UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of

CLEVELAND ELECTRIC ILLUMINATING COMPANY et al (Perry Nuclear Power Plant, Units 1 and 2)

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

SUNFLOWER BRIEF IN SUPPORT OF OCRE'S MOTION FOR SUMMARY DISPOSITION OF OPERATING LICENSE APPLICATION AND IN SUPPORT OF OCRE'S MOTION FOR STAY

On or about April 28, 1983 OCRE filed its Motion for Summary Disposition of Operating License Application and a Motion to Stay Proceedings. Sunflower supports both these Motions and urges the Board to grant them. In the alternative, if the Board feels that the provisions of 10 CFR 2.200 are applicable to this proceeding, then, Sunflower urges the Presiding Officer to exercise his authority under 10 CFR 2.718(m) and refer the question and Motions to the Director, Office of Inspection and Enforcement and grant OCRE's Motion for a Stay.

The facts are stated and supported in OCRE's Motion by official documents. Applicant has stated in response to question 290.08 profferred by the Staff that no herbicides will be used along any portions of the Perry transmission line. Staff relied on this representation in preparation of the Perry FES. See Section 5.5.1.4. This representation was false. See Applicant's Application to the Ohio Power Siting Board. Applicant's conduct, being on the public record, is open and, thus, the only question is the appropriate sanctions that should be imposed on Applicant.

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The governing statutory law in this instance is 42 U.S.C. Section 2236 which provides in part:

> Any license may be revoked for any material false statement in the application or any statement of fact required under section 182, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms or provisions of this Act or of any regulations of the Commission.

Thus, in accordance with this statute Applicant's construction permit can be revoked for any violation of the Atomic Energy Act. Further, the term "construction permit" can be construed to be a license. 10 CFR 50.10(b) (which is entitled License required) states that no one shall begin the construction of a nuclear power plant until a construction permit is issued. 10 CFR 50.23 states that a construction permit will be issued if the application is otherwise acceptable and shall be converted into a license if the provisions of 10 CFR 50.56 are met. Finally, 10 CFR 50.100 provides:

> A license or construction permit may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application for license of in the supplemental or other statements of fact required of the applicant; or because of conditions revealed by the application for license or statement of fact or any report, record, inspection, or other means, which would warrant the Commission to refuse to grant a license on an original application...or for failure to construct or operate a facility in accordance with the terms of the construction permit or license...or for violation of, or failure to observe, any of the terms and provisions of the Act, regulations, license, permit, or order of the Commission.

Thus, it is clear that even though we are still in the construction phase, Applicant is still bound by the requirements of 42 U.S.C. Section 2236 and if Applicant violates the requirements of 42 U.S.C. Section 2236, it subjects itself to sanctions.

The question of a violation of 42 U.S.C. Section 2236 arose in at least one reported case that was appealed all the way to the Commission itself. The Licensing Board in In the Matter of Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), 2 NRC 498 (1975) was confronted with several new questions of law. Specifically, the Board had to decide the meanings of the terms "false", "material", and "material false statement". The Licensing Board defined these terms in the following manner:

> Thus, the ordinary meaning at law for 'material' is to describe evidence which is likely to influence the determination of a matter...a material statement was found to be one which could effect or influence the exercise of a governmental function. The ordinary definition of 'false' is to describe that which is not true or correct, erroneous. A 'statement' is ordinarily defined as a written or oral communication setting forth facts, arguments, demands or the like. In a general sense it is an allegation, a declaration of matters of fact. These terms, especially when read in light of the non-delegable duty of the Licensee as discussed in our opinion above, express the intent of Congress to refer to a communication, written or oral, likely to influence the determination of a matter, which communication is not true. Accordingly, after careful review and consideration of the legislative history available and the briefs of the parties, we find that the meaning of the key phrase 'material false statement' in section 186 is defined by the ordinary meaning of the words used as defined above and is not ambiguous when read in light of its legislative history. In the Matter of Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), 2 NRC 498, 507 (1975).

Finally, the Licensing Board held:

> ...we find that the element of scienter is not included in the meaning of a material false statement. IBID, pg. 509.

