

ORIGINAL

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the Matter of:
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ATLANTIC RESEARCH CORPORATION
: Oral Argument
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East-West Towers
Room 550
4350 East West Highway
Bethesda, Maryland

Wednesday, May 14, 1980

The above-entitled matter came on for oral argument
pursuant to notice at 10:10 a.m.

BEFORE:

ALLAN S. ROSENTHAL, BOARD CHAIRMAN
JOHN H. BUCK
MICHAEL C. FARRAR

APPEARANCES:

On behalf of the NRC Staff:

JAMES LIEBERMAN, ESQ.
JAMES MURRAY

On behalf of the Applicant, Atlantic Research Corporation:

COLEMAN RAPHAEL, President
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ORAL ARGUMENT ON BEHALF OF NRC:

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James Lieberman, Esq.

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ORAL ARGUMENT ON BEHALF OF APPLICANT:

Coleman Raphael, President
Atlantic Research Corporation

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P R O C E E D I N G S

1
2 CHAIRMAN ROSENTHAL: This civil penalty proceeding
3 involving the Atlantic Reserach Corporation is now before us
4 on remand from the Commission. In an opinion issued two months
5 ago today, the Commission vacated our decision last year in
6 which we had held that the corporation was not liable to civil
7 penalties in the circumstances of this case.

8 The matter was sent back to us for further consideration
9 on the issue of penalty litigation. At our invitation, both
10 Atlantic Research and the NRC staff have filed supplemental
11 memorandum addressed to that question.

12 The argument today is governed by the terms of our
13 May 5 order. As they are indicated, each party will have 45
14 minutes for the presentation of its argument and the staff
15 will be heard first.

16 That order further posed a question, which we desire
17 the parties to address this morning in the course of their
18 arguments and also called upon staff counsel to provide us with
19 certain information.

20 I will now ask the counsel or other representatives
21 of the parties to identify themselves formally for the record
22 and we will start with Atlantic Research.

23 DR. RAPHAEL: I am Coleman Raphael, president of
24 Atlantic Research. I have with me Mr. Keith Britton, who is
25 staff assistant and director of marketing who has helped in

1 collecting some of the information of this case.

2 CHAIRMAN ROSENTHAL: Dr. Raphael, we thank you.
3 NRC staff.

4 MR. LIEBERMAN: I am James Lieberman, appearing today
5 on behalf of the staff, together with me is Mr. Murray.

6 CHAIRMAN ROSENTHAL: All right, Mr. Lieberman, we
7 thank you and you may now proceed with the argument on behalf of
8 the staff.

9 ORAL ARGUMENT OF JAMES LIEBERMAN

10 ON BEHALF OF NRC STAFF

11 MR. LIEBERMAN: Mr. Chairman and members of the Board,
12 at issue is mitigation, the exercise of discretion in determining
13 the amount of the civil penalty. In this case, the director
14 reasonably exercised his discretion in accordance with longstanding
15 public available policies.

16 Following those policies, he imposed a civil penalty of
17 \$8600, which represents a substantial mitigation from the
18 statutory maximum. The Commission has established the factors
19 which govern the determination of the amount of a civil penalty.
20 Those factors are found in the statements of consideration
21 for 10 CFR 2.205, the Commission's rule, which govern the civil
22 penalty process.

23 Each of the factors addressed in the statements of
24 consideration has been waived and balanced by the director in
25 this case. These factors or these policies have been applied to

1 more than 100 civil penalty cases. These policies have been
2 discussed with the Commission. They have acquiesced to their
3 use.

4 MR. FARRAR: Mr. Lieberman, are you suggesting that
5 we can only review this for an abusive discretion or are we
6 free to apply our own discretion?

7 MR. LIEBERMAN: Let me answer that question by saying
8 that you have three options that you could take in reviewing this
9 case. Let me say, first directly, you are not required by law
10 to take an abuse discretion standard. But you have three options
11 you might consider in determining how you should review this case.

12 The first option would be if you find the director has
13 considered all relevant factors and reasonably exercised his
14 discretion and in accordance with established policies, then
15 you could affirm this case.

16 The second option would be to stand in the shoes of
17 the director, apply his policies and procedures and in the
18 penalty exercise your judgment as to the amount of civil penalty
19 in this case.

20 Either of those options are more than acceptable to the
21 staff. However, in this particular case, as I will explain in
22 a moment, the director filing the policies imposed the
23 minimum civil penalties described by the policies. And therefore
24 both of those options would come up to the same civil penalty
25 amount.

1 MR. FARRAR: When you say stand in the shoes of the
2 director, you would have us start with provisions of his manual
3 which sets certain ranges for certain types of offenses and
4 particular sizes of licensees.

5 For your second option, would you have us start
6 with the manual as given?

7 MR. LIEBERMAN: Yes, we would. The third option is for
8 you to independently arrive at a civil penalty, applying your
9 own judgment, notwithstanding the director's policies. However,
10 you would be limited by two factors. One would be the consider-
11 ations, which the Commission has directed to be considered.

12 And the second, which I will get to on the May 5th
13 order, you would not be able to exceed the civil penalty imposed
14 by the director.

15 CHAIRMAN ROSENTHAL: Do I understand you then, Mr.
16 Lieberman, to suggest that the Commission really has not set
17 forth any standards with regard to the roll that is to be
18 played by the adjudicatory tribunal in passing upon civil penalty
19 matters such as this?

20 MR. LIEBERMAN: No.

21 CHAIRMAN ROSENTHAL: Do you suggest that there are
22 three alternative ways in which we might approach this matter and
23 I would infer from that the Commission has not, in your judg-
24 ment, clearly specified the scope of review, if I may put it
25 that way, that applies to us in this matter?

1 MR. LIEBERMAN: Except as to two elements, which I just
2 stated, the fundamental considerations, the factors to be
3 considered.

4 CHAIRMAN ROSENTHAL: Which are what?

5 MR. LIEBERMAN: The nature and number of the added
6 non-compliance; the corrective action, the department's corrective
7 action, the enforcement history, the size of the licensee's
8 operations and factors of that nature.

9 MR. FARRAR: The Commission does not limit it to those.
10 He says to consider all relevant factors included among others.

11 MR. LIEBERMAN: That is correct.

12 CHAIRMAN ROSENTHAL: Does that not then allow us to take
13 into account any other factors which appear to us to be relevant?

14 MR. LIEBERMAN: No question about that.

15 CHAIRMAN ROSENTHAL: On the question of litigation?

16 MR. LIEBERMAN: No question about that. You have to at
17 least consider those but all other relevant factors in this case,
18 the lack of direct measurement involvement is certainly an
19 appropriate consideration. The staff has considered factors
20 such as that and that is described in the testimony of Dr.
21 Volgenau before the Administrative Law Judge.

22 Let me add as to the third option, which is available.
23 The staff does not support that option here. As we said, the
24 policies of the director have been applied in many cases. The
25 Commission has been informed of the application of these policies.

1 They have acquiesced to applying those policies.

2 Uniformity is not an absolute goal in taking enforce-
3 ment action, as you stated, in radiation technology. However,
4 there is certainly a desire. And this Commission has five
5 regional offices. They have thousands of licensees, different
6 type of activities, different sizes and we have attempted to
7 develop a policy, which we think is reasonable and rational to
8 address the many types of situations that may occur.

9 And we think absent some compelling reason this appeal
10 board should not develop a separate policy to be applied.

11 CHAIRMAN ROSENTHAL: What do you think the Commission
12 had in mind when it remanded this case to us for further
13 consideration on the question of mitigation? I asked that question
14 because as the Commission itself noted, the facts of this case
15 are undisputed.

16 The Commission could have made that judgment, I would
17 suppose as easily as could we, if in fact the \$8600 assessment
18 was, as you appear to suggest, entirely in conformity with
19 settled policies, which the Commission has indicated approval. I
20 would have thought that the Commission would have taken that last
21 step itself, once it had reached the determination that we were
22 wrong in concluding that the absence of management involvement
23 per force relieved the licensee of any liability at all.

24 MR. LIEBERMAN: Of course, I cannot tell you what
25 was in the Commission's mind, but my own opinion on this is

1 that you never reached the question of a sanction and therefore
2 they thought it was appropriate for this appeal board to complete
3 the process and look to see if the director did, in fact, follow
4 policies and determine, for example, which we do not believe is
5 the case, but determine whether; for example, these policies are
6 in fact reasonable and rational. We think they are.

7 CHAIRMAN ROSENTHAL: I thought you said those policies
8 had been approved by the Commission. If they had been approved
9 by the Commission, the Commission scarcely would have sent
10 the matter back to us to determine whether those policies were
11 reasonable and rational.

12 MR. LIEBERMAN: I did not intend to suggest that they
13 had approved the policies. All I stated was that they had been
14 aware of the policies and they have acquiesced to their
15 application. They have not formally adopted or approved them as
16 Commission policy.

17 CHAIRMAN ROSENTHAL: What do you think that we can
18 appropriately attach to the degree of management involvement
19 or non-involvement in the incident that we are questioning here?

20 There are a number of factors that are taken into
21 consideration. And you have agreed that while setting forth
22 some of those factors, the policy does not exclude the consider-
23 ation of yet other factors. Now, if you are in a situation where
24 you are taking into account eight, ten, twelve, whatever number
25 of factors, whoever is making the judgment has to assign weight

1 to the various factors.

2 Now, how in your judgment do we do that? Are we free,
3 for example, to say that in our opinion factor A is an extremely
4 weighty one; factor B is of modest weight and factor C is of
5 relatively small weight?

6 MR. LIEBERMAN: The answer to that question is, yes,
7 you are free, in my judgement. The judgment of the staff is
8 the director's judgment and the director's judgment is found
9 in his policies that would put the greatest weight to the
10 nature and number of the items not in compliance, while giving
11 weight to the other relevant factors, such as the lack of
12 direct management involvement. That would be of lesser weight.

13 CHAIRMAN ROSENTHAL: Now, do we have to determine that
14 that conclusion on the part of the director is arbitrary in
15 order to place different weights on the factors? Or is it
16 enough for us to say, "Well, that is the director's opinion, but
17 we happen to see it differently."?

18 MR. LIEBERMAN: You could do that. I want to make it
19 clear; you could certainly do that. The staff would not support
20 that, because of the fact this policy has been used in many
21 cases. These types of problems come up both before and after.
22 We follow this scheme, which we think is reasonable.

23 There are many different ways of determining the
24 sanction. And I cannot say the way that you might suggest,
25 which might be different from the staff's, is not reasonable.

1 CHAIRMAN ROSENTHAL: I am not asking you whether it
2 was reasonable or not. What I asked you was whether in your
3 judgement we have the authority to substitute our judgment as to
4 the weight that should be attached to the various factors for
5 that of the director?

6 MR. LIEBERMAN: My answer to that question is yes.
7 You do have the authority. The staff would not recommend you
8 exercise that authority in this case. Does that answer your
9 question?

10 CHAIRMAN ROSENTHAL: Yes, sir.

11 MR. FARRAR: Mr. Lieberman, let me ask you something.
12 You keep saying that one of the factors we can take into
13 account is the lack of management involvement. Although that
14 is not one of the four mentioned in the statement of considerations,
15 I certainly would have agreed with you, at least until 60 days
16 ago.

17 But on page 14 of the Commission's decision where they were
18 discussing and reversing our decision, they found that a division
19 of responsibility between a licensee and its employees has no
20 place in the NRC regulatory regime and so forth. Where does
21 that leave me with my feeling that you have confirmed that lack
22 of management involvement should be a relevant factor here?

