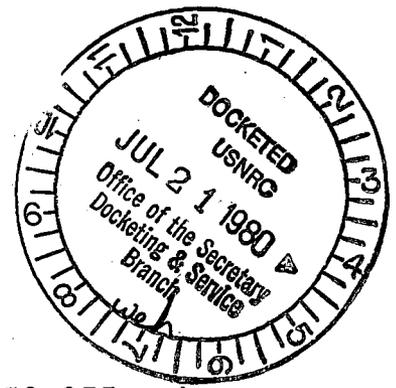


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADMINISTRATIVE LAW JUDGE

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

CONSUMERS POWER COMPANY'S ANSWER
IN OPPOSITION TO THE NRC STAFF'S
MOTION FOR PROTECTIVE ORDER

On February 21, 1980, Consumers Power Company ("Consumers") served on the NRC Staff ("Staff") Interrogatories and Requests For the Production of Documents. The Staff objected to a number of the Interrogatories, claiming that the information sought was irrelevant, not necessary for a proper decision in this proceeding and that the Interrogatories seek to inquire into the Staff's internal deliberative process; and, thus, the information sought is subject to a qualified privilege. Consumers then moved for an order compelling the Staff to respond to the Interrogatories. The Staff, in its "NRC Staff's Answer To Consumers Power Company's Motion To Compel And NRC Staff's Motion For A Protective Order," ("Staff Motion") dated July 3, 1980, opposed Consumers' Motion To Compel and moved for an entry of a protective order preventing Consumers from obtaining discovery of the requested information. By this Answer, filed pursuant to 10 CFR §2.730(c), Consumers opposes the entry of a protective order and renews its Motion that the Administrative Law

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Judge ("ALJ") order the Staff to comply with Consumers' discovery requests.

The information sought by Consumers for which the Staff seeks the issuance of a protective order falls into four general categories, as follows: 1) a description of the procedural steps taken by the Staff in determining to impose a \$450,000 fine for the alleged violations (Interrogatories 3 and 4); 2) an identification of each person who participated in or provided data utilized at each of the procedural steps identified, together with each communication with respect to the fine (Interrogatories 3, 4 and 5); 3) a description of the various factors or data considered by the Staff at each stage of internal review and how each such factor or datum influenced the recommendation or suggestion of the appropriate level of sanctions to be imposed for the alleged violations (Interrogatories 2(b), (c), (d) and (e)); and, 4) sanctions and recommendations of the Regional Offices, Inspection and Enforcement ("I&E"), in connection with other similar violations by other licensees (Interrogatories 12(f), 12(g), 13(f), 13(g) and 14(a)).

The Staff claims first that all of the above information is irrelevant to this proceeding, but the arguments relied on go only to the question of whether such information is dispositive of the issues in this proceeding, not its relevance. The Staff next argues that there is a qualified privilege (called "executive privilege" herein)

which attaches to the advice, recommendations and internal discussions of the Staff to prevent a chilling effect on frank and open communication. However, as applied to the facts of this case, permitting the Staff to withhold production of the requested information would not further the intended purpose of the privilege.

The Staff Motion for a protective order pursuant to 10 CFR §2.740(c) must be denied. 10 CFR §2.740(c) permits the issuance of a protective order "for good cause shown" by the party seeking such protection. The Staff has manifestly failed to make any such showing, as is more fully set forth below. The Staff is not, therefore, entitled to the relief sought and should be ordered to comply with Consumers' discovery requests.

ARGUMENT

A. Relevance

The Staff argues that the subject matter of all non-final deliberations by the Staff is per se irrelevant to any issue now before the ALJ. This argument is patently frivolous and should be rejected out of hand by the ALJ. Interrogatories 2, 3, 4 and 5 inquire into the underlying basis for the Staff's determination that Consumers committed the violations with which it has been charged, that civil penalties are appropriate for such violations if they occurred and in what amount. In essence, these Interrogatories inquire into the factors that went into the Staff's determination on these issues at each stage of internal review and the identity of the persons who considered such factors and, thus, have knowledge of relevant facts. As

these issues are the same issues now before the ALJ, the relevance of this material should be presumed. The Staff's blanket claim that no such material is relevant is tantamount to a claim that at no time did any member of the Staff consider any facts relevant to the issues then before them. Such a claim, on its face, is incredible, and, absent some showing in support of the claim, it should be rejected. Moreover, the Staff has in fact produced documents of the type claimed to be wholly irrelevant, and even the most cursory examination is sufficient to establish relevance (see Appendix A to Consumers' Supplemental Motion To Compel).

