DEC 2 0 1979

Docket No. 50-255

Consumers Power Company
ATTN: Mr. R. C. Youngdahl
Executive Vice President
1945 West Parnall Road
Jackson, MI 49201

Gentlemen:

Your letter of November 29, 1979, protesting the proposed imposition of civil penalties and requesting remission or mitigation of the penalties makes essentially four basic points:

1. "...the evidence to date does not conclusively demonstrate that any violation occurred." (p. 2);

2. "...the correct maximum [total penalty] is 17 x $25,000, not 18 x $25,000 [as proposed]." (p. 3); the Notice of Violation was erroneous in that there was a "misconception of the potential accident consequences..." (p. 2) and

3. the stated enforcement policies of the Commission "have been largely ignored" (p. 3); and

4. there exist a number of mitigating factors such as the fact that the violations were "voluntarily and timely reported" by the licensee, "corrective action...was undertaken promptly" and penalties in these circumstances lack any "remedial purpose". (pp. 10-11).

With respect to your first major point we are apparently in essential agreement as to the facts. We cannot, however, accept your view that a violation does not exist unless the evidence shows it "conclusively." In our view, the plain factual inference is that the valves in question were mistakenly left open for an extended period.

We fail to understand the basis for your second basic point. Part 100 dose estimates must be based on calculations using assumptions similar to your Maximum Hypothetical Accident (MHA) assumptions. When MHA assumptions are used, your calculations, with which we basically agree, show dose estimated in excess of Part 100 limits. Statements that Part 100 limits have been met using other less conservative dose calculation assumptions (DBA dose calculation) are not in keeping with Part 100 criteria.

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There were, according to your own records, 476 days during the relevant 517-day span during which the reactor was operated in other than a cold shutdown condition. At no time during any 30-day period within the 517-day span was the reactor in a cold shutdown condition for 25 days or more. Therefore, at least five violations occurred during every 30-day period encompassed by the 517-day span. Moreover, in addition to the seventeen 30-day periods covered by the 517 days, there are seven additional days during which violations occurred. Thus, the correct calculation is 17 x $25,000 plus 7 x $5,000 (limited to $25,000) equals $450,000.

You make several specific charges in support of your contention that NRC enforcement policies "have been largely ignored." First you state that "a violation representing a threat to public health and safety...is not the case here." Contrary to your view we nevertheless continue to believe, as stated in my letter of November 9, that "prolonged violation of containment integrity is a matter of very serious safety significance." This basic fact underlies our view that this case is not properly considered "normal" and that, in this particular situation, computation of the period of violation is entirely consistent with the portion of the Statement of Consideration quoted on page 4 of your response.

Your next point seems to be that since you "voluntarily discovered and reported the condition and took immediate corrective action," civil penalties are not appropriate. In making this point no mention is made of the fact that you are required to report and correct conditions of this sort and that even more serious sanctions such as suspension or revocation might be in order for failing to meet those obligations. I shall not again rehearse the gravity with which we view the dereliction in question. Suffice it to say here that the "voluntary" actions you took do not operate to prevent the imposition of civil penalties either as a matter of sound policy or as a legal matter.

The third point you make is that the published Enforcement Criteria indicate that items of noncompliance which "caused or resulted in actual consequences will be differentiated from those that merely provided the potential for the consequences." You then contend that such a differentiation was not made in this case. You find such a conclusion "apparent" from the fact that a $450,000 fine is proposed for Consumers while only a $155,000 fine was proposed for 148 violations associated with the Three Mile Island accident. I fail to follow this reasoning. There are, by your own count, 476 items of noncompliance here. Moreover, had actual overexposures occurred as a result of these items it is very likely a shutdown of the reactor would have been ordered rather than merely the imposition of penalties.

Your next point is that here "the items of noncompliance are not repetitive or numerous" and "do not constitute an immediate or serious threat to health and safety." For the reasons previously provided to you I regard the 476 derelictions here quite seriously threatening to the public health and safety.

Your next point is, apparently, that the violations here must be fitted into one of the eleven categories of examples set forth in the Criteria (or cases comparable to any of the eleven) and that the violations here cannot be fitted into any of the categories. This contention misreads the Criteria. The first three sentences of the Criteria for civil monetary penalties read as follows:

> "The Commission may levy civil monetary penalties on licensees who do not comply with the licensing provisions of the Act or any rule, regulation, order, or license issued. Generally, the type of cases that are appropriate for imposing civil penalties are those involving significant items of noncompliance and which represent a threat (but not necessarily immediate) to the health, safety, or interest of the public, or to the common defense or security, or the environment. As a matter of judgment, civil penalties may be used in lieu of license suspension when there is no immediate threat to the health and safety or the common defense and security and license suspension would deprive the licensee or his employees of their means of livelihood, or the public of essential service."