23 MR. LIEBERMAN: I think you have to put the Commission's
24 decision into context. They were focusing in the question of
25 whether management involvement was a necessity for a civil

1 penalty, not as to the amount of the civil penalty.

2 We think good faith of the licensee is certainly
3 relevant to the determination of a civil penalty. But we think
4 in this case, the nature and the number of the items not in
5 compliance is no dispute here that these items not in compliance
6 were serious: Deliberate violations by a radiographer of
7 basic radiation practices. The very systems which were defeated
8 were designed to avoid this incident from happening in the
9 future.

10 MR. FARRAR: Let me make sure I understand the
11 beginning of your answer. You are telling me that I can take
12 lack of management involvement, in fact, the staff recommends that
13 I take lack of management involvement, into account and that
14 that will not put me -- that I will not be in the position of
15 ignoring or flaunting the Commission's order, because there
16 is nothing worse than a lower tribunal ignoring what the
17 Supreme Court tells them to do and I certainly do not want to
18 be in that position. If you are saying that that would not be ---

19 MR. LIEBERMAN: If you consider that factor as one
20 of the number of factors, that was the only factor you looked
21 at, I would think that would be contrary to the Commission.
22 If it is just one of the number, then I think it would be
23 appropriate. The Commission was saying that some civil penalty
24 was appropriate.

25 MR. FARRAR: Let me ask you about the director's

1 scheme for these penalties. As I understand, we have to have
2 these manuals and this scheme for setting penalties, because
3 just like we had it at EPA, when I was there years ago, you
4 have got regional people all over the country that get faced
5 with violations and they have to have something to guide them
6 on the amount of the civil penalty.

7 So you have set up this general scheme with three
8 categories of offenses, violations, infractions and deficiencies,
9 and then you have sub-categorized that according to the size
10 of the licensee. And you come out here with this licensee
11 for an offense that is called a violation. The range should be
12 between \$2,000 and \$3,000.

13 MR. LIEBERMAN: That is correct. Let me add that the
14 characterization of violations, infractions, deficiencies, that
15 comes from the criteria from the enforcement action. The
16 criteria from the enforcement action was developed with more
17 direct input from the Commission. Again, they did not formally
18 approve it.

19 MR. BUCK: Can I see if I can get that tapping
20 stopped?

21 (Whereupon, there was a brief recess.)

22 CHAIRMAN ROSENTHAL: Is the matter of the Commission
23 enforcement policy now before the Commission itself? Does the
24 Commission have under consideration at this time any aspects of
25 the enforcement policies from the standpoint of civil penalties?

1 MR. LIEBERMAN: Yes, it does, but I do not think that
2 policy has any bearing on this case.

3 CHAIRMAN ROSENTHAL: Why not?

4 MR. LIEBERMAN: Because those policies are, first,
5 not in effect yet and, second, they certainly were not applied
6 in this case. On the other hand, the staff's views on those
7 policies are relatively consistent with the existing policies and
8 that might provide some weight.

9 CHAIRMAN ROSENTHAL: In the staff's views as reflected
10 how?

11 MR. LIEBERMAN: In the process of having a range of
12 civil penalties

13 CHAIRMAN ROSENTHAL: Were they reflected in a particular
14 document, these views?

15 MR. LIEBERMAN: There is a draft document, but maybe
16 I should step back. I do not think that they do have any
17 bearing on this case.

18 CHAIRMAN ROSENTHAL: Well, I was just wondering about
19 that. Because it was my impression that the staff has furnished
20 the Commission with a rather detailed proposed enforcement
21 policy. And it was my further impression that the Commission has
22 not acted on it and, indeed, has called upon another Commission
23 office to look at it.

24 And I raise that only because I wonder whether one
25 can say that there is a firmly in place view respecting what the

1 Commission's enforcement policy as it bears upon what kind
2 of penalties should be assessed for particular types of vio-
3 lations, as such.

4 MR. LIEBERMAN: That policy of paper is based on a
5 new statute, which has not yet been enacted that would provide
6 a \$100,000 civil penalty authority and it is a much tougher policy
7 than existing policy and it is based on the experience that the
8 Commission has had over the years.

9 There is much more detail in that policy. So there
10 are changes and the staff has been assigned responsibility to
11 make changes in that document in accordance with the direction
12 of the Commission. It is still a staff document.

13 CHAIRMAN ROSENTHAL: Do you agree that under the
14 existing policies of the director that a large emphasis is placed
15 upon the consequences in terms of radiation exposure of the
16 particular violation and a smaller amount of emphasis is placed
17 upon the egregiousness conduct of the licensee in a particular instance?

18 MR. LIEBERMAN: The amount of consequence, for example
19 in this case, the amount of the over exposure, the fact that it
20 happened not only to a radiographer, but also to a non-radiographer,
21 that was certainly important in the characterization of the
22 difference between a fraction and a violation, for example.
23 The amount of the exposure or the potential for the exposure is
24 relevant.

25 Now, that only brings you to a certain level. I believe

1 it is 25 rems to an extremity, approximately reach 75 rems to an
2 extremity. In this case, we had a 1,000 rems to the extremity.

3 CHAIRMAN ROSENTHAL: I did not want to get into those
4 specifics. I was just looking at the basic philosophy. For
5 example, as you understand the policy, if you had an instance of
6 egregious carelessness on the part of a licensee, which fortuitously
7 resulted in a very small radiation exposure, would the penalty
8 that was assessed be likely to be greater or smaller than the
9 penalty that would be assessed in precisely the opposite circum-
10 stance where you had a very small amount of carelessness, but
11 unfortunately for the licensee a very significant consequence?

12 Do you follow me?

13 MR. LIEBERMAN: Yes, I do.

14 CHAIRMAN ROSENTHAL: I want to get your answer in terms
15 of what you understand to be the policy of, the articulated policy
16 of the director.

17 MR. LIEBERMAN: The issue is not the amount of the
18 over exposure, it is the potential for an over exposure. So that if
19 in this case, everything occurred as it did, except there was
20 no over exposure, the interlock systems were disconnected, the survey
21 was not made, the film badges were not worn, etcetera, the
22 only difference would be obviously we could not cite them for an
23 over exposure, if the over exposure did not occur, but all of
24 the other items of non-compliance would have occurred, would have
25 received the same characterization, because the potential was

1 there; walking into a room where radar was conducted without
2 interlock systems, without a survey, without film badges, all
3 are serious ---

4 MR. FARRAR: Then what you are saying is that I should
5 read Dr. Volgenau's testimony where, if I recall it correctly,
6 he said something on the order of this is one of the worst
7 cases of over exposure we have ever seen. What he really meant
8 is that this was one of the worst cases for setting up a potential
9 for over exposure that I have ever seen.

10 He was not really concerned about the fact that the
11 over exposure occurred to that particular degree, but that
12 they had set up a situation where it could occur. Because I
13 did not read his testimony that way the first time.

14 MR. LIEBERMAN: The exposure level is certainly
15 relevant and makes it that much worse. It is bad enough if
16 the exposure does not happen. The penalty assessment does pay
17 some attention to the consequence or the potential for the
18 consequence. It was just fortuitous that in this case it was
19 just his fingertips that ---

20 MR. FARRAR: You had a phrase that it was fortuitous
21 that he only stayed there a minute. He could have stayed there
22 five minutes and then you would come in and say this case was
23 five times worse, because instead of 1250 rems, -- I do not
24 have my calculations -- it was a 1,000 something.

25 MR. LIEBERMAN: I think Dr. Volgenau did address that

1 testimony below, when the Judge was asking him questions con-
2 cerning if the exposure was higher, would you have a higher
3 civil penalty? If the exposure was lower, would the civil
4 penalty be lower?

5 And Dr. Volgenau said that there was no direct co-
6 relation with the amount of the over exposure other than in
7 determining whether it should be a violation or an infraction
8 as to the actual consequences or the potential for the conse-
9 quences. In the case of Kewanee, at a reactor site, a year or
10 so ago, there was an incident where an employee walked into a
11 high radiation area.

12 Because he was in and out very quickly his exposure
13 level was, I believe, 2.9 rems and the limit is three rems,
14 whole body. We provided a civil penalty in that case and I am
15 almost positive we called it a violation. Because the potential
16 for the act of non-compliance.

17 MR. BUCK: Mr. Lieberman, going the other way, how would
18 you rate the thing if the operator in this case had run all five
19 of his exposures and not left the cobalt out on the fourth one,
20 but did it on the fifth, his last one, forgot to return it after
21 the last exposure, and he walked out and went home with the
22 source on him?

23 MR. LIEBERMAN: He still had disconnected the alarm
24 system?

25 MR. BUCK: And he had no exposure whatsoever.

1 MR. LIEBERMAN: The only difference would be the first
2 item not in compliance, which related to the over exposure
3 and that would not have been ---

4 MR. BUCK: I ask you which is the more serious in your
5 opinion on the director's criteria?

6 MR. LIEBERMAN: I would have to say that obviously
7 they are both very serious. Your situation, which ---

8 MR. BUCK: No exposure at all.

9 MR. LIEBERMAN: But he left the source out without
10 giving any notice to anyone, I assume that would be your ---

11 MR. BUCK: He just went home.

12 MR. LIEBERMAN: So that if someone would come in,
13 a maintenance person or whatever, coming in would not have any
14 notice, that would be very serious. Now, at some point and
15 time something so serious to make it that much more serious is
16 an incremental amount, I am not sure how much more serious that
17 would be.

18 Again, I am not the director. I cannot speak for him,
19 but I would think that he would consider ---

20 MR. BUCK: This comes down to the subjective judgment
21 of an individual.

22 MR. LIEBERMAN: There is no question about it. Based
23 on the experience, looking at other cases, knowing the standard
24 of compliance in the industry, there are a lot of factors the
25 director focuses on in making his decision.

1 MR. BUCK: Are you going to go on to the second
2 question later on, the one that we asked you?

3 MR. LIEBERMAN: Right, maybe in view of the time,
4 I should get to that right now.

5 MR. FARRAR: Do you recall when the tapping started,
6 I was in the middle or beginning of a question about your whole
7 enforcement scheme? I would like to finish that up first.

8 We agreed that for this size licensee in a violation
9 range was \$2,000 to \$3,000.

10 MR. LIEBERMAN: That is correct.

11 MR. FARRAR: And in this case since the civil penalty
12 was 2,000 on each of the violations, I take that and I think
13 your brief says that that means that considering all of the
14 relevant factors, the director concluded that the absolute
15 minimum was in order, in other words, the factors weighed heavily
16 in the licensee's favor.

17 That is the director's own conclusion.

18 MR. LIEBERMAN: That is correct.

19 MR. FARRAR: Now, granted, you are limited, if you have
20 got a \$5,000 maximum, you do not have a big range to play with
21 when you are dealing with radiographers and when you are dealing
22 with reactors and so forth. Let us put that aside for the moment.
23 I can see why for the person out in the field who has a lot of
24 these to handle, it is nice to have this range.

25 He looks at it and the policy will be consistent around

1 the country. But cannot you envision cases -- Let me put it
2 this way. Cannot the director go outside of this range, in
3 other words, if he thinks these factors really weigh heavily
4 for the licensee, he would say, "Okay, 2,000 is the usual minimum.
5 I mean all of these policies and manuals, they are designed to
6 cover 99 percent of the cases."

7 So you get an oddball case, which this one may or may
8 not be, and he says that the factors are so heavily in favor of
9 the licensee that I am going to depart from my manual and go to
10 1,500 or a 1,000 even though the usual minimum is 2,000 or
11 maybe the other one percent of the cases where the factors are
12 so heavily against the licensee, it will go above the three.
13 It will go to the four or the five.

