

RAS 3090

DOCKETED
USNRC
LBP-01-18

'01 MAY 31 A11 :09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED MAY 31 2001

In the Matter of

FIRST ENERGY OPERATING COMPANY,
FENOC

(Perry Nuclear Power Plant, Unit 1;
Operating License No. NPF-58)

Docket No. 50-440-CivP

ASLBP No. 01-784-01-CivP

EA 99-012

May 31, 2001

MEMORANDUM AND ORDER
(Approving Settlement Agreement and Terminating Proceeding)

This proceeding concerns an August 3, 2000 Order Imposing a Civil Monetary Penalty of \$110,000, 65 Fed. Reg. 49,610-11 (August 14, 2000), resulting from an alleged violation by First Energy Operating Company (FENOC or Licensee) of NRC's employee-protection regulations. The alleged Severity Level II violation was based upon the asserted discrimination by a management official against an employee for engaging in protected activities (i.e., testifying in a whistleblowing case before the Department of Labor).

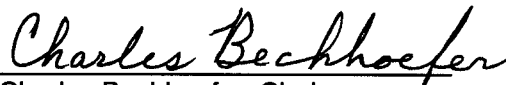
On October 18, 2000, FENOC filed a timely request for a hearing. By Memorandum and Order dated November 7, 2000, this Board granted FENOC's request and, on the same date, issued a Notice of Hearing. See 65 Fed. Reg. 68,163 (November 14, 2000). In the same Order, and in accord with the October 31, 2000 request of both parties to the proceeding (FENOC and the NRC Staff), we suspended further proceedings for a discrete time period to allow the parties an opportunity to pursue settlement negotiations. Upon further requests by both parties in order to facilitate settlement of the case, by Orders dated December 4, 2000, January 25, 2001, February 8, 2001, March 16, 2001, and May 4, 2001, we granted further extensions of the suspense period, the last suspension extending until June 19, 2001.

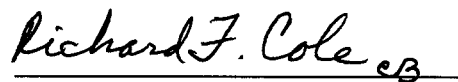
As part of their settlement negotiations, the parties jointly requested the appointment of a settlement judge. On March 16, 2001, a settlement judge was appointed. Based in part on the efforts of the settlement judge, who held formal mediation sessions with counsel on March 21, 2001, and with the parties and counsel on May 8, 2001, the parties, on May 22, 2001, filed a joint motion for the Licensing Board to approve a settlement agreement and terminate the proceeding. The agreement provides, inter alia, for an \$80,000 civil monetary penalty, based on a Severity Level III violation. The parties express the view that settlement in accord with the agreement (a copy of which is attached to this Memorandum and Order) is in the public interest.

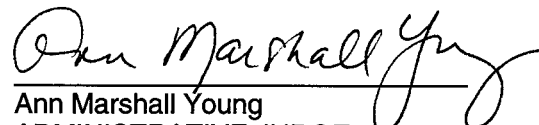
Under 10 C.F.R. § 2.203, the Licensing Board is authorized to approve a stipulation for the compromise of a civil penalty, "according due weight to the position of the staff." Given Staff approval of the stipulation in this case, the Licensing Board hereby approves the stipulation and terminates the proceeding.

IT IS SO ORDERED.

The Atomic Safety and Licensing Board


Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE


Dr. Richard F. Cole
ADMINISTRATIVE JUDGE


Ann Marshall Young
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 31, 2001

[Copies of this Memorandum and Order (including the attachment) have been transmitted this date by e-mail to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 50-440-CIVP
FIRSTENERGY NUCLEAR OPERATING)	
COMPANY)	ASLBP No. 01-784-01-CivP
)	
(Perry Nuclear Power Plant, Unit 1;)	EA 99-012
Operating License No. NPF-58))	

SETTLEMENT AGREEMENT

The United States Nuclear Regulatory Commission (hereinafter "NRC") and FirstEnergy Nuclear Operating Company (hereinafter "FENOC"), in consideration of the promises and representations contained in this document, hereby agree as follows:

1. On August 3, 2000, the NRC issued an Order Imposing Civil Monetary Penalty ("Order") in Enforcement Action 99-012 (EA 99-012) with respect to an alleged violation by FENOC. That Order asserted that, as described in a Notice of Violation and Proposed Imposition of Civil Penalty ("Notice") sent to FENOC by letter dated May 20, 1999, Centerior Energy Corporation¹ (Commission licensee of the Perry Nuclear Power Plant ("Perry") prior to the FirstEnergy merger, thereafter and subsequent thereto FENOC), discriminated against a Radiation Protection Supervisor (RPS) on July 16-17, 1997, for engaging in protected activities within the scope of 10 C.F.R. § 50.7. The alleged discrimination consisted of verbal counseling on July 16, 1997 and the placement of a July 17, 1997 memorandum documenting same in the RPS's section personnel file on July 22, 1997 and subsequently removed from the file on

¹ Prior to NRC approval of the transfer of operating authority of Perry to FENOC, a new company, 63 Fed. Reg. 67939 (December 9, 1998), The Cleveland Electric Illuminating Company and Centerior Service Company were agents for the licensed owners of Perry and had exclusive responsibility for, and control over, the construction, operation, and maintenance of Perry. *Id.*

February 4, 1998. The protected activities pertained to a deposition that the RPS was to give (and subsequently gave) in the pre-hearing discovery phase of a Department of Labor Section 211 proceeding concerning alleged employment discrimination by Centerior Energy involving a co-worker of the RPS. The Order imposed a civil monetary penalty in the amount of \$110,000 based upon a Severity Level II violation.

