

Mr. James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division

May 11, 1977

Bradford F. Whitman
Assistant Chief
Pollution Control Section

syh

Recommending Against Prosecution of Virginia Electric
Power Company for Failure to Disclose a Geological
Fault (18 U.S.C. 1001)

ATG:DFW
90-5-1-7-220

I

HISTORY OF THE CASE

In 1975 the Land and Natural Resources Division, at the request of a citizen (Mrs. June Allen), commenced an investigation to determine whether violations of 18 U.S.C. 1001 may have been committed by Virginia Electric Power Company or any of its consultants by the filing of certain statements with the Nuclear Regulatory Commission in the period from 1971 through 1973 that no fault was suspected or known at the site. In June 1975, we asked the Executive Legal Director of the NRC, Howard Shapar, for his opinion as to whether a criminal action was warranted. He replied by letter of June 20, 1975 that he did not believe a criminal action was warranted because we lacked proof of intent by the company to file false statements. In response to our request for all pertinent documents and materials, he submitted files of the Commission including depositions and exhibits to several agency proceedings. An intensive examination of all the records of the NRC was conducted. In addition, materials were submitted to us by Mrs. Allen, Chairman of the North Anna Environmental Coalition, and we reviewed these documents in detail.

The Nuclear Regulatory Commission determined that the fault discovered under the four nuclear reactors at the North Anna plant was not "capable" in terms of the NRC regulations (10 C.F.R. Part 100, Appendix A) and therefore was not a threat to the safety of the plant. Accordingly, the NRC denied an application by the North Anna Environmental Coalition to revoke the permits for the reactors. The Commission decision was upheld by the Court of Appeals for

the District of Columbia. The NRC in a separate proceeding, however, levied penalties in the amount of \$32,500 against VEPCO for the making of material false statements concerning the fault. This case is presently on appeal in the Fourth Circuit Court of Appeals. For the purpose of the agency proceedings, it was stipulated that "intent" was not an element of the offense under the Atomic Energy Act, 42 U.S.C. 2236 and 2282. The NRC found that the record would not support a finding of willful or deliberate false statements by VEPCO.

After our review of the documents, we decided that a number of the company-officials should be requested to submit additional materials and to answer questions since they had not been questioned by any of the investigators of the NRC and the issue of "scienter" on the part of VEPCO in fact had not even been examined. We asked Mr. Maupin, counsel for VEPCO, whether he would submit VEPCO employees for deposition under oath in lieu of grand jury testimony; he consented to this procedure. Twelve VEPCO officials and one former VEPCO official were deposed at the Department; each official was advised at the outset of his Fifth Amendment rights and was accompanied by counsel at the deposition. Additional documents were submitted. However, it was not until virtually the end of the investigation process, when we contacted Stone & Webster Engineering Corporation, VEPCO's architect-engineer for the North Anna project, that counsel for VEPCO "discovered" a file entitled "Amendment 20", which included draft safety analysis report amendments prepared by Stone & Webster disclosing the geological fault. We established at the depositions that VEPCO personnel deleted all references to the fault and filed the amendment on July 31, 1973 with the statement that no fault was known at the site.

Finally, a session was held with Mr. Maupin to describe potential criminal charges. Two additional conferences were held with VEPCO's newly retained counsel, Herbert J. Miller, during the weeks of April 25 and May 2, 1977. He was advised by Mr. Taft that we were reconsidering our evidence and would contact him prior to any further action.

II

ELEMENTS OF THE OFFENSE UNDER 18 U.S.C. 1001

Section 1001 makes it a felony punishable by \$10,000 fine, or imprisonment for 5 years, or both, knowingly and willfully to falsify, conceal or cover up a material fact in a matter within the jurisdiction of any United States Department or Agency or to make any false, fictitious or fraudulent statement or representation or to make or use any document knowing the same the contain any false statements.

