352. We are of opinion, however, that considering the face of the statute and the reasoning of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate Cases could furnish ground for refusing to carry out the commands of Congress... United States ex rel Kansas City Southern Railway Co. vs. I.C.C., 252 U.S. 178, 187-8 (1920).

The conclusion is loud and clear. The Statement of Policy adopted by the NRC is:

> ... a poor player
> That struts and frets his hour upon the stage
> And then is heard no more. It is a tale
> Told by an idiot, full of sound and fury,
> Signifying nothing. W. Shakespeare, Macbeth,
> Act V, Scene v, lines 24-28.

PART FOUR

9. The legal considerations to be reviewed in determining whether to grant this motion are:

> (1) a strong showing that he is likely to succeed on the merits of the appeal; (2) a showing that, unless a stay is granted, he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest. Reserve Mining Co. vs. United States, 498 F 2d 1073, 1076-7 (8th Cir., 1974).

Let us review each of these considerations.

10. Sunflower believes that it has demonstrated that it will succeed on the merits on the Petition for Review. The Statement of Policy has no effect, because it has no reasonable basis in law. The command of Congress is clear. the NRC SHALL give psychological health consideration in any proceeding that will affect the human environment. The NRC is a creature of Congress and is required by law to obey the commands of Congress. Congress has spoken through NEPA. The NRC can not evade its responsibility under law. The Statement of Policy is nothing more than an attempt by the NRC to evade its statutory duties. The Statement of Policy will be declared invalid.

11. Sunflower will suffer irreparable harm if the proceedings are not

stayed. Sunflower has no forum, except before this Board, to litigage psychological health considerations. To appeal this case after a license is granted, is no answer for then it will be too late. Sunflower is litigating the Statement of Policy, as suggested by this Board, in the only forum available. When the Statement of Policy is invalidated, Sunflower intends to reintroduce the contention. But, if by then, the license is granted and the plant is operating, it will be too late to address Sunflower's concerns. Sunflower's right in this case is to have the provisions of NEPA, as they relate to human health, enforced. This right can not be denied since it was granted to the American people by Congress. Since this Board is the forum created by Congress to seek protection of that right, this Board must protect that right. Since this Board has been ordered by its superior not to protect that right, Sunflower is required to go to Court to seek the Court's protection. In the interim, this Board is required by NEPA and by good conscience to stay proceedings until the Court processing of Sunflower's claims can be concluded. Any other action by this Board, will result in irreparable damage to Sunflower. Rights lost can never be regained!

12. What real harm will fall to Applicant? Applicant is also interested in considerations of human health. Applicant extensively advertises its deep commitment to human welfare and states that it takes all necessary actions to protect and preserve human health. Surely, Applicant does not truly seek to deny Sunflower its right to preserve and protect human health. Such a decision on the part of Applicant would be counter productive. If Applicant's consumers can not enjoy the power Applicant seeks to produce, the consumer will not buy that power. If consumers do not buy that power, Applicant will be required to seek the protection of the federal bankruptcy laws. Thus, it is

in the Applicant's real interest, as well as Sunflower's, to insure that this Board considers the psychological impact of the licensure of Perry.

13. Finally, what is the rush to judgment? Unit One will not be operational, if at all, for another 13 months. See Exhibit B, page 3. The NRC's counsel represented to the Court of Appeals that a stay of the action in the Court of Appeals would not injure anyone. If that is the case, a stay by this Board will not injure anyone.

14. What will best serve the public interest? This Board does not need to be reminded that the NRC is not held high in the public esteem. Here is the perfect opportunity to put public interest ahead of alleged private interest. This Board merely stays the licensing process until the Sixth Circuit rules. It is expected that the Sixth Circuit will process this case promptly. In the interim, no one is harmed. If Mr. Macy and Mr. Gimbel[1] can agree to put the public interest ahead of the private interest, so can the NRC. To do so, would create an improved public perception of the NRC and will truly improve the administrative process.

WHEREFORE, Sunflower prays that this Motion be granted.

Respectfully submitted,

Daniel D. Wilt, Esq.
Attorney for Sunflower Alliance Inc.
P.O. Box 08159
Cleveland, Ohio 44108
(216) 249-8777

[1] See Miracle on 34th Street.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

82-3563

CASE NO. _____

SUNFLOWER ALLIANCE INC.
P.O. BOX 91
JEFFERSON, OHIO 44047

Petitioner

vs.

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

Respondent

PETITION FOR REVIEW

Sunflower Alliance Inc. hereby petitions the Court for review of the Statement of Policy of the Nuclear Regulatory Commission prohibiting Atomic Safety and Licensing Boards from hearing questions on psychological stress entered on July 16, 1982. The statement of policy is attached as Exhibit A and is made a part hereof.