More importantly, a recent decision by the Appeal Board, which was not available to Consumers at the time its Motion To Compel and Supplemental Motion To Compel were filed, flatly rejects the Staff's position that the opinion of I&E regarding the significance of alleged violations is irrelevant to the issues at bar. In the decision Atlantic Research Corporation, ALAB-594, 11 NRC ____ (June 2, 1980), the Appeal Board was required to determine whether civil penalties proposed by the Director of I&E arising out of an overexposure of a radiographer caused in part by his defeat of a radiation alarm should be mitigated. In order to probe the importance that I&E attached to preventing a repetition of such incidents, the Appeal Board ordered that the Staff produce for the Appeal Board's review any guidance sent to licensees generally respecting hard-wiring of radiation alarms to prevent their future easy defeat (Slip Op., p. 20

fn. 23). I&E had sent no such guidance, to which the Appeal Board commented:

It is, of course, not our function to instruct the I&E Director respecting the guidance which his office should supply directly to licensees by means of bulletins and circulars (or other broadly-disseminated documents such as information notices). We must say, however, that the absence of such guidance with regard to the hard-wiring of alarm systems brings at least into question the importance attached by I&E to preventing a repetition of what transpired in this instance. And this consideration certainly is relevant (albeit not dispositive) on the question of the amount of the civil penalty which would ultimately be assessed in the interest of deterring future occurrences of a similar nature.

Slip Op., p. 21 fn. 23. Thus, although the Appeal Board was charged with the ultimate decision on the appropriate fine for the violation, the opinion of I&E was held to be a relevant consideration to the Appeal Board's determination. In this proceeding, also, the content of the deliberations leading to the Director's proposed record fine, which would directly show the importance attached to enforcement goals sought to be achieved by this action, are relevant (albeit not dispositive) to the issue of the appropriateness of the proposed fine.

Interrogatories 12, 13 and 14 inquire into the treatment of other licensees charged with violations similar to that with which Consumers is charged. As stated within the NRC's I&E Manual, "The primary objective of the IE enforcement program is to assure maximum compliance practic-

able with Commission requirements through consistent application of reasonable sanctions in accordance with uniform procedures." I&E Enforcement Manual §0803 (emphasis supplied). The importance of general equality of treatment of licensees has recently been recognized by the Appeal Board. Atlantic Research, Slip Op., p. 14. Based upon the apparent realization that information concerning the sanctions, if any, ultimately proposed by the Director of I&E in similar types of cases is germane to Consumers' possible defense regarding the inconsistent application of sanctions in the present enforcement proceeding, the Staff voluntarily identified the ultimate action taken by the Director in cases involving other licensees.

The Staff, however, refused to identify the action recommended in these cases by the Regional I&E offices.*

* See Staff's Motion, p.5.

With respect to Interrogatory 14 which not only asks for identification of the action recommended by the Regional Offices but also requests identification of the basis for these recommendations, the Staff maintains that, to date, only the present civil penalty case against Consumers falls within the scope of the Interrogatory. By definition the recommendations and explanations sought in Interrogatory 14, and which the Staff refuses to identify, do not exist. Therefore, the Staff is apparently attempting to seek a protective order regarding information which may, at some time in the future, come into existence. Since the Staff admits that the determination by the ALJ of Consumers' right to information involves a balancing of need for such information against the policy in favor of protecting certain governmental information from public disclosure, and since such a balancing process is certainly impossible where the nature of the information is unknown, the Staff request for a protective order is clearly premature.

Consumers submits that the identification of these recommendations is also necessary to enable Consumers and the ALJ to determine whether I&E's enforcement policies have been consistently and uniformly applied in this case. For, if it has generally been the Director's practice in past enforcement actions to approve without significant modification the recommendations submitted by the Regional Offices which, in view of Mr. Keppler's recommendations* clearly did not occur in the present case, there would be a strong inference that the sanction proposed by the Director in this proceeding is other than consistent with past enforcement actions.

To the extent the Staff objects to disclosing Regional Office recommended sanctions on the grounds of the qualified executive privilege, the objection is simply misplaced. The mere identification of recommended sanctions, without disclosing the bases or reasoning process associated with these recommendations would in no way "lay bare" the thoughts and opinions of agency personnel. Similarly, those portions of Interrogatories 3 and 4, which merely request the identification of the procedural steps taken within I&E, in no way probe the mental process of Staff personnel.