14 The first question is does the director have that
15 authority to do that? Can he depart in the rare or unusual case
16 from the provisions of his manual which are designed to cover
17 the vast multitude of the cases?

18 MR. LIEBERMAN: The manual chapter is not a regulation.
19 It is his policy. He could change his policy, but in doing
20 that he would risk abusing his discretion from deviating from
21 established, public available policy. To my knowledge, the
22 only cases where he has deviated from this guidance are cases where
23 the border line between an infraction, you know, something, is
24 more than an infraction. It might just be a violation and it
25 is called an infraction of the next lowest level.

1 MR. FARRAR: Okay, let us just leave that aside. No
2 one would dispute that this is a violation and no one would
3 dispute the size of the licensee. You are saying you do not
4 think he would depart from his policy. He has more or less
5 locked himself into this \$2,000 to \$3,000?

6 MR. LIEBERMAN: He could, but it would be highly
7 unusual, because the characterization of the violation means
8 it is an extremely serious event and the severity, the gravity
9 of the item of non-compliance is given the greatest weight in
10 the scheme.

11 Now, it might be that you have the situation that
12 Commissioner Henry indicated in his current decision, where
13 notwithstanding some serious violations, there might be a
14 deliberate violation to harm the company or something of that
15 sort. That might not even be a civil penalty in the first
16 place, if it was that egregious.

17 But in this case, the first determination was whether
18 to have a civil penalty. And we thought the situation was such,
19 notwithstanding the good factors, in this case the seriousness
20 of the item of non-compliance and the message we thought was
21 necessary to be given called and demanded for civil penalty.

22 MR. FARRAR: Let me ask you about that. Are you
23 saying that there could be something that is definitely a
24 violation and they might just get a warning letter instead of
25 a civil penalty?

1 MR. LIEBERMAN: That is correct.

2 MR. FARRAR: I remember reading that policy a long
3 time ago. So he either gets no civil penalty at all or he gets
4 a minimum of \$2,000?

5 MR. LIEBERMAN: That is the director's scheme.

6 CHAIRMAN ROSENTHAL: This is an element of rigidity,
7 is it not? It seems to me that there must be some room between
8 saying on the one hand that all that this merits is a warning
9 letter and saying on the other hand that this merits at least
10 \$2,000. I cannot believe that you have that jump from a
11 warning letter being sufficient to \$2,000 being the minimum
12 penalty without there being some room in between.

13 MR. LIEBERMAN: It might look or it might appear as
14 mechanical in nature, but it is a judgment decision in setting
15 up a system of this sort. The case where no civil penalty
16 applied would be the case where it would not be appropriate.
17 For example, you provided during the oral argument of the
18 typhoon type situation or the deliberate act to harm the company,
19 that might not be appropriate for a civil penalty.

20 But then you have that gray area where we move into
21 a civil penalty case. And all of those gray areas are very
22 serious and a civil penalty is appropriate. In fact ---

23 MR. FARRAR: What I think the chairman is suggesting
24 is that in that gray area, there is not a vast void where you
25 jump from zero to 2,000. In that gray area, in fact, are cases

1 worth \$100 or \$500 or \$1800.

2 MR. LIEBERMAN: There are very few areas in the
3 category where you would not give a civil penalty for items
4 not in compliance. So this gray area is not really in existence.
5 If it is very serious, by definition it is a violation. A
6 civil penalty is more likely than not appropriate. The cases
7 I am aware of where civil penalties have not been provided for
8 violations, there are sometimes mistakes, that the region never
9 referred it to headquarters and characterized it as a violation
10 and thus headquarters did not have an opportunity to impose
11 a civil penalty.

12 MR. FARRAR: Could we have on a first go around or, now,
13 suppose we had written our first decision the same way the
14 Commission had and it would have been on the right track, could
15 we have said this case does not warrant, as a result of the
16 mitigation hearing, this case does not warrant any fine at all,
17 with civil penalty at all? It warrants a warning letter.

18 Is that part of our roll in a mitigation hearing?

19 MR. LIEBERMAN: Yes, you have the authority under
20 the Commission's regulations to dismiss the civil penalty, to
21 dismiss the proceeding, mitigate the civil penalty, impose the
22 civil penalty or remit the civil penalty. You do have that
23 authority.

24 We would not think that would be appropriate for
25 the reasons I have previously given that it would not be

1 consistent with policies.

2 MR. BUCK: Mr. Lieberman, may I add, just a moment
3 ago, you said that there were certain cases that were considered
4 serious, that most cases were considered serious and would
5 automatically get a civil penalty. Now, what cases that you
6 considered serious would you not consider application of a
7 penalty?

8 I would like to know what the loopholes are here.

9 MR. LIEBERMAN: The one that comes to mind is a recent
10 case involving a radiographer, who was discharged, and came
11 back, he was discharged because -- I am not quite sure why he
12 was discharged.

13 He came back the next day and he was under the
14 influence of liquor. Somehow he got in the facility and they
15 found him near the source and there was some question of whether
16 he got over exposed or not.

17 MR. BUCK: How did he get into the building? Was that
18 not management's problem?

19 MR. LIEBERMAN: We cited the licensee for that, for
20 the lack of control of the activity.

21 MR. BUCK: Well, how much over exposure did he get?

22 MR. LIEBERMAN: I do not know.

23 MR. BUCK: Could it not be calculated as it was in
24 this case? There were no measurements in this case. It was
25 a calculation by the staff, as I understand it.

1 MR. LIEBERMAN: I do not think that we had enough
2 information to do the calculation. It was a situation where the
3 person said that he was near the source.

4 MR. BUCK: Here is a case where the employee is
5 legitimately and properly in the building. You are talking
6 about a case where for some reason or another the management
7 was sloppy enough to let an unauthorized employee, or x-employee,
8 into the building to get an over exposure and you consider
9 this a case where no penalty should be imposed.

10 I do not understand the difference. I do understand
11 the difference, but I do not understand it in the way that
12 you are applying it. This to me is just contrary to what you
13 have been telling us.

14 MR. LIEBERMAN: That case, the failures of that case
15 were controlling the keys to the operation, not having the
16 key returned by the employee. The employee was discharged ---

17 MR. BUCK: What was the failure here in regard to the
18 key? Any failure?

19 MR. LIEBERMAN: No, it was a different situation.
20 But let me just continue. The case that I was referring to,
21 the person was discharged from the field. He was told to
22 report back the next day to turn in the key and pick up his
23 paycheck.

24 And it may be that their mistake was that they should
25 have taken his key right away, the moment he was fired.

1 But there is no regulation ---

2 MR. BUCK: There is direct management involvement here.
3 Is there not?

4 MR. LIEBERMAN: In that case?

5 MR. BUCK: Yes. Is this not a straight issue that
6 the management failed to do what it should have done and take
7 his key away.

8 MR. LIEBERMAN: There was no requirement to -- I am
9 not sure what the requirements are. I only used that example
10 to show that there might be cases where ---

11 MR. BUCK: That is exactly what I am getting at. You
12 have obviously under the director's policy said that in some
13 serious cases a fine is not warranted. And you have given an
14 example, which I presume was the best case you can pick out,
15 otherwise you would not have picked it out.

16 And here is a man that was fired, management fails
17 to pick up his key. They failed to guard the building properly.
18 He walked in and gets an over exposure and no fine. How is
19 that so much better than this case?

20 MR. LIEBERMAN: First of all, I am not sure whether
21 an over exposure occurred. There was a potential for an over
22 exposure.

23 CHAIRMAN ROSENTHAL: You told us that was the important
24 criteria, did you not, was the potential for an exposure and
25 not simply what fortuitously occurred by way of exposure?

1 MR. LIEBERMAN: That is true, but there needs to be
2 some nexus. Someone can fail to do something here and if enough
3 intermediate events occur, there might be an over exposure.

4 CHAIRMAN ROSENTHAL: Suppose Dr. Buck's question, as
5 I understand it, is this; that both that case and this one, you
6 have either exposure or at the very least a potential for exposure
7 and this is supposed to be a very important factor, in that
8 case, as Dr. Buck's understands the facts, as you have set them
9 forth, one could pin on the management certain shortcomings
10 in putting this discharged employee in a position where he was
11 able to get into the building, as he did, and acquire, if that
12 if the appropriate word, this over exposure or potential for
13 over exposure.

14 In the case at bar, the employee is there quite
15 legitimately and there has been no management shortcomings
16 pointed to him. Yet what we are hearing is that in the one
17 case, where there would appear to be a management shortcoming
18 producing this at least potential for over exposure, no civil
19 penalty is imposed.

20 In this case, where there is a potential for over
21 exposure but no apparent management shortcomings, there is a
22 penalty imposed. Now, I appreciate that we have the facts here
23 and we do not have the facts completely in the other case, but
24 I would just have to tell you on the face of it, it seems to me,
25 as it apparently does to Dr. Buck, that there is a considerable

1 element of arbitrariness that is going into these determinations
2 as to whether to assess penalties or not.

3 MR. LIEBERMAN: I am not aware of the specific vio-
4 lations that occurred in the case I have stated. The timing,
5 I just do not know all of the factors. All I do know is here
6 is a case where the employee prepared to deliberately harm the
7 company's image and that was the factor in considering not to have
8 civil penalties.

9 That was the point that I cited that case for. I am
10 not aware of enough of the other facts to speak of the dis-
11 tinction, but I just wanted to be candid with this Board to say
12 that sometimes civil penalties are not imposed.

13 MR. BUCK: Is that the only example you know of?

14 MR. LIEBERMAN: That is the only one that comes to mind,
15 Dr. Buck.

16 MR. FARRAR: Mr. Lieberman, let me ask one last ques-
17 tion on the business of the range. If for each one of these
18 offenses the minimum was imposed and the Commission sent it back
19 to us to rethink about the matter of mitigation and since I
20 think you said at the beginning, we do not have an answer to our
21 question, we do not have the authority to raise the thing, then
22 the Commission -- Does that mean the Commission does not think
23 much of minimum and policies?

24 I mean because if we go with your minimum, then there
25 is no sense in us all gathering here and having a remand. What

1 am I supposed to do?

2 MR. LIEBERMAN: If I was sitting in your position,
3 Mr. Farrar, I would do what I suggested, adopt the staff's
4 approach. I do not know what they focused on, their decision on.
5 Maybe they only reached one level of whether one of some civil
6 penalty should be provided in this case.

7 And for whatever reason they did not go to the next
8 step, I cannot answer that. But I think it would be appropriate
9 for you to adopt the staff's judgment in this case.

10 CHAIRMAN ROSENTHAL: I do not know whether you under-
11 stood the drift of Mr. Farrar's question. As I understood it,
12 what he was saying is, as you seem to suggest, the Commission has
13 at least tacitly approved these ranges and as you also suggest
14 the penalty here is at the bottom, the very bottom of the range,
15 and as you further agree, as I understand it, we could not raise
16 a penalty, the Commission having sent it back. It would appear
17 to be totally inexplicable.

18 Because minimum penalties were imposed. They approved
19 those minimum penalties or the range which has that minimum and
20 we cannot raise them. Therefore they would be sending it back
21 to us saying, "Well, 8600 is what it is," and just reaffirm it.
22 And I am prepared to attribute many things to the Commission but
23 I am certainly not prepared to attribute to them a belief that
24 you and we and your opponent have nothing better to do with our
25 time than go through an idle exercise like that.

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1 I would have to assume that the Commission was
2 leaving the road open to a reduction of this penalty. So long as
3 you are in agreement that we cannot raise it and if the Commission
4 was leaving that road open, the Commission per force was leaving
5 it open to us to cut the penalties below the minimum on that
6 schedule, if as you say the minimum is what the 8600 represents.
7 And I think that is what Mr. Farrar was getting at and it is
8 something that troubles me as well.

