

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	Docket Nos. 50-445/83-03
)	50-446/83-01
TEXAS UTILITIES GENERATING)	
COMPANY, et al.)	Permits Nos. CPPR-126
)	CPPR-127
(Comanche Peak Steam)	
Electric Station))	EA No. 83-64

LICENSEES' ANSWER PROTESTING
CIVIL PENALTY

On August 29, 1983, the NRC Staff (Region IV) proposed a \$40,000 civil penalty in the captioned enforcement action against Texas Utilities Generating Company, et al. ("Licensees") for an alleged violation of 10 C.F.R. Part 50, Appendix B, Criterion I. Pursuant to 10 C.F.R. § 2.205, Licensees hereby respond to that proposed imposition of civil penalties.

I. Denial of Violation

For the reasons set forth in "Licensees' Response to Notice of Violation" (which we incorporate by reference) at pages 2 through 15, Licensees hereby deny in full the alleged violation and respectfully request that the proposed civil penalty be withdrawn or mitigated in full. Alternatively, Licensees urge that the Staff hold in abeyance any further consideration of whether the proposed civil penalty should be imposed pending judicial

review of the Secretary of Labor's Final Decision and Order in Atchison v. Brown & Root,¹ on which Final Decision this enforcement action is based. The basis for such request is set forth in Licensees' Response to the NOV at pages 19 through 22, also incorporated by reference.

II. Extenuating Circumstances

The extenuating circumstances which Licensees believe warrant the withdrawal or complete mitigation of the proposed civil penalty are set forth in Section IV, below.

III. Error in NOV

The Staff categorized the alleged violation as Severity Level III and proposed the \$40,000 base civil penalty for alleged violations of that severity level. Licensees submit that the alleged violation should have been characterized as Severity Level IV and that, as specified in the Enforcement Policy, no civil penalty should have been proposed.²

¹ Atchison v. Brown & Root, Inc.; 82-ERA-9; June 10, 1983; appeal pending sub nom.; Brown & Root v. Donovan, No. 83-4486 (5th Cir.).

² See 10 C.F.R. Part 2, Appendix C at Tables 1A and 1B and § IV.B.

As discussed in detail in Licensees' Response to the NOV, the Secretary did not make any findings with respect to possible safety impacts of the violation of Section 210 of the Energy Reorganization Act. Nor did the Secretary make any findings concerning the adequacy of Licensees' QA/QC program.³

In addition, the Staff itself made no independent findings on either of these matters. Its investigation of Atchison's original allegation did not substantiate or refute the claim of wrongful discharge under Section 210 of the Energy Reorganization Act and did not reveal any safety or programmatic issues raised by those claims.⁴ Similarly, the Licensing Board in the Comanche Peak operating license proceeding found that the Secretary's Decision did not address any safety questions and was not dispositive one way or the other as to whether this incident was an isolated occurrence.⁵ Finally, the Staff's recent investigation confirmed that there was no chilling effect on the issuance of NCRs due to Mr.

³ Licensees' Response to the NOV at 4-7.

⁴ Inspection and Enforcement Report 82-10 and 82-05; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2); June 30, 1982 at 2.

⁵ Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2); Docket Nos. 50-445, 50-446; Memorandum and Order (Collateral Estoppel; Atchison Case); July 6, 1983 slip op. at 4-5.

Atchison's discharge.⁶ Thus, the investigation revealed no safety or programmatic problems. Accordingly, because there is no evidence of systemic deficiencies in Licensees' QA/QC program, Licensees submit that the alleged violation should be categorized as a Severity Level IV. It clearly should not be treated by the Staff as a "significant" violation of NRC Regulations and thus categorized as Severity Level III.⁷

This view is confirmed by comparing the alleged violation in this enforcement action with analogous enforcement actions recently taken by the Staff. On October 5, 1982, the NRC Staff (Region III) proposed a \$40,000 civil penalty against Illinois Power Company for alleged Severity Level III violations of Appendix B, Criterion I at Clinton.⁸ In addition, on November 24, 1981, the NRC Staff proposed a \$50,000 civil penalty against Cincinnati Gas & Electric for an alleged Severity

⁶ Inspection and Enforcement Report 83-34 and 83-18; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2); September 12, 1983.

⁷ A Severity Level III violation is of "significant concern to NRC" while a Severity Level IV violation is of "more than minor concern. . . ." 10 C.F.R. Part 2, Appendix C, § III.

⁸ The \$40,000 civil penalty was one component of a \$90,000 total civil penalty. Illinois Power Company (Clinton Nuclear Power Station); Docket No. 50-461; Notice of Violation and Proposed Imposition of Civil Penalties; October 5, 1982.

Level III violation of Appendix B, Criterion I at Zimmer.⁹ In both of these cases, the Staff alleged numerous incidents which it claimed indicated systemic deficiencies in QA programs.

The Staff in this enforcement action, however, alleged only one isolated incident which it claimed constituted a violation of Criterion I, and never even directly related that incident to Appendix B. It then proposed a sanction which was virtually identical to those proposed in Clinton and Zimmer. Accordingly, to reflect the significance of the instant case relative to Clinton and Zimmer, Licensees submit that the alleged violation here should be categorized as Severity Level IV, not Severity Level III.