It is well established that the false statement or concealed fact must be found "material". Materiality is defined as the natural tendency of the document or statement to influence or affect the agency action. Whether or not the agency in fact relied upon the statement or suffered any specific harm is irrelevant to the prosecution. Second, the Government must show that the defendant "knowingly and willfully" filed a false statement or concealed a material fact. In several of the leading cases the courts have taken a broad view of this requirement to include a reckless disregard on the part of the defendant as to the truth or falsity of the document. In other cases, the courts applied the traditional definition of knowing and willful, i.e. deliberately and with knowledge of the falsity and not by mistake or inadvertence.

III

SUMMARY OF THE EVIDENCE

A. 1970 to 1973

The evidence shows that Stone & Webster discovered a chlorite seam in the excavation for Unit 1 in 1970 which its chief geologist examined as a possible fault. He has testified before the Commission that although the presence of chlorite itself is an indication in some cases of movement along a fault, in this particular case he believed it resulted from weathering of the rock and that other characteristics of a fault, primarily offset or displacement, were not present. Three private geologists not employed by the company did visit the site in 1970 and did conclude that a fault existed although the VEPCO representative who accompanied them to the site and was unskilled in geology does not recall being advised by any of them that a fault was present. In any event, Stone & Webster did not notify VEPCO formally of the possibility that this feature was a geological fault but instead proceeded with excavation and construction of the units. The presence of the chlorite seam was reported to the Atomic Energy Commission in the applicant's Preliminary Safety Analysis Report (PSAR). In 1971 an extension of the same feature was discovered at the site of the second group of reactors, Units 3 and 4. But until excavation for Unit 3 in April, 1973, the geologists had not observed any offset along the chlorite seam. In view of the disagreement among the experts as to the characteristics of the chlorite-seam underlying Unit 1, the publication by the Atomic Energy Commission at that time of instructions encouraging applicants not to file all technical reports with the Commission, and the fact that VEPCO did make reference in its PSAR to the chlorite seam, we believe that there was no basis for a criminal prosecution prior to April, 1973.

B. 1973

As of April, 1973 the status of the licensing proceedings for the four units was as follows. For Units 1 and 2 the applicant had filed for preliminary review on March 16, 1973 its Final Safety Analysis Report (FSAR). On April 17, 1973 the NRC advised VEPCO that the FSAR was deficient in a number of respects and, in addition, specifically called for submission of geological reports. On April 30, 1973 the FSAR for Units 1 and 2 was filed by VEPCO (73 copies) and accepted for final review although the applicant had not yet corrected the deficiencies. No hearings had been scheduled with respect to the operating license application (i.e. the FSAR) for Units 1 and 2. The construction permit had, of course, been granted for Units 1 and 2 in 1971.

With respect to Units 3 and 4, the PSAR had been filed on September 15, 1971; the PSAR constitutes the application for construction permits. Notice was subsequently issued of the establishment of an Atomic Safety and Licensing Board to hold a public hearing and to issue the initial decision ordering the Director of Regulation either to issue or deny the construction permit. On April 6, 1973 the NRC staff submitted its final Safety Evaluation Report for Units 3 and 4, and on April 27, 1973 the ASLB convened a prehearing conference in Fredericksburg, Virginia to establish procedures for the forthcoming construction permit hearing. The hearing itself is required by statute. 42 U.S.C. 2239. The ASLB, as scheduled, held construction permit hearings for Units 3 and 4 from May 7 through May 10, 1973 and visited the site on May 8, 1973. The sole contested issues at this hearing related to the discharge of heated water from the two reactors into Lake Anna.

On April 24, 1973 John Brideis of Stone & Webster Engineering Corporation (S & W) telephoned Clifford Robinson, VEPCO's engineer assigned to the North Anna plant, to advise him of the discovery of a possible fault in the excavation for Unit 3. Brideis had visited the site at the request of Mr. Pastuszak, who originally had noticed an offset in the pit and reported it to Mr. Rosenblad, also of S & W. Robinson stated that he told his supervisor, Mr. Alligood, of the possible fault, and Alligood in turn told Mr. Spencer. Spencer told his supervisor Mr. Wills, and finally Mr. Wills told William Proffitt, then Executive Manager of Power Station Engineering and Construction for VEPCO. Robinson and the S & W engineers visited the site on April 30, 1973 and agreed to call in Dames & Moore (D & M), an outside consultant firm which had performed the

site investigation for VEPCO under Units 1 and 2 and Units 3 and 4. All VEPCO personnel have testified that discovery of the feature was not considered routine but rather was a matter of some urgency.