9 MR. LIEBERMAN: If you find as a compelling reason
10 in this record to do so, you can. I think the Commission asks
11 for one question to be briefed by the parties in this pro-
12 ceeding. And that had to do with whether management involvement
13 was a necessary element for civil penalty.

14 They resolved that question and chose not to get into
15 the next question for whatever reason.

16 CHAIRMAN ROSETHAL: We are carrying you over time, but
17 I would like you to do two things for me. One is summarize
18 if you would.

19 MR. BUCK: I have another question. I did not know
20 you were over time.

21 MR. FARRAR: Jack, could I interrupt. Could I give him
22 a lead into that?

23 MR. BUCK: Sure.

24 MR. FARRAR: Anticipating what Dr. Buck's question
25 is going to be about, asking you what notices have gone out ---

1 MR. BUCK: Yes.

2 MR. FARRAR: In the Administrative Law Judge's first
3 decision before the mitigation hearing, he says, in describing
4 the case, "The licensee in effect asks what more could it have
5 done to insure complete conformance in accordance with the
6 Commission's regulations and the license conditions."

7 After that question was asked there was a litigation
8 hearing and here we are a couple of years later and I still do
9 not know the answer to that question. I do not think the licensee
10 does and I think, if you can bear that question in mind in
11 answering Dr. Buck's question, you may be able to tie the whole
12 thing together.

13 So do not answer it now, but just think about it
14 while you are listening to his.

15 MR. BUCK: Why do you not proceed on the basis of
16 the questions we have on page 2 of our order and then we will
17 go from there.

18 MR. LIEBERMAN: I have provided each of you and the
19 licensee with two documents. The first document is entitled,
20 "Report to Congress on Abnormal Occurrences," NUREG-0090-6.
21 It is a report that was prepared in accordance with Section
22 208 of the Energy Reorganization Act to give widespread dis-
23 semination of abnormal occurrences.

24 On pages 12 and 13 of this report, there is a discussion
25 of the Atlantic Research case, the nature and probable

1 consequences, the causes, the actions taken to prevent recur-
2 rence and that provides some information concerning what could
3 be done to avoid this incident.

4 Now, this document has been given widespread dis-
5 tribution. It was noted in the Federal Register but I cannot
6 state that every licensee received a copy.

7 MR. BUCK: What good does this do them by the way?

8 MR. LIEBERMAN: This tells them ---

9 MR. BUCK: What does it tell them. As I see it here
10 down on the bottom of page 13, it says that ---

11 MR. LIEBERMAN: Well, focusing on the design ---

12 MR. BUCK: Defeating the radiation alarm, it mentions the
13 defeating of the radiation alarm. Now, what does that tell
14 them they are supposed to do about their radiation alarm?

15 MR. LIEBERMAN: In the paragraph concerning actions
16 taken to prevent recurrence, they talk about the changes to
17 the alarm system to make it more foolproof in the civil penalty
18 aspect. The document speaks for itself.

19 MR. BUCK: What other notification have you given to the
20 licensees of this nature?

21 MR. FARRAR: This went to congress, right?

22 MR. LIEBERMAN: This went to congress.

23 MR. FARRAR: This was not sent to licensees?

24 MR. LIEBERMAN: Licensees requested copies of it since
25 it was noticed in the Federal Register. It was not sent to

1 every licensee.

2 MR. BUCK: They were not served on every licensee.

3 MR. LIEBERMAN: Correct. The second document would pro-
4 bably be more relevant is entitled "Public Meeting on Radiation
5 Safety for Industrial Radiographers," NUREG-0495. This was
6 issued in December '78 after a series of regional meetings with
7 radiographers and manufacturers and other interested persons,
8 to discuss radiation safety problems, what information could
9 be exchanged to try to improve radiation safety.

10 Case histories were discussed and at page 37, case
11 history no. 13 discusses the Atlantic Research incident,
12 a radiographer overexposed after defeating safety alarm.

13 Now, this document was sent to all radiography
14 licensees.

15 MR. BUCK: Now, what does it say here on it was
16 sent and it says the failure to retract the source following
17 an exposure is the direct cause of the incidence; however, equally
18 important was the bypassing of an interlock and failure to use
19 survey meters as required.

20 I notice down in prevention it says, the incident would
21 have been avoided had the radiographer followed procedures and
22 if management controls had existed to assure that he followed
23 procedures.

24 Now, what control did not exist at that particular
25 time that management had? There was a procedure as far as I am

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1 concerned on this thing, that this alarm system was left on.

2 MR. LIEBERMAN: The paragraph above that, Dr. Buck,
3 says, "It is apparent that use of an easily defeated safety
4 system is a poor practice."

5 MR. BUCK: Let me ask this again. This is not a
6 specific notice to radiographers of this type to put in hard
7 wiring, is it?

8 MR. LIEBERMAN: No, this is just information.

9 MR. BUCK: Okay. Now, how many of the license people
10 attended this meeting?

11 MR. LIEBERMAN: I am not sure but it was distributed to
12 all licensees. Maybe my next point can answer specifically
13 your concern, Dr. Buck, and that is the Commission's radiography
14 regulations in 10 CFR part 34, has been amended since the
15 incident at Atlantic Research.

16 MR. BUCK: When was it amended?

17 MR. LIEBERMAN: It was effective March 3rd, 1980 is
18 when the regulation went out.

19 MR. BUCK: March 3rd, 1980 is the first time you got
20 around to amending it. What is the amendment?

21 MR. LIEBERMAN: The proposed amendment was issued March 27,
22 1978. The amendment revamps almost the total of the radiography
23 regulations.

24 MR. BUCK: What does it say about our interlock wiring?

25 MR. LIEBERMAN: Section 34 or Section 29, part 34

1 provides for an interlock system and the regulatory guide, which
2 is in preparation ---

3 MR. BUCK: Wait a minute. What is provided in the way
4 of interlocks. Tell me what it says.

5 MR. LIEBERMAN: Permanent radiographic installations
6 of the high radiation area entrance patrols of the type described
7 in Section 20.203 shall also meet the following special require-
8 ments and then it goes on to say that each entrance as used for
9 personal access to a high radiation area in a permanent radio-
10 graphic installation to which this section applies shall have
11 both visible and audible warning signals to warn the presence
12 of radiation.

13 MR. BUCK: You mean about the wiring, how it should
14 be wired? Are there switches on the control panel?

15 MR. LIEBERMAN: No, it does not speak to that specif-
16 ically but the regulatory guide that will be issued to
17 determine the acceptability of meeting that requirement ---

18 MR. BUCK: Mr. Lieberman, when did this accident
19 happen? Was it 1977?

20 MR. LIEBERMAN: December '76.

21 MR. BUCK: Three years later the staff has still not
22 gotten out a notice to all licensees that you have got to have
23 these interlocks hard wired.

24 MR. LIEBERMAN: That is correct.

25 MR. BUCK: What are you doing running an entrapment

1 proceeding here, waiting for someone to go in and turn the
2 switch and then you will say, "Well, you have got the exposure
3 because you flipped that switch."? That is nothing but entrap-
4 ment of the licensees. You have to warn them about this.

5 MR. LIEBERMAN: I do not think that would be entrapment.

6 MR. BUCK: Well, what is it?

7 MR. LIEBERMAN: I think licensees are responsible for
8 safety. They know what the regulations are and there is no ---

9 MR. BUCK: Wait a minute. Let us go back to this
10 hearing in the first place. This particular set up was approved
11 by the staff. The switch on that control panel that would
12 switch off the alarm was passed by the staff. It was an approved
13 procedure and as far as I know now on what you are telling me
14 it still is.

15 MR. LIEBERMAN: I do not know whether, in the review
16 of this application, whether ---

17 MR. BUCK: You were asked to find out about this thing.
18 You do not know. Is this not the case that this was an
19 approved set up; it had been looked at, inspected by the staff
20 and it was stated during the hearing that the management had
21 fulfilled all of the regulations?

22 MR. LIEBERMAN: You have asked a series of questions.
23 The first question, you have asked what notice we have given. I
24 have provided you what specific notice we have given. We have
25 not provided ---

1 MR. BUCK: You have not given any specific notice
2 to any licensee. Is that correct?

3 MR. LIEBERMAN: Maybe reasonable people can differ,
4 Dr. Buck. I think this provides some guidance.

5 MR. FARRAR: We are talking about some notice like the
6 FAA. You know something happens and zoom out goes the notice
7 to all of the pilots or whatever, watch out for this. Has that
8 been done?

9 MR. LIEBERMAN: That has not been done in this case.
10 Second, I do not know what occurred during the review process
11 for this application as to what type detail was provided the
12 staff in reviewing this interlock facility. So I do not know
13 whether every switch on the panel was described in detail on
14 how the system would work.

15 MR. BUCK: Mr. Lieberman, there was at least one
16 inspection that I can find and I do not car what happened, but the
17 staff said that the managment fulfilled all of the requirements.
18 Now, if there was a requirement that said you shall not have
19 a switch for the interlock system on the panel, the staff should
20 have known it and should have been able to point it out, but the
21 staff has not pointed anything like that out to us.

22 MR. LIEBERMAN: There was no requirement at the time ---

23 MR. BUCK: There still is not.

24 MR. LIEBERMAN: Well, we now have this regulation.

25 MR. BUCK: Wait a minute. Is this not a proposed

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regulation?

MR. LIEBERMAN: No, that is an effective regulation.

MR. BUCK: That came out in when? March of 1980?

MR. LIEBERMAN: It was proposed in '78 and effective in 1980, correct.

MR. BUCK: Why do you have to wait three years for something that is obviously a dangerous situation as a potential for causing overexposure? Why does the staff have to wait three years, to let other people get damaged that same way so he can collect some fines?

MR. LIEBERMAN: I think the regulation that was in effect at the time and the licenses issued at the time were adequate to avoide this incident.

CHAIRMAN ROSENTHAL: I would like to get this in. I look at what you say here in the report of the public meeting and in describing the cause of this event, you say that it is apparent that use of an easily defeated safety system is a poor practice, one which good management review should have detected.

Likewise, good management audits might have detected poor work practices on the part of the radiography. Now, taking those in inverse order, I did not see anything in the record before us which indicated that this radiographer had on prior occasions engaged in poor work practices which a management audit would have picked up.

I do not know where this comes from, but it certainly

1 is nothing that is reflected in this record. So we are now back
2 to the use of an easily defeated safety system being a poor
3 practice. Now, with respect to that, I am somewhat puzzled about
4 the fact that in the prevention section of this discussion,
5 there is no reference to avoiding in the future the use of an
6 easily defeated safety system.

7 The prevention is all in terms of it would have been
8 avoided had the radiographer followed procedures, had management
9 controls existed which insured he had followed procedures. So
10 had I read this as the uninitiated, I would have said, well, they
11 have got this reference in the text to an easily defeated safety
12 system being a poor practice. But when you get around to how you
13 prevent it, as the word is going out, you do not prevent it,
14 the repetition of this incident through changing your system.
15 You prevent it through better controls of the radiographer to
16 make sure he follows procedures.

17 And that leaves me candidly very puzzled in the context
18 of the question that Mr. Farrar asked you. Because the fact
19 seems to be that there was not a word that went out immediately
20 to your licensees generally, saying, "Look, we had this event
21 here and this event occurred because the radiographer was able
22 to defeat the system and what you people have got to do is make
23 certain you have a system that is wired in such a way that it
24 cannot happen."

