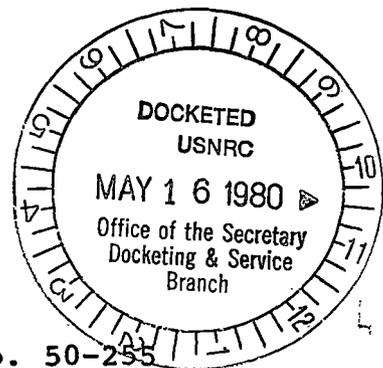


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADMINISTRATIVE LAW JUDGE



In the Matter of)
)
CONSUMERS POWER COMPANY)
(Palisades Nuclear Power Facility))

Docket No. 50-255
License No. DPR-20

MOTION TO COMPEL

Pursuant to an informal agreement reached between Consumers Power Company ("Consumers") and attorneys for the NRC Staff (the "Staff"), Consumers, on February 21, 1980, served certain interrogatories and requests for production of documents on the Staff. By letter dated March 6, 1980, the Staff indicated that it would informally respond to such discovery requests which encompass "matters which are appropriately discoverable in this case." The Staff has objected to certain discovery requests on the grounds that they request information which is irrelevant, not necessary to a proper decision by the Administrative Law Judge ("ALJ") in this case and are otherwise not properly discoverable in this proceeding. Attorneys for the Staff have informed attorneys for Consumers that the objections of the Staff are those objections which would have been advanced by the Executive Director of Operations had discovery been initiated formally pursuant to 10 CFR §2.720(h) and §2.744. Therefore, the Staff has agreed that the merit of Staff's objections are ripe for determination by the ALJ. By this Motion, Consumers

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seeks a ruling that the information sought in Consumers' discovery requests is relevant to the subject matter of this proceeding, is necessary for a proper decision in this proceeding and is not privileged from disclosure in this proceeding. Therefore, the requested information should be produced by the Staff.

Argument

Under the Commission's Rules of Practice, discovery directed to the NRC Staff is appropriate if the information sought is a) relevant, b) necessary to a proper decision in the proceeding, c) is not subject to any applicable privilege and d) is not reasonably obtainable from other sources. 10 CFR §§2.720(h) and 2.744. The Staff has implicitly asserted that the information it has declined to produce is not available in the NRC's public document room and claimed that the information is privileged and therefore need not be disclosed. See, "NRC Staff's Responses To Consumers Power Company's 'First Round of Interrogatories and Request For The Production Of Documents,' Dated February 21, 1980," at pages 2, 5-7 and fn. 2. Based on these statements, the ALJ should find that the information requested is not available except through discovery from the Staff. Moreover, as we will establish below, the discovery requests in question are not privileged for purposes of this proceeding and are both relevant and necessary to a proper decision.

With respect to relevance and necessity requirements, the Commission's Rules of Practice relating to discovery directed to the NRC Staff appear to have been drafted only with licensing proceedings in mind. In such a proceeding, the applicant has the burden of proof, and it is not inappropriate to insulate the Staff by imposition of a "necessity" showing from complying with discovery requests from other parties for materials of marginal relevance. However, we seriously question whether, in a civil penalty hearing wherein the NRC seeks to deprive a licensee of property, it is consistent with due process to deny a licensee relevant information based on the concept of necessity, absent some overwhelming countervailing public interest. In enforcement proceedings, the Staff acts in the nature of a prosecuting attorney. The Staff may well possess information which, to the Staff, appears to be of limited significance, but, if known to the licensee, could be central to its defense. Nonetheless, Consumers believes that the relevant materials requested in its discovery requests are clearly necessary to the proper disposition of this proceeding for the reasons set forth hereinafter in this Motion.

A. Privilege

The fundamental objection of the Staff is based on an asserted qualified privilege of intra-agency confidentiality incorporated in 10 CFR §2.790(a)(5).*

* This same privilege is alluded to in the quotation at page 537 from a Federal Trade Commission decision in Radiation Technology, Inc., ALAB-567, 10 NRC 533 (1979). The Radiation Technology case, however, did not rule on the existence of any such privilege.

standards of public availability are found in the Freedom of Information Act (5 U.S.C. §552), and that statute incorporates the qualified privilege regarding intra-agency information for purposes of agency responses to general Freedom of Information Act requests. However, the Freedom of Information Act does not purport to set rules of discovery in proceedings before the courts of the United States or hearings before the federal agencies. Rather, the Freedom of Information Act makes certain documents in the possession of federal agencies available to the general public. The Commission has incorporated standards of public availability in 10 CFR §2.790(a) which lists limited exceptions to the general rule that all NRC documents will be maintained in a public document room accessible to the general public. Courts of the United States have repeatedly and explicitly held that the exceptions listed in the Freedom of Information Act to the general requirement that agency documents be provided to members of the general public at their request does not constitute a list of documents privileged for purposes of discovery in connection with litigation. See, e.g., Boyd v. Gullett, 64 F.R.D. 169, 177 (D. Md. 1974); Verrazano Trucking Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972). Thus, decisions interpreting the Freedom of Information Act, such as Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974) and Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), are inapposite.

