

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF INSPECTION AND ENFORCEMENT  
James M. Taylor, Deputy Director

In the Matter of	)	Docket No. 50-441
CLEVELAND ELECTRIC ILLUMINATING	)	
COMPANY	)	(10 CFR 2.206)
(Perry Nuclear Power Plant,	)	
Unit 2)	)	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

By petition dated June 4, 1984, Susan L. Hiatt, on behalf of Ohio Citizens for Responsible Energy (OCRE), requested pursuant to 10 CFR 2.206 that the Director of the Office of Inspection and Enforcement (IE) order the Cleveland Electric Illuminating Company (CEI) to show cause why CEI's construction permit for Perry Unit 2 should not be revoked or suspended. OCRE asserts as bases for this request: 1) CEI's apparent abandonment of construction at Unit 2; and 2) CEI's silence to the Commission on the matter of the completion of the facility and its statements to the Regional Administrator, Region III, that corrective actions will be completed on Unit 2 within the year, in spite of its public statements that no work is being done or money is being expended on the facility. OCRE says that the latter circumstances raise the question of whether CEI has made a material false statement which would constitute grounds for revocation of its construction permit.

On July 3, 1984, the Director acknowledged receipt of the petition and informed OCRE that this request was being reviewed. A notice that

the petition was under consideration was published in the Federal Register. 49 Fed. Reg. 28484 (July 12, 1984). On July 31, 1984, CEI filed its response to the petition. The staff has completed its evaluation of the petition and, for the reasons stated in this decision, OCRE's request is denied.

### Background

The Cleveland Electric Illuminating Company holds Construction Permits CPPR-148 (Unit 1) and CPPR-149 (Unit 2), issued by the Nuclear Regulatory Commission in 1977, which authorize construction of the Perry plant. The Perry plant is located on Lake Erie in Perry County, Ohio, approximately 35 miles northeast of Cleveland, and consists of two boiling water reactors of General Electric design and related facilities for use in the commercial generation of electric power. Construction started on both units in October 1974.

The construction permits originally specified December 31, 1982 as the latest date for completion of construction of Unit 1 and June 30, 1984 as the latest date for completion of construction of Unit 2. By letter dated July 21, 1982, CEI requested that the construction permits be amended to specify November 30, 1985 as the latest date for completion of construction of Unit 1 and November 30, 1991 as the latest date for completion of construction of Unit 2. The licensee sought this amendment because construction had been delayed due to a reduced growth rate in the demand for electricity, the incorporation of changes for plant design and analysis, and the difficulty in obtaining capital funds. On December 29, 1982, the NRC extended the construction completion dates

to November 30, 1985 for Unit 1 and November 30, 1991 for Unit 2 as CEI had requested. 48 Fed. Reg. 1128 (January 10, 1983). The current Perry Unit 2 construction permit will therefore expire in 1991.

Concrete work for the entire Perry plant is 99% complete; all work on Unit 2 is approximately 44% complete. The licensee's periodic progress reports reflect that work is progressing on both Perry Units 1 and 2. By letter dated July 17, 1984, CEI advised NRC that minimal work is currently being undertaken on Unit 2. This work consists of completion of Unit 2 systems which are required to support Unit 1 operations, Unit 2 Division 1 and 2 diesel generators, and areas of the common plant facilities which are inside the initial Unit 1 operational security boundary. Although work is continuing, the licensee's completion date for Unit 2 is undetermined at this time. See letter from Murray R. Edelman, Vice President, Nuclear Group, CEI, to B.J. Youngblood, Chief, Licensing Branch No. 1, Office of Nuclear Reactor Regulation (NRR) (July 17, 1984) (Attachment 1 to CEI's response to the petition).

### Analysis

Petitioner raises two issues as a basis for her request that CEI's construction permit for Perry Unit 2 be revoked or suspended. A discussion of each of these issues follows.

1. Whether CEI has stopped construction on Perry Unit 2 and, if so, whether this constitutes grounds for revocation or suspension of CEI's construction permit.

Petitioner alleges that construction work has been halted, that no money is being spent on Perry Unit 2, and that CEI has been "parasitizing" Unit 2 for equipment for Unit 1, thereby reflecting the licensee's intention to abandon Unit 2. Petitioner argues that these actions constitute a basis for revocation or suspension of CEI's construction permit under NRC regulations. Specifically, petitioner argues that CEI's willful stoppage of construction on Perry Unit 2 can only be construed as a failure to construct that facility in accordance with the terms of its construction permit and, as such, triggers the sanctions of 10 CFR 50.100 which prescribes revocation or suspension of a construction permit for failure to construct or operate a facility in accordance with the terms of the construction permit or license. The petitioner argues that since the Commission obviously would not issue a construction permit to a utility that had no intention of building a nuclear facility, the Commission should revoke or suspend a construction permit when its holder no longer intends to complete the facility.