This is the general rule. The eleven categories of examples which follow in no way limit nor purport to limit the general rule for the application of civil penalties--a rule manifestly applicable here. In fact, this case falls squarely within example (h) of the criteria as it involves items of noncompliance in the violation category.

Your next point takes issue with the categorization of two of the items of noncompliance here as "violations" rather than "infractions." We believe both of these items of noncompliance had a "substantial potential for...contributing to or aggravating...an incident or occurrence [such as] (b) Radiation levels in unrestricted areas which exceed 50 times the regulatory limits..." By your own analysis releases under certain accident conditions could result in exposure rates of more than 100 mr/hr which would exceed the limits of 10 CFR 20.105 (b)(1) by a factor of 50. Therefore, the items of noncompliance are properly categorized as "violation".

Your next point is predicated on your notion--discussed and shown to be in error by the comments above--that the penalties here "fail to follow the Statement of Consideration [accompanying promulgation of 10 CFR 2.205] and the [published] Enforcement Criteria." On that erroneous premise you fault the penalties here on the grounds that they are products of new enforcement policies which have not been adequately published in advance. It is certainly true that over the years, and not just since the accident at Three Mile Island, the NRC has been applying existing enforcement policies in an increasingly more vigilant and diligent fashion. Continued noncompliances mandate such action. However, the basic policies remain the same and all licensees have long since been on notice that serious noncompliances will be met with serious enforcement actions.

The final charge you make in support of your contention that NRC enforcement policies "have been largely ignored" is that the proposed penalty action here is "arbitrary and capricious when contrasted with the many instances involving similar events, where licensees have not been cited at all for noncompliance or where, if cited, they have been penalized at a much lower level. The recently proposed civil penalties for the Three Mile Island accident are only the most obvious example." I have already discussed the differences between your derelictions and those at Three Mile Island. Your failure to provide any other indications as to the "many instances involving similar events" as well as my own study of the matter leads me to question whether such instances exist. In all events the serious safety violations here merit the enforcement sanction of civil penalties in the total amount of $450,000.

Regarding the matter of possible mitigation of the penalties which have been proposed, you list six factors for consideration. Briefly summarized they are:

1. the noncompliances "were voluntarily and timely reported",

2. there is no evidence of bad faith or willfulness,

3. extensive corrective action was undertaken promptly,

4. the cited violations are not representative of chronic violations,

5. the public health and safety was not, in fact, adversely affected, and

6. the penalties here are "solely punitive".

Factors such as reporting matters you were required to report anyway, taking corrective actions you would be required to take if you had not done so, not being in bad faith, not involving a chronic violation, and not actually over-exposing anybody are all "negative mitigation factors" in the sense that had any of them been present they would have warranted even more severe sanctions than those proposed. To be sure, we are pleased that the violations which did occur were not aggravated by any of those additional factors. However, they do not represent factors for mitigation here. Looked at a bit differently, these factors were taken into account--in the sense that they were not present to aggravate the situation further--when the initial $450,000 penalty was proposed.

The final factor you mention--that the penalties here are "solely punitive"--is in my view simply not the case. It is my firm expectation that in the wake of the imposition of these penalties your company will be more vigilant in the future to avoid noncompliances of this particular sort and, indeed, noncompliances in general. I also trust that other licensees will, in the light of this action, take appropriate steps to enhance their own confidence that future noncompliances will be avoided. For these reasons I believe that the penalties here quite clearly have a remedial or deterrent aspect and that they are not properly characterized as being solely punitive.

Accordingly, after careful consideration of your November 29, 1979 responses to the Notice of Violation and Notice of Proposed Imposition of Civil Penalties, which were sent to you on November 9, 1979, we conclude that the items of noncompliance did occur as described in the Notice of Violation and no valid reasons have been given for mitigation or remission of the proposed penalties. We hereby serve the enclosed Order on Consumers Power Company imposing civil penalties in the amount of Four Hundred and Fifty Thousand Dollars ($450,000).

Sincerely,

Original signed by
Victor Stello

Victor Stello, Jr.
Director
Office of Inspection
and Enforcement

Enclosure:
Order Imposing Civil Monetary Penalties

WPU:SM	ROI	ROI	FFMSD	ROI	ELD	OOS	A/DD:IE	D:IE
12/14/79	JRiesland	SEBryan	JSniezek	NCMoseley	JLieberman	GCGower	DThompson	VStello
JOB N	12/18/79	12/18/79	12/18/79	12/19/79	12/19/79	12/18/79	12/19/79	12/ /79

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