On May 2, 1973 D & M engineers, together with Alligood, visited the site. Mr. Ellwood of D & M stated that he believed there was not a fault at the site. He hypothesized that they were viewing a coincidental appearance of two pegmatite dikes rather than a single dike which had been offset by movement along a fault. Other geologists such as Mr. Pastuzak and Mr. Nivargikar, both of S & W, believed that a fault was present. Ellwood recommended that in any event additional data would have to be gathered to support his conclusion. On or about May 7, 1973 Robinson retained Professor Wise from the University of Massachusetts, a noted Piedmont geological expert, to visit the site and identify the feature. Spencer who had learned of the possible fault on April 25, 1973 testified at the public hearing on May 7-10, 1973 that the PSAR was true and correct to the best of his knowledge. The PSAR contained statements that faulting at the site was neither suspected nor known. Wills was also present at the hearing, although he did not testify. Mr. Baum, VEPCO's Manager of Licensing and Quality Assurance, presented a Summary of Application that the site was safe for a nuclear plant.

On May 7, 1973 Ellwood telephoned Brideis and Robinson to indicate that his preliminary geological mapping showed that there had been some movement along the chlorite seam; however, it appeared to him that the movement was not consistent with the hypothesis of a single pegmatite dike offset along a "normal" fault. On May 9, 1973 Stone & Webster sent a letter to VEPCO's Senior Vice President, Stanley Ragone, notifying him of the discovery of a "complex geological feature" which had been exposed in the containment excavation for Unit 3 and recommending that he in turn notify the AEC that a detailed investigation was being conducted. On May 14, 1973 Professor Wise visited the site and concluded that in the face of the six-to-ten foot displacement, one could not argue that there was no fault. He identified two periods of motion that had occurred and recommended a detailed study. Wise has testified before the NRC that the feature was a complex one with a reverse offset and that he believed it was reasonable not to have finally concluded there was a fault prior to May 14, 1973. In any event, on May 14 all the geologists concluded that a fault did exist at the site. Robinson told Alligood of the conclusion. On May 15, 1973 a meeting was held in Mr. Proffitt's office and the other engineering personnel of VEPCO were advised. Mr. Ragone was informed by Mr. Proffitt and he in turn advised the President of VEPCO, Justin Moore. Moore told Ragone to advise the Atomic Energy Commission by

phone and Ragone so instructed Baum. According to a memorandum of a phone conversation, Brideis of S & W was told by Robinson that Ragone would advise the AEC of the discovery by phone "to avoid leaking the information to the general public."

On May 15, 1973 Mr. Baum placed a call to Mr. Schwencer at the NRC. Schwencer was out. On May 16, 1973 Baum placed a call to Mr. Ferguson, NRC's North Anna Project Director, and Ferguson was also unavailable. On May 17, 1973 Schwencer returned Baum's call. According to Schwencer's telephone memorandum, Baum advised him that VEPCO had discovered on May 11, 1973 a chlorite seam indicative of possible rock folding. The word fault does not appear anywhere in the telephone memorandum, and Schwencer has stated that if he were advised of the discovery of a fault he would certainly not have omitted it from his record. Also, there is no explanation for the date of May 11, 1973 which is inconsistent with the initial discovery of the feature on April 24, 1973 by Robinson. May 11 was the day after the final session of the public hearing. On May 18, 1973 Cardone, the NRC geologist, called Spencer of VEPCO to follow-up on the phone call to Schwencer and to gain further knowledge of the feature. Spencer brought Robinson to the phone, and Robinson recalls that Cardone did indeed believe that there was only a chlorite seam present and did not understand that a fault had been found. Robinson states that he informed Cardone that the feature was a fault. However, Robinson's notes indicated that he urged Cardone not to visit the site until VEPCO had "a case prepared."

