

EA 99-012

August 3, 2000

Mr. John K. Wood
Vice President - Nuclear
FirstEnergy Nuclear Operating Company
P. O. Box 97, A200
Perry, OH 44081

SUBJECT: ORDER IMPOSING CIVIL MONETARY PENALTY - \$110,000
PERRY NUCLEAR POWER PLANT

Dear Mr. Wood:

This refers to your letter dated February 25, 2000, in response to the Notice of Violation and Proposed Imposition of Civil Penalty (Notice) sent to FirstEnergy Nuclear Operating Company (FENOC) by our letter dated May 20, 1999. Our letter and Notice described one violation of 10 CFR 50.7, "Employee Protection," which was described in NRC Office of Investigations (OI) Report No. 3-1998-007. To emphasize the importance of maintaining a safety conscious work environment including permitting employees to participate in the proceedings of the U.S. Department of Labor without fear of retaliation, a civil penalty of \$110,000 was proposed.

In your response, you denied the violation and requested that the violation be withdrawn and the civil penalty be rescinded. Subsequently, after several conversations between Mr. H. Bergendahl, Director, Nuclear Services, FENOC and Mr. R. W. Borchardt, Director, Office of Enforcement, NRC, FENOC formally requested in an April 10, 2000, letter that the matter be dispositioned through an Alternative Dispute Resolution (ADR) process. In a July 26, 2000, response the NRC explained that the Commission's current regulatory process does not specifically provide for the use of ADR in the enforcement arena and that its use poses unique concerns in the area of discrimination. Accordingly, your request to proceed with ADR was denied.

In your February 25, 2000, letter you contended that the Radiation Protection Manager who counseled the Radiation Protection Supervisor (RPS) on July 16, 1997, did not intend to retaliate or discriminate against the RPS for his participation in a protected activity. In addition, you maintained that the documentation of this discussion did not impact the terms and conditions of the RPS' employment, and therefore was not an adverse action, and consequently an essential element is missing which would be needed to support a finding of retaliation. After considering your response and for the reasons given below, we have concluded that the violation occurred as stated in the May 20, 1999, letter and Notice and neither an adequate basis for withdrawing the violation, reducing the severity level, or mitigating or rescinding the civil penalty has been provided. The RPS was about to testify in a DOL proceeding under Section 211 of the Energy Reorganization Act of 1974 concerning alleged employment discrimination at the Perry Nuclear Power Plant, which is a protected activity under 10 CFR 50.7, "Employee Protection." Counseling the RPS concerning the deposition he was to provide in a DOL proceeding constituted an adverse action. In addition, the placing of a

memorandum which is characterized as documenting a "counseling session" in an employee's personnel file, even if the memorandum is subsequently removed, has the potential to impact the terms and conditions of the employee's employment, and, as such, is also an adverse action. As these were adverse actions deliberately taken against the RSO because he engaged in protected activity, the NRC has concluded that a violation of 10 CFR 50.7 occurred.

Accordingly, we hereby serve the enclosed Order on FENOC, imposing a civil monetary penalty in the amount of \$110,000. As provided in Section IV of the enclosed Order, payment should be made within 30 days in accordance with NUREG/BR-0254. In addition, at the time payment is made, a statement indicating when and by what method payment was made, is to be mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738. We will review the effectiveness of your corrective actions during a subsequent investigation.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Sincerely,

/RA/

Frank J. Miraglia, Jr.
Deputy Executive Director
for Regulatory Programs

Docket No. 50-440
License No. NPF-58

Enclosures: 1. Order Imposing Civil Monetary Penalty
2. NUREG/BR-0254 Payment Methods (Licensee only)

cc w/Encl 1.: B. Saunders, President - FENOC
G. Dunn, Manager, Regulatory Affairs
R. Schrauder, Director, Nuclear
Engineering Department
W. Kanda, General Manager
Nuclear Power Plant Department
N. Bonner, Director, Nuclear
Maintenance Department
H. Bergendahl, Director
Nuclear Services Department
State Liaison Officer, State of Ohio
R. Owen, Ohio Department of Health
C. Glazer, State of Ohio Public
Utilities Commission

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

First Energy Operating Company, FENOC
Perry Nuclear Power Plant
Unit 1

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Docket No. 50-440
License No. NPF-58
EA 99-012

ORDER IMPOSING CIVIL MONETARY PENALTY

I

First Energy Operating Company (FENOC or Licensee) is the holder of Operating License No. NPF-58 issued by the Nuclear Regulatory Commission (NRC or Commission) on November 13, 1986. The license authorizes the Licensee to operate the Perry Nuclear Power Plant, Unit 1, in accordance with the conditions specified therein.

II

An investigation of the Licensee's activities was completed by the NRC Office of Investigation (OI) on December 18, 1998. The results of this investigation indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated May 20, 1999. The Notice states the nature of the violation, the provision of the NRC's requirements that the Licensee violated, and the amount of the civil penalty proposed for the violation.

The Licensee responded to the Notice in a letter dated February 25, 2000. In its response, the Licensee denied the violation, requested that the violation be withdrawn, and requested the proposed civil penalty be rescinded.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined the violation occurred as stated and that the penalty proposed for the violation designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee pay a civil penalty in the amount of \$110,000 within 30 days of the date of this Order, in accordance with NUREG/BR-0254. In addition, at the time of making the payment, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738.

The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a "Request for an Enforcement Hearing" and shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, and to the Regional Administrator, NRC Region III, 801 Warrenville Road, Lisle, IL 60532-4351.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

- (a) whether the Licensee was in violation of the Commission's requirements as set forth in the Notice referenced in Section II above and
- (b) whether, on the basis of such violation, this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Frank J. Miraglia, Jr.
Deputy Executive Director
for Reactor Programs

Dated at Rockville, Maryland
this 3rd day of August 2000

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