B. The Balance of Considerations Appropriate Under §2.744

Given the relevance of the information sought in Consumers' discovery request, the issue raised by the Staff's Motion for a protective order is whether Consumers' need for the information is sufficient to overcome the Staff's interest

* Mr. Keppler's recommendations are attached as Appendix A to Consumers' Supplemental Motion To Compel.

in maintaining the confidentiality of the information.*

(The Staff concedes this point at page 25 of their Motion.)

In this connection we note that Consumers' discovery request included the following instruction:

19. If you claim privilege as to any communication as to which information is requested by these Interrogatories or as to any answer requested by these Interrogatories, specify the privilege claimed, the communication and/or answer as to which that claim is made, the parties to the communication, the topic discussed in the communication and the basis for your claim.

The NRC has not objected to this Instruction, nor has it complied with the Instruction. The Staff's failure to identify the nature of the communications for which it now seeks protection deprives Consumers of a reasonable opportunity to address specifically the conflicting interests between its need for the information and the Staff's desire to withhold the information. Moreover, as we discuss below, even absent the quoted Instruction, it is incumbent on the Staff to identify for the ALJ the material for which it claims the qualified executive privilege to permit the ALJ to weigh the competing interest and decide the issue raised. The Staff, in effect, is attempting to usurp the ALJ's

* The Staff argues and Consumers acknowledges that the information at issue is exempt from disclosure under 10 CFR §2.790. We also assume from the fact that the Staff claims there are good reasons to maintain the confidentiality of the information that it has in fact been kept confidential to date (compare: 10 CFR §2.790(b)(4)(i)). Thus, we assume that the Staff concedes that the information in the form requested is not available from other sources.

judicial role of deciding the validity of claims of an evidentiary privilege. Consumers has argued generally its need for the requested information in its Motion To Compel and Supplemental Motion To Compel. We address herein the claimed interest in maintaining the confidentiality of the "deliberative process" (Staff Motion, p. 25) of the Staff.

The Staff argues that non-disclosure of certain non-specified materials is necessary because:

First, there is a general proscription against probing the mind of an administrative decisionmaker. Second, there is an interest in protecting the deliberative process by which enforcement decisions are made from unwarranted scrutiny in order to encourage open, frank discussion between subordinates and the decisionmaker concerning administrative action.

Staff Motion, pp. 18-19. While the asserted interest in avoiding a chilling of open discussion warrants due consideration in appropriate circumstances, the argument is untenable in the circumstances of this case.

To prevent the chilling effect in future Staff deliberations, arguably it is necessary to provide the Staff assurance that their deliberative process will be conducted in confidence and not exposed to subsequent public review. However, as the Staff points out repeatedly throughout its motion and brief, the Staff has already provided Consumers much of the very type of information which, if disclosed, the Staff claims will result in this unacceptable chilling effect (see, e.g., Staff Motion at p. 24). The Staff has not

attempted to describe in any fashion the nature of the specific aspects of the deliberative process still withheld nor has it attempted to explain why such material deserves more protection than the Staff has afforded to the materials supplied. Under these circumstances, the clear inference from the Staff's selective application of executive privilege is that the Staff does not seek to protect generally the Staff's internal deliberative process. Rather, it appears that certain matters may have been discussed which, for reasons unrelated to the purpose to be served by executive privilege, the Staff seeks to withhold from scrutiny. To permit a party unilaterally to assert an evidentiary privilege under circumstances in which the ALJ is deprived of the minimum information necessary to his ruling provides an unacceptable opportunity for abuse. The privilege can become less a means of encouraging open Staff discussion and more a means of withholding information which, if disclosed, would detract from the parties' position at hearing.*

We note, for example, that the Staff argues that there exists some need to protect from disclosure the "advice the decisionmaker receives from subordinate staff members."

* Certainly, the facts, criteria and law relevant to the issues before the ALJ are not themselves entitled to protection from discovery. This simple and, we think, uncontrovertible proposition seems to be imperfectly understood by the Staff. On numerous occasions throughout its motion, the Staff asserts that it has provided to Consumers the "facts, criteria and law" on which the Staff bases its case (see, e.g., Staff Motion at pp. 7, 10 and 27). The Staff does not claim that facts, criteria and law which are contrary to their position have been fully disclosed.