During this time field investigation was continuing at the site and D & M had obtained additional consultants: Professor Lowell A. Douglas from Rutgers University and Professor Paul Roper from Lafayette College. Professor Wise submitted his independent report to VEPCO on May 25, 1973 outlining a detailed investigation which he believed was necessary to "date" the fault. (The regulations at 10 C.F.R. 100, App. A, define a capable fault as one which has moved once in the last 35,000 years or repeatedly within the last 500,000 years.) Ellwood from D & M was disturbed by the tone of Wise's report and urged Robinson to have Wise rewrite substantial portions of the report. On June 2, 1973 a meeting was held at the Stone & Webster headquarters to discuss the fault. Mr. Rosenblad's notes indicate that there was concern that the consequences of the fault were "bad for land 2" and additionally may impose a problem for "3 and 4" with respect to design. The regulations prescribe that in the event of discovery of a capable fault, additional design parameters would have to be developed for the plant, and, at the worst, the plant would have to be relocated.

On June 13 a meeting was held at the Richmond headquarters of VEPCO at which VEPCO and their consultants discussed how to present the fault to the NRC team of geologists who were to arrive on the site on June 18, 1973. S & W and D & M staff members discussed the possible use of the term "shear" rather than the word "fault" at the meeting or at least in the written report to avoid "the broad scope of connotation" of the word "fault". Finally, Mr. Gibbons of D & M insisted on the use of the word "fault" at the meeting with the NRC.

On June 18, 1973 the NRC Project Director, Robert Ferguson, and two geologists, Cardone from NRC and Houser from U.S.G.S., observed the fault and were informed of the history of the excavation. They were also shown pictures of the chlorite seam under Units 1 and 2. Cardone complained about the absence of a written report at the meeting. Mr. Alligood of VEPCO inquired of the NRC team whether there was any need to halt construction at the site. Houser replied that he was satisfied and they could go ahead and Cardone had no comment on the subject.

Following the June 18, 1973 meeting, Ferguson prepared a detailed trip report outlining the discovery of the fault and the company's proposed investigation. The trip report was placed in the public document room in accordance with the general practice on June 26, 1973. Subsequent discussions over the telephone were held between VEPCO's Mr. Robinson and NRC's Cardone. Although a VEPCO engineering staff member stated that it was customary to confirm telephone reports to the NRC by letter, no such letter was transmitted relating to the fault from May 17 until the final report was submitted on August 17.

Meanwhile, S & W had been asked by VEPCO, following an April 19, 1973 meeting with NRC, to prepare additional amendments to the FSAR for Units 1 and 2 to satisfy the deficiencies noted by the Commission. The evidence shows that Stone & Webster was late in submitting its proposed amendment but that on June 29, 1973 S & W's Mr. Burroughs submitted proposed language for an "Amendment 20" to VEPCO. The proposed amendment was submitted to Mr. Rutkowski and routed from him to Mr. Prince and then to Robinson for their comments and changes. The relevant portions of the proposed amendment were as follows:

(1) Page 2.5-6 of the original FSAR included the statement, "faulting of rock at the site is neither known nor is it suspected." This statement was not changed by the amendment and there is no evidence that either S & W or VEPCO employees considered correcting this statement as part of Amendment 20.

(2) Page 2.5-10 of the original FSAR 1 and 2 contained the statement, "Faulting at the site is neither known nor suspected; all available information tends to confirm the continuity of strata." S & W's proposed page 2.5-10 contained the replacement language, "Faulting of rock strata at the site is not known. All available information tends to confirm the continuity strata." (Emphasis added.) There is no evidence of any deletion or comment by any of the VEPCO employees with respect to this statement from S & W, and it was submitted as part of Amendment 20 as written. Rutkowski did testify that it was his practice to draw a black line in the margin opposite any new material that was submitted to the NRC. In this case, he reorganized the section and did not draw a black line opposite the statement. VEPCO maintains that this supports their position that this blatantly false statement was unnoticed and was included as a result of mistake or inadvertence. Since we have not examined any S & W employees, we do not have their explanation on this point.

