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Mr. Samuel J. Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Attention: Docketing and Service Branch

Subject: Comments to Proposed General Statement of Policy and Procedure for Enforcement Actions

Dear Mr. Chilk:

This letter is submitted by Westinghouse Electric Corporation ("Westinghouse") to the Nuclear Regulatory Commission ("Commission") to submit comments on the Commission's enforcement program, to be codified as Appendix C to 10CFR Part 2. The Commission's invitations for comment were published on October 7, 1980 (45 Fed. Reg. 66754) and October 17, 1980 (45 Fed. Reg. 69077).

In this submittal, Westinghouse makes these three points: First, the proposed fine schedule is confiscatory in that instances come readily to mind where application of separate fines for each day's continued violation might approach or exceed the value of a facility. Second, the schedules of fines require modification to result in different levels of fines to differentiate between instances where there is only the mere potential of harm to the health and safety of the public from instances where harm results. If harm results, then the fine for similar events should be similar, no matter which type of licensee is involved or the presumed ability of the licensee to pay. Westinghouse believes that the discretionary 50% reduction in the fine schedule for self-regulation and reporting the subject occurrence to the Commission should be 100% for the first violation of the same type in any one reporting period, and that the reduction should be made automatic. Thirdly, the focus on operations of licensees' activities is appropriate.

1. The Proposed Fine Schedule is Confiscatory

The proposed regulations (and, indeed, the statute pursuant to which they were drafted) are potentially confiscatory. As such, they are improperly denominated "civil penalties". Because they more closely appear to be criminal in nature, they should contain all of the due process procedures normally afforded a criminal defendant.

To illustrate their confiscatory nature, witness the instance of an occurrence which is neither known nor reasonably known by a licensee. The cumulative fines in such an instance may approach or exceed one million dollars. On its face, a fine schedule subjecting a licensee to this magnitude of a fine is unreasonable.

The proposed mitigating mechanism of allowing reductions in such a fine depending on a licensee's ability to pay affords too great a level of administrative discretion. Licensees responsible for the same or similar violations resulting in harm to the health and safety of the public should be treated alike, as discussed below. Imposing a larger fine on a licensee with a greater presumed "ability to pay" than on one with a lesser presumed "ability to pay" would deny the equal protection of the laws to the first, because it would be placed in a different category for purposes of enforcement action without a rational basis therefore. That is, since the harm is what is to be protected against, licensees' causing that harm should be penalized equally which would recognize the similarity in the harm which they cause.

This problem is aggravated when considering the case of a licensed facility owner whose policy it is both to defend its separately licensed operator/employees against charges arising as a result of the performance of their duties, and to pay resultant fines, if any. It is possible, under the regulations as now drafted, that more than one licensee at a facility (e.g., the owner and the individual operators/licensees) may separately be assessed fines for one occurrence, the total of which might easily exceed $100,000.00 per day.

Therefore, the regulations need to clarify that only one fine will be assessed per occurrence per day, no matter how many individuals may have been involved.

2. The Schedule of Fines Requires Modification

Westinghouse strongly disagrees with the Commission's staff's conclusion that "the potential for an event [is] of similar seriousness as the occurrence of the event itself." The operation of a licensed facility, of necessity, carries with it some risk of harm, which, until realized, should not be punished to the same extent as the harm itself. The inclusion of redundant safety systems, and recurrent testing and inspection during all phases of design, fabrication, construction and operation, each minimize, but do not remove this risk. Inherent in this defense in depth concept is that while one or another of the systems may have failed, nevertheless, shutdown may occur without harm or undue risk of harm.

Westinghouse argues that the mere potential for an event is significantly less harmful than the event itself, and should be occassioned by a penalty significantly smaller than the penalty assessed if the harm had resulted. Therefore, if harm results, it should be penalized more severely.

Furthermore, since it is the harm which is to be avoided, if harm results it should be penalized equally with no regard to the type of license possessed or the presumed ability of the licensee to pay.

Westinghouse also believes that the proposed discretionary 50% reduction in a fine attendant upon a license's identification of a violation, its correction and reporting it to the NRC (where required) suffers from the defect that it will not encourage licensee self regulation in that civil penalties will still be imposed.

If the reduction were increased to 100%, licensee self regulation would be encouraged and a free flow of safety information would follow.