25 That apparently was not done. Apparently insofar as

1 the information you have given us, that instruction was not given
2 out and it is not listed as a prevention means. So we are back,
3 if we are talking about what actually appears here, we are back
4 to the matter of better management control of the radiographer and
5 I am confronted with the fact that again I do not find anything
6 in the record at all to indicate that this radiographer had
7 a track record of poor practices with the consequence that the
8 management could be held derelict for not properly supervising
9 him or not properly instructing him or whatever.

10 MR. BUCK: In addition to all of that, apart from this
11 document, in 1979, March '79, we had an oral argument here. We
12 requested you at that time and I would like to know whether
13 the staff has since this accident put out a notice to all
14 radiographers that they have to have hard wirings and at that
15 point you came back and said no.

16 Now, if that question and the answer and our intent
17 of this thing was not the intent to have the staff put out a
18 notice to these people, I do not know what the point of asking
19 the question is. I do not know what the whole point of this thing
20 is.

21 MR. FARRAR: Unless the staff has rejected the
22 notion that this is important, in which case they have rejected
23 the notion that it is important and I do not know how we can
24 subject Dr. Raphael's outfit to a fine for not doing it.

25 MR. LIEBERMAN: We are not subjecting Dr. Raphael's

1 organization for a fine because he did not have hard wiring.
2 Hard wiring is one alternative. Another alternative is having
3 a keylock on the turn switch.

4 That is not why. We are not giving the civil penalty
5 because of the design of the system. We are giving the civil
6 penalty because of a serious incident, there was a potential for
7 a serious incident. The serious incident occurred. It occurred not
8 only to the radiographer but to his assistant. It could have
9 been prevented.

10 MR. BUCK: How?

11 MR. LIEBERMAN: By carrying a survey meter. There is
12 no reason why an overexposure should ever occur.

13 MR. FARRAR: Yes, but that depends on people. Dr.
14 Buck's question a year ago suggested -- now, maybe he is wrong,
15 if he is wrong you can tell me, -- but his question at least
16 suggested to me that here is a way we do not care about people
17 who wire it up so people who make mistakes cannot defeat it.

18 Now, either that was a good suggestion or it was bad.
19 I would like you to tell me, if you know, not your personal
20 opinion, but whether the staff, one, ever thought about Dr.
21 Buck's suggestion and, two, if they did it whether they concluded
22 it was a bad one, in which case fine, tell us. He will not get
23 upset with you. Three, it was a good suggestion and for some
24 reason or another you decided not to notify people to implement
25 that suggestion.

1 MR. LIEBERMAN: The staff certainly was aware of Dr.
2 Buck's suggestion. Sometimes a regulatory process takes time.

3 MR. FARRAR: This does not take a regulation. Let
4 me ask you, because maybe we have a bad assumption here. Do we
5 agree that the director could if he wanted to and if this was a
6 good suggestion send out a letter saying, "Hey, there is nothing
7 about this in the regulation or the reg guides, but hereafter
8 you people will do things the following way."?

9 Do we agree he has that authority?

10 MR. LIEBERMAN: Yes, and, in fact, he does so on
11 occasion. I do not know why we did not do it in this case. I
12 do know that in the regulatory guide that will provide the
13 staff guidance as to what will be accepted to the staff in
14 meeting the new regulation. We are going to tell licensees that
15 an interlock system to be acceptable would either have to be
16 hard wired or key controlled or some method to avoid a maintenance
17 person or a radiographer without the approval of the radiation
18 safety officer disconnecting the system.

19 CHAIRMAN ROSENTHAL: May I ask this question just to
20 make certain I understand this, what the bottom line of this
21 entire discussion is. Is it fair to say that Dr. Raphael's
22 corporation is being held accountable, civil penalty, for an action
23 by the radiographer in circumstances where the radiographer was
24 able to defeat a safety system and that for whatever reason in
25 the ensuing years, the director of the office of inspection and

1 enforcement, although empowered to do so, did not send out by
2 way of instruction or guidance a notice to licensees telling them
3 that this event occurred and to avoid a repetition of this
4 kind of event, since sometimes individuals do make mistakes, you
5 should assure that in the future your system is set up so that
6 it cannot be that easily defeated?

7 Is that true?

8 MR. LIEBERMAN: That is true. In the case of every
9 item of non-compliance the director does not send out a notice.
10 In this case, the defeating of the alarm system was not the
11 only thing that occurred here, which was wrong. The real problem,
12 even if that had been defeated, and he had carried a survey
13 meter, that would ---

14 CHAIRMAN ROSENTHAL: But that again was the employee
15 and again you are confronted, I think, with the fact that
16 there was nothing in this record to suggest that the company
17 had any advanced notice that this employee might engage in
18 the various derelictions, which he did engage in, and that
19 the company could have prevented this kind of thing from happen-
20 ing in the case of this radiographer or some other radiographer,
21 by having a system that could not be defeated.

22 MR. LIEBERMAN: He could have also avoided this situa-
23 tion, which is in the record, by fixing a thermostat in the
24 room that would have kept the temperature more workable in the
25 room and therefore the radiographer would not have opened the

1 door and would have not turned on the alarm system.

2 CHAIRMAN ROSENTHAL: Was that mentioned at the
3 mitigation hearing or at any other time?

4 MR. LIEBERMAN: I attempted to mention that and you
5 stated, you questioned whether Dr. Volgenau had made that
6 statement concerning a discussion of management deficiencies.
7 He did not state that, but it is in the record in the response
8 to the items of non-accompliance and it may be in our briefs.
9 I am not sure.

10 MR. BUCK: Mr. Lieberman, I would like to point out
11 that you can go the other way in your example. If he had had
12 his meter on, he would not have been overexposed. I point out
13 too if he had not been able to cut off the radiation interlock,
14 whether he had his meter on or not, he would not have been over-
15 exposed. It works both ways, Mr. Lieberman.

16 And the part that bothers me, when we were talking
17 about this in the last oral argument, I think I made the statement
18 that if an interlock can be easily cut off, it is going to be
19 cut off sooner or later by someone. That is the history on
20 not only this industry, but a lot of other industries. If an
21 interlock can be cut off, it is going to be cut off.

22 And to me for the staff to sit around for three
23 years after this accident, I do not know how many other accidents
24 have happened, how many times in the meantime the interlock
25 systems have been cut off, but I can assure you that there are

1 probably dozens of them. That is human history. It is the
2 history of all that interlocks get off. Why they sit around
3 for three years and do nothing about it is beyond me.

4 MR. LIEBERMAN: We are going to institute a new system.

5 MR. BUCK: Yes, I know; we are going to. We always
6 are going to. Every time we bring this thing up, we are going
7 to something.

8 MR. LIEBERMAN: What we plan to do, for your information,
9 is to begin a newsletter to all licensees, whenever a signi-
10 ficant incident occurs, especially to smaller licensees, to
11 let them know of incidents and enforcement actions on a regular
12 basis.

13 MR. BUCK: Are you going to send them things like
14 that a direct notice of this is what you have to do?

15 MR. LIEBERMAN: In those cases where the director
16 feels it is appropriate to do so ---

17 MR. BUCK: He did not think it was appropriate to tell
18 them to at least put a decent interlock on.

19 MR. LIEBERMAN: The fact that we did not it, I would
20 have to conclude that.

21 MR. FARRAR: Mr. Lieberman, let me assist in that
22 question. Let me make a little statement. If Dr. Raphael's
23 corporator is guilty or should be fined, I will fine him whether
24 or not the staff meets up to its responsibilities. I will
25 look at the case according to what he deserves. But the staff

1 is fond in its briefs of telling us that they represent the
2 public interest and I have never questioned that. Because that
3 is their job.

4 It strikes me in handling a penalty case, the staff
5 lawyers, the staff technical helpers have a dual roll if they
6 want to punish or institute remedial measures on the person who
7 has committed the offenses, but if they are truly representing
8 the public interest, they cannot just focus on the bad or
9 the person whose radiographer went astray, but they also ought
10 to be looking at how can we protect the public interest by keeping
11 this from happening.

12 And it looks to me like here the staff has marched down
13 the one road about pinning the penalty on Dr. Raphael's
14 corporation and has not also at the same time marched down the
15 other road about making sure that this does not happen again.
16 I am not saying this is your fault, but it strikes me that it
17 is somebody's fault and it is something that the staff ought to
18 be conscious of when future cases -- I guess it is not too
19 late to still do this, although it is three years late, it is
20 not too late. But they ought to be conscious of it.

21 And I think that is kind of what our questions have
22 been getting at. It is either getting at that point or at the
23 point that if the staff does not think it is important enough
24 to pursue, then why is it important enough to get after Dr.
25 Raphael? I think that is kind of my little statement.

1 MR. LIEBERMAN: I note your comment. We have changed
2 the regulations. So we have done some. Again, this case
3 occurred for many reasons. Interlock was part of it.

4 MR. FARRAR: Yes, but I have read those reports,
5 all those Commission reports about Three Mile Island and they
6 said we have got to look at the fact that people are going
7 to foul up.

8 MR. LIEBERMAN: We know overexposures will occur. We
9 are trying to decrease it and the survey meter can always prevent
10 it. And if this had been a case where you only had an over-
11 exposure or the failure of doing a survey, for example, Pittsburgh
12 Steel Mining case, we would have given a civil penalty there too.

13 The survey meter can prevent an overexposure. There
14 is no excuse for ever having an overexposure if you are using
15 a survey meter as required. Dr. Volgenau stated in his testi-
16 mony that -- we have gone over this point before -- that the
17 management involvement on the basis of what he knew, but he was
18 concerned on whether on other days this radiographer was using
19 a survey meter.

20 These people are trained. They know what they are
21 supposed to be doing. When they see someone auditing their
22 activities, they use a survey meter. It is when they are working
23 by themselves, when it is difficult to inspect, when you do not
24 know what they are doing, it is very rare for an inspector,
25 announcing inspection, to come on a radiographer and find him

1 not doing a survey.

2 CHAIRMAN ROSENTHAL: Thank you, Mr. Lieberman. I
3 think we have probably detained you long enough.

4 MR. LIEBERMAN: Would you like me to get to your
5 question of exceeding remedial civil penalty limit?

6 CHAIRMAN ROSENTHAL: Just give me, if you would,
7 a summary. I do not think we will need a detailed response
8 because it is my impression that the members of the Board concur
9 in that judgment.

10 MR. FARRAR: If we did hear you correctly, at the
11 beginnig you said we would not on the original go around have
12 the authority to raise it.

13 CHAIRMAN ROSENTHAL: If you would just summarize quickly
14 what leads you to that conclusion.

15 MR. LIEBERMAN: Basically in the Administrative
16 Procedure Act 5 USC 557 B, which provides that an agency, and
17 this means the Appeal Board, since you have been delegated the
18 responsibility by the Commission, for reviewing this case, has
19 the same authority as the presiding officer had except as it
20 may limit by rule or by notice.

21 In this case, by both rule, 10 CFR 2.205, and by
22 notice, that would be the order imposing civil penalties
23 providing the opportunity for a hearing and stating what issues
24 would be held in the hearing and the notice of hearing issued
25 by the Commission's secretary stated the issue in this case would

1 whether these civil penalties should be sustained.

2 And as a matter of fairness, this licensee has not had
3 reasonable notice set by requesting a hearing.

4 MR. BUCK: So you are saying the presiding officer,
5 the Administrative Law Judge could not have raised the fine,
6 the penalty and neither could anybody else along the line.
7 In other words once you sent out that notice saying here is what
8 we propose that sets the maximum.

9 MR. LIEBERMAN: That is correct, under the existing
10 regulations.

11 CHAIRMAN ROSENTHAL: We will take a ten-minute recess
12 and then hear from the licensee.

13 (Whereupon, there was a ten-minute recess.)

