



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

April 7, 2004

EA-04-028

Carolina Power & Light Company
ATTN: C. S. Hinnant
Senior Vice President
Nuclear Generation/CNO
P. O. Box 1551
Raleigh, NC 27602

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY-
\$88,000 (U.S. DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD
CASE NO. 02-007)

Dear Mr. Hinnant:

This is in reference to a Department of Labor (DOL) complaint filed by Mr. Richard M. Kester, formerly the Superintendent of Site Access Authorization for Carolina Power and Light Company (CP&L), against CP&L under Section 211 of the Energy Reorganization Act (ERA) of 1974. On October 18, 2001, a DOL Administrative Law Judge (ALJ Case No. 00-ERA-31), in a Recommended Decision and Order, concluded that Mr. Kester had failed to establish that CP&L retaliated by discharging him and dismissed the complaint. Mr. Kester appealed the ALJ Decision to the DOL Administrative Review Board (ARB). On September 30, 2003, the ARB, in its Final Decision and Order of Remand (ARB Case No. 02-007), reversed the ALJ decision and found that Mr. Kester had engaged in protected activity and that the protected activity was a contributing factor in his termination. The ARB remanded the matter to the ALJ for further proceedings consistent with this decision. On January 13, 2004, the ALJ issued a "Recommended Decision and Order Approving Settlement Agreement and Dismissing Complaint With Prejudice", approving a settlement agreement between Kester and CP&L.

The NRC's review of the ARB decision identified an apparent violation of the Commission's requirements in 10 CFR 50.7, Employee Protection, which was transmitted to CP&L by letter dated February 19, 2004. The February 19th letter provided CP&L the opportunity to either respond to the apparent violation in writing or request a predecisional enforcement conference. CP&L representatives informed NRC that they did not wish to attend a predecisional enforcement conference. By letter dated March 19, 2004, CP&L provided its response to the apparent violation and addressed the corrective actions to prevent recurrence. NRC has reviewed the March 19, 2004, response and concludes that sufficient information is available to determine the appropriate NRC enforcement action in this matter.

This matter was fully litigated during the DOL proceedings, and the NRC adopts the ARB's Final Decision and Order of Remand. The NRC has determined that the apparent violation described in our February 19, 2004, letter is best characterized as a single violation of NRC requirements. The violation is cited in the enclosed Notice of Violation and Proposed

Imposition of Civil Penalty (Notice), and involves actions taken by CP&L against Mr. Kester which were in violation of 10 CFR 50.7. Specifically, the NRC has determined that CP&L discriminated against Mr. Kester, as described in the DOL ARB decision, by terminating his employment with CP&L. DOL and the NRC have both concluded that the protected activity was a contributing factor in Mr. Kester's termination. This violation has been categorized at Severity Level II in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600.

In our February 19, 2004, letter we stated that CP&L terminated Mr. Kester in retaliation for raising concerns about a security breach at CP&L's nuclear facilities. Your March 19, 2004, response letter suggested that the basis for the apparent violation as characterized in our February 19, 2004, was inaccurate. We agree that our characterization in that letter of the apparent violation was incorrect.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$88,000 is considered for a Severity Level II violation. In accordance with the civil penalty assessment process, Section VI.C.2 of the Enforcement Policy, both the *Identification* and *Corrective Action* factors are considered for Severity Level II violations. No credit was determined to be warranted for *Identification*, because this violation was identified through the filing of a DOL complaint and not by the actions of CP&L. Corrective actions documented in CP&L's response letter of March 19, 2004, included the following actions taken prior to the ARB decision: (1) moving the Access Authorization organization from Corporate Security to a newly created Nuclear Security section in the Nuclear Generation Group which receives direction from the Chief Nuclear Officer, (2) appointing a new Nuclear Security Manager who reports directly to the Chief Nuclear Officer, (3) providing computer-based training to supervisor and managers reinforcing that Nuclear Generation Group employees are encouraged to raise concerns through the Corrective Action Program, the leadership chain of command, the Employee Concerns Program or directly to the NRC. After the ARB made its final decision, CP&L took the following additional actions: (1) resolved the allegations to Mr. Kester's satisfaction, and (2) published expectations to supervisors and managers to communicate the receipt of the apparent violation regarding actions taken against an employee in violation of the employee's protected rights as described in 10 CFR 50.7. CP&L also committed to take the following corrective actions: (1) establish a biennial refresher training program for the Nuclear Generation Group managers and supervisors to reinforce the requirements of 10 CFR 50.7, (2) evaluate General Employee Training and Retraining to ensure it effectively captures employee rights under 10 CFR 50.7, and (3) develop and provide Group Employee Concerns computer based training to individual contributors in the Nuclear Generation Group to reinforce the requirements of 10 CFR 50.7. Based on the above, the NRC has concluded that credit is warranted for the factor of *Corrective Action*.