(3) S & W proposed to submit as part of a supplement volume certain answers to the deficiency requests made by the NRC in April. In response to the NRC comment, "Underlying Tectonic Structures - Provide a detailed description of tectonic structures of the region including the maps and assessment of activity status," S & W proposed the following language at Page D2.5.2-2:

Additional information was revealed during the excavation of the adjacent Units 3 and 4. An area indicative of very old minor shearing movement along a chlorite rich foliation plane was identified along the southern side of Units 3 and 4. Zones of this nature are frequent and commonly

found within the metamorphosed and complexly folded rocks of the Piedmont capital province. They represent old features related to the regional folding during or at the end of the Paleozoic Era, 260 ± M.Y. old or older.

The evidence indicates that Robinson deleted this response and noted: "This info will be well covered in the report to be submitted to AEC August 17, 1973, for NA 3 and 4. Best not to say anything at all about it now."

(4) In response to the NRC comment, "Surface Faulting - Throughout this section referral is made to other portions of the Final Safety Analysis Report which are themselves only summaries of reports submitted for the construction permit. To facilitate a meaningful evaluation of this section, the applicable data should be made a part of the FSAR," Stone & Webster proposed language at Section 2.5.3.7 as follows:

There is no zone requiring detailed investigation of faulting of rock strata. A zone of shear movement with [sic] a chlorite rich foliation plane between rock strata was investigated for the adjoining Units 3 and 4.

Robinson deleted the reference to "the zone of shear movement" and noted: "This will be handled in NA 3 and 4 report, as stated previously."

(5) In response to the same NRC deficiency comment, S & W also proposed language at Section 2.5.3.8 similar to that at Page D2.5.2-2, supra. Robinson deleted all references to the fault discovery and retained the sentence that there was no evidence of "active faulting of rock strata" in the site area.

Robinson's comments were returned to Rutkowski on or about July 18, 1973, and then Rutkowski, upon finding the S & W language deleted, went to Robinson and asked for an explanation. Rutkowski states that he initially did not agree with the deletions by Mr. Robinson but was persuaded by him to incorporate the changes in the original amendment. The amendment was filed on July 31, 1973 under Ragone's cover letter signed by Daum. In addition, the amendment was served individually upon the three members of the ASLB panel who had considered the North Anna Units 3 and 4 construction permit application during the May 7-10, 1973 hearings. Their decision on the construction permit was pending.

VEPCO has consistently maintained that the only reason why the references to the fault were deleted was that a full report was being submitted later under the docket numbers for Units 3 and 4 and Amendment 20 was to be filed only under the docket numbers for Units 1 and 2. They offer no explanation as to why the Amendment was personally served on the licensing board which was considering the 3 and 4 application. In fact, on June 28, 1973 an ASLB panel had been established to consider the operating license for Units 1 and 2; none of the 3 members served on the construction permit panel for 3 and 4. Also, Robinson has admitted that since April 24, 1973 there was no doubt in the minds of any of the geologists that the feature discovered under Unit 3 was an extension of the chlorite seam earlier found under Units 1 and 2. Thus, the fault investigation was highly pertinent to both applications by VEPCO. We have not examined any of the S & W staff to determine whether they were called by Rutkowski or Robinson to explain the nature of the final changes.

Robinson's notes prior to July 12, 1973 indicate that both he and D & M intended to file an interim investigation report with the Commission describing the preliminary findings of the fault investigation. On July 12, 1973 the notes record a conversation with Ellwood of D & M as follows:

Told him of change in NA report: no interim report - only a final report to be submitted as AEC has indicated that submission of report will hold up CP. Date now is August 17; draft will be here no later than the 10th of August.