(Staff Motion, p. 20). The Staff has provided Consumers the recommendation by the Director of Region III, a subordinate of the Director of I&E, that Consumers be fined \$11,000 for the alleged violations. This recommendation was quite clearly not adopted by the Director in that he has proposed a total fine of \$450,000. The NRC's Manual, at page 25, chapter MC0800, instructs the Director to advise the appropriate Regional Director of the reasons for not accepting the Regional Director's recommendations.* The Staff does not state whether such advice was given. Rather, in a somewhat different context (in arguing that the Staff should not be compelled to produce information relating to other, perhaps similar, violations), the Staff argues that

There is no requirement that the Director of I&E in civil penalty cases accept a regional office's recommendation . . . much less give his reasons for adopting or rejecting such recommendation.

Staff Motion, p. 12. The requirement is clearly imposed by the NRC's own internal procedures, cited above. It is

* Section 0840 of the IE Enforcement Manual provides, in pertinent part, as follows:

When enforcement cases are transmitted to IE:HQ for action, the responsibility for enforcement action rests with the Director, Division of Field Operations or one of his superiors. If the action of Headquarters differs from that recommended by the region, the region will be informed of the bases for the changes. (Emphasis supplied)

The Staff has refused to state whether this procedure was followed (see Consumers' Interrogatory 2(d)(ii) to which the Staff has objected).

reasonable to expect that, if these procedures were followed, the communication in question should provide the best contemporaneous assessment by the Director of the importance attached by I&E to the various considerations which led the Director to propose a fine of \$450,000. Given the Appeal Board's language in ALAB-594, quoted at p. 5, supra, we think it is readily apparent that such information must be forthcoming during hearings on the proposed fine. Unless Consumers is to be denied an adequate opportunity to prepare its defense prior to hearing, Consumers' need for the information is manifest.

The Staff's further claim that Consumers already has been provided with the considerations bearing on the magnitude of the fine imposed is dubious at best. The most important single factor which bears on the magnitude of the fine proposed is the determination that Item 1 of non-compliance constituted a "continuing violation." The Staff has objected to those Interrogatories which inquire directly into the factors which led to the categorization of the alleged violation as a continuing violation (Interrogatory 2(c)(i)). When asked to specify the general policy respecting continuing violations (Interrogatory 7), the Staff responded by quoting a passage from the Statement of Considerations which accompanied the issuance of 10 CFR §2.205 (Staff Answer to Consumers' Interrogatory 7). As the quoted passage is quite obviously inconsistent with the Director's proposed civil penalty, the Staff went on to state that "The imposition of

civil penalties for continuing violations is essentially a matter of judgment exercised within the guidelines of the general enforcement policy" The information provided by the Staff in response to Consumers' discovery request is devoid of any explanation of how these judgmental factors were applied to the facts of this case. The Staff seems to believe that it is adequate to supply only the general enforcement criteria at this time (see Staff Motion at pp. 27, 28) and wait until hearing to reveal the actual basis for its proposed record fine. This procedure would obviously deprive Consumers of a fair opportunity to prepare to meet such evidence at hearing.

The only hint available to Consumers to explain the apparent deviation from the NRC's past practice, and what appears to be the clear intent of published enforcement criteria, is the following statement by Dr. Hendrie, then Chairman of the NRC, at a press conference called to announce the NRC's proposed enforcement action:

The Commission requested of the Congress in February of this year an increase in its civil penalty authority to \$100,000 for a violation and for removal of a limit on a maximum amount in any given period, 30 days or any other period. That legislation still pends before the Congress.

And I will use a second of my time here to note that I continue to encourage the Congress in the strongest possible terms to get on with that legislation.

In carrying out its enforcement actions, the NRC, and in particular, in connection with levying of penalties for violations, the NRC

has been criticized in times past for seeming to, on the one hand, look for rather lower amounts to be levied for a violation than even the present law would allow; but also, it seemed to take an extremely long time to finally arrive at a determination and to take the formal action of levying the penalty.

I think those criticisms are valid, and one of the reasons that I have chosen to announce today's civil penalty myself is to make it clear that that is certainly not going to be the case in the future.

Press Conference on Consumers Power Company, Palisades
Nuclear Power Facility, November 9, 1979.