14 CHAIRMAN ROSENTHAL: Before you start, Dr. Raphael,
15 I wish to note that there seemed to be in your brief on the
16 mitigation question an inclination to reargue what we had
17 decided in your favor before, the prior occasion, and the
18 Commission, as you know, saw fit to vacate our decision.

19 You refer, for example, on page 4 to Commissioner
20 Kennedy's descending opinion. Obviously, as I assume you
21 appreciate that whether we agree with the Commission's decision or
22 not, it is binding upon us and the question here is solely
23 whether the penalty should be mitigated.

24 We have to accept in passing upon that question the
25 Commission's decision and everything that was said in that

1 decision.

2 ORAL ARGUMENT OF COLEMAN RAPHAEL

3 ATLANTIC RESEARCH CORPORATION

4 MR. RAPHAEL: I recognize that, Mr. Chairman, and
5 I appreciate that I am not going to argue my original case.
6 I am going to address the subject of mitigation.

7 But let me first briefly address the question that
8 you had asked in your order and relating to the authority of
9 the Appeals Board and I obviously agree with the staff. I
10 would refer you to .205 of the Code of Federal Regulations,
11 Title X, paragraph F, which states, "If a hearing is held an
12 order will be issued after the hearing by the presiding officer
13 or the Commission, dismissing the proceeding or imposing,
14 mitigating or remitting the civil penalty."

15 There is no reference to increasing it, but it would
16 certainly seem to me -- and I will come back to that sentence
17 a little bit later -- it certainly would seem to me that the
18 authority is there for mitigation on remission.

19 I would like to address an argument, which has
20 been presented many times by the staff. And I have not addressed
21 it in the past, because this subject was not in mitigation, but
22 it is now. And that relates to the continuous repetition
23 of the fact that the fine could have been \$35,000, but that a
24 fine of only \$8,600 was imposed because of ARC, Atlantic
25 Research's record of no previous history of violation and its

1 good attitude.

2 But that is not at all the facts or the case and I
3 would like to address it and tell you what really happened and
4 what really happens.

5 First, let me point out that the emphasis is contin-
6 ually placed on the number of violations and what severe
7 violations these are. The fact is that this miscreant radio-
8 grapher did go into a high radiation area without a film badge
9 and without taking a survey and he got overexposed. We got
10 hit for that for three violations. One, because he did not have
11 a film bade, one, because he did not take a survey and, one,
12 because he got overexposed.

13 When he got out and realized what had happened and
14 immediately called his superior and started the chain of events,
15 which have been going on for the last three and a half years,
16 his superior called consultants and we took him off to the
17 hospital and he did not sign out the log. He did not sign the
18 log and he did not put down the survey reading.

19 We got hit with two violations, two non-compliances
20 for that. One, because he did not put down his name and, one,
21 because he did not put down the survey reading.

22 In the specifications which have been written into the
23 license the statement is made that this daily log shall be
24 complete with the following information; date, initial survey
25 reading, final survey reading, dosimeter readings, project.

1 worked on, any maintenance performed, unusual equipment oper-
2 ation and name of radiographer and assistant radiographer.

3 I do not see the logic that might not have led to the
4 staff charging us with seven more violations. Because not only
5 did he not put down the name and the survey, he did not put down
6 these other things.

7 CHAIRMAN ROSENTHAL: You might not want to give
8 them any ideas. I do not know whether the Statute of Limitations
9 has run or not.

10 MR. RAPHAEL: I hope so. However, I do find a logic
11 and the logic is that there are paragraphs in the Code of Federal
12 Registration which state that he shall put down his name. And
13 there is another paragraph, which states that he shall put down
14 the final reading.

15 And the charge that has been made against us has been
16 in terms of paragraphs that have been violated, not whether or
17 not one aberrant procedure occurred by a radiographer who was
18 immediately punished for it, but what paragraphs could be
19 identified, and once all of those paragraphs were identified
20 we have continually been charged with seven violations and I
21 contend that that really is not the case.

22 MR. FARRAR: Are you suggesting that, and again
23 taking the Commissions' decision as we have to as given, and the
24 fact that all we are talking here is mitigation, is that
25 we could view this as one serious offense for which the range

1 under the director's policy is 2,000 to 3,000. And since
2 they say all of the factors are in your favor one way to handle
3 this would be this is one serious offense for which the penalty
4 is \$2,000?

5 MR. RAPHAEL: No, sir, I feel that there was no
6 guilt on the part of the corporation.

7 MR. FARRAR: I meant to reserve your right to take
8 that up on appeal later. Let us assume we are past that point,
9 that we say, yes, the Commission has disagreed and you are
10 responsible for this, how much is it going to cost you, I
11 know you disagree with that.

12 But one way to handle this would be this was one
13 serious offense, \$2,000.

14 MR. RAPHAEL: No, Mr. Farrar, I think one way to
15 handle this is to say that this is really one serious offense
16 and now shall it be 2,000, 3,000 or shall we mitigate that down
17 to zero.

18 MR. FARRAR: The director says given that it is
19 a serious violation and given your size, then the range is
20 2,000 to 3,000 and he is willing, he says all of the factors
21 are in your favor, so we are at the bottom of the range,
22 which is 2,000 by his standards.

23 Now, we are not bound by that standard and maybe we
24 could go a little lower. In other words, this argument you have
25 given me about the seven paragraphs and the seven violations,

1 I am trying to see where that takes me. I thought you were
2 suggesting it takes me to calling it one violation and one
3 penalty for that one violation.

4 MR. RAPHAEL: It takes you partially in that
5 direction. I feel that there are a number of interpretations
6 and a number of emphases which have been placed on this case
7 for the purpose of establishing the position that a fine must
8 be applied and that that is one of them for establishing the
9 extent of the fine.

10 I am really addressing myself now to the question of
11 was there any consideration of mitigation? Was there any
12 consideration of the company's past history? Was there any
13 consideration of the circumstances under the case? I am saying
14 that there was not.

15 MR. FARRAR: Okay, the staff says there was. If
16 they had considered those, it would have been 3,000 on each of
17 those ---

18 MR. RAPHAEL: And I plan to address all of this. The
19 point is that once one establishes that there are seven
20 violations, one can then go to 0800 and point out that there is
21 a reference to a \$5,000 maximum. And if you multiply \$5,000
22 by seven violations, you can then state that the fine could
23 have been \$35,000 and obviously there must have been consider-
24 ation of the mitigation, since the fine was only 8,000 which
25 can then be compared to 35,000.

1 But there is nothing in the record or in the history
2 or in the practice that would have made this a \$35,000 fine,
3 because the fact is that table two, a schedule of civil penalties
4 for NRC licensee, is the basic document which has been used
5 as the guidance for all of the fines that have been applied.

6 And since we are not at line one, a power reactor
7 interradiated* fuel reprocessor, but rather are a radiography
8 licensee with more than ten employees, we fall within line three.
9 And line three says that a violation shall be \$2,000 to \$3,000
10 an infraction. \$1,000 to \$2,000 is the range of monetary
11 penalty and a deficiency \$300 to \$500.

12 We had three violations. We were charged with three
13 violations, two infractions and two deficiencies.

14 MR. BUCK: And that is 14,500?

15 MR. RAPHAEL: \$14,000 would have been the maximum
16 under any -- if the maximum were applied.

17 MR. FARRAR: And they gave you only 8,600 and they
18 are saying because of those good factors in your favor they
19 cut you in half?

20 MR. RAPHAEL: I plan to address that too.

21 CHAIRMAN ROSENTHAL: When you are addressing that,
22 I also want you to address the sentence in the Commission's
23 decision, in the final paragraph on page 19, which states in
24 part, although the \$8,600 civil penalty was not the largest
25 that might have been levied and could be viewed as small, due to

1 the employee's deliberate disregard for safety systems.

2 Now, what do you take that to mean in terms of the Commission's
3 view of this case?

4 MR. RAPHAEL: I believe that the Commission listens
5 to the arguments that were presented by the staff and drew con-
6 clusions based upon the arguments that were presented to them.

7 CHAIRMAN ROSENTHAL: What specific argument that the
8 staff presented do you think prompted the Commission to make a
9 statement of that kind?

10 MR. RAPHAEL: Many times in the record this point has
11 been made that \$8,600 is considered small in view of their
12 seriousness. I think the Commission just picked that up.

13 CHAIRMAN ROSENTHAL: What are we supposed to do with
14 it, again, given the fact that we are bound by the Commission's
15 holding?

16 MR. RAPHAEL: I do not believe that that was a holding
17 of the Commission. The Commission remanded the investigation
18 of the fine to this Board and I am assuming that items like
19 the seriousness and whether or not any consideration of
20 mitigation had gone in there are valid subjects to bring up
21 at this time and to present to you.

22 CHAIRMAN ROSENTHAL: Do you think we should disregard
23 the statement entirely or is there some weight that you think
24 has to be attached to it?

25 MR. RAPHAEL: I believe that the Commission is giving

1 the Appeals Board the authority to consider the entire question
2 of what the fine may be and that statements which are not
3 directives in that Commission order are up for consideration
4 and that the Board has the authority to eliminate the fine and to
5 mitigate it down to zero and should not feel that it has to
6 interpret Commission statements which are not directions.

7 CHAIRMAN ROSENTHAL: Let me put it to you this way;
8 we obviously have the power to mitigate it. The Commission
9 sent it back for that purpose and there seems to be general
10 agreement that we cannot raise the penalty above the \$8,600
11 assessment. Accepting that, do you think we would be open to
12 a charge of total disregard of the Commission's decision and
13 views expressed therein, were we to accept your proposition
14 that the penalty be entirely mitigated, given the fact that
15 the Commission said here that the \$8,600 penalty could be viewed
16 as small, due to the employee's deliberate disregard for
17 safety systems?

18 In other words, how would we look if in the teeth of
19 that statement we said not merely are we going to cut the
20 penalty, but we are going to mitigate it in its entirety?

21 MR. RAPHAEL I believe, Mr. Rosenthal, that the
22 Commission has established that the company has a liability. This
23 was their decision. The company cannot be considered to have
24 no liability. I believe that their references to the extent
25 of the fine has been based upon the record as presented to them

1 and that the record as presented to them quotes things like
2 \$35,000 maximum and quotes statements that consideration for
3 mitigation has been given and that the Commission would -- I
4 do not know how the Commission would respond.

5 I would hope that you would consider that in view
6 of the correction of this information and the acceptance on
7 your part, based on what I am going to show to you, that
8 there has not been a consideration mitigation, that the fine
9 could not have been \$35,000, that you would feel it was within
10 the Appeal Board power.

11 CHAIRMAN ROSENTHAL: You do agree, I take it, that
12 the Commission understood the entire factual picture respecting
13 what transpired on the day in question. Because, indeed, at
14 page 3, going over to the top of page 4, the Commission has an
15 excerpt with respect to the facts which seems to be drawn from
16 the staff's brief to the Commission.

17 It would seem to me from a reading of that excerpt that
18 it is an accurate depiction of the events in question. The
19 staff fulfilled its responsibility to represent in its pleadings
20 the factual picture correctly. So that we can agree, can we
21 not, that the Commission did understand what had happened?

22 MR. RAPHAEL: Yes, the Commission had presented to it
23 facts, which I do not argue, and facts concerning what happened
24 on that day and interpretations and other facts associated
25 with consideration of mitigation and the degree of seriousness

1 and a series of other facts that I do argue that I was hoping
2 to present.

3 MR. FARRAR: Dr. Raphael, just be sure you put it
4 to me in a way so that if I accept it the Commission will not
5 write anything about me in terms of deliberate disregard of
6 what they have said.