This comment indicates that Robinson believed the submission of any interim report would hold up the construction permit and that it would be preferable to proceed with construction as permitted by Houser and Cardone without risking a stay of the construction permit proceedings, which would result from the filing of a written report. It is logical that Robinson had the same view of the written amendment to the Safety Analysis Report as he would have had for the investigation report itself. Other notes during this period indicated that VEPCO personnel did not want the discovery of the fault to be leaked to the public before they had conclusively determined that the fault was minor, ancient, and of no significance to the project. One can conclude that VEPCO feared June Allen and her friends would delay the construction permit if they learned of the fault before a final determination of "incapability" had been made.

As of this time, the ASLB panel for the construction permit application for Units 3 and 4 had kept the record open until receipt from the Virginia State Water Control Board of a certification under Section 401 of the Federal Water Pollution Control Act that the heated water discharges from the nuclear plant into Lake Anna would not violate water quality standards. The ASLB had not been advised of any of the details of the fault discovery or investigation by either the company or the staff. Following completion of our depositions of the VEPCO personnel, we interviewed several NRC officials, some of whom had already given statements to the F.B.I. about the phone call from VEPCO on May 17, 1973. We were stunned to learn at this late date that knowledge of the fault had gone far beyond the technical staff level. Prior to this time none of the regulatory personnel or the lawyers in the office of the Executive Legal Director or General Counsel had advised us of the extent of knowledge of the fault. We interviewed the following persons: David Kartalia formerly staff attorney assigned to the North Anna case and now in private practice in Maryland; Stephen Lewis, also a staff attorney and still with the NRC; Edward Case, formerly Deputy Director of Nuclear Reactor Regulation and now Acting Director; Robert L. Ferguson, Project Director; Albert Schwencer, Chief of Operating Reactors Branch No. 1; A. T. Cardone, geologist; William P. Gammill, Chief of the Site Analysis Branch; and Seth Coplan, formerly a seismologist with the NRC.

We established that following the June 15, 1973 visit to the site, Ferguson reported to Case at a bi-weekly regulatory meeting attended by Case's superior, John O'Leary, formerly Director of Nuclear Reactor Regulation and now head

of FEA, and by L. Manning Muntzing, Director of Regulation. Mr. Muntzing was the top regulatory official in NPC. Ferguson described the fault as a feature which the geologists believed was ancient and not capable. Apparently, there had been no capable faults determined to exist in the Piedmont Region. Kartalia raised the question of whether the ASLB should be notified of the discovery. Ferguson states that he suggested simply sending his trip report of the fault investigation to the ASLB. Kartalia suggested sending a letter recommending that the ASLB reopen the hearing in the Application for Units 3 and 4 to consider the fault question. An affidavit from Cardone was also to be submitted to the Board. Case disagreed with Kartalia because he felt it was "premature" to request that new hearings be held and he thought that an affidavit could be submitted to supplement the public record without further hearings. Kartalia told us that Case was interested primarily in avoiding further delay in the construction permit and that his view ultimately prevailed. All witnesses agree that O'Leary stated that the ASLB should be notified but left it to the others as to how and when to do it. No one recalls what decision Muntzing took.

The witnesses recall that additional high-level discussions were held on this subject before the affidavit of Cardone was prepared on or about July 20, 1973. Cardone's affidavit stated that a fault had been discovered at the site for Units 3 and 4, that he had personally examined it on June 18, 1973, and that based upon the data from a preliminary analysis he believed that it was not a capable fault and that there was no reason to change the staff's initial Safety Evaluation Report that the site was acceptable. Cardone went on to say, however, that VEPCO would file a final report by August 15, 1973 and that the safety question should be resolved on the basis of that report. A cover memorandum was prepared from Cardone to Kartalia which stated, among other things, that "on the basis of this affidavit the board will be requested to proceed with their initial decision." One can conclude from this memo that as of July 20, 1973 the staff did not even intend to request the Board to reopen the hearings so that the public could be heard on a matter as vital as the siting of a nuclear power plant directly on top of a geological fault. Carbon copies of the July 20 cover memo were sent to seven staff members as far up as Case.