In response to this argument, it should first be noted that available evidence does not suggest that CEI has abandoned construction of Perry Unit 2. The petitioner, in arguing that construction has been halted, relies primarily on newspaper reports of remarks made by Robert M. Ginn, Chairman of the Board and Chief Executive Officer of CEI, at CEI's annual shareholders' meeting on April 24, 1984. CEI has explained Mr. Ginn's

comments in its letter dated July 30, 1984, to Richard C. DeYoung, Director, Office of Inspection and Enforcement and the staff does not consider Mr. Ginn's comments to constitute evidence that Perry Unit 2 will not be completed. 1/ With regard to petitioner's allegations that CEI is "parasitizing" equipment, the licensee's letter of July 30, 1984, also explains that, although CEI admits that three control modules were transferred from Unit 2 to Unit 1, such reallocation of equipment between units on multi-unit sites in order to meet construction schedules is a common industry practice. This is an acceptable practice. NRC regulations do not prohibit such reallocation, as long as the licensee installs such equipment and takes such actions in constructing the facility as are necessary for the safe operation of its facility. The licensee's letter dated July 17, 1984, to B. J. Youngblood, supra, also indicates that work is progressing on Perry Unit 2, although at a slower pace than initially planned, with CEI manpower being concentrated on getting Perry Unit 1 licensed in 1985. Moreover, FSAR amendments submitted by the licensee continue to be applicable to both Perry

---

1/ Mr. Ginn addressed the status of Unit 2 both in his prepared statement to the shareholders and in an informal press conference following the meeting. He was quoted as saying in his prepared statement that CEI was spending only "limited funds" on Unit 2 and faces "many uncertainties as to the future of that second unit." Petition, Exhibit 2. A second article quoted him as saying during the press conference that CEI was "not spending any money on Unit 2." Petition, Exhibit 1. A third article did not quote Mr. Ginn on this point but concluded that CEI had essentially stopped building the second unit while concentrating all of its resources on Unit 1. Petition, Exhibit 3. As explained in CEI's July 30, 1984, letter to Mr. DeYoung, supra, the correct statement of the status of Unit 2 was Mr. Ginn's prepared statement that CEI is spending "limited funds" on Unit 2. The statement that CEI is "not spending any money on Unit 2" was an informal remark which was not intended to be taken literally but to emphasize CEI's concentration on Unit 1.

Units. Additionally, internal monthly progress reports are voluntarily provided by the licensee to the NRC resident inspector in order to keep him appraised of progress. These reports indicate that work is continuing on Perry Unit 2. On-site inspections by the NRC resident inspector and periodic inspections by other Region III staff have confirmed that construction work on Perry Unit 2 has not been discontinued.

Petitioner's argument that a halt or slowing of construction mandates show cause proceedings was specifically rejected in a Director's decision on another petition under 10 CFR 2.206. See Washington Public Power Supply System (WNP Nos. 4 & 5), DD-82-6, 15 NRC 1761 (1982). In that instance, the petitioner requested that the Washington Public Power Supply System (WPPSS) be ordered to show cause why its construction permits should not be revoked on the basis of the WPPSS Board of Directors' adoption of a resolution terminating two nuclear units in the project. WPPSS intended to retain the construction permits at least during the first phase of its termination plan that called for an attempted transfer of the projects to a new owner. In denying the petition, the Director of NRR stated that WPPSS' postponement or cancellation of its plant constituted actions clearly not inimical to public health and safety under the Atomic Energy Act. As termination of the projects did not itself pose any hazard to public health and safety that would require issuance of an order to show cause, there was no reason for the NRC to take the requested action. Id. at 1767. This decision was distinguished from that involving the Tyrone Plant, see Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523 (1980), in which the co-owners of the project indicated no desire to retain the construction permit and in fact consented to revocation of the permit.

In the present instance, as in that involving WPPSS, there is no current threat to public health and safety by the licensee's actions to slow the pace of construction. Thus, there is no reason for the NRC to take the action requested by petitioner of revocation or suspension of CEI's construction permit. Nor do NRC regulations require that a construction permit be revoked or suspended for slowing or stopping construction. While 10 CFR 50.100 provides for revocation or suspension of a construction permit for failure to construct a facility in accordance with the terms of the permit, failure to complete construction of the facility is governed by Section 50.55(b). That regulation states only that if the proposed construction is not completed by the latest completion date the permit shall expire. The licensee may stop or slow down work due to subcontractor disputes, strikes, redesign efforts, funding limitations or other considerations. NRC Region III staff conducts periodic audits of construction activities to assure compliance with the terms and conditions of the construction permit. As the current construction permit for Perry Unit 2 does not expire until 1991, there is no requirement that NRC take action because of a stoppage or slowing of construction. 2/

---

2/ It should also be noted that in construction of a facility, a licensee proceeds at its own risk. If a licensee obtains a construction permit, the licensee bears the risk that it may expend considerable funds but never complete construction or be granted an operating license. See Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO 367 U.S. 396, 415 (1961); Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1370 (D.C. Cir. 1979).