2. On October 18, 2000, FENOC requested an enforcement hearing in response to the Order entered in EA 99-012 in order to present to an Atomic Safety and Licensing Board (hereinafter "Licensing Board") testimony and evidence to contest the alleged violation of 10 C.F.R. § 50.7 and the Order as unjustified under the evidence and applicable regulations and law, as well as to pursue resolution pursuant to 10 C.F.R. § 2.203.

3. By Memorandum and Order dated November 7, 2000, the presiding Licensing Board granted the request of FENOC for a hearing and also granted the Joint Motion of FENOC and the NRC Staff to suspend proceedings to afford said parties an opportunity to pursue settlement negotiations.

4. As the result of the above, FENOC and the NRC have concluded that it is in the respective interests of FENOC and the NRC, as well as the public interest, to settle the dispute at issue in EA 99-012. Such settlement is encouraged by 10 C.F.R. § 2.203. Therefore, FENOC and the NRC agree as follows:

- A. The NRC and FENOC will jointly move the Board to approve this Settlement Agreement and to terminate this proceeding, pursuant to 10 C.F.R. § 2.203.
- B. Although there has not been any adjudication of any violation of 10 C.F.R. § 50.7 by FENOC, as a full and final settlement of the dispute at issue in EA 99-012, and as a *compromise of disputed claims*, FENOC does not contest the existence of a Severity Level III violation in response to the Notice sent to FENOC by NRC of May 20, 1999 referenced and described in paragraph 1 above.

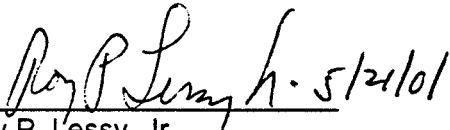
- C. The NRC agrees to reduce the amount of civil monetary penalty imposed by the Order to \$80,000 and the Severity Level of the violation to Severity Level III.
- D. As provided for in NUREG 1600, NRC Enforcement Policy, Paragraph C.2.a, Civil Penalty Assessment, Initial Escalated Action, escalated enforcement actions may impact discretion decisions for subsequent escalated actions for up to a two-year period. For this enforcement action, the NRC agrees that the two-year period is considered to have started on January 26, 1999 (the date of the letter from NRC Region III to FENOC re: Predecisional Enforcement Conference) and will have terminated on January 26, 2001, after which EA-99-012 will not be considered by the NRC in deciding subsequent escalated enforcement action involving FENOC as operator of Perry. Accordingly, this voluntary Settlement Agreement has no other use, nor can it create any new legal rights or liabilities, except as a full and final settlement of this matter.
- E. Within seven (7) business days of notice of approval of this Settlement Agreement by the presiding Licensing Board, FENOC agrees to pay a \$80,000 civil monetary penalty. Such payment shall be made by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and such check, draft, or statement indicating the date and time when an electronic transfer was made shall be mailed to Frank J. Congel, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738.
- F. This Settlement Agreement constitutes final disposition of the matters giving rise to EA 99-012 and to this litigation. In consideration of the terms of this Agreement, the NRC will assert no further enforcement or other claims, in any form or forum, related to the matters addressed in EA 99-012 and the underlying

inspection report, Notice, and correspondence, and FENOC will not pursue any further hearings on, or judicial review of, EA99-012.

IN WITNESS WHEREOF, FENOC and the NRC have caused this Settlement Agreement to be executed by their duly authorized representatives.

FIRSTENERGY NUCLEAR OPERATING
COMPANY

UNITED STATES NUCLEAR
REGULATORY COMMISSION



Roy P. Lessy, Jr.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue,
Washington, D.C. 20036
Counsel for FENOC
(202) 887-4500



Frank J. Congel, Director
Office of Enforcement
United States Nuclear Regulatory
Commission
11555 White Flint North
Rockville, MD 20852-2738

Dated: May 22, 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FIRSTENERGY NUCLEAR OPERATING)
COMPANY)
)
(Perry Nuclear Power Plant, Unit 1))

Docket No. 50-440-CIVP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (APPROVING SETTLEMENT AGREEMENT AND TERMINATING PROCEEDING) (LBP-01-18) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Ann Marshall Young
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Administrative Judge
Alan S. Rosenthal
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dennis C. Dambly, Esq.
Susan S. Chidakel, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Roy P. Lessy, Jr., Esq.
Donald R. Livingston, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Ave., NW, Suite 400
Washington, DC 20036

John K. Wood
Vice President
Perry Nuclear Power Plant
10 Center Road
Perry, OH 44081

Docket No. 50-440-CIVP
LB MEMORANDUM AND ORDER
(APPROVING SETTLEMENT AGREEMENT
AND TERMINATING PROCEEDING)
(LBP-01-18)


Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of May 2001