This case was appealed to the Appeal Board. The Appeal Board approved the Licensing Board's concept of "material" in the following statement:

> ...Invoking what it thought to be the 'plain meaning' of the term 'material' the Licensing Board found the principal test to be whether 'a reasonable staff member would, or should, consider (the content of the statement) in reaching a conclusion or in determining a course of action'... we think the Board's conclusions are essentially correct... In the Matter of Virginia Electric & Power Co.(North Anna Power Station, Units 1 and 2), 3 NRC 347, 358 (1976).

The case was then appealed to the Commission which wrote:

> We begin our consideration of this case with the legal questions on which the Licensing & Appeal Board's agreed. We concur in their judgment that knowledge of falsity is not necessary for liability under Section 186 of the Atomic Energy Act, and that materiality should be judged by whether a reasonable staff member should consider the information in question in doing his job... In the Matter of Virginia Electric & Power Co (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 486 (1976).

The facts are clear. The Applicant has stated one thing to the Commission and something absolutely opposite to the Ohio Power Siting Board. It is impossible to reconcile both answers. One answer must be true and the other answer must be false. As pointed out above, the law does not require scienter or malice to determine falsehood. The simple fact is that Applicant has stated something to the Commission which is not true.

The statement made to the Commission was material. The Commission's Staff relied on the statement in the preparation of the Perry FES. Thus, the test of material, as described above, has been met.

In light of the above, we must now turn to the question of sanctions. OCRE has proposed that the License application be dismissed in light of the

Applicant's violation of 42 U.S.C. Section 2236. The question is, is this too severe a penalty in light of the fact that the Applicant has spent in excess of four billion dollars on the Perry project?

The severity of the penalty must be determined in terms of the public interest and not on the basis of Applicant's economic investment. After all, Applicant's investment can be recovered whether the plant operates or not. The fact is, though, if Applicant violates the law and is not penalized or is only "slapped on the wrist", the damage to the public interest will be irreparable.

This nation is a nation of law. This statement may be trite but the fact is that both the economic system and the political system is grounded on the assumption that the public will respect the law. For the law to be respected by the public, it must earn that respect. This is done by enforcing the law fairly. If the public believes that the law can be bent, can be applied differently depending on the economic status of the person or institution, then our country is lost. The police power of the state cannot preserve a government that has lost the respect of its people. Witness El Salvador, Poland, Afghanistan, etc. Applicant has just as much interest, if not more, in the preservation of the rule of law as Sunflower.

Let us not forget that Applicant has put itself in this position. Applicant is charged with the responsibility for all its actions including what it reports and what it does not report. The law requires the Applicant to be honest and truthful to this Commission. The Commission, in undertaking its responsibilities, must rely upon the honesty and truthfulness of Applicant. Applicant has not complied with that responsibility and has violated its trust with the Commission.

This Board is being called upon by OCRE to balance the respect for the law on the one hand with economic interest on the other. Sunflower urges that this Board "take one small step for mankind" and enforce the law.

Sunflower is aware of the Show Cause provisions of 10 CFR 2.200. If the Board feels that a construction permit is a "license" within the meaning of 10 CFR 2.200, then, Sunflower urges that the Presiding Officer exercise his authority contained in 10 CFR 2.718(m) and refer this matter to the Director, Office of Inspection and Enforcement.

OCRE has also filed a Motion for a Stay. This Motion should be granted. The Courts have created the following tests in considering stay motions:

> (1) a strong showing that he is likely to succeed in 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).

Sunflower believes that all of these requirements exist in the case at bar. First, OCRE has demonstrated in fact the existence of a material false statement. Thus, OCRE is likely to succeed. Second, OCRE has demonstrated irreparable harm. OCRE has been commended by this Board and by the Appeal Board for its respect for the law and the regulations of the Commission. If Applicant is permitted to violate the law,then, OCRE will be treated differently under the law. This would constitute an irrational classification and would be unconstitutional. This unequal treatment would irreparably damage OCRE. There are members of OCRE who advocate disruption; demonstration; the disrespect for law. To permit unequal treatment, would cause dissention within OCRE and would impair OCRE's ability to carry out its responsibilities in this proceeding. TO PERMIT APPLICANT TO VIOLATE THE LAW WITHOUT SEVERE SANCTIONS IS, P' . SE, IRREPARABLE HARM!

Third, no harm can fall Applicant because Applicant created the harm.

Finally, the public interest is always served by the proper enforcement of the law!

For these reasons, Sunflower urges that the Board grant OCRE's Motions.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a copy of this Motion has been sent to all persons on the Service List on this 18 day of May, 1983.

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