Between July 20 and August 3 however, the decision was apparently made not to request the Board to proceed with its initial decision but simply to submit for their consideration

the affidavit from Cardone. Accordingly, on August 3, 1973 the Cardone affidavit was filed with the ASLB. The filing of the affidavit came on the heels of a phone call from Mrs. Allen to Mr. Brownlee of NRC Region 2 in Atlanta wherein she asked whether there was a geological fault at North Anna. Mr. Brownlee in turn called VEPCO and apparently was notified that a fault did exist although it was considered to be of no significance. VEPCO warned Brownlee not to engage "in a long distance telephone conversation with an unknown caller." By memorandum of August 8, 1973 Proffitt advised Ragone that there was "considerable discussion" within VEPCO about Mrs. Allen's call and that Moore, President of VEPCO, was also advised as to the real possibility of the public becoming aware of the situation. It was finally decided that there would be no voluntary statement by VEPCO regarding the fault because "the concern was that if this developed into a substantive issue, the AEC would, in fact, withhold the issuance of a construction permit."

Finally, on August 6, 1973, contrary to VEPCO's plans, a story was run in the local papers that a fault had been discovered at the site of the North Anna plant. VEPCO hurriedly assembled the experts and made a presentation at a news conference.

On August 17, 1973 VEPCO submitted the final D & M report entitled, Supplemental Geological Data. The report concluded that the fault was not capable in the terms of the NRC regulation. It was the consensus of the geologists that the fault was older than one million years. On August 23, 1973 the ASLB asked the staff and VEPCO how to proceed in the face of the affidavit. On August 29, 1973 the State Water Control Board issued the 401 certification. On the same date the staff asked the ASLB to hold open the record for further proceedings. Another site meeting was held with the NRC and VEPCO on September 7, 1973. It was at this meeting that the S & W report relating to the discovery of the chlorite seam under Unit 1 in 1970 was first revealed to the Commission. The report was subsequently filed with the Commission on October 15, 1973.

Finally, on October 17, 1973 the NRC staff moved for an evidentiary hearing on the fault in the Unit 3 and 4 proceeding and the Director of Regulation issued an order to show cause why the construction permit should not be suspended with respect to Units 1 and 2. Subsequent hearings on the show cause petition and the imposition of penalties extended through 1975. As indicated above, the penalty decision is on appeal. It should be noted that the Directorate of Regulatory Operations, which was the NRC enforcement arm at this time,

performed an investigation without even interviewing the primary VEPCO personnel or examining memoranda of VEPCO and S & W. They concluded that there was no violation of any law or regulation and no basis for the imposition of any penalties whatsoever. The Executive Legal Director later commenced his own investigation which resulted in the imposition of the civil penalties.

IV

LEGAL EVALUATION OF POTENTIAL PROSECUTION
FOR VIOLATION OF 18 U.S.C. 1001

The evidence shows that although S & W geologists may have had some basis for mistaking the appearance of the fault under Unit 1, a definite offset was observed in April 1973 consisting of from 6-10 feet in the excavation for Unit 3. This discovery was viewed by the Engineering Department of VEPCO with considerable concern, although the company's retained geologists did not finally accept the feature to be a fault prior to May 14, 1973. Obviously, both S & W and D & H had their reputation (and their contracts) at stake since they had jointly conducted the entire site investigation for all four nuclear reactors and had certified the site to be free from any fault prior to April 1973. By one company estimate, the total investment in the site by VEPCO prior to May 1973 was in the neighborhood of \$730,000,000. Abandonment of the site at this point would have been intolerable from both a financial and public relations standpoint for all persons involved. In addition, the contemporaneous notes of the VEPCO team are replete with suggestions to "overwhelm the NRC with talent" and prepare "a convincing story." It is deeply disturbing to think that the people entrusted with design and construction of nuclear power plants for the purpose of producing energy for the public actually view the public as adversaries.