3. The Focus on Licensees Operations is Appropriate

Westinghouse believes that the thrust of the proposed enforcement policy is directed towards assuring that licensees observe safe and environmentally acceptable operations. Our comments are based on this fact; that is, the proposed enforcement policy is directed to licensees with impact on vendors and supply firms only in the area of failure to report under the provisions of 10CFR21.

The specific responses of Westinghouse to the nine questions in the October 17 Notice are attached, as are comments directed to specific provisions of the proposed policy. Westinghouse appreciates this opportunity afforded it by the Commission to comment on this subject.

Very truly yours,

T. M. Anderson, Manager
Nuclear Safety Department

RAW/EJH/rjs

Attachments

ATTACHMENT A

Westinghouse WRD has comments to the nine questions identified in 45 Fed. Reg. 609077 (October 17, 1980) as follows:

Question 1: Is the policy fair and equitable?

Westinghouse Comment: No, as indicated in our comments to Question 3, we are concerned with the relative civil penalties assessed different licensees for a given violation.

Question 2: Is the policy understandable?

Westinghouse Comment: No, it is unclear what licensee-type a low-level fuel fabrication facility is considered to be in terms of Table 1.

Question 3: Are the severity levels appropriate?

Westinghouse Comment: No. Westinghouse does not agree that the potential for an event is of similar seriousness as the occurrence of the event itself. Further, Westinghouse believes that civil penalties should be assessed equitably with respect to occurrence in terms of Table 1, that is any actual occurrence should be penalized at the same level, corresponding to the actual effect on the public health and safety regardless of the licensee's ability to pay.

Also, Supplement III lists all SNM theft, loss, diversion and failure to report the same as Severity I. Although this may be appropriate for SNM category I, it is much too severe for SNM category III materials, for example. The lower levels of SNM should be removed from Severity I. Furthermore, category III material enriched to 5% or less in uranium 235 should be considered a *de minimus* level below which there should be no regulatory concern, or at most Severity VI.

Question 4: Are the different types of activities well enough defined? Should there be others?

Westinghouse Comment: Unclear;fuel fabrication plants licensed to process uranium enriched to 5% or less in uranium 235 should be exempt from the Table 1 "Types of Licensees" or at most be listed with "all other licensees and persons subject to civil penalties." The potential for such a plant to have any effect upon the public health and safety, common defense and security, and the environment is very slight.

Question 5: Are the distinctions among various types of licensees shown in Table 1 appropriate?

Westinghouse Comment: No, it is unclear what licensee type a low-level fuel fabrication facility is considered to be. Also, see the Westinghouse comments to Question 3.

Question 6: Are the factors for determining the level of enforcement actions appropriate? Should there be others?

Westinghouse Comment: Unclear; what is the intent of Table 2 concerning repetition of similar violations? Westinghouse assumes that the column labelled "1st" is meant to signify the first repetition of a similar violation under the same license. Also, similar, as used in Table 2, is too vague a term. What degree of similarity is required before Table 2 is used?

Question 7: Is the degree of discretion allowed to Office Directors appropriate? Should there be more flexibility? Less?

Westinghouse Comment: Unclear; what degree of discretion lies with the Office Directors and what is meant by the term "Office Director"? Westinghouse recommends that all civil penalties associated with Severity Level III or above be determined by the Director of the Office of Inspection and Enforcement.

Question 8: Are the levels of civil penalties that require Commission involvement appropriate? Should they be higher? Lower?

Westinghouse Comment: Westinghouse recommends that all civil penalties above $100,000 be approved by the Commission.

Question 9: Are the provisions for escalated action set forth in Table 2 appropriate?

Westinghouse Comment: The intent of Table 2 is unclear concerning the repetition of similar violations. Westinghouse assumes that the column labelled "1st" is meant to signify the first repetition of a similar violation under the same license. Similar, as used in Table 2, is too vague a term. What degree of similarity is required before Table 2 is used? Also in this Table, what is "d = further action as appropriate"?

ATTACHMENT B

Westinghouse has specific detailed comments to various portions of the proposed enforcement policy as follows:

- Section IV F, Table 2 indicates that the third repetition of a similar violation will result in enforcement action "d" which is defined as "further action, as appropriate".

  Westinghouse Comment: As previously stated, it is unclear what the intent of Table 2 is concerning repetition of similar violations. Westinghouse assumes that the column labelled "3d" is meant to signify the third repetition (fourth occurrence) of a similar violation under the same license. Similar, as used in Table 2 is too vague a term. What degree of similarity is required before Table 2 is used?