7 MR. RAPHAEL: Yes, sir, okay. We will find a job for
8 you at Atlantic Research Corporation. I hope that is taken in
9 the way it was said.

10 I guess the point I was making is that the \$35,000
11 actually in a maximum case could be \$14,000 and in no case, and
12 I believe that I have researched every case in which there
13 was ever a fine to anybody from the Nuclear Regulatory Com-
14 mission, starting in 1971, when records were developed, certainly
15 between '71 and '76, there was no case where any of the
16 deficiencies or infractions or violations for a radiographer
17 licensee was put at \$5,000.

18 In almost every case, when you identify a deficiency
19 or an infraction, which is similar to one of Atlantic Research's
20 and which can be identified with a specific paragraph, the
21 minimum of the range was shown. When the range says 2,000 to
22 3,000 and it was a violation, the number that was applied to
23 every company was \$2,000.

24 I will give you a few examples which show this. I
25 have gone back and Mr. Britton has gone back to identify all

1 of the cases where fines were applied. We found 58 such cases
2 prior to December 12th, 1976.

3 It is of interest to note that the average fine of
4 those 58 cases was \$8,600, of interest, but not very important.
5 A letter was generally sent or a notice was sent to the
6 violators and in 16 of those cases, there was no argument,
7 no defense and the fine was paid without any further consider-
8 ation.

9 In the other 42 cases, the companies generally wrote
10 a letter, either explaining or arguing their position. And in
11 every case, they were determined to be guilty, although in
12 15 of those cases there was a slight decrease, generally in
13 the order of ten percent.

14 CHAIRMAN ROSENTHAL: This a very interesting history,
15 but what point are you trying to make by referring to these
16 other cases? Because these are instances, where you point out,
17 where licensees were, in fact, fined for civil penalties
18 imposed against them.

19 MR. RAPHAEL: Yes. I would like to show you a chart.
20 What I am trying to point out is that the fines are applied
21 either by word processor or computer or reference to a chart,
22 that there is not and has never been a consideration of the
23 circumstances behind the fine, that there is no mitigation,
24 that a fine for a violation, if you do not sign your name in the
25 log book and you get picked up and charged for it, you get fined

1 \$300, because that is a deficiency. And that can be whether
2 or not you have had a 100 violations or no prior violations,
3 whether or not you are considered a cooperative or a non-
4 cooperative licensee.

5 CHAIRMAN ROSENTHAL: You say these are all minimum
6 penalties that were assessed?

7 MR. RAPHAEL: Not all, in most of the cases, in almost
8 all of the cases and I can show you some of them.

9 CHAIRMAN ROSENTHAL: If in some instances there
10 were minimum penalties assessed and in other cases it was not
11 a minimum, it would seem that some element of discretion was
12 being utilized and I wonder how if without knowing, as we clearly
13 do not, the precise circumstances of each case, we could
14 draw the inference that you appear to ask us to, mainly that
15 there is a robot that is spewing forth these penalty amounts
16 without any regard to the particular circumstances of the
17 particular case.

18 MR. RAPHAEL: May I show you some data?

19 CHAIRMAN ROSENTHAL: Do you have charts there?

20 MR. RAPHAEL: Yes.

21 CHAIRMAN ROSENTHAL: Have you furnished a copy to ---

22 MR. RAPHAEL: I have copies that were delivered to me
23 about an hour and a half ago. These charts did exist in the January
24 1978 hearings before Judge Jensch, so that they have been
25 presented before, but that was in a oral hearing and in rereading

1 the transcript it seems to me that the presentation that I made
2 was not represented very well.

3 CHAIRMAN ROSENTHAL: Is this the precise chart that
4 was before Judge Jensch?

5 MR. RAPHAEL: Yes.

6 CHAIRMAN ROSENTHAL: As an exhibit or just given to
7 him?

8 MR. RAPHAEL: It was included in the transcript. It
9 was presented before Judge Jensch. A copy of it was given
10 to the staff. Mr. Lieberman is looking at it right now and
11 it was -- I do not know ---

12 CHAIRMAN ROSENTHAL: It is in the transcript of?

13 MR. RAPHAEL: The transcript of the January 1978
14 hearing.

15 MR. LIEBERMAN: There is, Mr. Chairman, a series of
16 charts following page 47. I have not seen the charts he is
17 referring to to see if they are exactly the same, but I
18 assume they are the same.

19 CHAIRMAN ROSENTHAL: I am sure, Mr. Lieberman, that
20 Dr. Raphael will give you a copy of these charts so that you
21 can assure yourself that this is, in fact, the same chart.

22 MR. LIEBERMAN: The four pages of charts?

23 MR. RAPHAEL: There were three pages there. I have
24 reduced it two charts.

25 MR. LIEBERMAN: It looks more or less the same.

1 MR. RAPHAEL: Let me give you copies and I will use
2 an easel for them. This represents ever case that I was able
3 to find in which there was a notice of violation, an indication
4 of what the previous non-compliance history was, an indication
5 of the amount of exposure which occurred and the penalty which
6 was applied.

7 Out of the 58 cases, there are only 11 in which I was
8 able to find such records. The records in the NRC library are
9 sort of worn and missing and sloppy in some cases.

10 CHAIRMAN ROSENTHAL: I cannot believe that.

11 MR. FARRAR: Can you tell me what are the reasons
12 you eliminated the rest of the 58?

13 MR. RAPHAEL: Either there was not a notice of
14 violation -- In the early cases where there was no notice of
15 violation and the letter did not identify what the situation
16 was and where there were not the references. Today this is
17 done in a very standard way. The letter is a standard letter.
18 There is an Exhibit A, which indicates each non-compliance.

19 At the bottom, it says this is a discrepancy or this is
20 a violation and then there is a fine. Almost every time that
21 it says a violation, it says \$2,000. When it says an infrac-
22 tion, it is \$1,000. When it is a discrepancy, it is \$300.

23 And then there is an Exhibit B, which says here is
24 your previous record of non-compliances. I tried to find as
25 many of those as I could where I could put together data and I

1 have shown it here. The licensees, as you see, vary from the
2 National Bureau of Standards and reactor operators, that is
3 byproduct licensees. The non-compliance charges are written
4 in different ways.

5 But after 1976 and this represents two 1973, one 1974,
6 two are 1975 and everything else is 1976. You will notice
7 that in 1976 the violations for non-compliance charges call out
8 specific paragraphs in the Code of Federal Regulations. And
9 so it becomes easy in identifying the paragraph to decide what
10 the fine is that goes with that paragraph.

11 The middle column is the non-compliance history
12 and this is the number of items of non-compliances and the
13 number of months and the number of repetitions, which have
14 occurred. For example, International Testing Lab shows that
15 there had been 21 non-compliance charges over the previous
16 24 months and that six of them were repetitions at the time
17 that this charge was being made.

18 In some cases, particularly in the early years, it did
19 not say. In the National Bureau of Standards the statement was
20 there have been previous charges. In Rochester Gas and Electric,
21 there has been previous non-compliances and in the case of
22 Consolidated Edison, it said there have been many repetitions,
23 so I put down ---

24 CHAIRMAN ROSENTHAL: When you talk about these charges,
25 are these charges which were sustained? Because I gather that

1 when I & E apprises the licensee of his conclusion that
2 a violation has occurred, the licensee has the opportunity to try
3 to persuade I & E that there, in fact, had not been a violation.
4 So what I am really getting at is are these charges which in
5 the vernacular stuck?

6 MR. RAPHAEL: Not necessarily.

7 CHAIRMAN ROSENTHAL: Does that not have a bearing upon
8 your use of them? It is just like every indictment does not
9 lead to conviction and I do not know whether we should be taking
10 into account, assuming it has any relevance at all, a charge
11 which may not have been sustained. Because certainly in con-
12 sidering in a subsequent case whether to impose a civil penalty
13 of a particular amount, I would hope that I & E would only
14 consider prior charges that had been sustained.

15 MR. RAPHAEL: Right, Mr. Rosenthal, and let me tell
16 you what these are. These are all of the data I could find
17 and the data that I could find goes into the Nuclear Regulatory
18 file, NRC library file, before a final disposition is made.

19 I have records of the final dispositions. And as I said,
20 out of the 58 cases, there were reductions of as much as ten
21 percent in the fine on 15 of them. I do know that the Nuclear
22 Engineering Services and that the Globe case and that the \$20,000
23 Con Ed case and that the Vermont Yankee case, those were the final
24 numbers. I believe all of them were the final numbers.

25 In the event that one or two of them were not, it was

1 not a reduction of more than ten percent.

2 CHAIRMAN ROSENTHAL: What do you want us to do?

3 MR. RAPHAEL: I guess the conclusion, one of the
4 conclusions, I am trying -- there are two conclusions, one
5 follows on the next page. But one of them is that the average
6 of all other companies shows a compliance, a non-compliance per
7 month and many repetitions.

8 Only Atlantic Research, not only of these 12 as shown
9 here, but of anything I have been able to find, had no history
10 of ever having had a non-compliance in the three years prior
11 to this. And as a matter of fact, three years have passed now
12 and we have no non-compliance in our history.

13 If we ran the average of other companies, we would have
14 72 at the present time. I was going to, but I gather you prefer
15 that I do not, I was going to discuss the exposure and what whole
16 body rems mean and the significance of the continuous statement
17 that this man was exposed to the most flagrant exposure in the
18 history of the Nuclear Regulatory Commission, which is really
19 a dramatic presentation of the situation.

20 I will address that if you would like or if not I
21 will not.

22 CHAIRMAN ROSENTHAL: Well, you have given the figures
23 with respect to the exposure. Have you not?

24 MR. RAPHAEL: No, this fourth column is whole body
25 radiation. It does not represent extremity radiation.

1 MR. FARRAR: What really happened to this guy? Did
2 his thumb turn red?

3 MR. RAPHAEL: I have pictures of it right here. It
4 was reconstructed and somebody said, "Hey, he had his thumb
5 touching the cobalt source," which means you get down to zero
6 that is an infinite rate of radiation. Touching the cobalt
7 source for approximately a second, they measured a second and
8 a half and they said let us make it two seconds, which immediately
9 made the number much larger.

10 They concluded that he had exposed the tip of his
11 thumb nail to 1260 rems in the right-hand and they wrote a
12 report on it. And about three weeks later, his left-hand began
13 to redden and he had some peeling. And it was decided that some-
14 how or other the whole reconstruction had been wrong, because
15 it was the wrong hand.

16 However, what did happen is that the man's hand
17 suffered what I call reddening and peeling.

18 MR. BUCK: His whole hand?

19 MR. RAPHAEL: No.

20 MR. BUCK: Is his hand completely all right now?

21 MR. RAPHAEL: Yes.

22 CHAIRMAN ROSENTHAL: What are those photos coming
23 from?

24 MR. RAPHAEL: I went back to the records and found it.
25 It had not been presented previously. The answer is yes, there

1 was some reddening and some peeling.

2 I decided to identify for you every paragraph that
3 was repeated and there are not very many paragraphs that are
4 repeated in the Code of Federal Regulations. There are 19
5 separate paragraphs that are shown to have been violated. I
6 was able to identify, if you look at Atlantic Research, you
7 will find 34.27 and here is another 34.27.

8 So some of these paragraphs have been repeated. I
9 have taken every case where that happens and presented it on
10 the next chart. 10 CFR 34.33 A relates to a film badge. The
11 specification there states that when an employee walks into a
12 high radiation area, he must wear a film badge or a pocket
13 dosimeter.