Licensees recognize that there has been considerable publicity surrounding the Atchison case because of the pendency of the Comanche Peak OL case. However, undue sanctions should not be imposed on the Licensees simply because the case is celebrated. In addition, the Director of the Office of Inspection and Enforcement must assure that consistency in enforcement sanctions is maintained between the various NRC regional offices so that

⁹ This was one component of a \$200,000 total civil penalty. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station); Docket No. 50-358; Notice of Violation and Proposed Imposition of Civil Penalties; November 24, 1981.

an NRC licensee does not suffer (or benefit) because it is located in one Region rather than another. It is in this light that Licensees have presented here the comparison of the instant case with the Clinton and Zimmer cases, a comparison that we believe compels the conclusion that the Staff should reclassify the instant case as Severity Level IV.

IV. Other Reasons Why the Proposed Penalty Should Not Be Imposed

Even if the alleged violation was properly categorized as Severity Level III, Licensees submit that the Staff should exercise its discretion in this enforcement action and not impose the base civil penalty for the alleged violation. Instead, recognizing that the objective of any civil enforcement action should be to remedy rather than punish, the Staff should mitigate the proposed civil penalty in its entirety to reflect the unique facts in this case.

While the Secretary may have found a violation of Section 210, the record before the Department of Labor confirms beyond doubt that the QC inspector "repeatedly misrepresented facts about his background."¹⁰ In fact, the Secretary ordered that the inspector not be reinstated to his former job because of his

¹⁰ Secretary's Decision at 27.

prevarications.¹¹ Moreover, the Administrative Law Judge at Labor found that the QC inspector "lied on his application for Brown and Root in employment when he stated he received an associate's degree from Tarrant County Junior College . . . [;]" "physically altered a copy of the Tarrant County Junior College reply to Brown and Root to reflect his achievement of a degree and then used this altered form as part of his January, 1982 application for TUGCO employment[;]" and made "misstatements at points under oath" in connection with July, 1982 hearings.¹² The evidentiary record in the Comanche Peak OL case before the NRC supports the same findings.¹³

Under these circumstances, where the discharged QC inspector is found to be flatly dishonest, Licensees submit that the Staff should withdraw (or mitigate to zero) the proposed civil penalty. Further, the QC inspector discharged is not of the competence of other QC inspectors at Comanche Peak, and his treatment can therefore in no way be considered indicative of the treatment

¹¹ Id. at 25-27.

¹² Atchison v. Brown & Root; Case No. 82-ERA-9; December 3, 1982, Recommended Decision at 3.

¹³ Texas Utilities Generating Co. (Comanche Peak Steam Electric Station); 50-445 and 50-446; Transcript of Operating License Proceedings at 3270-71, 3340-41, 3356-57 and CASE Exhibit 650A at 1.

afforded other QC inspectors. The recent Staff investigation concluding that Mr. Atchison's discharge had no chilling effect on the issuance of NCRs confirms that QC inspectors feel free to report non-conforming conditions. In view of those unique facts, Licensees urge that the Staff exercise its discretion and reduce the proposed civil penalty.

V. Mitigation

The Enforcement Policy provides that the Staff may mitigate a proposed civil penalty by 50% in the event of unusually prompt and extensive corrective action.¹⁴ The Enforcement Policy also expressly provides that after the Staff has mechanistically applied the Policy to arrive at a preliminary penalty, the Staff will then exercise judgment and discretion when determining the appropriate enforcement sanction.¹⁵ Based on the exercise of such discretion, the Staff has in the past mitigated proposed civil penalties in full.¹⁶

¹⁴ 10 C.F.R. Part 2, Appendix C § IV.B.2.

¹⁵ Id. at § I.

¹⁶ E.g., August 16, 1983 letter from Richard C. DeYoung, Director, Office of Inspection and Enforcement, U. S. Nuclear Regulatory Commission to Mr. Warren Murphy, Vice President and Manager of Operations, Vermont Yankee Nuclear Power Corp.; Appendix at 3 (mitigating in full proposed civil penalty in EA-83-34); October 5, 1982 letter from Richard C. DeYoung, Director, Office of Inspection and Enforcement, U. S. Nuclear
(footnote continued)

Licensees submit that in view of the narrow scope of the alleged violation, the unique facts underlying this enforcement action set forth in the preceding section of this Answer, and the aggressive and comprehensive responsive actions now being implemented, complete mitigation of the proposed civil penalty is warranted.

As described in detail in Section III of Licensees' Response to the Notice of Violation (which is incorporated herein), Licensees are taking several additional steps to assure that incidents of this nature do not occur and to assure that no employee at Comanche Peak is inhibited in any way from expressing his or her concerns with respect to quality related work at the site. These responsive actions are convincing evidence that Licensees' management is concerned and will act promptly and forcefully to assure that management control of the QA/QC program is firm and that the necessary independence of that program from cost and schedule considerations is reaffirmed. In these circumstances, the Staff's enforcement action has already accomplished its intended

(footnote continued from previous page)

Regulatory Commission to Mr. W. G. Counsil, Senior Vice President, Nuclear Engineering and Operations, Northeast Nuclear Energy Company at 2 (mitigating in full proposed civil penalty in EA-82-33).

results, and no purpose would be served by imposing a monetary penalty. Thus, the proposed civil penalty should be mitigated to zero.

VI. Conclusion

For the reasons set forth above, Licensees request that the proposed civil penalty be withdrawn or mitigated in full.

September 28, 1983