- Supplement I, Severity I includes violations involving "A Safety Limit, as defined in the Technical Specifications, being exceeded;"

  Westinghouse Comment:

  Severity I - Safety Limit as defined in the T.S. is too broad. Some qualification relative to the potential serious impact on safety is required as is included in most of the other categories in this section.

- Supplement I, Severity IV includes violations involving inadequate review or the failure to make a review in accordance with 10CFR50.59 or 10CFR21.

  Westinhouse Comment: Inadequate review in accordance with 10CFR50.59 or 10CFR21 is overly subjective. This will result in technical desagreement between NRC and the licensees which should not result in civil penalties.

- Supplement III, Severity I "Actual entry of an unauthorized individual..."

  Westinghouse Comment: How is "the time of entry" to be defined? If the unauthorized individual is detected after he has entered the vital or material access area, is this still considered a violation? If the entry occurs and is detected, this seems less severe than if protection or control was not provided in the first place, as discussed in the Westinghouse Comment to Supplement III, Severity III below.

- Supplement III, Severity I includes actual theft, loss, or diversion of special nuclear material (SNM) or an act of radiological sabotage; or failure to promptly report an actual or attempted theft or diversion of SNM or an act of radiological sabotage.

  Westinghouse Comment: To categorically list "SNM" in this supplement as Severity level I fails to recognize the subdivisions of SNM which are generally recognized in the balance of this supplement. The above paragraphs should apply only to Category I SNM.

- Supplement III, Severity II specifies "Breakdown of security systems... such that access could have been gained without detection".

  Westinghouse Comment: This does not adequately define the intent of the category; would breakdown of any one system in a multitiered system be cause for violation? It is suggested that this be revised to read, "Breakdown of the overall security system without evidence of compensatory action..."

- Supplement III, Severity III "Failure to provide protection or control of access to a vital area or material access area" is Severity Level III, while Supplement III.B.1, "Breakdown of security systems...such that access could have been gained without detection," is the higher Severity Level II.

  Westinghouse Comment: It appears that the breakdown of an existing system is considered a more severe violation that the failure to provide a system in the first place. Westinghouse believes these priorities should be reversed.

- Supplement III, Severity IV "Failure to establish or maintain safeguards systems designed or employed to detect the unauthorized removal of Category III SNM from areas of authorized use or storage".

  Westinghouse Comment: An SNM Category IV should be established for uranium enriche to less than 5% in uranium 235. This new Category IV should be established as a de minimus level for which there should be no regulatory concern, or at most a Severity level VI.

- Supplement IV

  Westinghouse Comments: Some of the violation conditions in Supplement IV - Health Physics 10CFR20, page 66759 - appear to be out of line with others in the same category. For example, item 4 - a radiation level of 100 mrem/hr for one hour does not seem to be consistent with item 2 (exposure of a member of the public in excess of 0.5 rems).

  Severity I Fuel Cycle Operations - violations involving a nuclear criticality do not appear to be in the same severity class as "a system designed to prevent or mitigate a serious safety event not being operable when actually required to perform its design function" as discussed in Attachment "A", Question 3.

  Severity II Fuel Cycle Operations - Item 3, failure to make "an immediate or prompt report required to be made by telephone or other electronic means" does not appear to belong in the same category as the other II items. Making a prompt report would seem to be secondary to evaluating a safety hazard and preventing an accident. Also, certain mitigating circumstances could make this impossible or very difficult to perform (e.g., phone lines are overcrowded or are out of service). Thus, the prompt notification requirement appears to be a much lower class severity (perhaps IV or VI) than indicated.

Fuel Cycle operations, Severity Classes V and VI. Severity Class V is defined as "other violations, such as failure to follow procedures, that have other than minor safety, or environmental significance". Severity VI is defined as "Violations that have minor safety or environmental significance". Who will define "other violations" and whether they fall in the "minor" or "other than minor" category? The NRC inspector will undoubtedly make some arbitrary decisions based on his judgment and these will have to be separated from the Class IV violations, which are defined as "failure to follow requirements not covered in Severity Levels I, II, and III violations, that reduces margin or safety". The above definitions are vague which leave much to the regulator's and licensee's judgment to decide.