14 Our employee did not do it. This is an infraction.
15 The fine is \$1,000. The fine that we were charged was \$1,000.
16 Globe X-ray had an employee who for two months went in and
17 out of the area without a film badge. Their charge was \$1,000
18 and they had had 30 previous non-compliances in 36 months, six
19 of which were repeated.

20 Associated Piping had two employees who went in without
21 film badges. Their fine was \$500. Nuclear Services was \$1,000.
22 Similarly, you see that the fines were charged on the basis of
23 the violation of the paragraph, no consideration of mitigation.
24 And the basic point I am trying to make through the use of these
25 charges is that the contention that the director really looked

1 at the case and looked at the corporation's history and the
2 background and made the decision on that basis, I believe that
3 contention is not true, that there was no consideration. And
4 I believe that we should consider it.

5 MR. FARRAR: The up-shot of that should be that we
6 should sit down and look at the case on a clean slate ourselves
7 and throw out anything the director did on the grounds he did
8 not really do it. It was just the robot who applies these
9 things.

10 So what you are saying is we -- Mr. Lieberman gave
11 us three options that we should follow -- what you are saying is
12 we should not give any weight to what the director said
13 because you are saying he did not really do anything.

14 MR. RAPHAEL: Yes, sir, I believe that the director
15 and the directorate follows a procedure. The procedure was
16 applied. The procedure does not include sitting down and
17 analyzing the situation.

18 MR. BUCK: You are saying in a sense there was no
19 judgment used on this?

20 MR. RAPHAEL: No judgment relating to the facts of
21 the situation or company history or non-compliance or whether there
22 was anything the company could have done.

23 MR. FARRAR: But they can see -- They say we took all
24 of the factors into account and so we applied the minimum.

25 MR. RAPHAEL: It is not necessary to apply the minimum.

1 You have the authority to mitigate or remit the civil penalty.

2 CHAIRMAN ROSENTHAL: I think they agree that we have
3 that authority. I think the staff's position is that in the
4 totality of circumstances, the civil penalty which they assess
5 in the amount of \$8,600 is reasonable. And being reasonable,
6 we are to uphold it, whatever standard we might apply in terms
7 of our roll.

8 Now, this is very interesting and maybe it does and
9 maybe it does not demonstrate that the director is not really
10 exercising judgment in making these determinations. But I think
11 what your burden at this point is is to persuade us that this
12 penalty should be substantially mitigated.

13 Indeed, as I understand your position, it is that it
14 should be mitigated in its entirety. So I would suggest that
15 you might wish to assume that you have made the most out of
16 that chart that you can possibly make out of it and now turn to
17 the question as to why in the exercise of the discretion we
18 have, we ought to mitigate this penalty in its full amount,
19 which is your position as I understand it.

20 MR. RAPHAEL: Yes. All right, I would like to do that
21 in what essentially is a summary statement, although I will
22 answer any of the questions you may have. It was our position
23 prior to the Commission's decision that Atlantic Research could
24 have done nothing to prevent the incident. And they were all of the
25 questions of punitive versus remedial, strict liability, etcetera.

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To me this is a black mark. The consideration of either fine or a guilt is a black mark against the company that has a record that we have for many years attempted to protect as being completely out of the ordinary.

The Commission decision was that we must assume some guilt and we must there -- We are never in the position, if we choose not to carry further, we are never in the position where we can say that we are absolutely clean. I consider that that is extreme punishment for Atlantic Research Corporation.

The second question is whether or not in addition to that Atlantic Research should now pay a fine for this guilt, which to this day we do not know how to have avoided, and I believe that at that point that would be compounding the punishment. And I am requesting that by not assigning the fine does not clear Atlantic Research. We still carry the liability.

CHAIRMAN ROSENTHAL: Let me see if I understand that argument correctly. It sounded to me very much like the argument that I heard made at the time of sentencing of white collar criminals who have had a position of considerable reputation in the community. And we have a few of them in Maryland.

And their lawyers have gone before the judge and said, "Judge, do not send this man to jail. He has already suffered enough by the mere fact of his conviction." Here he has been

1 a governor or a prominent lawyer or whatever and the fact that
2 his reputation is now tarnished or destroyed, the lawyers would
3 usually make it appear to be the worst of all possible worlds,
4 is enough punishment.

5 To load on that a term of imprisonment would be
6 Dacronian in character. Now, is that the nature of your --
7 I realize we are in a civil and not a criminal contest -- is
8 that essentially the nature of your argument before us?

9 MR. RAPHAEL. Yes, sir, the extent of the fine, the
10 existence of a fine is now the issue, not the amount of the
11 fine. It does not mean that much to Atlantic, to the Nuclear
12 Regulatory Commission and it does not mean that much to
13 Atlantic Research's survival.

14 CHAIRMAN ROSENTHAL: That is the same argument, I
15 would assume, that could be advanced by any licensee in con-
16 nection with a first violation. They always say what we had
17 a clean record and now we have got this violation on the record
18 and it does tarnish our reputation and the blemish on that
19 reputation is enough of a sanction. And therefore we should not
20 have a civil penalty imposed on top of it.

21 Is that right? I mean there is really no difference
22 between your argument as applied to Atlantic Research and your
23 argument applied to any other, in the vernacular, first time
24 loser.

25 MR. RAPHAEL: Any other first time loser who has the

1 record of the training and the safety and all of the other
2 things that we have besides its first occurrence.

3 CHAIRMAN ROSENTHAL: You bring in what you say is ---

4 MR. RAPHAEL: Circumstances of the incident.

5 MR. FARRAR: Dr. Raphael, this question, I suppose,
6 is really irrelevant, but just out of my own curiosity you
7 you talked about the black mark against the company's name. Do
8 you plan to go to the Court of Appeals regardless of what
9 happens here?

10 MR. RAPHAEL: I plan to bring it before our board
11 of directors. I plan to ask the board of directors for ---

12 CHAIRMAN ROSENTHAL: May I say something in that
13 connection? One of the things that frankly has puzzled me
14 during this entire proceeding before the Commission is the
15 fact that you have chosen to represent the company rather than
16 to have the company represented by counsel.

17 Now, I do not wish to be understood as deprecating
18 the quality of your representation of the company. Indeed,
19 you persuaded us the last time and I would have to say that I
20 think that your representation of Atlantic Research, considering
21 that you are a layman, has been one of quality.

22 Now having said that, I must be forgiven my next
23 comment, which is that the issues here are essentially legal in
24 character and I tend to think frankly that you would have
25 been advantaged had you had legal representation. Now, you may

1 just attribute that statement to a statement of a lawyer, who
2 is trying to protect the brotherhood or exulting the worth of the
3 brotherhood as it were, but I just note that.

4 Now, that has nothing to do with how we will decide
5 this case. We will decide it on its merits without regard to
6 that fact. What prompted the comment was Mr. Farrar's inquiry,
7 because I think you will find that if you do go to the Court
8 of Appeals, they will require the corporation to be represented
9 by counsel.

10 They are not, of course, as liberal as we are
11 in terms of allowing lay officers, corporations to represent
12 the corporation in our proceedings. And I tend to think that if
13 that is what will confront you in court, that restriction will
14 require to employ counsel, maybe to your benefit.

15 Again, I want to stress that I am not at all trying
16 to deprecate the quality of your services. But it does trouble
17 me frankly to see a relatively large corporation represented in
18 a matter of this significance by a layman.

19 MR. RAPHAEL: May I address that?

20 CHAIRMAN ROSENTHAL: You certainly may. This, I might
21 say has nothing to do with this argument, but I did feel con-
22 strained to make that observation.

23 MR. RAPHAEL: Mr. Rosenthal, we are very proud of
24 our performance as a corporation. We feel that we have a civic
25 responsibility and a responsibility to our shareholders and to

1 our employees. We have taken the position that when we believe
2 we are right, we will fight for that position.

3 And being a federal contractor, doing much work for the
4 government, we are subject to the bureaucracy in many areas.
5 We recognize that OSHA and NRC and the Equal Opportunity Office
6 will very often come in and ask us to do something or very
7 often make charges against us.

8 If those charges are incorrect and we believe there
9 is no guilt, we will fight them as hard as we can. It has
10 been our experience when a legal matter arises, the costs of the
11 legal services have generally been greater than the issue that
12 we were fighting. For that reason, we avoid using outside, pay-
13 ing for legal services, if we think that we may not have to do
14 it.

15 We feel this was an issue that would have been solved
16 at a very early point. I said I would handle it until it
17 reached that point. It is now at the point where the next step
18 would involve and I recognize it would involve much expense.
19 And I do not believe that there will be a unanimous board
20 position supporting me or a board position supporting me
21 however we have pursued it to that.

22 And I agree that I cannot handle it. For that reason,
23 we may have to give up.

24 CHAIRMAN ROSENTHAL: I do not want to be understood
25 as suggesting to you that you should follow one course or

1 another. That obviously is going to be your decision to make
2 after we reach a decision and I can say, certainly for myself,
3 I have not got the foggiest notion as to how I am going to come
4 out on this case.

5 MR. RAPHAEL: As president of the corporation, I am
6 extremely concerned that the situation was adverse to us. Now,
7 the degree of adversity is the question.

8 CHAIRMAN ROSENTHAL: Thank you.

9 MR. FARRAR: Let me ask you, turning from the law
10 to the technical side, this interlock that we have been talking
11 about and whether it could be upgraded, when we talk about
12 interlock and its being hardwired, are we talking about just
13 something so that you could not defeat the alarm system? Or
14 are we talking about could we go so far as to have an inter-
15 lock so the door could not be opened while the source is out of
16 the ---

17 MR. RAPHAEL: That was not the interlock that we had.
18 We have two locks. One turns the key, which permits the
19 crank to be turned and this is from a safe area. It permits
20 the crank to be turned, which brings the cobalt source out.

21 And then there is a second lock at the door which
22 takes you inside the maze and then there is a third door at
23 the outside of the building. In the event that any of those
24 locks were open then the alarm system goes off as soon as you
25 start to -- or in the event that either door lock is open, the

1 alarm system goes off as soon as you start to crank the cobalt
2 source out.

3 This employee wanted to keep the outside door open
4 and because of that he wanted to remove the alarm system. And
5 to do that, he had to stand up on the table and pull some
6 wires. The thing that we have done, the modification, is that
7 we now have the wires encased in a metal-like VX cable which
8 runs inside the wall, but there is no question that with a hack
9 saw he could do it again if he chose to.

10 MR. FARRAR: But he could go in there with the alarm
11 on?

12 MR. RAPHAEL: Oh, yes, but that is very unpleasant.

13 MR. FARRAR: No one has ever suggested that it ought
14 to be that the door should be interlocked in a way that it could
15 not be opened?

16 MR. RAPHAEL: No, we have never talked about that.

17 CHAIRMAN ROSENTHAL: Mr. Lieberman, if you wish,
18 we will give you a few minutes for rebuttal.

19 MR. LIEBERMAN: Mr. Chairman, unless you have some
20 questions, I have nothing further to add concerning the staff's
21 position.

22 CHAIRMAN ROSENTHAL: Thank you, Mr. Lieberman. On behalf
23 of the entire Board, I wish to thank the parties for their
24 helpful presentations and on that note, the question of penalty
25 mitigation will stand submitted.

(Whereupon, the oral argument concluded at 12:30 p.m.)

ALDERSON REPORTING COMPANY, INC.

This is to certify that the attached proceedings before the

NUCLEAR REGULATORY COMMISSION

in the matter of:

Date of Proceeding: 5/15/80

Docket Number: S Atlantic Research Corp

Place of Proceeding: 4350 East-West Hwy, Bethesda

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

D. Dianne Vetter

Official Reporter (Typed)

Dianne Vetter

Official Reporter (Signature)