The heart of the case may be broken down into two time periods: from April 24, 1973 until May 14, 1973, and from May 14, 1973 through August 3, 1973. In the early period at least one geologist, Mr. Pastuszak from Stone & Webster, "strongly believed" that a fault existed under Unit 3. Other geologists and Robinson of VEPCO, who had limited geological training, suspected that a fault existed. This suspicion was relayed by Robinson to his superiors within VEPCO by memorandum of May 1, 1973. On the other hand in the same memorandum, Robinson notes that the geologists could not reach any conclusion as of April 30, 1973 as to whether there was in fact a fault. Swiger's notes

from the same meeting concludes that "on balance it is believed there is not a normal fault." Following the May 2 meeting Ellwood's preliminary opinion of "no fault", unsupported by data, was also forwarded to Spencer in a memorandum. Thus, although there can be no doubt that a fault was suspected prior to the May 7, 1973 public hearing, it would be difficult to obtain a criminal conviction of VEPCO for failure to report a feature at the public hearing which had only been known for about two weeks and about which there was some doubt as to whether it was indeed a fault. If the time period were greater or if the investigation had proceeded further along, we would have been able to charge VEPCO with concealment of material facts during the public proceeding and with making and using a false document (the PSAR).

During the second period after the May 14 meeting, we would have a much stronger case against VEPCO but for the actions of the NRC in sanctioning the continued construction by VEPCO and concealing on its own part from the ASLB the discovery of a fault. It should be understood that the ASLB, according to NRC regulations (10 C.F.R. 2.718 et seq.) has the power to reopen the proceedings for further evidence and its decision becomes the decision of the Nuclear Regulation Commission unless it is appealed. The ASLB decision is effective immediately, and a permit must be issued by the Director of Regulation upon entry of a favorable decision. Since the ASLB, then, does act as a separate adjudicatory panel, we could argue that notice to the staff does not constitute notice to the agency, which at this point is represented by the ASLB. In fact, the documents reveal a consistent policy by VEPCO of not filing during this period any formal document either by way of confirmatory letter, interim investigation report, or amendment to the Safety Analysis Report which would have apprised the ASLB and the public of the fault.

On the other hand, in the event of a trial, VEPCO would call as witnesses virtually the entire Office of Regulation of the NRC to testify that they were well aware of the fault and had determined not to take any immediate action to halt construction or to reopen the hearings. Indeed, VEPCO points to the fact that the ASLB, on its own part, did not take action upon being advised of the fault on August 3 but waited until the Director of Regulation issued its Order to Show Cause on October 17, 1973. These points all tend to defeat the Government's case that the concealment and the filing of Amendment 20 on July 31 had the natural tendency to affect the NRC's actions.

Moreover, although not technically relevant, Cardone and Coplan would testify that they did not even read Amendment 20 nor would the false statements contained therein have affected their review of the plant. Also, the ASLB was advised of the fault only three days after Amendment 20 was mailed when the Cardone affidavit was filed. Finally, as a legal matter until August 29, 1973, when the §401 state certification was issued, the ASLB was not in a position to issue the construction permit anyway.

In essence then, the possibility of successful criminal prosecution of VEPCO under 18 U.S.C. 1001 for concealment of the fault from April through July and for filing Amendment 20 on July 31, 1973 seems remote. This result is dictated largely by the actions of the Commission itself which in their best light can be characterized as ill-considered and inept, and perhaps more realistically, as demonstrating a pervasive bias against the public scrutiny which a project of this importance deserves and is entitled to under federal law. Had it not been for the persistent efforts of Mrs. Allen and her group, it is entirely likely that the NRC would not even have convened a full adjudicatory hearing on the fault question or have assessed penalties against VEPCO. I deeply regret that criminal sanctions may not be brought against VEPCO for misconduct in an area of such major public importance as the civil construction of nuclear reactors.