Moreover, to the extent that any such intra-agency privilege exists, a matter which need not be determined by the ALJ, such privilege is waived by the agency if the agency seeks to impose civil penalties on its regulatees. In United States v. Continental Can Co., 22 F.R.C. 241 (S.D.N.Y. 1951), the court addressed the question of the availability of the governmental privilege where the agency is a party to the proceeding and concluded that:

[t]here is ample authority for the belief that, regardless of the extent of the privilege when strangers seek to pry open the government's files for private benefit, once the government itself comes into court as a party, even in the performance of a regulatory function, it waives the privilege, if any it had. Id. at 245.

Similarly, in United States v. Reynolds, 345 U.S. 1 (1953), the United States Supreme Court has recognized that in criminal cases the government can invoke its evidentiary privileges only at the price of letting the defendant go free.

The rationale of the criminal cases is that, since the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Id., p. 12.*

* This language is no less applicable in this "civil" proceeding. Clearly, the underlying rationale for the above language hinges upon the fact that the government is attempting to deprive the accused of a protected liberty or property interest which is precisely what is at issue in this proceeding.

In Ghana Supply Com'n. v. New England Power Co., 83 F.R.D. 536 (D. Mass. 1979), the court discussed the waiver principle in the context of a regulatory agency attempting to impose civil sanctions:

In several cases adopting a waiver approach, the United States seeks to enforce its civil regulatory authority, and thus, . . . the defendant is exposed to a possible penalty. Certainly the fact that a defendant faces a regulatory penalty increases the unfairness of allowing the government to withhold material information and strengthens the case for a waiver. Id. at 594. (Emphasis supplied)

Thus, if the privilege claimed by the Staff ever existed, it has been waived for this proceeding. Indeed, the Staff has an affirmative obligation to lay all relevant materials before the ALJ to enable him to properly dispose of the issues before him. Consolidated Edison Co. (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 NRC 13, 15 (1973) and Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974).

B. Relevance and Necessity

Under the Commission's Rules of Practice, at 10 CFR §2.740(b), and under Rule 26 of the Federal Rules of Civil Procedure, after which 10 CFR §2.740 was modeled, discovery is generally available regarding any matter, not privileged, if it relates to a claim or defense of any party or it appears reasonably calculated to lead to the discovery of admissible evidence. The Commission's Rules do not define relevance, but there is no reason to believe that rele-

vance, as used in the Commission's Rules, has any meaning other than the universally accepted definition of relevance set forth in Rule 401 of the Federal Rules of Evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

10 CFR §2.740(b), which defines the general scope of discovery, is not directly applicable to the Staff. However, it is clear from 10 CFR §2.740(b) that, for purposes of pre-trial discovery, relevance should be broadly defined to encompass material that is relevant or is likely to lead to relevant information.

In arguing that the information sought by Consumers is not relevant, the Staff has created a straw man. The Staff relies exclusively on a reported decision which holds that certain defenses are not available to a respondent in arguing against the imposition of civil penalties. The Staff then objects to producing any information which might conceivably support such a defense. However, information cannot be withheld merely because it is relevant to inappropriate issues, if it is relevant to appropriate issues as well. All of Consumers' discovery requests seek information relevant to the issues set forth in the Notice of Hearing.

1. Interrogatories 2(b), (c), (d) and (e),
3, 4 and 5

Interrogatories 2(b), (c), (d) and (e) and 5 request facts, calculations, criteria, recommendations and documents considered during the internal review process which led up to the Notice of Violation, as well as an identification of the Director's ultimate position, and the bases for that position, with respect to his determination that the proposed civil penalties are warranted.

Specifically, Interrogatory 2(b) requests that the NRC identify each person who categorized the alleged items of noncompliance, the factors and data used in that categorization and how such factors or data entered into the categorization. The NRC's enforcement criteria assigns different levels of civil penalty depending on how an item of noncompliance is categorized. Pursuant to the Notice of Hearing, one of the issues to be decided by the ALJ is whether the order imposing civil penalties should be sustained. If the alleged items of noncompliance were incorrectly categorized, the ALJ would be warranted in altering the proposed civil penalties. It is inconceivable that the very factors considered by the Staff in reaching a determination on an issue which is now before the ALJ are irrelevant in their totality to that issue. Further, since the Staff has the burden of establishing that Item I of noncompliance in the Notice of Violation ("Item I") can appropriately be classified as a violation, Consumers must be informed of

the proof and arguments with respect to this issue in preparing its defense.