Daniel D. Wilt, Esq.
Attorney for Sunflower Alliance Inc.
P.O. Box 08159
Cleveland, Ohio 44108
(216) 249-8777

EXHIBIT A

[7590-01]

NUCLEAR REGULATORY COMMISSION

CONSIDERATION OF PSYCHOLOGICAL STRESS ISSUES

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Statement of Policy

SUMMARY: On May 4, 1982, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in People Against Nuclear Energy (PANE) v. NRC, No. 81-1131. By a divided vote, the court ruled that the National Environmental Policy Act requires the Commission to evaluate the effects on psychological health of operating the Three Mile Island Unit 1 facility. The Commission is directed to determine whether "significant new circumstances or information have arisen with respect to the potential psychological health effects of operating the TMI-1 facility," and if it answers that question affirmatively, to prepare a "supplemental environmental impact statement which considers not only effects on psychological health but also effects on the well-being of the communities surrounding Three Mile Island."

The time within which the Commission may seek further review of the court's decision by a petition to the Supreme Court for a writ of certiorari has not yet expired. Irrespective of its plans with respect to further judicial review of the decision, however, it is necessary for the Commission to provide guidance

EXHIBIT A

on the applicability of the decision to NEPA issues raised in proceedings other than the Three Mile Island Unit 1 restart proceeding, since the court did not provide explicit instructions to the Commission on that issue. (Indeed, the court stated expressly that it saw no need to attempt in its decision to "draw a bright line" between cognizable and non-cognizable psychological stress effects under NEPA.) The purpose of this Policy Statement is to furnish that guidance for NRC staff's own NEPA analyses, for proceedings in which NEPA psychological stress contentions have been or may be raised and for any petitions which may be submitted under 10 CFR 2.206 requesting relief on the basis of NEPA psychological stress issues.

The court's opinion states that the "issue of first impression" which it addresses is "the cognizability of post-traumatic psychological health effects under NEPA." Slip op. p. 13. Elsewhere, the court states its holding that while NEPA "does not encompass mere dissatisfactions arising from social opinions, economic concerns, or political disagreements with agency policies," the statute "does apply to post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." Slip op. pp. 16-17. The court underlines this point with a reference to the "unique and traumatic nuclear accident" which gave rise to the fears alleged by PANE. Slip op. p. 16. The court also stated:

EXHIBIT A

> We need not attempt to draw a bright line in this case. Three Mile Island is, at least so far, the only event of its kind in the American experience. We cannot believe that the psychological aftermath of the March 1979 accident falls outside the broad scope of the National Environmental Policy Act. Slip op., p. 17.

The majority opinion thus stands for the proposition that an evaluation of environmental impacts under NEPA includes evaluation of "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." As the Commission reads the opinion, the cognizability of psychological stress impacts under NEPA thus hinges on three elements. First, the impacts must consist of "post-traumatic anxieties", as distinguished from mere dissatisfaction with agency proposals or policies. Second, the impacts must be accompanied by physical effects. Third, the "post-traumatic anxieties" must have been caused by "fears of recurring catastrophe". This third element means that some kind of nuclear accident must already have occurred at the site in question, since the majority's holding was directed to "post-traumatic" anxieties and by fears of a "recurring" catastrophe. Moreover, the majority clearly had only serious accidents in mind, because of the use of the word "catastrophe" and its references to the "unique" Three Mile Island Unit 2 accident in the opinion. In the Commission's view, the only nuclear plant accident that has occurred to date that is sufficiently serious to trigger consideration of psychological

stress under NEPA is the Three Mile Island Unit 2 accident. Accordingly, only this accident can currently serve as a basis for raising NEPA psychological stress issues.

It is therefore the Commission's policy that adjudicatory boards, in ruling on NEPA contentions alleging psychological stress resulting from Commission-licensed activities, should assure that all of the elements described above are present. Psychological stress contentions which do not satisfy these criteria should be held inadmissible. For contentions which allege the elements described above, usual standards will apply for weighing the sufficiency of the initial filing. The NRC staff should apply the same tests in conducting its own NEPA analyses and in weighing requests for relief, filed under 10 CFR 2.206, which allege psychological harm resulting from ongoing Commission-licensed activities. The Commission believes that by adopting this approach, it can fully comply with the court's specific holding that the "psychological aftermath" of "unique and traumatic nuclear accidents" be cognizable in NRC proceedings, without at the same time so broadening the court's holding as to make the litigation of psychological stress contentions available virtually on demand in any licensing proceeding.

