

January 18, 2002

Mr. Robert Grant
Numanco, L.L.C
One Memorial Place
7633 East 63rd Place, 4th Floor
Tulsa, Oklahoma 74133

Dear Mr. Grant:

I am writing on behalf of the Nuclear Regulatory Commission (NRC) in response to your letter of October 28, 2001, regarding the Notice of Violation issued to you by the NRC staff on September 6, 2000. You state that your request for an evidentiary hearing was denied by the staff on September 7, 2001, and that the denial was arbitrary, not supported by the facts, and denied your right to due process. You asked the Commission to grant you a discretionary hearing.

Before replying to your request for a discretionary hearing, I would like to briefly summarize the legal requirements which govern when hearings associated with Nuclear Regulatory Commission actions must be held. Section 189a of the Atomic Energy Act prescribes those proceedings for which an opportunity for a hearing is required. The types of proceedings enumerated include the granting, suspending, revoking, or amending of licenses and the issuance of rules and regulations, but not notices of violation.

The statutory requirement that a Federal agency offer a hearing on certain actions is only the first source of authority relevant to a determination of whether a hearing must or should be held, and, if so, the nature of the hearing. Constitutional law, including the Due Process Clause, and other statutory law, such as the Administrative Procedure Act, must also be considered. Based on these authorities and the Commission's judgment as how to best balance appropriate factors such as fairness to all parties, development of sound records, and the expeditious conduct of agency business, the Commission has identified in its enforcement regulations those enforcement actions that will be subject to an opportunity to request a hearing. They include the issuance of orders (10 C.F.R. § 2.202), including orders imposing civil penalties (10 C.F.R. § 2.205(d), but not the issuance of Notices of Violation (10 C.F.R. § 2.201).

The Commission's Enforcement Policy (NUREG-1600) describes a variety of enforcement-related actions that may be taken in various circumstances, including Notices of Violation. In addition to those formal enforcement actions, the Policy describes certain related administrative actions, including Notices of Deviation, Notices of Nonconformance, Confirmatory Action Letters, Letters of Reprimand, and Demands for Information. Due process hearing rights are not implicated by the issuance of a notice of violation or any of these administrative actions unless there has been a deprivation of a property or liberty interest. The process due depends on the nature of the agency action. The process afforded to an individual

need not involve evidentiary rules like those used by courts. *Waters v. Churchill*, 511 U.S. 661, 675-77 (1994). In addition, the Supreme Court has held that not every government action that injures an individual's reputation infringes upon a constitutionally recognized liberty or property interest. *Paul v. Davis*, 424 U.S. 693, 701, 706, 710-12 (1976). Due process often entails only the right of an individual to be notified of the charges (e.g., violation) and an opportunity to respond to those charges. See *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 30 (1994).

For those actions which impose legally enforceable obligations or prohibitions on an individual or other person, including orders and the imposition of a civil penalties, the Commission's regulations provide the opportunity for any person adversely affected by the action to demand a hearing on the action. See, e.g., 10 C.F.R. § 2.202(a)(3) regarding orders and § 2.205(d) regarding the imposition of civil penalties. For those actions that require or request only information, such as demands for information, or which only state the NRC's position without imposing any obligation or prohibition on any person, such as notices of violation, the regulations provide an opportunity to respond in writing to the action. See, e.g., § 2.204(a)(2), (b) regarding demands for information and § 2.201 regarding notices of violation.

Thus, the Notice of Violation that was issued to you is not among the actions for which the Atomic Energy Act requires a hearing be offered, nor is it an action for which the Commission has determined generally as a matter of policy to offer for a hearing. The Notice of Violation did offer you the opportunity to respond in writing to the Notice of Violation.

Based on a review of the agency record in this matter, including the previous requests for a hearing from you and your attorney, Mr. Perry Robinson, as well as the NRC staff's denial of those requests, the Commission has concluded that the circumstances do not warrant the grant of a discretionary hearing and the further expenditure of resources that the hearing would entail. We are not aware of any case in which the Commission has held a hearing on a notice of violation (not associated with an order of some type) and we are unable to find a sufficient reason to depart from the Commission's long-standing policy to deny evidentiary hearings on notices of violation. The written record of this matter adequately describes not only the NRC staff's position on the underlying facts, but also your position. Your letter of October 25, 2001, and this response will become part of the written record.

I hope that this letter adequately explains the Commission's position in this matter and is helpful to you.

Sincerely,

/RA/

Richard A. Meserve