Interrogatory 2(c) requests the identity of each person who categorized one of the items of noncompliance as a continuing violation, the factors and data considered by each such person and a description of how those factors or data influenced the categorization. Consumers will argue that none of the items of alleged noncompliance are continuing violations as that term is defined in the Commission's Statement of Considerations on enforcement policy. Consumers must, therefore, be entitled to be apprised of the evidence and legal interpretations on which the Staff will rely in meeting its burden of demonstrating that Item I constitutes a continuing violation. Further, if some individuals responsible for classifying Item I concluded that it should more properly be classified as a single violation, the identity of these persons and a description of the considerations which influenced their conclusion are directly relevant or calculated to lead to relevant information. Considerations which may have militated toward lesser penalties, and which were obviously rejected by the Director, are directly relevant to any arguments Consumers may advance in support of its contention that the civil penalties imposed are not warranted.

Interrogatory 2(e) is also aimed at determining the manner in which the Staff has interpreted the enforcement criteria and applied them to the facts of this case.

One of the criteria relied upon by the Staff in reaching its determination that Item I constitutes a violation is that Item I had "substantial potential for . . . constituting or aggravating . . . an incident or occurrence [such as] (b) radiation levels in unrestricted areas which exceed 50 times the regulatory limits." In applying this criterion to the facts of this case, one must hypothesize an "incident", determine which are the proper "regulatory limits" (for example, 10 CFR Part 20, 10 CFR Part 100, technical specifications, etc.), and calculate whether, under the incident hypothesized, the radiation levels in unrestricted areas would exceed 50 times the regulatory limits. Inasmuch as this criterion will apparently be one of the bases in support of the Staff's claim that Item I constitutes a violation, Consumers must be informed prior to hearing of the Staff's interpretation of this criterion. Further, Consumers must also be entitled to analyze the Staff's calculations to determine whether they are accurate.

Interrogatories 2(d), 3, 4 and 5 request a description of, and documents related to, the Staff review which led to the Director's Notice of Violation. Consumers must be provided with this information in order to place the information sought in Interrogatories 2(b), (c) and (e) into proper context. For example, it may well be that certain recommendations by Staff personnel which, on their face indicate that Item I should not be classified either as continuing in nature or as a violation, were made prior to

the discovery of facts which place into question the validity of these recommendations. Knowledge of such information would clearly be relevant to Consumers' eventual determination regarding any arguments which Consumers may wish to advance in support of its contentions that the civil penalties imposed are not warranted.

The Staff argues, based on the holding in Radiation Technology, ALAB-567, 10 NRC 533 (1979), that the material requested in Interrogatories 2(b), (c), (d) and (e) and 3, 4 and 5 is irrelevant. The Staff's reliance on Radiation Technology is misplaced. In Radiation Technology, the Appeal Board held that it was not a denial of due process for the ALJ to refuse to permit a licensee to cross-examine the Director of Inspection and Enforcement for purposes of demonstrating that the Director's decision to charge the licensee with certain violations was based on alleged improper ex parte communications. In turn, this determination was based on the Appeal Board's conclusion that a licensee's right to a hearing, and thus the protection from ex parte communications involving the decision-maker, did not attach until a notice of violation had been issued. The Radiation Technology case neither holds nor implies that matters considered by the Director of Inspection and Enforcement or any of his subordinates, in connection with their enforcement activities, are, per se, irrelevant to issues which must be decided at a hearing on the appropriateness of proposed

civil penalties. Indeed, it is difficult to imagine information which might be more relevant.