In sum, there is no indication that construction work has been stopped on Perry Unit 2. Moreover, as indicated in Washington Public Power Supply System, 15 NRC at 1761, in the absence of clear abandonment of the project, a stopping of construction would not itself constitute grounds for revocation or suspension of CEI's construction permit. Even if the project were abandoned, the decision whether to take the formal step of revoking the construction permit or merely allow it to expire is largely discretionary.

2. Whether CEI has Made a Material False Statement to NRC

Petitioner asserts that CEI may have made material false statements to NRC and that this constitutes a basis for revocation of its construction permit. Petitioner alleges that CEI may have made a material false statement in its failure to inform NRC, the Licensing Board, or the parties of the cessation of work and investment in Perry Unit 2. Petitioner also alleges that CEI's statements to the Regional Administrator, Region III, that corrective actions will be completed on Unit 2 within the year, contradict its public statements and may thus constitute a material false statement. Such material false statements could subject the licensee to enforcement action up to and including revocation of its permit. See General Statement of Policy and Procedure for Enforcement Actions, 10 CFR Part 2, Appendix C, as revised, 49 Fed. Reg. 8583 (March 8, 1984).



The first question to be addressed is whether CEI's failure to notify NRC of the slowdown of construction at Perry Unit 2 constitutes a material false statement. In answering this question, it should be noted that CEI has in fact informed the NRC that only a limited amount of construction is being done on Perry Unit 2. See Summary Report of Caseload Forecast Panel Meeting with CEI and Facility Tour (January 11, 12 & 13, 1983) at the Perry site dated March 17, 1983. As discussed above, CEI has not entirely halted construction on Perry Unit 2. Correspondence received from the licensee indicates that work is continuing, as do CEI's internal monthly progress reports and inspections of the facility by the resident inspector and other regional staff.

A slowdown in construction does not itself give rise to a reporting obligation. Under 10 CFR 50.55(b), the NRC must be informed if an extension of the completion date for a construction permit is desired. However, absent the need for such an extension, a licensee is under no obligation to notify the NRC of the status of construction. There is no required rate of completion, and a licensee is free to determine its own rate of progress as long as the date of the expiration of the construction permit is met. 3/ Thus, there has been no failure to provide material

---

3/ As indicated earlier, CEI voluntarily submits monthly progress reports of work being completed to the resident inspector, and the resident inspector would notify NRR if work were discontinued. NRR would then inquire as to the reasons why construction had ceased.

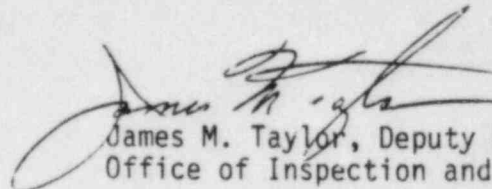
information to the Commission. See Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 488-491 (1976), aff'd sub nom. VEPCO v. NRC, 571 F.2d 1289 (4th Cir. 1978).

Petitioner also alleges that CEI's statements to the Regional Administrator, Region III, that certain corrective actions will be completed within the year contradict CEI's public statements that no work is being done or money being spent on Unit 2, and thus constitute material false statements. The "statements to the Regional Administrator" referred to by petitioner consist of statements made in letters dated April 30, 1984, and May 1, 1984, which are included as exhibits 5, 6 and 7 to the petition. These statements indicate that corrective work is being completed or has been completed on Governor Lube Oil Cooler relocation, tubing rework and relocation, installation of redesigned diesel generator exhaust piping/supports, and Bailey Utility Stations control modules. The "public statements" referred to by petitioner consist of the remarks made by Robert M. Ginn discussed earlier in this decision.

In a telephone conversation on November 13, 1984 with the NRR project manager, the licensee informed the staff that all of the corrective actions referred to by the petitioner have been completed with the exception of the installation of redesigned diesel generator exhaust piping. By letter dated June 29, 1984, CEI informed the Regional Administrator of Region III that remaining work was being rescheduled to be completed prior to pre-engine start testing which is scheduled for early 1985. Thus, circumstances do not indicate that the licensee has made material false statements regarding the status of corrective actions and the progress of work on Unit 2.

Conclusion

For the reasons stated in this decision, I have concluded no adequate basis exists to issue an order to the licensee regarding the Perry Unit 2 construction permit as requested by OCRE. Accordingly, the petitioner's request has been denied. A copy of this decision will be filed with the Office of the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations.

  
James M. Taylor, Deputy Director  
Office of Inspection and Enforcement

Dated at Bethesda, Maryland,  
this 15<sup>th</sup> day of November 1984.