Therefore, I have been authorized, after consultation with the Deputy Executive Director for Reactor Programs, to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty in the base amount of \$88,000 for the Severity Level II violation.

The NRC has concluded that information regarding the reason for the violation and the corrective actions taken to prevent recurrence has already been provided in CP&L's letter of March 19, 2004, and as discussed above. Therefore, you are not required to respond regarding these matters unless the description in those letters and as summarized above does

not accurately reflect your corrective actions or your position. In that case, or if you choose to provide additional information, you should follow the instructions specified in the enclosed Notice.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response (if you choose to provide one) will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. The NRC also includes significant enforcement actions on its Web site at www.nrc.gov; select **What We Do, Enforcement**, then **Significant Enforcement Actions**.

Sincerely,

/RA/

Frank J. Congel, Director
Office of Enforcement

Docket Nos.: 050-325, 050-324 ,050-261, 050-400
License Nos.: DPR-71, DPR-62, DPR-23, NPF-63

Enclosure: Notice of Violation and Proposed Imposition of Civil Penalty

cc w/encl:

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cc w/encl (continued):

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OFFICE	ES:OE	OGC		D:OE
NAME	D. Starkey	D. Dambly (e-mail)		F. Congel
DATE	4/1/04	3/30/04		4/7/04

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NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTY

Carolina Power and Light Company

Docket Nos. 050-325,
050-324 , 050-261, 050-400
License Nos. DAR-71,
DAR-62, DAR-23, NPF-63
EA-04-028

As a result of a Department of Labor (DOL) Administrative Review Board (ARB) Final Decision and Order of Remand issued on September 30, 2003, a violation of NRC requirements was identified. In accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions," (Enforcement Policy), NUREG-1600, the Nuclear Regulatory Commission proposes to impose a civil penalty pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205. The particular violation and associated civil penalty is set forth below:

10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. The activities which are protected are established by Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. Protected activities include, but are not limited to, reporting of safety concerns by an employee to his employer or the NRC.

Contrary to the above, Carolina Power & Light Company (CP&L) discriminated against Mr. Richard M. Kester, the former Corporate Superintendent of Site Access Authorization at CP&L, when it terminated his employment on April 26, 1999 for engaging in a protected activity. Specifically, Mr. Kester engaged in a protected activity when he reported to the Employee Concerns manager certain events related to CP&L's access authorization program and that this protected activity was a contributing factor in his termination.

This is a Severity Level II violation (Supplement VII), Civil Penalty - \$88,000

The NRC has concluded that information regarding the reason for the violation, the corrective actions taken and planned to correct the violation and prevent recurrence and the date when full compliance was achieved has already been provided in CP&L's letter of March 19, 2004. Therefore, you are not required to respond to this Notice. However, you are required to submit a written statement or explanation pursuant to 10 CFR 2.201 if the description therein does not accurately reflect your corrective actions or your position. In that case, or if you choose to respond, clearly mark your response as a "Reply to a Notice of Violation," and send it to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555, with a copy to the Regional Administrator, Region II, within 30 days of the date of the letter transmitting this Notice of Violation (Notice).

CP&L may pay the civil penalty proposed above in accordance with NUREG/BR-0254 and by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, a

statement indicating when and by what method payment was made, or may protest imposition of the civil penalty in whole or in part, by a written answer addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission. Should CP&L elect to file an answer in accordance with 10 CFR 2.205 protesting the civil penalty, in whole or in part, such answer should be clearly marked as an "Answer to a Notice of Violation" and may: (1) deny the violation listed in this Notice, in whole or in part, (2) demonstrate extenuating circumstances, (3) show error in this Notice, or (4) show other reasons why the penalty should not be imposed. In addition to protesting the civil penalty in whole or in part, such answer may request remission or mitigation of the penalty.

In requesting mitigation of the proposed penalties, the factors addressed in Section VI.C.2 of the Enforcement Policy should be addressed. Any written answer in accordance with 10 CFR 2.205 should be set forth separately from the statement or explanation in reply pursuant to 10 CFR 2.201, but may incorporate parts of the 10 CFR 2.201 reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the Licensee is directed to the other provisions of 10 CFR 2.205, regarding the procedure for imposing civil penalties.

Upon failure to pay any civil penalties due which subsequently have been determined in accordance with the applicable provisions of 10 CFR 2.205, this matter may be referred to the Attorney General, and the penalties, unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234(c) of the Act, 42 U.S.C. 2282c.

The responses noted above (Reply to Notice of Violation, statement as to payment of civil penalties, and Answer to a Notice of Violation) should be addressed to: Mr. Frank Congel, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, with a copy to the Regional Administrator, U.S. Nuclear Regulatory Commission, Region II, Sam Nunn Atlanta Federal Center, 23T85, 61 Forsyth Street, SW, Atlanta, GA 30303-3415.

Because your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), to the extent possible, it should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information).

In accordance with 10 CFR 19.11, you are be required to post this Notice within two working days.

Dated this 7th day of April 2004