By adopting a literal reading of the court's decision, as far as other proceedings are concerned, the Commission believes it is serving the public interest. In the conduct of licensing reviews and proceedings involving numerous complex technical issues, the Commission's resources should be devoted primarily to

EXHIBIT A

addressing the safety issues which are or might be the causes of psychological stress on the part of some members of the public, rather than to addressing the nature and extent of the stress itself.

Dated at Washington, D.C. this 16th day of July, 1982.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUNFLOWER ALLIANCE, INC., Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, Respondent.	No. 82-3563

MOTION FOR LEAVE TO HOLD CASE IN ABEYANCE

The United States Nuclear Regulatory Commission, respondent, respectfully requests that this Court hold this case in abeyance pending Supreme Court disposition of a case with a direct and immediate bearing on the merits of this appeal.

This appeal challenges a policy statement issued by the Nuclear Regulatory Commission on July 16, 1982, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in People Against Nuclear Energy (PANE) v. U.S. Nuclear Regulatory Commission. 678 F.2d 222 (opinions issued May 14, 1982). The PANE case held that the National Environmental Policy Act, 42 U.S.C. §4321 et seq., requires the Commission to evaluate psychological stress which may be associated with

EXHIBIT B

operation of the Three Mile Island Unit 1 nuclear reactor before allowing that reactor, which has been shut down since the accident at the adjoining Three Mile Island Unit 2, to resume operation. The Commission's July 16 policy statement, a copy of which was attached to petitioner Sunflower Alliance's petition, observed that although the time for filing a petition for certiorari had not yet expired, the Commission believed it "necessary ... to provide guidance on the applicability of the decision to NEPA issues raised in proceedings other than the Three Mile Island Unit 1 restart proceeding, since the court did not provide explicit instructions to the Commission on that issue." The policy statement interpreted the PANE decision as not requiring evaluation of psychological stress impacts in proceedings other than that involving Three Mile Island Unit 1.

Petitions for certiorari were filed by the Metropolitan Edison Company, et al., on August 1, 1982, and by the United States and the Nuclear Regulatory Commission on August 30, 1982. We assume that petitioner Sunflower Alliance was unaware of this fact when it indicated in its pre-argument statement that there was, to its knowledge, no pending case which "arises from substantially the same case or controversy as this action" or which "involves an issue that is substantially the same, similar, or related to an issue in this action." In fact, the PANE case meets both those tests. Petitioner Sunflower Alliance effectively

EXHIBIT B

acknowledged this when it stated, in an August 4, 1982 motion to the Commission's Atomic Safety and Licensing Board in the Perry operating license proceeding, 1/ "The basis for Sunflower's original Motion [requesting consideration of psychological stress in the Perry proceeding] was the case known as P.A.N.E. v. NRC, 81-1131 (1982)."

Since the brunt of petitioner's complaint, as outlined in its August 4 motion, is that the Commission improperly limited the reach of the PANE decision, it would be appropriate for this Court to defer acting on this case until the Supreme Court has had an opportunity to rule on the petitions for certiorari in PANE, and, in the event that it grants certiorari, on the merits of the case. A Supreme Court decision on the merits, whether favorable or unfavorable to the Commission's position in PANE, might well make it unnecessary for this Court to decide the instant case. Since current projections are that the Perry Unit 1 plant will not be completed and ready for operation for thirteen months at the earliest, and Supreme Court action on PANE v. NRC is likely to be completed long before that time, a grant of this motion by this Court should not prejudice petitioner's efforts to obtain a hearing on psychological stress issues prior to the actual operation of the Perry facility.

1/ In the Matter of Cleveland Electric Illuminating Company, Docket Nos. 50-440-OL, 50-441-OL.

Exhibit B

In requesting that the Court hold this case in abeyance, the Commission intends no waiver of any objections it may validly raise to the consideration of this petition at this time.

Respectfully submitted,

PETER G. CRANE
Acting Assistant General Counsel

EXHIBIT B

NO. 82-3563

FILED

DEC 8 1982

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUNFLOWER ALLIANCE INC.,

Petitioner,

vs.

NUCLEAR REGULATORY COMMISSION,

Respondent.

O R D E R

Upon consideration of respondent, United States Nuclear Regulatory Commission's motion to hold this case in abeyance pending disposition by the Supreme Court of Pane vs. U.S. Nuclear Regulatory Commission, 678 F. 2d 222 (1982), the responses thereto and the supporting memoranda,

It is ORDERED that the motion be and it hereby is denied.

ENTERED PURSUANT TO RULE 4(f)
SIXTH CIRCUIT RULES

John P. Hehman, Clerk

EXHIBIT C