The Staff has made the blanket assertion that only the final determination by the Director of Inspection and Enforcement is necessary to a proper decision in this proceeding; that is, that Consumers is guilty of certain violations and that certain civil penalties should be imposed. The Staff has apparently not considered the fact that, in preparing for its defense, Consumers is entitled to rely not only on facts within its possession, but is also entitled to rely on facts in the possession of others that may be relevant to any defense Consumers may raise. That the Director of Inspection and Enforcement may have rejected certain recommendations of his subordinates or may not have been persuaded by certain matters considered by his subordinates or by himself is in no way dispositive of the question of whether consideration of these same matters is necessary for a proper decision in this proceeding. As the Staff cogently points out in its objections to Consumers' discovery requests, by virtue of Consumers' request for a hearing, the ALJ, not the Director, is the ultimate judge of the facts supporting the alleged violations and must exercise his own discretion on the appropriateness of the proposed civil penalties. The Staff offers no reason whatsoever why the ALJ, in deciding these issues, should be precluded access to materials considered by the Staff in deciding initially the very same issues. Consumers believes that the ALJ should not be so

handicapped and should not be required to make his determination based solely on evidence which the Staff, in its prosecutorial role, believes supports the charges and the outcome of this proceeding it seeks. If this material is to be considered by the ALJ, fundamental concepts of due process require that Consumers be apprised prior to hearing of the evidence under which it is charged and on which it will be judged in order to enable Consumers to prepare and argue its defense.

A second reason that the requested information is necessary for a proper decision in this proceeding arises from the fact that Consumers is entitled as a matter of right to a trial de novo on the charges before a United States District Court.* As we have shown in the preceding section of this Motion, when and if this proceeding reaches court, the materials sought to be protected by the Staff must be provided to Consumers notwithstanding the NRC's claim of privilege. If Consumers is handicapped in the

* 28 USC §1355 confers on the federal District Courts "original jurisdiction, exclusive of the courts of the states, or any other action or proceeding for the recovery of the fine, penalty, or forfeiture . . . incurred under any action of Congress." The legislative history clearly indicates that Congress intended a de novo review in the District Courts. See Hearings before the Joint Committee on Atomic Energy, 91st Congress, 1st Sess., on AEC Omnibus Legislation, September 12, 1979. The language of §234(c), which provides for the collection action by the Justice Department, is the same as that proposed by the AEC, which stressed at the Hearings that "civil action would be instituted by the Department of Justice in Federal district court when the right to a full hearing on the merits of the charges would exist."

hearings before the ALJ by the denial of access to materials to which it will be entitled prior to trial before the District Court, this proceeding will be, in effect, a nullity. Certainly, the District Court will attach no weight whatsoever to a decision made in a proceeding which affords Consumers less access to information than it would be entitled to before the Court.

2. Interrogatories 12, 13 and 14

Each of these Interrogatories is directed at discovering information concerning the manner in which the enforcement criteria has been interpreted and applied in past enforcement actions.* The Staff has generally supplied responses to these Interrogatories, except to the extent that the Interrogatories seek information regarding the Staff's review prior to the ultimate decision regarding the enforcement action to be taken. Consumers submits that this information is relevant and necessary to a proper decision in this proceeding.

First, as we have previously stated, a crucial issue in this proceeding concerns the proper interpretation

* Interrogatory 12 requests information concerning past enforcement actions involving containment integrity noncompliances. Interrogatory 13 seeks information concerning past enforcement actions relating to noncompliances which the Staff considers of a similar severity as a breach of containment integrity noncompliance. Interrogatory 14 seeks information related to incidents wherein the Staff categorized a noncompliance as a violation based upon the determination that the noncompliance had "substantial potential for . . . contributing or aggravating . . . an incident or occurrence [such as] radiation levels in unrestricted areas which exceed 50 times the regulatory limits."

of the enforcement criteria. Clearly, the manner in which these criteria have been interpreted in past enforcement actions weighs heavily upon their interpretation in this proceeding. In fact, one of the primary objectives of the Office of Inspection and Enforcement's enforcement program "is to assure maximum compliance practicable with Commission requirements through consistent application of reasonable sanctions in accordance with uniform procedures." IE "Inspection and Enforcement Manual," Chapter 0800, §0803.

It may be that in past enforcement actions the recommendations made by those persons who initially evaluated items of noncompliance were consistently adopted by the ultimate decisionmaker and that, in this proceeding, such recommendations were rejected because of other considerations. Consumers believes that if this is the case, the ALJ ought to be entitled to weigh these considerations in determining the weight to be applied to the interpretation of the criteria advanced by the Director in this proceeding. Of course, since the Staff has refused to respond to Consumers' requests, we are not now in a position to determine whether these circumstances exist. Consumers is, however, entitled to pursue this possibility in preparing to defend against the Staff's allegations.