The above comments by Dr. Hendrie should be placed in the context of the following sequence of events:

1. During early February, 1979, the NRC proposed legislation to increase the maximum monetary penalties that the NRC could impose for violation of its regulations.
2. On February 16, 1979, the General Accounting Office issued Report No. EMD-79-9, which criticized the NRC for failing to use effectively its existing civil penalty authority in that the NRC has not generally imposed the maximum fines permitted under existing law and generally took too long in reaching its determination (see Document #5 produced by the Staff in response to Interrogatory 7).
3. On September 14, 1979, Consumers notified the NRC of its preliminary determination that there may have been a prolonged breach of containment integrity.

4. On October 26, 1979, in the normal course of business, Mr. James Keppler, Director, Region III, forwarded to Washington his recommendation that Consumers be fined a total of \$11,000 for three alleged violations arising out of the above.

5. On November 9, 1979, with the NRC's proposed legislation still pending before Congress, the Chairman of the NRC for the first time ever (see Staff Answer to Consumers' Interrogatory 16(a)) appeared at a press conference called to announce a \$450,000 fine for Consumers. Dr. Hendrie's remarks were directed primarily to the legislation pending in Congress and unspecified criticisms which, on their face, appear to be identical to those contained in GAO Report EMD-79-9.

On the surface, the main purpose intended to be served by imposing the \$450,000 fine appears to be to influence Congress to pass then-pending legislation proposed by the NRC. This is clearly not one of the purposes for which Congress originally granted the NRC authority to impose civil penalties. The Staff's selective claim of executive privilege, in which the recommendations of subordinates are laid bare and the rationale for the superiors' actions are withheld, does nothing to dispel this impression. Absent some description by the Staff of the communications sought to be protected and some discussion of the interest to be served by withholding such relevant information, the Staff's

Motion for a protective order cannot be granted. The Staff has failed to provide the ALJ the minimum information necessary to permit the weighing of the conflicting interests involved as required by 10 CFR §2.744.* See, also, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971).

CONCLUSION

WHEREFORE, the Staff's Motion for a protective order should be denied on the grounds that:

- (1) the Staff has failed to provide good cause for the issuance of such an order, and
- (2) on its face the relief requested is not warranted.

In the alternative, the ALJ should order the Staff to supply Consumers with a complete and adequate description, including the date of, parties to and general subject matter, of each and every communication as to which the Staff claims privilege. The Staff should also be ordered to provide the ALJ with the total content of each such communication for

* We note that, except for certain documents relating to an enforcement proceeding involving TVA's Brown's Ferry facility, the Staff has not offered to produce any of the materials they seek to withhold from discovery for in camera inspection by the ALJ.

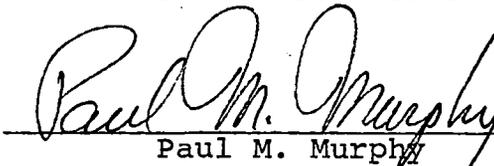
his in camera review to enable the ALJ to determine, on his own, or, if necessary, with the benefit of informed argument by opposing counsel, the extent, if any, of the protection which ought to be afforded to these materials.

DATED: July 18, 1980

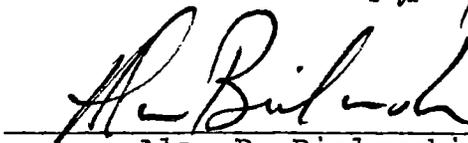
Respectfully submitted,



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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)) (Civil Penalty)

CERTIFICATE OF SERVICE

I, Paul M. Murphy, one of the attorneys for Consumers Power Company, certify that copies of "Consumers Power Company's Answer In Opposition To The NRC Staff's Motion For Protective Order" have been served in the above-captioned matter on the following by depositing same in United States mail, postage prepaid, this 18th day of July, 1980:

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

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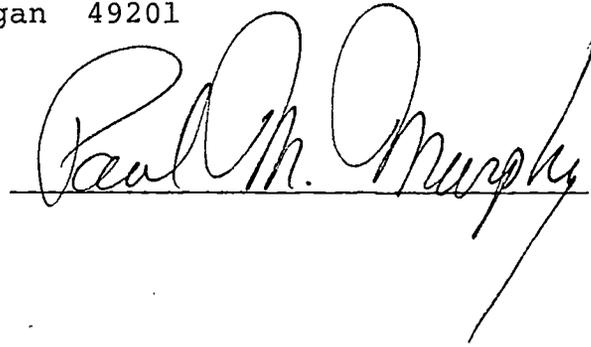
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A handwritten signature in cursive script, reading "Paul M. Murphy", is written over a horizontal line. The signature is positioned to the right of the date.

DATED: July 18, 1980