



UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION III
801 WARRENVILLE ROAD
LISLE, ILLINOIS 60532-4351

October 9, 1996

EA 96-253

Mr. John P. Stetz
Senior Vice President - Nuclear
Centerior Service Company
Post Office Box 97, A200
Perry, Ohio 44081

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY -
\$160,000
(U.S. DEPARTMENT OF LABOR (DOL) ADMINISTRATIVE LAW JUDGE (ALJ)
RECOMMENDED DECISION AND ORDER (CASE NO. 96-ERA-6))

Dear Mr. Stetz:

On October 26, 1995, the DOL Wage and Hour Division in Cleveland, Ohio, received a complaint by six insulators who claimed that they were denied access at Centerior Energy facilities because they were involved in litigation against Centerior regarding an exposure to radioactive materials while working at the Davis-Besse Nuclear Power Station. The denial of access by Centerior resulted in Fischbach Power Services, Inc., a Centerior contractor at the Perry Nuclear Power Plant, terminating one insulator and not hiring the other five. In response to the complaint, the Wage and Hour Division conducted an investigation, and in a letter dated January 9, 1996, the District Director of the Wage and Hour Division found that the evidence obtained during the Division's investigation indicated that the six insulators were protected employees engaging in a protected activity within the scope of the Energy Reorganization Act and that discrimination as defined and prohibited by the statute was a factor in the actions which comprise their complaint. Centerior filed an appeal with the DOL ALJ on January 16, 1996. In a Recommended Decision and Order dated June 11, 1996, the ALJ determined that the complainants had shown by the clear preponderance of evidence that Centerior's actions, which resulted in the termination of one complainant and the banning of the other five complainants, were in deliberate retaliation for their filing the civil complaint under the Atomic Energy Act.

Based on NRC review of the ALJ's Recommended Decision and Order, two violations of the Commission's regulations set forth in 10 CFR 50.7, "Employee Protection," have occurred. Under 10 CFR 50.7, discrimination by a Commission licensee against an employee or contractor employee for engaging in protected activities is prohibited. The violations are cited in the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice) and the circumstances surrounding the violation are described in detail in the ALJ's Recommended Decision and Order. Before the NRC made its enforcement decision, we provided you an opportunity to respond to the apparent violation in a letter dated July 18, 1996. In your response dated August 16, 1996, you disputed the apparent violation because you believe that a "public liability action" (i.e., a radiation injury lawsuit) is not conduct protected by the

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Energy Reorganization Act, and because you believe you had a legitimate basis for declining to hire individuals who profess to be suffering severe and debilitating emotional distress. However, the DOL ALJ disagreed with your legal argument and determined that Centerior's proffered reasons for terminating one of the insulators and banning the other five insulators, including your emotional distress argument, were pretextual. We do not disagree with the ALJ that filing a civil action against you under the Atomic Energy Act in this case is a protected activity.

Since the discrimination involved actions by the then-Director of the Perry Nuclear Services Department, essentially arising out of a single protected activity, the violations have been categorized as a Severity Level II problem in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. Such violations are very significant because they could have a chilling effect on other licensee or contractor personnel and deter them from identifying and/or raising safety concerns.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$80,000 is considered for a Severity Level II problem. The NRC considered whether credit was warranted for *Identification* and for *Corrective Action* in accordance with the civil penalty assessment process in Section VI.B.2 of the Enforcement Policy. Credit was not warranted for identification because the violation was not self-identified. Credit was not warranted for your corrective actions. You notified your employees of your decision to pursue an appeal of the ALJ's decision and emphasized that none of your employees misinterpret the appeal as any indication of unreceptiveness to safety concerns. Additionally, you re-emphasized that all employees should understand that it is their duty to identify conditions adverse to quality or safety and they may do so, publicly or confidentially, without any fear of retaliation. However, as you have informed us, you have neither provided a remedy to the parties involved in the DOL proceeding against you nor do you plan any further corrective action, unless the ALJ's decision is not overturned on administrative appeal or judicial review.

Therefore, to emphasize the importance of continuously assuring a work environment that is free of any harassment, intimidation, or discrimination against those who are engaged in protected activities, I have been authorized, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research, to issue the enclosed Notice in the total (twice the base) amount of \$160,000 for the Severity Level II problem.


You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. Since the NRC enforcement action in this case is being proposed prior to the final decision of the U.S. Department of Labor Administrative Review Board on this matter, you may delay payment of the proposed civil penalty, as well as certain portions of the response, as described in the enclosed Notice, until 30 days

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after the final decision of the U.S. Department of Labor Administrative Review Board. The NRC will use your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response will be placed in the NRC Public Document Room (PDR).

Sincerely,


A. Bill Beach
Regional Administrator *fr*

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

Enclosure: Notice of Violation and Proposed
Imposition of Civil Penalty

cc w/encl: L. W. Myers, Vice President, Nuclear
L. W. Worley, Director, Nuclear
Services Department
J. D. Kloosterman, Manager,
Regulatory Affairs
W. R. Kanda, Director, Perry Nuclear
Assurance Department
N. L. Bonner, Director, Perry
Nuclear Engineering Dept.
H. Ray Caldwell, General
Superintendent Nuclear Operations
R. D. Brandt, General Manager Operations
Terry J. Lodge, Esq.
State Liaison Officer, State of Ohio
Robert E. Owen, Ohio
Department of Health
C. A. Glazer, State of Ohio,
Public Utilities Commission