In this proceeding the ALJ is being asked to interpret enforcement criteria which are not necessarily self-explanatory, as is evident from the fact that the civil penalty proposed by the Staff is based on a "continuing

violation," even though the facts of this case do not appear to be consistent with the circumstances under which the Commission has stated a fine based on a continuing violation will be levied.*

In analogous situations, where faced with a problem of statutory construction, the courts give great deference to the interpretation of the person who is charged with the administration or enforcement of the statute. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965), reh. denied, 380 U.S. 989. Although this interpretation may not be controlling, it is entitled to great weight unless there are compelling indications that it is wrong. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). In this proceeding, the interpretations of those persons who initially evaluated the factual situation involving an item of noncompliance and who applied the enforcement criteria thereto should similarly be considered in determining the proper manner in which the criteria should ultimately be

* As quoted by the Staff in response to Interrogatory 7, the Statement of Considerations accompanying the issuance of 10 CFR §2.205 reads, in part:

In a case where, despite the exercise of reasonable diligence, a licensee was not aware of the violation until brought to its attention by the Commission, the computation of the period of violation would normally begin at the time or after the time allowed the licensee for corrective action. On the other hand, if the evidence showed that a licensee had knowingly permitted violations to continue, the computation of the period of violation might begin at the time the licensee permitted the violations to continue.

interpreted. Inasmuch as the Interrogatories in question seek information which would shed light upon the meaning of these criteria, they are unquestionably relevant and necessary to a proper decision in this proceeding.

3. Interrogatory 17

This Interrogatory seeks information within the Staff's possession concerning Consumers' past history as an NRC licensee with respect to Consumers' compliance or lack of compliance with NRC regulatory requirements. The Staff has acknowledged the relevance of this information and has supplied Consumers with a copy of a memorandum from James Keppler, Office of Inspection and Enforcement, Region III, to George C. Gower, dated October 26, 1979, in partial response to the Interrogatory. In this memorandum, Mr. Keppler states that he has attached a "draft letter to the licensee with attached Notice of Violation and Proposed Imposition of Civil Penalties," as well as a "table of containment integrity violations reported since the beginning of 1978." Although the Staff has produced the aforementioned table, it has refused to produce the referenced letter and Notice. The draft letter and Notice are clearly covered by Interrogatories 3 and 4. These documents should, therefore, be produced for the reasons set forth in our discussion above regarding these Interrogatories.

Conclusion

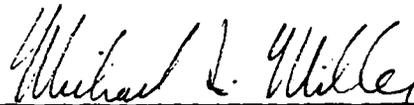
The Staff's heavy reliance on the Radiation Technology decision in support of objections to Consumers' discovery requests indicates strongly that the Staff gave no consideration to the possibility that the information they now seek to protect from disclosure may be relevant to appropriate issues in this proceeding and necessary for their proper resolution, as well as being relevant to a legal theory advanced in the Radiation Technology case and rejected by the Appeal Board. (See page 6 of NRC Staff's Response to Consumers' discovery requests.) Any given fact may be relevant to a multitude of issues. If a fact is relevant to a material issue, it is discoverable, notwithstanding its possible relevance to issues not appropriate for adjudication. The information sought in Consumers' Interrogatories is not made irrelevant by the fact that some member of the Staff considered it to be relevant at some earlier stage of review. Nor can Radiation Technology be interpreted as establishing an evidentiary privilege which the courts have expressly held does not exist under the circumstances of this case.

WHEREFORE, the Administrative Law Judge should find that all the materials requested in Interrogatories 2, 3, 4, 5, 12, 13, 14, 15 and 17 are relevant, necessary for a proper decision in this proceeding and not privileged. The Staff should be ordered to produce the information forth-

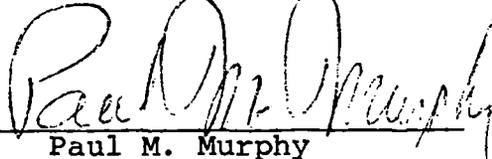
with. With respect to other materials objected to by the Staff, Consumers will renew its requests in the event that they are not produced pursuant to Consumers' pending Freedom of Information Act request and still appear necessary following review of the information sought by this Motion.

DATED: May 14, 1980

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of)
) Docket No. 50-255
CONSUMERS POWER COMPANY) License No. DPR-20
(Palisades Nuclear Power Facility))

CERTIFICATE OF SERVICE

I, Paul M. Murphy, one of the attorneys for Consumers Power Company, certify that copies of "Motion To Compel" have been served in the above-captioned matter on the following by depositing same in United States mail, postage prepaid, this 14th day of May, 1980:

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Administrative Law Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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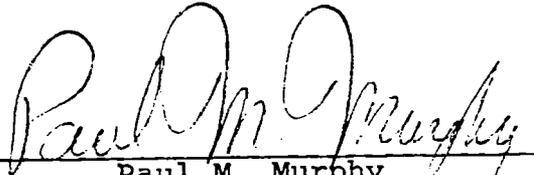
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DATED: May 14, 1980



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